UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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233 EAST 69TH STREET OWNERS CORPORATION,

Plaintiff,

- against -

UNITED STATES DEPARTMENT OF TRANSPORTATION, RAY LAHOOD, in his capacity as Secretary of the United States Department of Transportation, THE FEDERAL TRANSIT ADMINISTRATION, PETER M. ROGOFF, in his capacity as Administrator of the Federal Transit Administration, THE METROPOLITAN TRANSPORTATION AUTHORITY, JAY H. WALDER, in his capacity as Chairman of the Metropolitan Transportation Authority, THE NEW YORK CITY TRANSIT AUTHORITY, THOMAS F. PRENDERGAST, in his capacity as President of the New York City Transit Authority, and THE METROPOLITAN TRANSPORTATION AUTHORITY CAPITAL CONSTRUCTION COMPANY, MICHAEL HORODNICEANU, in his capacity as President of the Metropolitan Transportation Authority Capital Construction Company,

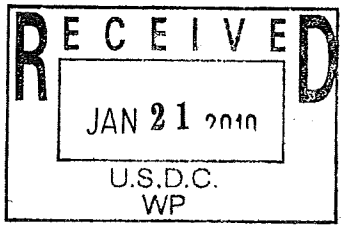
Defendants.

Civ.

COMPLAINT

'10 CIV 00491

JUDGE PAULEY



Plaintiff 233 East 69th Street Owners Corporation ("Plaintiff"), through its attorneys, Zarin & Steinmetz, respectfully allege, as follows:

SUMMARY OF ACTION

1. Five (5) years after the completion of the environmental review of a proposal to construct a subway connecting upper and lower Manhattan along Second Avenue (the "Second Avenue Subway Project" or the "Project"), the Defendant Metropolitan

Transportation Authority (the "MTA") announced suddenly a major modification to the design of the Project's "ancillary facility" to be built immediately adjacent to and abutting Plaintiff's residential buildings at the northwest corner of 69th Street and 2nd Avenue (the "69th Street Facility" or "Facility").[1]

2. The MTA's decision to construct what can only be characterized now as an "industrial plant" just inches from the Buildings' main entrance was made illegally, without any supplemental environmental review of the Facility's new significant impacts that were not previously studied, or other meaningful opportunity for public participation.

3. Plaintiff always understood the benefits of the Second Avenue Subway Project, and accepted that the 69th Street Facility would be constructed at its current location. Plaintiff also understood that the Facility would include an assortment of support equipment for the 72nd Street Station, including, a variety of ventilation facilities, emergency egress, electrical switchgear for track and station operations, and possibly one or more cooling towers on the roof, and that the Facility would operate continuously.

4. What motivated this action, however, was when the MTA announced, without any additional environmental review or analysis or public participation, a final design for the Facility, which constituted a complete change from the previous representations made in Defendants' 2004 environmental review regarding the Facility's appearance and impacts (the "Design Change"). The Design Change would, in sum, convert the Facility from its approved modest size and residential appearance, to an oversized, illuminated, industrial-looking building, which would be built immediately abutting the Plaintiff's Buildings, requiring the sealing and

[1] Plaintiff owns two residential buildings, Building A and Building B, having an address of 233 East 69th Street (Buildings A and B are sometimes referred to collectively herein as, the "Buildings"). Building A is located on East 69th Street, and Building B is located on East 70th Street and 2nd Avenue.

bricking up of thirty-two (32) residential windows in eight (8) apartments along the eastern face of Building A.

5. The National Environmental Policy Act of 1969 ("NEPA") and the New York State Environmental Quality Review Act ("SEQRA"), and their implementing regulations, are very specific in requiring supplemental environmental review when there are "substantial changes in the proposed action that are relevant to environmental concerns," which were not evaluated previously. 40 C.F.R. § 1502.9(c) (emphasis added); see 23 C.F.R. § 771.130(a); 6 N.Y.C.R.R. § 617.9(a)(7)(i)

6. NEPA specifically recognizes that supplemental review may be required to address issues of even "limited scope," such as evaluating a "design variation for a limited portion of the overall project." 23 C.F.R. § 771.130(f).

7. Defendants, respectfully, have two options. They can avoid a supplemental review by reverting to the plan and general design elements for the Facility consistent with what was approved in the 2004 Final Environmental Impact Statement. Or, if Defendants insist on modifying the design of the Facility as currently proposed, then they must supplement their prior environmental review and meaningfully study the new significant impacts not previously analyzed, and identify mitigation measures to avoid or minimize those impacts to the "maximum extent practicable."

8. Years ago, Plaintiff accepted that a less intrusive version of the 69th Street Facility would be constructed at this sensitive residential location. Plaintiff closely followed the environmental review process for the Project embodied in Defendants' 2004 Final Environmental Impact Statement.

The Buildings share the same main entrance located on East 69th Street. The proposed 69th Street Facility would be located on the corner between the Buildings.

9. Plaintiff understood and agreed to the potential environmental impacts and proposed mitigation measures for the Project's ancillary facilities, as well as the MTA's general design parameters for such facilities, as contained both textually and illustratively in the 2004 Final Environmental Impact Statement.

10. Plaintiff, once again, appreciated the important public benefit of the Second Avenue Subway Project.

11. The Final Environmental Impact Statement completed in 2004 by Defendants assured Plaintiff that the design of the Project's ancillary facilities would be "sensitive to the surrounding architectural context; they would not disturb views in the study area, nor would they change the study area's urban design." (FEIS at S-47).

12. The Final Environmental Impact Statement also represented that the Project's ancillary facilities would "be designed to blend into the urban fabric." The ancillary facilities would "appear like a neighborhood row house in height, scale, materials, and colors" in order to achieve continuity with community character. (Id. at 2-22).

13. The Final Environmental Impact Statement included explicit photographs, one of which is labeled "Conceptual illustration of a Second Avenue Subway ancillary building," showing that the Project's ancillary facilities would appear consistent with these critical design principles, which again, Plaintiff relied upon in supporting the Project. (See Figure 2-10 & Figure 2-11 from the Final Environmental Impact Statement for the Second Avenue Subway Project, dated April 2004, annexed hereto as part of Exhibit "A").

14. The Final Environmental Impact Statement further represented that the Project's ancillary facilities would measure approximately "25 feet wide, 75 feet deep, and four to five stories high." (FEIS at 2-22). This critical element would allow for the preservation of

the existing 15-foot setback between the eastern side of Plaintiff's Building A and the buildings on the adjoining lots (the "Setback").

15. The 2004 Final Environmental Impact Statement also committed to "privacy screens" around all cooling towers, and "state-of-the-art noise attenuation devices" for the air exhausts and intakes. (FEIS at 2-23).

16. Plaintiff was shocked when it learned for the first time in July 2009, that the MTA was now proposing a substantially modified 69th Street Facility. The MTA, with or without the approval or acquiescence of Defendant Federal Transit Administration (the "FTA"), the Lead Agency in this Project under the applicable governing regulations, made the decision to implement the Design Change without any supplemental environmental review as required under NEPA and SEQRA, and their implementing regulations.

17. This Court need spend only a few minutes comparing the photographs included in the Project's Final Environmental Impact Statement in 2004, to the modified design proposed in 2009, to recognize that the current plan for the 69th Street Facility constitutes a "substantial change" from the 2004 Impact Statement, and from what Plaintiff reasonably expected would be built. (Compare Selected Page of the MTA's Presentation entitled "Second Avenue Subway Project, Community Board 8," dated November 30, 2009 (the "November 30th Presentation"), with Figure 2-10 & Figure 2-11, which are all annexed hereto as Exhibit "A").[2]

18. As modified under the proposed 2009 Design Change, the 69th Street Facility would consist of a much larger, industrial-style building, measuring 75 feet high (i.e., approximately 8 stories), together with two (2), 20-foot cooling towers and other rooftop

[2] Additional selected pages of the MTA's November 30th Presentation are annexed hereto as Exhibit "B." Furthermore, Page S-47 of the Executive Summary, and Pages 2-21:2-23 of Chapter 2 (Project Alternatives) of the FEIS, which are of particular relevance to this lawsuit because they describe the Project's ancillary facilities as cited herein, are annexed hereto as Exhibit "C."

equipment, bringing the entire structure to approximately 95 feet, or 10 stories. The Facility, as described supra, would now occupy the entire footprint of the adjoining lots without any meaningful setback to the eastern side of Plaintiff's Building A.

19. The Facility's south and east façades would feature metal louvers (i.e., ventilation slits) typical of industrial buildings, including, a column of louvers on the Facility's southwest corner located immediately outside the Buildings' off-centered front door.

20. The 69th Street Facility would also contain a bizarre, oversized, 24-hour, illuminated glass staircase, wrapped around the Facility's prominent southeast corner on 2nd Avenue. The staircase would extend from above the proposed ground floor retail to the top of the 75-foot Facility. At a recent Community Board 8 meeting, no one but the MTA believed that this staircase would serve a valuable "decorative" purpose.

21. Of particular legal significance here, the Design Change would result in new potential significant adverse environmental impacts, which were never evaluated or even publicly disclosed since the 2004 FEIS was issued.

22. The now mammoth 69th Street Facility would be built right up to and abut the common boundary line between Plaintiff's property and the Facility. This would eliminate and completely destroy the Setback between the eastern side of Plaintiff's Building A and the proposed Facility.

23. The elimination of the Setback would require the sealing and bricking up of the eastern facing windows for approximately eight (8) residential units in Building A located at and below the top of the Facility (i.e., 32 windows in total, or 4 per apartment). Although these side lot line windows are not "legally required windows" under the NYC Zoning Resolution, the MTA has an affirmative legal obligation under NEPA and SEQRA to construct

the Facility in a manner that avoids or minimizes adverse impacts to the greatest extent practicable. Defendants made no demonstrable attempt to study or document this change in the Facility from the smaller dimensions stated in the 2004 Final Environmental Impact Statement, which would maintain the Setback.

