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QUESTIONS PRESENTED

1. Was Petitioner, as a motorist and taxicab passenger in Manhattan losing hours of his time in traffic congestion created intentionally by Respondent, within the zone of interests protected or promoted by the Environmental Conservation Act? The Court below answered this question in the negative.

2. Was Petitioner, age 79, with a possibility of being taken by ambulance to a local hospital for treatment of an apparent heart attack and more threatened with injury or death than younger as to traffic-congestion delays, within the zone of interests protected or promoted by the Environmental Conservation Act? The Court below answered this question in the negative.

3. Did Petitioner have standing to maintain his Petition under the Environmental Conservation Act? The Court below answered this question in the negative.

4. Should the Court below have granted Petitioner's motion to amend his Petition to clarify that the hours he has lost by reason of the traffic delays created by Respondent's activities could have been spent in non-economic pursuits such as watching television, sleeping, reading a book? The Court below answered this question in the negative.

STATEMENT OF THE FACTS

Two individuals in the NYC government (Respondent's Commissioner Janette Sadik-Khan and Mayor Bloomberg), without preparing an Environmental Impact Statement under § 8-0109 of the Environmental Conservation Law and SEQRA regulations thereunder, created and implemented a plan to create massive traffic congestion in New York, New York, for the purpose of imposing tolls on the free bridges to raise $2 billion a year in funds for unstated political purposes. This plan to intentionally increase traffic congestion in Manhattan was never announced by the Administration or approved by the City Council. R30-32.

Statute and Regulations as Described by the NYS Department of Environmental Conservation

In its website, at http://www.dec.ny.gov/permits/357.html, the NYS Department of Environmental Conservation summarizes the New York statute and related regulations under which this Petition was commenced, as follows:

> **SEQR**
>
> **Environmental Impact Assessment in New York State**
>
> In New York State, most projects or activities proposed by a state agency or unit of local government, and all discretionary approvals (permits) from a NYS agency or unit of local government, require an environmental impact assessment as prescribed by 6 NYCRR Part 617 State Environmental Quality Review (SEQR) (link leaves

DEC website.) [Statutory authority: Environmental Conservation Law Sections 3-0301(1)(b), 3-0301(2)(m) and 8-0113]. SEQR requires the sponsoring or approving governmental body to identify and mitigate the significant environmental impacts of the activity it is proposing or permitting.

Environmental assessments are standardized through use of the Environmental Assessment Form (EAF). The Environmental Assessment Forms are in a pdf format that can be filled and saved. * * * .

On completing an EAF, the lead agency determines the significance of an action's environmental impacts. The agency then decides whether to require (or prepare) an Environmental Impact Statement and whether to hold a public hearing on the proposed action.

Who Enforces SEQR

What agency enforces SEQR?

The Legislature has made SEQR self-enforcing; that is, each agency of government is responsible to see that it meets its own obligations to comply.

While the Department of Environmental Conservation is charged with issuing regulations regarding the SEQR process, DEC has no authority to review the implementation of SEQR by other agencies. In other words, there are no "SEQR Police."

What happens if an agency does not comply with SEQR?

If an agency makes an improper decision or allows a project that is subject to SEQR to start, and fails to undertake a proper review, citizens or groups who can demonstrate that they may be harmed by this failure may take legal action against the agency under Article 78 of the New York State Civil Practice Law and Rules. Project approvals may be rescinded by a court and a new review required under SEQR. New York State's court system has consistently ruled in favor of strong compliance with the provisions of SEQR (see also case law to be posted later). [Emphasis supplied.]

The Changes in Street Use Already Made by Respondent in its Secret Plan to Create Additional Traffic Congestion in Manhattan without Preparing and Filing an Environmental Impact Statement

The traffic-related changes (R34-36; R36-41) made from as early as April 22, 2007 (a period of more than 9 years) to date have resulted in

a. A reduction of 40% to 50% of the lanes available for use by motor vehicles in many parts of midtown Manhattan;

b. A slowing down and frequent stopping of vehicular traffic increasing by a substantial percentage the average length of time it takes to travel by vehicle from one place to another in Manhattan;

c. Increasing by a substantial percentage the length of time, on the average, it takes ambulances, fire trucks, police cars and other emergency vehicles to travel from one place to another in Manhattan;

d. Increasing substantially the average length of time it takes for a motorist to enter or leave NYC by bridge or tunnel;

e. Increasing substantially the time needed to begin a trip by motor vehicle from one part of Manhattan to another to arrive at a specified time;

