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

In the Matter of the Application of DAISY WRIGHT, NATHANIEL ROBERT LIVINGSTON by his parent Daisy Wright, OLIVER WRIGHT LIVINGSTON by his parent Daisy Wright, ELIZABETH WRIGHT, BERNIE WRIGHT by his parent Elizabeth Wright, VIVIAN DEE, SONIA GARCIA, JOAN HEITNER, PATRICIA LOFTMAN, LILLIAN PRYOR, EILEEN SALZIG, VALERIA SPANN and WALTER REINHARDT,

Petitioners,

For Judgment pursuant to CPLR Article 78

—against—

NEW YORK STATE DEPARTMENT OF HEALTH, HOWARD ZUCKER, as Acting Commissioner of the NEW YORK STATE DEPARTMENT OF HEALTH, JEWISH HOME LIFECARE, MANHATTAN, PWV OWNER, LLC, 156 W. 106th STREET HOLDING CORPORATION, and 102 W. 107TH STREET CORPORATION

Respondents.

Index No. 100641-15
RJI No. _____

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NOTICE OF PETITION

ORAL ARGUMENT REQUESTED

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PLEASE TAKE NOTICE that, upon the Article 78 Petition, verified on April 2, 2015 and April 3, 2015; the affirmation of Joel Kupferman, Esq., dated April 8, 2015, with exhibits attached; the affidavit of Paul Woods Bartlett, sworn to on April 8, 2015, with exhibit attached; the affidavit of David O. Carpenter, sworn to on April 1, 2015, with exhibit attached; the affidavit of Stephen Lester, sworn to on April 7, 2015, with exhibit attached; the affirmation of attorney and engineer Walter Matystik, Jr., dated April 8, 2015, with exhibit attached; the affidavit of Robert K. Simon, sworn to on April 1, 2015, with exhibit attached; the affidavit of the affidavit of Daisy Wright, sworn to on April 3, 2015; the affidavit of Elizabeth Wright, sworn to on April 2, 2015; the affidavit of Vivian Dee, sworn to on April 2, 2015; the affidavit of Sonia Garcia, sworn to on April 2, 2015; the affidavit of

Joan Heitner, sworn to on April 2, 2015; the affidavit of Patricia Loftman, sworn to on April 2, 2015; the affidavit of Lillian Pryor, sworn to on April 2, 2015; the affidavit of Eileen Salzig, sworn to on April 2, 2015; the affidavit of Valeria Spann, sworn to on April 3, 2015; the affidavit of Walter Reinhardt, sworn to on April 2, 2015; and the Memorandum of Law in Support of Verified Petition, an application will be made to this Court, to be held at the Supreme Court, New York County, 60 Centre Street, New York, New York, on May 11, 2015, at 9:30 A.M., or as soon thereafter as counsel may be heard, for a judgment pursuant to New York Civil Practice Law and Rules ("CPLR") Article 78 annulling, vacating, and setting aside as arbitrary, capricious, erroneous and an abuse of discretion, the Findings Statement issued by Respondent New York State Department of Health ("NYSDOH"), dated December 10, 2014, and enjoining Respondent Jewish Home Lifecare, Manhattan, from engaging in any construction activities at 125 West 97th Street until the Respondent NYSDOH has complied with New York State law.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR § 7804(c), answering papers, if any, shall be served at least five (5) days before the return date of this application.

Dated: New York, New York
April 8, 2015

Joel Kupferman, Esq.

New York Environmental Law Project
225 Broadway, Suite 2625
New York, New York 10007-3094
(917) 414-1983

Attorney for Petitioner

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| SUPREME COURT OF THE STATE OF NEW YORK<br>COUNTY OF NEW YORK | : | |
| In the Matter of the Application of DAISY WRIGHT, NATHANIEL ROBERT LIVINGSTON by his parent Daisy Wright, OLIVER WRIGHT LIVINGSTON by his parent Daisy Wright, ELIZABETH WRIGHT, BERNIE WRIGHT by his parent Elizabeth Wright, VIVIAN DEE, SONIA GARCIA, JOAN HEITNER, PATRICIA LOFTMAN, LILLIAN PRYOR, EILEEN SALZIG, VALERIA SPANN and WALTER REINHARDT,<br>Petitioners, | : | Index No. _____<br><br>RJI No. _____ |
| For Judgment pursuant to CPLR Article 78 | : | VERIFIED PETITION |
| —against— | : | ORAL ARGUMENT REQUESTED |
| NEW YORK STATE DEPARTMENT OF HEALTH, HOWARD ZUCKER, as Acting Commissioner of the NEW YORK STATE DEPARTMENT OF HEALTH, JEWISH HOME LIFECARE, MANHATTAN, PWV OWNER, LLC, 156 W. 106th STREET HOLDING CORPORATION, and 102 W. 107TH STREET CORPORATION<br>Respondents. | : | |

Each of the Petitioners, Daisy Wright, Nathaniel Robert Livingston by his parent Daisy Wright, Oliver Wright Livingston by his parent Daisy Wright, Elizabeth Wright, Bernie Wright by his parent Elizabeth Wright, Vivian Dee, Sonia Garcia, Joan Heitner, Patricia Loftman, Lillian Pryor, Eileen Salzig, Valeria Spann and Walter Reinhardt, by their undersigned attorney, for their verified petition in this Article 78 proceeding, allege as follows:

## NATURE OF THE PROCEEDING

1. With this application, a proceeding brought pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR"), Petitioners seek declaratory and injunctive relief against Respondent the New York State Department of Health ("NYSDOH") in connection with its arbitrary, capricious and unlawful issuance of a Findings Statement and Environmental Impact Statement ("EIS") pursuant to its approval process related to the proposal by Respondent Jewish Home Lifecare, Manhattan ("JHL") for a Certificate of Need for a "Replacement Nursing Facility Project" to construct and operate a 20-story nursing home in a parking lot area at 125 West 97th Street between Amsterdam Avenue and Columbus Avenue ("the Proposed Project"). The NYSDOH issued this Findings Statement and final EIS ("FEIS") pursuant to Respondent JHL's plan to conduct site preparation, construction and operation of the Proposed Project. See Exhibit 1, Findings Statement.

2. The NYSDOH's decision to approve and issue a Findings Statement for a FEIS pursuant to JHL's Certificate of Need Application is null and void because the environmental review of the Proposed Project violated the requirements of the State Environmental Quality Review Act, N.Y. E.C.L. §§ 8-0101 through 8-0117 ("SEQRA"), the implementing regulations promulgated thereunder at 6 NYCRR Part 617 ("Part 617"), and the SEQRA regulations of the NYSDOH at 10 NYCRR Part 97. It also is inconsistent with the guidance provided by New York City's Executive Order No. 91 of 1977, as amended (43 RCNY Chapter 6). City Environmental Quality Review ("CEQR") (codified at 62 R.C.N.Y. Chapter 5).

3. As described further in paragraphs 28 through 133 herein, the Proposed Project would require the disruption, excavation and removal of significantly contaminated soil, including contaminants such as lead, arsenic and barium as well as remediation of a petroleum spill,

entailing dust, dirt and odor control issues. It would also pose extreme noise issues. In addition, it would generate traffic hazards and congestion during both construction and operation of the project. Respondent NYSDOH failed to comply with the requirements of SEQRA in its analysis of these issues in the FEIS for this Proposed Project, having failed to analyze alternatives sufficiently or apply sufficiently protective measures to prevent harm from a project that should not be treated as a typical construction project, but rather as a project involving significant contamination issues and intrusion upon very close sensitive receptors.

4. While the Respondent NYSDOH may have an interest in facilitating the construction of a healthcare facility when it deems – correctly or incorrectly – that such a facility will promote its objectives for establishing the availability of a particular level and diversity of nursing home services, it cannot let its own interest, its working relationship with the Respondent JHL as a nursing home provider, or any enthusiasm for a particular nursing home design, interfere with or weaken its pursuit of its legal duty to protect the health of children and adults as "sensitive receptors" in close proximity to this project, or their environmental quality through the SEQRA process. It must act as an independent governmental assessor of the facts and it must fully carry out its duty to adopt feasible alternatives to protect public health and the environment.

5. Respondent NYSDOH also cannot delegate its duties under SEQRA to the applicant, Respondent JHL, or to any other agency.

6. Accordingly, through this Petition and as set forth below and in the Petitioners' affidavits and accompanying experts' affidavits and affirmation (Paul Woods Bartlett, atmospheric dispersion expert; David O. Carpenter, medical doctor; Stephen Lester, toxicologist; Robert K. Simon, chemist, biochemist and industrial hygienist; and Walter F. Matystik, Jr., engineer and attorney) submitted herewith, Petitioners are entitled to relief pursuant to Article 78 of the CPLR,

including annulling and vacating the approval of the FEIS and the environmental quality review findings made by the Respondent NYSDOH for the Proposed Project; declaring the approval granted and the environmental quality review findings made by the Respondent NYSDOH to be in violation of SEQRA, Part 617 and 10 NYCRR Part 97; enjoining Respondent NYSDOH from granting any approvals for the Proposed Project until they have complied with the requirements of SEQRA, Part 617, and 10 NYCRR Part 97; awarding Petitioners the costs and disbursements of this action pursuant to CPLR 8601(a); and granting such other and further relief as the Court deems just and proper.

## JURISDICTION AND VENUE

7. This court has jurisdiction pursuant to Article 78 of the CPLR to review the actions by bodies or officers who have failed to perform a duty enjoined upon them by law.

8. Venue in the County of New York is proper. The property that is the subject of this action is located in New York County, and the Public Scoping Meeting and Public Hearing on the Draft Environmental Impact Statement for the project that is the subject of this action were held in New York County. Also, the potential and likely environmental impacts of this project would occur in New York County.

## PARTIES TO THE ACTION

### PETITIONERS

9. Each of the Petitioners will suffer significant injury as a result of the Proposed Project. The project will result in releases of respiratory irritants, contaminated dust and toxic substances as well as odors released from the construction site; extreme noise that will severely diminish the daily use of their apartments, and exacerbated traffic hazards during both construction and operation of the proposed project that will also impede or delay emergency response to the

buildings in which they live, which are all in very close proximity to the site. See Bartlett Afd. ¶15. Their physical health will be at risk as a result of the emissions from the project's construction and the traffic hazards generated by construction and operation of the project. The failure of the Respondent NYSDOH to take a hard look at the potential environmental impacts of this project also deprives the petitioners of their procedural and substantive rights under SEQRA to take action to seek to protect themselves from the environmental harm posed by the proposed project through access to timely, adequate and full information concerning the risks presented by the proposed project, an adequate assessment and "airing" of the relevant issues and impacts, and thus full participation in the public review and comment process regarding such information and the agency's environmental decision-making.

10. Petitioner Daisy Wright resides at 788 Columbus Avenue, apartment 15-O, on the 15th floor. She has lived at this site since 1977. Her apartment windows and terrace directly face the Proposed Project site, and her apartment building with terrace is located approximately 60 feet from the Proposed Project site. Ms. Wright attended hearings held by Respondent NYSDOH pursuant to SEQRA review of the Proposed Project. Ms. Wright is also concerned regarding the impact of the project on the health and safety of her sons, Nathaniel Robert Livingston and Oliver Wright Livingston. Because Ms. Wright resides in close proximity to the site, her injuries differ from and will be even more severe than the effects that the project will have on the public at large.

11. Petitioner Nathaniel Robert Livingston is the 11-year-old son of Petitioner Daisy Wright and lives with her at 788 Columbus Avenue. Nathanial Robert Livingston appears in this proceeding by his mother, Daisy Wright. *See* N.Y. CPLR §1201. Because Nathaniel Robert

Livingston is only 11 years old and resides in close proximity to the site, his injuries differ from and will be even more severe than the effects that the project will have on the public at large.

12. Petitioner Oliver Wright Livingston is the seven-year-old son of Petitioner Daisy Wright and lives with her at 788 Columbus Avenue. Oliver Wright Livingston appears in this proceeding by his mother, Daisy Wright. *See* N.Y. CPLR §1201. Because Oliver Wright Livingston is only seven years old and resides in close proximity to the site, his injuries differ from and will be even more severe than the effects that the project will have on the public at large.

13. Petitioner Elizabeth Wright resides at 788 Columbus Avenue in apartment 2P, on the second floor. She has lived at this site for 23 years. Her apartment windows and terrace directly face the Proposed Project site and her apartment building with terrace is located approximately 60 feet from the Proposed Project site. Ms. Wright attended hearings held by Respondent NYSDOH pursuant to SEQRA review of the Proposed Project. Ms. Wright is 45 years old. She underwent chemotherapy and radiation for treatment of breast cancer that left some scarring of her left lung, which makes her vulnerable to upper respiratory infections and also has episodes of bronchitis. Because Ms. Wright resides in close proximity to the site, and because of her health condition, her injuries differ from and will be even more severe than the effects that the project will have on the public at large.

14. Petitioner Bernie Wright is the 17-year-old son of Petitioner Elizabeth Wright and lives with her at 788 Columbus Avenue. Bernie Wright appears in this proceeding by his mother, Elizabeth Wright. *See* N.Y. CPLR 1201. He suffers from allergies and is very sensitive to pollution and dust. Petitioner Elizabeth Wright reports that she constantly has to have the dust cleaned off of the air conditioning vents in her apartment and use air purifiers, particularly to

protect her son, who suffers from allergies. Because Bernie Wright is only 17 years old and resides in close proximity to the site, and because of his health condition, his injuries differ from and will be even more severe than the effects that the project will have on the public at large.

15. Petitioner Vivian Dee is a resident of 788 Columbus Avenue in apartment 8O, on the eighth floor. She has lived at this site for 41 years. Her apartment windows and terrace directly face the Proposed Project site and her apartment building with terrace is located approximately 60 feet from the Proposed Project site. Ms. Dee attended hearings held by Respondent NYSDOH pursuant to SEQRA review of the Proposed Project. Ms. Dee also submitted a written statement of concern to NYSDOH regarding the Proposed Project. See Exhibit 2, Comment of Vivian Dee for Public Scoping Meeting. Ms. Dee is 89 years old. She suffers from emphysema, and also five years ago underwent heart surgery for valve replacement. Because Ms. Dee resides in close proximity to the site and because of her health conditions, her injuries differ from and will be even more severe than the effects that the project will have on the public at large.

16. Petitioner Sonia Garcia is a resident of 120 West 97$^{th}$ Street, in apartment 4A, on the fourth floor. She has lived at this site for 40 years. Her apartment windows and terrace directly face the Proposed Project site and her apartment building, not counting the terrace, is located approximately 103 feet from the Proposed Project site. Ms. Garcia attended and testified at hearings held by Respondent NYSDOH pursuant to SEQRA review of the Proposed Project. Ms. Garcia is retired and spends significant amounts of daytime hours at home. Ms. Garcia is a lifelong chronic asthmatic and allergy sufferer, recently diagnosed with stage one Chronic Obstructive Pulmonary Disease ("COPD"). She has experience several hospitalizations from asthma exacerbations over the years. She reports that she also is being treated for a heart condition that affects her body's blood flow, which further compromises her breathing capacity.

Because Ms. Garcia resides in close proximity to the site and also spends significant amounts of daytime hours at home, and because of her health conditions, her injuries differ from and will be even more severe than the effects that the project will have on the public at large.

17. Petitioner Joan Heitner is a resident of 784 Columbus Avenue in apartment 14E, on the 14th floor. She has lived at this site since 1976, and she is 72 years old. Her apartment windows directly face the Proposed Project site, and her windows, rooms and terrace are approximately 60 feet from the Proposed Project site. Her husband testified on behalf of himself and her in the two public hearings, and they received and read documentation describing the toxic chemicals at the proposed project site and discussed the matters raised at the hearings and meetings. See Exhibit 3, Statements of Dean Heitner on Draft EIS ("DEIS") and Draft Scoping Document. Mr. Heitner also was a named member of the Stakeholders of the Park West Village Neighborhood's statement of public comment on the Draft Scoping Statement. See Exhibit 4. Ms. Heitner has a physical disability, which has resulted in her being non-ambulatory and having to use a motorized wheelchair. Because of the modifications of her apartment required for her disability, she cannot relocate during this period. She presently has respiratory issues, including allergies, sinusitis and pulmonary effusion, and reports that several of her doctors have advised her that inhaling dust and particulates from this proposed project will aggravate these issue. Because Ms. Heitner resides in close proximity to the site and because she also suffers from respiratory issues and uses a wheelchair, her injuries differ from and will be even more severe than the effects that the project will have on the public at large.

