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| <b>Matter of Seniors for Safety v New York City Dept. of Transp.</b>                                                                                                                                                       |
| 2011 NY Slip Op 33633(U)                                                                                                                                                                                                   |
| August 15, 2011                                                                                                                                                                                                            |
| Supreme Court, Kings County                                                                                                                                                                                                |
| Docket Number: 5210/11                                                                                                                                                                                                     |
| Judge: Bert A. Bunyan                                                                                                                                                                                                      |
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At an IAS Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15<sup>th</sup> day of August, 2011.

**P R E S E N T:**

HON. BERT A. BUNYAN,

Justice.

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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,

**DECISION AND ORDER**

For Judgment Pursuant to CPLR Article 78

Index No. 5210/11

- against -

(Seq. Nos. 1-4)

NEW YORK CITY DEPARTMENT OF TRANSPORTATION and JANETTE SADIK-KHAN, Commissioner of Transportation, in her official capacity,

Respondents.

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This CPLR article 78 proceeding challenges the propriety of the construction and post-construction implementation of a bikeway on Prospect Park West in Brooklyn, New York.<sup>1</sup> Prospect Park West is a 0.9 mile-long southbound one-way street extending from

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<sup>1</sup> "Bikeway" is a generic term used by the New York City Department of Transportation for (1) bicycle paths physically separated from traffic lanes, also known as Class I bike paths, (2) bicycle lanes which are directly adjacent to a traffic lane, also known as Class II bike lanes, and (3) bicycle routes which share a traffic lane (*see* Affidavit of Joshua Benson [DOT], at 2, n 1). The bikeway at issue belongs to the first category.

Union Street to Bartel Pritchard Square.<sup>2</sup> Its west side sidewalk abuts residential and commercial buildings; its east side sidewalk abuts Prospect Park. Before the construction of the bikeway, Prospect Park West, which is 49 feet wide, consisted of three traffic lanes: (1) a 19-foot wide combined parking/traffic lane adjacent to the west or the residential section of the sidewalk, (2) an 11-foot wide traffic lane in the middle of Prospect Park West; and (3) a 19-foot wide combined parking/traffic lane adjacent to the east or the park section of the sidewalk. In the summer of 2010, respondent New York City Department of Transportation (DOT) constructed the bikeway at issue. To do so, DOT redesigned the 19-foot wide combined parking/moving lane adjacent to the east sidewalk by separating it into three parallel zones: (1) an 8-foot wide floating parking lane adjacent to the middle traffic lane, (2) a 3-foot wide buffer zone painted with rumble strips, and (3) an 8-foot wide, two-way bicycle lane adjacent to the east sidewalk (hereinafter, the bikeway). DOT also installed flashing yellow warning signals to bicyclists at signalized intersections and re-timed traffic signals.<sup>3</sup>

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<sup>2</sup> See Apr. 12, 2010 Presentation by DOT to CB-6, "Parking Lane Widths" and "Bicycle Network and Proposed Design" slides (Answer, Ex. D); Affidavit of Joshua Benson (DOT), at 17, n 17.

<sup>3</sup> See Jan. 20, 2011 Presentation by DOT to CB-6, "Project Summary" slide (Answer, Ex. P).

In this CPLR article 78 proceeding commenced by verified petition, dated March 7, 2011, as amended on April 8, 2011 (the amended petition),<sup>4</sup> the petitioners Seniors for Safety (SFS), an unincorporated association, by its president, Lois Carswell, and Neighbors for Better Bike Lanes (NBBL), an unincorporated association, by its president, Louise Hainline (collectively, petitioners) assert two separate claims: (1) an annulment as “arbitrary and irrational” of the decision of the respondents DOT and its Commissioner Janette Sadik-Khan (collectively, respondents) to construct and implement the bikeway (¶¶ 151-157 [First Cause of Action]) (hereinafter, the bikeway claim),<sup>5</sup> and (2) a demand for a more complete response to the November 12, 2010 Freedom of Information Law (FOIL) request No. 27294 to DOT concerning the bikeway (¶¶ 179-180 [Fifth Cause of Action]) (hereinafter, the FOIL claim).<sup>6</sup> Respondents have interposed a verified answer to the amended petition, asserting, among other things, that the bikeway claim is barred by the

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<sup>4</sup> The original petition, dated Mar. 7, 2011, in sequence No. 1 has been superseded by the amended petition, dated Apr. 8, 2011, in sequence No. 3; the original discovery motion, dated Mar. 7, 2011, in sequence No. 2 has been superseded by the amended discovery motion, dated Apr. 8, 2011, in sequence No. 4. *See* Petitioners’ May 10, 2011 letter, at 2.

<sup>5</sup> In the remaining causes of action comprising the bikeway claim, petitioners allege that DOT failed to refer its plan for the construction of the bikeway to the Landmarks Preservation Commission (LPC) before approving and implementing it (¶¶ 159-164 [Second Cause of Action]), and that DOT failed to comply with the State Environmental Quality Review Act (SEQRA) and the City Environmental Quality Review (CEQR) (¶¶ 166-171 [Third Cause of Action] and ¶¶ 173-177 [Alternative Fourth Cause of Action]).

