No. 100641/15 & 100546/15

To be argued by:
ANDREW R. DAVIES

Supreme Court, New York County

Supreme Court of the State of New York
Appellate Division – First Department

In the Matter of the Application of

NATHANIEL ROBERT LIVINGSTON, by his parent Daisy Wright, et al.,

Petitioners-Respondents,

For a Judgment Pursuant to Article 78 of
the Civil Practice Law & Rules

-against-

NEW YORK STATE DEPARTMENT OF HEALTH, et al.,

Respondents-Respondents,

-and-

JEWISH HOME LIFECARE MANHATTAN,

Respondent-Appellant.

(captions continued on inside front cover)

BRIEF FOR RESPONDENT N.Y. STATE DEPARTMENT OF HEALTH AND COMMISSIONER ZUCKER

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Dated: March 22, 2016

(caption continued from front cover)

In the Matter of the Application of

THE FRIENDS OF P.S. 163, INC., et al.,

Petitioners-Respondents,

For a Judgment Pursuant to Article 78 of
the Civil Practice Law & Rules

-against-

JEWISH HOME LIFECARE MANHATTAN,

Respondent-Appellant.

-and-

NEW YORK STATE DEPARTMENT OF HEALTH, et al.,

Respondents-Respondents.

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PRELIMINARY STATEMENT

Pursuant to its authority under the Public Health Law, respondent Department of Health (DOH)[1] approved an application by respondent-appellant Jewish Home Lifecare (JHL) to build a new, state-of-the-art nursing home on the Upper West Side. DOH's approval was based on its finding that the public interest warranted a new nursing home at this location, which will better serve New York City's growing and vulnerable population of the elderly. Accordingly, the new facility will be constructed using an innovative model of long-term care that promotes residents' independence and quality of life. When the new building is completed, JHL will be able to close a nearby existing facility that is housed in old, outdated buildings that adversely affect residents' quality of life.

As part of the approval process, DOH was required to conduct an environmental review under the State Environmental Quality Review Act (SEQRA). DOH fulfilled its responsibilities under SEQRA with a comprehensive environmental review that included multiple expert

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[1] As a party to the proceedings below, DOH is filing this brief as a respondent in support of appellant Jewish Home Lifecare.

studies, thousands of pages of documents and reports, and extensive public consultation. DOH also required JHL to undertake substantial efforts to avoid or mitigate the few environmental effects identified during the review process. Notably, the site of the proposed new facility is zoned for "as-of-right" development that does not require the discretionary approval of any agency. Thus, if this project did not go forward, the site could be developed for some other purpose without the measures that DOH has imposed to protect the neighboring population.

Notwithstanding the thoroughness of DOH's environmental review, the article 78 petitions that are the subject of these appeals challenge DOH's approval on the ground that it failed to comply with SEQRA. The petitions were brought by and on behalf of pupils at an elementary school (P.S. 163) that adjoins the site of the new facility, and tenants of neighboring apartment buildings. Supreme Court correctly rejected the majority of petitioners' claims. Yet in two narrow respects, Supreme Court erroneously found the review to be deficient. Specifically, Supreme Court determined that DOH did not take a sufficiently close look at how (a) construction noise and (b) lead exposure (from dust kicked up during construction) might affect the

students at P.S. 163, and questioned the sufficiency of DOH's extensive plans to avoid or mitigate both environmental impacts.

This Court should reverse and confirm the validity of DOH's SEQRA review. The record reflects that the SEQRA review considered all of the relevant issues and that DOH made a reasoned elaboration of the bases for its decisions. DOH's analysis of both construction noise and the potential risk from airborne lead fully considered the presence of the adjoining elementary school and accommodated that sensitive population. Moreover, DOH appropriately relied on accepted standards in analyzing both issues (specifically, environmental standards from New York City and the U.S. Environmental Protection Agency (EPA)), and imposed reasonable mitigation measures consistent with those standards. In concluding otherwise, Supreme Court impermissibly substituted its own judgment for that of DOH, and thereby overstepped its narrowly circumscribed role in reviewing a SEQRA determination. Supreme Court's decision should therefore be reversed.

ISSUES PRESENTED

1. Did DOH take a close look at the potential impact of construction noise on the students of P.S. 163, and at the measures that should be imposed to mitigate any such risk?

2. Did DOH take a close look at the potential impact of lead exposure, and at the measures that should be imposed to avoid any potential risk posed by lead exposure during construction?

Supreme Court answered both questions in the negative.

STATEMENT OF THE CASE

A. Statutory Background

Public Health Law § 2802 authorizes DOH to approve the construction of a nursing home if, *inter alia*, the Commissioner is satisfied of "the public need for the construction, at the time and place and under the circumstances proposed." Public Health Law (PHL) § 2802(2).

When an agency considers a discretionary action—such as an application under PHL § 2802—that may have a "significant effect on the environment," SEQRA requires the agency to prepare or cause to be prepared an environmental impact statement (EIS). Environmental

Conservation Law (ECL) § 8-0109(2). The EIS forms the "heart of SEQRA." *Matter of Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 415-16 (1986). The requirement to prepare an EIS ensures that the agency, in consultation with the public where appropriate, will identify and analyze the potential environmental impacts of proposed actions, impose such mitigative measures as are practicable in light of the relevant social, economic and other essential considerations, and articulate the bases for its choices. *See id.* at 414-16.

Procedurally, SEQRA requires the agency to prepare or cause to be prepared a draft environmental impact statement (DEIS), to file the DEIS with the Commissioner of Environmental Conservation, and to allow at least thirty days for public comment. *See id.* at 415-16. After reviewing any public comments, the agency must then prepare and file a final environmental impact statement (FEIS), together with written findings of the facts found by the agency and a certification that the requirements of SEQRA have been satisfied. *See id.*

Substantively, SEQRA requires that the EIS set forth a description of the proposed action, including its environmental impact and any unavoidable adverse impacts, alternatives to the proposed

action, and mitigation measures proposed to minimize the environmental impact. *See id.* at 416. The statute does not require "every conceivable environmental impact, mitigating measure or alternative" to be identified and addressed." *Id.* at 417 (quotation marks omitted). "The degree of detail with which each factor must be discussed obviously will vary with the circumstances and nature of the proposal." *Id.*

To implement SEQRA's mandates in "the special circumstances of New York City's urban environment," the City has promulgated the City Environmental Quality Review Technical Manual (CEQR Manual) to guide SEQRA review for projects in New York City.[2] The CEQR Manual provides a guide to analytical methodologies and impact criteria, supplying, for example, criteria to determine whether a detailed analysis of a project's impact on traffic conditions is required, and providing methodologies for assessing such impacts. (A. 2732 (FEIS 7-1).) The CEQR Manual also provides criteria for determining whether an impact such as construction noise is significant in the context of a particular New York City location. (A. 2787-2788 (FEIS 10-3 to 4).)

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[2] N.Y. City Mayor's Office of Environmental Coordination, City Environmental Quality Review Technical Manual 1-1 (2012).

B. Factual Background

1. The Proposed Project

JHL, a member of the Jewish Home Lifecare System, serves nearly twelve thousand elderly and disabled people in New York City and the surrounding counties. (A. 2617 (FEIS S-5).)[3] JHL operates a nursing home on West 106th Street, in an outdated, inefficient facility that was constructed between 1898 and 1964, that is at the end of its useful life, and that adversely affects residents' quality of life, mobility, privacy, and independence. (A. 2617 (FEIS S-5), 3151 (Finding 16).)

On December 15, 2011, JHL sought permission from DOH to construct a new, state-of-the-art 414-bed facility at 125 West 97th Street (Proposed Project). (A. 871 (Certificate of Need Application), 2648 (FEIS 1-1).) JHL's application was the result of over eight years of planning to identify the best location and model of care for JHL's new facility. (A. 2617 (FEIS S-5).) That new facility will use the innovative

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[3] Unless otherwise noted, all references are to the Appendix (A.) in *Matter of Wright v. N.Y. State Dep't of Health*, No. 100641/15. Where necessary, documents in the appendix for *Matter of Friends of P.S. 163 v. Jewish Home Lifecare*, No. 100546/15, are cited in the format "Parents A. __".

"Green House" model of long-term care, which creates a small home environment to promote residents' independence and care. (A. 2611 (FEIS S-2), 2880 (FEIS 15-1), 3151 (Findings 18 & 19).) Every residential floor will accommodate two independently functioning "homes," each with a living room, dining room, kitchen, and outdoor space. Every home will have twelve private rooms, each with natural light and a private bathroom. (A. 2617 (FEIS S-5), 2657 (FEIS 1-5-6), 3151 (Findings 18 & 19).) When the new facility is completed, JHL will close the existing outdated facility. (A. 2648 (FEIS 1-1), 3151 (Finding 17).)

As DOH found during the environmental review at issue here, the current nursing home's residents, who would greatly benefit from the Proposed Project, are a sensitive and vulnerable population (A. 2887 (FEIS 15-7).) As the U.S. Department of Housing and Urban Development has recognized, rising life expectancy and a reduced birth rate are driving a long-term change in the age composition of the population, and as most seniors wish to "age in place," it is essential to

provide "age-appropriate housing options within their community."[4] Indeed, seventy percent of people turning sixty-five can expect to use some form of long-term care.[5] The New York City Department of City Planning estimates that, between 2005 and 2030, the number of New Yorkers who are sixty-five or older will increase by forty-seven percent, to more than 1.35 million. The City has committed to empowering those residents to live independently, including by allowing them "to move into appropriate housing that both meets their needs and allows them to remain in their communities, close to their social networks."[6]

125 West 97th Street (the "Site") is on the north side of West 97th Street between Amsterdam and Columbus Avenues. (A. 2652 (FEIS Fig. 1-3).) The Site is presently vacant, save for dumpsters that are used by the neighboring residential buildings. (A. 2613, (FEIS S-3), 2653 (FEIS

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[4] U.S. Dep't of Housing & Urban Dev., Evidence Matters: Transforming Knowledge into Housing and Community Dev. Policy (2013), www.huduser.gov/portal/periodicals/em/fall13/highlight1.html.