18. Petitioner Patricia Loftman is a resident of 788 Columbus Avenue in apartment 17-O, on the 17th floor. She has lived at this site for 42 years. Her apartment windows directly face the Proposed Project site and her apartment building with terrace is located approximately 60 feet

from the Proposed Project site. Ms. Loftman attended hearings held by Respondent NYSDOH pursuant to SEQRA review of the Proposed Project, and also submitted testimony on the Proposed Project to Respondent NYSDOH. See Exhibit 5, Statement of Patricia Loftman on Scoping Document. Ms. Loftman is an early breast cancer survivor. She underwent a lumpectomy and radiation, and has completed five years cancer free, and does not want to be exposed to cancer-causing chemicals. Because Ms. Loftman resides in close proximity to the site and because of her health conditions, her injuries differ from and will be even more severe than the effects that the project will have on the public at large.

19. Petitioner Lillian Pryor is a resident of 120 West 97th Street in apartment 9K, on the ninth floor. Her windows face the proposed Project site and her apartment building is located approximately 103 feet from the Proposed Project site. Ms. Pryor, who is 65 years old, plans to retire this year and will spend more hours of the day at home. Ms. Pryor is a lifelong asthmatic and allergy sufferer, having received ongoing care for 29 years form the same physician. Because Ms. Pryor resides in close proximity to the site and also will be spending more daytime hours at home due to her imminent retirement, and because of her health conditions, her injuries differ from and will be even more severe than the effects that the project will have on the public at large.

20. Petitioner Eileen Salzig is a resident of 784 Columbus Avenue in apartment 8J, on the eighth floor. She has lived at this site for over 22 years. Her apartment windows face the Proposed Project site and her apartment building is located approximately 60 feet from the Proposed Project site. Ms. Salzig is a freelance writer, and her apartment is both her working space and her living space. Ms. Salzig attended and spoke at the hearings held by Respondent NYSDOH pursuant to SEQRA review of the Proposed Project, presenting public comment on

the Scoping document and the DEIS. She submitted a letter of written comment to Respondent NYSDOH. See Exhibit 6, Public Comment of Eileen Salzig on DEIS. She also was a named member of the Stakeholders of the Park West Village Neighborhood's statement of public comment on the Draft Scoping Statement. See Exhibit 4, Stakeholders Letter. Ms. Salzig is very susceptible to bronchitis, which is easily triggered for her by repeated daily exposure to dust and diesel exhaust. She usually undergoes one severe case each year and several smaller episodes when in dusty or air polluted environments. Because Ms. Salzig resides in close proximity to the site and also spends a significant amount of daytime hours at home, and because of her health conditions, her injuries differ from and will be even more severe than the effects that the project will have on the public at large.

21. Petitioner Valeria Spann is a resident of 765 Amsterdam Avenue. Her apartment windows and terrace directly face the Proposed Project site, and the apartment building with terrace in which she lives is located approximately 275 feet from the Proposed Project site. Ms. Spann is 79 years old and suffers from emphysema. Ms. Spann attended the SEQRA hearings, as well as numerous community meetings, regarding the construction of the Proposed Project. In addition, she submitted a letter of concern to Respondent NYSDOH regarding the Proposed Project. Because Ms. Spann lives in close proximity to the Proposed Project site and because of her health condition, her injuries differ from and will be even more severe than the effects that the project will have on the public at large.

22. Petitioner Walter Reinhardt is a resident of 784 Columbus Avenue in apartment 12 G, on the 12$^{th}$ floor. He has lived at this site for over 10 years. His apartment windows directly face the Proposed Project site, and his apartment building is located approximately 60 feet from the Proposed Project site. Mr. Reinhardt is an illustrator, and his apartment is both his working

space and his living space. Mr. Reinhardt attended all of the hearings held by Respondent NYSDOH pursuant to SEQRA review of the Proposed Project, and wrote a letter of concern to Respondent NYSDOH. See Exhibit 7, Letter of comment on DEIS by Walter Reinhardt. Mr. Reinhardt suffers from hypertension (high blood pressure). Because Mr. Reinhardt resides in close proximity to the site and also spends a significant amount of daytime hours at home, and because of his health conditions, his injuries differ from and will be even more severe than the effects that the project will have on the public at large.

**RESPONDENTS**

23. Respondent the New York State Department of Health ("NYSDOH") is a department and agency of the State of New York, pursuant to Public Health Law §§200 and 201. Its central office is located at Empire State Plaza, Corning Tower Building, Albany, New York 12237. Among other responsibilities, pursuant to Public Health Law §2802, the NYSDOH has the discretionary authority to approve or deny a Certificate of Need. In the instant case, the NYSDOH declared itself to be the lead agency to fulfill the obligations under SEQRA with regard to a request for the NYSDOH to issue a Certificate of Need for this Proposed Project. Under SEQRA, the lead agency must determine whether an EIS is required, define the scope of such EIS, prepare or cause to be prepared an EIS for the proposed project, and certify that such EIS is complete and meets the requirements of SEQRA.

24. Respondent Howard Zucker is named in his official capacity as Acting Commissioner of the New York State Department of Health, with its central office located at Empire State Plaza, Corning Towner Building, Albany, New York 12237. It is his duty to carry out the responsibilities of the Respondent NYSDOH, as set forth herein.

25. Respondent Jewish Home Lifecare, Manhattan ("JHL"), the applicant in the Certificate of Need proceeding for a "Replacement Nursing Facility Project", which is the Proposed Project in this action, is a member of the Jewish Home Lifecare System, and JHL currently operates a nursing home complex occupying three buildings on the south side of West 106th Street in Manhattan, with the address of 120 West 106th Street. Respondent JHL plans to close this facility upon completion and opening of the Proposed Project.

26. Respondent 156 West 106th Street Holding Corporation, upon information and belief, is one of two holding companies established by Respondent JHL that own the land that includes the existing nursing home complex that would be replaced by the Proposed Project, and may be inequitably affected by a judgment in this matter if not named as a Respondent.

27. Respondent 102 West 107th Street Corporation, upon information and belief, is the other of the two holding companies established by Respondent JHL that own the land that includes the existing nursing home complex that would be replaced by the Proposed Project, and may be inequitably affected by a judgment in this matter if not named as a respondent.

**FACTUAL BACKGROUND: ACTIONS OF RESPONDENTS**

28. On or about February 8, 2012, Respondent JHL filed an application for a Certificate of Need for a "Replacement Nursing Facility Project" ("Proposed Project") under which it would construct a proposed 20-story facility with one cellar-level story and one mechanical story at 125 West 97th Street, located between Amsterdam Avenue and Columbus Avenue next to public elementary school P.S. 163 (Alfred E. Smith School), for the purpose of establishing a 414-bed nursing home.

29. Respondent JHL has stated its intention that, following construction of the new facility, it would close its current 514-bed nursing facility located at 12 West 106th Street in Manhattan. See Exhibit 1, Findings Statement, pp. 1 and 3.

30. The street on which the Proposed Project site is located contains several residential buildings, including residential buildings located directly adjacent to the project site.

31. The Proposed Project site, 125 West 97th Street, has served as a surface accessory parking lot since 1976, and was occupied by several dwellings prior to that at least until 1951, according to Respondent JHL's consultant, AKRF, Inc. (See AKRF, Inc., "Jewish Home Lifecare – 125 West 97th Street Subsurface (Phase II) Investigation, Sampling Protocol and Health and Safety Plan," July 2013, p. 1.) It served as an 88-space parking lot, for many years, for Park West Village residents. In the summer of 2014, the current Park west Village property owner opened a replacement parking lot in the Park West Village complex north of the Project Site, and users of the former surface parking lot at the Proposed Project site have received substitute parking at the replacement lot or elsewhere within Park West Village. See Exhibit 1, Findings Statement, p. 2.

32. Respondent JHL's application was filed after the facility had abandoned prior plans to build a facility on West 100th Street and to rebuild its existing facility on West 106th Street. Under the Proposed Project, the adult daycare facility currently located at 12 West 106th Street would not be moved to the Proposed Project site and no specific plans were stated to relocate those functions.

33. On June 5, 2013, Respondent NYSDOH issued a *Positive Declaration Notice of Intent to Prepare a Draft Environmental Impact Statement Determination of Significance ("Positive Declaration")* under SEQRA for the Proposed Project, declaring that the proposed action may have a significant environmental effect. Based on an initial evaluation for the Proposed Project,

NYSDOH had made a preliminary determination that the Proposed Project was a "Type I" action pursuant to 6 NYCRR 617.4(b)(6)(v), which determination indicates a likelihood that an environmental impact statement will be required. The Positive Declaration was accompanied by a Draft Scoping Document for the DEIS. See Exhibit 1, Findings Statement p. 6.

34. On July 5, 2013, Respondent NYSDOH declared itself to be the lead agency under SEQRA for the Proposed Project review. See Exhibit 1, Findings Statement, p. 6.

35. Respondent NYSDOH reports that the Public Scoping Meeting for the DEIS was postponed twice "at the request of the community," and the final Notice of the Positive Declaration and Draft Scoping Document was published in the Environmental Notice Bulletin on August 7, 2013. See Exhibit 1, Findings Statement, p. 6.

36. On September 17, 2013, Respondent NYSDOH held a public meeting to hear comments on the proposed Scoping Document for the draft EIS. See Exhibit 1, Findings Statement, p. 6. At this public meeting, numerous individuals and organizations as well as various civic groups and elected officials advised the NYSDOH about the deficiencies of the DEIS and the adverse impacts the Project would have on the nearby residences, public school and the community, and written comments on the proposed Scoping Document were accepted through October 4, 2013. See Exhibit 1, Findings Statement, p.6.

37. On or about January 28, 2014, Respondent NYSDOH issued a Final Scoping Document for the Proposed Project. See Exhibit 1, Findings Statement, p. 6.

38. On July 22, 2014, Supreme Court Justice Anil C. Singh granted a preliminary injunction against Respondent PWV Owner, LLC, from eliminating the existing outdoor parking at the 97th and 100th Street parking lots pending a determination of the remand to the New York State Division of Housing and Community Renewal ("DHCR") for further action (to rule on the issue

of whether or not the plan to modify or substitute parking spaces in the 808 Columbus Avenue underground garage is not inconsistent with the Rent Stabilization Law or Code, and whether the plan is an adequate substitute for the modification of the parking service as it pertains to the 117 indoor parking spots for rent-stabilized tenants). Decision and Order, *Matter of Park West Village Tenants' Association v. Division of Housing and Community Renewal of the State of New York,* Index No. 100415/14.

39. On or about March 21, 2014, Respondent NYSDOH issued a draft EIS ("DEIS") for the Proposed Project, although the Combined Notice of Completion of the Draft Environmental Impact Statement and Notice of Public Hearing was not published in the *New York Daily News* until March 26, 2014, and was not published in New York State's official Environmental Notice Bulletin until April 2, 2014. See Exhibit 1, Findings Statement, p. 6.

40. On information and belief, the DEIS was written and produced by Respondent JHL and accepted by Respondent NYSDOH for release for public comment.

41. Respondent NYSDOH held two public hearings on the DEIS for the Proposed Project, on May 7, 2014 and May 8, 2014. See Exhibit 1, Findings Statement, p. 7. At the public hearing, numerous individuals and organizations as well as various civic groups and elected officials advised the NYSDOH about the deficiencies of the DEIS and the adverse impacts the Project would have on the nearby residences, public school and the community. Written comments on the DEIS were accepted through the close of the public comment period, which ended on Monday, May 19, 2014. See Exhibit 1, Findings Statement, p. 7.

42. On November 14, 2014, Respondent NYSDOH issued the Final EIS ("FEIS") together with a Notice of Completion of Final Environmental Impact Statement for the Proposed Project. See Exhibit 1, Findings Statement, p. 7.

43. On December 10, 2014, the NYSDOH issued a "State Environmental Quality Review Findings Statement" ("Findings statement") for the Proposed Project. Among the findings, NYSDOH stated that the Proposed Project would involve subsurface disturbance for the construction of the proposed new building and outdoor improvements. Soil that would be disturbed by the Proposed Project would include "widespread historical fill materials that contain elevated levels of lead, limited petroleum-contaminated soil…, and some soil exceeding the hazardous waste threshold for barium content." See Exhibit 1, Findings Statement, p. 20.

44. In addition to approval of an EIS, the Proposed Project requires NYSDOH approval of a construction application and Certificate of Need pursuant to Section 2802 of the Public Health Law (for Project #121075-C). Upon information and belief, there are no other discretionary actions subject to SEQR associated with the Proposed Project. See Exhibit 1, Findings Statement, p. 7.

45. If approved, construction of the Proposed Project would be expected to begin in early 2015 and Respondent JHL asserts that it would last approximately 30 months. Respondent JHL predicted – and Respondent NYSDOH adopted these predictions in its FEIS – that excavation and foundation activities to accommodate the establishment of a cellar floor and mechanical floor as well as foundation would reportedly begin in early 2015 and would take approximately three months to complete. See Exhibit 1, Findings Statement, p. 25.

46. Respondent JHL predicted – and Respondent NYSDOH adopted these predictions in its FEIS – that superstructure construction would begin in Month 4 of construction and would be completed by Month 9 of construction. Exterior façade work would begin in Month 10 of construction and would be completed by Month 14 of construction. Interior fit-out work would be expected to begin in Month 13 of construction and would take approximately 13 months to

complete. Site work would begin in Month 22 of construction and would take approximately 3 months to complete. Commissioning would begin in Month 26 of construction and would be completed by Month 30 of construction. See Exhibit 1, Findings Statement, p. 25.

## ENVIRONMENTAL REVIEW OF THE PROJECT

### A. The Requirements of SEQRA

47. SEQRA defines "environment" to mean certain "conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character." ECL § 8-0105(6).

48. SEQRA and the regulations promulgated thereunder mandate that "[n]o agency involved in an action shall carry out, fund or approve the action until it has complied with the provisions of SEQR[A]." 6 NYCRR § 617.3(a). Respondent NYSDOH is subject to both Part 617 and its own SEQRA regulations, at 10 NYCRR § 97. *See* 10 NYCRR § 97.1.

49. SEQRA requires that an agency, before taking any action, take a "hard look" at the potential effects upon the environment of any such action. *See* 6 NYCRR § 617.2(b).

50. An EIS must meet the standards set by SEQRA for the contents of an EIS. The EIS must accurately and thoroughly describe the short term, long term, cumulative, and other associated impacts of a proposed action, as well as of the alternatives to that action (including the "no action" alternative). ECL §§ 8-0109(2)(a); 6 NYCRR §617.9(14)(f)(3); 10 NYCRR § 97.12(c).

51. The EIS must consider, with regard to cumulative impacts, "changes in two or more elements of the environment, no one of which is substantial, but when taken together result in a material change in the environment" or "two or more related actions no one of which has or would have a significant effect on the environment, but which cumulatively meet one or more to

the criterial in this section." 10 NYCRR §§ 97.13 (1) and (11). As guidance, the NYSDEC states that assessment of potential cumulative impacts should be done "the impacts of related or unrelated actions may be incrementally significant and the impacts themselves are related." See Exhibit 8, NYSDEC, *The SEQR Handbook*, pp. 83-84. The *CEQR Technical Manual* explains that, "Cumulative impacts are two or more individual effects on the environment that, when taken together, are significant or that compound or increase other environmental effects." See Exhibit 9, *CEQR Technical Manual*, p. 2-12.

52. The EIS should assess the likely consequence of an action "in connection with its setting (*i.e.*, urban or rural), its probability of occurring, its duration, its irreversibility, its controllability, its geographic scope and its magnitude (*i.e.*, degree of change or its absolute size)." 10 NYCRR §97.13(b).

53. In the instant case, the DEIS and FEIS for the Project were prepared by a consultant or consultants hired and paid by Respondent JHL. While an EIS often is prepared by consultants hired and paid by the applicant, the lead agency must review drafts of the EIS and is ultimately responsible for ensuring that the EIS complies with SEQRA and its related regulations.

54. As the New York Court of Appeals has declared, an EIS must allow a decision maker to (1) identify the relevant areas of environmental concern; (2) take a "hard look" at each of those areas; and (3) provide a "reasoned elaboration" of the basis for its decision. *See, e.g., Jackson v. New York State Urban Development Corp.*, 68 N.Y.2d400, 417, 503 N.Y.S.2d 298, 305 (1986). As explained herein, the FEIS for the Project fails to meet this standard.

55. SEQRA requires agencies to consider the environmental ramifications of their actions "[a]s early as possible" in the decision-making process. ECL §8-0109(4).

56. SEQRA and its regulations further obligate the lead agency to make certain findings before approving or carrying out an action that has been the subject of an EIS. The agency must find, with regard to the regulations, that "all requirements have been met." 6 NYCRR § 617.9(c)(2).

