ORIGINAL

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

DISTRICT 4 PRESIDENT'S COUNCIL; THE CITYWIDE COUNCIL ON HIGH SCHOOLS; DISTRICT 4 COMMUNITY DISTRICT EDUCATION COUNCIL; EAST HARLEM PRESERVATION, INC.; NOS QUEDAMOS COMMITTEE, INC.; NEW YORK CITY PARK ADVOCATES, INC.; MARINA ORTIZ; and HECTOR NAZARIO, Petitioners, -against- THE FRANCHISE AND CONCESSION REVIEW COMMITTEE OF THE CITY OF NEW YORK; MICHAEL R. BLOOMBERG, Mayor of the City of New York; ANTHONY CROWELL, Special Counsel to Mayor Michael R. Bloomberg; WILLIAM C. THOMPSON, JR., Comptroller of the City of New York; MICHAEL A. CARDOZO, Corporation Counsel for the City of New York; MARK PAGE, Director of the New York City Office of Management and Budget; SCOTT STRINGER, President, Borough of Manhattan; each in his official capacity as member of The Franchise and Concession Review Committee of the City of New York; THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION; and THE CITY OF NEW YORK, Respondents. For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory Relief Pursuant to CPLR 3001	Index No. 107463/09 IAS Justice Shafer M3#002

MEMORANDUM OF LAW IN SUPPORT OF AMENDED VERIFIED PETITION UNDER ARTICLE 78 TO COMPEL COMPLIANCE WITH THIS COURT'S JANUARY 30, 2008 ORDER, THE NEW YORK CITY UNIFORM LAND USE REVIEW PROCEDURES, AND THE STATE ENVIRONMENTAL QUALITY REVIEW ACT

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PRELIMINARY STATEMENT

Petitioners respectfully submit this memorandum of law in support of their Amended Verified Petition under Article 78 seeking a judgment, order and declaration pursuant to Civil Practice Law and Rules ("CPLR") 3001 and 7803, finding that: (1) Respondents must comply with the Order of this Court, dated January 30, 2008 in Case No. 108327/07 and undertake the public review process under the Uniform Land Use Review Procedures ("ULURP"), contained in the New York City Charter § 197-c and the Rules of the City of New York, Title 62, Chapter 2, in granting a concession to certain private schools with respect to permits for the use of athletic fields on Randall's Island; (2) in issuing the Negative Declaration of Non-Significance ("Negative Declaration") on January 26, 2009 concerning the Randall's Island Sports Field Development Project ("RISFDP" or "Project"), the respondent New York City Department of Parks and Recreation (the "DPR") acted in an arbitrary and capricious manner and/or abused its discretion by failing to comply with the State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law, §§ 8-101, *et seq.*, and its implementing regulations, 6 NYCRR §§ 617, *et seq.*, and the City Environmental Quality Review ("CEQR"), established by Executive Order No. 91 of 1977 and governed by the Rules of the City of New York, Title 62, Chapter 5, and the CEQR Technical Manual; and (3) DPR must issue a Positive Declaration and prepare an Environmental Impact Statement ("EIS") for the RISFDP pursuant to the requirements of SEQRA and CEQR.

STATEMENT OF FACTS

A. The Negative Declaration

On January 26, 2009, respondent DPR released an Environmental Assessment Statement for the RISFDP comprised of the standard form and a supplemental report (collectively the "EAS"). Verified Petition ("Ver. Pet.") Ex. I. As described in the EAS, RISFDP is a 209-acre

project which entails the "reconstruction or creation of 63 [athletic] fields; six comfort stations; new parking areas and roadways; park amenities; signage; and upgraded utilities" and "a concession agreement for the use of a portion of the 66 athletic fields of Randall's Island Park by a group of independent schools during the academic school year (approximately September through June)." Ver. Pet. Ex. I (EAS) at 1. A number of these athletic fields would be constructed of artificial turf, including eight 100-yard soccer/lacrosse fields and four 120-yard soccer fields. *Id.* at 3-4. Randall's Island has been designated as New York City (the "City") parkland since 1939 under the jurisdiction of DPR. *Id.* at 2. DPR was designated under SEQRA (6 NYCRR § 617.11) and CEQR as the lead agency for conducting the environmental review of the Project. The Project was classified as a Type I action carrying with it "the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS." 6 NYCRR §§ 617.4(a)(1). Based on the EAS, also on January 26, 2009, DPR issued a Negative Declaration under SEQRA and CEQR in which DPR determined that the Project "would not have a significant effect on the environment" and thereby concluded that an EIS need not be prepared.

B. The Parties

Petitioners District 4 Presidents' Council, Citywide Council on High Schools ("CCHS"), District 4 Community District Education Council ("CDEC"), East Harlem Preservation, Inc. ("EHP"), Nos Quedamos Committee, Inc. ("Nos Quedamos"), and New York City Park Advocates, Inc. ("Park Advocates") are community-based or public school-based organizations whose members use and/or will use the Randall's Island parkland and athletic fields and have a substantial interest in and will be directly and adversely affected by the RISFDP as currently being implemented, including the proposed concession agreement for preferential use of athletic fields by private schools during peak after school times. These Petitioners have long advocated

for more parkland and recreational facilities for public school children and for residents of low-income communities.

In particular, the District 4 Presidents' Council, comprised of the Presidents of the Parents' Associations/Parent Teacher Associations for schools in East Harlem, has been working to develop an organized after-school sports program for District 4. *See* Affidavit of Hunter Manuel, Ver. Pet. Ex. A. The CCHS represents parents of public high school students citywide, including East Harlem and the South Bronx, and has a substantial interest in the City granting a concession to private schools for use of sport fields on Randall's Island to the exclusion of the public schools. *See* Affidavit of David Bloomfield, Ver. Pet. Ex. B. The CDEC, representing forty schools and 22,000 students in East Harlem, advocates for community and after-school programming that addresses children's health and has a substantial interest in the accessibility of Randall's Island facilities for such programs. *See* Affidavit of Hector Nazario, Ver. Pet. Ex. C. Petitioner Hector Nazario is president of the CDEC and a resident of East Harlem who, along with his family, uses Randall's Island for recreation on a regular basis. Nazario Aff. ¶¶ 1-2, 4-7. The EHP monitors large-scale developments, as well as privatization and environmental issues in East Harlem, including Randall's Island, and has a substantial interest in the destruction of open parkland and natural resources on the island. *See* Affidavit of Marina Ortiz, Ver. Pet. Ex. D.

Nos Quedamos is a community-based organization, in a low-income community of color, working to rebuild a thirty-five-block area in the Melrose section of the South Bronx as an economically productive, sustainable and healthy community, and has been at the forefront in addressing environmental justice issues in its community, including the severe and disproportionate lack of access to parks and open space. Nos Quedamos has a substantial interest in securing access to Randall's Island facilities for more than 100 schools in the South

Bronx, whose students suffer from disproportionately high rates of obesity, diabetes and asthma. *See* Affidavit of Yolanda Gonzalez, Ver. Pet. Ex. E. Park Advocates is dedicated to restoring public funding for improving public parks, increasing public recreation programs, expanding open space and accessibility, and achieving equitable access to parks and open space, including Randall's Island. *See* Affidavit of Geoffrey Croft, Ver. Pet. Ex. F.

C. Respondents' Previous Attempt to Grant a Pay-to-Play Concession That Would Have Reserved Prime Playing Time on Randall's Island for Private Schools and Excluded the Public

On February 14, 2007, respondent Franchise and Concession Review Committee ("FCRC") approved a concession agreement, the "Randall's Island Sports Fields Improvement Project Agreement" ("2007 Concession"). The 2007 Concession resulted from an agreement among the City, operating through DPR; the Randall's Island Sports Foundation ("RISF"); and the Randall's Island Fields Group, LLC, a consortium of twenty affluent private schools in New York City ("Private Schools Group"). *District 4 Presidents' Council v. Franchise & Concession Rev. Comm. of the City of N.Y.*, No. 108327/07, 18 Misc.3d 1123(A) (unreported decision), 2008 WL 253048 (Sup. Co. N.Y. Co., Jan. 30, 2008) ("Order"), attached to Ver. Pet. as Ex. G, at *1.

