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

BATTERY PARK CITY NEIGHBORHOOD ASSOCIATION and J. KELLY McGOWAN

Petitioners,

-against-

BATTERY PARK CITY AUTHORITY,

Respondent.

For a Preliminary Injunction, Judgment, and Order Pursuant to Article 78 and CPLR 6301

No.

MEMORANDUM OF LAW IN SUPPORT OF ARTICLE 78 PETITION AND FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Wagner Park is the heart and soul of Battery Park City. But in the name of climate resilience, the Battery Park City Authority—a public benefit corporation operated by seven political appointees, five of whom do not live in the neighborhood—has decided that it must destroy Wagner Park in order to save it.

A needed respite from the urban noise and tall buildings abutting it, Wagner Park offers Battery Park City residents and visitors much-coveted greenspace and fresh air in which to relax, play, mingle with friends, and contemplate the unparallel views of the harbor and the Statue of Liberty. But this urban oasis is about to be destroyed. Fences now surround the park, and construction is set to begin any moment.

The Authority could have protected—and can still protect—Battery Park City from the ravages of climate change while preserving the unique gem known as Wagner Park. But it unreasonably discarded a climate resiliency option that was effective and available without due consideration, and instead solely and wrongly focused its attention on the most destructive, costly, and time-consuming option available. In doing so, it relied on faulty data and incorrect assumptions and inexplicably discounted effective and available options. These actions were arbitrary, capricious, and contrary to the requirements of the State Environmental Quality Review Act (SEQRA). Petitioners—neighbors who live in Battery Park City, regularly enjoy Wagner Park, and dread its destruction—ask this Court to intervene to halt construction and require the Authority to properly consider feasible alternatives that would promote climate resiliency *and* save the park.

The Authority's actions should be vacated. In the meantime, this Court must ensure that the Park is preserved while Petitioners' claims are heard. Thus, in addition

to (and before) awarding relief under Article 78 to vacate and set aside the Final Environmental Impact Statement (FEIS) and the Statement of Findings regarding the South Battery Park City Resiliency Project, the Court should preliminarily enjoin any demolition or construction in Wagner Park while these proceedings are pending.

FACTS

Designed by world-renowned architects, landscape designers, and horticulturists, Robert F. Wagner Park opened in 1996 to widespread acclaim. The *New York Times* architecture critic Paul Goldberger declared Wagner Park to be "one of the finest public spaces New York has seen in at least a generation."[1] Despite being less than 50 years old, it is eligible for registration on the National Register of Historic Places because of its exceptional significance. FEIS (Frick Aff. Ex. 1) at 3.4-44. The park's three main components are laid out in a "Y" shape: a pair of garden allées drawing pedestrians from the sidewalk toward the main park entrance; a two-part pavilion that frames a spectacular view of the Statue of Liberty; and a grass lawn framed by a continuous path and benches. It was designed specifically to withstanding flooding: It is constructed at a high elevation, on top of five feet of sand which facilitates drainage, and features sturdy and salt-tolerant vegetation.

Wagner Park anchors the Battery Park City neighborhood. It serves the approximately 16,000 people who live in Battery Park City as well as residents of neighborhoods across Lower Manhattan that lack adequate green spaces, like the Financial District and Tribeca. Affidavit of Britni Erez on behalf of the Battery Park City

[1] Paul Goldberger, *A Small Park Proves That Size Isn't Everything*, N.Y. Times, Nov. 24, 1996 at 2-46, available at https://www.nytimes.com/1996/11/24/arts/a-small-park-proves-that-size-isn-t-everything.html.

Neighborhood Association ("BPCNA Aff.") ¶¶ 9-10. Every day, hundreds of people visit the park to walk their dogs, play with their children, host PTA fundraisers, throw birthday parties, read in the sun, contemplate the gardens, and gaze at the river views. *Id.* ¶ 10; *see also* Affidavit of J. Kelly McGowan. Even schools rely on the park. During COVID, a local school used the park for lunch and recess, when eating outdoors was the only safe option for children. BPCNA Aff. ¶ 10. And local preschools serving hundreds of students use the park every single day. Affidavit of Jennifer Jones.

Now, less than three decades after it was constructed, respondent Battery Park City Authority ("Authority" or "the Authority") proposes to destroy this beloved neighborhood park. Petitioners are the BPCNA, a grassroots neighborhood organization fighting for the interests of Battery Park City residents, and J. Kelly McGowan, one of the organization's members and a Battery Park City resident who uses the park daily.

