NEW YORK SUPREME COURT
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.

VERIFIED PETITION

The Battery Park City Neighborhood Association ("BPCNA") and J. Kelly McGowan ("McGowan") (collectively, "Petitioners"), by and through their attorneys, Kaufman Lieb Lebowitz & Frick, for their verified petition pursuant to Article 78 of the New York Civil Practice Law and Rules, seek to enjoin Respondent from undertaking any additional action in furtherance of the destruction and/or altering of Robert F. Wagner, Jr. Park ("Wagner Park") until Respondent Battery Park City Authority ("Authority") has complied with their obligations under the State Environmental Quality Review Act ("SEQRA"), and in furtherance thereof allege as follows:

INTRODUCTION

1. Robert F. Wagner, Jr. Park ("Wagner Park") is an award winning, historically significant park and, equally importantly, the heart and soul of Battery Park City ("BPC"), which is located on the southern tip of Manhattan.

2. The park is a 3.5-acre "green oasis"[1] comprised of a network of three adjacent, flat green lawns with trees and ornamental gardens around their perimeter.

3. For BPC residents and visitors, Wagner Park offers coveted greenspace and fresh air in which to relax, stroll, exercise, play with children, mingle with friends, hold small or large gatherings, produce special events for the community and contemplate the unparalleled views to New York Harbor and the Statue of Liberty.

4. Its unique combination of beauty, tranquility and function are integral to the character of the community.

5. The attributes of Wagner Park are not happenstance because it was designed by masters within the fields of landscape architecture (Hanna/Olin), architecture (Machado & Silvetti) and public garden design (Lynden Miller).[2]

6. After the park opened in 1996, Paul Goldberger, the renowned architectural critic at *The New York Times*, wrote that the park is "one of the finest public spaces New York has seen in at least a generation."[3]

7. However, in the name of climate resiliency, the Battery Park City Authority ("the Authority")—a group of unelected state bureaucrats—has approved a $221 million dollar plan[4] that needlessly demolishes this Picassoesque green oasis into a spiritless concrete-laden amphitheater with a reduced-sized horseshoe-shaped lawn.

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[1] The New York Times article, "A Plan to Save a Beloved Park From Flooding Has Angered Its Biggest Fans," published 10/21/2022. Link: https://www.nytimes.com/2022/10/21/nyregion/wagner-park-manhattan.html.

[2] *See* Final Environmental Impact Statement for the South Battery Park City Resiliency Project ("FEIS") , p.2-16, acknowledging their contribution to Wagner Park and describing them as "masters," https://bpca.ny.gov/wp-content/uploads/2022/10/SBPCR-FEIS-Findings-Statement.pdf.

[3] Goldberg's article and this statement were quoted in the FEIS.

[4] See BPCA Investor Relations report, dated 07/26/22, at link: https://www.bpcabonds.com/bpca-investor-relations-ny/about/news/i5426?newsId=30285.

8. The Authority's plan not only harms the community and negatively impacts the natural environment, but its approval was irrational and arbitrary, for two general reasons.

9. First, the Authority failed to give an appropriate hard look at a reasonable, less costly, and more effective alternative design proposed by the initial firm hired to evaluate the need for a resiliency project (Parsons Transportation Group, Inc. ["Parsons"]), examined by the architectural firm hired to evaluate the project (Perkins and Eastman Architects ["Perkins"]), and deemed reasonable by members of the landscape architecture firm (Hanna/Olin) and architecture firm (Machado & Silvetti)[5] who designed the original park.[6]

10. Second, the Authority also failed to properly consider the appropriate climate science studies and information when determining their design for climate protection barriers.

11. Petitioners request that the Court issue a temporary restraining order and preliminary injunction because the Authority violated its duty to strictly comply with the State Environmental Quality Review Act (SEQRA) by failing to give fair and reasonable consideration to an available and effective alternative plan that is less destructive, costly, time consuming and has broad community support.

PARTIES

12. Petitioner Battery Park City Neighborhood Association ("BPCNA") is a grassroots nonprofit organization that advocates for members of the Battery Park City and Lower Manhattan community. It holds events and meetings to serve the

[5] See FEIS, page 2-16 (pdf 92), that refers to these firms as "masters."

[6] See October 27, 2022 presentation about a proposed climate design resiliency option for Wagner Park by Lucinda Sanders of Olin and Jeffry Burchard of Machado & Silvetti at link: https://www.youtube.com/watch?v=QsBnuwzYq44.

community. It has no operating budget but relies on donations from members of the Battery Park City and Lower Manhattan community to fund its operations.

13. Petitioner J. Kelly McGowan is a resident of Battery Park City who uses and enjoys Wagner Park regularly.

14. Respondent Battery Park City Authority ("BPCA" or "the Authority") is a New York State public benefit corporation whose mission is to plan, create, coordinate, and sustain a community of commercial, residential, retail, and park space within its designated 92-acre site on the lower west side of Manhattan.

JURISDICTION AND VENUE

15. This Court has jurisdiction pursuant to the State Environmental Quality Review Act ("SEQRA"), which permits challenges to governmental actions that threaten environmental resources. N.Y. Envtl. Conservation L. § 8-101 *et seq*.

16. This Court has further jurisdiction under CPLR 7803(3) and 7804(b) to review the actions by public bodies, like Respondent.

17. This Court has further jurisdiction to issue preliminary relief under CPLR 6301.

18. Venue in the County of New York is proper pursuant to CPLR 506(b) and 503(a) as the claims take place in New York County and/or one or more of the parties resides in New York County.

FACTUAL ALLEGATIONS

Wagner Park Is the Heart of Battery Park City

19. Battery Park City is a 92-acre mixed-use development that was constructed on reclaimed land (aka, landfill) in the 1970s.[7]

20. Over the past thirty years, its residential population has grown to over 16,000 people, thirty residential buildings, five schools and three cultural institutions including the Museum of Jewish Heritage (located on the north perimeter of Wagner Park).[8]

21. As described in the Final Environmental Impact Statement ("FEIS") for the South Battery Park City Resiliency Project, page ES-2 (attached as Exhibit 1 to the Frick Aff.):

> It [Wagner Park] was built between 1994 and 1996 and offers panoramic views of the New York Harbor and the Statue of Liberty. It includes a Pavilion, consisting of two structures connected by a rooftop walkway, two ornamental gardens, an esplanade, a central lawn, and various pieces of public art. The Museum of Jewish Heritage, which opened in Battery Park City in 1997, is located immediately north of Wagner Park. (Hanna/Olin), architecture (Machado & Silvetti) and public garden design (Lynden Miller).

22. In Paul Goldberger's 1996 *Times* article, he provides the following description of Wagner Park:

> The heart of this 3.5-acre public park is a great rectangle lawn, utterly empty, absolutely flat . . . Somehow it manages to feel as rich and as sensual—and as tranquil—as a thousand acres in the country, and it is a minor miracle. [. . .]
>
> Yet the complexity of Wagner Park overall is what makes the serenity at its center the more remarkable. The lawn is a kind of eye of the storm, an oasis in the midst of powerful presences. [. . .]
>
> What is most important is that every aspect of this design emerges from the realities of the park's surroundings—the waterfront, the

[7] See, website for the Authority at link: https://bpca.ny.gov/about/who-we-are/. Petitioners respectfully ask the court to take judicial notice of the government published website referenced throughout this petition, pursuant to CPLR 4511.

[8] *Id.*

> Statue of Liberty, the rest of Battery Park City and lower Manhattan—and connects to the imperatives of human use.[9]

23. Wagner Park is also noted to be significant under National Register Criterion A in the area of community and urban planning, and under Criterion C in the areas of landscape architecture, architecture and art.[10]

24. On February 25, 2020, NYC Manhattan Community Board 1 ("CB1) issued a Resolution stating: "Wagner Park is an award-winning landscape with beautifully crafted materials including Roman bricks to match the restaurant, built-in benches framing the lawn, [and] lighting that reninforces the elegance of the design. . . ." Frick Aff. Ex. 21 at 1.

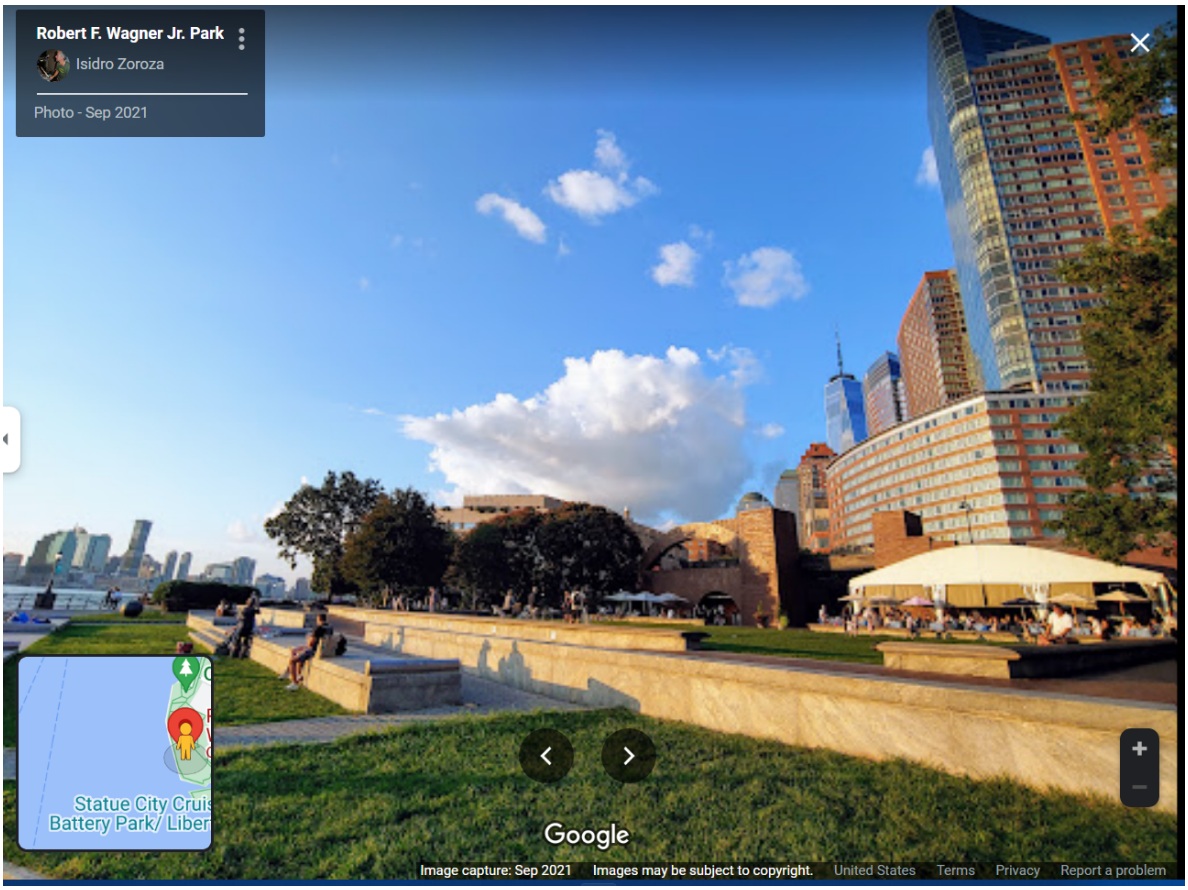
25. Below is a fair and accurate photograph of Wagner Park.[11] It is provided to show the Park's structures including its lawns, vegetation, proximity to shoreline:

