To Be Argued By:
Steven C. Russo

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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

In the Matter of the Application of

THE FRIENDS OF P.S. 163, INC.; THE P.S. 163 SCHOOL LEADERSHIP TEAM; JOSHUA KROSS; MILES KROSS, by his father, Joshua Kross; STELLA KROSS, by her father, Joshua Kross; EUGENIA FINGERMAN; ELIJAH FINGERMAN, by his mother, Eugenia Fingerman; GISELLE SANCHEZ; GIOVANNI FELICIANO, by his mother, Giselle Sanchez; LUCINDY CUEVAS; ANNELI LOPEZ, by her mother, Lucindy Cuevas; KEVIN RICHARDSON; CAMERON RICHARDSON, by his father, Kevin Richardson; DANIEL WEBSTER; DANIEL J. WEBSTER, by his father, Daniel Webster; DANIEL HOLT; and RACHEL BAKER-HOLT, by her father, Daniel Holt,

Petitioners-Respondents,

for a Judgment under Article 78

against

JEWISH HOME LIFECARE, MANHATTAN,

Respondent-Appellant,

and

NEW YORK STATE DEPARTMENT OF HEALTH, 156 W. 106TH STREET HOLDING CORP., 102 W. 107TH CORP., & PWV OWNER, LLC,

Respondents.

REPLY BRIEF FOR RESPONDENT-APPELLANT

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INTRODUCTION

The opposition briefs of Petitioner-Respondents Friends of P.S. 163, Inc. et. al ("Friends") and the Daisy Wright Petitioner-Respondents ("Tenants")[1] make clear that they disagree with the conclusions reached by the New York State Department of Health ("DOH") in its State Environmental Quality Review Act ("SEQRA") Findings. That policy disagreement, however, does not mean that DOH's SEQRA review was deficient. Under well-established Court of Appeals precedent, a policy disagreement did not permit the court below to substitute its judgment for that of the lead agency. Here, in authorizing the construction of the Jewish Home Lifecare's ("JHL") nursing facility ("New Facility") at 125 West 97th Street ("Project Site"), DOH identified environmental impacts—albeit temporary—and balanced them against long-term benefits of having this New Facility serve New York's aging population. The lower court is not empowered to second guess that determination.

The Friends fail to identify a single case where a court held that an Environmental Impact Statement ("EIS") that complied with the standards of the *CEQR Technical Manual* did not take the "hard look" required under SEQRA. Mayor's Office of Sustainability, *CEQR Technical Manual* (2014), http://www.nyc.gov/html/oec/html/ceqr/technical_manual_2014.shtml. Similarly,

[1] For expediency, JHL's reply brief jointly responds to the opposition of the Friends and Tenants, but will be filed separately under the captions for each proceeding.

the Friends and the Tenants have not produced any cases where a showing that air emissions measures that comply with applicable National Ambient Air Quality Standards ("NAAQS") have been found to not comply with SEQRA. The unprecedented nature of the lower court's ruling has caused both the City of New York, as well as the Real Estate Board of New York, to file amicus briefs urging reversal. That is hardly surprising given amici's understanding that the decision below creates a precedent that would make construction adjacent to any sensitive population virtually impossible and remove the predictability assured by compliance with SEQRA's accepted criteria.

The Petitioner-Respondents do not meaningfully rebut JHL's argument that the trial court's decision was based on a misapprehension that the *CEQR Technical Manual* and the NAAQS do not apply to sensitive locations such as a school. There is nothing exceptional about construction next to a school in densely-populated New York City. As JHL pointed out in its opening brief ("JHL's Br."), both the construction noise impact assessment criteria in the *CEQR Technical Manual* and the NAAQS for lead were specifically developed to consider impacts on sensitive populations such as school children.

Faced with this demonstrable showing of clear error by the lower court, the Friends resuscitate old arguments that are devoid of merit. For example, the Friends continue to maintain that the construction noise levels at the school will be

higher than predicted in the final EIS ("FEIS") because the windows would have to remain open during the noisiest parts of construction due to inadequate ventilation. There is no basis in law or logic to assume that school officials would keep windows open after JHL spent considerable money installing a second layer of sound-attenuating windows for the express purpose of reducing construction noise. Nor is there any evidence in the Record that the New York City Department of Education ("NYCDOE") has any concern with the safety and legality of using window unit air conditioners as a temporary means to ventilate the classrooms.

