TEMPORARY COVER FOR PERSON REPLY BRIEF

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# SUMMARY

Respondent-Respondent New York City Department of Transportation ("DOT") fails to understand that the limiting period for filing the within special proceeding did not start because of the alleged secrecy of DOT's plan (the "Plan") to create congestion for the purpose of imposing congestion-pricing tolls on NYC's toll-free bridges and providing no notice to anyone of the adoption of such secret policy; and that the instant proceeding is narrow in scope, in that the proceeding fails if Petitioner-Appellant Carl E. Person ("Person") fails to prove existence of the Plan.

Also, the DOT fails to understand that "the routing of mass transit in the future," and such traffic issues are "clearly within the zone of interests" of SEQRA (see Turner, infra), and that unnecessary ground-zero captivity of individuals as drivers and passengers, especially if they live or work in near proximity to the willfully-created congestion qualifies as injury to give standing for this proceeding.

# ARGUMENT

## I.

## LONG-RUNNING FAILURE TO COMPLY WITH SEQRA IS NOT A DEFENSE FOR THE INITIAL AND CONTINUING FAILURE TO COMPLY

Person alleges in his Petition that the DOT had from the outset a plan to create traffic congestion for the purpose of imposing tolls to enter New York City to reduce the congestion it was deliberately going to create (R36, ¶¶ 16-17). Person demonstrated how the DOT kept adding to the congestion over the years R34, ¶¶ 15A-15N), and how NYC attempted without success to impose tolls (i.e., congestion pricing) on the free bridges (R32, ¶ 7; and R36-37, ¶ 18).

The Petition is not a broad-based attack on NYC policies, but is narrow in its scope: that there was such a plan; that it was not disclosed as a plan adopted by the DOT; and that the failure to prepare and file an Environment Impact Statement to analyze and publicize the Plan and have a consideration of alternative, less-congestive practices, was a violation of SEQRA.

Passage of time and continuation and acceleration of the unlawful practices by DOT is not a defense. If the Petition proves to be accurate in its allegations, the Court should, at a minimum, stop any further congestion-creating practices and require preparation, filing and review of an appropriate

Environmental Impact Statement under SEQRA, and then order a transition to lawful activities by the DOT to eliminate the unlawful congestion it has created, such as (possibly) by putting bike lanes in the parks and offering free public transportation to and from the parks, possibly through a rental credit for bicyclists renting from Citi Bikes.

If Person fails to prove the existence of the alleged secret plan to create congestion for the purpose of imposing congestion-pricing tolls, the Petition will fail and the congestion being created will continue and presumably increase. See Citi Bike's website -- www.citibikenyc.com -- which on August 14, 2016 announces "Citi Bike is Expanding - We're adding 2,000 new bikes on the Upper East Side, Upper West Side, Brooklyn and Jersey City this year" At this time, according to the website Citi Bike has "8,000 bikes. 500 stations. 50 neighborhoods."

DOT's long-running failure to comply with SEQRA is not a defense for DOT's initial and continuing failure to comply if the Petition accurately describes a secret plan by DOT to create congestion for the purpose of imposing congestion pricing to reduce the congestion it is creating.

## II.

## PERSON HAS ALLEGED A SUFFICIENTLY CONCRETE INJURY FALLING WITHIN SEQRA'S ZONE OF INTERESTS

Person has alleged a loss of his time during the additional time he is caught in traffic congestion caused by the DOT. What he and others caught in this deliberately-created traffic congestion would have done with this time (if not lost as alleged) is irrelevant and speculative. The loss of the time while captive in the increased congestion is a concrete injury caused by DOT's alleged activities. The loss of time is a type of false imprisonment of vehicle drivers and passengers deliberately caused by the DOT's alleged secret plan and should be contrary to public policy to create unwarranted captivity of individuals (including Person) to enable NYC to impose congestion-pricing tolls on the free bridges.