57. The lead agency must also find that, "consistent with social, economic and other essential considerations, from among the reasonable alternatives thereto, the action to be carried out, funded or approved is one which minimizes or avoids adverse environmental effects to the maximum extent practicable, including those disclosed in the relevant environmental impact statement." 6 NYCRR §617.9(c)(3) and 10 NYCRR § 97.10(c)(2)(i). See ECL § 8-0109(2)(f) and 6 NYCRR§617(f)(7).

58. Under 6 NYCRR § 617.9(c)(4), the agency must make a further written finding that "consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided by incorporating as conditions to the decision those mitigative measures which were identified as practicable." The EIS must also include "mitigation measures proposed to minimize the environmental impact" of a project.

59. The New York State Department of Environmental Conservation ("NYSDEC") advises that in a DEIS, "Reasonable alternatives for avoiding specific impacts, and further possible measures for mitigating additional potential impacts, must be discussed in the context of the specific impacts to which they are addressed." Exhibit 10, NYSDEC, *SEQR: Guiding the Process* (2009). Similarly, Respondent NYSDOH's regulations state that NYSDOH must not approve an action until it has found that, "consistent with social, economic and other essential considerations from among the reasonable alternatives thereto, the action to be carried out or

approved is one which minimizes or avoids adverse environmental effects to the maximum extent practicable, including the effects disclosed in the relevant environmental impact statement." 10 NYCRR § 97.10(c)(2)(i).

60. While page 29 of the Scoping Document stated that the EIS would examine alternatives that achieve the goals of the project, the EIS must also consider the "no action" alternative of not going forward with the project. ECL §§ 8-0109(2)(a); 6 NYCRR §617.9(14)(f)(3); 10 NYCRR § 97.12(c).

61. Respondent DOH also is subject to its own requirements pursuant to the New York State Public Health Law (PHL). PHL §206(2)(a) states that the Commissioner shall "take cognizance of the interests of health and life of the people of the state, and of all matters pertaining thereto and exercise the functions, powers and duties of the department prescribed by law." Further, PHL §206(1)(d) states that the Commissioner shall "investigate the causes of disease, epidemics, the sources of mortality, and the effect of localities, employments and other conditions, upon the public health." Read together, these provisions make it clear that the Department of Health must take cognizance of potential health hazards related to site-specific contamination in the course of its duties and responsibilities, including addressing contaminated dust hazards in the context of a Certificate of Need determination.

62. PHL 206(1)(n), which pertains to rule-making specific to lead poisoning, is contained in the "general powers and duties" section of the Public Health Law, which indicates that prevention of childhood lead poisoning is considered to be a high priority duty for the DOH. This section states that the Commissioner shall "by rule and regulation establish criteria for identification of areas and conditions involving high risk of lead poisoning, specify methods of detection of lead in dwellings, provide for the administration of prescribed tests for lead

poisoning and the recording and reporting of the results thereof, and provide for professional and public education, as may be necessary for the protection of the public health against the hazards of lead poisoning."

63. Respondent NYSDOH, moreover, was directly involved in the production of the 2009 *Report of the New York State Task Force on The Prevention of Lead Poisoning* ("2009 Task Force Report"), a task force created by Governor Paterson through Executive Order 21, which declared, in part, that it is "critical to prevent children from becoming lead poisoned in the first instance by avoiding their exposure to sources of lead poisoning to the extent possible." See Exhibit 11, Governor's Executive Order 21. This Task Force report states, "Since there is no medical treatment that permanently reverses the neuro-developmental effects of lead exposure, primary prevention (taking action before a child is harmed) is critical to address the problem. Primary prevention marks an important augmentation of the traditional approach of responding to children who have already been poisoned." See Exhibit 12, The 2009 Task Force Report on Prevention of Lead Poisoning.

**B. The FEIS's Inadequate Analysis of Health Risks from Dust and Contamination**

***Background Regarding Guidance for Contaminated Soil Cleanup***

64. Respondent NYSDOH referred to a set of health-based soil cleanup guidelines and one health-based ambient air standard in assessing the risk from the project site, but neither standard is fully adequate for addressing the risks to Petitioners from the Proposed Project.

65. The NYSDEC, in consultation with the NYSDOH, has established guidelines, intended to be health-based, for the extent to which contaminated sites must be cleaned up at a site. These guidelines are termed "soil cleanup objectives" ("SCOs"). The guidelines vary based on the expected use of the site and assumptions, and in particular, on how children may access and use

a site. The NYSDEC has established "Unrestricted SCO's" for which no restrictions on use are established; "Residential SCOs" for single family housing but with some restrictions on use; "Restricted Residential SCOs" for which no single family housing or vegetable gardens are allowed (although community vegetable gardens may be considered with NYSDEC review and approval); and commercial SCOs with strict land use controls to limit possible exposures. These were promulgated in 6 NYCRR §375-6, effective December 14, 2006.

66. Pursuant to ECL §27-1415(6)(c), these contaminant-specific remedial action objectives are to be "updated every five years." The guidelines adopted in 2006, however, are still in effect.

67. As explained below, these guidelines are designed to determine how much contamination may remain in the ground, rather than having to be removed, at a site. The guidelines are used to assess risks from bare ground and leachate runoff, not from migration of the soil dust through the air to other environments.

***Contamination Levels Found at the Proposed Project Site***

68. Respondent JHL's consultant AKRF, Inc, conducted a "Phase II investigation" of soil contamination at the site. This consisted of only eight soil borings, taken only "within the proposed cellar footprint" on the site, along with "grab soil samples" that were "collected from the top six inches of on-site tree pits," as reported by AKRF, Inc. See Exhibit 13, AKRF, Inc., Jewish Home Lifecare – 125 West 97th Street Subsurface (Phase II) Investigation ("AKRF Subsurface (Phase II) Investigation Report") (excerpt), p. 2. Thus, the 38 soil samples generated came only from these eight soil borings and the tree pits.

69. One commentator pointed out that the soil sample collection was confined to the building foot print even though other areas of the surface and near surface in the former parking lot, constituting "approximately one quarter of the project site," would be disturbed as pavement is

removed and construction begins. See Exhibit 14, Comments of Center for Public Environmental Oversight, p. 6.

70. The NYSDOH concluded that the site likely contains "historic fill." The City of New York's *CEQR Technical Manual* defines historic fill as "elevated levels of hazardous materials in fill of unknown origin." See Exhibit 9, *CEQR Technical Manual*, p. 12-1. NYSDOH failed, however, to require additional testing to characterize the extent or content of this fill after receiving the AKRF "Phase II investigation." See Bartlett Afd. ¶12 and Simon Afd. ¶18.

71. Lead (also known as "Pb"), a toxic metal, was found in all of the 38 soil samples taken at the site by Respondent JHL's consultant, AKRF, Inc. its "Phase II investigation." The lead-in-soil is measured in milligrams per kilogram ("mg/kg"). Of these soil samples, 24 samples exceeded the NYSDEC's Unrestricted SCO for lead (which is 63 mg/kg) and 10 were at or exceeded the NYSDEC Restricted Residential SCO of 400 mg/kg. Of those 10, three exceeded 1,000 mg/kg, having levels of 1110 mg/kg, 1830 mg/kg and 3850 mg/kg. The remaining samples ranged from 6 mg/kg to 44 mg/kg. See Exhibit 13, AKRF Subsurface (Phase II) Investigation Report (excerpt), Table 3.

72. Dr. John Rosen, recently deceased, who directed the Multi-disciplinary Lead Program at the Albert Einstein College of Medicine, reported in a letter regarding the Proposed Project, submitted to the NYSDOH that Lead (Pb) is toxic to both children and adults. He reported that it can cause adverse health effects in children under 6 years old – including cognitive impairments, neurobehavioral disturbances, loss of IQ points and ADHD -- at blood lead levels greater than 4 micrograms per deciliter (µg/dl). He reported that blood lead levels above 4 µg/dl are also associated with high blood pressure and cardiovascular disease in adult males and females (above the child bearing age). See Exhibit 15, Letter from Dr. John Rosen. See also Carpenter

Afd. ¶5 (loss of cognitive function and memory). There is no known safe level for lead in children and the effects are not reversible. Carpenter Afd. ¶¶9-10.

73. Arsenic was found in 31 of the 38 soil samples. Eight samples had arsenic levels that ranged from 11.6 mg/kg to 69.4 mg/kg, while 23 samples had levels that ranged from 1.2 mg/kg to 8.5 mg/kg. See Exhibit 13, AKRF Subsurface (Phase II) Investigation Report (excerpt), Table 3. The unrestricted SCO for arsenic is 13 mg/kg, and the restricted residential SCO is 16 mg/kg. As pointed out by toxicologist Stephen Lester in a letter submitted to the NYSDOH regarding this project, five samples exceeded both the unrestricted and restricted residential SCOs for arsenic, and an additional sample exceeded the unrestricted SCO for arsenic but not the restricted residential SCO. See Exhibit 16, Letter from Toxicologist Stephen Lester.

74. Arsenic is a highly toxic chemical. Toxicologist Stephen Lester reports that it can cause stomach pain, nausea, numbness in hands and feet and partial paralysis, and it has also been linked to cancer of the bladder, lungs, skin, kidney, nasal passages, liver and prostate. The USEPA's "risk-based screening level" for arsenic in soil, which is based on the standard one-in-a-million ($1 \times 10^2$) cancer risk, recently was set at 0.67 mg/kg, which toxicologist Stephen Lester points out is almost 20 times lower (more protective of human health) than the NYSDEC's unrestricted SCO for arsenic and 24 times lower/more protective than the NYSDEC's restricted residential SCO. Toxicologist Stephen Lester explains that NYSDEC set its standard based in part on the acknowledgment that soil typically contains some "background" levels of arsenic but that there was no widely accepted definition of "background soil concentration." Existing levels of arsenic in New York State range from 1.1 to 40.3 mg/kg with a median value of 7.6 mg/kg. NYSDEC, as noted above, set the SCO unrestricted value at 13 mg/kg. See Exhibit 16, Letter

from toxicologist Stephen Lester. See also Carpenter Afd. ¶6 and Simon Afd. ¶30. No effort was made to predict potential impacts of arsenic-contaminated soil if disrupted.

75. Barium was found, with one soil boring showed a level of 1,300 ppm, in comparison with the unrestricted SCO of 63 ppm for barium. See Exhibit 13, AKRF Subsurface (Phase II) Investigation Report (excerpt), Table 3.

76. The site was also the location of petroleum contamination. The Phase II investigation identified benzene, ethylbenzene, m&p-xylene, and o-xylene (BTEX) at concentrations that exceed the Unrestricted SCOs, although they are below the Restricted Residential SCOs. See Exhibit 1, Findings Statement, p. 13. These chemicals pose significant health risks. See Carpenter Afd. ¶7. In compliance with the requirements of the New York State Department of Environmental Conservation ("NYSDEC"), a remedial action plan for the petroleum contamination requires excavation of the soil to approximately 20 feet below grade in the spill area and over the majority of the site. See Exhibit 13, AKRF Subsurface (Phase II) Investigation Report (excerpt), p. 2. See also Simon Afd. ¶32.

**C. The FEIS's Reliance on Inadequate Guidelines and Standards to Prevent Harm**

77. The Scoping Document, p. 20, states that procedures would be used to "ensure" that dust is kept within "acceptable levels," and asserts that environmental impacts will be "mitigated," but the NYSDOH is well aware that the goal of its own public health policy is prevention. Thus, the goal should be to eliminate, not reduce, avoidable exposure to lead dust for children. See Carpenter Afd. ¶17 and Simon Afd. ¶27. This means that the strategy for environmental protection during construction-related soil disturbance at this lead-contaminated site, located in such close proximity to "sensitive receptors," including both children and adults, should be

*containment* -- a strategy to *prevent* rather than just mitigate the migration of contaminated dust from the site. See Simon Afd. ¶¶16-17.

78. The FEIS fails to adopt a prevention-based strategy for lead-contaminated dust despite the information in the record and the NYSDOH's own knowledge regarding the poisonous effects of lead. See Exhibit 15, Dr. John Rosen letter, p. 2. See also Exhibit 17, comments by David Rosner, Ph.D., and Gerald Markowitz, Ph.D on Draft Scoping Statement, pp. 6-7.

79. While an EIS must consider the cumulative impacts of an action, pursuant to 6 NYCRR § 617(c)(1), the issue of cumulative effects is particularly important in the context of exposure to lead-contaminated dust, since the impacts of lead on the human body are cumulative. See Exhibit 17, comments by David Rosner, Ph.D. and Gerald Markowitz, Ph.D., pp. 4-6. See Carpenter Afd. ¶12 and Simon Afd. ¶28. Nevertheless, the FEIS and Findings Statement fail to disclose or present a plan to disclose the range of current blood lead levels in children and adults in close proximity to the Proposed Project site, and address the issue of cumulative effects of toxic lead exposure. See Simon Afd. ¶28.

***Inadequacy of Reliance on Soil Cleanup Objectives and Soil Lead Hazard Guidelines that Are Not Appropriate Measures and Are Out of Date***

80. Respondent NYSDOH's Findings Statement relies upon an inadequate guideline to assess the risk from construction at the site. It asserts misleadingly with regard to the soil contamination test results for lead that "these findings do not indicate a 'soil-lead hazard' defined by the United States Environmental Protection Agency ("USEPA")" at 40 CFR §745.65(c). The argument reflects a misunderstanding of the purpose of the USEPA soil hazard definition. Like the NYSDEC soil cleanup guidelines, the USEPA soil-lead hazard definition is used to measure risks from exposure to bare ground and leachate runoff, not from migration of the soil dust through the air to other environments.

81. Respondent NYSDOH's Findings Statement misleadingly implies that the NYSDEC is taking the position that the construction project does not present a significant health risk. It states that the NYSDEC, in two letters, stated that "the site does not pose a significant threat to public health or the environment based on the lead concentrations present and, therefore, no remediation of lead contamination is required." See Exhibit 1, Findings Statement, p. 33. In fact, the first letter, signed by the NYSDEC Commissioner, is based on completely incorrect information, stating that "data collected from the site exhibited lead concentration in one of the 38 soil samples collected at the site that exceeds the unrestricted use soil cleanup objectives," which is far from correct. The second letter, signed by the NYCDEC's Regional Remediation Director, Paul John, although based on more accurate information, is answering a completely different question than the one posed here regarding risks from dust dispersion. This second letter was considering the site from the perspective of what level of contamination can remain in the ground, rather than being excavated, at a commercial development – not what risks might be posed for nearby sensitive receptors from disrupting and dislodging that ground. This second letter states that the NYSDOH "reviewed the data and compared it to the Commercial Use Soil Cleanup Objectives" of 1000 mg/kg for lead, reasoning that "commercial use is the appropriate use category for a health care facility." See Exhibit 18, Letters from NYSDEC, August 6, 2014 and September 24, 2014).

82. The environmental risk of lead contamination posed by the Proposed Project is not a matter of remediation of otherwise intact soil. The Proposed Project is a plan to dig and dislodge in-place soil, which will release dust that will pose a risk to residences and the community. See Bartlett Afd. ¶11 and Matystik Afd. ¶4. See also Affidavit of Petitioner Joan Heitner, ¶6, regarding dust infiltration experienced during a prior construction project.) The concern is not

that children are coming to the former parking lot, but rather that dust from the former parking lot will come to the children, and adults as well. See Simon Afd. ¶26.

83. Nevertheless, despite the fact that the New York State Part 360 soil cleanup guidelines and EPA soil-lead hazard definition are guidelines governing the amount of lead that can remain in the ground on a site after a toxic cleanup, the NYSDOH relied upon these inadequate guidelines to address the health risk from lead dust caused by this project.

84. Even if one were to refer to soil removal guidelines, moreover, Respondent NYSDOH drew its conclusions based on an average of the sample results, not on the worst case scenario of the high end levels. 40 CFR §745.65(c) defines a "soil-lead hazard" for a child-occupied facility to exist if total lead in bare soil is equal to or exceeds 400 ppm (mg/kg) in a children's play area or is equal to or exceeds an average of 1,200 ppm (mg/kg) in the rest of the yard. While NYSDOH argues that, "The average lead level in the samples from the top 6 inches of tree pits was 304 ppm, with a maximum of 681 ppm, NYSDOH admits that in the developer's samples, the consultant firm AKRF, Inc., found that lead levels in 3 of the 38 soil samples exceeded 1,000 parts per million ("ppm") with a maximum level of 3,850 ppm. See Exhibit 1, p. 13. By averaging the sampling results, Respondent NYSDOH failed to take proper cognizance of the higher samples. See Bartlett Afd. ¶12.

