

**Gerson v City of N.Y.**

2008 NY Slip Op 32205(U)

August 4, 2008

Supreme Court, New York County

Docket Number: 0112619/2007

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON  
Justice

PART 55

Person A

INDEX NO. 112619107

MOTION DATE 4/10/08

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

- v -

City

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Art 78 petition

PAPERS NUMBERED

1-3

4-8

9-10

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion petition is decided together with the motion 001 in the ~~case~~ case filed under index number 603110/2007 and in accordance with the annexed memorandum decision, order and judgment.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 8/4/08

JANE S. SOLOMON  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X  
ALAN J. GERSON, (individually and as a Member Of the New York City Council for the First District, Manhattan), MARIAN FOX, VINCENT CORZZINI, (individually who are Directors or Officers of 505 La Guardia Place, a cooperative), ELAINE CORZZINI, HARRIET BELSKY, DOROTHY ZULLO, AUDREY THORNE, and JOSEPHINE DIGREGORIO (who are residents of 505 La Guardia Place), BRAD HOLYMAN, SHIRLEY SECUNDA, IAN DUTTON, LOIS RAKOFF, HARRIETT FIELDS, ZELLA JONES, and ANNE HEARN, (individually who are members of Manhattan Community Board 2), GEORGE HAIKALIS (individually who is the President of the Institute for Rational Urban Mobility), SEAN SWEENEY (individually who is the Director of the SOHO Alliance), LUCY CECERE (who is the founding member of the Caring Community) and SARA JOHNSON,

Index No. 112619/07

Petitioners

-against-

THE CITY OF NEW YORK and its constituent DEPARTMENT OF DESIGN AND CONSTRUCTION, DEPARTMENT OF TRANSPORTATION and DEPARTMENT OF CITY PLANNING,

Respondents.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1419).

-----X  
ALAN J. GERSON, (individually and as a Member Of the New York City Council for the First District, Manhattan), MARIAN FOX, VINCENT CORZZINI, (individually who are Directors or Officers of 505 La Guardia Place, a cooperative), ELAINE CORZZINI, HARRIET BELSKY, DOROTHY ZULLO, AUDREY THORNE, and JOSEPHINE DIGREGORIO (who are residents of 505 La Guardia Place), BRAD HOLYMAN, SHIRLEY SECUNDA, IAN DUTTON, LOIS RAKOFF, HARRIETT FIELDS, ZELLA JONES, and ANNE HEARN, (individually who are members of Manhattan Community Board 2), GEORGE HAIKALIS (individually who is the President of the Institute for Rational Urban Mobility), SEAN SWEENEY (individually

Index No. 603110/07

who is the Director of the SOHO Alliance),  
LUCY CECERE (who is the founding member of  
the Caring Community) and SARA JOHNSON,

Plaintiffs,

-against-

THE CITY OF NEW YORK and its constituent  
DEPARTMENT OF DESIGN AND CONSTRUCTION,  
DEPARTMENT OF TRANSPORTATION and  
DEPARTMENT OF CITY PLANNING,

Defendants.

-----X

**Solomon, J.:**

Motion sequence number 001 in the above-captioned proceeding, pursuant to Article 78 of the CPLR, Index Number 112619/07 (Proceeding), and motion sequence number 001 in the above-captioned action, Index Number 603110/07 (Action), are consolidated for disposition.

In the Proceeding and the Action (together, Proceedings), petitioner-plaintiffs (together, Petitioners) seek to enjoin ongoing reconstruction work on Houston Street in Manhattan, between West Street and the Bowery (Project). The petition in the Proceeding and the complaint in the Action (together, Pleadings) are identical, each asserting three causes of action that seek: a judgment declaring the Project in violation of law and suspending the Project until respondent-defendants (together, Respondents) present a revised Project plan that meets all statutory and governmental requirements and protects the

interests of citizens; damages for public nuisance; and relief pursuant to Article 78 of the CPLR, based upon respondent City of New York (NYC) allegedly ignoring the Project's impact on pedestrians and bicyclists, and failing to comply with the New York City Bicycle Master Plan (NYC Bike Plan) or the federal Congestion Mitigation and Air Quality (CMAQ) Program.

