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

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In the Matter of the Application of

SAVE CONEY ISLAND, INC., BRUCE HANDY, RUTH MAGWOOD, JENNY McGOWAN, ANGIE PONTANI and AMOS WENGLER,

Petitioners,

Index No. _____

Hon. _____
IAS Part ____

For judgment pursuant to Article 78 and section 3001 of the Civil Practice Law and Rules,

-against-

THE CITY OF NEW YORK, NEW YORK CITY COUNCIL and NEW YORK CITY PLANNING COMMISSION,

Respondents,

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PETITONERS' MEMORANDUM OF LAW

This Memorandum of Law is submitted on behalf of Save Coney Island and the individual petitioners in support of their position that the City of New York, and more specifically, the New York City Council and the New York City Planning Commission, did not comply with the State Environmental Quality Review Act [*Environmental Conservation Law, Article 8*] and violated the General Cities Law and the New York City Administrative Code when they approved the rezoning of approximately 47 acres (19 blocks) in the Coney Island area of Brooklyn (the "Coney Island Rezoning"). Among other things, the environmental impact statement ("EIS") on which the Planning Commission and the Council based their approvals failed to disclose or analyze many significant adverse impacts of the

Rezoning and, of equal importance, ignored expert studies that showed that the Rezoning could not succeed in revitalizing Coney Island's historic amusement district and presented alternatives that could.. Petitioners further contend that the Rezoning was not effected to promote the public health, safety and general welfare, but rather to accommodate the private interests of a speculative developer, Thor Equities, that had bought up land in Coney Island in anticipation of a favorable rezoning.

Petitioners ask the Court to (1) set aside and annul the Rezoning, (2) direct the City to prepare an EIS that conforms to the law before taking any further action to change the zoning for the area of Coney Island in question and (3) enjoin the City and its agencies, including its Department of Buildings, from taking any action to implement the Rezoning unless and until the legal errors are corrected.

FACTUAL BACKGROUND

The lead petitioner, Save Coney Island, Inc., is a volunteer grassroots community organization founded in 2008 to participate in the ongoing discussions regarding the future of Coney Island and to advocate for the revitalization of the area as world class amusement district in keeping with its illustrious history and its potential as one of the great attractions of New York. The remaining petitioners include a local resident, two individuals who are employed full time or part time in the amusement district, a performer who has worked in the district as Miss Saturn, and a guitar player who sets up shop along the Boardwalk and in other parts of the district and is also a Polar Bear who participates in the Annual New Year's Day Swim on the

Coney Island. All of the petitioners share a central goal – to help renew Coney Island as an amusement destination commensurate with the area's extraordinary history. [Petition, ¶¶ 3-10]

Coney Island is one of the most recognizable and famous names in the world. For tens of millions of Americans and for millions beyond our shores, it immediately brings to mind a gaudy image of fun, honky-tonk to some degree but filled with imagination, and the wonders of both the real and the make believe: beachgoers, daredevils, freaks, flashing lights, barkers, the carnival, palaces of pleasure, gondolas on fake lagoons, fireworks, mermaids, and much more. Memorialized in books and films and on records – *Goodbye My Coney Island Baby, Goodbye My Own True Love* – it is still today a living image, a living, if somewhat bedraggled, place in our national consciousness. [Petition, ¶ 14]

It began simply enough – as a real island the Dutch named *Conyne Eylandt,* a rough translation of which was Rabbit Island, apparently because it provided habitat for many and diverse rabbits. With the coming of the English, it became Coney Island and remained a relatively wild place until the island was joined to the mainland and, late in the 19th Century, resort development took hold. With railroads and steamboats providing easy access and an extraordinary stretch of sandy beach, hotels sprang up, followed shortly by horse racing and then the famous amusement parks, [Petition, ¶ 15]

At the beginning, in 1876, there was little more than a single hand-carved carousel, the work of a Dutch woodcarver. But by 1880, Coney Island was already

the largest amusement area in the United States. In 1885, the gigantic *Coney Island Elephant* was put on display, and for the next 10 years, it was the first sight to greet immigrants arriving in New York Harbor, who would see it before they saw the Statue of Liberty.[1] An image of the Elephant, which was actually a hotel, is included in the Exhibit Binder as Exhibit B. [Petition, ¶ 16]

In 1897, *Steeplechase Park,* the first of Coney Island's great amusement areas, opened and with it the first Ferris wheel in the Eastern United States, which immediately became the Island's biggest attraction. Steeplechase Park's creator, George Tilyou, soon added other rides and attractions, including a mechanical horse race course and scale models of such world landmarks as the Eiffel Tower and the Big Ben Tower. Steeplechase burned in 1907 but was reopened the next year with a huge Pavilion of Fun that covered five acres, and it continued to operate until 1964. Images of Steeplechase Park are included in the Exhibit Binder as Exhibit C. [Petition, ¶ 17]

The second of the great amusement areas – *Luna Park* – opened in 1903. Destined to give its name to other amusement parks around the world – it actually translates to "amusement park" in Dutch, German, Italian, Turkish and Hebrew – Coney Island's Luna Park was perhaps the most spectacular of all those constructed in the resort area. Characterized by turreted castles and a canal where you could take a gondola ride, transformed into a fairyland of lights by night, and filled with attractions for all classes, including the first roller coaster, Luna Park was arguably

[1] This description and others that follow of the great amusement parks are drawn largely (and often directly) from the descriptions given in Wikipedia, the on-line encyclopedia, and credit is accorded to that service.

Coney Island's greatest attraction for many years. Images of Luna Park are included in the Exhibit Binder as Exhibit D. [Petition, ¶ 18]

Dreamland, the last constructed of the great amusement areas, opened in 1904. It was supposed to be higher class entertainment, with elegant architecture, pristine white towers and educational exhibits along with rides and walks. It was supposedly illuminated by one million electric light bulbs and its attractions included a railway that ran through a Swiss alpine landscape, a "Lilliputian Village" with 300 dwarf inhabitants, a demonstration of fire fighting in which 2,000 people participated, and many side shows. Nonetheless, Dreamland fared rather poorly in its competition with the other amusement giants, and after it burned to the ground in 1911 in a spectacular fire, it never reopened. Images of Dreamland are included in the Exhibit Binder as Exhibit E. [Petition, ¶ 19]

Over the next 40 years, Coney Island remained the most important amusement district in the country, ever changing but ever renewing itself with new rides, new attractions, new side shows. The *Wonder Wheel* was built in 1918, opened in 1920 and continues to operate today as part of Deno's Wonder Wheel Amusement Park. A Ferris wheel that has both stationary cars and rocking cars that slide along a track, it holds 144 riders and stands 150 feet high and weighs over 2,000 tons. Close by is the *Cyclone Roller Coaster*, built and opened in 1927. It is one of the nation's oldest wooden coasters still in operation and includes an 85-foot, 60 degree drop and a number of sharp curves. Today it stands on property owned by the City and, protected as a living City landmark, continues to draw large

numbers of riders. Images of the Wonder Wheel and the Cyclone are included in the Exhibit Binder as Exhibits F and G. [Petition, ¶¶ 20-21]

Another continuing attraction – and another City landmark – is the 290 foot high *Parachute Jump*, which opened in 1939. The first ride of its kind, patrons were hoisted 190 feet in the air before being allowed to drop using guy-wired parachutes. Although the ride has been closed since 1968, it was refurbished in 2002 and remains a Coney Island Landmark, where it is sometimes referred to as Brooklyn's Eiffel Tower. Images of the Parachute Jump are included in the Exhibit Binder as Exhibit H. [Petition, ¶ 22]

Over the years, many other rides came and went at Coney Island, including the Thunderbolt and Tornado roller coasters and the B&B Carousel, which is now owned by the City and temporarily in storage. One of the more infamous rides – "The Flopper" – was the subject of a famous torts law case, *Murphy v. Steeple-chase Amusement Co.,* 250 N.Y. 479 (1929), where the plaintiff fell and fractured his kneecap. Murphy lost his case, decided by Justice Benjamin Cardozo, because he legally "assumed the risk" inherent in riding The Flopper, a moving belt run in a groove by an electric motor. [Petition, ¶ 23]

While the amusement attractions experienced a regular turnover as old tastes waned and new tastes emerged, one of the constants at Coney Island was its broad beaches and famous Boardwalk that attracted tens and even hundreds of thousands of New Yorkers on weekends and holidays. An image taken by the photographer known as Wegee in 1940 shows a crowd of bathers gathered on the beach extending

unbroken to the horizon, and other photographs taken over the years make it clear that this was not an unusual situation. For all of its amusement rides and side shows, Coney Island was *the* place that City residents escaped to both for leisure and as a way of keeping cool on hot summer days. Images of the beach and Boardwalk are included in the Exhibit Binder as Exhibit I. [Petition, ¶ 24]

After World War II, the popularity of Coney Island as a destination began to fall off sharply as a result of a number of factors, including the closing of Luna Park in 1946 and of Steeplechase Park in 1964. Still, Coney's heart never stopped beating. The beach remained popular, and while the amusement district saw more land falling vacant, Astroland and Deno's Wonder Wheel Amusement Park held on, along with Childs Restaurant, Nathan's Famous and a considerable number of separately-owned attractions ranging from bumper car concessions to haunted houses and the inevitable side shows. In addition, a modest baseball stadium – Keyspan Park – was built at the western end of the amusement area, where Steeplechase Park had once stood. [Petition, ¶¶ 25-26]

