To be argued by:
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New York Supreme Court
Appellate Division: First Department

In the Matter of

CARL E. PERSON,

Petitioner-Appellant,

against

NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Respondent-Respondent.

BRIEF FOR RESPONDENT

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PRELIMINARY STATEMENT

In this article 78 proceeding, *pro se* petitioner Carl E. Person[1] launches a broadside attack on the City of New York's transportation-related policies and initiatives—from large to small—announced and carried out over the past eight years. He posits that officials from across two mayoral administrations have secretly conspired to intentionally increase the traffic congestion on city streets, solely to win approval of a "congestion pricing" program for raising billions of dollars in revenues toward unspecified political ends. The striking breadth and implausibility of Person's theory is matched only by the relief he seeks: to undo virtually all of the street-use changes and other traffic-related activities the City has undertaken since 2008, ranging from the redesign of particular intersections to the years-long implementation of a large-scale bike sharing program.

Despite the extraordinary sweep of Person's allegations and far-reaching request for relief, he asserts a single claim under the State Environmental Quality Review Act (SEQRA), for failure to prepare an

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[1] Although Person appears *pro se*, he is an experienced attorney who runs his own practice and, as such, not entitled to the same solicitude this Court affords its more typical *pro se* litigants.

environmental impact statement. He claims the transportation-related policies and initiatives he challenges—including those to design safer streets and promote cycling—require reversal because the New York City Department of Transportation (NYCDOT) did not prepare an environmental impact statement at the outset of what he cryptically refers to as the "overall plan" to increase congestion.

Person's claim is misguided on several fronts, but founders at the very threshold because he lacks standing under SEQRA. Person maintains that he has been harmed by increased congestion in the form of hundreds of hours spent in traffic instead of pursuing other activities; more money spent on gas, parking, vehicle repairs, and insurance than otherwise would have been necessary; and more risk from exposure to air pollution and other hazards while driving. None of his alleged injuries is sufficiently concrete, environmental in nature, and distinct from the general public's experience to confer individual standing for a challenge like this one. Because Person lacks standing, and also because his allegations are in any event time-barred, Supreme Court, New York County (Hunter, J.), properly granted NYCDOT's motion to dismiss the petition. This Court should affirm.

QUESTIONS PRESENTED

1. Where Person's alleged injuries are speculative, largely (if not entirely) economic, and shared by the public generally, and where he filed this article 78 proceeding years after he claims that NYCDOT was required but failed to prepare an environmental impact statement, did Supreme Court properly grant NYCDOT's motion to dismiss?

2. Where Person did not seek leave to amend his petition until after Supreme Court had granted NYCDOT's motion to dismiss, and where the proposed amended petition did not adequately address defects in standing or timeliness, did Supreme Court properly deny Person leave to amend?

STATEMENT OF THE CASE

Person, who lives, works, and "from time to time" drives a motor vehicle in New York City (Record on Appeal ("R.") 33), suggests that NYCDOT's various street-use changes and traffic-related activities over the past eight years were component parts of an overall plan to congest traffic on city streets (R. 32-37, 41, 44-45). He claims that NYCDOT was required but failed to address the expected effects of all of its activities over this eight-year period in a single environmental impact statement at the very outset (R. 32-33, 36, 41, 44-45). Person maintains that, due

to this failure, *all* of NYCDOT's activities since 2008 are invalid and must be reversed as a violation of SEQRA's requirements for preparing environmental impact statements (R. 27-28, 41, 44-48).

A. SEQRA Framework

To ensure that state and local government agencies give appropriate weight to environmental considerations in setting public policy and deciding on proposed actions, N.Y. Envtl. Conserv. Law § 8-0103(1), (7)-(9); 6 N.Y.C.R.R. § 617.1(b)-(d), SEQRA requires agencies to assess the potential for significant adverse environmental impacts of certain discretionary actions before undertaking them, N.Y. Envtl. Conserv. Law § 8-0109(2); 6 N.Y.C.R.R. §§ 617.1(c), 617.3(a). If an agency determines that a proposed action may have a significant adverse environmental impact, the agency must prepare an environmental impact statement. N.Y. Envtl. Conserv. Law § 8-0109(2); 6 N.Y.C.R.R. § 617.7(a)(1)-(2).