Similarly, there was ample basis in the Record to support the rationality of DOH's determination not to require a not-for-profit health care provider to pay for the installation of central air conditioning in a sixty-year old elementary school to mitigate a nine-month construction noise impact. DOH relied on the opinion of the New York City School Construction Authority ("NYCSCA"), the agency charged with school construction in New York City, which advised DOH that installation of such a system would be difficult, take a great amount of time, and cost between $8 and $10 million. (A. 3027.) DOH was entitled to rely on the expertise of another government agency and, while the Friends and the lower court may disagree with NYCSCA's assessment, DOH's reliance on it cannot be deemed unreasonable.

The Record here demonstrates that the FEIS identified and fully analyzed the potential adverse construction impacts, including those impacts related to construction noise and hazardous materials. That review led to DOH requiring JHL to install sound-attenuating windows on the adjacent P.S. 163, a highly uncommon and costly mitigation measure, even though the construction noise impacts would occur intermittingly for only nine months. DOH then balanced in its SEQRA Findings the benefits of constructing this critical, modern health care facility with the temporary and essentially unavoidable impacts associated with the construction of the facility. That balancing is committed to the sound discretion of DOH. Because Supreme Court improperly substituted its judgment for the considered judgment of DOH, the decision below should be reversed.

POINT I

JHL RETAINS ITS RIGHT TO APPEAL

The Court should reject the Friends' first argument that, because DOH did not directly appeal the judgment below, JHL is now foreclosed from appealing that judgment. (Friends' Br. at 21-23.) The weakness of the Friends' argument is underscored by the fact that they quote from *only part* of the general rule regarding the limits of an appellate court's scope of review, deleting the aspect of the rule directly applicable here—that a co-party retains its right to appeal the full judgment "rendered against parties having a united and inseverable interest in the

judgment's subject matter." *Hecht v. City of New York*, 60 N.Y.2d 57, 62 (1983). An analog of this general rule, also applicable here, is that "an appellate court's scope of review with respect to an appellant, once an appeal has been timely taken, is generally limited to those parts of the judgment that have been appealed *and that aggrieve the appealing party*." *Id.* at 61 (emphasis added).[2]

There is no question that JHL has a united and inseverable interest in the subject matter of the judgment below and has been aggrieved by all aspects of that judgment. As in all C.P.L.R. Article 78 proceedings challenging an agency's issuance of a permit, JHL—as the applicant for authorization to construct from DOH—was a "necessary party" below pursuant to C.P.L.R. 1001(a). *See Ferrando v. N.Y.C. Bd. of Stds. & Appeals*, 12 A.D.3d 287, 288 (1st Dep't 2004) ("[O]wner of the premises for which the disputed certificate of occupancy was issued" constitutes "a necessary party."); *Llana v. Town of Pittsfield*, 245 A.D.2d 968, 968-69 (3d Dep't 1997) ("[S]even property owners who had been granted subdivision approval prior to the commencement of [Article 78] proceeding" found to be "indispensible" parties.). As a necessary party to the lower court's judgment annulling the DOH approval, JHL was "inequitably affected" (*i.e.*, aggrieved) by the judgment below. C.P.L.R. 1001(a). Thus, as a matter of law, JHL may appeal the full judgment below.

[2] The Court further noted that "it is axiomatic that once an appeal is properly before it, a court may fashion complete relief to the appealing party." *Id.* at 62.

Additionally, while DOH reviewed, adopted, and otherwise provided guidance with respect to the draft EIS ("DEIS") and FEIS, and issued the Findings Statement, JHL—as the project sponsor—undertook substantial work underlying the determinations at issue here. (A. 3002-3003.) *See* 6 N.Y.C.R.R. Part 617.9(a)(1) ("The project sponsor or the lead agency, at the project sponsor's option, will prepare the draft EIS."). Thus, in all respects, JHL was a joint party with DOH and has a united and inseverable interest in the subject matter of the judgment below.

Finally, the holding of *Hecht* was influenced by the unusual circumstances at issue there, whereby the non-appealing party to a trial court judgment reversed on appeal was found jointly and severally liable in the context of the original judgment appealed from. *Hecht*, 60 N.Y.2d at 62-63. The Court thus ruled that, because "a judgment for or against one tort-feasor does not operate as a merger or bar of a claim against other tort-feasors," the interests of the non-appealing party are "severable from that of its codefendant." *Id*. It reached this result because the plaintiff could have "proceed[ed] against any or all defendants." *Id.* at 62. Here, by contrast, C.P.L.R. 1001(a) *required* both DOH and JHL to be sued as necessary parties below, indicating the joint and inseverable link between an applicant for a permit and the government agency in charge of issuing a final decision on the underlying permit application. C.P.L.R. 1001(a). Accordingly, because the

interests of JHL in seeking DOH approval as a pre-condition for constructing the project are inextricably linked to DOH's approval pursuant to Public Health Law ("PHL") § 2802, JHL may proceed with this appeal regardless of whether DOH filed a notice of appeal.

