| **Matter of Fraydun Realty Co. v New York City Dept. of Transp.** |
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| 2017 NY Slip Op 31070(U) |
| May 16, 2017 |
| Supreme Court, New York County |
| Docket Number: 158295/2016 |
| Judge: Cynthia S. Kern |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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In the Matter of the Application of

FRAYDUN REALTY CO., SOMICH DELI, INC., 1221 3rd TASTI CORP. and PRIMROSE FLORIST, INC.,

**DECISION/ORDER**
**Index No. 158295/2016**

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

NEW YORK CITY DEPARTMENT OF TRANSPORTATION, POLLY TROTTENBERG, Commissioner of the New York City Department of Transportation, in her official capacity, CITIBANK, N.A. and NYC BIKE SHARE, LLC,

Respondents.

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HON. CYNTHIA KERN, J.:

Petitioners Fraydun Realty Co. ("Fraydun"), Somich Deli, Inc. ("Somich"), 1221 3rd Tasti Corp. ("1221") and Primrose Florist, Inc. ("Primrose") (hereinafter collectively referred to as "petitioners") bring the instant petition pursuant to Article 78 of the CPLR challenging the decision of respondents New York City Department of Transportation ("DOT"), DOT Commissioner Polly Trottenberg, Citibank, N.A. ("Citibank") and NYC Bike Share, LLC ("Bike Share") (hereinafter collectively referred to as "respondents") to install a bike share station on Third Avenue adjacent to the building located at 200 East 71st Street, New York, New York (the "Building"). For the reasons set forth below, the petition is denied.

The relevant facts are as follows. On May 27, 2013, DOT launched a public bike share program (the "Program") which is operated on DOT's behalf by respondent Bike Share, a subsidiary of Motivate International, Inc. The Program is funded by sponsorship agreements and member revenue. At the time of its launch, approximately 6,000 bikes were made available to the public at 332 stations. There are currently over 600 bike share stations at locations throughout New York City. The Program's current service area

includes Manhattan below 110th Street; the Brooklyn neighborhoods of Brooklyn Heights, Bedford-Stuyvesant, Williamsburg, Clinton Hill, Fort Greene, DUMBO, Boerum Hill, Cobble Hill, Carroll Gardens, Gowanus, Park Slope and Red Hook; and Long Island City in Queens. DOT alleges that to operate successfully, the Program requires a dense network of bike share stations to ensure that within the service area, users can easily locate and do not have far to travel to find a readily available station, either to obtain a bike or return it to a docking station.

To determine the location of bike share stations, DOT has engaged in an extensive and interactive public input process. Jennifer Sta. Ines ("Ines"), the Program's Senior Planner, affirms that in total, including Phase 1 and Phase 2, the DOT has held 197 public bike share meetings, presentations and demonstrations in addition to 400 meetings with elected officials, property owners and stakeholders. Ines affirms that DOT selects sites for bike share stations based on technical criteria developed to protect the public's safety, facilitate pedestrian, bike and vehicle traffic and minimize interference with the City's streetscape ("Siting Guidelines"). The Siting Guidelines state, *inter alia*, that all sites must have unrestricted 24/7 access with maximum visibility, cannot impede facilities such as bus stops and fire hydrants and must have a minimum of fifteen bikes. On-street sites cannot be located in driving lanes, sidewalk sites cannot block main entrances to "major buildings," such as the Empire State Building, cannot interfere with pedestrian travel patterns and should be installed at sites with at least sixteen feet of sidewalk space whenever possible. Ines affirms that the station selection process begins with the identification of technically viable sites, i.e., sites that satisfy the Siting Guidelines at an oversaturated network density so that there would be a number of choices for each station. In Phase 1 and Phase 2 of the Program, DOT worked to meet the basic rules of station spacing making sure that there would be at least one state for every approximately 1,000 square feet. To identify locations that met these and various other requirements, in 2009, DOT staff divided a map of the City into a grid of 1,000 square-foot sections. These grid sections were then investigated on foot to identify anywhere from four to twelve appropriate location options.