The State Department of Environmental Conservation has determined that certain classes of actions will *not* have a significant impact on the environment or otherwise do not require review—these are referred to as "Type II" actions. 6 N.Y.C.R.R. §§ 617.2(aj),

617.3(f), 617.5(a)-(c), 617.6(a)(i). "Type I" actions, by contrast, are presumed likely to have a significant adverse impact and may require preparation of an environmental impact statement. *Id.* §§ 617.3(c), 617.4(a)-(b). An "Unlisted Action" has not been identified as either Type I or Type II, *id.* § 617.2(ak), and requires preparation of an environmental impact statement if it may have a significant adverse impact on the environment, *id.* §§ 617.2(h),(y), 617.3(c), 617.7(a).

Where a proposed action consists of a "set of activities or steps," the agency must consider the entire set as the proposed action for purposes of review under SEQRA. *Id.* § 617.3(g); *see also id.* § 617.7(c)(2)(i)-(iii); *cf. id.* § 617.2(ag) (defining "segmentation" as the division of a proposed action's review to address its various stages "as though they were independent, unrelated activities"). For example, where a village agreed to sell hundreds of millions of gallons from its water system and also approved an agreement to construct a loading facility to transport the water by rail to its purchaser, the village should have considered the two agreements together for purposes of review under SEQRA. *Sierra Club v. Village of Painted Post*, 134 A.D.3d 1475, 1475-76, 1478 (4th Dep't 2015).

B. Person's Allegations of a Long-Running Conspiracy to Manipulate Transportation Policy and Increase Congestion on City Streets

Person alleges the plan to increase congestion originated with former Mayor Michael Bloomberg, who, in 2007, advanced a "congestion pricing" proposal that would have charged drivers a fee to enter Manhattan's central business district at its busiest hours (R. 30-32, 34). According to the petition, after that proposal failed in 2008, Mayor Bloomberg allegedly set NYCDOT on a course (that current Mayor Bill de Blasio allegedly has continued) to intentionally increase—rather than decrease—congestion, with the goal of winning congestion pricing's acceptance and, ultimately, raising revenues (R. 30-37).

1. "PlaNYC: A Greener, Greater New York"

In 2007, the City announced a comprehensive, long-term sustainability initiative called "PlaNYC: A Greener, Greater New York," setting goals to address the challenges posed by anticipated future population growth, climate change, and aging infrastructure (R. 30, 31-32, 56). The plan's chapter on transportation emphasized the need to expand transit's capacity, to relieve congestion and accommodate ever-increasing demand throughout the region, and to restore all existing

roads, subway routes, and commuter rail lines to good condition (R. 58-59). To meet those broad goals, PlaNYC identified 16 more specific transportation initiatives, including improvements to bus and commuter rail service, an expansion of ferry service, measures to promote and facilitate cycling, and implementation of a congestion pricing program on a three-year trial basis (R. 63-83).

PlaNYC's proposal for congestion pricing, inspired by systems then in place in London and other global cities, would have charged drivers a fee to enter Manhattan's central district during weekday business hours (R. 63-64, 74-77). PlaNYC expressed the goals that congestion pricing would reduce traffic and travel times on city streets; fund key mass transit improvement projects; and cut greenhouse gas emissions (R. 63, 74-77). PlaNYC acknowledged, however, that the City and State would have to collaborate on any congestion pricing program's details, with state legislation required to set the scope for an environmental review and enable the City's effective implementation of such a program (R. 75).

The State Legislature created a commission to study the matter and, after months of meetings and analysis, that commission formally

recommended adopting a congestion pricing plan similar to PlaNYC's proposal (R. 32).[2] However, the recommended plan failed to pass in the State Assembly in 2008 (*id.*).[3] As a result, the proposed trial of a congestion pricing program was abandoned, at least for the time being, and the City lost its eligibility for $350 million in federal grants that would have supported a number of transit projects (*id.*).[4]

2. NYCDOT's "Sustainable Streets"

Following PlaNYC's 2007 release and to further its transportation initiatives, NYCDOT in 2008 announced its own detailed strategic plan called "Sustainable Streets" (R. 31). Featuring policy statements underscored by numerous specific proposed actions, Sustainable Streets focused on improving mobility for everyone in New York City with more environmentally sustainable transportation options, including expanded facilities for cycling (R. 31, 85-87, 89-90). The plan also emphasized the redesign of city streets to be safer and more

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[2] *See also* William Neuman, *State Commission Approves a Plan for Congestion Pricing*, N.Y. Times, Feb. 1, 2008, http://nyti.ms/29F8gBJ.

