

<b>Coquis Sales Appliances LLC v Deblasio</b>
2019 NY Slip Op 33119(U)
October 17, 2019
Supreme Court, Bronx County
Docket Number: 260317/2019
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

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COQUIS SALES APPLIANCES LLC, WINDOW KING, LLC, FRANCESCO INC., CAPTAINS OF MORRIS PARK LLC, MORRIS PARK COMMUNITY ASSOCIATION, and Mark GJONAJ in his Official Capacity as Council Member of the 13<sup>th</sup> Council District, New York City Council,

Index No.: 260317/2019

Petitioners,

- against -

**DECISION and ORDER**

MAYOR WILLIAM DEBLASIO, in his Official Capacity as Mayor of the City of New York, POLLY TROTTEBERG, in her Official Capacity as Commissioner, New York City Department of Transportation, and NIVARDO LOPEZ, in his Official Capacity as Bronx Borough Commissioner, New York City Department of Transportation,

Respondents.

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PRESENT: Hon. Lucindo Suarez

The issues presented in this Article 78 petition are: (1) whether Respondents' administrative determination to implement a Street Improvement Project in the Morris Park section of the Bronx ("Morris Park Street Improvement Project") exceeded their jurisdiction; (2) whether Respondents' administrative determination to implement the Morris Park Project was taken without statutory authority; (3) whether Respondents' administrative determination was arbitrary, capricious and made without a rational basis; (4) whether Petitioners have made a *prima facie* showing to entitle them to a preliminary injunction; and (5) whether Petitioners are entitled to reasonable attorneys' fees and costs.

This court finds Respondents' administrative determination to implement the Morris Park Street Improvement Project was an administrative act taken within the purview of their jurisdiction and scope of their statutory authority under the New York City Charter, supported by a rational basis rooted in the public health and safety. Therefore, Petitioners' requests for a preliminary injunction, reasonable attorneys' fees and costs are denied.

### **BACKGROUND**

Petitioners commenced this proceeding in response to Respondents' administrative determination to implement the Morris Park Street Improvement Project pursuant to New York City's Vision Zero Initiative<sup>1</sup>, which calls for the installation of a flush pointed center median, left turn bays, bicycle lanes, and truck loading zones along sections of Morris Park Avenue. Petitioners challenge the implementation of the Project on several bases, the most prominent that it will alter Morris Park Avenue to the economic detriment of local businesses.

### **LEGAL ANALYSIS**

#### **I. Writ of Prohibition**

Petitioners seek a writ of prohibition to bar the implementation of the Morris Park Street Improvement Project based upon their claims that Respondents exceeded their jurisdiction or were without same.

A writ of prohibition may be maintained only to prevent any administrative agency in a judicial or quasi-judicial capacity from proceeding or threatening to proceed without or in excess of its jurisdiction. *See Town of Huntington v. NY State Div. of Human Rights*, 82 N.Y.2d 783, 624 N.E.2d 678, 604 N.Y.S.2d 541(1993). Under CPLR §7803(2), the extraordinary writ of

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<sup>1</sup> The Vision Zero Action Plan was released in 2014 and outlined 63 separate initiatives that the Mayor's Office and several City Agencies are undertaking to reduce death and serious injury in New York City as result of traffic accidents. Vision Zero, (visited Sept. 26, 2019) <https://www1.nyc.gov/site/visionzero/index.page>.

prohibition, empowers the court to review an administrative agency's determinations that are alleged to have exceeded the agency's jurisdiction or in situations where the administrative agency's determinations were made without jurisdiction. *Id.*

#### A. Standing

Petitioners claim that the implementation of the Morris Park Street Improvement Project was illegal and unauthorized and beyond the scope of Vision Zero. They posited that the implementation of the Morris Park Street Improvement Project exceeded their jurisdiction in that they improperly impeded upon Councilman Mark Gjonaj's ability to represent his constituents within his councilmanic district and to seek oversight over Respondents by proceeding without direction or guidance from the New York City Council.