[5] U.S. Dep't of Health & Human Services, Who Needs Care?—Long-Term Care Information, http://longtermcare.gov/the-basics/who-needs-care/.

[6] N.Y. City Office of the Mayor, Age-Friendly NYC 15-19, 46-61 (2009).

1-3).) P.S. 163, a public elementary school, is located to the west of the Site. (A. 2652 (FEIS Fig. 1-3).) *Matter of Friends of P.S. 163 v. Jewish Home Lifecare*, No. 100546/15 (Parents' Petition) was brought by and on behalf of children at the school. (Appendix for *Matter of Friends of P.S. 163* (Parents A.) 58-62 (Parents' Petition ¶¶ 20-37).) Four residential buildings—784 and 788 Columbus Avenue, 120-160 West 97th Street, and 765 Amsterdam Avenue—neighbor the Site. (A. 2652 (FEIS Fig. 1-3).) Petitioners in *Matter of Wright v. N.Y. State Dep't of Health*, No. 100641/15, are residents of those buildings. (A. 55-61) (Tenants' Petition ¶¶ 10-22).)

2. The SEQRA review

a. May-October 2013: initial stages of the SEQRA review, including public consultation on the scope of review

On May 22, 2013, JHL initiated the SEQRA process by submitting an Environmental Assessment Statement (EAS) to DOH. (A. 3149 (Finding 5).) On June 5, 2013, DOH issued the EAS to other relevant agencies and interested parties. (A. 3144.) As the only agency with discretionary approval authority over the Proposed Project, DOH assumed the lead agency role. (A. 3144.)

On June 12, 2013, DOH published notice of intent to prepare a draft environmental impact statement (DEIS). (A. 1376.1 (Positive Declaration Notice of Intent to Prepare a DEIS).) In addition, though not required to do so, *see* 6 N.Y.C.R.R. § 617.8(a), DOH published a "draft scoping document" that set forth the proposed scope of the SEQRA review in order to give affected members of the public (and others) an opportunity to provide input on the environmental impacts and mitigation measures DOH should consider. (A. 1387 (Draft Scoping Document), 3149 (Finding 6).)

On June 28, 2013, DOH published notice of a public meeting to discuss the draft scoping document. (A. 1381 (Notice of Public Scoping Session), 3149 (Finding 7).) The meeting was twice rescheduled at the request of the community, and took place on September 17, 2013. (A. 1377, 1379, 1383, 1385, 3149.) DOH also extended the usual ten-day comment period, and accepted comments until October 4, 2013. (A. 1476-1491 (Select Public Comments on Draft Scoping Document), 3149 (Finding 8).)

b. January 2014: issuance of the Final Scoping Document

On January 28, 2014, DOH issued the Final Scoping Document (FSD) (A. 1692 (FSD), 3149 (Finding 8)), which incorporated changes in response to public comments. (A. 1693 (FSD 2).) The FSD also responded to those comments, which addressed, *inter alia*, construction noise, hazardous materials, traffic, and alternatives. (A. 1721-1754.)

Construction Noise. Acknowledging the proximity of "sensitive receptors" including the students of P.S. 163 and the tenants at neighboring residential buildings, the FSD stated that a noise study would be undertaken to consider whether the Proposed Project would result in a significant increase in noise levels and to address what level of attenuation would produce acceptable interior noise levels. (A. 1715 (FSD 22), 1718 (FSD 25), 1752 (FSD 32).)

Hazardous Materials. The FSD provided that the DEIS would address the potential presence of hazardous materials on the Site and, if necessary, determine whether any additional testing, remediation or mitigation was required before or during construction to avoid any significant adverse impact. (A. 1709 (FSD 16).)

Transportation. Under the CEQR Manual's criteria, a detailed transportation analysis was not required because the Proposed Project would not generate a material number of additional peak hour pedestrian or vehicle trips. (A. 1403, 1712 (FSD 19)). Nevertheless, "in response to community comments," DOH determined to voluntarily conduct a detailed transportation analysis in accordance with the methodologies set forth in the CEQR Manual. (A. 1712 (FSD 19).)

Alternatives. DOH committed to considering whether there are any practicable alternatives that would avoid any significant adverse impacts without sacrificing the goals and objectives of the Proposed Project. (A. 1719 (FSD 26).) DOH agreed to consider at least three potential alternatives: (1) a No-Build Condition alternative (i.e., the Proposed Project would not move forward); (2) construction of a smaller facility on the Site that would not result in any significant adverse impacts; and (3) redevelopment of JHL's existing site on West 106th Street. (A. 1719.). The third alternative was added in response to public comments. (A. 1758 (FEIS 38).)

c. March 2014: issuance of the draft environmental impact statement (DEIS)

Over the next few months, DOH conducted an environmental review in accordance with the FSD. On March 21, 2014, DOH issued the DEIS for public review. (A. 1810 (DEIS).) As explained in more detail below: (i) The DEIS concluded that there would be times during the construction phase when the neighboring residences would experience significant noise that could be partially, but not fully, mitigated. (A. 1844-1846 (DEIS S-18 to 20), 1848-1851 (DEIS S-22 to 25), 1854-1855 (DEIS S-28 to 29).) Construction noise would *not*, however, have a significant adverse impact on P.S. 163. (A. 1840-1841 (DEIS S-14 to 15).) (ii) The DEIS concluded that construction would *not* result in any significant adverse impact as to hazardous materials, including lead. (A. 1835-1836 (DEIS S-9 to 10), 1843-1844 (DEIS S-17 to 18).) (iii) The DEIS concluded that any potentially significant traffic-related issues *could* be fully mitigated. (A. 1838 (DEIS S-12), 1847-1848 (DEIS S-21 to 22).) (iv) The DEIS concluded that there was no reasonable alternative to the Proposed Project that would both avoid the issues that had been identified and substantively meet the objectives of the Proposed Project—that is, construction of a new,

modern facility to serve the community's elders in a manner that enhances their quality of life. (A. 1851-1854 (SEIS S-25 to 28).)

i. Construction noise

The DEIS noted that, due to the proximity of P.S. 163 and the residences, JHL had already committed to employ extraordinary measures to minimize noise, including placing noisy equipment away from sensitive receptors; installing a ten-foot high noise barrier instead of the standard eight-foot barrier; and using less noisy electrical equipment. (A. 1845 (DEIS S-19), 1854 (DEIS S-28), 2040-2054 (DEIS 13-29 to 30).) DOH compelled JHL to implement these measures as a condition of approving the Proposed Project. (A. 3174 (Finding 99).)

The noise study employed conservative assumptions, including that the maximum amount of equipment would operate simultaneously near P.S. 163 and the residences, when in reality only a subset of the construction equipment on the Site would ever be used at the same time. (A. 1844-1846 (DEIS S-18 to 20), 1854-1855 (DEIS S-28 to 29), 2040-2052 (DEIS 13-25 to 36).) The study employed the state-of-the-art Computer Aided Noise Abatement (CadnaA) model, and was

undertaken by placing thirty noise receptors at six sites, including near P.S. 163 and the residences. (A. 2042-2046 (DEIS 13-27 to 31).)

The study showed that, at six of the test sites near the residential buildings, there would be elevated noise levels at various times during the workday over a period of two years or more. (A. 1845 (DEIS S-19), 1849 (DEIS (Table S-1), 2049-2050 (DEIS 13-33-34).) However, the DEIS found that any noise levels inside the buildings would generally be below 45 dBA[7]—an acceptable level under the CEQR Manual that is less noisy than a typical office—because of the buildings' double-glazed windows and air conditioning, which allowed windows to remain closed during the hours of construction. (A. 1845 (DEIS S-19), 1848-1851 (DEIS S-22 to 25), 1854-1855 (DEIS S-28 to 29), 2050 (DEIS 13-14).) The DEIS acknowledged that two of the residential buildings have balconies that would be exposed to significant unmitigated noise during the hours of construction. (A. 1845 (DEIS S-19), 1850 (DEIS S-24), 1854-1855 (DEIS S-28 to 29), 2068-2069 (DEIS 14-7 to 8).)

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[7] "dBA" is the unit used to measure sound, adjusted to account for human perception and sensibilities. (A. 17 n.6.)

As to P.S. 163, the DEIS found that the school would not be affected by significant construction noise as measured by the CEQR Manual. The CEQR Manual considers construction noise significant (thus warranting a further detailed assessment) only if it is projected to take place over a period of two years or more, but here the DEIS concluded that the noisiest construction stages would affect P.S. 163 for only approximately nine consecutive months, or fourteen months in total. (A. 2040-2041 (DEIS 13-25 to 26).) Nonetheless, because DOH viewed P.S. 163 as a "highly-sensitive location," it voluntarily conducted a detailed analysis of the potential noise impact on the school. (A. 1846 (DEIS S-20), 2041 (DEIS 13-26).)