Petitioners filed their Pleadings on September 18, 2007. Respondents now cross-move to dismiss the Proceeding and, separately, move to dismiss the Action.

#### Facts

The following factual allegations are taken from the Pleadings, and the affidavits of Yun Poy Ng (Ng) and Thomas Foley (Foley). Ng is the Assistant Commissioner of Infrastructure, Design/Research and Development for respondent New York City Department of Design and Construction (DDC), and the former Chief Engineer of Roadway Design for respondent New York City Department of Transportation (DOT). Foley is the Director of Manhattan Construction for DDC. Petitioners are: members of the New York City Council; directors, officers and residents of a cooperative corporation located at 505 La Guardia Place in Manhattan; members of Manhattan Community Board 2; the president of the Institute for Rational Urban Mobility; the director of the SOHO Alliance; and the founding member of the Caring Community.

Houston Street runs from the FDR Expressway to West Street.

According to Ng, DDC is currently undertaking the planning and design of the Project on behalf of DOT and respondent New York City Department of Environmental Protection (DEP). Ng and Foley claim that DOT and DEP referred the Project to DDC in 2001, and that DDC involvement stems from its general jurisdiction under section 1202 of the New York City Charter to design, implement and oversee the construction of public buildings, structures and facilities within NYC. The Project consists of three primary elements: the upgrade of water supply and sewer infrastructure; the enhancement of existing sidewalks, medians and crosswalks; and the enhancement of the roadway.

According to Ng, it is the policy and practice of DDC to involve members of the public and elected officials in the development of capital reconstruction projects planned for their neighborhoods. To this end, DDC interfaces with elected officials and local community boards by sending them copies of project plans, scheduling public meetings, and responding to questions and comments, some of which are incorporated into the design plans and become part of the capital project. Ng claims that, although no formal approval is legally required from a local community board prior to implementing a capital project, DDC, as a courtesy, asks the community board to consider a non-binding resolution supporting the capital project prior to its implementation.

The Project is within Manhattan Community Board Numbers 2 and 3 (CB-2 and CB-3, respectively). On July 31, 2001, Ng sent letters to City Council members Kathryn Freed and Christine Quinn, and Chairpersons and District Managers of CB-2 and CB-3, notifying them that NYC had retained a consultant, Parsons Transportation Group, Inc. (Parsons), to develop a preliminary and final design for the Project. The letter also provided information about the scope of the Project and sought assistance in identifying local community concerns.

In the summer of 2002, DDC approved the preliminary design drawings for the Project, and on June 7, 2002, Ng sent copies of the preliminary design drawings to representatives of CB-2 and CB-3, soliciting comments on the drawings. By letter dated September 25, 2002, CB-2 responded, stating that it "supports the [Project]. Most of the revisions requested by the Board have been incorporated into the design." Green Aff., Ex. D. In this letter, CB-2 requested that the sidewalks and median strips be widened to accommodate pedestrians.

By letter dated November 4, 2002, Ng responded to CB-2's September 25<sup>th</sup> letter, incorporating several of CB-2's comments into the design plans. Thereafter, Parsons drafted final construction contract drawings, and, on August 7, 2003, DDC's Deputy Commissioner for Infrastructure sent a letter and a copy of the Pre-Final Construction Contract Drawings to CB-2's

Chairperson. The August 7<sup>th</sup> letter summarized changes proposed to the then-existing street geometry, traffic lane configuration and streetscape. The letter also stated that, due to budget constraints, the Project was not scheduled to begin until 2005.

On October 14, 2003, representatives from DDC and Parsons met with CB-2's Transportation Committee concerning the Project. By letter dated November 21, 2003, DDC responded to CB-2's comments raised at the October 14<sup>th</sup> meeting.