SEQRA's zone of interests is defined by case law as a proximity to the activities in question. Person not only is a resident and has his law practice in New York County (in close proximity to the wrongfully-created traffic congestion), Person is also alleging that he is located within (and a captive of) the deliberately-created congestion, a proximity which is equivalent to ground zero, the ultimate proximity within SEQRA's zone of interests.

## III.

## PERSON HAS ALLEGED A SPECIAL INJURY THAT DIFFERS FROM INDIVIDUALS NOT CAPTIVE IN THE UNLAWFULLY-CREATED TRAFFIC CONGESTION

Person's "captivity" injury is not suffered by any of the perhaps one million corporations, LLP's, LLC's, trusts and other non-human entities located in or passing through New York County during a single business day.

Person's captivity is not suffered by the millions of individuals in New York County while located within their store, office or home (i.e., with close proximity to the congestion), or while they are shopping in stores or walking on sidewalks (also in close proximity), or while riding bicycles (a much closer proximity). Individuals and bicyclists are able to move around the increased traffic congestion, unlike the hapless driver or passenger in a captive vehicle who has to remain captive in his/her vehicle.

The only persons so captive are drivers and passengers in motor vehicles (including patients in ambulances and responders in other types of emergency vehicles) caught in the deliberately-created congestion, a very easily identifiable group of persons who are located within the vehicles stuck in the congested traffic. Every other individual is free to walk or bike around the congestion and, therefore, is not captive to the congestion.

## IV.

## PERSON'S SPECIAL INJURY IS DOT-CREATED CAPTIVITY THAT IS NOT EXPERIENCED SOLELY BY "CLOSE PHYSICAL PROXIMITY" BUT IS EXPERIENCED INSTEAD BY BEING IN A MOTOR VEHICLE CAUGHT IN GROUND ZERO OF THE ILLEGALLY-CREATED CONGESTION

DOT argues that Person's "close physical proximity" does not avoid the requirement of special injury. But DOT overlooks that Person's situation differs from most individuals who have a close proximity to the unlawfully-created congestion. Pedestrians. abutting storeowners and shoppers and bicyclists have a close physical proximity but do not suffer from captivity, because they are not in a vehicle caught in the congested traffic and have the freedom to move around the congestion.

Only drivers and passengers with the ground zero proximity (instead of non-motorist individuals with "close physical proximity") have the special injury.

DOT's phrase "close physical proximity" identifies individuals who do not have the special injury of captivity.

DOT's citation of Turner v. County of Erie, 136 A.D.3d 1297, 1297-98 (4th Dep't), lv. denied, 27 N.Y.3d 906 (2016) does not support DOT's argument that Person's captivity is not an environmental injury under SEQRA. The Turner opinion stated in relevant part:

> Although Giambra and Golombek stated that construction of the new facility would have "lasting environmental impacts, including urban sprawl, traffic congestion, redistribution of residential development, and the routing of mass transit in the future," and such traffic issues are "clearly within the zone of interests" of SEQRA (Matter of Pelham Council of Governing Bds. v City of Mount Vernon Indus. Dev. Agency, 187 Misc 2d 444, 448, 720 N.Y.S.2d 768, appeal dismissed 302 AD2d 393, 754 N.Y.S.2d 568), none of the petitioners is a resident "of the community which may be affected by the project since they are outside the existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character' in close proximity to [the construction]," and they therefore cannot rely [1299] on the traffic and population distribution issues to establish standing (Matter of Jackson v City of New Rochelle, 145 AD2d 484, 485, 535 N.Y.S.2d 741, lv denied 73 NY2d 706, 536 N.E.2d 627, 539 N.Y.S.2d 298).
>
> Inasmuch as none of the petitioners established an environmental injury, different from that of the public at large, that falls within the zone of interests sought to be protected or promoted by SEQRA, we conclude that the court properly dismissed the petition (see Tuxedo Land Trust, Inc., 112 AD3d at 727-728).
>
> [Emphasis supplied.]

Turner clearly states that "such HN3 traffic issues are "clearly within the zone of interests" of SEQRA".

