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. 160624/2022 (KRAUS, J.)

Mot. Seq. No. 2

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

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PRELIMINARY STATEMENT

Petitioners do not seek to substitute their own preferences for the Battery Park City Authority's, nor to undermine the Authority's goal of protecting Wagner Park from climate change. Petitioners merely seek to ensure that all viable and available plans receive adequate consideration, as SEQRA requires, so as to best protect the historic and architectural landmark that is Wagner Park. In several respects, as detailed in Petitioners' opening brief, the Authority's administrative actions fell short of that requirement. Petitioners are sufficiently likely to succeed and are threatened with irreparable harm stemming from the destruction of their neighborhood park. The Authority's desire for speedy implementation does not tip the balance of equities in its favor. A preliminary injunction should therefore be granted.

ARGUMENT

I. PETITIONERS HAVE DEMONSTRATED A SUFFICIENT LIKELIHOOD OF SUCCESS

The Authority does not dispute that Petitioners have a reduced burden of establishing likelihood of success on the merits. *See* Pet'rs Br. (Dkt. #32) at 17-18; Resp. Br. (Dkt. #74) at 8; *see generally Republic of Lebanon v. Sotheby's*, 167 A.D.2d 142, 145 (1st Dep't 1990). Under that reduced burden, Petitioners have demonstrated a sufficient likelihood of success on at least one of their claims of arbitrary and capricious decision-making.

A. The Authority's Defenses of its DFE Determination Lack Merit

The Authority's rejection of Alternative 1/1a[1] relied on an unreasonably inflated design flood elevation (DFE). *See* Pet'rs Br. at 13-15. This is so for at least three reasons. First, the Authority's estimate of storm surge elevation was based on nearly decade-old FEMA data that the City and FEMA ultimately agreed was inaccurate. *See* Pet'rs Br. at 13; Frick Aff. (Dkt. #37) ¶ 17 & Ex. 5 (Dkt. #42). Second, the Authority ignored—without explanation—recent projections of sea level rise from NOAA, NASA, and the International Panel on Climate Change, in favor of 2019 data from the New York City Panel on Climate Change. *See* Pet'rs Br. at 14; Frick Aff. ¶¶ 19-36. Finally, the Authority added a 4-foot wave run-up figure into its DFE calculation—increasing the DFE by approximately 20 percent—without providing any substantive explanation of how it arrived at that figure. *See* Pet'rs Br. at 5. Each of these deficiencies contributed to an exaggerated DFE of 19.8 feet, which in turn necessitated, according to the Authority, the selection of a buried floodwall alignment through the middle of the Park rather than the inland barrier alignment shown in Alternative 1/1a. Resp. Br. at 15.

The Authority principally responds that its preferred DFE was "required by" the New York City Building Code. Resp. Br. at 1, 5, 11. But this "requirement" went unmentioned in the final environmental impact statement—and for good reason.[2]

[1] Alternative 1a was presented on October 27, 2022 to demonstrate how the inland barrier option (aka, Alternative 1) was potentially feasible and should have been, but was not, developed and evaluated.

[2] The only mention of the Building Code appears to be a footnote buried in the responses to comments on the Draft Environmental Impact Statement. *See* Paget Aff., Ex. 5 (Dkt. #80), at 13 n.1. There, the Authority says that "Building Code and zoning requirements are based on the more conservative of the 2007 FIRMs or the 2015 PFIRMs," and that "[t]he SBPCR project has been designed accordingly." This vague language stops short of claiming that the Building Code required any particular design or DFE.

Contrary to the Authority's implication, the Building Code says nothing about whether Wagner Park or its Pavilion should be elevated to the DFE specified by the law (which relies on and incorporates the 2013 preliminary FEMA Flood Insurance Study Report).

The Building Code crucially distinguishes between residential and nonresidential buildings. *Compare* N.Y.C. Admin. Code § G304.1.1, *with id.* § G304.1.2. Nonresidential buildings are compliant when they are merely "dry floodproofed" up to the DFE, referring to "a combination of design modifications that results in the building's or structure's being water tight." *Id.* § G201.2. The Pavilion—the only building involved here—is obviously nonresidential, and the Authority has never claimed otherwise. Thus, even if the Authority's DFE were correct, the Building Code would not "require" a buried floodwall plan elevating the Park to the DFE.

