SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of
400 & 500 STATE STREET BLOCK ASSOCIATION, EILEEN BOXER, LAURA McCALLUM, JONATHAN GLAZER, ALEXANDER HUGHES, ALAN SEALES and MICHELLE ITKOWITZ,

Index No.:50604/2019

Petitioners,

-against-

THE CITY OF NEW YORK, NEW YORK CITY PLANNING COMMISSION, NEW YORK CITY COUNCIL, NEW YORK CITY EDUCATIONAL CONSTRUCTION FUND and 80 FLATBUSH AVENUE, LLC.

Respondents.

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PETITIONERS' MEMORANDUM OF LAW

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PRELIMINARY STATEMENT

Petitioners' right to maintain the residential character of their neighborhood, their quality of life, their property rights and their health and safety converge at the intersection of zoning and environmental law. Respondents have violated those rights.

First and foremost, the re-zoning of 80 Flatbush Avenue, in the County of Kings bounded by Schermerhorn Street to the north, Flatbush Avenue to the east, State Street to the south and Third Avenue to the west ("location"), constitutes unlawful "Spot Zoning." In an illegal manner, the City of New York has singled out this location, conferred a huge zoning bonus and financial windfall upon the developer to the detriment of the neighborhood residents. *See* Rodgers v. Village of Tarrytown, 302 N.Y. 115, 123 (1951).

The challenged "Spot Zoning" eviscerates years of sustained effort on the part of the community, elected officials, city planners alongside the Community Board that culminated in the passage of Article 10, Chapter 1 of the Zoning Resolution ("ZR") of the City of New York. The Special Downtown Brooklyn District ("SDBD") was promulgated to protect Petitioners from the very evil contested in this case. The legislative purpose of the SDBD expressed the long-term land use planning for the residents of State Street. §101-00 (c) recites the law's purpose:

> To create and provide a transition between the Downtown commercial core and lower-scale residential communities

of Fort Greene, Boerum Hill, Cobble Hill and Brooklyn Heights.

Nowhere in the voluminous studies and in the environmental review process undertaken by Respondents, was there any consideration given to the SDBD in the context of its impact upon Petitioners. The tripling of the Floor Area Ratio[1] ("FAR") of the commercial district at this location is unprecedented and stands in stark contrast to the very purpose of the City's long-term plan for this spot. The City of New York, along with the New York City Educational Construction Fund ("ECF") refused to take a "hard look" at the impact of the proposed project and zoning change upon the SDBD. The material conflict created by the introduction of two skyscrapers, one rising to seventy-four stories, within feet of the residential brownstones along State Street, was left unexamined within the context of the previous legislative protections articulated in the City's comprehensive long-term planning. This material conflict necessitated that the environmental studies and the Final Environmental Impact Statement ("FEIS") measure the impact of this project in undermining the legislative intentions of the City Planners articulated within the SDBD.

[1] Floor Area Ratio (FAR)
The floor area ratio is the principal bulk regulation controlling the size of buildings. FAR is the ratio of total building floor area to the area of its zoning lot. Each zoning district has an FAR which, when multiplied by the lot area of the zoning lot, produces the maximum amount of floor area allowable on that zoning lot. For example, on a 10,000 square foot zoning lot in a district with a maximum FAR of 1.0, the floor area on the zoning lot cannot exceed 10,000 square feet.

There are two regulations promulgated by the State and the City that address this precise point. *See* ECL §8-109, 6 NYCRR §617.c and CEQR §6-06 (a) (4).

Therefore, Petitioners 400&500 State Street Block Association, Eileen Boxer, Laura McCallum, Jonathan Glazer, Alexander Hughes, Alan Seales and Michelle Itkowitz commenced this proceeding challenging the unconstitutionality of the "Spot Zoning" and the violation of the State Environmental Quality Review Act ("SEQRA") and the City Environmental Quality Review ("CEQR"). This Memorandum of Law is respectfully submitted in support of the Verified Petition.

Petitioners are individuals and an association that live, work and own low-rise brownstones along the 400 and 500 block of State Street. These individuals will be significantly and deleteriously impacted by the various land use approvals at stake in this case. The unprecedented increase in height and density within steps of Petitioners' front doors, will subject each individual and their families to noise, pollution, toxicity, loss of parking, congestion and the evisceration of their residential quality of life. To have introduced this zoning change without so much as a nod to the previously enacted SDBD, is not only a breach of trust with City government, it is an unconscionably lawless act benefiting one developer at the expense of the community.