24. The destruction of the Setback, together with the Facility's extensive on-street metal louvers and other industrial components, would be situated immediately abutting the front door to the Buildings. The residential feel of the Buildings' entrance and curb appeal would be significantly altered.

25. In addition, the modified design for the 69th Street Facility, when compared to the illustrations contained in the 2004 FEIS, would be totally out of harmony with the residential character of the Upper East Side, and the immediately adjacent and surrounding residential buildings in the vicinity of the Facility.

26. The Facility's façade of glass (for the illuminated staircase), steel (for the industrial louvers) and panelized ceramic tile (for the remaining surface area), would contradict the façade finishes of the nearby residential buildings in this community, which are characterized mostly by brick.

27. The prior environmental review in 2004 made no mention whatsoever about the possibility of the Facility containing a round-the-clock, illuminated, glass, "ornamental" staircase, similar to something one might expect to see in Times Square. No other building in this established residential neighborhood has a feature close to this.

28. Unless properly mitigated with suitable screening, noise attenuation, and other measures, the 69th Street Facility would also cause significant adverse visual, noise and air quality impacts due to, among other things, the appearance and operations of the air exhausts and

intakes, cooling towers, fans, and other mechanical equipment, again, immediately abutting Plaintiff's Buildings. Defendants, in the 2004 Final Environmental Impact Statement, committed to "privacy screens" and "state-of-the-art noise attenuation devices" to mitigate potential visual and noise impacts. (FEIS at 2-23)

29. At no time during the nine (9) year environmental review for the Project did the MTA ever conduct any of the requisite "hard look" studies related to modifying the 69th Street Facility as currently designed.

30. The extent to which the FTA – as the federal lead agency under NEPA – has any knowledge about the Design Change remains unclear. The FTA has not issued any findings, studies, determinations, or any other documentation indicating it knows about or has reviewed adequately the potential modifications to the 69th Street Facility since the 2004 environmental review was completed, and the new environmental consequences that would result.

31. In the event that the FTA and MTA insist on pursuing the modified 69th Street Facility as the preferred design, they clearly violated NEPA and SEQRA by failing to evaluate, in an open and transparent manner, the impact of such changes, together with a meaningful and "rigorous exploration" of alternative designs that would avoid or minimize the new aforementioned significant adverse impacts to the maximum extent practicable. 40 C.F.R. § 1502.14.

32. In fact, at a meeting in December 2009 between Plaintiff's and the MTA's technical consultants, Plaintiff's engineering consultants discussed conceptually viable plans that would allow the MTA to return to a design for the Facility, which would be more in

conformance with the representations and impacts analyzed and advanced by the MTA in the 2004 Final Environmental Impact Statement.

33. These plans would allow for the full functionality of the 69th Street Facility, while at the same time preserve the Setback between Building A and the Facility, eliminate the glass illuminated stairway, and implement the screening and noise attenuation measures committed to previously in the 2004 FEIS, among other things.

34. There are a number of different configurations that could work. In a letter to Plaintiff received days before the filing of this Complaint, the MTA simply dismissed such options due to "technical and schedule impacts." The MTA did not provide any supporting analyses, drawings, or meaningful quantifiable data, which are ordinarily required under NEPA and SEQRA – as evidenced by the studies and detailed documentation contained in Defendants' prior voluminous environmental review of the Project.

35. Upon information and belief, the construction schedule for the Second Avenue Subway Project overall, and the 69th Street Ancillary Facility, in particular, would not be compromised if Defendants took the time necessary to redesign the Facility to return to the general plans and impacts advanced during the 2004 environmental review.

36. It would certainly be more judicious to pursue this route than maintain the current modified design, which would require a full supplemental environmental review.

37. By failing to supplement their 2004 environmental review of the Second Avenue Subway Project, by depriving affected parties and other governmental agencies an opportunity to study meaningfully the environmental impacts that would result from the modified 69th Street Facility, by not considering other viable alternatives or possible mitigation measures in an open and deliberative process, and by failing to explicate their course of inquiry,

analyses and reasoning, the FTA and MTA have failed to carry out their most fundamental responsibilities under NEPA, SEQRA, and their implementing regulations.

38. In light of the foregoing, Defendants, their agents, and all involved and related parties must be enjoined, as a matter of law, from undertaking: (i) any actions related to the issuance of Request For Proposals for the construction of the 69th Street Facility; and (ii) any other actions related to the Second Avenue Subway Project as a whole, which are dependant upon or linked to the ultimate design of the 69th Street Facility, until Defendants (a) fulfill all their essential obligations as mandated under NEPA, SEQRA, and their governing regulations, and undertake the thorough supplemental environmental review required by law of the potential new significant environmental impacts associated with this substantial change in the Second Avenue Subway Project, or (b) commit to returning to a design of the Facility consistent with the analyses and impacts approved under the 2004 Final Environmental Impact Statement.

THE PARTIES

39. Plaintiff 233 East 69th Street Owners Corporation is the owner of fee title to the premises and buildings located at 233 East 69th Street, New York, New York, otherwise known as Block 1424/Lot 28 (formerly), Condo 466 on the New York City Tax Map, which premises and buildings are located immediately adjacent to where the 69th Street Facility would be built.

40. The Buildings were constructed at the same time in or around 1954. The light and air that the MTA is proposing to obstruct has been a feature of the Buildings since they were constructed. The windows that the MTA is proposing to brick up have been part of Building A since it was constructed. There are 57 apartments in Building A, and 150 apartments in Building B.

41. Plaintiff has standing to bring this action.

42. Plaintiff has the requisite personal stake in the outcome of this action upon which to invoke Federal Court jurisdiction, and to trigger the exercise of the Court's remedial powers.

43. Many of the residents in Plaintiff's Buildings have been living there for thirty (30) years and longer.

44. Plaintiff has and will suffer threatened and/or actual injury as a direct consequence of Defendants' failure to carry out their legal responsibilities, including, but not limited to, their failure to conduct an adequate environmental review under NEPA and SEQRA of the 69th Street Facility's new potential significant environmental impacts under the proposed Design Change, which were not evaluated previously in the Project's Final Environmental Impact Statement in 2004.

45. The threatened and/or actual injury at issue is a consequence, in part, of Defendants' failure under 40 C.F.R. Section 1502.9, 23 C.F.R. Section 771.130 and 6 N.Y.C.R.R. Section 617.9(a)(7)(i) to supplement the 2004 Final Environmental Impact Statement for the Project prior to announcing their decision to make substantial modifications to the Project by, among other things, increasing the overall size of the Facility so as to eliminate the Setback, adding an illuminated staircase, and redesigning the façade of the 69th Street Facility to make it appear more industrial and less residential, which modified design would result in new potential significant environmental impacts that were not evaluated or even identified in the 2004 Final Environmental Impact Statement.

46. The threatened and/or actual injury at issue is also a consequence, in part, of Defendants' express stated intention to acquire a Permanent Easement at Plaintiff's property,

as evidenced by the MTA's Determination and Findings Pursuant to Article 2 of the New York Eminent Domain Procedure Law, approved by the MTA on December 19, 2007. The Permanent Easement is required in connection with the construction and operation of the 69th Street Facility.

47. Upon information and belief, if the 69th Street Facility was to consist of 25 feet in width as represented in the 2004 Final Environmental Impact Statement, then the MTA may not need a Permanent Easement relating to a proposed staircase under Building B. The MTA has not made public all the relevant information for Plaintiff to know for certain under what design options the Permanent Easement would not be required.

48. Plaintiff's threatened and/or actual injury is also based upon the immediate proximity of its property to the proposed 69th Street Facility.

49. Avoidance or minimization of Plaintiff's threatened and/or actual injury alleged herein is an interest within the zone of interests intended to be protected by NEPA and SEQRA.

50. Defendants' failure to perform their environmental review responsibilities would, if uncorrected through judicial intervention, injure the use, aesthetics, and environmental well-being of Plaintiff's residential property, the surrounding properties and sites, and the public uses thereof.

51. The threatened and/or actual injury alleged herein will likely be redressed by a favorable decision because Defendants will be compelled either: (i) to return to the design of the Project's ancillary facilities documented in the 2004 Final Environmental Impact Statement, or (ii) to investigate and study in an open and deliberative public process the environmental impacts of the proposed Design Change as NEPA and SEQRA requires, including, by preparing a Supplemental Environmental Impact Statement, and to avoid or

mitigate the adverse impacts associated with the proposed Design Change to the maximum extent practicable.

52. Ultimately, if Defendants insist in pursuing the Design Changes of the 69th Street Facility, a Supplemental Environmental Impact Statement will reveal the new significant environmental impacts that the proposed Design Change would cause, and Defendants will likely be compelled to abandon the proposed Design Change or portions thereof for a less harmful alternative.

53. Defendant United States Department of Transportation ("DOT") is an Executive Branch Department of the United States Government, pursuant to 49 U.S.C. Section 102. DOT has its principal Offices at 1200 New Jersey Avenue, SE, Washington, D.C. 20590. DOT is ultimately responsible for the actions of the FTA.

54. The Honorable Ray LaHood is the Secretary of the DOT.

55. Defendant FTA is an administrative agency of the DOT pursuant to 49 U.S.C. Section 107. FTA has its principal Offices at 1200 New Jersey Avenue, SE, Washington, D.C. 20590. FTA and MTA are acting as joint lead agencies under NEPA to conduct the inadequate environmental review of the 69th Street Facility, which is the subject of this action.

