

**South Bronx Unite! v New York City Indus. Dev.  
Agency**

2015 NY Slip Op 31760(U)

August 11, 2015

Supreme Court, Bronx County

Docket Number: 260462/2012

Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

\_\_\_\_\_  
SOUTH BRONX UNITE!, ET ALS. X

Petitioners,

-against-

**DECISION/ORDER**

Index No.: 260462/2012

NEW YORK CITY INDUSTRIAL DEVELOPMENT  
AGENCY, NEW YORK CITY ECONOMIC DEVELOPMENT  
CORPORATION, NEW YORK STATE DEPARTMENT  
OF TRANSPORTATION, EMPIRE STATE DEVELOPMENT  
CORPORATION, FRESH DIRECT, LLC., UTF TRUCKING, INC.,  
and HARLEM RIVER YARD VENTURES, INC.,

Respondents.

\_\_\_\_\_  
The following papers numbered 1 to 22 read on the below motion noticed on January 20, 2015  
and duly submitted on the Part IA15 Motion calendar of **April 20, 2015**:

<u>Papers Submitted</u>	<u>Numbered</u>
Pet.'s NOM, Aff., Exhibits, Memo of Law	1,2,3,4
DOT Aff. In Opp., Exh., Memo of Law	5,6,7
Resp. Aff. In Opp., Exh., Memo of Law	8,9,10
Resp. Supp. Aff. In Opp, Exh.	18,19
Pet.'s Reply. Aff., Memo of Law, Exh.	20,21
Oral Argument Transcript	22

Upon the foregoing papers, the petitioners, who are individual members of the community in the neighborhood surrounding the Harlem River Yard in the Bronx, as well as the organizational petitioner South Bronx Unite! (collectively the "Petitioners"), move pursuant to CPLR 2221(e), for leave to renew their prior motion, that sought renewal of a motion to amend their pleadings as to their third cause of action in this petition, which began as a hybrid Article 78 petition and declaratory judgment action. The motion is opposed by respondents Fresh Direct, LLC and UTF Trucking, Inc. ("Fresh Direct"), Harlem River Yard Ventures, Inc. ("HRYV"), and the New York State Department of Transportation ("DOT").

I. Background

This matter arises out of the Petitioners' challenge to Fresh Direct's relocation of its operations from Long Island City, Queens, to the Harlem River Yard ("HRY") in the Bronx, and its associated construction and installation project on that property.

On June 6, 2012, Petitioners filed an Article 78 petition, amended on September 6, 2012, challenging the conveyance of the property owned by the DOT, the HRY, to the private online grocer Fresh Direct. Petitioners' third cause of action contained in the petition sought a declaratory judgment to invalidate the sublease between HRYV and Fresh Direct on the grounds that the sublease violated the New York State Constitution's prohibition on the gift or loan of public property to private entities without an overriding public purpose. Specifically with respect to the third cause of action, the Petitioners contended that the Fresh Direct project called for construction and development that would squarely impede into an area that was previously reserved for the future development of an intermodal terminal. The project, therefore, constituted a material modification of the HRY's 1993 Land Use Plan that required the DOT's approval. After the respondents moved to dismiss the petition, on February 14, 2013, the Petitioners moved to amend to add DOT commissioner Joan McDonald as a respondent.

On May 24, 2013, this Court denied the Article 78 petition, and denied the Petitioners' motion to amend the petition, and granted the respondents' motions to dismiss the second, third, and fourth causes of action contained in the petition. In its Decision and Order, this Court dismissed the third cause of action because the Petitioners lacked standing to sue under State Finance Law §123-b.

On or around July 2, 2013, the Petitioners filed a motion to renew their previously-denied motion for leave to amend the pleadings, and add new parties only as to their third cause of action. During the pendency of that motion, on March 27, 2014, the Appellate Division, First Department, issued an Order, *inter alia*, affirming this Court's dismissal of the Petitioners' third cause of action for lack of standing. On or around June 18, 2014, this Court denied the Petitioners' motion to renew.