I. THE AUTHORITY PLANS TO DESTROY WAGNER PARK

A month ago, the Authority approved the FEIS for the South Battery Park City Resiliency Project ("SBPC Resiliency Project"). *See* FEIS; SEQRA Findings Statement, Oct. 27, 2022 (Frick Aff. Ex. 2). One component of the SBPC Resiliency Project would involve demolishing Wagner Park, constructing a buried floodwall, and building a new park on top of the floodwall approximately 7.8-9.8 feet above where it sits today ("the Wagner Park Plan").

The Wagner Park Plan is premised on a Design Flood Elevation ("DFE")—meaning the elevation of the highest flood that a project is designed to protect against—of 19.8 feet. Findings Statement at 3. A DFE of 19.8 feet requires a height of intervention ("HOI") of 7.8-9.8 feet, which represents the difference between the existing elevation and the DFE. *Id.* In other words, the Wagner Park Plan calls for demolishing Wagner

Park and the pavilion and rebuilding a new park and structure at an elevation approximately 8-10 feet higher than where it sits today. The Wagner Park Plan will also destroy the two allées of trees—*i.e.*, cut down over 100 trees—and "recreate[]" them along two ramps connecting the north and south arrival points of Wagner Park with the newly-raised park and the new pavilion. *Id.* at 4. Finally, the Wagner Park Plan calls for the demolition of the existing pavilion and construction of a new 18,200-square-foot structure 11-12 feet above ground. *Id.* at 5.

II. THE AUTHORITY USES FAULTY STORM SURGE AND SEA LEVEL ASSUMPTIONS AND IGNORES LAND FEATURES

In 2017, the Authority retained engineers to conduct a study of the potential vulnerability of Wagner Park and the surrounding area to flooding and to propose potential ways to improve the park's resiliency. FEIS at 2-5. That study used a DFE of 16.5 feet. *Id.* at 2-8. In the FEIS, however, the Authority invoked "subsequent coastal modeling that set the target DFE for Wagner Park at a significantly higher elevation than the previously assumed 16.5 feet." *Id.* at 2-8.

To justify its current Wagner Park Plan, the Authority now asserts that worst-case-scenario storm surges and rising sea levels require a DFE of 19.8 feet—though the FEIS does not explain how that figure was calculated. Frick Aff. ¶ 24. As discussed in more detail below, *see* Argument § II.B, the FEIS arrived at its storm surge predictions by relying on outdated data that had been rejected years earlier by both FEMA and New York City. *Id.* ¶¶ 10-18. In fact, the Mayor's Office of Recovery and Resiliency called FEMA's storm predictions, on which the Authority now relies, "scientifically and technically incorrect." *Id.* ¶ 13.

The Authority relied on similarly questionable data in analyzing sea level rise, using data put forward by the New York City Panel on Climate Change that contradicts both measured reality and predictions by the National Oceanic and Atmospheric Administration ("NOAA") and NASA. *Id.* ¶¶ 19-36. For example, it factored a 30-inch sea level rise into its analysis to determine an 18.5-foot maximum water level (necessitating a DFE above 18.5 feet from current elevation), without noting that the 30-inch prediction was premised on a baseline of water levels from 2000-2004, not current conditions. *Id.* ¶ 21. That error alone accounts for a dramatically higher DFE than is necessary. In all, the Authority's arbitrary use of this faulty data led it to arrive at a DFE at least 3.1 feet higher than it should be. *Id.* ¶ 36.

Finally, the Authority failed to account for the action of waves as they hit the land at Wagner Park. To properly determine an appropriate DFE, one must take account of the features of the land: its hills, depressions, structures, trees, etc. Frick Aff. ¶¶ 37-47. It does not appear that the Authority paid any attention to how the actual structures in place at Wagner Park, including the grass, raised concrete steps, concrete planters, and raised lawns, would impact wave force or height. *Id.*

III. THE AUTHORITY REJECTS ALTERNATIVES THAT WOULD HAVE PRESERVED WAGNER PARK

The FEIS put forward three alternative designs for Wagner Park: Alternative 1, called the "Inland Alternative"; Alternative 2, called the "Waterfront Edge Alternative," and Alternative 3, called the "Buried Floodwall Alternative." FEIS at 2-1 – 2-24. Authority selected Alternative 3. *Id.* at 2-20.

