

COMMENTS BY SUSTAINABLE PORT CHESTER ALLIANCE

**Directed to the DEIS for Village of Port Chester
Downtown Overlay Zone and Zoning Map Amendments**

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Directed to the DEIS for Gateway

Sustainable Port Chester Alliance is an association of participating members representing the following interests relevant to the Village of Port Chester Gateway Project and the DEIS presented in support of the Project and zoning applications

- Homeowners who pay property taxes
- Homeowners who want opportunities to purchase homes suitable to their current circumstances as residents of New Rochelle
- Renters who need affordable housing options
- Renters who are rent burdened because of the lack of affordable housing stock for low and moderate income households
- Renters who require quality housing that is the appropriate size for their current household
- Sponsors and supporters of work force housing
- Advocates of housing with an affordability range sufficient to meet the needs of Port Chester residents throughout the City as well as the needs of the region

Perspective of the Submitter

Sustainable Port Chester Alliance has organized its participating members around agreed principles and statement of common values and has engaged the submitter of the analysis below to present the position of the Alliance in objecting to the DEIS as an incomplete and inadequate document for the purpose of approving the Port Chester Gateway Project. The members of the Alliance believe that:

- economic forces of development in the Village of Port Chester should benefit all sectors, all neighborhoods and all communities;
- the DEIS supporting the Port Chester Gateway Project lacks any meaningful treatment of the need for affordable housing including work force housing and that because of this deficiency, the DEIS is incomplete and that there is no rational basis for having certified completeness based on this deficiency;
- the DEIS following the 2012 Housing Conditions Study appears to conclude that there is no present need to augment either the affordable housing or work force housing stock available to Port Chester residents, based on a mistaken assumption that the lack of enforcement of the Housing Allocation Plan or the Housing Settlement as to the Village of Port Chester implies that these studies and the decisions of the Judge and Monitor in the Fair Housing case have no application to Port Chester's housing policy;

- the omission of a housing affordability study relating to the Gateway Project is without reasonable support either in the Village Code or authority governing comprehensive planning for affordable housing;
- the characterization of work force and affordable housing as applying only to a middle range of income is arbitrary and capricious in that it wishes to avoid housing harder to produce for lower and moderate segments of the income spectrum;
- the proposed zoning changes have not been developed in a manner consistent with a current Comprehensive Plan, particularly as it relates to affordable and work force housing;
- the area studies and DEIS supporting the zoning changes do not constitute a comprehensive plan developed with an appropriate hard look at existing conditions on the site and throughout the City, particularly relating to housing and employment opportunities for the full range of Port Chester residential households;
- the area studies and DEIS have not presented a balanced approach to land use policy developed through a process consistent with best practices for planning which should properly precede the adoption of appropriate application of planning priorities and objectives derived by such balanced analysis, with a hard look at the features of the project the applicant is proposing;
- the present DEIS constitutes an improper delegation of supervisory authority in the assembling and monitoring the SEQRA review process by the Village to the Applicant's consultants and that such an uncritical approach is inherently unbalanced and unreasonably constricts the decision making power of the Lead Agency, the Trustees of the Village of Port Chester;
- the DEIS process has valued the studies and analysis performed by the Applicant relating to impact on public schools and remediation methods in preference over independently developed analysis of school populations and infrastructure needs which does not place undue reliance on the Applicant's market plan oriented to childless households;
- the DEIS process has not engaged in an analysis of affordability of housing as it relates to job creation and maintenance in the Village of Port Chester for the build out period and subsequent years such as to address the need to reduce the number of cost burdened renters and owners among the current residents Port Chester.

Perspective of the Author of the Commentary for the New Rochelle for Equitable Living Submissions

Geoffrey D. Smith, Esq. is an attorney in practice for 38 years including specialties in Representation and Litigation on behalf of tenants and tenant organizations, Land Use and Zoning, Real Estate Development and Management, and community organizing and empowerment.