Petitioners now make a second motion to renew their application for leave to amend their

petition, and submit a proposed third-amended complaint. The Petitioners in the proposed pleading are designated as “plaintiffs,” and seeks, again, to invalidate the sublease between HRYV and Fresh Direct as an unconstitutional conveyance of state property to a private third party. Petitioners annex to the motion a newly-proposed, third-amended complaint.

In support of their motion, Petitioners are alleging that on October 10, 2014, they received new critical evidence through a Freedom of Information Law (“FOIL”) response from the DOT, that provides a new basis for standing to sue and raises factual issues that cannot be resolved at this stage of the litigation. They therefore move for leave to renew their prior motion for leave to amend the complaint, to allege the newly-disclosed facts relevant to their claim under Article 7, Section 8 of the New York State Constitution. Petitioners note that their present motion concerns only the third cause of action from their September 6, 2012 amended petition/complaint. They have submitted a “proposed third amended complaint” seeking declaratory relief: declaring that the sublease between HRYV and Fresh Direct is unconstitutional, and annulling and setting aside that sublease.

“On the limited factual record previously before it,” Petitioners assert that this Court granted the respondents’ motion to dismiss, and denied the Petitioners’ motion for leave to amend the pleadings, as well as a prior motion to renew, on the ground that the Petitioners failed to allege DOT’s involvement in the conveyance to Fresh Direct, and thus lacked standing under State Finance Law. However, the “newly disclosed evidence reveals direct DOT involvement in the sublease, and contrary to [Respondents’] prior representations to the Court, allowing [Petitioners] to alleged sufficient facts to confer standing.” Petitioners contend that the new evidence specifically reveals for the first time that DOT had believed Fresh Direct’s use of the land could interfere with a possible intermodal terminal’s activity, and based on that concern, the DOT required the parties amend the sublease and to add new terms. Petitioners argue that these new facts “go to the heart of [Petitioners’] claim that the Fresh Direct sublease is unconstitutional because it would render the intermodal terminal impossible and eviscerate the public purpose underlying the DOT lease of the Harlem River Yard.” This new evidence not only confers standing to sue under State Finance Law, but “raises factual issues, which cannot be resolved on a motion to dismiss...” Therefore, the Petitioners not only move to renew their motion for leave

to amend the pleadings, but request this Court to “deny [Respondents’] motion to dismiss so that the claim can be resolved on the merits.” Alternatively, the Petitioners request leave to “conduct limited discovery to learn the full extent of DOT’s involvement in the Fresh Direct sublease” before deciding this motion.

Petitioners note that at the time of their original amended petition and complaint, they did not know the extent of DOT’s involvement with the Fresh Direct - HRYV sublease. Rather, the only fact they could allege was the existence of a requirement in the 1991 lease between the DOT and HRYV that DOT review and approve any proposed land use changes and proposed subtenants. They contend that prior FOIL requests for more information were met with responses from the DOT that no further documentation was available. Petitioners filed their prior motion to renew on July 5, 2013 after learning that the DOT had initiated its “review process.” While the motion was pending, on December 13, 2013, Petitioners learned that DOT had in fact “approved the sublease and Fresh Direct’s proposed land use.” DOT informed the Court at oral argument on April 7, 2014 that its role in the process was “very limited” and it “had no involvement in the sublease.”

The new evidence received by the Petitioners reveals that the “DOT was substantially involved in dictating substantive new terms of the Fresh Direct sublease relating to Fresh Direct’s potential interference with the intermodal terminal.” Petitioners specifically annex as exhibit “A” to their motion a November 22, 2013 letter from Steven Porter, Senior Vice President and General Counsel of HRYV, to Raymond Hessinger, Freight and Passage Bureau Director at DOT, and copied to Donna Hintz, a DOT attorney. The letter acknowledges that the DOT advised HRYV that any approval that would be granted relative to a 0.3-acre portion of the parcel, designated as “Tract II,” required certain language in the lease that would address the potential future usage of that tract for intermodal purposes. The letter annexes a proposed amendment sublease to address those issues regarding Tract II. Petitioners contend that additional e-mail correspondence revealed more communications between the two parties and “at least one in-person meeting of high level officials from DOT and HRYV...” Petitioners therefore argue that several “new facts” have been discovered that are pertinent to the Court’s prior resolution of the DOT’s involvement in the Fresh Direct- HRYV sublease, and thus the

