

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

2011-00063

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In the Matter of the Application of, :

**SENIORS FOR SAFETY**, an unincorporated :  
 association, by and in the name of its President, :  
 Lois Carswell, and **NEIGHBORS FOR BETTER** :  
**BIKE LANES**, an unincorporated association, by :  
 and in the name of its President, Louise Hainline, :  
 :

Petitioners, :

For Judgment Pursuant to CPLR Article 78 :  
 :

- against - :

**NEW YORK CITY DEPARTMENT OF** :  
**TRANSPORTATION**, and :

**JANETTE SADIK-KHAN**, COMMISSIONER :  
 OF TRANSPORTATION, in her official capacity, :

Respondents. :

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Index No. 5210/11

IAS Part

Justice

**NOTICE OF PETITION**  
**PURSUANT TO CPLR**  
**ARTICLE 78**

PLEASE TAKE NOTICE that, upon the annexed Verified Petition, verified on March 7, 2011, together with the accompanying Affirmation of Jim Walden, dated March 7, 2011, with exhibits thereto, and the Affidavit of Eric R. Fox, with exhibits thereto, Petitioners Seniors for Safety, by and in the name of its President, Lois Carswell, and Neighbors for Better Bike Lanes, by and in the name of its president, Louise Hainline, will move this Court, at the courthouse thereof, located at 360 Adams Street, Kings County Supreme Court, on March 29, 2011 at 9:30 a.m., or as soon thereafter as counsel may be heard, for a judgment pursuant to CPLR Article 78 granting the relief demanded in the Petition, along with such other and further relief as the Court

deems proper. This proceeding is for a judgment against Respondents pursuant to CPLR Article 78.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 7804, Respondent's answer and supporting affidavits, if any, are required to be served **by hand** upon the undersigned by March 24, 2011, and Petitioners' reply and supporting affidavits will be served **by hand** on March 28, 2011. Pursuant to CPLR 7804(b), this Court has exclusive jurisdiction over this Article 78 petition, and pursuant to CPLR 7804(b) and CPLR 506(b), Petitioner states that Kings County is a proper venue for this proceeding.

Dated: New York, New York  
March 7, 2011

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: 

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*Attorneys for Petitioners*

TO: New York City Department of Transportation  
Office of General Counsel  
55 Water Street, Ninth Floor  
New York, NY 10041

- and -

Janette Sadik-Khan, DOT Commissioner  
Office of General Counsel  
55 Water Street, Ninth Floor  
New York, NY 10041

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

In the Matter of the Application of,

**SENIORS FOR SAFETY**, an unincorporated association, by and in the name of its President, Lois Carswell, and **NEIGHBORS FOR BETTER BIKE LANES**, an unincorporated association, by and in the name of its President, Louise Hainline,

Petitioners,

For Judgment Pursuant to CPLR Article 78

- against -

**NEW YORK CITY DEPARTMENT OF TRANSPORTATION**, and

**JANETTE SADIK-KHAN**, COMMISSIONER OF TRANSPORTATION, in her official capacity,

Respondents.

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**VERIFIED PETITION**

Index No. 5210/11

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Petitioners, by their undersigned attorneys, for their verified petition allege as follows:

**INTRODUCTION**

1. Respondents have engaged in a scheme to justify the placement of a two-way, parking-separated experimental bicycle lane ("EBL") on Prospect Park West, relying on misleading, selective, and unsound data to support false conclusions. (See paragraphs 24 through 77 below.) Respondents also colluded with radical pro-EBL lobbyists to mislead the public, to suppress (in their words, "neutralize") criticism of the EBL, and to wage personal attacks, via

internet postings, against members of the public who voiced safety concerns about the EBL. (See paragraphs 78 through 87 below.)

2. The EBL, a lane design not seen on New York City streets before it was introduced on an extremely limited basis by Respondents in 2009, poses unique dangers to pedestrians, motorists, and cyclists. This design defect places pedestrians and bicyclists in constant danger of collision and, at present, no city agency is even monitoring such crashes.

3. Respondents promised a clear and complete process before making a final determination about whether the EBL would be permanent, including (a) careful study of traffic and safety before installation of the EBL, (b) careful study of traffic and safety after installation of the EBL, (c) public release of the resulting traffic and safety data, and (d) a period of public comment.

4. In every one of these representations, Respondents were untruthful with the public. More specifically:

- a. They conducted no meaningful study of traffic, safety, and environmental impacts before installing the EBL, and indeed ignored the Department of Transportation's own pre-existing traffic and safety data.
- b. They conducted no meaningful study of traffic, safety, and environmental impacts after installing the EBL.
- c. They eventually provided a false and misleading summary of the meager data they collected at a public forum on January 20, 2011.

d. They slammed the door on public input by declaring the EBL to be permanent, without first providing the public with the promised opportunity for comment and without taking into account data showing that the number of crashes and injuries increased after implementation of the EBL.

5. Of course, no one from the public was able to challenge DOT at the single meeting it had to summarize the data findings, as DOT withheld the data from the public until after the meeting.

6. While Respondents were withholding information from members of the public who expressed concern about the EBL, they were coordinating with pro-EBL lobbyists to stifle criticism of the EBL by "neutralizing" opposition, including by encouraging aggressive personal "counterattacks" against critics of the EBL.

7. In all these respects, Respondents' actions were arbitrary, capricious, and contrary to the civil and criminal laws of the State of New York.

8. Petitioners bring this Article 78 proceeding to reverse Respondents' actions and to require Respondents to remove the EBL and follow the careful process it first promised the community, outlined in Paragraph 2 above, as well as to perform legally required environmental reviews.

## PARTIES

9. Petitioner **Seniors for Safety** is a New York unincorporated association, with more than 85 senior-citizen members who reside on or near Prospect Park West. Petitioner **Lois Carswell** is the President of Seniors for Safety and resides on Prospect Park West.

10. Petitioner **Neighbors for Better Bike Lanes** is a New York unincorporated association, with more than 130 members who reside and/or operate businesses on or near Prospect Park West. Petitioner **Louise Hainline** is the President of Neighbors for Better Bike Lanes and resides on Prospect Park West.

11. Respondent **New York City Department of Transportation ("DOT")** is a public agency of the City of New York established pursuant to Chapter 71 of the New York City Charter.

12. Respondent **Janette Sadik-Khan** is Commissioner of DOT and is sued here in her official capacity.

## FACTS

### **A. Respondents' Implementation Of The EBL**

13. In 1997, DOT and the Department of City Planning ("DCP") published a Master Bicycle Plan (the "Master Plan") with the stated goal of "increas[ing] bicycle ridership in New York City." Ex. 1.<sup>1</sup> The Master Plan did not include the EBL, a two-way, "parking-protected"

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<sup>1</sup> Citations in this memorandum denominated "Ex. \_\_" refer to the Exhibits to the Affirmation of Jim Walden submitted herewith (the "Walden Aff.").

bike lane separated from traffic by a floating lane of parked cars. Instead, a traditional one-way bike plan was planned for PPW.

14. The EBL—repeatedly described by DOT as a "pilot" or trial configuration—did not exist anywhere in New York City. Although DOT has installed a limited number of parking-protected bike lanes, all had been one-way, with bike traffic flowing the same direction as the vehicular traffic. None were like the EBL, which requires pedestrians to traverse one-way vehicular traffic and then walk, with limited visibility, into two-way bike traffic.

15. As a general matter, any bicycle lanes separated from the roadway by a floating lane of parked cars, such as the EBL, are uniquely hazardous. The American Association of State Highway and Transportation Officials' ("AASHTO") Guide for the Development of Bicycle Facilities categorically states that "[b]ike lanes should never be placed between the parking lane and curb lane." Ex. 2. Moreover, AASHTO's Guide permits construction of a buffered two-way bike lane only "after a complete engineering study of other alternatives and relative risks." *Id.*

16. On information and belief, DOT conducted no AASHTO-compliant engineering study for the EBL, despite Commissioner's Sadik-Khan's testimony before the Transportation Committee of the New York City Council on December 9, 2010, in which she said DOT "follow[s] AASHTO standards in all of the work that we do, which is a requirement for the receipt of federal funds." Ex. 3.

17. The EBL represents an even greater hazard than other parking-protected bike lanes because it has a two-way bike lane separated from the one-way roadway by a floating lane of parked cars. The EBL requires pedestrians first to cross a street with multiple lanes of one-

way moving vehicular traffic. Pedestrians must then cross a floating lane of parked cars, which separates the road from the bicycle lane. The floating lane of parked cars obstructs the pedestrians' views of traffic in the two-way bicycle lane. Because cyclists do not have stop signs or signals, pedestrians must cross with very limited visibility into two-way bicycle traffic before reaching the curb. This configuration endangers every pedestrian, but particularly senior citizens, disabled persons, and parents with small children.

18. On information and belief, the only two existing EBLs are on PPW and Kent Avenue in Brooklyn. Wide stretches of the Kent Avenue EBL border industrial yards and facilities, not heavily accessed by pedestrian traffic.

19. Because NYPD currently does not keep statistics on bicycle-pedestrian crashes, no agency can effectively monitor how many collisions and near-collisions have occurred since the experimental project began, and DOT has not seen fit to keep its own count.

**B. Prospect Park West: Adjacent to a Safer Bicycle Lane in Prospect Park**

20. DOT installed the EBL on Prospect Park West, in Park Slope, Brooklyn, as part of a trial project during the summer of 2010.

21. Prospect Park West runs alongside the western portion of Prospect Park, which contains its own bicycle lane.

22. Cyclists can use Prospect Park's bicycle lane with no impact on traffic, and significantly less danger to themselves and to pedestrians.

23. Despite the existence of a safer alternative within Prospect Park and despite the existence of the proposed safer one-way alternative in the 1997 Master Plan, DOT insisted on

installing an unprecedented and dangerous EBL on PPW, which it justified through an extended campaign of distortion and deception.

C. **The Ultimate Oxymoron: DOT's Campaign to Justify the EBL As A "Traffic Calming" Measure**

24. Notwithstanding Respondents' well-documented motivation—to dramatically expand their citywide network of bike lanes in record time (*see, e.g.*, Ex. 4)—Respondents have sought to justify the EBL as a "traffic calming" measure.

25. On April 16, 2009, DOT presented its PPW bicycle lane plans, purported justifications, and underlying analysis to Community Board 6 ("CB6"). Ex. 5. In this presentation, DOT proposed the installation of the EBL, which would be a *two-way* lane separated from traffic by a floating lane of parked cars—a configuration that had not previously been considered.

26. In its April 16, 2009 presentation, DOT justified the EBL primarily as a way to achieve "traffic calming." *Id.* at 2. In support of this assertion, DOT did *not* claim crashes or injuries were on the rise. Rather, DOT claimed that existing conditions included an increase of speeding and "reckless driving" by cars. *Id.* at 4.