POINT II

THE FRIENDS HAVE FAILED TO SHOW HOW DOH'S CONSIDERATION OF CONSTRUCTION NOISE IMPACTS ON P.S. 163 WAS ARBITRARY OR IRRATIONAL

The Friends do not provide any meaningful rebuttal to the arguments presented in JHL's brief, namely that Supreme Court ignored the highly deferential standard of review applicable to the review of a lead agency's EIS, and based its conclusion—that DOH failed to take a "hard look" on construction noise impacts on P.S. 163—on the misapprehension that the *CEQR Technical Manual* did not speak to the assessment of construction noise impacts on sensitive receptors such as schools. (JHL Br. at 31-46.) Instead, they simply restate the lower court's conclusory ruling that the FEIS was required to go beyond the requirements of the *CEQR Technical Manual* because of impacts on the "learning environment" of those attending P.S. 163. (Friends' Br. at 32.)

The Friends' overheated rhetoric notwithstanding, there is nothing unique about the construction of a nursing home. The proposed twenty-story JHL facility conforms with the zoning for the Project Site and is being constructed with

standard methods pursuant to a typical thirty-month project schedule. (JHL Br. at 29-30, 45.) Additionally, there is simply no basis underlying the Friends' claim that the methodology and standards applied in the FEIS to analyze the construction noise did not adequately take into account sensitive receptors such as schools. Indeed, the Friends do not dispute either that DOH correctly followed the methodology and standards for assessing construction noise impacts described in the *CEQR Technical Manual*, or that the *Manual* was specifically developed to provide a framework for consideration of construction noise impacts on sensitive receptors. (JHL Br. at 29.) There is also no question that the *CEQR Technical Manual's* assessment criteria are based on impacts to sensitive populations, including children. *CEQR Technical Manual* at 19-6, 22-3 (identifying schools as "noise-sensitive receptors" and "highly-sensitive locations").

Given that error, it was irrational for the lower court to nullify DOH's conclusion with regard to temporary construction noise impacts on P.S. 163. The Friends ignore that, because DOH found that the temporary noise impacts associated with construction would *not* be significant—taking into account the multiple noise attenuation measures agreed to by JHL—DOH had *no* obligation to require mitigation under SEQRA; in particular, the mitigation measures advocated by the Friends. That DOH nevertheless provided extensive attenuation measures,

far exceeding the noise reduction measures required by law, should be applauded rather than attacked.

Given the reversible error by the lower court in holding that additional study was necessary because the *CEQR Technical Manual* does not address sensitive receptors such as schools, the Friends throw spaghetti at the wall. First, they reprise their argument, rejected by the lower court, that noise levels inside P.S. 163 will greatly exceed the levels predicted in the FEIS because the windows must always remain open throughout the school day, even when the noisiest construction is ongoing. (Friends' Br. at 38.) Second, they continue to press an argument, initially raised after the close of the comment period on the DEIS, that central air conditioning is the "only" method of providing ventilation when the classroom windows are closed because the use of window unit air conditioners for ventilation allegedly violates the New York City Mechanical Code. (Friends' Br. at 43.) Finally, they argue that it was irrational for DOH not to require central air conditioning of the school's auditorium and claim, wrongly, that the FEIS did not consider or analyze the impact of high impulsive noises during construction of the proposed nursing home. (Friends' Br. at 47-49.)

These arguments have no merit. First, the Friends' claim that the school windows must remain open makes the irrational assumption that P.S. 163 was designed to operate with windows open during all seasons as a means of providing

fresh air. There is nothing in the Record to support the claim that leaving sound-attenuating windows closed during periods of noisy construction would harm children because of the supposed lack of fresh air or that central air conditioning is the sole method for providing ventilation of the classrooms during the period of the most intense construction activity. It was not unreasonable for DOH to conclude that with the noise attenuation measures in place, the school would leave the windows closed during the noisiest period of construction. The Friends' claim that the use of window unit air conditioners somehow violates the New York City Mechanical Code was not raised until after the FEIS, and thus should not be considered here, and is otherwise without merit.

