STATE OF NEW YORK
SUPREME COURT : COUNTY OF NEW YORK

In the Matter of the Application of the SIERRA CLUB; FRIENDS OF FORT GREENE PARK; MICHAEL GRUEN, As President of the CITY CLUB OF NEW YORK; MARYLOU HOUSTON; SUDIP MUKHERJEE; JUDITH SCHRAEMLI; VERICE WEATHERSPOON; HUI-LING HSU, Individually and as President of FRIENDS OF FORT GREENE PARK; KELLY SCHAEFFER; ENID BRAUN; and LUCY KOTEEN,

Petitioners,

For a Judgment Pursuant to CPLR Article 78 of the New York Civil Practice Laws and Rules

vs.

THE DEPARTMENT OF PARKS AND RECREATION OF THE CITY OF NEW YORK; THE CITY OF NEW YORK,

Respondents.

Index No. 151735/2019

(Rodriguez, J.)

Oral Argument Requested

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF THEIR AMENDED PETITION

I. INTRODUCTION

This proceeding was brought by Petitioners to protect and preserve the historic landscape of Fort Greene Park in Brooklyn, New York. The New York City Department of Parks and Recreation (hereinafter cited as "Parks") intends to significantly change the landscape of the park, including taking down 83 mature trees, changing the entranceway to the park, adding various impervious surfaces to it, and otherwise destroying the historic landscape developed by America's most famous landscape architects. Furthermore, Parks does not believe that they have any obligation under the New York State Environmental Quality Review Act, § 8-0101 et. seq.

of the New York State Environmental Conservation Law (hereinafter cited as "SEQRA") and has improperly designated this project as a Type II exempt action, and therefore has not done any environmental assessment or prepared an environmental impact statement concerning the proposed work, despite the significant adverse environmental consequences that will ensue if Parks' landscape plan goes forward.

Therefore, because of the violations of SEQRA that will be explained in this Memorandum, Petitioners have requested through this Article 78 proceeding that the determination of Parks to approve the proposed landscape plan be voided, and that an injunction from any physical changes to the park be entered until such time as SEQRA has been fully complied with.

II. FACTS

Fort Greene Park is the oldest park in Brooklyn and one of the oldest parks in New York City. It was designed in 1867 by the father of Landscape Architecture, Frederick Law Olmsted and his partner Calvert Vaux. (Attached as Exhibit "A" is information concerning Olmsted and Vaux). Over the years, there have been changes made to the park, including a memorial designed by McKim, Mead and White (information concerning McKim, Mead and White may be found attached hereto as Exhibit "B"), a short stonewall along the park's border designed by Gilmore David Clarke, (information concerning Gilmore is attached hereto as "Exhibit C") and finally Dutch Mounds which children play on created by A.E. Bye (information concerning A.E. Bye is attached hereto as Exhibit "D"). The various elements of the park designed by these noted architects are exemplary of the historic nature of the park, and its importance to Brooklyn and New York City.

The park follows the innovative designs of Olmsted and Vaux. His winding paths invite the visitor to walk around them and experience a new view at every turn. The park also has a stately entry building leading into the tomb of the remains of some 11,000 patriots captured by British soldiers in the Revolutionary War, and imprisoned on ships until they died.

At the turn of the century, it was decided that the prison ship martyrs deserved a more significant memorial. Since Olmsted had just died, the design was awarded to the firm of McKim, Mead and White. They designed the grand staircase leading up to the memorial on a hillside within the park, which was 100 feet wide, leading from the base, past the tomb entrance, to the top of the hill at the middle of the park. (Please see a photograph of the McKim, Mead and White Memorial attached hereto as Exhibit "E"). The new staircase replaced two narrower stairs separated by a broad lawn.

A low wall was placed along the side of the park designed by Gilmore Clarke, and A.E. Bye designed beveled mounds of lawn and blocks for children's play and adult performances. It has been indicated by landscape historian Michael Gotkin's letter to the Landmarks Preservation Commission on November 20, 2017 that:

> "AE Bye's landscape mounds were resonant of burial mounds, a nod to the mass graves of prisoners of war that expanded the concept of the Martyrs memorial, and also restored, and reinterpreted, Olmsted and Vaux's concept of unprogrammed green open space."

(See a copy of the Michael Gotkin's letter attached hereto as Exhibit "F".)

The work proposed by Parks concerning Fort Greene Park is part of the "Parks without borders" concept promoted by Parks Commissioner Michael Silver, whose background is in urban planning, and would obliterate the design footprint laid out by generations of these respected landscape architects for the past 150 years. The Parks without borders plan is to

"restore" the grandiosity of the portion of the park as designed by McKim, Mead and White, by creating an exaggerated version of it. The plan would remove the 1936 Gilmore Clarke stonewall about three feet high at the northwest corner of the park so as to eliminate the perceived "border" between Myrtle Avenue and the park. A proposed broad entrance would be open at the northwest corner as the new entrance in line with the promenade so that the promenade and the monument would be visible from the street. The new promenade would be 43 feet wide, and the current landscape floral garden circle near the entrance of the northwest end of the promenade would also be replaced with a hardscape fountain. Gilmore Clarke designed a rounded retaining wall at the northwest corner in 1935 and further softened the pointed corner. Belgian blocks recycled from streets were reused to pave the edges of sidewalks surrounding the entire park. Workers during The Great Depression laid the blocks by hand, and created a pattern of impressive oval at the northeastern corner of the Park. A.E. Bye continued the use of Belgian block to create the two mounds, a feature which restored and elevated the greenery in place, resonant of burial mounds, and promoted a performative function of unprogrammed play.