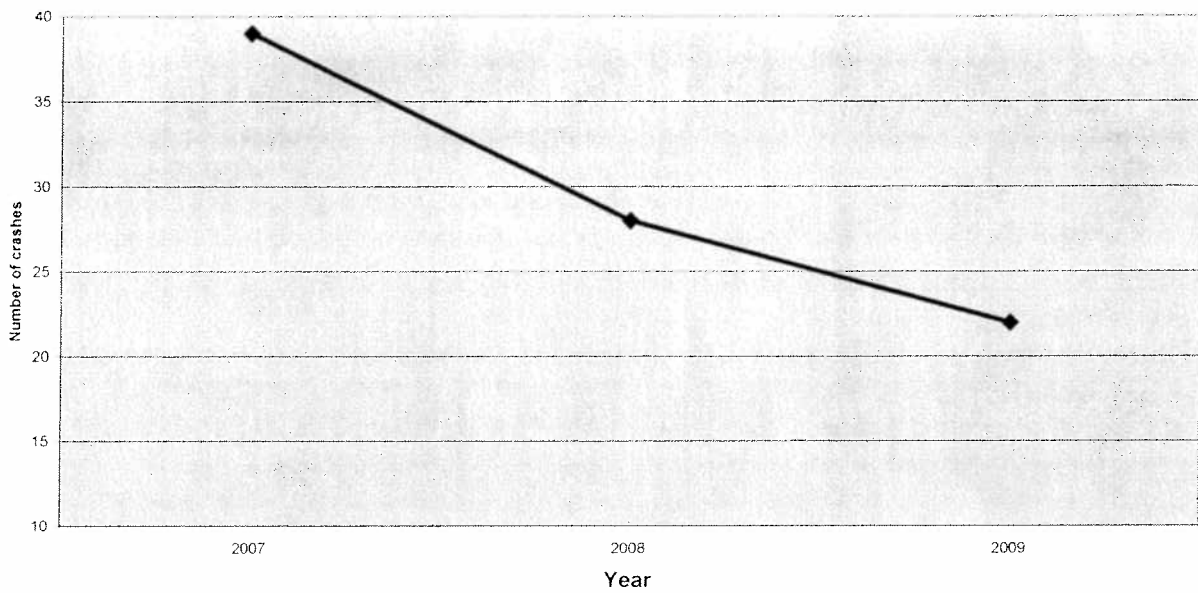
27. To support this claim, DOT provided a PowerPoint presentation. That PowerPoint included no information whatsoever about an increase of reckless driving citations on PPW. Indeed, the only data presented supported an assertion that "speeding ha[d] resumed" on PPW. *Id.* at 6. The PowerPoint explained that, in 2007, DOT sought to reduce speeding on PPW by adjusting traffic signals to allow vehicle progression between traffic lights at a lower speed. The PowerPoint said this project—often referred to as 'signalization'—worked until 2009.

The PowerPoint concluded that "speeding ha[d] resumed" in 2009. This was the sole justification for "traffic calming." *Id.*

28. Documents obtained from a Freedom of Information Law request (the "FOIL documents") demonstrate that DOT's analysis was highly misleading and deceptive. Indeed, DOT changed the signalization on both PPW and Eighth Avenue in 2007 – reducing it from 30 mph to 20 mph (meaning that cars travelling at higher speeds were more likely to get caught at red lights rather than proceeding through with cascading green lights). Ex. 6. For several months thereafter, DOT conducted monitoring on both streets, which showed the change in signalization from 30 mph to 20 mph was effective at reducing speeds on both roads. *Id.*

29. DOT's own data clearly demonstrate that the changes DOT made *before* the installation of the EBL were successful in reducing crashes and injuries. Both crashes and injuries declined from 2007 to 2009, as depicted in these graphs:

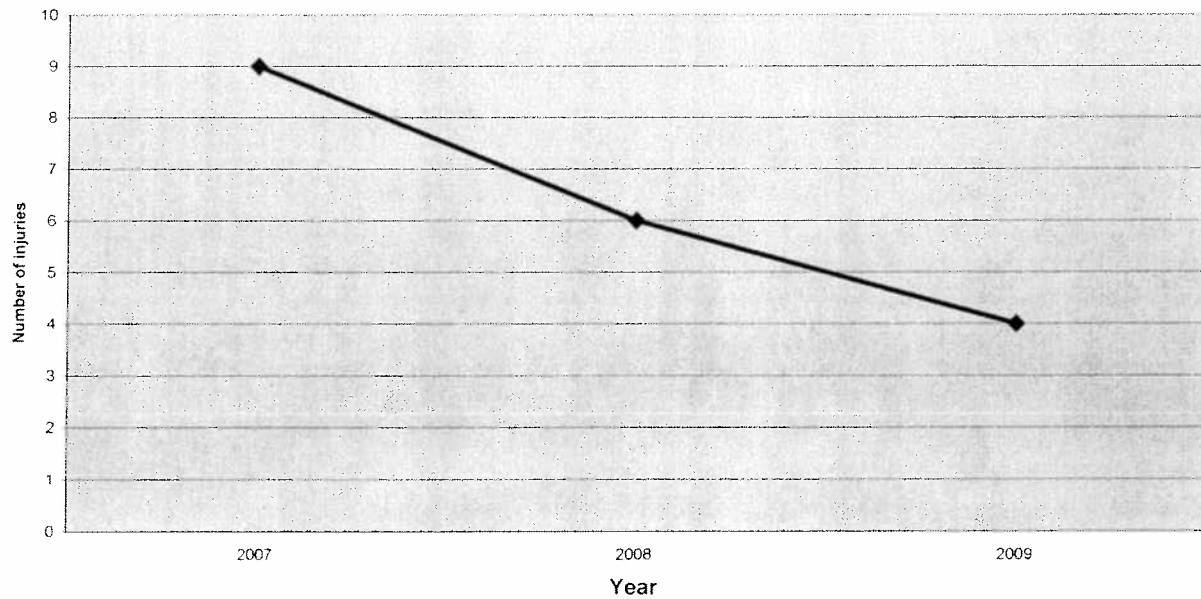
## What the Data Show



Crashes on PPW and Side Streets  
(2007 vs 2008 vs 2009)\*

\*Second Half of Each Year

## What the Data Show



Injuries on PPW and Side Streets  
(2007 vs 2008 vs 2009)\*

\*Second Half of Each Year

30. However, the FOIL documents also show that DOT stopped monitoring speeds on PPW through 2008 although it continued such monitoring on Eighth Avenue, which continued to show that the signalization change was successful and speeds were reduced. Ex. 7.

31. The traffic-light synchronization has been, on information and belief, reset to the 30 mph level, so it appears DOT reverted to the higher-speed signalization at some point for PPW but not for Eighth Avenue. It is unclear when DOT re-set the traffic lights to allow a higher speed, but DOT's own experience would certainly confirm that such a serious adjustment would increase overall traffic speed on a roadway.

32. Then, on March 25, 2009, DOT monitored speeds on PPW for only a total of 32 minutes. That brief glimpse reflected higher speeds, though not dramatically so. Ex. 8.

33. Thus, DOT's claim that the EBL was needed to calm traffic on PPW because signalization had not worked was fundamentally misleading and deceptive.

34. DOT's April 16, 2009 presentation to the community was false or misleading in other critical ways, including:

- a. In its PowerPoint, DOT claimed there had been 58 reported crashes on PPW between 2005 and 2007. Ex. 5. This was false and misleading:
  - (i) In reporting that there had been 58 crashes, DOT included at least 12 crashes that did not actually occur on PPW itself. *See id.*

- (ii) DOT thus artificially inflated its statistics—increasing the actual number of crashes by more than 25 percent—to help create a perceived need for a "traffic calming" bicycle lane.<sup>2</sup>
  
- b. Although DOT attempted to justify the installation of the EBL based in part on its (inflated) crash data, it failed to inform the community that its own data<sup>3</sup> showed that the number of accidents on parallel streets were significantly higher than crashes on PPW. Specifically:
  - (i) The DOT's own data, kept in the ordinary course of business, show that there were only 35 accidents on PPW between 14th Street and President Street in the nearly four years from 2006 to 2009. Ex. 9.
  - (ii) DOT's own data also show that there were 76 accidents on the same stretch on Eighth Avenue. Ex. 10.
  - (iii) DOT's own data also show that there were 91 accidents on the same stretch of 7th Avenue. Ex. 11.
  - (iv) DOT's own data also show that there were 71 accidents on the same stretch of Sixth Avenue. Ex. 12.

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<sup>2</sup> DOT did not produce the data underlying its numbers. However, its own schematic of the information, as well as other drafts, suggests that the report was manipulated to reflect an artificially high number of crashes.

<sup>3</sup> Ms. Hainline received these data in response the "NYCDOT Official Data Release Form" submitted on July 17, 2010.

- (v) DOT's own data also show that there were 111 accidents on 5th Avenue. Ex. 13.
- (vi) Thus, DOT did not inform the community that, despite its claimed need for "traffic calming" on PPW, that street had approximately half the number of accidents on parallel and comparable streets in the area.
- (vii) DOT did not explain, therefore, why the EBL was appropriate or even justified on PPW, as opposed to installing a bicycle lane on one of the parallel streets or not at all.

35. For these and other reasons, DOT's PowerPoint presentation to Community Board 6 on April 16, 2009 constitutes a false business record under New York Penal Law § 175.05 and also a false or deceptive report or statement under New York City Charter § 1116(b).

**D. Assurances Given: Respondents Promised Careful Study**

36. In misplaced reliance on the truth and accuracy of DOT's data at the April 16th presentation, the General Board of CB6, on May 11, 2009, conditionally approved DOT's proposal for the installation of the EBL. Significantly, the Board also adopted a supplemental resolution requesting that DOT delay implementation of the EBL until September 2009 at the earliest, in order to address the Board's safety concerns. Ex. 14.

37. Two months later, on July 13, 2009, CB6 communicated this conditional approval to DOT in a letter, specifically requesting, based on concerns from community members, that Respondents delay the EBL until at least September 2009. Ex. 15. Specifically, CB6 asked

DOT to study, *inter alia*, the potential effects of the EBL on vehicular loading and unloading along PPW during peak times.

38. Nearly nine months later, on April 12, 2010, DOT convened an "open house" meeting allegedly to discuss the community's concerns. Ex. 16.

39. Among the other concerns raised at the meeting, CB6 and community members wanted additional study of traffic and safety data.

40. Respondents promised to perform a rigorous 'before-and-after' study of various traffic and safety issues, including:

- The effect on loading and unloading<sup>4</sup>;
- Bicycle counts;
- Car counts; and
- Accident counts.

41. Even after the meeting on April 12, 2010, Respondents confirmed, again and again, their promises to conduct robust and statistically valid studies of the before-and-after impact of the EBL. For example:

- a. In her August 13, 2010 letter to Assembly Member James Brennan and Council Member Brad Lander, Commissioner Sadik-Khan asserted that

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<sup>4</sup> Despite CB6's explicit request that DOT study loading and unloading during *peak hours* pre-installation, DOT measured loading and unloading activity on only one day, a *Saturday*, May 9, 2009. Moreover, DOT measured this activity on only the east side of PPW, where cars are less likely to double-park. DOT misrepresented this fact in its April 2010 presentation to the community. Ex. 17.

DOT intended to "study conditions on Prospect Park West, following the installation of a parking-protected bicycle path." In addition, she claimed that DOT's "monitoring" of Prospect Park West would seek to "ascertain how the new street configuration has affected traffic flow and street safety" and would provide "sufficient data on crash injury rates of vehicle occupants, pedestrians and cyclists to make a meaningful comparison with crash data from before the project was implemented." Ex. 18.

- b. Commissioner Sadik-Khan, in her October 22, 2010 letter to CB6 Chairperson Richard S. Bashner, reported that DOT would be "collecting data over the next few months" to understand and assess vehicle and bicycle volumes, speeding frequency, frequency of illegal cycling behavior, and crash injury rates of vehicle occupants, pedestrians, and cyclists. Ex. 19.
- c. In her November 17, 2010 letter to NBBL member Norman Steisel, Commissioner Sadik-Khan assured him that DOT had "committed to studying the effect of the Prospect Park West project on safety and traffic flow for six months" and indicated that the PPW bicycle lane "is being vigorously monitored to ensure that it performs as anticipated." Ex. 20.