Petitioners' standing to sue under State Finance Law: Notably, the new evidence revealed that (1) the DOT devoted "considerable resources" to its review of the Fresh Direct project, proposed land use, and the sublease, (2) the DOT raised concerns that Fresh Direct's use of Tract II could impede intermodal terminal operations, (3) that the DOT required the parties to add certain sublease provision to address its concerns about intermodal terminal use as a condition of its approval of the Fresh Direct project, (4) that HRYV submitted a draft sublease for review, and (5) the [proposed new sublease contains provisions that Fresh Direct would cede use of Tract II to an intermodal terminal, if necessary. Petitioners argue that this evidence contradicted the respondents' prior representations to the Court that the DOT had little to no involvement with the sublease and did not have the authority to approve the sublease.

Petitioners stress that this new evidence changes the Court's prior determinations concerning whether they can allege standing, and whether the underlying facts regarding Fresh Direct's interference with the intermodal terminal have been adjudicated. They argue that the newly disclosed facts show that DOT did far more than simply approve or deny the project, but "substantively shaped the terms of the sublease" and "devoted considerable resources" to review the project, and raised concerns regarding its possible infringement upon the operation of an intermodal terminal. Petitioners argue that these acts constitute an actual expenditure or transfer of state property and allege "[n]o court has yet denied standing to sue a state actor who was directly involved in the transfer of state property because of an insufficient degree of involvement in the transfer..." Petitioners are now alleging that certain DOT officials, by requiring the parties to add certain new sublease terms, were directly involved in the sublease, transferring the DOT-owned property to Fresh Direct. The new sublease terms addressed the potential for the project to interfere with construction of an intermodal terminal, "and thus touch the heart of Plaintiff's claim that the transfer of DOT property to Fresh Direct violates the New York State Constitution's gift and loan clause by rendering operation of the intermodal terminal impossible."

Petitioners allege that restoring their third cause of action will not require a re-litigation of their Article 78 petition regarding the NYCIDA's SEQRA review, because the resolution of those claims did not require a determination of whether intermodal terminal operations remained

viable after completion of the Fresh Direct project. Petitioners are disputing the DOT's "proposed solution" and sublease revisions which would require Fresh Direct to simply abandon Tract II if that property becomes necessary for intermodal terminal use. They argue that whether the operation of Fresh Direct at the HRYV as a whole would impede intermodal terminal construction, or whether the proposed amendments to the sublease resolve any alleged interference, are factual issues that must be resolved on the merits and not on a motion to dismiss. Finally, Petitioners assert that allowing the constitutional claim to go forward would not constitute an "end-run" around the Plaintiff's challenge to the lease between the DOT and HRYV, asserted in their second cause action, which this Court dismissed as time-barred.

As to the standards for renewal, Petitioners argue that they would not present the current facts on their prior motion because the "DOT repeatedly delayed disclosing relevant information" that was requested via FOIL requests. Further, the motion is timely, because a motion for leave to renew is not subject to any particular time constraints.

Upon renewal, Petitioners request not only leave to amend the pleadings, but an order denying "Defendants' motion to dismiss for failure to state a claim" as they have now a cause of action under State Finance Law. In the alternative, Petitioners request that this Court hold the motion in abeyance and grant leave to conduct the single deposition of a person with authority to testify on behalf of DOT regarding its involvement in the sublease, and the "full reasons for DOT approval of the Fresh Direct project in light of its previously undisclosed concerns about Fresh Direct's interference with the intermodal terminal."

In opposition to the motion, HRYV asserts, among other things, that the DOT did not review or approve the HRYV-Fresh Direct sublease. Instead, the only actions ever taken by the DOT were to "approve Fresh Direct as a subtenant, confirm that certain boilerplate provisions were included in the sublease (as required by the Lease between [HRYV] and DOT), and confirm the consistency of the Fresh Direct project with the Land Use Plan for the HRYV." HRYV argues that, "[a]s held by the Appellate Division – and binding on both this Court and the parties as law of the case – such actions are insufficient as a matter of law to confer standing on Petitioners to sue under the New York State Finance Law." HRYV also contends that the proposed amendment must be denied as futile, as there is no merit to the Petitioners' claims that the project

will preclude intermodal rail terminal construction. Such claims have already been considered and rejected by this Court and the First Department, and Court of Appeals denied leave to appeal.