A. PARKS PROPOSED DESIGN PLAN

As previously indicated, Parks' plans require the intentional removal of at least one-third of the mature trees from the affected area of the park, or 83 trees, most of which are healthy mature trees. (See report of arborist Dr. Carsten W. Glaeser, attached as Exhibit "G"). The plan would also add approximately 13,314 square feet of impermeable pavement along the promenade both by creating the promenade, and by replacing the mounds, which will be destroyed, with concrete. Parks will also replace the current greenery and mounds with fenced-

in tree pits to compensate for the loss of usable greenery, which will not be available to the public due to the fencing.

Also, a radical change of character will be created by opening a wide new entry at the northwest corner on Myrtle Avenue, removing the mounds, and destroying the mature trees.

Within the arrow-head area leading to the memorial, there are 129 mostly mature trees. While the Parks Department regularly indicated at public meetings that virtually all of the trees it intended to remove were "at the end of their lifespan", "invasive species" or otherwise ready to be discarded, and initially only nine were identified to be removed. However, Parks' ultimately indicated that the trees must be removed for "design" reasons, that being that they must be destroyed in order to open up vistas and or take down the "border" at Myrtle Avenue, as the trees are blocking the view of the promenade and memorial. However, Petitioners contracted with a well known arborist, who indicates that the trees are essentially healthy and would otherwise not need to be removed. (See Arborist's Report of Dr. Carsten W. Glaeser attached hereto as Exhibit "G").

As previously indicated, the plan for the arrow-head area calls for replacement of the two earthen mounds with promenade walkway pavement. The two mounds are approximately 4,687 square feet in width. They are supported and shaped by cobblestones along the beveled rise of the mounds. Above the cobblestone line, they are flat and covered with grass. (See photograph attached hereto as Exhibit "H"). Parks plans calls for them to be removed and replaced with concrete pavings. In addition, the promenade is adding about 13,314 square feet of pavement, and the current landscape floral garden circle at the northwest end of the promenade will be replaced with a hardscape fountain of approximately another 2,650 square feet of pavement.

Finally, nine healthy honey locust trees which sit in front of the wall will also be removed at the northwest corner.

The park is largely surrounded by stonewalls. They serve as retaining walls to restrain the prominent hill that occupies much of the park from eroding away. They also exist in a more symbolic way in the northwest portion where the land approaches flatness. It was Olmsted and Vaux's plan that the border of a park should indicate that a person is leaving the hassle, bustle and industrial urban life to a place of tranquility and nature. Therefore, the stonewalls inform visitors of where the park begins and where it ends. It enables visitors to know that they are now entering space that is different from what lies around it. The park without borders plan is inimical to Olmsted and Vaux's vision. The "without borders" plan provides no demarcation line from the city and the park. Moreover, a low stone wall is different than a higher wall or spiked fence which might translate to "keep out". The low stone wall is still inviting to the visitor. Taking down these walls or low fences, as Parks plans to do, is contrary to the landscape philosophy of all of the noted landscape architects that have worked on the park.

Prior to preparing the proposed new landscape plan, Parks contracted with Nancy Owens to do a historic resource, management and operations study at a cost of $140,000, which she completed in 2015. (See attached hereto as Exhibit "I" the Nancy Owens' Report, including a number of pictures of the park itself.) Parks current landscape plans are largely contrary to the recommendations made in the Owens' Report and ignores most of her recommendations. Therefore, it is not surprising that Parks withheld about a quarter of the Owens' Report when the Petitioners herein requested it under a Freedom of Information Law request. Only after the court required Parks to provide the complete report, (see the Decision of Judge Arlene P. Bluth at Exhibit "J"), and the Appellate Division affirmed her decision six months later, and Parks

withheld the unredacted report for another month, did Parks provide the Owens' Report. (See the Appellate Division decision requiring delivery of the unredacted Report at Exhibit "K"). Even now, Parks did not include the report in the Certified Record, and it claims that it should not be part of the Certified Record because Parks did not rely on the report in developing their landscape plan, which is not only a clear post hoc rationalization for not including the Report in the Certified Record, but belied by the two references to the "Historic Resource and Management and Operations Study" (referred to herein as the "Owens Report") in the Determination at pages 2 and 3.

Therefore, a perusal of the Owens Report will show that the mounds developed by A.E. Bye would remain under the Owens' plan but destroyed under the Park's plan. (p. 94 of the Owens' Report). There is frequent advice in connection with most portions of the park to provide "new trees to restore canopy, according to historic plans" (see, p. 92-98). Nowhere is it suggested that the 83 trees should be removed.

Moreover, throughout the Owens Report is a strong preference to retain the original character and design of the Olmsted and Vaux design. For example, at p. 79, it is indicated that "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. This is especially so to avoid inappropriate planning of trees in open lawn areas." And "future planting of beds should to the extent possible, respect original design intentions, and should be incorporated into future capital projects." (p. 79) The Owens Report also recommends retention and restoration of the stonewalls. (pp. 82 and 99). In particular, she does not propose removal of the wall at the Myrtle Avenue corner, or any redesign of that corner (p. 94), which is one of the major changes in the Parks' landscape plan.

In spite of the major work that will be done at the park, at a cost of over $10,000,000, Parks determined that they did not have to do any environmental review, because the work that they were going to do at the park was exempted as a Type II action, which will be further explained herein.

III. ARGUMENT

(A) THE STATUTORY SCHEME OF SEQRA.

