

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

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In the Matter of

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

Index No.

VERIFIED PETITION

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

Petitioners,

-against-

CITY OF NEW YORK,

Respondent,

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

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Petitioners, by their counsel, Advocates for Justice, allege for their Verified Petition as follows:

INTRODUCTION

1. This is a proceeding seeking declaratory and injunctive relief addressed to the decision on the part of the City of New York to deprive its citizens of the use of East River Park, first as a staging ground for its construction of a massive seawall bordering the East River in the Lower East Side of Manhattan, and permanently, by destroying the existing park and turning East River Park into a seawall, all without a vote of the New York State Legislature to allow the project. Petitioners seek to stay that construction and to nullify the vote of the NYC Council approving the project.

2. Seven years after Hurricane Sandy lifted up the ocean, the East River, and the Hudson River and inundated whole swaths of New York City, including the Lower East Side, the de Blasio Administration has won approval from the City Council for what is called the East Coast Resiliency Project, a \$1.45 billion flood mitigation plan which is addressed by this lawsuit.

3. The Plan calls for closing the 58-acre East River Park, in phases, burying it beneath eight to ten feet of landfill, and building a new park on top of it. The entire barrier would run 2.2 miles, from Montgomery Street to East 25th Street.

4. Parks are the lifeblood of our community. They are places where regular people sit, play, exercise, engage in recreation, and in East River Park, gaze at the water. The Court of Appeals, first in *Williams v Gallatin*, 229 NY 248 (1920) made it crystal clear that because of their role, only the elected state legislature may grant permission for a park purpose to be altered to a non-park purpose. The Court stated: “[N]o objectives, however worthy, ... which have no connection with park purposes, should be permitted to encroach upon [parkland] without

legislative authority plainly conferred. ... [Because the state legislature has not given its approval to NYC's plan] the legislative will is that Central Park should be kept open as a public park ought to be and not be turned over by the commissioner of parks to other uses. It must be kept free from intrusion of every kind which would interfere in any degree with its complete use for this end." The Court of Appeals repeated this theme 20 years ago in *Friends of Van Cortlandt Park vs. City of New York*, 95 NY2d623,630 (2001): "[O]ur courts have time and again reaffirmed the principle that parkland is impressed with a public trust, requiring legislative approval before it can be alienated or used for an extended period for non-park purpose."

5. The City of New York hasn't learned. Using East River Park as the staging ground for building a seawall and taking away scores of acres from the public during that process, is a non-park purpose. And recreating a park on top of a seawall is sugar-coating a non-park purpose. NYC needs to be reminded of the law once again.

PARTIES

6. Petitioners are as follow:

a. East River Park ACTION is a grassroots community group formed in June 2019 to oppose the \$1.45 billion flood control project that will demolish the entire 1.2-mile park, which is used regularly by low- and middle-income residents of the East Village and Lower East Side. The group advocates a plan that provides flood control with minimal destruction of the existing parkland and biodiversity.

b. Orchard Street Block Association is an unincorporated association created by residents of Orchard Street south of Delancey Street, including the east side of Allen and Essex Streets, on the Lower East Side of Manhattan. The group works to preserve and improve the quality of life for all residents especially working families and immigrants. It pays close

attention to large projects that impact the neighborhood and fights to ensure there is proper community outreach prior to any development.

c. Washington Square Park Eco Projects is a local group focused on education, research, and advocacy. It uses educational outreach, citizen science, social media and hands-on learning events to reach diverse audiences throughout New York City. The organization forms partnerships and helps people think about parks differently as they learn how small urban parks benefit plants, animals, people, and biodiversity.

d. New York Climate Action Group is an unincorporated association of New York City residents committed to achieving NYC's goal of reducing greenhouse gas emissions 80 percent by 2050.

e. No Spray Coalition, Inc. is an unincorporated association of New York City residents who organize on a grassroots level and in the courts to prevent the spraying of pesticides, including in East River Park, and participate in anti-pesticide struggles elsewhere.