A. DOH Complied with the *CEQR Technical Manual*

The Friends wrongly contend that the FEIS failed to analyze how P.S. 163's learning environment would be impacted by the proposed construction. (Friends' Br. at 32.) At another point, the Friends disingenuously claim that JHL and DOH "ignored the *CEQR Technical Manual's* requirement to conduct an analysis where construction duration may be 'short,' but nonetheless the impacts are significant." (Friends' Br. at 32-33.) As the FEIS makes clear, even though the noisiest aspects of the proposed construction would not last two years or longer, DOH required collection from fourteen separate noise receptor areas near P.S. 163, including receptors close to the temporary trailers that are used as an "annex" for

kindergarten students. (A. 2702-2704, 2706, 2712.) The FEIS described in detail the numerous measures DOH required JHL to implement to reduce construction noise that went far beyond what was required by law. (A. 2705.) The FEIS calculated the noise levels to be expected at the fourteen receptor locations during various aspects of the construction, concluding that exceedances of *CEQR Technical Manual* impact criteria "would occur intermittingly for no more than 9 consecutive months and no more than 14 total months." (A. 1700.) Those calculations were not questioned by the lower court, and plainly show that a detailed analysis of the construction noise impacts on P.S. 163 was conducted per the *CEQR Technical Manual*. (*Id.*)

The Friends assert that DOH was required to use a more stringent standard than the 45 dBA level specified in the *CEQR Technical Manual* to examine noise exceedances at the school. Essentially they seek a rule—not contained in the *CEQR Technical Manual*—that forbids any construction near a school that results in any indoor ambient noise that exceeds 45 dBA. Such an unwritten rule would effectively prevent new construction at or adjacent to schools or any other sensitive receptor.

Contrary to the Friends' claims, the FEIS did not ignore potential impacts on P.S. 163's learning environment. Rather, DOH simply did not agree with the Friends' noise consultants that exceeding 45 dBA of noise in a classroom is *per se*

unacceptable. The FEIS noted that the "only [noise] threshold specifically mentioned [in Friends' comments] relating to physiological effects is 85 dBA, which is well above the interior noise levels that would be experienced at the school." (A. 2858.) The FEIS concluded that the noise levels that were predicted to occur during the loudest times within the nine-month window of most intense construction activity were "comparable to background noise levels in an office, and have not been demonstrated to have the potential to result in negative health effects to students." (*Id*.) The FEIS also noted that "conclusions regarding the effects of noise [from] more constant sources such as vehicular or aircraft traffic on reading comprehension in children do not necessarily apply to construction noise which is more intermittent." (A. 2858-2859.) Moreover, the FEIS specifically addressed the Friends' demand that a more stringent noise standard be applied, noting that the 45 dBA level recommended by the *CEQR Technical Manual* was slightly lower than the NYCSCA's own design guidelines for constructing schools in New York City. (A. 2857.)

As noted by the City of New York, a proposed amicus and author of the *CEQR Technical Manual*, the 45 dBA standard for indoor noise during daytime hours is not "absolute." (Amicus City of New York Br. at 10.) The Friends can point to no requirement that an agency refrain from development if temporary construction noise impacts exceed 45 dBA for any period of time, and the *CEQR*

Technical Manual does not suggest such an absolutist approach. Rather, logic and SEQRA's "rule of reason" require only that a lead agency consider such effects when determining whether to undertake or approve a proposed action. Here, the Record demonstrates that DOH fully quantified and considered the construction noise impacts on P.S. 163 in the FEIS, and weighed those impacts and the project benefits in its SEQRA Findings Statement. (A. 2971, 2975-2977.) SEQRA requires nothing more, and explicitly precludes courts from stepping into that balancing process to substitute its judgment for the judgment of the lead agency. *Akpan v. Koch*, 152 A.D.2d 113, 117 (1st Dep't 1989) *aff'd*, 75 N.Y.2d 561 (1990) ("[I]t is not for us—as a court—to substitute our judgment for that of the Legislature."); *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986) ("Nothing in the law . . . permits the courts to second-guess the agency's choice.").

Thus, it is not surprising that the Friends cannot cite to a case in New York where a court invalidated an FEIS based on temporary construction noise impacts at the levels and duration identified here. Instead, the Friends rely on *Los Angeles Unified School District v. City of Los Angeles*, 68 Cal.Rptr.2d 367 (Cal. Ct. App. 1997), a case decided under a different environmental review statute in California with facts far afield from the instant proceeding. Unlike here, that case involved the consideration of air conditioning to mitigate permanent air pollution and traffic

noise impacts, rather than temporary construction noise impacts. (*Id*.) It has no bearing on the facts at issue here.[3]

B. Supreme Court Did Not Base its Holding On the Friends' Irrational Assumption that P.S. 163 Would Maintain Open Windows Throughout the Noisiest Periods of Construction