On June 24, 2004, CB-2's board passed a unanimous resolution on the "Final Design" of the Project. Green Aff., Ex. H. The resolution acknowledged that DDC and DOT had incorporated some of the community's concerns and ideas. However, the resolution objected to, and urged reconsideration of, certain of CB-2's proposed revisions that were not incorporated into the Project's final design, such as certain turning bays and sidewalk width. Ng claims that DDC and DOT continued to work with the community to address its concerns, and that several of the community's comments concerning pedestrian areas were subsequently integrated into the final design plan.

According to Ng, on March 23, 2005, DDC issued a public Invitation for Bids for the construction of the Project. On May 31, 2005, the Director of the New York City Office of Management and Budget (OMB) issued Certificate 45785, approving the Project's scope of work and budget (OMB Certificate). The OMB

Certificate was sent to local officials, including the Comptroller, DOT, DDC, DEP, President of the Borough of Manhattan, and CB-2. The OMB Certificate states that the Project "will be financed with City Funds, Water Authority, State Multi-Modal Funds, and Private Funds . . . ." Green Aff., Ex. I.

In the summer of 2005, DDC awarded the construction contract to non-party Tully Construction, Inc. (Tully), and, on August 1, 2005, DDC directed Tully to proceed with implementing the final design plans. On August 24, 2005, Ng sent copies of the final contract drawings and specifications to, among others, the Manhattan Borough President, City Council Members for Districts 1 and 3, CB-2 and CB-3.

According to Foley, actual onsite construction activities began in September 2005, at which time a monthly newsletter notifying the public of the commencement of the Project was disseminated to local residents and elected officials (9/2005 DDC Newsletter). Foley states that construction of the Project is being implemented in three simultaneous phases, such that no phase needs to be 100% completed before work on the next phase begins. Foley claims that the phases refer to work being performed on certain parts of Houston Street. See also 9/2005 DDC Newsletter, Green Aff., Ex. K. According to Foley and the 9/2005 DDC Newsletter, Phase I refers to work being performed between West Street and 6<sup>th</sup> Avenue, Phase II refers to work being

performed between 6<sup>th</sup> Avenue and Broadway, and Phase III refers to work being performed between Broadway and the Bowery.

Foley maintains that, as of October 2007, Phase I is 95% complete with respect to utility, drainage and sewer, and distribution water main installation work; trunk main installation work is 75% complete; curb and sidewalk work is 40% complete; and roadway installation work is 20% complete. For Phase II, drainage and sewer, distribution water main installation, and trunk main installation work are 100% complete; utility work is 97% complete; center mall installation is 95% complete; and curb and sidewalk and roadway installation work are 90% complete. For Phase III, drainage and sewer work is 100% complete; distribution water main installation work is 90% complete; utility work is 40% complete; and trunk main installation is 2% complete.

#### Discussion

##### Standing

Respondents argue that Petitioners lack standing to bring their claims, because Petitioners have not alleged direct harm or an injury distinct from that suffered by the public at large. In opposition, Petitioners argue that they have suffered special injury in connection with their public nuisance claim.

To establish standing to challenge government action, Petitioners must show that the in-fact injury of which they

complain (their aggrievement, or the adverse effect upon them) "falls within the 'zone of interests,' or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted." *Society of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 773 (1991), citing *Lujan v National Wildlife Fedn.*, 497 US 871, 883 (1990). Petitioners "must show that [they] would suffer direct harm, injury that is in some way different from that of the public at large." *Id.* at 774.

In *Lujan v Defenders of Wildlife* (504 US 555, 560 [1992]), the United States Supreme Court stated that, in order to establish standing, the plaintiff must "have suffered an 'injury in fact' - an invasion of a legally protected interest which is (a) concrete and particularized [citations omitted] and (b) 'actual or imminent, not 'conjectural' or 'hypothetical' [citations omitted]." Where a government action does not cause a plaintiff injury, that party lacks standing to challenge it. *Matter of Sarah K.*, 66 NY2d 223, 240 (1985) ("[i]t is axiomatic that there is no standing to complain where an alleged defect in or violation of a statute does not injure the party seeking redress").