Additionally, Naim Rasheed ("Rasheed"), the Senior Director of DOT's Division of Traffic Engineering and Planning, has affirmed as follows. The Program was reviewed under the City

Environmental Quality Review ("CEQR"), New York City's process for implementing the State Environmental Quality Review Act ("SEQRA"), by which agencies of the City review proposed discretionary actions to identify and disclose the potential effects those actions may have on the environment. SEQRA permits a local government to promulgate its own procedures provided they are no less protective of the environment, public participation and judicial review than provided for by the state rules. To guide a lead agency in its CEQR review functions, the City has prepared a CEQR Technical Manual (the "Manual") which sets forth guidelines regarding the assessment methods for conducting a proper environmental review.

Environmental reviews prepared pursuant to SEQRA/CEQR undergo an environmental analysis consistent with applicable regulations that, in the first instance, categorize the type of action under consideration. Under SEQRA/CEQR, actions listed as "Type I" actions may require that an environmental impact statement ("EIS") be prepared, while actions listed as "Type II" actions are exempt from environmental review because they are actions which are predetermined not to result in significant environmental impacts. *See* 6 NYCRR §§ 6.17(a)-(c); 62 RCNY § 6-15. "Unlisted" actions are those actions that do not fall within the Type I or Type II categories and may or may not require a full EIS. Type I and Unlisted actions generally require completion of an environmental assessment statement ("EAS") to determine whether an action may have potentially significant impacts and whether preparation of an EIS is warranted.

Rasheed has affirmed that the DOT's environmental review of the Program satisfied the requirements under SEQRA/CEQR and was consistent with the guidance set forth in the City's CEQR Technical Manual. The DOT determined that the Program was an "Unlisted" action pursuant to NYCRR §§ 617.2(ak), 617.6(a) and 43 RCNY § 6-15 and in accordance with applicable regulations and guidance set forth in the Manual, it prepared an EAS to determine whether the Program was likely to result in potential significant adverse environmental impacts and would require further analysis. The EAS described the overall Program and examined the potential environmental impacts that were likely to result from it. The EAS applied the screen thresholds from the CEQR Technical Manual for nineteen impact categories

including, *inter alia*, transportation, historic and cultural resources, socioeconomic conditions, land use, zoning and public policy, air quality, noise and neighborhood character. Based on the analysis done in the EAS, the DOT determined that the Program did not exceed the screen thresholds for further review in any category and that the Program was not likely to result in significant adverse impacts in any analysis area. The DOT then issued a negative declaration on April 2, 2012 finding that the Program would not result in any significant adverse impacts on the environment.

Phase 2 of the Program began in August 2015. Throughout 2015 and 2016, the DOT held meetings with and gave presentations to the relevant elected officials, community boards, civic organizations and business improvement districts about proposed bike share station locations. DOT staff also solicited public feedback and conducted public demonstrations and presentations of the Program during which public feedback was collected. Using this feedback, Program staff developed plans and logistical requirements in order to identify specific locations for bike share stations ("Draft Plans") which were then presented to local community boards. The finalized Draft Plans are posted and released on the DOT website a few months after they are presented to the community boards. Prior to the installation of a bike share station, notifications to adjacent properties are completed by an outreach team which sends one or two staff members to perform door-to-door notification of the upcoming station installation. If, after three attempts, the staff members are unable to speak to someone, DOT mails out a notification of installation, in the form of a letter, informing tenants at the particular address of the upcoming station installation.