With respect to the November 22, 2013 letter, HRYV alleges that this correspondence was issued in response to DOT's concerns about the Fresh Direct project's use of Tract II, which had been designated for parking, would be consistent with the Land Use Plan. The letter included a "draft sublease" that would have rendered that concern moot. HRYV argues that the latter did not "attempt to confer on DOT" the power to "review the Fresh Direct sublease." Instead, the letter was to offer a potential solution to the DOT, if the DOT had concerns about the consistency of parking on Tract II of the Land Use Plan. During a subsequent meeting in Albany between HRYV and the DOT, at no times was there an understanding that DOT had "authority to approve the Fresh Direct sublease." On December 12, 2013, the DOT completed its review of the HRYV's October 2013 request, and concluded that the Fresh Direct project is consistent with the Land Use Plan, notwithstanding the use of Tract II for parking. HRYV stresses that DOT had "no role in negotiating the Fresh Direct sublease and did not approve the sublease." Rather, DOT was limited to determining consistency of the Fresh Direct project with the Land Use Plan.

In an accompanying affirmation in opposition, co-respondent Fresh Direct confirms, *inter alia*, that the role of the DOT *vis a vis* the HRY and its operations "is expressly limited by the terms of the 1991 lease," and such terms do not include the authority to "approve the sublease." The alleged "new fact" that the DOT carefully review the HRYV's October 2013 application before it issued its determination, is not a proper basis for renewal or standing. Even if the DOT had approved a modification of the Land Use Plan relative to Tract II, it does not provide a basis for standing, because the Appellate Division held in this case that such approvals were insufficient to confer standing under State Finance Law. In a joint memorandum of law with HRYV, Fresh Direct argues, *inter alia*, that this second motion to renew is barred by prior rulings of this Court that constitute either the "law of the case" or bar re-litigation of issues on collateral estoppel grounds. The cornerstone of Petitioners' claims here, that the project "eviscerates" the ability to implement an intermodal terminal at the HRY, thus eliminating the public purpose of that land, was the subject of their Article 78 petition that has been dismissed. Nevertheless, Fresh Direct and the HRYV argues that Petitioners still lack standing to sue, because they allege

no involvement with the subject sublease. Even if the Petitioners were correct that the DOT approved a change to the Land Use Plan, the First Department held that such allegations are “insufficient to confer standing under the statute.”

Fresh Direct and the HRYV argues that the alleged “new facts” do not change the Court’s prior determination and are therefore an improper basis for renewal. Further the motion is “fatally flawed” because it fails to offer any evidentiary proof of the proposed amendment’s merits. Instead, they “recycle the same arguments and affidavit of George Stern that they offered this Court on prior occasions.” Finally, Fresh Direct and the HRYV argue that the motion does not “renew” a “prior motion.” What the motion actually seeks is to amend a pleading that has been dismissed, which dismissal has been affirmed on appeal, and for which leave to appeal has been denied by both the First Department and the Court of Appeals. Petitioners are not asking this Court to grant their February 2013 motion to amend based on new facts or law. Rather, they ask the Court to allow them to amend their dismissed pleading to assert an entirely different pleading. Further, the respondents contend that a motion to renew under CPLR 221 is not a proper vehicle to address a “final disposition on the merits,” as exists here.

