SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

CHHAYA COMMUNITY DEVELOPMENT CORPORATION, MINKWON CENTER FOR COMMUNITY ACTION, INC., GREATER FLUSHING CHAMBER OF COMMERCE INC., and Robert LOSCALZO, Petitioners, For a Judgment Pursuant to C.P.L.R. Art. 78 -against- NEW YORK CITY DEPARTMENT OF CITY PLANNING and NEW YORK CITY CITY PLANNING COMMISSION, Respondents.	**Index No. _____** **VERIFIED PETITION** **ORAL ARGUMENT REQUESTED**

Petitioners, by their attorneys Paula Z. Segal and Daniel N. Carpenter-Gold, of TakeRoot Justice, hereby verify and affirm, under the penalties of perjury, that the following is true and correct:

PRELIMINARY STATEMENT

1. Flushing is a neighborhood under siege. Its working-class residents, primarily people of color, face an ever-increasing rate of displacement resulting from massive real-estate speculation over the last decade. Seecharran Aff. ¶ 3; Park Aff. ¶ 3; Choe Aff. ¶ 5. New residential development has not lowered rents, but instead created a surplus of unaffordable luxury housing, leading to a 21% rental vacancy rate. Seecharran Aff. ¶ 5. The median household income in Flushing has steadily declined, while the median sales price per housing unit has sharply increased, pushing up the number of people considered severely rent-burdened in the area. Park Aff. ¶ 3.

2. The proposed rezoning would exacerbate these threats. Designed without community input, it represents the dreams of developers rather than the needs of Flushing residents: nearly 3,000,000 zoning square feet of new development and nearly 1,800 new apartments, *see infra* ¶¶ 31-33, representing a profound and permanent change to the face of the Flushing waterfront.

3. A rezoning including the same area, called "Flushing West," was proposed by the City only a few years ago. Like the currently proposed rezoning, the community strongly resisted Flushing West out of concern that the project would lead to land speculation and gentrification. Unlike the current proposal, Respondents found that Flushing West would have environmental impacts in every area they studied, and required further environmental review. After the resulting public comment, the City withdrew its proposal. *See infra* ¶¶ 24-26.

4. This time, Respondents have not even allowed public comment, declaring instead that the project is not subject to full environmental review and the accompanying public scrutiny of its impacts. *See* Walters Aff. Ex. B (herein "the Negative Declaration" or "Neg. Dec."). They arrive at this conclusion by ignoring much of the increase in development that would be facilitated by the rezoning, while simultaneously inflating the amount of development that would occur in the absence of any action. By doing so, Respondents artificially decrease the "development increment"—the amount of additional development predicted by the proposal—to near zero. They claim, in essence, that the nearly all of the 2,900,000-zsf project would have been built anyway, and therefore the project has no chance of impacting the environment. *See infra* ¶¶ 34-52.

5. The result of this decision is that Petitioners will lose the opportunities for public comment normally required in major projects such as this. Curtailing environmental review and

public comment also eliminates the crucial information from the decision-makers' view and prevents their consideration of mitigations for the impacts that will occur. It is also a violation of Respondents' responsibility to conduct environmental review for any project that might have an environmental impact. *See infra* ¶¶ 53-55.

6. The proposed rezoning is now in the midst of the City's Uniform Land Use Review Procedure and, on information and belief, will likely be scheduled for hearings before the City Planning Commission and the City Council as soon as both decision-making bodies are able to meet virtually. City Council started remote video meetings and hearings on April 24, 2020.

7. Petitioners challenge this unlawful and arbitrary issuance of a declaration that the proposed creation of a Special Flushing Waterfront District would have no significant environmental impact. *See generally* Neg. Dec.

PARTIES, JURISDICTION, AND VENUE

8. Respondent New York City Department of City Planning ("DCP") is an "agency" within the meaning of SEQRA, Envtl. Cons. L. § 8-105(3); *see also* 6 N.Y.C.R.R. § 617.2(c), and CEQR, 43 R.C.N.Y. § 6-02; *see also* 62 R.C.N.Y. § 5-02(c)(3). DCP prepared the Negative Declaration challenged here. Neg. Dec. at 1.

9. Respondent New York City City Planning Commission ("CPC") is an "agency" within the meaning of the State Environmental Quality Review Act ("SEQR"), Envtl. Cons. L. § 8-105(3); *see also* 6 N.Y.C.R.R. § 617.2(c), and City Environmental Quality Review (CEQR), 43 R.C.N.Y. § 6-02; *see also* 62 R.C.N.Y. § 5-02(c)(3). It approved the Negative Declaration challenged here. Neg. Dec. at 1.

10. Petitioner Chhaya Community Development Corporation (Chhaya) is a nonprofit housing and community organization that has advocated for the needs of New York City's South Asian community for the past 20 years. Seecharran Aff. ¶ 2. Chhaya serves approximately 3,000 households each year and supports over 25 active tenant associations and tenant unions, many in or near Downtown Flushing. *Id.* Chhaya's work encompasses tenant rights, financial empowerment, sustainable homeownership, foreclosure prevention, immigration services, small business support, civic engagement, and broader community building and research and advocacy around community needs. *Id.* Chhaya participated as much as it was able in the limited public review of the proposed rezoning of Downtown Flushing. *Id.* ¶ 4. However, it was prevented from providing comments on the environmental review of the proposed rezoning by the Negative Declaration, which eliminated the public hearings that would otherwise have given it the opportunity. *Id.*

11. Petitioner MinKwon Center for Community Action, Inc. (MinKwon) is nonprofit community-based organization located in the heart of downtown Flushing. Park Aff. ¶ 3. MinKwon primarily serves low-income, limited-English-proficient residents who live and work in the Greater Flushing area. *Id.* MinKwon has been actively engaging with Flushing residents about the potential redevelopment of the Flushing waterfront for years. *Id.* ¶¶ 7-8. Like Chhaya, MinKwon participated as much as it was able in the limited public review of the proposed rezoning of Downtown Flushing. *Id.* ¶ 4. Although MinKwon has heard substantial concerns from Flushing residents about any rezoning that could increase rents in the area, *id.* ¶ 8, it was limited in raising these concerns as regards the proposed rezoning by the Negative Declaration, which eliminated the public hearings that would otherwise have been conducted. *Id.* ¶ 4.

12. Petitioner Greater Flushing Chamber of Commerce Inc. (Chamber) is a nonprofit organization with many members in downtown Flushing and the surrounding neighborhoods. Choe Aff. ¶ 3. The Chamber serves local businesses, and has been working on a community-led development plan that would reflect local residents' and business owners' vision of Downtown Flushing. *Id.* ¶ 7. Like Chhaya and MinKwon, the Chamber participated in public processes related to the proposed rezoning to the extent it was able, but would have raised concerns specific to the environmental review if such comments were permitted. *Id.* ¶¶ 4, 6-7.

