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Petitioners-Appellants-Respondents The City Club of New York (the "City Club"), Robert Buchanan, and Tom Fox (collectively, "Petitioners") submit this memorandum of law in support of their appeal.

PRELIMINARY STATEMENT

Seduced by the promise of a glamorous new project, the Hudson River Park Trust ("HRPT") has disregarded basic principles of law.

Pier 55 is a proposed island in the Hudson River Park Estuarine Sanctuary along Manhattan's western shore. The physical support for this 2.7-acre structure would be provided by 547 steel and concrete piles driven into an environmentally sensitive section of the Hudson River. The legal support for the project rests upon two key deceptions.

HRPT's first act of legerdemain is its claim that Pier 55 is a "reconstruction" of the old Pier 54. Pier 54 was a historic structure designed to move people and goods on and off ships, recognized by the Legislature for its rich maritime history. Pier 55 is a diamond-shaped entertainment platform with undulating, landscaped hills, three performing arts venues, a producer, and a director. HRPT allowed Pier 54 to crumble into the River instead of preserving its connection to the past as planned. Pier 54 is gone, and, as the Supreme Court correctly found, HRPT is "highly unlikely" to rebuild it. And HRPT has forsworn any plans to rebuild Pier 54 for the very same reasons it wants to build Pier 55: It thinks Pier 54 was an

inadequate performance venue, and it does not have enough money to rebuild a replacement without catering to the wishes of a donor. Pier 55 is a totally new project, catering to the wishes of a donor with a particular vision for how a public resource—the Hudson River—should be developed. That vision is a radical departure both from Pier 54 and from current conditions.[1]

The second false conceit is that the usual rules do not apply to Pier 55 because it is a "gift" that warrants special treatment. Barry Diller has in fact promised HRPT a gift—a very large gift—to build Pier 55. But HRPT has also promised at least $17 million in public funds in return and made many other commitments of public resources. In reality, Mr. Diller's gift is a gift that keeps on giving back to him, in the form of a commercial lease that provides thirty years of total control over public land just down the street from his office building, along with perpetual naming rights and a perpetual commitment of public funds for structural maintenance, all in exchange for one dollar in annual rent. Pier 55 may depend upon a private donation, but it is ultimately a massive 2.7-acre public works project that demands the same rigorous scrutiny as any other.

As this Court likely recognized when it found Petitioners likely to succeed on the merits and granted a preliminary injunction pending appeal, HRPT chose to

[1] Images found in the Joint Appendix and in the record capture the stark differences between Pier 55 and current conditions, and between Pier 55 and Pier 54. *See, e.g.*, A2735, 3035. Petitioners encourage the Court to view these images.

cut corners rather than follow the law. The court below erred in failing to require HRPT to conduct the proper environmental analysis and adhere to the proper bidding procedures.

First, HRPT manipulated its environmental assessment to avoid confronting Pier 55's true impact. Because HRPT is "highly unlikely" to rebuild Pier 54, as the Supreme Court found, it cannot use the reconstruction of Pier 54 as the baseline for its environmental analysis. The site of the Pier 55 project is open water, and the impact of Pier 55 must be compared to open water. This comparison requires an Environmental Impact Statement ("EIS") because there will be significant adverse environmental impacts by HRPT's own admission. The Supreme Court erred by allowing HRPT to avoid an EIS; by reaching beyond the record to offer its own self-generated analysis of environmental impact rather than remanding the matter to HRPT; and by allowing HRPT to gloss over the cumulative impact of Pier 55 and the adjacent, simultaneous redevelopment of Pier 57.

Second, the 165-page lease (the "Lease") between HRPT and PIER55, Inc. ("PIER55"), an entity controlled by Mr. Diller, is at bottom a commercial lease that required a request for proposals ("RFP"). HRPT's regulations mandate public bidding for "*any lease*" involving a capital expenditure over $1 million. The Supreme Court deemed HRPT's regulations unenforceable because HRPT retains discretion to choose the winning bidder. But the same is true of virtually every

enforceable public bidding law. This self-invented basis to deny public bidding was plain error and corrosive of the public policy favoring transparency and competition for public resources. The PIER55 Lease involves tens of millions of public dollars, so it demands an RFP. There is no exception for lessees controlled by wealthy donors, and this Court should reject HRPT's invitation to create one.

Finally, Pier 55 violates statutory restrictions on construction and use in the Estuarine Sanctuary because Pier 55 is not a "reconstruction" of Pier 54. HRPT concealed the existence of PIER55, the Diller gift, and the design of Pier 55 from the Legislature while asking the Legislature to approve a "reconstruction" of Pier 54. The fact that HRPT felt the need to deceive the Legislature confirms what an ordinary English speaker would know: A futuristic island with three performance venues is not a "reconstruction" of a working historic pier in a different location.

Throughout this litigation, Respondents have characterized Pier 55 as "iconic," "spectacular," and "unlike any other," while noting that various public officials and community groups support the project. Governor Cuomo has even released a statement, addressed directly to this Court, stating that he wants Respondents to win this case.[2] These claims are designed to further the false narrative that Petitioners are self-serving obstructionists, blocking a desirable public amenity to serve their own private ends. In truth, Respondents alone are

[2] *See* Joel Stashenko, *Panel Temporarily Halts Hudson River Floating Park*, N.Y.L.J., July 8, 2016, at 1.

responsible for their violations of state law. To the extent Pier 55 is in jeopardy, it is because HRPT chose to cut corners at every step of the process, not because Petitioners stepped forward to demand accountability in a public agency's use of public land and public money.

If HRPT wants to lease away land north of the old Pier 54 and build something radically new and different in a protected public waterway, it needs to prepare an EIS, issue an RFP, and obtain proper legislative authorization. Because HRPT did none of these, Pier 55 is unlawful, and the Supreme Court's decision approving it should be reversed.

QUESTIONS PRESENTED

1. *Is the Hudson River Park Trust "highly unlikely" to rebuild Pier 54 in the reasonably foreseeable future?*

   The lower court did not err in finding "yes."

2. *Can an environmental assessment satisfy SEQRA if it is based entirely upon a "no action" alternative that is "highly unlikely" to occur?*

   The lower court erred in answering "yes."

3. *Where SEQRA requires a cumulative impact study, does it suffice for the lead agency to assess only one area of environmental concern?*

   The lower court erred in answering "yes."

4. *Can a public agency ignore the legal requirement to hold a public bidding process before leasing away public land because the lessee is controlled by a donor?*

   The lower court erred in not answering this question but holding *sua sponte* that public bidding rules are unenforceable if an agency retains discretion to select the winning bid.

5. *Is a new structure a "reconstruction" of an old structure when they are in different locations, have different names, are structurally and architecturally dissimilar, and are designed for different functions?*

   The lower court erred in answering "yes."

6. *Does a park performance venue comply with the requirement that uses of the Hudson River Park Estuarine Sanctuary be water dependent?*

   The lower court erred in answering "yes."

7. *Does the public trust doctrine require that the Legislature clearly authorize the alienation of state-owned parkland?*

   The lower court erred in answering "no."

FACTS

The Hudson River Park Act Creates the Park and HRPT

In 1998, the New York State Legislature passed the Hudson River Park Act (the "Act"), N.Y. Unconsol. Law § 1641 *et seq.*, and established the Hudson River Park (the "Park"). The Park today contains approximately 550 acres of land and water along the western shore of Manhattan from 59th Street to Battery Park. A2708 ¶ 4. An EIS released in 1998 (the "1998 EIS") analyzed the environmental impact of the Park as a whole. A114-1026.

Under the Act, the Park's "water section" includes all of the area within the Park west of the Manhattan shore, except for the piers as they existed on the effective date of the Act. N.Y. Unconsol. Law § 1643(*l*). Recognizing that "[t]he area of the Hudson [R]iver within the [Park] is an important habitat for many marine and estuarine species including striped bass," the Act designates the "water section" of the Park as an Estuarine Sanctuary, subject to various restrictions set forth in the Environmental Conservation Law, in the Act, and in an Estuarine Sanctuary Management Plan ("ESMP") developed by HRPT. *Id.* § 1648(1). The Act provides that "[o]nly water dependent uses shall be permitted in the Estuarine Sanctuary," *id.* § 1648(3)(a), and restricts construction in the Estuarine Sanctuary, *id.* § 1648(3)(b).

The Act also created HRPT, a nonprofit public benefit corporation, and vested HRPT with authority over the planning, construction, operation, and maintenance of the Park. N.Y. Unconsol. Law § 1645(1); *see also id.* § 1646. The Act authorizes the Trust to promulgate regulations as necessary to carry out its duties. *See id.* § 1647(1)(d)(ii). The Act forbids the alienation of any property within the Park, except by a lease or license consistent with the Act or as otherwise authorized by the Legislature. *See id.* § 1647(3)(c). Pursuant to the Act, "[i]t is intended" that HRPT will generate revenue to sustain itself and to fund capital projects "to the extent practicable." *See id.* § 1642(e).

The Historic Pier 54 Falls into Disrepair, and HRPT Does Not Rebuild It

Pier 54 is located within the Park just south of West 13th Street. A1653. It is an historic pier that played a central role in New York's maritime history. The *Lusitania* embarked on its fateful final voyage from Pier 54, and the survivors of the *Titanic* disaster returned to shore at Pier 54. A1144. Pier 54 is marked by the iconic iron arch of the White Star Line, which still stands today. A1749.