Equally of note, a new kind of happening, centered uniquely on Coney Island, began to assume greater importance and draw a new kind of nationwide attention to the area. Typical of this trend are the annual Mermaid Parade and the Nathan's Hot Dog Eating Competition, both of which attract tens of thousands of visitors to the amusement area and receive national coverage in the media. Images of these events are included in the Exhibit Binder as Exhibit K. [Petition, ¶ 26]

Despite such stirrings and other signs of revitalization, the Bloomberg administration, which had begun to take an interest in Coney Island as a possible venue in City's failed effort to bring the 2012 Olympics to New York, viewed the area ambivalently, seeing it as blighted but also filled with potential. The idea of trying to build new housing in the area and also revitalize the amusement district was attractive enough that in 2003, the City initiated a community-based effort through a newly-established Coney Island Development Corporation ("CIDC"), which spent two years reaching out to local and regional stakeholders in an effort to develop a consensus program. In 2005, this effort resulted in the release of a Coney Island Strategic Plan that included a large amount of new housing and a restored publicly-owned entertainment district of close to 20 acres. This plan was rolled out by Mayor Bloomberg with great fanfare and enjoyed wide support by the interested parties. [Petition, ¶ 27]

The City's renewed interest in revitalizing Coney Island led developers to buy up land on speculation, and shortly before the CIDC plan was issued, Thor Equities, headed by Joseph Sitt, began to purchase property within the boundaries of the traditional amusement district, eventually accumulating close 10 acres. Thor soon began to close down many of the remaining entertainment uses, including, in 2008, *Astroland*, the last sizable amusement park. In time, Thor came up with its own plans for the area – a Las Vegas type of development that included the proposed demolition of many of Coney Island's remaining icons. This, in turn, led to a war-of-words between Mr. Sitt and the Bloomberg administration over which plan would be pursued. [Petition, ¶ 28]

In November 2007, Mayor Bloomberg unveiled the City's Coney Island Comprehensive Rezoning Plan, putting forth a vision for the future of Coney Island that largely followed the proposals in the CIDC plan. Central to the Plan was the amendment of the then-current zoning covering 19 blocks. In addition, while the City already owned approximately three acres (not including streets) at the center of the amusement district, the plan called for it to acquire an additional 16.5 acres. Together, these properties would create the 19.5 acres of publicly-owned parkland identified by the CIDC plan as necessary to support a new amusement area capable of restoring Coney Island's prominence as a premier destination. (A map showing the original area of the publicly-owned Amusement District – plus the area it was later reduced to -- is included in the Exhibit Binder as Exhibit L.) At the same time, nine acres of existing parkland to the west of Keyspan Park, which were being used for vehicle parking, would be demapped and made available for residential development, including affordable housing. [Petition, ¶ 29]

In February 2008, the City, through the Deputy Mayor's Office for Economic Development, which acted as "lead agency," the New York City Economic Development Corporation and the City Planning Commission, initiated the environmental review process under SEQRA by issuing a draft scope of work identifying the parameters of the proposal and the environmental issues that would be addressed in a draft environmental impact statement ("EIS") that would be prepared in conjunction with the proposal. The contemplated actions included the rezoning, acquisition and mapping as parkland of the properties to be included in the amusement area,

demapping as parkland of the nine acres adjacent to Keyspan Park, mapping and demapping of certain streets and several other actions. The proposed area of the publicly-owned amusement district followed the CIDC plan, constituting approximately 19.5 acres. [Petition, ¶ 30]

Between February and April 2008, however, the proposed publicly-owned amusement district shrank. During this period, the Administration began to negotiate with Mr. Sitt, whose speculative holdings would have to be acquired, whether through negotiation or by eminent domain, to create the contemplated entertainment district. According to an article in the April 17, 2008 issue of The New York Times, a copy of which is attached as Appendix 1 to the Memorandum of Law, as a result of these negotiations and in order to placate Mr. Sitt and another property owner, the City agreed to modify its proposal for the Rezoning; and a few days later, it ditched the plan that had come out of the CIDC two-year community planning process and revised its proposal to reduce the publicly-owned amusement district to 12.4 acres (the three acres the City already owned plus 9.4 acres it planned to map and acquire as parkland). The additional seven acres that had been part of the original proposal, mostly owned by Thor Equities, were to be left in private ownership, available for use for restaurants, indoor amusements and certain other commercial purposes, with greatly increased bulk parameters for the private owners. At the same time, the revised plan placed two high rise hotel sites on land owned by Thor Equities on the south side of Surf Avenue. (A total for four hotels was eventually included in the plan). A revised draft scope of work embodying these changes was issued for the EIS. The only explanation give for the reduction in the acreage for the publicly-

owned amusement area and the increase in private uses was that it would "achieve a better balance between indoor and outdoor uses in Coney [Island] East." No mention was made of the resulting benefits to Thor Equities. [Petition, ¶ 31]

In January 2009, the Deputy Mayor's Office for Economic Development released the completed draft EIS for the Coney Island Rezoning, and following certification by the City Planning Commission, the public review process under the City's Uniform Land Use Review Process began when the proposal and the draft EIS were forwarded to the local community board – Brooklyn Community Board 13 – for its consideration and comments. [Petition, ¶ 32]

In the meantime, the Municipal Art Society of New York ("MAS"), one of the City's leading civic and planning organizations, had taken a keen interest in the redevelopment of Coney Island and had drawn together many of the stakeholders, including Save Coney Island, to develop ideas for the future of the area and to respond to the City's plan. To this end, between October 2008 and January 2009, MAS undertook its own study, hosted a "Call for Ideas" on its website, sponsored a three-day "charrette" with a team of international experts, commissioned an economic analysis performed by the real estate firm RCLCo; and held a series of community meetings. The outcome, described more fully below, was that if Coney Island was to be reestablished as an exciting amusement district along the lines it had been in the past, a much larger area was required for outdoor amusements than the 12 acres the City was proposing. [Petition, ¶ 33]

In January and February 2009, the Coney Island Rezoning was under review by Community Board 13. This turned out to be a heavy-handed process from the point of view of Save Coney Island and many others. At the meeting of the Board's Land Use Committee, which first took up the Rezoning, the letter Save Coney Island had written the Board with recommended amendments was never distributed, and the local Council Member, who was a friend and ally of Mr. Sitt, started yelling at one member when he suggested that the existing zoning be retained. Then, at the full Board meeting, the recommendations of the Land Use Committee were neither read nor discussed before the vote, and the public was not allowed to speak until after the vote. While Save Coney Island participated to the extent it was allowed in this process, including through the submission of written recommendations and comments, it was to little avail. For all that, the Community Board still urged that any high rise hotels allowed under the rezoning be restricted to the north side of Surf Avenue, where they would not create a wall between Coney Island historic main street and the amusement district and Atlantic Ocean. [Petition, ¶ 34]

The application and draft EIS next went to the Brooklyn Borough President for his review and comments. These were generally supportive of the Rezoning, but included some recommendations to improve it, including a request that the area of the outdoor amusement district be enlarged and another that asked that a study be made of the feasibility of reopening the Parachute Jump for its historic use. [Petition, ¶ 35]

Public concern over the reduced size of the amusement district and the wall that could be created by the Surf Avenue hotels continued to grow as it appeared more and more likely that the Administration's proposal would go before the City Planning Commission without modifications. In February 3, 2009, The New York Times weighed in with a pointed editorial:

> Lawrence Ferlinghetti once wrote that Coney Island is "where I first fell in love with unreality." Today, a desolate reality has taken hold at the legendary amusement park. As rides close, bulldozers uproot land that once held delightfully sinister sideshows. The few rides left barely lure neighborhood children and nostalgic tourists.
>
> Mayor Michael Bloomberg says he wants to revive Coney Island, or as Robert Lieber, a deputy mayor, puts it, "We're trying to bling it up." The city development team has come up with elaborate plans to turn the Brooklyn park into the "destination for tourists" that it once was, and New York's Municipal Art Society has its own proposal.
>
> The surprise here is that the two plans are not drastically far apart. As New Yorkers approve new zoning for Coney Island, they should use the best of each proposal.
>
> The city's version displays Mayor Bloomberg's commendable effort to keep Coney Island from being overwhelmed by oceanfront condominiums. On the 60-acre spread proposed by the city, there are thousands of possible housing units, but most are at a distance from the entertainment areas.
>
> The hotels are a different story. This zoning proposal would allow a row of four hotels between the Stillwell Avenue subway stop and the outdoor entertainment area. The hotels could too easily become a wall, blocking public access to the sideshows and the rides, the boardwalk and the ocean. The hotels also squeeze the outdoor rides into a narrow strip of about 12 acres — an area that is simply too small to attract enough rides and attractions to bring back the big crowds.
>
> The art society has argued that one iconic ride, something on the order of the London Eye, would be another way to lure visitors from around the world. Obviously, a big new ride would take up more outdoor space as well. Because this project could take a decade to

> build, any rezoning now must encourage development without destroying the dreams of a modernized Coney Island.
>
> The new Coney Island should not be a theme park. No Six Flags or Disney World. It should be an alluring adaptation of Dreamland and Luna Park and the other exotic places that always made Coney Island splendidly odd, a New Yorker's kind of unreality.