13. Petitioner LoScalzo is a resident of Whitestone, Queens. LoScalzo Aff. ¶ 1. LoScalzo has studied the planning history of Downtown Flushing and neighboring Willets Point. *Id.* ¶ 5. He frequently travels for time-sensitive business purposes through the area affected by the proposed rezoning and is concerned about the impacts the proposed rezoning will have on traffic in the area. *Id.* ¶¶ 6, 8. Petitioner LoScalzo would have brought these concerns to Respondents during the public-review process ordinarily provided by SEQRA and CEQR but was unable to because of the improperly issued Negative Declaration. *Id.* ¶¶ 16-20.

14. This Court has jurisdiction over this proceeding: Petitioners allege that Respondents' issuance of the Negative Declaration was in violation of lawful procedure, affected by an error of law, and was arbitrary, capricious, and an abuse of discretion. C.P.L.R. § 7803(3). The issuance of a Negative Declaration is a final agency action as required by C.P.L.R. § 7801. *See, e.g.*, *Stop-The-Barge v. Cahill*, 1 N.Y.3d 218, 223 (2003). This cause of action accrued upon the issuance of the Negative Declaration on December 16, 2019, and was timely filed within the limits set by C.P.L.R. § 217(1), as extended by N.Y. Exec. Orders Nos. 202.8, 202.14 and 202.28.

15. Venue is proper in the County of Queens because material events took place here. C.P.L.R. §§ 506(b), 7804(b).

STATEMENT OF FACTS

I. Downtown Flushing

16. Over the last decade Flushing has been a focal point of the luxury housing boom that has transformed many parts of New York City. In fact, apart from Williamsburg, Brooklyn, Flushing has seen the largest number of new luxury units in the five boroughs. *See, e.g.*, Stefanos Chen, *The Decade Dominated by the Ultraluxury Condo*, N.Y. Times (Jan. 10, 2020), attached as Walters Aff. Ex. G. As a result, the predominately working-class immigrant community has been experiencing growing displacement pressure as property values, residential rents, and commercial rents rise beyond the means of its residents.

17. Between 2010 and 2017, the median household income in Flushing steadily declined, while the median sales price per housing unit sharply increased in Queens Community District 7 from $670,290 to $876,000. Park Aff. ¶ 3. During the same period, the percentage of individuals severely rent-burdened in QN07 rose from 31.3% to 39.9%. *Id.*

18. The luxury developments, and even the affordable housing created through Mandatory Inclusionary Housing, have failed to meet the needs of the community and are clearly not designed for current residents: Downtown Flushing has some of the highest rates of poverty in the borough, and one in three residents of the project's census tract live below the poverty line. Seecharran Aff. ¶ 5.

19. Neighborhood amenities have not kept up with the construction boom and increasing density, and there are no signs that this will change anytime soon. Nearly every

elementary and middle school serving the Flushing community is categorized as overcrowded. Every single high school that serves the community is considered overcrowded, including Francis Lewis High School which is operating at 208% of its capacity. *See* N.Y.C. Dept. Educ., *Space Overutilization in New York City Public Schools: Report on the 2017-2018 School Year* 21 (2019).[1]

20. Like the developers and the City, Petitioners have a development plan: a new school and library; a youth center and senior center; spaces and amenities for education and stewardship, including passive recreation spaces and publicly accessible bathrooms, included in any new waterfront esplanade design. *Id.* This is a vision of waterfront development that considers the challenges facing the Flushing community, meets the needs of the community, and does not overburden the existing infrastructure. *See, e.g.*, Seecharran Aff. ¶ 9; Park Aff. ¶ 6; Choe Aff. ¶ 7. In contrast, the proposed rezoning only worsens the overcrowding from which Flushing residents already suffer. Seecharran Aff. ¶ 5. The community needs any development on this land to include community amenities to accommodate the corresponding increase in community needs resulting from increasing density. *Id.*

II. The Rezoning Proposal

A. The Applicant

21. FWRA LLC ("the Applicant"), a private company, seeks this rezoning. FWRA LLC is a partnership of F&T Group, United Construction and Development Group, and Young Nian Group LLC. *See* Tarry Hum, *Special Flushing Waterfront District: A Massive Giveaway?*

[1] Available at https://www.schools.nyc.gov/about-us/planning-and-buildings/district-planning (follow link to "Space Over-Utilization Report").

Gotham Gazette (Jan. 31, 2020);[2] *see also* EAS at 17 ("The Applicant is comprised of three property owners within the Project Area"); *id.* at 65 (detailing ownership of Applicant-owned parcels).[3]

22. F&T Group is a member of the Board of Trustees of the Flushing Willets Point Corona Local Development Corporation ("FWPCLDC"), a non-profit organization run by former Queens Borough President Claire Shulman. *See* Flushing Willets Point Corona LDC, *Board of Trustees* (accessed May 7, 2020), https://www.queensalive.org/board.

23. The New York State Attorney General sanctioned FWPCLDC in 2012 for "t[aking] steps to create the appearance of independent 'grassroots' support…by concealing their participation in community organizing efforts." N.Y. State Attorney General *Press Release: A.G. Schneiderman Ends Illegal Lobbying Of NYC Officials By Three Local Development Corporations* (Jul. 3, 2012). [4] This included "ghost-writing letters and op-eds and preparing testimony for unaffiliated community members," *id.*, as well as "organiz[ing] transportation to City Council hearings for supporters," Assurance of Discontinuance No. 12-068 (July 2, 2012).[5] impermissibly ghost-writing op-ed pieces, preparing testimony for third parties and providing transportation for apparent "supporters" of discretionary land use actions, thereby attempting to influence legislation in contravention of the Not-for-Profit Corporation Law.

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[2] Available at https://www.gothamgazette.com/opinion/9087-special-flushing-waterfront-district-massive-giveaway.

[3] The version of the EAS referenced here is excerpted from the original, with exhibit pagination inserted. All pinpoint citations to this document included herein refer to the exhibit pagination.

[4] Available at https://ag.ny.gov/press-release/2012/ag-schneiderman-ends-illegal-lobbying-nyc-officials-three-local-development.

[5] Available at https://ag.ny.gov/sites/default/files/press-releases/2012/AOD-No-12-068.pdf.

24. FWPCLDC was previously involved in Flushing West, a proposed rezoning that included the same properties and nearly the same changes now at issue. That failed attempt was based on a plan that FWPCLDC reportedly commissioned Respondent DCP to create for the area. Joe Anuta, *A tiny nonprofit has outsize influence on city zoning plan*, Crain's New York (Jun. 29, 2015) ("In an uncommon arrangement, [FWPCLDC] agreed to pay $800,000...to hire the city as a subcontractor."), attached as LoScalzo Aff. Ex. B.