[9] "A Small Park Proves That Size Isn't Everything"; published 11/24/19; link at https://www.nytimes.com/1996/11/24/arts/a-small-park-proves-that-size-isn-t-everything.html. This article is also referenced in the FEIS, p. 3.4-44 [pdf 207]) at link https://bpca.ny.gov/wp-content/uploads/2022/10/SBPCR-FEIS-Findings-Statement.pdf.

[10] FEIS, p. 3.4-45 (pdf 207).

[11] Photograph from from page 30 of a presentation by Perkins Eastman, an architect who consulted with the Authority on the present project, and available on New York City government website at https://www.nyc.gov/assets/manhattancb1/downloads/pdf/external-documents/wagner-park-battery-

26. Below is a photograph[12] that fairly and accurately depicts Wagner Park, looking north toward the western perimeter of the central lawn. The notable features include the raised cement structures that surround the raised central lawn.[13]

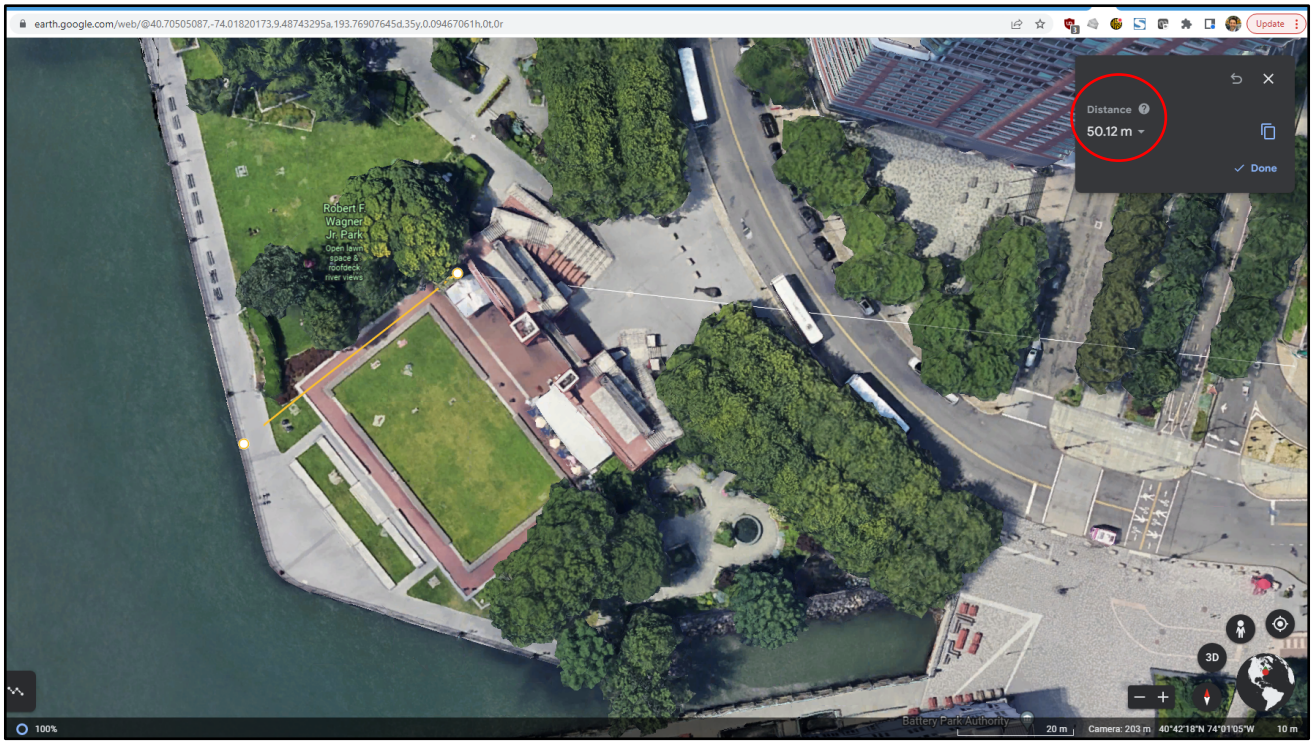


27. Below is a photograph that fairly and accurately depicts Wagner Park from an aerial view from Google Earth. The Google Earth platform was used to measure the distance from the bulkhead (shoreline) to the pavilion. The measurement is shown by the two yellow dots with the yellow line connecting them. The distance is approximate 50 meters (see red circle), or 150 feet.

park-city-authority.pdf. Pursuant to CPLR 4511, Petitioners respectfully request the Court take judicial notice of this informaton posted on a government website.

[12] Petitioner asks for the Court to take judicial notice of this Google photograph pursuant to CPLR 4511(c).

[13] As will be discussed later, the grass (aka wetlands) and raised features are factors that should be considered when determining storm water elevation including wave action.



28. The Cultural Landscape Foundation, an entity acknowledged as an authority in the FEIS,[14] also confirmed that Hanna/Olin designed Wagner Park to flood and withstand the 100-year storm, which it did during Hurricane Sandy (As discussed later, the FEIS failed to mention and, presumably, evaluate this fact when considering design option). In BPC, most of the damaging flood waters from Hurricane Sandy entered through the eastern side of BPC and not over the bulkhead adjacent to Wagner Park.[15]

29. The significance of Wagner Park to the community and their frustration with the Authority's manner of conducting business are described, in detail, within the affidavits of Petitioner Kelly McGowan, Petitioner BPCNA, and nonparties James

[14] FEIS, p. 1-16 (Pdf 92) at link: https://bpca.ny.gov/wp-content/uploads/2022/10/SBPCR-FEIS-Findings-Statement.pdf

[15] The Cultural Landscape Foundation. "Robert F. Wagner, Jr. Park at Risk." *The Cultural Landscape Foundation*, 1 June 2017, https://www.tclf.org/robert-f-wagner-jr-park-risk. Accessed 29 November 2022

Hamilton (Frick Aff. Ex. 18), Yvette Yasui (Frick Aff. Ex. 19) and Jennifer Jones (Frick Aff. Ex. 20).

30. As just one example, Wagner Park hosts the annual Swedish Midsummer Festival and, as shown the three photographs[16] [17] below, the central lawn is in full use.

Photo 1

[16] Photo 1 was downloaded from the Authority's website that discussed the festival, available at https://bpca.ny.gov/event/swedish-midsummer-festival-4/.

[17] Photo 2 and 3 was published on the Authority's Facebook page.

Photo 2

Photo 3

The BPCA Suffers from Antiquated and Poor Governance

31. In 1968, the Battery Park City Authority was formed pursuant to Section 1973 of the Public Authorities Law.

32. The Governor possesses the power to appoint the Board members. *Id.*

33. At that time, Battery Park City did not exist. It would be constructed from reclaimed land (landfill) and, thereafter, commercial and residential buildings would be constructed. Thus, it made sense for the seven-member Board of Directors ("Board") to be comprised of qualified individuals without any regard to their residency in BPC.

34. For the past 20 years, the Authority's duties with respect to BPC have transitioned from real estate development to ones centering around maintenance and governance of a thriving family-centric community.

35. But there is a growing disconnect between the Authority's actions compared to the values and needs of the community.

36. The protest known as "Pause the Saws" provides a poignant example of these longstanding and growing issues.

37. In June 2021, then-Governor Andrew Cuomo and the Authority devised and tried to implement a plan that would take up more than ten percent of the most-used lawn in BPC's Rockefeller Park to erect a 30,000 square foot, cement-laden monument with a ground level eternal flame—in a park primarily used by children.

38. The Authority failed to provide a meaningful opportunity for the community to be heard and its views considered. One resident summed up the feelings in the community by stating: "We were all blindsided by this. There was no community involvement. There was no community input. There was nothing."[18]

[18] https://www.cbsnews.com/newyork/news/battery-park-city-essential-workers-monument-rockefeller-park-andrew-cuomo/.

39. The community supported a monument to essential workers but opposed a process that pushed through a plan without a meaningful opportunity for it to be heard and considered.[19]

40. Members of the community protested.

41. Within a few days of the protest, the Authority issued an apology and acknowledged that it did not realize how the community valued and used Rockefeller Park. Then-Chairman of the Authority George Tsunis stated: "Over the past two weeks we have heard two things clearly and consistently: the love that our community harbors for its parks and public spaces, and its desire to honor the enduring efforts of essential workers."[20]

The Authority Plans to Destroy Wagner Park

42. In response to our growing understanding of climate change and events such as Hurricane Sandy, governing officials for lower Manhattan decided to implement an integrated coastal flood management project known as the Lower Manhattan Coastal Resiliency Master Plan.[21]

43. The South BPC Project ("Project") encompasses 1st Place, the Museum of Jewish Heritage, Wagner Park, Pier A and The Battery. *Id.*

[19] Ashley Wong, *Battery Park Monument for Essential Workers Paused After Protest*s, N.Y. Times, July 12, 2021, https://www.nytimes.com/2021/07/12/nyregion/battery-park-monument-essential-workers-protests.html (quoting Petitioner Kelly McGowan).