The Friends erroneously claim that construction noise levels at P.S. 163 would "range from the low- to the high-70s dBA." (Friends' Br. at 26.) The FEIS, however, contains no such finding. Rather, it concluded that "interior noise levels at P.S. 163 would reach the low-50s dBA" within the nine-month window of the most intense construction period activity. (A. 2845.) The Friends' claim of noise levels is based on their unreasonable assumption that windows would have to remain open at P.S. 163 throughout the noisiest periods of construction.[4] Supreme Court correctly accepted the calculations presented in the FEIS—based on the windows remaining closed—but nevertheless erroneously concluded that DOH's noise assessment was insufficient because it failed to address "the special

[3] The Friends cite to two additional extra-jurisdictional cases that arose under the separate legal standards of other state's environmental review statutes—*Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Com'rs*, 111 Cal.Rptr.2d 598, 615 (Cal. Ct. App. 2001), and *City of Fed. Way v. Town & Country Real Estate, LLC*, 161 Wash.App. 17, 252 P.3d 382 (Wash. Ct. App. 2011)—neither of which are at all applicable to the environmental review conducted by DOH. Both cases arose under other statutory regimes and involved permanent impacts rather than temporary construction impacts. In *Berkeley*, the noise analysis in the environmental impact report failed to account for nighttime flights, a major impact of increased cargo flights; here, it is uncontroverted that the FEIS focused on the entire time frame when construction would occur. *Federal Way* is even less applicable because it addresses a lead agency's failure to prepare an EIS.

[4] The Friends' assertion that noise levels inside P.S. 163 would rise by 800% (Friends' Br. at 27) is similarly based on the unreasonable assumption that windows would remain open during the noisiest periods of construction. (A. 398.)

circumstances here." (A. 36.) This was reversible error because it assumed incorrectly that the criteria in the *CEQR Technical Manual* are not based upon impacts to sensitive receptors like school children. (JHL Br. at 39-46.)

The Friends' further claim that the New York City Mechanical Code requires that classroom windows remain open during the noisiest periods of construction relies entirely on the self-serving statement submitted by one of their consultants after the completion and certification of the FEIS as complete. (Friends' Br. at 38.) This Court should reject this argument because the Friends raised it for the first time in comments *after* the FEIS was issued. (A. 3187-88.) Under SEQRA, "[r]eview of the substance of a FEIS should be based upon evidence refuting the analysis and conclusions contained therein which the lead agency had an opportunity to consider in the first instance." *Aldrich v. Pattison*, 107 A.D.2d 258, 268 (2d Dep't 1985). Allowing project opponents the opportunity to "ambush" an agency with adverse evidence after the close of public commentary is contrary to the cooperative intent underlying SEQRA. *Jackson*, 67 N.Y.2d at 427 ("Permitting a party to raise a new issue after issuance of the FEIS or approval of the action has the potential for turning cooperation into ambush.").

Regardless, there is no merit to the Friends' claim that classroom windows must remain open, independent of weather conditions or outside ambient noise levels. DOH's Findings accurately observe that P.S. 163 currently uses window

unit air conditioners to cool the classrooms. (A. 3026.) Obviously those units would not serve their purpose if they were used while the windows were left open. (*Id*.) Further, the Record makes clear that the NYCDOE and NYCSCA were intimately involved in DOH's environmental review process and the outreach to the school administration and parents. (A. 467-469.)

Moreover, there is no basis for the contention that the current use of window unit air conditioners at P.S. 163 is illegal, improper, or dangerous. The language of the Mechanical Code speaks to the requirements for a current design of permanent air handling systems for buildings. Those provisions are irrelevant to the operation of a building constructed in the 1950s. To state the obvious, NYCSCA constructs new schools in a substantially different manner than when P.S. 163 was built. Code provisions applicable to new construction, however, do not preclude the continued reliance on window unit air conditioners at P.S. 163; nor does it preclude the use of such units as a temporary means of ventilation for times when windows must remain closed due to heat or because of construction noise.

C. DOH's Failure to Require JHL to Install Central Air Conditioning at P.S. 163 Was Within its Discretion and Not Arbitrary or Irrational

The Friends assert that the "only way" (Friends' Br. at 27) that window/wall attenuation can be achieved at P.S. 163 is by installing central air conditioning throughout the entire school, a measure that NYCSCA advised DOH "would be

very difficult, would take a great amount of time and would be extremely costly." (A. 3027.) As the Friends concede, NYCSCA further advised that "the cost of providing central air conditioning for the entire building is estimated at approximately $8 to $10 million." (Friends' Br. at 45; A. 3027.)