25. That attempt was reportedly aborted after the Draft Scope of Work for the Flushing West Environmental Impact Statement (herein "Flushing West DSOW") was published and exposed to public comment. The City never released the Final Scope of Work or EIS for the project, never submitted a completed rezoning application, and never advanced the project for further review. *See* Ryan Brady, *Flushing West plan dropped by city*, Queens Chron. (Jun. 2, 2016).[6]

26. The present proposed rezoning would enable F&T Group to build the substantially the same large set of new residential and commercial buildings that it attempted to get permission to build via the abandoned Flushing West.[7]

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[6] Available at https://www.qchron.com/editions/queenswide/flushing-west-plan-dropped-by-city/article_cce639e3-9482-589f-9905-8fd2afb217b9.html.

[7] F&T Group has an ownership interest in two sites that the Applicant seeks to rezone: Sites 3 and 4, or Lots 85, 212, and 249. EAS at 65; Walters Aff. Ex. D. Between the City's 2015 proposal and the present application, plans for these Sites have changed little. In 2015, they planned for a total of 606 residential units, a 184-room hotel, approximately 57,000 square feet of retail, a community space and parking. The 2019 plan is substantially the same, but larger: 807 residential units, a 225-room hotel, approximately 65,000 square feet of retail, a community space, parking, and 200,000 square feet of office space.

B. Procedural History of the Application

27. An Environmental Assessment Statement, prepared by a consultant for the Applicant, was accepted by DCP and approved by the City Planning Commission on December 16, 2020. *See* Neg. Dec. at 1. The Department of City Planning declared the application complete on the same day; likewise, on the same day, the City Planning Commission reviewed and certified it for referral to the City's Uniform Land Use Review Procedure ("ULURP"). *See* N.Y.C. Dept. City Planning, Zoning Application Portal, Special Flushing Waterfront District (accessed May 6, 2020), https://zap.planning.nyc.gov/projects/P2017Q0052.

28. FWRA LLC reportedly paid over $1,000,000 to lobbyists in 2019, including New York City's largest single lobbying contract of 2019, as part of its efforts to get the City to rezoning the area. N.Y.C. Off. City Clerk, Lobbying Bureau Annual Report 29, 32 (Mar. 1, 2020).[8] These funds were specifically targeted at lobbying Olga Abinader, the DCP signatory of the Negative Declaration, to advance the "pre-certification of the Special Flushing Waterfront District app and L[and] U[se] Review Process." N.Y.C. Off. City Clerk, *FWRA LLC Lobbyist Search Report* (performed on Feb. 10, 2020), https://bmp.nyc.gov/elobbyist/search. The improperly issued Negative Declaration was the culmination of that pre-certification process.

29. The proposed rezoning is now in the midst of the City's review process. ULURP requires the relevant Community Board and Borough President to examine and provide recommendations on the proposed rezoning, and then requires Respondent CPC and the City Council to vote on the proposal. *See generally* N.Y.C. Charter §§ 197-c, 197-d. The Borough President and the Community Board have already issued their recommendations. On March 12,

[8] Available at https://www.cityclerk.nyc.gov/assets/cityclerk/downloads/pdf/2020_Annual_Report.pdf.

2020, the Borough President recommended that the City Council disapprove the application; prior to that, on February 12, 2020, Queens Community Board 7 recommended approval only if specific changes are made to the proposal.[9] *See* Seecharran Aff. Ex. 5 (Borough President recommendation, including summary of Community Board 7's recommendation). These recommendations will be considered by the City Council, the ultimate decision-maker on this matter, N.Y.C. Charter § 197-d(b), which will rely on the environmental review documents created and approved by Respondents when making its determination on this application. Envtl. Cons. L. § 8-0109(9).

30. The proposal will be heading to Respondent CPC, and then the City Council, as soon as both decision-making bodies are able to meet virtually. City Council started remote video meetings and hearings on April 24, 2020.[10]

C. Summary of Current Proposal

31. If the proposed rezoning is approved by the City Council, Respondents expect the construction of nearly 3,000,000 zsf of new development, including more than 1,700 new apartments. Walters Aff. ¶ 10; *id.* Ex. D (chart summarizing key numbers from the EAS and other sources).

32. This development would be achieved primarily through two zoning changes. First, the City would create a new zoning district, the "Special Flushing Waterfront District," that

[9] The Applicant has not made the recommended changes.

[10] The City's Uniform Land Use Review Procedure (ULURP) was suspended as of the close of business on Monday, March 16, 2020 by Mayoral Executive Order No. 100 § 2, but portions of the process, including the acceptance of new private applications, have re-opened since then. Modifications of the N.Y.S. Open Meetings Law are allowing bodies that would otherwise have to meet in person to resume their public deliberations through videoconferencing. N.Y. Exec. Order Nos. 202.1, 202.14 (extending Order 202.1).

would relax zoning requirements for the area along Flushing Creek between 36th Ave. on the north and 40th Rd. on the south, and inland to College Point Blvd., in exchange for expanded waterfront-walkway requirements. EAS at 22-23; *see also id.* at 43 (map of rezoning area). Second, the City would upzone the northern portion of the area, currently subject to a manufacturing-centric M3-1 district and a commercial-centric C4-2 district, to a primarily residential M1-2/R7-1 designation. *Id.* at 22. Virtually all of the direct impact from the proposed rezoning will occur in the area between 36th Ave. and Roosevelt Ave. ("Proposed Rezoning Area").[11]

33. The Rezoning would also drastically increase the amount of development available for the sites in the Proposed Rezoning Area not owned by the Applicant, including a large lot, Lot 200, that currently contains only a U-Haul storage facility and truck parking. *Id.* at 30; Walters Aff. ¶ 28 n.7.

III. The Negative Declaration and the Environmental Assessment Statement

34. Despite Applicant's plans for a new megadevelopment, Respondents issued an EAS finding that the development would result in relatively little new development overall and would even decrease hotel, retail, self-storage, and parking uses on the site. EAS at 37, 39.

[11] The remainder of the area, between Roosevelt Ave. and 40th Rd., is already developed and would receive only limited zoning benefits. *See* EAS at 29. In fact, there does not appear to be any land-use rationale for the inclusion of this area in the proposed Special District. The lots in Subdistrict C were recently developed with a large residential and commercial space as a development called "Sky View Parc." Walters Aff. ¶ 62. The EAS states that "Sky View Parc…is not expected to be affected by the Proposed Actions (except for the potential re-allotment of accessory parking within its existing parking garages)." EAS at 29. Inclusion of the additional area without clear purpose is a violation of the principle that all zoning have "purpose" and a "reasonable relation between the end sought to be achieved…and the means used to achieve that end." *Asian Americans for Equality v. Koch*, 531 N.Y.S.2d 782, 787 (1988).

35. On the basis of this analysis, Respondents found that the proposed rezoning "would not have a significant adverse impact on the environment," Neg. Dec. at 1, and that no "significant effects upon the environment…are foreseeable," *id.* at 3. Respondents issued the Negative Declaration based on the accompanying EAS on December 16, 2019. *Id.* at 3.