[20] *Id.*

[21] FEIS p. ES-1 (pdf 12), https://bpca.ny.gov/wp-content/uploads/2022/10/SBPCR-FEIS-Findings-Statement.pdf

44. To develop a climate resiliency plan, the Authority contracted with the Parsons Transportation Group, Inc. ("Parsons") for "Infrastructure Study & Resiliency Services" for BPC in the approximate amount of $1,230,000.[22]

45. Thereafter, the Authority contracted with engineering and architecture firm Perkins to provide a "Wagner Park Site Assessment" for the approximate amount of $486,000.[23]

46. In total, the Authority spent over $1,750,00 for Parsons and Perkins to analyze the proposed Project.

47. In early 2016, Parsons issued a report called 2015 Infrastructure & Resiliency Study ("Parsons Report"). Frick Aff. Ex. 12.

48. The Parsons Report stated the following regarding landscaped areas:

- Risk of Damage: Most landscaped areas would be under water during the storm event scenarios.
- Extent of Damage: Most landscaping would be ruined even after a short period being submerged under floodwaters. Accordingly extensive replacement of landscaping would be required with the exception of some trees. The potential extent of the damage would be considered significant.
- Mitigation: None.
- Evaluation: The cost of any structure to prevent flooding of landscaped areas would be high. In addition ***most engineered solutions would entail high costs for low value assets and would effectively ruin the aesthetic appearance of the park areas. The benefit cost ratio would be less than one***. (Bold and italics added)

[22] Pursuant to Sections 2879 and 2824(e) of the Public Authorities Law, the Authority must disclose information on any active (open) contract during each fiscal year's reporting period which includes vendor's name, description of services, contract award and start date and the contract amount. No contracts with Parsons or Perkins were disclosed in the fiscal year 2015 report. The Authority's fiscal year 2016 report is located at https://bpca.ny.gov/wp-content/uploads/2015/03/BPCA-Procurement-Report-FY2016.pdf and its fiscal year 2017 report at https://bpca.ny.gov/wp-content/uploads/2019/02/BPCA-Procurement-Report-FY2017.pdf. Note that vendors are listed in alphabetical order; and all Procurement Reports can be viewed at https://bpca.ny.gov/publicinfo/bpca-procurement-report/.

[23] *Id.*

- Timing: Accept the inevitable result of flooding and have an on-call contract in place for the expedited replacement of landscaping. This would at least minimize the time that landscape does not meet BPCA's high standards.

Id. at 23 (emphasis added).

49. The Parsons' Report provided the following opinion regarding artificial ridges or embankments, called berms:

> Berms can be used to provide both point and area protection. However, they require a lot of room and large quantities of earthen fill. ***Because of the high cost of transporting fill, berms are usually incorporated into existing high ground***. However, where existing high ground does not exist, berms could add attractive vertical landscape features as well as provide flood protection. ***While the berms are considered permanent features, they require continuous care to maintain the vegetative cover that is critical for their function***. Once berms are constructed as part of an integrated flood protection plan, it would be difficult to reclaim the land for other uses.

Id. at 16 (emphasis added).

50. The Parsons Report provided detailed descriptions of seven options for area protection of BPC.

51. One option it labeled "Option 2" was described as probably the least expensive option for protecting the west side and involved deploying post and panel flood barrier walls. It described the advantages and disadvantages of this plan. *Id.* at 32-33.

52. Another option, "Option 4" was described as an offshoot of Option 2 in that it used a combination of barrier walls with berms at the northern and extreme southern ends of BPC that would blend architecturally with adjacent structures and landscaping, also incorporating barrier walls for areas with limited space. *Id.* at 33-34.

53. The estimated cost for Option 2 and Option 4 was approximately $14 million dollars and $53 million dollars, respectively. *Id.* at 36. Each of these estimated

costs did not yet include an additional $13 million for the Eastern Boundary protection described in Option 1. *Id.*

54. On July 13, 2017, the Authority published Perkins' "Wagner Park Site Assessment and South Battery Park City Resiliency Plan Executive Summary for the Wagner Park Site Assessment." Frick Aff. Ex. 13 ("2017 Plan").

55. The 2017 Plan proposed using both deployable and permanent flood barriers along the Battery Place side of Wagner Park's lawn. *Id.* at 9.

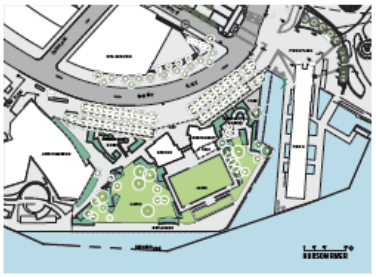
56. Thus, the 2017 Plan called for inland barriers that would leave the Wagner Park lawn on the water side.

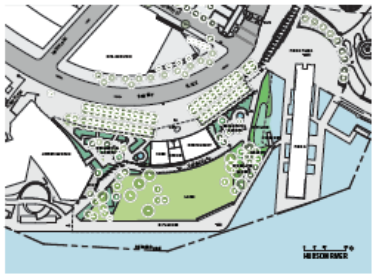
57. The deployable walls would be stored in the ground and not visible when not in use, "allowing views and access to the park." *Id.* at 8.

58. The 2017 Plan would expand the lawn by 500 square feet, expand the gardens by 2,000 square feet, reduce the hardscape and increase the planted areas to include a new wetland feature at Pier A cove. *Id.* at 9, as reproduced below:

The proposed Wagner Park landscape concept of the South Battery Park City Resiliency Plan enhances the quality of the Park experience by :

- expanding the ornamental gardens;
- simplifying the lawn;
- increasing the planted areas to include a new wetlands feature at the Pier A cove; and
- reducing existing paved areas.





Existing

Landscape Category	Area
Garden	21,000 sf
Lawn	39,500 sf
Wetland + Woodland	**0**
Hardscape	43,400 sf
Building	8,000 sf
Yard	1,600 sf
Water	3,000 sf
Total	**116,500 sf**

Proposed

Change in Area	Area
+ 2,000 sf	23,000 sf
+ 500 sf	40,000 sf
+ 9,600 sf	**9,600 sf**
- 8,300 sf	35,100 sf
- 1,700 sf	6,300 sf
+ 900 sf	2,500 sf
- 3,000 sf	0 sf
Total	**116,500 sf**

July 13, 2017

59. The 2017 Plan provided an example of Georgetown Harbor where such barriers had been successfully constructed, in use since 1986, remain in current operation and described as simple and efficient to operate. *Id.* at 7.

60. Finally, the 2017 Plan provided a recommendation for a new pavilion that would be incorporated into a wall of height that provided sufficient climate protection against storm floods.

61. On July 14 2017, the Authority issued a Request for Proposal (RFP), for designs for a flood barrier system in Wagner Park. Frick Aff. Ex. 22.

62. The RFP described the required community outreach:

> The selected Proposer shall conduct preliminary meetings with the local community members, the Community Board and interested groups as directed by BPCA. . . .
>
> ***Based on the input and comments*** obtained from the above, the selected Proposer shall prepare design plans which should include sufficient detail of site design, landscape design, streetscape design, existing and proposed plans, elevations, cross-sections, lighting design and all other appropriate elements and details.

Frick Aff. Ex. 22 at 19-20 (emphasis added).

The Authority Arbitrarily and Capriciously Jettisoned the Inland Barrier Plan

63. As confirmed by the FEIS, AECOM was chosen as the construction manager to oversee the various trades that would develop options and assist the Authority in evaluating them.

64. Throughout the process, NYC Manhattan Community Board 1 ("CB1") repeatedly called for more transparency from the Authority and more input from the community. It was specifically adamant that Wagner Park be protected.

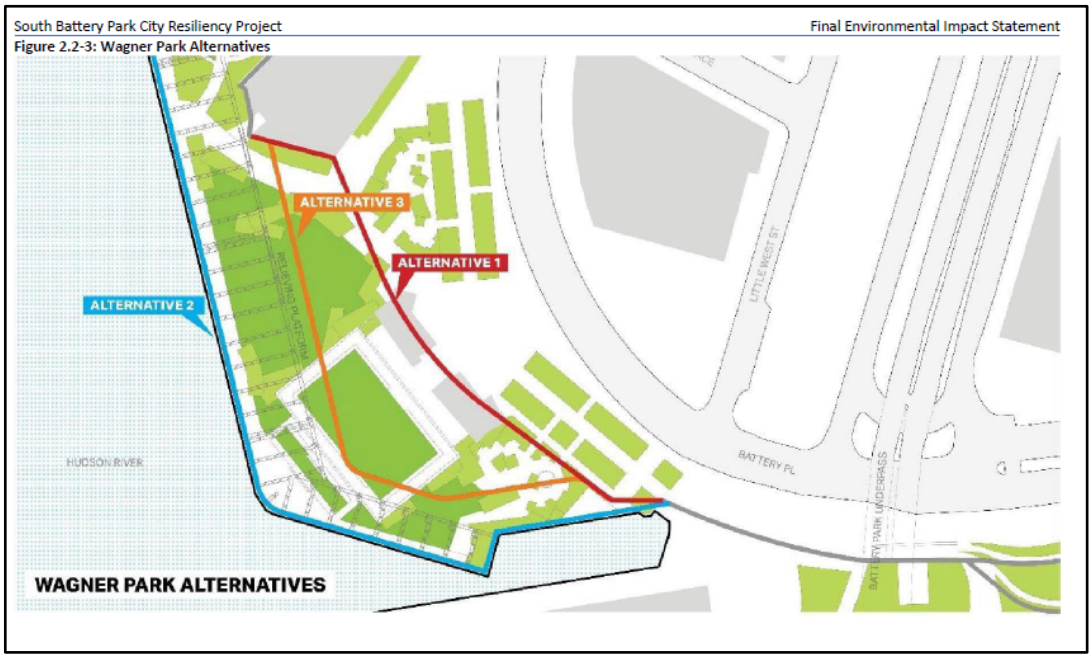
65. On February 25, 2020, CB1 issued a Resolution stating:

> CB1 has adopted three resolutions on Wagner Park (5/23/17) (9/26/17) (2/19/18). . . . The outstanding issues include: (1) disregard of CB1's ***urging to leave the pavilion and park intact***; (2) need to make Pier A Plaza and the Esplanade at Chambers Street and the West Side Highway a priority before Wagner Park; and (3) ***review of other alternatives that could allow for money, parks and natural habitats to be saved***.