That analysis showed that, during the very noisiest periods of construction, there would be intermittent times when the interior noise in the classrooms facing the Site would *not* be below the level (45 dBA) that is acceptable for classrooms under the CEQR Manual. (A. 1846 (DEIS S-20), 2051-2052 (DEIS 13-35 to 36).) But DOH provisionally concluded in the DEIS that additional mitigation was not required because the absolute noise levels outside P.S. 163 would be comparable to the noise on a heavily trafficked street, and would occur only

intermittently over a period of less than two years. (A. 2051-52 (DEIS 13-35 to 36).)

ii. Hazardous materials

As the DEIS noted, hazardous materials can threaten human health only if the public is exposed to them, and that exposure results in doses that are unacceptable. (A. 1924 (DEIS 5-1).) Although there would be no long-term exposure to the soil at the Site, the DEIS acknowledged that whatever contaminants might be in the soil could be disturbed during the construction work, which could potentially increase pathways for human exposure—for example, by creating airborne dust. DOH therefore addressed that risk and concluded that, with specified controls in place, the Proposed Project would not cause any significant impact from hazardous materials. (A. 1843 (DEIS S-17), 1929-1930 (DEIS 5-6 to 5-7).)

The DEIS incorporated the results of two environmental site assessments (ESAs). (*See* A. 1836 (DEIS S-10), 1924-1930 (DEIS 5-1 to 5-7).) In 2011, Ethan C. Eldon Associates, Inc. performed an ESA in accordance with the American Society for Testing and Materials (ASTM) Standard Practice for Environmental Assessments. Eldon

prepared a 1,084-page report based on its extensive review of federal, state and local databases to identify any history of environmental concerns at the Site, and its work at the Site and interviews with current and former owners. (*See* A. 2135.) Eldon located "[n]o evidence of recognized environmental concerns" from hazardous materials, and recommended no further action. (A. 2139-2140.)

In 2013, AKRF, Inc. conducted a further ESA, under a work plan approved by DOH. (A. 3155 (Finding 35).) AKRF collected and analyzed subsurface samples of soil and groundwater from the Site, and produced a 702-page report documenting its analysis and findings. (*See* A. 2169.) The detected levels of contaminants, including lead, were generally no higher than those typically found in urban fill. (A. 1835-1836 (DEIS S-9 to 10), 1927 (DEIS 5-4), 2020-2021 (DEIS 13-9 to 10), 2177 (AKRF Report 7-8).)

AKRF's analysis revealed several volatile and semi-volatile organic chemicals, metals and pesticides, most of which did not exceed the thresholds deemed acceptable by the Department of Environmental Conversation's (DEC) conservative Restricted Residential Use Soil Cleanup Objectives (RRSCOs), which presuppose multifamily

residences with potential for soil contact. Some substances, including lead and barium, were detected at levels exceeding the RRSCOs.[8] (A. 1927 (DEIS 5-4).) As the DEIS noted, however, there would be no long-term public exposure to the soil itself because it would either be excavated and removed or covered by the new facility. (A. 1927 (DEIS 5-4), 2174-2175, 2178 (AKRF Report 4-5, 8).) For the same reason, the lead detected at the site did not constitute a "soil-lead hazard," as defined by the U.S. EPA.[9] (A. 1835-1836 (DEIS S-9 to 10), 1927 (DEIS 5-4), 2020-2021 (DEIS 13-9 to 10), 2177-2178 (AKRF Report 7).)

DOH took steps, however, to analyze and mitigate any risk that contaminants in the soil could become airborne during construction, and thereby potentially affect the neighboring population. The DEIS

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[8] DOH noted that an elevated barium level was found in a single soil sample, and that it likely was associated with bricks, paint, tiles, glass or rubber that was present in the urban fill. (A. 3156 (Finding 39).)

[9] A "soil-lead hazard" exists when there is "bare soil on residential property or on the property of a child-occupied facility that contains total lead equal to or exceeding 400 parts per million in a play area or average of 1,200 parts per million of bare soil in the rest of the yard based on soil samples." (A. 1927 (DEIS 5-4) (quoting 40 C.F.R. § 745.65(c)).)

noted in particular the concern that lead, although ubiquitous in the urban environment, may present a threat to public health and particularly to children. (A. 1839-1840 (DEIS S-13 to 14).) Absent any applicable New York State-approved standard, the DEIS relied on the National Ambient Air Quality Standard (NAAQS), which is established by the EPA pursuant to the Clean Air Act, 42 U.S.C. § 7409, "to protect the public health," "allowing an adequate margin of safety." *Id.* § 7409(b). The EPA has established a respirable dust level for lead that is measured based on a rolling three-month average, 40 C.F.R. § 50.16, and that expressly takes into account "'sensitive' populations such as asthmatics, children, and the elderly."[10] (A. 1839-1840 (DEIS S-13 to 14), 2000-2001 (DEIS 11-1 to 2).)

To ensure that any airborne lead levels remained well within the NAAQS limits during construction, the DEIS imposed measures to control and monitor airborne dust that might contain lead and other substances. (A. 1840 (DEIS S-14), 1928-1929 (DEIS 5-5 to 6).) Those measures consist of a DOH-approved Remedial Action Plan (RAP) and a

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[10] EPA, National Ambient Air Quality Standards (NAAQS), https://www.epa.gov/criteria-air-pollutants/naaqs-table.

Construction Health and Safety Plan (CHASP) that complies with regulations promulgated by DEC's Division of Environmental Remediation. Together, those measures require, *inter alia*, dust control measures, disposal of excavated soil in accordance with applicable DEC standards, real-time monitoring of dust levels,[11] a vapor barrier surrounding the new building's cellar slab and sidewalls to prevent vapor intrusion, a cap of imported clean soil in areas not covered by the new building or paving, and contingency plans in case additional contamination should be encountered. (A. 1840 (DEIS S-14), 2021-2022 (DEIS 13-10 to 11).) With these extensive measures in place, the DEIS concluded that even if the construction work disturbed lead-contaminated soil, the airborne lead levels would be "significantly lower" than the limits set forth in the NAAQS, and that "even on a short-term basis" that limit would "rarely (if ever)" be exceeded. Under these circumstances, the DEIS concluded that the Proposed Project

[11] The DEIS recognized that no reliable technology exists to measure airborne lead, but it concluded that lead levels could be estimated by measuring the levels of dust, which would contain lead in approximately the same proportion as the soil. (A. 2001 (DEIS 11-2).)

would not cause any significant impact related to hazardous materials, including lead. (A. 1836 (DEIS S-10), 2022 (DEIS 13-11).)

iii. Transportation

Although the CEQR Manual did not require a traffic study, the DEIS nonetheless contained a detailed study of the Proposed Project's potential transportation-related impacts, undertaken in accordance with CEQR Manual methodologies. (A. 1938-1972 (DEIS 7-1 to 26), 2022-2033 (DEIS 13-11 to 18).) The study concluded that, although the Proposed Project had the potential to cause significant transportation-related issues both during construction and operation of the new facility, those issues could be fully mitigated. (A. 1837 (DEIS S-11), 1843 (DEIS S-17), 1847 (DEIS S-21); *see* A. 1938-1971 (DEIS 7-1 to 26).)

First, as to traffic flow, the DEIS anticipated that there could be increased peak-time congestion at two intersections during the construction and operational phases, but it concluded that the issue could be fully mitigated by signal retiming and phasing changes. (A. 1837-1838 (S-11 to 12), 1843 (DEIS S-17), 1847-1848 (DEIS S-21 to 22), 2022-2033 (DEIS 13-11 to 18), 2062 (DEIS 14-4 to 6).) *Second*, as to vehicular and pedestrian safety, the DEIS noted that the New York

City Department of Transportation (DOT) had recently taken steps to improve safety at West 97th Street and Columbus Avenue, which is a "high pedestrian/bicycle crash location," and it recommended that those measures be augmented to address the additional traffic. (A. 1838 (DEIS S-12), 1970-1972 (DEIS 7-24 to 26).) *Finally*, the DEIS concluded that the Proposed Project would not have a significant impact either on parking or on the mass transit system. (A. 1837-1838 (S-11 to 12), 1843-1844 (DEIS S-17 to 18), 1940 (DEIS 7-2), 1972 (DEIS 7-26).)

iv. Alternatives

The DEIS concluded that there was no reasonable alternative to the Proposed Project that would both avoid the adverse impacts that had been identified and meet the objectives of the Proposed Project. (A. 1851-1854 (DEIS S-25 to 28), 2071-2082 (DEIS 51-1 to 11.) *First*, if the Proposed Project did not move forward, JHL would not achieve its goal to create a modern, state-of-the-art facility that would enhance the lives of elderly members of the community, and would instead continue to operate its existing facility in outdated, inefficient buildings. (A. 1854 (DEIS S-28), 2071 (DEIS 15-1).) Moreover, although this "No-Build Alternative" would avoid the construction noise and increased traffic,

the Site is zoned for as-of-right development (i.e., development not requiring the discretionary approval of any agency), so it could be developed in future without the safeguards that DOH has imposed on JHL to avoid the potential risk from soil-borne pollutants. (A. 1851 (DEIS S-25).)

Second, JHL could build a new facility at its existing location, but zoning restrictions would limit such a facility to 303 beds, twenty-seven percent less than the Proposed Project. Such a facility also would not adhere to the Green House model because, for example, it would not accommodate a private room for each resident. (A. 1852-1853 (DEIS S-26 to 27), 2077-2078 (DEIS 15-5 to 7).) A Green-House-model-compliant facility at the West 106th Street site would be limited to 156 beds, sixty-two percent less than the Proposed Project. (A. 2078 n.4.) Either of those potential facilities would be less efficient to operate than the Proposed Project. (A. 1852-1853, 2077-2078.) Moreover, because JHL would have to demolish the existing facility, construction would take more than twice as long as the Proposed Project, causing significant disruption to the facility's residents, who are themselves a sensitive population. (A. 1852 (S-26).)