Alternative 1, which Petitioners supported, would have involved the placement of a flood barrier along the north side of the Wagner Park lawn, leaving most of Wagner

Park on the "water side" of the barrier. *Id.* at 2-8. 64. As described in the FEIS, Alternative 1 was designed in 2017 for a DFE of 16.5 feet—though the FEIS does not describe why it could not consider a similar inland barrier design designed for a higher DFE. *Id.*

The FEIS provided only a text description of Alternative 1 and two detail-free sketches, but no technical graphics or description of the precise components that it was considering. And, as detailed at length in the Petition and *infra* in § II.B of the Argument, the Authority built in several unreasonable assumptions about Alternative 1 that led it to reject that option.

Upon learning that the Authority planned to demolish Wagner Park in its entirety, the BPCNA asked experts from the design firms that built the original park to elaborate on the basic framework of the Authority's Alternative 1 to create an actionable design that would save the Park and its pavilion. Lucinda Sanders, from the landscape design firm OLIN, and Jeffry Burchard, from the architecture firm Machado Silvetti, heeded the call and designed Alternative 1a. *See* BPCNA Aff. Ex. 7 (Alternative 1a). Under Alternative 1a, a permanent flood alignment is placed between the gardens (north and south) and the allées of Red Maple trees, allowing the wall to serve as protection from flooding further into Manhattan. *Id.*

Alternative 1a has a number of benefits. First, placing the floodwall farthest from the river provides maximum inland protection from flooding with minimal disruption to the existing park. Second, the park can largely stay open during construction, as most work will be done behind the park and on the backside of the pavilion. Third, this alternative maintains both the special views to the water and the Statue of Liberty that make Wagner Park an international icon and historic landmark, as well as the

integration with the street and surrounding areas leading into the park. Fourth, the designers prioritize protecting mature trees and using green spaces—and the flood protection they offer—over impermeable surfaces. Finally, as Ms. Sanders explained, construction on Alternative 1a could take far less time than the Authority's Wagner Park Plan, as the changes proposed under Alternative 1a are more modest in scope than raising and rebuilding an entirely new park and structure. *See Id.*; BPCNA Aff. ¶¶ 75-86.

Just days after the BPCNA presented Alternative 1a, the Authority rejected it out of hand. First, it declared that the current pavilion could not be used as a flood barrier, but the Authority never properly evaluated whether there was any way to preserve the pavilion. Frick Aff. Ex. 10. The Authority also rejected Alternative 1-a's use of permanent floodwalls, claiming that they would "wall[] off the park and waterfront . . . [from] the surrounding Battery Park City community," would cause "significant disruption to the park," and would require the destruction of the garden allées. *Id.* Each of these same criticisms can be made of the Authority's own Wagner Park Plan—and thus are irrational reasons to reject the alternative. Finally, the Authority rejected Alternative 1-a because, by placing the floodwall on the street side of Wagner Park, it would permit the park to flood during storm surge events. *Id.* The Authority ignored the fact that Wagner Park was originally designed to withstand flooding—and that it had, in fact, survived Superstorm Sandy largely unharmed. BPCNA Aff. ¶¶ 20-33.

Meanwhile, other areas of the SBPC Resiliency Project use climate resiliency features, such as permanent above-ground floodwalls and flip-up deployables, that the Authority ruled out for Wagner Park, including in areas much closer to the water.

IV. THE AUTHORITY IGNORES COMMUNITY ENGAGEMENT

Throughout the design process, the community has consistently requested that the Authority preserve Wagner Park. Just as consistently, the Authority has ignored these requests. Community Board #1 has passed multiple resolutions asking for more information from the Authority and urging it to preserve Wagner Park and the pavilion. BPCNA Aff. ¶¶ 34-69 & Exs. 1-4. The Authority never offered much of a response.

Even worse, the Authority failed to fully and timely disclose its real plans to the public. For months, it had assured residents that its design for a new park would have the same amount of green space as the current Park. *Id.* ¶ 45. But weeks after the comment period on the Draft Environmental Impact Statement closed, the Authority finally revealed (without meaningful public notice comparable to that issued for other pronouncements) the specific dimensions of the new lawn it had designed, revealing it to be significantly smaller than the current lawn. *Id.* ¶¶ 45-51. After outrage from the BPCNA and the rest of the community, the Authority relented and added back some green space—but the design still represents a 10 percent reduction in lawn space. *Id.* ¶¶ 52-54.

The Authority was not forthcoming about other important parts of its plan, like its plan to replace the pavilion with a larger structure with more commercial space or the source(s) of funding for the Wagner Park Plan. *Id.* ¶¶ 34, 62-63. Despite assurances that residents would not foot the bill, the Authority in fact plans to pay for its plans with ground rent payments of the residential and commercial buildings in Battery Park City. *Id.* ¶ 64. The community has not even been given a straight answer regarding the precise timing and duration of construction. *Id.* ¶¶ 73. Unsurprisingly, many local groups and community officials, including the New York City chapter of the Sierra Club, have

expressed their opposition to the Authority's plans and their support of Alternative 1a. *Id.* ¶¶ 87-88 & Exs. 5-6, 8-9.

