To be Argued by:
ARTHUR Z. SCHWARTZ
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

In the Matter of

EAST RIVER PARK ACTION, by Its Chair, PAT ARNOW, and PAT ARNOW Individually; ORCHARD STREET BLOCK ASSOCIATION, by Its Chair, HOPE BEACH, and HOPE BEACH Individually; WASHINGTON SQUARE PARK ECO PROJECTS, by Its Chair, LOYAN BEAUSOLEIL, and LOYAN BEAUSOLEIL Individually; NEW YORK CLIMATE ACTION GROUP, by Its Chair, JUDITH K. CANEPA, and JUDITH K. CANEPA Individually; NO SPRAY COALITION, INC., by Its Chair, MITCHEL COHEN, and MITCHEL COHEN Individually; COMMON GROUND COMPOST LLC, by Its Chair, MEREDITH DANBERG-FICARELLI, and MEREDITH DANBERG-FICARELLI Individually; NORTH AVENUE A NEIGHBORHOOD ASSOCIATION, by Its Chair, DALE GOODSON, and DALE GOODSON Individually; 4TH STREET FOOD CO-OP, by Its Chair, ELISSA JIJI, and ELISSA JIJI Individually; MASTERS OF SUCCESSION COLLECTIVE, by Its Chair, ELIZABETH D. MAUCHER, and ELIZABETH D. MAUCHER Individually; CUALA FOUNDATION, INC., by Its Chair, SUSAN MCKEOWN, and SUSAN MCKEOWN Individually; VILLAGE EAST TOWERS EMERGENCY PREPAREDNESS TASK FORCE, by Its Chair, DANIEL MEYERS, and DANIEL MEYERS Individually; 9BC TOMKINS SQ. BLOCK ASSOCIATION, by Its Chair, CAROLYN RADCLIFFE; NATIONAL MOBILIZATION AGAINST SWEATSHOPS, by Its Chair, ANTONIO QUEYLIN, and ANTONIO QUEYLIN Individually; EXTINCTION REBELLION LOWER EAST SIDE, by Its Chair, GREGORY SCHWEDOCK,

(For Continuation of Caption See Inside Cover)

Appellate Case No.: 2021-00421

BRIEF FOR PETITIONERS-APPELLANTS

ADVOCATES FOR JUSTICE
Attorneys for Petitioners-Appellants
225 Broadway, Suite 1902
New York, New York 10007
(212) 285-1400
aschwartz@afjlaw.com

New York County Clerk's Index No. 151491/20

and GREGORY SCHWEDOCK Individually; DOUBLE DRAGON COACHING, by Its Chair, JUSTIN SHADDIX, and JUSTIN SHADDIX Individually; BOWERY ALLIANCE OF NEIGHBORS, by Its Chair, SALLY YOUNG, and SALLY YOUNG Individually; RENA ANASTASI; ANDREI ANIKIN; SARAH ANIKIN HOSPODAR; VALERIE BARNES; AMY BERKOV; ILONA BITO; RITA BOBRY; ANNE BOSTER; WENDY E. BRAWER; MARK BREEDING; JACK BROWN; EVA BUCHMULLER; MARY JO BURKE; MARYANNE BYINGTON; DANIELLE CHU; BILLIE COHEN, ALISON COLBY; KENNETH COLOSKY; CATHERINE CULLEN; SHAWN DAHL; MARIE DE CENIVAL; DAVID EISENBACH; GEORGE EVAGELIOU; SARAH FLORES; DONALD GALLAGHER; ELIZABETH GAYNOR; LENORE GOLDSTEIN; HARRIET HIRSHORN; KATE HORSFIELD; AUDUN HUSLID; FANNIE IP; LESLIE KRAMER; CHARLES KREZELL; JONATHAN LEFKOWITZ; VIRGINIA LIEBOWITZ; TOMMY LOEB; PETER MADDEN; CAMILLE MARLOW; LAURIEANNE MARRELL; ANA MARTON; KATHERYN MAY; EVA MCCLOSKEY; DEBORAH MILLS; BRUCE MORRIS; BROOKE MYERS; INDRANI NICODEMUS; THEODORE PENDER; RICHARDS PERRY; LAUREN POHL; JOAN REINMUTH; WENDY RUBIN; TRUDY SILVER; MARIAH STANCARONE; DANIEL TAINOW; AMANDA UDELL; REBECCA A. VAUGHAN; NINA WATKINS; ALEXIA WEIDLER; VICTOR WEISS; EGON ZIPPEL; STEVEN CARBO; J. PATRICIA CONNOLLY; EMMA FITZSIMMONS; RITA FREED; JOANN FYNKE; PRESLEIGH HAYASHIDA; FRANK LAUB; ANDREW LAWRENCE; BRUCE L. MISHKIN; VERONICA OLIVOTTO; PHOEBE QUIN; BARBARA ROSS and CLIFTON SMITH,

Petitioners-Appellants,

– against –

CITY OF NEW YORK,

Respondent-Respondent,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

APPELLANTS' BRIEF

INTRODUCTION

This is a proceeding brought by over 20 community organizations and over 100 individuals who use East River Park seeking declaratory and injunctive relief addressed to the decision on the part of the City of New York to deprive its citizens of the use of the Park The City wants to first use it as a staging ground, for five years or more, for its construction of a massive seawall bordering the East River in the Lower East Side of Manhattan. The want to alter the Park permanently, by destroying the existing park—cutting down every tree and removing every shrub in the park, and destroying natural habitats, and barring public use of the park, turning East River Park into a seawall with a park on the top. What they have refused to do is seek a vote of the New York State Legislature to allow the project. Petitioners-Appellants (hereinafter "Petitioners") seek to stay that construction and to nullify the vote of the NYC Council approving the project.

Seven years after Hurricane Sandy lifted up the ocean, the East River, and the Hudson River, and inundated whole swaths of New York City, including the Lower East Side, the de Blasio Administration won approval, in 2019, from the NY City Council for what is called the East Side Coastal Resiliency Project, a $1.45 billion flood mitigation plan which is addressed by this lawsuit. The portion which is objected to here, from 14th Street to Montgomery Street, has not yet

begun construction. As of the date of this brief no contracts have been let for the construction, which is already a year behind schedule.

The Plan calls for closing the 47-acre East River Park, in phases, burying it beneath eight to ten feet of landfill, and building a new park on top of it. The entire barrier would run 2.2 miles, from Montgomery Street to East 25th Street.

Parks are the lifeblood of our community. They are places where regular people sit, play, exercise, engage in recreation, and in East River Park, gaze at the water. The Court of Appeals, in *Williams v. Gallatin*, 229 NY 248 (1920), first made it crystal clear that because of its role, only the elected state legislature may grant permission for a park purpose to be altered to a non-park purpose. The Court stated: "[N]o objectives, however worthy, ... which have no connection with park purposes, should be permitted to encroach upon [parkland] without legislative authority plainly conferred. ... [Because the state legislature has not given its approval to NYC's plan] the legislative will is that Central Park should be kept open as a public park ought to be and not be turned over by the commissioner of parks to other uses. It must be kept free from intrusion of *every kind* which would interfere in any degree with its complete use for this end." (Emphasis added.) The Court of Appeals repeated this theme 20 years ago in *Friends of Van Cortlandt Park vs. City of New York*, 95 N.Y.2d 623, 630 (2001): "[O]ur courts have time and again reaffirmed the principle that parkland is impressed with a public trust,

requiring legislative approval before it can be alienated *or used for an extended period* for non-park purpose." (Emphasis added.)

The City of New York hasn't learned and, unfortunately, the Court below bough their argument that this was a park preservation project—they have to destroy it to save it is the theme of the City's position. Using East River Park as the staging ground for building a seawall and taking away scores of acres from the public for many years during that process, is a five-year-long non-park purpose. And recreating a park on top of a seawall, replanting trees and shrubs and hoping that is sugar-coating a non-park purpose. This Court needs to remind NYC of the law once again.

NATURE OF THE CASE

1. FACTUAL BACKGROUND

The John V. Lindsay East River Park ("East River Park") is a 57.5-acre park located along the waterfront of the Lower East Side of Manhattan. It was built in 1939. It runs from Montgomery Street to East 120th Street. (www.nycparks.org/parks/east-river-park/history)

The facilities of the park includes lawns & wooded areas, gardens, barbecuing areas, baseball fields, basketball courts, soccer fields, football fields, tennis courts, bicycling and greenways, fitness equipment, fishing, playgrounds,

running tracks, and an amphitheater, the Lower East Side Ecology center, a compost yard, and two water spray areas, including a seal sculpture water park. *Id.*

The NYC Park Department web site describes East River Park as follows: "One of New York City's finest places to play can be found along the waterfront of Manhattan's Lower East Side, in view of the Manhattan and Brooklyn Bridges. With a track, a tennis complex, eight baseball and softball fields, and fields and courts dedicated to soccer, football, and basketball, as well as its dramatic views of New York's harbor, John V. Lindsay East River Park is a popular place for your next game. The park is also a vital link on Manhattan's Waterfront Greenway and offers beautiful waterfront pathways for bicyclists and pedestrians to enjoy." *Id.*

East River Park runs alongside the Franklin Delano Roosevelt ("FDR") Drive and the East River from Montgomery Street to East 12th Street. Prior to its use as a park, the East River waterfront played a crucial role in the development of New York City as a safe harbor for numerous shipping interests in the early colonial period. By 1825, the area was marked by an active shipbuilding industry, boisterous masses of sailors, and a number of active municipal waterfront markets. In the mid-19th century, as sea trade moved to the deeper channels of the Hudson River, docks gave way to factories, and then, in the late 19th century, to tenements. By the time Parks Commissioner Robert Moses developed his plan for a waterfront park, the southern East River waterfront was dotted with slaughterhouses, glass

factories, power stations, and railroad yards. (https://www.nycgovparks.org/parks/east-river-park/history)