In recognition of Pier 54's historic significance, all of the original plans for the Park—including the 1998 EIS, the Park's General Project Plan, and the ESMP—dedicated Pier 54 to the celebration of the rich maritime history of Manhattan's West Side waterfront and to the docking of historic vessels. *See* A1137; A114, A115, A164; A2931. By providing that the Park would be

developed in accordance with the General Project Plan, the Act itself provides that Pier 54 be used for historic preservation. *See* N.Y. Unconsol. Law § 1647(8). Notwithstanding the General Project Plan, while awaiting funding for Pier 54's reconstruction, HRPT temporarily used Pier 54 for public events and performances, such as outdoor film screenings and fashion shows. *See* A2728 ¶ 70. The Act also limits Pier 54 to "park use." *See* N.Y. Unconsol. Law §§ 1643(h), 1647(9)(a).

Pier 54 was in poor condition when the Park was founded. The initial plans for the Park called for Pier 54 to be rehabilitated and partially resurfaced. A152. In 2005, HRPT obtained approval from the relevant regulatory agencies to completely rebuild Pier 54 within its existing footprint with the same design: a flat, rectangular concrete slab slightly elevated above the water on pilings (the "2005 Design"). A2270-71.

HRPT never rebuilt Pier 54. It continued to use Pier 54 for performances and allowed it to deteriorate further. A2707 ¶ 20. HRPT also did nothing to maintain Pier 54. Pier 54 was permanently closed in 2013, A2707 ¶ 20, and its deck was later removed, leaving behind only a "pile field" of wooden piles in the water. According to the sworn testimony of HRPT's President and CEO, Madelyn Wils, the 2005 Design "would not provide the community with the amenities that it

needed" and "suffered from several problems," including lack of seating, lack of greenery, and a narrow width that would limit event options. A2714 ¶ 22.

HRPT Conceals Pier 55 from the Legislature As the Act Is Amended

In November 2011, HRPT officials secretly approached media mogul Barry Diller about the possibility of funding a new project to replace Pier 54 in view of his office building along Route 9A. A2629 ¶ 10; A2714 ¶ 23. Mr. Diller assembled a design team that developed the plans for Pier 55. A2629-30 ¶¶ 11-12. HRPT committed $17.5 million in public funds to the Pier 55 project; Mr. Diller and his spouse, fashion designer Diane von Furstenberg, pledged to cover the remaining costs of Pier 55's design and construction. *See* A2631 ¶ 15. Mr. Diller's pledged contribution apparently exceeds $140 million, although the precise amount is left blank in the Lease. A1377; A2714 ¶ 23. In the spring of 2013, Mr. Diller created PIER55, a tax-exempt non-profit corporation. A1361-64; A1632; A2631 ¶ 14.

All of this happened secretly, with no public notice or press coverage. The process was "so secretive," according to a *New York Times* report, that "even the closest observers of the [P]ark" knew nothing of the negotiations between HRPT and Mr. Diller. A1145.

Without disclosing anything about Pier 55, the already existing PIER55 entity, or the Diller gift, HRPT asked the Legislature to amend the Act to authorize

the "reconstruction" of Pier 54. Assemblymember Deborah Glick, whose district includes the Pier 55 site, was one of two co-sponsors of Bill No. A08031 (the "Amendment"), which passed on June 16, 2013. A2887 ¶ 7. The Amendment was an eleven-page bill containing various technical changes to the language of the Act, most of which were unrelated to Pier 54. *See* A1027-1037. As Assemblymember Glick explains, HRPT "led [her] and other legislators to believe that its plan was to make minor changes to the then-existing Pier 54." A2887 ¶ 8. HRPT orally told legislators that it would make more sense to rebuild Pier 54 in a somewhat shorter, wider configuration to bring event attendees closer to the stage or screen and to facilitate emergency evacuation. A2888-89 ¶¶ 13-14. HRPT's CEO and counsel showed some legislators sketches of a shorter, wider structure centered over Pier 54's existing footprint. A2889 ¶ 15. When it passed the Amendment, the Legislature thought it was permitting "minor changes to the then-existing Pier 54." A2887 ¶ 8. It did not contemplate, did not believe it was authorizing, and would not have voted to authorize "an entirely new, large structure in a different location." A2887 ¶ 8.

The original 1998 Act prohibits the placement of any piling, platform, or structure in the Estuarine Sanctuary, while permitting HRPT to reconstruct or repair existing piers within their historic footprints. N.Y. Unconsol. Law

§§ 1648(3)(b), (c). The 2013 Amendment provides that, notwithstanding these restrictions,

> [P]ier 54 may be reconstructed outside of its historic footprint provided that the length of such pier does not exceed 700 feet and the total square footage of such reconstructed pier, including any adjacent platform areas or access ways, does not exceed 150,000 square feet and provided further that such reconstruction complies with all applicable federal, state and local laws and provided further that the historic elements from the White Star Line, including the iron arch, must be incorporated in any reconstruction/redesign.

Id. § 1648(3)(e); *see* A1027-37. Notably, however, the Amendment does *not* create an exception to the provision that "[o]nly water dependent uses shall be permitted" in the Estuarine Sanctuary. N.Y. Unconsol. Law § 1648(3)(a); *see id.* § 1648(3)(e).

Pier 55 Would Be a Performing Arts Venue that Bears No Resemblance to the Historic Pier 54

The Pier 55 structure would be 2.7 acres in total. *See* A1628. It would be located north of the old Pier 54, between the Pier 54 and Pier 56 pile fields, overlapping minimally with each. A1653. It would consist of a square island structure oriented at an angle to the shoreline and connected to the bulkhead by two accessways. A1653; A2680 ¶ 11; A2688. Pier 55 would have what Respondents call a "unique, undulating topography," A2680 ¶ 12, which would vary in elevation and rise approximately as high as a seven-story building. A1629. The structure would be supported by 547 piles driven into the riverbed; many of

the piles would be hollow and filled with liquid concrete. A1797. The piles supporting the platform would have distinctive white concrete "pots" at the top, prominently visible from the shoreline. A1657; A2692. The entire structure would be about the size of a typical Home Depot.

As renderings of the project show, it would obstruct water views from the Manhattan shore. A1661; A1663. The open, expansive River views that pedestrians, cyclists, and motorists now enjoy would be replaced by a view of the Pier 55 structure itself. A1661; A1663. And Pier 55 would replace acres of navigable water currently used by recreational boaters. A1532-33 ¶ 14; A1661; A1663.

The focus of Pier 55 is the performing arts. PIER55 has already hired a "Producer," who was once the theater director for the Royal Shakespeare Company, A2640-2653, and a "Director," who previously served as the director of the Public Theater, A2632-33 ¶ 21. The design for Pier 55 includes three performance spaces: a main plaza and lawn that can accommodate several thousand people for large events; an amphitheater that can accommodate approximately 750 people; and a small performance stage on the south side that can accommodate approximately 200 people. A1665-67; A2681-82 ¶ 15. The design would allow a barge to dock alongside the pier to provide dressing rooms,

storage space, and other logistical support for actors performing in the amphitheater. A1675-76. No other vessels could dock at Pier 55.

HRPT Pushes Through the Negative Declaration and the Lease

HRPT first disclosed Pier 55 to the public in November 2014—three years after it began negotiating with Mr. Diller and more than a year after the Legislature authorized a somewhat wider, shorter reconstruction of Pier 54. HRPT released an Environmental Assessment Form ("EAF"), asserting that it was not required to engage in the EIS process, A1626-1934; a proposed amendment to the Park's General Project Plan, A3792-93; and a proposed Lease between HRPT and PIER55, A1347-1511.1. HRPT provided notice of a public comment period and a public hearing, which was held on January 12, 2015. A3491-93. Petitioners submitted written comments and participated in the hearing. A2028-32. On February 10, 2015, HRPT provided written responses to public comments. A1038-1123. On February 11, 2015, HRPT's Board of Directors ratified the agency's negative declaration of environmental significance based upon the EAF, approved the Lease, and approved the amendment to the Park's General Project Plan. A1176-1186; *see also* A1623-25. After concealing the development of Pier 55 from the public for three years, HRPT devoted less than three months—a period that included Thanksgiving and the winter holidays—to the entire public review process for the project.

The EAF and HRPT's negative declaration of environmental significance rely upon a "no action" alternative in which HRPT rebuilds Pier 54 using the 2005 Design. As such, all of the EAF's analysis compares the impact of building Pier 55 to the impact of a rebuilt Pier 54. For example, because Pier 55 would have 2.7 acres of surface area and would be built entirely over open water, it would produce 2.7 acres of additional overwater coverage when compared with current conditions. The EAF, however, claims that Pier 55 would result in less than one acre of additional overwater coverage because it assumes that Pier 54 would be rebuilt if Pier 55 is not built. A1628. Similarly, Pier 55 would cast continuous shadow over 39,000 square feet of the Hudson River where there is now no shadow. A1731. But the EAF claims that Pier 55 would *reduce* shadow because a rebuilt Pier 54 would cast more shadow than Pier 55 would. A1731. The EAF engages in similar comparisons for noise, views, historic resources, and natural resources. In actuality, however, HRPT never considered rebuilding Pier 54, and it consistently maintained that it lacked the funding to do so. *E.g.*, A1048.

The Lease is a lengthy document that includes provisions one would expect to find in a commercial lease. The Lease conveys land, as well as any improvements and the rights of ingress and egress, to PIER55 in consideration for one dollar in annual rent. A1374-75 § 2.01; A1376-77 § 3.01. The term of the Lease is twenty years, with an additional ten-year renewal option exercisable by

PIER55. A1374-76. The Lease requires that 51 percent of performance events at Pier 55 be "free or low-cost," while allowing Pier 55 to charge whatever price it deems "appropriate" for the remaining 49 percent of events.[3] A1385 § 9.03. PIER55 is allowed to hold up to six "large" fundraising events occupying most or all of the structure from April 1 to October 31 each year. A1386 § 9.06. The Lease contemplates that PIER55 will earn income from ticketing, broadcast rights and royalties, and other sources, and the Lease requires that this income be spent on "Permitted Costs," including maintenance, utilities, performers' fees, salaries of PIER55 staff, and other operational expenses. *E.g.*, A1378-79 §§ 4.02, 4.03. The Lease also grants naming rights to PIER55 in perpetuity. A1377-78 § 4.01. Significantly, the Lease requires HRPT to maintain the substructure of Pier 55 over its lifetime and does not quantify or limit the expense to HRPT of that obligation. A1502.