In March 2009, as part of it ongoing evaluation of the Coney Island Rezoning, MAS issued a report titled "Coney Island Historic Resources." This identified 18 structures, ranging from the Wonder Wheel and the Cyclone to run-down turn-of-the-century buildings, that deserved to protected, but some of which would be lost if the publicly-owned amusement district was reduced to 12 acres. A copy of that report in included in the Exhibit Binder as Exhibit M. [Petition, ¶ 36]

On May 6, 2009, the City Planning Commission held its public hearing on the Coney Island Rezoning and related actions. Representatives of a large number of organizations appeared, including Save Coney Island, which supported the City's public acquisition of land for the amusement park but objected strongly to the reduced acreage proposed to be acquired and mapped for the outdoor amusement district. Along with others, Save Coney Island also raised a number of other objections, including opposition to the provisions of the Rezoning that allowed four high-rise hotel towers to be built on the south side of Surf Avenue and concerns about the impacts of the Rezoning on Coney Island's rich trove of historic buildings. These and other comments on the DEIS were also submitted in writing. [Petition, ¶ 37]

At the City Planning hearing, MAS submitted detailed testimony on the limitations of the Rezoning. After summarizing the efforts it had made to research the

viability of the City's proposal and the extensive outreach that it had conducted, MAS presented its two fundamental findings: The area the City had identified and planned to map as parkland for the outdoor amusement district was far too small to support a revitalized Coney Island that would be a world-class attraction of the sort that area had been in the past; and that limitation was compounded by the provisions of the Rezoning that permitted hotel towers to be built on the south side of Surf Avenue, in what should be the low rise section of the amusement park. Not only did MAS identify these limitations but it submitted an economic analysis and report by RCLCo, the largest independent real estate advisory firm in North America, with special expertise in resort planning and development. The RCLCo Report concluded that 26 acres of land were needed for a new Coney Island amusement district with the potential to become the kind of attraction it had once been. At the same time, the Report indicated that because of its world-renown "brand name," Coney Island had immense drawing power on a regional, if not national basis; what was needed was the kind of amusement park capable of capitalizing on that brand. Copies of the MAS testimony and the RCLCo PowerPoint presentation summarizing its analysis and findings are included in the Exhibit Binder as Exhibits N and O, respectively. [Petition, ¶ 38]

On June 17, 2009, the City Planning Commission approved the Rezoning and related mapping, demapping and other actions in a series of resolutions and reports, none of which significantly modified the original proposal. At the same time, it approved the final EIS for these actions and made the statutory findings required under SEQRA. The Planning Commission did not address or mention the MAS

submission or the RCLCo Report in the resolutions, other than to state (or more correctly, understate):

> The representatives of the Municipal Art Society, Coney Island USA and Save Coney Island expressed strong support for the City's goals of mapping parkland and the City's efforts to acquire land within the amusement area to ensure its long-term preservation and enhancement.
>
> These speakers also expressed concerns about the size of the amusement area, the preservation of historic structures in the rezoning area and the location of hotels south of Surf Avenue.

[Petition, ¶ 39]

Like the City Planning Commission's resolution, the final EIS did not address the MAS submission or the RCLCo Report. The only section it included that bore on the general subject matter of the inadequate size of the amusement district was contained in the assessment of the 15-Acre Mapped Amusement Park Alternative, where it was stated:

> The 15-Acre Mapped Amusement Parkland Alternative is less likely to achieve the goals and objectives established for the proposed Coney Island Rezoning. Most notably, with less land available in Coney East dedicated to private investment in the development of enclosed amusements, restaurants, and entertainment uses, it would be less likely that the district would grow to realize its full potential as a year-round destination. Further, because there would be less land available in Coney East for private development under this alternative, the footprints for private development would be smaller compared with the proposed actions. With smaller footprints, it is possible that redevelopment would be less economically viable compared with larger footprints under the proposed actions, and could possibly hinder the area's redevelopment into a year-round destination. Under this alternative, the amusement district is likely to be more seasonal than with the proposed actions because many of the uses that are so vital in making Coney Island a year-round destination would be precluded.

However, no support was offered for this statement, no study referenced that might have served as a basis for disputing the RCLCo Report, no expertise revealed to qualify the response. Rather, it was an argument, a speculation proposed by the person who wrote the final EIS. And in any case, it did not address the analysis and conclusions of the RCLCo Report that 12 acres of mapped parkland reserved for the amusement district were inadequate to support a viable amusement park and achieve that stated goal of the rezoning. [Petition, ¶ 40]

The final EIS was also deficient in a number of other important respects described below under Point One of the Argument.

On July 12, 2009, The New York Times published a second editorial urging the City Council to modify the Rezoning by adopting the recommendations of MAS regarding the size of the amusement district and the elimination of high-rise hotels on the south side of Surf Avenue. A copy of that editorial is included in the Exhibit Binder as Exhibit P. [Petition, ¶ 42]

On July 15, 2009, 15 noted historians published an Open Letter on the Coney Island Rezoning in which they wrote:

> The City's rezoning plan for Coney Island, however, dishonors its past and sacrifices its future. It would shrink the area reserved for amusement parkland to only 12 acres. It would insert soaring high-rises into the very heart of Coney Island's historic amusement district. It would invite developers to tear down many of Coney Island's remaining historic buildings, some dating back more than a century. This shrunken amusement district, hemmed in by high-rises, would leave little room for the innovation and creativity that have been Coney Island's hallmarks for more than a century.
>
> This plan must not be allowed to pass in its present form.

A copy of the full letter is included in the Exhibit Binder as Exhibit Q to the Petition. [Petition, ¶ 43]

Following the City Planning Commission's approval, the Rezoning was called up for review and action by the City Council. On July 20, 2009, the City Council's Subcommittee on Land Use and Zoning held a hearing on the Rezoning, at which Save Coney Island and others gave testimony in opposition to, among other things, the small size of the City-owned amusement district and the authorization to build hotels on the south side of Surf Avenue. However, the Subcommittee voted in favor of the Rezoning and the Committee on Land Use soon followed suit. On July 29, 2009, the full Council approved the Coney Island Rezoning and the related mapping, demapping and other actions. [Petition, ¶ 44]

Petitioners now ask this Court to annul the Coney Island Rezoning and the approvals given by the City Planning Commission and the City Council because of the failure of the City to comply with the requirements of SEQRA and because the Rezoning was in violation of the zoning enabling laws pursuant to which those bodies purported to act and was in response to the demands of a private developer rather than for the purpose of promoting the general welfare of the City and its citizens, all as more specifically spelled out below.

ARGUMENT

Point One

THE EIS FOR THE CONEY ISLAND REZONING DID NOT COMPLY WITH SEQRA, INVALIDATING THE APPROVALS GIVEN BY THE CITY PLANNING COMMISSION AND CITY COUNCIL BASED THEREON

A. Statutory Framework; Standard of Judicial Review

The State Environmental Review Act was adopted in 1975, with the goal of protecting the environment to the fullest possible consistent with other key areas of policy. To that end, it requires that

> Agencies shall use all practicable means to realize the policies and goals set forth in this article, and shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process. ECL, § 8-0109(1)

As the Court of Appeals described the import of the statute in City Council of Watervliet v. Town Board of Colonie, 3 N.Y.3d 508 (2004):

> "SEQRA's primary purpose 'is to inject environmental considerations directly into governmental decision making' Matter of Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d 674, 679 . . . [1988]. The Legislature's intent is reflected in the statute, which requires that '[s]ocial, economic and environmental factors be considered together in reaching decisions on proposed activities. (ECL 8-0103[7]). The procedures necessary to fulfill SEQRA review are carefully detailed in the statute (see ECL 8-0101 – 8-0117; 6 NYCRR Part 617; see also Matter of New York City Coalition to End Lead Poisoning v. Vallone, 100 N.Y.2d 337. . . [2003]), and we have recognized the need for strict compliance with SEQRA requirements (Matter of Merson v. McNally, 90 N.Y.2d 742. . . [1997].

The principal mechanism for ensuring that environmental factors are seriously considered in the decision making process is the environmental impact statement (or EIS), which SEQRA requires government agencies proposing to undertake an action or give discretionary approvals for actions by others to prepare:

> All agencies (or applicant as hereinafter provided) shall prepare, or cause to be prepared by contract or otherwise an environmental impact statement on any action they propose or approve which may have a significant effect on the environment. Such a statement shall include a detailed statement setting forth the following [among other things]:
>
> (a) a description of the proposed action and its environmental setting;
>
> (b) the environmental impact of the proposed action including short-term and long-term effects;
>
> (c) any adverse environmental effects which cannot be avoided should the proposal be implemented;
>
> (d) alternatives to the proposed action;
>
> (e) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented; [and]
>
> (f) mitigation measures proposed to minimize the environmental impact . . .