Here, Petitioners allege generally that they "are all intended beneficiaries of the defendants' promised plan to implement bicycle lanes in lieu of additional vehicular traffic on Houston Street," and that Respondents "have failed to

adequately protect the plaintiffs and all others living in and around or working in and around or visiting in and around Houston Street ... ." Pleadings, ¶ 37. The Pleadings claim that the Project will negatively impact "senior citizens and school children" and bicyclists, that businesses have been interrupted, and that "visitors have not been able to freely travel in and around Houston Street ... ." *Id.*, ¶¶ 37, 48-50.

Petitioners Alan Gerson, Brad Holyman, Shirley Secunda, Ian Dutton, Lois Rakoff, Harriett Fields, Zella Jones and Anne Hearn allege that they are political representatives for the community that includes Houston Street, including a Member of the New York City Council for the First District of Manhattan, and chairpersons and members of CB-2. Pleadings, ¶ 14 (A) and (C). Petitioners Marian Fox, Vincent Corzzini, Elaine Corzzini, Harriet Belsky, Dorothy Zullo, Audrey Thorne and Josephine DiGregorio are allegedly directors, officers and residents of 505 La Guardia Place in Manhattan (*id.*, ¶ 14 [B]); George Haikalis is allegedly a resident of Washington Square Village, "a few blocks from Houston Street" (*id.*, ¶ 14 [E]); and Sara Johnson is allegedly "a local resident of the community (living in New York County) who regularly needs to access Houston Street" (*id.*, ¶ 14 [I]). Petitioners Harriett Fields, Zella Jones, Sean Sweeney, and Lucy Cecere are allegedly involved in various not-for-profit organizations. *Id.*, ¶¶ 14 (D) and (F)-(H). None of these

petitioners alleges that he or she has incurred any direct or particularized harm as a result of the Project. Nor have they explained how they will suffer any harm that is distinct from the public at large. Therefore, Petitioners lack standing to bring their first and third causes of action for a declaratory judgment and Article 78 relief.

With respect to Petitioners' second cause of action for public nuisance:

A public ... nuisance is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency. It consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons.

*Copart Indus., Inc. v Consolidated Edison Co. of N.Y., Inc.*, 41 NY2d 564, 568 (1977) (internal citations omitted).

"A public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large." *532 Madison Ave. Gourmet Foods, Inc. v Finlandia Ctr., Inc.*, 96 NY2d 280, 292 (2001). The harm suffered must be different in degree and different in kind from the general public. *Id.* at 293-94. "When business interference and ensuing pecuniary damage is so general and widespread as to affect a whole community, or a very wide area

within it, the line is drawn." *Id.* at 293 (internal quotation marks and citation omitted).

In *532 Madison Ave. Gourmet Foods, Inc.*, the Court of Appeals found that the street closure of 15 heavily trafficked blocks on Madison Avenue affected the public as a whole, reasoning that "every person who maintained a business, profession or residence in the heavily populated areas of Times Square and Madison Avenue was exposed to similar economic loss during the closure periods." *Id.* at 294. The Court held that, "in that the economic loss was 'common to an entire community and the plaintiff[s] suffer[ed] it only in a greater degree than others, it is not a different kind of harm and the plaintiff[s] cannot recover for the invasion of the public right' (Restatement [Second] of Torts § 821C, comment h)." *Id.*

As discussed above, Petitioners are a member of the City Council, members and chairpersons of CB-2, and members of not-for-profit organizations, none of whom allege special injury. To the extent that certain of the Petitioners claim to live near Houston Street, their damages are common to the entire community. Moreover, while Petitioners claim that they suffered unspecified "business losses" (Petitioners' Opp. Mem. of law, at 13), none of the Petitioners claims to be a business owner in or around Houston Street. Rather, Petitioners affirmatively argue that "[t]heir 'pecuniary' injuries and their social injuries are

broad-based" (*id.*), thereby implicitly conceding the generality of their claims and that the Project affects the public as a whole.