In 1976, New York State enacted the New York State Environment Quality Review Act. While SEQRA was patterned after its Federal counterpart, the National Environmental Policy Act (42 U.S.C. § 4332, et. seq.), SEQRA is broader concerning when an Environmental Impact Statement needs to be drafted, and imposes greater duties insofar as substantive requirements are placed on the decision-maker to chose environmentally sound projects, and to mitigate and identify any identified adverse environmental consequences to the greatest extent practicable.

The Legislature declared that the purpose of SEQRA was to:

> "Declare a State policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the State."

ECL, Section 8-0101.

As New York State courts have repeatedly held, "a principle goal of SEQRA is to 'incorporate environmental considerations in the decision making process at the earliest opportunity.'" See, *Matter of City Council of the City of Watervleit v. Town Board of the Town of Coloney*, 3 N.Y.3d 508, 822 N.E.2d 339, 789 N.Y.S.2d 88 (2004), citing *Matter of Neville v. Koch*, 79 N.Y.2d 416, 53 N.E.2d 256, 583 N.Y.S.2d 802 (1992) and 6 NYCRR 617.1(c).

The heart of SEQRA lies in its provision regarding environmental impact statements. The law provides that whenever an action may have a significant impact on the environment, an EIS shall be prepared. ECL § 8-0109(2). The National Environmental Policy Act, after which SEQRA was patterned, only required Environmental Impact Statements when the action under consideration would in fact be a major federal action which would have significant adverse environmental affects. However, the New York State Legislature decided that the requirement of an environmental impact statement should be applied to a much broader category of circumstances, and therefore, determined that environmental impact statements are necessary not only when there will be substantial adverse environmental effects, but when there "may" be such effects. This document is to contain all the information necessary to assure that the decision-making body can ultimately determine to go forward or not with any project in a manner that would create the least negative impact to the environment.

As explained by the court *In the matter of Shawangunk v. Planning Board of Town of Gardener*, 157 A.D2d 273, 557 N.Y.S.2d 495 (3rd Dept. 1960):

> "The heart of SEQRA is the environmental impact statement (EIS) process [Matter of Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 415]…The EIS process is especially designed to ensure the injection of full, open and deliberative consideration of environmental issues into governmental decision-making. (Akpan v. Koch, 75 N.Y.2d 561, 569). The EIS process guarantees comprehensive review of a project's adverse environmental effects, consideration of less intrusive alternatives to the proposed action, including 'no-action', and consideration of mitigation measures. (ECL 8-0109[2]; 6 NYCRR 617.14[c]; Matter of Jackson v. New York State Urban Dev. Corp., supra, at 416. To assure accountability of the lead agency and avoidance of any oversight in that agency's assessments, the regulatory scheme requires public access to the information by making the draft and final EIS available, with sufficient lead time to afford interested persons an opportunity to study the project, its environmental effects and proposed mitigation measures, and then comment thereon (ECL 8-0109[4]; 6 NYCRR § 617.8[c]; 617.9[a]; Matter of

> Jackson v. New York State Urban Dev. Corp., supra at 415-416). Additional safeguards are found in the substantive requirements that the lead agency must act and choose among alternatives so as to minimize adverse environmental consequences, consistent with other social, economic and policy considerations and must then make appropriate written findings to that effect (ECL 8-0109[1][8]; 6 NYCRR 617.9[2]; Matter of Jackson v. New York State Urban Dev. Corp., supra at 416, See Akpan v. Koch, supra at 570)"

157 A.D.2d at 275-276.

The first step under the SEQRA regulations is the appointment of a "lead agency", or that agency principally responsible for carrying out or approving the project or activity, and who is charged with the responsibility for determining whether the project under consideration may have significant adverse environmental effects, and if so, to prepare an environmental impact statement or have it prepared. The "lead agency" is also the entity that is charged with carrying out the procedures mandated by SEQRA. Therefore, the lead agency "shall act and choose alternatives which, consistent with social, economic and other essential considerations, and to the maximum extent practicable, minimize or avoid environmental effects…." ECL Section 8-1019(1). (Emphasis added)

Once a lead agency is designated, that lead agency is then required to engage in the environmental review required by SEQRA, including determining whether or not there may be significant adverse environmental effects, and if there may be significant adverse environmental effects, require the preparation of a draft environmental impact statement.

In making this decision, the next step in this process is for the lead agency to determine whether or not the action under consideration is considered a "Type I" action, "Type II" action, or an "unlisted action". Type I actions are those actions under consideration that because of their size, scope, or type "are more likely to require the preparation of an EIS than unlisted actions". 6

NYCRR § 617.4(a). As further indicated in the regulations, "the fact that an action or project has been listed as a Type I action carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS." 6 NYCRR § 617.4(a)(1). The regulations then set out a road map for determining what type of action would be considered Type I actions. In the instant proceeding the Parks improperly determined that the project was a Type II action. Type II actions are those actions that are specifically listed in the regulations, and that are of such minor impact, that no further action under SEQRA needs to be undertaken. For example, maintenance or repair involving no substantial changes in an existing structure or facility would be considered a Type II action. As will be seen, the action in question is actually a Type I action. Finally, those actions that do not fall within the regulatory requirements listed for Type I actions or Type II actions are considered "unlisted actions". The importance of the designation is not only the presumption created of adverse environmental effects if an action is considered a Type I action, but also the heightened regulatory requirements for Type I actions as opposed to unlisted actions.

Once the type of the action is determined, the lead agency must then determine whether or not the action may have any significant adverse effects which would require the drafting of an environmental impact statement. As this point, it is instructive to note the importance that the State of New York, SEQRA and the regulations place on the preservation of historic resources in the SEQRA process.

