STATE OF NEW YORK
SUPREME COURT COUNTY OF NEW YORK

FRIENDS OF FORT GREENE PARK,

Petitioner-Plaintiff,

vs

NEW YORK CITY PARKS AND RECREATION DEPARTMENT; JOHN DOES 1-10; and ABC CORPORATIONS 1-10,

Respondents-Defendants.

PETITIONER'S/PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION AND COMPLAINT

Index No. 159628/2023

ORAL ARGUMENT REQUESTED

PETITIONER'S/PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION AND COMPLAINT

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PRELIMINARY STATEMENT

This hybrid Article 78 proceeding and plenary action concerns the New York City Parks Department's (the "Department") determination to issue a negative declaration of environmental significance (the "Neg Dec") for the "Fort Greene Park Entrances, Paths, Plaza, and Infrastructure Reconstruction" project (the "Project"), located within an approximately 30.2-acre Area (the "Property") at Fort Greene Park (the "Park") on land owned by New York City (the "City"). The Project would cause significant adverse environmental impacts, including the removal of at least 78 mature trees, at least 58 of which would come from a relatively small northwest corner of the park, thereby magnifying the impact of removal.[1] Community opposition is due to these adverse impacts, including the enormous number of trees to be removed, the bulk of which are to be replaced by a wide paved plaza in the relatively small section of the park most used by low- and middle-income residents of color. The Department's history with this Project is disturbing.

First, the Department unlawfully concealed a public record containing relevant information concerning the Project's adverse environmental impacts in response to a Freedom of Information Law request. ECF 1 at ¶¶21-31; ECF 4-7.[2] This resulted in litigation (the "FOIL

[1] The Park is located nearby the Brooklyn-Queens Expressway ("BQE"), the Manhattan Bridge, and the Flatbush Avenue Extension, all heavy traffic routes that produce significant air pollution and contribute to the existing negative air quality near the Park and in the 400' study area surrounding it, which includes the adjacent NYCHA Housing. There is a known asthma cluster in the area around the Park. ECF 1 at ¶¶163, 228. Significant adverse Project impacts may be experienced more severely by vulnerable individuals in those areas, particularly because the removal of so many mature trees will eliminate the environmental benefits that those trees currently provide, including, *inter alia*, carbon sequestration, shade, and improved air quality.

[2] The Department was afraid that, if the public learned that the Owens Report identified significant adverse Project impacts, that the Department would be required to classify it as a

Lawsuit") to compel the Department to produce the Owens Report (ECF 4),[3] which contained evidence of the Project's adverse impacts. The Trial Court awarded judgment in Petitioners' favor with costs and disbursements, which the First Department affirmed as modified. On remand, the Trial Court found that the Department had no reasonable basis to deny access to the Owens Report and awarded petitioners an additional $135,000 in attorneys' fees. *Id*.

But the Department was un-chastened by the Court's Judgment in the FOIL Lawsuit and persisted in attempting to bypass the requirements of SEQRA/CEQRA.[4] Without pausing to consider the impacts, the Department rushed ahead and classified the Project as a Type II Action exempt from all further environmental review in order to evade a public hearing, public comment, the creation of an EIS, and the preparation of a findings statement with mitigation. Accordingly, Petitioner commenced another Article 78 to challenge that illegal Type II classification. ECF 1 at ¶¶32-41; ECF 4, 8-10. Supreme Court granted the Petition on December 23, 2019, and its Judgment (ECF 10) described how the Project would adversely impact the Park's historic character and trees, quoting from the Owens report (ECF 4), Gotkin Letter (ECF 8) and Glaeser Affidavit (ECF 9).

Type I action under SEQRA/CEQRA, issue a Positive Declaration of Environmental Impact ("Pos Dec"), conduct public hearings, accept public comments, prepare an Environmental Impact Statement ("EIS"), and prepare a Findings Statement with mitigation. The Department sought to evade a complete environmental review by concealing adverse Project impacts from the Public.

[3] The Department commissioned the Owens Report in order to get a study of the needs of the Park. ECF 4. The Owens report focused on retaining trees and preserving the canopy at the Park, as well as preserving Olmstead's historic Park design and the historic landscape architecture. ECF 4. But the Project's broad tree removal plan ignores and contradicts the Owens Report's findings and recommendations.

[4] "SEQRA" means the "State Environmental Quality Review Act" (ECL Art 8 et seq.; ECL §3-0301; 6 NYCRR Part 617 et seq.) and "CEQRA" means the "City Environmental Quality Review Act."

But the Department thumbed its nose at the Court's judgment in the Type II Lawsuit. Without modifying the Project, the Department issued a Negative Declaration of Environmental Significance ("Neg Dec"), falsely determining that there is **no possibility** that a single potentially significant adverse environmental impact **may** result, without taking a hard look at the issues identified in the 2015 Owens Report, 2017 Gotkin Letter, or 2018 Glaeser Affidavit. By illegally issuing a Neg Dec, the Department evaded holding a public hearing, receiving public comments, making an EIS, and preparing a findings statement with mitigation, in violation of SEQRA/CERA.

As a result, without Court intervention, the Project will be constructed without the Department undertaking an adequate environmental review. This will cause unmitigated significant adverse impacts from the Project, which will harm Petitioner and its members, in violation of SEQRA/CEQRA and in violation of Petitioners' environmental rights under the Green Amendment.[5] Accordingly, for the reasons stated herein, the Petition should be granted.

STATEMENT OF FACTS

The facts are set forth in the Verified Petition (Doc. No. 1), which is incorporated herein.

STANDARD OF REVIEW

Judicial review in an Article 78 proceeding determines whether the agency "acted within the limits of its jurisdiction, whether the standards imposed by [the constitution,] statute[s] and ordinance[s] were respected, whether the procedural rights of the litigants were observed, and whether the board [or agency] was chargeable with any abuse of its discretion."[6] Anyone

[5] The ERA requires agencies to consider the environment in decision making and is intended to avert environmental degradation prior to such damage occurring, not provide a post-contamination remedy for it.

[6] PATRICIA E. SALKIN, 2 NEW YORK ZONING LAW & PRACTICE §28:30 (4th ed. Sept 2021).

aggrieved by the final administrative decision may seek judicial review to determine "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."[7] Courts will annul decisions[8] that are irrational, unreasonable, or inconsistent with law.[9] An agency's failure to comply with the law or a mandatory requirement is arbitrary and capricious, renders the agency action invalid, and warrants annulling it.[10]

Although local administrative agencies are sometimes given deference on factual findings within their expertise,[11] that principle does not apply where an agency fails to make findings on the necessary issues,[12] only makes conclusory findings[13], or when the decision does

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[7] CPLR §7803(3); *Chinese Staff and Workers Assn. v. City of New York*, 68 N.Y.2d 359, 363 (1986); *Eastern Niagara Project Power All. v. State Dept. of Envtl. Conservation*, 42 A.D.3d 857, 861 (3d Dept. 2007).

[8] *AA & L Assoc., L.P. v. Casella*, 207 A.D.2d 1012, 1014 (4th Dept. 1994); *151 Route 17M Associates, LLC v. Zoning Bd. of Appeals of Village of Harriman*, 19 A.D.3d 422 (2d Dept. 2005), *lv. denied*, 6 N.Y.3d 709 (2006).

[9] *E.g., Ferrari v. Town of Penfield Planning Board*, 181 A.D.2d 149 (4th Dept. 1992).

[10] *See Syquia v Bd. of Educ. of Harpursville Cent. School Dist.*, 80 N.Y.2d 531, 537 (1992) ("*Syquia*"); *Blaize v. Klein*, 68 A.D.3d 759, 761 (2d Dept. 2009) ("*Blaize*") ("An adverse agency determination must be reversed when the relevant agency does not comply with either a mandatory [procedural] provision, or one that was 'intended to be strictly enforced'").

[11] *E.g., P.M.S. Assets, Ltd. v. ZBA of Village of Pleasantville*, 98 N.Y.2d 683 (2002).

[12] 2 Salkin, New York Zoning Law and Practice (4th ed.) § 28:30.

[13] *Leibring v. Planning Board of the Town of Newfane*, 144 A.D.2d 903 (4th Dept. 1988).

not comply with the law, in which case no deference is warranted, and the decision should be annulled.[14] "The ultimate responsibility of interpreting the law is that of the court."[15]

Supreme Court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. CPLR § 3001.

POINT I: RESPONDENTS VIOLATED SEQRA/CEQRA.

Respondent's Neg Dec for the Fort Greene Project violated SEQRA[16] and CEQRA[17], and so must be set aside, because the Department illegally issued a CND for a Type I Action, improperly segmented review of related projects, failed to consider cumulative impacts, failed to follow its own precedent, and failed to take a "hard look" at all potentially significant adverse environmental impacts that may result from the Project.

[14] *Jacobsen v. Brown*, 231 A.D.2d 636 (2d Dept. 1996).

[15] *KMO-361 Associates v. Davies*, 204 A.D.2d 547, 547 (2d Dept. 1994), *lv. den'd* 84 N.Y.2d 811 (1994); *Lighthouse Pointe Property Associates LLC v. NYSDEC*, 14 N.Y.3d 161, 176 (2010).

[16] Environmental Conservation Law ("ECL") Article 8 et seq; ECL §§8-0101, 8-0103, 8-0105, 8-0107, 8-0109, 8-0111, 8-0113; 6 NYCRR Part 617.

[17] *See* Rules of the City of New York Chapter 5: City Environmental Quality Review (CEQR), *available at* https://www.nyc.gov/assets/oec/technical-manual/rules_procedure_ceqr_2014.pdf ; Rules of the City of New York Chapter 6: City Environmental Quality Review (CEQR) [Executive Order No. 91 of 1977, As Amended], *available at* https://www.nyc.gov/assets/oec/43%20RCNY-Chapter%206.pdf .

Court review of an agency's SEQRA/CEQRA determination ensures "that the agencies will honor their mandate regarding environmental protection by complying **strictly**[18] with prescribed procedures and giving reasoned consideration to all pertinent issues revealed in the process."[19] Reviewing Courts may therefore:

1. Evaluate whether the agency's environmental review **strictly complied** with the SEQRA's **procedural requirements** (*Jackson*, 67 N.Y.2d at 417);

2. Determine whether the agency satisfied its **substantive SEQRA obligations**, which requires applying the "HOMES Test" (the "Hard Look" standard) described below (*id*); and

3. Assess whether the agency's decision violates CPLR Article 78 because it is either arbitrary, capricious, lacks a rational basis, is unsupported by substantial evidence, an abuse of discretion, affected by an error of law, or in violation of lawful procedure. CPLR §7803(3).

Accordingly, where an agency's SEQRA determination does not **strictly comply with SEQRA's procedural demands**, does not satisfy the "Hard Look" standard, is arbitrary and capricious, or otherwise violates SEQRA or CPLR Article 78 et seq, the determination must be set aside. CPLR Article 78 et seq.; *Akpan*, 75 N.Y.2d at 570; *King,* 89 N.Y.2d at 347.

A. The Department Illegally Issued a CND For A Type I Action.

[18] *See, e.g.*, *King v. Saratoga Cnty. Bd. of Supervisors*, 89 N.Y.2d 341, 347 (1996) ("*King*") ("strict, not substantial, compliance is required"); *Schenectady Chems. v. Flacke,* 83 A.D.2d 460, 463 (2d Dept. 1981) ("permitting substantial compliance would not only frustrate the laudable purposes behind SEQRA, but would inevitably lead to numerous lawsuits wherein courts would be asked to weigh the acceptability of alternative procedures"); *Mobil Oil Corp. v. City of Syracuse IDA,* 224 A.D.2d 15, 22 (4th Dept. 1996) ("*Mobil*") (**strict** procedural compliance required).

[19] *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986) ("*Jackson*") (emphasis added). *See Akpan v Koch*, 75 N.Y.2d 561, 570 (1990) (courts may determine whether an agency's SEQRA determination was made in accordance with lawful procedure).

The purported Neg Dec issued by the Department must be set aside because it constitutes an impermissible Conditioned Negative Declaration (a "CND") for a Type I Action, prohibited under 6 NYCRR §617.7(d).

When a lead agency makes a determination of significance under SEQRA/CEQRA, it can issue one of three determinations: (1) a Positive Declaration ("Pos Dec"), requiring preparation of an Environmental Impact Statement ("EIS"), finding that the action **may** have one or more significant adverse environmental impact; (2) a Negative Declaration ("Neg Dec"), finding that the action **will not have any** significant adverse environmental impact; or (3) a Conditioned Negative Declaration ("CND"), finding that the action as initially proposed **may** have a significant environmental impact, **but that mitigation** measures identified and required by the lead agency **will eliminate the significant impact** on the environment. 6 NYCRR §617.7(a) (d); 6 NYCRR §617.2(h). It is unlawful to issue a CND for a Type I action. *Id*.