ECL, § 8-0109(2)

SEQRA further requires that the draft EIS be circulated to other involved agencies and the public for their critique and that any comments received, plus answers to them, be included in the final EIS. ECL, §§ 8-0109(2), 8-0109(4) This last requirement is intended to ensure that the public is fully informed about, and has a chance to offer its critique of, the proposed action and also to make sure that the agency proposing the action does not sweep difficult problems under the rug. *See*

Matter of Shawangunk Mountain Environmental Ass'n v. Planning Board of the Town of Gardiner, 157 A.D.2d 273, 276 (3d Dept 1990); Matter of Merson v. McNally, 90 N.Y.2d 742, 755 (1997).

Because a series of discretionary approvals were required in connection with the Coney Island Rezoning, including approvals by the City Planning Commission and City Council under ULURP, SEQRA was fully applicable in this case. The City recognized this to be the case and also recognized that the Rezoning would have a significant impact on the environment. The Deputy Mayor's Office for Economic Development consequently concluded that an EIS was required and set about preparing one. In time, the City Planning Commission certified the draft EIS to be complete and it was circulated through the ULURP process. When the Planning Commission approved the Rezoning, it also approved the final EIS and based on that document made the specific findings required under SEQRA. Two months later, the City Council did the same when it gave final approval to the Rezoning.

The challenge that Petitioners raise under SEQRA is to the adequacy of the final EIS. Faced with a document of some 730 pages not including 11 lengthy appendices, this may seem a daunting challenge indeed. But the weight of an environmental impact statement does not necessarily ensure, or even promise, completeness. Indeed, with the emergence of professional EIS consultants, the weight of the document has become something of a joke; it has become ever more possible to conceal a lack of focus on critical points in the endless pages of an

impact statement that few people, including many of the decisionmakers, read. In Petitioners' view, that is what happened here.

Petitioners recognize that the Court's role in assessing their claims is a narrow one. The standard of duty for a lead agency under SEQRA, and the standard of review for the courts, is well established. In complying with SEQRA in connection with an action, the agency must have focused on the significant environmental impacts, and the courts review its determination to see 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.* Court review, while supervisory only, insures that the agencies will honor their mandate regarding environmental protection by complying strictly with prescribed procedures and giving reasoned consideration to all pertinent issues revealed in the process. (emphasis added)

Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 417 (1986)

The courts may not substitute their own judgment regarding the merits of an agency decision under SEQRA. But where the agency has (1) failed to identify the relevant areas of environmental concern, or (2) having identified the relevant areas, failed to take a "hard look" at them, or (3) having identified the relevant areas and taken a "hard look," failed to provide a reasoned elaboration for its decision, the courts must set aside the decision and direct the agency to rectify the failure before proceeding further.

The willingness of the courts to do so is reflected in such Court of Appeals decisions as Matter of New York City Coalition to End Lead Poisoning v. Vallone, 100

N.Y.2d 337 (2003)[decision annulled for failure to prepare an EIS where agency failed to take a hard look at the impacts of hazardous materials]; Matter of Kahn v. Pasnik, 90 N.Y.2d 599 (1997)[decision annulled where, in deciding not to prepare an EIS, agency failed to take a hard look at traffic and other impacts]; and Chinese Staff and Workers Association v. City of New York, 68 N.Y.2d 359 (1986) [decision annulled for failure to prepare an EIS when agency failed to identify or take a hard look at possible secondary impacts of new luxury housing in Chinatown]. However, these cases all involved situations where an agency failed to prepare an EIS in the first instance, rather than instances, such as that involved here, where an EIS was completed. But the same standards of judicial review set out in Jackson v. New York State Urban Dev. Corp., *supra,* apply in determining the adequacy of an EIS – whether the agency identified the relevant areas of environmental concern, took a "hard look" at them and provided a reasoned elaboration for its decision.

Many Appellate Division and New York Supreme Court cases illustrate the willingness of the courts to look beyond the volume or weight of an EIS to determine whether an agency has meet the standards set out in Jackson. In Matter of Save the Pinebush v. Planning Board of the City of Albany, 130 A.D.2d 1 (3d Dept,1987), a relatively early decision under SEQRA that set aside an approval based on a deficient EIS, the Third Department affirmed the Supreme Court's finding that the EIS had not taken a "hard look" at the issue of the habitat required to sustain the endangered Karner Blue Butterfly. The EIS had identified the issue but provided no supporting data to justify its conclusion that the development in issue would not harm the Butterfly.

Five years later, the Third Department found another EIS for development in the Albany Pinebush defective because, while the impact statement had focused on the Karner Blue Butterfly, it had failed to make an adequate assessment of whether the habitat necessary to protect it could be acquired. Matter of Save the Pinebush v. Common Council of the City of Albany, 188 A.D.2d 969 (1992).

In 1995, the Fourth Department invalidated an EIS for a large development project because it failed to assess the impacts of relocating pipelines and building a new oil terminal facility that might be necessary if the development went forward. Sun Company, Inc. v. City of Syracuse Industrial Development Agency, 209 A.D.2d 34 (3d Dept, 1995). The Court also concluded that the analysis of alternatives in the EIS was inadequate because it failed to consider the *petitioners' proposal* to consolidate their facilities on a portion of the site.

In Matter of Doremus v. Town of Oyster Bay, 274 A.D.2d 390 (2d Dept, 2000), the Second Department upheld a Supreme Court decision invalidating the approval of a large subdivision because the Town Board had relied on an EIS that did not adequately address impacts on groundwater and open space. The EIS on which the Board relied was 10 years old and no effort had been made to address the changes that had occurred in the meantime or to implement mitigation.

Another recent Second Department decision in Matter of Orange County v. Board of Trustees of Village of Kiryas Joel, 44 A.D.3d 765 (2d Dept, 2007) affirmed a judgment of the Orange County Supreme Court, Matter of Orange County v. Board of Trustees of Village of Kiryas Joel, 11 Misc.3d 1056A (2005) that had

invalidated the Village's SEQRA review in connection with its plans to build a water pipeline to connect into the Catskill Aqueduct. The Supreme Court found the EIS deficient for failing to take a hard look at the problems of wastewater, the potential of the tap to accelerate growth and the impacts on wetlands. In addition, the EIS had not adequately addressed alternatives. The Appellate Division affirmed.

In another 2007 decision, the Supreme Court of Onondaga County invalidated special permits that two boards had issued for a series of wind turbines because of a defective EIS. Matter of Brander v. Town of Warren Town Board, 18 Misc.3d 477 (Sup. Ct, Onondaga Co., 2007). The Court found that the EIS had not adequately addressed impacts on historic structures, with particular emphasis upon mitigation. Equally important, while it identified alternatives, the EIS did not take a "hard look" at the options, dismissing them as "unreasonable" and declining a request by the State Department of Environmental Conservation to "perform an alternatives analysis with supporting data."

In summary, the fact that an EIS has been prepared or even that it has identified the relevant areas of concern does not mean that it meets the tests set forth in Jackson. The failure to take a hard look at adverse impacts or provide a reasoned elaboration for an agency's conclusions, whether this is the result of issuing a negative declaration or compiling a deficient EIS, is equally fatal.[2]

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[2] Many Appellate Division and Supreme Court cases invalidate negative declarations because of their failure to conform to the Jackson test. See, e.g., Matter of Kogel v. Zoning Board of Appeals of Town of Huntington, 58 A.D.3d 630 (2d Dept, 2009)[determination set aside when agency, in deciding not to prepare an EIS, failed to take a hard look at, or provide a "reasoned elaboration" regarding, potential impacts raised in an environmental assessment form]; Matter of Kittredge v. Planning Board of Liberty, 57 A.D.3d 1336 (3d Dept 2008) [determination set aside when agency's

B. **Failings of the Coney Island EIS**

1. Park Alienation

One of the underlying tenets of the Coney Island Rezoning is that the City will dedicate and acquire approximately nine acres of new parkland, which then allow it to demap somewhat over nine acres of existing parkland. The existing parkland, currently used primarily as parking lots for Keyspan Park, is then to become the site of a significant part of the new residential housing, supposedly including affordable housing, that is touted as once of the centerpieces of the Rezoning. Indeed, the EIS is filled with references to how this housing and others, as well as the elimination of the large parking lots, will improve the neighborhood and provide major benefits to the community and the City [see, e.g., FEIS at pp. S-39, 40; Petition, ¶ 51]. This asserted change for the better was one of the essential benefits envisioned for the Rezoning, and both the EIS and the City approval resolutions were based on the assumption that these benefits would be realized.[3]

There is a problem, however. The fact is that the nine plus acres of existing parkland cannot be used for other than park purposes unless and until the State

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decision not to prepare an EIS was based on its failure to take a hard look at potential impacts of project on wildlife]; Matter of Serdarevic v. Town of Goshen, 39 A.D.3d 552 (2d Dept 2007)[negative declaration annulled and preparation of full EIS directed for failure to take a hard look at, and provide a reasoned elaboration regarding, potential impacts of project on Town reservoir]; Matter of Shawangunk Mountain Environmental Ass'n v. Planning Board of Gardiner, 157 A.D.2d 273, 276 (3d Dept 1990)[decision annulled for failure to prepare an EIS when the project was in a sensitive environmental area and there was the potential for erosion, sedimentation and stream pollution]; Matter of Kasten v. Town of Gardiner, 2009 N.Y. Misc. LEXIS 3083 (Sup. Ct Ulster Co., 2009) [negative declaration annulled because of failure to take a hard look at visual impacts of proposed cell tower likely to be widely visible in the Shawangunk Mountain area]

[3] Indeed, at page S-35, the FEIS stated that "each element of the proposed amendment of the City Map is necessary to meet the goals of the proposed actions." It is thus clear that the successful demapping of the existing parkland was essential to the success of the overall Coney Island Rezoning. Yet as noted above, there is no assurance this will happen.