In the New York State Historic Preservation Act, Article 14 of the Parks, Recreation and Historic Preservation Law, Section 14.01, the Legislature declared that:

> "The historical, archeological, architectural and cultural heritage of the state <u>is among the most important environmental assets of the state and it should be preserved</u>. It offers residents of the state a sense of orientation and civic identity, is fundamental to our

> concern for the quality of life, and produces numerous economic benefits to the state. The existence of irreplaceable properties of historical, archeological, architectural and cultural significance is threatened by the forces of change. It is hereby declared to be the public policy and in the public interest of this state to engage in a comprehensive program of historic preservation to accomplish the following purposes:
>
> 1. To promote the use, reuse and conservation of such properties for the education, inspiration, welfare, recreation, prosperity and enrichment of the public;
>
> 2. To promote and encourage the protection, enhancement and perpetuation of such properties, including any improvements, landmarks, historic districts, objects and sites which have or represent elements of historic, archeological, architectural or cultural significance…." (Emphasis added)

Likewise, SEQRA also recognizes the protection of historic sites within the act itself and by its regulations. For example, in the State Environmental Quality Review Act, the environment is defined very broadly to mean "physical condition which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic and aesthetic significance, existing patterns of pollution concentration, distribution, or growth, and existing community or neighborhood character." [Emphasis added] New York State Environmental Conservation Law, Section 8-0105(6). Similarly, the regulations require that an action shall be considered a Type I action, even if it would otherwise be an unlisted action, if it occurs "wholly or partially within, or substantially contiguous to, any historic building, structure, facility, site or district or prehistoric site that is listed on the National Register of Historic Places, or has been proposed by the New York State Board on Historic Preservation for a recommendation to the State Historic Preservation Officer for nomination for inclusion on the National Register, or that is listed on the State Register of Historic Places…." 6 NYCRR § 617.4(b)(9). Fort Greene Park was so designated and listed on the National Register in 1978.

Therefore, the adverse effects on historic sites are considered so important in the regulatory scheme, that they are elevated to the level of Type I actions if the work affects only 2.5 acres rather than the otherwise applicable ten acre threshold (see 6 N.Y.C.R.R. § 617.44(b)(6)(i)). The Type I status provides a presumption that an environmental impact statement must be drafted. Similarly, because the site is parkland, it is subject to the 2.5 acre threshold, not the ten acre threshold. 6 N.Y.C.R.R. § 617.4(b)(10).

Finally, in that section of the regulations that specifically list what type of activities create adverse effects on the environment, historic sites are given special protection. Therefore, the regulations require the drafting of an environmental impact statement if there is an "impairment of the character or quality of important, historical, archeological, architectural, or aesthetic resources of an existing community or neighborhood character." 6 NYCRR § 617.7(c)(1)(b). In light of the law and regulation, Judge Jonathan Lippman indicated:

> "[t]here is no doubt that SEQRA views development occurring on properties adjoining structures of historical significance to be environmentally significant under the regulations." Lucas v. Bd. of Appeals of Village of Mamaroneck, 14 Misc.3d 1214(a), 836 NYS2d 486 (Supreme Court, Westchester Cty. 2007)

In following the sequential steps to determine whether or not an environmental impact statement needs to be drafted as outlined in the regulations, the next step after a lead agency is established and if the project is determined to be a Type II action, no further environmental review is necessary, and all SEQRA obligations end at that point. However, if the project is determined to be Type I or unlisted, the lead agency must compare the proposed project and its affects with a list of potential adverse environmental consequences contained in Section 617.7 of the regulations. As indicated in the regulations, "to determine whether a proposed Type I or unlisted action may have a significant adverse impact on the environment, the impacts that may

be reasonably expected to result from the proposed action must be compared against the criteria in this subdivision. The following list is illustrative, not exhaustive. These criteria are considered indicators of significant adverse impacts on the environment: ….” 617.7(c)(1). The regulations then go on to list a number of potential areas where adverse environmental consequence may occur, for example, substantial adverse changes in existing air quality, water quality, traffic or noise levels, a substantial increase in the potential for erosion, flooding, leaching or drainage problems, removal or destruction of large quantities of vegetation or fauna, effects on wildlife or their habitat, or effects on natural resources. As previously indicated, this list also includes adverse affects on historic, archeological, or aesthetic resources, and further includes in the list adverse affects of existing community or neighborhood character.

The regulations also indicate that an environmental impact statement must be prepared if the proposed action “may include the potential for at least one significant adverse environmental impact.” 6 NYCRR § 617.7(a)(1) [emphasis added].

Stated another way, the regulations indicate that “the lead agency must determine either there will be no adverse environmental impacts or the identified adverse environmental impacts will not be significant.” 6 NYCRR § 617.7(7)(a)(2).

Therefore, as can be seen, and as previously recognized by the Courts, the bar to determining when an environmental impact statement must be drafted, particularly in a Type I action, is very low. For example, as stated in *City of Buffalo v. New York State Department of Environmental Conservation*, 184 Misc.2d 243, 707 N.Y.S.2d 606 (Sup. Ct. 2000):

> “The substantive mandate of SEQRA is much broader than that of the National Environmental Policy Act (NEPA). 42 USCA Section 4332 requires federal agencies to prepare an EIS for “any major federal action significantly affecting the quality of the human environment.” This should be contrasted with Section 8-0109 of SEQRA which is more expansive it its terms. Subdivision

> 2 of this Section requires an EIS for "any action which is proposed or approved which may have a significant effect on the environment." Only a "low threshold" is required to trigger SEQRA review." Onondaga Landfill Systems, Inc. v. Flack, 81 A.D. 2d 1022, 440 N.Y.S. 2d 788 (4th Dept., 1981)."