On or about May 6, 2015, the DOT presented to Community Board 8 ("CB 8") the Draft Plan for the area covered by CB 8. Included in the Draft Plan was the bike share station at issue as a proposed site. The final plan for CB 8 was released on DOT's website on July 9, 2015 with the chosen site located on Third Avenue adjacent to the western side of the Building (the "Bike Share Station"). Petitioner Fraydun is the owner of the Building which includes a 19-story, 190-unit rental apartment building known as Empire House and eleven retail tenants located along Third Avenue. Petitioners 1221, Somich and Primrose are commercial tenants in the Building which all have their entrances on Third Avenue. The DOT received two objections to the proposed site of the Bike Share Station. One objection was from Nico Chang, the owner

of Serendipity Spa located on Third Avenue, who submitted a handwritten notation on a copy of a September 8, 2015 notification of installation letter stating that he was "protesting against installing a bike station in front of my business." The second objection was from the Board of Directors of the Townsend House Corp., a cooperative apartment building located at 176 East 71st Street on the southwest corner of Third Avenue, which submitted a letter dated July 30, 2015. The DOT responded to the Board's objection by letter dated August 21, 2015. No other complaints were received.

In or around May 2016, during Phase 2 of the Program, Rasheed filed a memorandum that confirmed that minor changes to the Program, including expanding it throughout the City and clarifications of, and minor changes to, guidelines for siting bike share stations, such as repositioning or removing certain streetscape elements in order to accommodate stations and clarifying that stations should not block the view of existing facilities such as bus stops, fire hydrants and curb cuts would not lead to any significant adverse impacts on the environment.

The Bike Share Station was installed on June 2, 2016. The portion of Third Avenue where the Bike Share Station is located is approximately 70 feet wide. The lane where the Bike Share Station is sited was previously designated for metered parking. The Bike Share Station, which originally included docks for 42 bikes, was 140 feet and 3 inches long with the entire station's footprint measuring 148 feet and 1 inch long and 9 feet 2 inches wide. The Bike Share Station is situated in the street in front of various commercial tenants and the sidewalk between the Bike Share Station and the commercial tenants' store facades measures 15 feet and 4 inches wide. Ines affirms that since its installation, the Bike Share Station has proved to be a popular station, ranking in the top 10 percent of bike share stations installed in 2016 in the Phase 2 expansion of the Program. Specifically, as of December 1, 2016, the Bike Share Station had provided a total of 6,712 trips since its installation. Ines also affirms that the Bike Share Station is sited in accordance with the Siting Guidelines and overall basic rules of station spacing.

Additionally, Ines affirms that while the data obtained by the DOT suggested a need for large bike share stations on the Upper East Side of Manhattan, finding viable sites in the area proved challenging for a number of reasons, including, that many locations along Second Avenue were not viable due to the

extensive construction from the Second Avenue subway; that some of the sidewalks were very narrow and such fact combined with a very high number of pedestrians and vendors using those same sidewalks made on-street stations as opposed to sidewalk stations much more desirable; and that other site options for a bike share station were not viable due to the existence of bus stops, clutter on sidewalks or street furniture, tree pits, fire hydrants, driveways and building entrances or exits. However, Ines affirms that the Bike Share Station is ideal in that none of the above issues apply to its location and for a number of other reasons, including, that it is situated near many educational institutions such as Hunter College, the New York School of Interior Design and Marymount Manhattan College; that its location offers a convenient and safe place for people to begin and end rides; that it is conveniently located near the 6 subway line; that its location contains sufficient space to install a station that accommodates the requisite number of bikes to meet the high demand; and that its location does not interfere with neighborhood residences.

After the Bike Share Station was installed, counsel for Fraydun wrote to the DOT requesting that the DOT reconsider its placement of the Bike Share Station and pointing out the availability of suitable alternative locations. After meeting with two DOT representatives at a CB 8 meeting, a representative of the DOT called counsel for Fraydun and stated that the DOT was reviewing the situation. Although the DOT has not formally responded to Fraydun's counsel's request, on or about September 16, 2016, the DOT reduced the length of the Bike Share Station so that it now contains 27 bike docks instead of the 45 bike docks originally installed as part of the DOT's "rebalancing" of the system.

Petitioners now move for an Order pursuant to Article 78 of the CPLR declaring that respondents have acted arbitrarily, capriciously, irrationally and contrary to law by installing the Bike Share Station in its location on Third Avenue near the tenant petitioners' commercial establishments and that respondents violated their legal duties under SEQRA and CEQR by failing to properly consider the socioeconomic impact the Program would have on their businesses. Specifically, the tenant petitioners assert that as a result of the placement of the Bike Share Station, their business receipts are lower, they have experienced a drop/loss in business and there is the potential for displacement of their businesses because it limits customer access and the businesses' curbside pickup abilities.