85. Respondent NYSDOH also failed to consider that, given the range of levels at the site, the soil conditions were not homogenous, and there was no reason to presume that the limited sampling conducted had identified the highest levels of contamination on the site. See Simon Afd. ¶¶ 18 and 25.

86. The USEPA soil-lead hazard definition and NYSDEC soil cleanup guidelines for lead, moreover, are based on outdated information about the toxicity of lead. As noted in paragraph

66 above, the NYSDEC soil cleanup guidelines were promulgated in 2006 and the NYSDEC and NYSDOH failed to update them in 2011, as required by the statute. The USEPA definition was promulgated on January 5, 2001. *See* 66 *Fed. Reg.* 1205 (January 5, 2001). As explained in paragraph 90 below, the USEPA itself has acknowledged, in response to a petition for rule change regarding dust-lead hazards, that the dust lead hazard that was adopted in 2001 is out of date. Dr. John Rosen pointed out that current analyses by the Centers for Disease Control ("CDC") and the American Academy of Pediatrics, find adverse health effects in both children under six years of age and adults at blood lead levels greater than 4 micrograms per deciliter (µg/dl). See Exhibit 15, Letter of Dr. John Rosen.

***Inadequacy of Reference to Leaching Criteria Designed for Ground or Surface Water***

87. References to results of testing samples using the USEPA's Toxicity Characteristic Leaching Procedure ("TCLP"), comparing the results to the EPA's toxic hazardous waste criteria for metals leaching from soil, are misleading. This test is designed to protect ground and surface water from the impacts of metals leaching from soil under the conditions typically found in a landfill, to determine whether or not the material must be managed in disposal as "hazardous waste." As toxicologist Stephen Lester points out, "These results say nothing about the public health risks posed by arsenic in soil. They are quite useless in a public health context." See Exhibit 16, Letter from toxicologist Stephen Lester. The residents, after all, will not be drinking the runoff water or groundwater from the site. See Exhibit 13, AKRF Subsurface (Phase II) Investigation Report (excerpt), p. 5.

***Inadequacy of Reliance on Ambient Air Standard and Averaging of Soil Data***

88. Even in its discussion of airborne lead, the NYSDOH fails to address the issue of deposition of disturbed contaminated dust and resorts instead to an inappropriate approach for

evaluating safety. The NYSDOH admitted that, "No reliable technology exists for real-time measurement of airborne lead." It instead relies on to a standard of limited applicability, the National Ambient Air Quality Standard ("NAAQS") for lead in the ambient atmosphere. The NYSDOH asserted, in its discussion of construction impact avoidance measures, that it would employ the DER-10 requirements for dust control measures, including "real-time monitoring to ensure 15 minute average respirable dust levels stay below 150 $\mu g/m^3$." It stated that the dust control measures and inhalable dust monitoring "would be more than sufficient to ensure that the level of lead would not violate the NAAQS," which is .15 $\mu g/m^3$ of lead calculated as a rolling 3 month average, based on its assertion that airborne lead levels could be "estimated from the known proportion of lead present in the Project Site's soil." See Exhibit 1, Findings Statement, pp. 27 and 33. The NAAQS, however, is a regional standard and a measure of atmospheric conditions. It measures only ambient (airborne) dust, not the localized settling of dust on surfaces that children will touch. Also, the measure that would be taken is a 15-minute average of air-suspended inhalable dust; it does not address local accumulation of lead dust particles (both inhalable and larger) over a lengthy site preparation and construction process. See Matystik Afd. ¶5.

89. Moreover, one expert commentator points out that the calculation finding no likely violation of the NAAQS standard was based on an average of all samples, which masks the higher elevations of contaminants on the site and potential for exceedance of the NAAQS, and raises the concern that the monitoring device will measure respirable dust particles but not larger particles that "will be dispersed from the project site and settle on surfaces at P.S. 163 and other neighboring properties." See Exhibit 14, Comments of the Center for Public Environmental Oversight, p. 8. See Bartlett Afd. ¶12.

***The Dust-Lead Hazard Standard and the Need to Be Cautious as It Is Out-of-Date***

90. There is only one indoor environment standard designed to protect children from lead contamination. Because a very small amount of lead dust can poison a child, federal regulations define a lead dust hazard, under 40 CFR §745.65(b), based on surface dust wipe samples as follows: "A dust-lead hazard is surface dust in a residential dwelling or child-occupied facility that contains a mass-per-area concentration of lead equal to or exceeding 40 µg/ft$^2$ on floors or 250 µg/ft$^2$ on interior window sills based on dust wipe samples." Given that this standard involves micrograms of lead dust on a square foot of floor or windowsill, it is clear that a very small amount of dust can poison a child, and it presents a risk even if not visible to the naked eye. See Carpenter Afd. ¶11. The NYSDOH is well aware of the existence of this standard, since its own website provides links to the federal standards (see Exhibit 19, page from NYSDOH website, titled "New York State Public Health Laws and Regulations for Lead Poisoning"). Nevertheless, there is no mention of this standard in the FEIS or Findings Statement.

91. Moreover, even the federal lead dust hazard standard is badly out of date. On August 10, 2009, three nonprofit organizations petitioned the USEPA to take action to modernize its regulatory lead hazard standard for lead in dust deposition (and its definition of lead-based paint). Specifically, petitioners proposed that USEPA should lower dust lead hazard standards as set out in 40 CFR §§745.65(b), 745.227(e)(8)(viii), and 745.227(h)(3)(i) from 40 micrograms of lead per square foot of surface area (µg/ft$^2$) to 10 µg/ft$^2$ or less for floors and from 250 µg/ft$^2$ to 100 µg /ft$^2$ or less for window sills. See Exhibit 20, Lead Standards Petition. The USEPA granted their petition to review its standard in a letter to them dated October 22, 2009. In that

letter, the USEPA itself acknowledged that the USEPA lead dust hazard standards are outdated, stating:

> Lead poisoning prevention is a priority for EPA. More recent epidemiological studies indicate that the current hazard standards may not be sufficiently protective. The Agency believes that its efforts should be based on current science. Thus after careful consideration, EPA has decided to grant your request and intends to begin an appropriate proceeding. Although EPA has granted your request, the Agency is not committing to a specific rule-making outcome including the specific level of the lead-dust hazard standard-or to a certain date for promulgation of a final rule.

See Exhibit 21, USEPA Response to Lead Standards Petition. Upon information and belief, no final decision on this petition has been issued.

92. Despite the absence of updated applicable standards and the mandate to protect children from lead dust exposure, Respondent NYSDOH failed to adopt measures to contain the lead dust on site and prevent migration, relying instead on measures that would allow some migration of dust, which would be monitored to a limited extent, using inadequate standards.

***Mischaracterization of Other Contamination Hazards***

93. Respondent NYSDOH similarly misconceived or mischaracterized the risks posed by other contaminants at the site, noting only that several volatile and semi-volatile organic compounds, metals and pesticides were "detected in exceedance of conservative NYSDEC Subpart 375 Unrestricted Use Soil Cleanup Objectives, which assume long-term exposure to unpaved soils, and stating, "In reality, long-term exposure to existing soils does not currently occur and would not occur with the anticipated use of the Project Site in which all existing soil not removed by excavation would be beneath a building, paving or new imported soils used for landscaping." It noted further that certain semi-volatile organic compounds ("SVOCs") and metals (including arsenic, barium, lead and mercury) exceeded even the less strict Restricted Residential Use Soil Cleanup Objectives. See Exhibit 1, Findings Statement, pp. 12-13. Again,

the issue is not that children and adults will be coming to the site, but rather that dust from the digging and dislodging of contaminated soil will be coming to the children and adults.

***Complacent and Inadequate Characterization of Risk from Toxic Substances at the Proposed Site***

94. NYSDOH repeated multiple times throughout the FEIS and Findings Statement that the level of contamination in soil samples were "consistent with those typically found in the types of fill material encountered in the borings" (see Exhibit 1, Findings Statement, pp. 12 and 19), or that the project includes "widespread historical fill materials (with lead levels typical of those found in such materials)" (see FEIS, p. S-11) – statements that appear to be designed to pacify concern but in fact have no probative value. The fact that a level of contamination in soil is found in multiple places makes the contaminated dust risk no less hazardous when the soil is dislodged. Moreover, NYSDOH failed to require sufficient testing to characterize the nature of the contamination, including the non-homogenous "historic fill," at the site. See Bartlett Afd. ¶12 and Simon Afd. ¶35.

95. Similarly, the statement that "lead remains ubiquitous in the urban environment" has no probative value for the question of health risk to the very nearby sensitive receptors for this Proposed Project, any more than a statement that cigarette smoke used to be ubiquitous in public places as well as homes would have any probative value for the question of health risk.

***Analysis of the Potential Impacts of Dust as a Respiratory Irritant***

96. In addition to the initial soil removal activity, construction will require digging into the bedrock to establish the foundation for the building. This will produce a significant amount of dust, and additional dust can occur from loading of the soil and rubble for removal from the site,

and the project construction, yet the FEIS fails to provide adequate analysis of this respiratory risk. See Simon Afd. ¶21.

97. Letters and testimony from the public raised concerns about the impact of the Proposed Project construction on people with respiratory conditions. Yet neither the FEIS nor the Findings Statement included any discussion of the prevalence of respiratory diseases, such as asthma, in the very local community. Most of the Petitioners have pre-existing heart or lung disease, which makes them more vulnerable to dust particles. See Carpenter Afd. ¶14.

***Routes of Exposure to Lead Dust and other Dust and Pollution Hazards***

98. The FEIS failed to analyze fully the potential for construction to cause dispersal and deposition of hazardous substances in the nearby residences and local neighborhood.

99. While construction at any ordinary site can be a challenge, construction immediately adjacent to residences and other sensitive receptors requires special care when such excavation and construction can generate odors and contaminated dust.

100. The FEIS also did not analyze potential drift of lead-contaminated dust to sensitive nearby receptors, including the apartments of 784 Columbus Avenue and 788 Columbus Avenue; the apartments facing east at the large building complex at 765 Amsterdam Avenue; and the large apartment buildings directly across the street, 120-160 West 97$^{th}$ Street (also known as Stonehenge Village).

101. The FEIS did not analyze the worst case scenario of failure of dust controls during construction work resulting in deposition in surrounding buildings.

***Inadequacy of Measures to Avoid Harm from Dust, Contaminants and Odors***

102. The Findings Statement asserts that a "Construction Health and Safety Plan" and "Remedial Action Plan" have been prepared and would be implemented during the subsurface

disturbance, and asserts that "excavated soil would be handled and disposed of in accordance with applicable regulatory requirements." See Exhibit 1, Findings Statement, p. 14.

103. The "Health and Safety Plan," however, is an occupational safety plan designed to protect the health and safety of "field personnel" working at the Project Site itself through work practices, personal protective equipment and monitoring. It is not designed to protect the community. See, AKRF, Inc., "Jewish Home Lifecare – 125 West 97th Street: Health and Safety Plan," July 2013. In particular, see pp. A-5, § 2.6 [Air Monitoring], which states that its "purpose of the air monitoring program is to identify any exposure of the field personnel to potential environmental hazards."

104. While the Remedial Action Plan for the site requires installation of a vapor barrier around the proposed new building's cellar slab and sidewalls to prevent vapor intrusion of VOCs from the soil into the building (see Exhibit 1, Findings Statement, p 27), this measure is to protect the Respondent's proposed building and occupants, not the neighboring residents or other sensitive receptors. There is no plan to protect the local residents from VOC vapors released by soil disturbance, even though volatile toxics are even more mobile than dust and can more easily penetrate buildings. See Bartlett Afd. ¶13, Carpenter Afd. ¶13 and Matystik Afd. ¶4.

105. The Findings Statement asserts that impacts from disturbance of contaminated soil "would be avoided by implementing the various measures identified under '*Construction Impact Avoidance Measures*' below." See Exhibit 1, Findings Statement, p. 20. It asserts that, "Precautionary measures required by the NYSDOH- and NYSDEC-approved RAP/CHASP, such as wetting exposed soils to reduce the generation of dust and covering soil stockpiles and haul trucks, would control and limit the potential for airborne exposure to dust and lead. The associated respirable dust monitoring would ensure that the level of lead would not violate the

NAAQS. With the implementation of the construction procedures described in '*Construction Impact Avoidance Measures'* above and with the air monitoring and dust control requirements set out in the May 2010 NYSDEC DER-10…during soil disturbance, it is concluded that the Proposed Project would not result in any significant adverse impacts from dust or lead on public health." See Exhibit 1, Findings Statement, p. 33. But this is not sufficient to prevent health risks.

106. The mere promise to "wet exposed soils and "cover" soil stockpiles and truck beds (*see* Exhibit 1, Findings Statement, p. 33) does not establish that the dust will be contained. A wetting process may miss some soil. Soil that is wetted may dry. Departing vehicle wheels may track and kick up dust. Covers for trucks removing the soil and debris may slip or rip. See Bartlett Afd. ¶10, Simon Afd. ¶17, Carpenter Afd. ¶18.

107. And compliance with these protocols may not be consistent. There is no discussion of whether or not an independent environmental monitor will be hired to report to the NYSDOH and the community on compliance, nor is it clear what measures will be taken if noncompliance occurs. See Carpenter Afd., ¶20.

108. Additionally, the planned perimeter air monitoring is based on a 15-minute averaged ambient air standard that does not apply directly to localized dust deposition hazards, and it monitors particles for size but not for toxicity. See Bartlett Afd. ¶14.

109. NYSDOH failed to adopt a recommendation by the Environmental Technology Group, Inc., submitted on behalf of Friends of P.S. 163 as commentary on the DEIS, that "an enclosed area tent should be utilized during excavation to prevent any particles and odors from emanating from the site." See Exhibit 22, Environmental Technology Group Report. See Bartlett Afd. ¶9.

**D. The FEIS's Inadequate Analysis of Public Health and Safety Risks from Traffic**

110. Nursing home projects must be designed with traffic safety in mind. 10 NYCRR § 711.3 requires a nursing home to provide paved roads within the lot lines to provide access to the main entrance, emergency entrance, entrances serving community activities and service entrances, including loading and unloading docks for delivery trucks, and access to the emergency entrance that does not conflict with other vehicular traffic and pedestrian traffic. This provision helps to prevent nursing home traffic from causing safety risks and troublesome traffic congestion in its host community.

111. Robert Chamberlin, Senior Director of RSG, acting as a consultant to the Coalition for a Livable West Side regarding traffic issues for this project, concluded that the proposed congestion mitigation would be "ineffective" and that "significant adverse traffic impacts" would persist at West 97th Street/Columbus Avenue, and that, with the likelihood of peak hour queuing, access to the proposed JHL project driveway for emergency services would be "severely compromised during critical travel periods." See Exhibit 23, Letter from Robert Chamberlin, RSG.

112. The FEIS and Findings Statement fail to analyze adequately the impact of the project on Park West Drive. Under the Proposed Project, the semi-circular ("turnaround") driveway at the rear of the facility for visitors, patients, ambulances, and taxis will depend for entrance and exit on an off-site "Park West Village Private Driveway," a north-south access lane within the Park West Village complex that was modified in the summer of 2014. Park West Drive would continue to function as a discontinuous, two-way access lane, with signage prohibiting JHL traffic from existing Park West Drive at West 100th Street so that all traffic exiting from the nursing home would be directed onto West 97th Street. See Exhibit 1, Findings Statement, p. 3**.**

A public comment letter explained to NYSDOH that this "Private Driveway" is the sole access for a 16-story apartment at 784 Columbus Avenue, and the area of that private driveway targeted to serve as the entrance to the proposed turnaround driveway is marked as a "Fire Zone." The letter warned that the private driveway will be congested with two-way traffic involving passenger discharges, creating traffic backup that will impair emergency vehicle access to the residential complex. See Exhibit 4, Stakeholders Letter of Comment. This concern is reiterated by a traffic consulting firm, EPDSCO, Inc., which noted that "queuing and double parking" already occur "throughout the day along West 97th Street and the access point to Park West Drive gets blocked" and, similar to the Chamberlin report, raised concern about the impact on "ambulette and emergency vehicles." See Exhibit 24, EPDSCO, Inc., Comments on Final Scoping Work Document, pp. 3-4. Yet Respondent NYSDOH's Findings Statement fails to fully analyze and address the impact on Park West Drive. See Exhibit 1, Findings Statement, pp 15-16.

113. The FEIS and Findings Statement do not sufficiently address the risk to pedestrians within the one-block section of West 97th Street from increased traffic related to the construction and operation of the Proposed Project. An analysis of transportation conditions on that one-block section of West 97th Street, conducted by Resource Systems Group, found that West 97th Street has a significant amount of pedestrian activity due to the residential and mixed-use density of the neighborhood and the existing public elementary school. The prevalence of children among the pedestrians in the area is of particular concern. During the busiest times of day, this would create a problem for vehicles trying to enter the JHL site during these times, as well as cause traffic congestion for neighbors. See Exhibit 23, Letter from Robert Chamberlin, RSG. The Findings Statement states that construction activities would occur during school hours,

typically from 7:00 a.m. to 3:30 p.m. on weekdays (see Exhibit 1, Findings Statement, p. 24), when school-related traffic also will be occurring.