The DOT also opposes the motion. Like Fresh Direct and HRYV, the DOT contends that their December 2013 determinations did not constitute an “approval” of the sublease. Instead, the DOT “merely found the Fresh Direct project to be consistent with the Land Use Plan, approved Fresh Direct as a subtenant, and confirmed that certain basic clauses listed in the 1991 lease with Ventures were included in Ventures’ sublease with Fresh Direct.” The DOT submits an affidavit from Raymond Hessinger, Director of their Freight and Passenger Rail Bureau, and a proposed co-respondent. Mr. Hessinger explains that the DOT was not involved in the negotiation or approval of the sublease. DOT, instead, carefully considered the proposed land usage of the Fresh Direct project, including its use of the 0.3 acre parcel denominated as “Tract II” for parking. DOT conducted a site visit and had several discussions with HRYV to explore alternatives which would avoid or minimize the use of Tract II. HRYV’s counsel sent proposed draft amendments of the HRYV-Fresh Direct sublease to address the potential future usage of Tract II for intermodal purposes. After sending the letter, however, HRYV informed DOT that the parking spaces proposed on Tract II were necessary under the building code, and,

accordingly, any draft amendment to the sublease was not pursued further. Although the letter from HRYV's counsel stated that the DOT required certain sublease language, that statement was inaccurate. The DOT did not – and could not – require any language be added to the Fresh Direct - HRYV sublease “beyond what is listed in the 1991 lease.” DOT ultimately concluded that the Fresh Direct project was consistent with the Land Use Plan under Section 8.02 of the 1991 lease. DOT also approved Fresh Direct as a subtenant under the lease and acknowledged that the lease contained certain clauses required under Section 4.06 of the lease.

The “new facts” regarding the “nature and depth” of the DOT's review process does not give rise to standing to bring a constitutional claim. DOT asserts that it considered the Fresh Direct project's potential impact on intermodal use before concluding that “the small size and elongated configuration of the 0.3 acres of the project situated on the intermodal area is not necessary to the development of intermodal at the Yard.” DOT also contends that Petitioners cannot blame DOT for their delay in bringing these facts to the attention of the Court. DOT seeks denial of the instant motion because, as with the first motion to renew, the DOT's level of involvement here does not amount to an allegation that a State actor is “causing, or about to cause a wrongful expenditure.” Moreover, while the motion is styled as one to “renew,” it seeks to renew the prior February 14, 2013 motion to amend “in name only.” In actuality, the motions sets forth new allegations that were not the subject of their February 2013 motion, and alleges certain facts that were not in existence at that time. For this additional reason, the motion to renew should be denied. Even if renewal were granted, the DOT objects to the Petitioners' request that any motion to dismiss be denied, as the DOT should still have the opportunity to move to dismiss the newly-amended petition if necessary. Finally, DOT argues that this Court should deny Petitioners' request for discovery, as Petitioners have been provided a copy of the December 2013 determinations and findings, and provide in opposition papers an affidavit from Mr. Hessinger who asserts that DOT was not involved in the sublease.

In reply and further support of their motion, Petitioners argue that the new documents reveal that the DOT officials did, in fact, request to review the terms of the HRYV-Fresh Direct sublease. The affidavits of key officials submitted by the respondents “further establish DOT's involvement in the property conveyance to Fresh Direct and raise additional questions about the

validity of DOT's ultimate determination that there was no potential for the Project to interfere with intermodal operations." Petitioners claim that the November 22 letter and other new evidence "demonstrate that DOT was actively involved in shaping terms of the sublease." The wording of that letter specifically stated that the "DOT has advised that any approval that may be granted relative to Tract II would require language in the HRYV/Fresh Direct lease that addresses potential future usage of Tract II for intermodal purposes." While the defendants deny the accuracy of the letter, the petitioners essentially argue that its wording speaks for itself and contradicts the defendants' arguments. Further, Petitioners stress that the new evidence "contradicts prior representations made to and relied upon by this court," that the DOT's involvement with the property conveyance "was very limited" and that HRYV was "able to 'freely' sublease property at the Yard without DOT involvement." At oral argument, Petitioners stressed that "no court has ever denied standing under State Finance Law" where "a plaintiff alleges direct state involvement in a transfer of state property that plaintiffs' alleging is unlawful."

## II. Applicable Law and Analysis

A motion to renew must be based on new facts not presented in the original motion that would change the prior determination (CPLR 2221[e]). The moving party must demonstrate a reasonable justification for not presenting those new facts on the prior application (*see Nicholas v. Curtis*, 104 A.D.3d 526 [1<sup>st</sup> Dept. 2013][internal citations omitted]).

