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

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ROGER MANNING,

Petitioner,

- against -

Index No. 158809/2021

CITY COUNCIL OF THE CITY OF NEW YORK, BILL DE BLASIO, as Mayor of the City of New York; NEW YORK CITY PLANNING COMMISSION; THE GOVERNORS ISLAND CORPORATION, d/b/a THE TRUST FOR GOVERNORS ISLAND; and THE NATIONAL PARK SERVICE

Respondents

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AMENDED MEMORANDUM OF LAW OF *AMICUS CURIAE*

THE CITY CLUB OF NEW YORK

Dated: Brooklyn, New York
July 25, 2022

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

PRELIMINARY STATEMENT

When the federal government transferred Governors Island to the State and subsequently to the City of New York, it imposed deed restrictions "to ensure the protection and preservation of the natural, cultural and historic qualities of Governors Island, guarantee public access to this magnificent island, promote the quality of public education, and enhance the ability of the public to enjoy Governors Island and the surrounding waterways, thereby increasing the quality of life in the surrounding community, the City, the State and the United States," and to make the Island "an educational and civic resource of special historic character and as a recreational and open space resource." Deed from the United States of America to the National Trust for Historic Preservation, Jan. 31, 2003 ("Deed") (Resp. Exh. 1), at ¶¶ 2.1, 2.3.

Petitioners challenge Respondents' enactment of new zoning that enables as-of-right construction and uses that violate the goals and specific restrictions of the Deed and the public trust doctrine that protects parkland. Respondents' key point in opposition is that those restrictions are directly enforceable only by the two entities that own Governors Island: the National Park Service, which owns 22 acres at the north end of the Island, and the Governors Island Trust ("Trust"), an instrumentality of the City of New York, which owns the remaining 150 acres. Deed ¶ 20. However, where the Trust, a City entity, has assumed ownership of Governors Island, and where all the respondent City entities have concededly accepted the accompanying Deed restrictions and obligations, it is arbitrary and capricious for those same entities to turn around and adopt zoning that, while it may further laudable City economic development objectives, negates those same Deed restrictions. Yet that is what has happened here.

Respondents claim that the Deed restrictions are "self-enforcing," so it is irrelevant that the rezoning that they sponsored and approved violates those same restrictions. Respondents'

Mem. of Law in Support of Their Answer to the Verified Petition ("Resp. Mem."), at 23. This is simply untrue. To enforce a deed restriction, a party with enforcement power must initiate a lawsuit. The Trust, having sponsored this rezoning, will not initiate litigation to block its implementation. And the National Park service has shown no interest whatsoever in the zoning of Governors Island.

Respondents further argue that the rezoning is actually consistent with, and does not violate, the goals or the specific proscriptions of the Deed. In their telling, the Deed prioritizes "maximizing"—not merely "guaranteeing"—public access to the Island, creating an "educational and cultural hub," making the Island a source of "major new economic development and job creation," and creating "a true, mixed-use, 24/7 neighborhood" that would generate sufficient rental income "for the [Governors Island] Trust to maintain and operate the Island … over the long-term." 2020 Final Second Supplemental Generic Environmental Impact Statement ("FSSGEIS"), Executive Summary at S-44, and Ch. 19 (Alternatives), at 19-11.[1] Therefore, they argue, to the extent that the Deed's first-stated goal of "protection of the natural, cultural and historic qualities of Governors Island" conflicts with these economic development goals, the former must give way.

These goals, which Respondents claim are primary, are nowhere to be found in the Deed, much less prioritized over the Deed's primary goal of protecting and preserving this unique environment of "vast water, big sky," and "views of the harbor … from all around the edge of the

[1] Respondents did not include any portion of the environmental review for the 2021 rezoning in the record. Respondents' Exhibit 6 (Dkt. No. 16), which purports to be the "Environmental Review Executive Summary—2021 Governors Island Rezoning, dated October 13, 2020," is in reality the Executive Summary of the 2011 environmental review. However, all environmental review documents, including those from the 2011, 2013, and 2020 reviews, can be accessed through this link on the website of the Mayor's Office of Environmental Coordination: https://a002-ceqraccess.nyc.gov/ceqr/Details?data=MTFETUUwMDdN0&signature=519dc2204e26214d558b31bc5eb3f7fbf0296379 .

island and from its interior." 2011 Final Generic EIS, Executive Summary ("FGEIS"), at S-5-S-6 (Resp. Exh. 16). Respondents' attempts to explain away the conflicts between the specific language of the restrictions and what the zoning allows are far-fetched. No matter how worthy the City's economic development goals may be, it cannot achieve them by an arbitrary and capricious repudiation of its legal obligations. *Avella v. City of New York*, 29 N.Y.3d 425, 440 (2017).