Under the 2007 Concession, between 2007 and 2009, RISF would undertake the RISFDP to develop or redevelop 63 athletic fields for baseball/softball, soccer, football and lacrosse, giving Randall's Island 66 new athletic fields at the project's end. Ver. Pet. Ex. (City's Verified Answer) H ¶ 59. The City was to contribute more than $65,000,000 towards the redevelopment project. Ver. Pet. Ex. (Order) G at *1. For a twenty-year period commencing on the date when 75% of the athletic fields were substantially complete, the Private Schools Group would be entitled to receive permits for two-thirds of the fields during the prime after-school hours of 3:00 p.m. to 6:00 p.m. on weekdays (which percentage could rise to 80% under certain circumstances). *Id.* Public schools, community-based sports clubs, professional after-work

sports leagues, and the public at large would have access to, at most, a third of the Randall's Island athletic fields during those prime after school hours. In return for this preferential access to athletic fields, the Private Schools Group would pay RISF $2,630,000 per year; RISF would retain $400,000 each year to maintain the athletic fields and remit the remainder to the City. *Id.*

This "pay-to-play" 2007 Concession met with significant public opposition, culminating in a petition to this Court by a group of petitioners substantially overlapping with Petitioners here. The petition alleged that the 2007 Concession violated the City Charter and was invalid because FCRC did not follow the process mandated by ULURP. After briefing and a hearing, Justice Shirley Kornreich of this Court agreed with the petitioners and, on January 30, 2008, issued the Order, which "vacated and annulled" the 2007 Concession. Order at *1, *7.

Justice Kornreich reasoned that because the 2007 Concession fit the definition of a "major concession," ULURP review was mandated. According to the City Planning Commission's regulations implementing ULURP, 62 RCNY § 7-01, *et seq.*, a concession is "major" and therefore subject to ULURP if, *inter alia*, it involves "an open use which occupies over 30,000 square feet of a separate parcel of parkland." Order at *2 (*quoting* 62 RCNY § 7-02(g)). Justice Kornreich took judicial notice of the fact that "30,000 square feet is equal to slightly over two-thirds of an acre," while the project under the 2007 Concession was to involve 158 acres (now estimated at 209 acres), including 12.5 acres of open City parkland on Randall's Island that would be converted from parking and passive uses to athletic fields. *Id.* These 12.5 acres included the Central Fields and Sunken Gardens Fields. *Id.* at *1.

Moreover, Justice Kornreich rejected Respondents' argument that since, under the 2007 Concession, the Private Schools Group could not begin exclusive use of the athletic fields until 75% of the fields were complete, this was simply a continuation of an "existing use," an

exception in the definition of major concession, and therefore ULURP did not apply. Order at *2. The Court disagreed with "this strained interpretation of the Concession, an interpretation designed to evade ULURP review under the governing statutes and regulations." *Id.* at *5. The Court continued, "Allowing the City to avoid ULURP review by drafting terms to redefine when a concession has been granted would undermine ULURP's purpose of requiring community input on significant land use decisions regarding public land." *Id.* at *6.

While the petitioners' ULURP claims involved the RISDFP as a whole (and not merely the 12.5 acres on which DPR had admitted would be transformed from passive use to newly built athletic fields) the Court found that DPR's actions with respect to the 12.5 acre parcel *alone* were sufficient to require ULURP review and thus did not reach the petitioners' claims with respect to the remainder of the RISFDP. The Court noted:

> The record is unclear as to the acreage of areas other than the 12.5 acres that will undergo a change of use. ***Respondents have provided the court with no figures setting forth the acreage of land surrounding the present playing fields. They argue unpersuasively that "active recreational use" is synonymous with sports fields and, thus, all the reconfigured fields will continue an existing use.*** It is not necessary to resolve this issue in order to determine that a major concession was issued.

Id. at *6 n.3 (emphasis added).

D. The Environmental Assessment Statement

On January 26, 2009, DPR released its EAS for the RISFDP. This fundamentally deficient EAS does not support the Negative Declaration finding that an EIS is not necessary.

1. A Massive Building Project With Numerous New Facilities on 209 Acres

The RISFDP is a massive project that will transform the face of Randall's Island. The Project would cover 209 acres of land and involve the construction or reconstruction of 63 athletic fields, six comfort stations, new parking areas and roadways, park amenities, signage,

and upgraded utilities. Ver. Pet. Ex. I (EAS) at 3. The athletic fields would consist of "13 baseball fields, two little league fields, 20 softball fields, six 120-yard soccer fields, and 22 100-yard soccer/lacrosse fields." *Id.* at 20. In addition, the project includes "new park amenities such as water fountains, bike racks, picnic areas, and comfort stations." *Id.* To support these new and increased uses, "new water mains, sewer lines, gas lines, and an electrical substation will be constructed on the island" as part of the project. *Id.* at 5. DPR anticipates that these "new fields will enable increased soccer, baseball and softball programming. ... The proposed project could add many thousands of hours of additional playing time for current and new users of the fields." *Id.* at 8. In recognition of the huge scale of the project, DPR has acknowledged the need to treat the RISFDP as a Type I project, thereby requiring a higher level of scrutiny during the SEQRA review. In fact, at 209 acres, the scale of the RISFDP is over *twenty times* greater than the threshold for Type I categorization. 6 NYCRR § 4(a)(6)(i) (categorizing as Type I "a project or action that involves the physical alteration of 10 acres").

2. The RISFDP Omits Numerous Basic Areas of Environmental Review

As discussed *infra*, the EAS overlooks, gives short shrift to, or blatantly mischaracterizes several basic and fundamental aspects of a thorough environmental review, including but not limited to the following:

Increased Usage

- *The EAS does not study the impact of thousands of additional users of the park on Randall's Island or the surrounding neighborhoods.*
- *The EAS finds that, while there would be an increase in traffic, a decrease in parking spots and no plan for better public transportation, traffic and congestion would not be impacted by the Project.*
- *Even though the RISFDP would increase usage of Randall's Island, the EAS does not analyze the impact of increased generation and management of solid waste on Randall's Island or in the surrounding neighborhoods.*

- *While admitting the current insufficiency of energy supply for Randall's Island and the requirement for building a new substation to feed the expected increase in energy demand, the EAS concludes the Project has no impacts on energy supplies.*

Water and Natural Resources

- *The EAS acknowledges impacts on water resources that would result from the RISFDP, but provides inadequate detail on impacts and mitigation measures.*

- *The EAS acknowledges impacts on wetlands from the RISFDP, but provides inadequate detail on the impacts on wetlands and mitigation measures.*

- *In view of the massive construction and development, the EAS contains insufficient detail to support its conclusory assertion that the RISFDP would not increase storm water discharge.*

- *The EAS contains insufficient detail to support its conclusory assertion that the RISFDP would not adversely effect wastewater treatment on Randall's Island.*

- *The EAS does not address the potential impact on Randall's Island and the Project from expected climate change, merely stating that most of the Project would be within the 100-year flood plain.*

Community and Public Health

- *The EAS summarily concludes that the conversion of passive recreational space to athletic fields would have no adverse impact on "open space" in the park.*

- *The EAS contains no data regarding the impact the concession to the Private Schools Group would have on Randall's Island and its surrounding neighborhoods.*

- *Even though the surrounding communities are low-income neighborhoods of color, there is no environmental justice analysis as required by DEC Commissioner's Policy CP-29 of March 2003.*

- *While admitting the synthetic turf to be used on "select" fields may result in harmful exposure to chemicals and significant increases in temperature on the fields, the EAS nevertheless concludes there is no potentially significant impact on public heath.*

Cumulative Impact

- *The EAS does not address the cumulative impact of the Project with the substantial increase in size of the Randall's Island Tennis Center, the further development and use of the Harlem River Event Area, and the construction of the electrical substation.*

E. Respondents' Resurrected Concession Agreement with the Private Schools Group

1. DPR Announces Its Intention in the EAS Not to Comply With this Court's Order or ULURP

The EAS also indicated that Respondents would again pursue a concession with the Private Schools Group without following the mandate of this Court's Order or ULURP, although the specific details were not made public at the time. In the section entitled, "Required Action or Approvals," DPR has checked the "No" box for Item 5, "Uniform Land Use Procedure (ULURP)." Ver. Pet. Ex. I (EAS Form) at 1. Attempting to foreclose the argument that the new concession would violate this Court's Order to comply with ULURP, the EAS contended that the concession would merely continue an existing use, asserting that, "In keeping with DPR's practice of requiring permits for the use of park facilities, ***the concession would not change the nature or use of the fields, but would simply determine to whom certain fields are allocated for certain times.***" *Id.* at 4 (emphasis added).