The determination of significance is not made in a vacuum. The SEQRA regulations establish that Type I Actions **carry a presumption that they are likely to have a significant adverse impact on the environment** requiring preparation of an EIS. 6 NYCRR §617.4(a)(l). Accordingly, a lead agency's classification of a project as a Type I Action triggers the presumption as a matter of law that the action may have a significant adverse impact. Thus, the scales begin tipped in favor of requiring a Pos Dec for Type I Actions.

On June 10, 2022, the Department classified this Project as a Type I Action [20], triggering the presumption that it may cause a significant adverse environmental impact.[21]

The Department never overcame that presumption, yet instead of issuing a Pos Dec, it purported to issue a Neg Dec on June 2023 that actually constituted an impermissible CND because it seeks to mitigate the Project's significant adverse environmental impacts through Project modification and/or the imposition of conditions. The Neg Dec is nothing more than a façade to keep out public participation and evade accountability for inadequate environmental review. Although the Department claims that no significant adverse impact will result, that conclusion is **based on modifying the Project in accordance with mitigation conditions designed to avoid adverse impacts**.

The Department's assertion that it issued a Neg Dec — notwithstanding the fact that its decision was based on complying with **conditions to avoid adverse environmental impacts** (which is the definition of a CND)— should be reviewed with skepticism because the Department is both the lead agency *and* applicant, and therefore has a greater incentive to make its Project's impacts appear less significant than they really are.

Generally, the lead agency serves as a "check" on an applicant, ensuring compliance with SEQRA/CEQRA, and involving the public. Where, as here, the Department serves as both lead agency and applicant, there is a greater risk that the SEQRA/CEQRA process will be

[20] ECF 11.

[21] This determination came only after petitioners successfully challenged the Department's earlier improper determination that the Project was a Type II Action, which would have made the Project exempt from any further environmental review. *The Sierra Club, et al. v. The Dept. of Parks & Rec.*, et al., No. 151735/2019, 2019 WL 7597286 (N.Y. Co. May 29, 2019).

manipulated/violated, and so careful judicial review is important, and **(1) the extremely low threshold for issuance of a Pos Dec and (2) the presumption in favor of a Pos Dec for Type I Actions, should be strictly enforced**.

The Department, as lead agency and applicant, imposed several conditions upon itself before approving its own project, knowing that absent these conditions, it would need to issue a Pos Dec. The conditions included the adoption and implementation of (1) a Remedial Action Plan,[22] (2) a Construction Health and Safety Plan,[23] (3) a Community Air Monitoring Plan,[24] and (4) an Unknown Discoveries Plan, all of which are designed to mitigate the Project's potentially significant adverse environmental impacts.[25] These plans were born out of the suggestions from the LPC and the NYC Department of Environmental Protection[26] to mitigate adverse impacts, and were imposed as conditions by the Department as lead agency, and adopted into their plans as the applicant, in order to avoid issuing a Pos Dec, preparing an EIS, and engaging with the public to address alternatives and mitigation measures. This is the epitome of an

[22] A plan instructing how to transport and dispose of soil, control dust, and remove and close underground storage tanks, among other mitigation efforts.

[23] A plan to ensure workers are safe from contaminates.

[24] A plan to protect the area from air contaminates, intended to reflect NYSDOH guidelines.

[25] A plan for dealing with unanticipated archaeological finds during construction.

[26] If the public and interested agencies had had been allowed to participate in this Project's SEQRA/CEQRA Review, even more significant adverse impacts would've been identified requiring mitigation.

impermissible CND designed to exclude the public and evade the heart of SEQRA (preparation of an EIS), and so the Neg Dec must be annulled.[27]

B. How a Determination of Significance is Made Pursuant to SEQRA.

The Lead Agency is responsible for making a written determination of significance (6 NYCRR §617.7(a)) and, for Type I Actions, begins from the presumption **that the project is likely to have a significant adverse impact on the environment** requiring a Pos Dec and preparation of an EIS. 6 NYCRR §617.4(a)(l).

The SEQRA regulations provide that, for all Type I actions, the lead agency making a determination of significance must:

> (1) consider the action as defined in sections 617.2(b) and 617.3(g) of this Part;
>
> (2) review the EAF, the criteria contained in subdivision (c) of this section and any other supporting information to identify the relevant areas of environmental concern;
>
> (3) thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and
>
> (4) set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation.

6 NYCRR §617.7(b). In making the determination of significance, SEQRA's substantive obligations require satisfying the "Hard Look" standard, and so a lead agency must:

1. Identify the relevant areas of environmental concern;
2. Take a "hard look" at areas of environmental concern; and

[27] *Miller v. City of Lockport*, 210 A.D.2d 955, 957-58 (4th Dept. 1994), (lead agency violated SEQRA when it issued a Neg Dec mitigated by conditions upon the applicant for a Type I action, to hold otherwise would reduce accountability of the lead agency and lessen public access to the process); *Shawangunk Mtn. Env't Assn. v. Planning Bd. of Town of Gardiner*, 157 A.D.2d 273, 275-76 (3rd Dept. 1990), (lead agency improperly avoided oversight in their assessment when it shut out the public from the process by issuing a CND for a Type I Action).

3. Make a "reasoned elaboration" of the basis for its determination.[28]

The "Hard Look" standard involves a qualitative assessment of the Agency's review to determine whether it was robust enough to satisfy SEQRA's substantive obligations and policy objectives.[29]

Here, even after Petitioners identify environmental concerns, the Department failed to comply with prongs two and three of the Hard Look Test. Instead, the Department summarily concluded that the Project will not cause any significant adverse impact without undertaking a substantive, objective analysis. Accordingly, its Determination must be set aside.

C. There Is a Very Low Threshold for Issuance of a Pos Dec.

There is a very low threshold for issuance of a Pos Dec, and a correspondingly high threshold for issuance of a Neg Dec. 6 NYCRR §617.7(b)(3); *Omni Partners, L.P. v. County of Nassau*, 237 A.D.2d 440, 442 (2d Dept. 1997). *Compare* 6 NYCRR §617.2(ad) ("Positive declaration means … the action as proposed **may have a significant adverse impact on the environment** and that an environmental impact statement **will be** required."), *with* 6 NYCRR §617.2(z) ("Negative

[28] *See H.O.M.E.S. v. N.Y. State Urban Dev. Corp.*, 69 A.D.2d 222 (4th Dept. 1979) ("*HOMES*"); *Jackson*, 67 N.Y.2d at 417.

[29] Under SEQRA, the sufficiency of an agency's findings depends on the quality of the review, not merely the quantity. *Jackson*, 67 N.Y.2d at 422.The regulations similarly state:

> An EIS must assemble relevant and material facts upon which an agency's decision is to be made. It must analyze the significant adverse impacts and evaluate all reasonable alternatives. EISs must be analytical and not encyclopedic. The lead agency and other involved agencies must cooperate with project sponsors who are preparing EISs by making available to them information contained in their files relevant to the EIS.

6 NYCRR §617.9(b)(1) (emphasis added).

declaration means … the action as proposed **will not result in any significant adverse environmental impacts**.") The low threshold for triggering a Pos Dec (and requiring an EIS) is necessary to effectuate SEQRA's policy of avoiding significant adverse environmental impacts because there is so much less information available when an agency makes a determination of significance compared with when the agency adopts its SEQRA Findings Statement after holding public hearings and preparing an EIS.

The Lead Agency **must** issue a Pos Dec if the action "**may** have a significant adverse impact on the environment." 6 NYCRR §617.7(b)(3) (emphasis supplied). To determine whether a proposed Type I action **may** have a significant adverse impact on the environment, **the Lead Agency must compare impacts that may be reasonably expected to result from the proposed action against the criteria found in 6 NYCRR §617.7(c), including:**

> (i) a substantial adverse **change in existing air quality, ground or surface water quality or quantity, traffic or noise levels…**;
>
> (ii) the **removal or destruction of large quantities of vegetation or fauna**; substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat area; substantial adverse impacts on a threatened or endangered species of animal or plant, or the habitat of such a species; or other **significant adverse impacts to natural resources**;
>
> …
>
> (v) the **impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character**;
>
> …
>
> (vii) the **creation of a hazard to human health**;

> (viii) a **substantial change in** the use, or intensity of use, of land including agricultural, **open space or recreational resources, or in its capacity to support existing uses**;
>
> …
>
> (xi) **changes in two or more elements of the environment**, no one of which has a significant impact on the environment, but **when considered together result in a substantial adverse impact** on the environment; or
>
> (xii) 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 criteria in this subdivision**.

6 NYCRR §617.7 (c) (emphasis added). These criteria are present here (as discussed below, including the removal of a large quantity of vegetation, e.g., trees, and the impairment of landscape architecture and design of significant historical and cultural value) — which indicates that significant adverse environmental impacts may result from the Project — and so the low threshold for triggering a Pos Dec was met.

> "Because the operative word triggering the requirement of an EIS is **'may,'** there is a relatively **low threshold for the [issuance of a Pos Dec and] preparation of an EIS**."

Omni Partners, L.P. v. County of Nassau, 237 A.D.2d 440, 442 (2d Dept. 1997) (citations omitted). That threshold was met here, but the Department purported to issue a Neg Dec anyways (which was actually an improper CND) to avoid its obligations to hold a public hearing, prepare an EIS, and issue a Findings Statement with mitigation.

SEQRA requires “lead agencies” and “involved agencies” to make independent SEQRA findings under 6 NYCRR §617.11(d) prior to rendering a final decision on the action. 6 NYCRR

§617.11(c). An agency's SEQRA findings are informed by the EIS,[30] which must be prepared when a Type I Action receives a Pos Dec.

The EIS is the "heart of SEQRA." which should be viewed as "an environmental 'alarm bell'" to "alert responsible public officials to environmental changes before they have reached ecological points of no return." *Town of Henrietta v. Dept. of Environmental Conservation of New York*, 76 A.D.2d 215, 220 (4th Dept. 1980). Here, the Department circumvented the "Heart of SEQRA" (creation of an EIS), without overcoming the presumption that this Project, as a Type I Action, is likely to have a significant adverse environmental impact.

In making a determination of significance, a lead agency must complete Parts 2 and 3 of the Full Environmental Assessment Form (FEAF). It is arbitrary and capricious for an agency to issue a Neg Dec where it identifies significant environmental impacts in an EAF. *See Omni Partners, L.P. v. County of Nassau*, 237 A.D.2d 440, 442-43 (2d Dept. 1997) (affirming annulment of Neg Dec where EAF revealed several potentially significant adverse environmental impacts).

Here, the Department as lead agency found in Part II of the EAS that the Project:

- May change or eliminate existing open space. See ECF 11 at page 8.
- Is located at, or is adjacent to, a site of historic and/or cultural significance. *Id*. at page 9.
- Is located at, or is adjacent to, a site that contains natural resources. *Id*.
- Would result in the development of a site where there is a reason to suspect the presence of hazardous materials, contamination, illegal dumping or fill, or fill material of unknown origin. *Id*.

[30] An agency's SEQRA findings must "consider the relevant environmental impacts, facts and conclusions disclosed in the final EIS." 6 NYCRR §617.11(d).

- Is located at, or is adjacent to, a site where a Phase I Environmental Site Assessment ("ESA") was performed, where Recognized Environmental Conditions ("REC"s) were identified, and where, based on the Phase I ESA, a Phase II Investigation is needed. *Id*.

- Would involve development on a site that is 5 acres or larger where the amount of impervious surface would increase. *Id*.

- Is a city capital project. *Id*. at page 10.

- Involves construction activities within 400 feet of a historic or cultural resource. *Id*. at page 11.

- Involves construction activities involving the disturbance of a site containing (or an adjacent site containing) natural resources. See *Id*.

- Based upon the limited analysis conducted, a detailed analysis is needed in at least 3 technical areas, including but not limited to

    - Air Quality (*Id*.),

    - Hazardous Materials (id.), and

    - Noise (id.).

The Department further found in Part III of the EAS that:

- "The technical analysis areas that required further analysis are: Open Space; Historic and Cultural Resources; Urban Design and Visual Resources; Natural Resources; Hazardous Materials; Water and Sewer Infrastructure; Greenhouse Gas Emissions and Climate Change; Public Health; and Construction Impacts." *Id*. at page 13.