56. A lead agency "means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement." 40 C.F.R. § 1508.16.

57. The Honorable Peter M. Rogoff is the Administrator of the FTA.

58. Defendant MTA is a public benefit corporation operating pursuant to Article 5, Title 11 of New York State Public Authorities Law. MTA has its principal Offices at 347 Madison Avenue, New York, New York 10017-3739. FTA and MTA failed to conduct a

supplementary environmental review of the 69th Street Facility's Design Change, which is the subject of this action.

59. The Honorable Jay H. Walder is Chairman of the MTA.

60. Defendant New York City Transit Authority ("NYCT"), is an affiliated agency of the MTA, and a public benefit corporation created by the State of New York. NYCT has its principal Offices at 2 Broadway, New York, New York 10004. NYCT participated and cooperated in the inadequate environmental review that is the subject of this action.

61. Thomas F. Prendergast is the President of the NYCT.

62. Defendant MTA Capital Construction Company ("MTA Capital"), was created by the MTA and is a wholly owned subsidiary of the MTA. MTA Capital has its principal Offices at 2 Broadway, New York, New York 10004-2207. MTA Capital is responsible for the management of the Second Avenue Subway Project.

63. Michael Horodniceanu is the President of MTA Capital.

JURISDICTION AND VENUE

64. Pursuant to 28 U.S.C. Section 1331, this Court has original jurisdiction over this matter because it arises under the laws of the United States, including, the APA and NEPA.

65. Pursuant to 28 U.S.C. Section 1361, this Court also has original jurisdiction over this matter because Plaintiff seeks relief in the nature of mandamus to compel an officer or employee of the United States or an agency thereof to perform a duty owed to Plaintiff.

66. Pursuant to 28 U.S.C. Section 1367, this Court has supplemental jurisdiction over all claims made by Plaintiff under New York State Law because such claims are

so related to claims in this action that are within the Court's original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

67. This Court has personal jurisdiction over each and every Defendant in this action because each and every Defendant named herein transacts business within the State of New York.

68. Pursuant to 28 U.S.C. Section 1391(e), venue in the Southern District of New York is proper because a substantial part of the events and/or omissions giving rise to Plaintiff's claims occurred there, and the property that is the subject of this action is situated there. Venue is also appropriate in the Southern District of New York as all Defendants are subject to personal jurisdiction in the Southern District at the time that this action is being commenced. 28 U.S.C. § 1391.

RELEVANT STATUTORY AND REGULATORY FRAMEWORK

The Federal Administrative Procedure Act

69. The Court's review of this action is governed by the APA, and, in particular, 5 U.S.C. Section 706. This statute empowers the Court to "compel agency action unlawfully withheld or unreasonably delayed" and "hold unlawful and set aside agency action, findings, and conclusions found to be," inter alia "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," "without observance of procedure required by law," or "unsupported by substantial evidence." 5 U.S.C. § 706.

70. The APA requires Courts to make a searching and careful inquiry into the underlying facts to determine whether an agency's decision to proceed with a proposal was based

on a consideration of all the relevant factors, and whether there has been a clear error of judgment and/or law.

The National Environmental Policy Act of 1969

71. Congress enacted NEPA in recognition of "the profound impact of man's activity on the interrelations of all components of the natural environment," including, in particular, "high-density urbanization," as well as "the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man." 42 U.S.C. § 4331.

72. In NEPA, Congress "declare[d] that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." Id.

73. In NEPA, Congress established that "it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources" in order to advance critical goals, including "assur[ing] for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings," and "preserv[ing] important historic, cultural, and natural aspects of our national heritage." Id.

74. To effectuate NEPA's salutary purposes, federal agencies are required to prepare, in conjunction with every recommendation or report on proposals for "major Federal

actions significantly affecting the quality of the human environment," an environmental impact statement ("EIS") addressing: (i) the environmental impact of the proposed action; (ii) any adverse environmental effects that cannot be avoided should the proposal be implemented; (iii) alternatives to the proposed action; (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Id. § 4332.

75. "[T]he primary purpose of an [EIS] is to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government." 40 C.F.R. § 1502.1.

76. An EIS, or a Supplemental Environmental Impact Statement ("SEIS") in this case, "shall provide full and fair discussion of significant environmental impacts and shall inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." Id.

77. The section of an EIS or SEIS analyzing alternatives is considered "the heart of the environmental impact statement." Id. § 1502.14.

78. In the alternatives section, agencies shall, inter alia, "[r]igorously explore and objectively evaluate all reasonable alternatives," "[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits," and "[i]nclude appropriate mitigation measures." Id. § 1502.14(a), (b), (f).

79. "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." Id. at § 1500.1(b) (emphasis added).

80. "Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." Id. § 1501.2 (emphasis added).

81. NEPA's implementing regulations require that a draft EIS ("DEIS") be prepared and circulated for comment, after which a final EIS ("FEIS") must be prepared to respond to comments on the DEIS. See id. §§ 1502.9, 1502.19.

82. The FTA's process for complying with NEPA is set forth in the joint Federal Highway Administration/Department of Transportation's Environmental Impact and Related Procedures. See 23 C.F.R. §§ 771.101-139.

83. The FTA's implementing regulations likewise recognize that "[e]arly coordination with appropriate agencies and the public aids in determining the type of environmental document an action requires, the scope of the document, the level of analysis, and related environmental requirements. This involves the exchange of information from the inception of a proposal for action to preparation of the environmental document." Id. § 771.111(a).

84. The FTA's regulations implementing NEPA mandate that "[a] draft EIS shall be prepared when the [FTA] determines that the action is likely to cause significant impacts on the environment." Id. § 771.123(a).

85. A Notice of Intent to prepare an EIS must be published in the Federal Register, after which the FTA must initiate a scoping process, which is "used to identify the

range of alternatives and impacts and the significant issues to be addressed in the EIS and to achieve the other objectives [concerning scoping] of 40 C.F.R. 1501.7." Id. §§ 771.123 (a), (b).

86. "The draft EIS shall evaluate all reasonable alternatives to the action and discuss the reasons why other alternatives, which may have been considered, were eliminated from detailed study." Id. § 771.123(c).

87. A principal aim of NEPA is active public involvement and access to information. As such, the DEIS must be circulated for comment and subjected to public hearings. Id. §§ 771.123(g), (h).

88. The DEIS must be "made available to the public" and transmitted to: "(1) [p]ublic officials, interest groups, and members of the public known to have an interest in the proposed action or the draft EIS; (2) Federal, State, and local government agencies expected to have jurisdiction or responsibility over, or interest or expertise in, the action . . . and (3) States and Federal land management entities which may be significantly affected by the proposed action or any of the alternatives." 23 C.F.R. at § 771.123(g).

89. The regulations applicable to the FTA mandate that interested parties, such as Plaintiffs, have "[e]arly and continuing opportunities" for review, requiring:

> early and continuing opportunities during project development for the public to be involved in the identification of social, economic, and environmental impacts, as well as impacts associated with relocation of individuals, groups, or institutions.

Id. § 771.123(h) (cross-referencing § 771.111(h)).

90. Accordingly, the FTA is specifically required to provide "[r]easonable notice to the public of either a public hearing or the opportunity for a public hearing." 23 C.F.R. § 771.111(h)(iv).

91. Following the DEIS process, an FEIS must be prepared, which must "identify the preferred alternative and evaluate all reasonable alternatives considered. It must also discuss substantive comments received on the draft EIS and responses thereto, summarize public involvement, and describe the mitigation measures that are to be incorporated into the proposed action." Id. § 771.125(a)(1).

92. A Record of Decision ("ROD") must then be prepared in accordance with 40 C.F.R. Section 1505.2. The ROD must "[s]tate what the decision was," "[i]dentify all alternatives considered," and "[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted." 40 C.F.R. § 1505.2; see also 23 C.F.R. § 771.127.

93. "The ROD will present the basis for the decision as specified in 40 C.F.R. 1505.2." 23 C.F.R. § 771.127(a).

94. Of significance in this action, agencies are required to prepare supplements to an FEIS where, as here: "(i) [t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c) (emphasis added).

95. Similarly, FTA's regulations implementing NEPA require that an EIS be supplemented when: "(1) [c]hanges to the proposed action would result in significant environmental impacts that were not evaluated in the EIS; or (2) [n]ew information or circumstances relevant to environmental concerns and bearings on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS." 23 C.F.R. § 771.130(a).

96. "Where the [FTA] is uncertain of the significance of the new impacts, the applicant [must] develop appropriate environmental studies or, if the [FTA] deems appropriate, an [Environmental Assessment] to assess the impacts of the changes, new information, or new circumstances. If, based upon the studies, the [FTA] determines that a supplemental EIS is not necessary, the [FTA] shall so indicate in the project file." 23 C.F.R. § 771.130(c).

97. "A supplement is to be developed using the same process and format (i.e., draft EIS, final EIS, and ROD) as an original EIS, except that scoping is not required." 23 C.F.R. § 771.130(d); see also 40 C.F.R. § 1502.9(c)(4).

98. "In some cases, a supplemental EIS may be required to address issues of limited scope, such as the extent of proposed mitigation or the evaluation of location or design variations for a limited portion of the overall project." 23 C.F.R. § 771.130(f) (emphasis added).

99. NEPA's implementing regulations thus require that agencies take a "hard look" at the environmental consequences of project changes or new information, such as the Design Change to the Second Avenue Subway Project, which arise following the publication of an FEIS to determine whether an SEIS is necessary.

100. All assumptions made by the agency in determining whether to prepare an SEIS must be spelled out, inconsistencies explained, methodologies disclosed, contradictory evidence rebutted, record references solidly grounded, guesswork eliminated, and conclusions supported in a manner capable of judicial understanding.