I am an active member of WESPAC Economic Rights Committee and the Westchester Work Force Housing Coalition; a former member of the Westchester Human Rights Commission Law Revision Advisory Committee and the Westchester County Housing Opportunities Commission overseeing the implementation of the Housing Allocation Plan for Westchester County and the Fair Housing Settlement. I have served as a staff member of Asian Americans for Equality, Inc. as Director of the Chinatown and Flushing Housing Clinics and Fair Housing Center, as litigation and compliance counsel, Vice President of AAFE Community Development Corporation which rehabilitate former city-owned properties in Queens, Executive Director of the Lower Manhattan Community Development Corp. and compliance officer for the Renaissance Economic Development Corp. funded by the US Treasury and major NYC banks for the purpose of micro-lending in Manhattan's Chinatown following 9-11.

Basis for Our Claim of Incompleteness and Failure to Follow Procedures for Proper Policy Development and SEQRA Review

Failure to Adequately Review Socio-Economic Factors required by SEQRA

Sustainable Port Chester Alliance members are deeply concerned that the Draft Environmental Impact Statement (“DEIS”) for the Port Chester Gateway Project (“the Project”) fails to fully or accurately set forth the likely negative impacts that the Project will have on the socio-economic character of the Village of Port Chester as a whole and as part of prevailing social and economic trends in Westchester County.

We submit that the Village of Port Chester has chosen to improperly delegate its legislative body the City's responsibility to exercise review in support of its police power to zone for the general welfare of all residents and commercial enterprises within the City and by doing so has chosen to voluntarily abrogate its policy responsibility in return for assurances of economic vitalization offered by supply side real estate interests with a distinct bias on marketing priorities, so that they may receive zoning concessions to develop the forms of projects, buildings and structures they prefer and maximize return without regard for public policies and priorities. These realities force upon the Trustees a conflict between political motivation to stimulate the Village economy and the policy review function of protecting the public interest of the whole spectrum of interest within the Village.

We submit that the evaluation of impacts and remediation cannot be guided by real estate industry actors whose interest is clearly in minimizing the mitigation to be required of developers and to fast track the study of proper zoning choices for the benefit of acting within a window of opportunity.

The DEIS also fails to provide any assurances that the benefits of the Project will flow to the residents of New Rochelle in accordance with the priority of their individual and collective needs or comport with the stated policy of the Village of Port Chester which should operate to influence the level and direction of review conducted by the City on behalf of its residents and of City officials with sufficient responsiveness to their constituents. No Community Benefits Agreement is discussed among the mitigation measures or remedial plans recommended for the risks assessed in the DEIS. We seem only to hear the voices of the Developer and their consultants.

Section III F(1) Demographics at (a.) reports that “[h]istorically, the Village has had a higher percentage of growth compared to the County at large” and that “Port Chester has a significantly lower median income when compared to the County between 2000 and 2009, approximately 70%; however that the median income of the Village is projected to grow at a slightly faster rate than the County” No support is provided for this trend projection or whether this increase will be due to developments within existing Village communities or through the influx of higher income new residents.

Section III (F) b projects, again without detailed support that the concept plan will generate approximately 1,431 **new residents** (in a total of 762 total units) in the Village of Port Chester, based on assumptions that all units of housing produced will be rented, including 10% “affordable” “across the board”. While these conclusions suggest a range, there is no support or allocation to support this marketing model for studio’s and 1 & 2 bedroom units either from the existing need within Port Chester or from a population outside Port Chester representing the regional need for the housing to be built.

There is no discussion of the needs of the current residents of the site, who are in fact historically a “work force” community, which the Applicant intends to replace with a preferable demographic in line with its market research and preference for childless households. At the same time, the County and business organizations serving the County have lamented “youth flight”, by which they refer to the 25 year old to 34 year old Millennial demographic, further adjusted by college and advanced degrees making them eligible for higher paying corporate and finance employment. *Westchester Municipal Planning Federation Workshop, Scarsdale Public Library,*

The Millennials may be looked to as the saving demographic, but there appears to be no trend that would support the conclusion that “If you build it, they will come”. Or more appropriately here, there is nothing to project that Millennials will come to Port Chester rather than White Plains or New Rochelle; bars or mini- cosmopolitan centers. For reasons this strategy may not work, see: Phil Reisman: “*Millennial is the New 'White' in New Rochelle,*” LoHud 10/14/2015; Christopher J. Eberhart, *New Rochelle Looking to Attract Millennials, LoHud, 10/13/15.* Neighboring communities will be in competition for the same declining demographic and would divide a consumer cohort that is apparently attracted to the liveliest of the downtowns or may instead choose take a 40 minute hour train ride to the real metropolis where they are also more likely to find good paying jobs to support their consumer appetites.