[3] *See also* Nicholas Confessore, *$8 Traffic Fee for Manhattan Gets Nowhere*, N.Y. Times, Apr. 8, 2008, http://nyti.ms/23poYcR.

[4] *See also* Neuman, *supra* note 2; Confessore, *supra* note 3.

accommodating for all who need to use them (R. 88-89, 91). NYCDOT followed Sustainable Streets with comprehensive progress reports in 2009 (R. 331-410) and 2013 (R. 98-313).

3. NYCDOT's challenged activities

Person alleges that after the congestion pricing plan's legislative defeat in 2008, Mayor Bloomberg and NYCDOT conspired to increase traffic congestion through a series of supposedly coordinated activities, with the aim of winning congestion pricing's approval (R. 32-37). Person alleges that the conspiracy to increase congestion had as component parts the use of red light cameras at intersections; efforts to promote cycling; street redesigns to create "floating" parking, refuge islands, and public plazas; changes in the timing of traffic signals on avenues; and a reduced default speed limit on city streets (R. 34-36).

Although Person claims these activities were all part of a secret plan formed in 2008, NYCDOT began several of these activities in 2007 or earlier. Many are addressed in 2008's Sustainable Streets and subsequent progress reports. And Person acknowledges that several in fact were subject to environmental review individually (R. 36, 41-44).

a. Red light camera program

Since the 1990s, NYCDOT has used a photographic enforcement program for issuing summonses when drivers run red lights at intersections that have cameras (R. 35, 411-12). The State Legislature several times has authorized an increase in the number of city intersections with cameras (R. 412). *See* 2009 N.Y. Laws 18; 2006 N.Y. Laws 658.[5]

b. Bike lanes, storage racks, and sharing program

In 2007, PlaNYC reflected a commitment to make cycling a viable form of transportation across New York City by expanding significantly and better connecting the existing network of bike lanes and installing thousands of additional storage racks (R. 31-32, 34-36, 73-74). In 2008, Sustainable Streets reemphasized those efforts as key to improving mobility (R. 86-87, 89). By 2013, NYCDOT had created more than 350 miles of new bike lanes, installed 16,000 storage racks, launched a bike sharing program, and reached its goal of doubling bike counts on commuter routes (R. 180-95).

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[5] *See also* N.Y. Veh. & Traf. Law § 1111-a(a)(1); N.Y.C. Admin. Code § 19-210(a)(1).

Person acknowledges that NYCDOT determined, through an environmental review in 2012, that its bike sharing program would not have a significant adverse impact on the environment (R. 42-43). Indeed, NYCDOT's determination has been reviewed, and upheld, by this Court. *See Bd. of Managers of the Plaza Condo. v. N.Y.C. Dep't of Transp.*, 131 A.D.3d 419, 419-20 (1st Dep't 2015) (concluding that NYCDOT undertook a sufficient environmental review of bike sharing program); *Cambridge Owners Corp. v. N.Y.C. Dep't of Transp.*, 118 A.D.3d 634, 634 (1st Dep't 2014) (similar).

c. "Floating" parking lanes

In 2007, NYCDOT pioneered the use of a "floating" parking lane to separate and protect from vehicle traffic a bike lane running next to the curb on Manhattan's Ninth Avenue (R. 34, 86, 182-83). By 2013, NYCDOT had applied the same award-winning, innovative design to other major avenues and streets (R. 182-83, 232). Person acknowledges that, in 2012 and 2013, NYCDOT issued Type II determinations for its redesign efforts on First, Second, Eighth, Ninth, and Columbus Avenues (R. 41-42).

d. Public plazas

In 2008, NYCDOT launched its public plaza program (R. 34, 91, 358). By 2009, the agency had developed a process for community groups to propose locations (R. 34, 91, 338, 358), and, by 2013, NYCDOT had created 59 new plazas (R. 219-21).