42. Furthermore, Respondents stated at various times that the results of the study would be released for public scrutiny and that the bicycle lane would not become permanent until after the study data was released and reviewed. For example:

- a. In her August 13, 2010 letter to New York State Assembly Member Brennan and New York City Council Member Lander, Commissioner Sadik-Khan stated an intention to present "the findings from the monitoring period at a public forum" early in 2011, where the "public [would] be encouraged to respond to this data and provide any additional input." Ex. 18.
- b. Commissioner Sadik-Khan, in her October 22, 2010 letter to CB6 Chairperson Bashner, promised to report back to the Board in "early 2011 to provide information" on utilization of the EBL and its impact on safety. In addition, she solicited the "counsel and guidance" of CB6 and looked forward to working with it "in a spirit of partnership and cooperation." Ex. 19.
- c. In her November 17, 2010 letter to Steisel, Commissioner Sadik-Khan assured him that "the community process did not end when the project was implemented" and that DOT intended to "present and discuss [its] findings with members of the community following the study period." Ex. 20.

**E. Petitioners Relied On These Promises**

43. DOT's promises to conduct a meaningful study of traffic and safety conditions before and after installation of the EBL—and to provide a meaningful opportunity for public review of and comment on the resulting data—induced members of the community, including Petitioners, to rely on these statements.

44. DOT sought to induce this reliance through repeated, false assurances to Petitioners' elected officials. These assurances were then conveyed through local elected officials to Petitioners and other members of the community. For example:

- a. On July 13, 2010, Council Member Lander assured a constituent who complained about the EBL that the lane had "been installed on a trial basis." Ex. 21.
- b. Council Member Lander referred to the EBL as subject to a "trial period" during the April 14, 2010 CB6 meeting. Ex. 22.
- c. Subsequently, Council Member Lander stated that the EBL had been installed "on a trial basis" and referred to the promised "study period" in his July 12, 2010 website note to the community. Ex. 23.
- d. Rachel Goodman, Council Member Lander's Chief of Staff, stated that the EBL was in the midst of a "trial period" in a September 2, 2010 e-mail to Brooklyn CB6 District Manager Craig Hammerman. Ex. 24.
- e. In a September 8, 2010 letter to Commissioner Sadik-Khan, long-time PPW resident Dennis Haseley vehemently criticized what he understood to be a "trial bicycle lane" on PPW. Ex. 25.
- f. NBBL member Norman Steisel, in an October 18, 2010 letter addressed to Deputy Mayor of Operations Stephen Goldsmith and copying Commissioner Sadik-Khan, expressed his belief that the EBL was "in a trial phase" and referred to it as a "trial project." Ex. 26.

45. Respondents never refuted these characterizations of the EBL as a "trial" project. In failing to do so, Respondents affirmed the community's belief that they would study the lane and allow for community comment before making a decision to make it permanent.

**F. The EBL Was Installed On A Temporary Basis**

46. In June 2010, DOT began installing the experimental EBL on PPW. This two-way, parking-protected lane resulted in the closure of an entire lane of traffic, coloring the new two-way bike lane with green paint, and installing temporary dividers.

47. As feared, the EBL has been extremely problematic and dangerous. Petitioners have conducted interviews, gathered data, and filmed the roadway. Together, this evidence fairly supports the following conclusions:

- a. Because an entire lane of traffic was removed to create the EBL, the heavily traveled roadway has become a virtual parking lot during rush hours.
- b. Increased vehicular congestion is exacerbated by the numbers of double-parked cars, delivery trucks, and vehicles parking that often reduce PPW to only one lane of flowing traffic.
- c. This effect has increased commuting times for commuters on PPW, increased the amount of vehicle exhaust, and increased the amount of noise pollution due to vehicles honking at each other.

- d. Emergency responders use the bicycle lane because they cannot traverse PPW due to the increased congestion. This creates dangerous traveling conditions for both cars on PPW and any cyclists in the EBL.
- e. Local small businesses and car services are unable to make deliveries and pickups essential to their business.
- f. Discharging or picking up passengers, particularly the elderly and disabled persons, has become virtually impossible for residents of PPW and park visitors amidst the narrowing of traffic lanes and increased congestion.
- g. Parking around Prospect Park has been severely diminished, making the park less accessible to all but those living in the immediate vicinity.
- h. The installation of the EBL has made crossing PPW more hazardous for pedestrians because cyclists traveling from two directions fail to slow down or stop at cross walks. The hazards of crossing the street are further exacerbated by the floating lane of parked cars installed on PPW, which decreases pedestrians' visibility of oncoming one-way vehicle and two-way bicycle traffic. The hazards of crossing the street and exiting an automobile are particularly acute for senior citizens, disabled persons, and parents with small children.
- i. It has also become more difficult for automobile passengers and drivers to safely exit their vehicles after parking along PPW, which lack any safety barrier for passengers entering or exiting their cars.

- j. Cyclists have been lured away from the pre-existing bicycle lane within Prospect Park itself to the more dangerous street-side bicycle lane on PPW.
- k. Even with the displacement of cyclists from Prospect Park itself, bicycle counts are still too low to justify installation of the EBL, particularly given the many costs to the neighborhood that benefits only a small proportion of those using the street.

**G. DOT Circled Its Wagons: NBBL Fought For Months To Obtain Study Data**

48. Throughout the monitoring period, DOT frequently cited its extensive data collection regarding utilization of the EBL, vehicular speeding, and traffic flow, among other issues.

49. At several public hearings and forums, DOT personnel—including Commissioner Sadik-Khan—discussed the study data, claiming the EBL had improved traffic and safety, but refused to release the data itself.

50. DOT released its preliminary "results" in October 2010. *See* Ex. 27. However, despite repeated attempts to obtain the raw data, and even though some data were clearly available, DOT refused to release them.

51. DOT refused to release the raw data underlying its claims despite attempts by community members to obtain access to the data. For example:

- a. NBBL President Louise Hainline requested data on DOT's bicycle lane network generally and the EBL specifically by submitting a "NYCDOT

Official Data Release Form" on July 17, 2010, but she received no documents in response to her request for data on traffic speed and volume on PPW. Ex. 28.

- b. By e-mail dated October 18, 2010. NBBL member Norman Steisel described NBBL's official data requests and noted the lack of "satisfactory data, analyses, or rationales" for DOT's decision to implement the bicycle lane. Mr. Steisel received no documents in response to his e-mail. Ex. 26.
- c. On November 12, 2010, NBBL submitted a FOIL request seeking documents containing any data collected, reviewed, analyzed, or prepared in relation to the EBL both before and after implementation. Ex. 29.
- d. On December 30, 2010, NBBL, through counsel, sent a letter to Commissioner Sadik-Khan imploring her to release all available safety, traffic, and other raw data immediately in compliance with NBBL's FOIL request. Ex. 30. Respondents did not respond.

#### **H. Community Board 6 Meeting On January 20, 2011**

52. Despite NBBL's repeated attempts to obtain the raw data on the EBL, DOT refused to give access to the underlying data in advance of a CB6 meeting it scheduled for January 20, 2011.

53. DOT presented the "results" of its study of the EBL at a CB6 meeting on January 20, 2011. This was DOT's first and only public meeting to discuss the results of its study of the EBL. In presenting its "results," DOT still failed to release the underlying data, but instead first

released only its own summary of the data in a PowerPoint (the "January 20 PowerPoint"). Ex. 31.

54. As described more fully below, the January 20 PowerPoint is a false and misleading business record in several ways.

55. As described in **Part 1**, DOT's critical conclusion in the PowerPoint – that crashes and injuries were reduced after the installation of the EBL – was false, as its own data demonstrates conclusively.

56. As described in **Part 2** below, the January 20 PowerPoint also manipulated the number of crashes and injuries on PPW by including "side street" incidents, which further skewed the data.

57. As described in **Part 3** below, the January 20 PowerPoint manipulated bike count information.

58. As described in **Part 4**, the January 20 PowerPoint also failed to address other critical issues supporting removal or redesign of the EBL.

59. As described in **Part 5** below, DOT official Ryan Russo – the key presenter for DOT – made affirmative misrepresentations.

60. And, as described in **Part 6** below, DOT violated its own standards in conducting a woefully deficient "study" that lacked any scientific validity.

## **Part 1: DOT's Primary Conclusion Was False**

61. DOT's January 20 PowerPoint is false and misleading because it manipulated and distorted crash and injury data. In fact, both crashes and safety were declining until the EBL was installed, and then spiked after the EBL was in use. DOT found a way to distort the data to make it appear, falsely, that the EBL caused a reduction in crashes and injuries.

- a. **DOT's Claims:** At the CB6 meeting, DOT claimed the EBL a "success" because of a decrease in injuries and crashes.
  - (i) DOT claimed that crashes had decreased after installation of the EBL. DOT based this claim on its reporting an average of 29.7 crashes for last six months of the years 2007 through 2009, the DOT's chosen "before" period.<sup>5</sup> DOT then claimed that crashes had been reduced because there had been only 25 crashes in the last six months of 2010, after the EBL was installed. Ex. 31.
  - (ii) Similarly, DOT reported that the number of injuries had decreased from 6.3 to 5 after installation of the EBL. This representation was based on DOT's comparison between the *average* number of injuries for the years 2007 through 2009 and the actual number of injuries after installation of the EBL. Ex. 31.

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<sup>5</sup> DOT apparently used data from only the latter half of the years 2007 through 2009 because data for the EBL were available only for the latter half of 2010. References in this section to the crash and injury data for the years 2007 through 2009 therefore refer to data relating to the last six months of those years.

(iii) On this basis, DOT declared that "crashes are down 16%" and "injuries to all street users are down 21%." Ex. 31.

b. **Analysis of DOT's Conclusions.** The fact that DOT used an average of the three previous years as the basis for its conclusions is significant.

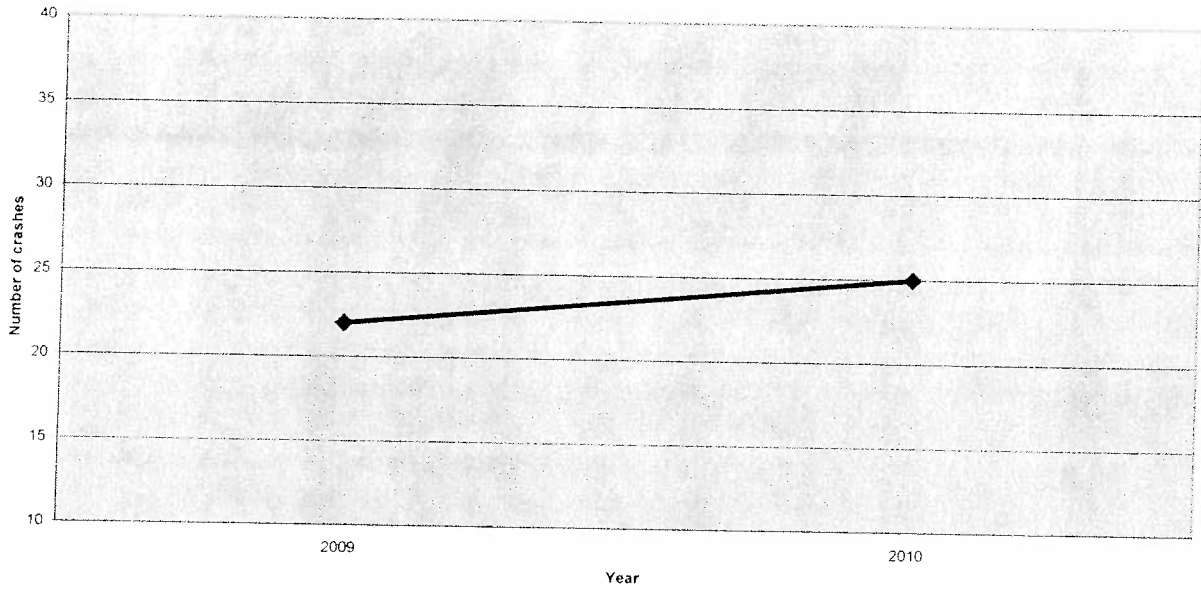
(i) In reporting other data, DOT generally used straightforward point-to-point comparison: comparing a single day or period of measurement before installation of the EBL to one or more days of observations after installation. Fox Aff. ¶ 13.