These are indications of significant adverse impacts, which re-enforce the presumption (6 NYCRR §617.4(a)(l)) that this Project **may** have a significant adverse impact on the environment, requiring a Pos Dec and preparation of an EIS.

Unbelievably, the Department found "no" <u>potential</u> for <u>any</u> significant adverse impact, and so issued a Neg Dec. ECF 12 at page 11. This record cannot support a Neg Dec.

As Part 2 of the EAF demonstrates, the Lead Agency did not take a hard look at the Project's potentially significant environmental impacts to Open Space; Historic and Cultural Resources; Natural Resources; Hazardous Materials; Water and Sewer Infrastructure; Public Health; and from construction. ECF 12.

Instead, the Department's review was conclusory and designed to produce a desired outcome that tainted its review. The Department therefore took a much more cursory look at the Project — based on significantly less information and without input from interested agencies, expert analysis, or public comment — than it otherwise would have if it had properly issued a Pos Dec, prepared an EIS, and complied with SEQRA. This rendered the quality of the Department's review inadequate, and so the Neg Dec must be annulled because the Department did not take a "Hard Look" or give a "Reasoned Elaboration."

D. The Department Failed to Take A "Hard Look" At Significant Adverse Impacts That May Result from the Project.

Under SEQRA/CEQRA, a lead agency must take a "hard look" at all areas of environmental concern that may produce an adverse environmental impact before making a determination of significance. 6 NYCRR §617.7(b); 6 NYCRR §617.11(c).[31] Here, the Department's failure to do so, requiring annulling the Neg Dec.

[31] *See* 6 NYCRR §617.3(a) ("No agency involved in any action shall carry out, fund or approve the action until it has complied with the provisions of SEQRA").

Where an agency receives information about a potentially significant adverse environmental impact, the agency violates SEQRA by failing to investigate the veracity and significance of the information.[32]

Here, the Department received information that this Project may result in such significant adverse impacts to (1) Open Space, (2) Historic and Cultural Resources, (3) Natural Resources, (4) Hazardous Materials, (5) Water and Sewer Infrastructure, (6) Public Health, and (7) Construction, but failed to take a "Hard Look" at them prior to making its Determination of Significance. The Neg Dec therefore violated SEQRA and so must be set aside.

1. The Department Failed to Take a Hard Look at Impacts to "Open Space."

The Department admits that the Project will "change or eliminate existing open space" (ECF 1 at ¶¶104-110; ECF 11 at page 8) and that "further assessment of potential direct effects as a result of the project" was warranted under the CEQRA Technical Manual, but still failed to a hard look. See ECF 11 at C-1. See also CEQRA Technical Manual, *available at* https://www.nyc.gov/site/oec/environmental-quality-review/technical-manual.page (the "Technical Manual"), at Chapter 7, page 7-3 (a direct effect on open space occurs if the project may "cause increased noise [or] air pollutants … on public open space that would affect its function, usability, or enjoyment, whether on a permanent or temporary basis).

[32] *See Wellsville Citizens ex rel. Responsible Dev., Inc. v Wal-Mart Stores, Inc.*, 140 A.D.3d 1767, 1769 (4th Dept. 2016) ("Given the information received from the public that state-listed threatened species might be present on the project site and the failure of the Town Board to investigate the veracity of that information, we conclude that the Town Board failed to take a hard look at the impact of the project on wildlife, and the negative declaration with respect thereto was therefore arbitrary and capricious.")

Here, there is no dispute that the Project will result in temporary inability to use public open space in the park during construction, and that the Project may impact the function and usability of the Park (by decreasing shade, eliminating or changing open space, and converting active recreation areas to passive recreation areas) as well as the enjoyment thereof). See ECF 1 at ¶58-59 (the Project will cause individuals to use and enjoy the Park and its natural resources less).

The CEQRA Technical Manual states that a project may have a significant adverse impact on open space if:

- "There would be a direct displacement/alteration of existing open space … that has a significant adverse impact on existing users;" or
- "the Project would reduce the open space ratio" as described in the Manual.

Technical Manual at Chapter 7, page 7-17. Here, there is no doubt that the Project reduces open and changes existing open space.

The Department further admitted that a project directly impacts open space if it results in the "physical loss of public open space, changes the use of an open space so that it no longer serves the same user population, … or results in increased noise or air pollutant emissions, odor, or shadows that would temporarily or permanently affect the usefulness of a public open space." ECF 11. This Project clearly changes the use of open space.

A significant feature of Fort Greene Park is the renowned landscape architect AE Bye's mounds, which "expanded upon the concept of the Martyrs memorial, and also restored, and reinterpreted, Olmsted and Vaux's concept of **unprogrammed green open space**." ECF 1 at ¶ 9 (emphasis added); Id. at ¶¶ 13-14, ¶38; ECF Doc 8 at page. 4. The Mounds currently serve as a stage for unprogrammed events, community activities, and recreation. Id. The Project will

change this existing open space and grassy area that currently has flexible uses into a table and barbecue area suitable only for passive activities. ECF 1 at ¶105.

The Project includes numerous other changes to open space, including, e.g., the destruction of the mounds, conversion of active recreation area to passive recreation area, a new corner entry staircase, and two additional entry ramps[33], and so the Project constitutes a direct impact on open space even under the Department's own standard. *Id*. The Project's elimination of the Mounds is particularly significant because they have historically been used to stage public events (including an annual Halloween dog parade) and by physical trainers who run group exercises using the mounds. Id. at ¶106. Existing open space around the mounds will also be adversely affected. The elimination of such active recreational open space is important for the qualitative assessment of the Project's impact on open spaces.

In the Court's Decision in the Type II Lawsuit, Justice Rodriquez observed that the Department's own consultant recommended "retaining the lawn area, including the Bye Mounds, and makes frequent references to the significance of adhering to the Park's historic plans and purposes as much as possible." ECF 10 at pg. 8 of 14 ; ECF 1 at ¶38. See generally ECF

[33] The new corner entrance staircase and the two new entry ramps will require the removal of numerous mature trees. Furthermore, the Project will result in removal of the Zelkova Trees on the landings of the Monument stairs. The new entrances – which the Department claims are for accessibility – will remove most of a historic wall, and is not even needed because there are already two accessible entrances to this small area of the Park. Additionally, Nancy Owens had designed a modification to an existing built staircase that would add a ramp at the Willoughby Street entrance on the east side of the Park, further indicating that the proposed re-design as part of this project, and the resulting adverse impacts to, inter alia, open space and trees, is not necessary to achieve the Department's goals.

4 (referencing the importance of adhering to the Park's historic plans and purposes as much as possible and preserving tree canopy). The Department ignored that significant impact.

The CEQRA Manual specifically indicates that qualitative impacts to open space may also cause an adverse impact to become more significant, and such considerations may include "the type of open space (active or passive), its capacity and conditions, the distribution of open space, the distance to regional parks, the connectivity of open space," etc. Technical Manual at Chapter 7, page 7-18.

Here, the Project undeniably disturbs open space, changes the type of open space (active vs. passive, as described above), changes its conditions and uses (e.g., removing the mounds and converting grassy open space into tables and a barbecue area suitable only for passive activities), and is not located directly near any public park of equal or greater size. And much of any replacement open space is to be relocated, and so will not serve the same user populations.

The Technical Manual lists other factors that indicate that a Project's impact to open space may be significant, including:

- Increasing shadow, noise, air pollutants, or odors compared to the future no-action condition.
- "Qualitative impact compared to the no-action condition," such as when the overall quantity of open space "is adequate, but a specific user group (e.g., young children or bocce players) would be adversely affected by changes to or elimination of park features they use."

Technical Manual at Chapter 7, page 7-18—7-19.

This Project, as demonstrated herein, increases noise, air, and odor compared to a no-action condition due to the Project's intentional destruction of 78 mature trees for design

purposes and other purposes (58 of which would be removed from the small northwest section of the Park), and the unintentional yet foreseeable loss of an unquantified number of trees due to severe pruning and root destruction. It will also increase shadows when considered together with the adjacent high-rise project. Furthermore, the Project will qualitatively impact specific user groups, including users of the mounds, by eliminating the unique public space used for active recreation. These facts demonstrate that the Project may cause significant adverse impacts to open space. The Department failed to take a hard look at all of these significant adverse impacts to open space.

Given the extremely low threshold for issuance of a Pos Dec, the presumption that such significant adverse impact will result for Type I Actions, and the evidence showing such adverse impacts, a Neg Dec was inappropriate for this Project. The Department failed to take a hard look at these environmental concerns, and so its Neg Deg must be annulled.

2. The Department Failed to Take a Hard Look at Impacts to "Historic and Cultural Resources."

The Project may cause significant adverse impacts by changing and/or destroying significant historic and cultural resources. ECF 1 at ¶¶111-120.

As a threshold matter, the Department admits that:

- the Park is located "within the Fort Greene Historic District … and is specifically defined by the extent of its unique spatial, architectural, and historical associations." ECF 11 at D-3.
- "The Fort Greene Historic District represents an usually significant and rare concentration of architecturally distinguished" features. *Id*.
- "The district also includes a major nineteenth century urban park of outstanding historical and landscape design significant." *Id*.
- The Park has a "long history and historical significance." *Id*. at D-6.

- "The Park includes known historic and cultural resources including the LPC-designated Fort Greene Park Historic district that [is] also listed on the State/National Register of Historic Places." *Id*. at D-10. See also ECF 1 at ¶116.

It is also known that the Park has cultural significance because, for example, the Society of Old Brooklynites have an annual ceremony there to honor revolutionary war sailors and soldiers who died on the prison ships, some of whom are buried there. ECF 1 at ¶113.

Because it is an indication of a significant adverse impact, the Technical Manual recommends conducting an architectural resources assessment if the Project would result in a change in scale, visual prominence, or visual context, of any building, structure, or object **or landscape feature**. See Technical Manual at Chapter 9, page 9-7—9-8.

Here, the Project indisputably includes changes in scale, visual prominence, and visual context to structures, objects, or **landscape features**, including, e.g., ground disturbances associated with removal of the historically and culturally significant Mounds, installation of new plumbing for a fountain, and new pavement. ECF 1 at ¶113.

The Technical Manual further explains that when, as here, a "project would affect those characteristics that make a resource eligible for listing on the State and/or National Register or for New York City designation, this would most likely be a significant adverse impact." Technical Manual at Chapter 9, page 9-18. Here, the Project impacts a resource listed on the National Historic Register (the Fort Greene Historic District), but the Department did not even bother to include SHPO in its review, even though SHPO is the state agency with expertise and experience protecting such resources and is the agency that granted the historic designation.

The Technical Manual further provides that adverse impacts to architectural resources may include, e.g.:

• "**Physical** destruction, demolition, damage, **alteration**, or neglect **of all or part of an historic property**. For example, alterations that would add a new wing to an historic building or replacement of the resource's entrance…"

• "**Changes to the architectural resource that cause it to become a different visual entity, such as a new** location, **design**, **materials**, or **architectural features**. An example would be recladding an architectural resource with new brickwork."

• "Isolation of the property from, or **alteration of, its setting or visual relationships with the streetscape**. This includes changes to the resource's visual prominence so that it no longer conforms to the streetscape in terms of height, footprint, or setback; is no longer part of an open setting; or can no longer be seen as part of a significant view corridor. For example, if all the buildings on a block, including an architectural resource, are four stories high, and a proposed project would replace most of those with a 15-story structure, the four-story architectural resource would no longer conform to the streetscape. Another example would be a proposed project that would result in a new building at the end of a street so that views of an historic park beyond were blocked."[34]

• "**Introduction of incompatible visual**, audible, or atmospheric **elements** to a resource's setting. An example would be construction of a noisy highway or factory near a resource noted for its quiet, such as a park. …"

• "**Introduction of significant new shadows**, or significant lengthening of the duration of existing shadows, over an historic landscape or on an historic structure (if the features that make the resource significant depend on sunlight) to the extent that the

[34] The Project is specifically designed to alter the Park's "setting" and/or its "visual relationship with the streetscape." Indeed, the Department's apparent rationale for the Project — including its plan to remove so many mature trees — is to open up the view from the street to create an unimpeded view of the Monument. Indeed, the fact that this Project is part of the "Parks Without Borders" program — which seeks to create clear "site lines" from the street to the features within the Park — confirms that an over-arching purpose behind the Project is to "alter" the Park's "setting" or its "visual relationship with the streetscape," which constitutes a significant adverse impact to architectural resources under the CEQRA Technical Manual for which a Pos Dec should have been issued.

> architectural details that distinguish that resource as significant are obscured."

See Technical Manual at Chapter 9, page 9-18—9-19 (emphasis added). A Neg Dec is inappropriate where such impacts are found.