The Park was designed in the 1930s, in tandem with the FDR Drive (also known as East River Drive.) Moses knew that the highway would pass through the Lower East Side, a neighborhood sorely in need of parkland. He envisioned a tree-shaded esplanade alongside the highway with abundant recreational facilities and windswept views of the East River and beyond. The acquisition of land for a park in this densely populated area was prohibitively expensive and fraught with legal difficulties, especially along this heavily industrialized waterfront. The Parks Commissioner arrived at an imaginative solution. The combination of landfill and Moses's energetic legal wrangling was enough to secure the needed parkland. In 1939, East River Park—the Lower East Side's largest open space—opened alongside the FDR Drive. (https://www.nycgovparks.org/parks/east-river-park/history)

East River Park has undergone many changes since then. In 1949, when the FDR Drive was widened, a portion of the park between Montgomery and Jackson Streets was eliminated. South Street was extended in 1963, protruding onto another 30-foot section of the park. The 10th Street pedestrian overpass above the FDR Drive was completed in 1951, connecting the park with residents of the East

Village and the neighboring Lillian Wald Houses. (https://www.nycgovparks.org/parks/east-river-park/history)

In 1941, an amphitheater was built in the park, along with an adjacent limestone recreational building, as part of an urban renewal project for the Lower East Side. During the 1950s, the amphitheater was the site of frequent free Evening-in-the-Park concerts. Joseph Papp (1921-1991), founder of Shakespeare in the Park and the Public Theater, staged Julius Caesar there in 1956. Local schools held their graduation ceremonies there, and the Group of Ancient Drama staged free-of-charge performances of classic Greek plays. In 1973 however, the amphitheater closed due to budget cuts. Vandals attacked the neglected theater and by 1980 it was unusable. (https://www.nycgovparks.org/parks/east-river-park/history)

The City Council passed a law in 2001 to rename the park as John V. Lindsay East River Park. (https://www.nycgovparks.org/parks/ east-river-park/history)

In the 1990s extensive renovations took place throughout the park and included the opening of the 10th Street comfort station and the Brian Watkins Tennis Center, and refurbishment of the amphitheater. After the 9-11-2001 attack, millions of dollars were allocated to further repair of East River Park. The most recent upgrades to East River Park include handicapped accessibility for the

Fireboat House and renovations to four of the park's ball fields, and its running track. The seawall, renovated for the first time since its completion in the 1930s, offers views of the East River. Additional upgrades include the Park's synthetic turf soccer field and basketball court. These upgrades were completed in 2010. (https://www.nycgovparks.org/parks/east-river-park/history)

East River Park is a vital link on the East River Esplanade, a series of connected parks and pedestrian paths that form part of a nearly uninterrupted greenway around the shoreline of Manhattan. East River Park continues its role as one of the largest waterfront parks in Manhattan, offering a variety of active and passive recreational purposes. (https://www.nycgovparks.org/parks/east-river-park/history)

The neighborhood around the East River Park is a low- to moderate-income area, and the neighborhood's residents rely on the park for recreation. Over 10,000 New York City Housing Authority apartments are arrayed across the FDR Drive, from 13th Street to Grand Street; the population of those apartments is overwhelmingly Black and Hispanic. (A69)

The Development of a Storm Protection Plan

In October 2012, Superstorm Sandy made landfall in New York, causing extensive flooding along all of New York City's waterways, including the East River. The flooding caused massive infrastructure damage, particularly on

Manhattan's Lower East Side, especially to the NYC Housing Authority developments. Water flooded as far west as First Avenue in the area between 23rd Street and Grand Street. (A69)

In response to the storm, the City began brainstorming plans to protect the City from future flooding. Over a period of five years, the New York City Council met with community groups to create a flood protection plan for the East River Park. The community's plan involved flood walls, berms, and a resilient parkland that could recover quickly from storm surges. (A69)

In May 2015, Assistant Parks Commissioner Alyssa Cobb Konon wrote to the Federal Emergency Management Agency ("FEMA"), advising FEMA that NYC Parks was going to assume the Lead Agency role in review of a proposed plan which would be vetted under the State Environmental Quality Review Act ("SEQRA"), the City Environmental Quality Review Act ("CEQRA") and, because Federal money would be requested, under the National Environmental Protection Act. In her letter (A330-332) Commissioner Konon described the project as follows:

> The Proposed Project is intended to advance coastal resiliency along Manhattan's East Side to mitigate against expected future flooding from events like Hurricane Sandy. The Proposed Project was identified by HUD in a winning Rebuild by Design contest proposal and was called out as a priority site for integrated coastal protection interventions in the City's "A Stronger, More Resilient New York" report. To that end, the Proposed Project involves the installation of a

> flood protection system on the East Side of Manhattan between Montgomery Street and East 23rd Street with the objective of reducing flood hazards, protecting a diverse and vulnerable residential population, and safeguarding critical energy, infrastructure, commercial, and transportation assets.
>
> The principal goals and objectives of the Proposed Project include:
>
> – Provide a reliable flood protection system for the flood hazard area that is mapped between East 23rd Street on the north and Montgomery Street on the south;
>
> – Improve and enhance access to the waterfront, including John V. Lindsay East River Park and Stuyvesant Cove Park;

On October 28, 2015, the Parks Department issued a Positive Declaration under SEQRA (A333-337). In that document, the project was "identified" and "described" as follows:

> In order to address flood hazard vulnerability for an approximately 2.4 mile stretch of Manhattan's East River waterfront, the City of New York is proposing to construct an integrated flood risk reduction system called the East Side Coastal Resiliency (ESCR) Project. The proposed project area extends between Montgomery Street on the south and East 23rd Street (and in one alternative East 25th Street) on the north.
>
> … The proposed integrated flood risk reduction system may be comprised of a combination of berm (or "bridging berms"), floodwalls, and deployable elements that would be located within existing City parkland and streets and potentially into non-City-owned property. The proposed project responds to the urgent need for increased flood protection and resiliency within this Federal Emergency Management Agency (FEMA)-designated flood hazard area. In doing so, the proposed project is intended to safeguard

> commercial and residential properties, and critical energy, infrastructure, and transportation systems against coastal flooding, and make related improvements to City infrastructure while simultaneously improving public open space and enhancing the accessibility and quality of waterfront open space in East River Park and Stuyvesant Cove Park.

On October 30, 2015, immediately after the Positive Declaration the City Issued its Draft Scope of Work to Prepare a Draft Environmental Impact Statement (A1496-1561). This is how the project, "a flood protection system …to reduce flooding,' was described in the Introduction to the Draft Scope (A1501):

> "[T]he City is proposing to construct a coastal flood protection system along a portion of the east side of Manhattan as part of the East Side Coastal Resiliency (ESCR) Project (the Proposed Action) … and make related improvements to City infrastructure. The proposed project area begins on the south at Montgomery Street and extends north along the waterfront to East 23rd Street (and, in one alternative, to East 25th Street) with inland segments along these streets and a design study area that includes portions of the Lower East Side and East Village neighborhoods, Stuyvesant Town, and Peter Cooper Village. Within the proposed project area, the City is proposing to install a flood protection system that is within City parkland and streets. This flood protection system may include a combination of berms (or "bridging berms"), floodwalls, and deployable systems with other infrastructure improvements to reduce flooding. In addition to providing a reliable coastal flood protection system for this area, a goal of the Proposed Action would be to improve open spaces and enhance access to the waterfront, including the John V. Lindsay East River Park (East River Park) and Stuyvesant Cove Park."

In describing the Project's purpose (A1507), the Draft Scope stated:

"The principle [sic] objectives of the Proposed Action are to:

- Provide a reliable coastal flood protection system for the 100-year flood event for the FEMA-designated flood hazard area, taking into consideration sea level rise, for the area between Montgomery Street to the south and East 23rd Street to the north;

- Improve access to, and enhance open space resources along, the waterfront, including East River Park and Stuyvesant Cove Park;

- Respond quickly to the urgent need for increased flood protection and resiliency, particularly for vulnerable communities and the large concentration of affordable and public housing units along the proposed project area;

In the section of the Draft Scope addressed to Potential Regulatory Approval (A1510-1511), the Scope states: "Subject to the review of additional design alternatives, the Proposed Action may also require an approval from the State Legislature to alienate portions of parkland within East River Park for non-park uses."

The Scope then discusses the "alternatives" being considered (see A1514, 1518 and 1524, and especially Figures 6, 7 and 8 (A1516, 1517 and 1519)):

Coastal Flood Protection Elements Common to Each Design Alternative

To implement integrated coastal flood protection and resiliency measures, the design alternatives may include a combination of systems composed of berms, floodwalls, deployable systems, and sewer system improvements. Provided below are brief descriptions of these systems:

- Engineered and Landscape Berm (A1515) (also referred to as a "bridging berm"). Engineered berms

elevate the existing topography to form a line of coastal flood protection and, therefore, require a relatively wide space to be installed. They are typically constructed of a core of compacted fill material, capped by stiff clay to withstand storm waves, with a stabilizing landscaped cover. To avoid seepage, the coastal flood protection berm has an interior cutoff wall that is constructed of either a stiff clay or slurry. These coastal protection berms can be integrated into a park setting and are also considered adaptable to provide increased protection or accommodate sea level rise to meet future design needs. Floodwalls (see below) are also used in conjunction with a berm at locations where there are horizontal space limitations. In certain reaches of Project Area One, these berms would be integrated with the pedestrian bridges that cross the FDR Drive and touch down in the park; these landings in the park (i.e., the "bridging berms") may then provide the dual benefit of improved access and flood protection. See Figure 6 (A1515) for a cross section of a typical engineered berm. Engineered berms may be used for coastal flood protection within East River Park in Project Area One and within Stuyvesant Cove Park in Project Area Two. Floodwalls (see the description below) can also be used in conjunction with a landscaped berm in design reaches where there are horizontal space limitations (see Figure 7 (A1517)). (In this combination, the floodwall provides the coastal protection and the berm is an associated landscape feature.)