INTEREST OF *AMICUS CURIAE*

The City Club was founded in 1892 as a good-government advocate. In recent years, it has been broadly concerned with the urban environment of New York City. It has addressed major land use issues, including zoning, parks, and historic preservation, with the dual objectives of improving the urban environment and curtailing governmental abuse that threatens the contrary.

Both City Club's objectives are at issue here: preventing the spoliation of the unique natural resource for New York City that is Governors Island, and calling the City to account for its disingenuous, arbitrary and capricious application of its rezoning powers in violation of the solemn formal commitments it made to the federal government when it took over all Governors Island except for the National Monument acreage at the Island's northern end.

City Club was a plaintiff and the animating force behind *Avella v. City*, in which the Court of Appeals held that the public trust doctrine, which requires State legislative approval for any alienation of parkland, prohibited construction of a shopping mall in Flushing Meadows Corona Park. City Club has a particular interest in defending natural areas and parkland such as Governors Island.

FACTS

The facts are as stated in the memoranda of the parties. Amicus only adds pictures copied from the FSSGEIS that show before and after comparisons.[2] These pictures, attached as Exhibit 1, illustrate the Manhattanization of Governors Island, and the destruction of its unique qualities, that will ensue if the challenged zoning is enacted.

ARGUMENT

RESPONDENTS' UPZONING IN VIOLATION OF THE DEED RESTRICTIONS WAS ARBITRARY AND CAPRICIOUS

Petitioners contend that the City's upzoning of parts of Governors Island to allow for large-scale commercial and manufacturing uses and high rise buildings is contrary to covenants that run with the land in the Deed from the federal government, and is therefore arbitrary and capricious. In response, the City Respondents make three arguments: first, that Petitioners lack standing to enforce the Deed; second, that Petitioners' argument is based on the "mistaken premise that local zoning provisions are arbitrary unless they mirror the broad use requirements and restrictions included in the deed"; and third that the upzoning is consistent with the Deed restrictions. All three lack merit.

A. Petitioners Seek to Invalidate the Council's Actions as Arbitrary and Capricious, Not to Seek Enforcement of the Deed Covenants Against the Trust

Petitioners do not seek to enforce the Deed covenants. Rather, they argue that when the City Respondents took ownership and control of Governors Island, it bound itself to those restrictions, and its enactment of zoning that allows as-of-right construction and uses in blatant

[2] FSSGEIS, Ch. 8, Urban Design and Visual Resources. Note, however, that the City Council subsequently reduced the allowable bulk and density from a floor area ratio of 2.98 to 2.63.

violation of them is arbitrary and capricious. *See, e.g., Dobbins v. State of N.Y.—Unified Court System*, 189 A.D.3d 1397 (2d Dep't 2020) (action that violates agency's own rules and requirements is arbitrary and capricious); *St. Joseph's Hosp. Health Ctr. v. Department of Health*, 247 A.D.2d 136, 155 (4th Dep't 1998) (same). It is the City Respondents, not Petitioners, who have acted disingenuously in purportedly accepting the deed restrictions, as they must, with one hand while negating them with the other.

The covenants at issue here differ from the run of the mill covenant between private parties, or indeed from the government covenants in *Glick v. Harvey*, 2014 N.Y. Slip Op. 30008(U) (S. Ct. N.Y. Co. 2014), or *Mendel v. Henry Phipps Plaza W., Inc.*, 6 N.Y.3d 783 (2006), cited by Respondents, in that here, the covenantor—the party bound by the covenants—is a City entity, the Governors Island Trust,[3] and it is the City, too, that has acted to negate or void those same covenants. It was the Governors Island Trust that initiated and sponsored the rezoning at issue here. It is the City's action in flagrant violation of the covenants to which it committed itself, and that concededly bind it, that makes its zoning approvals arbitrary and capricious.

In contrast, in both *Glick* and *Mendel*, the covenantee, a governmental entity, and the covenantor, a private party, acted jointly, and pursuant to the covenant itself (*Glick*) or a statute (*Mendel*), to dissolve covenants that a third party sought to enforce. In both those cases, the governmental entity that was the covenantee—the beneficiary of the covenant—argued successfully that the covenantor was legally entitled to void the covenant, that as the covenantee it no longer had any interest in enforcing the covenant, and that the covenantor was no longer

[3] "Governors Island Corporation, doing business as The Trust for Governors Island (the Trust), is a not-for-profit corporation and instrumentality of the City of New York." FSSGEIS, Executive Summary, at S-1.

bound. Therefore there was no claim in those cases, nor could there have been, that a governmental covenantor was negating its own obligation.