DOH's decision to reject the Friends' request that central air conditioning be required in lieu of installing window unit air conditioners was committed to the sound discretion of the lead agency, not the Friends or the lower court. DOH's Findings demonstrate that the agency relied heavily on the opinion and expertise of NYCSCA in determining that the installation of central air conditioning in this 1950s-era school was not justified. (A. 3027.) As noted in JHL's brief, it is not irrational for a lead agency to rely on the opinions of other agencies as to matters that are within that agency's area of expertise. (JHL Br. at 50) The Friends do not deny that the issue of timing, cost, and difficulty of a major capital improvement in a New York City public school is unquestionably within the expertise of NYCSCA.

The Friends attempt to belittle this reliance by asserting that DOH did not actually consult with NYCSCA, but rather relied on an e-mail exchange between NYCSCA and the Friends that DOH obtained. (Friends' Br. at 45.) However, the Record demonstrates that staff from the Dormitory Authority of the State of New York ("DASNY"), working with DOH in connection with the environmental

review of the project, regularly communicated and attended meetings with NYCSCA. (A. 682.) NYCSCA directly forwarded its communications with the Friends, assessing the feasibility and cost of installing central air conditioning, to DASNY, and DASNY forwarded the information to DOH. (*Id*.) That NYCSCA initially provided its assessment to the Friends rather than DOH does not in any way impugn the reliability of the information, or make it improper for DOH to have relied upon it.

The Friends also erroneously claim that the FEIS did not respond to their comments seeking central air conditioning and that this justified the lower court's finding that the agency failed to take a "hard look" at this proposed measure. (Friends' Br. at 27, 46.) However, the Friends' discussion of central air conditioning was presented in their comment on the DEIS as a component of its consultants' demand for installation of noise attenuating windows to increase noise attenuation in the school. (A. 2240-2241.) As noted in JHL's brief, those comments were not ignored. (A. 37.) The FEIS addressed the Friends' comments by requiring JHL to implement, at its own cost, several additional measures to attenuate construction-related noise impacts, including installing an additional layer of sound-attenuating windows and providing new window air conditioner units in the classrooms without functioning units. (JHL Br. at 47-48; A. 2694, 2712.)

The Friends argue that, even though DOH accepted their recommendation as to the sound-attenuating windows, anything short of acceptance of their consultants' proposed ventilation measure is *per se* irrational. (Friends Br. at 27-28.) They provide absolutely no legal support for that contention. Indeed, the Court of Appeals has held to the contrary, observing that SEQRA "does not require an agency to impose every conceivable mitigation measure, *or any particular one*." *Jackson*, 67 N.Y.2d at 421 (emphasis added); *see also, Aldrich*, 107 A.D.2d at 266; *H.O.M.E.S. v. N.Y.S. Urban Dev. Corp.*, 69 A.D.2d 222, 231 (4th Dep't 1979).

The Friends further contend that the aspects of DOH's SEQRA review related to the installation of central air conditioning in the school was "procedurally" improper because it was based on documents not included in the FEIS, and only discussed in DOH's SEQRA Findings. (Friends' Br. at 45-46.) As a threshold issue, matters of cost are not pertinent to a consideration of environmental impacts, and are thus appropriately addressed in a Findings Statement, a document explicitly designed to consider environmental impacts alongside "social, economic, and other essential considerations." 6 N.Y.C.R.R. 617.11(5). Furthermore, the issue of cost of central air conditioning was not pertinent until the Friends submitted their comments—post-FEIS—arguing for the installation of a central air conditioning system in lieu of the window unit air conditioners that DOH required JHL to install in the FEIS. JHL subsequently

provided written responses to those new issues raised by the Friends, and DOH addressed those new, post-FEIS comments in its SEQRA Findings. The SEQRA Findings were the only document issued by DOH following the submission of those comments, and thus the only vehicle for addressing the Friends' comment that window unit air conditioners were an inadequate alternate means of ventilation. Accordingly, DOH's choice to address that issue in its Findings was not procedurally improper.

D. The Friends' Remaining Claims Have No Merit

The Friends raise a number of additional arguments that were not adopted by Supreme Court as a basis for annulling the DOH approval of the New Facility. First, the Friends claim that the auditorium at P.S. 163 would be unusable because no air conditioning would be provided there. (Friends' Br. at 48.) This is just a reprise of their argument that central air conditioning is required mitigation. While the lower court and the Friends believe otherwise, the Record here does not demonstrate that DOH acted irrationally in making that assessment and determining that non-significant temporary impacts on a place of assembly should not preclude construction of this important state-of-the-art nursing care facility. That determination is especially reasonable in light of the fact that construction of another facility consistent with zoning would have none of the myriad noise reducing measures that DOH has imposed on JHL here.