– Floodwalls (A1515, 518). Floodwalls are narrow, vertical structures with a below-grade foundation that are designed to withstand both tidal storm surge and waves. They are typically constructed of steel, reinforced concrete, or a combination of materials with a reinforced concrete cap. Floodwalls can be used where there are horizontal space limitations

> and where there is a design objective to protect existing recreational facilities by narrowing the footprint of the flood protection system. Typical floodwall designs include I-walls, L-walls, and T-walls, each providing differing degrees of structural protection to withstand tidal surge and wave forces. See Figure 8 (A1519) for cross sections of a typical I-wall and typical L-wall. Floodwalls may be used (in combination with landscape berms) along the interior limits of East River Park in Project Area One (adjacent to the FDR Drive) and along the west (or inland) side of the FDR Drive between about East 13th and East 18th Streets in Project Area Two.

On September 28, 2018After years of study, including community meetings, workshops, and general engagement of the affected community, , the City, out of the blue, introduced a new plan, without community input, which would cost to the City to $1.45 billion, almost doubling the cost of the original proposed plan which had earned community support because of extensive involvement of local residents in the planning, This new plan replaced a plan which, while intrusive, did not involve the destruction of East River Park as it currently exists.

On December 6, 2018, a group of elected officials wrote to the City (see A1562-1545) about a new plan, announced on September 28, 2018. The letter expressed "serious concerns … regarding the manner in which the City has chosen the new plan … and the overall advisability of proceeding with the project as proposed" (A1532). The letter continued, "Overall the City is proposing to abandon approximately 70 percent of the previous plan, in a manner which negates

4 years of community involvement…As you know the new plan would involve closing, demolishing, and eventually reconstructing East River Park, which at 57 acres is the largest City park in Manhattan south of Central Park and a beloved and heavily used public space for many of our constituents who otherwise have limited access to green spaces and outdoor recognition. … [W]e were surprised at the least that the City chose a new plan without input from the community, or its elected representatives or community boards." (A1562)

The elected officials then addressed the issue of alienation (see A1563):

> The City had concluded that the previous plan would require alienation legislation and had engaged in discussions with elected officials in the fall of 2017 and again in the spring of 2018 regarding the timing of such legislation. The premise at the time was that time was that the legislation would be narrowly tailored to minimize ESCR's impact on East River Park. We understand that the City has concluded that alienation is no longer required, in spite of the fact that the City plans to demolish the entire park, build what is essentially an artificial plateau as a storm barrier where the park currently stands, and then reconstruct the park on top of the storm barrier.

The elected officials then asked one of the key questions which this Court has to address, and which the City asked the Court below to ignore: "If the City were to go forward with the new plan, and alienation is not required, how would the City be held accountable to ensure that 100% of the parkland and open space is returned to the public?" (A1563, point 4)

The City's response (A1639-1646) was hardly reassuring—in essence, the City said "don't worry, it's mapped parkland, so must always be mapped parkland."

On January 23, 2019 Mitchell Silver, the NYC Parks Commissioner, testified at the City Council (A1417-1419). His testimony is contained in Docket Document 111. Although he talked about how the new design would make the park more resilient, it was clear that the plan still emphasized the ESCR's flood protection role:

> This plan reflects years of community input; through the comprehensive community engagement that preceded the design process, we heard loud and clear that the users of East River Park loved the existing program and amenities that were in place, and this design reflects that consensus. The core recreational program and design elements for the park will remain in place and be enhanced. All that has changed is the engineering approach for how to incorporate flood protection functionality into the park, and the technical manner through which the project will be delivered. This revised plan will elevate the park by several feet, ensuring that all of the park investments will be out of the flood zone and able to sustain future climate challenges. (A1417)

On March 29, 2019, the City Revised its ULURP application. (A129-194). The Introduction (A134) read as follows:

> **INTRODUCTION**
>
> The New York City Departments of Transportation (NYCDOT), Environmental Protection (DEP), Small Businesses Services (SBS), and Citywide Administrative Services (DCAS) collectively the "Applicants," are seeking approval for the acquisition of real property and a text

> amendment to the New York City Zoning Resolution to facilitate the East Side Coastal Resiliency (ESCR) project. The purpose of the ESCR project is to address coastal flooding vulnerability along a segment of Manhattan's East River waterfront by implementing a flood protection system that reduces flood risk, improves access to the waterfront, and enhances waterfront parkland. (page 1)

The Revised application explained the development of the plan and described it (A135):

> In April 2015, the City released *"One New York: The Plan for a Strong and Just City," (OneNYC)* which identified the proposed ESCR project as one of several projects to strengthen coastal defenses and build a stronger, more resilient New York City that is prepared for the impacts of climate change. Vision 4 of *OneNYC* noted that the proposed ESCR project would benefit thousands of public housing and other residents of a particularly vulnerable part of Manhattan and would provide a new model for integrating coastal protection into neighborhoods, consistent with the City's resiliency vision.
>
> **DESCRIPTION OF THE PROPOSED PROJECT** (A136-139)
>
> **Introduction**
> The Proposed Project is a flood protection system comprised of a combination of floodwalls, 18 closure structures (i.e., gates), and supporting infrastructure improvements that together would reduce the risk of coastal storm flooding in the protected area. The flood elevation used in the design of the Proposed Project is 16.5 feet North American Vertical Datum, which is generally 8 to 9 feet above the existing surface grade, but diminishes in above grade height as the system moves inland and the topography rises. This flood protection design elevation was developed assuming the mapped 100-year Federal Emergency Management Agency flood elevation, incorporating storm wave height assumptions, and the 90th percentile sea level rise through to

the 2050s (see Figure 4: 100-Year Floodplain with 2050 Sea Level Rise). (A169)

Within this stretch of East River Park, the Proposed Project includes the following key design elements:

- A below-grade flood protection system (i.e., floodwall) running parallel to the existing East River Park bulkhead coupled with elevating much of East River Park, generally beginning on the south at the existing amphitheater and continuing northward to the northern end of the park, and thereby protecting park facilities and recreational spaces from design storm events and sea level rise inundation;
- Installing the floodwall structure below-grade to soften the visual effects of the flood protection system;
- Reconstructing the East River Esplanade to increase the deck elevation to match the raised park and protect the esplanade from design storms and sea level rise;
- Raising the majority of the park grade with an increase in elevation from the west (the FDR Drive) to east (the East River bulkhead) <u>to attain the flood protection system design elevation</u>**,** accompanied by the reconstruction of the park open space including all fields and passive spaces, and incorporating resilient landscaping and substantial tree replanting that envisions a more diverse, resilient, and ecologically robust habitat;

* * *

- Reconstructing all water and sewer infrastructure in the park, some of which is reaching the end of the serviceable life, including the outfalls and associated pipes that cross the park to the East River bulkhead.

* * *

> From East River Park, the proposed flood protection system continues west across the FDR Drive with closure structures (comprised of two swing gates that when deployed would close this segment of the system across the highway, but in non-storm conditions would be recessed to the sides of the highway). The floodwall then turns north and is aligned along the west (southbound) side of the FDR Drive to connect into the flood protection system at the Con Edison East River Generating Station (located between East 14th and East 15th Streets).

In essence, the full park itself is now described as part of the "flood protection system." To make that clear, the ULURP application includes this excerpt from the 2017-2018 Citywide Statement of Needs:

> **PUBLIC PURPOSE** (A153)
>
> As a key component of New York City's One New York: The Plan for a Strong and Just City, and the HUD sponsored Rebuild by Design Competition, the City is proposing to install an integrated flood protection system on the east side of Manhattan from Montgomery to East 23rd streets with the objective of reducing coastal flood hazards, mitigating flood risk for a diverse and vulnerable residential population, and safeguarding critical energy, infrastructure, public open space, commercial and transportation assets.

On April 5, 2019 the City published its Final Scope of Work to Prepare a Draft Environmental Impact Statement. (A1647-1667) This Final Scope made it clear that what was being built was a flood protection system and not a "park enhancement."

The Final Scope picked right up where the 2015 Positive Declaration (A233) left off. The Final Scope started this way (A1652):

INTRODUCTION

On October 29, 2012, Hurricane Sandy made landfall, greatly impacting the east side of Manhattan and highlighting the need for the City of New York (the City) to increase its efforts to protect vulnerable populations and critical infrastructure during major storm events. Hurricane Sandy, a presidentially declared disaster, caused extensive coastal flooding, resulting in significant damage to residential and commercial property, open space, transportation, power, and water and sewer infrastructure, which in turn affected medical and other essential services. As part of its plan to address vulnerability to such major flooding, the City is proposing the East Side Coastal Resiliency (ESCR) Project (the proposed project), which involves the construction of a coastal flood protection system along a portion of the east side of Manhattan and related improvements to City infrastructure (the proposed project).

In describing the purposes of the project, the Final Scope, at A1655, read:

PURPOSE AND NEED OF THE PROPOSED PROJECT

As established above, Hurricane Sandy underscored the City's need to bolster its resiliency efforts to protect property, vulnerable populations, and critical infrastructure during design storm events. The need to protect the area is magnified by the potential for more frequent flooding events and would align with resiliency planning goals described in *OneNYC* and *A Stronger, More Resilient New York*. To that end, the purpose of the proposed project is to address this coastal flooding vulnerability in a manner that reduces the flooding risk while enhancing waterfront open spaces and access to the waterfront.

The principal objectives of the proposed project are as follows:

– Provide a reliable coastal flood protection system against the design storm event for the protected area;

– Improve access to, and enhance open space resources along the waterfront, including East River Park and Stuyvesant Cove Park;

– Respond quickly to the urgent need for increased flood protection and resiliency, particularly for communities that have a large concentration of residents in affordable and public housing units along the proposed project area;

In the section discussing Regulatory Approvals (A1657-1658), unlike the 2015 Draft Scope, the Final Scope did not even discuss possible legislative approval of alienation.