Here, however, Respondents admit, and indeed insist, that "the Deed restrictions remain in place" and that "the Deed remains fully in force." Resp. Mem. at 23, 26. Yet they have enacted zoning that permits as of right construction and uses that are violative of both the text and the spirit of the restrictions. That is arbitrary and capricious.[4]

B. The Enactment of Zoning That Negates the Deed Restrictions Is Not "Irrelevant"

Respondents are correct that zoning need not "mirror" the Deed restrictions, but their enactment of zoning that violates those restrictions is nevertheless arbitrary and capricious. Respondents contend that "because the Deed restrictions remain in place, and are self-enforcing, they are entirely irrelevant to the question of whether the zoning change has a 'reasonable basis,' and must therefore be upheld." Resp. Mem. at 23 (underlining added). This is simply false. Deed restrictions are not "self-enforcing." Unless they are enforced by the covenantee, they are a dead letter.

It is true, as Respondents say, that zoning and restrictive covenants are "'separate and distinct matters, the ordinance being a legislative enactment and the easement or covenant a matter of private agreement,'" *id.* at 22 (quoting *Friends of Shawangunks, Inc. v. Knowlton*, 64 N.Y.2d 387, 392 (1985)), and "changes to zoning do not have the power to alter deed restrictions, such as those in place here," *id.* at 22-23 (citing *Gordon v. Lawrence*, 84 A.D.2d 558, 559 (2d Dep't 1981)). However, it is precisely because they are considered private agreements that deed

[4] It is especially arbitrary and capricious because, as explained below, the City's rezoning appears motivated at least in part by City-wide economic development concerns that, although laudable, are extraneous to the Deed and the carefully developed Governors Island Park and Public Space Master Plan (2010) ("Governors Island Master Plan"), (Resp. Exh. 47), and concededly may not be necessary to achieve the Plan's objectives. *Cf. Municipal Art Society v. City of New York*, 137 Misc. 2d 832, 838 (S. Ct. N.Y. Co. 1987) ("Zoning benefits are not cash items.").

restrictions are not "self-enforcing." The party seeking to enforce a deed restriction must initiate a lawsuit. In this case, too, the restrictions can only be enforced by the entities granted enforcement power in the Deed itself, *i.e.*, the Governors Island Operator, which is now the Governors Island Trust, and the Monument Operator, which is now the National Park Service. Far from enforcing the restrictions, the Trust has been the prime mover in undermining and negating them, while the National Park Service has shown no interest in enforcing them.

By mirroring deed restrictions, zoning can greatly assist in their enforcement, making enforcement automatic. If zoning does not permit something, one cannot get a permit to build it. Uses barred by zoning are shut down by administrative action, without litigation. However, by the same token, if zoning allows construction, it can be done as-of-right, and short of litigation by those empowered to enforce the restriction, there is nothing that can be done to stop it. The Trust will not initiate litigation to block construction enabled by zoning that it has just sponsored.

Thus, Petitioners' argument is not based on the "mistaken premise" that zoning provisions must "duplicate the Deed's restrictions and purposes," and "are arbitrary unless they mirror the broad use requirements and restrictions included in the deed." *Id.* at 22, 26. Petitioners' point is rather that the City's enactment of new zoning that allows construction and uses that violate the Deed restrictions, sponsored by the very party that is bound by those same Deed restrictions and is supposed to enforce them—the Governors Island Trust—is arbitrary and capricious.

C. The New Zoning Violates the Spirit and the Letter of the Deed Restrictions

Respondents' half-hearted argument that their upzoning is consistent with the Deed restrictions does not withstand scrutiny. The new zoning violates both the goals and the specific restrictions of the Deed.

1. The Rezoning Negates the Primary Goal of the Deed: "Protection and Preservation of the Natural, Cultural and Historic Qualities of Governors Island." The primary goal of the Deed is not, as Respondents would have it, to "maximize public enjoyment and access" to Governors Island, Resp. Mem. at 27, but rather to "ensure the protection and preservation of the natural, cultural and historic qualities of Governors Island," Deed ¶ 2.1, to make the Island "an educational and civic resource of special historic character and as a recreational and open space resource," *id.* ¶ 2.3

The Trust's design approach has purportedly been consistent with this commitment, treating Governors Island as "An Island Like No Other" that "allows visitors to leave the big city behind":

> **An Island Like No Other.** Several aspects of Governors Island make it unique—and these features are respected in the principle "An Island Like No Other." Its setting in the New York Harbor surrounds the Island with "vast water, big sky." From everywhere on the Island are views of the harbor, including the Statue of Liberty, Ellis Island, Lower Manhattan skyline, the East River bridges, Brooklyn, Staten Island, and New Jersey. Based on this, the design approach is to preserve and enhance these views, from all around the edge of the island and from its interior.
>
> *** * * ***
>
> **Carefree Island.** The trip to Governors Island, by boat, allows visitors to leave the big city behind. Visitors to the Island today remark that even an afternoon there feels like a vacation. This spirit is embodied in the principle, "Carefree Island."