The SDBD was created recently to create and provide a **transition** between the Downtown Brooklyn commercial core and the low-scale residential community exemplified by Petitioners.

The total square footage of the project is slated to surpass one million square feet. In addition to retail space, office space, a refurbished school and a new school, 922 residential units will be introduced into this location. The project is to be developed in two phases, spanning almost a decade of construction activity. The transformation of this location from a C6-2 Zoning District as envisioned by the SDBD to a C6-9 District, facilitates the construction of two towers, with height and density nearly 300% higher than previously allowed within the SDBD.

The first tower will be a mixed-use commercial and residential building rising 560 feet. All of the units in phase 1, will be luxury-for profit housing. This zoning change will net the developer hundreds of millions of dollars in additional square footage. Simultaneously with the increased profits realized by the developer, Petitioners will endure the burdens of a decade long disruption and plummeting property values. In essence, Petitioners are bearing a tax burden for the direct benefit of the developer. The second phase will witness a tower rising 845 feet and extending an unfathomable 74 stories high. The entrance to this residential, commercial and retail complex will face directly across from State Street. A nightmare of double-parked delivery trucks, construction vehicles along with the removal of toxic substance during excavation and demolition will destroy forever, the residential quality of life envisioned to be protected by the SDBD. This once quiet tree-lined community of low-rise homes faces the prospect of being turned into

the equivalent of Times Square. Alongside the residential units, will be 210,000 square feet of commercial space and 42,000 square feet of retail space.

As set forth herein, the extensive voluminous and encyclopedic Final Environmental Impact Statement ("FEIS") failed to accomplish its most basic and fundamental task, that is to evaluate the manner in which the violation of the City's long-term Zoning Plan for this community fundamentally and permanently alters the character of the neighborhood. This failure is patently violative of law and an arbitrary and capricious breach of public policy and municipal commitments to Petitioners.

STATEMENT OF RELEVANT FACTS

A full recitation of the implementing procedures that led to the enactment of the re-zoning of the location is set forth in the Verified Petition. The Zoning Amendment to the text of the New York City Zoning Resolution was passed by the New York City Council on September 26, 2018. The Zoning Amendment changed the location from C6-2 District to a new C6-9 District within the SDBD. The Zoning change permits ground floor use, parking and loading to facilitate a 1.1 Million square foot mixed use development with two schools, retail, office and over 900 residential units.

In conjunction with this zoning change, an environmental review was undertaken as mandated by law. However, the Environmental Review commenced by the City of New York, which designated the ECF as lead agency, was unlawful

and deficient. The lead agency is responsible for underwriting, producing and publishing a scoping document, a Draft Environmental Impact Statement ("DEIS"), holding Public Hearings, eliciting comments, responding to comments and issuing an FEIS. During the Public Hearing phase and the comment period, numerous speakers and commentators addressed the impact that this project would have in undermining the legislative purpose of the carefully articulated long-term planning encompassed within the SDBD. Despite the numerous and extensive data presented by the community, the conclusions set forth in the FEIS ignored these discussions and observations presented by elected officials, community residents, planning experts and Petitioners.

The purpose of the SDBD was to preserve residential and community character by creating a transition between the third largest central business district in the City of New York, the encroaching Atlantic Yards and the residential character of communities such as State Street. While the FEIS recognized that the project is located at the entrance to Downtown Brooklyn, the FEIS failed to recognize the transitional nature of the location. In a conclusory manner that defies logic or reason, the FEIS determined that "**the proposed action would not result in significant adverse impacts associated with neighborhood character**."

Rather than acknowledge the transitional nature of the location, the FEIS designated this spot as a "underutilized site." This phrase contradicts, defies and disregards the very statutory purpose of the SDBD. The FEIS goes to great pains to

detail mixed-use developments in the studied area and includes references to the Atlantic Terminal Mall and Barclays Center, however the protective umbrella presented by the SDBD to the residents of State Street is conspicuously absent. The FEIS references the need for affordable housing, however phase 1 of the project is devoid of affordable housing and it is unclear how affordable housing is guaranteed if financing falters in phase 2.