The Final Scope, at A1661 (under the heading Project Alternatives Design Process), stated that "subsequent to the issuance of the Draft Scope and the public comment period the City identified a "fourth alternative." The Scope then discussed the Coastal Flood Protection Components (A1662-1663):

> *Coastal Flood Protection System Components*
>
> The proposed project incorporates a combination of coastal flood protection components composed of floodwalls, levees, and closure structures, as well as drainage infrastructure improvements. Provided below are descriptions of these systems.
>
> Floodwall. Floodwalls are narrow, vertical structures with a below-grade foundation that are designed to withstand both tidal storm surges and waves. They are typically constructed of steel, reinforced concrete, or a combination of materials with a reinforced concrete cap and can be integrated into a park setting. Floodwalls can be used where there are horizontal space limitations for levees and where there is a design objective to have a narrow footprint of the flood protection system. Typical floodwall designs include I-walls

(partially embedded in the ground) and L-walls (foundation base slab supported by a pile foundation), each providing differing degrees of structural protection to withstand tidal surge and wave forces .

Levees. Levees elevate the existing topography, forming a barrier or line of coastal flood protection. In general, levees have a relatively wide footprint when installed. They are typically constructed of a core of compacted fill material, capped by stiff clay to withstand storm waves, along with a stabilizing landscaped cover. The slopes are designed to maintain the structural stability of the levee under design loading conditions, considering drainage and utilities. To avoid seepage, the coastal flood reduction levee has an interior cutoff wall that is constructed of either a stiff clay or slurry. These coastal protection levees can be integrated into a park setting and have the ability to be adapted or added to in the future to provide for greater flood protection or accommodate sea level rise.

Closure Structure. In many flood protection systems, it is necessary to provide an opening to accommodate day-to-day vehicular or pedestrian circulation along a street or sidewalk. In these instances, closure structures are installed to close the openings prior to the anticipated arrival of a design storm event and require active deployment. There are two types of closure structures that have been considered as part of the proposed project, each of which is made of steel and structurally reinforced. These closure structures include the following:

- Swing Gates. Swing gates operate like hinged doors and are moved to the closed position prior to the anticipated arrival of a design storm event. The span limit for these systems is generally around 40 feet .

- Roller Gates. Roller gates are closure structures that can be used in openings with spans up to 72 feet. They are stabilized with a single or double line of wheels and are slid into their protection position prior to the

anticipated arrival of a design storm event*Other Components*

Infrastructure Improvements. The flood protection components described above would prevent coastal flooding from entering the protected area. The protected area lies within a large sewershed served by a combined sewer system … Additional improvements are required to modify the existing combined sewer infrastructure to hydraulically isolate the protected area (drainage isolation) as well as to protect against inland flooding during the simultaneous occurrence of a rain event with a storm surge event (drainage management).

- Drainage Isolation. Modifications to existing sewer infrastructure would ensure that this infrastructure would not act as a conduit through which tidal surge water from the East River can enter the protected area. These modifications include installing gates on the existing large-diameter sewer pipe (interceptor) that collects and conveys flow through the system and flood-proofing components of the existing sewer infrastructure (such as catch basins and manholes) on the unprotected side of the proposed flood protection system.

- Drainage Management. During an extreme storm event, depending on the nature of coincident rainfall, with the tide gates closed, the sewer pipes can reach capacity, potentially resulting in drainage backups within the system that cause inland flooding. Measures to address the potential flooding include the installation of additional conveyance pipes and increasing the size of certain pipes to increase the capacity of the sewer system during design storm events.

Infrastructure Reconstruction within East River Park. The infrastructure within East River Park, including outfalls and regulators and the park's drainage collection system and water supply system, is proposed to be hardened and reconstructed under Alternatives 4 and 5.

The Final Scope then described "Alternative 4" (A1664), which is basically the plan at issue in this litigation:

> **PREFERRED ALTERNATIVE (ALTERNATIVE 4) – FLOOD PROTECTION SYSTEM WITH A RAISED EAST RIVER PARK**
>
> The Preferred Alternative proposes to move the line of flood protection further into East River Park, thereby protecting both the community and the park from design storm events, as well as protecting it from increased tidal inundation resulting from sea level rise
>
> In Project Area One, the proposed flood protection alignment begins at its southerly tieback along Montgomery Street about 130 feet west of South Street; at South Street the system turns north along for a distance of about 50 linear feet and then east, crossing under the FDR Drive to the east side of the highway with a pair of swing floodgates. Once on the east side of the highway, the flood protection system turns north and runs adjacent to the FDR Drive, continuing north into East River Park. Once in East River Park, the proposed flood protection alignment starts to turn east towards the East River near the existing amphitheater. From here, the alignment continues north and the system parallels the East River Park bulkhead. The Preferred Alternative would raise the majority of East River Park from the amphitheater to approximately East 13th Street, excluding the Fireboat House. This plan would reduce the length of exposed wall between the community and the waterfront to provide for enhanced neighborhood connectivity and integration. Between the amphitheater and East 13th Street, the park would be raised by an average of approximately eight-feet with the floodwall installed below-grade to meet the design flood elevation criteria. The Delancey Street, East 10th Street, and Corlears Hook Bridges would be reconstructed to be universally accessible. A portion of the park's underground water and drainage infrastructure and bulkhead are reaching the end of their serviceable life and are in need of repair. Therefore, this park infrastructure would be reconstructed, along with existing park structures and

> recreational features, including the esplanade, amphitheater, track facility, and tennis house, as part of the raised park. Relocation of two existing embayments along the East River Park esplanade is also proposed under this…. A shared-use pedestrian/bicyclist flyover bridge (See Figure 13) linking East River Park and Captain Brown Walk would be built cantilevered over the northbound FDR Drive to address the narrowed pathway (pinch point) near the Con Edison facility between East 13th Street and East 15th Street

The proposed plan, which has now been adopted through the Final EIS (A439-888), calls for elevating East River Park by eight feet in order to make it serve as a barrier to coastal storms and flooding. The entire East River Park is "anticipated" to be closed for some portion of the next five years while construction takes place. But, without alienation legislation, this "pie in the sky" five-year estimate (or any other estimate given by the City) is unenforceable. (The schedule is now 18 months behind.)

In order to raise the park by eight feet, the City plans to bury the park under 775,000 cubic yards of landfill, destroying the facilities that are currently there, including the recently renovated $3 million running track, structures on the National Register of Historic places, and rebuild a new park on top.

The proposed plan requires the removal of 991 trees from the Park as well as the destruction of all other plant life and flowers in the Park, including echinacea, bluebells, bee-balm, which sustained the imperiled golden northern bumble bees, and milkweed, the sole host plant for monarch butterflies, and the elimination of

the area's wildlife. As a mitigation, the City says it will plant 1,815 new trees as part of the landscape redesign. This tree plan, however, will not even come close to the replacement, in square footage, of the trees being destroyed.

The construction would require the use of diesel-powered barges and trucks to deliver materials, with an anticipated average of three barge trips per day for deliveries; the entire project would result in large amounts of airborne dirt and dust, the introduction of large numbers of pollution-belching construction machinery.

To "mitigate" the effects of closing the Park, the City is proposing to accommodate youth permit users within existing facilities under NYC Parks jurisdiction and to work with other entities with open space resources, such as those under control of the NYC DOE, and NYCHA, to identify additional recreational resources that can be opened during construction.

The City's plan was met with significant opposition from Park users.

The Plan was responded to by State Senator Brad Hoylman and Assembly member Harvey Epstein, whose districts abut parts of East River Park, with an admonition that the project involved "park alienation" and should not move forward without approval of the State legislature. (A82-87)

In response to community opposition, the City proposed phased destruction and reconstruction of the Park, rather than a complete closure. Approximately 40% of the Park is to remain open at a time.

a. Under Phase One of construction, which was slated to take place from Fall 2020 to Spring 2023, the majority of the Park between Delancey and Houston Streets, the amphitheater area in the south of the Park, and the portion of the Park between East 10th to East 12th Streets are to remain open.

b. Under Phase Two of construction, to take place from Spring 2023 to late 2025, the newly rebuilt portions of the Park from Houston Street to East 10th Street and most of the area between Corlears Hook Bridge to Delancey Street would be opened.

Closing the East River Park, whether completely or in phases, will deny Petitioners, and all New Yorkers access to greenspace and facilities in NYC parkland. There is no plan in place to mitigate this loss; such a plan would be impossible given the enormous size of East River Park. Furthermore, the closure will disproportionately affect the health and well-being, and recreational opportunities of low-income New Yorkers who live in the neighborhood around the Park for an extended period of time and will eliminate hundreds of full-grown trees, and their pollution protective role adjacent to a major highway, at a time when COVID-19 is rampant (studies show that COVID-19 spread has a direct correlation to air pollution). The closure and the project as designed, will destroy an entire ecosystem of plants, animals, birds, and insects which have developed in the park throughout its history, and disturb the ecosystems of the surrounding

communities. This ecosystem, starting with the 991 mature trees which will be cut down, cannot just get "recreated" at the completion of the sea-wall project.

While the project is intended to last for five years, prior construction on the Park to fix damaged bulkheads along the waterfront took six years rather than what was originally announced as a two-year project. Construction estimates for projects such as this are notoriously bad.

Furthermore, during the FEIS process the Dutch consulting firm Deltares explained that the plan design will only meet the level of sea rise we can expect up until 2050. The City's response is that they can add another two feet of landfill, which would require, once again, the removal of all biodiversity and the 15 to 20-year-old tress planted as part of the proposed project.

Despite the lack of approval from the State Legislature, and significant community opposition, the NYC Council approved the Resiliency Plan on November 14, 2019. This vote was the final approval following a process involving the Uniform Land Use Review Process ("ULURP").

The first steps towards commencing the project are now underway. In early 2021 contract proposals were sought, and the closing of the Parks' Ecology Center is imminent, though delayed.

2. THE PROCEEDINGS BELOW

The Verified Petition (A59-88) was filed on February 5, 2020. Petitioners moved by Order to Show Cause for a Preliminary Injunction. (A89-92). On March 16, 2020, the Respondent, City of New York, filed an Answer. (A110-1404).

The litigation was delayed, as was the commencement of construction on the East Coast Resiliency Project, by the Pandemic.