Ex. 21, p. 1 (emphasis added).

66. With respect to Wagner Park, the FEIS identified three alternative options—each of which ignored CB1's above Resolution: Alternative 1, an inland barrier alternative; Alternative 2, a waterfront edge barrier; and Alternative 3, a buried floodwall.

67. The FEIS provided the following diagram to provide a visual understanding for the location of the options.



FEIS at 2-7.[24]

[24] Frick Aff. Exhibit 1 includes excerpts from the FEIS; the full FEIS is available at https://bpca.ny.gov/wp-content/uploads/2022/09/SBPCR_rpt_feis_chapters_1_through_4_FINAL_Optimized.pdf.

68. Alternative 1 mirrored the 2017 Plan proposed by Perkins, but the FEIS never disclosed that Perkins proposal was consistent with Alternative 1. *Id.* at 2-5.

69. Jettisoning the 2017 Plan, the FEIS declared Alternative 3 to be the BPCA's proposed action.

70. The FEIS described Alternative 1 as a flood alignment "constructed furthest from the waterfront, and closer to Battery Place" and would be based on a design flood elevation ("DFE")—meaning the elevation of the highest flood that a project is designed to protect against—of 16.5 feet. *Id.* at 2-8.

71. The FEIS stated that Alternative 1

> would require the installation of two types of flood risk reduction systems: a recommended new pavilion designed to function as a barrier against storm surge, flanked by flip-up deployables stowed below ground in chambers that would measure approximately 26 feet deep and 25 feet wide. . . . The new pavilion would have to be built at a height sufficient to act as a barrier to storm surge.

Id.

72. The FEIS then rejected Alternative 1 on the grounds that it did not meet the purpose and need of the project because (i) the proposed 16.5 DFE identified in the 2017 Plan was less than the new higher DFE (approximately 19.5 feet) the Authority now deemed necessary, and (ii) the park would be susceptible to increased flooding, destruction and be unusable for unacceptable periods of time.

73. Instead, FEIS selected Alternative 3, the "buried floodwall," which entails demolishing Wagner Park and the pavilion and "elevat[ing] the entire park" to sit atop a buried flood alignment:

> Under Alternative 3, a buried floodwall would be constructed beneath the park. . . . The DFE would be 19.8 feet, and the HOI [height of intervention] would be 7.8 to 9.8 feet. Wagner Park would be raised 10 to 12 feet, thereby maximizing the amount of continuous lawn space, maintaining views to the waterfront, and preserving the elevation of the existing Battery Park City Esplanade.

74. On or about May 4, 2022, public notice was posted for the Draft Environmental Impact Statement ("DEIS").[25]

75. The public comment period on the DEIS was originally scheduled to end Friday, June 3rd, 2022 but was extended through Friday, June 10, 2022.[26]

76. On June 15, 2022, NYC Councilmember Christopher Marte hosted a Town Hall.[27]

77. Up until this point, the Authority had not released any meaningful measurements of the changed landscape features under its plan and had been telling the public that there would be about the same amount of green space in the new Wagner Park. *Id.*

78. During the Town Hall, the Authority's representative assured the audience that "the allocation of the green space is roughly the same. . . . The side lawns make up the bulk of the planted areas. . . . ***With the new park, the central lawn is bigger***."[28]

79. Although not sure of the exact date, sometime after the Town Hall, the Authority released specific measurements that, when calculated, showed the central lawn was being reduced in size by approximately 50%. Affidavit of Britni Erez on behalf of Battery Park City Neighborhood Association ("BPCNA Aff.") Aff. ¶¶ 33-34.

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[25] *See* Authority website at link: https://bpca.ny.gov/bpc-people/notice-to-extend-public-comment-period-for-draft-environmental-impact-statement-south-bpc-resiliency-project/.

[26] *Id.*

[27] Recording of Town Hall published on YouTube platform at link: https://m.youtube.com/watch?v=jXZhQy9csww

[28] *Id.* at approximately 00:46:30 minutes.

80. This was being done despite the Authority's statements at the above-described Town Hall and the FEIS acknowledging that "the central lawn is the primary gathering space of Wagner Park." FEIS at 3.2-6.

81. In August 2022, after concerted push back from the BPCNA, local politicians and the Community Board the Authority relented to community demands and added back some lawn space—but it was not enough. After agreeing to change a design it had previously insisted was "final," the Authority misleadingly declared that the change brought a "74 percent increase in green space."[29]

82. At first blush, it sounded like the Authority was expanding green space above what presently existed, but of course this was not true. The Authority removed gardens to add back some of the lawn space.

83. The overall result is still a 10% reduction in the size of the central lawn. BPCNA Aff. ¶ 38.

84. The Authority deliberately hid the ball from the community with respect to greenspace. It initially the community to believe greenspace would be increased (2017 Plan), then claimed it was the same (Dawson Town Hall statements), then reduced it by 50% (FEIS), until finally adding back some green space that still reduced the overall amount. These actions deprived the community of a meaningful opportunity to be heard and considered.

85. By the time the community understood the plan to *reduce* greenspace, the public comment period had expired.

[29] Carl Glassman, *Lost More Lawn in Wagner Park Redo, A Response to Critics Cries*, The Tribeca Trib, Aug. 19, 2022, http://www.tribecatrib.com/content/lots-more-lawn-wagner-park-redo-response-critics-cries.

86. Essentially, the Authority distracted and delayed the disclosure of accurate information until it ran out the clock.

87. On September 28, 2022, the Authority published its Notice of Completion of Draft for the Environmental Impact Statement[30] and the FEIS.

88. The FEIS including its exhibits and referenced materials was several thousand pages.

89. Two weeks later, on October 11, 2022, the Authority voted the approve the FEIS, ignoring requests from residents at the board meeting to delay the vote by two weeks to provide time for further review FEIS and for public comment.

The Authority Arbitrarily and Irrationally Relied on Unreasonable Storm Surge, Sea Level, and Wave Action Assumptions to Reject Alternative 1

90. The Authority rejected an inland barrier plan at least in part because the one it evaluated was based on a DFE of 16.5, which the Authority deemed too low.

91. The Authority assumed a storm surge level during a 100-year storm (also called "the stillwater level") to be 11.3 feet above sea level and a sea level increase of 30 inches by the 2050s. FEIS at ES-7.

92. Using those figures, the Authority calculated a maximum water elevation—*i.e.*, the highest point of the largest wave in a 100-year storm—to be 18.5 feet at the area around Wagner Park. Frick Ex. 3 at Table 4-2.

93. Based on that number, the Authority determined that the design flood elevation for Wagner Park would be 19.8 feet—though it did not explain how, precisely, it arrived at that figure.

[30] See document at Authority website at link: https://bpca.ny.gov/sbpc_resiliency/environmental-review/.

94. However, the Authority irrationally and arbitrarily relied on outdated projections for sea level, storm surge, and wave actions during storms, which led it to determine a DFE higher than necessary.

95. The BPCNA wrote to the Authority on July 8, 2022 to alert the Authority to these erroneous assumptions. Frick Aff. Ex. 6.

Incorrect Storm Surge Assumption

96. The Authority's Final Coastal Modeling Study, issued April 27, 2022, upon which the SBPC Resiliency Project (and the Wagner Park Project) is based, is premised on storm surge assumptions from the preliminary FEMA Flood Insurance Study Report from 2013 ("2013 FEMA FIS"). Frick Aff. Ex. 3 at 71.

97. Using the 2013 FEMA FIS figures, the Authority assumed a 100-year storm surge elevation at "about 11.3 ft." Frick Aff. Ex. 3 at 71.

98. That assumption is widely known to be exaggerated and wrong. Undertaking its own evaluation, New York City "found technical and scientific errors in FEMA's modeling that overestimate the height of flood waters during a one-percent-annual-chance flood event, the 'Base Flood Elevation (BFE),' by between 1 and 2.5 feet across the city. As a result, FEMA's modeling overestimates the size (or extent) of the one-percent-annual-chance (aka 100-year) floodplain."[31]

99. Hence in 2015, New York City appealed FEMA's Preliminary Flood Insurance Rate Maps for New York City, which was based on the 2013 FEMA FIS,[32] Frick Aff. Ex. 4.

[31] "About FEMA Flood Maps," NYC.gov, https://www.nyc.gov/site/floodmaps/about/about-flood-maps.page.
[32] https://www.nyc.gov/site/floodmaps/about/about-flood-maps.page.

100. The New York City Mayor's Office of Recovery and Resiliency deemed FEMA's storm projections "scientifically and technically incorrect." *Id.* at 1-9.

101. The City conducted its own analysis and found that the correct 1%-annual-chance (i.e., the 100-year storm) stillwater elevation for the Battery was 9.2 feet, rather than 11.3 feet. Frick Aff. Ex. 4 at 1-13 (Table 1-3).

102. Still, Gwen Dawson, VP of Real Property at the Authority, knowing about these findings after being alerted to them by the BPCNA, stated the following to the public at a Community Board 1 meeting on July 18, 2022:

> The reality is that [the project] is not based on outdated FEMA models at all. The flood protection models being used to develop the project are using existing FEMA standards which are considered the best available data.[33]

103. But the fact that these models are outdated is well understood and certainly should be well understood by a person in charge of a series of resiliency projects that are projected to cost approximately $880M. In a Department of Homeland Securities audit of the FEMA flood maps, they find a significant number—over half—of the FEMA maps are outdated.[34]

104. Under federal law, FEMA assess the need to revise and update floodplain areas every five years. The Inspector General has explained that "valid miles [on floodplain area maps] will expire every five years if not assessed."[35]

105. The Authority's use of FEMA data from 2015—seven years old—is objectively unreasonable.

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[33] https://www.youtube.com/watch?v=70lHeHu-cms; statement time stamped at 00:38:00 - 00:39:30.