Pier 55 Would Harm Petitioners' Distinctive, Legally Cognizable Interests

Pier 55 threatens Petitioners' distinctive interests in the environmental health and navigability of the Hudson River, in the development of the Park in

[3] PIER55 subsequently "clarif[ied]" certain provisions of the Lease in a letter to HRPT, which stated that half of the 51 percent of events which are "free or low cost" would be free; that tickets to the remaining 49 percent of events would be priced at "market prices for comparable events in New York City"; and that PIER55 would not hold more than four "large" fundraising events at Pier 55 from April 1 to October 31 annually. A3067-68. Presumably, the "market price" comparators include events such as Broadway musicals and major concerts.

accordance with its founding vision, and in ensuring that public parkland is not relinquished to private interests.

Robert Buchanan is an avid boater and a volunteer leader in the New York City recreational boating community. Mr. Buchanan is a member of the Steering Committee of the New York City Water Trail Association, an umbrella group that represents the common interests of community boating groups in the New York City harbor. A24; A1529 ¶ 4. Mr. Buchanan is a founder and board member of the Village Community Boathouse, where he helps to organize free rowing sessions for students and members of the public in the Park. A24; A1531 ¶ 11. Mr. Buchanan personally leads groups of students on rowing trips in the Park. Under certain wind and tide conditions, he guides his students in safely practicing rowing and sailing techniques in the embayment between Gansevoort Peninsula and Pier 57, which provides shelter from the wind and the current. A24; A1532-33 ¶ 14. The construction of Pier 55 will prevent Mr. Buchanan from boating in the area and will reduce the number of "stepping stones" that allow for safe transit in human-powered boats in the Park. A1532-33 ¶ 14.

Tom Fox was appointed by the Governor as a citizen member of the West Side Task Force and the subsequent West Side Waterfront Panel which recommended the reconstruction of Route 9A as a boulevard and the creation of a world-class waterfront park on the West Side in the 1980s. A1521 ¶¶ 6-7. He

drafted the memorandum of understanding between the City and State establishing the Hudson River Park Conservancy (HRPT's predecessor); served as the Conservancy's first president; and led the development of the 1995 Concept and Financial Plan for the Park, which later became the General Project Plan. A26; A1521-22 ¶¶ 8-9. Mr. Fox participated in the drafting of the Hudson River Park Act. A26; A1521-22 ¶¶ 8-9. Mr. Fox also regularly engages in recreation in the Park, including bicycling, walking, attending charity events, and photographing the evolution of the Park over time. A26; A3202-03 ¶¶ 4-5.

The City Club, which was founded in 1892, is a civic group whose mission is to promote thoughtful urban land use policy that responds to the needs of all New Yorkers. A26; A87 ¶ 2. The City Club has a particular concern for protecting New York City's public parks from overcommercialization. A26; A87 ¶ 2. Mr. Buchanan and Mr. Fox are members of the City Club. A27.

STATEMENT OF THE CASE

As the lead agency for environmental review of the Pier 55 project under SEQRA, HRPT released the draft EAF in November 2014, A2033-2267, completed the final EAF on February 10, 2015, A1626-1934, and issued a negative declaration of environmental significance on February 11, 2015, A1623-25. The HRPT Board of Directors also approved the Lease with PIER55 on February 11, 2015. A1174-76.

On June 11, 2015, Petitioners challenged these agency actions by initiating a hybrid Article 78 and plenary action in the Supreme Court for the County of New York. A83-113. Petitioners alleged that HRPT's negative declaration and its failure to prepare an EIS violated SEQRA; that Pier 55 violates the Act's restrictions on construction and use in the Estuarine Sanctuary; that the Lease violates HRPT's regulations because HRPT failed to hold a public bidding process; and that the Lease violates the public trust doctrine by alienating public parkland without legislative authorization. The case was assigned to Justice Joan B. Lobis. Respondents filed Verified Answers, A2543-59, and moved on September 17, 2015 for summary judgment with respect to the cause of action concerning the public trust doctrine, A2812-84.

On August 25, 2015, Petitioners moved for expedited discovery by order to show cause. Petitioners sought document discovery relating to the secret planning process for Pier 55, the 2013 Amendment of the Act, and the lease negotiations between HRPT and PIER55. A3104-11. Petitioners also sought to depose HRPT President and CEO Madelyn Wils on these subjects. A3112. The Court denied Petitioners' discovery motion in a Decision and Order dated November 20, 2015, which was served with a notice of entry the same day. A57-72.

In December 2015, days after merits briefing on the Verified Petition was complete, HRPT publicly released new material concerning the redevelopment of

Pier 57, which is located just to the north of the Pier 55 site. On March 4, 2016, Petitioners moved the Supreme Court for leave to file supplemental briefing to address the cumulative impact of Piers 55 and 57 in light of the recently released Pier 57 materials. A3255-3269. In a Decision and Order dated March 31, 2016, the Supreme Court held that this issue had been adequately addressed and denied leave to submit supplemental briefing. A82. This Decision and Order was served with a notice of entry on April 22, 2016. A80-82.

On April 4, 2016, the Supreme Court issued a Decision and Order dismissing the Verified Petition with prejudice, granting Respondents' motion for summary judgment, and granting judgment in favor of Respondents. The Clerk of Court entered judgment on April 7, 2016. A9-10. The April 4 Decision was served with a notice of entry on April 8, 2016. A8-10.

Petitioners appeal all three decisions and the final judgment of the Supreme Court. A6-7, A55, A78. HRPT and PIER55 filed a notice of cross-appeal with respect to a portion of the April 4 decision dismissing the Petition. A7.1. On May 5, 2016, Petitioners filed an unopposed motion for a preference in the calendaring of this appeal. On May 19, 2016, this Court ordered that the appeal be heard in the first two weeks of the September 2016 Term if Petitioners perfect their appeal by the deadline for the September 2016 Term.

On May 9, 2016, Petitioners filed a motion for a preliminary injunction in this Court, which was fully submitted on June 2, 2016. On June 30, 2016, the Court granted Petitioners' motion for a preliminary injunction and enjoined construction on the Pier 55 project pending disposition of this appeal on the condition that Petitioners perfect the appeal for the September 2016 Term. Respondents have filed a motion to modify the preliminary injunction that is fully submitted as of the filing date of this brief.

ARGUMENT

Under Article 78, courts must intervene to correct HRPT's agency actions if they were taken "in violation of lawful procedure," were "affected by an error of law," or were "arbitrary and capricious or an abuse of discretion." CPLR § 7803(3). With respect to HRPT's determinations under SEQRA, the Court must "review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990) (quoting *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986)).

I. THE COURT BELOW ERRED IN CONCLUDING THAT AN ENVIRONMENTAL ANALYSIS BASED WHOLLY UPON AN INVALID "NO ACTION" ALTERNATIVE SATISFIES SEQRA.

The "no action" alternative is the foundation of any environmental analysis. Under SEQRA, the "no action" alternative comprises "the adverse or beneficial site changes that *are likely* to occur in the reasonably foreseeable future, in the absence of the proposed action." 6 NYCRR § 617.9(b)(5)(v) (emphasis added). The EAF relied on a "no action" alternative of rebuilding Pier 54 as a flat, rectangular pier within its preexisting footprint using the 2005 Design. The Supreme Court correctly found that this was *not* a valid "no action" alternative. A29-30. The Supreme Court found that HRPT is "highly unlikely" to rebuild Pier 54 in the reasonably foreseeable future because HRPT has repeatedly acknowledged the "distinct drawbacks of reconstructing Pier 54 as it previously existed." A30.

Yet, having found that the "no action" alternative considered by the EAF was invalid under SEQRA, the Supreme Court nonetheless concluded that the EAF *satisfied* SEQRA. The court below was right in its assessment that the reconstruction of Pier 54 cannot be considered "no action." It erred in allowing the EAF to stand even though it agreed that the EAF's analysis depended upon an unacceptable premise. At a minimum, the Supreme Court was obligated to remand

for HRPT to undertake the correct environmental analysis consistent with the Supreme Court's finding that it used an improper "no action" alternative.

A. The Supreme Court properly found, on ample record evidence, that HRPT is unlikely to rebuild Pier 54 using the 2005 Design in the reasonably foreseeable future.

On the basis of the record, including written testimony submitted by HRPT CEO Madelyn Wils, the Supreme Court made a factual finding that HRPT is "highly unlikely" to rebuild Pier 54 using the 2005 Design, "given the distinct drawbacks of reconstructing Pier 54 as it previously existed." A30. The Supreme Court described the purported reconstruction of Pier 54 using the 2005 Design as an "illusory project." A30. This factual finding was not clearly erroneous, was amply supported by the record, and should not be disturbed. *See, e.g., Thoreson v. Penthouse Int'l, Ltd.*, 80 N.Y.2d 490, 495 (1992); *Kermanshah Oriental Rugs, Inc. v. Latefi*, 51 A.D.3d 562, 563 (1st Dep't 2008).

In a sworn affidavit submitted to the Supreme Court, Ms. Wils testified that the 2005 Design "suffered from several problems" and "*would not provide the community with the amenities that it needed*." A2714 ¶ 22 (emphasis added). The Supreme Court properly credited this testimony as an expression of HRPT's intentions. *See, e.g., Charles J. Hecht, P.C. v. Clowes*, 224 A.D.2d 312, 312 (1st Dep't 1996). And the Supreme Court properly followed this testimony to its logical conclusion. The 2005 Design has no seating, no greenery, and no

bathrooms despite a capacity of over 5,000 people. A2685 ¶ 19; A2714 ¶ 22. It lies below the future flood plain. A2714 ¶ 22. And its narrow width limits performance flexibility. A2714 ¶ 22. In light of all of the major problems HRPT has identified with the 2005 Design, it defies credulity for HRPT to suggest, as it does now, that it would waste public funds on this project in the reasonably foreseeable future if it does not build Pier 55.