f. Increasing substantially the average length of time it takes for deliveries by vehicle to take place in Manhattan from 7am to 7pm on Mondays through Fridays;

g. Increasing the cost of food and other items requiring delivery to stores in Manhattan;

h. Increasing the risk for senior citizens (such as the Plaintiff, now 79 years old) when requiring emergency transportation by ambulance or other vehicles to a hospital in Manhattan for emergency medical services (such as in the case of an apparent heart attack);

i. Increasing substantially the length of time that the Plaintiff, as a motorist/driver, is captive in his automobile (or captive as a passenger in a taxicab) because the vehicle (and passenger and driver) are excluded from using public property (street lanes) now turned into bike lanes and parking lanes created out of adjacent lanes previously used for vehicle traffic;

j. Increasing substantially the noxious emissions from vehicles having to burn more fuel because of the delays and increasing the cost of fuel by such increased use;

k. Increasing substantially the diseases and other adverse medical conditions resulting from the increase in noxious emissions;

l. Decreasing the profitability of a substantial number of the entities engaged in business in Manhattan;

m. Decreasing the taxes payable to New York City by reason of the decline in profitability of a substantial number of the entities engaged in business in Manhattan;

n. Decreasing the value of real estate in Manhattan with a resulting decrease over time in real estate taxes based on the value of real estate in Manhattan;

o. Fundamentally changing the way in which people live, work and do business in Manhattan and the quality of their life;

p. The increase in pedestrians being hit by bicycles;

q. The increase in bicyclists being hit by vehicles;

r. The increase in dangers caused by drivers and passengers having to wait substantially longer periods before having access to bathroom facilities;

s. The loss of time for motorists and passengers while they are captive in their vehicles for longer periods of time, preventing them from doing whatever they would have done with that time if not so confined in their vehicles;

t. NYC's failure to repair the streets in Manhattan while spending money instead on changes under the plan, causing further delays;

u. Creating traffic delays through lane elimination which often causes traffic to come to a complete halt when a single available lane is closed by building construction deliveries, or issuing of tickets, or cab discharge or pickup, or vehicle breakdown, or emergency vehicle parking, or towing of ticketed vehicle, or slow garbage truck using the only lane available for vehicles to pick up garbage along the street; or breakdown of vehicle causing other vehicles to have to back out of the one-lane street;

v. Closing down lanes when constructing bike lanes, floating parking, installation of red-light cameras.

w. Higher costs of vehicle operation;

x. Lower profitability of businesses;

y. Waste of time to wait for persons held up in traffic;

z. Transferring public property for exclusive use of for-profit corporation (Citybikes) without any bidding process;

aa. Elimination of timed lights on midtown portions of Third Avenue and Eighth Avenue in Manhattan, causing slowdown of traffic;

bb. Forcing cab seekers to hail cabs while in street rather than from sidewalk because of the intervening bike lane and floating parking lane;

cc. Forcing pedestrians to look both ways (for bike traffic) in streets that are one-way for motor vehicle traffic, resulting in greater number of pedestrian and bicyclist injuries;

dd. Creating backup of traffic when making turns where bike lanes and floating parking lanes exist;

ee. Arbitrary, temporary closing down of square miles of traffic in Manhattan causing massive traffic tie-ups and inability of motorists and passengers to get to their destinations;

ff. Snow plows are unable to plow the bike lane and cement plaza, which become unusable by bikes and pedestrians and make it more dangerous for them when forced to use the 3 moving lanes;

gg. Unnecessary use of 474 million gallons of gas per year, causing unnecessary emission of about 11,376,000,000 pounds of carbon dioxide and other global-warming gases (474,000,000 x 24 lbs);

hh. Mail truck are now required to stop in active traffic lanes to empty mail boxes, thereby causing additional congestion;

ii. Mail delivery is being delayed in Manhattan by reason of the increased traffic congestion; and

jj. Construction permits issued for Manhattan construction are causing lengthy reductions in the available moving traffic lanes, adding to existing congestion.

The changes are obviously designed to increase vehicle traffic congestion in Manhattan, which Respondent could not justify in an Environmental Impact Statement, and therefore chose not to prepare one, and also chose not to announce its plan of deliberately creating traffic congestion for the purpose of obtaining $2 billion in annual revenue by imposing congestion pricing tolls (R74-77) during rush hours at the presently toll-free bridges leading to Manhattan.