(ii) However, with respect to its most important statistic – the crash and injury data – DOT deviated from its usual approach in reporting its crash statistics. Instead of comparing data points, it picked a three-year average as the "before" data. This deviation is inherently suspicious: why did DOT deviate from its chosen method?

(iii) The answer lies in DOT's own data. Had DOT simply compared the previous year's crashes and injuries before installation of the EBL with crashes and injuries after installation of the EBL, the data would have revealed that crashes and injuries both *increased* after the EBL was installed. Fox Aff. ¶¶ 11-12.

(iv) The charts below conclusively establish the problem DOT faced: it realized the EBL made safety conditions *worse*.

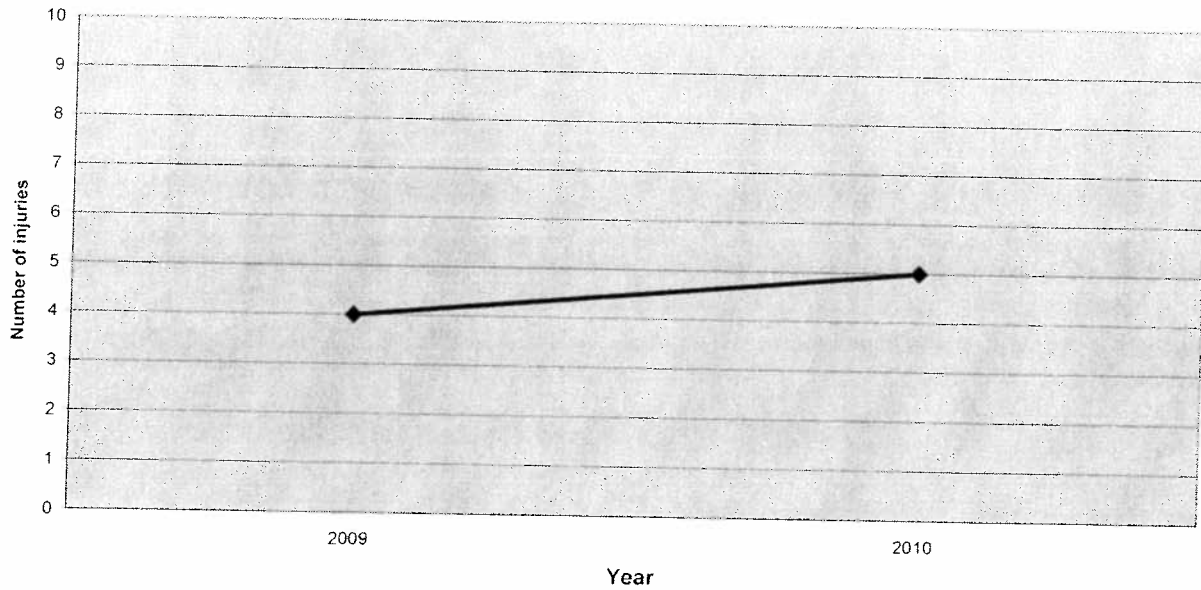
## What the Data Show



Crashes on PPW and Side Streets  
(2009 vs 2010)\*

\*Second Half of Each Year

## What the Data Show

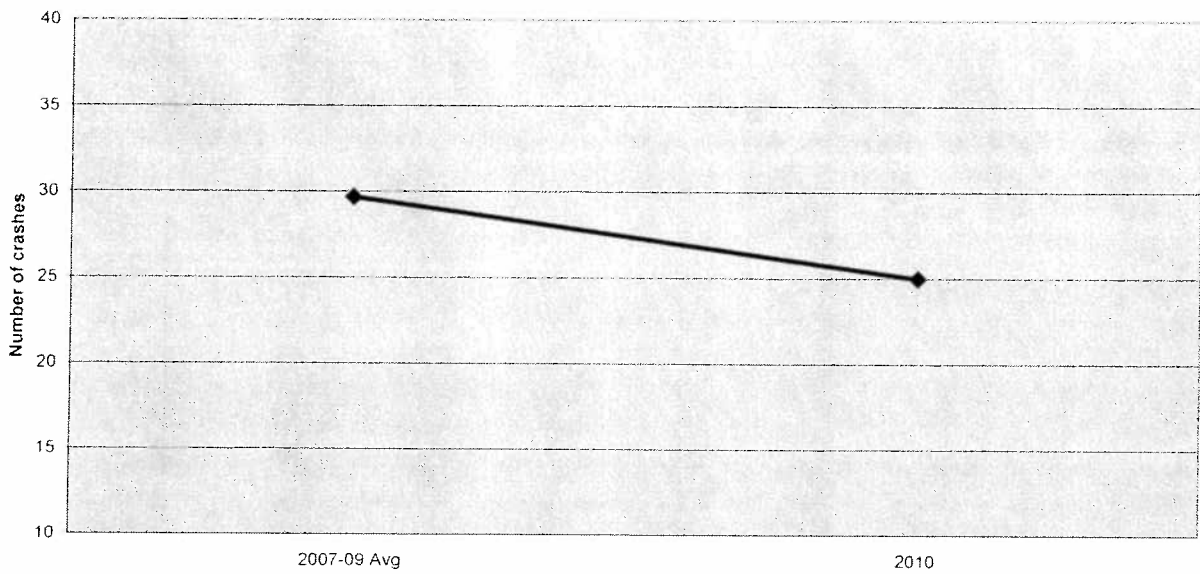


Injuries on PPW and Side Streets  
(2009 vs 2010)\*

\*Second Half of Each Year

(v) Faced with these facts, DOT decided to employ a statistical manipulation. DOT averaged crash data over a number of years, including 2007. That year, 2007, had the highest number of crashes by far. Fox Aff. ¶ 10. Thus, DOT used 2007-2009 data to derive average crash and injury figures, which it used as the "before" sample, and compared it against the post-installation data. *Id.* ¶ 8. This technique yields a starkly different slope (a statistical measure of a trend), that misleadingly shows *improved* safety, as depicted in the charts below. *Id.* ¶ 17

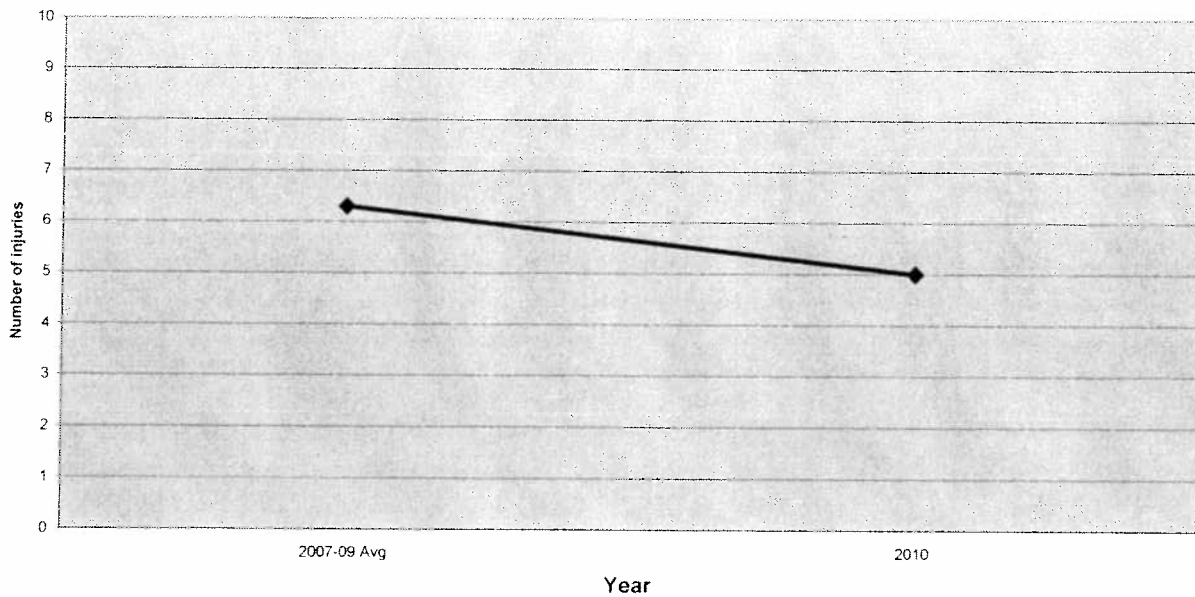
## What DOT Claimed



Crashes on PPW and Side Streets  
(2007-09 Average vs 2010)\*

\*Second Half of Each Year

## What DOT Claimed

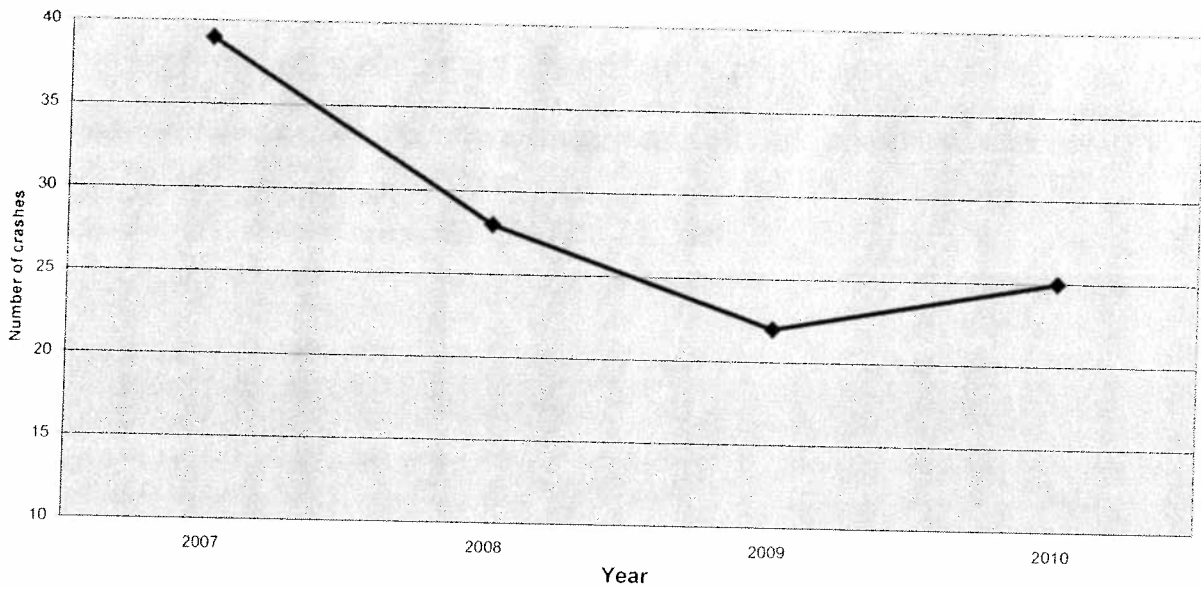


Injuries on PPW and Side Streets  
(2007-09 Average vs 2010)\*

\*Second Half of Each Year

- (vi) However, averaging the data conceals the trend line and masks the negative effect on safety. Fox Aff. ¶ 17.
  
