At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga, at 401 Montgomery Street, Syracuse, New York, on January 12, 2023.

Present: Hon. Gerard J. Neri, J.S.C.

STATE OF NEW YORK
SUPREME COURT ONONDAGA COUNTY

DECISION and ORDER
Motion #1

Index No: 007925/2022

RENEW 81 FOR ALL, by its president Frank L. Fowler, CHARLES GARLAND, GARLAND BROTHERS FUNERAL HOME, NATHAN GUNN, ANN MARIE TALIERCIO, TOWN OF DEWITT, TOWN OF SALINA, and TOWN OF TULLY,

Petitioners,

-against-

NEW YORK STATE DEPARTMENT OF TRANSPORTATION, MARIE THERESE DOMINGUEZ, in her official capacity as the Commissioner of New York State Department of Transportation, NICOLAS CHOUBAH, P.E., in his official capacity as the New York State Department of Transportation Chief Engineer, and MARK FRECHETTE, P.E., in his official capacity as the New York State Department of Transportation I-81 Project Director,

Respondents,

-and-

THE CITY OF SYRACUSE,

Intervenor-Respondent.

Preliminarily, this matter has generated much public attention and things have been said which are not true. Contrary to the authoritarian assertions of some, the Court has no ability to unilaterally dispose of a case without judicial review barring "extraordinary circumstances" (Bayview Loan Servicing, LLC v. Taddeo, 199 A.D.3d 749, 750 [Second Dept. 2021]). "The Supreme Court of New York State is one of general original jurisdiction in law and equity.

Under section 7 of article VI of the New York State Constitution, its powers extend to actions declaring the legal rights and relationships between parties, including those set forth in CPLR 3001, and unless it plainly appears to the contrary, it has jurisdiction of actions brought before it" (Doherty v. Meisser, 66 Misc.2d 550, 555 [Sup. Ct., Nassau County 1971]). "Public policy mandates free access to the courts" (Shreve v. Shreve, 229 A.D.2d 1005, 1006 [Fourth Dept. 1996]). The Court shall address the controversy before it as delineated by the papers submitted and oral arguments held thereon.

On September 30, 2022, Petitioners RENEW 81 FOR ALL, by its president Frank L. Fowler, CHARLES GARLAND, GARLAND BROTHERS FUNERAL HOME, NATHAN GUNN, ANN MARIE TALIERCIO, TOWN OF DEWITT, TOWN OF SALINA, and TOWN OF TULLY (collectively as the "Petitioners") filed a Verified Petition seeking an Order and Judgment, pursuant to CPLR Article 78, SEQRA, Climate Leadership and Community Protection Act ("CLCPA"), the Smart Growth Act, the Green Amendment, and/or otherwise: (1) vacating, annulling, and declaring illegal, invalid, null and/or void the Record of Decision("ROD"), the Environmental Impact Statement ("EIS"), the State Environmental Quality Review Act ("SEQRA") Review and any other Approvals related to the Interstate 81 ("I-81") Viaduct Project P.I.N. 3501.06 (the "Project") by NEW YORK STATE DEPARTMENT OF TRANSPORTATION ("DOT"), MARIE THERESE DOMINGUEZ, in her official capacity as the Commissioner of New York State Department of Transportation (the "Commissioner"), NICOLAS CHOUBAH, P.E., in his official capacity as the New York State Department of Transportation Chief Engineer, and MARK FRECHETTE, P.E., in his official capacity as the New York State Department of Transportation I-81 Project Director (collectively as the "Respondents"); (2) directing Respondents to proceed with an alternative for the Project that

complies with SEQRA, the Smart Growth Law, CLCPA, and the Green Amendment; and (3) granting such other and further relief as this Court deems just and proper, including Petitioners' costs and disbursements (*see* the Petition, Doc. No. 1). The Notice of Petition set a return date of November 16, 2022 (Doc. No. 2). Extensive motion practice has resulted in injunctive relief (*see* Decision and Order, Doc. No. 32), dismissal of the Federal Highway Administration as a party (*see* Decision and Order, Doc. No. 33), intervention by the City of Syracuse (the "City", *see* Order, Doc. No. 77), modification of the temporary restraining order (*see* Decision and Order, Doc. No. 70), permission for the New York Civil Liberties Union ("NYCLU") to appear as *amicus curiae* (*see* Order, Doc. No. 102), permission for Petitioners to file a supplemental petition (*see* Decision and Order, Doc. No. 137), and permission for the New York State Motor Truck Association, Inc. d/b/a The Trucking Association of New York ("TANY") to appear as *amicus curiae* (Doc. No. 148). The Petitioner's Supplemental Petition seeks the additional relief of requiring Respondents to complete a Supplemental Environmental Impact Statement ("SEIS") addressing the impacts of the recently announced Micron Project (Doc. No. 138). Respondents and the City oppose the relief sought.

Petitioners allege that Respondents choose the "community grid" option for the Project without adequately taking a "hard look" at other option (*see* Petition, Doc. No. 1, ¶¶1-5). Petitioners assert that the community grid option will divert drivers an extra 8 to 12 miles around the City or through local streets causing "numerous unmitigated but avoidable negative environmental impacts ("*ibid*, ¶3). The Project will take some six years and cost a projected $2.25 billion (*ibid*, ¶5). Upon information and belief, "never in the history of the interstate highway system has a primary long distance single or double numeric digit interstate highway been de-designated" (*ibid* ¶6). Petitioners claim "the SEQRA review limited the range of

alternatives subjected to full review and public comment to two alternatives, and applied rigid criteria that predetermined the outcome of their studies and limited their ability to avoid or mitigate impacts" and "the Project did not adequately evaluate the significant local and regional traffic and associated environmental impacts that would be cause by putting a large share of the 96,000 vehicles per day on local streets in the same minority neighborhoods the Project is allegedly designed to enhance" (*ibid*, ¶¶9-10). Petitioners also allege the Project violates the "Green Amendment" recently adopted by the voters of the State of New York (*ibid*, ¶¶10-12).