2. Respondents and the Private Schools Group Enter A New Concession Agreement Intended to Evade ULURP and This Court's Order

On Tuesday, May 26, 2009, Petitioners filed their original petition in this matter. On Friday, May 29, 2009, Respondents announced that, as promised in the EAS, DPR, RISF, and the Private Schools Group had negotiated a new concession agreement regarding the allocation of athletic fields on Randall's Island. On June 8, 2009, the FCRC held a public hearing on the concession agreement, and, on June 10, 2009, the FCRC unanimously voted to approve it. On June 19, 2009, DPR, RISF and the Private Schools Group executed a new concession agreement (the "2009 Concession"). Ver. Pet. Ex. Q.

According to the EAS, 63 athletic fields are to be built or rebuilt under the RISFDP, leaving Randall's Island with 66 athletic fields in total. Ver. Pet. Ex. I (EAS) at 1. According to

a License Agreement between the City and RISF, these 66 fields are under RISF's jurisdiction. *See* Ver. Pet. Ex. Q § 2.01 & Ex. C. thereto, fig. 2. The 2009 Concession lays out a complex, multi-tiered structure whereby the RISF is granted a concession over a subset of these fields for the purpose of permitting a certain percentage of that subset to the Private Schools Group. This structure appears to be intended to exclude athletic fields within the 12.5-acre area discussed by Justice Kornreich. Specifically, the 2009 Concession gives RISF control over certain "Sports Fields" on Randall's Island for a period of 20 years commencing on September 19, 2009. *Id.*, Ex. Q § 2.01. The "Sports Fields" are defined as the 51 or 52[1] "sports fields set forth on Exhibit A located at the Premises, and all related facilities including, without limitation, parking, curb work and restrooms." *Id.* at 4 & Ex. A thereto. The "Premises" are defined as "the land on which the Sports Fields are located, and any adjacent land necessary for their use, operation, management and maintenance, together with any improvements thereon." *Id.* at 4.

Within the "Premises" exists a designated "Concession Location," defined as the "Sports Fields specified in ... Exhibit [B]." *Id.* at 3. Exhibit B lists a total of 46 distinct Sports Fields, comprised of 40 designated fields for spring sports and 33 designated fields for fall sports. *Id.*, Ex. B thereto. In other words, five or six fields – Fields 31, 39, 40, 80, 81 and possibly 85[2] – constitute part of the Premises, but are not part of the Concession Location. *Compare id.* Ex. A and *id.* Ex. B.

During the 20-year concession period, the 2009 Concession would require DPR, acting through RISF, to issue permits to the Private Schools Group for 50% of the "School Playing Slots" on the Sports Fields in the Premises for the appropriate sports season, although the

[1] Field 85 is listed on Exhibit A under Randall's Island South Fields, but not included on Exhibit A's map.

[2] See previous note.

Concession would require that the actual fields assigned lie within the Concession Location. *Id.* § 3.02(b)(i). "School Playing Slots" are defined as, "for each School Year, the period from 3:00 PM New York City time, to 6:00 PM New York City time on Monday to Friday on all Sports Fields." *Id.* at 4. Thus, the 2009 Concession would give the Private Schools Group an exclusive right for 20 years to obtain permits on 23 Sports Fields in the spring sports season and 20 Sports Fields in the fall sports season during the prime playing time of 3:00 PM to 6:00 PM on school days.[3] In return for this preferential treatment, the Private Schools Group would pay RISF $2,200,000 per annum, subject to a cost of living increase from 2011 onward, and RISF would forward the payment amount, minus $400,000, to the City. *Id.* § 4.02(a), (d).[4]

The Private Schools Group may also obtain permits for the remaining five or six fields within the Premises but not the Concession Location. *Id.* § 3.02(b)(ii). Furthermore, although public schools, private and parochial schools not in the Private Schools Group, and certain approved community based organizations ("CBOs") would receive a preference for School Playing Slots on 40% of the Sports Fields under a "Permitting Agreement" between DPR and RISF (Ver. Pet. Ex. R), nothing prevents the Private Schools Group from obtaining permits for these Sports Fields as well if no other approved group or institution applies for such permits. *See* Ver. Pet. Ex. Q § 3.02(b)(ii) and Ex. R § 2. Similarly, nothing bars the Private Schools Group from obtaining permits for the remaining 10% of School Playing Slots, which are to be allocated

[3] The EAS, 2009 Concession and Permitting Agreement do not discuss the allocation of the "Premises" fields (Fields 31, 29, 40, 80, 81, and 85) between spring and fall sports, so Petitioners have assumed that all six "Premises" fields are available in both spring and fall. As a result, there are presumably 46 "Available Fields" in spring and 39 "Available Fields" in fall. *See* Ver. Pet. Ex. Q § 3.02.

[4] The 2007 Concession allocated some 72 spring and fall fields to Private Schools Group at a total cost of $2,630,000 per annum or approximately $36,000 per field per annum. *See* Ver. Pet. Ex. I (EAS) at 3. The 2009 Concession allocates 43 spring and fall fields to the Private Schools Group at a total cost of $2,200,000 per annum or approximately $51,000 per field per annum. The dramatic increase in per-field costs suggests that the Private Schools Group expects to be allocated more than 43 fields per year through the permitting process.

solely through the usual permitting process. Ver. Pet. Ex. R § 3.

In addition, the 2009 Concession appears carefully drawn to exclude certain other fields, including those in the Sunken Gardens Fields and Central Fields, that formed the basis for Justice Kornreich's Order. Exhibit C, figure 2, to the 2009 Concession lists and depicts all 66 fields of the RISFDP. Ver. Pet. Ex. Q, Ex. C thereto. By contrast, the map in 2009 Concession Exhibit A omits 15 of these fields – namely, fields 20-21, 50-54, 62-63, 82-85, and 90-91 (the "Non-Premises Fields") – presumably indicating that they are not part of the Premises. Respondents have not represented that the 15 Non-Premises Fields under the jurisdiction of RISF will be reserved for the exclusive use of public schools, CBOs and the general public, nor have they represented that they will refrain from issuing permits for the Non-Premises Fields to the Private Schools Group under the usual permitting process.

In sum, the Private Schools Group is guaranteed permits for School Playing Slots on 23 fields in the spring and 20 fields in the fall. However, under certain circumstances, the 2009 Concession and Permitting Agreement would allow the Private Schools Group to obtain permits for ***all*** of the School Playing Slots on Randall's Island in each of the next 20 school years.

F. The 2009 Concession Includes More than 30,000 Square Feet of Parkland Being Converted to New Uses

Sports Fields and other areas that are admittedly within the 2009 Concession are being converted to new uses. The 2009 Concession defines the "Premises," the subject of the 2009 Concession, as "the land on which Sports Fields are located, and any adjacent land necessary for their use, operation, management and maintenance, together with any improvements thereon." Ver. Pet. Ex. Q at 4. The "Concession Location" is defined as the "Sports Fields specified in ... Exhibit [B]," and "Sports Fields" are defined to encompass "all related facilities, including, without limitation, parking, curb work, and restrooms." *Id.* at 3, 4. Parking, restrooms and other

infrastructure have been constructed on parkland previously dedicated to another use, and these new uses occupy more than 30,000 square feet individually and collectively.

1. New Parking Spaces and Roads Far in Excess of 30,000 Square Feet

According to the EAS, parking will be significantly redistributed throughout Randall's Island under the RISFDP, resulting in parking areas being reduced or eliminated from some areas and being added to other locations that previously had no parking areas. For example, parking spaces will be added where they never existed before in the following locations: Bronx Shore Fields ("200 new parking spaces" plus "two open areas which may be used for picnicking or special events parking with a total of 300-400 spaces"); Sunken Meadows Fields[5] ("124 perpendicular parking spaces for visitors" plus "roughly 75 parking spaces available in front of the new tennis center and along the access road to this field area"); East River Fields ("about 84 parking spaces"); and Wards Meadow Fields ("about 230 spaces"). Ver. Pet. Ex. I at 6. Each of these areas is within the Concession Location and a part of the 2009 Concession. Ver. Pet. Ex. Q at 4 & Ex. A thereto. According to the EAS, all of these parking spaces have been constructed on land not previously containing designated parking areas. Ver. Pet. Ex. I (EAS) at 6.

The New York City Zoning Resolution states that a parking area must allocate at least 200 square feet per parking space, including access lanes.[6] Under this standard, the parking areas being added to Randall's Island presumably occupy the following areas: Bronx Shore Fields (200 spaces x 200 SF = 40,000 SF); Bronx Shore Fields "special events parking" (300-400 x 200SF = 60,000-80,000 SF); Wards Meadow Fields (230 x 200 SF = 46,000 SF); Sunken

[5] The Sunken Meadows Fields should not be confused with the Sunken Gardens Fields, which Respondents have purported to exclude from the 2009 Concession.