ARGUMENT

The Authority acted arbitrarily and capriciously in relying on faulty climate data and improperly rejecting alternatives to its preferred plan. Under SEQRA and Article 78 of the Civil Practice Law and Rules, this Court should invalidate those arbitrary acts. Because Petitioners face irreparable harm if the Authority is permitted to go forward with its demolition plans, the Court should enjoin the Authority from undertaking any construction on Wagner Park (including the pavilion) during the pendency of these proceedings.

I. PETITIONERS HAVE STANDING TO SUE AND FALL WITHIN SEQRA'S ZONE OF INTERESTS

Petitioners—a grassroots neighborhood organization as well as a member of the organization who resides in Battery Park City and regularly uses Wagner Park—have standing to challenge the Authority's actions. "A person who can prove that he or she uses and enjoys a . . . resource more than most other members of the public has standing under the State Environmental Quality Act (SEQRA) to challenge government actions that threaten that resource." *Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297, 301 (2009). And "in cases involving environmental harm, the standing of an organization [can] be established by proof that agency action will directly harm association members in their use and enjoyment of the affected . . . resources." *Id.* at 304 (quotation marks omitted). Petitioners have standing here because their use and enjoyment of Wagner Park would be directly harmed by the Authority's plan, and they would suffer far more than most members of the public.

Additionally, Petitioners fall squarely within SEQRA's zone of interests. "The requirement that a petitioner's injury fall within the concerns the Legislature sought to advance or protect by the statute assures that groups whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes." *Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 774 (1991). While SEQRA litigation may be susceptible to interference by "special interest groups or pressure groups, motivated by economic self-interests," *id.*, Petitioners here are neighbors who are driven by a passion for their local park, have no economic self-interest, and share the climate-resilience goals motivating the Authority's plan. Petitioners merely seek to ensure the rational and fact-based selection of the best possible option.

II. THE COURT SHOULD GRANT THE PETITION AND, IN THE MEANTIME, ISSUE A PRELIMINARY INJUNCTION

The Authority landed on the Wagner Park Plan by inexplicably relying on flawed data and stacking the deck with unreasonable criticisms of Alternative 1/1-a, many of which apply equally to the Authority's own plan. This is the definition of arbitrary and capricious agency action, which the Court should invalidate. While these proceedings are pending, the Court should enter a preliminary injunction to maintain the status quo.

A. Relevant Legal Standards

SEQRA was enacted with the intent that "the protection and enhancement of the environment, human and community resources shall be given appropriate weight with social and economic considerations in public policy." N.Y. Envtl. Conserv. Law § 8–0103(7). "To that end, the Legislature created an elaborate procedural framework governing the evaluation of the environmental ramifications of a project or action."

N.Y.C. Coal. to End Lead Poisoning, Inc. v. Vallone, 100 N.Y.2d 337, 347 (2003) (quotation marks omitted). If a proposed action will have an adverse environmental impact, the lead agency must mitigate the impact "to the maximum extent practicable," taking social and economic considerations into account. N.Y. Envtl. Conserv. Law § 8-0109(1). And the agency must issue an environmental impact statement (EIS), the purpose of which "is to provide detailed information about the effect which a proposed action is likely to have on the environment, to list ways in which any adverse effects of such an action might be minimized, and to suggest alternatives to such an action so as to form the basis for a decision whether or not to undertake or approve such action." *Id.* § 8-0109(2).

"To be meaningful, any choice among alternatives must be based on an awareness of all reasonable options." *Town of Dryden v. Tompkins Cnty. Bd. of Representatives*, 78 N.Y.2d 331, 333-34 (1991). Of course, "the degree of detail required in assessing those alternatives will vary with the circumstances and nature of each proposal." *Id.* at 334. SEQRA's implementing regulations require that "[t]he description and evaluation of each alternative should be at a level of detail sufficient to permit a comparative assessment of the alternatives discussed." 6 NYCRR § 617.9(b)(5)(v).

Judicial review of an EIS "is limited to whether the lead agency identified the relevant areas of environmental concern, took a 'hard look' at them, and set forth a reasoned elaboration for its determination." *Roosevelt Islanders for Responsible Southtown Dev. v. Roosevelt Island Operating Corp.*, 291 A.D.2d 40, 54 (1st Dep't 2001). Challenges to an agency's compliance with SEQRA are brought by petition under CPLR Article 78, which requires a reviewing court to overturn agency action if it is "arbitrary, capricious or an abuse of discretion." CPLR § 7803(3).