On July 20, 2020, the Petitioners filed reply papers (A1495-1646), Argument occurred on August 20, 2020 (A8-48), and the Court announced its decision on the record (A46-48) denying the Petition. The Court began its decision by citing *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623, 631-632 (N.Y. 2001), and then states:

> "While I do find that the City's plan involves a substantial intrusion, as a matter of law, it is for a park purpose … [H]ere, the record supports that without this plan we will likely not even have a park at all. Although the original impetus for the project was to protect the surrounding community from flooding, on further investigation the project grew to involve the overriding concern of protecting the park as well, and saving the park, therefore is a park purpose. *Van Cortlandt* would be distinguishable, then, because the water treatment plant had nothing to do with protecting the park from any danger like climate change.
>
> Now petitioners conceded that were the City not … restore the entire park, let's say by allowing residences to be built on part of it, or something like that, the City surely would need alienation legislation at that point. And *Avella v. City of New York*, 29 N.Y.3d 425 (N.Y. 2017), supports that requirement, but at this point the danger of the City using the park for

> something else is speculation. *Stephenson v. County of Monroe,* 43 AD2d 897 (4th Dept.). The main thrust of that project was to use the park to dispose of refuse, which is clearly inconsistent with a park purpose, so that case is distinguishable."

(A46-47).

The Notice of Appeal (A46) was filed on August 28, 2020.

Other than publication of the Request for Proposals, the project in the East River Park section of the East Coast Resiliency Project has not moved forward. The City has discussed commencement of work in October 2021.[1]

QUESTIONS PRESENTED

1. Whether a project, which has the principal purpose of creating a flood wall to protect a residential community, built in and on a park, which may have the ancillary effect of protecting the rebuilt park from floods, requiring alienation legislation passed by the State Legislature.

2. Whether the use of a park for a three to five-year period to build a flood wall, during which time the park is destroyed and then, after the flood wall is completed, is rebuilt, requires alienation legislation.

[1] Appellants do plan to move, in this Court, to stay construction in the Park, based, in part, on post-Notice of Appeal developments. This motion will be filed shortly.

ARGUMENT

POINT I

GIVEN THAT THE EAST COAST RESILIENCY PLAN INVOLVES A SUBSTANTIAL INTRUSION INTO THE PARK IN ORDER TO CREATE A FLOOD WALL, THE COURT ERRED WHEN IT HELD THAT THE PUBLIC TRUST DOCTRINE DID NOT REQUIRE NEW YORK CITY TO RECEIVE STATE LEGISLATIVE APPROVAL

The common law public trust doctrine has long compelled municipalities in New York State to obtain "the direct and specific approval of the State Legislature, plainly conferred" before taking parkland for non-park use. *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623, 631-632 (N.Y. 2001), *citing Ackerman v. Steisel*, 104 A.D.2d 940 (2d Dept. 1984). For well over a hundred years, the public trust doctrine has been applied to vindicate the right of the people of New York to preserve parkland for community use. *Williams v. Gallatin*, 229 N.Y. 248, 253-54 (N.Y. 1920) (finding the Parks Commissioner in violation of the public trust doctrine when he attempted to lease space in the Arsenal Building in Central Park to the Safety Institute of America for a ten-year period); *Brooklyn Park Commissioners v. Armstrong*, 45 N.Y. 234 (N.Y. 1871) (land acquired as parkland is held in the public trust and cannot be alienated without specific State legislative approval); *Avella v. City of New York*, 29 N.Y.3d 425, 431 (N.Y. 2017) ("the public trust doctrine is ancient and firmly established in our precedent … parkland is impressed with a public trust, requiring legislative approval before it

can be alienated or used for an extended period for non-park purposes") (internal citations omitted).

It does not matter that East River Park is not being transferred to private use. In *Friends of Van Cortlandt Park*, *supra*, which we believe is a profoundly similar case, the Court of Appeals explained why the use of parkland for an extended period, even for a public use, required legislative approval.

> "We begin analysis with two points of agreement by the parties: that this water treatment plant is a non-park use, and that *Williams v. Gallatin* (229 NY 248) is controlling precedent.
>
> In *Williams*, a taxpayer sought to enjoin the New York City Commissioner of Parks from leasing the Central Park Arsenal Building to the Safety Institute of America, arguing the transaction was "foreign to park purposes" (*id.*, at 250). The lease was for a 10-year term, cancellable if the City needed the property for park use. In prohibiting the lease, this Court explained that a park is a recreational pleasure area set aside to promote public health and welfare, and as such:
>
> > '<u>no objects, however worthy, ... which have no connection with park purposes, should be permitted to encroach upon [parkland] without legislative authority plainly conferred.</u> ...'
> >
> > 'The legislative will is that Central Park should be kept open as a public park ought to be and not be turned over by the commissioner of parks to other uses. It must be kept free from intrusion of every kind which would interfere in any degree with its complete use for this end" (*id.*, at 253-254).'
>
> In the 80 years since *Williams*, our courts have time and again reaffirmed the principle that parkland is impressed with a public trust, requiring legislative approval before it can be alienated or <u>used for an extended period</u> for non-park

purposes (*see, Miller v. City of New York,* 15 NY2d 34, 37 [20-year lease]; *Incorporated Vil. of Lloyd Harbor v. Town of Huntington,* 4 NY2d 182, 190; *Matter of Ackerman v. Steisel,* 104 AD2d 940, 941 [2d Dept] [storage of sanitation vehicles and equipment], *affd* 66 NY2d 833; *Stephenson v. County of Monroe,* 43 AD2d 897 [4th Dept]; *Aldrich v. City of New York,* 208 Misc 930, 939 [Sup Ct, Queens County], *affd* 2 AD2d 760 [2d Dept]; *Matter of Central Parkway,* 140 Misc 727, 729 [Sup Ct, Schenectady County]; *contrast, 795 Fifth Ave. Corp. v. City of New York,* 15 NY2d 221, 225 [Park Commissioner properly determined that a café and restaurant could be constructed in Central Park where the project furthered park purposes]).

Where the parties disagree is as to application of these longstanding precedents to the present facts. The City argues that, even under *Williams,* legislative approval is not required, first, because there will be no alienation of parkland and second, because the plant will be substantially underground, with park surfaces fully restored, and therefore the proposed use is not inconsistent with park purposes. Both arguments lack merit.

Williams makes clear that legislative approval is required when there is a substantial intrusion on parkland for non-park purposes, regardless of whether there has been an outright conveyance of title and regardless of whether the parkland is ultimately to be restored. Indeed, in *Williams* itself there was no divestiture of ownership—there was a 10-year lease cancellable by the City—and upon expiration of the lease the property could return to park use. Nonetheless, without legislative approval the lease was prohibited.

Bates v. Holbrook (171 NY 460, 465-468)—which predated *Williams*—is also instructive. There, the City Department of Parks permitted construction of storage buildings on parkland in connection with a subway project. Because the Legislature allowed the Department to grant "temporary privileges" for use of park property to facilitate construction, defendants urged that the structures were authorized. This Court disagreed, concluding no "direct

> legislative authority" warranted invasion of the park (*id.*, at 467). Structures could not be considered "temporary" when "authorized to remain until the completion of the work" on a project that would take at least three years (*id.*, at 468).
>
> Here, the public will be deprived of valued park uses for at least five years, as plant construction proceeds. While there may be "de minimis" exceptions from the public trust doctrine, the magnitude of the proposed project does not call upon us to draw such lines in this case."

Friends of Van Cortlandt Park v. City of New York, 95 N.Y.2d 623, 629–31 (2001). (Emphasis supplied.)

The Supreme Court ignored the words we emphasize above. Even if the Court was right about the East River Project being a park protection project *in part* (a finding we disagree with) the parkland will be used for five (5) years as a base for work at least some of which will be unrelated to the park, i.e., the creation of walls and sewage systems and other aspects of the flood prevention infrastructure which are designed to protect the surrounding community,

In *SFX Entertainment, Inc. v. City of New York*, 2002 WL 1363372 (N.Y. County 2002), Judge Bransten held that the City violated the public trust doctrine by failing to obtain legislative approval to execute a 35-year lease for a concert amphitheater that authorized "substantial use of parkland for non-park purposes." The amphitheater took up only 10 acres of the 341 available acres of Randall's Island parkland. The court found that because members of the public would have to pay a fee to use this portion of the park, it would be closed seven months out of

the year, and enjoyment of the park area around the amphitheater would be diminished because of the crowd attending events, the amphitheater constituted use of parkland for non-park purposes and required legislative approval.

This is analogous to the East River Park Plan because closing 60% of the park for three plus years to build a barrier would in and of itself be a substantial use of parkland for non-park purposes, thus requiring legislative approval. Here is how Judge Bransten saw it in *SFX Entertainment:*

> Petitioners urge that legislative approval is required here because the Amphitheater Project is effectively a 35–year lease of parkland to a private entity. They contend that the land is being used "for a purpose wholly inconsistent with its traditional status as free and open parkland; namely, a permanently constructed concert amphitheater with fixed seating for nearly 20,000 people to be used for commercial concert and entertainment events, and not for any free and open public recreational use." Petitioners further assert that legislative approval is warranted because the 20,000–person amphitheater, with its resulting traffic and congestion, would impede use and enjoyment of surrounding parkland as well.
>
> Respondents, by contrast, maintain that because the Amphitheater Project does not result in *alienation* of parkland—the concession simply involves the grant of a revocable license—legislative approval is unnecessary. Additionally, they argue that the license merely permits Quincunx to construct, use, operate and manage a concert facility and entertainment venue, which is "a traditional undeniably park-related use." …
>
> Again, petitioners have the better argument.
>
> Regardless of whether the Amphitheater Project is a lease or license, this particular concession violates the public trust doctrine because it authorizes *substantial use* of parkland for

non-park purposes. While a lease or conveyance of parkland may more clearly constitute "alienation" subject to legislative approval, the Court of Appeals has determined, time and again, that the common law public-trust doctrine prohibits substantial *use* of parkland for non-park purposes. *See, e.g., Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d, at 630, 727 N.Y.S.2d 2 ("our courts have * * * reaffirmed the principle that parkland is impressed with a public trust, requiring legislative approval before it can be alienated *or used for an extended period* for non-park purposes"); *id.*, at 632, 727 N.Y.S.2d 2 ("*use* " of parkland for non-park purposes "either for a period of years or permanently, requires the direct and specific approval of the State Legislature, plainly conferred"); *Williams v. Gallatin*, 229 N.Y., at 253–254, (prohibiting "encroachment" on parkland, barring "intrusion of every kind which would interfere in any degree with its complete use for [park purposes]," and stating that parkland should not be turned over to other "*uses* "); *Matter of Ackerman v. Steisel, supra*, 104 A.D.2d, at 940–941 (barring use of parkland for storage of sanitation vehicles and equipment). Indeed, the Court of Appeals has made plain that "legislative approval is required when there is a substantial intrusion on parkland for non-park purposes, regardless of whether there has been an outright conveyance of title and regardless of whether the parkland is ultimately to be restored." *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d, at 630.