There is no reason to believe that this marketing to outside new residents will produce the outcomes projected or that would justify building to meet only select regional needs over a strategy that would build upon current community needs within the Village and which would thrive in the multicultural mix that is Port Chester. This calculation becomes even more unreasonable when local needs are ignored to design a project that will attract a group of new residents while displacing still other existing residents of the site.

Serious socio-economic review is required through the SEQRA process as mandated by the NYS Court of Appeals in *Chinese Staff & Workers Ass'n. v. New York*, which construed the term “environment” to include issues of “community character” and recognized the clear definition of the statute to include among “physical conditions” existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character. (ECL 8-0105[6]; [emphasis supplied]).” 68 N.Y.2d 359 at 365(1986) .

The Court of Appeals in *Chinese Staff Workers* stated:

Thus, the impact that a project may have on population patterns or **existing community character**, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis since the statute includes these concerns as elements of the environment. That these factors might generally be regarded as social or economic is irrelevant in view of this explicit definition. By their express terms, therefore, both SEQRA and CEQR require a lead agency to consider more than impacts upon the physical environment in determining whether to require the preparation of an EIS. In sum, population patterns and neighborhood character are physical conditions of the environment under SEQRA and CEQR regardless of whether there is any impact on the physical environment. 68 N.Y. 2d at 366 (Emphasis supplied; footnotes omitted).

Faith in external, market driven revitalization distorts the economic driver function and relies too heavily on supply side economics, which leads the the policy reviewer to neglect a needs based demand side of the economic equation, which is also necessary for broader economic recovery, if the benefits distributed are to be integrated and comprehensive.

While the Housing Characteristics of Port Chester Study (“HCPCS”), relying on HUD and Census data, assembled a description of residential buildings, ownership and rental, and reports demographic information as to households, their composition, racial and cultural identity of households but does not perform a needs assessment that would be of critical use in evaluating the housing impact of the Project. (HCPCS p. i) Additionally, the Study chooses to ignore the value of both the County Housing Allocation Plan and the findings of the Federal District Court and Monitor in *U.S. ex rel Anti-Discrimination Center v. Westcheser* case (HCPCS, pp. 71-750, apparently based on the observation that neither of these standards are currently being enforced against the Village of Port Chester. This is like saying because a fire department does not have mandatory code inspections your house is safe from burning down.

Because Port Chester has a history of higher racial and cultural integration of its housing stock, the structure behind the AFFH settlement model exempted the Village of Port Chester. At the same time, there is no showing that other aspects of the Settlement including the injunctive relief do not apply to Port Chester. As a member of the Consortium Community that received CDBG funds on the basis of unsupported (“false” claims that an impediments and remedial strategy analysis had been performed. In fact, the review deficiencies of the present DEIS shows that it was not only the County that was unwilling to conduct a frank assessment of fair and affordable housing impediments and remedies, but this aversion is typical of the Village of Port Chester as well, notwithstanding its present diversity.

The Housing Conditions Study notes that the previous Housing Allocation made by the Westchester County Housing Opportunities Commission stood at a balance of 189 affordable units deficient. Because the HOC reconstituted under the Astorino

administration retroactively de-authorizes the enforcement of the allocation, the Village concludes that there is no such need. This is of course not the case as judicial case law underlies the exercise of formulating a housing needs and allocation plan as a necessary part of developing a well considered comprehensive plan under the *Berenson* decision, discussed below.

The DEIS fails to analyze the impact of the Gateway Project on affordable housing within the redevelopment area or throughout the City and fails to develop a remediation strategy or mitigation measures to address the displacement and exclusionary affects we believe will result from the high cost, high rise development. There is no analysis of the contribution of affordable or work force housing which would be necessary for a well considered and balanced plan for a project this size.