101. In applying the "hard look" test, Courts determine, among other things, whether the agency obtained opinions from its own experts, obtained opinions from experts outside the agency, gave careful scientific scrutiny, responded to all legitimate concerns raised, as well as provided a reasoned explanation for said determination.

102. Even where an agency takes the requisite "hard look," the Court still must review the agency's decision to determine whether it has violated the APA's arbitrary and capricious standard in deciding not to issue an SEIS.

The State Environmental Quality Review Act

103. New York State's SEQRA is modeled on NEPA.

104. As with NEPA, SEQRA requires all state and local governmental agencies to prepare an EIS for any action they propose or approve, which may have a potential significant effect on the environment. N.Y. Envtl. Conserv. Law § 8-0109(2).

105. No agency subject to SEQRA can make a final determination to undertake, fund, approve or disapprove an action that has been subject to an EIS until it issues formal Findings, certifying, inter alia, that the action avoids or minimizes adverse environmental impacts to the maximum extent practicable through the incorporation of identified mitigation measures. 6 N.Y.C.R.R. § 617.11(d).

106. The environmental review required under SEQRA and NEPA may be coordinated, including, through the preparation of a joint EIS, to satisfy both State and Federal requirements. See id. § 617.15.

107. The 2004 Final Environmental Impact Statement for the Project was "prepared pursuant to [NEPA] and is also consistent with [SEQRA] and its implementing regulations." (See FEIS Abstract).

108. SEQRA also recognizes situations may occur where "changes proposed for the project" present "significant adverse environmental impacts not addressed or inadequately addressed" in the initial FEIS. 6 N.Y.C.R.R. § 617.9(a)(7)(i). In the event that such circumstances present themselves, the lead agency must supplement its initial review to

account for the new aspects of the project not adequately addressed in the initial EIS. Id. § 617.9(a)(7)(i).

109. Where supplementation is required, "it will be subject to the full procedures" of SEQRA review. Id. § 617.9(a)(7)(iii).

110. The FTA and MTA complied with none of the foregoing substantive or procedural obligations under NEPA or SEQRA in connection with the proposed Design Change for the 69th Street Facility.

FACTUAL BACKGROUND

Second Avenue Subway Project

111. The FTA and MTA, in cooperation with MTA NYCT, have proposed a major capital project known as the Second Avenue Subway Project.

112. The Project is meant to provide a "full-length Second Avenue Subway from Harlem to Lower Manhattan." (See FEIS for the Second Avenue Subway Project, dated April 2004 (the "FEIS"),[3] at 1-1).[4]

113. The Project would be a "new, two-track, approximately 8.5-mile rail line extending the length of Manhattan's East Side from 125th Street in East Harlem to Hanover Square in the Financial District." (Id.).

114. In addition to the full-length Second Avenue route, the Project includes a second route operating "along Second Avenue from 125th Street to 63rd Street, and then

[3] The defined term "FEIS" hereinafter is used to refer to the Final Environmental Impact Statement for the Second Avenue Subway Project.

[4] The FEIS, as well as other documents and presentations related to the Second Avenue Subway Project, are available at the MTA's website at http://www.mta.info/capconstr/sas/sas_documents.htm. Selected pages of the FEIS (i.e., S-47 & 2-21:2-23), which are of particular relevance to this lawsuit, are annexed hereto as Exhibit "C." A CD ROM version of the FEIS is available upon request.

travel[ing] west along the existing 63rd Street Line, joining the existing Broadway Line, serving express stations along Seventh Avenue and Broadway before crossing the Manhattan Bridge to Brooklyn." (Record of Decision for MTA/NYCT Second Avenue Subway Project, New York, New York, dated July 8, 2004 (the "ROD"), a copy of which is annexed hereto as Exhibit "D").[5]

115. The overall Project is being constructed in four phases. (See FEIS at S-15 to S-17).

116. The first phase, which is underway, "would include construction of three entirely new subway stations – 96th Street, 86th Street, and 72nd Street." (FEIS at S-16).

117. The 69th Street Facility at issue in this lawsuit would be constructed as part of the first phase in connection with the Project's 72nd Street Station.

118. Regarding the timing of construction of the Facility, according to the MTA's Proposed Construction Schedule presented at the Community Board 8 Meeting on November 30, 2009, demolition of the existing buildings at the properties adjacent to Plaintiff's Buildings, namely 1313 Second Avenue (Block 1424/Lot 21) ("Lot 21") and 1315 Second Avenue (Block 1424/Lot 22) ("Lot 22," collectively with Lot 21, the "Subject Site"), is scheduled to start in late 2010. (See Exhibit "B," Selected Pages of the November 30th Presentation).

119. Upon information and belief, the MTA is expected to award contracts for this work during the first part of 2010.

120. Construction of the 69th Street Facility at the Subject Site would begin by mid-2013, and be completed by the 3rd quarter of 2015. (See Exhibit "B").

[5] The defined term "ROD" hereinafter is used to refer to the Record of Decision for the Second Avenue Subway Project.

The FTA's and MTA's NEPA/SEQRA Review Of The Project

121. Important projects for the City, such as the Second Avenue Subway Project, must undergo extensive planning and review.

122. The analysis of the Second Avenue Subway Project's alternatives and related environmental impacts under NEPA and SEQRA began in 1995, with the preparation of a combined Major Investment Study ("MIS") and DEIS. (FEIS at 4-1).

123. By Defendants' own account, that analysis lasted nine (9) years, and included an "extensive public outreach program," and "dozens of meetings with Community Boards, the public . . . and interested governmental agencies." (Id. at 4-1).

124. The Project's "public outreach program [was] initiated during the MIS/DEIS phase and continu[ed] through the SDEIS and FEIS phases." (Id. at 4-2).

125. The MIS and DEIS together comprised what is known as the Manhattan East Side Alternatives ("MESA") Study. (Id. at 2-1).

126. The MESA MIS/DEIS was published in August 1999. (Id. at 4-2).

127. The MESA MIS/DEIS "analyzed a wide range of possible alternatives to ease transit problems on Manhattan's East Side." (Id. at 2-1).

128. The MESA MIS/DEIS studied in detail four particular alternatives, none of which included a full-length Second Avenue Subway from East Harlem to Lower Manhattan. (FEIS at 4-2).

129. During the public outreach effort, "the public voiced its strong support for a full-length Second Avenue Subway." (Id. at 2-1).

130. Mindful of their responsibility to supplement a prior environmental review before finalizing substantial changes to a proposal – a practice abandoned in the instant Design

Change related to the 69th Street Facility – Defendants commenced the preparation of a supplemental draft environmental impact statement pursuant to NEPA and SEQRA requirements. The potential environmental impacts of the full-length Second Avenue subway had not been studied or analyzed in detail in the MIS/DEIS.

131. On March 22, 2001, the FTA and MTA/NYCT issued a Notice of Intent to prepare a Supplemental Draft Environmental Impact Statement ("SDEIS") to "evaluate a 'full-length' Second Avenue Subway alignment in Manhattan, extending from the vicinity of 125th Street in Harlem south along Second Avenue to the Financial District in Lower Manhattan." (Notice of Intent, dated March 22, 2001, a copy of which is annexed hereto as Exhibit "E").

132. The SDEIS was intended to "present new information or circumstances relevant to the full-length Second Avenue Subway alignment and evaluate environmental impacts that were not evaluated in the MESA DEIS." (Id.).

133. The SDEIS was published in April 2003. Public hearings were held in May 2003. The public comment period remained open until June 10, 2003. (FEIS at 4-2).

134. In April 2004, the FTA and MTA/NYCT published the FEIS, which "respond[ed] to comments received on the MIS/DEIS published in 1999, and to comments received on the SDEIS during the public comment period." (Id. at 4-2).

The FEIS Describes And Illustrates The Project's Ancillary Facilities

135. The FEIS identified in both narrative and photographs the purpose and need for the Project's ancillary facilities, what they would look like, how they would be consistent with community character, and mitigation measures related to potential visual and noise impacts in particular. (See FEIS at S-47 & 2-21:2-23, Exhibit "C"; see also FEIS Figures 2-10 & 2-11, Exhibit "A").

136. Based upon those representations, Plaintiff supported the Second Avenue Subway Project, and the location of an ancillary facility and its attendant impacts at the Subject Site.

137. Specifically in regard to aesthetics and community character, the FEIS stated, as an overarching design principle, that the Project's ancillary facilities would be "sensitive to the surrounding architectural context; they would not disturb views in the study area, nor would they change the study area's urban design." (FEIS at S-47) (emphasis added).

138. The FEIS further stated that "[t]he new ventilation structures would typically be approximately the same size as a typical rowhouse – 25 feet wide, 75 feet deep, and four to five stories high." (Id. at 2-22) (emphasis added). The FEIS noted that some ventilation structures may need to be wider only if they incorporated a subway station entrance. (See id.). That is not the case with respect to the subject 69th Street Facility. If the 69th Street Facility was, in fact, built consistent with the dimensions represented in the FEIS, it would not occupy the entire Subject Site, and importantly, it would preserve the existing Setback between Plaintiff's Building A and the abutting structures.

139. The FEIS further promised that "[v]entilation facilities and emergency egress stairs are being planned for locations off the sidewalk in neighborhood buildings or plazas [that would be] integrated into the community character." (Id.) (emphasis added). See also FEIS at 6-49 ("These ancillary facilities would be designed to be consistent with neighborhood character.") (emphasis added).

140. The FEIS continued to explain that such ancillary facilities "would be designed to blend into the urban fabric; for example, they could be designed to appear like a neighborhood row house in height, scale, materials, and colors." (Id. at 2-22) (emphasis added).