Legislature approves of their "alienation." See Friends of Van Cortlandt Park v. City of New York, 95 N.Y.2d 623 (2001). The EIS acknowledges this, but it never addresses the resulting impacts if that approval is not given, including the loss in claimed benefits from the new housing on the currently mapped parkland.

At the time the EIS was finalized and the City Planning Commission and City Council approved the Coney Island Rezoning, the State Legislature had not acted, nor has it yet, nor has it apparently even been asked; and there is no assurance its approval will be forthcoming. The Legislature does not automatically say yes to alienation proposals, and several, including Van Cortlandt Park and Yankee Stadium, have barely squeaked by. In these circumstances, it was improper for the final EIS to take credit for the benefits of the new housing when there was no assurance it could be built. And in any case, the risks and impacts of any failure to alienate the existing parkland should have been spelled out.

The same kind of failing was held to invalidate the EIS is the *Albany Pine-bush* cases cited above at page 23 of the Memorandum of Law. In the first of those cases, the EIS had observed that 1,700 of preserve were to be set aside as habitat, but only about a third of it has been acquired. The EIS and the City's approval assumed that the additional purchases would be made, but there was no assurance that would be the case. This invalidated the EIS. Matter of Save the Pine Bush v. Planning Board of the City of Albany, *supra,* 130 A.D.2d at 6-7. In the subsequent 1992 decision, 1,700 acres of preserve had been secured, but another 300 acres remained uncertain. The Court concluded:

> "It was essential for a proper analysis to assess whether the minimum acreage could be acquired in the absence of the subject parcels or provide a reasoned elaboration as to why such an assessment was not required.
>
> . . . The probability, likelihood or expectation of acquiring the necessary acreage is not addressed in the environmental impact statements . . . The determinations lack a reasoned elaboration concerning the manner in which the 2,000 acres would be acquired in the absence of the subject properties, which was an environmental concern that had to be addressed as it was essential to perpetuate the Pine Bush ecology and the Karner Blue Butterfly. Thus, Supreme Court properly reviewed whether respondent took a hard look and, upon its conclusion that respondent did not do so, properly annulled the determinations. Matter of Save the Pine Bush v. Common Council of the City of Albany, *supra, 188 A.D.2d at 6-7*

The error in crediting the benefits of the as-yet uncertain housing on the currently mapped parkland without taking account of the potential negative impacts is illustrated in an early Federal case decided under the National Environmental Policy Act, upon which SEQRA is modeled. In that case, Chelsea Neighborhood Associations v. United States Postal Service, 389 F. Supp. 1171 (U.S.D.C. NY 1975), *aff'd* 516 F. 2d 378 (2d Cir 1975), the Postal Service prepared a lengthy EIS addressing the impact of building a new garage in the Chelsea section of New York City and constructing moderate-income housing on top of the garage. However, while the housing was not assured, the EIS treated it as a principal benefit of the project. The District Court held the EIS inadequate because it failed to disclose the fact that the housing might never be built:

> At the outset, the Court notes that, throughout the EIS, the housing project is cited as one of the primary benefits to be derived from the construction of the VMF. It was a major factor in the rejection of other alternatives. In essence, defendants argue that they were justified in considering the beneficial aspects of the housing but they

were not required to detail its environmental impact because (1) the housing is too speculative and remote; (2) the Postal Service has no responsibility for the housing; and (3) eventually HUD will prepare an EIS for the housing.

Defendants' argument that the housing component is too speculative and remote to require an analysis of its environmental impact at this time, *reveals a significant omission in the EIS – the failure to mention the possibility that the housing project may never be built.* Indeed, there is much to indicate that this might well be the case. The EIS notes that noise levels at the site are 'unacceptable,' by HUD standards, for new housing construction. It, therefore, notes that extensive acoustical treatment will be required if these standards are to be met, including air conditioning consuming 2500 kilowatts of electricity. There is no discussion as to whether the cost of providing these noise reducing features will render the development of low and moderate income housing economically unfeasible. HUD, in its comment letter, specifically requested that this be considered and discussed in the final impact statement.

The failure to discuss in any meaningful fashion the economic feasibility of providing the acoustical treatment required is significant in that it renders the impact statement inadequate by virtue of its failure to fully disclose to all interested parties the very real possibility that the housing may not and cannot be built.

So, in the instant case, the EIS took credit for the new housing that would be built on the currently mapped parkland, but failed to disclose that alienation was not assured or to identify the consequent adverse impacts that would follow if the State Legislature did not agree. In failing to do so, the EIS, and the Rezoning that was based on it, violated SEQRA.

2. Alternatives

The City's formal proposal for a restored Coney Island amusement district was first set forth in the Draft Scope of Work it issued in February 2008. Based on the consensus developed in a three-year community planning process and following

the Comprehensive Rezoning Plan Mayor Bloomberg had announced in the previous November, this called for a public owned amusement district of approximately 19.5 acres – three acres already owned by the City plus 16.5 acres to be acquired by it. Given the incorporation of this plan in a *formal* SEQRA document, it represented a real and important proposal by the City itself.

This proposal turned out to be short-lived. Within two months, after extended negotiations with Thor Equities and its principal, Joseph Sitt, the City issued a new plan and a Revised Scope of Work that reduced the size of the publicly-owned amusement district to 12 acres and expanded the area proposed for *private* indoor amusements by some seven acres, taking in much of Thor's property. In addition, the new plan moved two hotel sites on the south side of Surf Avenue to property owned by Thor. The revised plan became the proposed "action" under SEQRA, which thereafter became the focus on the EIS for the Rezoning.

This sudden change caused a considerable amount of consternation in many of the groups that had participated in the planning process and it led the Municipal Art Society to convene its own assembly of stakeholders to focus on the implications of the change for the entertainment district. As a part of this effort, MAS retained RCLCo, one of the country's leading real estate advisory firms, whose practice included advising Disney and others like it, to conduct an analysis of what would be needed to restore Coney Island to some of its former glory. This resulted in the RCLCo Report (Exhibit O to the Petition), which concluded that an outdoor area of at least 25 acres was required to establish a viable, revitalized Coney Island Enter-

tainment District. The Report also identified the parcels that should be acquired to create this entertainment district, all laid out on a map of the area. MAS presented the results of the study as an alternative in the testimony it gave to the City Planning Commission in May 2009. Copies of the Report were also submitted.

Despite the provenance of the MAS/RCLCo alternative, one searches the final EIS in vain for any analysis of it. There is a mention. At page 27-13 of the final EIS, in the section devoted to Comments on the draft EIS and Responses to those Comments, the following appears:

> **Comment 1-2:** The "Viability of an Amusement Destination" plan put together by David Malmuth for the Municipal Art Society [the RCLCo Report], presented on February 11, 2009 at their Imagine Coney presentation, is the only realistic plan for the future of Coney, and the only plan put together by people in the amusement industry. (Kramer: BP Hearing 3/30/09)
>
> **Response 1-2:** Comment noted.

This is so far from the "hard look" or "reasoned elaboration" required under SEQRA and the Jackson decision as to seem ridiculous; and it is. Here was an alternative of obvious merit that needed to be addressed and analyzed in a serious way. If there were reasons why it could not be implemented, these should have been provided. Instead, all the EIS offers is "Comment noted."

At a later point in the Comments section, the final EIS does acknowledge the testimony of MAS to the effect that a 12 acre amusement area would be too small and that 25 acres were needed for the outdoor amusement area, but the response does not offer any analysis of the MAS/RCLCo plan. Final EIS, p. 27-33, Comment

and Response 2-10. Instead, it simply repeats that there will be 12 acres publicly dedicated to open air amusements, while indoor amusements will be allowed on adjacent private land. Again, there is no "hard look" or "reasoned elaboration;" there in no look or elaboration at all.

This failure to address the MAS alternative violated SEQRA. Thus in Sun Company, Inc. v. City of Syracuse Industrial Development Agency, *supra,* the Appellate Division, Third Department, found the EIS in that case to be defective because it failed to consider as an alternative to a large scale development plan the petitioners' proposal to consolidate their facilities on a portion of the site allowing development to go forward on the other part. In Matter of Orange County v. Board of Trustees of Village of Kiryas Joel, *supra,* the Supreme Court, affirmed by the Appellate Division, struck down an EIS and the approvals that had relied on it because the EIS did not consider an alternative that could have mitigated some of the adverse impacts of the proposed water line connection to the Catskill Aqueduct. And in Matter of Brander v. Town of Warren Town Board, *supra,* the Supreme Court invalidated an EIS that had identified alternatives, but not taken a "hard look" at them, simply dismissing them as "unreasonable."