The Housing Conditions Study concludes that because 274 new units have been added to the housing stock in the last 10 years (an increase of 2.7%) (HCPCS, p.8) and because there is a reported aggregate vacancy rate of 5% “suggests a relatively unconstrained market.” (HCPCS, p. ii) Table 1.7 at page 9 does not break down the rent level of the claimed 277 vacant units appears to justify a conclusion that Port Chester has all the affordable housing it can use.

The DEIS however concludes that “work force housing issues in central Westchester and the Village of Port Chester relate to the fact that there is an insufficient supply of housing available in this segment of the market.” PCG DEIS III.G-12 8 Workforce (Affordable) Housing Here the HOC Housing Plan is credited with bring the recognition that “all of the County’s communities need ‘guidance’ including recommended allocations to assist (them) in meeting a share of the need for affordable housing’ (citing the Allocation Plan 2000-2015)No explanation is given for not

This conclusion is not reasonable and is not accurate based on the information compiled in the HCPCS itself. The Executive Summary for the HCPCS does state that “[w]hile these various types of subsidized housing are typically occupied by low to moderate income residents with housing affordability needs, they are not synonymous with the new definition of ‘affordable’ housing.” (HCPCS, p.i) The summary then goes on to mischaracterize “affordable housing” by associating it with a range of affordability (“80% - 120%) above that of public housing, subsidized housing and other federal and state programs (presumably including LIHTC projects with maximum income eligibility at 50% or 60% AMI).

Placing the definition of “affordable housing” at this level is not limiting without a rational basis but accommodates the all too often heard excuse of lack of financial feasibility. This argument is promoted to justify inaction when a local zoning authority can not find a developer who is willing to address lower income brackets without deep subsidy or accommodations without regard for the large profits that are to be realized with high rise buildings with floor and density bonuses. Bonus programs are to often viewed as pure inducement to build and not as a promotion of what the jurisdiction wants or needs to have built.

When addressing affordable housing, the necessary information must include housing unit size and mix, range of income the unit is being marketed to, and the duration of the affordability period. No rent level or unit size by itself can be described as “affordable housing” unless it is related to the existing income demographics within the target community. Eligibility under federal programs assume that 30% of income is the appropriate portion of a household budget to be dedicated to shelter needs with the subsidy designed to cover the remaining 70%. Additionally, “[u]nder existing conditions, fully 1,449 households either live in subsidized developments or controlled rental assistance through ETPA and or tenant-based Section 8.” (HCPCS, p. iii) Still such programs do not set the limit of what is considered affordable housing when the qualifying metrics are derived from the basic federal rent burden assumption and are extended to include overcrowded ownership housing units.

According to the Study, rental housing comprises 57% of occupied housing units with an average household size of 3.3 per unit and considers 7% of the units to be overcrowded with more than one person to per room, concluding that “only extreme overcrowding may be diminished.” (HCPCS, p.ii) So rentals are vacant but many existing units are overcrowded. This confirms that the vacancy calculation is not calibrated to the ability to pay the rent asked for the vacant unit. Still the Executive Summary concludes with “Affordable Housing Recommendations” finding

With no obligation to build affordable housing, the Village should nonetheless encourage developers of multifamily rental housing to apply for Low Income Housing Tax Credits. (HCPCS, p. iv)

Apparently the DEIS does not follow this recommendation as the proposed site is not a residential, or multifamily district but looks to select a narrow spectrum of the market to occupy the complex without significantly expanding the school aged population.

We gain some insight into the overcrowding and doubling up of housing from additional data reported in the Study. Between 2000 and 2010, it is reported, family size increased from 3.44 persons to 3.54 with household size increasing from 2.89 on average to 3.08. Of the 28,502 households recorded for 2010, 12% of these households included family members other than spouses and children and an additional 9% included non-relative co-occupants, for a total of 21% of the households that could be considered to be overcrowded. All too often, overcrowding is the result of insufficient pay for employment, underemployment, unemployment and disability due to poor health and therefore relates directly to a household’s collective financial viability.