f. Common Ground Compost LLC is an organization dedicated to bringing about the reorganization of recycling in New York City. Working with businesses, it engages in program design, setup and management, waste audits and analysis, waste collection, leftover food recovery and donation, organics collection and processing. It also educates business employees and staff about sustainability initiatives and has programs in East River Park.

g. The North Avenue A Neighborhood Association is a block association concerned about quality-of-life issues for residents along Avenue A from St. Marks Place to 14th Street.

h. 4th Street Food Co-op is a co-operative organization, located at 58 East 4th Street, which is run and supported by its members to purchase fresh fruit, vegetables, and other produce. Many of the Co-op's members utilize East River Park.

i. The Masters of Succession (MoS) Collective is an informal collective of permaculture practitioners, who create activities and products that benefit the air, water, soil and community. The group's innovative bioremediating activities and products symbiotically connect into a spiraling beneficial economic system. Many of its activities are carried on in East River Park.

j. Cuala Foundation is a not-for-profit cooperative led by artists who believe that the measure of a society is how it takes care of its people and its land. The organization works collaboratively to develop new systems of self-care with youth and communities on the Lower East Side. Use of East River Park is integral to its programs.

k. Village East Towers Emergency Preparedness Task Force is a subsidiary of the Village East Towers, a 434-unit Mitchell-Lama co-op at Avenue C and East 10th Street in Manhattan, which is in the Federal Emergency Management Agency's "Super Flood Zone." The Emergency Task Force was created to assist vulnerable residents and to formulate plans for future emergencies.

l. 9BC Tompkins Square Block Association is a 501(c)3 corporation that provides an online platform for the residents of the 600 block of East 9th Street in Manhattan to be kept abreast of concerns that impact on the lives of local residents. At a December 5, 2019 meeting held at Trinity LES Lutheran, the members present voted to sign on to this Article 78 proceeding since they were concerned about the ramifications of the proposed East River Coastal Resiliency Plan and how it will impact on lives of nearby residents.

m. National Mobilization Against Sweat Shops (NMASS) is a multi-trade, multi-racial workers' center with a membership that unites workers (immigrants and citizens) to stand up against the exploitation that they face where they work and where they live. NMASS organizes workers to fight against sweatshop conditions like wage theft and long hours. With a drop-in center in the Lower East Side, NMASS fights against displacement in the community, prioritizing the passage of the Chinatown Working Group Rezoning Plan to protect all workers in Chinatown and the Lower East Side. Many of its members use East River Park.

n. Double Dragon Coaching is an organization located at 430 East 9th Street in Manhattan that provides corporate training and consulting for workplace culture development. Its mission is to create better leaders, teams, and organizations. Many of its coaches and trainees utilize East River Park.

o. The Bowery Alliance of Neighbors is a nonprofit grassroots organization located at 184 Bowery in Manhattan, which works to protect residents, small businesses, the neighborhood, and the historic character of the Bowery and the surrounding community. The organization also advocates for similar causes in other areas of New York City and supports the work of outside groups.

p. Rena Anastasi, Andrei Anikin, Sarah Anikin Hospodar, Pat Arnow, Valerie Barnes, Hope Beach, Amy Berkov, Ilona Bito, Rita Bobry, Anne Boster, Wendy E. Brawer, Mark Breeding, Jack Brown, Eva Buchmuller, Mary Jo Burke, Maryanne Byington, Judith K. Canepa, Danielle Chu, Alison Colby, Kenneth Colosky, Catherine Cullen, Meredith Danberg-Ficarelli, Shawn Dahl, Marie de Cenival, David Eisenbach, George Evageliou, Sarah Flores, Donald Gallagher, Elizabeth Gaynor, Lenore Goldstein, Dale Goodson, Harriet Hirshorn, Kate Horsfield, Audun Huslid, Fannie Ip, Elissa Jiji, Leslie Kramer, Charles Krezell, Jonathan