707 N.Y.S. 2d at 611.

As previously indicated, in spite of the fact that this project is a Type I action, Parks improperly determined that the action was Type II and exempt from further environmental review.

While the reviewing court is required to apply a strict and literal standard of compliance concerning the procedural requirements of SEQRA, the reviewing court is not to substitute its judgment for that of the lead agency in reviewing the substantive decision made by the lead agency. However, a reviewing court must not slavishly adopt those findings either. As indicated by the Court of Appeals in *Akpan v. Koch*, 75 N.Y.2d 561, 555 N.Y.S.2d 16 (1990),

> "Nevertheless, an agency, acting as a rationale decision-maker, must have conducted an investigation and reasonably exercised its discretion so as to make a reasoned elaboration as to the effect of a proposed action on a particular environmental concern. Thus, while a court is not free to substitute its judgment for that of the agency on substantive matters, the court must insure that, in light of the circumstances of a particular case, the agency has given due consideration to pertinent environmental factors."

(Citations omitted) 555 N.Y. 2d at 21.

Similarly, a lead agency's SEQRA judgments would never be overturned if a reviewing court was not able to determine whether or not a decision that there will be no adverse environmental affects so that an environmental impact statement need not be drafted was arbitrary, capricious, or otherwise in violation of law.

In determining whether or not there has been full compliance with the procedures of SEQRA, SEQRA requires strict compliance with its procedural requirements and some courts

have indicated a literal compliance standard. Therefore, as opposed to most other statutes, courts early on recognized that because of the importance placed on SEQRA responsibilities by the legislature, substantial compliance with SEQRA would not suffice, and the courts require that SEQRA be strictly and literally construed, along with the procedural requirements indicated in the regulations. *Matter of Rye Town/King Civic Association v. Town of Rye*, 82 A.D. 2d 474, 442 N.Y.S. 2d 67 (2nd Dept., 1981), app. dism. 56 N.Y.S. 2d 985, 453 N.Y.S. 2d 682 (1982); *Schenectady Chemicals v. Flack*, 83 A.D. 2d 460, 446 N.Y.S. 2d 418 (3rd Dept., 1991).

In the oft-quoted citation from *Schenectady Chemicals*, the court indicated:

> "By enacting SEQRA, the Legislature created a procedural framework which was specifically designed to protect the environment by requiring parties to identify possible environmental changes 'before they have reached ecological points of no return.' At the core of this framework is the EIS, which acts as an environmental 'alarm bell'. It is our view that the substance of SEQRA cannot be achieved without its procedure, and that any attempt to deviate from its provisions will undermine the law's express purposes. Accordingly, we hold that an agency must comply with both the letter and spirit of SEQRA before it will be found to have discharged its responsibility thereunder."

(Emphasis Added) (Citations Omitted), 446 N.Y.S. 2d at 420.

The courts in New York State continue to adhere to this strict and literal compliance standard as necessary to fulfill the goals of SEQRA, and not just because the Legislature mandated that the act be carried out "to the fullest extent practicable," E.C.L., Section 8-0103(6), but also to ensure that both the spirit and letter of SEQRA are followed, the court could not allow a lead agency to invoke the rubric of "substantial compliance" as a device to escape the rigorous environmental goals of the Act. See, e.g. *Coalition for Future of Stoney Brook Vill. v. Reilly*, 299 A.D.2d 481, 750 N.Y.S.2d 126 (2nd Dept. 2002).

At this point, it might be helpful to point out that Petitioners' challenge to the determination that the action is a Type II action is not a mere academic exercise. It is only through the environmental impact statement process that the lead agency, and just as surely the public, will have the opportunity to review and analyze alternatives to the proposed project that are required to be developed in the environmental impact statement process. Therefore, as part of the environmental impact statement, Parks would be required to provide a reasonable range of alternatives to the proposed project, including alternative designs of the landscape project. Therefore, if an environmental impact statement was drafted, both the lead agency and the public would be able to analyze and compare the project. Without doing an environmental impact statement, neither the lead agency, nor the public, has been given the opportunity to review and analyze potential alternatives designs, and to comment thereon.

For all of these reasons, the courts have determined that even a procedural violation of SEQRA requires that the action taken by the lead agency be voided, so that the lead agency could not treat the new work as a mere post-hoc rationalization of what has gone on before. The Court of Appeals decision in *Tri-County Taxpayers Association v. Town Board*, etc., 55 N.Y. 2d 41, 447 N.Y.S. 2d 699 (N.Y., 1987) is instructive. In that case, the Appellate Division, with two judges dissenting on the issue of remedy, determined that nullifying a vote of the electorate that took place prior to SEQRA compliance "would serve no useful purpose to undo what has already been accomplished...." 437 N.Y.S. 2d at 984. However, the Court of Appeals adopted the position of the dissenters, holding that in order to properly insure that the goals of SEQRA would be met, that the vote had to be nullified. The Court stated:

> "It is accurate to say, of course, that by actions of rescission later adopted the Town Board could have reversed the action authorizing the establishment of the sewer district. As a practical matter, for several reasons, however, the dynamics and freedom of

> decision-making with respect to a proposal to rescind a prior action are significantly more constrained than when the action is first under consideration for adoption. "

55 N.Y. 2d, at 64.

More recently however, the New York Court of Appeals has had further occasions to provide guidance concerning the strict compliance standard for SEQRA violations. Therefore, in the case of *New York City Coalition to End Lead Poisoning, Inc. v. Vallone,* 100 N.Y.S.2d 337 (2003), the court indicated:

> "SEQRA's policy of injecting environmental considerations into governmental decision making, (see Matter of Coca-Cola Bottling Co. v. Board of Estimate of City of New York, 72 N.Y.2d 674, 679, 536 N.Y.S.2d 33, 532 N.E.2d 126 [1998] 'effectuated, in part through strict compliance with the review procedures outlined in the environmental laws and regulations' (Matters of Merson, 90 N.Y.2d at 750, 665 N.Y.S.2d 605, 688 N.E.2d 479). Strict compliance for SEQRA is not a meaningless hurdle. Rather, the requirement of strict compliance and the attendant spectre of *de novo* environmental review insure that agencies will err on the side of meticulous care in their environmental review. Anything less than strict compliance, moreover, offers an incentive to cut corners and then cure defects only after protracted litigation, all at the ultimate expense of the environment. (Matter of King, 89 N.Y.2d at 348, 653 N.Y.S.2d 233, 675 N.E.2d 1185; see Matter of E.F.S. Ventures Corp. v. Foster, 71 N.Y.2d 359, 371 526 N.Y.S.2d 56, 520 N.E.2d 1345 [1988]). Accordingly, where a lead agency has failed to comply with SEQRA's mandates, the negative declaration must be nullified (see, e.g., Chinese Staff & Workers Assn. v. City of New York, 68 N.Y.2d 359, 368-369, 509 N.Y.S.2d 499, 502 N.E.2d 176 [1986]). 100 N.Y.2d at 348."

With this statutory scheme in mind, it is respectfully submitted that Parks violated both the procedural requirements and the substantive requirements of SEQRA.

(B) IMPROPER DESIGNATION OF THIS PROJECT AS TYPE II.

Leaving aside for the moment the fact that no Certified Record has been served by the Respondents and only cherry picked exhibits have been filed, as indicated in the Memorandum

to file of Owen Wells of August 30, 2018 (Exhibit "L") which lists the extensive work which is being proposed by Parks, this memo is Parks' determination that all of the work in the park is exempted from environmental review as Type II actions. They base this on four separate sections of the Type II regulations listed at 6 N.Y.C.R.R. § 617.5(c), and claim that the Type II classifications listed in § 617.5(c)(1)(2)(6) and (20) apply.

Taking these one by one, § 617.5(c)(1) exempts maintenance or repair involving no substantial changes in an existing structure or facility. Section 617.5(c)(2) exempts replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading buildings to meet building or fire codes, unless such action meets or exceeds any of the thresholds in § 617.4 of this part. Section 617.5(c)(6) exempts maintenance of existing landscaping or natural growth. Finally, § 617.5(c)(20) exempts routine or continuing agency administration and management, not including new programs or major reordering of priorities that may affect the environment.

The memo ends with the statement that "The work is designed for the routine agency rehabilitation, management and maintenance of the park. Therefore, pursuant to the sections listed above, NYC Parks has determined that the proposed Fort Greene Park repair and reconstruction is a Type II action having no potential for significant adverse environmental impacts and is not subject to further environmental review."

(C) THE TYPE II EXEMPTIONS DO NOT APPLY, SINCE THE PROPOSED PROJECT IS ACTUALLY A TYPE I PROJECT.

Section 617.5, the section of regulations dealing with Type II actions, at subsection (b) indicates that:

> "(b) Each agency may adopt its own list of Type II actions to supplement the actions in subdivision (c) of this section. No

> agency is bound by an action on another agency's Type II list… An agency that identifies an action as not requiring any determination or procedure under this Part is not an involved agency. Each of the actions on an agency Type II list must:
>
> (1) in no case, have a significant adverse impact on the environment based on the criteria contained in section 617.7(c) of this Part; and
>
> (2) not be a Type I action as defined in section 617.4 of this Part."

At § 617.4(b) of the regulations, it is indicated that:

> "(b) The following actions are Type I if they are to be directly undertaken, funded or approved by an agency:
>
> …
>
> (6) activities, other than the construction of residential facilities, that meet or exceed any of the following thresholds; or the expansion of existing nonresidential facilities by more than 50 percent of any of the following thresholds:
>
> (i) a project or action that involves the physical alteration of 10 acres;"

Moreover, at subdivision 617.4(b)(10) it is indicated that "any unlisted action, that exceeds 25 percent of any threshold in this section, occurring wholly or partially within or substantially contiguous to any publicly owned or operated parkland, recreation area or designated open space, including any site on the Register of National Natural Landmarks pursuant to 36 CFR part 62, 1994 (see § 617.17 of this Part)… is also considered a Type I action."[1]

[1] Respondent disregards this provision on the theory that it only applies to Unlisted actions, and, according to Respondent, its selection of Type II is conclusive regardless of its lack of merit. One can agree with Respondent only at the price of ignoring all the evidence and law affirming that this is an action which threatens very material environmental consequences. In addition, Section 617.5 (quoted above), while allowing agencies to "supplement" the list of Type II actions, very clearly prohibits an agency from adopting any rule or regulation expanding the list in a manner that is inconsistent with the guidelines of Section 617.7(c) or would modify the import of the rules defining Type I actions in Section 617.4. Yet, that is exactly what Respondent seeks to do. Foreclosed form enacting its own list of non-conforming Type II catch-all, it construes the statutory list so generously that, in its own opinion at least, it covers every function that Parks engages in. To allow an agency to do by individualized fiat exactly what is expressly barred from doing by rule or regulation, would be absurd. An absurd result cannot be inferred to be the legislative intent. *See e.g.,* William v. Williams, 23 N.Y.2d 592 (1969); see generally McKinney's