The court first turns to that portion of the petition which seeks a declaration that respondents acted arbitrarily, capriciously, irrationally and contrary to law by installing the Bike Share Station in its location on Third Avenue near the entrances to their businesses. On review of an Article 78 petition, "[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v. Lewis*, 90 A.D.2d 748, 749 (1st Dep't 1982). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis." *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005); *see Pell v. Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974)("[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.") "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to facts." *Pell,* 34 N.Y.2d at 231 (internal citations omitted).

In the instant action, this court finds that respondents' decision to place the Bike Share Station in its location in the street on Third Avenue adjacent to the west side of the Building was rational based on the fact that the Bike Share Station was sited in accordance with the Program's Siting Guidelines and based on technical considerations and an extensive public input process. Specifically, DOT rationally found that the Bike Share Station's location was appropriate as it was convenient for the public to use as it was located near other transportation options such as the subway and busses; it does not interfere with any utilities or residences; it provides unrestricted, 24/7 public access; it does not impede the use of any existing facilities; it is not located in a bus stop; it is not in a lane that becomes a driving lane at certain times; and it is not within a restricted area.

To the extent petitioners assert that respondents' decision to place the Bike Share Station in its location is arbitrary and capricious because it generally inconveniences the businesses located on Third Avenue, such assertion is without merit. The fact that the DOT selected a location for the Bike Share Station disfavored by the petitioners does not support a finding that such decision was arbitrary and

capricious. There is no requirement that the DOT relocate or alter a bike share station if it receives a complaint about its location.

Petitioners' assertion that respondents' decision to place the Bike Share Station in its location is arbitrary and capricious because it evinces an arbitrary change in respondents' policy not to site bike share stations in front of businesses is without merit. As evidence of such a policy, petitioners point to a previous Article 78 petition brought before this court in which respondents affirmed that their policy is not to locate bike share stations in front of businesses. *See Board of Mgrs. Of the Plaza Condominium v. New York City Dept. of Transp.*, 43 Misc.3d 1219(A) (Sup. Ct. N.Y. County 2014), *aff'd*, 131 A.D.3d 419 (1st Dept 2015). However, respondents have never affirmed that the DOT adheres to a policy pursuant to which bike share stations are *never* placed in front of businesses but only that when possible and given better alternatives, the DOT tries not to place bike share stations in front of businesses.

Petitioners' assertion that respondents' decision to place the Bike Share Station in its location is arbitrary and capricious because it considerably reduces the number of metered parking spaces on Third Avenue and in the area around petitioners' businesses is without merit. Initially, petitioners have failed to establish that the reduction of metered parking spaces is in contravention of the Siting Guidelines. Further, Ines has affirmed that while consideration of the loss of metered parking is important in the evaluation of appropriate bike share station sites, it is not the only or most important consideration and that a site selection is, in essence, a balancing act of many different factors. To the extent petitioners assert that the Bike Share Station is more of an impediment than parked cars would be because "[p]arked vehicles usually leave orderly room to walk between" and that the Bike Share Station is "difficult to navigate when empty and virtually impossible to cross when filled with bicycles," such assertion is without merit. Even if petitioners were correct that attempting to get from the street to the sidewalk by crossing through the Bike Share Station is more difficult than doing so through spaces left in parked cars, pedestrians are supposed to be crossing from the street to the sidewalk via the crosswalk, which has not been blocked by the Bike Share Station and they should not be doing so in the middle of Third Avenue.

Petitioners' assertion that respondents' decision to place the Bike Share Station in its location is arbitrary and capricious because it "creates a potentially dangerous obstacle for children attempting to board school buses" is also without merit. Initially, the petitioners fail to establish how the Bike Share Station is a dangerous obstacle unlike parked cars and idling vehicles through which bus passengers would have to negotiate. Additionally, Ines affirms that under DOT rules, school buses are directed to pick up and drop off passengers at designated bus stops that are generally within a foot of the curb and thus, picking up and discharging children at the location where the Bike Share Station is sited is not authorized.