While this standard of review is deferential, courts have not hesitated to overturn SEQRA actions when the agency "ignore[d] key, disputed issues," *Chem. Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 411 (1995); engaged in "no coherent evaluation" of a critical issue, *Purchase Env't Protective Ass'n, Inc. v. Strati*, 163 A.D.2d 596, 597 (2d Dep't 1990); relied on insufficient information to reach a conclusion, *Wellsville Citizens ex rel. Responsible Dev., Inc. v. Wal-Mart Stores, Inc.*, 140 A.D.3d 1767, 1769 (4th Dep't 2016); or made dubious, unexplained assumptions, *Save the Pine Bush, Inc. v. Planning Bd. of the City of Albany*, 130 A.D.2d 1, 4 (3d Dep't 1987).

The party seeking a preliminary injunction "must demonstrate a likelihood of ultimate success on the merits, irreparable harm in the absence of injunctive relief, and a weighing of equities in [their] favor." *Bingham v. Struve*, 184 A.D.2d 85, 88 (1st Dep't 1992); *see* CPLR § 6301. The purpose of a preliminary injunction "is not to determine the ultimate rights of the parties but to maintain the status quo until a full hearing on the merits can be held." *2914 Third Sportswear Realty Corp. v. Acadia 2914 Third Ave., LLC*, 93 A.D.3d 573, 573 (1st Dep't 2012).

B. The Authority Acted Arbitrarily and Capriciously

Alternative 1a, which elaborates upon and implements the basic framework of the Authority's Alternative 1, provides a reasonable alternative that the Authority should have meaningfully considered. It provides effective flood protection; is quicker to construct; costs less; has a lower carbon footprint; will not reduce active green space; will avoid the destruction of over 100 mature trees; is adaptable to scientists' changing understanding of climate change; is aligned with the federal government's policy of nature-based climate protection; will not require the destruction of a historically significant park central to the character of the community; has been deemed a

reasonable alternative by the Park's original architects; and has strong community support. The Authority arbitrarily disregarded this alternative in favor of what appears to be a preselected plan that will require maximum destruction, cost, time, and carbon emission and will result in a 19-foot-high, inflexible, concrete-laden hill that reduces active green space by more than 10 percent. The totality of these facts show that the Authority acted unreasonably in excluding Alternative 1/1-a from consideration.

More specifically, in rejecting Alternative 1/1-a, the Authority failed to take the requisite hard look or set forth a reasoned elaboration for its determination. This is so for at least five reasons.

First, the Authority's rejection of Alternative 1/1-a was based in part on irrational and incorrect assumptions about storm surge and sea level rise: one about storm surge and one about sea level rise.

As to storm surge, the Authority's Final Coastal Modeling Study, issued April 27, 2022, assumed a 100-year-storm surge elevation of "about 11.3 feet" based on a 2013 preliminary FEMA Flood Insurance Study Report. Frick Aff. Ex. 3 at 3.1. If approved, this FEMA study would have dictated flood insurance requirements and premiums in New York City. The City appealed FEMA's preliminary findings, however, and in 2015 conducted its own analysis finding that the correct 100-year-storm surge elevation for the Battery was 9.2 feet. Frick Aff. ¶¶ 13-15. In doing so, the City criticized FEMA's projections as "scientifically and technically incorrect." *Id*. ¶ 13. FEMA ultimately granted the City's appeal and agreed to use the City's data to revise its preliminary study. Frick Aff. ¶ 17 & Ex. 5. Thus, the Authority effectively inflated the DFE by 2.1 feet by relying on data that both the federal and municipal governments themselves deemed incorrect.

In addition, the FEIS relied on an incorrect and exaggerated assumption about sea level rise: 10 inches of sea level rise by the 2020s and 30 inches by the 2050s. For one thing, the 30-inch assumption (taken from the New York City Panel on Climate Change) was counted from a baseline of 2000-2004 water levels, not current conditions—but the Authority uses that figure to assume a 2.5-foot (30 inches) sea-level rise against which the designed flood barrier must protect. Frick Aff. ¶¶ 20-21.