Lefkowitz, Virginia Liebowitz, Tommy Loeb, Peter Madden, Camille Marlow, Laurieanne Marrell, Ana Marton, Elizabeth D. Maucher, Katheryn May, Eva McCloskey, Susan McKeown, Daniel Meyers, Deborah Mills, Bruce Morris, Brooke Myers, Indrani Nicodemus, Theodore Pender, Richards Perry, Antonio Queylin, Carolyn Ratcliffe, Joan Reinmuth, Wendy Rubin, Gregory Schwedock, Justin Shaddix, Trudy Silver, Mariah Stancarone, Daniel Tainow, Amanda Udell, Rebecca A. Vaughan, Nina Watkins, Alexia Weidler, Victor Weiss, Sally Young, and Egon Zippel are residents of the East Village and Lower East Side who are regular users of East River Park.

q. Loyan Beausoleil, Steven Carbo, Mitchel Cohen, J. Patricia Connolly, Emma Fitzsimmons, Rita Freed, JoAnn Fynke, Presleigh Hayashida, Frank Laub, Andrew Lawrence, Bruce L. Mishkin, Veronica Olivotto, Lauren Pohl, Phoebe Quin, Barbara Ross, and Clifton Smith are New York City residents who are regular users of East River Park.

STATEMENT OF RELEVANT FACTS

6. The John V. Lindsay East River Park (East River Park) is a 45.88-acre park located along the waterfront of the Lower East Side of Manhattan.

7. The facilities of the park include barbecuing areas, baseball fields, basketball courts, soccer fields, football fields, tennis courts, bicycling and greenways, fitness equipment, fishing, playgrounds, running tracks, and an amphitheater.

8. The NYC Park Department web site describes East River Park as follows: “One of New York City’s finest places to play can be found along the waterfront of Manhattan’s Lower East Side, in view of the Manhattan and Brooklyn Bridges. With a track, a tennis complex, eight baseball and softball fields, and fields and courts dedicated to soccer, football, and basketball, as well as its dramatic views of New York’s harbor, John V. Lindsay East River

Park is a popular place for your next game. The park is also a vital link on Manhattan's Waterfront Greenway and offers beautiful waterfront pathways for bicyclists and pedestrians to enjoy.”

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

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

11. East River Park has undergone many changes since then. In 1949, when the FDR Drive was widened, a portion of the park between Montgomery and Jackson Streets was eliminated. South Street was extended in 1963, protruding onto another 30-foot section of the park. The 10th Street pedestrian overpass above the FDR Drive was completed in 1951, connecting the park with residents of the East Village and the neighboring Lillian Wald Houses. (<https://www.nycgovparks.org/parks/east-river-park/history>)

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

13. The City Council passed a law in 2001 to rename the park as John V. Lindsay East River Park. The legislation honors the City's 103rd mayor, who served in office from 1966 to 1973. The renaming took place on the first anniversary of the former mayor's death. (<https://www.nycgovparks.org/parks/east-river-park/history>)

14. In the 1990s extensive renovations took place throughout the park and included the opening of the 10th Street comfort station and the Brian Watkins Tennis Center. After the 9-11-2001 attack, millions of dollars were allocated to further repair of East River Park. The most recent upgrades to East River Park include handicapped accessibility for the Fireboat House and renovations to four of the park's ball fields. The seawall, renovated for the first time

since its completion in the 1930s, offers views of the East River. Additional upgrades include the Park's synthetic turf soccer field and basketball court. These upgrades were completed in 2010. (<https://www.nycgovparks.org/parks/east-river-park/history>)

15. East River Park is a vital link on the East River Esplanade, a series of connected parks and pedestrian paths that form part of a nearly uninterrupted greenway around the shoreline of Manhattan. The Esplanade's expansion includes the transformation of Pier 42 to the south of East River Park from an unused shipping terminal into a recreational facility. East River Park continues its role as one of the largest waterfront parks in Manhattan, offering a variety of active and passive recreational purposes. (<https://www.nycgovparks.org/parks/east-river-park/history>)

16. The neighborhood around the East River Park is a low- to moderate-income area, and the neighborhood's residents rely on the park for recreation and fishing.