Petitioners argue under CPLR § 7803(3), the question presented in an Article 78 proceeding is "whether a 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" (CPLR §7803(3)). An action contrary to state or local law will be annulled as illegal (*see, e.g.*, Ferrari v. Town of Penfield Planning Board, 181 A.D.2d 149, 151, [Fourth Dept. 1992]). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (Pell v. Board of Education of Union Free School District No. 1, 34 N.Y.2d 222, 230 [1974]). Decision-making by an administrative official must be "reasonable" and supported by "substantial evidence" (Chemical Specialties Manufacturers Association v. Jorling, 85 N.Y.2d 382 [1995]).

Petitioners argue strict compliance with SEQRA is required (*see* King v. Saratoga Cnty. Bd. of Sup'rs, 89 N.Y.2d 341 [1996]). The Project is a Type I action, since it involves the physical alteration of at least 10 acres, and also the acquisition of more than 100 acres (6 NYCRR §617.4(b)), so coordinated SEQRA review was required, pursuant to which Part 1 of an Environmental Assessment Form must be circulated to all involved agencies, and they must designate a lead agency to conduct the SEQRA review, pursuant to 6 NYCRR §617.4(b)(2)(i). While an Environmental Assessment Form ("EAF") is used to determine the significance of

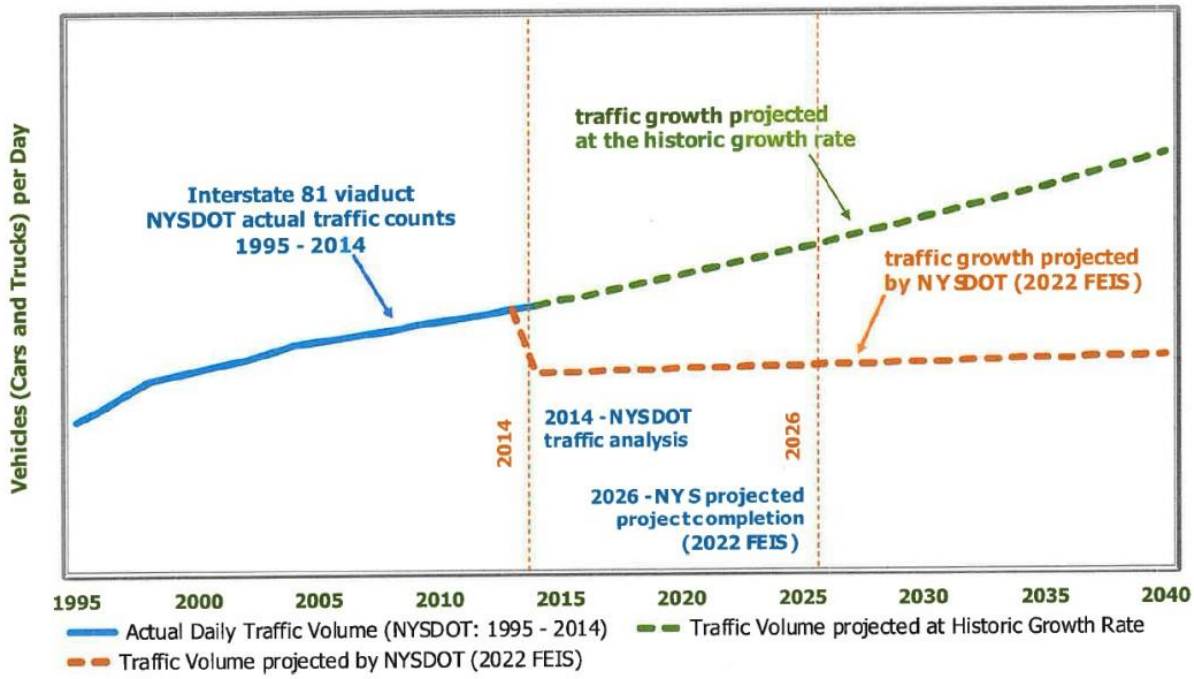
actions, the purpose of an EIS is to examine identified, potentially significant impacts which may result from the project (*see* Merson v. McNally, 90 N.Y.2d 742 [1997]). "In assessing an agency's compliance with the substantive mandates of the statute, the courts must review the record to determine 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" (Akpan v. Koch, 75 N.Y.2d 561, 570 [1990], *citations omitted*). Judicial intervention is appropriate where an agency renders a decision without having conducted a thorough review of all statements and relevant information (*see e.g.*, Penfield Panorama Area Community, Inc. v. Town of Penfield Planning Bd., 253 A.D.2d 342 [Fourth Dept. 1999]).

Petitioners assert the FEIS failed to adequately address air quality and greenhouse gas ("GHG") emissions. Petitioners assert the Project will result in adverse impacts on an annual basis as follows:

- 1.76 million impacted truck trips
- 19.8 million additional truck miles traveled
- 3.04 million gallons of diesel fuel
- $32 million in trucking costs
- $500 thousand in monetized emission externalities from 20.5 million additional tons of hydrocarbons, NOx and fine particulate matter (*see* Petition, Doc. No. 1, ¶72).