114. Mitigation of the impacts of increased vehicular traffic on pedestrian safety at crosswalks appears to be dependent upon action by another agency. The NYSDOH acknowledges that the intersection of West 97th Street and Columbus Avenue already meets the criteria for a high pedestrian/'bicycle crash location based on accident data covering the period from January 2011 through December 2013, and that the Proposed Project would increase vehicular activity there during the weekday morning, weekday midday, and weekday evening peak hours. NYSDOH, however, merely refers to proposed safety improvements for the intersection such as extending the Leading Pedestrian Interval across Columbus Avenue, installing "turning Vehicles Yield to pedestrians" and "Signal Ahead" signage, and comments speculatively that, "NYCDOT could implement some or all elements of these measures to further improve bicycle and pedestrian safety at this location." See Exhibit 1, Findings Statement, p. 16. There is no discussion of an alternative plan to mitigate these impacts if the City agency's action is delayed or does not occur.

115. Mitigation of the impacts of increased vehicular traffic appears to be dependent upon action by another agency. The NYSDOH found that significant adverse traffic impacts from increased vehicle trips generated by the operation of the completed facility would occur at two intersections – the signalized intersections of West 97th Street and Amsterdam Avenue and at West 97th Street and Columbus Avenue – during weekday morning, weekday midday, and weekday evening peak hours, respectively. While it asserts that these impacts "could be fully mitigated with standard mitigation measures, such as signal retiming and phasing changes," it acknowledges that these measures "would be subject to the review and approval by the New York City Department of Transportation." See Exhibit 1, Findings Statement, p. 15. There is

no discussion of an alternative plan to mitigate these impacts if the City agency's action is delayed or does not occur.

**E. The FEIS's Inadequate Mitigation of Noise and Vibrations**

116. The Findings Statement states, "The most significant construction noise sources are expected to be the operation of pile driver, tower crane, pavement breakers, and concrete pumps, as well as movements of trucks to and from the Project Site." See Exhibit 1, Findings Statement, p. 22.

117. Public testimony raised concern about the pile driving and other activity on the site, as well as the sounds of dump trucks taking out dirt and rock, and trucks delivering cement, steel beams and other construction materials. While the Findings Statement reasonably states that the noise levels expected "would be comparable to those from any typical construction site in New York City involving construction of a new building with concrete slab floors and foundation," see Exhibit 1, p. 24, testimony pointed out the very close proximity of this site to young students and residences. The Mount Sinai Children's Environmental Health Center, for example urged that timing of the noisiest activities should be scheduled to reduce adverse impacts on students. See Exhibit 25, Letter from Mount Sinai Children's Environmental Health Center.

118. The Findings Statement acknowledges that, "the east and south facades of the immediately adjacent P.S. 163 would experience noise levels that exceed *CEQR Technical Manual* noise level impact criteria during some construction activities. Construction noise levels would exceed the *CEQR Technical Manual* noise level impact criteria at certain times during the excavation and foundation activities (3 months), superstructure construction (6 months), and when two construction stages overlap, each of which would last for a limited duration (2 months

for exterior façade construction/interior fit-out activities and 3 months for interior fit-out activities/site work)." See Exhibit 1, Findings Statement, p. 23.

119. The Findings Statement states that while residential buildings with double-glazed windows and air-conditioning will generally experience interior predicted noise values less than 45 dBA (which are deemed acceptable by the *CEQR Technical Manual*), "during some limited time periods construction activities may result in interior noise levels that would be above the 45 dBA $L_{10(1)}$ noise level recommended by the *CEQR Technical Manual* for these uses." Also, it finds that two buildings – 784 Columbus Avenue and 122 West 97th Street – have outdoor balconies that would be expected to experience absolute noise levels up to 87.7 dBA, which would not be mitigated. It observes that the noise level increments at these balconies would be highest during excavation/foundation activities (two months), superstructure construction (six months), and when two construction stages overlap, each of which would last only for a limited duration (two months for exterior façade construction/interior fit-out activities and three months for interior fit-out activities/site work). See Exhibit 1, Findings Statement, pp. 28 and 32. Moreover, the Findings Statement did not discuss whether or not air conditioning would be used year-round.

**F. Failure of FEIS to Conduct an Adequate Alternatives Analysis**

120. The FEIS failed to give a hard look at an alternative under which Respondent JHL's existing facility would be renovated rather than a new facility constructed. In its balancing of considerations regarding feasible alternatives, the NYSDOH should have given a hard look to this feasible alternative to the Proposed Project, especially given that the Proposed Project is an undesirable approach for achieving the public goal of a safe, efficient nursing home that is also a "good neighbor" in the community.

121. Respondent JHL admitted in its proposed Certificate of Need, Project # 121075-C, submitted February 8, 2012, that its existing facility had 99 percent utilization for 2008, 2009 and 2010, even though the average utilization for New York County was 96.5 percent to 96.9 percent during this period, and the average utilization for the region was 94.5 percent to 94.8 percent during this period. Exhibit 26, JHL Certificate of Need application, Executive Summary, pp. 1 and 3). A letter of comment pointed out that the existing facility has substantially more "frontage" (estimating that the frontage for the proposed site is 60 percent smaller) for managing vehicular traffic. See Exhibit 4, Stakeholders Letter of Comment, p. 2.

122. While the FEIS and Findings Statement accept JHL's conclusory assertion that the existing buildings "are at the end of their useful life and operate at approximately 65 percent efficiency," see Exhibit 1, Findings Statement, p. 8, the FEIS fails to explain how the facility could accommodate 99 percent utilization in 2010 while operating at 65 percent efficiency by early 2012. Moreover, it offers no evidence of the buildings' "useful life" other than an assertion that the buildings reportedly were constructed "between 1898 and 1964." See Exhibit 1, Findings Statement, p. 8.

123. The FEIS and Findings Statement state that the existing buildings would "require major infrastructure replacement" to make them more efficient and more capable of fostering independence, see Exhibit 1, Findings Statement, p. 8, but fail to establish that such renovation is not a feasible and prudent alternative.

124. The FEIS failed to take a hard look at the alternative of constructing a new facility or facilities on the existing West 106$^{th}$ Street site. The Findings statement acknowledges that JHL had considered a project to redevelop its existing property with a new nursing care facility on the western portion of the site and a new residential development on the eastern portion. The new

nursing facility would have been limited to 10 stories, pursuant to the zoning restrictions for the site, and would have accommodated only 303 beds, 27 percent less than the 414-bed Proposed Project. See Exhibit 1, Findings Statement, p. 36. Nevertheless, information in the record indicates that NYSDOH approved JHL's application on Sept 2, 2008 to replace its existing facility on West 106th Street with a new facility that would contain small-scale households of 18 to 16 residents, and that its 2006 Certificate of Need Application had stated, "The project is designed to apply the best practices from the 'Greenhouse' model and other innovative models which will provide significant improvements in the quality of life of the residents." See Exhibit 4, Stakeholders Letter of Comment, p. 10. Information in the record indicates that this approved plan was the subject of three agreements -- an executed Memorandum of Agreement, an executed Memorandum of Understanding, and a negotiated Declaration of Development Covenants and Restrictions. Community Board 7 signed all three agreements, and that Respondent JHL received a zoning "carve-out" from the City of New York to allow a developer to build residential housing on part of the site. See Exhibit 4, Stakeholders Letter of Comment, p. 10. The FEIS asserts that the construction of residential development on the existing nursing home site would be required to "enable the applicant to raise the capital necessary to support the redevelopment of the JHL facility under this alternative." See Exhibit 1, Findings Statement, p. 37. It states in a conclusory fashion that "In order to facilitate construction of the new nursing care facility and the new residential development on the West 106th Street site, JHL would need to reduce the number of nursing home residents to 328, so that only a portion of the existing facility would be occupied." See Exhibit 1, Findings Statement, p. 37.

125. The FEIS failed to take a hard look at the alternative of constructing the new facility at a different location despite the fact that this particular proposed site contains soil significantly

contaminated by one or more brain-damaging chemicals and is located adjacent to, and in exceptionally close proximity to children and adults. While the applicant has an "option" to purchase the proposed site, it does not yet own the site, and the contamination and proximity issues associated with this site merit an alternatives analysis. The Scoping Document contains the statement that "the selection of additional sites not under the control of JHL is outside the scope of this environmental review" (see Scoping Document p. 39), but this is not a correct statement of SEQRA requirements. While NYSDEC regulations do allow the agency to exercise its discretion to limit its consideration of alternative sites to parcels under the applicant's control, stating, "Site alternatives may be limited to parcels owned by, or under option to, a private project sponsor," 6 NYCRR §617.9(b)5)(v), the operative word is "may," not "must." In this case the proposed site is not owned by the applicant. NYSDEC's guidance manual states that "Examples of situations where a discussion of alternative sites for a proposed action would be reasonable include … [a]ny case where the suitability of the site for the type of action proposed is a critical issue, in which case a conceptual discussion of siting should be required." See Exhibit 8, NYSDEC, *The SEQR handbook*, p. 124-125. Such is certainly the case here.

126. The Proposed Project is not a prudent alternative because of access and egress challenges. Respondent JHL asserts that this project would be designed to establish two small household environments, containing 12 beds each, on each floor from floors 9 to 19. Each of these floors would contain two sets of cooking and laundry appliances – stoves, dishwashers, clothes washers and dryers. See Exhibit 1, Findings Statement, pp. 2-3. The placement of these units on floors 9 to 19 would present access and egress challenges for elderly and mobility impaired residents, given the time involved in reaching the ground. These access and egress challenges also would make emergency evacuation difficult in the event of a fire or other danger. See, Exhibit 27,

Comments by Catherine Unsino, LCSW, on Draft Scoping Statement; Exhibit 28, Comments by Cynthia Rudder, Ph.D., founder of the Long Term Care Community Coalition; and Exhibit 29, Comments of Amy Paul, former Executive director of FRIA (friends and Relatives of Institutionalized Aged).

127. The Proposed Project is not a prudent alternative because, while renovation of the existing facility would leave longer corridors which "would result in greater inefficiencies for providing services to the residents and would hamper the independence of the residents" (see Exhibit 1, Findings Statement, p. 38), the 20-story Proposed Project would involve long elevator rides to reach the ground, making it challenging for residents to gather and congregate in floor level common space or access the community. See Exhibit 27, comment by Catherine Unsino, LCSW, on Draft Scoping Statement; Exhibit 28, Comments by Cynthia Rudder, Ph.D., founder of the Long Term Care Community Coalition; and Exhibit 29, Comments of Amy Paul, former Executive director of FRIA (friends and Relatives of Institutionalized Aged).

128. The Proposed Project is not a prudent alternative because it provides no plan for the replacement of the adult day care facility (see Scoping Document, p. 5 and Matystik Afd. ¶9), and also will result in a decertification of 100 beds. See Exhibit 26, JHL Certificate of Need application, Executive Summary, pp. 1 and 3, and Exhibit 1, Findings Statement, p. 1. While some areas of New York State are predicted to have a "glut" of unoccupied nursing home beds, this is not the case for New York County. See Exhibit 27, Comments of Catherine Unsino, LCSW, on Draft Scoping Statement, p. 20.

129. The Proposed Project is not a prudent alternative because it would result in fewer jobs than the existing facility provides. The new project would employ approximately 625 full-time-equivalent employees, compared with 760 jobs at the existing facility. See Exhibit 30,

Respondent JHL's CEQR Environmental Assessment Statement Full Form excerpt: Appendix B, Technical Memorandum, p. 1. See also Exhibit 1, Findings Statement, p. 3.

**G. Respondent NYSDOH's Failure to Exercise Independent Critical Judgment as Lead Agency Under SEQRA**

130. In relying on outdated standards and guidelines set by other agencies; standards and guidelines that were not directly applicable to the local conditions of this Proposed Project; and statements regarding environmental risk by an environmental agency that were not directly applicable to the human health risk from dust exposure at issue, Respondent NYSDOH failed to exercise its independent critical judgment as lead agency.

131. Respondent NYSDOH, in relying on conclusory assertions by the applicant with regard to environmental effects, mitigation actions and the availability of alternatives, failed to exercise its independent critical judgment as lead agency.

**THE REVIEW OF THE CERTIFICATE OF NEED**

132. This facility is operated pursuant to Article 28. A facility subject to Article 28 is required to submit a Certificate of Need application and obtain approval from the New York State Department of Health or the Public Health and Health Planning Council prior to, among other actions, establishing and/or constructing new facilities or renovations of existing facilities or adding or deleting services. Certificate of Need applications are reviewed in light of, among other factors, public need, financial feasibility, and construction. See 10 NYCRR § 710.2(b) and (c).

133. With regard to the criterion of "construction," the Proposed Project presents many construction risks that are specific to this particular location and project design, including the risk of dispersion and exposure to contaminated soil and dust from the site, the risk posed by

respiratory irritants from the site, and the noise and traffic impacts on very nearby sensitive receptors such as the residences of the Petitioners.

**CAUSE OF ACTION PURSUANT TO SEQRA, PART 617 AND 6 NYCRR § 97**

134. Petitioners repeat and reallege, as if set forth fully herein, the allegations contained in paragraphs 1 through 133 herein.

135. By reason of the foregoing, the NYSDOH failed to follow the procedural requirements of SEQRA.

136. By reason of the foregoing, the NYSDOH failed to identify relevant areas of environmental consideration in its FEIS and Findings Statement.

137. By reason of the foregoing, the NYSDOH failed to take a "hard look" at the areas of environmental consideration in its FEIS and Findings Statement.

138. By reason of the foregoing, the NYSDOH failed to present a "reasoned elaboration" for its conclusions regarding the areas of environmental impacts and decisions regarding mitigation measures and feasible and prudent alternatives.

139. By reason of the foregoing, the NYSDOH's determination that the mandates of the SEQRA process were met and that NYSDOH had demonstrated that adverse environmental effects of the Proposed Project would be avoided or minimized was in violation of SEQRA and was arbitrary and capricious, and an abuse of discretion.

140. By reason of the foregoing, the NYSDOH's issuance of the Findings Statement and approval of the FEIS for the Proposed Project was in violation of SEQRA, is null and void, and should be set aside.

141. Construction has not yet begun on the project. Petitioners reserve the right to seek an injunction during the pendency of this proceeding to prevent JHL from moving forward with their work that would result in irreparable harm. Petitioners have a likelihood of prevailing on the merits of this proceeding and a balancing of the equities favors the granting of an injunction.

**NO PRIOR APPLICATION**

142. No prior application for the relief sought herein has been made in this Court on behalf of residents. A related case has been filed on behalf of elementary school students at P.S. 163 and school-related organizations, *In the Matter of the Applications of The Friends of P.S. 163, Inc., et al., vs. Jewish Home Lifecare, Manhattan, New York, State Department of Health, 156 W. 106th Street Holding Corp., 102 W. 107th Street Corp. & PWV Owner, LLC,* Index no. 100546/15. In addition, an administrative appeal is pending before the board of Standards and Appeal from a decision of the New York City Buildings Department denying a challenge to the amount of open space on the zoning lot upon which Respondent JHL proposes to construct the proposed Project (alleging that the Proposed Project would cause a lack of sufficient open space for the zoning lot and arguing that an amendment to the New York City Zoning Resolution would preclude the inclusion of certain rooftop gardens, based on limited accessibility, from the open space calculation). On information and belief, that appeal is scheduled to be presented at a hearing of the Board of Standards and Appel on Tuesday, April 14, 2015 (*In the Matter of 125 West 97th Street, Manhattan*, Calendar No. 320-14-1.)