141. Consistent with all of these critical design elements, the FEIS included specifically Figures 2-10 and 2-11 as examples of what the Project's ancillary facilities, including the subject 69th Street Facility, would look like. (See FEIS Figure 2-10 & Figure 2-11, Exhibit "A").

142. Figure 2-11, in particular, which is entitled "Conceptual illustration of a Second Avenue Subway ancillary building," appears like any other residential building in New York City, replete with windows and a brick façade.

143. The modified design of the 69th Street Facility looks absolutely nothing like the ones illustrated in Figure 2-10 and Figure 2-11.

144. Plaintiff would have no objection if the design of the 69th Street Facility was consistent with the facilities depicted in Figures 2-10 and 2-11, and described textually on pages 2-21 through 2-23 of the FEIS.

145. Moreover, with respect to cooling towers, the FEIS explained that "plans call for cooling towers to be located on the roofs of buildings." (Id. at 2-23).

146. The FEIS stated, however, that the cooling towers "would be hidden from view by privacy screens." (Id. at 2-23).

147. The FEIS also acknowledged that "the various ancillary facilities such as fans, cooling towers, chillers and pumps required to operate the Second Avenue Subway [P]roject have the potential to generate airborne noise." (Id. at S-60) (emphasis added).

148. In response, the FEIS stated that "[t]he exhausts and intakes would be designed to have state-of-the-art noise attenuation devices and are planned to be located at least 10 feet away from any neighboring building windows or entrances both to meet code

requirements and to minimize any potential adverse impacts to the neighborhood from noise." (Id.) (emphasis added) (see also FEIS at 2-23, Exhibit "C").

The FTA Issues The ROD For The Project,
Ending Its NEPA Environmental Review

149. In July 2004, the FTA, as Lead Agency under the Second Avenue Subway Project's environmental review, issued the Record of Decision for the Project. (Exhibit "D").

150. The ROD stated the formal decision of the Lead Agency, as well as identified all alternatives considered by the Agency in reaching its decision. 40 C.F.R. § 1505.2.

151. The ROD stated that "the requirements of NEPA have been satisfied for the Second Avenue Subway Project, proposed by the MTA and NYCT." (ROD at 1).

152. The ROD provided that the "environmental record for the Second Avenue Subway project includes the previously referenced MESA MIS/DEIS issued in 1999, the SDEIS issued in April 2003, and the FEIS issued in April 2004." (Id. at 10).

153. "These documents represent[ed] FTA's detailed analyses and findings required by NEPA." (Id.).

154. Of relevance here, the Record, as defined in the ROD, did not contain any specific reference to the 69th Street Facility, nor did the ROD indicate that Defendants may undertake substantial changes in the design of the Project's ancillary facilities in the future.

155. The only substantive references in the ROD to ancillary facilities was acknowledging that they are a feature of the Project, and that certain private properties would need to be acquired to allow for their construction. (Id. at 5, 7).

The FTA and MTA Prepare A Supplemental EA
Unrelated to the 69th Street Facility

156. Pertinent to the issues at hand, in recognition of their fundamental obligation under NEPA and SEQRA to supplement an environmental review when there are substantial changes to a proposed action, the FTA and MTA issued a document in June 2009 entitled, "Supplemental Environmental Assessment to the Second Avenue Subway Final Environmental Impact Statement: 72nd and 86th Street Station Entrance Alternatives" (the "EA").

157. The purpose of this Supplemental EA was to analyze alternatives for substantial design changes made by the MTA to the northern entrances at the 72nd Street and 86th Street Stations.

158. The EA was issued following extensive community concern, and the filing of several lawsuits by nearby residents raising NEPA and SEQRA challenges. The lawsuits challenged the MTA's decision to relocate the station entrances to an unprecedented mid-block location from a more traditional corner location without analyzing any of the new significant environmental implications.

159. Similar to the situation here, the MTA sought to implement a substantial design change without studying and mitigating the new potential significant impacts that were not previously studied.

160. The MTA and FTA explained in their EA that "advanced engineering has identified unanticipated difficulties in the . . . design for the northern entrances at the 72nd Street and 86th Street Stations, and therefore alternatives for those entrances have been explored." (See, e.g., EA at 1-2) (A copy of the pages cited to the EA in this Complaint is annexed hereto as Exhibit "F").

161. Inexplicably, the EA did not mention, or contain any discussion or analysis of the changes the MTA was obviously contemplating for the 69th Street Facility at such time.

162. The EA noted that an ancillary facility would be constructed at the Subject Site; however, the EA stated specifically that the "location and design of these structures would not be changed by the Build alternatives for the 72nd Street Station described below." (EA at 2-1) (emphasis added).

163. The EA went on to read that "[t]herefore, the descriptions that follow focus on proposed changes in station entrances on the northeast and southeast corners of 72nd Street and Second Avenue," and not on any changes in the design of the Project's ancillary facilities as represented in the FEIS. (Id.) (emphasis added).

164. Thus, as of June 2009, Plaintiff had no reason to believe that the ultimate design and impacts of the 69th Street Facility approved in the 2004 FEIS would be any different than what was shown and described in the FEIS.

Plaintiff Learns For The First Time About
The Design Change Being Proposed By The MTA

165. On July 1, 2009, Plaintiff received a letter from the MTA, formally advising the residents of Plaintiff's Buildings in writing, for the first time, that the MTA now planned to construct the 69th Street Facility on the Subject Site "without any setbacks." (See the "July 1st Letter," a copy of which is annexed hereto as Exhibit "G").

166. The MTA stated that, under its current plans, "the existing buildings on Lots 21 and 22, which are not currently built to their common lot boundary with your property, will be demolished and replaced with the new Ancillary Building, which will extend to that boundary line and occupy all or substantially all of Lots 21 and 22." (Id.) (emphasis added).

167. The MTA further stated that the "Ancillary Building will be 75 feet high, topped with a cooling tower that will be an additional 20 feet high, and will impact the lot line windows on the easterly facade of your building that are located at or below those heights." (Id.) (emphasis added).

168. Although the MTA stated that the "ultimate design was dictated by operational and safety requirements and construction constraints," the MTA provided no supporting documentation whatsoever, such as structural plans or drawings, demonstrating what "requirements" and "constraints" existed, and how they factored into the modified design and location of the Facility, which the MTA admits "will impact" Building A. (Id.).

169. As stated above, the MTA's decision to extend the 69th Street Facility to the common property line and occupy the entire Subject Site would completely destroy the existing Setback, and result in the bricking up and sealing of all of the thirty-two (32) eastern facing windows for eight (8) residential apartments in Building A.

170. The proposed much larger 69th Street Facility would also impact an additional approximate eighteen (18) apartments in the Buildings by obstructing their current light and views.

171. The loss of the Setback would also damage Plaintiff's curb appeal.

172. There would be no buffer between Building A and the Facility to maintain the residential feel of the Buildings' entrance. Instead, the column of steel louvers located on the southwest corner of the Facility would be located immediately outside of the Buildings' front door. Currently, a single story shoe repair shop provides a 15-foot buffer to the remainder of the adjoining 5-story building.

173. This would also cause the value of the apartments in Plaintiff's Buildings to decrease substantially, including, according to some published reports, by as much as 20%.

174. Further, the MTA's July 1st Letter made no mention of any mitigation measures that would be implemented to avoid or minimize adverse visual and noise impacts from the Facility's cooling towers, air intakes and exhausts, fans, and other functions. There was no discussion or analysis by the MTA regarding privacy screens around the rooftop equipment, or noise attenuation devices as part of the exhausts, fans and cooling towers as mentioned in the 2004 FEIS.

175. None of the usual and customary "hard look" studies were performed by Defendants to analyze the Facility's new impacts, and to devise adequate mitigation measures prior to sending the July 1st Letter.

176. The July 1st Letter was also devoid of any mention of supplemental environmental review under NEPA and SEQRA to study the Facility's new potential significant impacts.

Plaintiff Asks The MTA To Return To The Facility's
Design Elements Represented In The 2004 FEIS

177. The residents of Plaintiff's Buildings were shocked, to say the least, by the modified design of the Facility, and that the MTA finalized its design plans without any input from either the community or the Plaintiff.

178. The residents of Plaintiff's Buildings had generally accepted and supported the MTA's decision in 2004 to locate an ancillary facility at the Subject Site. They understood the MTA's general design parameters disclosed in the FEIS, including, but not limited to, the overriding principle that the Facility would be consistent with the residential character of the East 69th Street community, that the Facility would consist of four to five stories,

and that the Facility's dimensions would preserve the Setback. They also believed that the "privacy screens" and "noise attenuation devices" promised in the FEIS would adequately mitigate any potential visual and noise impacts.

179. Following the July 1st Letter, Plaintiff hired a Professional Planning Consultant to analyze the Design Change and its impacts upon Plaintiff.

180. In a letter to the MTA dated August 28, 2009, Plaintiff explained that the "primary issue is the proposed 100% lot coverage for the proposed Ancillary Facility, which will directly block light and air for fourteen (14) residential units, while the cooling towers will negatively impact an additional twelve (12) residential units." (See the "August 28th Letter," a copy of which is annexed hereto as Exhibit "H.").

181. The August 28th Letter went on to describe that the 69th Street Facility would cutoff and "block windows in bedrooms, kitchens, dining rooms, and bathrooms" of the aforementioned eight (8) residential units.

182. Plaintiff made repeated requests of the MTA, including, asking the MTA to go back to the 2004 design of the Facility so as to preserve and "accommodate [the existing] 10' to 15' airshaft to maintain light and air to the fourteen (14) impacted apartments," and to locate the cooling towers to ensure that they "will have the least impact on these residential units." (Id.).