Petitioners also do not dispute that they failed to file a Notice of Claim, as required under section 50-e (1) (a) and 50-i of New York's General Municipal Law, thereby rendering Petitioners' public nuisance claim deficient to the extent that it is based upon pecuniary harm. In addition, Petitioners lack standing because DDC acted pursuant to its authority under section 1202 of the New York City Charter to design, implement and oversee the construction of the Project. *Niagara Falls Sightseeing by Sheridan, Inc. v Penn Adv., Inc.*, 163 AD2d 861, 862 (4<sup>th</sup> Dept 1990) (plaintiff lacked standing to maintain public nuisance cause of action "because the Legislature has vested the authority to regulate highway signs in the Commissioner of Transportation").

The two cases cited by Petitioners, *State of New York v Fermenta ASC Corp.* (166 Misc 2d 524 [Sup Ct, Suffolk County 1995]) and *Leo v General Elec. Co.* (145 AD2d 291 [2d Dept 1989]), are distinguishable on their facts. For the foregoing reasons, the Pleadings are dismissed for lack of standing.

#### Statute of Limitations

In addition to challenging Petitioners' standing, Respondents argue that Petitioners' claims are time-barred under

the four-month statute of limitations governing article 78 proceedings, because all of the claims could have been brought in a traditional article 78 proceeding. Petitioners counter that the statute of limitations began to run on April 22, 2007, when Mayor Michael Bloomberg delivered a speech on Earth Day; that the statute of limitations began anew when Phase II of the Project began; and that the court has discretion to extend the statute of limitations.

Under CPLR 217 (1), "a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact ... ." "Whether petitioners' ... claims are subject to the four-month statute of limitations period under CPLR article 78 or the residuary six-year limitations period of CPLR 213 (1) turns on whether the parties' rights could have been resolved in an article 78 proceeding." *Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 (2007). "The fact that the challenge mounted to defendants' determinations is stated in terms of a constitutional objection ... does not serve to make unavailable an article 78 proceeding - the customary procedural vehicle for review of administrative determinations." *Solnick v Whalen*, 49 NY2d 224, 230-31 (1980).

"The reason for the short statute is the strong policy,

vital to the conduct of certain kinds of governmental affairs, that the operation of government not be trammelled by stale litigation and stale determinations.'" *Id.* at 232 (citation omitted). "[A]ny question regarding the legality of the governmental action ... can properly and expeditiously be resolved by means of a CPLR article 78 proceeding." *Fisher v Biderman*, 154 AD2d 155, 160 (1<sup>st</sup> Dept 1990).

For example, in *Board of Educ. of Altmar-Parish-Williamstown Central School Dist. v Ambach* (49 NY2d 986, 987 [1980]), the plaintiffs sought "review of the Department of Education's determination limiting State aid reimbursement for the cost of acquiring facilities from the State Dormitory Authority (see Education Law, § 1950, subd 13) by utilizing the cost allowance scheme set forth in subdivision 6 of section 3602 of the Education Law." The Court of Appeals held that, "[a]lthough this action is one for a declaratory judgment, inasmuch as the resolution of rights sought by the parties could have been obtained in a CPLR article 78 proceeding, the applicable Statute of Limitations is the four-month statute governing proceedings under article 78." *Id.*

Here, Petitioners' claims regarding the Project's design could have been brought in a traditional Article 78 proceeding. Petitioners claim that Respondents designed the Project in violation of law by failing to adequately account for the impact

to pedestrians and bicyclists, and by failing to conform the Project with the NYC Bike Plan and the CMAQ Program. Thus, at the heart of Petitioners' lawsuits is Respondents' purported improper governmental decision-making, which, even if styled as declaratory judgment claims, are subject to the four-month statute of limitations contained in CPLR 217.