Third, JHL could build a facility on the Site at West 97th Street that would not result in significant noise or traffic issues, but a project of that size would reduce the number of beds by almost ninety percent as compared with the Proposed Project, would not be economically viable, and would not result in the creation of a Green-House-model-compliant facility. (A. 1853-1854 (DEIS S-27 to 28), 2079-2080 (DEIS 15-8 to 9).)

d. May-November 2014: public hearings and issuance of the final environmental impact statement (FEIS)

On May 7 and 8, 2014, DOH held public hearings on the DEIS. (A. 1787-1809 (Public Hearing Presentation), 3150 (Finding 10).) DOH accepted written comments on the DEIS through May 19, 2014. (A. 3150 (Finding 10); *see* A. 2302-2573 (Selected Public Comments).) On November 14, 2014, DOH issued the 547-page FEIS. (A. 2575 (Notice of Completion of FEIS), 3150 (Finding 11); *see* A. 2596-3143 (FEIS).) The FEIS summarized and responded in detail to the comments that had been received, including comments from the petitioners here. (A. 2903-3029 (FEIS 19-1 to 127). Supporters of the Proposed Project commented that West 97th Street is an "ideal site" for the new facility that would

enhance residents' "individual choice and autonomy," and provide them with "dignity, independence and a meaningful life." (A. 3028 (FEIS 19-126).) Others applauded the new facility's flexibility to provide dedicated units for kosher and LGBT residents. (A. 3028.)

Key changes to the EIS that followed the public consultation are outlined below.

i. Construction noise

As a result of public comments concerning the impact of construction noise on P.S. 163 (A. 2975-2978 (FEIS 19-73 to 76), 2986 (FEIS 19-84), 2999-3005 (FEIS 19-97 to 103), 3013-3016 (FEIS 19-111 to 114)), DOH undertook further noise-related analysis (A. 2626 (FEIS S-14)). The complete noise study thus considered data from a total of forty-eight noise receptor sites, compared with thirty for the DEIS. (A. 2852 (FEIS 13-34). The additional testing showed that the interior noise in the trailers that P.S. 163 uses as classrooms would be acceptable

under the CEQR Manual.[12] (A. 2626-2627 (FEIS S-14 to 15), 2635 (FEIS S-23), 2858 (FEIS 13-40)).

Also in response to the public comments, DOH imposed additional noise-mitigation measures that were not required under the CEQR Manual: specifically, requiring JHL to install interior acoustical windows in the classrooms that face the Site and to provide window air conditioners for the classrooms that did not already have them so that the windows could remain closed during construction. (A. 2628 (FEIS S-16), 2635-2636 (FEIS S-23 to 24).) In addition, the ten-foot-high sound barrier required by the DEIS (which had itself been extended from the standard eight feet) would be increased to sixteen feet on the side of the Site facing P.S. 163. (A. 2816 (FEIS 13-6), 2874 (FEIS 14-5).)

With these additional measures in place, the FEIS concluded that interior noise at P.S. 163 would generally be within the acceptable range for classrooms (below 45 dBA). That noise might, however, episodically rise into the low-50s dBA when construction activity was at

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[12] The FEIS also acknowledged that the top floor windows of the lunch/play room at P.S. 163 would experience noise levels exceeding the CEQR Manual thresholds during the peak hours of some of the construction phases. (A. 2634-2635 (FEIS S-22 to 23).)

its most intense, i.e., at discrete times during the three-month period of excavation and foundational work and during the six-month period of superstructure construction. (A. 2628 (FEIS S-16), 2635-2636 (FEIS S-23 to 24), 2799 (FEIS 11-5), 2800-2801 (FEIS 11-6-7), 2878-2879 (FEIS 14-9 to 10).) The FEIS concluded that this intermittently elevated noise would have no adverse health effects on children: the low-50s dBA level is comparable to the background noise in an office, and comments on the DEIS submitted by the Mount Sinai Children's Environmental Health Center found no negative health effects. (A. 3004 (FEIS 19-102).)

In addition, the FEIS requires JHL to work with the school to ensure that particularly noisy work does not take place during yearly state testing periods. (A. 2630 (FEIS S-18), 2815 (FEIS 13-5), 2863 (FEIS 13-45).) The FEIS also requires JHL to make a construction manager available to liaise with P.S. 163 if concerns about noise were to arise. (*See* A. 2975 (FEIS 19-73), 2987 (FEIS 19-85), 3017 (FEIS 19-115).)

ii. Hazardous materials

The FEIS summarized and responded to public comments on the analysis and conclusions in the DEIS concerning the risk from potentially hazardous materials being disturbed during construction.

(A. 2931-2939 (FEIS 19-29 to 36).) Among its responses to these comments, the FEIS noted that, in letters dated August 6, 2014, and September 24, 2014, DEC had determined that, based on the analysis of soil samples, the Site posed no significant threat to public health, and that there was therefore no basis to require remediation of lead contamination. (A. 2933 (FEIS 19-31), 3062-3064.)

One comment specifically requested that an enclosed tent be used during excavation—i.e., a tent large enough to cover the entire construction site. (A. 2989 (FEIS 19-87).) DOH determined that, based on the levels of lead and other contaminants detected at the Site, the existing proposal to use a RAP and CHASP would sufficiently control and measure dust levels, so that use of an enclosed tent was not necessary. (A. 2989.) Further, the FEIS stated that the RAP and CHASP had been approved by both DOH and by DEC. (A. 2623 (FEIS S-11), 2631-32 (FEIS S-19 to 20), 2722 (FEIS 5-5).

iii. Transportation

The FEIS responded to a significant number of public comments concerning potential transportation impacts. (A. 2943-2969 (FEIS 19-41 to 67), 2991-2995 (FEIS 19-89 to 93), 3008-3010 (FEIS 19-106 to 108).)

Based on these comments, DOH expanded its traffic study to include a third intersection (West 97th Street and Park West Drive), and concluded that any impact on that intersection would not be significant. (A. 2735 (FEIS 7-3), 2836 (FEIS 13-19), 2955 (FEIS 19-53).) Also in response to public comments, the FEIS considered the possibility that driveway traffic at the new facility would back up into Park West Drive, and concluded that there was no such risk. (A. 2759 (FEIS 7-20).) After further analysis, the FEIS also proposed to increase the time for pedestrians to cross Columbus Avenue at 97th Street. (A. 2638 (FEIS S-26), 2873 (FEIS 14-1).) Finally, the FEIS confirmed that the traffic analysis was performed in coordination with DOT, that the results of the study had been presented to DOT, and that DOT had approved the proposal to mitigate any traffic-related impact by adjusting traffic signal timing and phasing. (A. 3008-3010 (FEIS 19-106-108).)

iv. Alternatives

In addition to the three alternatives addressed in the DEIS, in response to public comments, the FEIS considered the possibility of locating the tower crane further away from P.S. 163. (A. 2644 (FEIS S-32), 2821-2822 (FEIS 13-8 to 9), 2880 (FEIS 15-1), 2889-2893 (FEIS 15-

9 to 11).) The FEIS concluded that this change would be consistent with the goals and objectives of the Proposed Project. (A. 2889-2893 (FEIS 15-9 to 11).) In response to public concerns, the FEIS noted that, among other precautions, the crane will be programmed so that neither it nor its loads would hang over P.S. 163 or over the adjacent residential buildings. (A. 2864 (FEIS 13-46), 2889 (FEIS 15-9), 2985 (FEIS 19-83).)

e. November 2014: P.S. 163 objects for the first time to the proposal to require the installation of window air conditioners

Although SEQRA does not contemplate post-FEIS public consultation, on November 24, 2014, the P.S. 163 parent-teacher association (PTA) asserted, for the first time, that the use of window air conditioners at P.S. 163, as contemplated by the FEIS, would violate applicable codes, and that JHL should be compelled to install central air conditioning for the entire school at the cost of $750,000 to $1.5 million. (A. 3342-3344.)

JHL responded that P.S. 163 was already widely using window air conditioners. (A. 3387, 3389-3450.) JHL also noted that, according to

NYCSCA,[13] it would be very time-consuming and expensive (roughly $8 to $10 million) to install central air conditioning at P.S. 163. (A. 3387, 3452-3456.) JHL further argued that, even if central air conditioning could be installed at the cost suggested by the PTA, it would not be reasonable to require JHL to make that permanent improvement to the school because the construction noise would be only temporary and intermittent. (A. 3388.)

The Dormitory Authority of the State of New York (DASNY), which provides construction-related services for State agencies, reviewed the information provided by NYCSCA concerning the time and expense associated with installing central air conditioning at P.S. 163. (A. 865-866.) DASNY further noted that if asbestos were found during the installation at the school, the requirement to abate it would further increase the time and cost of installation. (A. 866.) Under all of these circumstances, DASNY advised DOH that it would not be feasible to install central air conditioning at P.S. 163. (A. 866.)

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[13] The NYCSCA is responsible for building new public schools and for managing capital projects in New York City public schools. (A. 864.)

f. December 2014: issuance of the SEQRA findings statement

On December 10, 2014, DOH issued its Findings Statement, which incorporates the FEIS. (A. 3144 (Findings Statement), 3150 (Finding 13).) DOH found that the Proposed Project would promote the public purpose of creating a modern nursing care facility that would allow JHL to serve senior members of the community in a new, state-of-the-art facility. (A. 3151 (Findings 16 & 17).