Although these activities are part of an overall but secret plan (to deliberately create traffic congestion), they have not been treated together when NYC has decided several times (as to small components of the overall plan) that it does not have to prepare and file an Environmental Impact Statement under McKinney's Environmental Conservation Law, § 8-0109, or SEQR, or under federal law requiring an Environmental Impact Statement for projects receiving federal funding. The "Transportation" part of the plan (plaNYC) revealed to the public (R57-83) together with R84-415 leaves no doubt about the changes in land use undertaken by Respondent, without any public participation through SEQRA.

Two people (the Mayor and DOT Commissioner) have changed and continue to change NYC and the lifestyle and quality of life of its residents,

workers and visitors according to the personal views of these two persons without permitting political input from the voters, legislators, taxpayers, citizens, businesses and other residents of NYC, by denying them the preparation and circulation of (and public hearings on) an Environmental Impact Statement describing what they are doing and the effect it will have (and is having) on living, working, doing business and travelling in Manhattan.

The Respondent recognizes the importance of NYC's transportation network - see R58 "Transportation has always been the key to unlocking New York's potential" and "Transportation is the greatest single barrier to achieving our region's growth potential", inserted on page 2 of PlaNYC, "A Greener, Greater New York", Mayor Michael R. Bloomberg. See R82 in the exhibit which describes "Congestion Pricing" as:

> "Congestion pricing is projected to generate net revenues of $380 million in the first year of operation, increasing to over $900 million by 2030. Based on traffic patterns, roughly half the revenues from congestion pricing would be paid by New York City residents, and the other half by non-city residents."

At R83, Respondent is saying that it is planning to move NYC from a vehicle transportation system into one dominated by bikes, buses, ferries and subways, when it states (and admits to damage being caused already by traffic congestion):

Conclusion

> We can accept increasing congestion and the damage it will inflict on our economy and quality of life. Or we can act to reshape our transportation network and ensure that New York maintain its position as the world's premier city. That means providing every New Yorker, visitor, and worker with transportation that is as attractive, efficient, and sustainable as possible.
>
> As a result of the policies outlined above, New Yorkers like Bryan Block will experience reduced travel times, more comfort, and more reliable rides, whether are going to work, going shopping, attending cultural events, or visiting family and friends. By accelerating long-delayed projects, implementing smart, short-term improvements, and embracing a new set of transportation priorities, New York can achieve a new standard of mobility.

Such a grandiose scheme for changing the use of land and quality of life Manhattan and elsewhere in New York City should have been made the subject of an Environmental Impact Statement to see what alternatives there are to the regimen being imposed on 8,000,000 residents and millions of visitors and workers, by a mere 2 individuals.

The above-listed changes in the use of Manhattan's streets have been caused by the environmental changes made by NYC in its plan to create congestion pricing by creating traffic congestion in Manhattan, and move NYC into a bike, bus, ferry and subway economy.

Assuming a population of 10,000,000 (including workers and visitors), and an average cost of $10,000 per year for each, there is a total annual cost of the plan

of $100 billion, for NYC to try to extract $2 billion per year in congestion-pricing tolls. There should be an analysis of the intended changes in an Environmental Impact Statement for present residents, voters and workers to see how the scheme will affect their lives, and whether there is not a better, less drastic way of accomplishing what the 2 individuals have envisioned for NYC.

Nobody has prepared an Environmental Impact Statement as to these effects of the plan or any impact statement for that matter (R36).

Plaintiff falls into 3 categories that make his different from the average citizen of New York: (i) his age (79) and greater need for speedy ambulance service to a hospital in the event of a life-threatening medical emergency; (ii) a motorist/driver, who as such is not permitted to use public property and who loses additional time while a captive of the deliberately-created traffic congestion; and (iii) a passenger in taxis, who as such is not permitted to use public property and who loses additional time while a captive of the deliberately-created traffic congestion.

ARGUMENT

I.

PETITIONER HAS ALLEGED ENVIRONMENTAL INJURY (CAPTIVITY IN CONGESTED TRAFFIC FOR ADDITIONAL 100 HOURS PER YEAR) IN ADDITION TO PETITIONER'S ECONOMIC INJURY

The Court's initial decision dismissing the Petition (R10) stated:

> In addition, "a party must show that the in-fact injury of which it complains falls within the 'zone of interests,' or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted." ld. at 773. In land use matters, in order to maintain standing, the petitioner must show that he "would suffer direct harm, [or] injury that is in some way different from that of the public at large." ld. at 774. "To qualify for standing to raise a SEQRA challenge, a party must demonstrate that it will suffer an injury that is environmental and not solely economic in nature." Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, 76 N.Y.2d 428,433 (1990). A review of the record reveals that the crux of the petitioner's alleged damages are not environmental but economic in nature, and thus insufficient to qualify for standing.

