

Via email to Kensingtonexpressway@dot.ny.gov
Kensington Expressway Project Team
NYSDOT Region 5 100 Seneca Street
Buffalo, NY 14203
Re: Kensington Expressway Public Comments

Dear Kensington Expressway Project Team,

Thank you for providing us with this opportunity to submit public comments on the route 33 (“Kensington Expressway”) redevelopment project. The New York Civil Liberties Union (“NYCLU”) is a non-profit, non-partisan organization with more than 85,000 members and supporters and is the New York State affiliate of the American Civil Liberties Union. The NYCLU’s mission is to advocate for all New Yorkers to have equal access to opportunities and the equal ability to participate in government decisions that affect them. This includes planning and development decisions, which have historically excluded or intentionally discriminated against Black, Indigenous, and Latinx New Yorkers—much like the original design and construction of highway and expressway projects across New York state and their continued harm. During the redevelopment of Interstate 81 (“I-81”) in Syracuse NY, the NYCLU submitted public comments at every stage of the public participation process, published a report, *Building A Better Future, The Structural Racism Built Into I-81 and How To Tear It Down*¹, testified at NYSDOT public hearings, and held dozens of community meetings with stakeholders such as the Environmental Protection Agency, Federal Highway Administration, and Department of Housing and Urban Development and impacted community members.

Black people in this country live with, on average, 56 percent more air pollution than white people.² Often carrying the burden of years of discriminatory redlining and systemic and environmental racism in industrial development, placement of highways, and lax regulation enforcement.³ This means that some of the worst pollution problems in the United States burden communities that are especially vulnerable to them. New infrastructure and development projects do not happen on a blank slate. Major projects are often proposed in neighborhoods demographically made up

¹ Lanessa Owens-Chaplin, “Building a Better Future; The Structural Racism Built into I-81, and How to Tear it Down” [2021] available at

<https://www.nyclu.org/en/publications/building-better-future>.

² U.S. Environmental Protection Agency, “Study Finds Exposure to Air Pollution Higher for People of Color Regardless of Income” [Sept. 20, 2021] available at

<https://www.epa.gov/sciencematters/study-finds-exposure-air-pollution-higher-people-color-regardless-region-or-income>

³ Noel King, “A Brief History of How Racism Shaped Interstate Highways”, NPR [Apr. 7, 2021] available at <https://www.npr.org/2021/04/07/984784455/a-brief-history-of-how-racism-shaped-interstate-highways>



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of Black people. Thus, creating more air pollution and disruption in neighborhoods that already face increased health risks from decades of past pollution. The injustice is a direct consequence of racism and disregard in the process of planning and building projects in the United States.

I. The Original Construction of Major Infrastructure Projects Across NYS Were Rooted in Racially Discriminatory Policies and Produced Adverse Economic, Social, and Environmental Harms That Impact Black Residents Today.

New York has a history of constructing highways that destroyed Black communities. As a direct result of the construction of I-81, the city of Syracuse has asthma rates that are higher than the state average, and respiratory disease is especially prevalent for Black people in the region.⁴ Syracuse has one of the largest racial poverty gaps of any metropolitan area in the nation. An estimated 40 percent of Syracuse's Black residents live below the poverty line, far more than the 11 percent of white residents living in poverty.⁵ It is a gap that is more than double the national average. Much of that poverty can be traced back to decisions on government policies that were made decades ago such as redlining and urban renewal that made this community ripe for the devastating impacts of a highway ripping through their neighborhood displacing thousands of residents, plummeting housing prices and exposing residents to vehicle pollution.⁶

The Kensington Expressway, shares in that awful history, something Governor Hochul called an “enduring injustice.”⁷ The construction of the Kensington Expressway in the 1960s destroyed a neighborhood comprised of 94 percent Black residents.⁸ Its construction in Buffalo separated their parks and neighborhoods by race and class, demolished thousands of homes and businesses, and displaced thousands of Black Buffalo residents from their neighborhood.⁹ The lasting impacts are felt today, property values in the neighborhood plummeted and remain among of the lowest in the city, and

⁴ Evan Comen & Michael B. Sauter, “The Worst Cities for Black Americans”, 24/7 Wall St, [Jan. 12, 2020] available at <https://247wallst.com/special-report/2017/11/03/the-worst-cities-for-black-americans-2/>; *Supra* n 1 at 12

⁵ *Supra* n 1

⁶ *Supra* n 1

⁷ N.Y. Governor's Office, “Governor Hochul and Senator Schumer Announce Major Milestone for \$2.25 Billion I-81 Viaduct Project In Syracuse”, [May 31, 2022] available at <https://www.governor.ny.gov/news/governor-hochul-and-senator-schumer-announce-major-milestone-225-billion-i-81-viaduct-project>

⁸ William Fox, *Segregation Along Highway Lines: How the Kensington Expressway Reshaped Buffalo* at 34, [2017] available at <https://arts-sciences.buffalo.edu/content/dam/arts-sciences/history/documents/FINAL-Segregation-Along-Highway-Lines-by-Will-Fox.pdf>