Here, the City has authorized Quincunx to build on parkland, *use it for 35 years* as a concert venue, operate the amphitheater and manage the venue. Such an arrangement authorizes substantial *use* of park property, both in terms of duration and scope. That the City can use the premises 8 times a year (under certain conditions) or revoke the concession in a manner that is not arbitrary or capricious is irrelevant. After all, *Williams v. Gallatin, supra*, 229 N.Y., at 251–253, involved a 10–year lease that could be cancelled by the City. *See also, Miller v. City of New York*, 15 N.Y.2d 34, 38 (1964); *Friends of Van Cortlandt Park v. City of New York, supra*, 95 N.Y.2d, at 631. Nonetheless, our State's the highest court

> held that the 10–year "use" for other than park purposes required legislative approval.

SFX Entertainment v. City of New York, 2002 WL 1363372, at *8–9 (N.Y. County Sup. Ct, 2002).

The issue here not only involves the period of construction, it also involves the post construction period when the park is being "restored" and serves both as a sea wall and a park. Here again, the decision in *Friends of Van Cortlandt Park* is instructive:

> Though the water treatment plant plainly serves an important public purpose—indeed, even the State Attorney General believes it should be built at the site selected (*see, United States v. City of New York, supra,* 96 F Supp 2d, at 203)—our law is well settled: dedicated park areas in New York are impressed with a public trust for the benefit of the people of the State. Their "use for other than park purposes, either for a period of years or permanently, requires the direct and specific approval of the State Legislature, plainly conferred" (*Ackerman v. Steisel, supra,* 104 AD2d, at 941, *affd* 66 NY2d 833; *see also, Potter v. Collis,* 156 NY 16, 30 [where a municipality holds title to land for public use "the power to regulate those uses (is) vested solely in the legislature"]). That proposition is reflected both in our case law and in our statutes (*see, e.g.,* L 1989, ch 533 [easements over parkland for construction, operation and maintenance of water treatment facility]; L 1998, ch 209 [easements in Webster Park for construction, operation and maintenance of sanitary sewer system facilities]; L 1994, ch 341 [parkland in Town of Waverly necessary for sewer district]; L 1994, ch 534 [easements in Towns of Fleming and Owasco for water mains]).

Friends of Van Cortlandt Park v. City of New York, 95 N.Y.2d 623, 631–32, (2001). (Emphasis added.)

The requirement of legislative action is necessary despite the public benefit that the intrusion is supposed to provide. In *Williams v. Gallatin*, 229 N.Y. 248 (1920), the Court of Appeals held that a 10-year lease of the Central Park Arsenal Building (a large office structure which did no more than housing Parks Department Offices) to the Safety Institute of America required legislative approval. The court found that "no objects, however worthy … which have no connection with park purposes, should be permitted to encroach" on the park without prior legislative approval. Further, Central Park "must be kept free from intrusion of every kind which would interfere in any degree with its complete use" as a public park. In the case of East River Park, protecting the contiguous community from storm surges and flooding is a worthy endeavor, but shutting down more than half the Park to do so would greatly interfere with its use as a public park and would require approval.

The Court below had to bend like a pretzel to get around the rule enunciated in *Williams* and *Friends of Van Cortlandt Park:* "While I do find that the City's plan involves a substantial intrusion, as a matter of law, it is for a park purpose … [H]ere, the record supports that without this plan we will likely not even have a park at all. Although the original impetus for the project was to protect the

surrounding community from flooding, on further investigation the project grew to involve the overriding concern of protecting the park as well, and saving the park, therefore is a park purpose." The Court admits that there will be a "substantial intrusion." Those words could not be used if this was a park project; park renovation cannot be described as a "substantial intrusion." The statement that the "project grew to involve the overriding concern of protecting the park as well," still reflects a dual purpose. The record does not show that the City ever proceeded from a need to protect the Park; they spent six years developing a plan which would minimally intrude on the Park, and then, overnight, came up with a means of avoiding State oversight.

Respondent argued below is that the project is a "reconstruction and improvement project to protect the Park," and that it is being done by the Parks Department in order to "maintain the beauty and utility of the park, with very little description (because there is none) of what feature of the existing park is being maintained. In fact, despite the fact that this entire project is part of a multiyear effort described by the City in all ULURP and EIS documents as a "coastal flood protection system," see A1511: "a goal [not the goal] of the Proposed Action would be to improve open spaces and enhance access to the waterfront, including the John V. Lindsay East River Park." Even in its Revised March 2019 ULURP application, the Proposed Project is described as a "combination of floodwalls, 18

closure structures (i.e., gates), and supporting infrastructure improvements that together would reduce the risk of coastal storm flooding in the protected area." (A130)

Respondents relied below on two cases for the notion that *any* project which ultimately serves a park purpose and which also serves non-park purpose does not require alienation legislation. Their leading case was *Friends of Petrosino Square v. Sadik-Khan*, 42 Misc.3d 226 (Sup. Ct. N.Y. County 2013), *aff'd* 126 A.D.3d 470 (2015). But in that case, which involved placement of a bike rack in the street adjacent to a City park, labeled the bike rack an "appropriate incidental use of parkland," relying on *Blank v. Browne*, 217 A.D. 624, 629 (2d Dept. 1926), which approved placement of a parking lot in a park. Key to the Appellate Division's analysis is the statement that bike riders after docking a CityBike could "enjoy the Park as a respite." The Court went on to say that the bike rack was properly allowed because the petitioners in that case had not shown that the bike share station would not facilitate park purposes, and that it, or that it would substantially undermine the use and enjoyment of the park. In fact, the bike stand, while within the Park's theoretical boundary, did not intrude on the park at all.

The other case they relied on was *795 Fifth Avenue Corp. v. City of New York*, 15 N.Y.2d 221 (1965), which involved the construction of a café and restaurant in the southeast corner of Central Park. But in that case the Court found

that a restaurant in the park was a park purpose, replacing a "neglected and unused area of the park, most of which is on a steep slope, barren of grass and containing unsightly ventilators from the subway system." Here we are talking about five years or more of construction in a vibrant, well-used park.

What this Court has before it is a closure of large portions of the park for a period of five years (the "pie in the sky" estimate given by the City), which realistically will be a much longer period, based on past and current city construction projects, current pandemic and economic conditions, and complicating factors like Con-Ed and the need to coordinate multiple city agencies which are facing drastic cuts in their budgets. It will deny residents of the use of one of the City's paramount recreational spaces for that entire period. It will destroy an existing ecosystem which cannot simply be re-created. The project will close the bike path for the full term of the project, just as the City, in this period of a COVID-19 recovery, is encouraging transportation via bicycle. These are the very things that the legislature, in considering alienation legislation, would have in mind, unlike the City Council, which mainly addressed the project's utility (with an apology about its long-term impact on community residents.)

We should note, before getting into the relevant case law, that an alienation vote by the legislature is not the imposition of a heavy burden on the City. It is a requirement that the elected members of the State Legislature *vote,* democratically,

about whether to allow the project to go forward, and in that legislation, set terms and conditions (which the City is clearly trying to avoid). The legislative process could have easily been undertaken in early January 2019 (or earlier) before the City revised its ULURP application and dropped its position on seeking state legislative permission. The City, which had changed its community-accepted plan after years of community meetings and workshops, did not want to submit its newest plan to the Legislature, even after statements by state elected officials in the affected district, Senators Hoylman and Assembly Member Epstein, that they believed that alienation legislation was necessary.

The only reason the Project at issue is *proceeding* is out of the City's desire to build a flood defense system for the community from Madison Street to 23rd Streets. There is no question that if the danger which the City is seeking to mitigate was just the flooding of East River Park, the project would never have been commenced or planned, at the cost of $1.5 billion, *or even less*. In its most recent pronouncement on alienation, the Court of Appeals, in *Avella v. City of New York*, 29 N.Y.3d 425 (2017), where the court said "A municipality may, without legislative authorization, make improvements to a park that are consistent with its status as a pleasure ground set apart for recreation of the public, to promote its health and enjoyment," the Court blocked the conversion of a *parking lot* at Shea Stadium (public parkland), into a mall. Were East Side Coastal Resiliency project

an improvement of park drainage, or repair of the bulkhead to prevent flooding of the park, it might fall into the *Avella* niche. But it is not**.** It is a long-term (five-year) closure of large portions of the park to build a flood protection system for the surrounding community, which will, after the eight-foot elevation is built, be restored as a park. And it will not be the park which is there now, with five-story trees. It will take decades to replicate what is there now, if ever.

Friends of Van Cortlandt Park v. City of New York, 95 N.Y.2d 623 (2001), remains the seminal case which this Court must apply. There are many parallels to the case at bar. We start with the Court's description of the project it addressed, which has astounding parallels.