Petitioners assert that the ROD concedes that travelers from the south would take five to six minutes longer, resulting in an adverse effect on air quality (*see* ROD, Doc. No. 3, p. 16). Petitioners allege the FEIS failed to properly consider particulate matter and other related adverse impacts on the Southside neighborhoods. Petitioners further assert that the FEIS failed to adequately address traffic impacts. Petitioners claim the FEIS does not address travelers headed west, specifically citing garbage haulers from New York City destined for the Seneca Meadows Landfill. Petitioners assert the traffic data is out of date being from 2009 and failing to account significant projects including the Amazon warehouse and Micron chip factory.

Petitioners assert DOT used projected traffic growth of 0.3% (*see* Petition, Doc. No. 1, ¶99; *see also* DEIS at 5-18), but data from 1994 through 2013 shows traffic grew at 2.71% annually (*see* Petition, Doc. No. 1, ¶98). Petitioners graphically represented the competing trends:



(*see* Petition, Doc. No. 1, ¶99). The Project went through a significant alteration between the DEIS and FEIS in that a new railroad bridge is proposed north of Martin Luther King, Jr. East (*ibid*, ¶¶108-110). This alteration was not subject to the comment period (*ibid*).

Petitioners assert DOT selected the Community Grid Alternative, regardless of the fact that other alternatives, such as the Viaduct Alternative, pose much less risk to ecological resources such as threatened and endangered bat species. The Viaduct Alternative would only alter "305.0 acres of land for new transportation right-of-way, build noise barriers, and to provide sufficient area around the viaduct for construction. The majority of permanent land use change would occur adjacent to the I-81 and I-690 interchange" (*see* FEIS at 6-465). In addition, a "total of 10.3 acres of tree removal would occur as part of the Viaduct Alternative" (FEIS at 6-

466). Furthermore, the Viaduct alternative poses no risk to the endangered Indiana bat, but only a risk to the threatened northern long-eared bat (*see* Table at FEIS 6-4-8-4).

This is in stark contrast to the selected Community Grid Alternative, which the Respondents admit would "permanently affect 1,050 acres of ecological communities, comprising 771.4 acres of terrestrial cultural ecological communities, 69.4 acres of successional southern hardwood (including 5.7 acres in a roadcut cliff/slope community), 91.7 acres of successional old field, 42.9 acres of successional shrubland, 74.0 acres of floodplain forest, 0.89 acres of freshwater wetlands, [and] 0.07 acres of open surface waters" (FEIS at 6-504; ROD at 18). In addition, a "total of 17.9 acres of permanent tree loss would result from the Community Grid Alternative" (FEIS at 6-504). Most notably, the Project would impact the habitat of both the endangered Indiana bat and threatened Northern long-eared bat (*see* Table 6-4-8-6). If a private sector project were to cause all of these ecological impacts, it would be denied as environmentally harmful. However, this government-sponsored Project seems to get a "free pass" to adversely impact the habitat and ecological areas that serve as natural wetlands, prevent flooding and the destruction of trees and flora and fauna, which eliminate GHG, and take threatened and endangered species.

Petitioners argue an EIS must give sufficient consideration to alternatives (*see* Matter of Falcon Group LLC v. Town/Village of Harrison Planning Bd., 131 A.D.3d 1237, 1240 [Second Dept. 2015]). Petitioners claim the EIS is insufficient in that it only considered a no-build option, a viaduct option, and the selected community grid option. Petitioners assert at least one other option, the "Bridge" option, should have been considered as well. Petitioners claim other alternatives were not fully considered which would have minimized impacts.

Petitioners further argue that SEQRA has been improperly segmented (*see generally* Westbury v. Dept. of Transp., 75 N.Y.2d 62, 71 [1989]). "[S]egmentation, which is the dividing for environmental review of an action in such a way that the various segments are addressed as though they were independent and unrelated activities, is contrary to the intent of SEQRA and is disfavored" (City of Buffalo v. N.Y. State Dept. of Envtl. Conservation, 184 Misc 2d 243, 250 [Sup. Ct., Erie County 2000]). Petitioners claim that the Project is illegally segmenting SEQRA by deferring review of redevelopment of 10-12.5 acres of land (*see* ROD §10-3 at 22), public housing and specifically Pioneer Homes, and contaminated waste sites (FEIS at 5-565). Petitioners claim that it was an error for the Respondents not to consider other pending developments in the area when performing their traffic analysis (*see e.g.* Save Pine Bush, Inc., 70 N.Y.2d 194, 194 [1987]).

Petitioners assert NYSDOT failed to comply with the CLCPA §7(2) and perform a proper greenhouse gas emissions and mitigation analysis. Petitioners claim Respondents improperly rely upon future electrification of personal transportation, fail to account for increase travel as a result of fewer parking spots, more travel time due to slower speeds, and only minor growth resulting in negligible increases in traffic. Petitioners specifically reference The Trucking Association of New York ("TANY") and their comments (included in the FEIS Appendix M-6, Letters S-SMTC through Z Part 7, at page 451) concluding that the Community Grid change will consume on an annual basis an additional 3.04 million gallons of diesel fuel and cost $500,000.00 in monetized emission externalities from 20.5 million additional tons of hydrocarbons, NOx and particulate matter (*ibid* at 455). Petitioners claim that failure to properly review alternatives that reduce GHG is a violation of CLCPA §7(2).