[6] NYCZR 25-62. Petitioners acknowledge that zoning regulations do not apply to City parks. However, Petitioners submit that it is reasonable to assume that parking spaces constructed on Randall's Island are standard size for New York City.

Meadows Fields/Tennis Center (199 x 200 SF = 39,800 SF); and East River Fields (84 x 200 SF = 16,800 SF). In total, the new parking spaces within the Concession Location occupy at least 202,600 square feet.

In addition, the RISFDP includes, *inter alia*, an extension of the "circulatory road system" to enable visitors to "access all of the field clusters without having to drive on pedestrian pathways, which are currently used by all vehicular as well as non-vehicular traffic." Ver. Pet. Ex. I at 5. Petitioners allege that these new roads occupy 30,000 square feet or more of land not previously used in this manner.

2. Reconfiguration and Increase in the Number of Athletic Fields Will Convert 30,000 or More Square Feet to Athletic Fields from Passive Uses

The reconfiguration of allegedly pre-existing athletic fields will require the conversion into athletic fields of land between the old athletic fields that was previously available for passive use, such as picnicking, sunbathing, reading and informal games like Frisbee, kite-flying, and catch. As in the prior proceeding, Respondents have not provided sufficient information to determine the total square footage of these reconfigured areas, but the reconfigured areas within the Concession Location and/or the Premises are believed to equal or exceed 30,000 square feet.

3. The Premises Include 30,000 or More Square Feet of Newly Constructed Sports Fields

The 2009 Concession states that "'Concession Location' shall include ***only locations which were used as permitted sports fields prior to renovation of such fields as set forth on Exhibit B*** and shall include the Sports Fields specified in such Exhibit." Ver. Pet. Ex. Q at 3 (emphasis added). The "Sports Fields" within the Premises but outside the Concession Location are purported not to be "on locations which were used as permitted sports fields prior to renovation of such fields." *See id.* at 3, 4 & Ex. A (definitions of "Premises" and "Sports Fields"

and map of fields in the Premises). Thus, Respondents admit that at least the five or six Sports Fields outside the Concession Location but inside the Premises are located on parkland *not* previously used as permitted athletic fields. Fields 80, 81, and 85 are soccer fields. Ver. Pet. Ex. Q, Ex. A & Ex. C fig. 2 thereto. A regulation soccer field is 100 yards by 60 yards, and therefore occupies an area of 54,000 square feet, *see, e.g.,* http://www.sportsknowhow.com/soccer/dimensions/soccer-dimensions.html, while at least one of the soccer fields in the East River Fields may be 120 yards by 60 yards, or 64,800 square feet, *see* Ver. Pet. Ex. I at 4.

STANDARD OF REVIEW

Pursuant to CPLR 3001, this Court "may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001. Under CPLR Article 78, when an agency's "determination was made in violation of lawful procedures, was affected by an error of law or was arbitrary or capricious or an abuse of discretion, this Court should invalidate that determination. *See, e.g., In the Matter of the Village of Westbury v. Department of Transportation*, 75 N.Y.2d 62, 66 (1989).

As for SEQRA, that statute grants this Court "authority to examine a SEQRA review conducted by an agency that was required to do so," particularly by "reviewing whether the [agency's] determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." *In the Matter of Chatham Towers, Inc.*, 6 Misc.3d 814, 822, 793 N.Y.S.2d 670, 678 (Sup. Ct. N.Y. Co. 2009) (citing *Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 688 (1996)). The question here is "whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them and made a 'reasoned elaboration' of the basis for its determination." *Id.* (*citing Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986); *Gernatt, supra;* and

Matter of New York City Coalition to End Lead Poisoning, 100 N.Y.2d 337, 348 (2003)). "It is well settled that 'literal compliance with both the letter and spirit of SEQRA is required and substantial compliance will not suffice.'" *Golten Marine Co. v. New York State Dep't of Env. Conserv.*, 193 A.D.2d 742, 743-44, 598 N.Y.S.2d 59 (2d Dep't 1993) (citations omitted).[7]

ARGUMENT

I. RESPONDENTS MUST COMPLY WITH ULURP IN CONNECTION WITH ANY CONCESSION TO THE PRIVATE SCHOOLS GROUP FOR PREFERENTIAL USE OF RANDALL'S ISLAND SPORTS FIELDS

On January 30, 2008, this Court found that the 2007 Concession allocating athletic fields to the Private Schools Group was a "major concession" that required DPR to comply with ULURP, because the RISFDP required the conversion of 12.5 acres of open space and parking space, including the Central Fields and Sunken Gardens Fields, into athletic fields. Ver. Pet. Ex. G (Order) at *1, *3. The 2009 Concession purports to comply with this Court's Order by excluding the Central Fields and Sunken Gardens Fields from the Concession Location. *See* Ver. Pet. Ex. Q at 3 & Ex. B thereto. Respondents' gerrymandering of the borders of the Concession Location violates the spirit, and mocks the letter, of the Court's Order.[8] Accordingly, the Court should order Respondents to comply with ULURP with respect to the 2009 Concession as well.

Furthermore, the 2009 Concession requires ULURP review in its own right. The Sports

[7] The RISFDP and Negative Declaration were prepared in accordance with City Environmental Quality Review ("CEQR") procedures. CEQR implements SEQRA in New York City and has essentially the same procedural and substantive rules as SEQRA. CEQR's requirements concerning when an EIS is appropriate are virtually identical to those of SEQRA. Therefore, there are no relevant provisions of CEQR that differ from SEQRA. 43 RCNY § 6-01, *et seq.* *See also Williamsburg Around the Bridge Block Ass'n v. Giuliani*, 223 A.D.2d 64, 69 (1st Dep't 1996) (CEQR and SEQRA requirements on prerequisites for an EIS are virtually identical). As such, except where necessary, references in the argument will be to SEQRA and its implementing regulations at 6 NYCRR Part 617.

[8] The discussion above, in Sections E and F of the facts, illustrates the enormous lengths to which Respondents went to try to structure a concession that would circumvent Justice Kornreich's Order and avoid ULURP. If Respondents had simply submitted the 2007 Concession to ULURP review after Justice Kornreich's Order 18 months ago, they would likely have completed that process by now.

Fields within the Concession Location are defined to include "all related facilities, including, without limitation, parking, curb work and restrooms." Ver. Pet. Ex. Q at 4. The RISFDP will add at least 713 parking spaces within the Concession Location, not including the 300-400 spaces for "special events parking" in the Bronx Shore Fields. Ver. Pet. Ex. I at 6. These parking spaces are a "major concession" because they constitute "accessory parking lots with over 250 spaces on parklands." 62 RCNY § 7-02(c). They also constitute a "major concession" because a number of these parking areas individually exceed 30,000 SF (Bronx Shore Fields (40,000 SF) and Wards Meadow Fields (46,000 SF)), and collectively occupy 142,600 square feet, not including the "special events" parking. 62 RCNY § 7-02(g) ("an open use which occupies over 30,000 square feet of a separate parcel of parkland" is a "major concession"); *District 4 Presidents' Council*, 2008 WL 253048, at *2 (new parkland use of 30,000 square feet subject to ULURP review).

In addition, the 2009 Concession requires ULURP review because other aspects of the concession constitute major concessions under 62 RCNY 7-02. The following components of the 2009 Concession each equal or exceed 30,000 square feet in area and therefore require ULURP review under 62 RCNY § 7-02(g): (1) the reconfigured Sports Fields within the Concession Location, which will cause parkland between the old fields in excess of 30,000 square feet to be converted from passive uses such as walking, sunbathing, reading, Frisbee and "catch" to athletic fields; and (2) the five or six newly constructed fields within the Premises but outside the Concession Location, of which the three soccer fields designated Fields 80, 81 and 85 alone occupy at least a combined 162,000 square feet. *See* Ver. Pet. Ex. I at 3-6, Ver. Pet. Ex. Q at 2 & Ex. C thereto.