The EIS in this case did even less with respect to the MAS alternative. Its "hard look" was limited to saying "comment noted." The import of the RCLCo report was totally ignored, while the more general MAS testimony was met with responses that were non-responsive and, more importantly, provided no analysis of the very critical points made in the MAS submission. In that, the EIS failed to comply with

SEQRA and the standards set out in the Jackson case. Here, as in other areas, buried under the weight of 736 pages of narrative, it turned out there was little of substance. There was never the kind of serious consideration given to given to the MAS alternative that SEQRA requires; indeed, there was, effectively, no consideration at all.

The final EIS did include a limited discussion of an alternative scenario that would have included 15 acres of mapped parkland for the amusement district. But that discussion was simply a series of unsupported generalizations and suppositions, none of which were backed up with any confirming study or other kind of evidence. [4] Indeed, as far as anyone can tell, the only qualifications of the authors of the discussion appear to be that they were professional EIS writers, nothing more.[5] In the circumstances here, where highly qualified experts have placed in question the viability of one of the central elements of the proposed actions, petitioners submit that SEQRA does not permit the matter to be brushed off with a few sentences unsupported by any objective evidence.

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[4] The following is the heart of the "analysis" in the final EIS for rejecting this alternative: "The 15-Acre Mapped Amusement Parkland Alternative is less likely to achieve the goals and objectives established for the proposed Coney Island Rezoning. Most notably, with less land available in Coney East dedicated to private investment in the development of enclosed amusements, restaurants and entertainment uses, it would be less likely that the district would grow to realize its full potential as a year-round destination. Further, because there would be less land available in Coney East for private development under this alternative, the footprints for private development would be smaller compared with the proposed actions. With smaller foot-prints, it is possible that redevelopment would be less economically viable compared with larger footprints under the proposed actions, and could possibly hinder the area's redevelopment into a year-round destination. Under this alternative, the amusement district is likely to be more seasonal than with the proposed actions because many of the uses that are so vital in making Coney Island a year-round destination would be precluded."

[5] The authors of the Coney Island EIS were AKRF, the same consulting firm that has recently been subject to scathing criticism by the First Department in its decision in Kaur v. New York State Urban Development Corporation, Decision issued and entered December 3, 2009.

It is, of course, true that SEQRA does not require that economic factors be analyzed in an EIS. See Nixbot Realty Associates v. New York State Urban Dev. Corp., 193 A.D.2d 381 (1st Dept 1993). But where, as here, an EIS attempts to justify the rejection of an alternative on economic grounds, those grounds need to backed up with more than the generalized claims of the EIS authors. In this case, the RCLCo Report commissioned by MAS was prepared by highly-qualified experts who presented an in-depth economic analysis that identified its underlying sources and assumption. If the EIS was to reject the conclusions of the Report, it could only do so *rationally* if there were other expert reports undercutting those conclusions. As far as anyone can tell from the EIS or any other part of the public record, there was nothing of that sort here. Consequently, the dismissal of the alternatives that called for more publicly-dedicated acreage for the amusement park was without a rational basis.

There is, moreover, another concern raised by the failure of the EIS to take a hard look at the RCLCo Report and its conclusion. This is the potential for *very* significant adverse environmental impacts if, as predicted in the RCLCo Report, the amusement distract is a failure because it is undersized. If that happens, the center-piece of the Rezoning could fall or lie fallow for many years, continuing or even worsening the current conditions and possibly infecting the surrounding areas of Coney Island. This failure scenario is by no means impossible; and given the conclusions of the RCLCo Report, it could well be what happens. The EIS should have disclosed the potential for such a failure and the resulting adverse impacts. In failing to do so, it violated SEQRA.

3. The Surf Avenue Hotels

The fact that the Coney Island Rezoning permitted hotel towers of up to 27-stories on the south side of Surf Avenue was one of Save Coney Island's great concerns – one that MAS shared and summarized in its testimony:

> [The Rezoning should] ensure that Surf Avenue has a low-rise South Side by moving the hotels to the North Side of Surf Avenue. Coney Island is first and foremost a seaside resort, and it's critical to retain the sense of openness, views of the horizon and taller amusements. The vast majority of people arrive at the Stilwell Avenue Station, and Surf Avenue functions as their point of entry into the amusement district. Erecting high-rise buildings there would create a visual obstacle for those visitors. Furthermore, Surf frequently functions as a public space for the events like the Mermaid Parade and Nathan's Hot Dog eating contest, which we all agree are critical to Coney's success. Those events need an abundance of light and air and a feeling of openness in order to thrive.
>
> Further, high-rise buildings along the south side of Surf Avenue would have the effect of "privatizing" the amusement area behind them, which would feel more like the backyard of private buildings rather than public spaces.

To illustrate its concern, MAS developed renderings of how high-rise hotel towers would impinge on the openness of views towards the Ocean and create a barrier in both directions. A copy of one such rendering is included in the Exhibit Binder as Exhibit R.

Despite the concerns presented by Save Coney Island and MAS in their testimony on the proposed Rezoning and their comments on the draft EIS, the final EIS at best provided a confused and inconsistent analysis of these concerns – an analysis that largely ignored the negative impacts. Thus in the section on Visual Impacts, at page 8-21, the final EIS claimed that "[o]n the blocks north of the

mapped amusement park, it is expected that the proposed actions would improve the streetscape of the Coney East subdistrict by replacing the mix of low rise . . . buildings, vacant buildings, parking lots and vacant lots with new buildings . . . containing hotels." Unmentioned is the reality that the hotels would block views towards the ocean.

Similarly, at page 8-30, the EIS states that "views along the Surf Avenue corridor would change due to the added bulk and density of the new developments along the avenue, [but] although numerous tall buildings would line the avenue, this would not result in any significant adverse impacts." Again, the visual obstructions that the hotels would interpose are not identified. A few sentences further on, while the EIS acknowledges that view of the Wonder Wheel "might be obstructed," it then denies any adverse impact by asserting that "existing views of the Wonder Wheel along the avenue are already obstructed where there are low rise buildings." This is equivalent to saying one billboard justifies several new ones.

More importantly, the EIS contains no renderings or other visual aids to illustrate the consequence of allowing high rise hotels on the south side of Surf Avenue, no counter of any kind to the MAS presentation. In the end, the final EIS simply deals in generalities, asserting without any supporting evidence that the hotels will not block views. This is far from the "hard look" that SEQRA requires be taken in evaluating the impacts of any action. *See* Matter of Kasten v. Town of Gardiner Town Board, 2009 N.Y. Misc. LEXIS 3083 (Sup. Ct, Orange County, 2009), where, in annulling a negative declaration, the court found that the failure to

conduct adequate visual impact analyses fell short of taking the "hard look" that SEQRA requires; *and also* Matter of Orange County v. Board of Trustees of Village of Kiryas Joel, *supra,*

The significance of the failure of the final EIS to account for the adverse impacts of the hotels on the south side of Surf Avenue, as well as the other adverse impacts described in the preceding and subsequent parts of this Memorandum of Law, is underscored by the fact that in the resolutions presented to the City Planning Commission and City Council, which, when adopted, constituted the approvals given for the Rezoning, *the only adverse impacts identified* were those regarding traffic congestion, hazardous materials, excessive noise at two locations, the potential loss of Nathan's Famous, possible adverse visual impacts on the historic Shore Theater, and the potential overloading of day care facilities. The far more significant impacts resulting from the undersized amusement district, the obstacles created by the hotel towers and the potential alienation failure were not even mentioned in the approval documents that the Planning Commission and Council adopted.

4. Open Space.

The EIS also failed to accurately describe the impacts of the Coney Island Rezoning on open space. To begin with, it did not acknowledge the negative impacts of demapping nine acres of existing designated parkland. To the contrary, because that acreage is currently being used primarily for parking to service Keyspan Park, the final EIS asserted, at page S-34, that "the alienation would not result in any significant adverse impact on open space." However, this ignores the

fact that the nine acres could at any time be converted to active and/or passive park space. They could, for example, as MAS suggested, be used to support a larger dedicated amusement district. They could be converted into other more traditional kinds of parkland, with playgrounds and playing fields and places to sit and enjoy views of the Atlantic Ocean. Once demapped, in contrast, they would lose their protected status and be available, as the Rezoning contemplates, for development. That was a significant change, with significant adverse implications. These should have been, but were not, identified or considered in the EIS.

The consideration of open space in the final EIS was also deficient because it failed to treat as an adverse impact the fact that the development permitted by the Rezoning would exacerbate a shortage of active open space that already exists in the Coney Island community but will be made significantly worse by the new development. The EIS described the shortfall at page S-35, but it did not identify it as a negative impact and, as a consequence, it was not brought to the attention of the City Planning Commission or the City Council. Moreover, the lack of adequate active open space identified in the EIS did not take into account the demands that would be placed on existing spaces by summer visitors to Coney Island, which the EIS acknowledged would number as many as 70,000 a day. This last limitation also applied to the evaluation of passive open space. It is clear that the open space resources in Coney Island would be significantly overtaxed if the contemplated development were to take place, but the resulting negative impacts were swept under the rug in violation of SEQRA.