<sup>6</sup> A copy of petitioners’ FOIL request to DOT is reproduced as Ex. 29 to the Affirmation of Jim Walden.

statute of limitations (§ 138 [First Affirmative Defense]). There is no dispute that petitioners' FOIL claim is timely.

Concurrently, petitioners move by amended notice of motion for leave to conduct expedited discovery with respect to their bikeway claim. More particularly, petitioners seek production of 27 categories of documents, as well as depositions of the Commissioner, two additional named employees of DOT, and one additional employee to be designated by DOT as having knowledge of DOT's relevant data collection and analysis.<sup>7</sup> Respondents oppose the amended discovery motion.

### *The Bikeway Claim*

The threshold issue is whether petitioners' bikeway claim is timely. In accordance with 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 . . ." Conversely, pursuant to CPLR 7801 (1), an article 78 proceeding "shall not be used to challenge a determination . . . which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application . . ." An administrative determination becomes "final and binding" when two requirements are met: (1) completeness or finality of the determination, and (2) exhaustion of administrative

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<sup>7</sup> See Exs. 58-62 to the Affirmation of Jim Walden.

remedies. “First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be . . . significantly ameliorated by further administrative action or by steps available to the complaining party” (*Walton v New York State Dept. of Correctional Services*, 8 NY3d 186, 194 [2007] [internal quotation marks omitted]). An “actual, concrete injury” generally occurs “when the challenged action has its impact” (*Matter of Platt v Town of Southampton*, 46 AD3d 907, 908 [2d Dept 2007]). By way of illustration, the Second Department recently dismissed the portion of a homeowner’s article 78 proceeding which sought the removal of the sand dunes that interfered with his property, noting that “[t]he determination to construct the dunes in the first instance was final and binding, at the latest, when the dunes were erected” (*Matter of Agoglia v Benepe*, 84 AD3d 1072, 1075 [2011]). The complementary exhaustion-of-remedies requirement ensures that the challenged action may not be significantly ameliorated by further administrative action or by steps available to the complaining party. For example, the Second Department held that, when a municipal agency had selected the site for a sanitation garage, its initial selection of the site commenced the running of the statute of limitations for article 78 purposes, even though it made subsequent incidental or technological changes in the plans to minimize the project’s impact on the surrounding roadways (*see Matter of Douglaston & Little Neck Coalition v Sexton*, 145 AD2d 480, 481 [1988]).

(I)

For purposes of the statute of limitations analysis of the bikeway claim, the relevant chronology of events is as follows:

*April 16, 2009:* DOT made a presentation to the Transportation Committee of Brooklyn Community Board 6 (CB-6), whose jurisdiction includes Prospect Park West, regarding the proposed construction of the bikeway.<sup>8</sup> The minutes of the CB-6 Transportation Committee reflect that “the committee support[s] the proposal to close one lane and provide a 2-way bike lane but include north bound signalization and south bound signalization and daylighting.”<sup>9</sup> The April 16<sup>th</sup> meeting was open to the public and prior public notice had been provided.

*May-July 2009:* On May 13, 2009, at its general meeting open to the public, CB-6 conditionally approved DOT’s “proposal to reduce from 3 to 2 driving lanes and install two-way bicycle lanes in the parking lane with a painted median [*i.e.*, the buffer zone] on the eastside of Prospect Park West between Union Street and Bartel Pritchard Square.”<sup>10</sup> At the same time, CB-6 conveyed to DOT the following concerns: (1) that the bikeway should be regulated by a separate set of traffic signals, (2) that loading zones should be installed,

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<sup>8</sup> A copy of this presentation is annexed to the Answer as Ex. G.

<sup>9</sup> See Affidavit of Richard Bashner (then Chairperson of CB-6), Ex. N.

<sup>10</sup> See July 13, 2009 letter from CB-6 to DOT Brooklyn Borough Commissioner (Answer, Ex. C); Affidavit of Richard Bashner, ¶ 12.

and (3) that the buffer zone should be in the form of a fully built-out raised median. By letter dated July 13, 2009, CB-6 communicated its conditional approval to DOT.

*March 1, 2010:* The Brooklyn Borough President and the Commissioner met to discuss the proposed bikeway. The parties' recollections of what exactly was said at that meeting differ. According to the Borough President, the Commissioner told him that the bikeway would be implemented on a "trial" basis, that DOT would study the bikeway once it was constructed, that any decision to finalize the bikeway would be based on the data collected during its study, and that if its study revealed that the bikeway was a failure, DOT would modify the bikeway or even remove it altogether.<sup>11</sup> On the other hand, the Commissioner avers that during the March 1, 2010 meeting she did not identify the bikeway as a trial or pilot project and that the bikeway was never conceived or discussed by DOT as such.<sup>12</sup> Rather, according to the Commissioner, she advised the Borough President that DOT would not initially construct certain features as part of the bikeway and that after its construction and during its implementation, DOT simply would be monitoring its performance.<sup>13</sup>

*April 2010:* On April 12, 2010, at an open house sponsored by local council members, DOT made a presentation to the CB-6 Transportation Committee concerning the proposed

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<sup>11</sup> See Affidavit of Marty Markowitz, dated July 18, 2011, ¶¶ 6-7.