Petitioners claim that the Project violates the Smarty Growth Act. Environmental Conservation Law ("ECL") §6-0107 provides:

> "In addition to meeting other criteria and requirements of law governing approval, development, financing and state aid for the construction of new or expanded public infrastructure or the reconstruction thereof, no state infrastructure agency shall approve, undertake, support or finance a public infrastructure project, including providing grants, awards, loans or assistance programs, unless, to the extent practicable, it is consistent with the relevant criteria specified in subdivision two of this section"(ECL §6-0107).

Petitioners claim the demolishment of the current viaduct violates ECL §6-0107(2)(a) (the advancement projects for the use, maintenance or improvement of existing infrastructure). The Project violated ECL §6-0107(2)(d) in that the Towns of Salina and DeWitt will see a loss of forests, agricultural lands, and/or open spaces. The Project violates ECL §6-0107(2)(e) as there is no plan to address the endangered affordable housing at Pioneer Homes. The Project also violates ECL §6-0107(2)(g) by ignoring the concerns of surrounding impacted Towns.

Petitioners allege violations of the Green Amendment, which provides: "Each person shall have a right to clean air and water, and a healthful environment" (NY Const. Art. I, § 19). Petitioners assert Respondents violated the Green Amendment by failing to properly account for the additional traffic on local City streets "in an already disadvantaged Environmental Justice community" (*see* Memorandum, Doc. No. 11, p. 33). Petitioners reiterate their concerns regarding "the lack of environmental impact analysis on the loss of wetlands, forested areas and other natural resources for over 1,000 acres in the suburbs of Syracuse, including the habitat of endangered and threatened bats, being eliminated as a result of this Project" (*ibid*, p. 34). Petitioners pray the Court grant the relief requested.

The Respondents oppose the relief sought. Respondents assert 6 NYCRR Part 617 is inapplicable: "Because the lead federal agency was already required to prepare an EIS pursuant

to NEPA, NYSDOT only needed to consider that federal EIS and issue the Record of Decision" (*see* Memorandum in Opposition, Doc. No. 43, p. 13). Respondents claim that 17 NYCRR §15.6(c)(1) obligates DOT to only "consider the federal environmental impact statement and to prepare a Record of Decision" (*ibid*, p. 15). Respondents claim that through NEPA review Respondents complied with its SEQRA obligations (*see* ECL §8-0111(1)).

Respondents assert that DOT took a "hard look" at the Project and such is evidenced by the Record of Decision "and rationally concluded that the Community Grid Alternative would be the most environmentally protective option (*see* Memorandum in Opposition, Doc. No. 43, p. 16). "Judicial review of a lead agency's SEQRA determination is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (Akpan v. Koch, 75 N.Y.2d 561, 570 [1990]). A court must decide only whether DOT's determination "has a rational basis in the record" (*see* Higston v. New York State Dep. of Envtl. Conservation, 202 A.D.2d 877, 879 [Third Dept. 1994]). "Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA" (Jackson v. N.Y. State Urban Dev. Corp., 67 N.Y.2d 400, 417 [1986], *citations omitted*). "[I]t is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively" (*ibid* at 416). Respondents sum up Petitioners complaints as follows:

> "Petitioners specifically complain that NYSDOT improperly analyzed the Project's potential impacts on traffic (Pet. ¶¶ 95-116, 221-223), failed to adequately assess the Project's air quality impacts (id. ¶¶ 117-135, 218-219), disregarded the Project's impacts on the existing community in the Southside neighborhood (id. ¶¶ 136-163, 216-218), failed to properly analyze the various alternatives (id. ¶¶ 164-180), improperly segmented review regarding the City of

> Syracuse's new zoning scheme and any hazardous or contaminated waste that might be discovered during construction (id. ¶¶ 181-209), improperly analyzed the Project's impacts on local parking (id. ¶¶ 210-213), inadequately analyzed the Project's noise impacts (id. ¶¶ 214-215), improperly assessed the Project's impacts on the local ecology (id. ¶¶ 220, 224)" (*see* Memorandum in Opposition, Doc. No. 43, pp. 18-19).

Respondents address the claims and cite to the Record of Decision to support their claims. The Project would not adversely impact local traffic (*see* Record of Decision, Doc. No. 3, pp. 8-9). The Project would not adversely impact air quality (*see* FEIS, Ch. 6-4-4). The Project adequately accounts for and protects affected Environmental Justice Communities (*see* Record of Decision, Doc. No. 3, pp. 12-13). DOT rationally considered project alternatives (*ibid*, pp. 10-13). Respondents argue the Project review's scope was rational and permissible as the Project was governed by DOT's specific SEQRA regulations at 17 NYSCRR 15, not the general SEQRA regulations established by DEC at 6 NYSCRR 617. Further, Respondents argue, the Petitioners' claims of segmentation are not directly related to the Project. For example, ReZone Syracuse is the City's effort to change its own zoning code. Respondents affirmatively state that the Project would not adversely impact parking. Respondents acknowledge the loss of 1,089 public off-street parking spaces, but claims those lost spots will be mitigated citing the FEIS at 5-174 (*see* Memorandum in Opposition, Doc. No. 43, p. 25). The Project would not create undue adverse noise impacts (*see generally* FEIS §6-4-6). The Project would not have undue adverse impacts on local ecology (EIS §6-4-7). Respondents assert that DOT complied with CLCPA and found that the Community Grid will reduce GHG emissions (*see generally* FEIS, §6-4-5).