> As designed, the water treatment plant is to be a 473,000 square foot industrial facility covering 23 acres, with a raw water pumping station, finished water pumping station and tunnel linking the plant to a distribution system near another reservoir. It will operate around the clock, seven days a week, filtering 290 million gallons of water and producing up to 61 tons of "dewatered sludge cake" daily. Once the plant is operational, the Croton water will be transported there for treatment, fluoridation, chlorination, and distribution.
>
> After considering several locations, in December 1998 the City announced that its preferred site was the Mosholu Golf Course in Van Cortlandt Park, the City's third largest park, dedicated as parkland by an act of the Legislature. The Mosholu Golf Course is a year-round, nine-hole course and driving range regularly used by the public … as well as by schools and youth programs. It is the only City golf course directly accessible by subway.

> According to the Environmental Impact Statement, construction at the Mosholu site is scheduled to last more than five years, during which time 28 acres of parkland—including the golf course and driving range—will be closed to the public, and will become an active construction site. Construction will require demolition of the clubhouse, roads and parking areas, which will later be restored. The driving range, however, will be rebuilt on the roof of the plant, above a layer of dirt. The Environmental Impact Statement further discloses that hundreds of trees and associated vegetation rare to New York City—whose "loss would represent a potential significant adverse impact"—are threatened by the construction, and a million cubic yards of soil and rock will be removed from the park. During peak construction, more than a thousand workers will be at the site, and hundreds of vehicles will deliver construction materials and remove soil.
>
> The plant will, moreover, change the gradient of the park. Though the plant is to be built underground in the sense that it will be below "finished grade," its roof will be between five and 30 feet above existing ground elevation. Additionally, vents and air intake louvers placed in berms surrounding the facility will extend above finished grade**.**

Friends of Van Cortlandt Park v. City of New York, 95 N.Y.2d 623, 627–28 (2001).

The *Friends of Van Cortlandt Park* litigation began in Federal Court. The District Court did not find a need for alienation legislation. As the Court explained, there being

> "no transfer of an interest in land to another entity ... [and] no diminution of parkland available for public use after the plant is built, underground use of the parkland [was] not an alienation in the sense of diversion of parkland for non-park purposes."

United States v. City of New York, 96 F.Supp.2d 195, 204 (E.D.N.Y. 2000). On appeal the US Court of Appeals for the Second Circuit asked the NYS Court of Appeals to address the issue.

After reviewing the limited law on the subject (which we discuss above), the Court of Appeals addressed an argument similar to that made by the City here, and came down squarely on the side of requiring legislative approval**,** no matter how well the park was restored at the end of construction:

> Here, the public will be deprived of valued park uses for at least five years, as plant construction proceeds. While there may be "de minimis" exceptions from the public trust doctrine, the magnitude of the proposed project does not call upon us to draw such lines in this case**.**
>
> For much the same reason, we also need not resolve the interrelated question whether an underground installation that in no way intrudes on park use requires legislative approval. That an appreciable area of the park will be closed for more than five years, and that some future uses of the land will be inhibited by the presence of the underground structure, render that issue hypothetical.

Friends of Van Cortlandt Park v. City of New York, 95 N.Y.2d 623, 630–31 (2001). (Emphasis supplied).

And, like here, the public purpose, however laudable, did not excuse the need for the appropriate legislation in a situation where parkland was being used for an extended period of time as a construction site—here to build walls, bridges, and sewage lines designed to protect the inland community.

> Though the water treatment plant plainly serves an important public purpose … our law is well settled: dedicated park areas in New York are impressed with a public trust for the benefit of the people of the State. Their "use for other than park purposes, either for a period of years or permanently, requires the direct and specific approval of the State Legislature, plainly conferred."

Friends of Van Cortlandt Park v. City of New York, 95 N.Y.2d 623, 631-32 (2001).

The Court of Appeals' reliance on *Bates v. Holbrook (171 NY 460, 465-468),* in deciding *Friends*, is instructive because there a three-year use of parkland for subway construction equipment storage was found to be an alienation, even though the legislative authority existed for temporary use or occupancy to support the construction. The Court there held that "as to this contract and the completion of the work thereunder, "the storage structures were permanent." *See also Chatham Green v. Bloomberg,* 765 N.Y.S.2d 446 (Supreme Court NY County 2003), where the NYPD claimed their use of James Madison Plaza as a parking lot was a "temporary use" because it would end when their prior garage space was reopened. The Court found the use to be an alienation, saying that the use had gone on for nearly two years and that the actual reopening date was indefinite. There is nothing in the East Coast Resiliency Plan which guarantees a true date by which the project will be completed, and the parkland restored to the residents of New York City. In fact, as we litigate, it is already a year and six months behind schedule. And see *Ackerman v. Steisel,*104 A.D.2d 940, 941 (2nd Dept. 1984) ("nor are …

"temporary" encroachments upon parkland exempt from the public trust doctrine.")

The Fourth Department in *Stephenson v. Monroe County*, 43 A.D.2d 897, 897 (4 Dept., 1974) dealt with almost the identical argument—a five-year landfill project which would eventually result in the creation of a ski-slope. Here is what they said:

> Plaintiffs, by their complaint and affidavits in support of their motion for summary judgment, aver that the area known as Black Creek Park is a public park owned by the County and that the County has at all times intended to use the area solely as a public park and has irrevocably dedicated it for that purpose. They also aver that, based upon the report of an engineering consultant firm, the County, contrary to law, has approved the use of a portion of the park as a sanitary landfill, ostensibly for the purpose of converting the landfill area into a ski slope some five years hence. Affidavits submitted by the County in support of its cross-motion to dismiss plaintiffs' complaint merely tend to justify use of the park as a landfill area on an engineering and environmental basis … Park areas in New York are impressed with a public a trust and their use for other than park purposes requires the direct and specific approval of the State Legislature, plainly conferred (*Williams v. Gallatin*, 229 N.Y. 248; *Brooklyn Park Commissioners v. Armstrong*, 45 N.Y. 234; *Aldrich v. City of New York*, 208 Misc. 930, 145 N.Y.S.2d 732, *affd*. 2 A.D.2d 760, 154 N.Y.S.2d 427; *American Dock Company v. City of New York*, 174 Misc. 813, *affd*. 261 App.Div. 1063, *affd.* 286 N.Y. 658. See also *Miller v. City of New York*, 15 N.Y.2d 34; *Inc. Village of Lloyd Harbor v. Town of Huntington*, 4 N.Y.2d 182). Since the County has failed to show that such approval has been obtained, the sole question presented on this motion is whether the disposal of refuse in a park is an activity consistent with park purposes so as to obviate the need for legislative sanction. We are convinced that it is not (*Village*

> *of Croton-On-Hudson v. County of Westchester,* 38 A.D.2d 979, *aff'd* 30 N.Y.2d 959) and the mere speculation that one day people might ski down a mountain of garbage does not make it so**.**

See also Stephenson v. Monroe County, 43 A.D.2d at 897. And see *Village of Croton-On-Hudson v. Westchester County*, 38 A.D.2d 979, 980 (2 Dept. 1972) (City plan to use part of park for landfill denied; "The ultimate control over the uses of public parks is in the Legislature (cf. *Matter of Lake George Steamboat Co. v. Blais*, 30 N.Y.2d 48 (1972)) and this public park land may not be diverted to a different use without specific legislative authorization.

Judge Graham in Kings County Supreme Court addressed a similar dispute involving the City in *Matter of Raritan Baykeeper v. City of New York*, Misc. 3d 1208(A) (Sup C Kings County 2013).

> "There is a formidable body of case law which stands for the proposition that any "non-park use" of a park requires legislative approval (citations)…
>
> The Municipal Respondents contend that it is integral to the operation of the New York City Parks that there be a solid waste composting facility located on parkland to process the large volume of organic matter collected by the Department of Sanitation. The composting plan, the City argues, is consistent with local laws and solid waste management plans of the City of New York.
>
> Towards this end, the New York City Department of Sanitation and the Department of Parks Commissioner entered into the MOU …to operate a portion of Spring Creek Park as a solid waste management facility…to generate compost to be used by the Parks Department.

> The Municipal Respondents assert that the use of the Facility to compost leaves and branches is a "park use" and is needed to generate compost for the various New York City parks, including Spring Creek Park. The composting of leaves is said to reduce soil compaction and increase water retention, minimizing erosion and storm water runoff. The composting material also adds nutrients to park soil and is used in planting, horticultural projects and capital projects, among other uses.
>
> The Municipal Respondents offer the argument that the duration of the Spring Creek Facility is temporary, however, courts have rejected a temporary taking of public park land even for a modest duration of only five years."

Petitioner-Appellants' argument finds support in two other key documents.

The first is an Opinion issued by the Attorney General's Office in 2008. A1566 -A1569) The County of Nassau proposed to transfer approximately 250 acres of developed and undeveloped parkland to the Town of Hempstead. The agreement between the Town and the County provided that the deed for each park being transferred would provide that the transferred land will be "forever used and maintained as and for public park and public recreational purposes and for those purposes only," except for parking and ancillary structures necessary for operations consistent with public park and recreational purposes. The agreement further provided that "all Nassau County residents shall be allowed to use and enjoy the said premises at the same times and on the same terms and conditions as shall residents" of the Town, that county residents would retain the same rights of access to the park after the transfer that they currently have to the county park. Sounds

like a far simpler version of the fact situation facing this Court. No change or delay or interruption of park use was planned at all.

But the Attorney General (who was then Andrew Cuomo) found that alienation legislation was needed.