<sup>12</sup> See Affidavit of Janette Sadik-Khan, dated July 19, 2011, ¶ 2.

<sup>13</sup> *Id.*, ¶ 4.

bikeway. Two days later, Chairperson of CB-6 updated its members on the status of the proposed bikeway, noting:

“DOT has been largely responsive to our suggestions so yellow flashing traffic signals for the bicyclists, north and southbound, will be included in their initial plans and, assuming the new configuration works as it is expected to, with funding from our Council Members they are also open to the idea of building out the traffic medians to separate the parked cars from the two-way bicycle traffic . . . DOT has agreed to attend our upcoming meeting of our Transportation Committee to share their implementation plans. They are targeting a summer installation.”<sup>14</sup>

On April 29, 2010, DOT made another presentation to the CB-6 Transportation Committee where it specifically advised the CB-6 Transportation Committee that the bikeway “was not a trial project, but that after its installation it would be monitored with adjustments made as deemed appropriate.”<sup>15</sup> According to DOT, the bikeway “is not (and has never been) identified as a ‘pilot’ or ‘trial’ project” by DOT.<sup>16</sup>

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<sup>14</sup> See Brooklyn CB-6 General Board Meeting, Apr. 14, 2010, at 2-3, annexed to the Affirmation of Jim Walden as Ex. 22.

<sup>15</sup> See Affidavit of Joshua Benson, ¶ 21.

<sup>16</sup> *Id.*, ¶ 22.

*June-July 2010:* In June 2010, DOT constructed the bikeway.<sup>17</sup> According to the Commissioner, the bikeway was substantially completed by July 1, 2010.<sup>18</sup> Earlier on June 7, 2010, petitioners separately e-mailed the Commissioner with their complaints about the bikeway.<sup>19</sup>

*September-October 2010:* By letter dated September 15, 2010, CB-6 expressed to DOT its concerns about the bikeway as constructed.<sup>20</sup> On October 19, 2010, DOT presented to CB-6 a before-and-after update of the allegedly positive results of the bikeway on the community.<sup>21</sup> On October 22, 2010, DOT indicated that it would report to CB-6 in early 2011 with the information on the following issues: (1) vehicle and bicycle volumes, (2) speeding frequency, (3) frequency of illegal cycling behavior, and (4) crash injury rates of vehicle occupants, pedestrians, and cyclists.<sup>22</sup> By October 8, 2010, DOT made certain enhancements to the bikeway by installing flexible bollards at pedestrian islands, painting

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<sup>17</sup> *Id.*, ¶ 23.

<sup>18</sup> *See* Aug. 13, 2010 letter from the Commissioner to Assembly Member Brennan and Council Member Lander (Affidavit of Brad Lander, Ex. 5).

<sup>19</sup> *See* Answer, Ex. M.

<sup>20</sup> *See* Sept. 15, 2010 letter from CB-6 to DOT (Affidavit of Richard Bashner, Ex. Q).

<sup>21</sup> *See* Oct. 19, 2010 presentation by DOT to CB-6 (Answer, Ex. N).

<sup>22</sup> *See* Oct. 22, 2010 letter from DOT to CB-6 (Richard Bashner Aff., Ex. R).

white striping for loading zones, adding loading zones in two locations, and designating a no-standing zone in one location.<sup>23</sup>

*November 17, 2010:* The Commissioner responded to an earlier e-mail from petitioner NBBL, noting that:

“DOT has collected baseline data on vehicle and bicycle volumes, vehicle speeds, crashes and injuries. We are monitoring these criteria for six months following project completion . . .

The findings from the monitoring period will be presented at a public forum early next year, at which time we encourage you and other members of the public to provide additional input.”<sup>24</sup>

*December 2010:* On December 9, 2010, New York City Council’s Committee on Transportation held a five-hour hearing to discuss “Bicycling in New York City – Opportunities and Challenges.”<sup>25</sup> The Commissioner specifically testified (at page 66) that DOT does not construct “temporary” bikeways as a matter of practice. Separately, the Borough President testified about his views concerning the bikeway on Prospect Park West. While the Borough President criticized the bikeway’s configuration,<sup>26</sup> he never stated that

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<sup>23</sup> See Affidavit of Joshua Benson, ¶ 25.

<sup>24</sup> See letter dated Nov. 17, 2010 from DOT to NBBL, at 5, annexed to the Affirmation of Jim Walden, Ex. 20. NBBL’s original e-mail to DOT, dated Oct. 18, 2010, is annexed to the Affirmation of Jim Walden, Ex. 26.

<sup>25</sup> See Affirmation of Jim Walden, Ex. 3.