Moreover, the prediction itself was and remains inaccurate. According to NOAA—the federal agency responsible for monitoring ocean conditions—sea levels are currently rising approximately 1.1 inch per decade, 10 times slower than the Authority assumed. Frick Aff. Ex. 11. This trend would suggest 5.5 inches of rise by the 2050s, rather than 30. *Id*. NASA's predictions are similar: And even the "High" scenario recently projected by NASA's Sea Level Rise Interagency Task Force would involve a rise of 19.8 inches, still much less than the 30 inches the Authority projected. Frick Aff. ¶ 28 & Exs. 7-8. And, again, NASA's predictions are calculated from a baseline of water levels in 2000, not today. For its part, the International Panel on Climate Change issued new projections this year that show sea levels around New York City increasing approximately 12 inches by 2050. Frick Aff. Ex. 9. Thus, the Authority's assumption about sea level rise was an outlier when compared to both observed reality and credible projections of future sea level rise by respected sources. The Authority failed to explain why it would choose to rely on an outlier. *See, e.g.*, *Chem. Specialties*, 85 N.Y.2d at 411 ("agency efforts to ignore key, disputed issues have repeatedly been rejected").

These faulty assumptions about storm surge and sea level rise infect the Authority's calculation of the DFE (and thus the HOI) in the Wagner Park Plan. By using the rejected FEMA storm surge assumption, the Authority artificially inflated the DFE

and HOI by 2.1 feet. By using the faulty sea level rise assumption, the Authority artificially inflated the DFE and HOI by approximately another 1-2 feet. Using calculations based upon observed reality and credible scientific projections, Alternative 1's 16.5-foot DFE is in fact sufficient, and the rejection of Alternative 1 on the basis that it did not conform to the Authority's 19.8-foot DFE was arbitrary and capricious. Moreover, even if a higher DFE were necessary, the Authority entirely failed to consider the possibility of simply building the floodwall and/or deployables in Alternative 1/1-a higher.

Second, the Authority unreasonably assumed that Alternative 1 required the replacement of the pavilion and that the current pavilion could not serve as a flood barrier. But Alternative 1a calls for an inland barrier strategy that would leave the existing pavilion in place. BPCNA Aff. Ex. 7. Notably, the FEIS's plan for the Museum of Jewish Heritage, which sits at the same elevation as the pavilion but closer to the water's edge, is to preserve the building and fortify it with a combination of flood mitigation landscape, flip-up deployables, and floodwalls on the water side of the building. FEIS at 2-4 – 2-5. Instead of adequately explaining why the pavilion needed to be replaced, the FEIS simply took it for granted, starting from the assumption that the park had to be rebuilt at much higher ground and then reasoning that a new pavilion must follow.

Third, the Authority irrationally rejected Alternative 1 on the ground that its use of flip-up deployables, stored below ground, is "subject to mechanical and human error." FEIS at 2-8. That rationale was based on not one but two mistakes. Most fundamentally, an inland barrier strategy does not necessarily *require* extensive reliance on flip-up deployables. Alternative 1a, which the Authority all but ignored, features a permanent floodwall, integrated into the design of the park, with minimal use of

deployable barriers in the event of flooding. BPCNA Ex. 7. Furthermore, the Authority's own plan relies on deployables at even more vulnerable parts of Battery Park City, FEIS 1-23 (flood alignment plan calls for a raised segment "in combination with flip-up deployables" and a short section of floodwall"); FEIS 2-26 (existing grade of Pier A plaza is lowest throughout the Project Area and requires the tallest height of intervention); it utterly failed to explain why the risk of mechanical and human error is unmanageable at Wagner Park but nowhere else.

Fourth, the Authority declared that an inland barrier plan like Alternative 1/1-a would fail to meet the project purpose because it would necessarily leave Wagner Park on the water side of the barrier, which would render the park inaccessible for "extensive periods" during times of flooding. But the Authority neglected to compare these supposedly "extensive periods" with the minimum two years it proposes to close the park for construction. And it further neglected to note that Wagner Park was designed with the most up-to-date flood protections available at the time. The builders removed approximately five feet of soil and replaced it with sand to create a thick base designed specifically to drain water efficiently and effectively. A diverse slate of carefully selected plants and trees were strategically placed to tolerate salt, wind, and water, with the sturdiest plants found in the plant beds closer to the water. These steps were taken to ensure that the park would be useable as quickly as possible after flooding events. *See* BPCNA Aff. ¶¶ 20-33. Notably, despite the extensive damage elsewhere, Wagner Park's resilient design proved effective during Hurricane Sandy, which the park survived without serious damage. *Id*. Moreover, just as with the deployables, the Authority's own plan involves an inland barrier system just north of Wagner Park, Frick Aff. Ex. 15—a contradiction in its rationale for rejecting Alternative 1/1-a that it utterly failed to face.