By holding that the "crux of the petitioner's alleged damages are not environmental", the Court below chose to disregard the environmental damages alleged by the Petitioner, as if the Petitioner could only allege one or the other of the two types of injury.

Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, 76 N.Y.2d 428, 433 (1990), cited by the Court (R13) makes it clear that economic damages can be alleged with environmental damages, as follows: "a party must demonstrate that it will suffer an injury that is environmental and not solely economic in nature." (R13).

Petitioner has alleged environmental injury, in various ways:

1. Captivity as a Taxicab Passenger for 50 Additional Hours Per Year in Congested Traffic - Because 20% to 40% of More of the Traffic Lanes Are Denied to Vehicles

The congestion has caused Petitioner, as a frequent passenger in taxicabs in Manhattan, to spend approximately 50 additional hours per year in captivity in taxicabs (not counting an additional 50 hours per year for the Petitioner as a motorist) because the taxicabs (and private automobiles) are not permitted to use the public land (i.e., the streets and vehicle lanes) that Respondent has removed from use by vehicles and set aside for bike lanes, floating parking (in traffic lanes), concrete islands, and pedestrian plazas or seating areas, and through the other alleged ways that NYC is deliberating creating traffic congestion as an overall plan to force congesting pricing (i.e., rush-hour tolls at the now toll-free bridges leading into Manhattan) (R32, R34-36).

Although the loss was characterized in the Petition as "loss of Petitioner's valuable professional time ... for an estimated 100 hours per year" and "Denial to Petitioner of use of public property (i.e., parts of the sidewalks and streets in New York County) put to illegal private use by Respondent" (R45), the loss of 50 hours per year of the Petitioner's time in captivity resulting from denial of use of public roadway lanes in Manhattan to taxicabs in which Petitioner is a passenger is an

environmental loss (the unnecessary captivity of the Petitioner and loss of his time for 50 hours per year) whether or not the Petitioner would have used all or any of such 50 hours for dining out, going to the movies, going to a bookstore, running for Attorney General of New York State (as Petitioner did in 2011 and 2015) or working on his law cases.

The unnecessary captivity and loss of hours resulting from land use changes by Respondent prevented any of the other uses by Petitioner from occurring, leaving only the wrongful captivity for 50 hours per year as the demonstrated injury.

The Court below failed to recognize that the 50 hours of captivity itself was an environmental injury to the Petitioner, whether he be a student, business person, lawyer or retired person.

2. Captivity as a Motorist/Driver for 50 Additional Hours Per Year in Congested Traffic - Because 20% to 40% of More of the Traffic Lanes Are Denied to Vehicles

Petitioner's injury, as a motorist driving an automobile in Manhattan, losing 50 hours per year in Manhattan traffic congestion being deliberately created by the Respondent, is different from the public at large, most of whom do not operate or ride as passengers in non-commercial automobiles in Manhattan. Instead, the public at large mainly uses transportation means such as ferries, subways, trains,

buses, bicycles, skateboards, wheelchairs, jogging or walking (without trying to be all-inclusive).

Driving an automobile in Manhattan for residents of Manhattan is uncommon, because of the lack of parking spaces, the traffic congestion delays, and the high cost of parking in commercial garages or lots in Manhattan.

Thus, the Petitioner, as a motorist residing and driving in Manhattan, as such, is different from the public at large.

Petitioner alleges that he loses an additional 50 hours per year in captivity while driving his motor vehicle as a result of the traffic congestion being deliberately created by the Respondent, for the purpose of forcing congestion pricing on motorists, taxicabs and truckers when seeking to use the now toll-free bridges to enter Manhattan during rush hours.

Whether the 50 hours would have been used by Petitioner to paint pictures, read books, buy or sell real estate, watch television, argue cases in court, repair his automobile, or get more sleep does not change Petitioner's environmental injury of loss of 50 hours of his time (and captivity) into an economic injury, and Mobil Oil Corp., supra, makes it clear that having economic injury does not deprive the Petitioner of standing. Instead, it seems clear that those who have standing with environmental injury (loss of time due to exclusion of use of public roadways set aside for special interests) will have lost an opportunity for economic pursuit or for

non-economic pursuit, and that the loss of hours in NYC-created captivity is the injury, not what the injured person may or may not have done with the time if not so captive.

3. As a 79-Year Old Citizen - Increased Risk of Injury or Death from Ambulance Delays Caused by Increased Traffic Congestion

The age of the Petitioner (79) is an obvious difference which the public at large does not have.