To the extent petitioners assert that respondents' decision to place the Bike Share Station in its location is arbitrary and capricious because it is one of several bike share stations within a 1,000 square foot section of the City, such assertion is without merit. Even if petitioners are correct that the Bike Share Station is not the only bike share station in its 1,000 square foot section, petitioners provide no evidence that respondents are explicitly prohibited from siting more than one bike share station in a 1,000 square foot section of the City. Rather, it is clear that the location of each station depends on a number of factors, including, the number of bike docks at each bike share station. As the DOT has reduced the number of bike docks at the Bike Share Station at issue, its decision to site other bike share stations in the vicinity to make up for such loss of bikes is rational.

The court next turns to that portion of the petition which seeks a declaration that respondents violated their legal duties under SEQRA and CEQR based on the allegations that respondents failed to take the requisite "hard look" at the socioeconomic impact the Program would have on their businesses and failed to consider how the placement of the Bike Share Station in its location on Third Avenue would economically effect the tenant petitioners' businesses.

CEQR incorporates the statutory requirements contemplated by SEQRA within the regulatory framework that governs city agencies. CEQR requires that all agencies determine whether the actions they undertake, fund, or approve may have a significant adverse impact on the environment. "The initial determination to be made under SEQRA and CEQR is whether an [environmental impact statement] EIS is required, which in turn depends on whether an action may or will not have a significant effect on the

environment." *Chinese Staff & Workers Assn. v. City of New York*, 68 N.Y.2d 359, 364 (1986). A court's review of an agency's compliance with SEQRA/CEQR is limited to "whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986). In reviewing the agency's determination as to the potential for environmental impacts, a court may not substitute its judgment for that of the agency, weigh the desirability of a proposed action, or choose among alternatives. *See Merson v. McNally*, 90 N.Y.2d 742 (1997). Rather, a court must limit its review to whether the agency's determination was arbitrary, capricious, an abuse of discretion, or affected by an error of law. *See Akpan v. Koch*, 75 N.Y.2d 561 (1990). Further, generalized "community objections" to an agency's conclusions are insufficient to challenge an environmental review that is based on empirical data and analysis. *See WEOK Broadcasting Corp. v. Planning Bd. of Lloyd*, 79 N.Y.2d 373 (1992); *see also Vesey v. Zoning Bd. of Appeals*, 154 A.D.2d 819, 821 (3d Dept 1989)(a lead agency's expert opinion "may not be disregarded in favor of generalized community objections.")

In order to establish standing to bring a claim under SEQRA and CEQR, an individual petitioner must show (1) "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"; and (2) "that it would suffer direct harm, injury that is in some way different from that of the public at large." *See Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 773-774 (1991). It is well-settled that economic injury alone will not provide standing to challenge environmental review under SEQRA or CEQRA as only certain socioeconomic impacts have been identified as within its zone of interests. *See Mobile Oil Corp. v. Syracuse Indus. Dev. Agency*, 76 N.Y.2d 428 (1990). *See also Village of Canajoharie v. Planning Bd. Of Town of Florida*, 63 A.D.3d 1498, 1501 (3d Dept 2009)(finding that petitioner failed to show "a specific or direct environmental harm" because the petition contains nothing more than allegations of potential economic harm, ranging from the loss of employment, commercial activity and sales tax revenue, to negative impacts on population, housing values and resources.")

As an initial matter, to the extent petitioners assert that respondents have violated SEQRA and CEQR based on the allegations that their businesses are experiencing lower business receipts and a drop or loss in business, petitioners lack standing to assert such claim as such injuries are purely economic in nature and do not fall within the zone of interests of SEQRA or CEQR. Notably, the tenant petitioners cite no precedent supporting the notion that a business' lower business receipts, loss in business or a drop in business are recognized environmental impacts within SEQRA's and CEQR's purviews.