In addition to Ms. Wils's testimony, HRPT's conduct demonstrates that it will not rebuild Pier 54 using the 2005 Design. HRPT has had the necessary permits to rebuilt Pier 54 for more than ten years. A2270-71. But it never began the project or even attempted to do so. Instead, it allowed Pier 54 to fall into further disrepair until it was forced to close Pier 54 entirely. A2713 ¶ 20. The reason for HRPT's inaction—in addition to the inherent deficiencies of the 2005 Design—is that, as HRPT has acknowledged, it does not have "sufficient funding" to rebuild Pier 54 under the 2005 Design without Mr. Diller's contribution. A1048; *see also* A2892-94. But Mr. Diller's contribution is earmarked only for the new Pier 55 that he designed—not for rebuilding Pier 54. A2632 ¶ 18.

It is widely known that HRPT's finances are "tenuous" and that the "revenue stream" for the Park is "drying up." A2892-94. In light of this economic reality and Ms. Wils's sworn testimony that HRPT considers the 2005 Design inadequate, the Supreme Court was correct to conclude that HRPT is highly unlikely to rebuild

Pier 54 if it does not build Pier 55. Because the purported reconstruction of Pier 54 using the 2005 Design is illusory, it is an invalid "no action" alternative. *See* 6 NYCRR § 617.9(b)(5)(v). The proper "no action" alternative is no action: leaving the existing pile field and open water as is.

Cases that approve the use of the "net-increment" methodology in SEQRA analysis do not allow HRPT to rely upon a "no action" alternative that is unlikely to occur. The "net-increment" methodology allows a lead agency to compare the impact of a proposed new project to the impact of a previously authorized, "materially similar" project. *S. Bronx Unite! v. N.Y.C. Indus. Dev. Agency*, 115 A.D.3d 607, 609 (1st Dep't 2014). Thus, for example, it is not arbitrary and capricious for a lead agency to compare the environmental impact of a refrigerated warehouse for groceries to the environmental impact of a refrigerated warehouse for flowers that would have been built at the same location. *See id.* at 608-09.

Here, however, the old Pier 54 and the new Pier 55 are not at all similar, let alone materially so. And the net-increment methodology still requires the lead agency to consider a "no action" alternative that is "*likely to occur* in the reasonably foreseeable future." 6 NYCRR § 617.9(b)(5)(v) (emphasis added). The Supreme Court's factual finding that HRPT is "highly unlikely" to rebuild Pier 54 using the 2005 Design is eminently supportable and certainly not clear error. *See Bragdon v. Bragdon*, 23 A.D.3d 203, 204 (1st Dep't 2005); *see also Anderson*

v. City of Bessemer City, 470 U.S. 564, 574 (1985) (factual findings of lower court are reviewed for clear error even when they "do not rest on credibility determinations, but are based instead on . . . documentary evidence or inferences from other facts").

B. The Supreme Court erred in upholding the negative declaration despite the EAF's reliance on an invalid "no action" alternative.

For several independent reasons, the Supreme Court erred in concluding that HRPT's negative declaration complied with SEQRA despite its reliance on an invalid "no action" alternative. At a minimum, the Supreme Court was required to remand to HRPT to remedy its error.

First, if an environmental assessment does not compare the proposed project to a valid "no action" alternative—the likely future conditions without the project—the assessment does not satisfy SEQRA as a matter of law. *See Long Island Pine Barrens Soc'y, Inc. v. Town Bd. of Town of Riverhead*, 290 A.D.2d 448, 449 (2d Dep't 2002); *MYC N.Y. Marina, LLC v. Town Bd. of Town of E. Hampton*, 17 Misc. 3d 751, 760 (Sup. Ct. Suffolk Cnty. 2007); *see also Residents for Reasonable Dev. v. City of New York*, 128 A.D.3d 609, 610 (1st Dep't 2015) (City environmental quality review law, implementing SEQRA, "requires" consideration of a valid "no action" alternative). By virtue of this fact alone, the

Petition must be granted and the matter remanded to HRPT for the preparation of an EIS—or, at least, an EAF using a valid baseline.

Second, it is a "bedrock principle of administrative law" that the propriety of agency action must be judged "solely by the grounds invoked by the agency." *See Nat'l Fuel Gas Distrib. Corp. v. Pub. Serv. Comm'n*, 16 N.Y.3d 360, 368 (2011). In the administrative process and in the proceedings below, HRPT only defended its analysis on the basis that the "no action" alternative—the rebuilt Pier 54—was proper and that the resulting analysis was reasonable. *See* A1063 ("[T]he No Action pier is reasonable and appropriate under SEQRA . . . ."); A2836, A2863-65 (asserting that HRPT "could—and would—reconstruct Pier 54 as previously authorized" if it did not build Pier 55). The Supreme Court therefore erred by sustaining HRPT's agency action on a basis HRPT never asserted: that Pier 55 has no possibility of any significant adverse environmental impact when compared to open water. *See Nat'l Fuel Gas*, 16 N.Y.3d at 368; *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991).

Third, the EAF directly states that Pier 55 would have a significant adverse environmental impact when evaluated against the proper baseline: open water with no new construction. Pier 55 is a Type I action under SEQRA, presumptively requiring an EIS. *See Vill. of Chestnut Ridge v. Town of Ramapo*, 45 A.D.3d 74, 78 (2d Dep't 2007); *Manhattan Valley Neighbors for Permanent Hous. for the*

Homeless v. Koch, 168 A.D.2d 262, 263 (1st Dep't 1990). SEQRA requires an EIS if the proposed project "*may* include the *potential* for at least *one* significant adverse environmental impact." 6 NYCRR § 617.7(a) (emphasis added). This threshold is "relatively low," and an EIS is mandated if there is some possibility that the proposed action "may have a significant effect on the environment." *Chinese Staff & Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 364-65 (1986).

For instance, the "environment" includes noise. *See* N.Y. Envtl. Conserv. Law § 8-0105(6). The EAF explains that, when baseline noise levels exceed 62 dBA $L_{eq(1)}$, an increase of 3 dBA $L_{eq(1)}$ constitutes a significant impact. A1828. The EAF documents an existing noise level of 70.2 dBA $L_{eq(1)}$ under current conditions; projects a noise level of 75.1 dBA $L_{eq(1)}$ if Pier 54 is rebuilt; and projects a noise level of 73.6 dBA $L_{eq(1)}$ if Pier 55 is built.[4] A1828-30. Relying on the invalid "no action" alternative—a rebuilt Pier 54—HRPT found no possibility of a significant noise impact because a rebuilt Pier 54 would be noisier than Pier 55. *See* A1832-33. When measured against the proper "no action" alternative, however, Pier 55 will increase noise levels by 3.4 dBA $L_{eq(1)}$. This noise increase is significant by definition because it exceeds 3 dBA $L_{eq(1)}$ and the baseline exceeds 62 dBA $L_{eq(1)}$. A1828.

[4] All figures are for Saturday events.

Simply put, in the case of noise, the EAF expressly states that Pier 55 will cause a significant adverse noise impact when compared to open water. The Supreme Court therefore plainly erred in concluding that the EAF adequately analyzed noise despite using an invalid "no action" alternative. A37-39.

The Supreme Court claimed that, despite the erroneous "no action" alternative, HRPT "certainly has taken a 'hard look' at noise" because it extensively analyzed the issue. A39. But an agency cannot satisfy SEQRA merely by preparing voluminous documentation. The "hard look" standard demands that the agency reach substantively reasonable conclusions and provide a "reasoned elaboration of the basis for its determinations." *Akpan*, 75 N.Y.2d at 570; *Chinese Staff & Workers Ass'n v. Burden*, 88 A.D.3d 425, 428-29 (1st Dep't 2011). Here, according to the Supreme Court's own finding, the agency could not reach a reasoned conclusion because it used an invalid "no action" comparator.

On its face, the EAF discloses significant adverse environmental impacts with respect to noise, shadows, and views when Pier 55 is compared to open water. It is arbitrary and capricious for HRPT to conclude that there is *no possibility* of any significant environmental impact when its own EAF says there *will be* a significant environmental impact. When the proper "no action" alternative is used, either an EIS or, at minimum, a remand to HRPT is required. *See* 6 NYCRR

§ 617.7(a); *Chinese Staff & Workers Ass'n v. City of New York*, 68 N.Y.2d at 364-65.

II. THE COURT BELOW ERRED IN CONCLUDING THAT HRPT ADEQUATELY STUDIED THE CUMULATIVE IMPACT OF PIERS 55 AND 57.

The Pier 55 project and the redevelopment of Pier 57 immediately to the north are reasonably related, simultaneous projects. HRPT was required to study their cumulative impact across all relevant areas of environmental concern, but it never did so. The Supreme Court therefore erred in upholding HRPT's negative declaration.

In determining whether Pier 55 has any possibility of causing a significant environmental impact, HRPT was required to consider "reasonably related long-term, short-term, direct, indirect, and *cumulative* impacts, including any other simultaneous or subsequent actions which are . . . included in any long-range plan of which the action under consideration is a part." 6 NYCRR § 617.7(c)(2)(i) (emphasis added). The "decisive factor" in determining whether two projects are reasonably related, and thus require a Cumulative Impact Statement, is "the existence of a 'larger plan' for development." *North Fork Envtl. Council v. Janoski*, 196 A.D.2d 590, 591 (1993) (quoting *Long Is. Pine Barrens Soc'y v. Planning Bd.*, 80 N.Y.2d 500, 513 (1992)).