According to Parks, the proposed action will take place on 9.85 acres of land and therefore, according to Parks, the 10 acres threshold has not been met. However, Parks provides no calculation or other support for their claim that the work would only be done on 9.85 acres of land. However, Petitioners have in fact made that calculation. See Fort Greene Area of Disturbance Estimate of July 5, 2019, using a scientific method to determine the amount of disturbance and work in the park. (See the calculation at Exhibit "M"). As can be seen, and as agreed by Parks, the entire park is 30.5 acres. Based upon the calculation, the initial work of the park plus phase II of the park work constitutes work on 10.28765 acres, and if the stairs area is included, the work includes 10.4554 acres. Therefore, according to § 617.4(b)(6)(i) cited supra, this action is actually a Type I action, and therefore, the Type II exemptions do not apply.

Even though these sections of the regulations are clear on their face, and this argument could end at this point, as previously indicated, the regulations also indicate that a Type II exemption does not apply where there is "a significant adverse impact on the environment based on the criteria contained in subdivision 617.7(c) of this part…." § 617.5(b)(1).

Section 617.7(c) provides an agency with criteria for determining significance. While the section specifically indicates it applies to Type I or Unlisted actions to determine whether or not there would be a significant adverse effect on the environment, it is also adopted in the 617.4 language concerning the application of Type II exemptions. Therefore, the criteria contained at § 617.7(c) are applicable to indicate the need for the drafting of an Environmental Impact Statement. For example, at 617.7(c) it is indicated that such a determination of significance would exist where "the removal or destruction of large quantities of vegetation or fauna;" would

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N.Y. Statutes § 145. Therefore, Sections 617.4(b)(9) and (10) must be construed to apply to a situation such as the present one where Respondent may claim that its action is Type II, but that does not make it so. (See Sierra Club v. Vill. Of Painted Post, 134 A.D.3d 1475, 1477 (4th Dept 2015) (Unlisted action are those not previously identified as Type I or Type II).

take place. 617.7(c)(ii). Since 83 trees will be removed, this section clearly applies and would indicate that the removal of so many trees in it of itself would be a significant adverse environment impact, without considering the extensive loss of green space and gardens to impervious pavement.

Moreover, at subdivision (v), it is indicated that "the impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character;" would also constitute a significant adverse environmental effect. Again, the proposed plan significantly detract from all of the noted architects who added historic and architectural importance to the site, and in particular Olmsted and Vaux plan as indicated in the Nancy Owens' Report, and Michael Gotkin's testimony concerning the A.E. Bye mounds. These actions impair the character or quality of important historic, architectural or aesthetic resources, and change the streetscape surrounding the park which will change the character of the neighborhood.[2]

Therefore, the 617.7 listing of potentially significant adverse environmental consequences would also preclude the adoption of the Type II exemptions.

(D) EVEN IF THIS PROJECT WOULD NOT BE CONSIDERED A TYPE I PROJECT, THE TYPE II EXEMPTIONS WOULD STILL NOT APPLY.

Given the scope and type of work that is proposed concerning this project, the Type II exemptions which Parks claims this project falls under would still not apply.

The Department of Environmental Conservation, which developed and adopted the SEQRA regulations, also provided guidance to agencies, explaining more fully the nature of

[2] The fact that the Landmark Preservation Commission ("LPC") approved of Parks plans is immaterial to Petitioners argument. Approval by the LPC was based on an entirely different standard than is required of Parks under SEQRA. The only issue under SEQRA is whether Parks plans may significantly affect the architectural or aesthetic quality of Fort Greene Park, not whether such effects are appropriate according to the LPC.

each regulation and how it should be applied. The SEQR Handbook, Third Edition – 2010, therefore starting at page 30 of the SEQR Handbook, DEC provides further guidance concerning Type II actions. (Attached hereto at Exhibit "N", please see the relevant pages of the SEQR Handbook).

(E) N.Y.C.R.R. § 617.5(C)(1)

The first section under which Parks claims this project is exempt as a Type II project is § 617.5(c)(1) which indicates that "maintenance or repair involving no substantial changes in an existing structure or facility" applies to this project.

However, the DEC in the Handbook indicates that, for example:

> "This allows for the normal cleaning, upkeep and minor repairs to a structure or facility. Painting, repair of damaged wood around a window, retiling a ceiling, repairing a hole in an existing fence, sealing an asphalt parking lot, installing vinyl siding on a house in a historic district, or reshingling a roof would be examples of actions that would fit in this category.
>
> Ordinary home repair, business repair in-place, in-kind remodeling, or upgrading to meet fire or plumbing codes are not substantial changes, unless the repairs are extensive enough to trigger any of the Type I thresholds. Even if a building is damaged or destroyed by fire, if it is rebuilt in the same footprint, and is comparable in size, scale and intended use to the old structure, it is still not subject to SEQR.
>
> Examples of repair and remodeling that would exceed a Type II threshold and examples of actions that would be considered a 'substantial change' that does exceed the Type II threshold are given below:
>
> - If a school district decided to pave a narrow walkway denuded of vegetation and beaten into the ground by children running for the school bus, the action would not be considered a substantial change. However, paving a 12,000 square foot play area for handball, tennis, or basketball courts **would** be considered a substantial change.
> - A commercial building located in a town with a population of 150,000 or fewer was damaged by a tornado. The owner

> decided to take advantage of a bad situation and knock out the side of the structure that was damaged and build a whole new wing on the building. The plan submitted to the town for approval is for a warehouse area that exceeds 50,000 square feet. This action **would** be a substantial change, and thus subject to SEQR.
> - If a waterfront was bulkheaded, and the old wood was rotting, replacing the bulkhead with new wood, of the same length and as close to the old location as possible, would **not** be considered a substantial change. Placing the new bulkhead sizable distance from the old bulkhead (for example, several feet seaward), and filling in the area between the old and new bulkheads, **would be** considered a substantial change. Bulkheading an area that had never been bulkheaded before **would** also be considered a substantial change."