17. In October 2012, Superstorm Sandy made landfall in New York, causing extensive flooding along all of New York City's waterways, including the East River. The flooding caused massive infrastructure damage, particularly on Manhattan's East Side, where a large number of NYC Housing Authority developments exist.

18. In response to the storm, the City began brainstorming plans to protect the City from future flooding. With respect to the Lower East Side (Manhattan south of 23rd Street) over a period of five years, the New York City Council met with community groups to create a flood protection plan for the East River Park. The community's plan involved flood walls, berms, and a resilient parkland that could recover quickly from storm surges.

19. In October 2018, the City Council introduced a new plan, without community input, at a cost of \$1.45 billion, almost doubling the cost of the original proposed plan which had met with community support, and which did not involve intrusion on East River Park.

20. The proposed plan, which has now been adopted, calls for elevating East River Park by eight feet in order to make it serve as a barrier to coastal storms and flooding. Under this plan, the entire East River Park is anticipated to be closed for some portion of the next 3.5 years while construction takes place.

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

22. The design elements of the project include:

a. Installing a below-grade flood protection structure running parallel to the existing East River Park bulkhead and elevating most of the park.

b. Reconstructing the Tennis House, Track and Field House, and East 10th Street comfort station.

c. Reconstructing the East River Esplanade to increase the deck elevation to match the newly raised park.

d. Building a new shared-use flyover bridge connecting the north end of East River Park with Captain Patrick J. Brown Walk.

e. Reconstructing the Corlears Hook Bridge over FDR Drive and replacing the existing Delancey Street and East 10th Street Bridges.

f. Relocating the two existing embayments (coves) in the Park.

g. Relocating the Park's water and sewer infrastructure.

23. The proposed plan also requires the removal of 991 trees from the Park as well as the destruction of other plant life and flowers in the Park, including echinacea, bluebells, and milkweed, which attracts monarch butterflies. As a mitigation, the City says it will plant 1,815 new trees as part of the landscape redesign.

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

25. Under the proposed plan, not only would East River Park be closed, Murphy Brothers Playground, Stuyvesant Cover Park, Asser Levy Playground, and a portion of Captain Patrick J. Brown Walk would also be closed during construction.

26. To “mitigate” the effects of closing the Park, the City is proposing to accommodate youth permit users within existing facilities under NYC Parks jurisdiction and working with other entities with open space resources, such as those under control of the NYC Department of Education, and NYC Housing Authority, to identify additional recreational resources that can be opened during construction.

27. The City also proposes keeping playing fields at other parks on the Lower East Side open later, improving turf at seven park locations, and updating playgrounds and park equipment at other parks in the city.

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

29. The Plan was also responded to by State Senator Brad Hoylman and Assembly member Harvey Epstein, whose districts abut parts of East River Park, with an admonition that the project involved “park alienation” and could not move forward without approval of the State legislature. See Exhibit A.

30. In response to community outrage, the City proposed an amended plan in October 2019, which calls for phased destruction and reconstruction of the Park, rather than a complete closure. Approximately 40% of the Park is to remain open at a time.

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

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

31. Closing the East River Park, whether completely or in phases, will deny Petitioners, members of the Plaintiff organizations, and all New Yorkers access to greenspace and facilities in New York City parkland. Furthermore, the closure will disproportionately affect low-income New Yorkers who live the neighborhood around the Park.

32. The City claims there will not be a significant adverse noise affect across the neighborhood and that the noise levels will generally be in line with the range typical for Manhattan and the Lower East Side area. However, a three-to-five-year ongoing construction project will involve pile driving for the seawall and is likely to increase noise pollution for the residents of the neighborhood.