WHEREFORE, Petitioners request that this Court issue a judgment:

(1) Annulling and vacating the approval granted for the FEIS and the environmental quality review findings made by the New York State Department of Health for the Proposed Project;

(2) Declaring the approval granted for the FEIS and the environmental quality review findings made by the New York State Department of Health to be in violation of SEQRA, part 617, and 6 NYCRR § 97;

(3) Enjoining Respondent New York State Department of Health from granting any approvals for the Proposed Project until it has complied with the requirements of SEQRA, Part 617, and 6 NYCRR § 97;

(4) Awarding Petitioners the costs and disbursements of this action pursuant to CPLR 8601(a); and

(5) Granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
April 8, 2015

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Attorney for Petitioner

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| SUPREME COURT OF THE STATE OF NEW YORK<br>COUNTY OF NEW YORK | : | |
| In the Matter of the Application of DAISY WRIGHT, NATHANIEL ROBERT LIVINGSTON by his parent Daisy Wright, OLIVER WRIGHT LIVINGSTON by his parent Daisy Wright, ELIZABETH WRIGHT, BERNIE WRIGHT by his parent Elizabeth Wright, VIVIAN DEE, SONIA GARCIA, JOAN HEITNER, PATRICIA LOFTMAN, LILLIAN PRYOR, EILEEN SALZIG, VALERIA SPANN and WALTER REINHARDT,<br>Petitioners,<br><br>For Judgment pursuant to CPLR Article 78<br><br>—against—<br><br>NEW YORK STATE DEPARTMENT OF HEALTH, HOWARD ZUCKER, as Acting Commissioner of the NEW YORK STATE DEPARTMENT OF HEALTH, JEWISH HOME LIFECARE, MANHATTAN, PWV OWNER, LLC, 156 W. 106th STREET HOLDING CORPORATION, and 102 W. 107TH STREET CORPORATION<br>Respondents. | : | Index No. _____<br><br>RJI No. _____ |

**MEMORANDUM OF LAW**
**IN SUPPORT OF VERIFIED ARTICLE 78 PETITION**

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## INTRODUCTION

Petitioners Daisy Wright, Nathaniel Robert Livingston, Oliver Wright Livingston, Elizabeth Wright, Bernie Wright, Vivian Dee, Sonia Garcia, Joan Heitner, Patricia Loftman, Lillian Pryor, Eileen Salzig, Valeria Spann and Walter Reinhardt (hereinafter, collectively "Petitioners"), respectfully submit this memorandum of law in support of their Verified Article 78 CPLR Petition challenging the December 10, 2014 determination by the New York State Department of Health ("NYSDOH") approving a massive multi-year construction project by Respondent Jewish Home Lifecare ("JHL") at a contaminated site, with significant traffic and noise issues, in close proximity to their residences. Respondent NYSDOH has approved and issued a Findings Statement for a Final Environmental Impact Statement ("FEIS"), under the New York State Environmental Quality Review Act ("SEQRA"), pursuant to JHL's Certificate of Need application to construct a 20-story nursing home in a parking lot area at 125 West 97th Street between Amsterdam Avenue and Columbus Avenue ("the Proposed Project").

At issue in this Article 78 proceeding is NYSDOH's failure to take the requisite "hard look" at the potential effects upon the environment of any 'action' under SEQRA, including the release of respiratory irritants, contaminated dust and toxic substances, odors and other emissions from this contaminated site. The release of these emissions from the contaminated site during the length of operation of the proposed project into the environment will render the petitioners vulnerable to significant health risks owing to their residential proximity to the construction site. In making its determination, respondent NYSDOH failed to exercise independent critical judgment in its capacity as lead agency under SEQRA, and (1) failed to identify relevant areas of environmental concern, (2) take a hard look at potential effects and (3) require mitigation measures or the use of feasible alternatives to minimize the potential adverse effects of the project to the fullest extent

practicable. Because NYSDOH made determinations that were arbitrary, capricious, an abuse of discretion and in violation of law, petitioners request that the NYSDOH's Findings Statement and FEIS be vacated and that NYSDOH be directed to comply with the requirements of SEQRA.

## BACKGROUND

### *The Proposed Project*

On or about February 8, 2012, Respondent JHL filed an application for a Certificate of Need for a "Replacement Nursing Facility Project" ("Proposed Project") to construct a 20-story facility with one cellar-level story and a mechanical story at 125 West 97th Street, located between Amsterdam Avenue and Columbus Avenue next to public elementary school P.S. 163 (Alfred E. Smith School), to establish a nursing home. Several residential buildings are adjacent to or in close proximity to the proposed site. Petition ¶ ¶ 28 and 30. The Proposed Project site, 125 West 97th Street, has served as a surface accessory parking lot since 1976, and was occupied by several dwellings prior to that at least until 1951. Petition ¶ 31.

Respondent JHL has stated that, after construction of the new facility, it would close its current nursing facility located at 12 West 106th Street in Manhattan, but the adult daycare facility currently located at 12 West 106th Street would not be moved to the Proposed Project site and no plans were stated to relocate those functions. Petition ¶ ¶ 29 and 32. Respondent JHL's application was filed after the facility had abandoned prior plans to build a facility on West 100th Street and to rebuild its existing facility on West 106th Street. Petition ¶ 32.

### *Contaminant levels found at the site*

Respondent JHL's consultant AKRF, Inc, conducted a "Phase II investigation" of soil contamination at the site. This consisted of only eight soil borings, taken only "within the proposed cellar footprint," along with "grab soil samples" that were "collected from the top six

inches of on-site tree pits." The total of 38 soil samples generated thus came only from these eight soil borings and the tree pits, and was confined to the building footprint. Petition ¶ ¶ 68-69.

The results were compared to a set of health-based soil cleanup guidelines that, explained below, are out of date. These guidelines – termed "soil cleanup objectives" ("SCOs") – were adopted by the New York State Department of Environmental Conservation ("NYSDEC"), in consultation with the NYSDOH, to determine whether or not soil must be cleaned up at a site. The NYSDEC has established "Unrestricted SCO's" for which there are no restrictions on use; "Residential SCOs" for single family housing but with some restrictions on use; "Restricted Residential SCO's" for which no single family housing or vegetable gardens are allowed (although NYSDEC may allow community vegetable gardens under certain conditions); and commercial SCOs with strict controls to limit possible exposures. Petition ¶ ¶ 64-65.

Lead (also known as "Pb"), a toxic metal, was found in all of the 38 soil samples taken at the site by Respondent JHL's consultant, AKRF, Inc. its "Phase II investigation." The lead-in-soil is measured in milligrams per kilogram ("mg/kg"). Of these soil samples, 24 samples exceeded the Unrestricted SCO for lead (which is 63 mg/kg) and 10 were at or exceeded the Restricted Residential SCO of 400 mg/kg. Of those 10, three exceeded 1,000 mg/kg, having levels of 1110 mg/kg, 1830 mg/kg and 3850 mg/kg. Petition ¶ 71.

Lead (Pb) is toxic to both children and adults. Dr. John Rosen, who directed the Multi-disciplinary Lead Program at the Albert Einstein College of Medicine, reported in a letter submitted to Respondent NYSDOH that lead can cause adverse health effects in children under six years old – including cognitive impairments, neurobehavioral disturbances, loss of IQ points and ADHD -- at blood lead levels greater than 4 micrograms per deciliter (µg/dl). He reported

that blood lead levels above 4 µg/dl are also associated with high blood pressure and cardiovascular disease in adult males and females (above the child bearing age). Petition ¶ 72.

Arsenic was found in 31 of the 38 soil samples. Eight samples had arsenic levels that ranged from 11.6 mg/kg to 69.4 mg/kg, while 23 samples had levels that ranged from 1.2 mg/kg to 8.5 mg/kg. The NYSDEC's unrestricted SCO for arsenic is 13 mg/kg, and the restricted residential SCO is 16 mg/kg. Five samples exceeded both the unrestricted and restricted residential SCOs for arsenic, and an additional sample exceeded the unrestricted SCO for arsenic but not the restricted residential SCO. Petition ¶ ¶ 73-74.

Arsenic is a highly toxic chemical. Toxicologist Stephen Lester reports that it can cause stomach pain, nausea, numbness in hands and feet and partial paralysis, and it has also been linked to cancer of the bladder, lungs, skin, kidney, nasal passages, liver and prostate. He reports that the federal USEPA's "risk-based screening level" for arsenic in soil, which is based on the standard one-in-a-million ($1 \times 10^2$) cancer risk, recently was set at 0.67 mg/kg, which is almost 20 times lower (more protective of human health) than the NYSDEC's unrestricted SCO for arsenic and 24 times lower/more protective than the NYSDEC's restricted residential SCO. He explains that NYSDEC set its standard based in part on the acknowledgment that soil typically contains some "background" levels of arsenic and that existing levels of arsenic in New York State range from 1.1 to 40.3 mg/kg with a median value of 7.6 mg/kg. Petition ¶ 74. See also Affidavit of toxicologist Stephen Lester.

The site was also the location of petroleum contamination. The Phase II investigation identified benzene, ethylbenzene, m&p-xylene, and o-xylene (BTEX) at concentrations that exceed the Unrestricted SCOs, although they are below the Restricted Residential SCOs. In compliance with the requirements of the New York State Department of Environmental

Conservation ("NYSDEC"), a remedial action plan for the petroleum contamination requires excavation of the soil to approximately 20 feet below grade in the spill area and over the majority of the site. Petition ¶ ¶ 76.

***The Petitioners***

All of the petitioners reside in apartments that are very close to, and directly face the site. Petitioner Daisy Wright has lived at 788 Columbus Avenue, which is approximately 60 feet from the proposed site, for 38 years. Petitioners Nathaniel Robert Livingston, her 11 year old son, and Petitioner Oliver Wright Livingston, her seven-year- old son also reside with her at this address, on the 15th floor. Petitioner Elizabeth Wright has lived at 788 Columbus Avenue, which approximately 60 feet from the proposed site, for 23 years, on the second floor, just above street level. Petitioner Elizabeth Wright has upper respiratory problems (bronchitis, scarring of left lung), and underwent chemotherapy and radiation for treatment of breast cancer in 2005. Petitioner Bernie Wright, Elizabeth Wright's 17-year-old son, resides with her and suffers from allergies and is very sensitive to pollution and dust. Petitioner Vivian Dee has lived at 788 Columbus Avenue, which is approximately 60 feet from the proposed site, on the eighth floor for 41 years. Ms. Dee has respiratory and heart health problems. Petitioner Sonia Garcia is a resident of 120 West 97$^{th}$ Street, approximately 103 feet from the proposed site, and has lived there, on the fourth floor, for 40 years. This resident has COPD, chronic lifetime asthma and allergies and heart induced pulmonary problems. Petitioner Joan Heitner is a resident of 784 Columbus Avenue on the 14$^{th}$ floor, since 1976, approximately 60 feet from the proposed site. Ms. Heitner has a physical disability, which has resulted in her being non-ambulatory and having to use a motorized wheelchair. Because of the modifications of her apartment required for her disability, she cannot relocate during this period. She presently has respiratory issues, including

allergies, sinusitis and pulmonary effusion. Petitioner Patricia Loftman is a resident of 788 Columbus Avenue, approximately 60 feet from the proposed site, on the 17th floor for 42 years. Ms. Loftman is an early breast cancer survivor who underwent a lumpectomy and radiation, and has completed five years cancer free, and does not want to be exposed to cancer-causing chemicals. Petitioner Lillian Pryor is a resident of 120 West 97th Street, which is approximately 103 feet from the proposed site, on the ninth floor. Ms. Pryor is a lifelong asthmatic and allergy sufferer. Petitioner Eileen Salzig is a resident of 784 Columbus Avenue, which is approximately 60 feet from the proposed site, and has lived on the 8th floor, for over 22 years. Ms. Salzig, who is a freelance writer whose apartment is both her working space and her living space, is very susceptible to bronchitis, which is easily triggered for her by repeated daily exposure to dust and diesel exhaust. Petitioner Valeria Spam is a resident of 765 Amsterdam Avenue, which is approximately 275 feet from the proposed site. Ms. Spann suffers from emphysema. Petitioner Walter Reinhardt is a resident of 784 Columbus Avenue, which is approximately 60 feet from the proposed site, on the 12th floor, for over 10 years. Mr. Reinhardt, who is an illustrator whose apartment is both his working space and living space, suffers from hypertension (high blood pressure). Petition ¶ ¶ 10-22.

***The Role of SEQRA and Its Requirements***

In enacting SEQRA, the New York State Legislature stated that its purpose was "to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; [and] to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources . . . ." N.Y. E.C.L. § 8-0101.

SEQRA declares that environmental protection as a matter of intergenerational consequence,[1] is a procedural bulwark against short-term, political or economic exigencies that may otherwise overwhelm environmental considerations in public decision-making.[2] SEQRA and the regulations promulgated thereunder mandate that "[n]o agency involved in an action shall carry out, fund or approve the action until it has complied with the provisions of SEQR[A]." 6 NYCRR § 617.3(a). Respondent NYSDOH is subject to both Part 617 and its own SEQRA regulations, at 10 N.Y.C.R.R. § 97. *See* 10 N.Y.C.R.R. § 97.1.

As noted by the Court of Appeals, "[t]he heart of SEQRA is the Environmental Impact Statement (EIS) process." *Matter of Jackson v. N.Y. Urban Dev. Corp.*, 67 N.Y.2d 400, 415 (1986) (citation omitted). Briefly, this process requires agencies to "determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact statement." 6 N.Y.C.R.R. § 617(c). The EIS must accurately and thoroughly describe the short term, long term, cumulative, and other associated impacts of a proposed action, as well as of the alternatives to that action (including the "no action" alternative). N.Y. E.C.L. §§ 8-0109(2)(a); 6 N.Y.C.R.R. §617.9(14)(f)(3); 10 N.Y.C.R.R. § 97.12(c).

SEQRA requires that an agency, before taking any action, take a "hard look" at the potential effects upon the environment of any such action. *See* 6 N.Y.C.R.R. § 617.2(b).

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[1] *See* ECL § 8-0103(8) (declaring "the intent of the legislature that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that *they have an obligation to protect the environment for the use and enjoyment of this and all future generations*") (emphasis added).

[2] *See* ECL § 8-0103(7) (declaring "the intent of the legislature that the protection and enhancement of the environment, human and community resources shall be given appropriate weight with social and economic considerations in public policy").

As the New York Court of Appeals has declared, an EIS must allow a decision maker to;

(1) identify the relevant areas of environmental concern;
(2) take a "hard look" at each of those areas; and
(3) provide a "reasoned elaboration" of the basis for its decision.

*See, e.g., Jackson v. New York State Urban Development Corp.*, 68 N.Y.2d400, 417, 503 N.Y.S.2d 298, 305 (1986). As explained herein, the FEIS at issue fails to meet this standard.

SEQRA commands agencies to implement the EIS process "to the fullest extent possible . . . in accordance with" the legislative goals of protecting and enhancing the environment. N.Y. E.C.L. § 8-0103(6). According to the Court of Appeals:

> The mandate that agencies implement SEQRA's procedural mechanisms to the "fullest extent possible" reflects the Legislature's view that the substance of SEQRA cannot be achieved without its procedure, and that departures from SEQRA's procedural mechanisms thwart the purposes of the statute. *Thus, it is clear that strict, not substantial, compliance is required.*
>
> Nor is strict compliance with SEQRA a meaningless hurdle. Rather, the requirement of strict compliance and attendant spectre of de novo environmental review insure that agencies will err on the side of meticulous care in their environmental review. Anything less than strict compliance, moreover, offers an incentive to cut corners and then cure defects only after protracted litigation, all at the ultimate expense of the environment.

*King v. Saratoga Cty. Bd. of Supervisors*, 89 N.Y.2d 341, 347–48 (1996) (emphasis added). The agency must find, with regard to the regulations, that "all requirements have been met." 6 N.Y.C.R.R. § 617.9(c)(2).

SEQRA requires the lead agency to analyze alternatives to the proposed project. The lead agency must find that, "consistent with social, economic and other essential considerations, from among the reasonable alternatives thereto, the action to be carried out, funded or approved

is one which minimizes or avoids adverse environmental effects to the maximum extent practicable, including those disclosed in the relevant environmental impact statement." 6 N.Y.C.R.R. §617.9(c)(3) and 10 N.Y.C.R.R. § 97.10(c)(2)(i). See N.Y. E.C.L. § 8-0109(2)(f) and 6 N.Y.C.R.R. §617(f)(7). The New York State Department of Environmental Conservation ("NYSDEC") advises that in a DEIS, "Reasonable alternatives for avoiding specific impacts, and further possible measures for mitigating additional potential impacts, must be discussed in the context of the specific impacts to which they are addressed." ). Petition ¶ 59. Similarly, Respondent NYSDOH's regulations state that NYSDOH must not approve an action until it has found that, "consistent with social, economic and other essential considerations from among the reasonable alternatives thereto, the action to be carried out or approved is one which minimizes or avoids adverse environmental effects to the maximum extent practicable, including the effects disclosed in the relevant environmental impact statement." 10 N.Y.C.R.R. § 97.10(c)(2)(i). It is notable that, while page 29 of the Scoping Document stated that the EIS would examine alternatives that achieve the goals of the project, the EIS must also consider the "no action" alternative of not going forward with the project. N.Y. E.C.L. §§ 8-0109(2)(a); 6 N.Y.C.R.R. §617.9(14)(f)(3); 10 N.Y.C.R.R. § 97.12(c).