- (vii) This is made even more clear when the "before" averaged data is plotted against the "after" data. The plot line shows a *downward* trend in crashes and injuries before the EBL, and a sharp rise in crashes and injuries after the EBL. *Id.* ¶ 16. The charts below conclusively demonstrate the safety trend data after removing DOT's clever "averaging" trick:

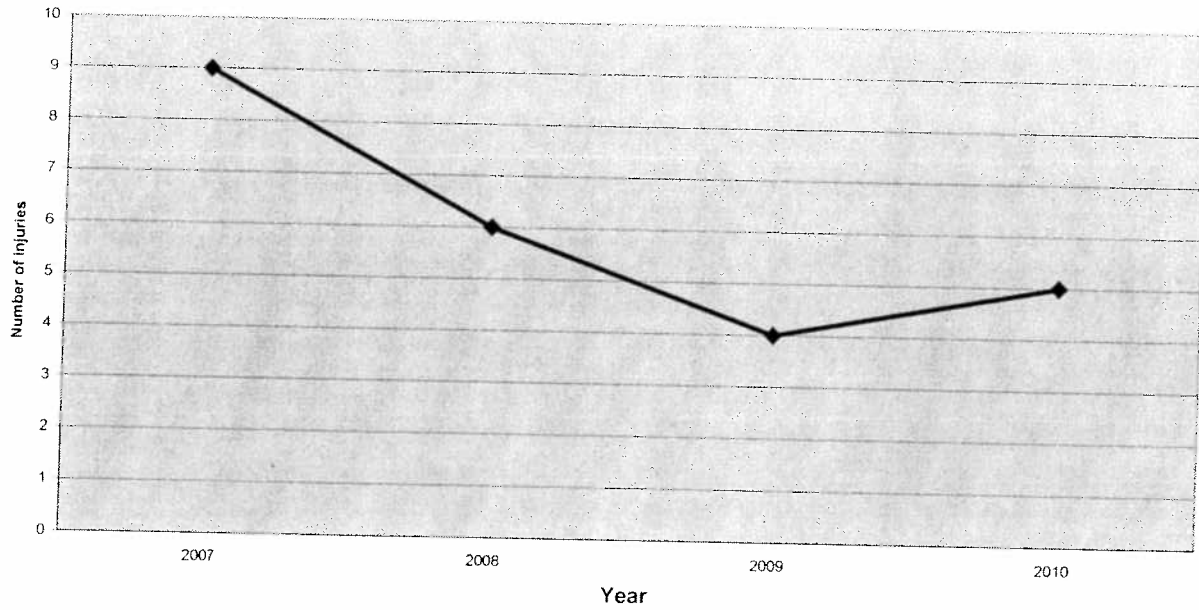
## What the Data Show



Crashes on PPW and Side Streets  
(2007 vs 2008 vs 2009 vs 2010)\*

\*Second Half of Each Year

## What the Data Show

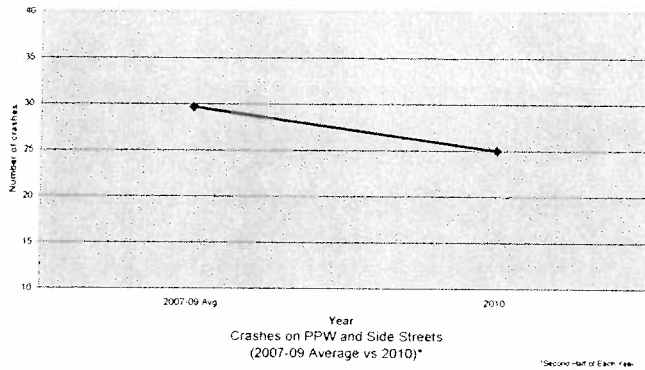


Injuries on PPW and Side Streets  
(2007 vs 2008 vs 2009 vs 2010)\*

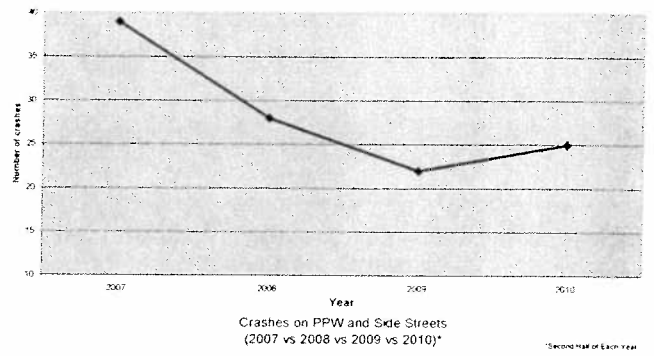
\*Second Half of Each Year

(viii) A side-by-side comparison of DOT's "averaged" data presentation against the actual trend line reveals an inescapable conclusion: DOT's pronouncement of increased safety in the January 20, 2011 public presentation was false.

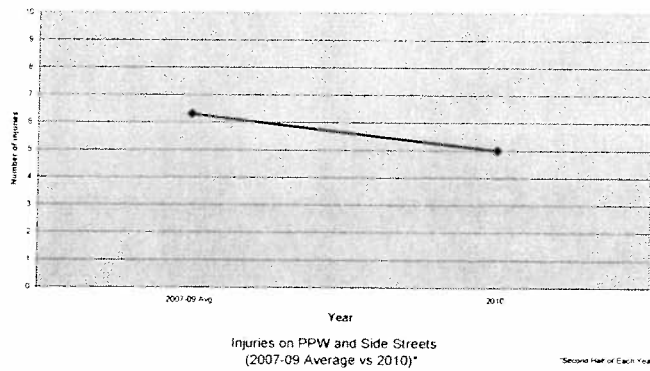
**What DOT Claimed**



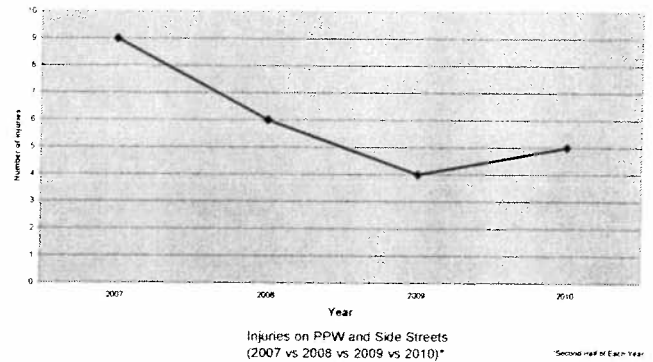
**What the Data Show**



**What DOT Claimed**



**What the Data Show**



(ix) Of course, in its response to Petitioners' second Freedom of Information request (related specifically to the PPW study), DOT included no documents reflecting the basis on which it elected,

contrary to the methods used elsewhere in its data summary, to rely on data averages. Fox Aff. ¶ 10.

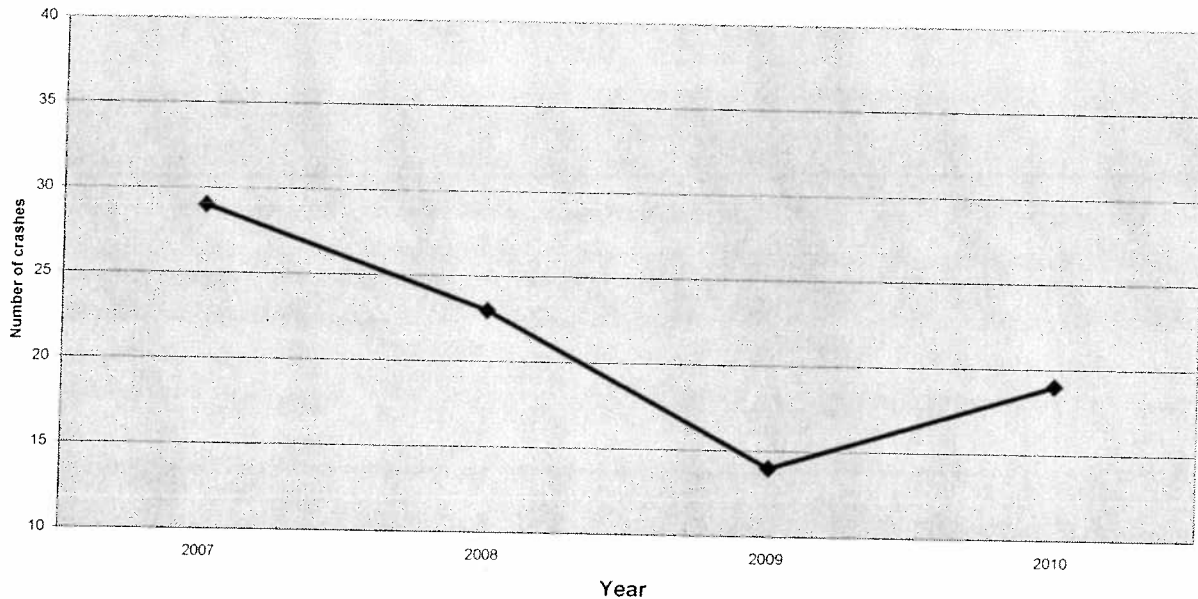
**Part 2: DOT Manipulated the Number of Crashes and Injuries on PPW**

62. A careful review of DOT's data reveals another serious manipulation. Without disclosing this fact, DOT used data that included not only crashes and injuries on PPW, but also crashes and injuries on side streets. Fox Aff. ¶ 18. Given the number of traffic incidents on those congested, smaller streets, inclusion of the data skewed the numbers.

- a. By reporting crash and injury data that included incidents on side streets and not on PPW alone, DOT was able to report a greater decrease in the number of "crashes with injury" than if it had reported data pertaining to just PPW itself. Thus, DOT's data show that the number of crashes with injury decreased from 4 to 2 (-50%) from 2009 to 2010, when side-street data is included, but decreased only from 3 to 2 (-33%) when only PPW itself was considered. DOT further distorted the data by actually reporting only an average of the number of crashes with injuries for the three years prior to installation of the lane. DOT thus actually reported a decrease from 5.3 to 2 (-62.5%). *Id.* ¶ 22.
- b. The more dramatic effect on the data is seen in the "total crashes" and "total injuries" analysis. When the underlying side-street data is stripped out, and one evaluates only incidents on PPW, the adverse effect of the EBL is even more pronounced. *Id.* ¶¶ 20-21.