[34] https://www.documentcloud.org/documents/4066233-OIG-17-110-Sep17.html, page 2.

[35] Department of Homeland Security Office of Inspector General, *FEMA Needs to Improve Management of Its Flood Mapping Programs*, Sept. 27, 2017, at 2, https://www.documentcloud.org/documents/4066233-OIG-17-110-Sep17.html.

106. In the wake of the City's appeal, FEMA and the City in 2016 "agreed that the information submitted during the appeal period should be utilized to revise the preliminary FIS study and preliminary FIRM." Frick Aff. Ex. 5.

107. Hence, the Authority's improper reliance on outdated FEMA estimates irrationally raised its DFE in the Wagner Park Plan by 2.1 feet. Frick Aff. ¶ 18.

Inaccurate Sea Level Rise Assumption

108. In addition to using "scientifically and technically incorrect" FEMA model, Frick Aff. Ex. 4, the FEIS relies on assumptions about sea level rise that contradict NASA, National Oceanic and Atmospheric Administration ("NOAA") and International Panel on Climate Change ("IPCC") sea level rise projections.

109. The Authority relied on sea level rise projections from the New York City Panel on Climate Change in the FEIS, Frick Aff. Ex. 3 at 3.2, declaring a sea level rise of 30 inches by the 2050s.

110. Even though this prediction was related to a base-line level from 2000-2004,[36] the Authority assumed a 30-inch sea level rise *from current conditions*, in 2022.

111. The Authority's model relied on the highest projection of 10 inches of sea level rise by the 2020s and 30 inches by the 2050s. Frick Aff. Ex. 3 at 3.2.

112. But that projection is wildly exaggerated relative to both NASA and NOAA's predictions.

113. In 2022, NOAA revised its sea level projections down from its prior 2017 projections, explaining:

> The 2022 scenarios build upon new research and modeling since the 2017 report, and leverage output from the Intergovernmental Panel on Climate

[36] 6 N.Y.C.R.R. 490.3 (defining the baseline level against which the sea level rises are predicted to be "the average level of the surface of marine or tidal water over the years 200-2004").

> Change's Sixth Assessment Report (AR6), which was released in 2021. Since 2017, improved observations and modeling help us get a clearer picture of how and when sea level is changing both globally and regionally. In short, the science and the scenarios are not static and will continue to evolve and change through time. The scenarios in the 2022 Technical Report are lower in the near-term decades than they were in the 2017 Technical Report because there is improved understanding of Antarctic and Greenland ice sheet dynamics."[37]

114. According to NOAA, the current sea level rise trends are at .11 inches per year, or approximately 1.1 inch per decade, 10 times smaller than the High Projections seal level rise for the 2020s upon which the Authority relied. Frick Aff. ¶¶ 25-26, Frick Aff. Exs. 6 & 11.

115. In other words, the current trend shows sea levels rising only 1.1 inch per decade in the 2020, rather than the Authority's High Projection of 10 inches by the 2020s. *See* Frick Ex. 3. Starting from 2000 and extending out to the 2050s, the current trend would suggest 5.5 inches of sea level rise by the 2050s, instead of 30 inches. Frick Aff. ¶ 26.

116. In addition, the Authority's predictions are wildly out of step with the current sea level predictions by NOAA. In 2022, NOAA lowered its sea level predictions from its past projections. As a comparison, NOAA's 2017 model predicted 2.13 ft sea level rise at The Battery by 2060 (the year immediately after the 2050s decade) for the Intermediate Scenario. However, NOAA's 2022 model predicts only a 1.71-foot sea level rise for the Intermediate Scenario by 2060; its High Scenario predicts a 2.33-foot raise, still lower than the Authority's 30-inch (2.5 feet) assumption.[38]

117. In addition to being exaggerated relative to NOAA predictions, the sea level rise predictions on which the Authority relied are also wildly out of step with sea level projections by

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[37] NOAA, Frequent Questions, February 2022, https://coast.noaa.gov/data/digitalcoast/pdf/slr-faq.pdf.

[38.] NOAA, Sea Level Rise Viewer, https://coast.noaa.gov/slr/#/layer/sce/2/-8240344.254113205/4970509.654392059/13/satellite/87/0.8/2060/interHigh/midAccretion.

NASA Frick Aff. ¶ 28 & Ex. 7 (NASA Projections: New York [The Battery][39]). NASA's predictions for 2060 range from 1.27 feet for the Low scenario to 1.70 feet for the Intermediate one, as opposed to Authority's 30 inches (2.5 feet) for 2050s.

118. NASA admits that it factored into its Intermediate, Intermediate-High, and High scenarios a number of "low confidence" processes—*i.e.*, uncertain physical processes under high-emissions scenarios. Frick Aff. ¶ 29 and Ex. 8. In other words, NASA's Intermediate to High scenarios are *designed* to examine a world of what-if's. By contrast, its lower estimates reflect the data and trends observable now. Frick Aff. ¶¶ 30-31.

119. Under NASA's higher-confidence Intermediate-Low scenario, sea levels are predicted to rise 1.47 feet (17.6 inches) by 2060.[40] Frick Aff. Ex. 7.

120. In addition, IPCC issued new projections this year that predict median sea levels around New York City will increase approximately 12 inches by 2050. Frick Aff. Ex. 9.

121. Thus, the best available data suggests a sea level rise between 5.5-17.6 inches by the end of 2050s.

122. The Authority used the "scientifically and technically incorrect"[41] FEMA model and erroneous assumptions about sea water levels to factor into its DFE, which it puts (without explanation) at 19.8 feet for Wagner Park. Frick Aff. Ex. 3 at Tables 4-1 and 4-2.

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39. NASA, Sea Level Rise for Different Seal Level Scenarios, https://sealevel.nasa.gov/task-force-scenario-tool?psmsl_id=12

40. Id.

41 City of New York's "Appeal Of FEMA's Preliminary Flood Insurance Rate Maps For New York City," June 26, 2015, P. 1-8 (pdf 18), https://www.nyc.gov/assets/floodmaps/images/content/pages/1-NYC%20FEMA%20Appeal%20FINAL%20with%20Appendices%20and%20Cover%20Letter%20062520155_web.pdf

123. Specifically, as shown in Tables 4.1 and 4-2 from the Climate Modeling Study (Frick Ex. 3), the Authority relied on an 11.3-foot storm surge figure,[42] taken directly from the outdated FEMA model), and a 30-inch/2.5-foot sea level rise (based on outdated data that at the very least should be compared to a baseline from 2000-2004, not today) to arrive at the 18.5-foot total water elevation level, above which it set its 19.8-foot DFE.

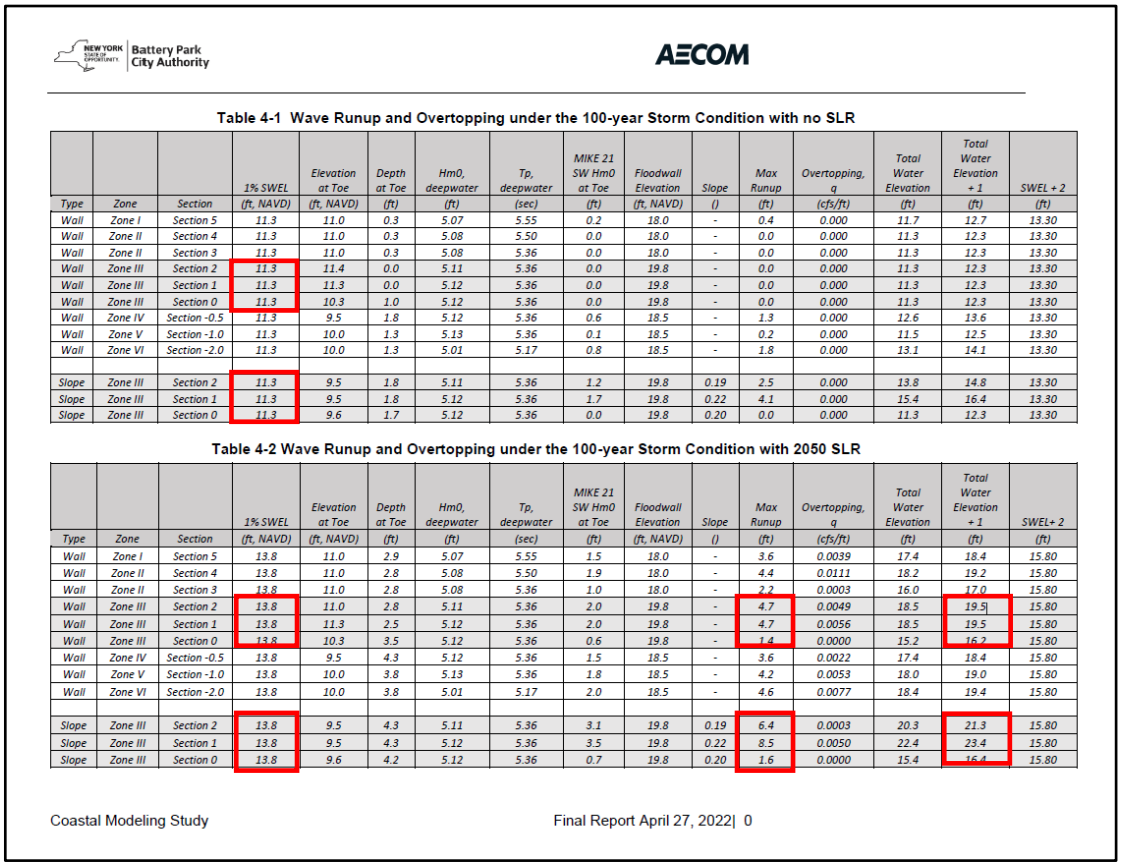

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Table 4-1 Wave Runup and Overtopping under the 100-year Storm Condition with no SLR