183. Plaintiff also asked the MTA to design the façade of the Facility so that it would be "contextual to the 69th Street neighborhood, pedestrian-friendly and safe" – consistent with the representations in the 2004 FEIS that the Facility would be in harmony with community character. (Id.). Although as of the August 28th Letter the MTA had not yet revealed publicly the final exterior design of the Facility, including the completely out of character illuminated

staircase, Plaintiff knew that the Facility's massing and façade treatment were real issues, which required attention.

184. In sum, Plaintiff sought to preserve the design elements of the Project's ancillary facilities that were promised and analyzed in the 2004 FEIS.

The MTA Summarily Rejects Plaintiff's Requests

185. The MTA rebuffed all of Plaintiff's requests.

186. In a letter dated September 17, 2009, and again without providing any supporting documentation, the MTA stated that "the structure requires use of 100% of the parcel to house all of the equipment and shaft ductwork." (See the "September 17th Letter," a copy of which is annexed hereto as Exhibit "I").

187. The MTA did not provide any of the underlying assumptions or bases, or any other technical analysis, for reaching this conclusion. The MTA also dismissed Plaintiff's request for a meaningful analysis of preserving the Setback, stating, again, without any analysis or discussion of design alternatives, that it is simply not feasible "given the space requirements for the ancillary building and emergency egress." (Id.).

188. Moreover, completely oblivious to the conceptual Figures presented in the FEIS, the MTA concluded in its September 17th Letter that the "proposed ancillary building is consistent with the facility that was approved as part of the [FEIS and ROD] issued for the original plan." (Id.).

189. Again, while some of the finishing details may have needed to be worked out post-FEIS, this Court need spend only a brief moment comparing the current modified design of the Facility with what was promised in the FEIS, both of which are annexed hereto as Exhibit

"A," to understand the disingenuousness of the MTA's statement that the current modified design is somehow "consistent" with the approved plan. The differences are real and substantial.

190. The MTA also rejected a façade that would be consistent with the façade finishes in the other residential neighborhood buildings and the designs illustrated in the FEIS, stating simply that "the options for finishes are very limited since much of the surface area is louvered." (See Exhibit "I").

191. This statement is wrong on a number of accounts. First, according to Plaintiff's consultants, there are different styles of louvers. The louvers utilized for the Facility, which would be located in the epicenter of a residential community, need not be so industrial-looking. The louvers will be custom designed. The MTA could design the louvers and locate them in such a way so as to preserve and protect the character of the community.

192. In addition, there is plenty of surface area that would not be louvered, namely the area now shown to consist of panelized ceramic tile. (See Exhibit "A"). The façade finish for this area, like the rest of the Facility, must be sympathetic to the other finishes in this residential community.

193. The MTA's September 17th Letter continued to make no mention whatsoever about the performance of visual, noise, and air quality impact studies and analyses, or potential mitigation measures.

194. Plaintiff, completely caught off guard by these turn of events, made the further reasonable written request to the MTA for copies of the "plans, renderings, and construction documents" so that Plaintiff could better understand the MTA's rationale, and perhaps work together with the MTA to achieve a "technical solution that satisfies the Ancillary

Facility's technical requirements." (See Letter from Plaintiff to the MTA dated September 30, 2009, a copy of which is annexed hereto as Exhibit "J"),

195. Once again, Plaintiff reassured the MTA that it "does not oppose" the purposes or construction of the ancillary facility planned for the Subject Site. (Id.).

196. Plaintiff is concerned only with ensuring that the 69th Street Facility adheres to the basic design elements that were represented in the 2004 FEIS in order to, among other things, preserve the Setback, eliminate the illuminated staircase, protect community character, and ensure the provision of suitable screening and noise attenuation measures.

The MTA Meets With Plaintiff On November 6, 2009

197. Representatives of the MTA finally agreed to meet with Plaintiff on November 6, 2009.

198. During that meeting, Plaintiff repeated its concerns about the substantial changes in the design of the 69th Street Facility from the representations and analysis included in the 2004 FEIS, especially with respect to the overall scale of the Facility and its inconsistency with the residential character of the community.

199. The MTA agreed to allow Plaintiff's experts to meet with its engineers to review the structural plans for the Facility.

The MTA Formally Announces The Modified Design Of The 69th Street Facility To Plaintiff And The Community

200. Despite the planned upcoming technical meeting between Plaintiff and the MTA, the MTA, without any advance notice, announced formally the final Design Change for the 69th Street Facility at a Community Board 8, Second Avenue Subway Project Meeting held on November 30, 2009. (See Selected Pages of the November 30th Presentation, Exhibit "B").

201. In a power point presentation at the November 30th meeting, the MTA made clear that the modified 69th Street Facility would look absolutely nothing like the Project's ancillary facilities described and shown in the 2004 FEIS.

202. While the MTA had shown Plaintiff preliminary renderings of the Facility at their prior meetings, this is the first time that Plaintiff learned just how obnoxious and inconsistent with the community character the Facility's Design Change would be.

203. An advanced rendering of the Facility was shown for the first time, which is annexed hereto as part of Exhibit "A." It indicated that the 69th Street Facility would utilize glass, steel, and panelized ceramic tile treatment on the Facility's façade, include an illuminated, glass staircase, and contain industrial-style louvers on its southern and eastern sides.

The Modified Facility Would Cause New Significant Adverse Impacts

204. The modified 69th Street Facility was substantially different from the representations contained in the 2004 FEIS, and would unquestionably result in a number of new significant adverse impacts never previously analyzed or disclosed.

205. As a result of the elimination of the Setback, the eastern facing windows in eight (8) apartments in Building A would be bricked up and sealed.

206. The destruction of the Setback would also harm the existing residential curb appeal of Plaintiff's Buildings, and cause the value of the apartments in Plaintiff's Buildings to decrease by as much as 20% according to some published reports.

207. The modified Facility pursuant to the Design Change would also represent a blatant disregard of the community's residential character.

208. The use of glass, steel, and panelized ceramic tile treatment on the Facility's façade would be wholly out of context with the brick that characterizes the façades of the nearby, residential buildings, including Plaintiff's Buildings.

209. The proposed panelized ceramic tile façade treatment, in particular, is typical of low budget developer construction, not new construction on the Upper East Side in Manhattan.

210. The November 30th Presentation also illustrated, for the first time, the illuminated staircase and surrounding white glass to be wrapped around the southeast corner of the Facility. The existing buildings in the East 69th Street area do not feature large expanses of illuminated glass, particularly on prominent corners, as would exist under the Design Change. In addition, the bulk of the glass for this ill-designed staircase would face 69th Street, which is residential in character, and not the partially commercial Second Avenue.

211. The November 30th Presentation also showed columns of louvers on the south and east facades, including, a large horizontal band facing 69th Street, as well as the louvers on the southwest corner of the Facility just outside the off-centered front door to the Buildings. No other building in the immediate area is plastered with such industrial-style louvers.

212. In fact, the FEIS had represented that "[e]xhaust gratings and louvers would primarily be <u>through the roof</u> to minimize the amount of surface area needed at street level, while fresh air intake will occur through louvers located toward the rear yard." (FEIS at 2-23). (emphasis added). The location of the industrial louvers on the façade of the Facility is in direct conflict with this pronouncement in the FEIS.

213. The Facility would also have the potential to cause new adverse visual, noise, and air quality impacts as a result of the appearance and operations of the Facility's ventilation structures, cooling towers, fans, and other rooftop equipment.

Defendants Fail To Study And Mitigate
The New Adverse Impacts In A Supplemental Review

214. Inexplicably, the November 30th Presentation occurred without any corresponding announcement of a completed or an upcoming supplemental environmental review to study and mitigate the Facility's new potential significant adverse impacts.

215. The Facility's new impacts were not evaluated as part of the 2004 FEIS, and there was no effort by the MTA to conduct the proper and required analyses in 2009.

216. If Defendants persist with the Design Change, such supplemental review must include, for example, a full analysis of the community's character, taking into account, at a minimum, the issues mentioned in this Complaint regarding the Facility's overall massing and façade treatment in relation to the other buildings in this residential neighborhood.

217. The New York City Environmental Quality Review Technical Manual ("CEQR Manual"), which is the technical guidance document for conducting environmental reviews of projects in New York City, sets forth in detail the appropriate methodologies for analyzing impacts to Urban Design/Visual Resources (Chapter G) and Neighborhood Character (Chapter H) in the City.[6]

218. None of the procedures or analyses described in the CEQR Manual related to community character impacts was followed in connection with the Design Change of the 69th Street Facility.

[6] The CEQR Manual is available online at http://www.nyc.gov/html/oec/html/ceqr/ceqrpub.shtml. Relevant Chapters of the CEQR Manual are available upon request.

219. The CEQR Manual was prepared by the same environmental consultants who prepared the 2004 FEIS for Defendants.

220. The CEQR Manual states, for example, that "an assessment of neighborhood character is generally needed" when, among other things, "development resulting from the proposed action would conflict with surrounding uses," and when "the proposed action would result in substantially different building bulk, form, size, scale, or arrangement," as well as "streetscape elements." (CEQR Manual at 3H-1; see also CEQR Manual at 3G-2).

221. Of particular relevance to the MTA's proposed construction of an "industrial plant"-like facility in the heart of this established residential community in Manhattan's Upper East Side, the CEQR Manual recognizes that "the more uniform and consistent the existing neighborhood context is, the more sensitive it is to change." (Id. at 3H-4).

222. Defendants, if they remain firm in modifying the design of the Facility, also must analyze the impacts to Plaintiff associated with the loss of the Setback, including, other alternatives consistent with the 2004 FEIS design, which would preserve the Setback.

223. Renderings showing the views of the Facility's rooftop equipment from various vantage points on Plaintiff's Buildings, including the roof deck on Building A, would also be required, at a minimum, to confirm whether adverse visual impacts would occur, and what mitigation measures would be appropriate such as a decorative screen around the equipment.