The Study further reports that 54% of all households (owner occupied and rental units) spend more than 30% of household income on housing costs, thereby exceeding the federal subsidy threshold and that 60% of all renters, or more than 3,000 households paying rent paid more than the federal standard. (HCPCS, p.ii)

Faced with a housing needs assessment of this magnitude, to conclude that there is no housing allocation problem is to substitute economic feasibility for a reasonable housing policy response designed to meet existing needs by looking beyond the easier and historically available options. With the shrinking of federal funding for construction and maintaining quality low and moderate income housing, a jurisdiction must be innovative in looking to the engine of private investment to satisfy the broad scope of community need at all income levels.

The Zoning Ordinance for Port Chester at §345-16 provides for a building height and floor area bonus program that is available to be applied to PMU Planned Mixed Use districts for new construction only. These bonus items are specified in three provisions at defined at §365-16 (C)(3) “Open Space”, (4) “Housing Rehabilitation” and (5) “Downtown Parking” and provide for a contribution of 15% of the assessed value of the added height and density space. Only the rehabilitation bonus fund is arguably addressed to the priority need for affordable housing. The mitigation sum if applied to the Gateway Project would not have a reasonable relationship to the impact in need of remediation of the residential displacement, the replacement of work-force housing stock due to be lost and replaced by high cost construction, or contribute to offsite development of affordable housing targeted to measured need for impacted income level cohorts.

In ignoring the affordable housing need in the bonus scheme, the Trustees are passing on a bonus scheme that does not address at all a major impact or conform to the Trustees responsibility for land use decisions to zone for the general welfare directed to all income components of the Village population. See *Asian Americans for Equality v. Koch*, challenging a Special District bonus plan which did not reflect the priority for low income housing in Chinatown, Manhattan, 72 N.Y.2d 121 (1988). Dobkin, Smith, Tockman, “Zoning for the General Welfare: A Constitutional Weapon for Lower Income Tenants”, New York University Review of Law and Social Change, Vol. XIII Number 4 (1984-1985).

The DEIS Fails to Consider Possible Exclusionary and Displacement Impacts or Develop Adequate Safe Guards and Protections

The New York Court of Appeals has warned in *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 108 that a well consider and balanced plan is required so that efforts to allow exclusion will not be allowed under the review of the zoning authority. In *Kurzius v. Incorporated Village of Upper Brookville*, 51 N.Y.2d 338, 346, the Court of Appeals found that a zoning ordinance would be invalidated if it was enacted without giving proper regard to local and regional needs and had an “exclusionary purpose”.

The Housing Conditions Study observes that the “racial composition of the population has become more diverse” and that “Hispanics of all races, which now comprise 17,193 Village inhabitants or 59% of total population, grew by 4,309 over the decade.” This represents a growth rate of 33% over 10 years. Not building affordable housing to meet this growth, would constitute an unbalanced development plan.

Planned reduction of lower income communities in the belief that it is a worthwhile expense for general social and economic advancement can take on discriminatory and racist overtones as observed by J.A. Kushner in *Fair Housing Discrimination in Real Estate, Community Development and Revitalization*:

There is nevertheless a significant correlation between racial minority status and poverty; classification based on income can easily mask racial discrimination and even where such motivation is absent, the effect of regulation may result in minority disqualification to an identical extent. (at p.31. 1983)

It would not only be ironic if the Village were not to harness economic development through the Gateway Project to the housing prioritized purposes, but would be unreasonable, arbitrary and capricious to exclude existing residents in need from these opportunities when the Village has significant bargaining position in the form of its zoning authority.

The saliency of this point, the link to the racial and cultural identity of the residents identified as in need, and the peril of the City not giving these factors proper attention and priority has recently been addressed by the US Supreme Court in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*. 576 U.S. ___ (2015) validating discrimination cases based on disparate impact where income segregation is linked to segregation of a protected class, (in this case race). No proof of bad intentions is required in such a case if policy results in the discrimination.