36. Just four years prior, Flushing West proposed changes very similar to the current rezoning proposal for the same parcels. *See generally* Walters Aff. Ex. C (herein "Flushing West DSOW") at 19-29 (describing the proposal). However, that proposal received a "Positive Declaration" by Respondents during their environmental review, indicating that Respondent "determined that the [project] may have a significant adverse impact on the environment" in each of the eighteen categories it assessed, and would require an EIS. *Id.* at 7.

A. Increment in Development between No-Action and With-Action Scenarios

37. The EAS bases nearly all of its analysis on a comparison of two projected development scenarios: the state of the Proposed Rezoning Area in 2025 if the rezoning does not occur (the "No-Action Condition"), and the state of the same area in the same year if the proposed rezoning does occur (the "With-Action Condition"). Walters Aff. ¶ 13. The difference between the amount of development in the No-Action and With-Action Conditions, typically measured in terms of square footage of new construction or the number of new apartments and hotel rooms, provides the basis for assessing the environmental impact the proposed rezoning will cause. *Id.*; EAS at 29 ("The potential environmental impacts of the Proposed Actions are based on the incremental difference between the No-Action and With-Action conditions.").

38. The EAS predicts that under the With-Action Condition—the world in 2025 in which the proposed rezoning does occur—there will be about 2,900,000 zoning square feet

("zsf")[12] of construction in the Proposed Rezoning Area, nearly all of it new. Walters Aff. ¶ 10; *id.* Ex. D. However, the EAS only analyzes some of the affected area, meaning that it only includes about 2,510,000 zsf in its analysis. Further, it predicts that in the No-Action Condition—without the rezoning—there would be about 2,380,000 zsf of development. EAS at 73. As a result, the incremental development that the EAS uses as the basis for its analysis is relatively tiny: only about 130,000 zsf, roughly 5% of the total predicted development. Walters Aff. ¶ 23; EAS at 73.

39. The size of the increment is, by definition, determined by the assumptions made about the No-Action and With-Action Conditions. Both scenarios contain strong assumptions that drive up the expected development in the No-Action Condition while minimizing the expected development in the With-Action Condition.

B. Analysis of the With-Action Condition

40. Respondents make two errors that suppress the amount of development in the With-Action Condition: they leave out most of the land that would be affected by a requested change in zoning districts, and they assume that construction of a waterfront walkway will be permitted, despite needing discretionary permits from the State Department of Environmental Conservation ("DEC").

41. First, the EAS includes only sites owned by the Applicant in its increment calculations. Walters Aff. ¶ 45; EAS at 30, 39. The lots in the Proposed Rezoning Area not owned by the Applicant—Lots 75, 200, and 210—are thus excluded from most of the EAS's

[12] Zoning square footage measures the total square footage of construction counted toward the maximum amount of development permitted by the relevant zoning provisions. Walters Aff. ¶ 10 n.2.

analyses. *See* EAS at 29-30. No justification is given for this choice, other than the observation that these lots "are not controlled by the Applicant and do not have any known redevelopment plans." *Id.* at 30.

42. The decision to exclude these sites from the increment analysis has a particularly large impact because the major zoning change proposed in the proposed rezoning would disproportionately affect those sites. The proposal to upzone the manufacturing and commercial districts in the northern portion of the Proposed Rezoning Area to allow for heavy residential development includes Lots 75 and 200. *See id.*at 22 (describing the upzoning). In fact, the *majority* of the area affected by that upzoning is within Lot 200. Thus, by refusing to include Lot 200 in their increment calculations, Respondents are ignoring the bulk of the impact from this portion of the proposal. Walters Aff. ¶ 49 & n.21.

43. Lot 200 would see its total development potential increase to more than 580,000 zsf under the proposed rezoning, *id.* ¶ 53; *id.* Ex. D, dwarfing the increment of 130,000 zsf actually used in the EAS. In other words, including Lot 200 would more than quintuple the total development Respondents used to analyze possible environmental impacts. Furthermore, the proposed rezoning would allow for residential uses, rather than the current use as a self-storage facility. *Id.* ¶ 53; *see also* EAS at 22. The additional capacity on Lot 200 would therefore allow for at least 749 new apartments, more than tripling the total amount of new residents that the proposed rezoning would bring to the Proposed Rezoning Area. Walters Aff. ¶ 55.

44. Second, Respondents assume that the Applicant will construct a waterfront walkway alongside Flushing Creek. Based on the installation of this walkway, Respondents assert that the proposed rezoning will "improve the environmental conditions of the area," EAS

at 24, help to satisfy the City of New York's "OneNYC 2050" goals, *id.* at 52, increase open space, *id.* at 57, and improve urban design in the area, *id.* at 61.

45. Much of this walkway would be constructed on or adjacent to tidal wetlands regulated by the State Department of Environmental Conservation ("DEC"). *See id.* at 78 (map of tidal wetlands). Applicant, and anyone else building in the area, would therefore need a DEC permit to construct anything like the expansive waterfront area anticipated in the EAS. As no such permit has been approved or even filed, *see id.* at 63 (stating that an application "will be" submitted), the walkway is a purely hypothetical amenity.

46. If the walkway were removed from the EAS's analysis, the predicted environmental benefit of the proposed rezoning would substantially decrease. In particular, the ratio of open space to resident population ("open-space ratio"), which Respondents predict will increase as a result of the rezoning by about 2.5%, would instead *decrease* by about 3.6%. Walters Aff. ¶¶ 56-59.

C. Analysis of the No-Action Condition

47. The EAS also makes several inappropriate assumptions regarding the No-Action Condition—the future condition of the site without the proposed rezoning—resulting in a baseline amount of development almost equal to that which the proposed project would bring.

48. Currently, the area subject to the proposed rezoning is primarily vacant lots and vacant commercial buildings. *Id.* at 18 ("Site 1 is currently vacant…. Site 2 is also vacant…. Site 3 is a surface parking lot and temporary construction staging area. Lot 75 contains a…vacant commercial building…. Site 4 is currently vacant…. Lot 210, adjacent to Site 4, contains a vacant auto-body shop."). The only currently occupied building in the Proposed Rezoning Area is a 104,500 zsf building used by a self-storage and truck-rental operation on Lot 200. *Id.* at 33;

see also Walters Aff. Ex. D (size of building in zsf). Even this is substantially underbuilt: the current zoning regulations allow for two to four times as much development as is currently there. Walters Aff. ¶ 28 n.7.

49. Despite the current conditions, the EAS predicts that, with no further action by Respondents, the Proposed Rezoning Area will see a sharp increase in development density by 2025. Specifically, Respondents expect that the area, which currently has two buildings totaling 133,140 zsf, will become home to about 2,600,000 zsf of development by 2025. Walters Aff. ¶ 33(i); *id.* Ex. D.