The Authority further defends FEMA's 2013 study as providing the "best available" and "most recent" data on storm surge. Resp. Br. at 11. But the City itself does not even believe that FEMA's 2013 study contains the "best available" data. The City, after all, successfully appealed FEMA's findings, which effectively overestimated the DFE by 2.1 feet. *See* Pet'rs Br. at 13. As further explained on a City website the Authority cites, "The 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 . . . by between 1 and 2.5 feet across the city." *About FEMA Flood Maps*, *available at* https://www.nyc.gov/site/floodmaps/about/about-flood-maps.page; *see* Salinger Aff. ¶ 19 n.8 (citing website). The Authority's plea to defer to the City, even while the City regards the underlying data as inaccurate, therefore rings hollow. Resp. Br. at 13. Nowhere in its submissions, totaling hundreds of pages, does the Authority

meaningfully grapple with the City's rejection of the FEMA study on which the DFE depends.

The Authority also argues it would have defied "logic and reason" to use NASA, NOAA, and the IPCC's recent projections of sea level rise because the Project commenced in 2019 before those projections were issued. Resp. Br. at 12. But the SEQRA process did not *end* until fall 2022, and the Authority does not explain why the best available data would not be the most recent. The Authority falls back on the claim that it prioritized consistency across City projects, Resp Br. at 11-12, but consistency in using outdated information is no virtue. And the City itself admits in a footnote that it used more conservative estimates for some projects, undermining any reliance on consistency. Salinger Aff. (Dkt. #89) at ¶ 28 n.13.

Nor can the Authority cherry-pick the NOAA data to suggest support for its position. Resp. Br. at 12. The Authority compares NOAA's High Scenario for *2060* (2.33 feet) with the NPCC's High Scenario for the *2050* (2.5 feet). *Compare* Resp Br. 12 *with* Frick Aff. ¶ 27. This is not an apples-to-apples comparison. And while inches may not sound like much, they exponentially affect the DFE when used to calculate storm surge and wave run action.

At bottom, the Authority offers no persuasive reason to rely on data that we now know is outdated and exaggerated. While scientific unanimity is surely not a prerequisite to a valid FEIS, *see* Resp. Br. 12-13, the Authority was required, at a bare minimum, to adequately explain why it relied on outdated outliers rather than the more recent estimates of highly reputable agencies.

As for wave run-up, another component of the DFE, the Authority claims that its analysis "included detailed modeling of wave run-up." Resp. Br. at 13. Yet the cited

portions of the AbiDargham affidavit implicitly acknowledge the defect Petitioners identified: the failure to account for topography and other features of the Park as it currently exists. *See* Pet'rs Br. at 5. The affidavit concedes that "[w]ave run-up can be reduced (and thus the height required to be added to the DFE reduced) by obstacles, or attenuation features, encountered between the water's edge and the flood alignment, such as landscaping, slopes, or engineered wave attenuation measures."[3] AbiDargham Aff. (Dkt. #87) ¶ 29; *see also* Salinger Aff., Ex. D (Dkt. #93) ("Design Flood Elevation Memo") at 11 ("The height of the wave reaching a flood defense structure can vary greatly depending on the topography, vegetation and other structures located between the water and the flood defense system."); Pet'n (Dkt. #1) at ¶¶ 129-35. Despite the Authority's acknowledgment of the critical importance of these features in determining wave action, nowhere does the Authority provide any substantive explanation for how—or, indeed, *whether*—it actually accounted for the unique topographic features specific to Wagner Park in calculating the wave run-up. While Mr. AbiDargham describes how these features can theoretically affect wave action, AbiDargham Aff. ¶¶ 27-29, he does not describe whether they were part of the modeling specific for Wagner Park. Instead, he discounts "existing" attenuation features because they might "wash[] away" with time. *Id*. ¶ 29.