Fifth, the Authority gave several irrational reasons for rejecting Alternative 1a's use of permanent flood walls. To start, the Authority claimed that permanent flood walls would "wall[] off the park and waterfront . . . [from] the surrounding Battery Park City community," but this is assuredly less true of a wall with regular openings than of an elevated hill rising far above street level. Frick Aff. Ex. 10. Next it asserted that building Alternative 1a would cause "significant disruption to the park," failing to acknowledge that its own plan would require at least two years of construction, longer than Alternative 1a. *Id.* Then it claimed that Alternative 1a would require demolition of the garden allées, again failing to note that its own plan also calls for the destruction of those same trees. *Id.* And finally, the Authority insisted that Wagner Park simply could not be allowed to flood, asserting without evidence that flooding would require "years" of closure*, id.*, but ignoring that the park is specifically designed to withstand flooding and has successfully done so, including during Hurricane Sandy. *See Bauer v. DeVos*, 325 F. Supp. 3d 74, 109 (D.D.C. 2018) ("[A]n unacknowledged and unexplained inconsistency is the hallmark of arbitrary and capricious decision-making."); *see also, e.g.*, *Matter of Charles A. Field Delivery Serv., Inc.*, 66 N.Y.2d 516, 520 (1985).

For all these reasons, the Authority acted arbitrarily and capriciously, and the Petition should be granted.

At the very least, these merits questions are certainly close enough to require a preliminary injunction to maintain the status quo while the Court gives full consideration to the arguments. Petitioners' burden of proving likelihood of success is reduced here because the denial of injunctive relief would render the final judgment ineffectual. *See Republic of Lebanon v. Sotheby's*, 167 A.D.2d 142, 145 (1st Dep't 1990) ("Where denial of injunctive relief would render the final judgment ineffectual, the

degree of proof required to establish the element of likelihood of success on the merits should be accordingly reduced."); *see also Congregation Erech Shai Bais Yosef, Inc. v. Werzberger*, 189 A.D.3d 1165, 1167 (2d Dep't 2020). In this respect this case is indistinguishable from *Gramercy Co. v. Benenson*, 223 A.D.2d 497 (1st Dep't 1996), in which the First Department affirmed an order enjoining defendants from cutting down trees in Gramercy Park, *see id.* at 498 ("Denial of injunctive relief would render the final judgment ineffectual, since the trees, once cut down, cannot be replaced."). Similarly, in an action to prevent the sale or alteration of approximately 750 community gardens absent a full environmental review pursuant to SEQRA, the Second Department held that the degree of proof required to establish likelihood of success on the merits was reduced, as "the imminent sale of the community gardens will result in irreparable harm." *State v. City of New York*, 275 A.D.2d 740, 741 (2d Dep't 2000); *see also Lake George Ass'n v. N.Y. State Adirondack Park Agency*, 76 Misc. 3d 295, 305-11 (Sup. Ct. Warren Cnty. 2022) (finding petitioners were likely to succeed on several claims given their reduced burden). Particularly given this reduced burden, Petitioners are demonstrably likely to succeed on the merits of their SEQRA claim.

C. Petitioners Will Suffer Irreparable Harm Absent an Injunction

Petitioners will suffer irreparable harm if construction is not halted because the Authority is preparing to cut down numerous trees, rip up Wagner Park, and destroy the historically significant pavilion.

Irreparable harm "means any injury for which money damages are insufficient." *Klein, Wagner & Morris v. Lawrence A. Klein, P.C.*, 186 A.D.2d 631, 633 (2d Dep't 1992). As Justice Engoron of this Court once explained, money cannot "adequately compensate" park users for alterations to their park, because "you do not lose money by

losing parkland." *Union Square Park Cmty. Coal., Inc. v. New York City Dep't of Parks*, 38 Misc. 3d 1215(A), at *14 (Sup. Ct. N.Y. Cnty. 2013), *rev'd on other grounds*, 107 A.D.3d 525, (1st Dep't 2013), *aff'd*, 22 N.Y.3d 648 (2014). The alteration of parkland is thus quintessentially irreparable harm. *See City of New York*, 275 A.D.2d at 741; *Gramercy Co.*, 223 A.D.2d at 498; *Capruso v. Vill. of Kings Point*, 34 Misc. 3d 1240(A), at *5 (Sup. Ct. Nassau Cnty. 2009), *aff'd as modified*, 102 A.D.3d 902 (2d Dep't 2013), *aff'd*, 23 N.Y.3d 631 (2014). Even just the "threatened removal of large trees," standing alone, "constitutes irreparable harm." *Green Harbour Homeonwers' Ass'n, Inc. v. Ermiger*, 67 A.D.3d 1116, 1117 (3d Dep't 2009); *see also Sforza v. Nesconset Fire Dist.*, 184 A.D.2d 631, 632 (2d Dep't 1992). Trees, after all, "cannot be replaced." *Wiederspiel v. Bernholz*, 163 A.D.2d 774, 775 (3d Dep't 1990). Nor can the time during which a beloved neighborhood park is closed. *See Union Square Park Cmty. Coal.*, 38 Misc. 3d 1215(A), at *14.