50. This new development would include three new market-rate residential buildings bringing about 1,500 new apartments. *Id.* at 30-32; Walters Aff. ¶ 30. This rate of increase—about 300 apartments per year—would be roughly equal to the rate at which new housing is being constructed in the entire neighborhood combined. *See* Walters Aff. ¶ 30.

51. The commercial development Respondents expect to appear by 2025, meanwhile, would be substantially *larger* than the total amount of commercial development expected within a quarter-mile of the project. Walters Aff. ¶ 31.

52. Respondents projected a far smaller amount of development in the 2015 Flushing West DSOW. For the same area and analysis year, Respondents predicted in that analysis that only about 1,600,000 zsf of new development, including about 1,100 new apartments, would be built by 2025. Walters Aff. ¶ 33; *id.* Ex. D. This analysis was based in part on the finding that the zoning and economic-development planning that was then, and is still, in effect "ha[s] not engendered a significant overall change in the area." Flushing West DSOW at 12. After five years in which no new construction was built in the Proposed Rezoning Area, however, Respondents have revised their prediction for the amount of development that would occur there

by 2025 from 1,600,000 zsf to 2,600,000 zsf—*upwards* by over 60%—to be built in half the time.

LEGAL FRAMEWORK AND AGENCY GUIDANCE

53. SEQRA requires Respondents to prepare an Environmental Impact Statement ("EIS") for "any action…which may have a significant effect on the environment." Envtl. Cons. L. § 8-0109(2).

54. This requirement is a key part of the mandated environmental review. Before approving a land use change, the decision-maker—here the City Council—must be "fully informed of all pertinent environmental issues…and consider[]" them. *Sutton Area Community v. Bd. of Estimate of City of N.Y.*, 78 N.Y.2d 945, 947 (1991). The City Council must identify "the relevant areas of environmental concern," (2) take "a hard look at them" and (3) make "a reasoned elaboration of the basis for its determination." *Chinese Staff and Workers Ass'n v. City of N.Y.*, 68 N.Y.2d 359, 363-64 (1986) (internal quotation marks omitted) (determination annulled on ground that agency did not take a "hard look" at the potential for impacts on an aspect of the environment covered by SEQRA).

55. An EIS enables a decision-maker to take that "hard look" at the potential impacts of a proposal before electing whether or not to act. An important and necessary part of that process is the opportunity for the public, who have other interests and more direct knowledge of the potential impacts than the Respondent City Agencies, to weigh in on both the Draft Scope of Work and the Draft EIS. Envtl. Cons. L. § 8-0109(4)-(5); 6 N.Y.C.R.R. §§ 617.8(d), 617.9(a)(3)-(4). Public comments allow "relevant areas of environmental concern" to be identified in

collaboration with experts and the public. As the New York County Supreme Court recently explained:

> [T]he public review process exists to allow the residents of the community, who will ultimately reap the benefits and/or consequences of the proposal, to have meaningful involvement in the process and provide the agency with feedback regarding important issues to be reviewed in order to determine, what if any, environmental impact implementation of the proposed plan will have.

Northern Manhattan is Not for Sale v. Cty. of N.Y., 2019 NY Slip Op 33698(U) at *4 (Sup. Ct. N.Y. Cty. Dec. 16, 2019) (slip copy) (nullifying a City Council rezoning approval based on an incomplete environmental review).

56. In order to limit their review to an EAS, avoid an EIS entirely, and end the environmental review process without public comment, Respondents must determine "that there will be no [significant] adverse environmental impacts" from the proposed rezoning. 6 N.Y.C.R.R. § 617.7(a)(2). Although the City Council will ultimately approve or deny this application, the City as a whole is bound, for SEQRA and CEQR purposes, by Respondents' Negative Declaration. 62 R.C.N.Y. § 5-05(a)(1). As with an EIS, the standard of review for an EAS is "whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them and made a 'reasoned elaboration' of the basis for its determination." *Chatham Towers, Inc. v. Bloomberg*, 793 N.Y.S.2d 670, 677-78 (Sup. Ct. N.Y. Cty. 2004) (quoting *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986)), *aff'd as modified*, 795 N.Y.S.2d 57 (1st Dept. 2005). Failure to perform adequate analysis at the EAS stage requires annulment of the Negative Declaration and preparation of a full EIS. *E.g.*, *Chatham Towers*, 793 N.Y.S.2d at 680 ("[I]t remains clear that the NYPD failed to meet the 'hard look' requirement

that is required under applicable CEQR and SEQRA provisions, and this Court is left no other alternative than to order that the NYPD conduct a full EIS.").

57. The DEC has, by regulation, provided a list of criteria for agencies to consider in determining whether an action "may have a significant effect," Envtl. Cons. L. § 8-0109(2). *See* 6 N.Y.C.R.R. § 617.7(c). Similar, and in some cases identical, criteria are required under CEQR. *See* R.C.N.Y. § 6-06(a). Additional criteria may be necessary to comply with SEQRA—the list is "illustrative, not exhaustive," 6 N.Y.C.R.R. § 617.7(c)(1)—but any project that may have an impact listed in the regulatory criteria requires an EIS. *UPROSE v. Power Auth. of State of N.Y.*, 285 A.D.2d 603, 608 (2d Dept. 2001) ("An EIS is required if the proposed project '*may include* the potential for at least one significant adverse environmental impact'….") (quoting 6 N.Y.C.R.R. § 617.7(a)(1)).

58. The regulations specifically require agencies to "take[e] into account social and economic factors." Envtl. Cons. L. § 8-0113(2)(b). Such criteria include a "substantial change in the use, or intensity of use, of land" and the "encouraging or attracting of a large number of a people to a place." 6 N.Y.C.R.R. § 617.7(c)(1)(viii), (ix); *accord* R.C.N.Y. § 6-06(a)(3), (8).

59. In assessing these criteria, Respondents "must consider reasonably related long-term, short-term, direct, indirect and cumulative impacts." 6 N.Y.C.R.R. § 617.7(c)(2). These must include any "subsequent actions which are…likely to be undertaken as a result [of the project], or…dependent [on the project]." *Id.*

60. In addition to the statutory and regulatory requirements of SEQRA and CEQR, the New York City Mayor's Office of Environmental Coordination has published a City Environmental Quality Review Technical Manual. Walters Aff. Ex. E (herein "Technical Manual"). The Technical Manual is not a legally binding regulation. *See generally Ordonez v.*

City of N.Y., 110 N.Y.S.3d 222 at *22-23 (Sup. Ct. N.Y. Cty. July 11, 2018) (slip copy). It does, however, reflect the City's own interpretation of the controlling law, and City agencies are therefore generally required to comply with them. *See, e.g.*, *Chatham Towers*, 793 N.Y.S.2d at 678 (describing failure to follow Technical Manual as "gross oversight[] on the EAS").