2011 Final Generic EIS, Executive Summary at S-5-S-6 (Resp. Exh. 16) (emphasis added).

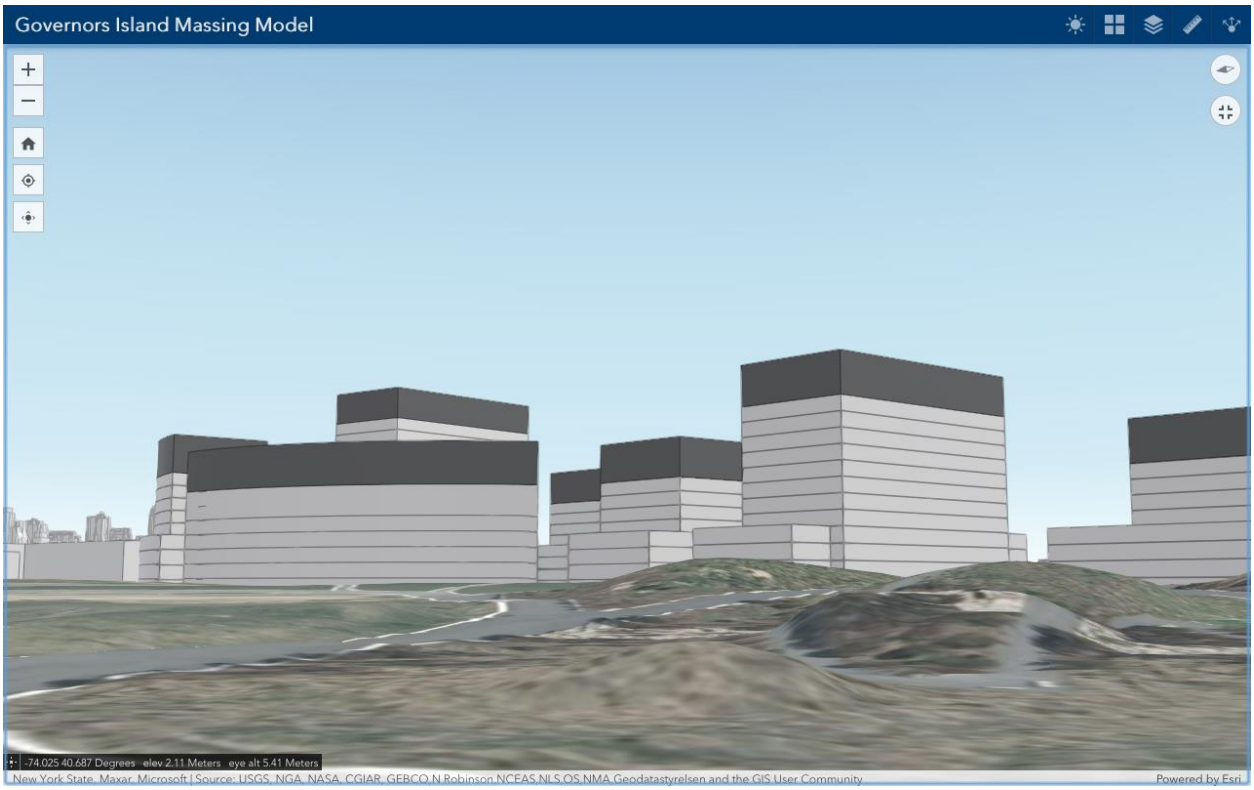
The Governors Island Master Plan (Resp. Exh. 47) emphasized the 360° view of New York Harbor from the 82-foot high hill in the southern park area:

> Your visit to Governors Island culminates at the top of the Hills where you take in breathtaking 360° views of the New York Harbor. … In Manhattan, tall buildings create canyons with their own shadows. There is little sense that Manhattan is an island surrounded by water. … The Hills offer a more

> dramatic 360º panorama of the Harbor. As you make your way up one of four hills, the Island's open spaces and buildings fall away, and the Harbor and skyline reveal themselves. While just 82 feet high above grade, the tallest hill affords views previously only experienced from a plane or helicopter. The panorama of the Harbor, with the sea, sky and monuments unfolding, gives you the sensation of being at the top of the world.

Master Plan, at 31, 35, 38.[5]

Under the rezoning, the culminating experience of this 360º panorama is no more. The blocking of this view by buildings is shown in the below 3D model prepared by the Environmental Simulation Center and George M. Janes & Associates, consultants to Community Board 1. This image shows the view from the Open Space Subarea and the Hills looking northeast. The 2021 zoning allows buildings 225 feet high—equivalent to 22 stories, plus a 40-foot allowance



[5] The Master Plan also demonstrated how, under the then-envisioned density, the Island could become financially self-supporting. Master Plan, at 171.

for permitted rooftop obstructions. ZR 134-24(b). This is three times the height of the highest hill on Governors Island. Under the rezoning, too, the maximum permitted floor area ratio (FAR) on the two Development Zones rises from 0.5 to 2.63. ZR 134-212; FSSGEIS, Executive Summary at S-3 (comparing 2013 plan with rezoning). This more than five-fold increase in bulk and density violates the Deed restrictions. With its out-of-scale tall buildings and density, this rezoning negates the Deed's goal of "preserv[ing] and enhance[ing] these views [of the harbor], from all around the edge of the island and from its interior," and particularly from the interior open space of the South Island and Outlook Hill.