Here, as the Owens Report observes, "Frederick Law Olmsted and Calvert Vaux envisioned Fort Greene Park as a verdant oasis of shaded walkways and lush plantings." ECF 4 at pg. 50. The 2015 Owens Report "make frequent references to the significance of adhering to the Park's historic plans and purposes as much as possible" to avoid adverse impacts affecting those natural resources and historical and cultural resources. ECF 4; ECF 1 at ¶38. The Department ignored these significant adverse impacts.

In 2017, Landscape Preservation expert Michael Gotkin raised concerns about the Project's significant adverse impacts, noting the Project "runs roughshod, and virtually erases, the extant historical layers of park design history." See ECF 8 at page 5 ("Where previous designers were sensitive to add new landscape features to the park while respecting and preserving earlier landscape strategies, the current proposal rolls out a massive paved plaza across the original green open space, removes the 1930s landscape details, and eradicates the modernist landscape mounds, and instead creates a strange ersatz rendition of a City Beautiful era formalism on steroids, while removing the distractive pink granite Belgian block paving and replacing these with pink-tinted concrete pavers and incongruous bands of contrasting Jet Mist granite").

> Most importantly, the proposal, for the first time in the park's history, breaches the wooded corner of the park and replaces the mature grove of trees and protective rustic retaining wall with an outsize grand staircase, bringing the formality of the monument

> directly in this sylvan corner of the park and the scale of the hillside monumental stairs directly out to the city streets. …
>
> The scale and troubling details of this proposal have more in common with the new luxury condominium towers, rising just outside the park, than with the historical design and verdant nature within the park walls.

ECF 8 at page 5.[35] These impacts meet the threshold for finding a significant adverse impact to "historic or cultural resources" because they involve:

(1) Physical destruction or alteration of property in a historic district, including removing the mounds, expanding the staircase, constructing a fountain, and more.

(2) Changes to the architectural resource that cause it to become a different visual entity, such as a new location, design, materials, or architectural features. The views of several architectural features will change, including views from the street, views of the mounds (which will be lost), and views of the expanded staircase. The Project will also change architectural and landscape features by incorporating different materials, designs, and architectural/landscape features.

(3) Alteration of the Park's architectural and landscape features, including its setting or visual relationships with the streetscape. ECF 8; ECF 1 at ¶¶116-118.

(4) The introduction of incompatible visual elements to the resource's setting. The 2017 Gotkin Letter (ECF 8) and 2023 Gotkin Report (ECF 13) address those incompatible features. ECF 8; ECF 1 at ¶115.

(5) Introduction of new significant shadows or lengthening of the duration of existing shadows over a historic landscape, which impact the historic landscape features that rely on sunlight. Adjacent high-rise projects that should be considered together with this project will introduce new shadows of a longer duration and impact trees and other landscape and historical features of the Park that depend on sunlight. ECF 8.

In September 2023, Landscape Preservation expert Michael Gotkin prepared a report detailing how the Project may cause significant adverse impacts and concluding that the

[35] These concerns are part of the administrative record for the Project and the record in prior litigation with the Department concerning the Project, and so the Department was aware of these potential Project impacts but failed to take a hard look at them.

Department failed to take a hard look at them. See ECF 13 at page 1 ("the planned construction project destroys significant historical, cultural, and ecological features of the park, completely wiping away over 150 years of stewardship and respect for this historic designed landscape. The Parks Department failed to take a hard look at these issues.") Based upon his review, Mr. Gotkin determined that "the Parks' Department's proposed plan for Fort Greene Park remains completely, if not substantially, unchanged from the earlier plan that was successfully challenged in court and the Department failed to take a hard look at adverse impacts." See *Id*. (the Project "wipes out over 150 years of Fort Greene Park's historic build landscape [and] does not take a hard look at any of the threatened historic features that I outlined in my original testimony.")

The 2023 Gotkin Report, 2017 Gotkin Letter, and 2015 Owens Report refute the Department's incorrect claim that the Project is somehow consistent with historical and cultural resources, and explain that **the Department's false narrative is based on unbuilt plans that were never previously used, implemented, or constructed**. ECF 4; ECF 8; ECF 13. The expert submissions reveal that the Department's reliance on unbuilt plans to show historical, cultural, architectural, and landscape consistency was irrational and unsupported at best, if not disingenuous, manufactured, and pre-determined. *Id*.

The 2023 Gotkin Report further establishes that:

> "The most significant historic features in Fort Greene Park that will be destroyed by the planned proposal are the original large grove of trees at the entrance to the park, and also the formal allée, the tree lined park path that leads to the Fort Greene monument inside the park. NYC Parks proposes to eliminate the historic grove, and to greatly modify, extend and widen the allée, wiping out 150 years of landscape architectural history by some of our most historically notable designers. The original grove of trees

> at the entry to the park is one of the most salient features of the park's original design, and also a paradigmatic design feature of the Olmsted and Vaux firm's park design philosophy that was employed across all of their park work. The essential design feature is that upon entering a city park, the park should present an immediate landscape contrast to the formal city that surrounds the park. As an example, if the road outside the park is straight, then the entry path to the park should be curved, and if the road outside the park is formally planted, then the plantings inside the park should be markedly informal. Also, the entrances to parks designed by Olmsted and Vaux are notably off center, or oblique, and not aligned with any streets or view corridors. There are, of course, formal features inside Olmsted and Vaux parks, like a promenade, but these features must be discovered by the park visitor, and they are never made manifest at the entrance to the park. NYC Parks current proposal to extend a widened formal allée all the way to the park entrance completely impacts this most important historical feature of the original park design. …
>
> Parks [Department] has now chosen to excavate these unbuilt plans and preliminary sketches, and submit them as evidence in support of their massive reconstruction of this part of the park, including felling all the trees in the original Olmsted and Vaux grove, adding bombastic fountains and paving elements to the demure McKim, Mead and White allée, and destroying the Robert Moses era recreational modifications to the allée, and also notably demolishing the Bicentennial landscape mounds that continue to be beloved and heavily used by the surrounding community. All of these historical features that will be destroyed are to be replaced by acres of formal paving, providing an unobstructed view corridor from the outside street to the monument on the hill, that is completely in opposition to Olmsted and Vaux's original concept for a landscape screening of an entry grove of trees, a concept that had been faithfully respected and preserved by all of the subsequent historical designers that worked on this park of Fort Greene Park. I previously raised these significant adverse impacts but the Parks Department failed to take a hard look at them in the EAS, and fail[ed] to provide a reasoned elaboration addressing these points.

ECF 13 at pages 3-4 ("the proposed massive park reconstruction project will greatly compromise the historic Fort Greene Park landscape, by demolishing the Park's most salient

historic features.") From these facts, Mr. Gotkin concluded that the Project "remains unaltered from the earlier criticisms, including criticisms by both the community and by experts, that were in response to the original proposal. Rather than addressing the earlier concerns of environmental impacts to the historic park, NYC Parks has simply chosen to ignore them, without submitting any new relevant documentation to support their findings, without taking a hard look, and without providing a reasoned elaboration to address all identified areas of environmental concern." *Id*. at page. 5.

Given the extremely low threshold for issuance of a Pos Dec, the presumption in favor of a Pos Dec for Type I Actions, and the evidence showing such adverse impacts, a neg dec was inappropriate for this Project. For these reasons, the Department failed to take a hard look, and so its Neg Deg must be annulled.

3. The Department Failed to Take a Hard Look at "Natural Resources."

The Department failed to take a hard look at significant adverse impacts to Natural Resources (ECF 1 at ¶¶121-140), even though the Department admitted that the Project will remove at least 78 mature trees (48 for design purposes plus another 30 for other reasons) from the Park (ECF 11 at F-19), many of which have been there for decades, have a height of around 60 feet (the equivalent of a 6-story building), and provide significant environmental benefits. ECF 9 at ¶¶5-6, 8. See ECF 11 at F-20 ("The canopy portion of the park would be altered by the removal of approximately 48 trees, many of which are mature and providing myriad ecological and social benefits"). Of the 78 mature trees targeted for removal, 58 would be removed from the small northwest section of the Park. The Department also ignored the impacts of the Project's extreme pruning and root destruction, which will foreseeably cause

even more tree deaths in the Park, thereby exacerbating the Project's adverse impacts on natural resources.

The *Department's own consultant* notified the Department as early as 2015 that the Project may adversely impact natural resources (including mature trees), which is why it discussed staging or staggering any tree removals and replacements in order to maintain the canopy at the Park. ECF 4. Indeed, the Owens Report "emphasizes the importance of retaining as many trees as possible, and suggests that the Parks Department avoid planting new trees in the open portion of the park [which would exacerbate other adverse impacts.]" ECF 4; ECF 1 at ¶38. See ECF 4 ("The overall picturesque character of openings (lawn) and enclosures (canopy) of the Olmsted and Vaux plan should be maintained and serve as a guide for future plantings.") The Department's decision to ignore evidence in the Owens Report that tended to undercut the Department's desired result was arbitrary and capricious as a matter of law.[36] Another Court previously called-out the Department for ignoring such evidence of adverse impacts in the Owens report[37] and failing to discuss the report in its SEQRA determination.[38] Here, the

[36] Holliday et. al., 12A N.Y. JUR. 2D BUILDINGS § 466, Evidence on hearing of appeal for administrative relief from zoning provisions (2021). *See, e.g.*, *Switzgable v. BZA of Town of Brookhaven*, 78 A.D.3d 842, 844 (2d Dept. 2010) (ZBA's determination was arbitrary and capricious because "[t]he Board disregarded evidence" of witnesses with first-hand knowledge); *Engleson & Van Liere, Inc. v. Village of Sodus Point*, 135 A.D.2d 1141, 1142 (4th Dept. 1987) (although an administrative body "may reject opinion evidence, a determination based on less than the entire record cannot stand."); *Buric v. Safir*, 285 A.D.2d 255, 263-264 (1st Dept. 2002) (annulling determination where key details were ignored, holding "[t]his record, when viewed as a whole, fails to support the determination.").

[37] See ECF 1 at ¶39 (citing ECF 4) (explaining that the Department "relied on some parts of the study even though it rejected others.")

[38] ECF 1 at ¶39 (citing ECF 4) ("the respondent fail[ed] to mention the [Owens] report in its Type II determination."]

Department's EAS and Neg Dec again ignored the Owens Report, aside from two identical sentences stating that it was prepared in 2015, and did not review the facts, analysis, or conclusions contained therein, nor did the Department attach a copy of the Owens report to the EAS or Neg Dec.

The Project also proposes "extreme branch pruning by as much as 50%," which arborist and horticulture consultant Dr. Glaeser described as "unacceptable and **a likely death sentence for these trees** over time because"[39] excessive pruning:

(a) "Creates wounds on the tree that have detrimental health consequences for the tree when compared to leaving their canopies intact. The larger the branch cut for such pruning, the greater the probability that the tree's wound does not heal successfully. Unsucessful wound healing from the pruning of large trees increases the risk that the tree will develop a fatal condition, such as wood decay, fungal pathogens, and boring insects that contribute to declining tree health." ECF 9 at ¶7.

(b) Of 50% "results in a commensurate reduction of leaves resulting in reduced photosynthesis, a diminishment of the trees' food production capacity, and thereby a weakened tree." Id.

(c) "Exposes normally shaded interior tree bark to intense solar radiation and heat. Exposing formerly shaded tree branches to new intense radiation (that had been previously shaded) shall result in sunscald and bark cracking where it previously did not exist. Sun scalding of tree bark is tree wounding and most probably to become an entryway for new pests, disease and pathogens that adds to tree stress and eventually a decline in overall tree health over time." Id.

(d) Reduces the size of the tree crown, causing a "direct reduction in the environmental benefits and services delivered" by these trees and their current crowns. Id. "Leafy tree crowns play a vital role in the improvement of local air quality … by "intercepting airborne particulate matter (PM2.5, PM10)." If those particulates were ingested by people rather than being absorbed by trees, such suspended particles are significantly harmful to human health, and are "known to contribute to

[39] ECF 9 at ¶7.

> cardiopulmonary and bronchial diseases along with asthma.[40] Crown size reduction also reduces the trees' capacity to effectively intercept gaseous air pollutants like ozone, nitrogen oxides and sulfur dioxide and the diminishment of the sequestering capacity of hydrocarbons." Id.