II. THE NEGATIVE DECLARATION IS INVALID BECAUSE DPR FAILED TO TAKE A "HARD LOOK" AT THE RISFDP IN VIOLATION OF SEQRA

Despite the potential impacts that the RISFDP would have on Randall's Island and its surrounding neighborhoods, and despite the fact that DPR acknowledges that the RISFDP is a "Type I" action that requires a higher level of environmental scrutiny under SEQRA, DPR has concluded in its EAS that the project will cause no significant environmental impacts and, therefore, it need not prepare an EIS. The failure of DPR's EAS to evaluate the environmental impacts of numerous additions and alterations to Randall's Island, as set forth in more detail below, violates SEQRA and its implementing regulations. Environmental Conservation Law ("ECL") §§ 8-101, *et seq.*; 6 NYCRR §§ 617, *et seq.*

A. SEQRA Embodies an Important State Policy Mandating an EIS Whenever an Action or Project "May" Adversely Impact the Environment

SEQRA was enacted "to incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local governmental agencies at the earliest possible time." 6 NYCRR § 617.1(c). SEQRA's goal is "to minimize, to the greatest degree possible, the adverse environmental consequences of any project that is approved." *Aldrich v. Pattison*, 107 A.D.2d 258, 486 N.Y.S.2d 23, 27 (2d Dep't 1985).

SEQRA embodies an important public policy – declared by the Legislature, endorsed by the Executive, and recognized by the Courts of this State – that requires state agencies to study and minimize the potentially adverse impacts of their actions on the environment. By its express terms, SEQRA announces a "state policy" to:

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

ECL § 8-0101. The Legislature has further declared that, "to the fullest extent possible," environmental factors should be considered in reaching decisions on proposed projects. *Williamsburg Around the Bridge Block Ass'n v. Giuliani*, 223 A.D.2d 64, 69 (1st Dep't 1996), ECL § 8-0103(6)-(7). In a memorandum in support of SEQRA, then-governor Hugh Carey noted that "the information contained in [an EIS] would allow state and local officials to better assess environmental factors in conjunction with social, economic, and other relevant considerations, to be in a better position to make decisions which are in the best overall interest of the people of the State." *Williamsburg Around the Bridge*, 223 A.D.2d at 69. The Court of Appeals also has recognized that "SEQRA makes environmental protection a concern of every agency...." As a result,

> [i]n proposing action, an agency must give consideration not only to social and economic factors, but also to protection and enhancement of the environment.... SEQRA ensures that agency decision-makers-enlightened by public comment where appropriate-will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices.

Matter of Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 414-15, 503 N.Y.S.2d 298 (1986).

The First Department has stated that the "heart of SEQRA is the Environmental Impact Statement." *Williamsburg Around the Bridge*, 223 A.D.2d at 169. SEQRA sets out a comprehensive scheme for determining whether a proposed action is likely to have a significant environmental impact, thus requiring the lead agency to prepare an EIS. As a threshold matter, the agency must determine whether a proposed action "may have" a significant effect on the environment. If the action may have such an effect, the agency must issue a "positive

declaration" and prepare an EIS. ECL § 8-109(2); 6 NYCRR § 617.1(a)(1). If the agency concludes that the action does not have the potential for adverse impacts, it may issue a "negative declaration" and no further study is required. 6 NYCRR § 617.1(a)(2). As the leading treatise on SEQRA states, "As the use of the word 'may' indicates, SEQRA requires that a positive declaration be issued where the *potential* for a significant environmental effect exists." Gerrard, Rusov and Weinberg, *Environmental Impact Review in New York* (2008) ("Gerrard, et al."), Section 3.05[3][a] at 3-118.1 (emphasis in original) (*citing* ECL § 8-0109(2)).

To make this threshold determination, the agency must "thoroughly analyze . . . relevant areas of environmental concern" to determine if there will be adverse impacts and prepare a written "determination of significance" that includes a "reasoned elaboration" of its conclusion. 6 NYCRR §§ 617.7(b)(3) and (4). This reasoned elaboration must provide reference to any supporting documents. 6 NYCRR § 617.7(b)(4).

In conducting this analysis, the agency must compare the likely impacts of the action with a list of criteria set out in the regulations at 6 NYCRR § 617.7(c). The required analyses include, *inter alia*:

> (i) a substantial adverse change in existing air quality, ground or surface water quality or quantity, traffic or noise levels; a substantial increase in solid waste production; a substantial increase in potential for erosion, flooding, leaching or drainage problems;
>
> (ii) the removal or destruction of large quantities of vegetation or fauna; . . . or other significant adverse impacts to natural resources;
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> * * *
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> (v) the impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character;
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> (vi) a major change in the use of either the quantity or type of energy;

(vii) the creation of a hazard to human health;

(viii) a substantial change in the use, or intensity of use, of land including agricultural, open space or recreational resources, or in its capacity to support existing uses;

(ix) the encouraging or attracting of large numbers of people to a place or places for more than a few days, compared to the number of people who would come to such a place absent the action;

* * *

(xi) changes in two or more elements of the environment, no one of which has a significant impact in the environment, but when considered together result in a substantial adverse impact to the environment; or

(xii) two or more related actions undertaken, funded or approved by an agency, none of which has or would have a significant impact on the environment, but when considered cumulatively would meet one or more of the criteria in this subdivision.

6 NYCRR § 617.7(c)(1). As discussed below, the EAS fails to adequately address these types of impacts, mandating the invalidation of the Negative Declaration.

B. SEQRA Creates a Presumption that "Type I" Actions Like the RISFDP Require the Lead Agency to Prepare an Environmental Impact Statement

SEQRA identifies certain actions – "Type I" actions – as being "those actions and projects that are more likely to require the preparation of an EIS" than others." 6 NYCRR § 617.7(a). DPR has properly classified the RISFDP as a "Type I" action. Ver. Pet. Ex. I (EAS Form) at 2, Item 11a. "The fact that an action or project has been listed as a Type I action carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS." 6 NYCRR § 617.4(a)(1). The Fourth Department stated in its seminal decision in *H.O.M.E.S. v. New York Urban Dev. Corp.*, 69 A.D.2d 222, 232, 418 N.Y.S.2d 827, 832 (4th Dep't 1979): "In a case of this sort, [*i.e.*, involving a Type I action] 'there is a relatively low threshold for [environmental] impact statements.'" *Accord, Holmes v. Brookhaven Town*

Planning Board, 137 A.D.2d 601, 524 N.Y.S.2d 492, 493 (2d Dep't 1988) (classification of the project as a Type I action "made it more likely that the project would require an EIS").

To rebut the presumption that an EIS need be prepared, "the agency's determination of environmental significance must contain persuasive documentation demonstrating that the agency took a 'hard look' at the likely consequences of the action." *H.O.M.E.S.*, 69 A.D.2d at 232, 418 N.Y.S.2d at 832; *see also Chinese Staff of Workers Assn. v. City of New York*, 68 N.Y.2d 359, 363-64, 509 N.Y.S.2d 499 (1986); Gerrard, *et al.*, Section 3.05(4). DPR has utterly failed to demonstrate that it took the requisite "hard look" at the RISFDP.

C. The EAS Failed to Rebut the Presumption that an EIS was Required Here Because DPR Did Not Take a "Hard Look" at Numerous Aspects of the RISFDP

As discussed *supra*, DPR has properly classified the RISFDP before us as a Type I action requiring a heightened level of scrutiny by the lead agency in its environmental review under SEQRA.[9] Ver Pet. Ex. I (EAS) at 9. 6 NYCRR § 617.4(a)(1); *H.O.M.E.S. v. New York Urban Dev. Corp.*, 69 A.D.2d at 232. Nevertheless, in the EAS, several critical areas that may produce an adverse environmental impact on Randall's Island and the surrounding neighborhoods are either treated in cursory fashion or omitted entirely. By failing to analyze these areas adequately, DPR failed to meet SEQRA's requirement to take a "hard look" at the RISFDP's potential

[9] At the time the Court invalidated the original 2007 Concession, DPR claimed that the RISFDP was a Type II action under SEQRA, not requiring any environmental review, based on the argument that the Project was simply a replacement in kind. Ver. Pet. Ex. G (Order) at *2-*3. While the EAS indicates that DPR still believes the Project to be a Type II action, DPR decided to consider the Project as a Type I action for purposes of an environmental review. Ver. Pet. Ex. I (EAS) at 9. The classification of this massive 209-acre Project for 63 new sport fields replacing 33 fields, with all the new supporting infrastructure, as a replacement in kind was and continues to be incongruous. Because of this faulty classification and DPR's original refusal to conduct an environmental review in 2007 (there was no determination of significance in the first place), it was difficult to determine the commencement of the statute of limitations in a challenge to what the agency did not do. Therefore, while the Order dismissed the environmental claim based on limitations grounds (not on the merits), that part of the Order is not relevant in the current action given DPR's new "determination," and this Court has full jurisdiction to review the EAS and Negative Declaration. *See* Order at *3-*5.

adverse environmental impacts. *See New York City Coalition to End Lead Poisoning v. Vallone,* No. 120911/99, 2000 WL 35489684 (Sup. Ct. N.Y. Co. Oct. 11, 2000), at *4, *aff'd* 100 N.Y.2d 337, 763 N.Y.S.2d 530 (2003) (describing the City Council's review as "mostly perfunctory only occasionally raising to the level of cursory, with the operative word being alacrity rather than analysis").