However, to the extent petitioners assert that respondents have violated SEQRA and CEQR based on the allegations that their businesses are being negatively socioeconomically impacted in that there is a danger that they will be displaced, this court finds that petitioners have standing to assert such claim as such injuries are not purely economic in nature and fall within the zone of interests of SEQRA and CEQR. The statutes define "environment" as "the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character." ECL 8-0105(6); *see also* CEQR 1(f). The Court of Appeals has held that "both SEQRA and CEQR require a lead agency to consider more than impacts upon the physical environment in determining whether to require the preparation of an EIS" because "population patterns and neighborhood character are physical conditions of the environment under SEQRA and CEQR regardless of whether there is any impact on the physical environment." *Chinese Staff & Workers Assn.*, 68 N.Y.2d at 366. Indeed, in *Chinese Staff & Workers Assn.*, the Court of Appeals held that "the potential displacement of...businesses is an effect on population patterns and neighborhood character which must be considered" in order for an agency's environmental analysis to be valid. *Id.* at 365. Thus, petitioners have standing to bring such claim.

However, petitioners have failed to establish that respondents violated their legal duties under SEQRA and CEQR as this court finds that respondents have taken the requisite "hard look" at the socioeconomic impact the Program would have on the environment. The socioeconomic character of a project area includes its residents, housing, the economic activity associated with an area's businesses and institutions and major industries or commercial operations in the City. The Manual suggests beginning a

review of a project's socioeconomic impacts by determining whether the thresholds in the following five areas have been exceeded: (i) direct residential displacement; (ii) direct business and industry displacement; (iii) indirect residential displacement; (iv) indirect business and industry replacement; and (v) specific industries. If the initial assessment indicates that thresholds in any of these areas have been exceeded, the Manual recommends additional tiered review to determine whether a proposed project has the potential to result in socioeconomic impacts in each identified technical area or areas. Specifically, an agency must determine whether an action would: (i) generate a net increase of 200 or more residential units; (ii) generate a net increase of 200,000 or more square feet of commercial space; (iii) directly displace more than 500 residents; (iv) directly displace more than 100 employees; (v) or affect conditions in a specific industry. If the initial assessment concludes with a determination that a socioeconomic impact is likely or cannot be ruled out, then the Manual requires a detailed assessment to be performed. However, if the initial assessment concludes with a determination that none of the above thresholds would be met, then the Manual suggests that the project or action would not introduce or accelerate a socioeconomic trend with the potential for significant adverse impacts.

Here, respondents have established that they took the requisite "hard look" at the socioeconomic impact the Program would have on the environment in terms of business displacement. Rasheed affirms that consistent with the guidance provided in the Manual, the DOT undertook an environmental review that considered whether any thresholds had been met such that additional socioeconomic analysis would then be warranted. The Program's EAS form and supplemental report looked at each of the five analysis areas, explained that none of the five thresholds would be exceeded for the Program and concluded that no further socioeconomic analysis was warranted. Specifically, the EAS analyzed the relevant areas and determined that the Program would not displace or generate residential populations, businesses and employees, significantly change land uses, result in new development or changes to conditions or adversely affect the economic conditions of any specific industry or business. In 2016, the DOT confirmed that expansion of the Program throughout the City would also not result in any significant adverse socioeconomic impacts on the environment. Indeed, the court finds that such environmental review conformed to what is required by

SEQRA and CEQR and petitioners have failed to offer any evidence suggesting that respondents did not perform an appropriate review. Petitioners' assertion that the Bike Share Station may lead to the displacement of their businesses because it is having an affect on the "curbside pickup" portion of their businesses is merely speculative. Moreover, it is undisputed that the portion of the street on which the Bike Share Station is located was formerly designated as metered parking and thus, there was no empty space allocated to the tenant petitioners for their curbside pickup needs.

Accordingly, the petition is denied in its entirety. This constitutes the decision and order of the court.

DATE : 5/16/17

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KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
J.S.C.