In a contradictory manner, the FEIS concedes that construction activity would result in significant negative impacts to neighborhood character during the length of construction activity. The FEIS concedes that the demolition of the buildings would alter neighborhood character in the immediate vicinity of Third Avenue and State Street. Additionally, noise levels will far exceed the minimum decibel levels allowed by the City of New York during the length of construction. The FEIS foresees eighteen months of excessive noise, which will be intermittent and non-consecutive. The noise impacts will exceed the mid-70's dBA with severe health consequences. No mitigation measures have been implemented addressing vibration levels, air emissions, the spewing of toxic dust or the prolonged traffic congestion and street closures that will be attendant with construction activity. An estimated 19.7 tons of solid waste per week will be generated by the project. An estimated 6.4 of commercial solid waste will be hauled away by private carters and New York City Sanitation trucks eviscerating the once bucolic tree-line State Street. The influx of

deliveries with loading and unloading along State Street remains an unmitigated impact severely damaging neighborhood character.

The nature, length, duration and extent of construction activity stretching nearly a decade by itself, significantly alters the character and quality of the State Street residential neighborhood.

ARGUMENT

Point I

The Zoning Amendment Enacted by The City of New York on September 26, 2018 Changing the Zoning Map from C6-2 District to a C6-9 District on the Property Bounded by Schermerhorn Street, Flatbush Avenue, State Street and Third Avenue in the County of Kings, City of New York ("September 26, 2018 Zoning Amendment"), Constitutes Unlawful "Spot Zoning."

"Spot Zoning" is defined as the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area for the benefit of the owner of said property to the detriment of other owners.

New York State law requires that zoning acts such as the Zoning Amendments challenged herein be undertaken "in accordance with a well-considered plan."[2] or "in accordance with a comprehensive plan."[3] Taken together, the legal understanding of "comprehensive plan" means that a zoning law or amendment must

[2] New York Consolidated Law Gen. City Law §20(25).
[3] New York Consolidated Law Town Law §263; New York Consolidated Law Village Law §7-704.

be enacted in accordance with careful study and consideration that serves a greater purpose of the community.

The New York State Court of Appeals has elaborated that one of the fundamental requirements of a comprehensive plan, is that the zoning act must be carefully studied within the context of the plan before being enacted. In Thomas v. Town of Bedford, 11 N.Y.2d 428 (1962) the Court of Appeals upheld a rezoning from residential to research-office use, finding that it had been enacted after careful study and consultation with experts as well as after extensive public hearings.

Additionally, in Udell v. Haas, 21 N.Y.2d 463, 470 (1968) the Court of Appeals stated that "one of the key factors" to be used by the courts in determining whether zoning is "in accordance with a comprehensive plan" is whether forethought has been given to the community's land use issues. The Udell court went on to hold that "Where a community, after a careful and deliberate review of 'the present and reasonably foreseeable needs of the community', adopts a general developmental policy for the community as a whole and amends its zoning law in accordance with that plan, courts can have some confidence that the public interest is being served."

In this proceeding, there can be little doubt that the SDBD is the comprehensive plan as discussed by the Court of Appeals in Thomas and Udell. The SDBD was enacted by the City of New York and crafted by the City Planning Commission after years of careful analysis and support by local elected officials and residents. Its core purpose is to serve as the transition zone between the expanding

Downtown Brooklyn Commerical District, and the residential low-rise brownstones of Boerum Hill.

In Udell v. McFadyen, 40 Misc.2d 265, 267 (Sup. Ct., Nassau Co., 1963), the Supreme Court delineated some of the factors of comprehensive plan by writing that "The phrase 'in accordance with a comprehensive plan' may be understood to mean (1) conforming to a master plan, (2) broad in scope of coverage, (3) all-inclusive in control of use, height and area, or (4) internally consistent zoning based on a rational underlying policy."

While the City can adopt Zoning Amendments that respond to changing conditions in the community, the City's actions must reflect a reasoned and thought out planning basis or goal consistent with the pre-existing legislatively articulated land use policies directly related to the location in question. *See* Matter of Town of Bedford v. Village of Mount Kisco, 33 NY2d 178 (1973). The linchpin of "Spot Zoning", is that it occurs when legislative action is undertaken that conflicts with the fundamental land use policies and development plans of the community. *See* Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 NY2d 668, 685 (Ct. of Appeals 1996).

No single document is decisive as it relates to a comprehensive plan, however in this case, there is a comprehensive plan that pertains precisely and specifically to this location. The Court of Appeals in Town of Bedford recognized that zoning changes must be consonant with a total planning strategy, reflecting consideration of the needs of the community. What the Courts have mandated, is a logical,

rational, comprehensive source of planning. To completely disregard the comprehensive plan that was developed for this exact location, literally defines arbitrary, capricious and irrational behavior. The decision makers must show that they gave "some thought to the community's land use problems." *See* Eggert v. Town Board of the Town of Westfield, 217 AD 2d 975, 977 (4th Dept. 1995).