For the reasons set forth in the FEIS, DOH found that the Proposed Project would result in some limited adverse noise impacts on the adjacent residential buildings. (A. 3165-3166, 3171, 3174-3175.) DOH also found that the measures set forth in the FEIS represented appropriate mitigation for the insignificant short-term construction noise that would be experienced by some of the classrooms at P.S. 163, and that it would not be feasible to require JHL to install central air conditioning at P.S. 163 due to the time and cost involved. (A. 3165-3166, 3172-3173, 3186.)

DOH further concluded, based on the analysis set forth in the DEIS, the FEIS and the two ESAs, that the Proposed Project would not cause any significant adverse impacts relating to hazardous materials,

and, in particular, that the measures DOH had imposed would be "more than sufficient" to ensure that airborne lead, if any, would not violate the conservative limits set forth in the NAAQS. (A. 3144, 3155-3157, 3162-3163, 3170-3171.)

Based on the analysis set forth in the DEIS and the FEIS, DOH concluded that the Proposed Project would not result in any significant transportation-related adverse impacts, as any potential impacts could be fully mitigated through standard mitigation measures such as signal retiming. (A. 3158-3159.)

DOH further concluded that there was no reasonable alternative to the Proposed Project that would both avoid the traffic and noise-related impacts and meet the Proposed Project's substantive goals. (A. 3178-3185.) DOH found, however, that the construction crane should be moved so that it would be further away from P.S. 163 than originally anticipated. (A. 3185.)

Finally, DOH certified that SEQRA's requirements have been satisfied. (A. 3187 (Certification 1).) It found that the Proposed Project minimizes or avoids adverse environmental impacts to the maximum

extent practicable, and it conditions approval upon implementation of those measures. (A. 3187 (Certifications 2 & 3).)

C. Procedural Background

On March 25, 2015, the Parents filed an article 78 petition, seeking to annul the Findings Statement as arbitrary, capricious, erroneous and irrational. (Parents A. 49 (Parents' Petition).) On April 9, the Tenants filed an article 78 petition in which they sought the same relief. (A. 49 (Tenants' Petition).)

Both sets of petitioners asserted that DOH erred in its findings as to construction noise, hazardous materials (with a particular focus on soil-borne lead) and traffic. Both petitions also asserted that DOH erred in its analysis of whether JHL should be required to redevelop its existing site at West 106th Street as an alternative to the Proposed Project. (Parents A. 52-53, 73-84; A. 52-53, 71-96.) In addition, the Parents asserted that the Proposed Project might cause P.S. 163 economic harm, if existing and prospective parents were to place their children in other schools. (Parents A. 88.)

D. Supreme Court's Ruling Under Review

Supreme Court consolidated the two proceedings for purposes of disposition and adjudicated them in a single decision issued on December 9, 2015. (A. 8.) Supreme Court rejected the claim that DOH failed to take the required hard look at the Proposed Project's potential impact on traffic, holding that "DOH identified the relevant concerns and sufficiently addressed those concerns in the FEIS, and proposed reasonable mitigation measures." (A. 44.) Similarly, Supreme Court rejected the claim that DOH failed adequately to consider alternatives to the Proposed Project, holding that DOH's determination on that issue was "rationally based and supported by the record." (A. 46.) Supreme Court also held that the Parents' concerns about the potential impact on school enrollment did not state a SEQRA-covered environmental claim. (A. 47.)

Although Supreme Court held that DOH had generally taken the required hard look at the issues of construction noise and hazardous materials, it ruled that, in certain limited respects, DOH's analysis was insufficient. On that basis, Supreme Court vacated and annulled DOH's approval of JHL's application, and remitted the matter to DOH "for

preparation of an amended FEIS, to reconsider the findings on the issues of noise and hazardous materials." (A. 48.)

Construction Noise. Supreme Court recognized that DOH's construction noise analysis complied with the CEQR Manual. (A. 17-21, 32-37.) Thus, Supreme Court held that the Tenants had not carried their burden to show that DOH had failed to take the required hard look at the potential construction noise impacts on the residential buildings, or that it was arbitrary and capricious for DOH to determine that there was no feasible way to mitigate the noise impact on the balconies of certain of those buildings. (A. 36-37.)

As to P.S. 163, however, Supreme Court held that DOH's "singular reliance on CEQR guidelines" did not demonstrate "that the requisite hard look was taken," because, by applying the CEQR Manual, DOH had purportedly failed to take into account the "exceptional circumstances of this matter" consisting of an elementary school with young children in "extremely close proximity to the construction site." (A. 36.) Supreme Court further held that DOH had failed to take a sufficiently hard look at "additional noise mitigation measures,

including central air conditioning, to reduce the adverse noise impact on the school." (A. 36.)

Hazardous Materials. Supreme Court rejected the vast majority of petitioners' complaints about DOH's analysis of the potential hazardous materials-related impact of the Proposed Project. As Supreme Court held, DOH's conclusions were based on a "comprehensive and detailed investigation of hazardous materials at the site," which complied with operative federal and state standards and guidelines. (A. 21-24, 40-41.) Further, Supreme Court held that DOH had recognized and required JHL to take steps to avoid any risk that construction work might result in airborne dust that could contain lead. (A. 40.)

Supreme Court held, however, that, in light of the "extraordinary and uniquely difficult challenges" presented by "young children at a school very close to the construction site," DOH failed to take a "hard enough look" at measures to mitigate the "potential harm in lead-containing airborne dust particles." (A. 41-42.) Specifically, Supreme Court was not satisfied that DOH had sufficiently demonstrated that it was not necessary to require the entire Site to be covered by a sealed tent. (A. 42.)

ARGUMENT

Judicial review of the adequacy of a SEQRA review is "extremely limited." *Matter of Develop Don't Destroy* (*Brooklyn*) *v. Urban Dev. Corp.*, 59 A.D.3d 312, 316 (1st Dep't 2009). A SEQRA determination may be annulled only if it is "arbitrary and capricious or an abuse of discretion." *Matter of Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 416 (1986) (quotation marks omitted). Thus, review is limited to considering "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." *Id.* at 417 (quotation marks omitted).

A rule of reason further tempers judicial review, in two respects. *See id.* First, not every conceivable environmental impact, mitigating measure or alternative need be identified and analyzed. *See id.* Second, SEQRA permits "considerable latitude in evaluating environmental effects and choosing among alternatives." *Id.* "While judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives.'" *Akpan v. Koch*, 75 N.Y.2d

561, 570 (1990) (alteration in original) (quoting *Matter of Jackson*, 67 N.Y.2d at 416).

Applying this standard of review, courts have repeatedly rejected challenges to SEQRA reviews that were nowhere near as comprehensive as the one conducted in this case. For example, in *Matter of Save the Pine Bush, Inc. v. Common Council of Albany*, the Court of Appeals, calling for a "common sense" approach, held that a SEQRA review was sufficient even though it failed to investigate altogether the potential impact on a certain rare species. 13 N.Y.3d 297, 301, 306-08 (2009). Similarly, in *Akpan*, the Court of Appeals held that a particular impact was sufficiently considered because, even though it was not addressed in a discrete section of the DEIS, it was addressed in response to public comments and at the public hearing. 75 N.Y.2d at 571-74. And in *Matter of Halperin v. City of New Rochelle*, the Appellate Division upheld a SEQRA review because the EIS identified a reasonable range of alternatives, even though it failed to address the

specific alternatives advocated by petitioners. 24 A.D.3d 768, 777 (2d Dep't 2005).[14]

Courts have only annulled SEQRA determinations when the review was clearly inadequate in some critical respect, such as where a findings statement was "bereft of *any* explanation of the FEIS's findings and conclusions," *Matter of Town of Amsterdam v. Amsterdam Indus. Dev. Agency*, 95 A.D.3d 1539, 1544 (3d Dep't 2012) (emphasis added); where the agency identified areas of significant concern but utterly failed to address them, *Matter of Town of Dickinson v. County of Broome*, 183 A.D.2d 1013, 1014 (3d Dep't 1992); or where there was a total failure to consider a statutorily required "no-action" alternative, *MYC N.Y. Marina, L.L.C. v. Town Bd. of E. Hampton*, 17 Misc. 3d 751, 760 (Sup. Ct. Suffolk County 2007).[15]

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[14] *See also Matter of Druyan v. Vill. Bd. of Trs.*, 96 A.D.3d 1207, 1209 (3d Dep't 2012) (holding that an agency "sufficiently" considered an environmental impact, even though it allegedly failed to gather certain "critical information"); *Matter of Saratoga Lake Protection & Improvement Dist. v. Dep't of Pub. Works*, 46 A.D.3d 979, 983-88 (3d Dep't 2007) (holding that the agency had either sufficiently addressed the potential impacts or was not required to do so).

[15] *See also Matter of Troy Sand & Gravel Co. v. Town of Nassau*, 82 A.D.3d 1377, 1379 (3d Dep't 2011) (agency failed to provide any

(*continued on the next page*)

No similar deficiencies exist in this case. To the contrary, DOH's SEQRA review here was extraordinarily detailed, and carefully considered and incorporated the extensive public comments that DOH received during the protracted review process. In particular, DOH took the required hard look at the potential impact of construction noise and hazardous materials, and at measures to avoid and mitigate both of these issues. In conducting the required analysis and considering mitigation measures, DOH also appropriately and expressly focused on the unique needs of the neighboring school and residences, and properly relied on broadly accepted standards for both construction noise and hazardous materials. In light of DOH's careful review, this Court should confirm the validity of its SEQRA review, and reverse Supreme Court's holding to the contrary.