Traffic congestion is more apt to unnecessarily kill the Petitioner (who lives and works in Manhattan) in comparison to substantially younger persons if the Petitioner is transported by ambulance to a hospital in Manhattan after a heart attack, for example.

The governmental Center for Disease Control states in its website:

> About three-fourths of all deaths are among persons ages 65 and older. The majority of deaths are caused by chronic conditions such as heart disease, cancer, stroke, diabetes, and Alzheimer's disease.
>
> [Source: http://www.cdc.gov/nchs/data/ahcd/agingtrends/06olderpersons.pdf]

A 2003 study in Toronto of delays in ambulance transportation of chest-pain (suspected heart condition) patients to a hospital came up with the following conclusion:

> Each year in Toronto, about 5000 patients with chest pain are transported by ambulance. Up to 20% of these patients have acute myocardial infarction,7,22 and 10% of those may require thrombolysis.23 Thus, for every 5000 ambulance patients with chest pain, approximately 100 are candidates for thrombolytic therapy. On the basis of the delays we observed at the 50th, 90th and 95th percentiles, we estimated an average increase in the transport interval of approximately 2.8 minutes per patient in the period of greater ambulance diversion (in 1999). A 30-minute delay in the initiation of thrombolysis can shorten average survival of patients with acute myocardial infarction by 1 year,24,25 so a 3-minute delay might shorten survival by as much as 0.1 year. Therefore, on an ecologic level, an increase in transport time of 2.8 minutes each for 100 thrombolysis patients could amount to 10 years of life lost annually in our study setting. However, these adverse outcomes are unlikely to manifest themselves in the ambulance or even the ED. Therefore, it is necessary to determine patients' outcomes well beyond their arrival at the hospital door to gain a true understanding of the impact of overcrowding on these outcomes.
>
> [Source: http://www.cmaj.ca/content/168/3/277.full.pdf , published by the Canadian Medical Association Journal, February 4, 2003, pp. 277-283]

The traffic delays experienced by Petitioner, taxicab drivers, truck drivers and others in Manhattan caused by elimination often of 40% or more of otherwise available lanes causes ambulances to slow down and stop as well, because there is nowhere to go, with 40% or more of the lanes being closed to vehicles.

As a result, ambulances and other emergency vehicles take longer to get to their respective destinations, and elderly heart patients run a much greater risk of

injury and death than other persons being transported by ambulance facing the same delays.

You cannot eliminate 20-40% of the traffic lanes without creating additional traffic congestion.

The Respondent knew this and could not prepare an environmental impact statement without revealing this truth and its intention, which is why the Respondent failed to comply with the environmental impact statement requirements of SEQRA. Respondent did not want to avoid traffic congestion. Its plan was to create traffic congestion to obtain congestion pricing - more money for the politicians to award to their friends, supporters and campaign contributors.

Petitioner is in the zone of interest and needed the protection under SEQRA and its requirements, to see if Respondent could provide bicycle parking and bicycle lanes in some other, less damaging way to motorists, vehicle passengers and elderly residents in Manhattan.

II.

PETITIONER'S ENVIRONMENTAL INJURY IS NOT SUFFERED BY THE PUBLIC AT LARGE IN MANHATTAN

1. As a Taxicab Passenger

Petitioner, as a taxicab passenger, losing 100 hours per year in Manhattan traffic congestion being deliberately created by the Respondent, is different from

the public at large, most of whom are not regular taxicab passengers (such as infants, school children, welfare recipients, pensioners, and others who cannot afford the comparative luxury of a taxicab ride. The persons who choose not to use taxicabs, for whatever reason, are not prohibited from using the public street lanes set aside for bikers, pedestrians and others, unlike taxicabs (and their drivers and passengers).

2. As a Motorist/Driver

Petitioner, as a motorist/driver, is losing 50 hours per year of his time spent in captivity in his automobile caused by the deliberate traffic congestion created by the Respondent.

The public at large typically are not motorists and are able to use the public street lanes set aside for bicyclists, bicycles and other special interests, so they have no injury of the delays and captivity as to which Petitioner is being injured.

As Petitioner stated in his affidavit in opposition (R418):

> **My Category as a Driver**
>
> 7. I am a driver of an automobile in New York County and as such am one of no more than 221,916 individuals (the number of vehicle registrations for New York County during 2013 [source footnote omitted] and if assuming that 50% of the registered vehicles are commercial, only about 110,00 non-commercial drivers exist, including me. This puts the Petitioner into a group consisting of 6.7 percent of New York County's 1,626,000 population. [R418]

The changes implemented by Respondent directly regulate my use of public roadways by prohibiting me from using roadway space or land that is available to everyone except drivers and passengers of motor vehicles.