Here, the imminent demolition of Wagner Park threatens all of these harms. Dozens of mature trees will be uprooted and destroyed. *See* BPCNA Aff. ¶¶ 8, 14. The pavilion that currently frames a picturesque view of the Statue of Liberty will be demolished. And the park will be closed for at least two years while under construction. Frick Aff. Ex. 2 at 22 (Authority's plan "is anticipated to have a 24-month construction schedule"). No amount of money could possibly compensate Petitioners for these losses.

D. The Balance of Equities Favors Petitioners

The balance of equities lies in Petitioners' favor because they seek only a pause to preserve the status quo. The Authority may still proceed with the majority of the SBPC Resiliency Project that does *not* affect Wagner Park right away, and it may still pursue the Wagner Park Plan in the future if it complies with the requirements of SEQRA.

When one party merely seeks maintenance of the status quo and the other party would suffer only delay or administrative burden, the balance of equities typically favors the former. *See, e.g.*, *Gramercy Co.*, 223 A.D.2d at 498 ("[T]he balance of the equities tilts in favor of plaintiffs, who merely seek to maintain the status quo, and against the trustees, who may remove trees once they have obtained the written recommendation of a licensed arborist or horticulturalist that they pose a significant danger."); *cf. Deane v. City of New York Dep't of Bldgs.*, 177 Misc. 2d 687, 699 (Sup. Ct. N.Y. Cnty. 1998) (denying injunction that would cost developer "a great deal of money" as well as their "window of opportunity to build this project"). In such cases, "the equities lie in favor of preserving the status quo while the legal issues are determined in a deliberate and judicious manner." *City of New York*, 275 A.D.2d at 741; *see also Capruso*, 34 Misc. 3d 1240(A), at *6.

A recent decision by Justice Muller of Supreme Court, Warren County, illustrates these principles. *See Lake George Ass'n*, 76 Misc. 3d 295. In that Article 78 proceeding, the petitioners challenged the respondent park commission's issuance of permits authorizing the use of an aquatic herbicide in certain wetlands around Lake George and sought a preliminary injunction against application of the herbicide. After determining that the petitioners satisfied their reduced burden of establishing likelihood of success on the merits and that their injury was irreparable because "[t]here is no removing the chemical from the lake once it has been introduced," the court turned to the balance of equities. *Id.* at 311. If a preliminary injunction were denied and the herbicide treatments were done "this month," the court reasoned, the treatments "cannot be undone—even if petitioners ultimately prevail." *Id.* On the other hand, if the injunction were granted and the treatments "delayed one year," then "the status quo is simply maintained." *Id.* And

"if petitioners lose, the treatments can be done next year." *Id.* Since the invasive plant species that the herbicide was meant to kill had been a problem "for decades," it was unclear why there was any "imminent need" for the treatments. *Id.* at 311-12; *see also Union Square Park Cmty. Coal.*, 38 Misc. 3d 1215(A), at *14.

So too here. All agree on the need to increase Battery Park City's resiliency to flooding. But this problem dates back years and will take years to address. The delay associated with litigating this case on the merits pales in comparison. Additionally, while any preliminary relief is in place, the Authority will still be free to proceed with the remaining portions of the SBPC Resiliency Project that do *not* affect Wagner Park and are not the subject of this litigation.

Yet if injunctive relief is denied, Wagner Park will likely be irreversibly altered before the merits can be resolved. Moreover, the Authority cannot claim any significant hardship from delay since it had ample notice that Petitioners fiercely opposed its plan and might commence litigation. *See Doe v. Dinkins*, 192 A.D.2d 270, 276 (1st Dep't 1993); *Union Square Park Cmty. Coal.*, 38 Misc. 3d 1215(A), at *14.

Because Petitioners have demonstrated a likelihood of success on the merits, irreparable harm, and a balance of equities in their favor, the Court should preliminarily enjoin the Authority from undertaking the planned Wagner Park portion of the Project absent full compliance with SEQRA.

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