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reasoned explanation for its negative determination that a SEQRA review was not required); *Anderson v. Town of Chili Planning Bd.*, 59 A.D.3d 1017, 1019-20 (4th Dep't) (Smith & Pine, JJ., dissenting) (agency failed entirely to consider risk that automobile shredder could imperil aircraft at adjacent airport), *rev'd*, 12 N.Y.3d 901 (2009) (adopting reasoning of the dissenting Appellate Division justices); *Matter of Niagara Mohawk Power Corp. v. Green Island Power Auth.*, 265 A.D.2d 711, 712 (3d Dep't 1999) (negative declaration supported only by a "bald conclusory statement").

POINT I

THE DEPARTMENT TOOK A HARD LOOK AT THE RISK POSED BY CONSTRUCTION NOISE AND AT APPROPRIATE MEASURES TO MITIGATE THAT ISSUE

A. There Is No Basis to Disturb Either DOH's Analysis of the Potential Impact of Construction Noise or its Selection of Measures to Mitigate that Impact.

At the outset of the SEQRA process, the Draft Scoping Document recognized that the analysis of construction noise would be informed by the "sensitive land uses" that surround the Site. (A. 1405 (Draft Scoping Document 17).) As anticipated, following public consultation, the Final Scoping Document required a detailed analysis of the potential impact of construction noise on the adjacent "sensitive receptors," i.e., the students at P.S. 163 and the residents at neighboring buildings, and of the level of attenuation that would yield acceptable interior noise levels. (See Statement of the Case Pt. B.2.b, *supra.*)

DOH's noise study employed conservative assumptions and utilized state-of-the-art computerized noise modeling, with data inputs from thirty noise receptors that were placed to analyze the impact on P.S. 163 and the residences. (See Statement of the Case Pt. B.2.c.i, *supra.*) In response to public comments, further noise testing was

conducted at eighteen additional sites, including at P.S. 163. (See Statement of the Case Pt. B.2.d.i, *supra*.)

On this basis of this detailed study, DOH concluded that interior noise at the residential buildings would generally be below the 45 dBA threshold that is acceptable for residences under the CEQR Manual, but that some of the exterior balconies would experience significant unmitigated noise during the hours of construction. (See Statement of the Case Pt. B.2.c.i, *supra*.) These conclusions were incorporated into the Findings Statement. (See Statement of the Case Pt. B.2.f, *supra*.)

As to P.S. 163, an otherwise unrequired noise study was performed because P.S. 163 was treated as a "highly-sensitive location." (See Statement of the Case Pt. B.2.c.i, *supra*.) That study concluded that the interior noise in the classrooms would largely be below the 45 dBA level that is acceptable for classrooms under the CEQR Manual. Because some classrooms would intermittently experience somewhat higher levels, DOH required JHL to adopt even more mitigation measures than would ordinarily be required at such a construction site. Specifically, DOH required JHL to install acoustical windows in all of the classrooms that face the Site, and window air conditioners in all of

the classrooms that do not already have them so that the windows can remain closed during construction. (See Statement of the Case Pt. B.2.d.i, *supra*.) DOH also required JHL to increase to sixteen feet (double the standard height) the sound barrier facing P.S. 163. (See Statement of the Case Pt. B.2.d.i, *supra*.) These additional addressing mitigation measures were on top of the measures that JHL had already committed to employ, including placing noisy machinery away from P.S. 163, installing an oversized noise barrier, and using less noisy electrical equipment. (See Statement of the Case Pt. B.2.c.i, *supra*.)

With all of these measures in place, DOH found that the interior noise would be within the level that the CEQR Manual considers acceptable for classrooms, save that it might episodically rise into the low 50s dBA (the typical level of background noise in an office) when the noisiest construction work (excavation work on the foundation and work on the superstructure) was underway.[16] (See Statement of the Case Pts. B.2.d.i, B.2.f, *supra*.) To address this issue, DOH has required JHL to

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[16] The Parents are, therefore, incorrect that DOH failed to appreciate that some of the construction work would entail episodic high impact noise. (Parents A. 77-78.)

ensure that the noisiest work does not take place during the yearly testing period, and to make available a construction manager to liaise with P.S. 163 to address issues as they arise. (See Statement of the Case Pts. B.2.d.i, *supra*.) DOH determined that these measures represented appropriate mitigation for the short-term construction noise impact on P.S. 163.[17] (See Statement of the Case Pt. B.2.f, *supra*.)

As the record reflects that DOH took the required hard look at the issue of construction noise and made a reasoned determination as to the appropriate mitigation measures, *see Matter of Jackson*, 67 N.Y.2d at 416-47, DOH fully discharged its responsibility under SEQRA, and the petitions should have been dismissed.

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[17] There is no basis for the Parents' position (Parents' A. 74-75) that it was capricious for DOH not to accept their expert's speculation that construction delays could cause the Proposed Project to overrun. (A. 2982.) This Court rejected a similar argument in *Matter of Develop Don't Destroy* (*Brooklyn*), holding that "[t]he build dates having been rationally selected, there can be no viable legal claim that the EIS was vitiated simply by their use." 59 A.D.3d at 318.

B. Supreme Court Erred in Faulting DOH's Review of the Impact of Construction Noise on P.S. 163.

1. DOH appropriately relied on the guidelines in the CEQR Manual and addressed the special circumstances of P.S. 163.

Supreme Court held that DOH's "singular reliance on CEQR guidelines" in its noise analysis failed to take into account the "special circumstances" of an elementary school with young children in proximity to the construction site. (A. 36-37.) This holding is wrong on multiple levels. DOH did *not* singularly rely on the CEQR Manual. Indeed, DOH commissioned a detailed noise analysis and required mitigation measures that would not have been required under the CEQR Manual. (See Statement of the Case Pt. B.2.c.i, B.2.d.i, *supra*.) And the very reason that DOH pursued these additional steps was because of its careful attention to the "special circumstances" of P.S. 163. In other words, contrary to the Supreme Court's holding, the proximity of P.S. 163 to the Site profoundly affected DOH's analysis of construction noise. DOH's specific concern for the schoolchildren resulted in additional noise testing to confirm that interior noise at the classrooms that are housed in trailers would be within acceptable limits. (See Statement of the Case Pt. B.2.d.i, *supra*.) And it resulted in

DOH's requiring JHL to take a range of additional measures to mitigate the construction noise at P.S. 163, even though those measures would not have been required under the CEQR Manual.[18] (See Statement of the Case Pt. B.2.d.i, *supra*.)

Nor is there anything inappropriate about DOH's use of the 45 dBA standard that is acceptable in New York City classrooms under the CEQR Manual. (A. 2052 (DEIS 13-36).) Courts have repeatedly held that an agency could "hardly be found to have been arbitrary or capricious" when its SEQRA analysis complies with the standards set forth in the CEQR Manual. *Matter of Neighborhood in the Nineties, Inc. v. City of N.Y.*, 2009 N.Y. Slip Op. 51812(U) at *14 (Sup. Ct. N.Y. County Aug. 13, 2009).[19] Supreme Court observed that the Parents'

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[18] To the extent Supreme Court intended to suggest that DOH failed to respond to public comments concerning the impact of construction noise on P.S. 163 (A. 36), that suggestion cannot be reconciled with the record. Not only did DOH take all of the steps discussed above, but it expressly responded in writing to voluminous public comments on the draft scoping document and on the DEIS, many of which addressed construction noise, including the specific impact of construction noise on schoolchildren and school activities. (A. 1721-59 (Final Scoping Document, Ex. A), 2903-3029 (FEIS 19-1-127).)

[19] *Accord Hand v. Hosp. for Special Surgery*, 2010 N.Y. Slip Op. 50060(U) (Sup. Ct. N.Y. County Jan. 11, 2012) (holding that agency

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experts "recommended maximum classroom noises of 40 dBA, or lower, depending on the age of the children." (A. 33.) DOH acknowledged those comments, but noted that such noise levels are "not often achieved in densely-populated urban locations such as New York City," which is why the CEQR Manual specifies higher guidelines than those that might be achievable in "the most rural and remote locations." (A. 3003 (FEIS 19-101).)

DOH's reasoned determination to employ the 45 dBA standard should not have been second-guessed by Supreme Court, notwithstanding the presence of competing evidence in the record. *Matter of Jackson*, 67 N.Y.2d at 416. Nor should Supreme Court have overridden DOH's decision to follow the standard set by the experts who formulated the CEQR Manual over the standard advocated by petitioners' experts. As Supreme Court correctly recognized elsewhere in its decision (A. 44), differences of opinion among experts do not

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took a "hard look" by conducting a SEQRA review that complied with the CEQR Manual), *aff'd*, 107 A.D. 3d 642 (1st Dep't 2013); *Matter of Collier Realty LLC v. Bloomberg*, 24 Misc. 3d 1071, 1078-79 (Sup. Ct. N.Y. County 2009) (holding that there was "no basis to fault the agency" because its SEQRA analysis complied with the CEQR Manual).

provide a basis to annul a SEQRA determination. *See also Roosevelt Islanders for Responsible Southtown Dev. v. Roosevelt Island Operating Corp.,* 291 A.D.2d 40, 54 (1st Dep't 2001) (a court reviewing a SEQRA determination must not "resolve disagreements among experts, or substitute its judgment for that of the agency") (quotation marks omitted). For these reasons, Supreme Court's decision should be reversed.

2. DOH took a hard look at measures to mitigate the construction noise impact on P.S. 163, and required JHL to adopt substantial measures to abate excess noise.

Supreme Court further held that DOH failed to take a "sufficiently hard look" at "additional noise mitigation measures, including central air conditioning, to reduce the adverse noise impact on the school." (A. 36-37.) This holding, too, should be reversed.