Respondents argue that Petitioner Towns cannot assert a cause of action under the Smart Growth Act, but even if they could, DOT complied with the Act. The Smart Growth Act provides: "Nothing contained in this article or in the administration or application hereof shall be

construed to create any private right of action on the part of any person, firm or corporation against the State of New York or any state infrastructure agency as defined in subdivision two of section 6-0103 of this article" (ECL §6-0111). Respondents note that Respondent Towns claim they are not included in the prohibition on private actions. "Capacity to sue is a threshold question involving the authority of a litigant to present a grievance for judicial review" (Town of Riverhead v. N.Y. State Bd. of Real Prop. Servs., 5 N.Y.3d 36, 41 [2005]). "Governmental entities created by legislative enactment present similar capacity problems. Being artificial creatures of statute, such entities have neither an inherent nor a common-law right to sue. Rather, the right to sue, if it exists at all, *must be derived from the relevant enabling legislation or some other concrete statutory predicate*" (City of N.Y. v. State, 86 N.Y.2d 286, 292 [1995], *citations omitted, emphasis in original*). As this matter does not implicate Petitioner Towns' home rule power, Respondents assert Petitioner Towns do not have the capacity to sue (*cf.* Matter of N.Y. Blue Line Council, Inc. v. Adirondack Park Agency, 86 A.D.3d 756, 758 [Third Dept. 2011]). Respondents argue any claim under the Smart Growth Act must be dismissed.

Similarly Respondents argue there can be no cognizable claim under the Green Amendment. Respondents claim the Green Amendment contains no operative language and simply states: "Each person shall have a right to clean air and water, and to a healthful environment" (N.Y. Const Art I, §19). Further, Respondents assert compliance with SEQRA protects Petitioners' rights. Respondents pray the Court deny the requested relief.

Respondent-Intervenor City of Syracuse moved to intervene in the action (Doc. No. 45) and the request was granted (Doc. No. 77). The City's arguments largely mirror those of the Respondents (*see* Memorandum of Law, Doc. No. 99). The City makes the unique argument that the community grid alternative should be allowed to go forward because it is the popular

choice: "the City and its residents have repeatedly and consistently expressed their preference for the Community Grid" (*ibid*, p. 7). The City supports this claim by noting that the Common Council for the City passed a resolution in support of the community grid (*ibid*, p. 8), and "more than fifty 'stakeholders and civic leaders who represent numerous institutions, organization, communities and neighborhoods in the greater Syracuse areas, [wrote the Governor] to convey [their] strong support for a Community Grid'" (*ibid*). The City concludes this portion of their argument by stating: "As the record set forth above makes clear, contrary to Petitioners' unsubstantiated allegations, the City and its residents favor the Community Grid" (*ibid*, p. 9). The City prays the Court deny the requested relief.

Petitioners requested leave to file a supplemental petition (*see* Notice of Motion, Doc. No. 104). The Court granted the request (Doc. No. 137). The supplemental petition seeks an order directing Respondents to prepare a supplemental EIS ("SEIS") due to the Micron Chip Factory Complex (the "Micron Project") recently announced (*see* the "Supplemental Petition", Doc. No. 138). Petitioners argue "an agency must prepare a SEIS if environmentally significant modifications are made after issuance of a FEIS" (Jackson v. N.Y. State Urban Dev. Corp., 67 N.Y.2d 400, 429 [1986]). Petitioners assert that On October 4, 2022, after the original Petition was filed in this action, Governor Hochul announced that Micron Technology would undertake "one of the largest economic development projects in U.S. history – a transformation public-private partnership… to build a cutting-edge semiconductor manufacturing campus in Onondaga County" (*see* the "Supplemental Petition", Doc. No. 138, ¶280). The Micron Project is projected to create 9,000 jobs directly and 40,000 jobs indirectly (*ibid*, ¶282). Petitioners assert the Micron Project will put a huge new demand on local roads, including I-81 (*ibid*, ¶284). Petitioners claim some of the people employed by the Micron Project will reside on the south side of Syracuse,

Salina, DeWitt, and others (*ibid*, ¶285). New York State has committed $200 million for road and other infrastructure improvements for the Micron Project (*ibid*, ¶286). Petitioners, via letter dated October 13, 2022, requested Respondents to prepare an SEIS (*ibid*, ¶287). Petitioner assert Respondents have not replied, effectively declining to prepare an SEIS (*ibid*, ¶288). Petitioners assert it is arbitrary and capricious for the Respondents to decline preparing an SEIS in light of the projected 50,000 new jobs, representing 22% of the current Onondaga County workforce, and 125,000 new residents, 27% of the current County population.

Respondents oppose the relief sought in the Supplemental Petition and first claim Petitioners lack standing to request an SEIS. "Standing is a threshold determination," in which petitioners must demonstrate an injury in fact – "an actual legal stake in the matter being adjudicated – [which] ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute 'in a form traditionally capable of judicial resolution'" (Society of Plastics Indus. V. County of Suffolk, 77 N.Y.2d 761, 769, 773 [1991], *quoting* Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 220-221 [1974]). The Court of Appeals went on to say it has "long imposed the limitation that the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large" (Socy. of Plastics Indus. V. County of Suffolk, 77 N.Y.2d 761, 774 [1991]). Respondents assert Petitioners have failed to articulate any concrete injury to sustain their standing to seek an SEIS and demand that this cause of action be dismissed.