⁹ Congress for the New Urbanism, “Buffalo | Kensington Expressway: History and Context,” available at <https://www.cnu.org/highways-boulevards/campaign-cities/buffalo-kensington>



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Black residents have some of the highest rates of asthma and respiratory disease.¹⁰

Considering the litany of harms endured by this Black neighborhood both past and present, any project redevelopment must seriously consider, in other words, take a “hard look” at the impacts of this redevelopment plan. As such, we are requesting the New York State Department of Transportation (NYSDOT) in compliance with the State Environmental Quality Review Act (SEQRA) (1) conduct an Environmental Impact Statement to fully assess the impacts of this proposed project (2) create a meaningful public participation process that targets and elevates the concerns of the majority Black residents that live adjacent to the proposed plan, and will **again** shoulder the impacts for generations to come, and finally (3) prioritize the reduction of environmental harms in this “disadvantaged community” in compliance with the Climate Leadership and Community Protection Act (“CLPA”).



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II. The NYSDOT Must Conduct an Environmental Impact Statement to Examine The Negative Impacts of This Project on The Majority Black Community That Have Been Historically Marginalized and Harmed by The Original Construction of Kensington Expressway.

Where the lead agency determines that there is “significant effect” on the environment, both NEPA and SEQRA require that agencies prepare an EIS.¹¹ The threshold for requiring an Environment Impact Statement (“EIS”) is low and the standard for compliance with SEQRA is strict.¹² Adverse changes in existing air quality, impairment of existing community or neighborhood character, and material conflicts with a community’s current plans and goals are all indicators of significant adverse impacts on the environment.¹³ In the environmental assessment (“EA”) for this project the NYSDOT recognize that the build alternative would cause a 6 percent increase in PM2.5 (and decrease in air quality) in the area around the tunnel exit portals.¹⁴ The tunnel exits are intended to sit in areas zoned residential.¹⁵ The majority Black residents who live, work or attend school near Kensington Expressway will have to shoulder this additional air pollution. Again, enshrining the negative impacts of a highway project on this Black community.

¹⁰ *Id.*

¹¹ N.Y. Env’t Conserv. Law § 8-0109; 42 U.S.C.A. § 4336

¹² See Save the Pine Bush, Inc. v. Plan. Bd. of City of Albany, 96 A.D.2d 986, 987 (1983)

¹³ 6 NYCRR 617.7(c)(1)

¹⁴ NYSDOT & FHWA, Environmental Assessment at 201

¹⁵ *Id.* at 163

This community already has an increased incidents of asthma, cardiovascular disease, and premature death.¹⁶ The potential risk of worsened air quality alone should trigger an EIS. Additionally, the only build alternative presented would disturb asbestos containing materials associated with demolition and construction which requires an additional plan for asbestos mitigation for the surrounding community.¹⁷

Performing an EA does not preclude the need for an EIS. To the contrary, where an EA identifies various mitigation measures that should be undertaken to minimize the environmental effects of the project there is an implication of significant environmental impact.¹⁸ The EA in this project identifies the need for the mitigation of construction noise, traffic and air quality effects for two to three years,¹⁹ and long term mitigation of air quality created by the proposed build alternative.²⁰ This should suggest to the agencies that there are significant impacts with respect to construction and air quality which require deeper investigation. Throughout the EA and the scoping documents, the agencies suggest potential adverse impacts that will fall largely on the residents living in the project area but have yet to address them. As the Joint Lead Agencies, the Federal Highway Administration and NYSDOT are under both state and federal obligations to go beyond the Environmental Assessment (EA) and conduct a comprehensive EIS.

III. The NYSDOT Must Illicit Meaningful Public Participation From The Directly Impacted Community That Reside Just a Stone's Throw Away From Kensington Expressway Project Proposal.

SEQR affirmatively identifies public participation as an “important aspect” of state law, noting that public participation allows “the public and other agencies to provide input into the planning or review process, resulting in a review with a broader perspective” and involves sharing timely and accurate information with the public and providing “effective means for the public to provide timely comments.”²¹

¹⁶ Angela Morrison, “Minorities in Buffalo face high asthma rates, air pollution,” WBFO, [Jan. 16, 2018] available at <https://www.wbfo.org/environment/2018-01-16/minorities-in-buffalo-face-high-asthma-rates-air-pollution>

¹⁷ *Supra* n 15 at 296

¹⁸ *S.P.A.C.E. v. Hurley*, 291 A.D.2d 563, 739 N.Y.S.2d 164 (2002) (Town planning board, in performing its environmental review of proposed golf course was required to prepare an EIS prior to approving project, where environmental assessment report implicitly revealed various possible environmental impacts in connection with proposed project by identifying various mitigation measures that would be undertaken to minimize environmental effects)

¹⁹ *Supra* n 15 at 203

²⁰ *Supra* n 15 at 270

²¹ N.Y. State Department of Environmental Conservation, *The SEQR Handbook*, , at 4, 10 [2020] available at https://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf.