- c. The total number of crashes on PPW decreased each year from 2007 to 2009 (from 29 in 2007 to 23 in 2008 to 14 in 2009), but increased once the EBL was installed – from 14 in 2009 to 19 in 2010, an increase of 35.7%. *Id.* ¶ 20.
- d. The chart below shows the number of crashes, from 2007 though 2010, on PPW itself, without incorporating crashes on side streets:

### What the Data Show



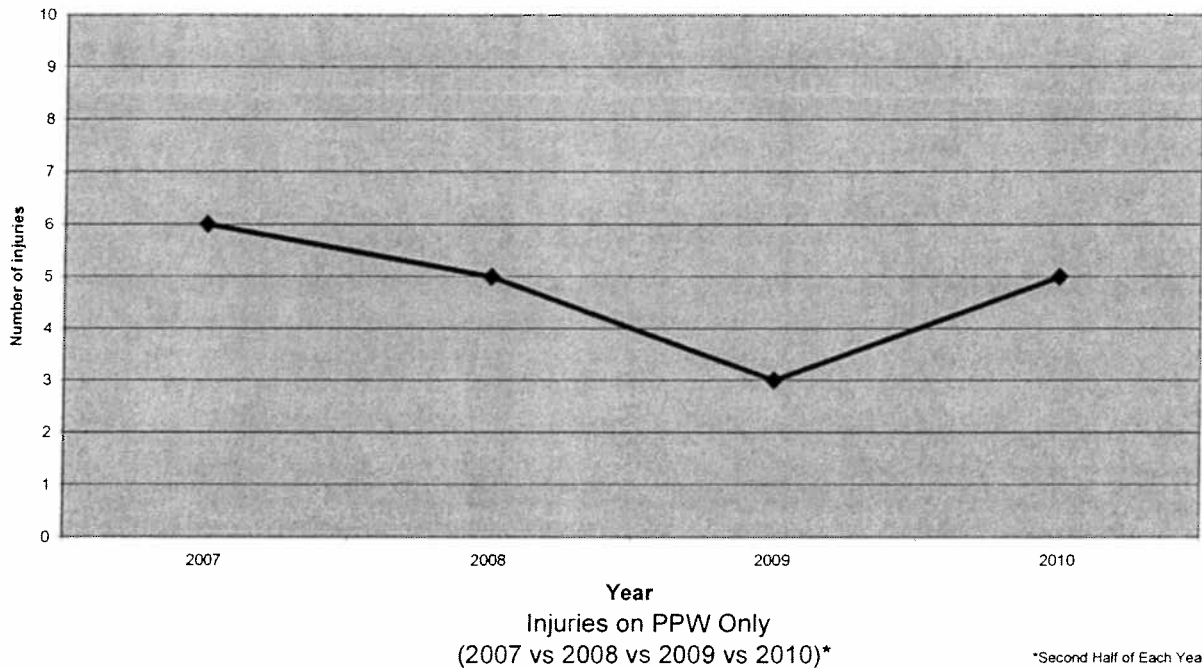
Crashes on PPW Only  
(2007 vs 2008 vs 2009 vs 2010)\*

\*Second Half of Each Year

- e. Similarly, the total number of injuries on PPW decreased each year from 2007 to 2009 (from 6 in 2007 to 5 in 2008 to 3 in 2009), but increased once the EBL was installed – from 3 in 2009 to 5 in 2010, an increase of 66.7%. Fox Aff. ¶ 21.

f. The chart below shows the number of injuries, from 2007 though 2010, on PPW itself, without incorporating crashes on side streets:

### What the Data Show



63. Of important note, the person who presented this skewed and misleading data to the community was none other than Ryan Russo, the DOT official who—months before the study was completed—encouraged bike-lane lobbyists to counterattack those who were raising safety concerns and delighted in the results of those efforts, as described below in paragraphs 78 through 87.

### Part 3: DOT's Bicycle Count Data Were Misleading

64. DOT also heralded the EBL as a success based on its data summary allegedly demonstrating that bike counts increased significantly after the EBL's installation.

65. However, the PowerPoint is false or misleading because it underestimated pre-installation bicycle count and overestimated the post-installation bicycle count, greatly exaggerating the impact of the EBL on ridership.

- a. DOT measured pre-installation bicycle counts during only one weekday and only one weekend day between 4th and 5th Streets on PPW. Ex. 31.
- b. These data are inherently flawed as a sample because they measure only two days' worth of activity: one weekday and one weekend. Fox Aff. ¶ 26. DOT gathered significantly more data before installing bicycle lanes in other parts of the City.
- c. DOT's data on pre-installation weekday bicycle volume are artificially low because the data were collected only on June 9, 2009, which experienced heavy rain in the early morning hours and again during the morning rush hours. The rest of the day was damp, overcast, and chilly, even when it was not actively raining; temperatures were below average. *Id.* ¶ 27. DOT failed to disclose these facts to the public.<sup>6</sup>
- d. DOT's decision to monitor pre-installation weekday bicycle volume on a single day with bad weather renders that data fundamentally unreliable as a baseline. *Id.* ¶ 28.
- e. DOT's post-installation data are even more fundamentally flawed.

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<sup>6</sup> ([http://www.wunderground.com/history/airport/KNYC/2009/6/9/DailyHistory.html?req\\_city=Brooklyn&req\\_state=NY&req\\_statename=New+York](http://www.wunderground.com/history/airport/KNYC/2009/6/9/DailyHistory.html?req_city=Brooklyn&req_state=NY&req_statename=New+York)).

- f. To begin, DOT reported to the public post-installation ridership numbers that included riders on the sidewalk and in the street itself, not just the bicycle lane. Only DOT's raw backup data, not included in its January 20 PowerPoint, reveal that DOT incorporated these non-bicycle-lane numbers into its statistics. *Id.* ¶ 29.
- g. Moreover, DOT failed to disclose that it counted post-lane-installation ridership from a different location – between 3rd and 4th Streets – than it counted pre-lane-installation ridership – between 4th and 5th Streets. *Id.* ¶ 30.

#### **Part 4: DOT's PowerPoint Failed To Address Other Critical Issues**

66. DOT failed to present any information regarding the full effect of the lane on several critical issues, including bike volume, emergency response times, and environmental impacts.

67. For example, DOT did not present data on bicycle counts during the winter months or on the impact of the EBL on usage of the pre-existing bicycle lane inside Prospect Park.

68. DOT also failed to present data in its possession that suggested that any purported increase in bicycle ridership was attributable to mere displacement from nearby Prospect Park.

- a. DOT's adjusted<sup>7</sup> data suggest that approximately 3,861 cyclists used West Drive in Prospect Park, between 3rd Street and Bartel Pritchard Square, from 7:00 a.m. and 7:00 p.m. on Tuesday, June 8, 2010. *Id.* ¶ 33.
- b. In contrast, DOT's own data reveal that approximately 2,322 cyclists used West Drive in Prospect Park, between 3rd Street and Bartel Pritchard Square, from 7:00 a.m. and 7:00 p.m. on Thursday, July 29, 2010. *Id.* ¶ 34.
- c. This nearly 40% reduction in bicycle volume in a seven-week period strongly suggests that installation of the PPW lane simply displaced riders from nearby Prospect Park. *Id.* ¶ 35.
- d. Despite the fact that DOT had these data in January 2011, it did not share them with the community.

69. Additionally, DOT's failure to produce documents on vitally important issues raises the inference that DOT failed to study such issues, rendering any before-and-after study of the impact of the EBL utterly meaningless. For example:

- a. DOT produced no data on emergency response times either pre- or post-installation of the EBL.
- b. DOT admitted that it had no documents responsive to NBBL's FOIL request for documents concerning potential alternative locations for the

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<sup>7</sup> These data were adjusted to compensate for certain time periods that were missing from the original bicycle count data for June 8, 2010, that were provided in DOT's FOIL production.

EBL or potential alternative traffic arrangements to calm traffic. *See* Exs. 29, 32.

- c. DOT admitted that it had no documents responsive to NBBL's FOIL request for documents relating to the application of SEQR and CEQR to the construction of the EBL on PPW. *See id.*
- d. DOT admitted that it had no documents responsive to NBBL's FOIL request for correspondence between DOT and the Landmarks Preservation Commission concerning the effects of the EBL on the community. *See id.*

70. Significantly, DOT has produced no documents exhibiting the methodology used to measure any of its data, despite NBBL's request for such information in its FOIL request.

71. Moreover, the documents that DOT did produce in response to NBBL's FOIL request lack, in many instances, any indication of what information they purport to represent, rendering them nearly impossible to analyze.

72. In sum, DOT's deficient data and failure to consider, or meaningfully discuss, critical information confirm that, despite its pretense of objectivity, its "trial" was a sham with a predetermined outcome.

#### **Part 5: DOT's Oral Presentation Was Also Misleading and Evasive**

73. DOT repeatedly stymied meaningful engagement with the larger community by evading questions from audience members regarding the permanency of the EBL, DOT's efforts to accommodate elderly and disabled persons, the methodology it used to conduct its study, and why it refused to release the raw data underlying its claims about the bicycle lane.

74. DOT misrepresented critical facts in response to some questions. For example, one community member asked whether DOT had observed any reduction in bike volume within Prospect Park after the installation of the EBL, which might indicate that cyclists were being drawn from the safety of the park to the road-side bike lane. Ryan Russo, a DOT official, denied that DOT had any such data. Data buried within DOT's FOIL production reveals that claim to be false; indeed, DOT did conduct a measurement. *Fox. Aff.* ¶¶ 33-35. Moreover, that data show a dramatic decrease in the number of bikes in the park – a reduction of more than 1,000 riders in a single day – after installation of the bike lane. *See Ex. 33.* Thus, as Plaintiffs suspected, the EBL has displaced bikers out of the safety of the park.

75. Moreover, Russo was asked by community members why DOT refused to disclose the data underlying its pronouncements of enhanced safety. Russo claimed that DOT "was organizing" the data to be "more helpful." *See Walden Aff.* ¶ 3. Based on the information above, this transparent side-step has no credibility whatsoever.

76. Most importantly, Russo was asked pointedly whether the EBL was permanent, and he evaded the question. *Walden Aff.* ¶ 3.

77. DOT's statements that the EBL was a "trial" were thus revealed to be a complete sham. Although this was the first meeting to present data to the public, DOT presented the EBL as permanent – contradicting its previous claims that it would allow for public input before making a final decision on the permanency of the lane.

#### **Part 6: DOT Did Not Prepare An Adequate Study Plan**

78. The Federal Highway Administration has published a national standard for "How to Develop a Pedestrian Safety Action Plan." *Ex. 34.* The fundamental principles outlined in

this report set the standard for designing and implementing a safety action plan. Those standards include:

- Defining clear objectives;
- Identifying high-risk locations;
- Selecting all potential countermeasures;
- Developing an implementation strategy (requires public involvement and possible use of temporary measures);
- Institutionalizing changes to planning and design standards;
- Considering land use, zoning and site design issues;
- Reinforcing commitment; and
- Evaluating results.

79. DOT has not produced, despite Plaintiffs' FOIL request, any study plan at all that mentions the PPW bicycle lane, let alone a study plan that meets the rigorous national standards of the Federal Highway Administration.

80. In fact, DOT not only failed to meet the standards set forth by the Federal Highway Administration, but it also fell short of its own standards. DOT outlined fundamental principles in the DOT Pedestrian Safety Study and Action Plan of August 2010. Ex. 35. According to the report, the action plan: "consists of highly targeted, data-driven policies and

programs" (Ex. 35 at 32) that uses "state-of-the-art data statistical modeling techniques and a wide-ranging dataset" (Ex. 35 at 20).

81. In addition, DOT failed to consult with emergency responders before implementing the EBL and failed to consider alternatives to the EBL before implementing it.

82. Rather than implement a methodologically sound, data-based approach, the DOT used statistically unsound methodologies to push through its pro-bicycle lane agenda. Instead of letting the data determine the outcome, DOT predetermined the outcome and cherry-picked the data to suit the determination.

83. As discussed below, the reason for the utter lack of objectivity and honest presentation of data is buried in FOIL documents obtained by Plaintiffs. DOT never intended to be objective from the outset. Indeed, when safety concerns first surfaced, DOT launched a "counterattack" against EBL opponents via the Internet, using known and anonymous "bloggers" to launch aggressive personal attacks.

