SUPREME COURT OF THE STATE OF NEW YORK
ERIE COUNTY

In the Matter of the Application of

Western New York Youth Climate Council, Coalition for Economic Justice, and Citizens for Regional Transit,

Petitioners,

For a judgment under article 78 of the Civil Practice Law and Rules

-against-

Index No. 808662/2024

New York State Department of Transportation, Marie Therese Dominguez, in her official capacity as Commissioner of the New York State Department of Transportation, and Stephanie Winkelhake, P.E., in her official capacity as New York State Department of Transportation Chief Engineer,

Respondents.

RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO THE COALITION'S MOTION FOR A PRELIMINARY INJUNCTION AND NOMINAL BOND

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PRELIMINARY STATEMENT

Four months after filing its petition, ten days after a fellow petitioner sought injunctive relief, and a week after the Department awarded the first project contract, the Western New York Youth Climate Council, the Coalition for Economic Justice and Citizens for Regional Transit (collectively the Council) move—for the first time—for injunctive relief. The Council makes no new substantive arguments in favor of an injunction, instead reiterating arguments made by the East Side Parkways Coalition (East Side petitioners) and writing separately only to assert that the Court should impose a nominal bond if it grants injunctive relief because of its members' statuses as nonprofits with no ability to obtain a bond.[1] The Council offers no explanation for its delay despite the fact that, like the East Side petitioners, it has known since at least late June that the Best Street Bridge contract would be awarded in early October.

The Department opposes the Council's request for an injunction for the reasons already set forth in opposition to the East Side petitioners and incorporates by reference index. no. 808702/2024 docket nos. 79 [MOL in Opp], 80 [LaFarr Aff] and 81 [October 15 Moryl Aff, re-filed with this memorandum]. The Department also objects to the Council's request for a nominal bond rather than a bond that is reasonably related to the losses the Department will incur. Had the Council acted promptly, the requirements of CPLR 6312(b) would be of no concern.

[1] Although the Western New York Youth Council has offered an affidavit in support of its claim that it cannot afford a non-nominal undertaking, its co-petitioners, the Coalition for Economic Justice and Citizens for Regional Transit, have not.

ARGUMENT

IF THE COURT ENJOINS THE PROJECT, IT SHOULD IMPOSE AN UNDERTAKING THAT WILL AT LEAST PARTIALLY PROTECT NEW YORK TAXPAYERS AGAINST THE POSSIBILITY THAT NO INJUNCTION SHOULD HAVE BEEN GRANTED

"A preliminary injunction is an extraordinary provisional remedy to which a plaintiff is entitled only on a special showing" (*Margolies v Encounter, Inc.*, 42 NY2d 479 [1977]). An undertaking, "in an amount fixed by the court," operates "[t]o afford reasonable protection to the defendant against an erroneous or improper grant of this special provisional remedy," the "purpose and function" of which is "to reimburse the defendant for damages sustained if it is later finally determined that the preliminary injunction was erroneously granted" (*id.* at 477). Thus, while courts have discretion in fixing the amount of an undertaking, it should be "reasonably related to the amount of damages defendant established that it might suffer 'by reason of the injunction'" (*MonsterHut, Inc. v PaeTec Communications, Inc.*, 294 AD2d 945, 946 [4th Dept 2002], quoting CPLR 6312[b]).

As clearly established in the affirmation of Jeffrey M. Moryl, DOT engineer and director of its construction management bureau, the State will without question incur, by a conservative estimate, thousands of dollars a day in initial losses and, by spring 2025, millions of dollars. Moryl estimates the cost of an injunction on the Best Street Bridge project at over $14,000 per day of delay—for a total of $445,000 per month—based just on the increased costs associated with inflation; this assessment is not speculative, as it is derived through use of the Federal Highway Administration's Seasonally Adjusted National Highway Construction Cost Index,

specifically pertaining to highway construction, and supported through reference to the inflation experienced for the first nine months of 2023 (October 15, 2024 Moryl Aff. ¶ 17, 19). Delay of the second contract to be awarded would amount to some $100,000 per month (*id.* ¶ 22). Delay of the primary contract, expected to be awarded in March 2025, would likely run into the millions of dollars per month of delay (*id.* ¶¶ 23-25).

