SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

THE COUNCIL OF THE CITY OF NEW YORK and MANHATTAN BOROUGH PRESIDENT GALE A. BREWER,

Petitioners-Complainants,

For Judgment Pursuant to Article 78 and Sections 3001 and 6301 of the Civil Practice Law and Rules

- against -

THE DEPARTMENT OF CITY PLANNING OF THE CITY OF NEW YORK, NEW YORK CITY PLANNING COMMISSION, NEW YORK CITY DEPARTMENT OF BUILDINGS, THE CITY OF NEW YORK, and MARISA LAGO, Director of Department of City Planning of the City of New York and Chair for the New York City Planning Commission,

Respondents-Defendants,

- and -

TWO BRIDGES ASSOCIATES, LP, LEI SUB LLC, and CHERRY STREET OWNER LLC,

Intervenor Respondents-Defendants.

Index No. 452302/2018
IAS Part 37
Engoron, J.

BRIEF OF AMICUS CURIAE THE MUNICIPAL ART SOCIETY OF NEW YORK IN SUPPORT OF AMENDED PETITION-COMPLAINT

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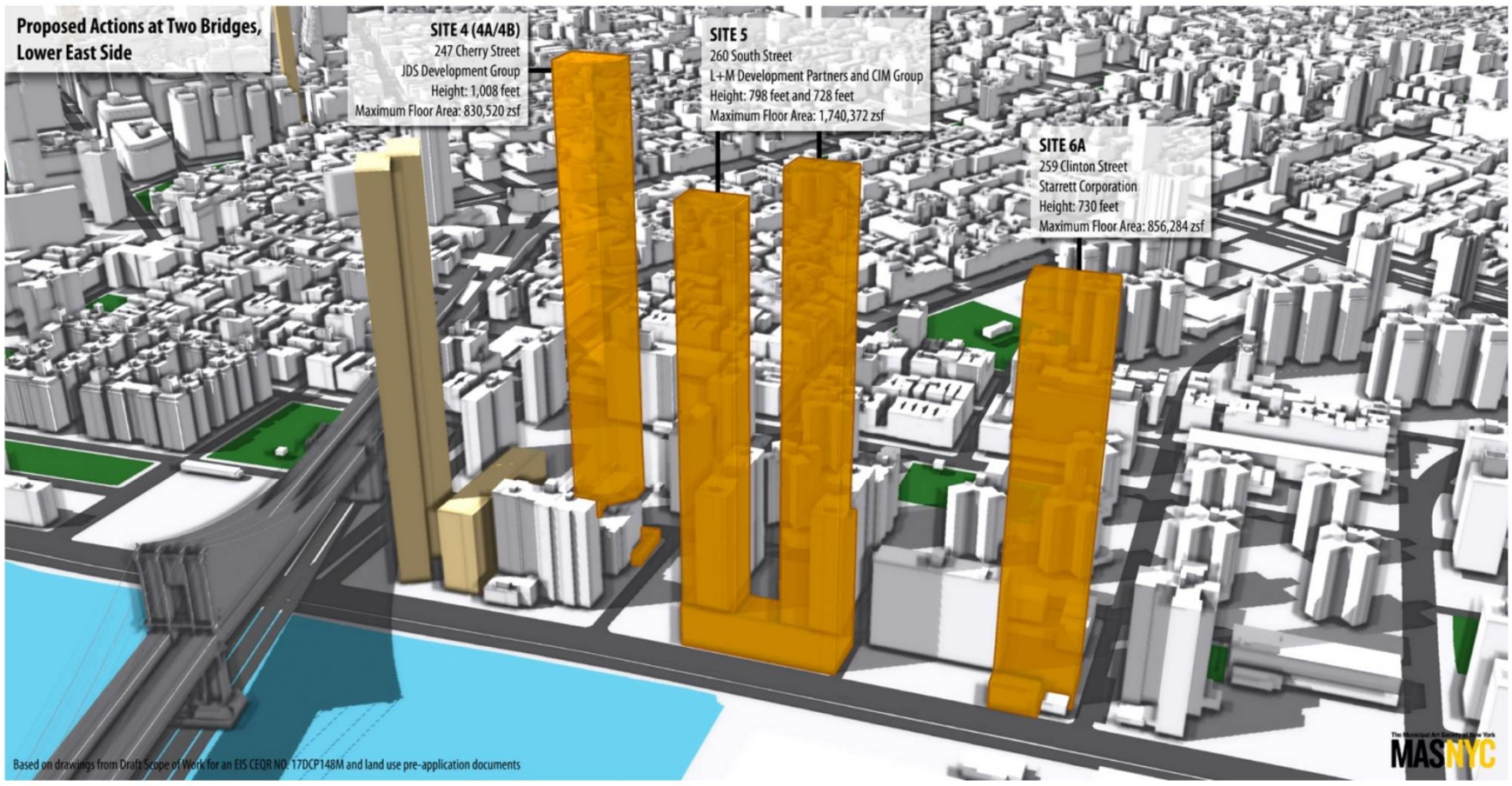
PRELIMINARY STATEMENT