33. While the project is intended to last for three to five years, prior construction on the Park to fix damaged bulkheads along the waterfront took six years rather than the proposed two. Construction estimates for projects such as this are notoriously bad.

34. Despite the lack of approval from the State Legislature, and significant community opposition, the NYC Council approved the Resiliency Plan on November 14, 2019. This vote was the final approval following a process involving the Uniform Land Use Review Process (ULURP). The project also underwent an Environmental Impact Study under the State Environmental Quality Review Act (SEQRA), with a Final Report issued in around September 2019.

35. The first steps towards commencing the project are underway. Contract proposals are being sought, and the closing of the Parks' recycling Center is imminent.

LEGAL ARGUMENT

A. THE PUBLIC TRUST DOCTRINE REQUIRES NEW YORK CITY TO RECEIVE STATE LEGISLATIVE APPROVAL IN ORDER TO PROCEED WITH THE EAST SIDE COASTAL RESILIENCY PROJECT.

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

parkland is impressed with a public trust, requiring legislative approval before it can be alienated or used for an extended period for non-park purposes”) (internal citations omitted).

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

“We begin analysis with two points of agreement by the parties: that this water treatment plant is a non-park use, and that *Williams v Gallatin* (229 NY 248) is controlling precedent.

In *Williams*, a taxpayer sought to enjoin the New York City Commissioner of Parks from leasing the Central Park Arsenal Building to the Safety Institute of America, arguing the transaction was “foreign to park purposes” (*id.*, at 250). The lease was for a 10-year term, cancellable if the City needed the property for park use. In prohibiting the lease, this Court explained that a park is a recreational pleasure area set aside to promote public health and welfare, and as such:

‘no objects, however worthy, ... which have no connection with park purposes, should be permitted to encroach upon [parkland] without legislative authority plainly conferred. ...’

‘The legislative will is that Central Park should be kept open as a public park ought to be and not be turned over by the commissioner of parks to other uses. It must be kept free from intrusion of every kind which would interfere in any degree with its complete use for this end” (*id.*, at 253-254).’

In the 80 years since *Williams*, our courts have time and again reaffirmed the principle that parkland is impressed with a public trust, requiring legislative approval before it can be alienated or used for an extended period for non-park purposes (*see, Miller v City of New York*, 15 NY2d 34, 37 [20-year lease]; *Incorporated Vil. of Lloyd Harbor v Town of Huntington*, 4 NY2d 182, 190; *Matter of Ackerman v Steisel*, 104 AD2d 940, 941 [2d Dept] [storage of sanitation vehicles and equipment], *affd* 66 NY2d 833; *Stephenson v County of Monroe*, 43 AD2d 897 [4th Dept]; *Aldrich v City*

of New York, 208 Misc 930, 939 [Sup Ct, Queens County], *affd* 2 AD2d 760 [2d Dept]; *Matter of Central Parkway*, 140 Misc 727, 729 [Sup Ct, Schenectady County]; *contrast*, *795 Fifth Ave. Corp. v City of New York*, 15 NY2d 221, 225 [Park Commissioner properly determined that a café and restaurant could be constructed in Central Park where the project furthered park purposes]).

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

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

Bates v Holbrook (171 NY 460, 465-468) --which predated *Williams*--is also instructive. There, the City Department of Parks permitted construction of storage buildings on parkland in connection with a subway project. Because the Legislature allowed the Department to grant “temporary privileges” for use of park property to facilitate construction, defendants urged that the structures were authorized. This Court disagreed, concluding no “direct legislative authority” warranted invasion of the park (*id.*, at 467). Structures could not be considered “temporary” when “authorized to remain until the completion of the work” on a project that would take at least three years (*id.*, at 468).

Here, the public will be deprived of valued park uses for at least five years, as plant construction proceeds. While there may be “de minimis” exceptions from the public trust doctrine, the magnitude of the proposed project does not call upon us to draw such lines in this case.”