<sup>26</sup> See Transcript of Testimony of Borough President at 148 (“I’ve been very vocal in my opposition to the drastic changes made to Prospect Park West to accommodate a two-way bike lane. Had DOT installed a traditional bike lane, I would have supported it enthusiastically.”) and at 158 (continued...)

its construction was a pilot or temporary project. Thereafter, by letter dated December 30, 2010, petitioner NBBL requested that DOT provide an immediate release of data and a public forum to address the alleged safety problems with the bikeway.<sup>27</sup>

*January 2011:* On January 20, 2011, DOT presented to the CB-6 Transportation Committee the results of its six-month implementation study of the bikeway, and on January 27, 2011, DOT released the supporting data to CB-6.<sup>28</sup> According to DOT, the bikeway was (and still is) a “resounding success.” In particular, DOT emphasized that in the six-month June-December 2010 implementation period, there were no reported pedestrian injuries, and that the NYPD reported no pedestrian or cyclist injuries from the pedestrian-bicyclist only crashes. Nevertheless, DOT indicated that, in response to the community input, it would further enhance the bikeway by: (1) installing raised tinted landscaped pedestrian islands, (2) painting rumble strip bicycle markings at intersections, (3) narrowing the buffer between Union Street and Montgomery Place, and (4) consolidating the loading zone to south of 9<sup>th</sup> Street and installing stanchions to prevent

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<sup>26.</sup> (...continued)

(“my personal objective is to remove these two-way bike lanes and to install a traditional bike lane on Prospect Park West”), annexed to the Affirmation of Jim Walden, Ex. 3.

<sup>27.</sup> Annexed to the Affirmation of Jim Walden as Ex. 30.

<sup>28.</sup> See Jan. 20, 2011 Presentation by DOT to CB-6 (Answer, Ex. P); January 2011 Evaluation Summary & Raw Data by DOT (Answer, Ex. D).

vehicle access to the 9<sup>th</sup> Street entrance to Prospect Park.<sup>29</sup> The minutes of the CB-6 Transportation Committee meeting of January 20, 2011 reflect the following pertinent colloquy with DOT regarding the bikeway:

- “Q – Is DOT working on a timeline to make the bike lanes permanent?  
A – The project was done at the request of the community. Adjustments will be made as needed and in response to community input.
- Q – Is this bikeway permanent? Wasn’t it presented as an ‘experiment’?  
A – Community Board made the request for the bike lanes. DOT’s mandate is to promote safety and efficiency. DOT designed the plan, evaluated and monitored it after construction. The project is a success based on the standards established for it, therefore no plans to change it other than adjustments presented.
- Q – Why was the community led to believe this was a ‘pilot’ project?  
A – DOT has communicated the purposes of this project very clearly via a public process and has implemented the project in accordance with their standards.
- Q – If this was an experiment, what are DOT’s conclusions?  
A – The project is working well, requires some adjustments.”<sup>30</sup>

In addition to the minutes of the January 20, 2011 presentation, petitioners’ counsel Jim Walden affirms that he personally attended this presentation, that during this presentation, a DOT employee stated that DOT “was organizing” the data to be “more helpful,” but that

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<sup>29</sup>. See Jan. 20, 2011 Presentation by DOT to CB-6, “Response to Community Input” slides.

<sup>30</sup>. See Exhibit 10 to the Affidavit of Brad Lander.

when this DOT employee was asked whether the bikeway was going to be permanent, this individual “evaded directly answering the question.”<sup>31</sup>

*March 7, 2011:* Petitioners commenced the instant article 78 proceeding challenging the propriety of the construction and its implementation of the bikeway. The petition is supported by an affidavit of their expert challenging the accuracy and sufficiency of DOT’s January 2011 implementation study.

(2)

Based on the underlying article 78 petition and answer, the court may decide the issues raised on the papers presented and grant judgment to the prevailing party, unless there is an issue of fact requiring a trial (*see* CPLR 7804 [h]). The first, and foremost, issue presented in this case is a matter of law – the applicability of the statute of limitations. To determine when the statute of limitations is triggered in an article 78 proceeding, the court must first ascertain what administrative action petitioners seek to review (*see Matter of Young v Board of Trustees of Vil. of Blasdell*, 89 NY2d 846, 848 [1996]). Here, petitioners allege in their first cause of action that respondents’ conduct in constructing and implementing the bikeway was arbitrary/irrational and that their decision should be annulled because DOT falsely labeled this project as “trial” when, in fact, its decision had a “predetermined outcome.” Petitioners further allege that DOT failed to: (1) collect sufficient pre-construction data to adequately analyze the appropriateness of a bikeway on

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<sup>31</sup>. *See* Affirmation of Jim Walden in Support of Amended Petition, ¶ 3.

Prospect Park West, (2) consider the community concerns before construction, (3) adhere to its own standards in analyzing the appropriateness of the bikeway, and (4) consider alternatives to the bikeway (*see* Amended Petition, ¶¶ 151-157). As the aforementioned allegations make it clear, petitioners essentially are challenging the propriety of DOT's documented and effectuated determination to construct the bikeway in June-July 2010. Since the original petition was filed in March 2011, or more than four months after the bikeway's construction, the bikeway claim is untimely (*see Agoglia*, 84 AD3d at 1075; *Douglaston & Little*, 145 AD2d at 481).