HRPT plans to redevelop Pier 57 into a major 428,000-square-foot commercial complex located just upriver from the site of Pier 55. *See* A141. These two projects are reasonably related. *See North Fork*, 196 A.D.2d at 591. Pier 55 and Pier 57 are clearly part of a "larger plan of development" because HRPT has proposed a "Connector Project" for the purpose of better integrating the two. A1664. HRPT confirms that it is concentrating its efforts to complete the construction of the Park in "the area between Gansevoort Peninsula [to the south] and Pier 57 [to the north] at West 15th Street, within which Pier 54 is located." A2710 ¶ 12. And, in the 2013 Amendment concerning the "reconstruction" of Pier 54, HRPT also obtained legislative authorization for "business, professional or governmental offices" at Pier 57. A1029. The geographic proximity of Pier 55 and Pier 57 further supports the conclusion that the projects are reasonably related. *See North Fork*, 196 A.D.2d at 591.

The Supreme Court appears to have concluded that HRPT adequately studied the cumulative impact of Piers 55 and 57 because the EAF discussed the impact of pile-driving for both projects. A36-37; A1774-75. But this discussion of *one* potential area of environmental concern, *during construction only*, falls far short of what the law requires. The "environment" includes "the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing

patterns of population concentration, distribution, or growth, and existing community or neighborhood character." N.Y. Envtl. Conserv. Law § 8-0105(6); *accord* 6 NYCRR § 617.7(c)(1). Because Pier 55 and Pier 57 are reasonably related, simultaneous projects, HRPT was required to determine whether they had the possibility of a cumulative adverse impact in any of these areas.

For instance, HRPT was required to consider whether traffic associated with both completed projects could have a significant adverse impact on noise, air quality, or street safety. Potential obstructions of the Hudson River Greenway—the nation's busiest bicycle path—by throngs of eventgoers at Pier 55 and by arriving and departing office workers at Pier 57 are of particular concern. *See* A1526 ¶¶ 26-27; A3271; A3766. HRPT was also obligated to consider whether crowds associated with the changed uses at both locations could have a significant adverse effect on neighborhood character; and whether the construction of a new marina at Pier 57 and the replacement of open water with Pier 55 would affect small boat navigation and cause congestion on the River. It never did so.

HRPT's failure to identify these "relevant areas of environmental concern" invalidates its negative declaration. *Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 9 N.Y.3d 219, 231-32 (2007); *Akpan*, 75 N.Y.2d at 570. To the extent HRPT claims that it silently studied the cumulative impact of Piers 55 and 57 on noise, air quality, neighborhood character, and other relevant areas of concern

without expressly saying so, HRPT's failure to provide a "reasoned elaboration of the basis for its determination" also invalidates the negative declaration. *Riverkeeper*, 9 N.Y.3d at 232 (internal quotation marks omitted).

III. THE COURT BELOW ERRED IN HOLDING *SUA SPONTE* THAT COURTS CANNOT ENFORCE DISCRETIONARY PUBLIC BIDDING RULES.

Public bidding aims to prevent public agencies from acting out of "favoritism, improvidence, fraud [or] corruption" in allocating public resources. *AAA Carting & Rubbish Removal, Inc. v. Town of Southeast*, 17 N.Y.3d 136, 142 (2011). Fair, transparent, competitive public bidding processes protect the "public interest in the prudent and economical use of public moneys." *Conduit & Found. Corp. v. Metro. Transp. Auth.*, 66 N.Y.2d 144, 148 (1985). The Act requires HRPT to enact public bidding regulations concerning its lease of public land. *See* N.Y. Unconsol. Law § 1647(11). The public bidding regulations promulgated by HRPT are codified at 21 NYCRR part 752. The Court must construe them as a whole, based upon their text, structure, and purpose. *See, e.g.*, *Messina v. City of New York*, 300 A.D.2d 121, 123 (1st Dep't 2000).

The regulations begin with a provision titled "Applicability." 21 NYCRR § 752.1. It provides that the public bidding regulations apply to "[l]ease, licenses, concessions or other agreements for facilities or properties under the jurisdiction of [HRPT] that . . . provide for a total *capital expenditure* in excess of $1,000,000

over the proposed term of the agreement." *Id.* § 752.1(a)(2) (emphasis added). The operative provision of the regulations states: "[HRPT] shall issue a bid prospectus for any proposed lease, license, concession agreement or other agreement for the use of property or facilities within the jurisdiction of [HRPT] where the proposed agreement would provide for a total *capital investment* in the park of no less than $1,000,000 over the proposed term of the agreement." *Id.* § 752.4(a) (emphasis added). By using the terms interchangeably, the regulations define the term "capital investment" to mean a "capital expenditure." *See, e.g.*, *Empire Ins. Co. v. San Miguel*, 114 A.D.3d 539, 540 (1st Dep't 2014) (terms used interchangeably have same meaning).

The Lease between HRPT and PIER55 is undisputedly a "lease . . . for the use of property." 21 NYCRR § 752.4(a). And it undisputedly involves a capital expenditure in excess of $1 million, both by HRPT and by PIER55. A1363. Thus, competitive bidding was required. Because HRPT did not hold a bidding process, the Lease is unlawful.

A. The decision below is unsupportable.

The Supreme Court held *sua sponte* that HRPT's public bidding regulations are judicially unenforceable because, "unlike normal public bidding requirements," the regulations "give HRPT total discretion over how to evaluate bids." A45. For two reasons, this conclusion cannot stand.

First, HRPT never once suggested in the proceedings below that its public bidding regulations cannot be enforced in court. To the contrary, HRPT conceded that Petitioners *would* have the ability to challenge HRPT's failure to hold a bidding process in court if Petitioners were denied a fair opportunity to bid. A2857-58. By inventing its own basis to uphold the Lease, the Supreme Court violated the "bedrock principle of administrative law" that agency action must be judged "solely by the grounds invoked by the agency." *Nat'l Fuel Gas*, 16 N.Y.3d at 368; *accord Scherbyn*, 77 N.Y.2d at 758.

Second, and more importantly, the Supreme Court is wrong. While it asserted that HRPT's public bidding regulations are "unlike normal" ones, the Supreme Court never explained what "normal" public bidding requirements entail. A45. Under the State's general public bidding statute, N.Y. Gen. Mun. Law § 103, agencies routinely have substantial discretion to reject any or all bids, disapprove a low bid, or readvertise for new bids. *See, e.g.*, *Conduit & Found. Corp.*, 66 N.Y.2d at 148-49 ("Although the power to reject any or all bids may not be exercised arbitrarily or for the purpose of thwarting the public benefit intended to be served by the competitive process, the discretionary decision ought not to be disturbed by the courts unless irrational, dishonest or otherwise unlawful." (citations omitted)); *accord Acme Bus Corp. v. Bd. of Educ.*, 91 N.Y.2d 51, 55 (1997). No one disputes that courts can require agencies to comply with this

statute despite this wide agency discretion. Discretion in choosing the winning bidder provides no basis to distinguish HRPT's public bidding requirements from "normal" ones. A45.

Moreover, even if HRPT had an unusual degree of discretion in determining whether to *accept* a particular bid, it has no discretion in determining whether to *solicit* bids. It "shall" issue a bid prospectus for all leases involving a $1,000,000 capital expenditure. 21 NYCRR § 752.4(a). As a matter of bedrock public policy, a public bidding process promotes transparency and fairness, regardless of its eventual outcome. Agency discretion in choosing a winning bidder provides no basis to undermine the requirement that a bidding process occur. *See Diamond Asphalt Corp. v. Sander*, 92 N.Y.2d 244, 264 (1998) ("The public bidding process must be protected from creative efforts . . . to skate around the process, however well intentioned the [agency]'s policy, fiscal or practicality grounds.").

The Supreme Court's *sua sponte* holding that HRPT's public bidding regulations are unenforceable must be reversed.

B. The Lease is unlawful without a public bidding process because it involves a capital investment in excess of $1 million.

As explained above, HRPT's regulations define "capital investment" as "capital expenditure" by using the terms interchangeably. *See* 21 NYCRR §§ 752.1(a)(2), 752.4(a). The Lease between HRPT and PIER55 is a lease for the

use of land that involves a capital expenditure in excess of $1 million, so HRPT "shall" issue a bid prospectus. *Id.* § 752.4(a). HRPT's failure to hold a competitive bidding process invalidates the Lease.

For purposes of this litigation only, notwithstanding the regulations' text, HRPT attempts to define "capital investment" as "the expenditure of funds used to purchase an asset with the hope that it will generate income or appreciate in value in the future." A2729 ¶ 75. This litigation-minted position is irrational and entitled to no deference because it fails to account for the fact that HRPT has *already* defined "capital investment" as "capital expenditure" by using the terms interchangeably.[5] *See Mental Hygiene Legal Serv. ex rel. DeAngelo v. Cuomo*, 195 A.D.2d 189, 190-91 (3d Dep't 1994) ("[I]f the agency's interpretation runs counter to the clear wording of the regulatory provision, it should not be given any weight.").

