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July 19, 2011

By Fax (347 401 9111) 7 Pages Total

Hon. Bert A. Bunyan  
New York State Supreme Court  
360 Adams Street, Room 1126  
Brooklyn, New York 11201

Re: Seniors for Safety v. NYC Dep't of Transportation, No. 5210/2011

Dear Justice Bunyan:

This office represents the respondents (collectively "DOT") in the above-captioned Article 78 proceeding, scheduled for argument on July 20, 2011. I write in response to the petitioners' July 18, 2011 letter that seeks to submit a factual affidavit even though petitioners submitted their reply papers more than a month ago.

Petitioners contend that at the last appearance, on June 22, 2011, Your Honor "provided a brief adjournment to permit Petitioners an opportunity to explore" the issue of whether the Prospect Park West Bicycle Path and Traffic Calming Project ("PPW Project") was installed as a trial project. Petitioners' assertion is inaccurate; specifically, Your Honor adjourned the proceeding to July 20<sup>th</sup> to permit the petitioners to review hundreds of pages of documents -- produced shortly before the June 22 appearance -- by Council Member Brad Lander in response to petitioners' Freedom of Information Law Request ("FOIL"). Nothing in petitioners' submission suggests that it is a consequence of information obtained as a result of this FOIL production. Accordingly, petitioners' eleventh hour attempt to submit an affidavit should be rejected on that ground alone.

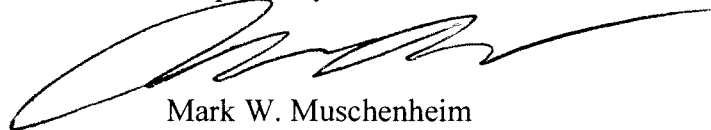
In addition, the affidavit should be rejected since petitioners have already submitted their reply papers. Specifically, petitioners submitted their reply papers more than a month ago, on June 17, 2011, two weeks after DOT submitted its opposition papers. Moreover, for at least the past two months petitioners have known that the matter addressed in the affidavit (whether or not the PPW Project was installed on a trial basis) was an issue in dispute; indeed, on May 17, 2011, petitioners submitted a letter to Your Honor that exclusively addressed this issue. See Ex. A attached hereto. Petitioners' attempt to litigate by ambush should not be countenanced. Although aware of this issue for at least two months, petitioners' July 18<sup>th</sup> letter

utterly fails to attempt to explain why petitioners could not have submitted this affidavit with their reply papers. Their failure to do so, together with the fact that their reply papers were submitted more than a month ago, warrants rejection of this affidavit.

If, however, Your Honor is inclined to consider the petitioners' eleventh hour affidavit, DOT respectfully requests that Your Honor also consider the following and the attached affidavit from DOT Commissioner Janette Sadik-Khan. In her affidavit, Commissioner Sadik-Khan explicitly states that she never told Borough President Markowitz at the March 1, 2010 meeting "that the PPW Project was a trial or pilot project." Rather, during that meeting DOT simply indicated that it would not initially install concrete pedestrian islands (although it will do so in the future), and that following the installation of the PPW Project, DOT would be monitoring its performance (as DOT does for all of its projects). Thus, to the extent that the Borough President misinterpreted<sup>1</sup> the discussion at the meeting to mean that the PPW Project was being installed on a trial or pilot basis, he was mistaken.<sup>2</sup>

DOT believes that the issues raised in the amended petition are ripe for a judicial determination, and DOT is eager to have this Article 78 proceeding resolved promptly. However, to the extent that resolution of the issue of whether the installation of the PPW Project was a "trial" or "pilot" project will delay the ultimate resolution of this matter, respondents are prepared to not pursue the statute of limitations defense.

Respectfully submitted,



Mark W. Muschenheim  
Assistant Corporation Counsel

Enclosure

cc: Jim Walden, Esq.  
(By E-mail)

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<sup>1</sup> Curiously, shortly after the Borough President's meeting with DOT, he was interviewed on WNYC and said nothing about DOT declaring that the PPW Project was a trial project: "I think the two-way bicycle lanes will cause a great inconvenience to the residents of Prospect Park West and I don't want to be blamed, because they're going to move ahead with this as you know, I don't want to be blamed, and that's why I took this interview with you. I don't want to be blamed. On the other hand, I hope that the commissioner and the department is right. If they're right, and in fact it causes no bottlenecks, no inconvenience, and if it works, I'll be the first to say I was wrong. I would." <http://www.wnyc.org/articles/wnyc-news/2010/apr/12/the-latest-skirmish-in-the-bike-lane-battles/>.

<sup>2</sup> Petitioners also attempt to rely on an NBC segment from July 2010. That segment, however, neither quotes the purported DOT spokesperson, nor identifies that person.



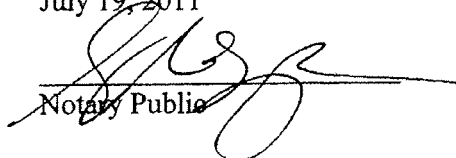
3. On March 1, 2010, I met with Borough President Markowitz and others from his staff to discuss the then forthcoming PPW Project. Others from DOT who attended this meeting included Jon Orcutt, the Senior Policy Director, David Woloch, the Deputy Commissioner for External Affairs, and Joseph Palmieri, DOT's Brooklyn Borough Commissioner.