The Municipal Art Society of New York ("MAS") submits this *amicus curiae* brief in support of the challenge by the City Council and Manhattan Borough President to the City Planning Commission's approval of four soaring luxury residential towers in the low- and middle-income Two Bridges Large-Scale Residential Development (the "LSRD") on the Lower East Side of Manhattan.

MAS is a domestic not-for-profit advocacy organization that has, for 125 years, worked to educate and inspire New Yorkers to engage in the betterment of our city. With a team of preservationists, urban planners, architects, and attorneys, MAS has played a major role in protecting the city's legacy spaces, encouraging thoughtful planning and urban design, and fostering stable communities throughout the five boroughs. It was instrumental in the passage of the 1916 Zoning Resolution, the first comprehensive zoning program of its kind and the model for innumerable zoning laws throughout the country. It also helped to establish the City Planning Commission (the "Commission"), as well as the Public Design Commission and the Landmarks Preservation Commission. For more than a century, it has been a guardian and a steward – and sometimes a critic – of zoning and land-use planning in the city.

The Commission's decision in this case not to require the developers to apply for special permits and undergo review under the City's Uniform Land Use Review Procedure ("ULURP") is a dangerous precedent. The agency's explanation for its decision – that the development here would be only a "minor modification" of the LSRD – is risible. Currently the tallest building in the LSRD is 27 stories; the proposed towers would be 80, 70, 63, and 63 stories, and the tallest would rise to 1,008 feet. There are now 1,043 dwelling units in

the LSRD; the towers would triple the figure, adding 2,775 units (of which 2,081 would be market rate). *See* Two Bridges Final Environmental Impact Statement (the "FEIS"), dated November 23, 2018, Chapter 1 (www1.nyc.gov/site/planning/applicants/env-review/two-bridges.page). It is difficult to imagine a more *major* modification. The following illustration makes the point better than a string of numbers:



The purpose of this *amicus* brief is not to repeat the Petitioners-Complainants' legal arguments that the decision of the Commission is arbitrary and capricious; the arguments are well-articulated in the Amended Petition-Complaint. Instead, it is to provide a fuller description of what ULURP does, and how the Commission's failure to use it here subverts the regulatory process.

ULURP is the statutory framework for a joint public-private consideration of major land-use changes in the city. On a governmental level, it balances the Commission's experience and perspective with those of the City Council and Borough President. On a private level, it engages citizens early in the process and, through the City Council's

authority to override the Commission's decision, provides them with the leverage they need to insure that the project respects both the letter and the spirit of the zoning laws.

The implications of the Commission's decision extend well beyond the Two Bridges LSRD. There are LSRDs throughout the city, as well as Large Scale General Developments and Large Scale Community Facility Developments. Since 2010, 19 of these have undergone ULURP review for modifications of one kind or another. *See* Mayor's Office of Environmental Coordination, CEQR Access Portal (www1.nyc.gov/site/oec/environmental-quality-review/ceqr-access.page). To allow the Commission to characterize the modifications in this case as "minor" is to threaten the integrity of all such developments, and to undermine the essential purpose of the statute.

ARGUMENT

I. ULURP Insures that Major Modifications of LSRDs Are Properly Reviewed by the Public, the Borough President, and the City Council

It is difficult to escape the conclusion that the Commission's refusal to require the developers to apply for special permits can be traced to one fact: A special permit "within the jurisdiction of the [Commission] under the Zoning Resolution" must go through ULURP. N.Y.C. Charter § 197-c(a)(4); 62 R.C.N.Y. § 2-01(d).

ULURP is not a formality; it is an iterative democratic process that enlists the affected Community Board and Borough President, and later the City Council, in a dialogue with the Commission. The Community Board possesses the local knowledge that the Commission lacks, and the Borough President possesses the political power, broader policy experience, and resources – the Charter grants him or her a full planning staff – to further refine the issues and advance possible solutions. N.Y.C. Charter § 82. Most significantly,

ULURP grants the City Council the authority to reject or modify the Commission's decision. *Id.* § 197-d. That authority – the Damocles sword that hangs above the agency – is what further empowers the Community Board and Borough President to influence the process, whether by opposing an application outright or by bartering with the developer and the Commission to produce a better compromise for the community.