Accordingly, by intentionally removing 78 mature trees, and unintentionally but foreseeably destroying an unknown number of additional trees due to excessive pruning and root destruction, the Project will cause, for each tree removed the release of a significant volume of sequestered carbon from the trees back into the atmosphere.[41] The Department also failed to consider that the adverse impacts from such tree removals will not be adequately mitigated by the Project in the areas where the impacts will be most significant because the mitigation measures included — e.g., the planting of replacement trees — is not required to occur in the areas where the trees will be removed from or even where the most significant impacts will occur. Instead, the Department merely commits to locating its mitigation — specifically, its replacement trees — "within the community board boundaries," regardless of where the original trees were removed from, where the adverse impacts are felt, or how long it would take for the adverse impacts to be mitigated. That's irrational.

Also, the Department did not take a hard look at how many additional trees were likely to be destroyed by the Department's extreme pruning and root destruction from the Project.

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[40] The Park is located near a known asthma cluster, and so the adverse environmental impacts from the Project will be felt by a highly vulnerable population with existing health problems.
[41] See ECF 14 at ¶20 (Dr. Glaeser's affidavit confirmed that the removal of so many trees will result in the "release tens of thousands of tons of carbon back into the atmosphere," that the Department failed to consider information concerning the impacts of the Project on carbon sequestration and release, and that the failure to consider such data made it impossible for the Department to satisfy its SEQRA/CEQRA obligations to take a Hard Look at such impacts).

The detrimental impacts of this excessive tree limb amputation (pruning of 50%), and the damage to the health of the trees, is "worsened by the planned removal of the earthen-mounds located at the foot of all trees and within the tree critical root zone (CRZ)." See ECF 9 at ¶8. ("It is more probable than not that a high volume of the root system of all trees occupy the soils of these earthen-mounds. … [Therefore,] mechanical excavation to reduce the mound height down to grade level as part of the design plan shall remove, harm and damage 50% or greater of the roots of each of these trees. … Most trees including Planetrees are unable to recover from significant root loss, and will spiral into declining health a few short years after root removal. Removal of any significant structural roots shall destabilize the trees placing them in unacceptable tree risk condition.")

Dr. Glaeser's 2019 Affidavit expresses extreme doubt that any of the planetrees could survive the extreme pruning and root destruction. Id. at ¶9. The Department failed to take a hard look at this issue. See ECF 14 at ¶19 ("There is no evidence that the Department conducted a Tree Risk Assessment…[,] which indicates a failure to take a hard look. … If such information were included, it might explain why the Department determined that so many trees of large size in one sector of Fort Green[e] Park were identified for removal [despite their apparent good health]. The omission of such information suggests that the trees are not in poor condition and are not a risk, and that they were targeted for removal not for health or safety reasons, but to achieve design goals for the Project. … It is my opinion and conclusion that the 78 mature trees to be removed as part of this project do not require removal due to health or safety concerns.")

The Technical Manual gives examples of projects that may cause significant adverse impacts on natural resources:

> "a stand of trees may shade an area, allowing for increased cover and a cool microclimate for small mammals, birds, plants, and other organisms. The loss of the trees would remove a specific habitat. Based on this type of analysis, the assessment identifies the loss associated with the project and the importance of that loss for the critical functions of the habitat."

ECF 1 at ¶123.

The Department admits that "there is an existing canopy of shade trees" (ECF 11 at A-5 and B-2) and "tree canopies meet and/or overlap providing nearly continual shade below." ECF 11 at F-5. The Department further admits that trees "capture carbon and also create shade that help mitigate the urban heat island effect." ECF 11 at I-2. See ECF 14 at ¶11 (NYC's tree map website identifies additional environmental benefits from trees, including "Carbon storage and sequestration, mitigated surface water runoff, air pollution removal, tree effects on ultraviolet radiation exposure, tree effects on air temperature, reduction in UV radiation, and other structural and functional benefits).

Accordingly, the Department's factual admissions establish that the 78 mature Trees at the Park shade a significant area of the Park, allowing for increased cover and cool microclimate, and that they work to capture carbon and reduce the heat island effect. The environmental benefits and services provided for each tree species identified in a 2015 NYC Tree Census have been evaluated and quantified with calculations using formulas from the U.S. Forest Service. The calculations show that the Ecological benefits for all NYC Street and Parkland Trees, in just a few categories, are as follow:

Environmental Benefit	Quantification of Benefit	Monetary Value of Benefit

Stormwater Intercepted/Year	1,329,452,847 Gallons	$13,161,576.54
Energy Conserved/Year	799,471,000 kWh	$100,929,122.82
Air Pollutants Removed/Year	1,518,019 Pounds	$7,937,234.96
Total Value of Annual Environmental Benefits From Certain Categories		$127,206,602.23

ECF 14 at ¶11. Despite its ability and experience doing so, the Department did not evaluate the value of the environmental benefits to be removed as part of the Project due to loss of trees. See ECF 14 at ¶15 ("None of the tree benefits and services values and their economic worth for the trees indicated for removal were calculated by NYC Parks Capital for this Project using i-Trees ECO and thereby not presented in the EAS.")

By removing so many large, mature trees, the Department is eliminating the environmental benefits they provide, and thereby exacerbating adverse environmental conditions. See ECF 14 at ¶15 ("these large aged public shade trees are irreplaceable for the immense benefits and services that they provide currently and will continue to provide for decades into the future.") Because the Department seeks to replace these trees with much smaller trees[42], and is not even committing to locating all replacement trees within the Park or within any specific timeline (ECF 1 at ¶¶131-133), it is undeniable that **the replacement trees**

[42] The Department is proposing to mitigate the removal of mature trees by replanting enough small, immature trees to equal the amount of mature tree "trunk area" removed, even though it is beyond dispute that the equivalent trunk areas of many smaller trees do not have nearly the same environmental benefits as mature trees totaling the same trunk area. This demonstrates that the Department has not truly taken a hard look at the adverse impacts from the loss of mature trees and failed mitigate the adverse impacts. It also suggests that the Department acted arbitrarily and capriciously and, inconsistent with its past precedent for SEQRA reviews, which looked at replacing the environmental benefits from the removal of mature trees rather than replace the equivalent trunk area.

will not be capable of replacing the environmental benefits lost from the destruction of the mature trees for several decades, depriving generations of people the environmental benefits those mature trees now provide. See ECF 11 at F-19—F-20 (The Department admits that (1) "the environmental benefits provided by mature trees, such as increased shade and lower air temperatures, air quality improvement, carbon sequestration, and wildlife habitat, would not be immediately realized by replanting smaller trees" and (2) tree removals may have "impacts to resident and breeding birds in the Park, which may persist until the newly planted trees are installed, become established, and expand their canopies," which may take decades); ECF 14 at ¶15 ("the proposed replacement trees do not come anywhere near replacing the full value of the trees and their environmental benefits, which are to be removed from the Park.") This is especially true because the 2017 and 2018 Tree Valuations for this Project are not equal to the 2023 values, and so even their intended mitigation falls short because it is based on outdated data that was not adjusted for inflation.

Moreover, the quantity of living tree wood removed (78 mature trees) will not come anywhere close to the quantity of living tree wood contained in the replacement trees, and so cannot possibly provide the same quantity or quality of environmental benefits.

> "The EAS Report shows that tens of thousands of square inches of tree Basal Area belonging to the parkland trees at the Park are targeted for removal. By contrast, the Department is offering to plant only 200 immature trees with a caliper of 3.0-inches as replacements…. Wood-for-Wood, the 200 replacement trees shall only provide 1,412 square inches of new wood. By contrast, the removal of the 78 mature trees as part of this Project will result in the removal of tens of thousands of square inches of wood from the Park, with a significant volume of carbon released back into the atmosphere as a result. … The cutting and removing of (78) large and mature shade trees … shall release tens of thousands of tons of carbon back into the atmosphere. … The Department's

> exclusion of [such] and analysis … from the EAS made it impossible for the Department to take a hard look at all identified areas of environmental concern and provide a reasoned elaboration."

ECF 14 at ¶20.

The Technical Manual indicates that an adverse Project impact may be significant if:

- A "project would likely result in the loss of part or all of a resource that is important because it is large, unusual, the only one remaining in the area where the project is to take place, or occurs within a limited geographic region" or

- "A project would, either directly or indirectly, be likely to cause a noticeable decrease in a resource's ability to serve one or more of the following functions: wildlife habitat; food chain support; physical protection (e.g., flood protection); water supply; pollution removal; biogeochemical cycling; recreational use; aesthetic or scenic enhancement; commercial productivity; or microclimate support."

Technical Manual at Chapter 11, page 11-37. This Project will result in the loss of part or all of resources (e.g., at least 78 mature trees and a Sylvan Glen stand of trees, both of which provide ecological and health benefits)[43] that are important because the resource is large, unusual, the only one remaining in the area where the Project is to take place, or occurs within a limited geographic region. And the Project would, directly or indirectly, be likely to cause a noticeable decrease in a resource's ability to serve one or more functions related to physical protection (from the sun), pollution removal, biogeochemical cycling, or microclimate support.[44]

[43] Beyond the 78 Mature trees planned for removal, the Department failed to identify how many trees may die due to the Project's excessive pruning and root destruction, and so did not consider whether those additional tree deaths (and corresponding loss of their environmental benefits) may result in a potentially significant adverse impact.

[44] See ECF 11 at F-20 ("The canopy portion of the park would be altered by the removal of approximately 48 trees, many of which are mature and providing myriad ecological and social benefits").

Obviously, an environmental resource's (e.g., a tree's) ability to provide beneficial environmental, ecological, and health benefits noticeably decreases if the environmental resource, or parts thereof, are removed. More so when its access to food — which, in the case of trees, includes sunlight — will be reduced by the unconsidered adverse impacts from the shadows produced by related project that was improperly segmented from this Project's review. Indeed, the Department admits that the environmental benefits from the replacement trees will not immediately match the environmental benefits from the trees to be removed, and that admission doesn't even factor into account the trees that will be sentenced to death by root destruction and excessive pruning of around 50%. This indicates that the Project will noticeably decrease the trees' abilities to provide environmental benefits.

Dr. Carsten Glaeser, a professional arborist and horticulture consultant, visited the Park in November 2017 and again in September 2023 to inspect the trees, and determined to a reasonable degree of professional certainty that **a large number of the trees that the Department claims need to be removed due to their condition <u>are actually in good health and do not need to be removed</u>**. Specifically, Dr. Glaeser's 2023 Affidavit confirms that:

- A group of six mature Japanese Zelkova and a double-rowed group of five mature Zelkova trees on the lower landing of the Monument Stairs were determined to be in good to excellent health in 2004 and 2018, and were healthy and robust. See ECF 14 at ¶5 (these trees have a low percentage of diseased and dead wood. Dr. Glaeser opined that cutting and removing them would be "an unthinkable act").

- A double row of thirteen mature London Planetrees near the Promenade and Lower Plaza "create a closed canopy" in the summer "providing vital shade and other amenities. These tree species, hardy trees for a tough urban environment, appear to be in good health and structure." *Id.* at ¶6 (these trees may live for "100+ years.")

- About two dozen trees (Norway Maples and Large London Planetrees) near the Wall adjacent to Myrtle Avene are in "reasonably good health," "provide a high level of shade [and] screening, retain soil from erosion, intercept air pollution and have rainfall capture

benefits. These trees were well foliated a the time of the 2018 inspection and reasonable incremental growth on tree twigs, suggesting that they are relatively healthy trees." *Id.* at ¶7.

- Eight established Honey Locust trees near the northwest corner of Mrytle Ave and St Edwards "are in reasonable fair health" (*Id.* at ¶8), yet the Project would needlessly remove them and eliminate the environmental benefits and services they deliver.

- "Trees deliver a myriad of quantified benefits as they do services to the environment and for human health. This includes those trees that populate Fort Greene Park." *Id.* at ¶10.

Dr. Glaeser found that the Department's conclusion that no significant adverse impacts will result is based on "false [and] misleading [claims], and not based on a hard look or reasoned elaboration." *Id.* at ¶13. He confirmed that "Adverse effects from tree removals in this sector of the park are indeed expected by the purposeful evisceration of numerous large living tree assets that deliver real benefits and services currently, and will continue to do so for decades forward, if not cut and removed." *Id.* at ¶14 ("The Final Environmental Assessment Report falls extremely short in its honesty and openness without accounting for the environmental and human health benefits and services lost when such a volume of living trees and tree wood are clear-cut and removed from the landscape.")

For these reasons, given the low threshold for issuance of a Pos Dec; the presumption that such adverse impact may result; and the evidence showing such impacts here, the Project's Neg Dec was inappropriate and failed to take hard look, and so must set aside.

4. The Department Failed to Take a Hard Look at "Hazardous Materials," "Water and Sewer Infrastructure," "Public Health," and "Construction" Impacts.