Type	Zone	Section	1% SWEL (ft, NAVD)	Elevation at Toe (ft, NAVD)	Depth at Toe (ft)	Hm0, deepwater (ft)	Tp, deepwater (sec)	MIKE 21 SW Hm0 at Toe (ft)	Floodwall Elevation (ft, NAVD)	Slope ()	Max Runup (ft)	Overtopping, q (cfs/ft)	Total Water Elevation (ft)	Total Water Elevation + 1 (ft)	SWEL + 2 (ft)
Wall	Zone I	Section 5	11.3	11.0	0.3	5.07	5.55	0.2	18.0	-	0.4	0.000	11.7	12.7	13.30
Wall	Zone II	Section 4	11.3	11.0	0.3	5.08	5.50	0.0	18.0	-	0.0	0.000	11.3	12.3	13.30
Wall	Zone II	Section 3	11.3	11.0	0.3	5.08	5.36	0.0	18.0	-	0.0	0.000	11.3	12.3	13.30
Wall	Zone III	Section 2	11.3	11.4	0.0	5.11	5.36	0.0	19.8	-	0.0	0.000	11.3	12.3	13.30
Wall	Zone III	Section 1	11.3	11.3	0.0	5.12	5.36	0.0	19.8	-	0.0	0.000	11.3	12.3	13.30
Wall	Zone III	Section 0	11.3	10.3	1.0	5.12	5.36	0.0	19.8	-	0.0	0.000	11.3	12.3	13.30
Wall	Zone IV	Section -0.5	11.3	9.5	1.8	5.12	5.36	0.6	18.5	-	1.3	0.000	12.6	13.6	13.30
Wall	Zone V	Section -1.0	11.3	10.0	1.3	5.13	5.36	0.1	18.5	-	0.2	0.000	11.5	12.5	13.30
Wall	Zone VI	Section -2.0	11.3	10.0	1.3	5.01	5.17	0.8	18.5	-	1.8	0.000	13.1	14.1	13.30
Slope	Zone III	Section 2	11.3	9.5	1.8	5.11	5.36	1.2	19.8	0.19	2.5	0.000	13.8	14.8	13.30
Slope	Zone III	Section 1	11.3	9.5	1.8	5.12	5.36	1.7	19.8	0.22	4.1	0.000	15.4	16.4	13.30
Slope	Zone III	Section 0	11.3	9.6	1.7	5.12	5.36	0.0	19.8	0.20	0.0	0.000	11.3	12.3	13.30

Table 4-2 Wave Runup and Overtopping under the 100-year Storm Condition with 2050 SLR

Type	Zone	Section	1% SWEL (ft, NAVD)	Elevation at Toe (ft, NAVD)	Depth at Toe (ft)	Hm0, deepwater (ft)	Tp, deepwater (sec)	MIKE 21 SW Hm0 at Toe (ft)	Floodwall Elevation (ft, NAVD)	Slope ()	Max Runup (ft)	Overtopping, q (cfs/ft)	Total Water Elevation (ft)	Total Water Elevation + 1 (ft)	SWEL+ 2 (ft)
Wall	Zone I	Section 5	13.8	11.0	2.9	5.07	5.55	1.5	18.0	-	3.6	0.0039	17.4	18.4	15.80
Wall	Zone II	Section 4	13.8	11.0	2.8	5.08	5.50	1.9	18.0	-	4.4	0.0111	18.2	19.2	15.80
Wall	Zone II	Section 3	13.8	11.0	2.8	5.08	5.36	1.0	18.0	-	2.2	0.0003	16.0	17.0	15.80
Wall	Zone III	Section 2	13.8	11.0	2.8	5.11	5.36	2.0	19.8	-	4.7	0.0049	18.5	19.5	15.80
Wall	Zone III	Section 1	13.8	11.3	2.5	5.12	5.36	2.0	19.8	-	4.7	0.0056	18.5	19.5	15.80
Wall	Zone III	Section 0	13.8	10.3	3.5	5.12	5.36	0.6	19.8	-	1.4	0.0000	15.2	16.2	15.80
Wall	Zone IV	Section -0.5	13.8	9.5	4.3	5.12	5.36	1.5	18.5	-	3.6	0.0022	17.4	18.4	15.80
Wall	Zone V	Section -1.0	13.8	10.0	3.8	5.13	5.36	1.8	18.5	-	4.2	0.0053	18.0	19.0	15.80
Wall	Zone VI	Section -2.0	13.8	10.0	3.8	5.01	5.17	2.0	18.5	-	4.6	0.0077	18.4	19.4	15.80
Slope	Zone III	Section 2	13.8	9.5	4.3	5.11	5.36	3.1	19.8	0.19	6.4	0.0003	20.3	21.3	15.80
Slope	Zone III	Section 1	13.8	9.5	4.3	5.12	5.36	3.5	19.8	0.22	8.5	0.0050	22.4	23.4	15.80
Slope	Zone III	Section 0	13.8	9.6	4.2	5.12	5.36	0.7	19.8	0.20	1.6	0.0000	15.4	16.4	15.80

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124. Under a proper analysis, the predicted storm surge in a 100-year storm is 9.2 feet (instead of 11.3), and the correct sea level rise is somewhere between 5.5 and 17.6 inches by 2050s (instead of 30 inches). Combined, these faulty assumptions suggest that the Authority's Total Water Elevation, on which DFE is based, is at least approximately 3.1 feet higher than it should be.

[42] "1% SWEL" stands for sea water elevation ("SWEL") in a 100-year storm (1%).

125. Even elected officials such as Assemblymember Charles Fall and Assemblymember Yuh-Line Niou have expressed confusion on why the Authority rested its conclusions on older models over newer projections. BPCNA Aff. ¶ 69.

Failure to account for wave action

126. The FEIS's 19.8-foot DFE for Wagner Park also fails to properly account for maximum wave runup.[43]

127. The DFE is based on the calculations contained in the Coastal Modeling Study. Frick Aff. Ex. 3.

128. As explained below, the DFE analysis in the Coastal Modeling Study failed to properly calculate the DFE for Alternate 3 (the selected design) and failed to perform any analysis for Alternate 1 to determine what DFE would be required for an inland flood wall erected in line with any part of the pavilion.

129. On December 7, 2022, Peter Glus, the Senior Vice President and Senior Project Engineer for Arcadis—the company hired by the Authority to evaluate design flood elevation issues for the *North* BPC Resiliency Project—appeared at a Community Board meeting to discuss design flood elevation issues for the North BPC Resiliency Project.

130. A video of his presentation is available at https://www.youtube.com/watch?app=desktop&v=Pi4LfOyEocI.

131. Glus was an expert who worked for the company hired by the Authority. His education, training, and experience are in civil and environmental engineering.

[43] FEMA, Glossary, Wave Runup is defined as "[t]he rush of water that extends inland when waves come ashore. Wave runup effects are computed as a part of the overland wave analysis and are added to the stillwater elevations computed from the storm surge model when developing Base Flood Elevations in coastal areas."

132. Glus stated that in order to evaluate and make valid findings for the design elevation of a project, the evaluation must consider all the landscape features because a storm wave loses power as it encounters those features. These land features include wetlands (aka grass), objects, and the distance the water travels between the time it makes landfall and encounters the flood barrier.

133. Once this evaluation is done, a physical model is developed. The physical model is used to calculate how the wave loses force to see if it is true to the scaled model. This is the process for determining maximum wave runup, which factors into the total design elevation.

134. As shown in the photographs of Wagner Park, it contains features such as raised concrete steps, raised concrete planters, trees, and a raised central lawn.

135. There is no cited information showing that the Authority complied with the criteria discussed by Glus and evaluated how the actual structures in place at Wagner Park, including the grass (aka wetlands), raised concrete steps, concrete planters, raised lawns and vegetation, would impact wave force or height—or any of the other numbers used to determine maximum wave runup.

136. Moreover, the wave height and runup depend not only on topography features but also where in relation to the shoreline the flood alignment is located (*i.e.*, inland, like Alternative 1, at the water's edge, like Alternative 2, or in between, like Alternative 3). On information and belief, these calculations were never performed for the varying Alternative proposals.

137. Similarly and equally problematic, no design flood elevation study was performed for Alternative 1 at all.

138. Thus, the Authority's rejection of Alternative 1 on the basis that it did not meet the correct DFE was based on no analysis whatsoever.

139. The Authority paid almost two million dollars for Parsons and Perkins to evaluate options, including inland options like Alternate 1. The least it could have done was run a coastal flooding model to confirm the appropriate DFE for an inland barrier and provide a reasonable basis for its decisions.

The Authority Arbitrarily Rejects the Community's Preferred Plan

140. The Authority ignored longstanding community feedback and failed to perform all evaluations in an appropriate manner.

141. Instead, the Authority used a drawn-out process to stall the community's meaningful understanding of the design while pushing through what appears to be a preordained plan that, whether coincidentally or not, was the most expensive ($221 million[44]) and profitable for its chosen construction manager, AECOM.

142. BPCNA's members asked members of the firms that originally designed Wagner Park, Lucinda Sanders, CEO and partner in Olin, and Jeffry Burchard, partner and principle at Machado & Silvetti, to do what the Authority should have but never did: Review and develop a reasonable and effective design without destroying the character and award-winning features of Wagner Park.