SEQRA also demands that the lead agency must complete the required environmental analysis *before* it makes its decision whether to issue a Negative Declaration. It is improper for a lead agency to issue a faulty Negative Declaration and then attempt to justify the determination with after-the-fact revisions or rationalizations. *Chinese Staff and Workers Assn.*, 68 N.Y.2d at 369, n.11. *See also Matter of O'Connell v. Town Board of the Town of Amherst,* 656 N.Y.S.2d 100 (4th Dept. 1997). Therefore, there is no appropriate remedy other than to invalidate the Negative Declaration and direct DPR to prepare a full Environmental Impact Statement.

1. The EAS Fails to Address the Potential Adverse Environmental Impacts of Thousands of Additional Park Users

The regulations implementing SEQRA require state agencies to address "the encouraging or attracting of large numbers of people to a place for more than a few days, compared to the number of people who would come to such a place absent the action." 6 NYCRR § 617.7(c)(1)(xi). The EAS fails this requirement. First, the EAS neglects to establish an accurate usage baseline, relying instead on attendance figures in a nine-year old consultant study used for a different purpose and based on summertime usage only (estimating that the park "attracts about 500,000 visitors per year, with approximately 1,200 visitors on an average summer weekday and approximately 2,900 visitors on an average summer weekend"). Ver. Pet. Ex. I at 27 & n.4. Second, the EAS does not address the potential environmental impact of increased park usage – including those impacts resulting from increased traffic and congestion,

increased generation of solid waste and increased energy use – even though the EAS acknowledges that the improvements will add "many thousands of hours of additional playing time for current and new users of the fields" and states that RISF plans to "substantially increase" its Randall's Island Kids programming, which already brings "thousands of children" to Randall's Island each year. *Id.* at 8; *see* photographs attached to Croft Aff.

The failure to analyze the impacts of increased usage of Randall's Island mandates the invalidation of the Negative Declaration. In *Segal v. Town of Thompson*, 182 A.D.2d 1043 (3d Dep't 1992), the Third Department invalidated a negative declaration that concluded that extending a town's water and sewer system to undeveloped lots would have no adverse environmental impact, because no "consideration has been given to the impact that the creation of the [new water and sewer] districts would have on the rate of development of vacant lots within the district." *Id.* at 1046. The logic of *Segal* applies with even greater force here where DPR not only acknowledges that the improvements will attract "new users," but also that RISF intends actively to encourage greater usage of the park.

a. **The Traffic and Parking Study are Inadequate**

SEQRA requires DPR to analyze potentially adverse changes in existing traffic and air quality associated with the Project. 6 NYCRR § 617.7(c)(1)(i). While the EAS finds that the Project would result in an increase in traffic, a decrease in parking spots and no plan for better public transportation, DPR nevertheless concludes that traffic and congestion would not increase due to the Project. It projects a significant increase in traffic attributed to the fields but does not consider traffic associated with the increase in the Tennis Center or the Harlem River Event Area, the current traffic and parking problems on the island, or the air impacts associated with increased traffic and the resulting congestion. Furthermore, the existing M35 bus route from Manhattan is the only consistent public transportation to Randall's Island. Ver. Pet. Ex. I (EAS)

at 87, 98 and 105. Residents of the South Bronx who live literally yards away currently have no direct access and must either drive or travel a long distance into Manhattan to reach the fields. Gonzalez Aff., ¶¶ 3-5. There was no discussion of possible mitigation measures, such as providing shuttle buses or enhancing public transportation to reduce traffic and the attendant air pollution. As such, the EAS does not represent a "hard look" at traffic impacts as required by SEQRA. 6 NYCRR § 7(c)(1)(i); *Holmes*, 137 A.D.2d at 604 (rejecting negative declaration where agency "failed to consider [relevant] areas of possible adverse impacts").

b. The EAS Fails to Address the Increase in Solid Waste

SEQRA requires DPR to analyze "a substantial increase in solid waste production." 6 NYCRR § 617.7(c)(1)(i). However, the EAS acknowledges that DPR never estimated "[t]he exact amount of waste to be generated" from the expected increased usage of Randall's Island and merely asserts, without supporting evidence, that "it will likely be of a similar amount as is currently managed by DPR." Ver. Pet. Ex. I (EAS) at 74. The EAS then summarily concludes that, because DPR "manages its own waste, no significant impacts on sanitation services are expected as a result of the proposed action." *Id.* To the contrary, the increase in the generation of solid waste will necessarily impact "sanitation services" by requiring more service and garbage trucks. Further, there is no discussion of whether the RISFDP will increase litter in the park, rivers, and surrounding areas, how and where DPR will dispose of that additional wastes, and what impact that will have on the environment. The EAS contains no discussion of mitigation measures such as additional garbage receptacles, waste reduction programs, or recycling programs. DPR has abdicated its duty to take a "hard look" at the potential for increased solid waste on Randall's Island. *H.O.M.E.S.*, 69 A.D.2d at 233.

c. The EAS Fails to Address Additional Energy Use

Although 6 NYCRR § 617.7(c)(1)(vi) requires DPR to analyze any "major change in the

use of either the quantity or type of energy," the EAS completely fails to address this issue, which is increasingly important in light of the need to conserve energy and reduce greenhouse gas emissions. *See* DEC Draft Policy, *Guide for Assessing Energy Use and Greenhouse Gas Emissions in an Environmental Impact Statement* (March 11, 2009) (The guide is to be used for large proposed projects that "generate thousands of vehicle trips or use significant amounts of electricity, such as very large-scale resort, residential, industrial, or commercial development projects."). Ver. Pet. Ex. K at 1. The EAS contains only a single paragraph on energy, admitting that "the existing system barely has sufficient capacity to maintain the existing tennis bubble and ball field lights" thereby requiring a new electrical substation to be constructed on the north end of the island, yet concludes no significant impact on the environment is caused by this finding. Ver. Pet. Ex. I (EAS) at 75. DPR's conclusion of no impact on energy resources or the environment under these circumstances strains credulity, and such cursory treatment fails the "hard look" requirement imposed by SEQRA. *Holmes*, 137 A.D.2d at 604.

2. The EAS Fails to Address the Potential Impacts on Water and Natural Resources that Will Result from the RISFDP

Although the EAS concerns a major construction project on an *island* that drains into two major waterways, the EAS devotes but one paragraph to the impact on "Water Resources" – a paragraph that focuses only on *construction* and completely ignores potential impacts from park usage once the RISFDP is complete. The EAS acknowledges "temporary impacts to water resources from construction activities" on "Wards Meadow Fields, Hell Gate Fields, Sunken Garden Fields, and East River Fields, which drain into the East River; and Central Fields, which drain into the Harlem River." Ver. Pet. Ex. I (EAS) at 54. However, the EAS does not identify the "temporary" impacts, and it simply concludes that so-called "best management practices" ("BMPs") – which it fails to explain – "will prevent" the unnamed "negative impacts in these

water bodies." *Id.* The EAS also concludes without evidence that "no negative impacts to the water quality in the Harlem River are anticipated as a result of the construction of the waterfront pathways and the reconstruction of seawalls" due to the use of BMPs. *Id.* As for environmental impacts *after* construction, there is no discussion regarding the potential impact on water resources, either from increased litter, runoff from fertilizers and pesticides, or other human impacts. DPR has clearly failed in its duty to "thoroughly analyze" "significant adverse impacts to natural resources," as required by 6 NYCRR § 617.7(c)(1)(ii), and has likewise failed to satisfy SEQRA's "hard look" requirement. *See, e.g., Holmes*, 137 A.D.2d at 604.