The Authority cites a table that simply lists the final number for "max run-up"—roughly four feet—without explanation. *See* Paget Aff., Ex. 2 (Dkt. #77). Thus, although the Authority used its wave run-up calculation to elevate the DFE by up to four feet, the factors that went into that calculation are not described in any document. The figure

[3] Notably, the Authority also concedes that its plan would result in a total reduction in lawn space of about 12%. Dawson Aff. (Dkt. #88) ¶ 55.

appears to be an arbitrarily and capriciously derived number which significantly impacted the Project.

Ultimately, the Authority contends that the entire discussion of DFE is irrelevant because it would have rejected Alternative 1 even if it had calculated a lower DFE. Resp. Br. at 13-14. But that conclusory assertion should not be credited. The Authority admits that it was the higher DFE that required it to abandon the 2017 inland barrier plan, conclude that the Pavilion must be destroyed, and reject the extensive use of deployables. Dawson Aff. (Dkt. #88) ¶ 33; *see also* Pet'rs Br. at 14-15. And, highlighting how the DFE infected the rest of the analysis, the Authority appears to acknowledge that a lower DFE would suggest a lower risk of "frequent damage to the Park."[4] Dawson Aff. ¶ 37.

As the Authority has admitted, and contrary to its current contentions, the DFE was intertwined in all of the relevant decision-making. Since the Authority relied on faulty assumptions, its actions should be annulled so it can properly re-analyze these issues. *See, e.g.*, *Save the Pine Bush, Inc. v. Common Council of City of Albany*, 188 A.D.2d 969, 971 (3d Dep't 1992) (administrative action properly annulled because it lacked "reasoned elaboration" and "proper analysis").

B. No Other Consideration Rationally Explains the Authority's Rejection of Alternative 1

Even if the DFE could be neatly separated from the other issues, the Authority's additional justifications for rejecting Alternative 1—an inland barrier that would preserve the bulk of Wagner Park as it exists today—fare little better.

[4] In the same vein, the Authority apparently concedes that its decision to destroy the Pavilion was informed by its calculation of the DFE and corresponding decision that the entire Park had to be elevated. Resp. Br. at 15-16.

The Authority claims that, regardless of the DFE, Alternative 1 would have been rejected because it would allow Wagner Park to excessively flood and overly relied on deployable measures. Resp. Br. at 15. However, the Authority's analysis of both issues was irrationally flawed.

On the first point, the Authority concedes that Wagner Park's "slope and relative elevation at its high point" offer some protection against flooding—yet those considerations were absent from the FEIS. Resp. Br. at 3. The Authority simply ignores the flood-resistant features already built into the Park, such as its thick sand base and carefully selected plants and trees. *See* Pet'rs Br. at 16. Nowhere does the FEIS describe or consider them. Finally, while the Authority criticizes Petitioners for being "willing to leave the majority of Wagner Park exposed to future storm activity," Resp. Br. at 16, the Authority has offered no explanation why an inland barrier system is inappropriate for Wagner Park when such a system is acceptable for the Authority's coastal resiliency project for nearby Rockefeller Park. Pet'rs Br. at 16.

As for deployables, the Authority acknowledges that nearby areas extensively use such measures. Resp Br. at 16. While the Authority now tries to explain why those areas are different from Wagner Park, it offered no such explanation in the FEIS. The FEIS simply asserted that deployables are "subject to mechanical and human error," Paget Aff., Ex. 4 (Dkt. #79), at 2-8, and thus unacceptable for use at Wagner Park—a patently insufficient explanation since deployables would be no more error-prone in Wagner Park than just outside it. Its claim that an inland alignment "would entail more than 50% of the Project being reliant on deployable features," Dawson Aff. ¶ 25, is a similarly unfounded assumption. As Petitioners demonstrated with Alternative 1a, it is possible to design an inland alignment that relies primarily on passive barriers, with minimal use of

deployables. *See* Pet'rs Br. at 15-16. Moreover, Wagner Park is just one piece of the overall project; nowhere does the Authority explain how using an inland alignment would mean that more than *half* of all flood protection in the overall project would necessarily be from deployables. Thus, the Authority's rejection of Alternative 1—*i.e.*, an inland alignment—was premised entirely on irrational assumptions and flawed data.