#### **I. DOT Colluded With Bike Lobbyists To Mislead The Public And Attack Opponents**

84. While the FOIL documents obtained by Petitioners demonstrate, quite clearly, the false and misleading nature of DOT's presentations, the documents also reveal how DOT personnel gave pro-EBL lobbyists political access, advance information, and input into strategic decision-making. Among other things, the documents show – remarkably – that DOT worked closely with pro-EBL lobbyists to suppress any criticism of the EBL—even using these "advocates" as its proxy to lead "counterattacks" to "neutralize" those who questioned the safety of or need for the EBL—spawning personal attack campaigns (of which DOT was aware) against fellow community members, including Petitioners. Moreover, DOT personnel – on at least one

occasion – got suggestions from these "advocates" to mislead the public about a particular safety issue by using irrelevant and skewed data.

85. Most remarkably, DOT sanctioned these bare-knuckled tactics despite data in its own possession showing that safety critiques were real and substantial.

86. Although FOIL documents reveal several such communications, on information and belief, many more undoubtedly exist.

87. **"Counterattacks"**: The FOIL documents reveal a stunning series of communications, in which, when opposition to the EBL first started to mount, DOT officials colluded with EBL advocates to hatch a plan to incite personal attacks and then relish in the results. For example:

a. In some of the communications, DOT officials specifically approved personal attacks, via internet postings, against EBL opponents.

(i) For example, on June 21, 2010, a bike lobbyist reported a serious accident within the newly installed EBL and expressed concerns that the accident would tarnish the EBL project and lead to public disapprobation. Ex. 36.

(ii) The lobbyist sent this communication to Commissioner Sadik-Khan. At the time of this e-mail, the EBL was then apparently under "vigorous monitoring" by DOT. The lobbyist described the accident as a "classic nightmare scenario" to advocates of the lane, and making suggestions to deal with this "critical safety issue." *Id.*

- (iii) Of course, nowhere in DOT's public presentations is this accident, or others like it, disclosed to the public.
  
- (iv) The lobbyist then forwarded his initial email to DOT Official Ryan Russo. Instead of addressing the safety concerns raised by the lobbyist, Russo apparently had a different concern on his mind. Russo disclosed mounting opposition to the EBL, saying the lane was under "serious attack." When the lobbyist asked for clarification, Russo responded that "enough important people" had expressed concerns about the EBL for Russo to "worry." Russo further said the opponents would "require neutralizing." He asked whether the pro-EBL lobbyists were "counterattacking" critics of the EBL. Exs. 37, 38.
  
- (v) The lobbyist then directed Russo to a blog comment the lobbyist wrote, in which he referred to critics of the EBL as:
  - (1) "shameless, selfish pigs,"
  - (2) "complete f'ing troglodytes," and
  - (3) "the worst of what the baby boom generation has to offer America" (an obvious, biased reference to senior citizens, such as the members of Petitioner Seniors for Safety).

- (4) The lobbyist's post continued: "If they won't shut up and they can't be ignored then they need to be publicly disgraced every time they pop their heads up." Ex. 39.
- (vi) DOT's Russo encouraged the lobbyist's attacks by saying that the lobbyist's post was "quite enjoyable." Ex. 37.
- (vii) The lobbyist then continued the email chain, assuring Russo that EBL would get built—"and no one can touch it for a while as it gets tried out . . . unless there's a horrible crash with a brainless motorist heading into a driveway or a cyclist runs over an old lady." Ex. 38.
- (viii) DOT did not produce, pursuant to Petitioners' Freedom of Information Law request, Russo's response.
- e. On June 30, 2010, a lobbyist communicated with DOT Official Ryan Russo, calling opponents of the EBL "maniacs" and notifying Russo about efforts to organize opposition to the EBL. Russo responded that it was "unfortunate," prompting the lobbyist to confirm – consistent with Russo's previous directive to "counterattack[]" and "neutralize" such opponents – that the EBL opponents "need[ed] to be smacked down hard." The lobbyist then suggested that "Seth" – on information and belief, a reference to Seth Solomonow, DOT's press secretary – organize a strategy meeting with other pro-EBL lobbyists to coordinate their responses to the EBL opponents' concerns. Ex. 40.

- f. Russo apparently responded to this e-mail, or forwarded it to others within DOT, but the document produced to Plaintiffs was redacted to omit this communication. *Id.*
- g. Thereafter, DOT attended in-person meetings to strategize with the lobbyists regarding ways to quell opposition to the EBL. On July 9, 2010, an e-mail confirmed a meeting at a local bar between lobbyists and DOT. DOT official Christopher Hrones went "out for a beer (or two)" with one lobbyist to "catch [Hrones] up on the steps" pro-EBL advocates were taking against opponents and to "pick [Hrones's] brains about how real any threats to try to roll back the project might be." Hrones offered to bring another DOT official, Keith Bray, to the meeting. Ex. 41.
- h. Interestingly, the lobbyist's e-mail, and all subsequent e-mails in this chain, copied another person on the original invitation to Hrones. But, in producing the e-mail chain, DOT redacted that individual's name. *Id.*
- i. DOT produced no information, pursuant to Petitioners' FOIL request, concerning whether the meeting occurred or what was discussed, other than the lobbyist's post-meeting "thank you" note, saying: "I really appreciated your insights on Prospect Park West." *Id.*
- j. On information and belief, at least one DOT official is registered as "friends" with pro-bike-lane lobbyists on social media sites.

88. As the months between the Summer of 2010 and the present progressed, the lobbyists mounted increasingly aggressive efforts to humiliate and attack EBL opponents, as

Russo initially suggested. Among many other disparaging remarks, EBL opponents were characterized – often by name – as:

- "monsters,"
- "crazy,"
- "stupid,"
- "selfish,"
- "very good at lying," and
- in a continuing biased theme against senior citizens, calling opponents people who should "move to Florida," where "they probably won't live long enough to experience what climate change has in store for the Sunshine State." Ex. 42.

On information and belief, lobbyists continued their contact with DOT officials concerning these efforts.

89. DOT also communicated with pro-EBL lobbyists regarding their input into presentations to the public about the potential installation of the EBL. On April 28, 2010, one lobbyist and DOT Official Christopher Hrones had an e-mail communication concerning an upcoming public presentation of information by DOT to the community. The lobbyist anticipated that the community would be concerned about "the absence of bike signalization" (which would cause bike riders to stop at pedestrian walkways) from the EBL design. To answer the community's concerns (which the lobbyist claimed would only be raised by "pitch-fork wielders"), the lobbyist suggested that DOT should advance accident statistics from a park-

enclosed bike lane because "in relation to the huge number of users there, it's a small number."

Ex. 43.

- a. Given the fact that DOT had accident data for other parking-protected bike lanes, this suggestion represents a remarkable misdirection.
- b. DOT's FOIL production did not include DOT's outline for its oral presentation to the public, so it is impossible (at this stage) to determine whether DOT accepted the lobbyist's misleading suggestion.

90. DOT's conduct in repeatedly coordinating with pro-EBL advocacy organizations to quell opposition and criticism of the EBL contravenes DOT's promise to objectively evaluate the EBL and consider community concerns before making the EBL permanent. Indeed, DOT's communications with these organizations establishes that DOT intended to install the EBL permanently, regardless of community concerns and the results of its study period.<sup>8</sup>

91. Indeed, as early as August 13, 2010, approximately two months after the PPW lane was substantially constructed, Commissioner Sadik-Khan informed Assembly Member Brennan and Council Member Lander that DOT "anticipate[d] that the data will show that the parking-protected bicycle path on Prospect Park West has increased street safety and bicycle volumes, as similar projects throughout New York City have." Ex. 44.

92. Before the data was analyzed, other DOT officials, including Jon Orcutt, Senior Policy Advisor for DOT, were in contact with EBL lobbyists.

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<sup>8</sup> In addition, Respondent Sadik-Khan has stated that implementing traffic initiatives as an "experiment" makes them "very hard to argue with" – an approach Respondents have clearly adhered to here. "You get a lot of momentum that way," she added. Ex. 45.

93. As noted above, the individual from DOT responsible for interpreting and presented the misleading and skewed data to the community was none other than Ryan Russo. Given the obvious agenda he showed in word and deed in these e-mails, which crossed the line from bad judgment to actual wrongdoing, the motive for the various data manipulations above are abundantly clear, animating Petitioners' urgent need to obtain additional documents through expedited discovery.

**J. PPW's Historic Character Demands Environmental Review**

94. DOT assumed throughout this process that it could impose the PPW bicycle lane with no meaningful environmental review. That is not true.

95. Because Prospect Park West touches not one but two sites that are listed on the National Register of Historic Places, New York State and City law demands careful study of various environmental impacts, including but not limited to exhaust and noise pollution.

96. Park Slope Historic District is listed on the National Register of Historic Places. It was added to the Register in 1980. It is roughly bounded by Prospect Park West, Berkeley Pl., 15th St., 6th, 7th, and Flatbush Aves.

97. Prospect Park is listed on the National Register of Historic Places. It was added to the Register in 1980. It is roughly bounded by Parkside, Ocean and Flatbush Aves., Prospect Park West and Prospect Park Southwest.

98. Park Slope Historic District was also designated a Historic District by the New York City Landmarks Preservation Commission in 1973. The District borders Prospect Park West between portions of President St. and Garfield Pl., 1st St. and 3rd St., 4th St. and 9th St., and 10th St. and 14th St.

99. Prospect Park was also designated a Scenic Landmark by the New York City Landmarks Preservation Commission in 1975.

**K. Relevant Legal Authorities**

- **NY CPLR § 7803(1)**

100. A governmental decision may be overturned in an Article 78 proceeding if the governmental "body or officer failed to perform a duty enjoined upon it by law." CPLR § 7803(1).

101. "[A]n article 78 proceeding in the nature of mandamus is an appropriate remedy to compel the performance of a statutory duty that is ministerial in nature." *Cohalan v. Caputo*, 94 A.D.2d 742, 743 (2d Dep't 1983) (upholding the special term's order that the comptroller process a purchase order to procure certain police vehicles and encumber funds related to the purchase).

- **NY CPLR § 7803(3)**

102. A governmental decision may be annulled in an Article 78 proceeding if it is "made in violation of lawful procedure, was effected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR § 7803(3).

103. "When an agency decision is based upon conclusions . . . which are not arrived at in good faith or in a rational and reasoned manner, that decision is necessarily arbitrary." *See Sierra Club v. United States Army Corps of Eng'rs*, 614 F. Supp. 1475, 1516 (S.D.N.Y. 1985) (holding that Army Corps of Engineers' decision under the Clean Water Act based upon "incomplete and misleading statements" in an environmental impact statement rendered that decision "necessarily arbitrary").

- **NY City Charter § 1116(b)**

104. New York City Charter § 1116(b) makes it illegal for any officer or employee of any city agency to knowingly make a false or deceptive report or statement in the course of duty. A violation is a misdemeanor requiring forfeiture of office or employment.

- **Penal Law Provisions**

105. New York Penal Law § 175.05 makes it illegal for a person to, *inter alia*, with the intent to defraud make a false entry or material omission from a business record.

106. New York Penal Law § 195.00 makes it illegal for a public servant to, *inter alia*, knowingly refrain from performing a duty clearly inherent in the nature of his office with the intent of depriving another of a benefit.