a. The EAS Fails to Address the Potential Impacts on Wetlands

The EAS's inadequate treatment of wetlands resources closely resembles its deficient analysis of water resources. The EAS acknowledges the potential for "temporary impacts" from "construction activities" on both "freshwater wetlands" and the "Bronx Kill Salt Marsh." Ver. Pet. Ex. I (EAS) at 54. Again, the EAS does not discuss the type or extent of these temporary impacts, and does not discuss mitigation beyond a conclusory assertion that "BMPs" will mitigate these impacts. *Id.* Nor does the EAS contain any discussion whatsoever about impacts that would result from the use of the completed project. *Id.* The single-sentence promise of "restoration of wetlands" serves as a smokescreen to obscure the deficiencies in the EAS and is entirely insufficient to overcome the total lack of attention to the potential short-term and long-term impacts on these wetlands from the RISFDP. *See* 6 NYCRR § 617.7(c)(1)(ii) (requiring analysis of impact on "natural resources"); *see also Holmes*, 137 A.D.2d at 604.

b. The EAS Fails to Address the Impacts of Storm Water Runoff

Related to water resources and wetlands, the EAS fails to address the potential impact of storm water runoff during and after construction of the RISFDP. *See* Ver. Pet. Ex. I at 72-73. As for the completed project, the EAS merely states that DPR is "implementing comprehensive

storm water management that will reduce pollutants entering the East and Harlem Rivers," but does not explain what this system will entail and how it will minimize runoff from a park with expected increased usage and maintenance. Nor does the EAS discuss the impact on storm water runoff of clearing trees and replacing absorbent natural grass with synthetic surfaces. Extensive clearing of trees and natural vegetation, as well a significant use of artificial turf, presents a potentially significant adverse impact, which may lead to more combined sewer overflow and greater discharge of pollutants, including raw sewage, into the adjacent water bodies. *See* Affidavit of Stuart Gaffin, Pet. Ver. Ex. L, ¶ 7. The EAS fails to satisfy SEQRA as to analyzing storm water impacts in this regard. *See* 6 NYCRR § 617.7(c)(1)(ii) (requiring analysis of impact on "natural resources"); *Holmes*, 137 A.D.2d at 604.

c. **The EAS Fails to Address Impacts of Increased Wastewater**

Although the EAS describes measures to improve the flow of wastewater from existing sanitary facilities to the sanitary sewer system, the EAS does not address the impact of increased volumes of wastewater created by thousands of additional users of the park when the RISFDP is complete. Instead, the EAS merely asserts that "the comfort stations will have between .08 and .15 cubic feet per second (cfs) of sanitary flows" and concludes that, "[a]s a result of the improvements to the system, no significant adverse impacts are anticipated." Ver. Pet. Ex. I at 72. The EAS fails to discuss whether wastewater capacity will be adequate to deal with the anticipated usage of the park, whether storm surges and combined sewer overflows, as discussed above, could result in greater discharge of wastewater into the rivers or back into park facilities, and what risks such discharges could pose to the public health. Gaffin Aff. ¶7. The EAS's conclusory statements do not satisfy the "hard look" that SEQRA mandates for environmental review. *Holmes*, 137 A.D.2d at 604.

d. The EAS Fails to Address The Potential Impact From Climate Change

The New York City Panel of Climate Change ("NPCC"), established in August 2008 by the City as part of its PlaNYC 2030 sustainability initiative, released a report entitled *Climate Risk Information* on February 17, 2009 providing, among other information related to the effects of climate change, projections of future sea level rise and extreme precipitation events. Ver. Pet. Ex. M at 3 and 17. The report, prepared by "leading climate change and impact scientists, academics and private sector practitioners," found that sea level rise around New York City is likely to occur and cause significant flooding. The NPCC estimates that sea level rise could range from 2 to 5 inches by 2020, 7 to 12 inches by 2050 and 12 to 23 inches by 2080. *Id.* Similarly, the NPCC found that brief, intense precipitation events are likely to occur with greater frequency due to temperature increases that will further contribute to significant inland flooding. *Id.* at 4, 18-20. Despite the City's expressed concern about this issue, the EAS merely mentions those portions of the RISDFP within the 100-year floodplain and completely ignores the potentially significant adverse impacts associated with climate change documented by the City's experts. Ver. Pet. Ex. I (EAS) at 66. Therefore, DPR's failure to consider the impacts on the Project from expected sea level rise further demonstrates its failure to take the requisite "hard look." *Holmes*, 137 A.D.2d at 604.

3. The EAS Fails to Address the Impact of RISFDP on the Surrounding Communities and on Public Health

SEQRA broadly defines "environment." It is well settled that "environment" includes socio-economic impacts, impacts on community character and health impacts. *Chinese Staff and Workers Assn.*, 68 N.Y.2d 359; *Williamsburg Around the Bridge*, 223 A.D.2d 64; 6 NYCRR § 7(c)(1)(v) and (vii). Therefore, DPR is required to analyze all such potentially adverse impacts associated with the Project, including those affecting the surrounding communities as well as

visitors to and workers at Randall's Island.

a. The EAS Fails to Address the Impacts on Open Space

The EAS does not address the Project's reallocation of parkland between space devoted to active sports, like playing fields (especially synthetic turf playing fields), and passive recreation, such as picnicking, walking, or merely lying on the grass with a book. It does not address the fact that at least 12.5 acres of passive recreational space in the Sunken Gardens and Central Fields – an amount of land constituting a "significant land use," according to this Court – would be converted into athletic fields under the RISFDP. Ver. Pet. Ex. I at 27-29; *see* Order at *3. Nor does it address the construction of fields 31, 39, and 40 in the Sunken Meadow Fields or fields 80-85 in the East River Fields, which the 2009 Concession admits are newly constructed. Ver. Pet. Ex. Q at 3 (definition of "Concession Location") & Ex. B thereto. Fields 80-85 alone represent more than *seven acres* of new construction on previously open parkland.[10]

Furthermore, although the addition of playing fields will unquestionably decrease the amount of open space not allocated to "play or sport," the EAS does not discuss the impact the RISFDP would have on such space and the surrounding communities, which lack green open space. *See* Ortiz Aff., ¶ 4. Instead, the EAS summarily concludes that the conversion of passive recreational space to athletic fields will have no adverse impact on "open space" in the park. The EAS further concludes, in a non-sequitur, that because the proposed concession to the Private Schools Group will "not change the nature or use of the fields from existing conditions, ... no significant adverse impacts on open space are expected." *Id.* at 29. This non sequitur does not satisfy DPR's obligation under SEQRA to "thoroughly analyze" "a substantial change in the use

[10] An acre of land occupies 43,560 square feet. *District 4 Presidents' Council*, 2008 WL 253048, at *2 n.2. Fields 80-85 are regulation soccer fields. One regulation soccer field occupies 54,000 square feet (*see* http://www.sportsknowhow.com/soccer/dimensions/soccer-dimensions.html), and six regulation soccer fields occupy 324,000 square feet. 324,000/43,560=7.438 acres.

or intensity of use, of land including agricultural, open space or recreational resources, or in its capacity to support existing uses." 6 NYCRR § 617.7(c)(1)(viii). Nor does it constitute a "'reasoned elaboration' of the basis for its determination" to issue the Negative Declaration. *H.O.M.E.S.*, 69 A.D.2d at 232.

b. **The EAS Fails to Address the Impacts of the 2009 Concession**

The EAS similarly contains no data regarding the impact on usage patterns that the 2009 Concession would have on Randall's Island and its surrounding neighborhoods. The EAS merely states that, because the number of fields at Randall's Island will increase, the "percentage of the total number of fields that would be included in the concession is anticipated to be considerably smaller than the percentage of total fields currently used by the independent schools." Ver. Pet. Ex. I at 23. In contrast, DPR does recognize that additional field days are imperative for local public schools in communities in sharp need of active recreation facilities. *Id.* at 8. Further, the lack of access for children, particularly those in low-income communities closest to Randall's Island, may have significant impact on their health as rates of obesity, diabetes, and asthma are already as epidemic levels. See Nazario Aff., ¶¶ 4-5; Gonzalez Aff., ¶ 3; Bloomfield Aff., ¶ 3. DPR's failure to evaluate the effects of committing to a pay-for play concession again demonstrates its failure to take a hard look at required by SEQRA.

c. **DPR Fails to Address Environmental Justice Concerns**

Even though the communities most impacted by the RISFDP – *i.e.*, those surrounding Randall's Island – are low-income neighborhoods of color, the EAS contained no environmental justice analysis as required by DEC Commissioner's Policy CP-29 of March 2003. The DEC policy was established to

> promote the fair involvement of all people in the DEC environmental permit process. It will do this by training and educating DEC staff on environmental justice; providing public

> access to DEC permit information; incorporating environmental justice concerns into DEC's permit review process; and pursuing technical assistance grants to enable community groups in potential environmental justice areas to more effectively participate in the environmental permit review process.