93.3% of New York County's population are not denied the use of such public space and in fact are invited to use the land (such as CitiBikes - R460, bicyclists and others) now that Petitioner and other drivers and passengers are prohibited from using the public land.

3. As a 79-Year Old Resident

Petitioner is in the zone of interest protected by SEQRA because of his age and higher risk when being transported to a hospital by ambulance if and when he suffers an apparent heart attack, stroke or other critical condition.

The land use involved is the 20-40% of the street lanes that are denied vehicles including ambulances, so that even emergency vehicles have to navigate with fewer lanes, and slower or non-moving traffic, causing the ambulance to reach its destination 10, 20 or 30 minutes after it would have reached its destination but for the traffic congestion created by the Respondent.

III.

TRAFFIC CONGESTION IS WITHIN THE ZONE OF INTEREST PROTECTED BY SEQRA

Traffic congestion has been held to be within the zone of interest protected by SEQRA. Lo Lordo v. Board of Trustees, 202 A.D.2d 506, 609 N.Y.S.2d 22, 1994 N.Y. App. Div. LEXIS 2386 (N.Y. App. Div. 2d Dep't 1994), which held in relevant part:

> We find the petitioners' allegations of potential injury are **[507]** supported by the record and that the petitioners have demonstrated that they are within the zone of interest protected by SEQRA. ...
> Traffic congestion, such as that alleged by the petitioners has been held to be an environmental issue within the zone of interest of SEQRA (see, Matter of Heritage Co. of Massena v Belanger, supra; Matter of Schweiss v Ambach, 98 AD2d 148, 471 N.Y.S.2d 167, affd 63 NY2d 835, 482 N.Y.S.2d 269, 472 N.E.2d 45). Thus, in the present proceeding, the petitioners have each alleged environmental harm that is different from that suffered by the public at large and that comes within the zone of interest protected by SEQRA. Thus, they have the requisite standing to pursue their claims on the merits (see, Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead, 69 NY2d 406, 515 N.Y.S.2d 418, 508 N.E.2d 130, supra).

Lo Lordo, supra, was cited by McGrath v. Town Bd. of N. Greenbush, 254 A.D.2d 614, 678 N.Y.S.2d 834, 1998 N.Y. App. Div. LEXIS 11191 (N.Y. App. Div. 3d Dep't 1998), which held in relevant part:

> Furthermore, averments that McGrath will suffer harm from "increased noise", "increased vehicle and truck traffic", and "degradation in the character of the neighborhood and style of life" are concerns within the zone of interest protected by the Town's zoning laws (*see,* *Matter of Rosch v Town of Milton Zoning Bd. of Appeals,* 142 AD2d 765, 767). We also note that McGrath's allegations of traffic congestion and its consequential increase in noise are potential noneconomic environmental concerns within the zone of interest of SEQRA (*see,* *Matter of Lo Lordo v Board of Trustees*, 202 AD2d 506, 506-507; *Matter of Heritage Co. v Belanger*, 191 AD2d 790, 791). Therefore, we find that McGrath has established standing to challenge the enactment of Local Law No. 22.Accordingly, we reinstate McGrath's petitions/complaints and remit them to Supreme Court for further proceedings.

IV.

PROXIMITY TO THE TRAFFIC CONGESTION IS NEEDED FOR STANDING TO CHALLENGE THE GOVERNMENTAL ACTION UNDER SEQRA

The Lo Lordo and McGrath decisions, supra, both held that proximity of the Petitioner's use to the traffic congestion put them "within the zone of interest" and gave them standing to sue under SEQRA. The petitioners were land owners and users in close proximity to the traffic congestion and its injurious effect.

V.

PETITIONER AS MOTORIST AND TAXICAB PASSENGER IS WITHIN THE ZONE OF INTEREST PROTECTED BY SEQRA

Petitioner Person has an even stronger proximity. His proximity is within the traffic congestion itself, causing him to be a captive in his vehicle (or as a taxicab passenger) for 100 additional hours per year solely because of the traffic congestion deliberately being created by the Respondent.

The Court below failed to see or understand that motorists and taxicab passengers are caught within the traffic condition created illegally by Respondent, and not in the position of members of the public at large who are on the sidelines, outside of the traffic congestion, while Petition is being held captive, unnecessarily, in a vehicle.