5. Historic Resources.

The EIS went to great lengths to give the impression that it took account of the impacts of the Rezoning on the many historic (although sometimes dilapidated) structures in the rezoned area. Thus the effects of the Rezoning on the major icons – the Wonder Wheel, the Cyclone, the Parachute Jump, and Childs Restaurant – are addressed at considerable length. So, too, is Nathan's Famous, whose potential demolition is identified as one of the unavoidable adverse impacts of the plan. The Shore Theater is also given its due, with the EIS noting that the large new buildings contemplated by the Rezoning could have an adverse effect on that structure. Here again, however, there is no acknowledgment of the adverse impacts of the hotel towers that can now be developed on the south side of Surf Avenue, obstructing views to the Cyclone and Wonder Wheel. Moreover, impacts on many other historic structures identified by MAS in its inventory included as Exhibit M in the Exhibit Binder were not treated as negatives, because the New York City Landmarks Preservation Commission had not concluded that they were worthy. That, however, was not the proper measure. At the very least, the authors of the EIS should have asked the State Office of Historic Preservation to evaluate the importance of such structures as the Shore Hotel and the Bank of Coney Island. This they refused to do.

6. Sewage Treatment

One of the central goals of the Rezoning is to add new housing, and thus new residents, to Coney Island. It is anticipated that under the new zoning, as many as 2,400 new residential units will be developed, adding as many as 6,000 new residents, as well as 600 new hotel rooms. These, as well as the million new

visitors the revitalized amusement district is expected to add annually, will significantly increase demands on the water and sewer systems, generating heavy additional loads of sanitary sewage. These will be directed to the City's existing Coney Island Water Pollution Control Plant, which, according to the final EIS, has adequate capacity to treat these wastes.

That conclusion, however, was based on normal flows, without taking account of the additional water that flows into the sewers when it rains. In these circumstances, the Pollution Control Plant does not have the capacity to treat the augmented flows which end up in Coney Island Creek or the Atlantic Ocean through combined sewer outfalls. As an article appearing on the front page of the November 23 edition of The New York Times spells out, the resulting contamination of coastal waters has reached serious proportions. Yet this situation and the fact that it would be exacerbated by the new development the Coney Island Rezoning is intended to promote were never mentioned in the EIS.

7. 100-Year Flood Plain

The entire area of the Coney Island Rezoning lies within the 100-Year Flood Plain for the Coney Island area. This means that in the most severe storms, which, with global warming, are expected to increase in frequency, the entire area will be flooded as the Atlantic Ocean pushes up onto the land. That this is the case is acknowledged in the final EIS. However, there is no attempt to assess the resulting impacts, nor is there any discussion of how those impacts may be worsened by the new development. This is bound to follow as many parcels of land that now lie

vacant and thus are capable of absorbing some part of the floods are covered over with impervious surfaces. The consequence will be to worsen the flooding, adding to the potential for damage. Moreover, the new development will mean that more residents will be subject to the dangers that such flooding would impose and more structures will be subject to flood damage. However, these and other potential adverse impacts are not mentioned, much less evaluated, in the EIS.

To the contrary, it appears that some of the most important implications following from the fact that the Rezoned area falls entirely within the 100-year flood plain have not yet been resolved. Thus in responding to a Comment regarding the fact that some streets and portions of some building sites will be raised to lessen flooding impacts but others cannot be, raising significant design and other problems, the EIS responds that "this issue is currently under review by the CPC [City Planning Commission]. Any CPC modifications related to this issue will be the subject of further environmental review." Final EIS, p. 27-52.

This approach violates SEQRA. An EIS is required to identify and analyze potential impacts in the EIS, not identify them and say they will be evaluated or resolved somehow at a later date. A case in point is Town of Red Hook v. Dutchess County Resource Recovery Agency, 146 Misc.2d 773 (Sup. Ct. Dutchess Co. 1990), where a supposedly final EIS for the siting of a landfill was issued before certain hydrological studies had been made. The EIS acknowledged that a further study was needed, but nonetheless concluded that the project would not have significant impact on the environment. The court invalidated the EIS for having failed to take

the requisite "hard look," observing that an impact statement could hardly be called "final" when important information bearing on potential impacts was missing.

In a more recent case, Matter of Brander v. Town of Warren Town Board, *supra,* the Onondaga County Supreme Court found that the consideration of mitigation measures in an EIS for a series of wind turbines was inadequate because it deferred to a later date the specifics of the measures. The court observed that "approval [of the specific measures] by the town after the SEQRA process is completed . . . denies the petitioners and other members of the public their intended input with respect to whether such analysis and mitigation is appropriate or acceptable." 18 Misc.3d at 481. And at a later point, the court added that "the deferral of mitigation issues until after the completion of the SEQRA procedure, therefore, has made the process substantively defective, requiring this court to conclude that the board's determination in granting the special use permits was arbitrary, capricious and unsupported by substantial evidence." 18 Misc.3d at 484-85. *See, also,* Matter of Orange County v. Board of Trustees of Village of Kiryas Joel, *supra,* 11 Misc.3d 1056A at p. 4 of Supreme Court decision [among other things, deferral of evaluation of wetlands impacts invalidated EIS].

So, too, in the instant case, the failure of the EIS to consider the implications inherent in building in the 100-year floodplain, including the deferral of mechanisms for mitigating possible impacts, ran afoul of SEQRA.

8. Wishful Thinking.

The final EIS also falls short for another reason. It is often no more than an

exercise in wishful thinking – a speculation about what *may* happen in the future. This is most evident in the section of the EIS discussing infrastructure. There is, for example, a rather lengthy description of how the sewer system will need to be upgraded to accommodate the anticipated new development and a less detailed discussion about how the grades of the roads in the amusement district will be elevated and the benefits that will follow from these actions. *What is missing is any assessment of the feasibility of these and other infrastructure improvements that are essential if development is to go forward as planned.*

Most of these infrastructure improvements will be very expensive to build, but the EIS does not identify where funding will be found to finance them. Instead, it simply *assumes* that they will be available when needed – an assumption that is highly doubtful in the current economic climate. Equally important, the EIS does not attempt to identify the impacts that will follow if development goes forward without some or all of the infrastructure improvements; nor does it analyze a scenario – all too likely – that due to lack of infrastructure or for other reasons, the build out for the development is significantly delayed, with consequent adverse impacts.

One of the purposes of SEQRA and the EIS process is to force the sponsors of projects – here, the City – to focus on the implications of their actions and to address them in a coordinated, forward-thinking way. What has happened here is almost the opposite of that. In the end, the Coney Island Rezoning represents the triumph of wishful thinking over serious analysis. In this and other ways, it has run amok of SEQRA.

Point Two

THE CONEY ISLAND REZONING EXCEEDED THE LEGAL AUTHORITY OF THE CITY AND WAS *ULTRA VIRES* ITS LEGITIMATE ZONING POWERS

As the Court of Appeals has made clear, municipal authorities, including cities, "have no inherent power to enact or enforce zoning or land use regulations. They exercise such authority solely by legislative grant and in the absence of legislative delegation of power, their actions are *ultra vires* and void." Matter of Kamhi v. Planning Bd. of Town of Yorktown, 59 NY2d 385, 389 (1983); BLF Associates v. Town of Hempstead, 59 A.D.3d 51 (2d Dept 2008).

The enabling statutes applicable here are General City Law Section 20, Subsections 24 and 25. Section 20, Subsection 24, confers upon the City the authority to enact ordinances "to regulate and limit the height, bulk and location of buildings hereafter erected, to regulate and determine the area of yards, courts and other open spaces, and to regulate the density of population in any given area, and for said purposes divide the city into districts," all in order "to promote public health, safety and welfare." Section 20, Subsection 25, states that the City may "divide the city into districts and prescribe for each such district the trades and industries that shall be excluded or subjected to special regulation and the uses for which buildings may not be erected or altered," in order to "promote the public health, safety and general welfare" and "in accordance with a well considered plan."

Because zoning regulations impose restraints on the use of private property, the *sine qua non* of any ordinance is that it promote the public welfare. To this end,

zoning ordinance must be rational, rationally-based and well-grounded in necessity and reality. Thus, in the seminal case that validated zoning under the United State Constitution – Village of Euclid v. Ambler, 272 U.S. 365 (1926), the Supreme Court relied heavily on expert studies that had shown that separation of uses was essential to the orderly and healthy development of communities. *See* 272 U.S. at 394-95. Similarly, in a leading New York case – Udell v. Haas, 21 N.Y.2d 463 (1968) – the Court of Appeals, in invalidating the amendment of a zoning ordinance, placed heavy emphasis on the testimony of the Village planning consultant who acknowledged on cross examination that the rezoning was not supported by the Village's traffic problems. 21 N.Y.2d at 474-75. The claimed nexus was not there and so the rezoning could stand.

Equally important in considering the validity of a zoning ordinance or amendment is the requirement that the regulations be "in accordance with a well-considered plan." As stated is Udell v. Haas, *supra:*

> The fundamental conception of zoning has been present from its inception. The almost universal statutory requirement that zoning conform to "a well-considered plan" or "comprehensive plan" is a reflection of that view. . . The thought behind the requirement is that consideration must be given to the needs of the community as a whole. In exercising their zoning powers, the local authorities must act for the benefit of the community as a whole following a calm and deliberative consideration of the alternatives, and not because of the whims of either an articulate minority or even majority of the community." Thus the mandate of the Village Law § 177 [which parallels General Cities Law, § 20(25)] is not a mere technicality which serves only as an obstacle course for public officials to overcome in carrying out their duties. Rather, the comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. 21 N.Y.2d at 468.