Respondents, however, argue that the Deed prioritizes maximizing public access and creating an "educational and cultural hub" over protection of the natural, cultural and historic qualities of Governors Island:

> [W]hile preservation was important to the U.S. federal government when it conveyed the Island to GIPEC in 2003, its primary goal was to ensure the Island is redeveloped in a way that maximizes public enjoyment and access and makes the Island an educational and cultural hub. Thus, any limitations in the Deed should be read in connection with that overarching goal.

Resp. Mem. at 27.

Nothing in the record suggests that maximizing public access and creating an educational and cultural hub were primary, or that the federal government even had the goal of maximizing public access or creating an educational and cultural hub. To the contrary, the Deed states that the first goal is "to ensure the protection and preservation of the natural, cultural and historic qualities of Governors Island." The other goals are, in order, to "guarantee public access to this magnificent island, promote the quality of public education, and enhance the ability of the public to enjoy Governors Island and the surrounding waterways, thereby increasing the quality of life in the surrounding community, the City, the State and the United States." Deed ¶ 2.1. The

Deed speaks of "guarantee[ing]," not maximizing, public access, and of "promoting the quality of public education," not creating an "educational and cultural hub."

In comparing the upzoning to what they called "the 2013 Alternative," Respondents concede that the 2013 Alternative would not necessarily preclude making the Island self-sufficient, and that the density allowed by the rezoning is more in the service of economic development than of meeting the goal of financial self-sufficiency for the Island:

> The 2013 Alternative's development scenarios, though including many of the same uses as the Proposed Project, would not achieve the Proposed Project's primary policy goals, including both economic development and job creation, the creation of a lively 24/7 neighborhood, and the generation of sufficient rental income ….
>
> * * * *
>
> [Limiting] potential South Island development to a total of approximately 1.6 million gsf, a size at which the project would be unlikely to both attract a sizeable academic anchor tenant and simultaneously include significant office and research and development space [would make it] unlikely that the significant economic development and job creation goals of the project would be achieved. Though it is possible that the Trust could attract a large academic or commercial anchor tenant to occupy the majority of the approximately 1.6 million gsf development envelope permitted under the 2013 Alternative, the lack of cultural uses and limited amenities would make this difficult ….

FSSGEIS Ch. 19, Alternatives, at 19-9. 19-11.

2. The Rezoning Violates the Deed's Requirement That at Least 40 Acres Be Dedicated as Public Parkland, and Also Violates the Public Trust Doctrine. The Deed requires the creation of "public parkland of at least forty (40) acres …which shall be dedicated and used as such in perpetuity," Deed ¶ 2.3(a)(i). Respondents' affiant Marni Friedlander states that "the Trust has dedicated 43-acres of the Island to parkland, which cannot be converted to a non-park use, thus satisfying and even exceeding the parkland requirements under the Deed." Friedlander Aff. ¶ 22 (Dkt. No. 8).

However, the approved zoning allows these areas—the "Open Space Subareas"—to be built on and used in ways that violate not only the Deed, but also the public trust doctrine. The new zoning states outright that permitted uses in the Open Space Subareas may include not only "public parks," but also "private parks," without limitation. ZR 134-112(a). Respondents concede that allowing private parks is inconsistent with the Deed, but say that it doesn't matter, because "the Deed's requirement that the required parkland be open to the public must be complied with, notwithstanding the applicable zoning." Resp. Mem. at 39 n.14. Respondents' argument ignores the fact that the Deed's supposed enforcer is the entity that sought to allow private parks.

The rezoning also allows "buildings or other structures containing permitted uses, up to a height of … 25 feet," occupying as much as 20 percent of the Open Space Subarea. ZR 134-24(b)(5). While the public trust doctrine allows structures serving park purposes, two-plus story structures covering 20 percent of the park's area cannot be said to serve park purposes. The zoning further allows cellars underneath the entirety of the Open Space Subarea, which can be used for <u>any</u> "use otherwise permitted in the Southern Subdistrict." ZR 134-112(a). Such uses include large-scale commercial and manufacturing uses, as discussed below.

These provisions are contrary to the Deed's requirement that these areas be dedicated as public parks, and also violate the public trust doctrine. *Avella v. City of New York*, 29 N.Y.3d at 435 (shopping mall not a park use within the meaning of the public trust doctrine); *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623, 628 (2001) (absent State legislative approval, underground construction in park resulting in "vents and air intake louvres … in berms [that will] extend above finished grade" violates public trust doctrine).