To expand upon this issue: once the bikeway's construction was completed in June-July 2010, DOT's determination to construct it became final and binding on petitioners. First, it cannot be disputed that the bikeway had an impact on petitioners who obviously were aware of it, as evidenced by their complaints to DOT.<sup>32</sup> Second, petitioners were on notice that DOT had no intention of removing the bikeway, since DOT was merely enhancing it following its construction in June-July 2010. Third, DOT never stated to CB-6 that it would remove the bikeway should its January 2011 implementation results prove to be adverse to the community. Lastly, if, as petitioners allege (in ¶ 153), DOT's plan to construct the bikeway had a "predetermined outcome," then DOT never had any intention of removing the bikeway, regardless of the outcome of its implementation study. Thus, the

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<sup>32</sup> The record before the court includes three e-mails, two e-mails dated June 7, 2010 and one e-mail dated October 18, 2010, in which petitioners objected to the bikeway. *See* Answer to Amended Petition, Ex. M; Affirmation of Jim Walden, Ex. 26.

statute of limitations began to run in June-July 2010, at the latest, when the actual onsite construction began and was completed. The statute of limitations expired, at the latest, in November 2010, at which point no further event needed to take place in order for petitioners to claim to be aggrieved by the bikeway's presence.

In opposition, petitioners assert that their original petition is timely based on the following two-step sequence. Their first step in reaching this conclusion is their assertion that the bikeway has always been a pilot or trial project that may (but need not) become permanent in its implementation phase. In support, they rely on the affidavit of the Borough President averring (in ¶¶ 4, 6-7) that on March 1, 2010 (three months before the bikeway's construction), the Commissioner told him that the bikeway would be constructed on a trial basis, that any decision to finalize the bikeway would be based on the data collected during its implementation phase, and that she believed the bikeway would prove to be a success, but, if not, DOT would modify or remove it. Petitioners' second step is their assertion that DOT's data, when released in January 2011, proved that the bikeway was a failure in its implementation phase.<sup>33</sup> Based on these premises (the trial construction of the bikeway and its adverse implementation results), petitioners contend that the four-month limitations period began to run in January 2011 when the bikeway's "trial" period ended, since its implementation demonstrated that its harm outweighed its utility.

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<sup>33</sup> See the affidavit of petitioners' accounting and financial expert Eric Fox.

Even if this conclusion followed from its premises, it would not make petitioners' bikeway claim timely in this proceeding. The administrative decision under review in this proceeding is DOT's documented determination to construct, and its actual construction of, the bikeway in June-July 2010. This determination and its actual construction indisputably occurred outside the limitations period.<sup>34</sup> This proceeding is *not* about DOT's purported determination not to remove the bikeway during its implementation phase, since petitioners do not allege – and the record fails to indicate – that following the release of the implementation study by DOT in January 2011 but before petitioners' commencement of this proceeding in March 2011: (1) they made a demand on DOT to remove the bikeway based on their interpretation of the January 2011 implementation study, and (2) DOT determined not to remove the bikeway. Stated differently, there were two discrete events that occurred at definite certain times: (1) DOT's documented and effectuated determination to construct the bikeway in June-July 2010, and (2) DOT's purported determination not to remove the bikeway notwithstanding petitioners' interpretation of the January 2011 implementation data. With respect to the first temporal event (DOT's initial decision to construct and its actual construction of the bikeway), petitioners are out of time. With respect to the second temporal event (the January 2011 implementation results and their interpretation by petitioners), petitioners would *not* be out of time; however, at this juncture, there is nothing for the court to review because petitioners made no pre-commencement demand on DOT

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<sup>34</sup> Petitioners in effect so concede when they allege (in ¶ 94 of the Amended Petition) that the bikeway was “substantially constructed” two months before August 13, 2010.

based on their interpretation of the January 2011 implementation data and, therefore, DOT could make no separate, independent determination not to remove the bikeway in the implementation phase based on petitioners' interpretation of the January 2011 data. In other words, petitioners have failed to exhaust their administrative remedies – before attempting to invoke this court's jurisdiction – by confronting DOT with their interpretation of the January 2011 data and by obtaining DOT's separate and independent determination not to remove the bikeway during its implementation phase notwithstanding petitioners' interpretation of such data.<sup>35</sup> Petitioners' challenge to the accuracy of DOT's January 2011 implementation data should have been provided to DOT before this proceeding was commenced, rather than brought up for the first time in this proceeding. This preexisting failure of petitioners to establish the administrative record with respect to the bikeway's implementation has enabled DOT to expand the length of the implementation period and to include as part of its answer an additional (now a nine-month cumulative) implementation study of bikeway's alleged success, while petitioners in their reply papers are now challenging the accuracy of this additional study. Conversely, if petitioners had exhausted their administrative remedies with respect to the bikeway's implementation before

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<sup>35</sup>. To the extent petitioners' first cause of action could be interpreted as seeking mandamus to compel DOT to remove the bikeway, the same is dismissed, since mandamus to *compel* "does not lie to enforce the performance of a duty that is discretionary, as opposed to ministerial" (*Agoglia*, 84 AD3d at 1076 [internal quotation marks omitted]). Although mandamus to *review* DOT's decision not to remove the bikeway could be available in theory, the same is not available in this proceeding for the reasons stated above.

commencing this proceeding, the court could have made a concrete assessment of the bikeway's implementation and would not have faced a moving target.