Indeed, the Authority's arguments with respect to Alternative 1a misconstrue its relevance. *See* Resp. Br. at 18-20. Petitioners did not offer Alternative 1a as a fully fleshed-out, ready-to-go engineering plan. Instead, they offered Alternative 1a (just a week after the FEIS was finalized) to illustrate the feasibility of an inland alignment—and to demonstrate the Authority's failure to adequately consider Alternative 1 before rejecting it (for example, by showing that an inland alignment would not require extensive use of deployables). That Alternative 1a lacks engineering details is therefore beside the point. Petitioners do not ask the Court to implement Alternative 1a on the ground that it "was a better alternative that the agency should have chosen," as the Authority suggests. Resp. Br. at 20. Rather, Petitioners seek only to vacate the Authority's actions on the ground that it failed to take the requisite hard look at or set forth a reasoned elaboration for its rejection of an inland barrier approach. And while the Authority is surely correct that agencies can reject "infeasible" alternatives, Resp. Br. at 14, the determination that an alternative is infeasible must be rationally supported and explained.

Ultimately, the Authority's examination of Alternative 1 lacked the "detail sufficient to permit a comparative assessment of the alternatives discussed," as required by the SEQRA regulations. 6 NYCRR § 617.9(b)(5)(v). The Authority relied on conclusory assumptions to reject Alternative 1 before doing any comprehensive analysis

or public evaluation, as required by the regulations. For example, it appears that the Authority never conducted a full benefit-cost analysis, despite FEMA's requirement that such an analysis be done for any flood mitigation project. Frick Aff., Ex. 12 (Dkt. #49) at 17. At the very least, no such analysis was performed with respect to an inland alignment, despite the Parsons Report noting that such an analysis should be "calculated for each proposed action," *id.*, and despite specific requests from community members for such an analysis, BPCNA Aff., Ex. 3 (Dkt. #56) (Community Board 1 Resolution asking for "benefit-cost analysis . . . for all options that are under serious consideration"). The Authority's refusal to provide that information is in keeping with its obscuring the real consequences of its preferred actions, such as how the lawn space would be dramatically reduced—a fact it hid from the public until *after* the deadline for public comment on the Draft Environmental Impact Statement ran. BPCNA Aff. (Dkt. #53) ¶¶ 45-46. Similarly, when community members repeatedly asked whether and how the Authority had sufficiently considered ways to *preserve* Wagner Park, it was met with silence.[5]

The Authority's complaint that *Petitioners* have not provided sufficient detail on Alternative 1a thus rings hollow: It is the Authority that failed to ever provide costs and construction time estimates for any of the alternatives. That failure is all the more notable given that the FEIS for the East Side Coastal Resiliency Project (ESCRP) provided precisely that information, for all four alternatives.[6] Only with that

[5] *See, e.g.*, BPCA, SBPCR Project Public Meeting #2, March 12, 2019, at 01:21:58 http://communitek.tv/bpca/?q=video/bpca-community-meeting-march-12-2019 (Community Board 1 Chairperson asks what "considerations were given to keep the park as it is," to which she receives no response.).

[6] East Side Coastal Resiliency Project Final Environmental Impact Statement, at Chapter 2.0-12 et seq., available at

information could the decision-maker perform the necessary hard look at all options and come to a reasoned and rational decision. Thus, that a court rejected a challenge to the ESCRP is of little relevance, contrary to the Authority's argument, Resp. Br. 16-17, because action was taken there only after the City provided a benefit-cost analysis and, in the Draft EIS, estimates of costs and construction time for each alternative. The Authority's failure to do these things stands in start contrast.

"Requiring that reasonable alternatives be discussed allows a reviewer to independently determine if the proposed action is, in fact, the best alternative for that project when all environmental factors have been considered." New York State Department of Environmental Conservation, *The SEQR Handbook, Fourth Edition, 2020*, at 117.[7] Here, the Authority foreclosed any full discussion of the inland alignment options, negating the SEQRA process. Especially considering Petitioners' reduced burden, there is a sufficient likelihood of success on their claim that the Authority's rejection of Alternative 1 was arbitrary and capricious.