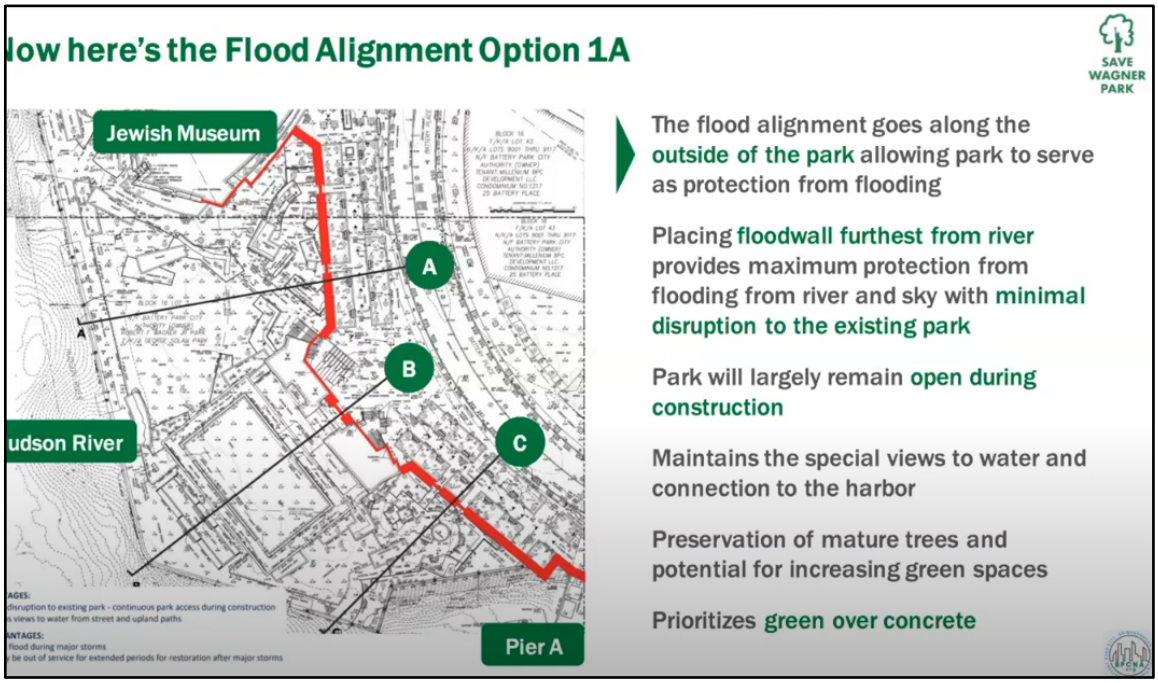
143. Sanders and Burchard graciously volunteered their time to develop ideas consistent with Alternative 1 and, on October 27, 2022, provided a presentation to the community they called Alternative 1A.

144. A video of Sanders and Burchard's October 27, 2022 presentation is available at https://www.youtube.com/watch?v=QsBnuwzYq44.

[44] BPCA Investors Relation website discusses the $221 million dollar cost for the Project at link: https://www.bpcabonds.com/bpca-investor-relations-ny/about/news/i5426?newsId=30285

145. Among other things, Sanders pointed out that (i) the Authority's description of Alternative 1 focused heavily on pop-up deployables but did not take a hard look at other solutions consistent with the concept, like a permanent inland flood wall; (iii) the FEIS did not discuss that Wagner Park was designed to flood; (ii) the FEIS never compared the amount of time the park may be out of commission if it flooded to the minimum two years it would be closed for construction under the Authority's plan; and (iv) based on the description in the FEIS, it appears that Alternative 1 was viewed through a very narrow lens. *Id.* at 25:10 - 27:00.

146. Sanders and Burchard's alternative design used a floodwall alongside the pavilion so as to preserve the lawn, as per the illustration below. *Id.* at 26:55 - 28:30.

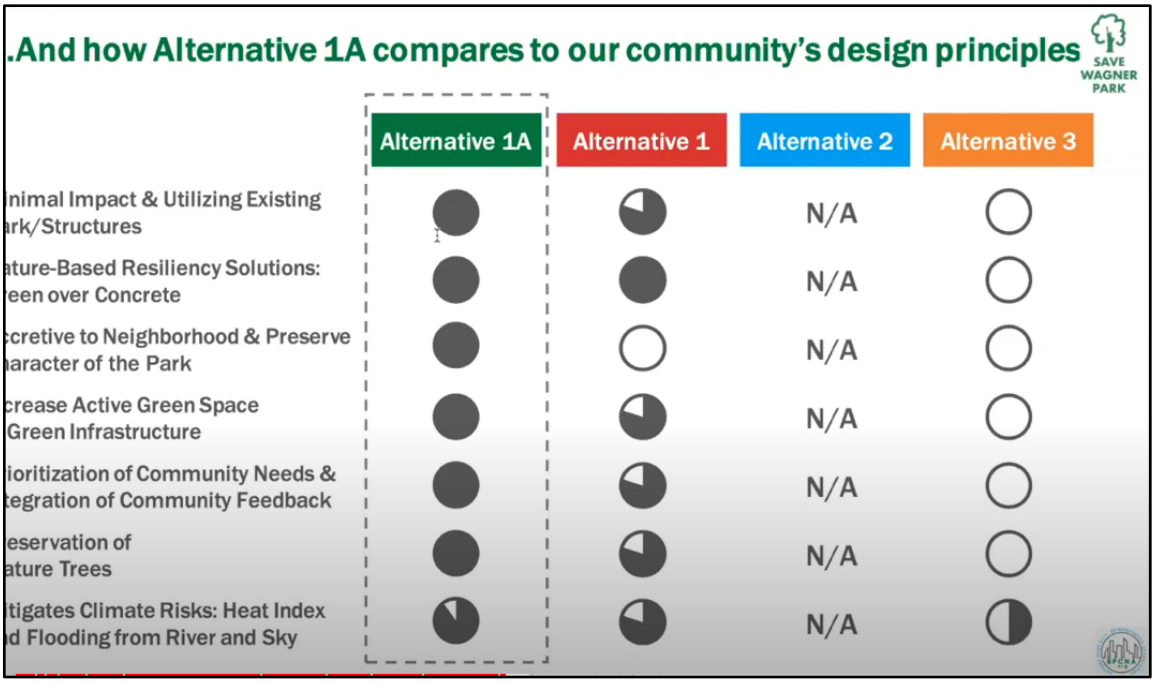


147. Sanders provided an illustration (below) comparing the Alternative 3 design (the Authority's plan) and Alternative 1A design (Sanders/Burchard concept). *Id.* at 29:05 - 30:07.

148. Sanders pointed out, among other things, that Alternative 3 requires a large amount of fill brought into the park to create buried wall, which is extremely expensive. *Id.*

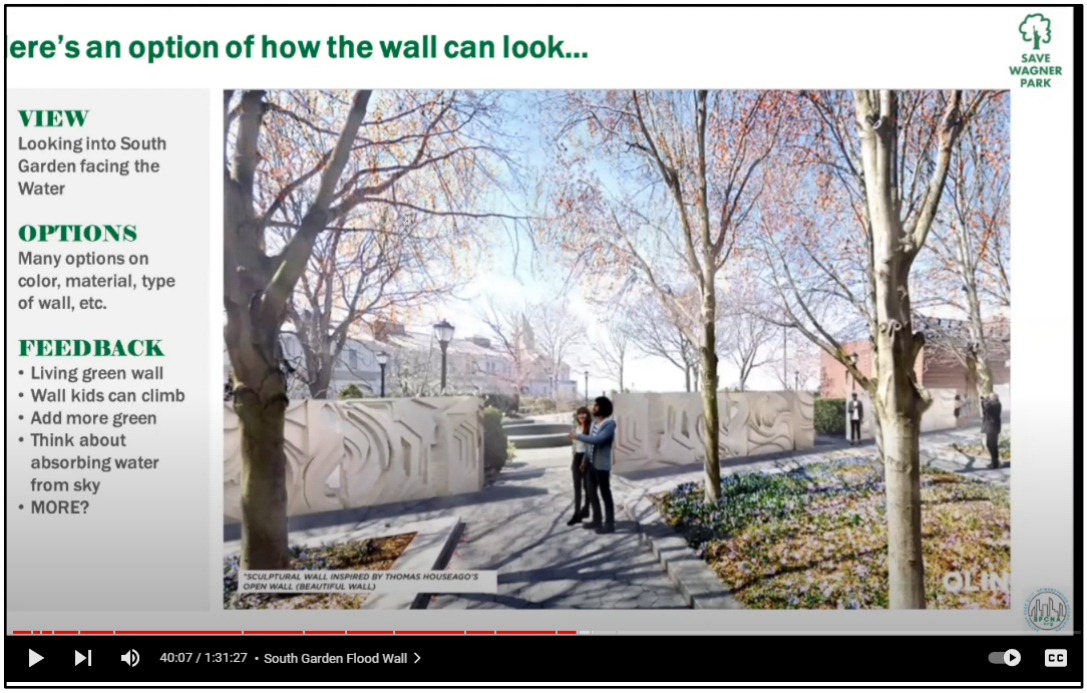
149. Sanders explained how she and Burchard had consulted with independent engineers with deep knowledge of modeling behind sea level rise and the behavior of waves as they approach a barrier, and how the closer the barrier is to the body of water, the higher the barrier has to be because the wave does not dissipate. By contrast, the further away the barrier is (as in an inland model), the lower the barrier needs to be because the wave dissipates. *Id.* at 30:07 - 31:10.