Petitioner respectfully refers the Court to ¶¶141-147 (hazardous materials), ¶¶148-155 (water and sewer infrastructure), ¶¶156-170 (public health) and ¶¶171-177 (construction) of the Petition (ECF 1), which is incorporated herein by reference.

E. The Neg Dec Is Irrational and Not Supported by Substantial Evidence in The Record.

Pursuant to CPLR §7803(3), an agency's SEQRA/CEQRA determination of significance must have a rational basis and be supported by substantial evidence. Here, substantial evidence was not obtained, and the record is insufficient to overcome the presumption on a Type I Action that a Pos Dec should be issued and an EIS prepared, especially given the extremely low threshold for issuance of a Pos Dec.

The Department ignored identified areas of environmental concerns, refused to require further information, excluded from the EAS the Owens Report that its own consultant prepared and that the Department previously concealed from the Public, ignored evidence that undercut its desired result, and did not provide a rational basis or reasoned elaboration for its decision.

For the reasons set forth herein, the Department's Neg Dec is not supported by substantial evidence, lacks a rational basis, and should be set aside.

F. The Department Failed to Consider Cumulative Impacts and Improperly Segmented Environmental Review of the Project.

The Neg Dec must be set aside because the Department failed to consider cumulative impacts of the Project together with the construction of an adjacent luxury apartment complex, in violation of 6 NYCRR §617.9(b)(5)(iii)(a) and ECL §8-0109(2). Consequently, the Department also improperly segmented its review in violation of SEQRA.

A lead agency's review must consider reasonably related long-term, short-term, direct, indirect, and cumulative impacts, including other simultaneous or subsequent actions which are likely to be undertaken with or dependent upon the action.[45] The "whole action" must be

[45] 6 NYCRR §617.7(c)(2). See *Vill. of Westbury v. Dep't of Transp. of State of N.Y.*, 75 N.Y.2d 62, 69-70 (1989) (holding that a project involving widening of roadway should not have been

reviewed by the lead agency, and the fact that several agencies are involved in the "whole action" does not mean a cumulative review by one agency is not necessary.[46] Additionally, actions can still be linked — and must be reviewed together — even if they have different applicants, approval requirements, or funding sources, e.g., a group of projects that are part of the same overall action.[47] Here, the Department violated SEQRA by failing to consider cumulative impacts and improperly segmenting environmental review of related projects.

1. The Department Improperly Segmented Its Review.

Segmented review is the alternative to cumulative review and occurs when the lead agency looks at a project's impact individually rather than in connection with related or simultaneous projects. Improper segmented review occurs when either (1) a project sponsor attempts to avoid thorough environmental review of a whole action by splitting a project into smaller projects, or (2) where related activities that may be occurring at different times or places are excluded from the scope of the project's environmental review.[48] Here, the second situation occurred because the Department failed to consider the impacts of the luxury

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segmented from NYSDOT interchange reconstruction project because the future widening of roadway was a subsequent action contemplated by SEQRA and the cumulative environmental impacts of both projects, especially traffic impacts, should have been considered by the lead agency despite DOT's claims that the two projects served separate purposes and were not part of an area-or community-wide plan).

[46] See generally NYSDEC, *The SEQR Handbook, 4th ed.*, Chapter 2 at 53, *available at* www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf (SEQRA refers to review of the 'whole action' when there are interrelated projects that may have a collective impact).

[47] *Id.* at 55.

[48] *City of Buffalo v. NYSDEC*, 184 Misc.2d 243, 250 (Erie Co. 2000) (segmentation wrongly divides various segments of a single action as though they are independent and unrelated).

apartment complex development adjacent to the Park. Segmented review is problematic and closely scrutinized because it allows for concealment of environmental impacts of projects, undermines the purpose of CEQRA/SEQRA[49], and makes environmental impacts seem less significant than they are when viewed collectively, burying necessary mitigation measures.

To perform a segmented review, the lead agency must determine that segmentation is proper. This requires the lead agency to document its reasons for believing so; detail why segmented review is no less protective of the environment than cumulative review; and identify and disclose the other segments in the individual environmental review for each segment.[50] The Department did not do this.

Not only that, but since a nexus exists between the Project and the luxury apartment complex, the Department simply cannot justify segmented review, and should have considered the cumulative impacts between the Project and the adjacent development in its EAS before making a determination of significance. Its failure to do so violated SEQRA/CEQRA.

2. The Department Failed To Consider Cumulative Impacts.

When a nexus exists between two actions, the lead agency must consider the actions together — including the entire set of activities — regardless of whether the agency decision-making relates to the action as a whole or to only a part of it.[51] Several factors demonstrating the requisite nexus are present here because there are common:

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[49] *Sun Co., Inc. v. City of Syracuse Indus. Dev. Auth.*, 209 A.D.2d 34, 46-47 (4th Dept. 1995), ("considering only a part or segment of an action is contrary to the intent of SEQR.").

[50] 6 NYCRR §617.3(g)(1).

[51] 6 NYCRR §617.3(g).

(1) reasons for each action being completed at or about the same time;

(2) geographic locations between the actions; and

(3) impacts that result in significant adverse impacts.[52]

The reason: neighborhood connectivity. Underscoring the Project is the Department's aspiration to improve neighborhood connectivity. The EAS prepared by the Department indicates that the Project would improve the park's connection to the surrounding area through improvements that would allow enhanced connection for better use and enjoyment of the park.[53] Similarly, construction of the luxury apartment complex would bring new residents to an area immediately adjacent to the Park. Redeveloping commercial space for residential use brings new residents into a community and offers new residents the chance to connect with the existing neighborhood. Here, the high-rise projects will add new residents to the neighborhood next to the Park that will join existing residents and Park-goers. New residents will have the opportunity to connect with the Park physically and to engage in interpersonal community-building, which the Project seeks to support through connectivity efforts. Since this Project and the luxury apartments project are occurring simultaneously to improve the neighborhood with

[52] *The SEQR Handbook, 4th ed.*, Chapter 2 at 53. *Vill. of Westbury*, 75 N.Y.2d at 69 (review of a highway interchange must also consider a parkway widening project whose planning and scheduling are intimately tied to the interchange project); *Save the Pine Bush v. City of Albany*, 70 N.Y.2d 193, 206 (1987) (agency is required to examine the cumulative impacts of separate related projects even if they are not under common ownership); *Sun Co., Inc.* 209 A.D.2d at 46-47 (IDA's SEQRA review set aside because it failed to consider the cumulative effects of related projects); *City of Buffalo*, 184 Misc.2d at 256 (agency improperly segmented review by failing to consider cumulative effect of bridge and toll plaza construction).

[53] ECF 11 at pages A-9, C-3, D-7, E-6, F-18, K-4, and K-5.

similar connectivity benefits, the Department should have considered the cumulative impact of the projects together. The Department failed to do so.

The location: side-by-side, if not the same. The perimeter of the Park touches the luxury apartment project. There is no street interruption between them. The areas surrounding each project not only touch one another, they also impact the same soil, grade, run-off, community character, aesthetic, and wildlife. Since this Project and the luxury apartment project share a common location, the Department should have considered their cumulative impacts together. The Department failed to do so.

The impact: detriment to wildlife and trees. The Project calls for the removal of at least 78 mature trees for design and other reasons (58 of which will be removed from the small northwest corner of the Park), and will result in an unknown number of additional tree deaths due to excessive pruning and root destruction. While the Department purports to mitigate this impact with new tree plantings, it fails to consider the effect that shadows from the luxury apartment project will have on the ability of the replacement trees to survive. Shade from the adjacent apartment project will decrease the amount of natural sunlight absorbed by the replacement trees, slowing their growth, decreasing their likelihood of success and survival, and increasing the number of years (or decades) before they can replace the benefits lost by removing existing trees. Removing mature trees also removes wildlife habitats for the Woodpeckers, Blue Jays, Mockingbirds, Robins, Cardinals, squirrels, bees, and butterflies that call Fort Greene Park home; habitats that cannot be replaced with small replacement trees that are not guaranteed to survive or even be in the Park. Since this Project and the adjacent luxury apartment complex share common impacts (and magnify each others' impacts), the

Department should have considered their cumulative impacts together. The Department failed to do so.

For these reasons, this Project and the adjacent apartment project share common reason, time, location, and impacts, which warranted a cumulative impact review by the Department. The Department failed to even consider whether segmentation was proper and failed to document its basis thereof. The Department therefore violated SEQRA/CEQRA, and so the Neg Dec should be annulled.

G. The Department Failed To Follow Its Own Precedent By Using A Different Tree Valuation Tool To Quantify The Value Of The Environmental Benefits Lost By Removing Trees For The Project.

The Department acted arbitrarily and capriciously by failing to follow its own precedent, without explanation, by using a different tree valuation tool for this Project than the tool that the Department historically used to evaluate the environmental impacts of tree removals.

It is arbitrary and capricious for a lead agency to "neither adhere to its own prior precedent nor indicate its reason for reaching a different result on essentially the same facts."[54]

Historically, the Department used a tool developed by the United States Forest Service — the "i-Tree" model — that measures and places quantifiable value on the ecological and economic benefits of a city's trees.[55] This includes those in parks and that line city streets. In

[54] See *Tall Trees Constr. Corp. v. Zoning Bd. of Appeals of Town of Huntington*, 97 N.Y.2d 86, 93-94 (2001) (holding that agency's denial of application was arbitrary and capricious because it was similar to other applications that were granted and "the Board failed to identify any evidence to" distinguish the denied application from the granted applications); *Knight v. Amelkin*, 68 N.Y.2d 975, 977 (1986); *Charles A. Field Delivery Servs. (Roberts)*, 66 N.Y.2d 516, 517 (1985).

[55] See ECF 14 at ¶14 ("NYC Parks Forestry divisions and its employees within the agency – particularly its Certified Arborist – have used and applied the i-Trees suite of software as a Best

2016, the Department incorporated i-Tree into the city's Tree Map to better assess the benefits that such trees provide. ECF 14 at ¶ 11. i-Trees places monetary values on these benefits, including air pollution removal, mitigated surface water run-off, reduction of UV radiation, carbon storage and sequestration, and reduction of air temperature. *Id.* Collectively, NYC trees save the city $151 million per year. ECF 14 at ¶14. This information is also available per tree.

With such powerful, relevant, and helpful information at its disposal, the Department historically relied on i-Tree when evaluating the need for canopy expansion to aid urban greening and the improvement of community and citizen health. *Id*. The Department even used i-Tree to acquire funding through grants or budget proposals to local governments and community boards. *Id.* If the Department had acted consistently with its past practice, it would have utilized i-Tree, which is integrated into *its own* Tree Map, to determine the value of the trees that the Department plans to remove for this Project, too. But surprisingly, the Department chose not to use i-Tree to value the trees it plans to remove and provided no explanation as to why it abandoned its historical use i-Tree to evaluate *this* Project. See *Id*. at ¶15 ("None of the tree benefits and services values and their economic worth for the trees indicated for removal were calculated by NYC Parks Capital for this Project using i-Trees," even though i-Tree contains detailed information about the value of environmental benefits from the trees that will be removed.)

Management Practice tool for NYC street and parkland trees.") See also id. at ¶15 ("the agency has successfully used the i-tree model in the past to take a hard look at the value of tree benefits and services"); id. at ¶14 (i-tree is also used by the Parks Department to determine the "benefits and services trees and their canopy are providing NYC and its inhabitants.")

Rather than using i-Tree, which it has successfully used in the past to value tree benefits, the corresponding adverse impacts of tree removal, and to secure funding for its projects, the Department inexplicably used the "Tree Valuation Trunk Formula" methodology. ECF 14 at ¶¶15-16. This formula was historically used by the Department to determine a tree's replacement cost when, for example, it was damaged by a contractor. Id. at ¶16. The Tree Valuation Trunk Formula is not designed to, and was not generally used to, determine the value of environmental benefits and services for trees that the Department planned to remove during a project (and therefore the adverse impacts therefrom). Id. at ¶16. The Department's use of the Tree Valuation Trunk Formula for this purpose was therefore inconsistent with the Department's historical use of i-Tree to determine such values, and therefore constitutes a departure from precedent. See *Id*. at ¶¶11-16.

The Department's unexplained deviation from precedent (use of i-Tree for such purposes) violates the basic rule of administrative law that, when confronted with essentially the same facts, an administrative agency must act consistently, or else identify evidence that distinguishes its prior decision. *See Charles A. Field Delivery Serv. (Roberts),* 66 N.Y.2d 516, 520 (1985) ("A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious.")[56]

[56] "The policy reasons for consistent results, given essentially similar facts, are, however, largely the same whether the proceeding be administrative or judicial--to provide guidance for those governed by the determination made; to deal impartially with litigants; promote stability in the law; allow for efficient use of the adjudicatory process; and to maintain the appearance of justice. The underlying precept is that in administrative, as in judicial, proceedings 'justice demands that cases with like antecedents should breed like consequences.' " *See Charles A. Field Delivery Serv. (Roberts)*, 66 N.Y.2d 516, 519.