3. <u>The New Zoning Allows Industrial and Manufacturing Uses That the Deed Explicitly Prohibits</u>. The Deed explicitly prohibits "Industrial or manufacturing uses." Yet ZR §

134-111 expressly permits "furniture manufacture; manufacture of pharmaceutical products, chemical compounding or packaging; manufacture of non-alcoholic beverages; food product manufacture ...; and the manufacture of alcoholic beverages and breweries."

This too is a clear violation of the Deed restriction. Respondents claim that allowing manufacturing does not violate the Deed because the Deed does not define "manufacturing," or alternatively, that because the Deed's paragraph 2.4, "Prohibited Uses," begins with the words, "Without limiting the [Permitted Uses]," the prohibition can be disregarded. Resp. Mem. at 32-33. This far-fetched interpretation would void ¶ 2.4 entirely.

In reality, it appears that the City is primarily interested in facilitating development to help the City's economy, regardless of what the Deed restrictions require. In 2020, the Office of the Mayor "announced that the [Governors Island] Center for Climate Solutions would play a key role in the Mayor's economic recovery agenda, *StrongerNYC*. The Center for Climate Solutions is projected to create 8,000 direct new jobs and $1 billion in economic impact for New York City." City Planning Commission Lead Report C210127 ZMM (Mar. 17, 2021) (Resp. Exh. 19), at 10. These are laudable goals. But what the Court of Appeals said in *Avella* is equally applicable here:

> We acknowledge that the remediation of Willets Point is a laudable goal. Defendants and various amici dedicate substantial portions of their briefs to the propositions that the Willets West development would immensely benefit the people of New York City, by transforming the area into a new, vibrant community, and that the present plan might be the only means to accomplish that transformation. Those contentions, however, have no place in our consideration of whether the legislature granted authorization for the development of Willets West on land held in the public trust.

Avella, 29 N.Y.3d at 440. Just so here, no matter how laudable the City's goals, they cannot override the covenants in the Deed.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition or the First Amended Petition.

Dated: Brooklyn, New York
July 25, 2022

Respectfully submitted,

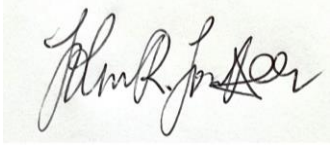


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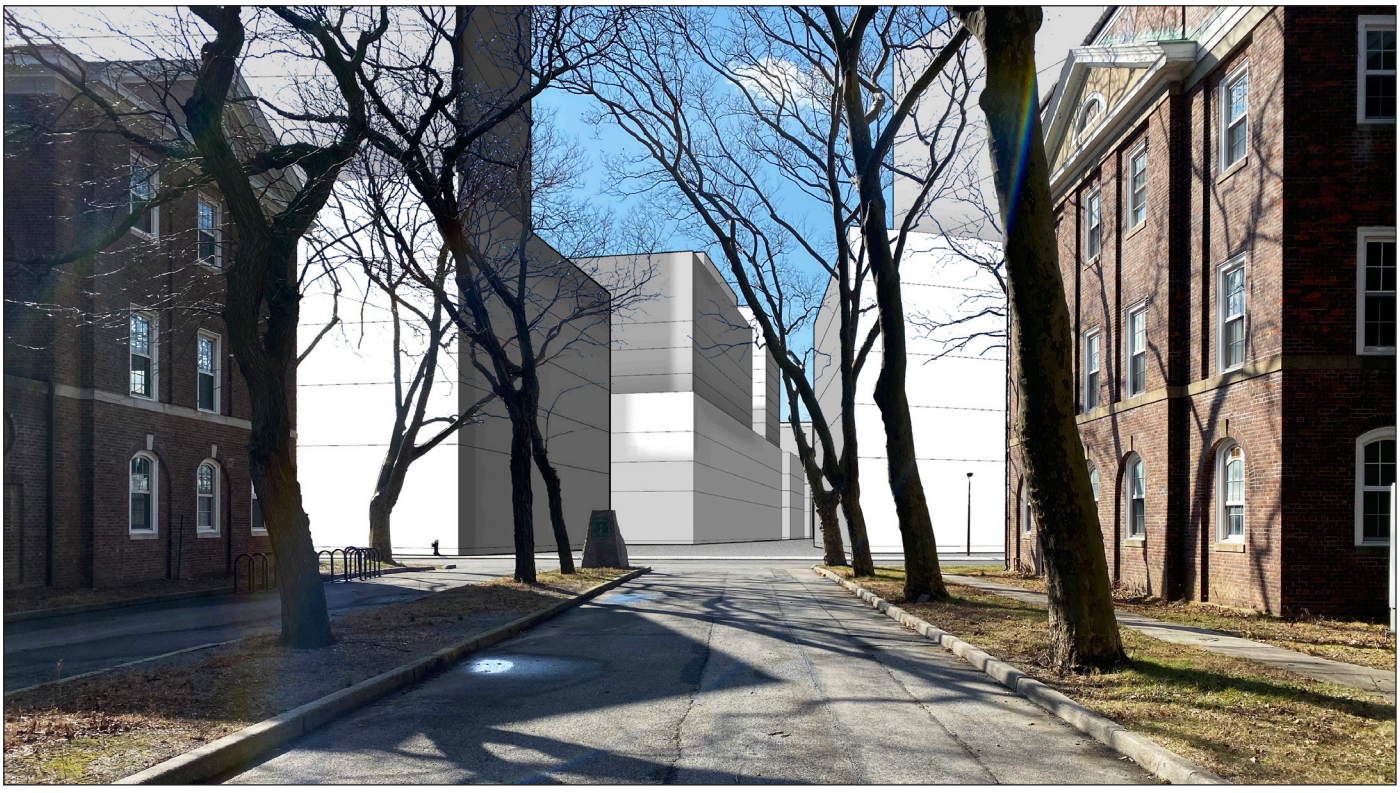
Exhibit 1