II. PETITIONERS ARE THREATENED WITH IRREPARABLE HARM AND THE BALANCE OF EQUITIES TIPS IN THEIR FAVOR

Petitioners contend they face irreparable harm because the Authority is "preparing to cut down numerous trees, rip up Wagner Park, and destroy the historically significant pavilion." Pet'rs Br. at 18. To downplay the harm Petitioners will suffer absent an injunction, the Authority extols the benefits of its chosen plan. Resp. Br. at 21-

https://www.nycgovparks.org/download/escr/ESCR%20EIS_Chapter%202.0_Project%20Alternatives.pdf (Alternative 2 would require five years and approximately $445 million to complete; Alternative 3 would require 5 years and approximately $1.2 billion to complete; Alternative 4, the preferred alternative, would take 3.5 years and approximately $1.45 billion to complete; and Alternative 5 would require 5 years and approximately $1.59 billion to complete.).

[7] https://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf.

22. These alleged benefits are irrelevant. Petitioners desire, as much as the Authority does, to "protect Lower Manhattan from future storm surge and sea level rise" and to "ensure that the Park can be enjoyed by generations to come." Resp. Br. at 22. Petitioners simply seek a properly reasoned analysis of all the alternatives for achieving these goals. If construction is allowed to commence, the Park indisputably will be permanently altered (including the demolition of the Pavilion and the destruction of many mature trees). Any alternatives will then become truly infeasible, and this action will be moot. *See Green Harbour Homeonwers' Ass'n, Inc. v. Ermiger*, 67 A.D.3d 1116, 1117 (3d Dep't 2009) (collecting cases involving threatened removal of trees).

The Court should disregard the unpublished trial-court case cited by the Authority for the proposition that the destruction of trees is not irreparable harm. *See* Resp. Br. at 22-23. In the first place, the Authority did not provide a copy of this decision as required. N.Y. Cty. J. Rule 14(a). More fundamentally, this trial-court decision conflicts with the appellate case law cited by Petitioners, which the Authority ignores. *See, e.g.*, *State v. City of New York*, 275 A.D.2d 740, 741 (2d Dep't 2000); *Gramercy Co. v. Benenson*, 223 A.D.2d 497, 498 (1st Dep't 1996).

Against Petitioners' harms, the Authority seeks to balance the alleged harm of delaying a "critical flood risk reduction project." Resp. Br. at 21. Again, Petitioners share the goal of protecting Wagner Park from flooding. Any delay in implementing a particular plan to achieve that end will be insignificant when measured against the long-term nature of the project.

III. IF AN UNDERTAKING IS REQUIRED, IT SHOULD BE NOMINAL

The Court should reject the Authority's request for almost half a million dollars as an undertaking. Resp. Br. at 23-24. "It is improper to require, as a condition of a

preliminary injunction, an undertaking in an amount which would result in a denial of the relief to which the plaintiffs show themselves to be entitled." 67A N.Y. Jur. 2d Injunctions § 160. Courts have discretion in setting the bond and must account for the parties' relative financial positions. *Peyton v. PWV Acquisition LLC*, 35 Misc. 3d 1207(A), 2012 WL 1130202, at *5 (Sup. Ct. N.Y. Cnty. April 5, 2012) *aff'd*, 101 A.D.3d 446 (1st Dep't 2012).

Requiring Petitioners to post a bond anywhere near $459,000 would effectively deny them equitable relief. Petitioners "do[] not have unlimited financial resources." *Id.* Petitioner Battery Park City Neighborhood Authority is a small nonprofit organization with no operating budget or employees. Erez Aff. (Dkt. #18) ¶¶ 3-4. To date, it has raised less than $50,000 to fund this litigation and has no ability to raise hundreds of thousands of dollars. Erez Reply Aff. ¶¶ 4-5. And petitioner Kelly McGowan is retired from full-time work. *Id.* ¶ 6. That the families harmed by the threatened destruction of their neighborhood park cannot pay half a million dollars should not foreclose the vindication of their rights.

Dated: January 27, 2023
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