Addressing the merits of the cause of action for an SEIS, Respondents argue the Micron Project is too speculative to require an SEIS. Under SEQRA, a "lead agency may require a supplemental EIS, limited to the specific significant adverse environmental impacts not

addressed or inadequately addressed in the EIS" arising from, among other things, newly discovered information (6 NYCRR §617.9(7)(i)). "It is not the province of the courts to second-guess thoughtful agency decisionmaking and, accordingly, an agency decision should be annulled only if it is arbitrary, capricious or unsupported by the evidence" (Matter of Riverkeeper, Inc. v. Planning Bd. of Town of Southeast, 9 N.Y.3d 219, 232 [2007]). Respondents assert that it cannot prepare a meaningful SEIS as DOT would need to know, *inter alia*, the location of the Micron facilities, construction dates, number of employees and work hours, and where the employees live. Respondents argue that any conclusions about the Micron's Project's impact would be pure speculation. Alternatively, Respondents note that the EIS generally accounts for development of the White Pines Commercial Park (*see* EIS, §6-2-1). At this time, Respondents argue it was completely reasonable to decline to prepare an SEIS. Similarly, the City opposes the relief sought in the Supplemental Petition (Doc. No. 146).

Petitioners replied and reiterated their arguments (Doc. Nos. 128 & 152).

Discussion:

Respondents assert that Petitioners lack standing to seek an SEIS.

> "'Under the common law, there is little doubt that a 'court has no inherent power to right a wrong unless thereby the civil, property or personal rights of the plaintiff in the action or the petitioner in the proceeding are affected' (Society of Plastics Indus. V. County of Suffolk, 77 NY2d 761, 772 778 [1991], *quoting* Schieffelin v. Komfort, 212 NY 520, 530 [1914]). Related to this principle is 'a general prohibition on one litigant raising the legal rights of another' (Society of Plastics, 77 NY2d at 773). Thus, if the issue of standing is raised, a party challenging governmental action must meet the threshold burden of establishing

> that it has suffered an "injury in fact" and that the injury it asserts 'fall[s] within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the [government] has acted' (New York State Assn. of Nurse Anesthetists v. Novello, 2 NY3d 207, 211, [2004]). The injury-in-fact requirement necessitates a showing that the party has 'an actual legal stake in the matter being adjudicated' and has suffered a cognizable harm (*see* Society of Plastics at 772) that is not 'tenuous,' 'ephemeral,' or 'conjectural' but is sufficiently concrete and particularized to warrant judicial intervention (Novello at 214; *see* Spokeo, Inc. v. Robins, 578 US 330, 339 [2016])" (Matter of Mental Hygiene Legal Serv. V. Daniels, 33 NY3d 44, 50 [2019]).

Petitioners purport to represent people living on the south side of Syracuse. Petitioners assert that individuals living on the south side of the City need to be able to get to the Micron Project in Clay and that removal of the viaduct impedes them (*see* Supplemental Petition, Doc. No. 138, ¶285). Petitioners have standing.

Respondents have also argued that Petitioner Towns cannot assert a cause of action under the Smart Growth Act (Article 6 of the ECL). The State's smart growth policy as explained by ECL §6-0105 is:

> "It is the purpose of this article to augment the state's environmental policy by declaring a fiscally prudent state policy of maximizing the social, economic and environmental benefits from public infrastructure development through minimizing unnecessary costs of sprawl development including environmental degradation, disinvestment in urban and suburban communities and loss of open space induced by sprawl facilitated by the funding or development of new or expanded transportation, sewer and waste water treatment, water, education, housing and other publicly supported infrastructure inconsistent with smart growth public infrastructure criteria" (ECL §6-0105).

Yet this "policy" is completely aspirational as ECL §6-0111 specifically prevents any private right of action to actually enforce the Smart Growth Policy (*see* ECL §6-0111). Petitioners' argument that municipalities are not included within the identified groups is incorrect. Respondents correctly note that municipalities are simply municipal corporations. Petitioners' claims under the Smart Growth Act are denied as a matter of law.

Respondents argue that Petitioners have failed to join a necessary party. The Court previously ruled on this claim (Doc. No. 33). Petitioners seeks to enforce state law claims, not federal ones (*see* Natural Resources Defense Council, Inc. v. New York, 528 F.Supp. 1245, 1251 [S.D.N.Y. 1981]). Further, Respondents misconstrue their obligations under SEQRA. While they are permitted to utilize NEPA in achieving their requirements under SEQRA, they are nonetheless required to meet the SEQRA standards (*see* Westbury v. Dept. of Transp., 75 N.Y.2d 62, 71 [1989]). NEPA does not displace SEQRA.

Petitioners claim that Respondents failed to meet their obligations pursuant to the ECL and seek an order of the Court vacating, annulling, and declaring illegal, invalid, null and/or void the ROD, the EIS, the SEQRA Review, and any other Approvals related to the Project by Respondents, and further seek an order requiring Respondents to prepare an SEIS relative to the Micron Project. "In reviewing the sufficiency of an EIS, the role of a court is 'to determine 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'" (Matter of Bronx Comm. for Toxic Free Schs. v. N.Y. City Sch. Constr. Auth., 20 N.Y.3d 148, 155 [2012], *citing* Jackson v. N.Y State Urban Dev. Corp., 67 N.Y.2d 400, 417 [1986]; *see also* Matter of Pyramid Co. of Watertown v. Planning Bd. of Town of Watertown, 24 A.D.3d 1312 [Fourth Dept. 2005]). "As discussed throughout this Petition, [Petitioners allege] Respondents also failed to take a

'hard look' at the environmental impacts posed by the Project, including but not limited to those related to traffic, air quality, parking, noise, environmental justice, construction, GHG, wetlands, public health and safety, and wildlife" (*see* Petition, Doc. No. 1, ¶238). However, nowhere in Petitioners' papers is an expert affidavit explaining how the analyses conducted by Respondents is deficient in any area. This record is replete with examples of how the Respondents looked at certain aspects of the Project and explanations on how the purported datasets support Respondents' conclusions. "Nothing in the law requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence" (Jackson v. N.Y. State Urban Dev. Corp., 67 N.Y.2d 400, 417 [1986]).