After a full analysis, DOH determined that the considerable package of mitigation measures required by the FEIS represented an appropriate mitigation plan for the short-term construction noise impact on P.S. 163. (A. 3172 (Finding 91); see Statement of the Case Pt. B.2.d.i, *supra*).) Those measures will ensure that the internal noise at the school remains within CEQR Manual limits, except episodically during the

limited periods when the very noisiest construction is underway—and even during those periods the noise will be addressed by additional mitigation measures undertaken by JHL. (See Statement of the Case Pt. B.2.d.i, *supra*.) Supreme Court had no basis to determine that DOH's conclusion was arbitrary or capricious. *See Matter of Jackson,* 67 N.Y.2d at 421-22 (holding that SEQRA does not require an agency to impose "every conceivable mitigation measure or even any particular one").

In particular, Supreme Court erred in finding that DOH failed to take a sufficiently hard look at the alternative mitigation measure of central air conditioning. DOH considered that option and determined that it was not feasible, a conclusion that is well supported by the record.[20] (See Statement of the Case Pt. B.2.e, *supra*.) Moreover, it was reasonable for DOH to conclude that it would not be appropriate to require JHL to make an expensive, permanent improvement to the school in order to mitigate a short-term, intermittent, and insubstantial

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[20] DOH's determination is further supported by the Parents' acknowledgment that installation of central air conditioning would take "between 12 and 16 weeks" (Parents A. 79 (Parents' Petition ¶ 85)), which makes clear that such a project would inevitably disrupt the school during term time.

noise issue. (See Statement of the Case Pts. B.2.d.i, B.2.f, *supra*.) Under all of these circumstances, there is no support for the notion that DOH acted arbitrarily or capriciously by not requiring JHL to install central air conditioning as the price of moving forward with the Proposed Project. A court cannot annul an agency determination simply because it believes that it might have been "wiser" to impose some other mitigating measure. *Matter of Jackson*, 67 N.Y.2d at 421. "Dissatisfaction with an agency's proposed mitigation measures is not redressable by the courts so long as those measures have a rational basis in the record." *Id.*

Nor, finally, is there any merit to the Parents' position that DOH acted wrongfully when it addressed in the Findings Statement their belated objection to the plan to compel JHL to install window air conditioners. (Parents A. 78-79 (Parents' Pet. ¶¶ 83-84).) DOH would have been entitled to ignore the Parents' belated objection altogether: as the Court of Appeals held in *Matter of Jackson*, an agency may reasonably disregard comments received after the FEIS has been issued, because permitting new comments at that stage risks turning the SEQRA process from a cooperative venture into a game of

"ambush." 67 N.Y.2d at 427. In light of DOH's entitlement to disregard this objection altogether, the agency did not act arbitrarily and capriciously when, instead, it considered the Parents' complaint in consultation with NYCSCA and DASNY—the agencies best-placed to assist in considering the execution of a significant construction project in a New York City school[21]—and made a reasoned determination to reject their suggestion.

For all of these reasons, Supreme Court's rulings should be reversed, and the Petitions dismissed.

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[21] *See Matter of Jackson*, 67 N.Y.2d at 427 ("Nothing in SEQRA bars an agency from relying on information or advice received from others, including consultants or other agencies, provided that the reliance was reasonable under the circumstances.").

POINT II

THE DEPARTMENT TOOK A HARD LOOK AT THE RISK POSED BY HAZARDOUS MATERIALS AND AT APPROPRIATE MEASURES TO AVOID THAT RISK

A. DOH Took a Hard Look at the Potential Risk Posed by Hazardous Materials.

Supreme Court correctly recognized that DOH had conducted a "comprehensive and detailed investigation of hazardous materials at the site," in compliance with federal, state, and city standards and guidelines. (A. 21-24, 40-41.) DOH's SEQRA review incorporated an extensive analysis of the potential that the Site might contain hazardous materials, and the risk that those materials could present a threat to public health, including to the students at P.S. 163 and the Tenants. Among other analyses, DOH relied on two environmental site assessments, which comprised some 1,700 pages of detailed analysis. (See Statement of the Case Pt. B.2.c.ii, *supra*.) As Supreme Court noted, these studies were conducted "in accordance with CEQR Manual criteria and federal and state standards and guidelines in effect at [the] time of investigation," and encompassed testing for "numerous potentially hazardous materials," including fifty-two volatile organic compounds, sixty-seven semi-volatile organic compounds, and twenty-

six metals, including lead and mercury. (A. 21-24, 40-41.) Supreme Court acknowledged that petitioners' experts submitted speculative opinions that discussed additional testing that might have been undertaken (A. 38-41), but Supreme Court correctly did not annul DOH's findings based on these "differing conclusions reached by other experts." *Roosevelt Islanders for Responsible Southtown Dev.*, 291 A.D.2d at 55.

The analyses of potentially hazardous materials revealed that the soil at the Site contains levels of contaminants, including lead, that are consistent with those typically found in urban fill in New York City. (See Statement of the Case Pt. B.2.c.ii, *supra*.) DOH noted, however, that hazardous materials in soil pose a threat to public health only if there is a pathway to public exposure and if the public is exposed to unacceptable doses. (See Statement of the Case Pt. B.2.c.ii, *supra*.) Although the soil at the Site contains some contaminants at levels that exceed standards that are based on exposure to unpaved soil, DOH concluded that, in fact, the P.S. 163 students and Tenants would face no long-term exposure to the soil. Indeed, DOH imposed measures that ensure that, to the extent the existing soil is not excavated and removed, it will be covered by the new building or by new, imported soil.

(See Statement of the Case Pt. B.2.c.ii, *supra*.) Thus, DOH rationally focused on the risk that hazardous materials in the soil could be disturbed during construction, and that they could thereby pose a threat to public health.

B. The Department Took a Hard Look at Appropriate Measures to Avoid Any Risk from Hazardous Materials.

As Supreme Court held, DOH recognized and addressed the risk that the Proposed Project might disturb the soil and thereby potentially expose the public to contaminated dust, and DOH imposed measures that it determined would avoid any such risk. (A. 40.) Specifically, DOH required JHL to implement specific measures that, where applicable, complied with DEC regulations, including dust control measures, controlled disposal of excavated soil, real-time monitoring of dust levels, a vapor barrier, and a contingency plan in case additional contaminants come to light during construction.[22] (See Statement of the Case Pt.

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[22] The Tenants speculated that JHL might not consistently comply with the required measures (A. 86 (Tenants Petition ¶¶ 106-07), but the theoretical possibility of violation cannot possibly mean that every potential impact must be regarded as incapable of mitigation.

B.2.c.ii, *supra*.) DOH found that these measures would be "more than sufficient" to ensure that construction would not result in contaminated dust, and that even if it did any airborne lead would not exceed the conservative standard that the NAAQS establishes explicitly to protect sensitive populations, such as children. (See Statement of the Case Pts. B.2.c.ii, B.2.f., *supra*.) Specifically, DOH determined that, with these measures in place, airborne lead levels would be "significantly lower" than the limit established by the NAAQS. (See Statement of the Case Pts. B.2.c.ii, *supra*.)

DOH thereby fully discharged its responsibility to identify and take a hard look at areas of environmental concern. *Matter of Jackson,* 67 N.Y.2d at 416. Where, as here, there is no applicable state air quality standard, the Court of Appeals has held that agencies act reasonably by applying the NAAQS. *See Matter of Spitzer v. Farrell*, 100 N.Y.2d 186, 191 (2003) (holding that "it was rational for the agency, which is not an expert on air quality, to use [the NAAQS] in its [SEQRA] analysis").

Yet Supreme Court erroneously held that, in light of the "extraordinary and uniquely difficult challenges" presented by "young children at a school very close to the construction site," DOH failed to

take a "hard enough look" at measures to mitigate the "potential harm in lead-containing airborne dust particles." (A. 41-42.) Absent any sensible or practicable suggestion from petitioners or their experts as to alternative measures that might be imposed, Supreme Court took up and endorsed petitioners' insistence that JHL should be compelled to enclose the entire Site in the protective bubble of a sealed tent. (A. 41-42.) In so doing, Supreme Court erred by substituting its judgment for that of DOH, and by failing to recognize that SEQRA does not require an agency to impose every possible mitigating measure or any particular measure, much less the extreme measure suggested by petitioners and endorsed by Supreme Court. *Matter of Jackson*, 67 N.Y.2d at 417.

In reaching its conclusion, Supreme Court misapprehended a portion of DOH's response to a comment that "no level of lead is safe." (A. 42, 2936 (FEIS 19-34).) DOH's response was that lead is ubiquitous in the urban environment, and that the NAAQS thresholds provide "appropriate guidelines for developing control procedures and monitoring during construction." (A. 2936 (FEIS 19-34).) Supreme Court was not entitled to disturb DOH's reasoned determination to

impose measures that DOH found would be "more than sufficient" to ensure compliance with the protective standard set by the NAAQS. (A. 3170.) Indeed, as the levels of contaminants at the Site, including lead, are comparable to those generally found in urban fill, Supreme Court's approach would seemingly frustrate construction anywhere in New York City. Moreover, Supreme Court failed to recognize that if the Proposed Project does not move forward at the Site, then the zoning of this prime Upper West Side real estate would permit it to be redeveloped without the kinds of restrictions that DOH has imposed on JHL to ensure compliance with the NAAQS. (See Statement of the Case Pt. B.2.c.iv, *supra*.)