61. The Technical Manual directs reviewing agencies to develop a "Reasonable Worst-Case Development Scenario," or RWCDS, for both the No-Action Condition and With-Action Condition of a proposed action. Technical Manual at 2-5. The increment between the amount of development in the two RWCDSs forms the basis for assessing the impact of the project in most of the areas assessed by the EAS. *Id.* at 2-11.

62. In developing the RWCDS for a proposed action that would affect an area beyond the site that the applicant plans to develop, the Technical Manual directs agencies not to limit their analysis to the applicant's sites, but to "consider the change in development potential for all the sites" affected. *Id.* at 2-9. Any such sites which are "soft," meaning that they have conditions favorable to further development, should generally be included in the RWCDS. *Id.* at 2-10. In determining whether a site is a "soft site," the Technical Manual recommends first determining whether the site is "built to substantially less than the maximum allowable floor area ratio (FAR)" and whether the lot is large enough for development, typically 5,000 sf or larger. *Id.* at 2-6. If a site meets both requirements, then the Technical Manual recommends consideration of several factors, including "Recent real estate trends in the area" and "Recent and expected future changes in residential population and employment in the study area." *Id.*

63. The Court of Appeals explains that, to ensure that the full range of what the City considers reasonable as-of-right development is subject to environmental review when it applies SEQRA to a rezoning application, the City uses a RWCDS with the "maximum

allowable zoning square feet" that would be permitted if the rezoning is granted. *Neville v. Koch*, 79 N.Y.2d 416, 422 (1992) (environmental review adequate where it includes potential development that would be allowed by new zoning not currently planned). This City procedure "is followed even where the applicant proposes [to build] a project that is less dense than allowed as-of-right under the requested zoning." *Id*. An agency discharges "its statutory responsibility by studying hypothetical…'full-build' uses for" sites to be rezoned. *Id.* at 427.

ARGUMENT

64. Respondents issued a Negative Declaration on the basis of an EAS that grossly underestimates the amount of harm the proposed rezoning is likely to cause. They have manipulated the analysis criteria they are required to use in the EAS process, comparing an artificially low amount of anticipated development to an artificially high baseline. Their assumptions contradict SEQR, CEQRA, and the Technical Manual, as well as Respondents' own analysis from only four years prior. The Negative Declaration is therefore arbitrary, capricious, an abuse of Respondents' discretion, and contrary to law, and should be annulled.

I. The EAS Does Not Take a "Hard Look" at the Extent of Development under the Proposed Rezoning

A. The EAS Ignores the Likely Impact of the Upzoning of Lot 200

65. The With-Action Condition in the EAS is suppressed by Respondents' improper assumptions. First, Respondents ignore the impact that could come from upzoning Lot 200, which would greatly increase the total amount of development allowed in the Proposed Rezoning Area.

66. Currently, Lot 200 has only a single self-storage building, EAS at 30, and its development capacity is limited by the M3-1 zoning governing its northern portion, meant

primarily for manufacturing, and the C4-2 zoning on its southern portion, meant primarily for commercial uses, *id.* at 18 n.2. The Rezoning would upzone Lot 200 to an M1-2/R7-1 district and then further increase the maximum amount of residential development allowed on the site. *Id.* at 22. This would permit residential development for the first time on the northern portion of the site, and almost double the maximum residential floor-area ratio ("FAR")[13] of the southern portion, from 2.43 to 4.6. *Id.* at 24; Walters Aff. ¶ 50.

67. However, Respondents exclude Lot 200 from the EAS, thereby erasing this impact from their calculation of the incremental increase in development as a result of the proposed rezoning. Walters Aff. ¶ 45. The only justification Respondents provide for failing to include the site in their calculations is that it is "not controlled by the Applicant and do[es] not have any known redevelopment plans." EAS at 30.

68. The fact that a parcel is not currently owned by the Applicant is an irrational and insufficient justification for excluding it. Respondents must consider all of the environmental impacts that "may" result from the proposed action, including any "reasonably related" actions that are "likely to be undertaken as a result" of the proposed rezoning. 6 N.Y.C.R.R. § 617.7(c)(1), (2)(ii). Whether development is likely to result from the proposed rezoning does not depend on the current owner of the parcel, but on whether the relaxation of zoning restrictions will encourage further construction on the lot. *See* Technical Manual at 2-10 to 2-11; Walters Aff. ¶ 46. Respondents simply did not undertake the analysis necessary to determine whether to include the likely development on Lot 200 in their calculations. Instead, they rely entirely on current ownership of the site, an unrelated characteristic that simply is not useful for

[13] The FAR of a given lot is the total zoning square footage of development on the lot, divided by the square footage of the lot. N.Y.C. Zoning Res. § 12-10.

assessing its likelihood of future development, because ownership of real estate is fluid. Walters Aff. ¶ 47.

69. Had Respondents applied the correct analysis, it would become clear that Lot 200 a "soft site" requiring inclusion in the EAS's analysis. Lot 200 would acquire development rights that it does not presently have if the rezoning is approved and must be part of the analysis of environmental impacts. Lot 200 would be rezoned in a way that would allow nearly 300,000 zsf of new residential development. A study of hypothetical full-build uses for each site in the Proposed Rezoning Area, should therefore have been included. *See* Technical Manual at 2-9 to 2-10; Walters Aff. ¶ 48.

70. If Respondents properly included Lot 200 in the EAS, it would radically increase the projected development increment, and therefore the environmental impact, of the proposed rezoning. If built to its maximum residential capacity under the proposed rezoning, Lot 200 would add about 584,000 zsf of new residential development, or about 794 new apartments.[14] Walters Aff. ¶¶ 53-55; *id.* Ex. D. This additional amount would triple the amount of new residents that the proposed rezoning is anticipated to bring and *quintuple* the total anticipated development increment. *Id.* ¶ 54.

71. The increment is the basis for nearly all the analysis in the remainder of the EAS, which itself is the basis of the Negative Declaration. In ignoring the likely massive new development on Lot 200, therefore, Respondents have failed to meet the SEQRA and CEQR

[14] The EAS claims that, if the site were to be developed after the proposed rezoning, it would be developed only by the addition of a 177,000-zsf building in the northern half because U-Haul, the current owner of the site, would not want to demolish the building currently occupying the southern half. EAS at 37; Walters Aff. ¶ 51. But this is an unreasonable assumption, because the lot would allow for far more valuable development. Walters Aff. ¶¶ 52-53. And even if development were limited to the additional building, that would still more than double the roughly 130,000-zsf development increment predicted in the EAS, EAS at 73, and increase the increment of commercial development by more than ten times, Walters Aff. ¶ 52.

requirements of considering all "impacts that may be reasonably expected to result from the proposed action," 6 N.Y.C.R.R.§ 617.7(c)(1), and failed to take the requisite "hard look" at all relevant environmental impacts, *Chatham Towers*, 793 N.Y.S.2d at 678.