Even under HRPT's irrational and textually unsupported definition of "capital investment," the Lease still involves a capital investment in excess of $1 million. PIER55 and HRPT "hope" that the money they pour into the Pier 55

[5] *See* 21 NYCRR § 752.1(a)(2) ("Leases, licenses, concessions or other agreements for facilities or properties under the jurisdiction of the Hudson River Park Trust that . . . provide for a total *capital expenditure* in excess of $1,000,000 over the proposed term of the agreement are subject to one or more provisions of this Part." (emphasis added)); *id.* § 752.4(a) ("The Hudson River Park Trust shall issue a bid prospectus for any proposed lease, license, or concession agreement for the use of property or facilities within the jurisdiction of the Hudson River Park Trust where the proposed agreement would provide for a total *capital investment* in the park of no less than $1,000,000 over the proposed term of the agreement." (emphasis added)).

project will "generate income." A2729 ¶ 75. As Ms. Wils explains, HRPT and PIER55 expect Pier 55 to generate "revenues from ticket sales [that] would be used to support the pier's maintenance, operations and nonprofit programs"—that is, income. A2714-15 ¶ 24. The Lease requires that income earned by PIER55 be used to pay "Permitted Costs" related to the maintenance and operation of Pier 55. *See* A1386. PIER55's status as a non-profit does not change the fact that it intends to, and will in fact, *generate* income. Nor do HRPT's regulations exclude nonprofit income.

Given the inconsistency between HRPT's litigation position and the text of its own regulations, Respondents will likely argue that that the public bidding requirement "simply does not apply to charitable contributions." A2730 ¶ 77. But the law recognizes no such exception: HRPT "*shall* issue a bid prospectus for *any* proposed lease . . . where the proposed agreement would provide a total capital investment in the park of no less than $1,000,000." 21 NYCRR § 752.4(a) (emphasis added). Nor should the Court create a special exception for donors to generally applicable public bidding requirements. Petitioners take Mr. Diller at his word that he has public-spirited intentions. *See* A2631-32 ¶ 17. Even so, the Lease is a commercial agreement that conveys public assets of real value to PIER55, including land, perpetual naming rights, the right to generate concession revenue, the ability to prevent *others* from hosting events at Pier 55, and HRPT's

commitment to perform all necessary structural maintenance. *See* A1374-75 § 2.01; A1377-78 § 4.01; A1391 § 9.12; A1396 § 9.17; A1502. Mr. Diller and his family will control the project for thirty years, and the public will have no recourse to revisit the terms of the Lease.

Moreover, the next person or entity who attempts to circumvent a bid prospectus by using a lease to convey a charitable contribution may not have benign intentions. If a food service vendor competing for a concession pledges to make a $1,000 donation to HRPT in a licensing agreement, is that licensing agreement exempt from public bidding, too? If not, what is the principled basis for exempting PIER55 from public bidding but not the food service vendor? Such an unprincipled, unwritten exception for donors would dangerously undermine the public policy of public bidding. The Court should not accept HRPT's invitation to read such an exception into the regulation where none exists.

To the extent Mr. Diller's gift does not fit perfectly within the legal framework for public bidding, the solution is *not* to contort the regulations' plain meaning beyond recognition to create an exception for this Lease. The solution is simple: Arrange Mr. Diller's donation in a way that does not involve leasing away public property to be kept under his control. Nothing compelled HRPT to structure this transaction as a lease. But HRPT and Mr. Diller apparently decided that it would be advantageous to give Mr. Diller control of the project by leasing public

land to PIER55 in exchange for one dollar in annual rent. Having done so, HRPT must live with the consequences dictated by law. Because the Lease involves a capital expenditure in excess of $1 million and HRPT did not comply with the requirement that it "shall issue" a bid prospectus, the Lease is unlawful. 21 NYCRR § 752.4(a).

C. Petitioners have standing to challenge the Lease.

Because its position on the merits cannot withstand scrutiny, HRPT will likely attempt, as it did below, to shield its noncompliance with its own regulations from judicial review by claiming that Petitioners lack standing to challenge the Lease. A2856.

As the Court of Appeals recently emphasized in its decision in *Sierra Club v. Village of Painted Post*, 26 N.Y.3d 301 (2015), "standing rules should not be 'heavy-handed.'" *Id.* at 311 (quoting *Assoc. for a Better Long Is., Inc. v. N.Y. State Dep't of Envtl. Conserv.*, 23 N.Y.3d 1, 6 (2014)). Standing principles may not be applied "in an overly restrictive manner where the result would be to completely shield a particular action from judicial review." *Id.* (quoting *Assoc. for a Better Long Is.*, 23 N.Y.3d at 6). To have standing, a person need only suffer "injuries that are 'real and different from the injury most members of the public face.'" *Id.* (quoting *Save the Pine Bush, Inc. v. Common Council*, 13 N.Y.3d 297, 306 (2009)).

The Supreme Court implicitly determined that Petitioners have standing here by reaching the merits. A45; *see Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 769 (1991) ("Standing is a threshold determination . . . that a person should be allowed access to the courts to adjudicate the merits of a particular dispute . . . .").

HRPT is likely to claim that Petitioners lack standing because they did not allege in their Verified Petition that they would have participated in a public bidding process if HRPT had held one. A2856. HRPT cannot so easily evade judicial review of its noncompliance with the law. *See Painted Post*, 26 N.Y.3d at 311. Petitioners cannot possibly be expected to have alleged in a Verified Petition *under penalty of perjury* that they "would have" responded to a theoretical bid prospectus of unknown content and scope. *See* CPLR § 3020(a). HRPT cannot be allowed to draft a proposed Lease in secret to suit a donor's tastes; announce the Lease to the public; and then prevent Petitioners from challenging the Lease by faulting them for failing to allege under oath how they would have responded had the whole process been open. *See Assoc. for a Better Long Is.*, 23 N.Y.3d at 6; *see also Montgomery v. Metro. Transp. Auth.*, 25 Misc. 3d 1241(A), 2009 WL 4843782, at *4 (Sup. Ct. N.Y. Cnty. Dec. 15, 2009) ("[T]his Court is troubled that, were standing interpreted too restrictively, . . . there could be no way of judicially challenging what could be a clear violation of [public bidding laws]."). Depending

on what the prospectus said, Petitioners—who have experience running businesses in the Park and leading community boating organizations that operate from piers in the Park—may have bid. *See* A1529-33 ¶¶ 4-6, 11-14; A1522 ¶ 11.

Regardless of whether they would have participated in public bidding, Petitioners have standing because they suffer distinctive injury from HRPT's noncompliance with its own regulations. *See Painted Post*, 26 N.Y.3d at 311; *Soc'y of Plastics*, 77 N.Y.2d at 774. HRPT's regulations are promulgated under the Hudson River Park Act for the purpose of carrying out HRPT's duties under the Act. *See* N.Y. Unconsol. Law § 1647(1)(d). Tom Fox participated in the drafting of the Act. *See* A1521-22 ¶ 8. He has also consistently advocated for the development of the Park in accordance with its founding principles and guidelines through articles, comments, letters, and public speaking. *See* A1522 ¶ 12. Because of his role in writing the Act and his long history of working to ensure that HRPT fulfills its statutory mandate, Mr. Fox suffers an injury that is different in degree or in kind from that suffered by the general public when HRPT ignores its regulations implementing the Act. *See Painted Post*, 26 N.Y.3d at 311; A26 (Supreme Court finding that "Fox has a long history of knowledge of, involvement with and concern about the park which differentiates him from members of the general public").

Similarly, the City Club of New York's mission is "to promote thoughtful urban land use policy that responds to the needs of all New Yorkers," and the City Club has a particular interest in protecting public parks from overcommercialization. A26. As a result, the City Club, of which Mr. Fox and Mr. Buchanan are members, suffers more harm than the general public does when HRPT leases public parkland to a private interest for one dollar in annual rent without public bidding. *See Painted Post*, 26 N.Y.3d at 311.

IV. THE COURT BELOW ERRED IN CONCLUDING, WITHOUT INTERPRETING THE STATUTORY LANGUAGE, THAT PIER 55 IS A "RECONSTRUCTION" OF PIER 54.

The Supreme Court concluded that the 2013 Amendment to the Hudson River Park Act is "unambiguous" and that its plain meaning must be given effect. A43. But the Supreme Court never actually construed the text of the Amendment or explained what its supposedly unambiguous meaning is. A43. The Amendment and the original Act must be construed together, and the original Act "is not presumed to be changed further than is necessarily implied from the language used in the amendatory act." McKinney's N.Y. Consol. Laws, Statutes § 193 cmt.; *accord In re Delmar Box Co.* 309 N.Y. 60, 66-67 (1955).

Pier 55 violates the Act's restrictions on construction in the Estuarine Sanctuary because it is not a "reconstruction" of Pier 54 in the ordinary meaning of

that word. Pier 55 also violates the Act because it is designed for non-water-dependent uses, which are forbidden in the Estuarine Sanctuary.

A. The Amendment creates a narrow exception to generally applicable restrictions in the Estuarine Sanctuary.

Section 8(3)(a) of the Act provides that "[o]nly water dependent uses shall be permitted" in the Estuarine Sanctuary. N.Y. Unconsol. Law § 1648(3)(a). Water-dependent uses include: (i) "any use that depends on utilization of resources found in the water section"; (ii) "recreational activities that depend on access to the water section, such as fishing, boating, swimming in such waters, passive enjoyment of the Hudson river and wildlife protection and viewing"; (iii) "facilities and incidental structures needed to dock and service boats"; and (iv) "scientific and educational activities that by their nature require access to marine reserve waters." *Id.* § 1643(m).

Section 8(3)(b) of the Act prohibits the placement of new pilings in the Estuarine Sanctuary. *Id.* § 1648(3)(b).

Section 8(3)(c) of the Act allows HRPT to perform reconstruction and repair on existing piers within their historic footprints. *Id.* § 1648(3)(c).

The Amendment passed by the Legislature in 2013 creates an exception to sections 8(3)(b) and 8(3)(c), but not to section 8(3)(a). The Amendment provides:

> Notwithstanding the prohibition[s] in paragraph (b) of this subdivision on the placing of pilings in the Hudson River, [and in] paragraph (c)

> of this subdivision on buildings outside of historic footprints, . . . *[P]ier 54 may be reconstructed* outside of its historic footprint provided that the length of such pier does not exceed 700 feet and the total square footage of such reconstructed pier, including any adjacent platform areas or access ways, does not exceed 150,000 square feet and provided further that such reconstruction complies with all applicable federal, state and local laws and provided further that the historic elements from the White Star Line, including the iron arch, must be incorporated in any reconstruction/redesign.