With regard to cumulative impacts, the EIS must consider "changes in two or more elements of the environment, no one of which is substantial, but when taken together result in a material change in the environment" or "two or more related actions no one of which has or would have a significant effect on the environment, but which cumulatively meet one or more to the criteria in this section." 10 N.Y.C.R.R. §§ 97.13 (1) and (11). As guidance, the NYSDEC states that assessment of potential cumulative impacts should be done "the impacts of related or unrelated actions may be incrementally significant and the impacts themselves are related." ).

Petition ¶ 51. The *CEQR Technical Manual* explains that, "Cumulative impacts are two or more individual effects on the environment that, when taken together, are significant or that compound or increase other environmental effects." ). Petition ¶51. The EIS should also assess the likely consequence of an action "in connection with its setting (*i.e.*, urban or rural), its probability of occurring, its duration, its irreversibility, its controllability, its geographic scope and its magnitude (*i.e.*, degree of change or its absolute size)." 10 N.Y.C.R.R. §97.13(b).

Respondent DOH also is subject to its own requirements pursuant to the New York State Public Health Law (PHL). PHL section 206(2)(a) states that the Commissioner shall "take cognizance of the interests of health and life of the people of the state, and of all matters pertaining thereto and exercise the functions, powers and duties of the department prescribed by law." Further, PHL section 206(1)(d) states that the Commissioner shall "investigate the causes of disease, epidemics, the sources of mortality, and the effect of localities, employments and other conditions, upon the public health." Read together, these provisions make it clear that the Department of Health must take cognizance of potential health hazards related to site-specific contamination in the course of its duties and responsibilities, including addressing contaminated dust hazards in the context of a Certificate of Need determination.

***Summary of the SEQRA Procedural Steps Taken in this Case and Construction Plan***

The relevant facts regarding steps taken in the SEQRA review process in this case are set forth in the Verified Petition and are hereby incorporated by reference and filed jointly herewith. By way of summary, Respondent NYSDOH made the determination that an EIS would be required because the Proposed Project may have a significant environmental effect, declared itself to be the lead agency, and issued a draft "Scope of Work" for the EIS, on which a public meeting was held. A final "Scoping Document" was issued, and this was followed by issuance

of a Draft EIS ("DEIS"), on which hearings were held. In a parallel proceeding, on July 22, 2014, Supreme Court Justice Anil C. Singh granted an injunction against Respondent PWV Owner, LLC, from eliminating the existing outdoor parking at the 97th and 100th Street parking lots pending a determination of the remand to the New York State division of Housing and Community Renewal ("DHCR"). In the instant case, the DEIS and FEIS for the Project were prepared by a consultant or consultants hired and paid by Respondent JHL. While an EIS often is prepared by consultants hired by the applicant, the lead agency must review and approve drafts of the EIS and is ultimately responsible for ensuring that the EIS complies with SEQRA.

On November 14, 2014, Respondent NYSDOH issued the Final EIS ("FEIS") together with a Notice of Completion of Final Environmental Impact Statement for the Proposed Project, and on December 10, 2014, the NYSDOH issued a "State Environmental Quality Review Findings Statement" ("Findings statement") for the Proposed Project. Among the findings, NYSDOH stated that the Proposed Project would involve subsurface disturbance for the construction of the proposed new building and outdoor improvements. Soil that would be disturbed by the Proposed Project would include "widespread historical fill materials that contain elevated levels of lead, limited petroleum-contaminated soil…, and some soil exceeding the hazardous waste threshold for barium content." Petition ¶ ¶ 28-43.

In addition to approval of an EIS, the Proposed Project requires NYSDOH approval of a construction application and Certificate of Need pursuant to Section 2802 of the Public Health Law (for Project #121075-C). If approved, construction of the Proposed Project would be expected to begin in early 2015 and Respondent JHL asserts that it would last approximately 30 months. Respondent JHL predicted – and Respondent NYSDOH adopted these predictions in its FEIS – that excavation and foundation activities to accommodate the establishment of a cellar

floor and mechanical floor as well as foundation would reportedly begin in early 2015 and would take approximately three months to complete, followed by superstructure construction (from Month 4 to Month 9), exterior façade work (Month 10 to Month 14), interior fit-out work (beginning Month 13 for approximately 13 months), site work (beginning Month 22 for approximately 3 month)s, and commissioning (from Month 26 to Month 30). Petition ¶ ¶ 44-46.

## ARGUMENT

### THE NYSDOH'S ACTIONS FAILED TO COMPLY WITH SEQRA

### I. JUDICIAL REVIEW OF AGENCY DETERMINATIONS UNDER SEQRA

A lead agency's SEQRA and CEQR determinations are judicially reviewable in an Article 78 proceeding under "standards applicable to administrative proceedings generally: whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." *Jackson*, 67 N.Y.2d at 416 (quoting C.P.L.R. § 7803(3)) (internal quotation marks omitted). Courts have developed a well-established approach for reviewing agencies' SEQRA determinations: "courts must review the record to determine whether the agency [1] identified the relevant areas of environmental concern, [2] took a hard look at them, and [3] made a reasoned elaboration of the basis for its determination." *Matter of Chinese Staff and Workers' Assn. v. Burden*, 19 N.Y.3d 922, 924 (2012) (citation and internal quotation marks omitted). By holding agencies to this "hard look" and "reasoned elaboration" standard, courts ensure "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*." *Jackson*, 67 N.Y.2d at 417 (*emphasis added*).

Courts generally follow a contextual, common sense approach when applying the "hard look" and "reasoned elaboration" standard. *See Matter of Chinese Staff Workers' Assn. v. Burden*, 88 A.D.3d 425, 429 (1st Dep't 2011) (citing *Matter of Town of Henrietta v. Department of Envtl. Conservation of State of N.Y.*, 76 A.D.2d 215, 224 (4th Dep't 1980)) ("The reviewing court must employ reasonableness and common sense, tailoring the intensity of the 'hard look' to the complexity of the environmental problems actually existing in the project under consideration."), *aff'd* 19 N.Y.3d 922. *See also Jackson*, 67 N.Y.2d at 417 ("The degree of detail with which each factor must be discussed obviously will vary with the circumstances and nature of the proposal.") (*citation omitted*). In applying this approach, courts "may not substitute their judgment for that of the agency for it is not their role to weigh the desirability of any action or to choose among alternatives." *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990) (quoting *Jackson*, 67 N.Y.2d at 416) (*internal quotation marks and brackets omitted*).

It is well-established that "[a]n agency determination under SEQRA will . . . be set aside where the agency's review of the environmental impacts is unsupported by studies and data or is conclusory." *Develop Don't Destroy (Brooklyn) Inc. v. Empire State Dev. Corp.*, 33 Misc.3d 330, 346 (Sup. Ct. N.Y. County 2011) (citing *Tupper v. City of Syracuse*, 71 A.D.3d 1460 (4th Dep't 2010)), *lv denied* 74 A.D.3d 1880 (2010); *Matter of Baker v. Village of Elmsford*, 70 A.D.3d 181 (2d Dep't 2009); *Matter of Serdarevic v. Town of Goshen*, 39 A.D.3d 552 (2d Dep't 2007).

In the present case, in hearings and public comment periods, petitioners, members of the public and technical experts repeatedly expressed concerns about key environmental issues that were being improperly overlooked or inadequately analyzed. As lead agency, Respondent

NYSDOH violated both the spirit and letter of SEQRA by summarily dismissing these concerns without a rational basis, without gathering the information required to make a reasoned analysis, at times making reference to guidelines or standards that either were not applicable, not fully dispositive, or not up to date with current science, and without taking a "hard look" at the potential environmental effects of the Proposed Project.

While the Respondent NYSDOH may have an interest in facilitating the construction of a healthcare facility when it deems – correctly or incorrectly – that such a facility will promote its objectives for establishing the availability of a particular level and diversity of nursing home services, it cannot let its own interest, its working relationship with Respondent JHL as a nursing home provider, or any enthusiasm for a particular nursing home design, interfere with or weaken its pursuit of its legal duty to protect the health of children and adults as "sensitive receptors" in close proximity to this project, or their environmental quality through the SEQRA process. It must act as an independent governmental assessor of the facts and it must fully carry out its duty to adopt feasible alternatives to protect public health and the environment. NYSDOH also cannot delegate its SEQRA duties to the applicant, Respondent JHL, or to any other agency.

In this case, the approval process for the FEIS appears to have been driven by Respondent NYSDOH's desire to move the project forward, and it failed to act as a neutral agency applying vigorous scrutiny of the environmental effects of this project as required by SEQRA.

## II. Respondent NYSDOH Failed to Comply with SEQRA's Requirements With Regard to Issues of Dust, Contamination and Odors From the Project Site

The Proposed Project would require the disruption, excavation and removal of significantly contaminated soil, including contaminants such as lead, arsenic and barium as well as remediation of a petroleum spill, entailing dust, dirt and odor control issues. Respondent

NYSDOH failed to comply with the requirements of SEQRA in its analysis of these issues in the FEIS for this Proposed Project, having failed to analyze alternatives sufficiently or apply sufficiently protective measures to prevent harm from a project that should not be treated as a typical construction project, but rather as a project involving significant contamination issues and intrusion upon very close sensitive receptors.

## A. Failure to Identify Relevant Areas of Environmental Concern and Take a hard Look at the Potential Impacts

Respondent NYSDOH's cavalier attitude toward protection of the public from the site's toxic contaminants is particularly surprising given that one of those contaminants is lead (Pb). In addition to its mission to protect public health, NYSDOH has a special mandate to address lead poisoning. Public Health Law § 206(1)(n), which pertains to rule-making specific to lead poisoning, is contained in the Public Health Law's "general powers and duties" section, which indicates that childhood lead poisoning prevention is a high priority duty for the DOH. It requires the NYSDOH to take actions regarding lead in dwellings, testing for lead poisoning, and professional and public education as may be needed to protect public health against the hazards of lead poisoning. PHL § 206(1)(n). Respondent NYSDOH also was directly involved in the production of a report on lead poisoning prevention pursuant to an Executive Order issued by former Governor Paterson, which declared that it is "critical to prevent children from becoming lead poisoned in the first instance by avoiding their exposure to sources of lead poisoning to the extent possible." This Task Force report states, "Since there is no medical treatment that permanently reverses the neuro-developmental effects of lead exposure, primary prevention (taking action before a child is harmed) is critical to address the problem. Primary prevention marks an important augmentation of the traditional approach of responding to children who have already been poisoned." Petition ¶ ¶ 62-63.

1. **Reliance on out-of-date and inappropriate guidelines and misleading "average"-based calculations for soil contamination risks constitutes failure to identify effects and take a hard look at them**

Respondent NYSDOH's Findings Statement fails to identify and take a hard look at the environmental effects of the project because it relies upon an inadequate guideline to assess the risk from construction at the site. It asserts misleadingly that the lead (Pb) soil contamination test results do not meet the U.S. Environmental Protection Agency ("USEPA") 'soil-lead hazard' definition at 40 C.F.R. § 745.65(c), and also refers to NYSDEC soil cleanup guidelines, neither of which guidelines can serve as definitive measures of risk from this site.

Both of these guidelines are out of date. The NYSDEC soil cleanup guidelines were adopted in 2006 and the NYSDEC and NYSDOH failed to update them in 2011, as required by N.Y. E.C.L. §27-1415(6)(c), which requires the SCOs to be "updated every five years." The USEPA definition was promulgated in 2001, and the USEPA itself has acknowledged, in response to a petition to update the dust-lead hazard definition (for sampling lead-contaminated dust on surfaces) promulgated in the same year, that the 2001 dust lead hazard is out of date. Dr. John Rosen notes that the Centers for Disease Control ("CDC") and American Academy of Pediatrics currently find adverse health effects in both children under six years of age and adults at blood lead levels greater than 4 micrograms per deciliter (µg/dl). Petition ¶ ¶ 66 and 86.

Respondent NYSDOH also failed to take a hard look at the risks of from the site by reaching its conclusions based on an average of the sample results, not on the worst-case scenario of the high-end levels. NYSDOH admits that lead (Pb) levels in 3 of the 38 soil samples exceeded 1,000 mg/kg, and that the highest level reached 3,850 mg/kg. By averaging the sampling results, Respondent NYSDOH failed to take proper cognizance of the higher samples.

Further, Respondent NYSDOH failed to take a hard look at the risks from the site by failing to consider that, given the range of levels found at the site, the conditions were not homogenous. There was no reason to presume that the limited sampling conducted – only eight borings plus tree pit samples -- had identified the highest levels of contamination on the site.

Finally, the NYSDEC soil cleanup guidelines and the USEPA soil-lead hazard definition are used to measure risks from exposure to bare ground and leachate runoff, not migration of soil dust through the air to nearby residences due to disruption and excavation. NYSDOH's Findings Statement misconstrues statements in two NYSDEC letters about the site contamination, which stated that the site did not pose a significant threat to public health or the environment, and thus "no remediation of lead contamination is required." The first letter, signed by the NYSDEC Commissioner, very wrongly stated that only one soil sample from the site exceeds the unrestricted use soil cleanup objectives, and the second letter, signed by the NYCDEC's Regional Remediation Director, while citing accurate test data, made its statement from the perspective of what level of contamination can stay in the ground, rather than being excavated, at a commercial development – not what risks would be posed for nearby sensitive receptors from disrupting that ground. It bases its "no significant threat" conclusion on a comparison to Commercial Use SCOs, which do not assume children's exposure to soil, given that "commercial use is the appropriate use category for a health care facility." Petition ¶ ¶ 80-81.

The environmental risk posed by the Proposed Project is not a matter of remediation of otherwise intact soil. The Proposed Project is a plan to dig and dislodge in-place soil, which will release dust. The concern is not that children are coming to the former parking lot, but rather that dust from the former parking lot will come to the children, and adults as well.

References to results of testing samples using the USEPA's Toxicity Characteristic Leaching Procedure ("TCLP"), comparing the results to USEPA's toxic hazardous waste criteria for metals leaching from soil, are even more misleading. This test is designed to protect ground and surface water from metals leaching from soil under conditions typically found in landfills, to determine whether or not the material must be managed as "hazardous waste." As toxicologist Stephen Lester states, "These results say nothing about the public health risks posed by arsenic in soil. They are quite useless in a public health context." The residents will not drink the site's runoff water or groundwater. Petition ¶ 87. See also Affidavit of toxicologist Stephen Lester.

NYSDOH's reliance upon these inadequate guidelines to address the health risk from lead dust caused by this project was arbitrary, capricious and an abuse of discretion because the guidelines are seriously out of date with regard to health risks from lead (Pb), the use of averaging masks the higher levels of contamination, the amount of sampling done was not adequate to characterize the site, and state and federal guidelines for soil cleanup are not sufficient to address the potential risk of dust migration and deposition.

**2. Reliance on inappropriate and misleading calculations for air and dust impacts**

The NYSDOH also resorts to another inappropriate approach for analyzing the impacts from contaminated dust. It relies on a standard of limited applicability, the National Ambient Air Quality Standard ("NAAQS") for lead in the ambient atmosphere. It asserted that it would require air monitoring to ensure that inhalable dust levels stay below 150 $\mu g/m^3$, and that the dust control measures and inhalable dust monitoring "would be more than sufficient to ensure that the level of lead would not violate the NAAQS." This was based on its wrong assertion that airborne lead levels could be "estimated from the known proportion of lead present in the Project Site's soil" – which is not homogeneous and not adequately sampled. Also, the NAAQS

measures only airborne dust, not local accumulation of dust settling on surfaces that children and adults will touch. Moreover, the calculation of impact was based on an average of samples, which masks the higher levels of contaminants and risk of exceeding the NAAQS, and there is concern that the monitoring device will measure respirable dust particles but not larger particles to be dispersed from the site and settle on surfaces at neighboring properties. Petition ¶ 88-89.

Respondent NYSDOH completely ignored the only indoor environment standard designed to protect children from lead contamination. Federal regulations define a lead dust hazard in a child-occupied facility, under 40 C.F.R. §745.65(b), as surface dust "that contains a mass-per-area concentration of lead equal to or exceeding 40 µg/ft$^2$ on floors or 250 µg/ft$^2$ on interior window sills based on wipe samples." Given that this standard involves micrograms of lead dust on a square foot of floor or windowsill, it is clear that a very small amount of dust can poison a child. The NYSDOH is well aware of this standard, as its own website links to it. Yet there is no mention of this standard in the FEIS or Findings Statement. Petition ¶ 90.