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

38. In *SFX Entertainment, Inc. v. City of New York*, 2002 WL 1363372 (NY County 2002) Judge Bransten held that the City violated the public trust doctrine by failing to obtain legislative approval to execute a 35 lease for a concert amphitheater that authorized “substantial use of parkland for non-park purposes.” The amphitheater took up 10 acres of the 341 available acres of Randall’s Island parkland. The court found that because members of the public would have to pay a significant fee to use this portion of the park, it would be closed seven months out of the year, and enjoyment of the park area around the amphitheater would be diminished because of the crowd attending events, the amphitheater constituted use of parkland for non-park purposes and required legislative approval.

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

Petitioners urge that legislative approval is required here because the Amphitheater Project is effectively a 35-year lease of parkland to a private entity. They contend that the land is being used “for a purpose wholly inconsistent with its traditional status as free and open parkland; namely, a permanently constructed concert amphitheater with fixed seating for nearly 20,000 people to be used for commercial concert and entertainment events, and not for any free and open public recreational use.” *See*, Petitioners' Brief, at 12. Petitioners further assert that legislative approval is warranted because the 20,000-person amphitheater, with its resulting traffic and congestion, would impede use and enjoyment of surrounding parkland as well.

Respondents, by contrast, maintain that because the Amphitheater Project does not result in *alienation* of parkland—the concession simply involves the grant of a revocable license—legislative approval is unnecessary. Additionally, they argue that the license merely permits Quincunx to construct, use, operate and manage a concert

facility and entertainment venue, which is “a traditional undeniably park-related use.” ...

Again, petitioners have the better argument.

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

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

York, supra, 95 N.Y.2d, at 631. Nonetheless, our State's the highest court held that the 10-year “use” for other than park purposes required legislative approval.

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

40. The issue here not only involves the period of construction, it also involves the post-construction period, when the park is being “restored” and used both as a sea wall and a park. Hereto the decision in *Friends of Van Cortlandt Park* is instructive:

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

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

41. The requirement of legislative action is necessary despite the public benefit that the intrusion is supposed to provide. In *Williams Gallatin*, 229 N.Y. 248 (1920) the Court of Appeals held that a 10 year lease of the Central Park Arsenal Building (a largely office structure housing Parks Department Offices) to the Safety Institute of America required legislative approval. The court found that “no objects, however worthy. . .which have no connection with

park purposes, should be permitted to encroach” on the park without prior legislative approval. Further, Central Park “must be kept free from intrusion of every kind which would interfere in any degree with its complete use” as a public park. In the case of East River Park, protecting the contiguous community from storm surges and flooding is a worthy endeavor, but shutting down more than half the park to do so would greatly interfere with its use as a public park and would require approval.

B. BECAUSE ALIENATION MUST PRECEDE THE ULURP PROCESS, THE CITY CANNOT RELY ON THEIR PREMATURE ULURP APPROVALS

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

INJURY

43. The loss of any part East River Park to the Resiliency Project would constitute irreparable injury to Petitioners and to the community they represent.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray that this Court:

1. Enter and Order and Judgment, and provide for temporary injunctive relief if required, enjoining the City from proceeding with the East Coast Resiliency Plan,
2. Enter and Order and Judgment declaring that the vote of the City Council approving the Plan on November 14, 2019 be declared null and void, and the ULURP process must be recommenced at whatever date, if any, that legislative approval is given, and that the SEQRA EIS be reopened; and
3. Enter and Order and Judgment awarding attorneys' fees and costs, and such other and further relief as is just and equitable.

Dated: New York, New York
February 5, 2020

ADVOCATES FOR JUSTICE
Attorneys for Petitioners

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VERIFICATION

Arthur Z. Schwartz, an attorney at law duly admitted to the Bar of the State of New York, and attorney for Petitioners, based upon my own knowledge, information, and belief, verifies that the aforestated Petition is true.

Dated: February 5, 2020

/s/
ARTHUR Z. SCHWARTZ