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Despite these obligations, the NYSDOT failed to demonstrate meaningful public involvement. In fact, the NYSDOT presented only one redevelopment option and solicited support of a forgone conclusion of their plan before engaging in meaningful public participation. Upon information and knowledge presented to us the NYSDOT brought a pre-drafted form letter to a recent community meeting to solicit signatures of support for the project. (*See* Attached Pre-Filled Form). Thus, thwarting any chance of engaging in meaning public participation. The action of a state official leveraging their authoritative and discretionary power to pressure laypersons to blindly sign a pre-drafted form, raises serious concerns of meeting the strict standards of meaningful public participation. Over a hundred community members attended a recent community meeting and expressed concerns about the lack of options the NYSDOT had presented, providing only one option “capping” the expressway.²² The pre-filled form surfaced mere days after residents raised significant concerns with the project.

Community concerns varied but maintained a consistent theme. A need for more robust understanding of the projects short- and long-term impacts, requesting more than just one option for redevelopment, and additional time to review the hundreds of pages. Specific concerns included concerns about the of increase air pollution at the end of the tunnel,²³ the future use of land that will become available by the Kensington Expressway capping. A valid fear of history repeating itself by displacing residents.²⁴ An analysis of future land use demands an EIS to consider the unintended harms.

The NYSDOT response to the above was unacceptable. The NYSDOT extended the public comment period by a mere 10 days. Ostensibly in hopes of obtaining a late influx of positive comments to crowd out the wide array of concerns raised by community members. These superficial attempts at depicting public positive support—including the pre-script support form—fall woefully short of the state’s obligation to ensure meaningful public participation. Indeed, the NYSDOT, to date, fail to demonstrate proactively seeking community participation, input, and meaningful dialogue—elements that are hallmark to the meaningful public participation requirement. With at least one resident stating “The deal is already done. This is a ‘dog and pony’ show.”²⁵

²² Mark Sommer, “ROCC member calls to fill in Kensington as opposition to current plan grows” The Buffalo News [2021] available at https://buffalonews.com/news/local/rocc-member-calls-to-fill-in-kensington-as-opposition-to-current-plan-grows/article_f981d416-78e0-11ee-befd-87ade5cced7f.html

²³ *Supra* n 15

²⁴ *Supra* n15

²⁵ Eileen Buckley, “There’s a lot of unanswered questions’: Some residents speak out against Kensington Expressway Project” WBKW [Sept. 28, 2023] <https://www.wkbw.com/news/local-news/buffalo/theres-a-lot-of-unanswered-questions-some-east-side-residents-speak-out-against-kensington-project>

IV. The NYSDOT Must Prioritize Efforts to Recue Environmental Harms in Disadvantaged Communities Consistent with The Climate Leadership and Community Protection Act (“CLCPA”)

New York’s landmark legislation enacted to address climate change and its inequitable burdens on disadvantaged communities. The CLCPA makes clear that the state must prioritize the health and safety of environmental justice communities in advancing greenhouse gas reduction goals.²⁶ It recognizes that climate change disproportionately affects “disadvantaged communities” and demands those communities benefit from the state’s transition to cleaner, greener sources of energy, reduced pollution, and cleaner air.²⁷ The CLCPA defines disadvantaged communities as those who “bear the burdens of negative public health effects, environmental pollution, impacts of climate change...or comprise of high concentrations of low- and moderate-income households.”²⁸

Section 7(3) demands that state agencies, when considering and issuing administrative approvals and decisions, “shall not disproportionately burden disadvantaged communities” and “shall prioritize reduction of greenhouse gas emissions and co-pollutants in disadvantaged communities....” Section 7(3) makes clear the Legislature’s intent to prioritize reductions of greenhouse gas emissions and co-pollutants in communities like those next to the Kensington Expressway.

As explained supra—Section I, the Kensington Expressway proposed project increases air pollution to the “disadvantaged community.” The residents, who are predominately Black, have been cut off from meaningful economic resources and exposed to a higher rate of pollutants and toxins. The goals of the CLCPA are to prioritize the safety and health of the community that has been carrying the brunt of harm caused by the original build of Kensington Expressway. Finally, the NYSDOT failed to meaningfully consider any alternatives to reroute traffic that would reduce the exposure from vehicle pollution in this community to meet the demands of the CLPA.

V. Conclusion

We must ensure the awful history of the past does not repeat itself. For the above reasons we are requesting the NYSDOT conduct an Environmental Impact Statement to determine the full impact of the project, including the

²⁶ Env’t Conserv L §75- 15

²⁷ See id. § 1 [7]

²⁸ See New York State, Climate Act: Ensuring Equity and Inclusion [2023] available at <https://climate.ny.gov/Our-Impact/Ensuring-Equity-Inclusion> and mandates that state agencies identify disadvantaged communities using specific criteria including income, race, and proximity to major toxins; Env’t Conserv L §75-0111 [1] [b].



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future land use and air quality impacts. We are requesting an extended public participation process that includes meaningful public participation from residents in the impacted neighborhoods. Finally, we are requesting compliance with the CLCPA to consider alternative proposals that prioritize decreasing exposure to this community, including rerouting cars traveling through this neighborhood for the benefit of the suburbs. If you have any questions, contact Lanessa Owens-Chaplin Lchaplin@nyclu.org.

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