Neither of the cases cited by Petitioners supports a different conclusion. In *Matter of Tommy & Tina, Inc. v Department of Consumer Affairs of City of New York* (117 Misc 2d 415, 420 [Sup Ct, NY County], *affd* 95 AD2d 724 [1<sup>st</sup> Dept 1983], *affd* 62 NY2d 671 [1984]), the court determined that, "where a branch of an action or proceeding is appropriate for article 78 review and another aspect requires conversion to a declaratory judgment action, a hybrid action and proceeding has specifically been authorized to enable the court to pass upon both issues [citations omitted]," and that "the proceeding insofar as it challenges the constitutionality of regulation No. 1(a), will be converted to a declaratory judgment action for purposes of addressing the constitutional issue." Similarly, in *Matter of Pokoik v Department of Health Services of County of Suffolk* (185 AD2d 929, 932 [2d Dept 1992]), the Court converted "so much of this [Article 78] proceeding as relates to the legality of the local law and the waiver into a cause of action for a declaratory judgment and the instant proceeding into a hybrid proceeding and

action." Neither *Tommy & Tina Inc.* nor *Pokoik* addressed statute of limitations, let alone created an exception to the four-month statute of limitations applicable to Article 78 claims.

For the foregoing reasons, Petitioners' claims are subject to the four-month statute of limitations of CPLR 217. "A challenged determination is final and binding when it 'has its impact' upon the petitioner who is thereby aggrieved." *Edmead v McGuire*, 67 NY2d 714, 716 (1986) (citations omitted). In *Matter of Edmead*, the Court of Appeals held that "the determination of the Board of Trustees became 'final and binding' (CPLR 217) and, therefore, that the four-month limitation period commenced to run, on the date petitioner was notified of the Board's decision." *Id.*; see also *Matter of Metropolitan Package Store Assn. v Duffy*, 143 AD2d 832, 833 (2d Dept 1988) ("determination is considered final and binding for CPLR 217 purposes when it has an impact upon the petitioner and when he knows he is aggrieved [citations omitted]. It is considered final and binding when no further events need take place for him to be aggrieved").

As discussed above, the OMB Certificate approving the Project was issued on May 31, 2005 and was sent to local officials, including the Comptroller, DOT, DDC, DEP, President of the Borough of Manhattan, and CB-2. On August 24, 2005, Ng sent copies of the final contract drawings and specifications to, among others, the Manhattan Borough President, City Council

Members for Districts 1 and 3, CB-2 and CB-3. Actual onsite construction activities began in September 2005. (In fact, the Pleadings identify a letter dated October 29, 2004 as evidence of "defendants' stance on left turn lanes," which, according to Petitioners, addresses "only the needs of vehicles" and not "the needs of pedestrians." Pleadings, ¶ 49.)

Petitioners' assertion that "[t]here is no dispute here that [they] offered their hybrid action papers for filing ... within the four months from the Mayor's Earth Day speech" (Petitioners' Opp. Mem. of Law, at 11) is without merit. The Mayor's April 22, 2007 Earth Day speech does not mention the Project, and Petitioners offer no legal support for the conclusion that a government official's policy speech renewed an expired statute of limitations for an ongoing road work project. Significantly, even if Petitioners' claims accrued on April 22, 2007, those claims would be time-barred, because the action was not commenced until September 18, 2007, more than four months later. Furthermore, even if Petitioners had not "wasted two weeks in trying to file the action," which Petitioners claim was caused by the County Clerk's mishandling of the filing of the action (11/13/07 Goldberg Aff., ¶ 9), the action would still be untimely by almost two weeks if measured from the Mayor's Earth Day speech.