e. Pedestrian safety refuge islands

At least as early as 2008, NYCDOT proposed using refuge islands for safer street-crossings, which are especially critical for the safety and well-being of senior citizens (R. 34, 88, 341). Although Person is concerned with refuge islands on Manhattan's Eighth and Ninth Avenues in particular (R. 34), he acknowledges that redesign efforts there were classified as Type II actions in 2012 and 2013 (R. 41-42). As of 2013, NYCDOT still considered refuge islands an important safety measure to reduce traffic fatalities (R. 110-12, 115-16).

f. Congestion management system

In 2011, NYCDOT began a program called "Midtown in Motion" to reduce congestion by adjusting traffic signal patterns remotely to clear backups as they happen (R. 35, 204, 414-15). Engineers use sensors and cameras to monitor vehicle travel times and traffic volumes by

analyzing, in real time, the data transmitted to them wirelessly (R. 204, 414-15). Preliminary results showed a 10% reduction in travel times and, by 2013, NYCDOT had doubled the size of the Midtown service area (R. 204, 414).

g. Reduced default speed limit

In 2014, after Mayor de Blasio had taken office, and after the State legislatively had conferred the necessary authority, *see* 2014 N.Y. Laws 248,[6] the New York City Council approved a bill reducing the speed limit from 30 to 25 miles per hour on residential streets with no maximum speed posted (R. 35).[7] The reduced speed limit took effect more than four months before Person filed his article 78 petition in March 2015 (R. 27-49).

In his article 78 petition, Person alleges that all of these activities, in combination, have been *designed* to increase—and have increased—traffic congestion on city streets at tremendous cost to the local economy and inconvenience to residents (R. 32-41). He claims that the adverse

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[6] *See also* N.Y. Veh. & Traf. Law § 1642(a)(26)(a)-(b).

[7] *See also* Patrick McGeehan, *New York City Council Passes Bill Lowering the Speed Limit on Most Streets*, N.Y. Times, Oct. 7, 2014, http://nyti.ms/1sbWthf.

effects of increased congestion can be felt on every mile of Manhattan's avenues and streets (R. 44), an assertion that is contradicted by NYCDOT's report in 2013 of reduced traffic volumes and increased speeds in Manhattan's central business district (R. 203).

As for his alleged personal injuries, Person claims that increased congestion has cost him time spent in traffic that he otherwise would have used for other activities and greater expense for gas, parking, vehicle maintenance, and insurance (R. 41, 45-46). He also claims that, as a driver and taxi passenger, he has been denied use of parts of city streets that NYCDOT now has designated for other uses, such as cycling (R. 41, 45). Finally, he claims that he has been exposed to increased air pollution and other increased hazards while driving (*id.*).

C. Supreme Court's Grant of the City's Motion to Dismiss and Denial of Person's Motion for Leave to Amend the Petition

NYCDOT moved to dismiss the petition on grounds that Person lacks standing under SEQRA and his allegations are time-barred and fail to state a cause of action (R. 50-55). In granting the motion and dismissing the petition, Supreme Court concluded that Person had not alleged a sufficiently concrete environmental injury different from the

experience of the public at large to establish individual standing (R. 8-14). After Supreme Court had dismissed the petition, Person moved for leave to amend the petition's allegations regarding his injuries (R. 433-89). Supreme Court denied the request as improperly made for the first time in seeking leave to reargue (R. 21-26).

ARGUMENT

POINT I

SUPREME COURT PROPERLY DISMISSED THE PETITION

Supreme Court properly granted NYCDOT's motion to dismiss because Person's alleged injuries do not confer individual standing to challenge the agency's compliance with SEQRA. Even if Person has standing, however, his conclusory allegations of a long-running conspiracy are barred by the applicable statute of limitations.

A. Person Lacks Individual Standing to Raise His Sweeping Challenge to NYCDOT's Compliance with SEQRA.

Person has not met his burden of establishing standing to seek judicial review under SEQRA. *Soc'y of the Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 769-75 (1991). SEQRA, by its terms, does not provide standing for "any person" or "any citizen" to sue to compel

compliance with its requirements. *Id.* at 769-71. Rather, to have standing to sue, a petitioner must show an injury-in-fact that falls within the "zone of interests" that SEQRA protects, and that is direct and different from the manner in which the challenged action affects the public generally. *Id.* at 771-75; *see also Ass'n for a Better Long Island v. New York State Dep't of Envtl. Conservation*, 23 N.Y.3d 1, 6 (2014). Person's alleged injuries do not meet any of these criteria.