Substitution of Millennials and empty nesters in Gateway housing for current current Latino and African American residents in need without an adequate policy reason or persisting in this strategy when there is a viable non-discriminatory alternative available must be evaluated as a potential risk that the zoning ordinance may provide a cognizable predicate for claims of housing discrimination and violation of due process.

Commenting on the *Texas Department of Housing* case Prof. John Nolan at a recent Land Use Leadership Alliance Program described its relevance for zoning authorities as follow:

Any municipality subject to an action under the FHA is liable for discrimination if its actions cause a disparate impact or disparate treatment of protected classes including racial minorities. This requires a review of all general laws, policies, rules and programs to be sure they do not unintentionally cause some segregation, which is likely correlated to racial segregation. It also requires that municipalities be extremely careful in turning down requests to rezone property for multifamily housing. A proper explanation of the public interest served by the challenged zoning policy may be a sufficient defense. Recipients of Community Development Block Grant Funds are now responsible for affirmatively furthering fair housing by eliminating impediments that cause disparate impacts and treatment.

Failure to Conform Zoning Changes to a Well-Considered Comprehensive Plan

To perform an analysis of the Gateway Project correctly and competently, the Village of Port Chester needs to make reference to a well considered policy document setting forth the principles underlying its land use decisions. Using developer produced studies as a substitute for planning expected to be performed under the guidance of the Lead Agency, distorts a necessary part of the Village's policy making responsibility. The perils of enacting land use decisions in this way are identified in *Zoning without Planning* by Professor Tom Angotti, Director of Hunter College Center for Community Planning and Development with particular reference to issues of affordable housing, building height and waterfront access. (copy attached).

The socio-economic analysis set forth in the DEIS is so light as to be non-existent. The analysis of construction job work units is cumulated as a projection, but there is no analysis to show what benefit this would convey to the Village and its residents. There is no commitment to hiring practices, to utilize local labor force, or to promote training and experience. No Community Benefits Agreement has been outlined or committed to. For a project which eliminates affordable, work-force housing stock, it is shocking that lack of vision is shown by the lack of consideration for replacement and measuring the current level of need both by public service employees and others who work for large companies or institutions. No mention is made for developing a Design-Build Procurement protocol for such a private-public collaboration to reduce construction costs of the proposed projects.

There is no Impact-Mitigation factor relating specifically to housing to be lost or housing needed in Port Chester. No study is developed of the existing resident population of the redevelopment areas, but rather a general assertion that Port Chester has enough affordable housing, which is defined in several different ways with no consistency except that , no matter how described, Port Chester has enough.

This is a critical and fatal deficiency in the DEIS. There is no reasonable argument that can be made that the Trustees would not include housing as a primary concern in the study to support rezoning on the Gateway site. Given the manner in which the supporting studies were developed by the Applicant's consultants, one might understand why a developer controlled entity would concentrate marketing to new residential communities from outside the Village as an important predicate for success of the envisioned projects. Neglect, indifference or disregard of existing housing needs by the Trustees, however, can not be justified. Port Chester passed an Affordable Housing Statute in 2004 which provides a narrow mitigation structure that is not correlated to actual income level and unit size needs. There is no analysis to show that this statutory scheme is the appropriate level of mitigation for a project this size that will displace work-force tenants and demolish affordable housing stock without replacement of the units.

The best practices requirement to keep a Comprehensive Plan current is discussed extensively Stuart Meck, *The Legislative Requirement that Zoning and Land Use Controls Be Consistent with Independently Adopted Local Comprehensive Plan:*

A Model Statute, *Washington University Journal of Law & Policy* 3:295 (2000). Decisions of New York courts assert the need for a balanced and well considered comprehensive plan to serve as a policy anchor for adopting or changing zoning. (See Syracuse University, New York State Comprehensive Plan Development – A Guide Book for Local Officials 2015 - Attached as Appendices to this Submission are NYS sponsored guidance addressed to municipalities as resources for developing proper practices in exercising their planning and zoning policy decisions).

Standing for those among the submitters in need of affordable housing to come into the public arena when they believe their interests are not being addressed is also recognized. . See *Suffolk Housing Services v. Town of Brookhaven*, 91 Misc.2d 80 affd. and mod 63 A.D.2d 239 (1978).