> There is a reasonable argument that the public trust doctrine should not apply here because, under the proposed agreement between the County and the Town, park purposes would be preserved, and access by all county residents also would be preserved. The rule is typically applied when parkland is diverted to non-park use.
>
> Because public parkland is held by a municipality in trust for the public, however, the power to regulate the use of that park property is "vested solely in the [L]egislature" and the local government alone cannot "divest the municipal corporation of that control." *Potter v. Collis*, 156 N.Y. 16, 30 (1898) (common council could not authorize laying of railroad tracks in city streets absent delegation of that power by Legislature because said streets were held in trust for public); *cf. Lake George Steamboat Co. v. Blais*, 30 N.Y.2d 48. 51-52 (1972) ("The ultimate control over the uses of public places is in the Legislature, and the only powers in this respect possessed by a municipality are derivative."). This lends support to the argument that even an intermunicipal transfer where parkland continues to be used for park purposes for the same members of the public requires legislative approval.
>
> Moreover, a transfer of parkland from one municipality to another creates some risk that the use will change or access by previous users to the parkland will be restricted. An important safeguard against this risk is to subject the proposed transfer to legislative review and approval.
>
> General Municipal Law § 72-h, authorizing local legislative bodies to transfer land to other governmental bodies, does not shed any light on this question. It expressly does not apply to real property that is made inalienable by general, special, or

> local law or charter. *Id.* § 72-h(2). Furthermore, it has been construed not to constitute the necessary specific legislative approval to alienate or divert parkland that is inalienable under the public trust doctrine. *See* Op. St. Comptr. No. 88-1; Op. St. Comptr. No. 65-623…
>
> Moreover, municipalities have sought and received legislative approval for such transfers. *See*, Act of Aug. 1, 2007, ch. 413, § 1, 2007 McKinney's N.Y. Laws 1011 (authorizing transfer of parkland from Nassau County to village of Flower Hill); Act of July 26, 2006, ch. 301, § 1, 2006 N.Y. Laws 3111 (authorizing transfer of parkland from Niagara County to town of Lockport); Act of Aug. 30, 2000, ch. 387, § 1, 2000 N.Y. Laws 3035 (authorizing transfer of parkland from village of Lancaster to town of Lancaster).
>
> The State Office of Parks, Recreation and Historical Preservation has indicated that alienation legislation might not be needed for a transfer from one municipality to another, but recognizes that a definitive answer must come from a court. New York State Office of Parks, Recreation and Historical Preservation, Handbook on the Alienation and Conversion of Municipal Parkland 13 (rev. April 1, 2005).

The State's Handbook on the Alienation and Conversion of Municipal Parkland, A1570, a key document that this Court must consider, was last issued in 2017. Key language in this exhaustive treatise is found on page 8, under the heading "Temporary Use.

> Legislative approval is required even for non-permanent disruptions of parkland where the municipality intends to restore the parkland. While courts allow for the possibility of de minimus exceptions to the public trust doctrine, inconsistent uses as short as two years have been found to be alienations. (Emphasis supplied).

The appeal before this court does not involve a short-term upgrade to park facilities. It is the creation of a flood protection system one of the elements of which is raising East River Park eight feet into the air and then recreating the park. "The proposed project incorporates a combination of coastal flood protection components composed of floodwalls, levees, and closure structures, as well as drainage infrastructure improvements." A130. In the end, after many years of construction a park will be rebuilt, although without alienation legislation that remains an unenforceable promise, and therein lies the key to alienation legislation. If the legislature approves the project the City would be required by statute to rebuild East River Park, likely within a statutory timeframe, with park and recreational elements that the elected legislature found necessary. It is a desire to avoid this legislative requirement, a desire to be able to change their plans, like they did in the fall of 2018 without any advance notice to the public, and with abandonment of a role for the State Legislature, which drives the City, and its opposition to this petition.

Our position has been endorsed by the state legislators in the adjoining Senate and Assembly Districts, Assembly Member Epstein and State Senator Hoylman. (A82-87)

The law does not allow what the City is doing, the local legislators are opposed to it, and the Court should not allow it.

POINT II

BECAUSE ALIENATION MUST PRECEDE THE ULURP PROCESS, THE CITY CANNOT RELY ON THEIR PREMATURE ULURP APPROVAL AND EIS PROCEEDINGS.

The Respondents were premature in shepherding the ESCR project through the Final EIS and ULURP process without having received State Legislative approval to alienate the East River Park parkland. *Friends of Van Cortlandt Park v. City of New York*, 95 N. Y.2d 623, 628 (N.Y. 2001) (enforcing the public trust doctrine by requiring the City to first obtain specific legislation permitting the placement of a water treatment facility in a park, and describing the State Attorney General's objection to the City's granting of ULURP approvals before obtaining such approval); *Avella v. City of New York*, 131 A.D.3d 77 (1st Dept. 2015) (enjoining further work on a shopping stadium that had not obtained ULURP approval or alienation, and requiring the alienation legislation first). Consequently, a finding by this Court that legislative approval was needed would require not only nullification of the City Council's approval, but also a recommencement of the ULURP process, and a reopening of the EIS process.

CONCLUSION

For the above stated reasons, this Appeal should be granted, and the construction in East River Park should be stayed until the project is submitted to the State Legislature for a vote.

Dated: New York, New York
April 28, 2021

ADVOCATES FOR JUSTICE
Attorneys for Petitioners-Appellants

By: _____
Arthur Z. Schwartz
225 Broadway, Suite 1902
New York, New York 10007
(212) 285-1400
aschwartz@afjlaw.com

PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 1250.8(j)

The foregoing brief was prepared on a computer. A proportionately spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 13,885.

Dated: April 28, 2021

Arthur Z. Schwartz

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—First Department

In the Matter of

EAST RIVER PARK ACTION, by Its Chair, PAT ARNOW, and PAT ARNOW Individually; ORCHARD STREET BLOCK ASSOCIATION, by Its Chair, HOPE BEACH, and HOPE BEACH Individually; WASHINGTON SQUARE PARK ECO PROJECTS, by Its Chair, LOYAN BEAUSOLEIL, and LOYAN BEAUSOLEIL Individually; NEW YORK CLIMATE ACTION GROUP, by Its Chair, JUDITH K. CANEPA, and JUDITH K. CANEPA Individually; NO SPRAY COALITION, INC., by Its Chair, MITCHEL COHEN, and MITCHEL COHEN Individually; COMMON GROUND COMPOST LLC, by Its Chair, MEREDITH DANBERG-FICARELLI, and MEREDITH DANBERG-FICARELLI Individually; NORTH AVENUE A NEIGHBORHOOD ASSOCIATION, by Its Chair, DALE GOODSON, and DALE GOODSON Individually; 4TH STREET FOOD CO-OP, by Its Chair, ELISSA JIJI, and ELISSA JIJI Individually; MASTERS OF SUCCESSION COLLECTIVE, by Its Chair, ELIZABETH D. MAUCHER, and ELIZABETH D. MAUCHER Individually; CUALA FOUNDATION, INC., by Its Chair, SUSAN MCKEOWN, and SUSAN MCKEOWN Individually; VILLAGE EAST TOWERS EMERGENCY PREPAREDNESS TASK FORCE, by Its Chair, DANIEL MEYERS, and DANIEL MEYERS Individually; 9BC TOMKINS SQ. BLOCK ASSOCIATION, by Its Chair, CAROLYN RADCLIFFE; NATIONAL MOBILIZATION AGAINST SWEATSHOPS, by Its Chair,

ANTONIO QUEYLIN, and ANTONIO QUEYLIN Individually; EXTINCTION REBELLION LOWER EAST SIDE, by Its Chair, GREGORY SCHWEDOCK, and GREGORY SCHWEDOCK Individually; DOUBLE DRAGON COACHING, by Its Chair, JUSTIN SHADDIX, and JUSTIN SHADDIX Individually; BOWERY ALLIANCE OF NEIGHBORS, by Its Chair, SALLY YOUNG, and SALLY YOUNG Individually; RENA ANASTASI; ANDREI ANIKIN; SARAH ANIKIN HOSPODAR; VALERIE BARNES; AMY BERKOV; ILONA BITO; RITA BOBRY; ANNE BOSTER; WENDY E. BRAWER; MARK BREEDING; JACK BROWN; EVA BUCHMULLER; MARY JO BURKE; MARYANNE BYINGTON; DANIELLE CHU; BILLIE COHEN, ALISON COLBY; KENNETH COLOSKY; CATHERINE CULLEN; SHAWN DAHL; MARIE DE CENIVAL; DAVID EISENBACH; GEORGE EVAGELIOU; SARAH FLORES; DONALD GALLAGHER; ELIZABETH GAYNOR; LENORE GOLDSTEIN; HARRIET HIRSHORN; KATE HORSFIELD; AUDUN HUSLID; FANNIE IP; LESLIE KRAMER; CHARLES KREZELL; JONATHAN LEFKOWITZ; VIRGINIA LIEBOWITZ; TOMMY LOEB; PETER MADDEN; CAMILLE MARLOW; LAURIEANNE MARRELL; ANA MARTON; KATHERYN MAY; EVA MCCLOSKEY; DEBORAH MILLS; BRUCE MORRIS; BROOKE MYERS; INDRANI NICODEMUS; THEODORE PENDER; RICHARDS PERRY; LAUREN POHL; JOAN REINMUTH; WENDY RUBIN; TRUDY SILVER; MARIAH STANCARONE; DANIEL TAINOW; AMANDA UDELL; REBECCA A. VAUGHAN; NINA WATKINS; ALEXIA WEIDLER; VICTOR WEISS; EGON ZIPPEL; STEVEN CARBO; J. PATRICIA CONNOLLY; EMMA FITZSIMMONS; RITA FREED; JOANN FYNKE; PRESLEIGH HAYASHIDA; FRANK LAUB; ANDREW LAWRENCE; BRUCE L. MISHKIN; VERONICA

OLIVOTTO; PHOEBE QUIN; BARBARA ROSS
and CLIFTON SMITH,

Petitioners-Appellants,

– against –

CITY OF NEW YORK,

Respondent-Respondent,

For an Order Pursuant to Article 78 of the
Civil Practice Law and Rules.

---

1. The index number of the case in the court below is 151491/20.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The proceeding was commenced in Supreme Court, New York County.

4. The proceeding was commenced on or about February 6, 2020 by the filing of a Verified Petition. Issue was joined on or about March 16, 2020 by service of a Verified Answer.

5. The nature and object of the proceeding is a Special Proceeding pursuant to CPLR Article 78.

6. This appeal is from the Decision and Order of the Honorable Melissa A. Crane, dated August 20, 2020, which denied the Verified Petition.

7. This appeal is on the appendix method.