1. Person has not alleged a sufficiently concrete injury within SEQRA's zone of interests.

While Person offers a litany of personal inconveniences that he claims to have suffered from NYCDOT's activities over the past eight years (R. 45-46), his alleged injuries either are not within the zone of interests that SEQRA promotes and protects or they are entirely speculative. Because he lacks an environmental injury-in-fact, he has no standing to challenge NYCDOT's compliance with SEQRA. *See Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 76 N.Y.2d 428, 430, 433-34 (1990) (affirming lack of standing to challenge adequacy of environmental review for project where petitioner had not alleged that project threatened it with environmental harm); *see also New York*

State Ass'n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 209-10, 211-15 (2004) (dismissing complaint where plaintiff's injury lacked requisite concreteness for standing).

Person's allegations that NYCDOT's supposedly coordinated activities have cost him time spent in traffic instead of other pursuits, and money spent on gas, parking, vehicle maintenance, and insurance, are not within the relevant zone of interests to establish standing (R. 45-46). A statute's zone of interests refers to its legislative purpose—what the statute promotes or protects. *Soc'y of Plastics*, 77 N.Y.2d at 773-74. Here, SEQRA promotes a more harmonious relationship with and better understanding of the physical environment, and protects against further degradation in the quality of environmental resources and similar harms. *See* N.Y. Envtl. Conserv. Law §§ 8-0101, 8-0103(1)-(9), 8-0105(6); *Soc'y of Plastics*, 77 N.Y.2d at 777-78.

Person's allegations of lost time and money do not touch SEQRA's interests, or suggest that he has suffered anything more than economic injury (at best). *See, e.g., Widewaters Route 11 Potsdam Co., LLC v. Town of Potsdam*, 51 A.D.3d 1292, 1294 (3d Dep't 2008) (concluding a property owner's concern that anticipated change in traffic patterns

would interfere with development of its property was economic, not environmental, injury); *see also Better Long Island*, 23 N.Y.3d at 8-9 (assertion that challenged regulations would impede redevelopment of property was economic, not environmental, injury). Economic injuries, like those alleged here, do not confer standing to challenge an agency's compliance with SEQRA. *Better Long Island*, 23 N.Y.3d at 9; *Soc'y of Plastics*, 77 N.Y.2d at 777-78; *Mobil Oil*, 76 N.Y.2d at 433.

Person argues that his lost time is not necessarily an economic injury, because if he had not been stuck in traffic, he may have spent his time on activities that do not bring him income, such as dining at a restaurant or going to the movies (App. Br. at 14-17). But this argument misses the point. No matter how Person would have spent his time, any alleged impacts on how he spends his time are not an environmental injury. *See Turner v. County of Erie*, 136 A.D.3d 1297, 1297-98 (4th Dep't) (concluding that alleged expense and inconvenience of college student's having to use public transportation to reach proposed site for new academic building was not environmental injury), *lv. denied*, 27 N.Y.3d 906 (2016).

The petition alleges as a further injury that Person has been denied use of parts of city streets for driving or riding as a passenger in a motor vehicle now that NYCDOT has put those areas to other uses, such as for cycling, refuge islands, and plazas (R. 45). But Person has no entitlement to perpetual use of any particular street lane for driving, much less an entitlement recognized by SEQRA. And there is nothing stopping him from using the disputed areas as the rest of the public now uses them, for cycling, parking, safer street-crossings, or sitting outdoors. At bottom, he is concerned that loss of lanes for vehicle traffic in his experience has caused longer travel times and a corresponding loss of personal time for other interests (App. Br. at 5, 12, 14-17, 21). This, again, is not an environmental injury.