The federal lead dust hazard standard, also, is badly out of date. In 2009, nonprofit organizations petitioned the USEPA to modernize its lead dust hazard standard. The petitioners asked that the dust lead hazard standards be lowered from 40 µg/ft$^2$ to 10 µg/ft$^2$ or less for floors and from 250 µg/ft$^2$ to 100 µg /ft$^2$ or less for window sills. The USEPA granted their petition on October 22, 2009, acknowledging that its lead dust hazard standards are outdated, stating:

> Lead poisoning prevention is a priority for EPA. More recent epidemiological studies indicate that the current hazard standards may not be sufficiently protective. The Agency believes that its efforts should be based on current science. Thus after careful consideration, EPA has decided to grant your request and intends to begin an appropriate proceeding. Although EPA has granted your request, the Agency is not committing to a specific rule-making outcome including the specific level of the lead-dust hazard standard-or to a certain date for promulgation of a final rule.

Petition ¶ 90.

### 3. Mischaracterization of other contamination hazards and failure to analyze risks of dust as a respiratory irritant

Respondent NYSDOH mischaracterized risks posed by other contaminants at the site, noting only that several volatile and semi-volatile organic compounds, metals and pesticides were "detected in exceedance of conservative NYSDEC Subpart 375 Unrestricted Use Soil Cleanup Objectives, which assume long-term exposure to unpaved soils." Petition ¶ 93. Respondent NYSDOH also stated that "in reality, long-term exposure to existing soils does not currently occur and would not occur with the anticipated use of the Project Site in which all existing soil not removed by excavation would be beneath a building, paving or new imported soils used for landscaping." Petition ¶ 93. But "in reality," again, the issue is not that children and adults will be coming to the site, but rather that dust from the digging and dislodging of contaminated soil will be coming to the children and adults.

In addition to the initial soil excavation, construction will require digging into the bedrock to establish the building foundation. This will produce a significant amount of dust. Dust also can be generated from loading the soil and rubble for removal from the site. Letters and public testimony raised concerns about the impacts on people with respiratory conditions. Yet neither the FEIS nor the Findings Statement included any discussion of the prevalence of respiratory diseases, such as asthma, in the very local community. Petition ¶¶ 96-97.

### 4. Respondent NYSDOH's complacent characterization of toxicity risks and failure to characterize the site fully indicate its failure to take a hard look at the issues

NYSDOH repeated multiple times throughout the FEIS and Findings Statement that the level of contamination in soil samples were "consistent with those typically found in the types of fill material encountered in the borings" or that the project includes "widespread historical fill materials (with lead levels typical of those found in such materials)" – statements that appear to

be designed to pacify concern but in fact have no probative value. The fact that a level of contamination in soil is found in multiple places makes the contaminated dust risk no less hazardous when the soil is dislodged. Similarly, the statement that "lead remains ubiquitous in the urban environment" has no probative value for the question of health risk to the very nearby sensitive receptors for this Proposed Project, any more than a statement that cigarette smoke used to be ubiquitous in public places as well as homes would have any probative value for the question of health risk. Petition ¶¶ 94-95.

Moreover, even as NYSDOH used the term "historic fill" to describe the contamination at the site, it failed to take the hard look required to consider the impact of contamination from such fill entering surrounding residences. The City of New York's *CEQR Technical Manual* defines historic fill as "elevated levels of hazardous materials in fill of unknown origin." Petition ¶ 70. Thus, this is an admission that the site could contain any number of types of contamination at any number of levels. (There is also no description of what happened at the site during the intervening years between its use for housing and the start of its use as a parking lot. See Petition ¶ 31.) A hard look would have required a much more thorough characterization of the site.

Finally, the FEIS did not analyze the worst-case scenario of failure of dust controls during construction work resulting in deposition in surrounding buildings. Petition ¶ 101. The Findings Statement asserts that impacts from disturbance of contaminated soil "would be avoided by implementing the various measures identified under '*Construction Impact Avoidance Measures*'" and that, "Precautionary measures required by the NYSDOH- and NYSDEC-approved RAP/CHASP, such as wetting exposed soils to reduce the generation of dust and covering soil stockpiles and haul trucks, would control and limit the potential for airborne exposure to dust and lead. The associated respirable dust monitoring would ensure that the level

of lead would not violate the NAAQS." But this is not sufficient to prevent health risks. The mere promise to "wet exposed soils and "cover" soil stockpiles and truck beds does not establish that the dust will be contained. A wetting process may miss some soil. Soil that is wetted may dry. Departing vehicle wheels may track and kick up dust. Covers for trucks removing the soil and debris may slip or rip. Petition ¶¶ 105-106.

And compliance with these protocols may not be consistent. While the FEIS appears to take the position that the applicant will be sufficiently vigilant, there is no independent environmental monitor who will be present at the project continuously and who would be answerable to the public. Petition ¶ 107.

**5. Failure to analyze routes of exposure to contaminants and cumulative impacts**

The FEIS failed to analyze fully the potential for construction to cause dispersal and deposition of hazardous substances in the nearby residences and local neighborhood. While construction at any ordinary site can be a challenge, construction immediately adjacent to residences and other sensitive receptors requires special care when such excavation and construction can generate odors and contaminated dust. The FEIS also did not analyze potential drift of lead-contaminated dust to sensitive nearby receptors, including the apartments in which the Petitioners live. Petition ¶¶ 98-100.

While an EIS must consider the cumulative impacts of an action, pursuant to 6 N.Y.C.R.R. § 617(c)(1), the issue of cumulative effects is particularly important in the context of exposure to lead-contaminated dust, since the impacts of lead on the human body are cumulative. Petition ¶ 79. Nevertheless, the FEIS and Findings Statement fail to disclose or present a plan to disclose the range of current blood lead levels in children and adults in close proximity to the Proposed Project site, and address the issue of cumulative effects of toxic lead exposure.

## B. Failure to Take a hard Look at or Provide Written Reasoned Elaboration of Mitigation Measures to Minimize Impacts to the Fullest Extent Practicable

Despite the absence of updated applicable standards and the mandate to protect children from lead dust exposure, Respondent NYSDOH failed to adopt measures to ensure containment of the contaminated dust on site and prevent migration, relying instead on measures that would allow some migration of dust, which would be monitored to a limited extent, using inadequate standards. While the Scoping Document states that procedures would be used to "ensure" that dust is kept within "acceptable levels," and that environmental impacts will be "mitigated," Respondent NYSDOH is well aware that the goal of its own public health policy with regard to lead (Pb) is prevention. Thus, the goal should be to eliminate, not reduce, avoidable exposure to lead dust for children. Petition ¶ 77.

This means that the strategy for environmental protection during construction-related soil disturbance at this lead-contaminated site, located in such close proximity to "sensitive receptors," including both children and adults, should be *containment* -- a strategy to *prevent* rather than just mitigate the migration of contaminated dust from the site. The FEIS fails to adopt a prevention-based strategy for lead-contaminated dust despite the information in the record and the NYSDOH's own knowledge regarding the poisonous effects of lead.

Respondent NYSDOH's explanations for its weak approach to mitigation are further evidence of its failure to take a hard look at the issues. The Findings Statement asserts that a "Construction Health and Safety Plan" and "Remedial Action Plan" would be implemented during the subsurface disturbance. The "Health and Safety Plan," however, is an occupational safety plan designed to protect the health and safety of "field personnel" working at the Project Site itself through work practices, personal protective equipment and monitoring. It is not designed to protect the community. Petition ¶¶ 102-103. And the Remedial Action Plan is based

on preparing the site for new construction. While the Remedial Action Plan for the site requires installation of a vapor barrier around the proposed new building's cellar slab and sidewalls to prevent vapor intrusion, this measure is to protect the Respondent's proposed building and occupants, not the neighboring residents or other sensitive receptors. Petition ¶ 104.

Perhaps most revealingly, Respondent NYSDOH essentially ignored a reasonable recommendation by the Environmental Technology Group, Inc., that "an enclosed area tent should be utilized during excavation to prevent any particles and odors from emanating from the site." Petition ¶ 109.

## III. Respondent NYSDOH Failed to Comply with SEQRA Mandates With Regard to Traffic Issues and Admits That Noise Issues for Residents Would Not Be Mitigated

The Proposed Project would generate traffic hazards and congestion during both construction and operation of the project. Robert Chamberlin, Senior Director of RSG, concluded that the proposed congestion mitigation would be "ineffective" and that "significant adverse traffic impacts" would persist at West 97$^{th}$ Street/Columbus Avenue, and that, with the likelihood of peak hour queuing, access to the proposed JHL project driveway for emergency services would be "severely compromised during critical travel periods." Petition ¶ 111.

The FEIS and Findings Statement fail to analyze adequately the impact of the project on Park West Drive, a north-south access lane within the Park West Village complex on which the Proposed Project will depend for access to the semi-circular ("turnaround") driveway at the rear of the facility for visitors, patients, ambulances, and taxis. A public comment letter explained to NYSDOH that this "Private Driveway" is the sole access for a 16-story apartment at 784 Columbus Avenue, and the area of that private driveway targeted to serve as the entrance to the proposed turnaround driveway is marked as a "Fire Zone." The letter warned that the private driveway will be congested with two-way traffic involving passenger discharges, creating traffic

backup that will impair emergency vehicle access to the residential complex. This concern is reiterated by a traffic consulting firm, EPDSCO, Inc., which noted that "queuing and double parking" already occur "throughout the day along West 97th Street and the access point to Park West Drive gets blocked" and, similar to the Chamberlin report, raised concern about the impact on "ambulate and emergency vehicles." Petition ¶¶ 112.

The FEIS and Findings Statement do not sufficiently address the risk to pedestrians within the one-block section of West 97th Street from increased traffic related to the construction and operation of the Proposed Project. An analysis of transportation conditions conducted by Resource Systems Group, found that this block has a significant amount of pedestrian activity, and that the prevalence of children among the pedestrians in the area is of particular concern. During the busiest times of day, this would create a problem for vehicles trying to enter the JHL site during these times, as well as cause traffic congestion for neighbors. Petition ¶ 113.

Mitigation of the impacts of increased vehicular traffic on pedestrian safety at crosswalks, as well as on traffic congestion, appear to be dependent upon action by other agencies. The NYSDOH acknowledges that the intersection of West 97th Street and Columbus Avenue already meets the criteria for a high pedestrian/'bicycle crash location based on accident data, but merely refers to proposed safety improvements for the intersection such as extending the Leading Pedestrian Interval across Columbus Avenue and installing signage, and comments speculatively that, "NYCDOT could implement some or all elements of these measures to further improve bicycle and pedestrian safety at this location." Similarly, The NYSDOH found that significant adverse traffic impacts from increased vehicle trips generated by the completed facility's operation would occur at two intersections – at West 97th Street and Amsterdam Avenue and at West 97th Street and Columbus Avenue – during several "peak hours," and yet

while it asserts that these impacts "could be fully mitigated with standard mitigation measures, such as signal retiming and phasing changes," it acknowledges that these measures "would be subject to the review and approval by the New York City Department of Transportation." There is no discussion of an alternative plan to mitigate the impacts of either of these conditions if the relevant New York City agency's action is delayed or does not occur. Petition ¶¶ 114-115.

Public testimony raised concern about the noise of pile driving and construction, dump trucks taking out dirt and rock, and trucks delivering construction materials. The noise would be highest during excavation and foundation activities (two months), superstructure construction (six months), and when two construction stages overlap (two months for exterior façade construction/interior fit-out activities and three months for interior fit-out activities/site work). During some specific periods construction may result in interior residential noise levels above the 45 dBA $L_{10(1)}$ noise level recommended by the *CEQR Technical Manual*. And the Findings Statement admits that for two buildings – 784 Columbus Avenue and 122 West 97$^{th}$ Street – the outdoor balconies would be expected to experience absolute noise levels up to 87.7 dBA, which would not be mitigated. While the Findings Statement reasonably states that the levels expected "would be comparable to those from any typical construction site in New York City involving construction of a new building with concrete slab floors and foundation," testimony noted the close proximity of this site to children and homes and the project's length. Petition ¶¶ 116-119.

## IV. Respondent NYSDOH Failed to Comply with SEQRA's Requirements With Regard to the Evaluation of Alternatives to the Proposed Project

The FEIS failed to give a hard look at an alternative under which Respondent JHL's existing facility would be renovated rather than a new facility constructed. Respondent JHL admitted in its proposed Certificate of Need application that its existing facility had 99 percent utilization for 2008, 2009 and 2010, even though the average utilization for New York County

was 96.5 percent to 96.9 percent during this period. While the FEIS and Findings Statement accept JHL's conclusory assertion that the existing buildings "are at the end of their useful life and operate at approximately 65 percent efficiency," the FEIS fails to explain how the facility could accommodate 99 percent utilization in 2010 while operating at 65 percent efficiency by early 2012. Moreover, it offers no evidence of the buildings' "useful life" other than an assertion that the buildings reportedly were constructed "between 1898 and 1964." Petition ¶¶ 120-123. Given the existing facility has substantially more "frontage" space (one letter of comment estimated that the frontage for the proposed site is 60 percent smaller) for managing vehicular traffic and less proximity to sensitive receptors, this does not constitute a hard look or a reasoned elaboration of a decision to reject an alternative that could significantly reduce adverse impacts.

The FEIS failed to take a hard look at the alternative of constructing a new facility or facilities on the existing West 106th Street site. JHL had considered a project to redevelop its existing property with a new nursing care facility on the western part of the site and a new residential development on the eastern portion. That nursing facility would have been limited to 10 stories, pursuant to zoning restriction, and would have accommodated 303 beds. Information in the record indicates that NYSDOH approved a JHL application in 2008 to replace its existing facility on West 106th Street with a new facility, and that its 2006 Certificate of Need Application had stated, "The project is designed to apply the best practices from the 'Greenhouse' model and other innovative models which will provide significant improvements in the quality of life of the residents." The FEIS states that the construction of housing on the existing nursing home site would be needed for the applicant to "raise the capital necessary to support the redevelopment of the JHL facility under this alternative," but fails to provide significant scrutiny to JHL's assertion

that combining the housing and new nursing care facility would require reducing the number of nursing home residents. Petition ¶ 124.

The FEIS failed to take a hard look at the alternative of constructing the new facility at a different location, even though the proposed site contains soil significantly contaminated by one or more brain-damaging chemicals and is located adjacent to, and in exceptionally close proximity to children and adults. The NYSDOH should have exercised its discretion to include consideration of additional sites not under JHL's control. While NYSDEC regulations do allow the agency to choose to limit its consideration of alternative sites to parcels under the applicant's control, stating, "Site alternatives may be limited to parcels owned by, or under option to, a private project sponsor," 6 N.Y.C.R.R. §617.9(b)5)(v), the operative word is "may," not "must." In this case the applicant does not own the proposed site, although it has an "option" to purchase it. NYSDEC's guidance manual states that "Examples of situations where a discussion of alternative sites for a proposed action would be reasonable include … [a]ny case where the suitability of the site for the type of action proposed is a critical issue, in which case a conceptual discussion of siting should be required." Petition ¶125. Such is certainly the case here.

The Proposed Project is not a prudent alternative for several reasons. The placement of nursing home residence units on floors 9 to 19 would present access and egress challenges for elderly and mobility impaired residents, given the time involved in reaching the ground, and make evacuation difficult in a fire or other emergency. It also is not a prudent alternative because it provides no plan for replacing the adult day care facility and will result in a decertification of 100 beds. While some areas of New York State are predicted to have a "glut" of unoccupied nursing home beds, this apparently is not the case for New York County. Finally, it would result in 135 fewer jobs than the existing facility provides. Petition ¶¶ 126-129.

## V. Respondent NYSDOH Failed to Exercise the Required Independent Critical Judgment as Lead Agency Under SEQRA

In relying on outdated standards and guidelines set by other agencies, standards and guidelines that were not directly applicable to the local conditions of this Proposed Project, and statements by an environmental agency regarding risk that were not directly applicable to the human health risk from dust exposure at issue, Respondent NYSDOH failed to exercise its independent critical judgment as lead agency. Similarly, in relying on conclusory assertions by the applicant about environmental effects, mitigation actions and the availability of alternatives, Respondent NYSDOH failed to exercise its independent critical judgment as lead agency.

## CONCLUSION

The NYSDOH, in its FEIS and Findings Statement, failed to follow SEQRA's procedural requirements, to identify relevant areas of environmental consideration and take a "hard look" at them, and to present a "reasoned elaboration" for its conclusions regarding environmental impacts and decisions regarding mitigation measures and feasible alternatives. Thus, the NYSDOH's determination that the mandates of the SEQRA process were met and that adverse environmental effects of the Proposed Project would be avoided or minimized was in violation of SEQRA and was arbitrary and capricious, and an abuse of discretion, and should be set aside.

Dated: New York, New York
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