Ver. Pet. Ex. N at 1. There are several DEC permits required by this Project and potentially significant impacts on the surrounding neighborhoods, yet the EAS contains no mention of environmental justice concerns and makes no attempt at an environmental justice analysis. There can hardly be a more important requirement than to look at the impacts of a project on communities that have long been burdened with negative environmental impacts and denied environmental benefits. *See* Nazario Aff. ¶ 5; Gonzalez Aff., ¶¶ 3-4; Manuel Aff., ¶ 6.

d. The EAS Fails to Address the Health Impacts of Synthetic Turf Adequately

SEQRA requires that a project proponent identify and study all potential impacts of the project that may result in a hazard to public health. 6 NYCRR § 7(c)(1)(vii). While admitting the synthetic turf to be used on "select" fields may result in harmful exposure to chemicals and significant increases in temperature on the fields, the EAS nevertheless concludes there is no potentially significant impact on public heath. Ver. Pet. Ex. I (EAS) at 114-116. The mitigation measures discussed are "Coolfill" infill material to reduce temperature, the provision of more drinking fountains, and signs to warn children about heat and to find shade (it is unclear whether shade will actually be provided). There is no discussion of the effectiveness of the Coolfill or potential impact of such extreme heat on children playing on the artificial turf and no evaluation of why grass cannot be used. Gaffin Aff. ¶¶ 5-6 (even if Coolfill reduces temperature of turf 30%, temperatures can be as high as 150 degrees); Affidavit of Dr. Maida Galvez, Ver. Pet. Ex. O, ¶¶ 5-14 (discussing health impacts on children from synthetic turf including the potential for exposure to lead and other carcinogenic chemicals, as well as heat stress or stroke).

Furthermore, climate change impacts and storm water runoff, already of concern here, may be exacerbated significantly by the use of synthetic turf and these potential impacts have been ignored. The EAS's failure to incorporate a full-fledged analysis of the health and environmental impacts of artificial turf demonstrates the woeful insufficiency of the EAS to support DPR's issuance of the Negative Declaration. 6 NYCRR § 617.4(a)(1); *H.O.M.E.S. v. New York Urban Dev. Corp.*, 69 A.D.2d at 232; *UPROSE v. New York Power Authority*, 285 A.D.2d 603, 608 (2d Dept. 2001) (in view of potential health effects, respondent should have issued a positive declaration and prepared an EIS). The potential adverse impacts of the artificial turf alone mandate an EIS here.

III. THE NEGATIVE DECLARATION IS INVALID BECAUSE DPR FAILED TO ASSESS CUMULATIVE IMPACTS

Under SEQRA, when assessing whether an action may have a significant adverse environmental impact, the lead agency must consider cumulative and synergistic effects of related simultaneous and pending actions. SERQA requires consideration of "two or more related action undertaken, funded or approved by an agency, none of which has or would have a significant impact on the environment, but when considered cumulatively would meet one or more of the criteria [for determining significance] in this subdivision." 6 NYCRR § 617.7(c)(1)(xii). Further, the lead agency "must consider reasonably related long-term, short-term, direct, indirect and cumulative impacts, including other simultaneous or subsequent actions which are: (i) included in any long-range plan of which the action under consideration is a part...." 6 NYCRR § 617.7(c)(2). *See Matter of Save the Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 518 N.Y.S.2d 943 (1987) (environmental review of cumulative impact of related actions is required).

In addition to the deficiencies in the EAS discussed *supra*, DPR's Negative Declaration is

also invalid because the agency improperly segmented from the RISFDP as a whole and failed to analyze the cumulative impacts associated with the Project in conjunction with those from: (1) the substantial increase in size and use of the Randall's Island Tennis Center; (2) the further development and use of the Harlem River Event Area; and (3) the construction of a substantial electrical substation. *See* Ver. Pet. Ex. I at 27. Each of these three actions is being taken pursuant to the RISF's "Management, Restoration, and Development Plan," which was authored in 1999 and "refined and enhanced" in 2007. *Id.* at 6-8. In *Village of Westbury v. Department of Transportation of the State of N.Y.*, 75 N.Y.2d 62 (1989), the Court of Appeals held that where two highway construction projects were functionally related, segmentation into separate environmental reviews was improper and the cumulative effect of both projects had to be reviewed as one. The Court invalidated a negative declaration resulting from the segmented review and ordered the preparation of a full EIS. *Id.* at 67, 69.

Although the EAS acknowledges that the number of tennis courts will nearly double from eleven to twenty, and that the Tennis Center will also add a café and meeting rooms, the EAS does not address the potential impact that increased use of the Tennis Center will have on Randall's Island. Ver. Pet. Ex. I (EAS) at 7, 18, 27. Incredibly, the EAS fails to address the added impacts of the 2500-seat stadium also planned for the Tennis Center, as advertised on the website of Sportime, the private contractor managing the Tennis Center. Ver. Pet. Ex. P. A 2500 seat stadium will increase the numbers of people entering the park, traffic, noise, solid wastes, wastewater, and numerous other environmental burdens.

With respect to the event area, the EAS merely states that the City is looking "to expand the variety of events at the Harlem River Event site." Ver. Pet. Ex. I (EAS) at 8 and 18. As stated in the Affidavit of Geoffrey Croft, Cirque Du Soleil is currently using the event space and,

last year, a Farm Aid concert attracted tens of thousands of people. Pet Ver. Ex. F. The EAS is silent, however, with respect to the potential impacts of an expansion in size or use of the event area which is *over 24 acres in size. Id.* Finally, as discussed *supra*, DPR must build a new electrical substation to provide sufficient energy to the facilities on Randall's Island but the impacts associated with construction and operation of the substation is also ignored, especially those related to electro magnetic fields and PCBs in transformers.

The EAS's failure to address the environmental impact on Randall's Island resulting from these improvements – including additional users and increased, noise, traffic, and litter – requires the invalidation of the Negative Declaration. *See, e.g., Segal*, 182 A.D.2d at 1046; 6 NYCRR § 617.7(c)(1)(i) (agency must address "traffic or noise levels; a substantial increase in solid waste production"); 6 NYCRR § 617.7(c)(1)(ix) (agency must address "attracting of large numbers of people to a place ... for more than a few days"). Here, the expansion of the Tennis Center and the Harlem River Event Area, as well as the addition of the new substation, is integrally related to the RISFDP, yet the EAS ignores the potential cumulative and synergistic affects of these projects being constructed, expanded and used at the same time, in the same geographic location and under the auspices of the same agency.

The CEQR Technical Manual, in its discussion of the segmentation issue, cites as guidance for determining when segmentation must be avoided the State's SEQRA Handbook, published by DEC, which offers eight criteria that may be considered when making such determination:

1. Is there a common purpose or goal for each action?

2. Is there a common reason for each action being completed at about the same time?

3. Is there a common geographic location involved?

4. Do any of the activities being considered contribute toward significant cumulative or synergistic impacts?

5. Are the different actions under the same ownership or control?

6. Is a given action a component of an identifiable overall plan?

7. Can the interrelated phases of various projects not be considered "functionally independent?"

8. Does the approval of one phase or action commit the agency to continuing with other phases?

CEQR Technical Manual at 1-4.[11] The answer to all these questions with respect to this Project is a resounding "yes!" The redesigning, rebuilding and reallocating of almost 500 acres of Randall's Island parkland are all one huge City infrastructure project that has never undergone the required environmental review. Ver. Pet. Ex. I (EAS).

The failure of the EAS to address the expansion of the Tennis Center, the Harlem River Events Area and the substation along with the rest of the RISFDP was improper under the Court of Appeals' ruling in *Village of Westbury*, and the Negative Declaration should be invalidated as a result. DPR should be directed to go back to the drawing board and start again. Only a Positive Declaration requiring a full and complete EIS is proper. *UPROSE*, 285 A.D.2d at 608.

[11] The CEQR Technical Manual may be found at http://www.nyc.gov/html/oec/downloads/pdf/ceqr_chapter_1.pdf. The SEQR Handbook is available at http://www.dec.ny.gov/permits/47636.html

CONCLUSION

For the reasons presented herein, pursuant to CPLR 3001 and 7803, and SEQRA, this Court should: (1) declare that Respondents must comply with ULURP with respect to the 2009 Concession; (2) invalidate the Negative Declaration for the RISFDP issued by DPR on January 26, 2009; (3) order Respondents (i) to issue a Positive Declaration and (ii) to prepare a full EIS for the RISFDP; and (4) grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
July 10, 2009

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