On a broader level, ULURP provides a balance between the authority of the Mayor and his agencies, on the one hand, and the authority of the City Council on the other – a body closer to the ground, composed of people with a knowledge of their neighborhoods. This balance – a municipal "separation of powers" – is no less central to local land-use regulation than the balance between the President and Congress is to federal income tax legislation. The Commission's decision upsets that basic equilibrium. *See generally* Frederick A.O. Schwarz Jr. and Eric Lane, *The Policy and Politics of Charter Making: the Story of New York City's 1989 Charter,* 42 N.Y.L.S. L. Rev., 723, 775-899 (1998) (https://scholarlycommons.law.hofstra.edu/faculty_scholarship/740/).

* * * *

The rezonings of Greater East Midtown and the Garment District provide two strong examples of how a constructive (if, inevitably, sometimes testy) dialogue between stakeholders and the City can result in a dramatically improved project. The City's original 2013 proposal for Greater East Midtown was unsound, and in response to criticisms by MAS and other advocacy organizations, the City withdrew the proposal. Over the next four years, compromises and trade-offs by all of the parties yielded new height and setback restrictions, preserving some of the precious light and air still remaining in Midtown; additional indoor and outdoor public spaces; the designation of several new landmarks;

private investment in area public transit; and an ongoing engagement of the public in the administration of the district: The final version provided that one of the seats in the Public Realm Improvement Fund Governing Group, the group that decides which improvement projects will be underwritten by the Fund, is reserved for a representative of a city-wide civic organization.

The City's 2017 proposal to rezone the Garment District posed a genuine threat to the survival of that storied district, and indeed to the fashion industry throughout the city. The public reaction was swift, and the Manhattan Borough President and Speaker of the City Council persuaded the Deputy Mayor for Economic Development to form a Garment District Steering Committee. The idea was to engage stakeholders to come up with new approaches to preserving garment manufacturing there. The Steering Committee's recommendations recognized the necessity of compromise; rather than reject the rezoning wholesale, it proposed sensible non-zoning solutions. In response, the City postponed the certification of the zoning amendment and implemented many of the recommendations. This collaborative process, in turn, informed the ULURP review. Community Boards 4 and 5, the Borough President, and a consortium of civic groups, including MAS, worked closely with the City and the Economic Development Corporation’s Industrial Development Agency to create property tax abatements encouraging long-term affordable leases for garment manufacturers. The stakeholders also secured a commitment of 300,000 square feet of manufacturing space; millions of dollars in funding to help acquire a building dedicated solely to garment manufacturing; and assistance finding a nonprofit partner to leverage City funding for private financing – all in the service of preserving a thriving

mixed-use neighborhood. As with East Midtown, ULURP was a critical process in bringing stakeholders together to produce a better result.

II. The Commission Has No Authority to Substitute a CEQR Review for a Required ULURP Review

The Commission defends its decision to forego ULURP by arguing that the City Environmental Quality Review ("CEQR") provides an adequate opportunity for the public to comment on the application. *See* 62 R.C.N.Y §§ 5-01 to 5-11; 43 R.C.N.Y §§ 6-01 to 6-15. In a 2016 letter describing the decision, the chair of the Commission at the time wrote, "[W]e are requiring the completion of an Environmental Impact Statement . . . to ensure that both any cumulative and project-specific potential impacts are identified and addressed through the public process mandated by CEQR." Letter from Carl Weisbrod to Margaret Chin *et al.,* dated August 11, 2016, at 2.

This is not, however, player's choice for the Commission; it is not free to pick either ULURP and CEQR. The two statutes create legally distinct obligations, and if both happen to apply, both must be followed. Indeed, we are not aware of any project on this scale that has *not* required both.

ULURP offers citizens a far greater role in the process than CEQR does. The lead agency in a CEQR review need only take a "hard look" at the potential impacts disclosed in the Environmental Impact Statement; beyond that, neither the public nor other branches of government have a say. Given the elastic interpretation of "hard look" by New York courts, lead agencies can easily understate the risks of a project, and offer the most perfunctory mitigation measures. *See, e.g., Chinese Staff & Workers' Association v. Burden,* 19 N.Y.3d

922 (2012); *Akban v. Koch*, 75 N.Y.2d 561 (1990); *Jackson v. N.Y.S. Urban Development Corp,* 67 N.Y.2d 400 (1986).

MAS recently published a study on the limitations of CEQR, *A Tale of Two Rezonings: Taking a Harder Look at CEQR,* which found that too often the process fails to identify and control a project's real risks. MAS, *A Tale of Two Rezonings: Taking a Harder Look at CEQR,* November 2018 (www.mas.org/wp-content/uploads/2018/11/ceqr-report-final-smaller.pdf). Among the study's recommendations were that environmental reviews provide a more accurate definition of a project's purpose and need; a more searching examination of potential impacts; a process for developing mitigation measures – and later tracking them; and finally, throughout the review, more transparency and accountability. Alas, at this point, CEQR's limitations remain.