B. The EAS Assumes the Issuance of Permits that are Discretionary

72. Respondents offset some of the environmental harms created by the proposed development by assuming that the rezoning will catalyze the construction of a large waterfront walkway along Flushing Creek. Walters Aff. ¶ 56. But the walkway would have to be built largely within or adjacent to tidal wetlands, and therefore would require DEC permits that have not yet been issued. *Id.* ¶ 57; EAS at 63. Respondents err in assuming that the walkway will be built without first confirming that it would be permitted by the DEC.

73. The "erection of any structures" in an area "immediately adjacent to inventoried wetlands" requires a permit from the DEC. Envtl. Cons. L. § 25-0401(1)-(2). This specifically includes "construction of any facilities or roads" within 150 feet of a tidal wetland. 6 N.Y.C.R.R. § 661.4(b), (ee)(1)(iii). Flushing Creek is an inventoried tidal wetland, and Respondents admit that much of the Proposed Rezoning Area is subject to DEC wetlands jurisdiction. *See* EAS at 63 (describing permit requirements); *id.* at 78 (map of DEC wetlands jurisdiction, apparently prepared for the Applicant by a third party).

74. The DEC's tidal-wetlands jurisdiction substantially overlaps with the location of the proposed walkway, *see id.* at 78, and therefore a DEC permit would be required for some or all of that construction. The Applicant has not been issued such a permit. *See id.* at 63.

75. Despite the missing permit, Respondents assume that the entirety of the proposed walkway will be built, and uses that assumption to offset the open-space and urban-design impacts of the proposed rezoning.

76. In the "Open Space" section of the EAS, the extra space created by the walkway is taken into account in calculating the open-space ratio, a comparison of the total local population with nearby open space, used as a proxy for determining the amount of impact the proposed rezoning would have on access to parkland and similar amenities. *See id.* at 57. The presumed walkway would add about 3.1 acres of open space, which the EAS touts as about a 2.5% increase over the No-Action Condition. *Id.* at 120. But if no waterfront walkway were built, the incremental increase in residential population in the Proposed Rezoning Area would result in a *decrease* in the open-space ratio of 3.7%. *See* Walters Aff. ¶ 59.

77. In the "Urban Design and Visual Resources" section of the EAS, the walkway is considered qualitatively, as part of the evidence leading to the conclusion that urban design would be improved by the proposed rezoning. The EAS notes that the With-Action Condition would result in "additional commercial and residential FAR" in the Proposed Rezoning Area, but that the additional amenities, including the walkway, would offset the increase in density. EAS at 61. Although it is difficult to assess the impact of the walkway on the more abstract analysis in this section of the EAS, it is apparent that the analysis relies on its construction.

78. Respondents should not have assumed the construction of an amenity which would require a permit from the DEC, a separate government body. A Negative Declaration requires certainty: to issue one, Respondents must "determine either that there *will be no* adverse environmental impacts or that the identified adverse environmental impacts *will not be* significant." 6 N.Y.C.R.R. § 617.7(a)(2) (emphasis added). With respect to the impacts offset by the walkway, the EAS determines at best that there would not be significant adverse impacts *if* the DEC permits the requested development. To avoid this kind of problem, the Technical Manual directs City agencies to allow project components "that seek to reduce environmental

effects" into the EAS only where "mechanisms for their implementation" are included along with them. Technical Manual at 2-9. Here, because their implementation hinges on the issuance of a permit by an unrelated state agency, there is no implementation mechanism for the walkway, and therefore its construction should not have been assumed in the EAS.

II. The EAS Creates an Artificially High Baseline of Development for Its Analysis

79. In addition to overlooking much of the development that would result from the proposed rezoning in the With-Action Condition, the EAS artificially inflates its projections for development without the proposed actions in the No-Action Condition. The Flushing Creek neighborhood envisioned in the No-Action Condition is radically transformed from the neighborhood that exists today: Respondents envision the empty lots, vacant buildings, and storage units that populate the Proposed Rezoning Area today suddenly blooming into a dense megadevelopment by 2025. *See generally* Walters Aff. ¶¶ 27-32; *compare* EAS at 41 (map of current land use by lot) *with* EAS at 46 (map of development projected in No-Action Condition). The result of this massive assumed development is to make Applicant's proposed project look like a small marginal increase, rather than what it is: the replacement of the current neighborhood with a new one.

80. An EAS must consider the impact stemming from the action that is being proposed, 6 N.Y.C.R.R. § 617.7(c), and therefore the baseline from which that impact is measured is crucially important. The Technical Manual explains that it provides the baseline "[f]or most technical areas" of an analysis. Technical Manual at 2-11. And the EAS itself notes that all the "potential environmental impacts of the Proposed Actions are based on the incremental difference between the No-Action and With-Action conditions." EAS at 29. Thus,

use of an inappropriate No-Action Condition is a breach of Respondents' duty to take a "hard look" at the potential environmental impacts, *Chatham Towers*, 793 N.Y.S.2d at 678, and prevents the "fully informed" decision-making required by SEQRA and CEQR, *Sutton Area Community*, 78 N.Y.2d at 947.

81. This assumption has no basis in fact or analysis of development trends. The Proposed Rezoning Area is almost entirely empty. The only buildings are on Lots 75, 200, and 210; the buildings on Lots 75 and 210 are vacant. EAS at 18. The sole occupied building is the self-storage facility on the southern half of Lot 200, *id.*, and even that lot is substantially underbuilt. *See* Walters Aff. ¶ 28 n.7. The remainder of the lots are either vacant or used for parking. EAS at 18.

82. Despite these conditions, the EAS predicts that most of the Proposed Rezoning Area will be built to the maximum density allowed in its current zoning in the next five years without further action. *Id.* at 30-33; Walters Aff. ¶ 29. This would mean the construction of almost 2,500,000 zsf of new development over five years, *see id.* ¶ 32, without any change in policy or government action. This is an assumption divorced from the decades-long trends in the area and is therefore irrational as a basis for the EAS's development calculations.[15] Walters Aff. ¶¶ 27-32.

83. The new development would include approximately 1,500 new apartments. EAS at 30. This rate of growth in new apartments is roughly equal to the total growth in apartments projected for the *entire EAS study area*, outside of the Proposed Rezoning Area, or roughly equal

[15] Although the COVID-19 pandemic was not predictable on December 16, 2019 when Respondents made the determination at issue here, what we have learned in the intervening months about the future of our economy makes the projection that this area will be developed as they predict in the next five year absent any land use changes doubly absurd. Walters Aff. ¶ 27 n.6.

to the rate of new luxury condo units developed *in all of Flushing* between 2009 and 2019. *See* Walters ¶ 30. Respondents provide no justification for the aggressive pace of new development they assume in the No-Action Condition, beyond the guiding principle that the lots would be developed "to the maximum permitted FAR." EAS at 30.