Here, it is true, as asserted by the respondents, that the alleged "newly discovered evidence" annexed to the motion was not in existence at the time of the original application, which is generally an improper basis for a renewal motion (*see Johnson v. Marquez*, 2 A.D.3d 786, 789 [2<sup>nd</sup> Dept. 2003]; *Matter of Weinberg*, 132 A.D.2d 190 [1<sup>st</sup> Dept. 1987]). The motion will nevertheless be considered, however, since the First Department has recognized some flexibility with this rule (*see Ramos v. City of New York*, 61 A.D.3d 51 [1<sup>st</sup> Dept. 2009]).

The Court also notes that the Petitioners' motion, although styled as one to "renew" their previously-denied motion for leave to renew and amend, annexes a proposed pleading that is now

characterized as a “third amended complaint,” even though there was never a “complaint” filed in this action. Still, the motion will not be denied on the grounds that it is improperly characterized, since it seeks essentially the same relief as the prior motion to renew – that is, leave to amend its third cause of action, seeking annulment of the HRYV-Fresh Direct sublease, based on allegedly newly-discovered evidence. While the prior Order resulted in the disposition of this case, an appeal from that order has been filed and is pending, therefore the “time to appeal” had not “expired,” thus CPLR 2221 is a proper vehicle for relief from that Order (*see, e.g. Luna v. Port Auth. of N.Y. and N.J.*, 21 A.D.3d 324 [1<sup>st</sup> Dept. 2005]; *cf. Swope v. Quadra Realty Trust, Inc.*, 28 Misc.3d 1209 [A][Sup. Ct., N.Y. Cty., 2010]).

After review of the submissions and after oral argument, however, this Court denies the Petitioners’ motion. On July 2, 2013, Petitioners made a motion seeking leave to renew their February 14, 2013 motion to amend the petition. The prior motion was based on the fact that, in part, the petitioners had “reason to believe that [HRYV] has submitted or will soon submit to the DOT and Commissioner has approved or will soon approve the proposed change to the 1993 Land Use Plan to allow the Fresh Direct project, as well as its construction plans.” During the pendency of the prior motion, petitioners learned that, in fact, in October 2013, the DOT had received HRYV’s request to modify the subject Land Use Plan to accommodate the Fresh Direct project. In December 2013, the DOT wrote to the Court and the parties to advise that the DOT had completed its review of HRYV’s request for certain approvals relative to the project, and found that the project was consistent with the Land Use Plan per section 8.02 of the 1991 Lease. Petitioners then claimed that these events cured any deficiencies in their pleadings concerning the involvement of a DOT officer in the proposed conveyance, and, consequently, alter this Court’s prior determination regarding standing under State Finance Law §123-b.

This Court, however, denied the Petitioners’ motion, reasoning:

Essential in examining this issue is the fact that HRYV’s contractual obligation to submit, among other things, land use plan modifications and proposed subtenant information to the DOT for approval, has been known to petitioners since the onset of this action. Indeed, the original petition and subsequently amended petitions alleged, in paragraph 72, that the 1991 lease required HRYV to submit requests to change the land use plan for the HRY to the DOT for approval. This Court took that allegation into consideration when

dismissing the cause of action for lack of standing under State Finance Law. The Appellate Division further held specifically that this pre-approval requirement was insufficient to confer standing to sue. Now, the alleged “new facts” – that the DOT has actually performed its obligations under the lease, and made certain approvals for the project – do not alter the prior determinations. At bottom, it has been determined that the DOT’s level of involvement here does not amount to an allegation that a State actor is “causing, or about to cause a wrongful expenditure” of State property. This finding is consistent with the requirement that the statute be “narrowly construed” (*see Matter of Human Society of the United States v. Empire State Development Corporation*, 53 A.D.3d 1013, 1016 [3<sup>rd</sup> Dept. 2008])

Decision and Order dated June 18, 2014, at pages 8-9.