The Friends also assert that JHL's commitment to install noise attenuating windows is "illusory" because the commitment is conditioned on the approval by NYCDOE. (Friends' Br. at 42.) Obviously any obligation for JHL to install a layer of temporary sound attenuating windows at the school must be conditioned upon NYCDOE approval. However, at no point has NYCDOE suggested that such approval would not be forthcoming. DOH's SEQRA Findings simply disclosed that, if for some reason NYCDOE does not approve the noise attenuating window installation, the noise attenuation inside the school would be reduced from 25 to 30 dBA with the sound-attenuating windows to 15 to 20 dBA. (A. 3026-3027.) Such disclosure does not make JHL's obligation to install the windows "illusory." Rather, it ensures transparency through the Findings Statement about construction noise impacts at P.S. 163 in the unlikely event that NYCDOE refuses to permit the installation of sound-attenuating windows. (A. 3026.)

Finally, the Friends claim that DOH erred because it focused on average sound levels ($L_{eq(1)}$) and statistical sound levels ($L_{10(1)}$), while "ignoring" high impulsive noise that the Friends allege has been shown to cause acute and long-term impacts on children. (Friends' Br. at 48.) This contention ignores the commitment made in the FEIS that all construction equipment would not exceed the legally permissible maximum level set by the New York City Noise Control

Code. (A. 2651.) As discussed in the affidavit of Daniel Abatemarco submitted below:

> [T]he New York City Noise Control Code governs permissible instantaneous maximum noise levels produced during construction of the type not captured by the L_{10} measurement. Here, the Code would prohibit instantaneous maximum noise levels from exceeding 85 dBA (for non-impulsive sound like an engine or concrete mixer) at or beyond the property line of the Project Site, or instantaneous maximum noise levels that are 15 dBA above the ambient noise level (for impulsive sound like impact pile driving).

(A. 405.) By committing to abide by the Noise Control Code, JHL is ensuring that sources of construction noise—whether high impulse or continuous—do not exceed the 85 dBA level at the property line. With sound attenuation provided by the school's façade and windows, even instantaneous noise would not exceed the low 60s dBA inside the school and would be no different from sirens or other instantaneous noise experienced at the school today. As the FEIS and mitigation plans clearly indicate an obligation to limit high impulsive noise, the Friends' claims that these impacts were ignored are meritless.

POINT III

PETITIONER-RESPONDENTS HAVE FAILEDTO DEMONSTRATE THAT DOH DID NOT TAKE A "HARD LOOK" AT THE POTENTIAL CONSTRUCTION IMPACTS FROM AIRBORNE LEAD

The arguments made by the Petitioner-Respondents regarding DOH's examination of the potential impacts of airborne lead are either contradicted by the Record or irrelevant. To start, neither the Tenants nor the Friends acknowledge the

aspects of the decision below refuting the identical arguments they make here, where the court ruled that DOH's Findings were based "on a comprehensive and detailed investigation of hazardous substances at the site, which considered the relevant environmental concerns raised by petitioners." (A. 40.) Similarly, while the Tenants cavalierly assert that DOH "misrepresented the data . . . so as to underestimate the dangers from lead dust as an area of environmental concern" (Tenants' Br. at 28), the court below correctly found that DOH tested "soil samples for numerous potentially hazardous materials . . ., such as lead and mercury, in accordance with CEQR Manual criteria and federal and state standards and guidelines in effect at the time." (A. 40.)

In an attempt to get around the Court's conclusion, the Tenants and the Friends cite to cleanup standards related to *hazardous waste sites*, but fail to explain how such standards apply to the Project Site. For example, each of the Petitioner-Respondents repeatedly asserts that DOH failed to follow the criteria provided in New York State Department of Environmental Conservation's ("DEC") Technical Guidance for Site Investigation and Remediation ("DER-10") in taking soil samples from the site. (Tenant's Br. at 19-20, 30-33; Friends' Br. at 51). DER-10, however, applies to sites subject to DEC's "Inactive Hazardous Waste Disposal Site Remedial Program" and related programs. *See* DER-10, at 1.[5]

[5] DER-10 can be found at: http://www.dec.ny.gov/docs/remediation_hudson_pdf/der10.pdf.

There is simply no evidence in the Record that the Project Site constitutes a hazardous waste site subject to DER-10, and the Tenants have offered no explanation as to why DER-10, or any other criteria related to hazardous waste sites, applies to the Project.[6] In response to similar arguments raised below, the lower court appropriately ruled that "it was not unreasonable for DOH to use the otherwise accepted standards in place at the time of the environmental review." (A. 41.)