N.Y. Unconsol. Law § 1648(3)(e) (emphasis added).

Thus, the Amendment allows HRPT to drive piles in the Estuarine Sanctuary and build in the Estuarine Sanctuary outside piers' historic footprints, but only if HRPT is engaged in a "reconstruction" of Pier 54 that satisfies various conditions. *Id*. Because the Amendment creates exceptions to generally applicable statutory prohibitions, it must be "strictly construed so that the major policy underlying the legislation"—protecting the Estuarine Sanctuary—"is not defeated." *Radich v. Council of City of Lackawanna*, 93 A.D.2d 559, 562 (4th Dep't 1983); *see also Van Amerogen v. Donnini*, 78 N.Y.2d 880, 882 (1991). The exceptions created by the Amendment "extend only so far as their language fairly warrants, and all doubts should be resolved in favor of the general provision rather than the exception." *Radich*, 93 A.D.2d at 562. Because section 8 of the Act expresses a "dominant policy" of setting aside the water section of the Park as an Estuarine Sanctuary, the Amendment to section 8 should be given a "strict and literal

construction" to effectuate that dominant policy. *Kenwell v. Lee*, 261 N.Y. 113, 117 (1933).

B. Because Pier 55 is not a reconstruction of Pier 54, it violates the restrictions on construction in the Estuarine Sanctuary.

The Act, as amended, forbids driving piles in the Estuarine Sanctuary outside Pier 54's historic footprint unless Pier 54 is being "reconstructed." N.Y. Unconsol. Law § 1648(3)(e). This case requires the Court to draw a line between the reconstruction of Pier 54 outside its historic footprint, which the amended Act permits, and the construction of a new and distinct pile-supported structure outside Pier 54's historic footprint, which the amended Act forbids. *See id.* The Supreme Court erred because it never attempted to draw this line. A42-44. HRPT surely could not build a new pile-supported office building at the Pier 54 site and call it a "reconstruction"; nor could it build a carbon copy of the old pier two miles upriver and claim to have rebuilt "Pier 54." Under the plain meaning of the terms "reconstruct" and "reconstruction," a replacement structure is only a "reconstruction" if it is a materially similar structure in the same location as its predecessor. Because Pier 55 is on the wrong side of the Act's line between permissible reconstruction and impermissible new construction, it is unlawful.

The terms "reconstruct" and "reconstruction," which are not defined in the Act, must be given their ordinary meaning in common usage. *See Orens v.*

Norvello, 99 N.Y.2d 180, 185-86 (2002). In ordinary English, to "reconstruct" a structure is to build the same structure, or at least a materially similar one, again. *See, e.g.*, *Owen v. Div. of State Lands*, 76 P.3d 158, 162 (Or. Ct. App. 2003) ("The plain meaning of reconstruction is the action of reconstructing or state of being reconstructed. To reconstruct is to construct again . . . ." (citations and internal quotation marks omitted)); Black's Law Dictionary (10th Ed. 2014) (defining "reconstruct" as "[t]o build (something) again after destruction, damage, or impairment").[6] For instance, ordinary speakers of English would not call Citi Field a reconstruction of Shea Stadium because Citi Field looks nothing like Shea Stadium and was built in a different location (the Shea Stadium parking lot).

The Supreme Court never construed the purportedly unambiguous statutory term "reconstruction" or explained what features of Pier 55 make it a supposed "reconstruction" of Pier 54. A42-44. Pier 55 bears no structural or aesthetic resemblance to Pier 54. A1655. If built, Pier 55 would be north of the old Pier 54 site, minimally and equally overlapping with the footprints of both Piers 54 and 56. A1664. Consistent with its placement directly between Piers 54 and 56, it would be called "Pier 55." And, unlike Pier 54, which was designed as a place for ships to dock, Pier 55 would be designed as a park and performing arts venue. Because

[6] *See also Reconstruct*, Merriam-Webster, http://www.merriam-webster.com/dictionary /reconstruct; *Reconstruct*, Oxford Dictionaries, http://www.oxforddictionaries.com/definition /english/reconstruct.

the two structures have different names, are in different locations, are different shapes, look entirely different, and are designed for different functions, no ordinary English speaker would refer to Pier 55 as a reconstruction of Pier 54.

This understanding of the term "reconstruction" furthers the purposes of the Act. *See Centennial Restorations Co. v. Wyatt*, 248 A.D.2d 193, 196 (1st Dep't 1998). The Act strictly prohibits construction in the water section of the Park—that is, the Estuarine Sanctuary—except for floating structures, minor improvements along the shoreline, habitat restoration, and maintenance or reconstruction of "the piers and bulkheads existing and as depicted in the [1998 EIS] within their historic footprints or boundaries." N.Y. Unconsol. Law § 1648(3)(c). The purpose of this restriction, like all other restrictions in the Estuarine Sanctuary, is to protect "an important habitat for many marine and estuarine special including striped bass." *Id.* § 1648(1).

The Amendment creates a narrow exception for a "reconstruction" of Pier 54, not to exceed 700 feet in length or 150,000 square feet in total. *Id.* § 1648(3)(e). The natural and obvious reading of this provision is that the "reconstruction" would occur at the site of Pier 54 and would extend somewhat beyond its historic footprint. *Id.* This understanding of the term "reconstruction" is consistent with the Amendment without artificially extending its meaning in a manner inconsistent with the overriding policy objective of section 8 of the Act.

HRPT's withholding of the existence of PIER55 and its plans for Pier 55 from the Legislature while advocating for the passage of the Amendment further supports Petitioners' definition of the term "reconstruction." As Assemblymember Glick explains, HRPT represented to members of the Legislature that it contemplated "minor changes to the pier's shape for functional and safety reasons." A2889 ¶ 16. HRPT told the Legislature that a shorter, wider configuration would bring eventgoers closer to the stage or screen and would facilitate emergency evacuation. A2889 ¶ 14. It also represented that the Fire Department had suggested a second walkway alongside the pier to help emergency egress. A2889 ¶ 14. And HRPT showed legislators sketches of a shorter, wider pier centered over Pier 54's preexisting footprint. A2889 ¶ 15. All of these actions demonstrate HRPT's own recognition that a "reconstruction" is the construction of a materially similar structure in the same location, not the building of an entirely distinct structure in a different location.

C. Because it is designed for non-water-dependent uses, Pier 55 violates the restrictions on use in the Estuarine Sanctuary.

The Amendment exempts a reconstructed Pier 54 from the restrictions on driving piles and performing construction work outside piers' historic footprints in the Estuarine Sanctuary. *See* N.Y. Unconsol. Law §§ 1648(3)(b), (3)(c), (3)(e). However, it conspicuously does not exempt a reconstructed Pier 54 from the Act's

requirement that "[o]nly water dependent uses" shall be permitted in the Estuarine Sanctuary. *Id.* § 1648(3)(a). By using the phrase "notwithstanding the restrictions in paragraph (b) . . . [and] paragraph (c)," the Legislature manifested its intention to preserve the applicable restriction in paragraph (a), which prohibits non-water-dependent uses in the Estuarine Sanctuary. *Id.* § 1648(3)(e). Had the Legislature wanted to create an exception from § 1648(3)(a) alongside the exceptions from §§ 1648(3)(b) and 1648(3)(c), it would have said so. Thus, under the plain text of the Amendment, only water-dependent uses are allowed at a new structure that extends beyond Pier 54's historic footprint. Water-dependent uses include "recreational activities that *depend on access* to the [Estuarine Sanctuary], such as fishing, boating, swimming in waters, passive enjoyment of the Hudson [R]iver and wildlife protection and viewing." *Id.* § 1643(m)(ii) (emphasis added).

The Act also provides that Pier 54 "shall be used solely for park use." *Id.* § 1647(9)(a). Some "park uses," like recreational boating, are water dependent; others, like a soccer field, are not. *See id.* § 1643(h) (statutory definition of park use). When this provision is read in tandem with the Amendment, the Act requires park uses at Pier 54, and further requires that those park uses be water dependent if Pier 54 is extended beyond its historic footprint into the Estuarine Sanctuary.

As a practical matter, members of the Legislature were aware when they passed the Amendment that Pier 54 had previously been used (on an interim basis)

as a performance venue and, at least arguably, intended this use to continue at the rebuilt pier. A2888 ¶¶ 12, 13. Thus, Respondents will likely contend that the Legislature's failure to exempt a rebuilt Pier 54 from the water-dependent use requirement—its failure to create an exception to § 8(3)(a) alongside the exceptions to §§ 8(3)(b) and 8(3)(c)—should simply be ignored. That is what the Supreme Court did. A42-43.

This construction of the statute is wrong because it fails to give any effect to the Legislature's refusal to authorize non-water-dependent uses at a rebuilt Pier 54. The statute must be given "a sensible and practical over-all construction, which is consistent with and furthers its scheme and purpose and which harmonizes all its interlocking provisions." *Long v. Adirondack Park Agency*, 76 N.Y.2d 416, 420 (1990). The proper way to read the statute is that the Legislature intended any extension of Pier 54 beyond its historic footprint to be minimal. Non-water-dependent park uses of a reconstructed Pier 54, such as performances and movie screenings, are grandfathered and can continue at a rebuilt Pier 54 that remains essentially within its preexisting footprint. *See* N.Y. Unconsol. Law § 1648(3)(e). To the extent a new structure encroaches almost entirely into the Estuarine Sanctuary, however, non-water-dependent uses remain forbidden. *See id.*

Pier 55 violates this restriction because it involves non-water-dependent uses well beyond Pier 54's historic footprint. The purpose of Pier 55 is to provide a

venue for "performances of a variety of types of music, performances of dramatic works, opera or theater, public talks by artists, academics, writers or public figures, dance performances, art displays or exhibits, and other types of programming." A2643-44 ¶ 12. These activities occur daily throughout New York City in indoor and outdoor locations far away from the Hudson River. These functions are not water dependent because they do not "depend on access to" the Estuarine Sanctuary. N.Y. Unconsol. Law § 1643(m)(ii).