There are however three particular aspects where the Court finds there are glaring omissions in the EIS. First, Section 6-4-4 concerning Air Quality provides an excellent explanation of the Project's effects on the City. Yet it is also contradictory of other portions of the EIS. "The Community Grid Alternative would not generate or ***divert*** substantial volumes of diesel vehicle traffic as compared with the No Build Alternative" (EIS, p. 6-258, ***emphasis added***). Contrast that with: "The Community Grid Alternative would establish former I-481 as the quickest path for regional north-south travel through the project area. As a result, traffic would increase substantially on former I-481 both north and south of I-690 and decrease on former I-81" (EIS, p. 5-148). These two statements cannot logically coexist. Either traffic is going to continue along the new Business Loop (the current I-81) through the City and enter urban traffic with traffic control devices such as stoplights at every block as a result of demolishing 1.4 miles of viaduct then get back on the limited access highway, or traffic will, as noted in Chapter 5 of the EIS, divert to I-481 as it will become "the quickest path for regional

north-south travel through the project area" (EIS, p. 5-148). Based upon the EIS's own statement, there will be a significant diversion of traffic from I-81 to I-481. The sites chosen to review for air quality were only City locations: Site 1, Crouse Ave and Erie Boulevard; Site 2, West Street and Erie Boulevard; Site 3 Almond Street and Harrison Street; and Site 4, State Street and Erie Boulevard (*see* EIS, G-8, G-22). During oral argument, Counsel for Respondents acknowledged that the removal of the viaduct will result in drivers taking alternate routes away from the City (*see* Transcript at 106). Despite the admission that traffic would "increase substantially" on the present I-481, scant evidence of reviewing the I-481 corridor appears in the EIS and specifically the air quality review sections. "Similar agency efforts to ignore key, disputed issues have repeatedly been rejected in the past (Matter of Pyramid Co. of Watertown at 1315). This failure requires declaration that the EIS is insufficient in this regard and must be remedied prior to the demolition of the 1.4 miles of viaduct in downtown Syracuse.

Petitioners have alleged that the Respondents failed to properly address stormwater management. The EIS provides:

> "To obtain the required permits, a detailed hydraulic analysis would be conducted during final design to demonstrate the project development the project development would have no adverse impacts to the downstream watercourses" (EIS, p. 6-428).

This point was conceded by Respondents at oral argument.

> "The first two contracts are different from the immediate following contracts because they are -- they are -- what is being contracted out is not only the construction, which is what's happening with some of the later contracts, but also the -- the design portion of it, which is not in the first two being done by DOT itself. It's being contracted out to a bidder who will be identified at some point. DOT sincerely hopes soon. And the storm water analysis is happening as part of that first contract, and I understand that, you know, it will happen momentarily" (*see* Transcript at 99).

Such tentative plans are not sufficient for SEQRA (*see* Matter of Pyramid Co. of Watertown at 1314). Removing the present stormwater runoff from the combined sewer system means runoff from the roadway will not be treated before entering Onondaga Lake, once widely acknowledged as one of the most polluted bodies of water in the Country. The tentative proposal will lead to the runoff directly entering Onondaga Creek and Onondaga Lake. An analysis of the final plan is required.

Similarly, the Respondents claim supplementation of the EIS is not required in light of the Micron Project. "The decision to prepare a SEIS as a result of newly discovered information 'must be based upon . . . (*a*) the importance and relevance of the information; and (*b*) the present state of the information in the EIS'" (Matter of Riverkeeper, Inc. v. Planning Bd. of Town of Southeast, 9 N.Y.3d 219, 231 [2007], *citing* 6 NYCRR §617.1(d)). Respondents claim that any review would be speculative. This rings hollow. Respondents seem to have no issue on "speculating" as to what traffic conditions will be like in 2056. As admitted by Respondents' Counsel during oral arguments, "population growth is one factor" considered by DOT engineers in making their projections (*see* Transcript, p. 54). Respondents' Counsel went on to recite other factors considered, "vitality of public transit, the community land use design including housing density, walkability, bicycle infrastructure, as well as the current design of the highway and transportation infrastructure" (*ibid*).