Two additional points deserve mention. First, even assuming that after constructing the bikeway, DOT could have reconsidered its determination and removed or modified the bikeway in the implementation phase, DOT's authority to reconsider does not extend the statute of limitations with regard to its initial determination that was otherwise final and binding (*see Wechsler v State*, 284 AD2d 707, 709 [3d Dept 2001], *lv denied* 97 NY2d 607 [2001]). In this regard, the court notes that petitioners have presented no evidence that DOT viewed the bikeway as a pilot or temporary project. Indeed, this could not have been the case if the then-enacted and unenacted legislative plans were considered as evidence of the City policy. Introduction 1063, enacted as Local Law § 90/2009 on December 28, 2009 and effective April 27, 2010, established procedures for DOT to follow in notifying the community of any proposed "major transportation project," which included the then-proposed bikeway.<sup>36</sup> Yet, a companion bill Introduction 1077, which would have required DOT to provide notification in advance of "pilot projects," was put on hold in the City Council on December 31, 2009 and was never enacted. Equally important, the DOT representatives consistently aver that the bikeway was *not* a temporary project. A DOT

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<sup>36</sup> See New York City Administrative Code § 19-101.2 (a) (2) (defining a "major transportation project" as "any project that, after construction will alter four or more consecutive blocks, or 1,000 consecutive feet of street, whichever is less, involving a major realignment of the roadway, including either removal of a vehicular lane[s] or full time removal of a parking lane[s] or addition of vehicular travel lane[s]").

representative (Joshua Benson) states in his affidavit that he specifically advised the CB-6 Transportation Committee at his April 29, 2010 presentation that the bikeway “was not a trial project, but that after its installation it would be monitored with adjustments made as deemed appropriate.”<sup>37</sup> Additionally, the Commissioner states in her affidavit, as well as in her December 9, 2010 testimony before City Council’s Committee on Transportation, that DOT did not construct any temporary bikeways as a matter of practice. By contrast, petitioners point to no relevant evidence suggesting that the bikeway was temporary. They purport to create an issue of fact by citing the affidavit of the Borough President where he averred that, on March 1, 2010, the Commissioner told him that the bikeway “would be implemented on a trial basis” (¶ 6). However, the Borough President’s conclusory affidavit is devoid of detail and fails to raise a genuine issue of material fact. Moreover, the Borough President never mentioned in his December 9, 2010 testimony before the City Council’s Committee on Transportation that DOT had characterized the bikeway as temporary.<sup>38</sup>

The other point worthy of mention is the general rule that where “the claim is that a public official has failed to perform a continuing statutory duty,” the right to relief will not be barred by the four-month statute of limitations (*see Matter of Janke v Community School*

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<sup>37</sup>. See Affidavit of Joshua Benson, ¶ 21.

<sup>38</sup>. In his testimony, he expressed his “opinion” (at pages 150-151) that DOT used the community’s request to improve safety and slow down traffic to turn Prospect Park West into an “experiment” to fit its current ideology. Even if his use of the word “experiment” could be interpreted to mean that the bikeway was “experimental” and/or temporary, his statement expressly qualified it as his “opinion,” and not what DOT told him.

*Bd. of Community School Dist. No. 19*, 186 AD2d 190, 193 [2d Dept 1992]). Here, however, petitioners do not allege that DOT has failed to comply with any continuing statutory duty. To the contrary, petitioners contend that DOT has failed to live by its alleged promise, made some time before June-July 2010, to construct the bikeway on a temporary basis.

Accordingly, petitioners' first cause of action is dismissed. Petitioners' second, third, and fourth causes of action for failing to comply with SEQRA and CEQR, as well as for failing to refer the matter to LPC, at or before the bikeway's construction in June-July 2010, are dismissed on the statute of limitations grounds (*see Matter of Villella v Department of Transp. of State of New York*, 142 AD2d 46, 48 [3d Dept 1988], *lv denied* 74 NY2d 602 [1989]; *Lai Chun Chan Jin v Board of Estimate of City of New York*, 101 AD2d 97, 99 [1<sup>st</sup> Dept 1984], *appeal dismissed* 63 NY2d 675 [1984]).

### ***The FOIL Claim***

Petitioners, in their fifth and final cause of action, allege (in ¶ 179) that respondents have failed to produce documents in their possession that are responsive to the FOIL request, that are "public records" within the meaning of FOIL, and that do not fall within any of the exemptions to FOIL. Respondents deny this allegation, asserting (in ¶ 143) that they have fully complied with all FOIL requirements in responding to the FOIL request.<sup>39</sup>

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<sup>39</sup> There is a potential procedural impropriety on the part of petitioners which the court will overlook because it has been waived by respondents. Petitioners use the plural "petitioners" instead of the singular "petitioner" as the entities that made the FOIL request (*see* Amended Petition, ¶ 179). Actually, only petitioner NBBL made the FOIL request. Yet, the amended petition which asserts the FOIL cause of action – the original petition did not assert it – is verified by the other petitioner, Lois (continued...)