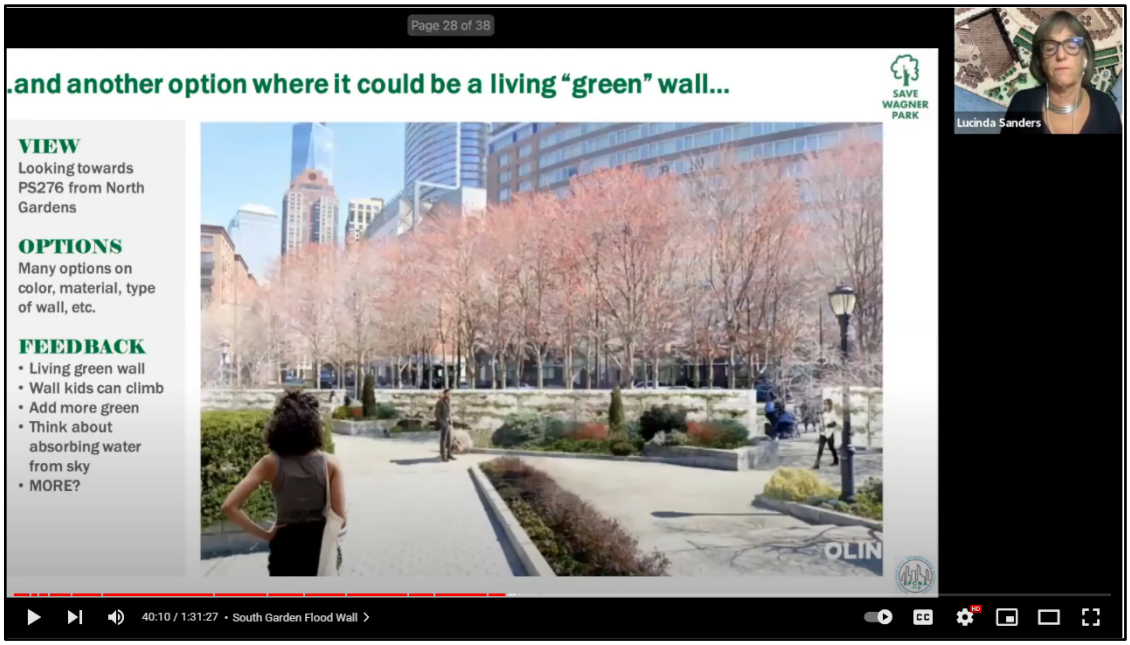
150. Sanders explained how, in a head-to-head comparison of the compared the design principles behind Alternate 1, Alternate 1A, and Alternate 3 (Authority plan), Alternative 1a better fulfills these principles while preserving the character of the park, protecting greenspace, reducing carbon footprint, and incorporating community input. She showed the slide below illustrating these conclusions. *Id.* at 32:00 - 33:30.



151. Burchard explained how their proposed floodwall could be integrated into the existing pavilion, thus maintaining the character of the structure and preserving the views, providing the below sketch to illustrate the concept. *Id.* at 35:30 - 36:27.

152. Sanders explained how the proposed wall could be permanent, with openings to the street and the park, and that the wall could itself be a piece of art. It could be a "green" wall (covered by vegetation) and could itself become a beloved feature of the park. She provided two renderings as examples (below). *Id.* at 38:40 – 40:50.





153. Overall, Sanders emphasized that the proposed design, Alternate 1A, provides a good example for how a flood wall can achieve the following:

- Leverage same design principles that the Authority claims to embrace.
- Minimal impact to the unique character of the park.
- Preservation of the heart and soul of the community.
- Preserve unique character of neighborhood.
- Integration of community feedback.
- Opportunity to increase active green spaces.
- Implementation may be faster than demolishing and rebuilding.
- Achieve adequate protection sooner.
- Prioritize green over concrete.
- Preserve mature trees and critical infrastructure to protect from increasing heat.
- Opportunities to add green to prevent flooding from increasing microburst events and flooding.

Id. at 41:25 –42:40.

154. Sanders and Burchard stated that the design is still a concept and they cannot comment on construction costs or timeline because there is much work to be done to further the process.

155. But Alternative 1a is simply an example of how an inland barrier (i.e., Alternative 1) could achieve the climate resiliency goals, protect the park, and engage with the community—all at a lower cost.

156. But instead of examining this idea, the Authority rejected an inland barrier without substantive analysis.

157. The first reason for Alternative 1's rejection—that it did not meet the required DFE—was arbitrary because the Authority's 19.8 DFE was improperly arrived at and relied on outdated and unreliable data.

158. The second reason for Alternative 1's rejection—that it used deployables is "subject to mechanical and human error," FEIS 2-8—is just as arbitrary and similarly withers upon scrutiny.

159. For one thing, an inland barrier does not *require* extensive use of deployables, as Alternative 1a shows.

160. For another, the 2017 Plan *recommended* deployables—"deployed manually" and "simple and efficient to operate"—like those in Georgetown Harbor.

161. Indeed, throughout the FEIS, the Authority relies on deployables, including at Pier A, the most vulnerable part of South 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).

162. Nowhere does the FEIS explain why the risk of mechanical and human error is unmanageable at Wagner Park but nowhere else in the South Battery Park area

The Community Faces Irreparable Harm if Wagner Park Is Destroyed

163. The Battery Park City community, many of whom are children who rely on this park, will be adversely affected by Wagner Park's two-year closure under the Authority's plan and elected officials have also expressed concerns about the impact of reduced green space and increased size of the pavilion on the community. BPCNA Aff. ¶¶ 13-16, 35, 42, 51; Affidavit of Kelly McGowan; Affidavits of Jim Thompson. Exh. 18; Affidavit of Yvette Yasui. Exh. 19; and Affidavit of Jennifer Jones. Exh. 20.

164. Moreover, once it is built, the new park dramatically reduces the lawn space and eliminates dozens of mature trees. It will take decades for those new trees to provide the same beauty and shade as the trees that are about to be destroyed by the Authority any day. BPCNA Aff. ¶¶ 14, 35.

165. Given that the Lower East Side riverfront has been closed since 2021 for its own climate resiliency projects, the closure of Wagner Park for years to come will exact a

heavy toll on lower Manhattan residents, the schools nearby and it will leave residents without sufficient open space to enjoy. To some, losing Wagner Park is a tragedy. BPCNA Aff. ¶¶ 13, 15.

166. Plus, the destruction of Wagner Park will be the permanent removal of a treasure that does not need to be lost; or, at the very least, should not be destroyed unless and until the Authority complies with SEQRA.

CAUSE OF ACTION

SEQRA/Article 7803(3)

167. Petitioners repeat and reallege each allegation contained in the preceding paragraphs as if set forth fully herein.

168. The Wagner Park Plan is an "action" under SEQRA. N.Y. Envtl. Conservation L. § 8-0105(4).

169. Respondent is an "agency" under SEQRA. *Id.* at § 8-0105(3).

170. Respondent was required to follow SEQRA in developing the Wagner Park Plan and to properly consider the environmental and community impacts of the Plan.

171. Respondent relied on incorrect and exaggerated projections for storm surge and sea level rise in selecting its plan to demolish and rebuilt Wagner Park and in rejecting Alternative 1/1-a.

172. Respondent's irrational assumptions of storm surge and sea level rise invalidate its analysis in the FEIS.

173. Respondent's failure to properly document its recognition and consideration of land features, and/or to use these variables in its design flood elevation study, including the calculation of wave runup, is another reason the invalidate its analysis in the FEIS.

174. Further, Respondent's rejection of Alternative 1/1-a was separately irrational, arbitrary, and capricious in that it relied on faulty assumptions about what an inland barrier would require and about Wagner Park's ability to withstand flooding.

175. Alternative 1a illustrates that there was an available and effective climate resilience design that was not meaningfully evaluated and/or considered.

176. Given these faulty assumptions, it cannot be said that Respondent properly took a "hard look" at areas of environmental concern and set for a "reasoned elaboration" for its determination. *Roosevelt Islanders for Responsible Southtown Dev. V. Roosevelt Island Operating Corp.*, 291 A.D.2d 40, 51 (1st Dep't 2001).

177. Accordingly, the FEIS with respect to Wagner Park should be declared invalid.

178. A preliminary injunction should be granted to halt construction based on an arbitrary and capricious FEIS that used improper data and failed to adequately consider Alternative 1/1a.

179. Petitioners are likely to succeed on the merits and they risk suffering irreparable injury if construction is not halted because Respondent is preparing to cut down numerous trees, rip up Wagner Park, and destroy the culturally-significant pavilion. The balance of equities lies in Petitioners' favor because Respondent may still build the project in the future, but must do so only after considering accurate data and taking the requisite "hard look" at all alternatives, without arbitrarily rejecting them on flimsy reasoning. Petitioners have no other remedy at law.

180. By reason of the foregoing, Petitioners are entitled to an order (i) vacating and setting aside the Final Environmental Impact Statement and the Statement of Findings regarding the South Battery Park City Resiliency Project and (ii) enjoining the Battery Park City Authority from undertaking the planned Wagner Park portion of the

Project absent full compliance with the New York State Environmental Quality Review Act.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray for the following relief:

a. An order vacating and setting aside the Final Environmental Impact Statement and the Statement of Findings regarding the South Battery Park City Resiliency Project;

b. An order enjoining the Battery Park City Authority from undertaking the planned Wagner Park portion of the Project absent full compliance with SEQRA.

c. An award of costs and attorney's fees to Petitioners; and

d. Other, further, or different relief as the Court deems just and proper.

Dated: December 12, 2022

KAUFMAN LIEB LEBOWITZ
& FRICK LLP

/s/Alison Frick
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New York, New York 10017
(212) 660-2332

Attorneys for Petitioners

VERIFICATION

STATE OF NEW YORK)

) ss.:

COUNTY OF NEW YORK)

BRITNI EREZ, on behalf of Petitioner Battery Park City Neighborhood Association, being duly sworn, is a Petitioner in this proceeding and has read the foregoing Petition and knows the contents thereof; that the same is true to her own knowledge, except as to matters therein that are stated upon information and belief; and as to those matters, she believes them to be true.

Dated: December 12 2022

New York, New York

Britni Erez

Sworn to me this

12th day of December 2022

Notary Public

ALISON E FRICK
NOTARY PUBLIC-STATE OF NEW YORK
No. 02FR6384973
Qualified in New York County
My Commission Expires 12-24-2022

This remote notarial act involved the use of audio/visual communication technology.

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

J. KELLY MCGOWAN, being duly sworn, is a Petitioner in this proceeding and has read the foregoing Petition and knows the contents thereof; that the same is true to his own knowledge, except as to matters therein that are stated upon information and belief; and as to those matters, he believes them to be true.

Dated: December 12 2022
New York, New York

J. Kelly McGowan

Sworn to me this
12th day of ~~July~~ December 2022

ALISON E FRICK
NOTARY PUBLIC-STATE OF NEW YORK
No. 02FR6384973
Qualified in New York County
My Commission Expires 12-24-2022

Notary Public

This remote notarial act was performed by audio/visual communication technology.