- **Landmarks Preservation Law, Admin. Code of the City of New York § 25-318**

107. New York City enacted its Landmarks Preservation and Historic Districts Law in order to protect, preserve, and enhance the city's improvements, landscape features of historic value, and historic districts. Administrative Code of the City of New York § 25-301 *et seq.*

108. Administrative Code § 25-318(a) provides that:

Plans for the construction, reconstruction, alteration or demolition of any improvement or proposed improvement which: (1) is owned by the city or is to be constructed upon property owned by the city; and (2) is or is to be located on a landmark site or in an historic district or contains an interior landmark; shall, prior to city action approving or otherwise authorizing the use of such plans with respect to securing the performance of such work, be referred by the agency of the city having responsibility for the preparation of such plans to the [Landmarks Preservation] commission for a report.

109. Administrative Code § 25-302(i) defines "improvement" as "[a]ny building, structure, place, work of art or other object constituting a physical betterment of real property, or any part of such betterment."

- **SEQR and CEQR**

110. SEQR, Article 8 of N.Y. Environmental Conservation Law ("ECL"), was enacted to incorporate the consideration of environmental factors into the planning, review, and decision-making processes of state and local governmental agencies at the earliest possible time. 6 New York Codes, Rules & Regulations ("NYCRR") § 617.1(c).

111. CEQR incorporates the statutory requirements contemplated by SEQR within the regulatory framework that governs city agencies. Pursuant to section 192(e) of the Charter, the City Planning Commission established additional rules under CEQR. *See* 62 RCNY § 5-01 *et seq.*

112. To accomplish their purpose, SEQR and CEQR require that all agencies determine whether the actions they undertake, fund, or approve may have a significant adverse impact on the environment. *See* ECL § 8-0103; 6 NYCRR § 617.1(c); 62 RCNY § 5-01 *et seq.*

113. CEQR defines agency "actions" broadly, meaning "any activity of an agency" other than select exemptions for facility maintenance or repairs, criminal enforcement proceedings, state legislation, and certain other ministerial actions enumerated in 43 RCNY § 6-04. 43 RCNY § 6-02.

114. DOT has admitted that it has no documents relating to any potential or actual review under SEQR or CEQR.

115. The few agency actions that are expressly exempted, known as Type II actions and specifically enumerated in 6 NYCRR § 617.5, are defined as "[a]ctions or classes of actions which have been determined not to have a significant effect on the environment." 6 NYCRR § 617.5(a).

116. All other actions are either specifically enumerated as Type I or fall into the catch-all "Unlisted" class. 6 NYCRR § 617.2 (a)-(k).

117. A Type I action "carries with it the presumption that it is likely to have a significant adverse impact on the environment." 6 NYCRR 617.4(a)(1).

118. Among those actions identified as being Type I, SEQR includes any "Unlisted action . . . occurring wholly or partially within, or substantially contiguous to, any historic building, structure, facility, site or district that is listed on the National Register of Historic Places." 6 NYCRR § 617.4(b)(9).

119. Under SEQR and CEQR, an agency may not make a decision to approve or disapprove a Type I action until it has completed the SEQR process: "No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQR" and CEQR. 6 NYCRR § 617.3(a); *see also* 43 RCNY § 6-12(a).

120. As the first step in an environmental review for a Type I action under SEQRA, an Environmental Assessment Form ("EAF") must be completed to determine the environmental significance of the action. 6 NYCRR § 617.6(a)(2).

121. Under CEQR, this requirement is met via the completion of "the standardized environmental assessment statement ["EAS"] provided by the [New York City Office of

Environmental Coordination]." 62 RCNY § 5-05(b). The EAS assists the agency in determining whether the proposed action will have a significant adverse impact on the environment.

122. Pursuant to SEQR, "[a]s early as possible in an agency's formulation of an action it proposes to undertake . . . it must . . . [d]etermine whether the action is subject to SEQR." 6 NYCRR § 617.6(a)(1)(i). At that time, the agency must take four steps: (i) determine whether the action is subject to SEQR (if the action is Type II, the agency does not have to take any further steps); (ii) determine whether the action involves a federal agency; (iii) determine whether the action may involve one or more other agencies; and (iv) make a preliminary classification of the action as Type I or Unlisted. 6 NYCRR § 617.6(a)(1)(i)–(iv).

123. Pursuant to the CEQR Technical Manual, "[a]n agency should document its consideration and determination of a Type II action in a memorandum for its files, with a copy sent to" the Mayor's Office of Environmental Coordination. Ex. 46 at 1–3.

### **FIRST CAUSE OF ACTION**

124. Petitioners repeat and reallege, as if set forth fully herein, the allegations contained in Paragraphs 1 through 123 hereof.

125. DOT failed to collect sufficient pre-installation data to adequately analyze the appropriateness of the EBL.

126. DOT failed to consider the concerns of the community and the appropriateness of the bicycle lane on PPW before installing the EBL.

127. Although DOT disingenuously labeled the bicycle lane a "trial," DOT's "trial" was a sham with a predetermined outcome, which DOT is using to install the EBL without conducting proper analysis.

128. DOT failed to adhere to its own standards in analyzing the appropriateness of the EBL.

129. DOT failed to adequately consider less obtrusive alternatives to the EBL.

130. For these reasons and more, Respondents' conduct in implementing the EBL is arbitrary, irrational, and in violation of New York Penal Law §§ 175.05 and 195.00.

131. DOT's decision to implement the EBL on PPW should therefore be annulled.

### **SECOND CAUSE OF ACTION**

132. Petitioner repeats and realleges, as if set forth fully herein, the allegations contained in Paragraphs 1 through 131 hereof.

133. Pursuant to Administrative Code § 25-318(a), Respondents are required to refer to the Landmarks Preservation Commission any "plans for the construction . . . of any improvement or proposed improvement which . . . (1) is owned by the city or is to be constructed upon property owned by the city; and (2) is or is to be located on a landmark site or in an historic district . . . prior to city action approving or otherwise authorizing the use of such plans." Administrative Code § 25-318(a).

134. The EBL is an improvement subject to the requirements of Administrative Code § 25-318(a). *Id.* § 25-302(i).

135. The EBL is located in or on the border of the Park Slope Historic District, and directly adjacent to Prospect Park, both of which are listed in the National Register of Historic Places and recognized by the City as a Historic District and Scenic Landmark, respectively.

136. The EBL has been approved, authorized, and implemented. It has added to the Park Slope Historic District a bright-green, eight-foot-wide lane running for nineteen blocks; several flashing yellow lights; a three-foot-wide striped buffer lane; and myriad directional signs intended to govern the flow of bicycle traffic.

137. Thus, Respondents violated their obligations under Administrative Code § 25-318(a) by failing to refer the EBL plan prior to approving, authorizing, and implementing that plan.

138. Accordingly, this Court should declare that Respondents violated Administrative Code § 25-318(a) and should mandate that Respondents fulfill their legal obligations under this regulation.

### **THIRD CAUSE OF ACTION**

139. Petitioner repeats and realleges, as if set forth fully herein, the allegations contained in Paragraphs 1 through 138 hereof.

140. As an action occurring within a Historic District that is listed on the National Register, the construction and implementation of the EBL is a Type I action under SEQR and CEQR.

141. Under SEQR and CEQR, an agency may not approve or disapprove a Type I action until it has completed the necessary environmental reviews and SEQR procedures.

142. On information and belief, DOT has failed to submit the EBL to any environmental reviews.

143. DOT's failure to conduct environmental reviews was arbitrary, capricious and an abuse of discretion under CPLR § 7803(3). As a result, DOT's decision to implement the EBL should be annulled until it submits to required environmental reviews under SEQR and CEQR.

144. The duty to perform SEQR and CEQR reviews is not discretionary.

145. Thus, under CPLR § 7803(1), DOT should be compelled to conduct these environmental reviews.

#### **FOURTH CAUSE OF ACTION**

##### **(in the alternative)**

146. Petitioners repeat and reallege, as if set forth fully herein, the allegations contained in Paragraphs 1 through 145 hereof.

147. Even if DOT determines that the EBL is a Type II action, DOT must still document this determination and send the documentation to the Mayor's Office of Environmental Coordination.

148. Upon information and belief, DOT has not documented such a determination.

149. DOT's failure to document its consideration and determination was arbitrary and capricious under NY CPLR § 7803(3). As a result, DOT's decision to implement the EBL should be annulled until it submits to required environmental reviews under SEQR and CEQR.

150. The duty to document the Type II determination is not discretionary.

151. Thus, under CPLR § 7803(1), DOT should be compelled to document its determination.

**L. No Prior Applications**

152. No prior application for this or any similar relief has been made in this Court.

**WHEREFORE**, Petitioners request that this Court issue a judgment pursuant to Article 78 of the CPLR:

- (i) declaring that the Respondents acted arbitrarily, capriciously, irrationally, and contrary to law by installing the EBL without undertaking the required analyses, community consultation, and consideration of alternatives;
- (ii) declaring that Respondents acted arbitrarily, capriciously, irrationally, and contrary to law by actually installing the EBL under a sham "trial" designation in order to minimize and lessen their future procedural obligations;

- (iii) declaring that Respondents violated their clear duties under City Charter § 1116(b) by presenting to the public deceptive reports in the course of their official duties;
- (iv) declaring that Respondents violated their clear duties under New York Penal Law by presenting to the public false and misleading data summaries;
- (v) declaring that Respondents violated their clear legal duties under the Administrative Code of the City of New York § 25-318 by failing to refer the EBL plans to the Landmarks Preservation Commission;
- (vi) declaring that Respondents violated their clear legal duties under SEQR and CEQR by failing to make and document a determination of which SEQR action type the bicycle lane installation constitutes;
- (vii) declaring that Respondents violated their clear legal duties under SEQR and CEQR by making a determination that the EBL constitutes a Type II action not subject to environmental review;
- (viii) annulling Respondents' determination to install the EBL on a permanent basis and directing Respondents to remove the installed components of the lane and restore PPW to its condition prior to any installation activities;

- (ix) ordering expedited discovery consistent with the discovery requests and notices of deposition attached as Exhibits 47 through 51 to the Affirmation of Jim Walden;
- (x) ordering Respondents to preserve all communications on DOT-related email systems, personal email systems, and social media websites;
- (xi) awarding Petitioners the costs and disbursements of this proceeding; and
- (xii) granting such other and further relief as the Court deems just and proper.

Dated: New York, New York  
March 7, 2011

GIBSON, DUNN & CRUTCHER LLP

By: 

Jim Walden

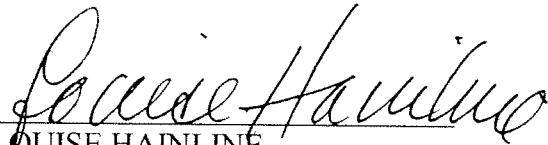
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Attorneys for Petitioners


VERIFICATION

STATE OF NEW YORK    )  
                                  )  
COUNTY OF KINGS    )

LOUISE HAINLINE, a member of the affected neighborhood, being duly sworn, states that she is a Petitioner in this proceeding, and has read the foregoing Petition and knows the contents thereof; that the same is true to her own personal knowledge, or information and belief, based on discussions with other community members; and as to those matters, she believes them to be true.

  
\_\_\_\_\_  
LOUISE HAINLINE

Sworn to before me this  
7<sup>th</sup> day of March, 2011

  
\_\_\_\_\_  
NOTARY PUBLIC

ANGEL ARIAS  
Notary Public, State of New York  
No. 01AR5040048  
Qualified in Queens County  
Certificate Filed in New York County  
Commission Expires March 6, 2015