To give some background, petitioner NBBL, by letter dated November 12, 2010, sought from DOT 23 categories of documents relating to the bikeway.<sup>40</sup> By letter dated January 27, 2011, DOT advised NBBL that: (1) its FOIL request was granted in part and denied in part, (2) there were no responsive documents in 4 of the 23 categories, and (3) some of the responsive documents were redacted or withheld on the grounds of statutory exemptions. Thereafter, NBBL, by letter dated February 25, 2011, appealed DOT's partial denial of its request. By letter dated March 14, 2011, DOT advised NBBL that its appeal was granted in part and denied in part, provided additional responsive documents, and further indicated that some of the responsive documents were redacted or withheld on the grounds of one or more of the following statutory exemptions: personal privacy (§ 89 [2] [b]) as well as inter-agency or intra-agency materials (§ 87 [2] [g]).

Thereafter, petitioners, by letter dated March 17, 2011, made a FOIL request on the office of the City Council with respect to the bikeway. By letter dated March 25, 2011, the office of the City Council acknowledged receipt of this request, indicating that "[d]ue to the

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<sup>39</sup>. (...continued)

Carswell, President of petitioner SFS, which did not make the FOIL request. Because CPLR 7804 (d) requires a petition to be verified, the amended petition, in effect, is not verified as to the FOIL request. Pursuant to CPLR 3022, "[w]here a pleading is served without a sufficient verification in a case where the adverse party is entitled to a verified pleading, he may treat it as a nullity, provided he gives notice with due diligence to the attorney of the adverse party that he elects so to do." Since respondents provided no such notice or even raised this potential defect, the same has been waived by respondents (*see Matter of Engels v Town of Parishville*, 2011 WL 3190270, \*1, 2011 NY Slip Op 06063 [3d Dept 2011]).

<sup>40</sup>. *See* Affirmation of Jim Walden, Ex. 29. The FOIL request, totaling 23 categories, consisted of 5 categories of documents (designated as "a" through "e") in request No. 1, plus 1 category of documents in each of requests No. 2-19.

extensive nature of your request we expect to provide you with a response within 90 business days.” The record is unclear regarding whether petitioners have received to date any responsive documents from the office of the City Council.

*(1)*

Petitioner NBBL asserts that DOT’s document production in response to its FOIL request was “woefully inadequate.” In particular, NBBL alleges that DOT has failed to produce the following categories of documents:

- (1) Data on the emergency vehicle response time, before and after the bikeway’s construction (§ 109);
- (2) Any studies conducted by DOT before constructing the bikeway (§ 113);
- (3) Any study-design plans for the study of the bikeway which DOT “promised, including the standardized statistical procedures it intended to follow” (§ 113);
- (4) The methodology that DOT used to study the effect of the bikeway on motor vehicle speeds (§ 113);
- (5) The complete correspondence between DOT officials and bikeway advocates (§ 114);
- (6) Documents and e-mails from the Commissioner of DOT Policy Jon Orcutt concerning the bikeway (§ 114);
- (7) The complete correspondence between DOT and the third-party consultant it hired to conduct studies of travel times and bicycle volumes after the construction of the bikeway (§ 115); and
- (8) Documents further illuminating DOT’s role in collecting, analyzing, or selecting the data on which it relied and disclosed to the public (§ 116).

In opposition, DOT asserts generally that it has produced more than 3,000 pages of responsive documents. When it comes to particulars, however, DOT treats the aforementioned categories of documents in significantly less detail than they deserve and addresses only the first two of the aforementioned categories. As to the first category (the emergency vehicle response times), DOT asserts, by counsel, that the January 2011 data on traffic volumes before and after the bikeway construction, as well as the data on the time it took to travel on Prospect Park West, were responsive to this request, since “[t]hese both have an effect on the ability of emergency and non-emergency vehicles to traverse the [Prospect Park West] corridor.”<sup>41</sup> DOT’s response makes no sense, however. The speed of emergency and non-emergency vehicles cannot be the same, since emergency vehicles, when involved in an emergency operation, are permitted to disregard traffic rules.<sup>42</sup> Ambulances, in particular, may in the event of an emergency use the bikeway, since it is wide enough for them to pass.<sup>43</sup>

As to the second category (the pre-construction studies), DOT asserts, again by counsel, that the January 2011 data are responsive because they list the types of information that DOT collected before constructing the bikeway. DOT avers that to the extent NBBL

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<sup>41</sup>. See Respondents’ Memorandum of Law in Opposition, at 36.

<sup>42</sup>. See Vehicle & Traffic Law §§ 1104 (a) and (b).

<sup>43</sup>. See Vehicle & Traffic Law § 1104 (f).

seeks a formal pre-construction engineering study, no such study had been performed.<sup>44</sup> Again, DOT's response is inadequate: if DOT conducted no study before constructing the bikeway, its records access officer should so state without leaving NBBL to reason or guess and conjecture. Accordingly, the court finds that DOT has failed to respond fully and adequately to NBBL's FOIL request.