The present motion is based on correspondence and other documents transmitted between October 2013 and December 2013 that reflect the sum and substance of discussions, meetings, and other communications between the DOT and HRYV concerning the HRYV - Fresh Direct sublease, and its consistency with the Land Use Plan for the HRY. The information contained in this newly submitted evidence, however, does not, as urged by the Petitioners, constitute “new facts.” It has been known since the prior motion was made that the DOT had involvement with this project to the extent that it could approve the Fresh Direct project’s proposed modifications to the HRY’s Land Use Plan. The documents obtained pursuant to the petitioners’ FOIL request merely confirm that discussions, an in-depth review, and subsequent approval actually took place. Petitioners seize on the fact that the November 22, 2013 letter from HRYV to the DOT provides a proposed amended sublease with language that specifically addresses Tract II and its possible interference with the intermodal terminal construction. This letter or the subsequent review by the DOT, however, did not alter DOT’s ultimate role in this project - a role that has been consistent since the Petitioners’ first motion for leave to amend : the DOT was tasked with, among other things, confirming that the proposed land use modifications of the Fresh Direct project were consistent with the land use plan for the HRY, approval that was required under the 1991 HRYV/DOT lease. This Court finds that the evidentiary material submitted by the Petitioners in support of their motion does not reflect that anything has in fact changed since denial of their prior motion to renew. Petitioners are essentially seeking renewal because certain events have taken place that they already anticipated would happen. The DOT has remained, at

all times, uninvolved with the execution of the sublease itself, which was signed in 2012. The “new documents” or “new facts” submitted on this motion, evincing the comprehensive nature of the DOT’s approval process, do not require a change in the previous determinations of this Court and the Appellate Division – the mere fact that the DOT “must pre-approve a modification of the Land Use Plan is insufficient to confer standing under the statute” (*South Bronx Unite! v. New York City Indus. Dev. Agency*, 115 A.D.3d 607, 610 [1<sup>st</sup> Dept. 2014], *lv. den.*, 24 N.Y.3d 908 [2014]). Contrary to Petitioners’ contentions, the prior determination was not based on alleged “contradictory” assertions by the respondents – rather, it was based on the allegations in the proposed amended pleadings, the First Department’s ruling, and the context of the motion considering the procedural posture of the litigation at the time the original motion was made.

Accordingly, even if the petitioners were granted leave to renew their twice-denied motion to amend the pleadings, the proposed amendment must be denied as futile. While generally, leave to amend is freely granted (CPLR 3025), this court is not required to allow an amendment where the proposed amended pleadings patently lacks merit (*Eighth Ave. Garage Corp. v. H.K.L. Realty Corp. et al.*, 60 A.D.3d 404, 875 N.Y.S.2d 8 [1<sup>st</sup> Dept 2009]). Here, even if the proposed amendment was permitted, the third cause of action would remain subject to dismissal (*Viacom Int’l. v. Midtown Realty Co.*, 235 A.D.2d 332 [1<sup>st</sup> Dept. 1997]). State Finance Law §123-b confers standing on citizen-taxpayers to prevent the unlawful expenditure of state funds or state property by an officer or employee of the State, in the course of his or her duties. Here, the allegedly injurious “state action” remains, as it has been since the onset of this litigation, the DOT’s “pre-approval” of the land use modification proposed by the Fresh Direct project, a task that DOT is required to undertake by virtue of the 1991 DOT/HRYV lease. As was previously held by this Court on the prior motion, and the Appellate Division, however, such involvement by the DOT is simply not enough to confer standing. The “nature or depth” of the DOT’s execution of their duties under the 1991 DOT/HRYV lease does not change the fact that their involvement does not rise to the level of a state action causing or about to cause an expenditure of state funds or property.

Petitioners’ request for limited discovery is also denied, as the additional information that Petitioners hope to discover regarding the DOT’s level of involvement would not cure their lack

of standing to sue under these circumstances (*see e.g. Cracolici v. Shah*, 127 A.D.3d 413 [1<sup>st</sup> Dept. 2015])<sup>1</sup>.


III. Conclusion

Accordingly, it is hereby

ORDERED, that the petitioners' motion to renew pursuant to CPLR 2221(e) is denied.

This constitutes the Decision and Order of this Court.

Dated: 8/11, 2015



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Hon. Mary Ann Briganti, J.S.C.

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<sup>1</sup>HRYV's request that this Court require Petitioners' to obtain permission from the Court before filing any future motions to renew, is denied.