224. A noise impact study related to the modified design of the 69th Street Facility also must be performed in accordance with generally accepted methodologies, including, those set forth in Chapter R of the CEQR Manual, if Defendants are adamant about implementing the Design Change.

225. The CEQR Manual states, for example, that "[t]ypical stationary noise sources of concern for CEQR include machinery or mechanical equipment associated with industrial and manufacturing operations or building heating, ventilating, and air-conditioning systems." (CEQR Manual at 3R-1).

226. Accordingly, acoustical performance data would need to be provided for all of the proposed mechanical equipment to verify whether adverse noise impacts would occur, taking into account the proximity of the equipment to sensitive receptors on Plaintiff's Buildings. If any adverse impacts are demonstrated, then adequate noise attenuation measures must be provided to avoid or minimize the impacts. Defendants should also commit to ongoing monitoring and maintenance to ensure that compliance with the appropriate noise criteria is achieved at all times.

227. Defendants must also provide the necessary technical information to assure Plaintiff that no adverse air quality impacts would result from the Facility's functions, particularly the cooling towers and exhaust vents, or that such impacts would be properly mitigated.

228. Defendants must also make publicly available all of the baseline data they have collected from the vibration monitors, which Defendants installed on the façade of Building B in or about July 2009, in order to assess and mitigate potential construction impacts on Plaintiff's Buildings.

The MTA's Engineers Meet With Plaintiff's Experts On December 3, 2009

229. Having already announced formally the Design Change at a Community Board 8 meeting, the MTA's consulting and design team nonetheless met with Plaintiff's professional engineering consultants on December 3, 2009.

230. At the meeting, Plaintiff, for the very first time, had the opportunity to review the design and construction drawings for the 69th Street Facility, although Plaintiff was not allowed to obtain any copies for its further review.

231. During the meeting, the respective professionals discussed, in concept, potential redesigns of the Facility that would return it to and be more consistent with the plan elements represented and analyzed in the approved 2004 FEIS.

232. Such plans would relocate certain of the functions within the interior of the Facility in order to, among other things, preserve the Setback. The Facility's operations would remain unchanged. Such plans would also eliminate the illuminated staircase in order to protect community character, and preclude light from shining in the area at all hours of the night.

233. As just one example of a few possible configurations of relocated functions, Plaintiff's and the MTA's consultants discussed moving the air ducts away from the western end of the Facility and towards the center, while relocating the emergency egress staircase from the center and towards the southwest corner to adjacent to Plaintiff's Building A. This emergency egress staircase could consist of its own, one-story structure – equal to the height of the existing, stepped building at the Subject Site in this precise location (the existing building steps up to 5 stories further east). In this manner, the 69th Street Facility would also be a tiered building, and importantly, would preserve the existing Setback. Meanwhile, the illuminated staircase would be eliminated, and an interior staircase would be installed near the northeast corner of the Facility to afford MTA workers access to the Facility's functions for maintenance.

234. Because the Plaintiff was not allowed to leave this meeting with a copy of the structural plans or drawings for the 69th Street Facility, it is impossible for Plaintiff, on its

own, to analyze fully the potential feasibility of this or other redesigns that would return the design of the Facility to that represented and analyzed in the 2004 FEIS. It is incumbent upon Defendants to conduct such an evaluation pursuant to their responsibilities under NEPA and SEQRA.

235. Plaintiff also requested that the MTA incorporate into the final plan the noise and visual mitigation measures that it discussed in the 2004 FEIS. Plaintiff requested, in particular, the installation of a decorative screen wall around the rooftop equipment.

236. Plaintiff memorialized the December 3rd meeting in a letter to the MTA, dated December 8, 2009 (the "December 8th Letter," a copy of which is annexed hereto as Exhibit "K").

237. As set forth in the December 8th Letter, the MTA promised at the December 3rd meeting to study further a plan involving the relocation of the Facility's functions consistent with what was discussed at the meeting. MTA also promised to provide Plaintiff with a copy of the structural drawings for the Facility in a timely manner pursuant to a Confidentiality Agreement so that Plaintiff's own consultants could analyze further a potential reasonable design that would avoid or minimize the aforementioned impacts.

The MTA Summarily Dismisses Relocating The Facility's Functions

238. In a letter dated January 13, 2010, the MTA rejected, in conclusory fashion, the possibility of redesigning the Facility so as to conform with the plan elements articulated during the 2004 environmental review (the "January 13th Letter," annexed hereto as Exhibit "L").

239. Without providing any of the meaningful data and technical analysis typically required under NEPA and SEQRA, the MTA provided a few, unsubstantiated reasons why "technical and schedule impacts" allegedly preclude such redesign.

240. The MTA stated, for example, that "flipping the staircase does not provide sufficient space." (Id.). The MTA did not explain or offer any evidence supporting this statement. The MTA must provide, at a minimum, the dimensional requirements for its emergency staircases, and show graphically or otherwise why the MTA believes relocating the emergency staircase to the rear of the Facility adjacent to Building A is not viable. There may be reasonable means to remedy the purported spatial deficiency.

241. The MTA also rejected the possibility of relocating certain equipment "to below ground." (Id.) The MTA summarily concluded that constructing beneath the ground would be "extremely difficult and costly due to rock conditions in the area." (Id.) The MTA went on to state that "the cavern cannot be made any wider and the building cannot go any deeper because of the rock condition." (Id.)

242. The MTA similarly did not provide any technical evidence to confirm these claims. The MTA must first explain and substantiate why relocating certain functions would absolutely require the building to extend into the rock as the MTA seems to suggest. If that is the case, the MTA must also describe in sufficient detail the subsurface rock conditions, and explore fully all options for blasting and other methodologies to resolve any impediments posed by the presence of rock. Typically, the presence of rock does not prohibit construction, particularly in New York City.

243. The MTA must also provide quantifiable data demonstrating how it calculated the alleged increases in construction costs and delay if it was to construct through the

rock. The MTA provided no verifiable basis for its estimates that construction costs would increase by "$50-$60 million," and that construction would be delayed "by as much as 6 months." (Id.).

244. Even assuming that an option involving relocating certain equipment to below ground was determined not to be viable following a meaningful analysis, this option is just one of many possible solutions.

245. Defendants are obligated under NEPA and SEQRA to evaluate "all reasonable alternatives." 40 C.F.R. § 1502.14.

246. Defendants clearly have not fulfilled that responsibility here with respect to the Design Change, and its new significant adverse impacts upon Plaintiff's Buildings. The MTA did not provide sketch plans, reports, studies or any other materials documenting a real attempt to analyze fully a redesign of the 69th Street Facility.

247. The MTA's unsupported responses in the January 13th Letter establishes that the MTA conducted a mere cursory review before concluding that a redesign of the Facility was not possible.

248. The MTA did not fulfill its promise made at the December 3rd Meeting, or its obligations under the governing laws and regulations, to take a hard look at all reasonable potential options for returning the Facility to a design consistent with what was analyzed and approved in the FEIS, and one that would not cause new significant adverse impacts upon Plaintiff's Buildings.

249. Plaintiff has always maintained that if the MTA devoted the necessary time and resources, and conducted a fair review, it could and would identify a creative means to devise a workable plan, which achieves everyone's objectives. The MTA has done so in other

cases, including, relocating a prior mid-block location for certain station entrances on 72nd Street to a corner location pursuant to a Supplemental EA as mentioned supra.

The MTA Also Summarily Dismisses Plaintiff's Other Concerns

250. The January 13th Letter also makes a number of other extremely general responses regarding critical issues relating to noise, visual screens, and other items.

251. The MTA states, for instance, that "noise being transmitted through the vent shaft to the exhaust louvers (passive air vents) will be low because the velocity of air leaving the louvers will be low." (January 13th Letter, Exhibit "L") (emphasis added).

252. There is no quantifiable basis for this assertion of "low" noise and "low" air velocity. Decibel levels and other analytical data must be provided to verify such conclusions.

253. The MTA also states that acoustic louvers "are not as effective as manufacturers would lead people to believe," and that in their place the MTA has "utilized acoustical absorbing material lining to the interior of the ducts," and "other noise reducing measures." (Id.).

254. There is no accompanying decibel level or other technical information, except for a specification of a typical cooling tower, which details or substantiates the MTA's statements about the Facility's proposed noise attenuation devices, including, their ability to maintain noise at acceptable levels.

255. The MTA must provide, at a minimum, the acoustical performance diagrams that were shown to Plaintiff's representatives at the December 3rd Meeting. These diagrams concerned all of the rooftop equipment, not just the cooling towers.

256. Upon information and belief, the Facility would cause a perceptible difference in noise at Plaintiff's Buildings as compared to existing conditions based upon the discussion at the December 3rd Meeting.

257. The January 13th Letter also does not provide any concrete information regarding the screen wall, which Plaintiff requested around the Facility's rooftop equipment, other than to state that such a visual screen would be "developed," and when it "is done, [the MTA] will show designs to the community." (Id.). This response is wholly insufficient, as a matter of NEPA and SEQRA law, to ensure that the Facility's potential visual impacts would be adequately mitigated.

258. Furthermore, regarding potential blasting and vibration impacts, the MTA attached to its January 13th Letter certain "data from the vibration monitors." (Id.) This data only related, however, to vibration readings for a few random days in September and October 2009. Plaintiff requested months of data obtained by the MTA since the monitors were installed in July 2009.

259. Additionally, with respect to electromagnetic frequency (EMF) shielding, the MTA's January 13th Letter states that a "Shielding Plan" would be developed "at a 'reasonable' point during the initial construction." (Id.). At the December 3rd Meeting, the MTA representatives indicated that such a Shielding Plan has already been developed. Such a Plan must be provided to Plaintiff at this time to ensure that any potential health impacts related to EMF can be avoided or mitigated.