(2)

NBBL further contends that DOT has failed to identify with any particularity the records to which the statutory exemptions from disclosure allegedly applied. According to NBBL, it is unable to evaluate the legitimacy of DOT's invocation of the statutory exemptions (Amended Petition, ¶ 110). In opposition, DOT asserts that it has invoked only two statutory exemptions: personal privacy (§ 89 [2] [b]), and inter-agency or intra-agency materials (§ 87 [2] [g]). To illustrate the applicability of these exemptions, DOT offers, by an affidavit of its records access officer, an example of a redacted document for each of the two exemptions.<sup>45</sup> DOT concludes that its level of detail is sufficient and that it is not required to itemize or identify each document that it withheld in whole or in part.

Freedom of Information Law provides that all records of a public agency are presumptively open to public inspection and copying, irrespective of the status or need of the person making the request, unless otherwise specifically exempted (*see* Public Officers

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<sup>44</sup>. *See* Affidavit of Joshua Benson, at 8, n 13, stating that no "formal engineering study document" was prepared for the bikeway.

<sup>45</sup>. *See* Affidavit of Penny Jackson, ¶¶ 8-9; Answer, Exs. EE and FF.

Law § 87 [2]; *Matter of Farbman & Sons v New York City Health & Hospitals Corp.*, 62 NY2d 75, 80 [1984]). “Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access” (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]). While an agency should be accorded an opportunity to prove by means other than an in camera inspection that it is entitled to an exemption, if it fails to provide such detailed information, an inspection of such documents may be performed by the court (*see Matter of Miller v New York State Dept. of Transp.*, 58 AD3d 981, 983 [3d Dept 2009], *lv denied* 12 NY3d 712 [2009]), or by a referee as necessary (*see Matter of New York Civil Liberties Union v City of Schenectady*, 2 NY3d 657, 661 [2004]).

Accordingly, NBBL’s fifth cause of action is granted, and DOT is directed to provide responsive documents, to the extent that they exist,<sup>46</sup> in accordance with FOIL. In the alternative, DOT is directed to provide a detailed exemption log explaining why the responsive documents have either been redacted or withheld, subject to an in camera review by this court. In any event, NBBL needs to review its original FOIL request so as to avoid duplication with the information already obtained from other sources, including any

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<sup>46</sup> To the extent that DOT certifies that after a diligent search, no documents responsive to a particular request of NBBL were in its possession, DOT satisfies its FOIL obligations with respect to such request (*see Matter of Livingston v Hynes*, 72 AD3d 968 [2d Dept 2010]).

documents obtained from the City Council under FOIL (*see Cornex, Inc. v Carisbrook Indus., Inc.*, 161 AD2d 376, 377 [1<sup>st</sup> Dept 1990]).

\* \* \*

Under the circumstances, including that the court has dismissed the portion of the amended petition which asserts the bikeway claim and that petitioners already have sought extensive disclosure through FOIL, petitioners' amended discovery motion is denied as moot.

The parties' remaining contentions have been considered and found to be either moot or without merit.

### *Conclusion*

Based upon the foregoing, it is

ORDERED that petitioners' original petition, dated March 7, 2011 (sequence No. 1), is hereby dismissed as moot, having been superseded by amended petition, dated April 8, 2011 (sequence No. 3); and it is further

ORDERED that petitioners' original discovery motion, dated March 7, 2011 (sequence No. 2), is hereby dismissed as moot, having been superseded by amended discovery motion, dated April 8, 2011 (sequence No. 4); and it is further

ORDERED that petitioners' amended petition, dated April 8, 2011 (sequence No. 3), is hereby determined, as follows:

1. *The Bikeway Claim:* Petitioners' first through fourth causes of action in the amended petition are hereby dismissed without prejudice; and

2. *The FOIL Claim:* Petitioners' remaining fifth cause of action in the amended petition is hereby denied as to petitioner SFS, and is hereby granted as to petitioner NBBL to the extent that DOT is directed to provide to NBBL responsive documents, to the extent that they exist, in accordance with FOIL. Alternatively, DOT shall provide to NBBL a detailed exemption log explaining why the responsive documents have either been redacted or withheld, subject to an in camera review by this court. In any event, NBBL is hereby directed to review its original FOIL request so as to avoid duplication with the information already obtained from other sources, including any documents obtained from the New York City Council under FOIL; and it is further

ORDERED that petitioners' amended discovery motion, dated April 8, 2011 (sequence No. 4), is hereby denied as moot; and it is further

ORDERED that respondents' counsel is directed, within 14 days after entry of this decision and order, to serve upon petitioners' counsel a copy of same with notice of entry pursuant to CPLR 2103 (b) and 5513 (a), and to file proof of service thereof with the clerk's office.

The foregoing constitutes the decision and order of the court.

ENTER FORTHWITH



J. S. C.

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CLERK'S OFFICE

FILED

HON. BERT A. DUNYAN  
JUDGE N.Y.S. SUPREME COURT

DAVID T. SUNSHINE

FILED

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CLERK OF COURT

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