2.26.21

NO ACTION



Source: fxcollaborative

WITH ACTION

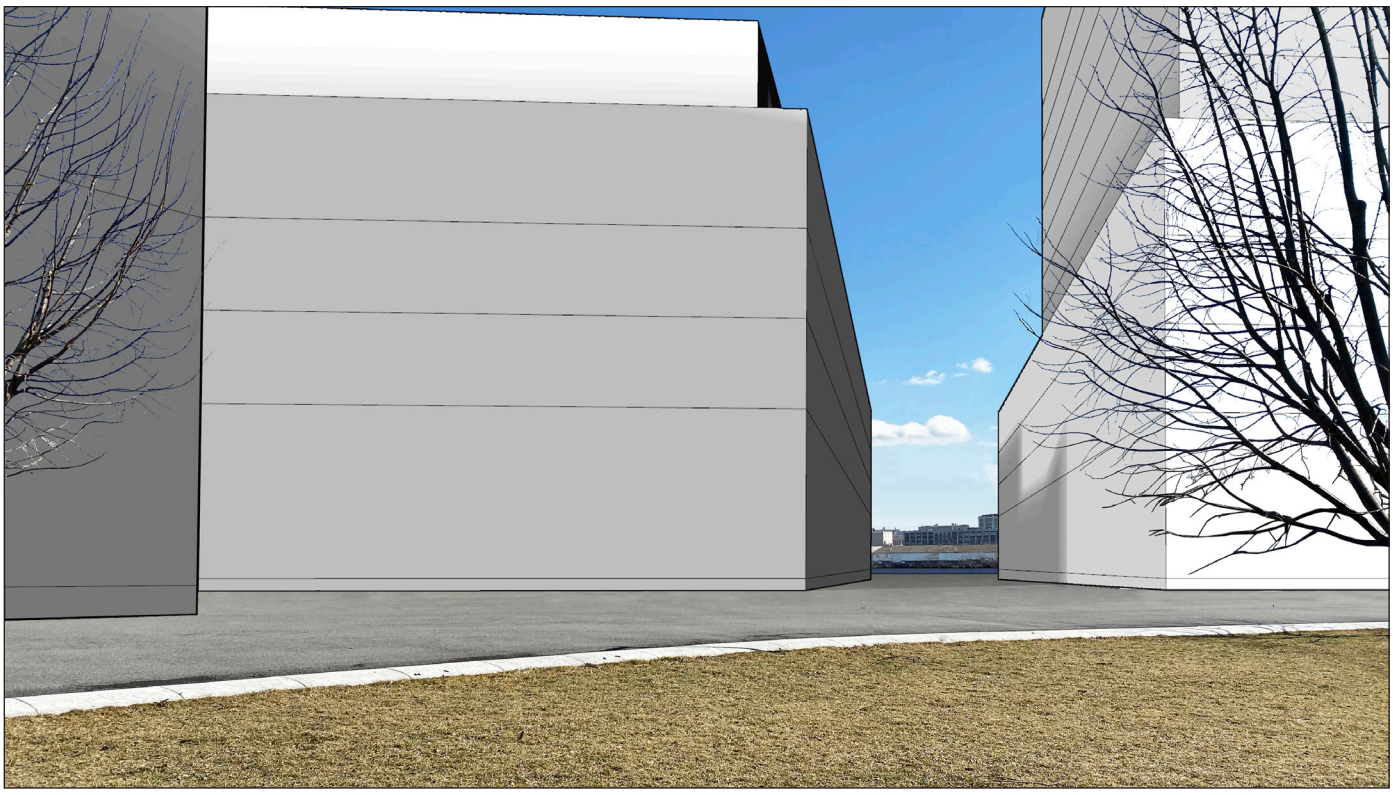
NOTE: The two-story brick structures beyond the chain fence will be demolished in the No Action Condition.