By contrast, ULURP has teeth; it requires the Commission to submit to a succession of reviews, each one informed by the knowledge that the City Council may later overturn the agency's decision. That threat is what gives the public the confidence to oppose a project, reconceive it, or insist on meaningful mitigation measures that the FEIS stopped short of imposing.

The FEIS here was candid about the seriousness of the project's adverse effects, but it proposed only the most superficial correctives. The study acknowledged, for example, that the loss of open space would result in a "significant adverse impact" as defined in the *CEQR Technical Manual*. FEIS at 24-3. And yet the only required mitigation was the conversion of roughly one-third of an acre from private to public open space – a figure well below what is needed to avoid the "significant adverse impact" finding – and the modest renovation of three small playgrounds. *Id*. As for shadows from the project, the FEIS found that they would be

"substantial enough in extent and duration to significantly affect the use or vegetation" of two of the playgrounds. *Id.* at 24-4. But the only mitigation was "enhanced maintenance"; the Commission gave no serious consideration to whether reducing the building's bulk might provide a salutary effect – there or elsewhere in the neighborhood. *Id.*[1]

* * * *

It is also the case that certain planning issues are better suited for ULURP. The CEQR process can be expected to yield reliable facts and projections about air quality, noise, hazardous materials, energy, and other generally measurable impacts. But the more intangible impacts – neighborhood character, in particular – are better considered from an intimate, local perspective.

Neighborhood character is certainly central to this case. One of the foundational purposes of LSRDs is "to foster a more stable community providing for a population of balanced family sizes." ZR § 78-01; *see id.* § 78-313(a). That principle was reflected in the Commission's original 1961 report designating Two Bridges as an Urban Renewal Area: "[T]he re-use of the designated area [should] be predominantly for middle-income housing." City Planning Commission Report, CP-16479, dated June 28, 1961, at 728 (Exhibit H to Affirmation of David B. Berman, dated January 24, 1961).

[1] The LSRD statute loosens otherwise-applicable zoning restrictions *for the purpose of creating cohesive neighborhoods.* The flexibility is intended to encourage better site planning, preserve open space and protect viewsheds, ensure "harmonious designs," and as noted above, "foster a more stable community by providing for a population of balanced family sizes." ZR § 78-01. As the FEIS made clear, the proposed towers would exploit that flexibility to undermine every one of those goals — dispensing with site planning, tossing off open spaces and viewsheds, offering unimaginably disharmonious designs, and posing an existential threat to the integrity and stability of the neighborhood. The ULURP process would remind the Commission of its responsibilities under the Charter and the Zoning Resolution – in particular, to use common sense in applying the LSRD statute, and to insure that the flexibility the statute allows is employed to further those purposes, not erode them.

Over the next 58 years, through public and private partnerships, the LSRD largely achieved that goal. In 1977, the Settlement Housing Fund and Two Bridges Neighborhood Council sponsored the construction of Lands End I, which provided 260 units of federally-subsidized Mitchell Lama housing. From 1983 to 1985, they sponsored the construction of Two Bridges Townhouses, 57 moderate-income condominiums created under HUD's Section 235 program. In 1989, they supported the Two Bridges Senior Apartments, a 10-story building for the elderly and disabled. *See* Two Bridges Neighborhood Council website (https://twobridges.org/programs-and-projects/affordable-housing/two-bridges-urban-renewal-area-1972-1997/).

Nowhere is the project's insensitivity to the character of this neighborhood more on display than in the physical relationship between the Two Bridges Senior Apartments and the proposed 247 Cherry Street. This tower would cantilever directly over the apartment building – an 80-story, 1,008-foot-tall structure putting the senior housing in a literal headlock. It would also encase half of the building's southern side, forcing the relocation of 19 residents, whose units would be rendered windowless. FEIS at 18-4. It is a potent metaphor for the project's attitude toward the LSRD and its residents:

ULURP would force a deeper conversation between the Commission and local residents, which could shed more light on what is distinctive about the community, and on the particular impact of buildings like 247 Cherry Street. Through a more inclusive ULURP process, the public could impress upon the developers, the Commission, the Borough President, and the City Council that there may be ways to develop this property without causing the grave

impacts – not only on neighborhood character, but on traffic, density, shadows, open space, and a host of other elements – that the project's current incarnation promises.

CONCLUSION

The Commission's decision to approve the four towers without a special permit or ULURP review violates both the Zoning Resolution and the City Charter, and should be annulled and vacated.

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