The requisite “careful and deliberative review” required for developing land use policy in a city’s comprehensive plan to support zoning decisions is described in *Udell v. Haas*, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968). The Court of Appeals stated that such an exercise must be performed for the benefit of

“the community as a whole following a calm and deliberate consideration of alternatives, and not just because of the whims of either an articulate minority or even a majority of the community.” *Id.* At 469

A “hard look” at existing circumstances is required. *H.O.M.E.S .v. New York State Urban Development Corp.* 69 A.D.2d 222 (4 th Dept., 1979) and *Neville v. Koch* , 173 A.D.2d 323 (1st Dept., 1991), aff’d. 79 N.Y.2d 416 (1992); *Matter of Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400 (1986); *Akpan v. Koch* , 75 N.Y.2d 561 (1990), mot. to am. den. , 76 N.Y.2d 846 (1990); *Kahn v. Pasnik*, 90 N.Y.2d 569 (1997)

The exercise of the zoning power delegated by state statute must necessarily be constrained by the requirements of the New York State Constitution that such action be performed for the General Welfare of the population without leaving out any group or interest that is impacted. Additionally, Article XVII of the Constitution provides:

The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivision and in such a manner and by such means, as the legislature may from time to time determine.”

The Trustees are the legislative branch of the government of Port Chester entrusted with this constitutional mandate. The Trustees and Mayor cannot allow their enthusiasm and the urgency of acting on a development project to overwhelm their legislative obligation to be mindful of “the needy” both in the Downtown and throughout the City. The needs communities are certainly among the intended beneficiaries of economic recovery.

The Lead Agency has Improperly Delegated Planning and Decision Making Authority to the Master Developer

This omission of an affordable housing study and analysis makes it appear that the City's commitment to the communities in need of housing affordable to people with incomes at 80% - 120% AMI with a 10% moderate income housing set aside is deficient. It makes the expressed commitment to affordable housing on a broad scale either superficial or insincere, and disregards these important interests by deeming them a necessary cost for approval of the Project because of the time and expense required for a thoroughgoing governmental review.

To not address opportunities and strategies to build low, moderate and Work Force housing when municipally owned properties are being committed to the project is critically unbalanced and biased against the needs of residents and employers within the Redevelopment Areas and the City at large. To bypass this opportunity for community development in a project of this magnitude is essentially to surrender bargaining power, not for policy reasons or for the general welfare of the City's residents but in the interest of expedited approval and commencement of site based proposals to accommodate the individual developers of the properties.

Engagement of the affordable housing needs community has been minimal and has not been structured into the community outreach plan for the DEIS. Given the large Spanish speaking population of Port Chester and their apparent interest in affordable housing, translation and Spanish speaking outreach appears to be at most minimal.

Residential displacement in the redevelopment areas is being presented as necessary collateral damage for the benefits of revitalization as higher income residents with more aggressive consumer appetites are substituted for present residents whose protection under Mitchell Lama is to be terminated. Once work-force housing, the residential building is to be replaced without adequate mitigation for the loss of these units. The proposal for mitigation is too narrow in being limited to "moderate income" units. There is no study or analysis to show that the apartment size mix or affordability conform to the need of the displaced community or other in residents in need of appropriately sized and priced units. These are exclusionary impacts that cannot be permitted. Proper planning requires the raising of all boats, not the sacrifice of small craft for the passage of the steam ship of high impact development.

Confusion and conflict in this area of policy making arises from the Trustee's role as the Lead Agency in developing the DEIS while not giving proper attention to the the Comprehensive Plan. The Trustee's supervision of the studies, thresholds and conditions for the DEIS is not within their administrative or staff competency. The Trustees do not exercise sufficient critical judgment in evaluating elements of the Project and seek to use selected portions of government gather data to accommodate fast-tracking the zoning approval so that site proposals can be expedited with greater certainty in terms of as of right options developers prefer. This objective is not a reasonable alternative to careful, deliberative and balanced planning.

The State's "Zoning and the Comprehensive Plan," Local Government Technical Series, James A. Coon at p.5-6, warning against

"Spot zoning [which] refers to rezoning of a parcel of land to a category different from the surrounding area, usually to benefit a single owner or a single development interest."