The requirements of a comprehensive or well-considered plan not only regulate governmental action, but it protects individuals from arbitrarily imposed burdens that would be fostered by the implementation of discriminatorily beneficial zoning decisions. It is the arbitrary and preferential imposition of burdens and benefits that creates the constitutional impediment in this case. While Petitioners must overcome a heavy burden to prove the unconstitutionality of governmental actions, the extreme burdens and outlandish benefits in violation of the SDBD makes that burden an easy lift in this case. *See* Asian-Americans for Equality v. Koch, 72 NY2d 121 (1988); *see also* Cannon v. Murphy, 196 AD 2d 498 (2nd Dept. 1993).

Point II

The September 26, 2018 Zoning Amendment Violates the State and City Environmental Statute, Rules and Regulations

The seminal case of Jackson v. New York State Urban Development Corp., 67 N.Y.2d 400 (N.Y. 1986) proclaimed that the heart of the State Environmental Quality Review Act ("SEQRA") is the Environmental Impact Statement ("EIS")

citing Matter of Town of Henrietta v. Department of Environmental Conservation, 76 AD 2d 215, 220. The Court, in Jackson, established the role of the judiciary in reviewing an agency's procedures is to determine whether they were lawful. Critically, the Court may review the record to determine whether the agency identified the relevant areas of environmental concern, took a "hard look" and made a "reasoned elaboration" of the basis of its determination. *See* Aldrich v. Pattison, 107 A.D.2d 258, 265*; see also* Coalition Against Lincoln W. v. City of New York, 94 A.D.2d 483, 491, *affidavit* 60 N.Y.2d 805*; see also* H.O.M.E.S. v. New York State Urban Dev. Corp., 69 A.D.2d 222, 232.

In the Matter of Merson v. McNally, 90 N.Y.2d 742 (1997), the Court of Appeals was definitive that an agency must adhere strictly with the review procedures outlines in SEQRA. The policies that provide foundational support for the implementation of environmental laws and regulations can only be accomplished through strict adherence to the procedural mandates of SEQRA. *See also*, Matter of King v. Saratoga County Board of Supervisors, 89 NY 2d 341, 347-348 (1996). In Youngerwith v. Town of Ramapo, 155 AD3d 755 (2nd Dept. 2017), the Court summarized a long line of Court of Appeals decisions by holding that in a statutory scheme whose purpose is to compel agency decision makers to focus attention on environmental concerns, it is not the role of the Courts to weigh the desirability of any action or choose among alternatives, **but to assure that the agency itself has satisfied SEQRA procedurally and substantively** (*emphasis added*).

SEQRA is designed to assure that the main environmental concerns of a community are addressed and that the measures to mitigate them, are described in a publicly filed document identified as an EIS. *See* Matter of Bronx Comm. for Toxic Free Schools v. New York City Sch. Constr. Auth., 20 NY 3d, 148 (2012). In the case of New York City Coalition to End Lead Poisoning, Inc. v. Vallone, 160 NY 3d 337, 2003, the Court emphasized that the requirement of strict compliance insures that agencies will err on the side of meticulous care in their environmental review. The Court insightfully recognized that anything less than strict compliance, offers an incentive to cut corners at the ultimate expense of the environment. That is precisely the situation in this case. The failure to evaluate the breach of the SDBD has fostered catastrophic consequences upon the residents of State Street. With the transitional zone torn asunder, drastic consequences will be inflicted upon Petitioners. The statutory language of the implementing regulations of both SEQRA and CEQR makes it irrefutable that the EIS in this matter was deficient. 6 NYCRR 617.7(c)(iv) mandates that "a decision that creates a material conflict with a community's current plans or goals as officially approved or adopted" must be evaluated. There can be no question that the recently enacted SDBD stands in stark conflict with the challenged Zoning Amendment. If there is any doubt, the City regulations also contain that precise requirement. *See* CEQR §6-06(2)(4).

The failure to take a "hard look" at the contradictions between the legislative purpose of the SDBD and the Zoning Amendment in the context of its impact upon

the neighborhood character of State Street, was an arbitrary and capricious abuse of discretion and violative of the environmental laws of this State and City.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the relief sought in the Notice of Petition be granted.

Dated: New York, New York
March 18, 2019

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