Traffic congestion injures members of the public at large (including Petitioner when he is not a motorist or taxicab passenger), but when he becomes a motorist or taxicab passenger Petitioner makes use of NYC land (i.e., the public roadways) only to find himself captive in the vehicle for an additional 100 hours per year as a result of the illegal actions by Respondent, who failed to announce its plan to actually create additional congestion (to be able to impose congestion pricing at the presently toll-free bridges) and failed to prepare and file an environmental impact statement under SEQRA to explain what it is doing and what alternative there were which they rejected.

For example, Petitioner states in his opposing affidavit (R421-422) :

> **Statement for the Bike Program, DOT Failed to Examine a More Suitable Alternative**
>
> 14. If DOT has prepared an environmental impact statement, it would have had to consider possible alternatives to the bike lanes it has installed. One possible alternative, that would have not created congestion would have been to create bike lanes in NYC's parks in each Boro (Central Park in Manhattan), with bike stations in the parks, and free public transportation to the parks through reimbursement at the time of bike rental or return. Also, the High Line, a 1.45 mile long green space on the west side; Prospect Park in Brooklyn; Governor's Island; Bronx Park, Van Cortlandt Park and Soundview Park in the Bronx; Gateway National Recreation Area, Wolfes Pond Park and Bloomingdale Park in Staten Island; and Flushing Meadows park, Forest Park, Roy Wilkins Park, Astoria Park, Cunningham Park, Kissena Park, Gateway National Park (Jamaica Bay, Breezy Point and Jacob Riis), Gantry Plaza State Park, Alley Pond Park and Juniper Valley Park in Queens. There was no need to create congestion to have bike lanes. All DOT had to do was put the bike lanes and bike stations in the parks. And rather than having commercial bike stands in the streets and on the sidewalks of Manhattan, DOT should have required store rentals, to keep the bikes off the streets, with access to the stores through the bike user's credit card.

The failure to prepare and publish an Environmental Impact Statement (R27-28, 33, 36, 41, 44 and 46) was necessary because traffic congestion was the known and desired result of the Respondent's activities, and could not have been disclosed and analyzed under SEQRA without revealing these land-use abuses being forced

upon NYC (and especially Manhattan) without compliance with state or federal law.

VI.

THE COURT BELOW SHOULD HAVE GRANTED PETITIONER'S MOTION TO AMEND HIS PETITION

The Petition (R30) made it clear that Petitioner was losing 100 hours per year of his time because of the traffic congestion being created by the Respondent.

The Court below held that Petitioner's alleged financial losses due to traffic congestion gave him no standing, even though the allegations of 100 hours of loss per year as a captive in the congested traffic was alleged, which is the standing. The Court below failed to understand that loss of time through captivity in the traffic congestion provided standing, whether or not the Petitioner would have used such time to sleep, run for office, make money, or read a book.

Accordingly, to clarify this for the Court below, Petitioner prepared a proposed amended Petition (R442), alleging at sub-paragraph V of ¶ 19:

> loss of valuable time caused by transportation delays which, for the Petitioner, is $400/hour, whether such time would have been used for personal/non-economic pursuits or for economic pursuits

and "Damages" in subparagraph A of ¶ 27:

> A. The loss of Petitioner's valuable professional time (and the option to use all or any part of such time for non-economic pursuits) caused by transportation delays, at the rate of $400/hour for an estimated 100 hours per year;

Petitioner moved for leave to serve and file the proposed Amended Petition (R433) under CPLR 3025(b), but this motion was denied (R23).

This procedure (for permitting amendment of a complaint after dismissal of the action) has been acknowledged by the 1st Department in Guthartz v. City of New York, 84 A.D.2d 707, 443 N.Y.S.2d 841, 842 (1st Dept. 1981), which held:

> At issue here is whether the amended complaint alleges new facts sufficient to support the newly alleged cause of action, based upon the failure of consideration, impossibility or frustration of purpose. In dismissing the complaint originally without prejudice to a subsequent application, this court stated: * * *
>
> * * *
>
> The deficiencies of the complaint cannot be cured by plaintiff tacking thereon the conclusory allegations that "the acts and conduct of the defendants, their agents, servants and employees are such as to have led to a failure of consideration and complete frustration of the parties of the lease as well as impossibility of performance."
>
> 2 Conclusory allegations do not satisfy the requirement that the complaint must set forth essential facts with some degree of particularity upon which a claim or legal theory is based Goldstein v. Siegel, 19 A.D.2d 489, 244 N.Y.S.2d 378 (1st Dept. 1963).

> 3 The failure to lay bare the proof, and to plead and set forth essential facts to support its conclusory allegations, render this proposed pleading insufficient as a matter of law. Therefore, Special Term erred in granting plaintiff's application for leave to serve his amended complaint.