The petition alleges that Person has been injured by air pollution and exposure to increased driving hazards, allegedly caused by all or some unspecified combination of NYCDOT's activities over the past eight years (R. 45). But his claims here are far too vague and speculative to satisfy the injury-in-fact requirement. *See Rent Stabilization Ass'n of N.Y.C. v. Miller*, 15 A.D.3d 194, 194 (1st Dep't) (holding petitioners' claims that local law would lead to reduced

availability of affordable housing and increased lead poisoning were too speculative for standing under SEQRA), *lv. denied*, 4 N.Y.3d 709 (2005). Standing requires harm that is "more than conjectural," *Nurse Anesthetists*, 2 N.Y.3d at 211, 214-15, to ensure that petitioners have a "concrete interest" in seeking judicial review, and that courts are not issuing advisory opinions, *Soc'y of Plastics*, 77 N.Y.2d at 772-73. Even though NYCDOT's activities about which Person complains have had effect for years, Person has not alleged any actual injury from purportedly increased pollution or other hazards. Without an injury capable of redress, Person has no stake in this proceeding other than his apparent disagreement with years of transportation-related policy determinations. *See id.* at 769, 772-73, 778. Such far-reaching disagreements on matters of public policy, abstract by their nature, do not lend themselves to judicial review and resolution. *See id.*

Although not in the petition, Person argues in his brief that he has been injured because, as a 79-year-old man, he may show signs of a heart attack and need an ambulance, and that ambulance may be slowed by traffic delays allegedly caused by NYCDOT's activities, negatively impacting Person's health or even killing him (App. Br. at

17-19, 21). This assertion of another alleged injury outside SEQRA's zone of interests plainly also suffers from too many "layers of speculation" to constitute an injury-in-fact for standing purposes. *Nurse Anesthetists*, 2 N.Y.3d at 212-15 (finding plaintiff had no injury-in-fact and, thus, no standing to challenge guidelines that "might, or might not, actually affect" plaintiff in the harmful manner alleged).

Likewise, Person's argument, made for the first time on appeal, that he is injured because traffic delays may prevent him from accessing a restroom when he needs it (App Br. at 17), reflects a harm too "tenuous and ephemeral" to support a challenge to the adequacy of environmental review for eight years of NYCDOT's citywide activities. *Nurse Anesthetists*, 2 N.Y.3d at 214 (internal quotation marks omitted). Given Person's assertions that NYCDOT's street redesigns, efforts to promote cycling, and various other activities publicized as improving safety, mobility, and sustainability all were, in his view, part of a plan formed by Mayor Bloomberg to intentionally congest city streets, the larger theory underlying Person's claim is just as speculative and misguided as any of his alleged injuries.

2. Person has not alleged special injury that differs from the general public's experience.

Even if Person could identify a concrete environmental injury (and he has not), none of his alleged injuries establishes that he is affected differently by NYCDOT's activities than other members of the public. That fact independently defeats his claim of individual standing for this broad-based challenge. *See Rent Stabilization Ass'n*, 15 A.D.3d at 194-95 (holding that even if petitioners' alleged environmental harms were not speculative, they nonetheless "would be shared by the public," and therefore could not establish standing).

For standing in matters affecting land use, petitioners must show they have a specific, direct stake in the matter, different from the interest of their larger community. *Soc'y of Plastics*, 77 N.Y.2d at 774-75. For example, the petitioners in *Save the Pine Bush, Inc. v. Common Council of Albany*, 13 N.Y.3d 297 (2009), who had used a protected natural area repeatedly for recreation and study, had standing to challenge a nearby property's rezoning for a hotel, because they would be affected differently by the rezoning than the rest of the public. *Id.* at 301-03, 305-06. Similarly, the petitioner in *Sierra Club v. Village of Painted Post*, 26 N.Y.3d 301 (2015), who lived less than two blocks from

a new rail loading facility and whose sleep was disturbed by noise from increased train traffic, had suffered a specific, direct injury to establish standing. *Id.* at 306-08, 310-11. By contrast, Person's alleged injuries—loss of personal time, increased expense, and exposure to pollution and other hazards—he feels indirectly, and shares with the public generally.

Person attempts to distinguish his experience from the general public's by identifying personal characteristics that in his view make him unique—for example, his age, which he correlates to an increased likelihood that he will need an ambulance for a medical emergency; his private ownership of a motor vehicle while a resident of Manhattan; and his means to afford taking taxis (App. Br. at 12, 15-21, 31). None of these characteristics makes Person unique. But more to the point, none bears on the crux of his alleged injury: time spent in traffic, instead of somewhere else. And he admits that any member of the public who either drives or rides as a passenger in any type of motor vehicle, whether or not privately owned, and no matter the trip's purpose or where in New York City it takes place, suffers this same injury (App. Br. at 4-10, 18, 21). That is the very definition of generalized harm that does not confer individual standing to seek judicial review of

administrative action. *See, e.g., Shelter Island Ass'n v. Zoning Bd. of Appeals*, 57 A.D.3d 907, 909 (2d Dep't 2008) (increased traffic a generalized harm), *lv. denied*, 12 N.Y.3d 797 (2009).