No Action and With Action Comparison:
Illustrative Rendering of the View South from King Avenue

PHASED REDEVELOPMENT OF GOVERNORS ISLAND – SOUTH ISLAND DEVELOPMENT ZONES **Figure 8-39**

2.26.21

NO ACTION



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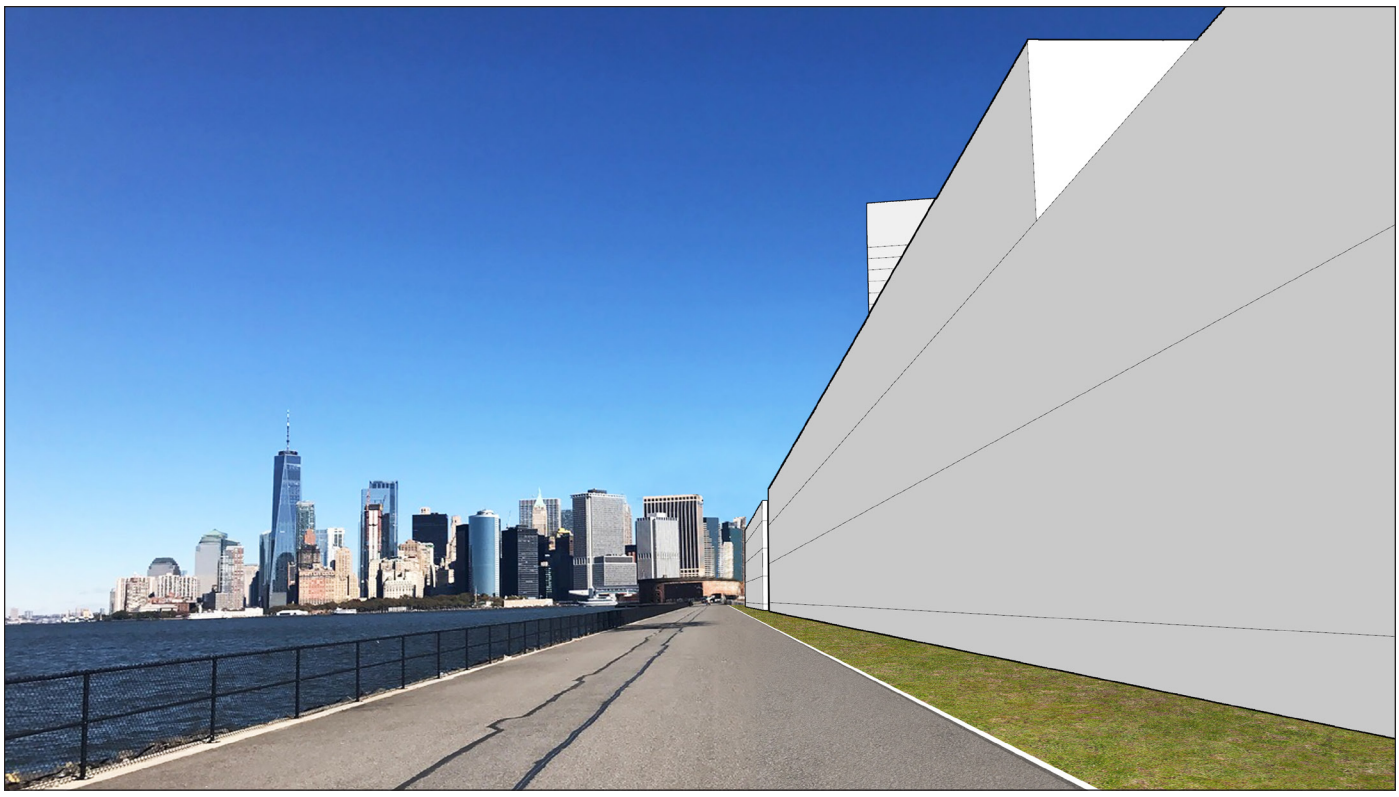
WITH ACTION

NOTE: The two-story brick structures beyond the chain fence will be demolished in the No Action Condition.

No Action and With Action Comparison:
Illustrative Rendering of the View East from the Oval

2.26.21

NO ACTION



Source: fxcollaborative

WITH ACTION

No Action and With Action Comparison:
Illustrative Rendering of the View from the Great Promenade

PHASED REDEVELOPMENT OF GOVERNORS ISLAND – SOUTH ISLAND DEVELOPMENT ZONES **Figure 8-41**

NO ACTION

Source: fxcollaborative

WITH ACTION

NOTE: The white structure at the far right will be demolished in the No Action Condition.
The brick structure is located outside of the Development Zone and will remain.

No Action and With Action Comparison:
Illustrative Rendering of the View North
from East Development Zone

NO ACTION

Source: fxcollaborative

WITH ACTION

No Action and With Action Comparison:
Illustrative Rendering of the View from Outlook Hill