As to Supreme Court's view that the extreme measure of a sealed tent might be required, DOH considered and responded in the FEIS to a comment that specifically requested just such a measure. (See Statement of the Case Pt. B.2.d.ii, *supra*.) DOH found that use of a tent was not necessary, because the analysis showed that the measures set forth in the FEIS would sufficiently avoid any risk from airborne contaminants. (A. 2989 (FEIS 19-87).) Supreme Court erred by second-guessing DOH's considered exercise of judgment on this question.

Finally, there is there no merit to petitioners' contention that the SEQRA analysis as to hazardous materials was deficient because it relied on prevailing but allegedly outdated regulatory standards.[23] (A. 76, 78-79, 81-81.) As Supreme Court recognized (A. 41), the Court of Appeals has held that agencies are entitled to rely on the standards in place at the time of the review, or else SEQRA reviews would be "perpetual and subvert . . . legitimate objectives." *See Matter of Jackson*, 67 N.Y.2d at 425-26 (rejecting challenge to EIS based on alleged staleness of data on which the agency relied); *Matter of Spitzer*, 100 N.Y.2d at 191 (holding that the agency acted reasonably in a SEQRA review by relying on federal standards in force at the time the review was conducted).[24] In any event, in January 2015, the EPA proposed to

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[23] The Tenants also asserted that DOH should have considered the NAAQS for lead *indoors*, but, as DOH explained in response to a public comment, that standard is not applicable because the Site is outdoors and the dust will be controlled by the RAP and the CHASP. (A. 2936 (FEIS 19-34).)

[24] The Parents also speculated that the closure of the classroom windows "may lead to the build-up of chemical vapors migrating from contaminated groundwater beneath the school," including "highly toxic polychlorinated biphenyls (PCBs)." (Parents A. 83-84 (Parents Petition ¶¶ 97-99).) In fact, the ESAs revealed no evidence that the groundwater is contaminated with PCBs. (A. 2176 (AKRF Report 7).)

retain without revision the NAAQS standard for lead that DOH employed in the FEIS.[25]

For all of these reasons, Supreme Court's ruling should be reversed.

POINT III

SUPREME COURT CORRECTLY REJECTED THE REMAINDER OF PETITIONERS' ARGUMENTS

DOH supports JHL's appeal for the reasons given above. In addition, the Parents have filed a cross-appeal from the portions of the decision below. Because the Parents will thus urge this Court to affirm the annulment of DOH's findings on grounds other than those on which Supreme Court based its decision, DOH demonstrates here that there is no substance to any of their other arguments.

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[25] National Ambient Air Quality Standards for Lead, 80 Fed. Reg. 278 (Jan. 5, 2015) (to be codified at 40 C.F.R. § 50).

A. The Department Took a Hard Look at Potential Traffic-Related Issues and Found That They Could Be Fully Mitigated.

Supreme Court correctly rejected petitioners' arguments that DOH failed to take the requisite "hard look" at the Proposed Project's potential impact on traffic conditions, holding that "DOH identified the relevant concerns and sufficiently addressed those concerns in the FEIS, and proposed reasonable mitigation measures." (A. 43-45.)

In response to public concerns, DOH performed a detailed traffic study, even though the CEQR Manual did not require one. (See Statement of the Case Pt. B.2.b, *supra*.) That extensive analysis, which is described in the FEIS (A. 2732-2767 (FEIS 7-1 to 27), 2825-2838 (FEIS 13-12 to 21)), concluded that, during the construction and operation of the new facility, there could be a significant peak-time adverse impact on traffic flow at two intersections (West 97th Street at Columbus and Amsterdam Avenues), but that such impact would be fully mitigated by signal retiming measures that have been approved by

DOT.[26] (See Statement of the Case Pt. B.2.c.iii, *supra*; A. 3163, 3173-3174 (Findings 65, 94, 95-97).) Such use of signal retiming is a recognized means to mitigate potential traffic impacts. *See, e.g., Mun. Art Soc'y of N.Y., Inc. v. N.Y. State Convention Ctr. Dev. Corp.*, 2007 N.Y. Slip Op. 51031(U) at *9-*10 (Sup. Ct. N.Y. County May 21, 2007).

Also in response to public comments, DOH studied a third intersection as well (West 97th Street and Park West Drive), and concluded that any traffic flow impact on that intersection would not be significant, and that there was no risk that driveway traffic at the new facility would back up into Park West Drive. (See Statement of the Case Pt. B.2.d.iii, *supra*.) Further, with respect to pedestrian safety, the study noted, and DOH found, that DOT had already taken steps to improve the safety of the intersection at West 97th Street and Columbus Avenue, and that those measures should be augmented to

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[26] As DOT has approved the measures, there is no merit to the Tenants' complaint (A. 89) about the fact that implementation of these measures would be dependent on action by another agency. *See also Matter of Jackson*, 67 N.Y.2d at 422 (holding that "nothing in [SEQRA] bars an agency from relying on mitigation measures that it cannot itself guarantee in future").

address the additional traffic resulting from the Proposed Project. (See Statement of the Case Pt. B.2.c.iii, *supra*; A. 3174 (Finding 98).)

Petitioners' expert witnesses disagreed with DOH's traffic analysis, but, as Supreme Court recognized (A. 44), it would have been error to annul DOH's findings based on these "differing conclusions reached by other experts." *Roosevelt Islanders for Responsible Southtown Dev.*, 291 A.D.2d at 55. As Supreme Court correctly held, petitioners did not establish that DOH's traffic analysis failed to comply with the CEQR Manual, much less the resulting findings were arbitrary and capricious. (A. 44.) Thus, Supreme Court correctly rejected petitioners' claims.

B. The Department Took a Hard Look at Alternatives to the Proposed Project.

Petitioners asserted that DOH failed adequately to consider the possibility that JHL could build a new facility at its existing West 106th Street location. (Parents A. 87-88 (Parents Petition ¶¶ 108-09); A. 92-93 (Tenants Petition ¶ 124).) Supreme Court correctly held that DOH's determination that a redevelopment of JHL's existing site was not a

reasonable alternative was "rationally based and supported by the record." (A. 46.)

As DOH found, building a new facility at West 106th Street would not be consistent with the objectives of the Proposed Project—i.e., construction of a state-of-the-art facility based on the Green House model that enhances the lives of senior members of this community. (See Statement of the Case Pt. B.2.c.iv, *supra*; A. 3179-3182 (Findings 118-126).) JHL could not construct an economically viable Green House-compliant facility at its existing site. (See Statement of the Case Pt. B.2.c.iv, *supra.*; A. 3179-81 (Findings 118-121, 124-126)).) Moreover, construction at that site would take almost twice as long as the Proposed Project and would be disruptive to another sensitive population—the nursing home's residents. (See Statement of the Case Pt. B.2.c.iv, *supra*; A. 3180-3181 (Finding 123).) Moreover, due to zoning conditions, if the Proposed Project did not go ahead at the West 97th Street Site, a different development could take place there without the measures that DOH has imposed to avoid the risk of hazardous materials to P.S. 163 and the residential buildings. (See Statement of the Case Pt. B.2.c.iv, *supra*; A. 3180 (Finding 122).)

Under all of these circumstances, there is no basis to disturb DOH's reasoned conclusion that requiring JHL to build a new facility at its existing location would not be a "reasonable alternative[] to the action that [is] feasible, considering the objectives and capabilities of the project sponsor." 6 N.Y.C.R.R. § 617.9(b)(5)(v).[27] As this Court has recognized, SEQRA affords agencies "'considerable latitude'" to evaluate environmental effects and choose among alternatives. *Matter of Develop Don't Destroy* (*Brooklyn*), 59 A.D.3d at 319 (quoting *Matter of Jackson*, 67 N.Y.2d at 417). In this case, as in *Matter of Develop Don't Destroy* (*Brooklyn*), "there is no tenable argument" that DOH's preference for the Proposed Project "arrived at after an evidently conscientious weighing of alternatives, was not rationally and sufficiently based on the project's distinctive constellation of otherwise unattainable benefits." *Id.* Supreme Court was correct, therefore, to reject petitioners' claims.

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[27] Contrary to the Tenants' contention (A. 93-94 (Tenants Petition ¶ 125)), DOH was under no obligation to consider the speculative alternative that JHL might build a new facility on some other unidentified site. *See* 6 N.Y.C.R.R. § 617.9(b)(5)(v) ("Site alternatives may be limited to parcels owned by, or under option to, a private project sponsor.")

C. Any Potential Economic Impact on School Enrollment Does Not Raise SEQRA Concerns.

Finally, Supreme Court correctly rejected the Parents' claim that the SEQRA analysis should have addressed the Proposed Project's potential impact on school enrollment. (A. 47; Parents A. 88 (Parents Petition ¶ 110).) First, the FEIS noted in response to a public comment that this concern is "entirely speculative." (A. 2921 (FEIS 19-19).) Second, as Supreme Court held, the kind of economic injury postulated by the Parents is "'not by itself within SEQRA's zone of interests.'" (A. 47 (quoting *Soc'y of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 778 (1991)). Thus, for example, in *Matter of Mobil Oil Corp. v. Syracuse Industrial Development Agency*, the Court of Appeals held that a petitioner has standing under SEQRA only if it asserts "specific environmental harm," rather than injury that is "solely economic in nature." 76 N.Y.2d 428, 433 (1990). Thus, Supreme Court correctly rejected the Parents' claim.

CONCLUSION

For all of the foregoing reasons, the December 9, 2015 decision, order, and judgment of Supreme Court should be reversed insofar as it annulled the Department of Health's findings and required the preparation of an amended final environmental impact statement, and the petitions should be dismissed.

Dated: New York, NY
March 22, 2016

Respectfully submitted,

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