> "From the policy considerations embodied in administrative law, it follows that when an agency determines to alter its prior stated course it must set forth its reasons for doing so. Unless such an explanation is furnished, a reviewing court will be unable to determine whether the agency has changed its prior interpretation of the law for valid reasons, or has simply overlooked or ignored its prior decision (Kramer, *op. cit.,* at 68-70). Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made."[57]

New York State Law therefore requires that, where comparison of facts concerning an agency's past precedent to the facts of a new matter reveal the existence of "factual similarity between those cases and the new case," the agency must provide an explanation "of why it reached a different result in this case." *Charles A. Field Delivery Serv. (Roberts)*, 66 N.Y.2d at 521. The Department failed to do so.

The Neg Dec does not even attempt to distinguish its abandonment of the i-Tree valuation method for this Project from its historical decisions applying i-Tree for that same purpose. Because the Department failed to set forth its reasons for applying different tree valuation methods to perform the same purpose (i.e., assess the environmental impacts of tree removal), "a reviewing court will be unable to determine whether that agency has changed its prior interpretation of the law for valid reasons, or has simply overlooked or ignored its prior decision…Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary, even [if] there is in the record substantial evidence to support the determination made." *Id.*

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[57] *Charles A. Field Delivery Serv. (Roberts)*, 66 N.Y.2d at 520.

The Department provides no reason for its deviation. Moreover, without the usual evaluation using i-Tree, the Department could not have taken a hard look to determine how the removal of so many mature trees as part of this Project may cause significant adverse impacts. Since the Department chose not to use i-Tree, and did so without providing justification, the Department not only acted counter to its legal obligations,[58] but conveniently misvalued the removal of the trees in its Neg Dec, distorting the record to support the Department's preferred outcome. This illegal maneuver allowed the Department to avoid preparing an EIS, holding a hearing, and accepting public comment, all of which are required under SEQRA where, as here, a Project may have a potentially significant adverse environmental impact.[59]

The Department acted arbitrarily and capriciously by inexplicably departing from its past precedent without explaining why. For these reasons, the Neg Dec should be set aside.

H. The Department Failed to Involve SHPO In The Project's Environmental Review.

The Neg Dec should be set aside because the Department failed to involve the New York State Historic Preservation Office ("SHPO") in the Project's environmental review.

The federal government encouraged, and New York State established, SHPO as a state-level operation to facilitate designation and subsequent preservation of historic, archeological, and cultural resources, sites, and districts.[60] SHPO is tasked with advancing a **statewide historic**

[58] *See Tall Trees Constr. Corp.*, 97 N.Y.2d 93-94 (2001); *Charles A. Field Delivery Serv.,* 66 N.Y.2d 520 (1985).

[59] *See* 6 NYCRR §617.9.

[60] *See* https://parks.ny.gov/shpo/. SHPO was authorized by the National Historic Preservation Act of 1966 ("NHPA"), and the New York State Historic Preservation Act of 1980 ("NY SHPA").

preservation program to connect federal and state interests with local government activities. These activities include administering grants to assist local and regional preservation programs for public benefit, and assisting local governments to advance their historic preservation activities.[61] SHPO reflects the interests of the State in preserving cultural heritage, with a focus on cooperation with local governments to ensure historic properties are considered across all levels of planning and development.[62] The historic review process of SHPO is meant not only to ensure historic sites are properly managed by one level of government when other levels have an interest at play, but also to encourage coordination along the way.

In 1983, the Fort Greene neighborhood was designated — by SHPO — as a *National* Historic District in the National Register of Historic Places.[63] The district encompasses Fort Greene Park. While it is true that the Fort Greene neighborhood is also a *local* historic district (in addition to being a national historic place), the local government is not best situated to advocate on behalf of state or federal interests, nor was it the entity that designated the neighborhood as a historic place on the National Register.

The New York City Landmark Preservation Commission ("LPC"), unlike SHPO, is not tasked with connecting federal and state interests in historic places to local projects. Although the LPC has jurisdiction over work done to and within *local* historic districts in NYC,[64] and was

[61] N.Y. Parks Rec. Hist. Preserv. Law § 14.05(1)(c-d).

[62] 36 CFR § 800.2(c)(1)(i).

[63] National Archives Catalog, Fort Greene Historic District, Nat'l Register of Historic Places Nomination Form, August 12, 1983, *available at* https://catalog.archives.gov/id/75318393.

[64] NYC Local Law 77 of 1995.

appropriately involved in coordinated review here,[65] it does not have the same roles or responsibilities as SHPO with respect to *national* historic districts. Moreover, the LPC's involvement in an environmental review does not obviate the need to involve SHPO in such review for projects affecting historic resources of national or state significance. For these reasons, SHPO is undeniably an interested agency under SEQRA with relevant and useful expertise to contribute to an environmental review, determination of significance, EIS, Findings, and mitigation.

The LPC's inclusion was necessary (because it represents *local* historic preservation concerns), but LPC's inclusion was not sufficient because it cannot represent state or federal historic preservation concerns. If local governments were meant to serve as the advocates for state historic preservation concerns, the NY SHPA would say so,[66] but it doesn't. Failure to include SHPO in the environmental review of a project involving a nationally registered historic district that was so-designed *by SHPO* undermines the very foundation of SHPO: to designate and preserve historic sites. The state, through SHPO, is the proper party to advocate such state-level interests[67] and should have been consulted on this Project, especially where, as here state and federal statutes contemplate SHPO's role in designating and protecting historical resources.

[65] Notice of Lead Agency Designation and Review, June 13, 2022.

[66] *See generally* N.Y. Parks Rec. Hist. Preserv. Law § 14

[67] *Id*.

Even if, *arguendo*, SHPO's involvement were not required by SHPA and/or NHPA, SHPO must still be included in such review because failure to coordinate review with SHPO is counter to the spirit and goals of SEQR/CEQR.

Type I actions are those that require more comprehensive environmental review because there is a presumption that they may cause significant adverse impacts. Accordingly, when a lead agency engages in coordinated review, it includes" involved agencies" who can provide comments within their area of expertise as to whether the Project may result in a significant adverse impact.

When a Pos Dec is used, the public and "interested agencies" (those that wish "to participate in the review process because of [their] specific expertise or concern about the proposed action") may also participate in the Project's SEQRA Review. 6 NYCRR §617.2(u). Improper issuance of a Neg Dec wrongfully and needlessly excluded SHPO from the Project's environmental review, undermining the Department's ability to take a hard look at the impacts of the Project on state and federal historic preservation interests. See *Id*. ("An 'interested agency' has the same ability to participate in the review process as a member of the public.")

To exclude SHPO from an environmental review impacting a nationally registered historic site – made so by SHPO's own designation – diminishes the importance of the state historic preservation interest, treats the "hard look" standard as merely optional, and ignores the spirit of SEQRA. It further undermines the goals of SEQRA/CEQRA, making it difficult – if not impossible – to effectively mitigate significant adverse impacts. Thus, SEQRA/CEQRA call for SHPO's inclusion in the Project's environmental review. The Department's decision to exclude

SHPO therefrom was irrational at best or, at worst, intentionally designed to obscure the Project's significant adverse impacts on state-level historic preservation interests.

The Department's decision was therefore arbitrary and capricious, and so must be set aside because the Department failed to involve SHPO in the Project's environmental review, in violation of law (e.g., SHPA/SEQRA/CEQRA).

POINT II: RESPONDENTS INFRINGED UPON PETITIONERS' ENVIRONMENTAL RIGHTS UNDER NEW YORK STATE CONSTITUTION'S GREEN AMENDMENT.

A. The Green Amendment / Environmental Rights Amendment Generally.

The Green Amendment passed via general voter referendum on November 2, 2021, and took effect on January 1, 2022. It provides, "Each person shall have a right to clean air and water, and a healthful environment." N.Y.S. Const. Art. I, §19. The legislative history is instructive:

> "'Clean' means healthful to human beings, healthful to our fellow creatures in the environment. 'Healthful' means that it will do no harm to consume that water. … I do know that if there was any injury to either yourself or your loved ones or myself, or my constituents, or my -- my family, that that would be outside of the bounds of expectation that should be part of the guarantee that you have as being a citizen of this great State. … If you are able to buy fresh produce and the produce is without contamination in the way that nature intended it to be consumed, it will be healthful. If it is something that poisons you, that causes disease or convulsion, that is the opposite. We're looking for the former, not the latter to be the norm in this State.") Legislative History of N.Y. Const. Art. I, §19, Assembly Transcript 4.30.2019, *available at* https://bpb-us-w2.wpmucdn.com/blogs.pace.edu/dist/1/400/files/2022/11/Assembly-Transcript-4.30.2019.pdf

The legislative purpose of the bill was "to protect public health and the environment by ensuring clean air and water." E.g., NY Senate Bill S.5287, 2017, available at

https://www.nysenate.gov/legislation/bills/2017/S5287 ; New York Senate Bill S.2072, 2019 (2022), *available at* https://www.nysenate.gov/legislation/bills/2019/S2072 . The Green Amendment was intended to address issues related to water contamination and ongoing concerns about air quality. *Id.*

The floor debate indicated the Green Amendment was intended to ensure "that part of the fundamental rights of being a citizen of this great State should be that one of those rights…is a right to have a healthy environment." Floor Debate on Apr. 24, 2017 for Assemb. No. 6279, Rep. 62, at 30 (2017), *available at* https://nystateassembly.granicus.com/player/clip/4222?view_id=7&meta_id=17575&redirect=true&h=5c3d80ac02d787e8dbf67b3513373f06 ("Floor Debate") at 1:21:07. Indeed, placement of the Green Amendment in the New York Bill of Rights demonstrates that it is a fundamental right, just like freedom of the press and speech. *Hernandez v. State*, 173 A.D.3d 105, 114 (3d Dept. 2019). Assembly member Steve Englebright commented that the nature of the Green Amendment is to "reinforce the premise that all of our citizens have the right to grow up and reside in this State free from contamination, free from fear that their families will be injured by water that is not pure, air that is not clean enough to breathe." See Floor Debate, at 49.

B. The Green Amendment Creates a Private Right of Action.

The plain language of the Green Amendment creates substantive environmental rights "to clean air and water, and a healthful environment" and a private right of action for each person to enforce the rights created by it:

> While federal and state environmental laws are designed to manage pollution, clean up and remediate contamination, and conserve natural resources, these laws do not provide the highest legal protection available under the law. This legislation changes

> that by **making these rights fundamental and inalienable**, providing the same legal strength that we protect our rights to free speech, freedom of religion, due process or property. **This legislation** is not just symbolic; it **provides for an actionable right**. Its inclusion in the State Constitution would provide procedural and substantive safeguards by **requiring the government to consider the environment and our relationship to it in decision making**") (emphasis added).

Legislative History of N.Y. Const. Art. I, ¶19, Environmental Advocates NY in Support Memo 1 for A1368 and S528, *available at* https://bpb-us-w2.wpmucdn.com/blogs.pace.edu/dist/1/400/files/2022/11/Environmental-Advocates-NY-Support-Memo-1-for-A1368-and-S-528.pdf

The New York State Legislature specifically intended to create a private right of action for the Green Amendment. See Legislative History of N.Y. Const. Art. I, ¶19, Senate Transcript 1.12.2021, *available at* https://bpb-us-w2.wpmucdn.com/blogs.pace.edu/dist/1/400/files/2022/11/Senate-Transcript-1.12.2021.pdf (Senator Jackson: "New Yorkers will finally have the right to take legal action for a clean environment, because it will be in the State Constitution.")

At least one court agrees. *Fresh Air For the Eastside, Inc. v. Town of Perinton et al* (Monroe County S.C. 2022) (Denying motion to dismiss Green Amendment claim). This holding is wholly consistent with long-established Constitutional Law principles.

The "right-remedy principle" embodied in *Marbury* dictates that where there is a right, there is a remedy. *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("*Marbury*"). Further, the Supreme Court in *Bivens* held a private cause of action exists for damages against federal officials who violated the search and seizure provisions of the Fourth Amendment. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1999) ("*Bivens*").