Nor do they become water dependent merely because they happen in a venue that has a good view of the River. If a dance theater, an outdoor nightclub, or a football field could become "water dependent" merely by being placed atop a new pier, the statutory command that "[o]nly water dependent uses shall be permitted" in the Estuarine Sanctuary would be rendered meaningless. *Id.* § 1648(3)(a).

V. THE COURT BELOW ERRED IN CONCLUDING THAT PIER 55 IS CONSISTENT WITH THE PUBLIC TRUST DOCTRINE.

As shown above, the 2013 Amendment must be narrowly construed to allow only a bona fide "reconstruction" of Pier 54 at the same location while serving the purpose of limiting new construction to protect the Estuarine Sanctuary. This construction of the Act is buttressed by the public trust doctrine, which forbids the alienation of parkland without the Legislature's specific and unambiguous consent.

A. The public trust doctrine applies to state-owned land.

The public trust doctrine derives from the common law principle that the king held title to public lands in trust for the people. *See, e.g.*, *Martin v. Waddell's Lessee*, 41 U.S. 367, 407-11 (1842). The people are now sovereign, but the concept remains the same. Because the people are the beneficiaries of lands held in trust by the government, the government may only alienate public lands or otherwise modify the terms of the trust with the people's consent, as expressed by an act of the people's elected representatives in the Legislature. *See People v. N.Y. & Staten Island Ferry Co.*, 68 N.Y. 71, 76-79 (1877). New York courts have enforced the public trust doctrine, using that name, for at least a century and a half. *See Brooklyn Park Comm'rs v. Armstrong*, 45 N.Y. 234, 243 (1871). In recent years, the Court of Appeals has consistently reaffirmed the doctrine. *See, e.g.*, *Glick v. Harvey*, 25 N.Y.3d 1175, 1180 (2015); *Union Square Park Cmty. Coal., Inc. v. N.Y.C. Dep't of Pub. Parks & Rec.*, 22 N.Y.3d 648, 654 (2014); *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623 (2001). This Court has also recently applied the doctrine. *Avella v. City of New York*, 131 A.D.3d 77 (1st Dep't), *lv. to appeal granted*, 26 N.Y.3d 912 (2015).

Relying on two sentences of dicta in a decision of the Appellate Division, Fourth Department, the Supreme Court erroneously held that the public trust doctrine does not apply to state-owned parkland. A16-18 (citing *Niagara Preserv.*

Coal. v. N.Y. Power Auth., 121 A.D.3d 1507, 1511 (4th Dep't 2014) (stating that there is no case law in New York applying the doctrine to state-owned parks)).[7] While it does not appear that the issue has ever been litigated, the controlling decisions of the Court of Appeals draw no distinction between state and municipal parkland: "[O]ur 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*." *Friends of Van Cortlandt Park*, 95 N.Y.2d 623, 631 (2001) (emphasis added). Nor do this Court's statements of the doctrine provide any reason to question that state parkland is held in trust for the people. *See, e.g.*, *Avella*, 131 A.D.3d at 82; *N.Y. State Assemblyman v. City of New York*, 85 A.D.3d 429, 430 (1st Dep't 2011).

The public trust doctrine is derived from common law, and courts in other states have concluded that it applies to state-owned lands. For instance, in *Gould v. Greylock Pres. Comm'n*, 215 N.E.2d 114 (Mass. 1966), the Massachusetts Supreme Court held that a lease to create a ski resort on state-owned parkland was invalid because it lacked sufficiently clear legislative authorization under the public trust doctrine. In the analogous context of state-owned beachland between the high and low water lines, courts have widely concluded that the state holds the "wet beach" in trust for the public. *See, e.g.*, *Severance v. Patterson*, 370 S.W.3d

[7] The statement in *Niagara Preservation Coalition* is dicta, as the Court held that the petitioners lacked standing. *Niagara Preserv. Coal.*, 121 A.D.3d at 1510. It has not been followed in any decision of record except the decision below. In any event, this Court is not required to follow a Fourth Department decision. *See* 28 N.Y. Jur. 2d Judges and Courts § 220.

705, 715-16 (Tex. 2012); *City of Long Branch v. Liu*, 203 N.J. 464 (2010); *see also Citizens for Responsible Wildlife Mgmt. v. State*, 103 P.3d 203 (Wash. Ct. App. 2004). This broad understanding of the doctrine's scope is consistent with its historic application to the states. *See, e.g.*, *Martin*, 41 U.S. 367; *Saunders v. N.Y. Cent. & Hudson River R.R. Co.*, 144 N.Y. 75 (1894).

Contrary to the Supreme Court's conclusion, the reference to the public trust doctrine in General City Law § 20(2) does not imply that the doctrine is limited to municipal lands. A17-18. The function of this statute is to grant powers to cities, which are subsidiary political units that possess only those powers delegated to them. *See* N.Y. Gen. City Law § 20 ("Grant of specific powers"). The statute authorizes cities to alienate their property, except where the public trust doctrine forbids it, as in the case of "land under water" and "parks." *Id.* § 20(2). Thus, having granted cities the power to alienate property, the statute also states the necessary exceptions. *See id.*

The Supreme Court inferred that the public trust doctrine must not apply to state land because there is no analogous statutory provision for the state. *See* A18. This inference is wrong. There is no analogous statutory language for the state because its sovereign power to alienate land is inherent and need not be set forth in a statute at all. The memorialization of limits on statutory municipal powers says nothing about whether the common law similarly limits the state's inherent

powers. Moreover, the Hudson River Park Act effectively incorporates the public trust doctrine by prohibiting the alienation of real property without legislative authorization. *See* N.Y. Unconsol. Law §§ 1644, 1647(3)(c).

B. The proposed alienation to PIER55 lacks the Legislature's explicit and unambiguous consent.

The public trust doctrine preserves public lands for the people, while allowing conditions to change if the Legislature, on the people's behalf, clearly and explicitly approves it. Any alienation of land held in trust for the public therefore requires "direct and specific approval of the State Legislature, plainly conferred." *Friends of Van Cortlandt Park*, 95 N.Y.2d at 632; *see also* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law*, 68 Mich. L. Rev. 471, 495 (1970). Thus, for example, the Legislature's authorization of "improvement of trade or commerce" is not sufficiently clear to allow the construction of a shopping mall in a park. *Avella*, 131 A.D.3d at 81.

Under the public trust doctrine, "parkland cannot be leased, even for a park purpose, absent legislative approval." *Union Square*, 22 N.Y.3d at 656. As explained above, the Legislature did not approve Pier 55 because it is not a reconstruction of Pier 54. *See supra* Argument § III. Even if the Legislature did approve Pier 55, the Lease between HRPT and PIER55 is only consistent with the public trust doctrine if the public has "sufficient" access to the amenities at Pier 55

"to characterize the lease as one which serves 'public purposes.'" *Port Chester Yacht Club v. Vill. of Port Chester*, 123 A.D.2d 852, 854 (2d Dep't 1986). Whether the public enjoys such sufficient access is a question of fact. *See id.*

Respondents failed to show that there is no genuine factual dispute as to whether PIER55 will provide sufficient access to the public. The Lease between HRPT and PIER55 gives PIER55 a substantively unlimited right to exclude the public from nearly half of all events at Pier 55. Nothing in the Lease prevents PIER55 from, for example, holding exclusive concerts at Pier 55 on all major holidays and charging a "market price" for those events that makes them inaccessible to a major swath of the general public. *See* A1385 § 9.03; A3067-68. While PIER55 states that its "intentions" for Pier 55 are inclusive, it has bargained for the contractual right to turn a public park into an exclusive concert venue, including on major holidays, and offers no assurance that it will not exercise this right. A2649 ¶ 25.

HRPT has a fiduciary responsibility to the public, on whose behalf it serves as trustee to the land, to ensure meaningful public access to Pier 55. *See Union Square*, 22 N.Y.3d at 657 (relying in part on public agency's control over pricing to conclude that public trust doctrine was not violated). Here, HRPT has abdicated any meaningful control over pricing and access to a private entity. The court below therefore erred in granting Respondents' motion for summary judgment on

Petitioners' claim under the public trust doctrine—particularly without the benefit of any discovery. *See, e.g., James v. Aircraft Serv. Int'l Grp.*, 84 A.D.3d 1026, 1027 (2d Dep't 2011).

CONCLUSION

In granting a preliminary injunction, this Court inferentially recognized that Petitioners were likely to succeed on the merits of this appeal. The Court can now choose among several reasons why the judgment below must be reversed. An "illusory" project that is "highly unlikely" to occur in the future cannot serve as the baseline for a proper environmental analysis. Cumulative impacts from the simultaneous construction and operation of two adjacent piers must be assessed. A public bidding law that requires bids for "any lease" does not allow a silent exception for lessees who donate money. A statute authorizing a "reconstruction" does not authorize a new, structurally and architecturally distinct project in a different location. And the Lease alienates parkland to PIER55 without specific legislative approval.

Mr. Diller's philanthropy may be tempting. But HRPT is a public agency that manages our land and speaks for us all. It has certain standards to uphold no matter what financial inducements it may be offered. HRPT's zeal to benefit from Mr. Diller's largesse does not justify cutting corners in its environmental analysis, contorting the meaning of its regulations beyond recognition, and deceiving the

Legislature. The judgment below should be reversed, the Article 78 petition granted, and the Pier 55 project permanently enjoined.

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New York, New York

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