SEQR Handbook p. 30.

Therefore, the instant project contains many substantial changes that would take this project out of maintenance or repair involving no substantial changes to the existing structure or facility. These include the removal of the 83 trees, the removal of the Gilmore Clarke fence, the repaving, losing a substantial portion of the greenery, and redoing the entranceway to the park also allowing for extensive new and additional paving, would not be considered maintenance or repair involving no substantial changes.

(F) § 617.5(c)(2)

This section of the exempt actions includes "…replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading buildings to meet building or fire codes, unless such action meets or exceeds any of the thresholds in section 617.4 of this Part".

According to the SEQR Handbook:

> "Replacement in kind refers to function, size and footprint. Stick-for-stick replacement is not needed to qualify as replacement in kind, especially where the changes are required by current

> engineering, fire and building codes. Actions such as building ramps as required by Americans with Disabilities Act, installing new or improved fire escapes, or removal of asbestos shingles would be Type II.
>
> After over twenty years of use, the Alfred E. Smith state office building in Albany needed to be rehabilitated and brought up to current codes. It was initially thought that this action would be classified as Type II because the action included repairs, upgrades and in-kind replacement. However, when the project manager for the New York State Office of General Services looked more closely at the wording of 617.5(c)(2), he realized that the action did not satisfy the final provision in the item '…unless such action meets or exceeds any of the thresholds in section 617.4 of this part.' The scope of the work on this multi-story building far exceeded the threshold 617.4(b)(6)(v):..."

The proposed project is clearly not "replacement, rehabilitation or reconstruction of a structure or facility, in-kind". Handbook pp. 30-31(emphasis added).

Much of the work that is being proposed is simply not "in-kind". A new entranceway is proposed to be built, the staircase to the memorial monument will be significantly changed and widened with impervious surfaces, the Bye mounds will neither be replaced, rehabilitated or reconstructed, but destroyed with no replacement in-kind, the low stonewalls will be demolished and not replaced, and of course the 83 trees that will be lost, even if replaced by new trees, will not be in-kind given the fact that the current trees are uniquely mature trees that cannot be replaced in-kind.

(G)617.5(C)(6)

This provision allows for "maintenance of existing landscaping or natural growth". According to the Handbook, the DEC indicates that "In a municipal park, routine trimming of trees or replacement of shrubbery that has died would be Type II under this section. In contrast, clear-cutting of a forested area of the park would not fit under the heading of maintenance." Handbook p. 32.

The proposed Parks plan not only includes routine trimming of trees, but the actual destruction of 83 trees. Moreover, the extensive new work at the entrance and the walkway to the memorial consists of new work including significant new pavement and loss of a formal garden. This is not merely maintenance of existing landscaping or natural growth, but revamping the landscape of Fort Greene Park.

(H)617.5(C)(20)

This provision deals with "routine or continuing agency administration and management, not including new programs or major reordering or priorities that may affect the environment". The Handbook explains this provision by indicating:

> "SEQR does not apply to the ordinary administration and continuing management of a governmental agency. It is when new actions are taken, or new programs are begun, that the environmental assessment must be done.
>
> This section includes activities such as:
> - Decision to relocate an office from one building to another,
> - Entering into a contract to operate an existing facility,
> - Setting tipping fees at a landfill,
> - Providing funding for an existing agency to allow it to conduct current programs;
> - Revising applications/registration fees,
> - Changing the operating hours of a public facility, and
> - The designation of a structure as a historic landmark."

Handbook pp. 38-39.

Again, the extensive work plan at Fort Greene Park to the tune of 10.5 million dollars, simply is not "routine or continuing agency administration and management" or to the ordinary administration and continuing management of a governmental agency which this provision applies to. Extensive new landscaping work in a park radically changing certain parts of the park, is certainly not routine or continuing agency administration and management.

Therefore, as can be seen, according to the DEC explanation of the SEQRA regulations as contained in the SEQR Handbook, clearly indicates that the proposed work to be done at Fort Greene Park, even if not considered a Type I action due to the § 617.4, § 617.7 regulations would still not be considered exempt actions with no environmental review at all. The designation of the work at Fort Greene Park is clearly an attempt to avoid the work and delay of preparing an Environmental Assessment Form, which, because of § 617.7 list of potential significant adverse environmental effects would certainly lead to the requirement of drafting an Environmental Impact Statement.

IV. CONCLUSION

Finally, as previously indicated, a Certified Record has not been provided to the Petitioners or to the court, but rather an Affidavit with cherry picked documents as exhibits. Therefore, it is respectfully submitted that the full record of Parks determination is not before the court. However, even only considering the documents provided by Parks, as well as the exhibits provided in this Memorandum, it is clear that the project is a Type I project that may have at least one significant adverse environmental consequence, leading to the requirement of the drafting of an Environmental Impact Statement. Therefore, it is respectfully submitted that this court should void the approval of the proposed landscape plane, and issue an injunction from any physical work at Fort Greene Park until such time as SEQR has been fully complied with.

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Respectfully submitted,

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