84. In fact, the numbers used here directly contradict Respondents' assumptions in an environmental review they issued just four years prior, analyzing the proposed Flushing West rezoning. In the Flushing West DSOW, Respondents determined that the Proposed Rezoning Area, would have about 1,600,000 zsf of development by 2025 without further action, and in fact found that the current zoning scheme has "not engendered a significant overall change in the area." *See* Flushing West DSOW at 12, 71; Walters Aff. ¶ 33(i). But the EAS predicts that the exact same sites will have *2,600,000* zsf by 2025. *Id.* Similarly, the Flushing West DSOW envisions about 1,100 new apartments in its No-Action Condition, while the EAS predicts 1,500. *Id.* ¶ 33(iii). The EAS provides no explanation of Respondents' decision, after 5 years without development at the Proposed Rezoning Area, to revise their 2025 projection *upward* by 50%.[16]

85. Finally, the new buildings projected in the No-Action Condition cannot be built at all because they violate LaGuardia Airport's height restrictions. No new construction may pierce the "Approach Surface" of any airport in New York City as-of-right. N.Y.C. Zoning Res. § 61-21(a). As Respondents admit, the Proposed Rezoning Area "lies underneath the airport's primary approach path." *id.* at 18. Indeed, LaGuardia's Approach Surface extends southeast across Flushing Bay and directly over the Proposed Rezoning Area, restricting as-of-right building

[16] Respondents elsewhere acknowledge that their Flushing West analysis includes information that should be used in the instant EAS, see EAS at 59 (EAS's Historic and Cultural Resources analysis "draws from the research conducted for…the Flushing West Rezoning Proposal….").

height in the area to about 150 feet above sea level, including any bulkheads. *See* Walters Aff. ¶¶ 39-40; *id.* Exs. H, I (Department of Buildings analysis of LaGuardia's Approach Surface and accompanying map). But the buildings projected by Respondents in the No-Action Condition are built up to 205 feet from the curb, EAS at 31-32, or up to about 193 feet above sea level, Walters Aff. ¶ 40 n.17, far taller than is permitted in the area. As it is not clear that the projected development could even be built to the same density without building to those heights, the bulk development assumptions in the No-Action Condition are likely also incorrect.

86. The development assumptions in the No-Action Condition entirely determine the conclusion that the proposed rezoning "would not have a significant adverse impact on the environment." Neg. Dec. at 1. If the impact of the proposed rezoning were measured from the projections that Respondents made in the 2015 Flushing West DSOW, the incremental impact of the project would be immense: the 2015 analysis had a baseline development of 1,600,000 zsf for the Projected Development Sites, whereas the With-Action Condition would lead to development of about 2,600,000 zsf, leaving an increment of 1,000,000 zsf, more than *seven times* the increment assessed in the EAS. *See* Walters ¶ 36. In terms of new apartments, using the Flushing West baseline of about 1,100 would result in a predicted increase of about 400 apartments, two-and-a-half times the increment predicted in the EAS. *See id.* ¶ 33(iii).

87. Respondents acted in contravention of their legal duty to account for any reasonably likely environmental impact in formulating the No-Action Condition. Their assumptions directly contradict their prior findings of the likely development in the area, without justification for this reversal. Further, the assumptions are manifestly unreasonable, in that they assume a rate of development that is not likely or feasible without the proposed actions. Therefore, the EAS cannot support Respondents' decision to issue the Negative Declaration.

III. The Proposed Rezoning Requires a Full Environmental Impact Statement

88. Respondents' errors in developing the EAS go to the heart of the justification for their Negative Declaration. If reasonable No-Action and With-Action Conditions were used, the incremental amount of development would have been far larger than the EAS projects. This larger increment, in turn, would lead to analyses that would find significant environmental impact in many of the analyzed areas and require mitigations of those impacts to be considered.

89. To take only the largest changes: acknowledging the likely redevelopment of Lot 200 would add about 450,000 zsf of development to the With-Action Condition, including 749 new apartments, Walters Aff. ¶¶ 53, 55 (about 584,000 total zsf, less about 130,000 existing zsf), and adopting the Flushing West baseline would subtract about 900,000 zsf of development from the No-Action Condition, including about 400 apartments, *id.* ¶ 33(iii) (change from about 1,500 new units to about 1,100 new units). *See also generally* Walters Aff. Ex. D. The increment would therefore grow from about 132,000 zsf and 293 new apartments, EAS at 73, to roughly 1,500,000 zsf and roughly 1,150 new apartments (or, at the rate of 2.74 people per apartment, about 3,200 new residents).

90. The increment is at the heart of Respondents' analyses, and an error of this size renders the entirety of the EAS meaningless. The increment is "the basis by which the potential environmental impacts of the Proposed Actions are evaluated." *Id.* at 37. Because the increment is off by an order of magnitude, therefore, virtually all of the components of the EAS will also be wrong. The result is that Respondents could not have considered all possible environmental impacts and determined that none could occur, 6 N.Y.C.R.R. § 617.7(a)(2), and could not have identified all the relevant impacts and taken a "hard look" at them, *Chatham Towers,* 793 N.Y.S.2d at 678. This failure also prevents the EAS from serving its purpose: ensuring that the

Council is able to take its own "hard look" at the rezoning proposal when deciding whether to approve it. *Chinese Staff and Workers Ass'n*, 68 N.Y.2d at 363.

91. It is clear that the proposed rezoning "may have a significant effect on the environment," Envtl. Cons. L. § 8-0109(2). The EAS on which the Negative Declaration is based, furthermore, contains key assumptions that are both unjustified and contrary to Respondents prior findings. Therefore, the issuance of the Negative Declaration is contrary to law, arbitrary and capricious, and an abuse of Respondents' discretion, and must be reversed.

REQUEST FOR RELIEF

Wherefore, Petitioners respectfully request that this Court annul the Department of City Planning Commission's December 16, 2019 Negative Declaration.

Additionally, Petitioners respectfully request that this Court hear oral argument on this issue as soon as is practicable given the restraints of the coronavirus pandemic.

Respectfully submitted,

Daniel N. Carpenter-Gold
New York, New York
June 5, 2020

Attorney's Verification

Daniel Carpenter-Gold, an attorney duly admitted to practice in the State of New York and an employee of TakeRoot Justice, attorneys for petitioners in the within action, hereby affirms the following to be true under the penalties of perjury: that the foregoing Verified Complaint is true to his knowledge, except as to those matters herein stated to be alleged upon information and belief, and as to those matters he believes them to be true; and that the grounds of his belief as to all matters not stated upon knowledge are from conversations with Petitioners, publicly available documents, and/or documents furnished to him by Petitioners.

The undersigned further states that this verification is made by the undersigned and not by petitioners because petitioners are not in the county where affirmant has his office.

Dated: June 5, 2020

Daniel N. Carpenter-Gold