Because the Court below in the instant case determined that the original Petition did not allege facts to support standing to sue, the proposed Amended Petition provided essential facts with the requisite degree of particularity for Petitioner's claim, as required by Guthartz, supra.

There had been no prior opportunity for Petitioner to amend his Petition, and the Petition had not been previously dismissed, and the dismissal in the Court's Decision at issue (R9) did not state with prejudice.

CPLR 3025(b) provides, as follows:

> (b) Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

The proposed pleading (R442) provides the additional transactions or occurrences.

Petitioner's proposed pleading clearly shows the changes or additions made to the pleading.

Leave shall be freely given upon such terms as may be just (CPLR 3025-b).

The Court below in its decision denying the motion to amend (R23-24) cited Am. Trading Co., Inc. v. Fish, 87 Misc.2d 193, 197 (Sup Ct. 1975). The decision stated:

> And, even if that branch of the motion were deemed an application for leave to serve an amended complaint, this is not a proper case for the granting of such relief in the exercise of the court's discretion, since the papers submitted do not contain the requisite evidentiary support.

Petitioner in the instant case complied with CPLR 3025(b) by providing a marked copy of the proposed pleading showing the changes, and explained in his affidavit (R438-440) why those changes were being made.

Also, it should be noted, that the decision cited by the Court below is earlier (1975) and from a lower court than the 1981 First Department decision (Guthartz, supra) cited by Petitioner.

The Court below also cited The Bd. of Managers of the A Bldg. Condominium v. 13th & 14th Street Realty, LLC, 2015 WL 3750124, 2015 N.Y. Misc. LEXIS 2136, 2015 NY Slip Op 31021(U), (N.Y. Sup. Ct. June 16, 2015),

which cited Am. Trading Co., Inc. without mentioning the language quoted above, pursuant to which a motion to amend could have been presented.

Although motions to reargue or renew have their limitations, there does not appear to be a limitation excluding other motions from being made at the same time, such as a motion to amend a pleading under CPLR 3025(b). If a properly supported motion to amend is made, the Court should consider it on its merits, whether not it is made with a motion to reargue or renew under CPLR 2221(d).

VII.

INTENTIONALLY INJURING NYC'S ECONOMY IN THE SHORT RUN (10-15 YEARS) AS PART OF A PLAN TO TRANSFORM NYC INTO A BIKE, BUS, FERRY AND SUBWAY ECONOMY AND LIFESTYLE IS A LAND USE CHANGE REQUIRING PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT UNDER SEQRA

Respondent admits its total awareness that traffic congestion injures the economy in its Exhibit B, the Transportation chapter from the Report plaNYC, a Greener, Greater New York (R57-83): "We can accept increasing congestion and the damage it will inflict on our economy and quality of life..." (R83, under the hearing "Conclusion").

A review of all 27 pages of the Transportation Chapter (R57-83) shows the massive land-use and quality of life changes now undertaken by Respondent (as to NYC's transportation system) without the preparation of any Environmental

Impact Statement under SEQRA or federal law.

The need for an Environmental Impact Statement to enable public participating in whatever changes are being made is vital for maintaining our democratic form of government, and having citizen review of the massive land-use changes being made by the 2 individuals (NYC Mayor, and NYC Transportation Commissioner).

Petitioner, as a motorist/driver, taxicab passenger and 79 year old resident has the required proximity to the land-use changes required for standing. His proximity is within the subject land itself as a captive in a car, cab or ambulance, unable to use the former street lanes now set aside for bikes, parking and pedestrians, because of the additional traffic congestion being deliberately created by the Respondent.

CONCLUSION

For all of the foregoing reasons and the reasons set forth in the Petitioner-Appellant's opening brief, the Decisions and Judgments of the Hon. Alexander W. Hunter (R9-14 and R22-26) should be reversed in their entirety, and denial of the Petitioner's motion for leave to amend his Petition (R433) should be reversed, and the action be sent back to the Court below for discovery and trial.

Dated: **New York, New York**
May 17, 2016

Respectfully submitted,

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Certificate of compliance pursuant to Rules of Procedure § 670.10.3(f)

Carl E. Person hereby certifies that the foregoing brief was prepared on a computer.

The name of the typeface is Times New Roman.

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The word count is 6,863.

The brief has been signed by the undersigned in accordance with section 130-1.1-a(a) of this Title.

The foregoing is hereby certified.

Dated: **New York, New York**
May 17, 2016

Carl E. Person