The rationale underlying *Bivens* is that constitutional guarantees are worthy of protection on their own terms without being linked to some common-law or statutory tort, and that courts have the obligation to enforce these rights by ensuring that each individual receives an adequate remedy for unconstitutional acts. *Brown v. State*, 89 N.Y.2d 172, 187-89 (1996) ("*Brown*"). This reasoning implicitly relies on the premise that the Constitution is a source of positive law, not merely a set of limitations on government. *Id*. In *Brown*, the Court of Appeals held that "In New York, constitutional provisions are presumptively self-executing." 89 N.Y.2d at 186. It went on to apply *Bivens* to determine that a private right of action was available to enforce Due Process and Equal Protection rights guaranteed by the New York Bill of Rights. This applies even more forcefully here, where the ERA is invoked specifically to review the constitutionality of government action.

The Legislature of New York and its citizens have adopted the Green Amendment, placed it within the Bill of Rights, and vested the State with the affirmative duty to ensure, "each person shall have a right to clean air and water, and a healthful environment." N.Y. Const. Art. 1 §19. It is now the Court's obligation per *Bivens* and *Brown* to ensure each citizen receives an adequate remedy for their rights under the Green Amendment.

C. The Green Amendment Applies to the Park's Department's Decisions, Including Its Decision to Issue a Neg Dec for This Project.

The Parks Department's Determination to issue a Negative Declaration of Environmental Significance for the Fort Greene Park Project is subject to the Green Amendment because the Decision was made more than a year after the Green Amendment went into effect on January 1, 2022.

The legislative history of the Green Amendment (also known as the "Environmental Rights Amendment" or "ERA") makes clear that it will **require government to consider the environment** and its citizens' relationship to it **in all decision making**:

> [W]e will finally have safeguards **requiring government to consider the environment** and our relationship to Mother Earth **in the decision-making process**) (emphasis added). Legislative History of N.Y. Const. Art. I, ¶19, Senate Transcript 1.12.2021, *available at* https://bpb-us-w2.wpmucdn.com/blogs.pace.edu/dist/1/400/files/2022/11/Senate-Transcript-1.12.2021.pdf.

The legislative history also makes clear that the Green Amendment will apply to all state and local government agencies:

> The ERA will apply to "**all parts of government**, including the Legislature, including the Judiciary, **including the agency**, all are working in concert with one another for a composition that will result in better protection for their -- their families, for their communities, for the environment") (emphasis added). Legislative History of N.Y. Const. Art. I, ¶19, Assembly Transcript 4.30.2019, *available at* https://bpb-us-w2.wpmucdn.com/blogs.pace.edu/dist/1/400/files/2022/11/Assembly-Transcript-4.30.2019.pdf.
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> . . .
>
> The ERA "illustrates that municipalities also would have to really be more conscious and self-conscious and aware of the expectation of their citizens for municipal activities, such as a landfill, to make sure that that landfill is not intruding upon" the environmental rights enshrined in the ERA. Id.
>
> . . .
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> **The "Green Amendment ensures that decisionmakers consider and take seriously the environmental implications of the decisions they make, the permits they issues,** the regulations and/or legislation they passed, rather than simply looking to the four corners of a regulatory or legislative mandate. It will ensure the use of good science and consideration of individual, local and

> cumulative impacts during the decision-making process. **A Green Amendment will in fact help avert environmental degradation and the need for litigation <u>because it will ensure better, defensible decisions from the outset</u>**") (emphasis added); Id.
>
> The Green Amendment requires science-based decision making, ensure that government officials are considering individual and cumulative impacts of the decisions they are making, **"make clear that environmental rights must be honored and protected by every government official <u>at every level of government</u>** here in New York," and "**<u>It will require government officials, before passing a law, issuing a permit, or approving a new industrial operation</u>**, to not only look to see if they are checking the boxes of existing regulations, but also that **they are taking the extra big-picture look to <u>ensure that the actions they are proposing will not take from someone their access to healthy water</u>, air or environments, <u>and that environmental rights will be given consideration on par with other rights, like constitutional property rights</u>**." (Legislative History of N.Y. Const. Art. I, ¶19, Delaware Riverkeeper Network Support Letter 2018, *available at* https://bpb-us-w2.wpmucdn.com/blogs.pace.edu/dist/1/400/files/2022/11/Delaware-Riverkeeper-Network-Support-Letter-2018.pdf) [68]

Administrative agencies, public entities, and municipalities are creatures of the state and derive their power from state law, and so, just like the state itself, their decisions are subject to the constitution; accordingly, administrative agencies may not violate constitutional

[68] Even opponents of the ERA recognized, in the legislative history, that the ERA's passage would place an obligation on all levels of state and local government to consider the impact of government action/approval on the environmental rights protected by the ERA, because "they're the ones who are supposed to be delivering clean water." See Legislative History of N.Y. Const. Art. I, ¶19, Assembly Transcript 4.30.2019, *available at* https://bpb-us-w2.wpmucdn.com/blogs.pace.edu/dist/1/400/files/2022/11/Assembly-Transcript-4.30.2019.pdf ("we will be burdening ourselves, our businesses, and our sub municipalities, our counties, our towns, our cities and villages with more litigation exposure because they're the ones that are supposed to be delivering clean water.")

rights.[69] If they do, the law provides a remedy. *Bivens*, 403 U.S. 388 (1999); *Brown*, 89 N.Y.2d at 186. Agencies must therefore ensure that their decisions consider, and avoid infringing upon, fundamental rights protected by the state or federal constitution. That now includes rights to clean air, clean water, and a healthful environment. N.Y. Const. Art. I, §19.

Even opponents of the Green Amendment admitted in its legislative history that the ERA would apply to administrative decisions:

> [I]n my county there's been a tremendous amount of controversy over the addition of windmills because of flicker, because of low frequency sound, because of the impact on migratory birds, including protected species. This legislation would give all of the neighbors the right to bring a private lawsuit claiming that their Constitutional rights to a clean and healthy environment are being adversely impacted. Legislative History of N.Y. Const. Art. I, ¶19, Assembly Transcript 4.30.2019, *available at* https://bpb-us-w2.wpmucdn.com/blogs.pace.edu/dist/1/400/files/2022/11/Assembly-Transcript-4.30.2019.pdf

An agency's failure to comply with a mandatory legal requirement renders the agency action invalid and warrants annulling it.[70] *See Hannet v. Scheyer*, 37 A.D.3d 603 (2d Dept. 2007) ("*Hannet*") (annulling a ZBA's decision for failure to consider issues required by statute). Thus, where one identifies at the administrative level a potential environmental impact from an application pending before the agency that could infringe upon a "person['s] … right to clean air

[69] See *1616 Second Ave. Rest., Inc. v. New York State Liq. Auth.*, 75 N.Y.2d 158, 161 (1990) ("It is beyond dispute that an impartial decision maker is a core guarantee of due process, fully applicable to adjudicatory proceedings before administrative agencies"); *Warder v. Bd. of Regents of Univ. of State of N. Y.*, 53 N.Y.2d 186, 197 (1981) ("Of course, an applicant is constitutionally entitled to unprejudiced decision making by an administrative agency.... It follows that a determination based not on a dispassionate review of facts but on a body's prejudgment or biased evaluation must be set aside").

[70] *See Syquia*, 80 N.Y.2d at 537; *Blaize*, 68 A.D.3d at 761.

and water, and a healthful environment," then the agency must (1) consider whether its decision may interfere with such environmental rights and (2) avoid rendering a decision that interferes with such rights. *Id*. N.Y. Const. Art. 1, §19. To hold otherwise would allow the government to violate fundamental environmental rights protected by the constitution, and relegate them to second-class rights, in direct contravention of the Legislature's and Public's intent in adopting the ERA and placing it in the New York Constitution's Bill of Rights.

Accordingly, because no government entity has authority to violate the Constitution, an administrative decision that infringes upon constitutional rights exceeds the agency's authority, is *ultra vires*, is based on an error of law, is arbitrary and capricious, and must be annulled. CPLR §7803(3).

D. The Park's Department Failed To Consider How Issuing the Neg Dec for the Project Would Infringe Upon Petitioners' Environmental Rights.

The Parks Department violated the ERA by approving an action that will interfere with Petitioner's rights to clean water, clean air, and a healthful environment, and failing to consider whether the Project would infringe upon Petitioner's environmental rights to same.

This is particularly troubling because the Fort Greene Park Project will not only burden petitioners and the public but will also have significant negative impacts on the adjacent residents of a New York City Housing Authority facility (which includes low income and disadvantaged communities) as well as vulnerable residents within the nearby asthma cluster. This Project allows adverse impacts to their environmental rights in the hopes that the Project's mitigation measures may someday be sufficient to offset the environmental harms (including the lost value from the trees to be removed) that the Project will foreseeably cause.

Shockingly, the Department did not even consider the Green Amendment or whether the Project may interfere with constitutionally protected environmental rights under the ERA. Instead, it apparently wrongly assumed that the Green Amendment imposed no new obligation, created no new right, and could be satisfied through SEQRA, and so made no effort to ensure that the Project did not degrade air quality, water quality, or the environment. The assumption is wrong: the ERA is not an unenforceable policy or values statement; to the contrary, the ERA grants the public fundamental rights and correspondingly imposes legal obligations on the government not to infringe with such rights.[71]

But here, as set forth in more detail above, the Department violated the ERA:

- Petitioners warned the Parks Department about potentially significant adverse environmental impacts that may result from the Project, thereby infringing on their right to clean air, clean water, and/or a healthful environment, aggrieving them, and causing them harm. Petitioners' concerns were based in part on expert analysis.

- For example, petitioners warned the Department that the lost environmental benefits caused by the removal of 78 mature trees for design purposes plus 30 for other reasons could cause potentially significant adverse environment impacts, including worsened air quality, increased heat island affects, the release of sequestered carbon, and more.

- The Park Project is in the vicinity of a known asthma cluster, and so worsened air quality will more significant adverse environmental, health, and other impacts on the resident population, and will therefore dramatically decrease the use and enjoyment of the Park by this vulnerable group.

- It is undisputed that the environmental benefits lost as a result of the removing the trees will not be replaced to the same level for several decades, if ever, and may not be as concentrated in Fort Greene Park as they are now due to plans to plant replacement trees outside of the Park. Thus, a generation or more may have their rights to clean air and a healthful environment violated before the mitigation from the replacement trees

[71] Courts carefully scrutinize government action that burdens fundamental rights and in some cases, overturn government action burdening fundamental rights unless the government action furthers a "compelling governmental interest" and is "narrowly tailored" to achieve that interest.

replaces the lost benefits from the removed trees (which may never reach pre-project levels).

- The Department's failure to utilize the i-trees system also impaired its ability to identify the full extent of adverse impacts from tree removals, and therefore made it impossible for the Department to prevent or avoid those impacts, as would be necessary to protect the public's right to clean air and healthful environment. Moreover, the Department's reliance on the "Tree Valuation Trunk Formula" methodology actually obfuscated the adverse impacts of the tree removals by excluding the value of the environmental benefits to be lost when the mature trees are removed.

- The Parks Department did not independently consider Petitioner's concerns regarding same, but instead merely found without evidence that not a single potentially significant adverse environmental impact would result from the Project.

- The Parks Department did not consider the impact of issuing a Neg Dec on Petitioners' environmental rights under the ERA to clean air, clean water, and a healthful environment.

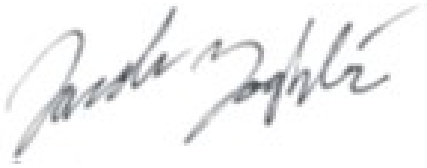
As explained above, the ERA was designed to infuse environmental considerations into every level of government decision making in order to avoid such decisions causing environmental harm in the first place (rather than merely allowing people to sue to redress environmental harms that already occurred). The ERA's guarantee of clean air, clean water, and a healthful environment would therefore be meaningless if the Parks Department were not required to consider how its decision on an application may affect environmental rights. That reasoning applies even more forcefully here, where it is undisputed that Petitioners raised environmental concerns about the Project before the Parks Department, which were backed by an expert with supporting data and analysis.

It was arbitrary and capricious for the Parks Department to refuse to consider the issue. Accordingly, the Parks Department's Determination should be annulled for failing to consider and protect Petitioners' Environmental Rights under the ERA.

CONCLUSION

Based on the foregoing, Petitioners' Verified Petition should be granted.

Dated: October 30, 2023.
Rochester, New York



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WORD COUNT CERTIFICATION

Pursuant to 22 NYCRR §202.8-b

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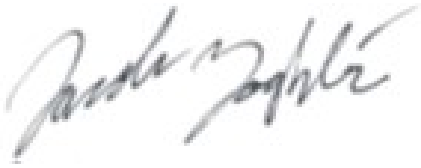

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