260. In sum, as of the filing of this Complaint, the MTA has not abandoned the Design Change or otherwise announced any intentions of returning to a design for the 69th Street Facility consistent with what was represented and analyzed in the 2004 FEIS. The MTA has not

reduced the Facility's size, preserved the Setback, eliminated the illuminated staircase, or changed the Facility's façade treatment to ensure that it blends into the residential character of the community.

261. The MTA's January 13, 2010 Letter makes clear that Defendants have every intention of constructing the 69th Street Facility as currently designed and modified from the 2004 FEIS.

262. Accordingly, Plaintiff has no choice but to bring the subject action.

COUNT I
(Violation of APA/NEPA)

263. Plaintiff respectfully realleges Paragraphs 1 to 262 of this Complaint as if stated fully herein.

264. NEPA required Defendants to supplement the FEIS prior to modifying the design of the 69th Street Facility to determine, inter alia, the potential environmental impacts of such facility, whether all alternatives had been considered and whether all practicable means to avoid or minimize environmental harm have been adopted. 40 C.F.R. § 1502.9; 23 C.F.R. § 771.130.

265. Defendants' decision to announce the Design Change without first examining whether the new design would present potentially significant adverse impacts not previously examined or even identified in 2004 was arbitrary, capricious, an abuse of discretion, and not in accordance with NEPA and the applicable law.

266. The ROD adopted by the MTA and FTA in 2004 as part of this Project mandated specifically that "MTA and NYCT, in cooperation with FTA, shall initiate a supplemental environmental review of the Project, as outlined in 23 CFR 771.130, whenever: (1) Substantial changes to the project would result in significant environmental impacts that were

not evaluated in the FEIS; (2) New information or circumstances relevant to environmental concerns and bearing on the Project or its impacts would result in significant environmental impacts not evaluated in the FEIS; or (3) where the significance of new impacts is uncertain." (ROD at 14, Exhibit "D")

267. The cover letter from the FTA to the MTA, dated July 8, 2004, similarly stated that "[i]f changes to the [P]roject are made, FTA must be notified and appropriate supplemental environmental studies conducted before changes will be approved." (Cover Letter from the FTA to MTA, dated July 8, 2004, Exhibit "D").

268. The FTA and MTA followed this mandate precisely in June 2008 when it issued the Supplemental EA regarding alternatives for substantial design changes to the northern entrances at the 72nd Street and 86th Street Stations.

269. Defendants have violated their own correctly articulated standards and past practices. Defendants' supplemental environmental review obligations, as described in the ROD, are expressly set forth in NEPA's implementing regulations.

270. Pursuant to NEPA's implementing regulations, including 40 C.F.R. Section 1502.9 and 23 C.F.R. Section 771.130, Defendants were required to supplement the FEIS for the Project if they either made substantial changes in the proposed action that are relevant to environmental concerns, or if there arose significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

271. Defendants made a substantial change in the Project when modifying the design of the 69th Street Facility in 2009 by departing significantly from the express

representations in the 2004 FEIS regarding the appearance, character and general design elements of the Project's ancillary facilities.

272. The FEIS represented that the Project's ancillary facilities would be "sensitive to the surrounding architectural context; they would not disturb views in the study area, nor would they change the study area's urban design." (FEIS at S-47).

273. The FEIS also represented that the Project's ancillary facilities would "be designed to blend into the urban fabric," and that they would "appear like a neighborhood row house in height, scale, materials, and colors." (Id. at 2-22).

274. The FEIS further represented that the Project's ancillary facilities would measure approximately "25 feet wide, 75 feet deep, and four to five stories high." (Id.).

275. Instead, the 69th Street Facility now proposed by the MTA differs significantly from these design principles contained in the FEIS, and presents new significant environmental impacts that were not studied and mitigated in the 2004 FEIS.

276. Under the 2009 Design Change, the 69th Street Facility would consist of a much larger, industrial-style building, measuring 75 feet high, with an additional twenty (20) feet of height added from the two (2), 20-foot cooling towers and other rooftop equipment.

277. The Facility's south and east façades would feature industrial louvers.

278. The Facility would also contain an oversized, 24-hour, illuminated glass staircase, wrapped around the Facility's prominent southeast corner on 2nd Avenue.

279. The now mammoth 69th Street Facility would occupy the entire Subject Site, resulting in, among other things, the complete destruction of Plaintiff's Setback.

280. The destruction of the Setback would also substantially impact Plaintiff's curb appeal, and cause the value of the apartments in Plaintiff's Buildings to decrease by as much as 20%.

281. The modified design for the 69th Street Facility would also be out of character with the residential character of the Upper East Side, and the immediately adjacent and surrounding residential buildings in the vicinity of East 69th Street.

282. The 69th Street Facility would also cause significant adverse visual, noise, and air quality impacts that were not previously studied.

283. Unless Defendants abandon the Design Change and return to the design elements approved in the 2004 FEIS, they are now required under NEPA and SEQRA to supplement the prior environmental review, and analyze and mitigate the 69th Street Facility's new, unstudied significant potential adverse impacts.

284. If Defendants insist on proceeding with the Design Change, then they must also study alternatives to the current modified design of the 69th Street Facility in an open and deliberative process as part of a Supplemental EIS.

COUNT II
(Violation of SEQRA)

285. Plaintiff respectfully realleges Paragraphs 1 to 284 of this Complaint as if stated fully herein.

286. Pursuant to SEQRA, the MTA, NYCT and MTA Capital were required to prepare a separate EIS under SEQRA if the EIS prepared pursuant to NEPA was not sufficient to make the formal Findings required pursuant to 6 N.Y.C.R.R. Section 617.11(d). 6 N.Y.C.R.R. § 617.15(a).

287. Upon information and belief, neither the MTA, NYCT nor MTA Capital prepared SEQRA Findings, as required by 6 N.Y.C.R.R. Section 617.11(d), for the proposed modified 69th Street Facility pursuant to the Design Change and so much of the Second Avenue Subway Project as may be dependent upon it.

288. Even if such SEQRA Findings were prepared, the FEIS prepared under NEPA here was insufficient to make the requisite Findings required for the proposed modified 69th Street Facility pursuant to 6 N.Y.C.R.R. Section 617.11(d).

289. In addition, where a determination that an action will not require an EIS is made under NEPA it does not constitute automatic compliance with SEQRA.

290. Any findings made by Defendants under NEPA that the proposed modified 69th Street Facility, and so much of the Second Avenue Subway Project as may be dependent upon it, would have no significant environmental impacts, would not satisfy SEQRA. 6 N.Y.C.R.R. § 617.15(b).

291. Defendants the MTA, NYCT and MTA Capital remain responsible for compliance with SEQRA for the proposed Design Change, and so much of the Second Avenue Subway Project as may be dependent upon it.

292. The potential significant impacts related to the modified 69th Street Facility, and so much of the Second Avenue Subway Project as may be dependent upon it, surpass the established low threshold triggering the requirement to prepare an EIS under SEQRA.

293. Defendants the MTA, NYCT and MTA Capital violated SEQRA through their failure to prepare a separate, supplemental EIS under SEQRA.

294. The 69th Street Facility, as modified under the Design Change, presents potentially significant and adverse environmental impacts, which were not addressed in Defendants' original FEIS.

295. The modified design of the 69th Street Facility, as announced at the Community Board 8 Meeting on November 30, 2009, was not reflected, discussed, studied or mitigated in any way in the FEIS or otherwise.

296. Prior to modifying the design of the 69th Street Facility, the MTA should have performed a supplemental EIS pursuant to 6 N.Y.C.R.R. Section 617.9(a)(7).

297. The potential significant impacts upon community character, views, noise, and air quality, among other impacts, surpass the established low threshold triggering the requirement to prepare a supplemental EIS under SEQRA.

298. The MTA, NYCT and MTA Capital further violated SEQRA through, upon information and belief, their failure to issue formal Findings required pursuant to 6 N.Y.C.R.R. Section 617.11(d), setting forth a reasoned elaboration supporting the decision to modify the 69th Street Facility.

299. Accordingly, the MTA, NYCT and MTA Capital have failed to conduct the type of analysis and deliberation required by SEQRA, and should be compelled to evaluate the modified design of the 69th Street Facility in an open and public manner.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests judgment against Defendants, jointly and severally, and seek the following declaratory and equitable relief:

i. declaring that Defendants' purported final determination to adopt the Design Change regarding the 69th Street Facility without preparing a Supplemental Environmental Impact Statement is in violation of NEPA and SEQRA and their implementing regulations because the Design

Change represents a substantial change in the Second Avenue Subway Project from what was approved and analyzed in the 2004 FEIS;

ii. compelling Defendants to correct their NEPA and SEQRA deficiencies by, inter alia, committing to a design of the 69th Street Facility that is consistent with the representations in the 2004 FEIS regarding the general design parameters for the Project's ancillary facilities, or preparing a Supplemental Environmental Impact Statement to study and mitigate the new significant environmental impacts of the modified 69th Street Facility, as well as other new circumstances and/or information relevant to environmental concerns implicated by said action;

iii. enjoining any and all actions in furtherance of the 69th Street Facility, as well as so much of the Second Avenue Subway Project that depends upon or is linked to the construction of the 69th Street Facility as currently designed, unless and until Defendants comply with NEPA and SEQRA, and their implementing regulations; and

iv. granting Plaintiff costs, reasonable attorneys' fees, interest, and such other and further relief as this Court deems just and proper.

Dated: January 21, 2010
White Plains, New York

Respectfully submitted,

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