Citing *Matter of Village of Scarsdale v Jorling* (229 AD2d

101 [2d Dept 1997], *affd* 91 NY2d 507 [1998]), Petitioners argue that, "[i]n a multi-phased public project, the time to commence an action governed by the four month ... statute of limitations is not always the first such phase of that project." Opp. Mem. of Law, at 9. In *Village of Scarsdale*, the petitioners challenged a government decision against reviewing an increase in consumer water rates imposed by the NYC Water Board. The Water Board argued that the action was time-barred, because the first phase of the increase went into effect more than four months before the action was commenced. The Second Department reasoned that the proceeding was timely commenced, because if the proceeding were commenced immediately following the initial rate increase, the Water Board would have argued that the petitioners failed to exhaust their administrative remedies by neglecting to first pursue redress from the New York State Department of Environmental Conservation, which the Water Board had acknowledged was the appropriate course of action. The Court held that, therefore, "the Water Board may not now take the position that the petitioners, by seeking administrative review of the issue by the DEC, have allowed the applicable limitations period to expire." *Village of Scarsdale*, 229 AD2d at 107. Thus, *Village of Scarsdale* does not hold that Article 78 proceedings can be brought at different phases in a multi-phase project, but rather, that it begins to run when the affected party has

exhausted its administrative remedies, which is not at issue herein. Therefore, Petitioners' reliance upon *Village of Scarsdale* is unpersuasive.

In addition, any attempt by Petitioners to parse the Project into Phases I, II and III, for purposes of statute of limitations accrual also is unpersuasive. The Project was designed, bid, approved and budgeted as a single project, not as three separate projects. Ng. Aff., Exs. A-K. Moreover, Foley, who has overseen construction work on the Project for two years, states that the construction activities on the Project are being implemented simultaneously, meaning that Phase I does not need to be 100% complete before work on Phase II begins. Rather, the phases refer to work being performed on certain parts of Houston Street. Foley Aff., ¶¶ 5-6 and Ex. K. Petitioners provide no legal support for their conclusion that the statute of limitations challenging the overall Project is renewed at the end of each construction phase.

Petitioners also appear to be suggesting that the recent death of a cyclist was caused by work on the Project, thereby renewing the statute of limitations, and that this work is within the four-month period preceding the commencement of this action. However, Petitioners offer no legal support for this argument. Nor do they explain how they have standing to assert this claim on behalf of the cyclist.

Petitioners argue that the court should equitably extend the statute of limitations due to the "unique fact pattern present" in this case, and because this proceeding was brought as a "writ of prohibition." Opp. Mem. of Law, at 10. However, Petitioners fail to explain how the fact pattern of this case is unique, sufficient to revive the statute of limitations. Petitioners cite *Matter of Roberts v County Court of Wyoming County* (39 AD2d 246 [4<sup>th</sup> Dept 1972]) in support of their argument that seeking a writ of prohibition allows the court to extend the statute of limitations. However, the Fourth Department's 1972 decision in *Roberts* was decided 17 years before the Court of Appeals decision in *Matter of Holtzman v Marrus* (74 NY2d 865, 866 [1989]), where the Court of Appeals stated that, "[e]ven if prohibition were available to challenge such an order the proceeding would have to be commenced within four months of the date on which the order became final and binding (CPLR 217)." Therefore, Petitioners' argument is unpersuasive.

For the foregoing reasons, the statute of limitations began to run in September 2005 at the very latest, when (with the OMB Certificate already issued and the final contract drawings already sent out) the actual onsite construction began. Accordingly, the statute of limitations expired, at the latest, in January 2006, at which point no further event needed to take place in order for Petitioners to claim to be aggrieved.

Therefore, the first and third causes of action, and the portion of the second cause of action based upon allegations that the Project, as designed, will become a public nuisance once completed, are dismissed as time-barred. Accordingly, it hereby is

ORDERED and ADJUDGED that the cross motion to dismiss, in Index Number 112619/07, is granted and the petition is denied and the proceeding is dismissed without costs and disbursements; and it further is

ORDERED that the motion to dismiss, in Index Number 603110/07, is granted and the complaint is dismissed without costs and disbursements, and the Clerk is directed to enter judgment accordingly.

Dated: August 4, 2008

ENTER:

  
\_\_\_\_\_  
J.S.C.

JANE S. SOLOMON

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).