The extension of this logic is that a zoning ordinance, or a particular part of it, cannot be enacted for the benefit one or a few individual property owners. The cases are legion where zoning amendments have been invalidated because they served private rather than public interests, constituting "spot zoning." *See, e.g.,* Udell v. Haas, *supra* [zoning amendment allowing commercial uses in solidly residential area found to be illegal]; Matter of Augenblick v. Glantz, 66 N.Y.2d 775 (1985)[amendment tailored to allow asphalt plant to continue and expand its operations invalidated]; Matter of Dexter v. Town Board of the Town of Gates, 36 N.Y.2d 102 (1975)[zoning amendment applicable only to an identified company's land found illegal]: Blumberg v. City of Yonkers, 21 A.D.2d 886 (2d Dept 1964) [zoning amendment to allow parking on a single parcel invalidated]; Matter of Yellow Lantern Kampground v. Town of Cordlandtville, 279 A.D.2d 6 (3d Dept 2000) [amendment changing commercial zoning to industrial, which applied to only 13 acres of property in single ownership found illegal as not in accordance with a comprehensive plan]; Matter of Cannon v. Murphy, 196 A.D.2d 498 (2d Dept, 1993) [zoning amendment to allow condominiums on 28 acre parcel invalidated because "there was no evidence [it] . . . was enacted for the benefit of or with regard to the neighbors of the parcel or the community as a whole . . . Apparently the entire benefit of the rezoning inured to the owner of the parcel in question."]

Holding the Coney Island Rezoning up to the standards described above, it does not pass muster. To begin with, the *raison d'etre* of the Rezoning was to re-establish a viable amusement district in Coney Island. When, however, the area available for outdoor amusements was reduced by seven acres, this action was

taken without any studies or other information to show that the reduced area could be successful. What was of record was the RCLCo Report, prepared by expert consultants in the entertainment and amusement fields, which provided clear evidence that the 12 acres dedicated to outdoor amusements would be less than half that needed to restore Coney Island to some of its historic glory. At the very least, the Report put the City on notice that the reasons given for the Rezoning would not be achieved with the plan it was reviewing. Just as the claims made about traffic in Udell v. Hess, *supra,* did not support the zoning amendment in that case, so too, here, the City's stated purposes for the Coney Island Rezoning were not supported by any studies or other information. As a result, the Rezoning cannot be said – or found – to have been rational or rationally based.

Further undercutting the validity of the Rezoning – and fatal to the amended ordinance that was approved – is the reality that the new regulations – or at least those parts of them that converted the seven acres originally proposed for outdoor amusements to hotels and other private indoor uses – were adopted not for the benefit of the community as a whole but rather in the private interests of Thor Equities and a few other property owners in the area. This is not surmise, but follows from the public reports, including statements from the City and Thor, that appeared in the public press, The Times in particular [Petition, ¶ 31; Appendix 1 to this Memorandum of Law]. Moreover, this conclusion is evident on the face of the modified proposal, which not only diminished the area of open amusements, leaving Thor and the few other owners with private property to develop under far more liberal restrictions, but also moved two hotel sites onto Thor's property, when

otherwise they might have been shifted to the north side of Surf Avenue. But Thor did not own those parcels.

It is the habit of the City land use processes – an unhappy one at that – to be more responsive to developer requests than one might think should be the case given the public welfare standard that underlies them. But many of the instances that gain public attention are not rezonings, but requests for special permits and other case-by-case approvals. Here, in contrast, the City was purporting to change the basic rules – the underlying zoning. To do that, it was obligated to conform to the criteria on which the power to zone is based and to which the courts have given added definition over nearly 100 years now. This it failed to do in adopting the Coney Island Rezoning. Instead, it violated the law by failing to provide a rational basis for the reduction of the open amusement district to 12 acres and by ceding the resulting development rights to Thor and a few other property owners for their private benefit.

CONCLUSION

For the reasons set forth above, this Court should enter judgment and an order: (1) declaring illegal and annulling the Coney Island Rezoning due to the City's failure to comply with SEQRA and the applicable statutes governing re-zoning in New York City; (2) enjoining the City, including the City Department of Buildings, from implementing the Coney Island Rezoning, including the issuance of any building permits thereunder; (3) awarding Petitioners their costs and disburse-

ments in this proceeding; and (4) granting such other and further relief as the Court may deem just and proper.

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Respectfully submitted,

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City's Coney Island Design Revised to Break Deadlock

By CHARLES V. BAGLI

The Bloomberg administration has revised its redevelopment plan for the Coney Island waterfront in an effort to break a deadlock with some landowners and elected officials while still preserving the area's historic amusement district, which includes the Wonder Wheel and the Cyclone roller coaster.

The proposal, which would turn the area into a year-round attraction, still calls for a lot of stores and as many as 5,000 apartments along Surf Avenue, but it would reduce to 9 acres from 15 a city-owned open-air amusement park north of the Boardwalk between KeySpan Park and the New York Aquarium.

The city would buy the land for a permanent amusement district from local property owners including Thor Equities and the Vourderis family, which owns Deno's Amusement Park and the Wonder Wheel.

But in a departure from the original plan unveiled in November by Mayor Michael R. Bloomberg, those owners would be able to develop the remaining parts of their property themselves as long as they followed the city's master plan, which must still undergo an environmental review and a land-use review.

The city's plan for the area north of the amusement district calls for a series of buildings that could include a glass-enclosed water park, games and amusements, a bowling alley, restaurants and entertainment-oriented businesses like House of Blues, Dave & Busters, NikeTown and movie theaters. Finally, the new zoning would allow for hotel towers on the south side of Surf Avenue.

"This is a plan that will preserve the iconic nature of Coney Island and enhance the amusement district, while generating economic opportunities and jobs for local residents," Deputy Mayor Robert C. Lieber said. "We're trying to bling it up."

APPENDIX 1

The revised plan is the result of meetings with local property owners and others since November.

"I'm guardedly optimistic," said Jesse Masyr, a real estate lawyer for Thor Equities, which has been at loggerheads with the Bloomberg administration. "We have to look at the size of sites we have left and what we could build."

As the largest landowner in the area, Thor was in a position to block the city's redevelopment plan, and appeared willing to wait out the Bloomberg administration. Thor's chairman, Joseph J. Sitt, has spent more than $120 million in recent years buying about 10 acres in the heart of Coney Island's traditional amusement district and developing his own $1.5 billion proposal for the area.

Mr. Sitt proposed a glitzy amusement park, as well as stores, game rooms and condominium hotels. But the city and some urban planners opposed generic retailing and any housing near the Boardwalk, saying that it would inevitably crush a noisy, late-night amusement district.

In recent months, the two sides have been discussing a mutually acceptable compromise. Mr. Sitt's recent counterproposal called for a smaller, 6.5-acre amusement area and far more stores and hotels — 2.9 million square feet — spread over 24 acres. The city's revised plan allows for 1.9 million square feet.

Councilman Domenic M. Recchia Jr., a critic of the original plan who has supported Thor, said the city was headed in the right direction, as did Dennis Vourderis, of the family that owns the Wonder Wheel.

"We're optimistic," Mr. Vourderis said. "We're hoping that they're going to let us develop our own properties."

The glory days of Coney Island's amusement parks are long gone, and the area is speckled with empty lots and dingy buildings. But the old-fashioned rides, sword swallowers, go-carts, wide-open beaches and cool breezes still attract hundreds of thousands of visitors in the summer months.

The "stars may finally be realigning," said Brooklyn's borough president, Marty Markowitz, a longtime advocate of revitalizing Coney Island.

"Coney Island was always a working-class playground," he said. "We should preserve the amusements for future generations. I welcome a water park, movie theaters, a bowling alley and House of Blues. I do not want to see another generic shopping mall."

The key issue for all sides is how to attract visitors to Coney Island in the winter, when the area is cold and windswept. Mr. Sitt had insisted on traditional retail space and housing to offset the cost of the amusements. But the redevelopment plan goes beyond the amusement district. There are plans for housing and retail businesses on the north side of Surf Avenue and west of the KeySpan ballpark.

In recent months, the Bloomberg administration has sought to redesign and refurbish the historic 271-foot-tall Coney Island Parachute Jump, which sits on 2.2 acres west of the amusement district. The centerpiece of the new plaza would be the restored Bishoff & Brienstein carousel, and could include a glass pavilion, an observation deck and restaurants.

Mr. Sitt is bringing the Reithoffer Shows traveling carnival to Coney Island from May 22 through June 1. The Astroland amusements, which Mr. Sitt bought and planned to close, will also reopen for one more season.

Both sides need a victory. Many of the city and state's development plans have been battered by a slowing economy and the credit crisis, which has effectively ended lending for large-scale real estate projects.

So if Mr. Sitt fails to compromise on Coney Island, he risks alienating City Hall and jeopardizing two other projects he would like to build on the Brooklyn waterfront. He has proposed a $100 million shopping center at a former bus depot along Shore Parkway in Bensonhurst, where he lives. In Red Hook, Mr. Sitt bought the long dormant Revere sugar works, and would like to build a marina and luxury apartments there, next to the soon-to-open Ikea furniture store.