*Turner* involved a proposed construction project having a specific site, and held that individuals (i.e., students) not living in proximity to the site had no standing to sue under SEQRA, in spite of the alleged consequences of construction "including urban sprawl, traffic congestion, redistribution of residential development, and the routing of mass transit in the future".

The construction project was not being developed for the purpose of creating congestion.

The student petitioner did not live in proximity to the construction site.

Person, however, lives and has his office in New York County and therefore has this proximity to the willfully-created congestion, and as a motorist and passenger Person has ground-zero proximity to the deliberately-created congestion.

Whereas Turner's project necessarily involves urban sprawl, traffic congestion, redistribution of residential development and the routing of mass transit in the future, the project was not being developed for such purposes, unlike the instant Petition in which the traffic issues of congestion [which are "clearly within the zone of interests" of SEQRA"] and captivity of drivers and passengers

are being created deliberately by the NYC agency. and not as a necessary result of the construction of a new building or plaza.

It should be noted that in Turner there was an Environmental Impact Statement, as indicated by the opinion language, "to annul the negative declaration issued by respondent County of Erie under the State Environmental Quality Review Act ([SEQRA] ECL art 8) with respect to the proposed construction of a new academic building on the Amherst Campus of respondent Erie Community College (ECC)."

Turner did not allege any captivity in traffic, or any improper purpose of the construction to result in the alleged environmental problem. Instead, the alleged injury was what anyone could expect from construction of the proposed building, with no objections apparently by anyone residing near the construction site. In the instant Petition, however, the site is throughout all streets in New York County, with Person living and having his office adjoining the deliberately-created congestion, and with Person being captive at ground zero when caught as a driver or passenger in the willfully-created congestion.

## V.

## PERSON'S PETITION WAS TIMELY BECAUSE THE DOT NEVER ANNOUNCED ITS SECRET PLAN AND IN FACT CONTINUES TO DENY THAT THERE WAS A SECRET PLAN TO CREATE CONGESTION FOR THE PURPOSE OF IMPOSING CONGESTION PRICING

Because the DOT never announced its secret plan, there was no start of any limiting period in which Person's action should have been commenced. The secret adoption of the Plan was not announced so that there was no commencement of any limiting period in which a remedial special proceeding could be commenced. It took a period of time after adoption of the secret plan for its effects to be seen and understood as a secret Plan of the DOT, and at all times DOT is saying that there is no secret plan to create congestion to impose congestion pricing.

Failure to announce its secret plan prevents the start of any limiting period, similar in fashion to the statute of limitations not running against co-conspirators until they publicly announce that they have left the conspiracy or the statute of limitations not running against any policy or plan not yet adopted (publicly) by NYC or one of its agencies.

## VI.

## PERSON'S PETITION IS ADEQUATE WITHOUT ANY AMENDMENT

Person's Petition provides the allegations showing Person's close proximity (address), ground-zero proximity, and captivity, and needed no amendment to survive DOT's motion. DOT's motion should have been denied, whether or not Person's cross-motion for leave to amend his Petition was granted.

## VII.

## ALTERNATIVELY, LEAVE TO AMEND THE PETITION SHOULD HAVE BEEN GRANTED

The original Petition should not have been dismissed for the reasons set forth above, and the proposed amended petition should be granted to clarify Person's allegations. The proposed Amended Petition is a properly pleaded petition for the reasons set forth above.

# CONCLUSION

For all of the foregoing reasons and the reasons set forth in Person'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 Person's motion for

leave to amend his Petition (R433) should be reversed, and the proceeding be sent back to the Court below for discovery and trial.

**Dated:** **New York, New York**
**August 15, 2016**

**Respectfully submitted,**

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## PRINTING SPECIFICATIONS STATEMENT
## Pursuant to 22 N.Y.C.R.R. § 600.10(d)(1)(v)

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The foregoing is hereby certified.

**Dated:** **New York, New York**
**August 16, 2016**

_____
**Carl E. Person**