Tellingly, neither the Tenants nor the Friends directly address the lower court's finding that SEQRA can be used to dictate the use of a tent as a mitigation measure. (A. 42.) Questions regarding mitigation—such as use of a tent to enwrap a construction site—only become relevant upon the agency's finding that a proposed project may have the potential for "a significant adverse environmental impact." *See* 6 N.Y.C.R.R. §§ 617.7(a)(1), 617.9(b)(5). Here, the FEIS appropriately determined that potential impacts related to pathways for human exposure to lead and other dust-related particulate matter "would be avoided by implementing the . . . measures" required under the Remedial Action Plan and Construction Health and Safety Plan. (JHL Br. at 54.) It was thus reversible error

[6] The Petitioner-Respondents also point, absent any explanation, to unspecified "guidance" issued by the New York City Office of Environmental Remediation guidance (Tenants' Br. at 31; Friends' Br. at 51). To the extent the Tenants meant to reference guidance related to New York City's E-Designation regulations, those regulations apply only to former industrial sites that have been rezoned for residential uses. *See* E-Designation Program, http://www.nyc.gov/html/oer/html/e-designation/rules.shtml.

for the court below to dictate a mitigation measure for DOH to impose in the absence of ruling that the agency's determination in this regard was arbitrary and capricious. Indeed, based upon the lower court's dual findings that DOH (i) undertook a "comprehensive and detailed investigation of hazardous substances," and (ii) then applied "otherwise accepted standards in place at the time of the environmental review," the only logical conclusion is that DOH's determination regarding exposure to airborne lead was reasonable.

Nor do the Tenants and Friends distinguish the several cases holding that an agency's use of the NAAQS as the appropriate air pollution standard is *per se* reasonable. *See Spitzer v. Farrell*, 100 N.Y.2d 186, 191 (2003) ("Although the SEQRA review could have been conducted without reliance on the federal air standards, here it was rational for the agency, which is not an expert on air quality, to use such standards in its analysis."); *Bronx Envtl. Health & Justice, Inc. v. N.Y.C. Dep't of Envtl. Protection*, 8 Misc. 3d 1002(A), 2005 WL 1389360 at 7 (Sup. Ct. N.Y. Co. 2005) (air quality analysis applying NAAQS found reasonable). For their part, the Tenants claim that the NAAQS for lead is "outdated" but their only citation for this theory is to a Federal Register notice, in which the U.S. Environmental Protection Agency ("EPA") proposes "*to retain the current standards, without revision*." (Tenants' Br. at 38) (quoting 80 Fed. Reg. 283 (Jan.

5, 2015)) (emphasis added.) Obviously, EPA's proposal does not support the Tenants' position.

Rather than providing any support in the Record for their various theories, the Friends and Tenants resort to pulling at heart strings and making false accusations. For example, the Friends seek to make hay out of the issue of lead toxicity in the drinking water supply of Flint, Michigan (Friends' Br. at 51), which is irrelevant to the potential exposure to airborne lead at issue here. Each of the Petitioner-Respondents also accuses DOH of having failed to consider the potential impact of airborne lead on children. (*Id.* at 50; Tenants' Br. at 40.) However, DOH dedicated an entire section of the FEIS to evaluating the public health impacts of the Project "given the extent of public concern over lead, in particular the potential for lead exposure to the community during the construction of the Proposed Project, an assessment of public health is presented below." (A. 2649.)

It is precisely because of DOH's concern for the health of children and the elderly that the agency applied the NAAQS for lead, which specifically accounts for "'sensitive' populations such as asthmatics, children, and the elderly." (A. 1693-1694, 1854-1855; JHL Br. at 63, n. 20.) Indeed, the Federal Register notice that the Tenants cite also points to the fact that, in setting the NAAQS for lead, "primary attention was given to consideration of nervous system effects, including neurocognitive and neurobehavioral effects, in children." 80 Fed. Reg. at 286/3.

In the end, the aspects of the Project related to "[e]xcavation and foundation activities . . . would take approximately 3 months to complete." (A. 2484.) The two New York State agencies that have the greatest technical expertise relating to public health and environmental remediation—DOH and DEC—both agreed that the three-month excavation of the Project Site would not result in any harmful exposure to airborne dust. (A. 3011.) Neither Petitioner-Respondent has raised any arguments to show that this finding was arbitrary and capricious. Accordingly, Supreme Court's decision related to the impacts of airborne lead should be reversed.

CONCLUSION

For the reasons stated above, the decision of the Supreme Court should be reversed and DOH's approval of JHL's new proposed nursing care facility reinstated.

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