Neither these conservative numbers, nor the requested $445,000 bond, are the full measure of delay damages that could result from an injunction. The State and New York taxpayers should not incur these losses alone should it later be determined that an injunction was improperly granted (s*ee Destiny USA Holdings, LLC v Citigroup Glob. Markets Realty Corp.*, 69 AD3d 212, 224 [4th Dept 2009] [trial court erred in failing to require undertaking when granting preliminary injunction and directing a $15 million undertaking as a "reasonable amount" to reimburse defendant for potential damages]; *Lelekakis v Kamamis*, 303 AD2d 380, 380 [2d Dept 2003] [changing amount of undertaking where it was not rationally related to amount of potential damages]; *Blueberries Gourmet, Inc. v Aris Realty Corp.*, 255 AD2d 348, 350 [2d Dept 1998]; *Weitzen v 130 E. 65th St. Sponsor Corp.*, 86 AD2d 511, 511 [1st Dept 1982] [holding that amount of the undertaking fixed by trial court enjoining demolition of building at request of neighboring property owner was "inadequate on this record" and "should be increased to $150,000"]).

Petitioners claim that they are entitled to an exception to the statutory requirement that an undertaking be reasonably reflective of the damages and costs

the defendant may sustain by reason of the injunction. As the cases upon which they rely show, however, this is not true. To the contrary, in each of those cases, the defendant failed to demonstrate the damages it would incur as a result of the injunction. In *Daytop Vil., Inc. v Consol. Edison Co. of New York, Inc.*, a nominal $5,000 undertaking was appropriate because Con Ed—which was simply seeking to recoup monies allegedly owed by plaintiff—made "no showing" of damages that it would "suffer in the event it were determined the injunction should not have been granted" as plaintiff was paying current bills (61 AD2d 933, 934-935 [1st Dept 1978]). Likewise, in *Adirondack Wild Friends of the Forest Preserve v New York State Dept. of Envtl. Conservation*, the court required only a nominal undertaking because "[u]nder the circumstances, any potential damages are speculative" (65 Misc 3d 1211[A], *35 [Sup Ct, Warren County 2019]). Finally, in *Broadway Triangle Community Coalition v Bloomberg*, where the court ordered a $5,000 undertaking, it did so because the defendants had made only a "one-line request" for an undertaking in "an unspecified amount" and had "not shown what their own damages would be if the injunction were to be incorrectly granted" (35 Misc 3d 167, 178 [Sup Ct, NY County 2011]). Each of these courts ultimately relied on the defendants' failure to establish damages that would flow from an incorrectly granted injunction.

Finally, the bond that the Department seeks would have been entirely unnecessary had petitioners, including the Council, not sat on their rights. The Department completed the challenged environmental review in mid-February 2024

(Council Pet. ¶ 5). Petitioners commenced this proceeding in mid-June 2024. Petitioners have known since at least the end of June—two weeks after they filed their petitions—that the first contract would be awarded during the first week in October. The Department did in fact award the contract on October 11, two days after the East Side petitioners sought immediate injunctive relief and after the Council was represented in Court at the TRO hearing. Petitioners nonetheless inexplicably waited until October 17, 2024 to seek injunctive relief: eight months after the challenged determination and one week before this Court will hear the merits of the proceeding. The Council could have entirely avoided CPLR 6312(b)'s undertaking mandate by acting on its rights when the Court could have addressed the request before Best Street Bridge contract was awarded or construction was imminent.

CONCLUSION

For the reasons set forth in the Department's opposition to the East Side petitioners' request for injunctive relief, the Department opposes the Council's request for a preliminary injunction. As directed by CPLR 6312(b), the Department is entitled to a bond. For the reasons set forth in the October Moryl affirmation the Court should require the posting of a bond in the amount of $445,000 (Oct. 15 Moryl Aff. ¶¶ 16-29) within ten days of any order. The Department expresses no opinion about which of the movants in these related cases should be required to bear the cost of that undertaking.

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMIT

The undersigned attorney hereby certifies:

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Dated: October 23, 2024

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