3. Person cannot avoid the requirement of special injury by relying on a presumption of aggrievement due to close physical proximity.

Person attempts but is not entitled to rely on a presumption that he has suffered special injury due to an alleged close physical proximity to the land uses he challenges (App. Br. at 23-24, 31-34). The presumption on which Person relies in fact applies where a petitioner seeking judicial review of administrative action resides or owns property in "the immediate vicinity" of a discrete site undergoing redevelopment, rezoning, or like changes. *Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals*, 69 N.Y.2d 406, 411, 413-16 (1987) (applying presumption to establish standing of property owners who challenged neighboring property's new use); *cf. Tuxedo Land Trust, Inc. v. Town Bd. of Tuxedo*, 112 A.D.3d 726, 727-28 (2d Dep't 2013) (concluding petitioners' properties were not close enough to proposed development to establish standing on that basis for their challenge under SEQRA).

Showing sufficiently close proximity of a petitioner's property to a challenged land use by itself permits an inference that the petitioner has a direct stake in the matter, different from the interest of the larger community. *Gernatt Asphalt Prods., Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 687 (1996) (observing as to nearby property owner's standing that "aggrievement may be inferred from proximity"). Person does *not* claim injury based on the close proximity of his residence or other property to a discrete and identifiable land use. To the contrary, he challenges a constellation of initiatives impacting the entire metropolitan area.

As a result, this record differs substantially from both *Lo Lordo v. Board of Trustees*, 202 A.D.2d 506 (2d Dep't 1994), and *McGrath v. Town Board*, 254 A.D.2d 614 (3d Dep't 1998), *lv. denied*, 93 N.Y.2d 803 (1999), on which he relies to argue that he has met the requirement of special injury distinct from the general public's experience (App. Br. at 22-24, 31-34). In *Lo Lordo*, owners of property near the site of a proposed project who were concerned about traffic congestion had standing to challenge a village board of trustees' compliance with SEQRA in adopting a particular land-use resolution. 202 A.D.2d at 506-07. In *McGrath*, a petitioner who lived near a proposed shopping center

and was concerned about noise from increased traffic in that same area had a special injury within SEQRA's zone of interests. 254 A.D.2d at 615-16. By contrast, here, Person is not entitled to a presumption of special injury on the basis that he from time to time finds himself in congestion, in the presence of countless other drivers and passengers who would have the same experience as him.

B. Even if Person Has Standing, His Challenge to NYCDOT's Activities Is Untimely.

In the event this Court determines, contrary to Supreme Court's judgment, that Person has standing under SEQRA, he cannot overcome this proceeding's untimeliness, given the applicable four-month statute of limitations. *See* N.Y. C.P.L.R. 217(1); *Young v. Bd. of Trs.*, 89 N.Y.2d 846, 848 (1996). The petition alleges in conclusory fashion that NYCDOT's violation of SEQRA occurred when it began carrying out a plan to intentionally congest traffic on city streets without having prepared an environmental impact statement at the plan's very outset (R. 27-28, 32-33, 36, 41-45). According to the petition, then, the statute of limitations began to run in 2008 (R. 32-33), when Mayor Bloomberg allegedly formed the plan, NYCDOT allegedly "committed itself to 'a

definite course of future decisions,'" *Young*, 89 N.Y.2d at 848-49 (quoting 6 N.Y.C.R.R. § 617.2(b)(2), (3)), and Person became aggrieved by the purported SEQRA violation of which he complains, *see id.*