4. I have been provided a copy of the Borough President's July 18, 2011 affidavit in which he claims that I told him at the March 1<sup>st</sup> meeting that the PPW Project would be implemented on a trial basis. The Borough President's recollection is mistaken; specifically, I never said at that meeting or at any other time that the PPW Project was a trial or pilot project, or that it would be installed on a trial or pilot basis. Nor did any of the others from DOT make such a statement at that meeting. During that meeting I do recall that DOT stated that it would not initially install concrete pedestrian islands (although it will do so in the future), and that post-installation DOT would be monitoring the performance of the PPW Project as we do for all DOT projects. To the extent that the Borough President misinterpreted the discussion to mean that the PPW Project was being installed on a trial or pilot basis, he is mistaken.

5. Accordingly, I am firm in my belief that Petitioners have no basis for characterizing the installation of the PPW Project as a pilot or trial project.

  
JANETTE SADIK-KHAN

Sworn to before me on  
July 19, 2011

  
Notary Public

**SUSAN ROGERSON PONDISH**  
Notary Public, State of New York  
No. 02PO6100049  
Qualified in Richmond County  
Commission Expires Oct. 14, 2011

12/17/2011

**EXHIBIT A**

May 17, 2011

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**BY HAND**

Honorable Bert A. Bunyan  
New York State Supreme Court  
360 Adams Street, Room 1126  
Brooklyn, NY 11201

Re: *Seniors for Safety and Neighbors for Better Bike Lanes v. New York City Department of Transportation and Janette Sadik-Khan, Commissioner of Transportation, Index No. 5210/2011*

Dear Justice Bunyan:

The above-referenced matter is an Article 78 proceeding, in which two large community-based associations – Seniors for Safety and Neighbors for Better Bike Lanes (collectively, "Petitioners") – challenge the Department of Transportation's ("DOT") decision to permanently place a dangerous bike lane (two-way bike traffic, separated from one-way car traffic by a floating lane of parked cars in the middle of the street) along Prospect Park West, creating gnarled rush-hour traffic, increased air and noise pollution, and dangerous safety concerns for pedestrians, cars, and emergency-service vehicles. The Petition challenges DOT's use of false and misleading traffic and safety data to justify its decision. The Petition also challenges DOT's collusion with pro-bike-lane lobbyists to stifle public debate about the bike lane by launching personal attacks via internet postings against community members, including the elderly. The Petition challenges DOT's failure to conduct any environmental impact assessment at all before announcing the permanent lane, despite its obligations under the State and City Environmental Quality Review Acts.

We write briefly to respond to the May 11, 2011 letter by Respondents (collectively, "DOT") and to clarify certain issues for the Court before the parties' appearance tomorrow. In short, DOT's letter further demonstrates the need for expedited discovery here, since it highlights the dispute regarding when DOT made a final decision to install this experimental bike lane ("EBL") on Prospect Park West.

In the first instance, DOT has incorrectly asserted that Petitioners' claims fall outside the statute of limitations. Contrary to DOT's claims – and as made clear in the Amended Petition – Petitioners have challenged, among other things, DOT's decision to make the EBL permanent and DOT's study supposedly justifying that decision. The results of DOT's study and DOT's decision (supposedly based on that study) to make the EBL permanent were not completed and reported until January 20, 2011, making Petitioners' March 7, 2011 filing well within the statute of limitations.<sup>1</sup>

<sup>1</sup> Thus, contrary to DOT's contention, Petitioners' request for documents created after the installation of the EBL – during the study period in which DOT promised to determine,

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Honorable Bert A. Bunyan

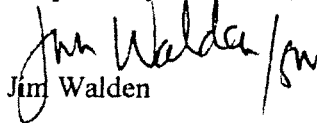
May 17, 2011

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However, the fact that DOT apparently plans to raise a statute of limitations defense is significant. From the outset, DOT assured the public that the EBL was being installed on a "trial" basis, to be followed by a "monitoring period." DOT represented that it would make a final decision on the EBL's permanence only after an objective study on the impact of the EBL, including the opportunity for public input after the study was complete. Contrary to these public promises, DOT instead conducted an inadequate study and released the data underlying the reported "results" of its study only *after* the single public meeting purporting to discuss the effects of the EBL. Moreover, DOT manipulated the reported "results" of its study, reporting, for example, that the numbers accidents and injuries decreased after the implementation of the trial EBL, when, in fact, the underlying data show that accidents and injuries actually increased after the EBL was installed. Because DOT misleadingly reported the results of its study and did not timely provide the data underlying its study, the public was unable to review the data before public meeting and was thus effectively deprived of any meaningful opportunity to comment on the EBL after its implementation.

The claims in DOT's May 11 letter represent a complete reversal of DOT's prior public statements. Although DOT assured the public from the outset that the EBL was being installed on a trial basis, it apparently now admits that it intended to make the EBL permanent all along – regardless of the results of the "study" it promised to conduct. This about-face further highlights the need for immediate discovery here, so that Petitioners may obtain documents addressing when DOT made a final decision to permanently implement the EBL.

Respectfully submitted,

  
Jim Walden

cc: Mark W. Muschenheim, Esq., Assistant Corporation Counsel of the City of New York (by email)

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with public input, whether to make the EBL permanent – go to the heart of Petitioners' claims that DOT conducted an inadequate study, manipulated the results of that study, and colluded with lobbyists to stifle criticism and attack opponents of the EBL.