The guidance states that: "{t}he question with {rezoning} is whether the change conflicts with the fundamental land use policies and development plans of the community" citing *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 667 at 685 (1996).

To surrender policy judgment and negotiating power based on an evolving sense of public benefit forecloses a well considered evaluation of the Applicant's submission and truncation of the "hard look" required of the Lead Agency in evaluating Applicant's Project design and studies supporting it. Without the housing analysis required of a well considered and balance Comprehensive Plan, such deference is not reasonable or appropriate. Given the dismissive judgments made as to the need for affordable and workforce housing in the EIS and HCPCS, the finding can be said to arbitrary and capricious and obviously biased toward approval of the Project as proposed without necessary land use policy input. The Court of Appeals has affirmed that the reason for strict requirements for procedure in government supervision of the SEQRA process is to insure that the lead agency will ultimately take environmental issues into account in its decision making and not just rubber stamp someone else's report to complete the process. *E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 371.

Legislative approvals for the required zoning and permitting is distinct from proper guidance and oversight of the scope and direction of the DEIS. If an actual policy and decision making body is "insulated from consideration of environmental factors", the Court of Appeals has found that a fundamental policy of SEQRA is violated. *Coca-Cola co. v. Board of Estimate*, 72 N.Y.2d 674 (1988). Under ECL §8-0109(4), the lead agency must take a "hard look" at the issues raised by the project to determine whether the project is likely to have a significant effect on the environment, including the social and economic features of the existing communities. The process that produced this DEIS circumvented these responsibilities, most notably in the obligation to provide affordable housing and employment opportunities (particularly as employment is related to meeting rent burden). Project Goals are not equivalent to the totality of public interests that the Trustees are obligated to protect.

One particular community, prominent in current residence within the Downtown may be prominently identified by the fact that they read and speak Spanish. As we have described, this community is exposed to potential displacement and yet they will not learn of this potential through documents translated into their own language or through outreach designed to reach Spanish speakers. This is not only a serious oversight, but an insensitive and disrespectful price of an overly accelerated procedure not under control of a branch of the City government with political interests and understanding to alert them to their responsibilities.

CONCLUSIONS:

SUSTAINABLE PORT CHESTER ALLIANCE asserts the following and requests appropriate modification of the SEQRA and Comprehensive Planning processes to address the following concerns and deficiencies.

We assert that:

- The DEIS is not complete and should be revised to address the deficiencies described in this Submission so as to enable the Trustees to present an Amended DEIS;
- That the DEIS be harmonized with the findings of the Housing Conditions in Port Chester Study, the Housing Allocation Plan of the Westchester County Housing Opportunities Commission and the Rutgers study on which it is based, and the findings of the Monitor in the Fair Housing Settlement case as the remedial measures ordered by the District Court are implemented;
- That a Fair Housing analysis be performed to assure that the zoning provisions do not establish an economically based discrimination that could give rise to discrimination and due process claims by members of protected classes, including race, gender and family status in accordance with the Supreme Court decision in the Texas Department of Housing and Community Affairs v. Inclusive Communities Project, 576 U.S. ____ (2015).
- That the Trustees as the current Lead Agency for the DEIS extend the review to measure impacts on the public education system from households with children who will enter the school system if the population of the Project is not restricted to Millennials and empty-nesters as a way of developing an alternative, conservative mitigation for affects of class size, facility capacity thresholds and risk based support for capital expenditure that would otherwise redound to the property tax payers, with the limitation of the State imposed 2% ceiling.
- Extend the time to amend and augment the review of the DEIS to provide for a balanced housing and employment impact statement and appropriate mitigation strategies in accord with long term planning for broad based economic recovery and alleviating the problem of overcrowding of housing units and the deficite of affordable housing stock in each income cohort;
- All DEIS documentation should be translated into the Spanish language and distributed in a manner designed for broad engagement and public input from the Spanish speaking community;

Respectfully Submitted,

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On Behalf of **SUSTAINABLE PORT CHESTER ALLIANCE**

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