Petitioners rely upon the Governor's press release announcing the Micron Project. The Petition ascribes a total cost of $2.25 billion for the I-81 project at issue in this litigation (*see* Petition, Doc. No. 1, ¶5). Respondents do not challenge that dollar amount. According to the Governor's press release:

> "Micron, a U.S.-based memory and storage manufacturer and the fourth-largest producer of semiconductors in the world, will invest up to $100 billion over the

> next 20-plus years to construct the project, with the first phase investment of $20 billion planned by the end of this decade, creating nearly 50,000 jobs statewide".[1]

Even the first phase of the Micron project is approximately ten times the cost of the I-81 project. Respondents assert: "Because the Micron project is in its earliest stages, its details and any impacts therefrom remain nebulous and inadequate to perform a supplemental review at this time. Notably, petitioners cite only anticipatory remarks from elected officials and the president of Micron that provide no concrete details about the Micron project whatsoever" (*see* Memorandum in Opposition, Doc. No. 145, p. 6). The Governor's press release notes significant State investments for the Micron project:

> "To attract this transformational, multibillion-dollar investment to New York, ESD has offered a package of performance-based incentives up to $5.5 billion in Green CHIPS Excelsior tax credits over two phases over 20 years. These targeted incentives are directly tied to Micron creating 9,000 new jobs, investing $100 billion, and meeting the Green CHIPS community benefits package and sustainability standards. The agreement also includes a commitment by New York State to invest $200 million for necessary road and other infrastructure improvements surrounding the campus, and $100 million in funding for community benefits as part of the $500 million Green CHIPS Community Fund."[2]

Contrast that statement with the EIS concerning growth in the community:

> "Overall, traffic volumes are expected to increase moderately by the year 2026. Traffic volume increases from 2026 to 2056 are greater due to the longer time interval but are still modest on an annual basis. Traffic volume increases in the area can be attributed to economic development and population growth. As shown in Table 5-7, the largest traffic increases occur on the section of I-81 south of Court Street, I-690 west of West Street, and I-481 south of the I-690 interchange. These are heavily traveled commuter routes today and under No Build conditions, a continuation of traditional growth patterns would produce regional traffic patterns similar to existing conditions" (*see* EIS, p. 5-22).

[1] https://www.governor.ny.gov/news/hochul-schumer-mcmahon-announce-micron-coming-onondaga-county-micron-will-invest-unprecedented
[2] https://www.governor.ny.gov/news/hochul-schumer-mcmahon-announce-micron-coming-onondaga-county-micron-will-invest-unprecedented

Shockingly, there is no reference to actual or projected population numbers in Chapter 5 – Transportation and Engineering Considerations, only travel times and volumes. The introduction does state:

> "The City's population grew rapidly until about 1930, but much of the rest of Onondaga County remained rural, with few residents. By 1950, the City had approximately 220,000 residents and Onondaga County had approximately 342,000 residents.4 Since 1950, the City's population has declined, but the County population has increased. As of 2018, Onondaga County has 461,809 people, and the City of Syracuse has 142,749 people" (*see* EIS, p. 2-3).

Even this does not accurately reflect population trends for Onondaga County over the last fifty years. According to the Census, Onondaga County's population was as follows[3]:

1970	472,835
1980	463,920
1990	468,973
2000	458,336
2010	467,026
2020	476,516

Presuming a 2% growth trend (2000-2010 Onondaga County saw a 1.9% increase and 2010-2020 saw a 2.03% increase) Onondaga County would see the following population figures:

2030	486,046
2040	495,767
2050	505,683
2060	515,796

Even at the far end in 2060 at a presumed growth rate of 2%, 515,796 falls far short of the estimated 100,000 new residents (*see* Supplemental Petition, Doc. No. 138, ¶283). Rob Simpson, President of CenterState CEO, estimates Onondaga County will see an increase of

[3] Data retrieved from www.census.gov

125,000 in is population over the next twenty years.[4] Ben Walsh, Mayor of Intervenor-Respondent City of Syracuse stated:

> "This project no matter what is going to be transformative, but if we truly want to make it unlike anything that this country has ever seen before, we need to make sure we are lifting up everyone in our community. In this case, we do have a lot of people, particularly in the city that are unemployed and that are underemployed. That's an opportunity for those individuals, for the company and for the region."[5]

For those living in the Southside of Syracuse, I-81 represents the most direct route to the Mircon site. Unless Respondents are arguing that statements by the Governor and other elected officials are not factually supported, the Micron Project dwarfs the I-81 Project, much less anything this community has seen. It is just too massive to ignore. The Micron Project's impact on the community's population renders the population projections seemingly relied on in the EIS meaningless. Respondents must account for population growth in light of the "transformational" nature of the Micron Project. Respondents shall supplement the EIS.

NOW, THEREFORE, upon reading and filing the papers with respect to the Petition, oral arguments, and due deliberation having been had thereon, it is hereby

ORDERED, that the relief requested in the Petition and Supplemental Petition is granted insofar as to require a Supplemental Environmental Impact Statement addressing the deficiencies identified above, including but not limited to the lack of specific air quality analysis on the present I-481 corridor as a result of diverted traffic from the demolition of the I-81 viaduct in downtown Syracuse, failure to provide specific analysis on impact to water resources due to stormwater management not being finalized, and invalid future traffic projections as a result of the imminent Micron Factory Campus; and it is further

[4] https://www.syracuse.com/news/2022/10/the-vision-micron-housing-boom-would-spread-far-beyond-clay-including-lots-of-urban-apartments.html
[5] https://www.localsyr.com/news/micron-comes-to-clay/filling-jobs-for-micron-syracuse-mayor-ben-walsh-discusses-the-task-with-newschannel-9/

ORDERED, that Respondents may proceed on Contracts Numbered 1 through 3 which are to be completed by late 2025, but are precluded from undertaking demolition activities of the viaduct unless and until they complete the required supplementation; and it is further

ORDERED, that Respondents may continue to perform necessary maintenance and safety repairs for the Project area including Interstates 81 and 481; and it is further

ORDERED, that the Petition is DENIED in all other respect not specifically granted above.

Dated: February 14, 2023

HON. GERARD J. NERI, J.S.C.

ENTER.