Even if the statute of limitations did not begin to run in 2008, because, as Person contends, Mayor Bloomberg's plan initially was a secret (App. Br. at 9), the time for this challenge certainly passed more than four months before Person filed his petition in March 2015. By Person's own account, the plan he challenges was "obvious[]" from a series of public statements made over the years, starting with 2007's PlaNYC (App. Br. at 9 (arguing that PlaNYC together with documents issued subsequently "leave[] no doubt about" NYCDOT's activities); *id.* at 30-31 (similar)). Given that, and given that, by 2013, many of the challenged activities had noticeable effects—from the hundreds of miles of new bike lanes and thousands of storage racks (R. 180-95), to dozens of new plazas (R. 219-21), to "floating" parking on major avenues and streets (R. 182-83, 232)—Person years ago had notice of the alleged violation. *See Seniors for Safety v. N.Y.C. Dep't of Transp.*, 101 A.D.3d 1029, 1032-33 (2d Dep't 2012) (holding that statute of limitations to challenge compliance with SEQRA was triggered, at latest, when bike

path installed), *lv. denied*, 21 N.Y.3d 859 (2013); *see also Branch v. Riverside Park Cmty. LLC*, 74 A.D.3d 634, 635 (1st Dep't), *lv. denied*, 15 N.Y.3d 710 (2010).

Because Person waited so long before he filed his petition, allowing NYCDOT to carry out eight years of street redesigns and make countless other investments (R. 27-28, 33, 47-48), this challenge has been largely academic from the beginning. *See, e.g., Citineighbors Coal. of Historic Carnegie Hill v. N.Y.C. Landmarks Pres. Comm'n*, 2 N.Y.3d 727, 728-30 (2004) (holding petitioners' challenge under SEQRA was moot where they had not sought to halt construction, which had been substantially completed and could not be "readily demolished without undue hardship"). Accordingly, this proceeding's untimeliness provides further grounds for dismissal.

POINT II

SUPREME COURT PROPERLY DENIED LEAVE TO AMEND THE PETITION

Supreme Court also properly exercised its discretion to deny leave to amend where Person did not seek it until after his petition had been dismissed. *See Metro. Steel Indus., Inc. v. Perini Corp.*, 23 A.D.3d 205, 206 (1st Dep't 2005) (faulting claimant for not seeking leave to amend

until after claim's dismissal); *cf. Boothe v. Weiss*, 133 A.D.2d 603, 604 (2d Dep't 1987) (denying plaintiff's request on appeal for leave to replead where he had not sought it in opposing successful motion to dismiss complaint).

Although Person argues this Court has an established procedure for seeking leave to amend after a pleading's dismissal (App. Br. at 26-30), the authority he cites, *Guthartz v. City of New York*, 84 A.D.2d 707 (1st Dep't 1981), *appeal dismissed*, 62 N.Y.2d 632 (1984), does not support that proposition. In *Guthartz*, this Court noted that on a prior appeal in that same case, *Guthartz v. City of New York*, 411 N.Y.S.2d 241 (1st Dep't 1978), it had reversed the lower court's denial of summary judgment to defendant, with the effect of dismissing the complaint, but without prejudice to plaintiff's making an application to serve an amended complaint on remand. 84 A.D.2d at 707. Although plaintiff timely applied on remand, its proposed amended complaint lacked sufficient factual allegations, and this Court reversed the lower court's grant of leave to serve it on that basis. *Id.* at 707-08. By contrast, here, Person did not have express authorization from this Court (or any other) to seek to amend after his petition's dismissal.

Supreme Court's denial of leave to amend was proper for the additional reason that Person's proposed amended petition does not adequately address defects in standing, timeliness, or the conclusory nature in which he alleges the existence of a long-running conspiracy to manipulate transportation policy. Indeed, the proposed amended petition merely reemphasizes the same non-environmental injuries, shared by the public generally, that Person alleged previously and that Supreme Court determined correctly do not confer standing under SEQRA (R. 465-89). The proposed amendment therefore was "clearly devoid of merit," and leave was properly denied. *Perrotti v. Becker, Glynn, Melamed & Muffly LLP*, 82 A.D.3d 495, 498-99 (1st Dep't 2011) (internal quotation marks omitted); *see also Benjamin Shapiro Realty Co., LLC v. Kemper Nat'l Ins. Cos.*, 303 A.D.2d 245, 246 (1st Dep't) (affirming trial court's denial of leave to serve amended pleading that plainly lacked merit), *lv. denied*, 100 N.Y.2d 573 (2003).

CONCLUSION

For the foregoing reasons, Supreme Court's judgments dismissing the petition and denying leave to amend should be affirmed.

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Respectfully submitted,

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