In an Article 78 proceeding petitioners must demonstrate they have standing to sue by showing they have suffered an injury-in-fact, distinct from that of the general public. *See Hunts Point Term. Produce Coop. Assn., Inc. v. NY City Economic Dev. Corp.*, 36 A.D.3d 234, 824 N.Y.S.2d 59 (1st Dep't 2006). This is so since, under common law, a court is without power to right a wrong where civil, property or personal rights are not affected. *Transactive Corp. v. NY State Dept. of Social Servs.*, 92 N.Y.2d 579, 706 N.E.2d 1180, 684 N.Y.S.2d 156 (1998). Moreover, petitioners must demonstrate that the "injury claimed falls within the zone of interests to be protected by the statute challenged." *Id.* This prerequisite ensures that a group or an individual "whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes." *Id.*

Petitioners rely upon *Silver v. Pataki*, 96 N.Y.2d 532, 755 N.E.2d 842, 730 N.Y.S.2d 482 (2001) to underpin their argument that Respondents' determination to implement the Morris Park

Street Improvement Project exceeded their jurisdiction as they lacked express legislative authority from the New York City Council to implement same, thereby, inuring an injury to the representative Council member.

However, *Silver* addressed the limited circumstances wherein individual legislators have standing to sue, wherein it held that in only two situations have courts recognized an individual legislator standing to sue: (1) in actions regarding the nullification of votes; or (2) in actions regarding the usurpation of a legislator's individual powers. *Silver* did not confer upon an individual member of a legislative body the right to sue for a harm done to the legislature as a whole as Petitioners suggest.

Accordingly, this court finds Petitioners have not shown that Petitioner representative Councilman Gjonaj has demonstrated an injury-in-fact distinct from that of the general public by Respondents' implementation of the Morris Park Street Improvement Project. The petition is void of any allegations that Respondents' administrative act unlawfully nullified the Councilman's ability to vote, nor was it alleged that it usurped his individual powers as a legislator. Furthermore, the Councilman suffered no direct or personal injury, whereby, standing could be conferred upon him. Petitioners alleged injury with respect to the Councilman is more general in nature and it lies with the Legislature as whole, if in fact, the Morris Park Street Improvement Project proceeded without express legislative authority. Therefore, the Councilman lacks the requisite standing to legally challenge the implementation of the Morris Park Street Improvement Project, and his only alternative forum is to avail himself of the political process.

B. Statutory Authority

Petitioners contend that the Morris Park Street Improvement Project was fashioned without any legislative directive or regulatory program promulgated to guide how the program would be designed or implemented. They argued that Respondents implementation of the Morris Park Street Improvement Project was solely based upon priority rankings of need collected for each major corridor in each borough that comprises New York City and not based upon statutory authority.

Respondents counter by arguing that the Morris Park Street Improvement Project is a proper exercise of the Department of Traffic's ("DOT") broad authority under New York City Charter §2903. Respondents contend the New York City Charter particularly gives DOT discretion over matters essential to ameliorating traffic conditions, which adversely affects the welfare of New York City. Further, Respondents contend that New York City Charter §2903 bestows DOT's Commissioner with expansive powers to regulate and control vehicular and pedestrian traffic on New York City streets.

In reply, Petitioners argue that New York City Charter §2903 did not expressly confer the right to DOT's Commissioner to implement the Vision Zero initiative nor did it confer the express statutory authority to implement the Morris Park Street Improvement Project.

This court finds Petitioners' arguments unavailing. Section 2903 of the New York City Charter statutorily empowers the DOT Commissioner with board discretion to promulgate rules and regulations for the conduct of vehicular and pedestrian traffic in the streets as may be necessary. *See Santiago v. Riccio*, 170 A.D.2d 340, 566 N.Y.S.2d 44 (1st Dep't 1991). In pertinent part, the New York City Charter §2903(a) expressly authorizes the DOT Commissioner to:

(2) establish, determine, control, install and maintain the design, type, size and location of ... signs, signals, marking, and similar devices indicating the names of the streets and other public places and for guiding, directing or otherwise regulating and controlling vehicular and pedestrian traffic in the streets, ...;

- (4) prepare and submit to the mayor a proposed comprehensive city traffic plan;
- (5) collect and compile traffic data and prepare engineering studies and surveys in regard to vehicular and pedestrian traffic;
- (6) ... submit to the mayor detailed reports in regard to traffic conditions in the city;
- (7) make recommendations to the mayor in regard to methods of ameliorating traffic conditions which adversely affect the welfare of the city and which cannot be remedied by traffic rules and regulations;
- (8) ... submit to the mayor...recommendations and proposals for the improvement of existing streets, street widening and the location of new streets...;
- (9) ... submit to the mayor, for consideration ... recommendations and proposals for the improvement of existing streets, street widening and the location of new streets [and] avenues...; the location and design of parking garages and parking areas; the establishment of public parking garages and parking areas; the location, type and design of off-street loading and unloading and parking facilities; and other matters relating to traffic control;
- (10) coordinate the efforts of and consider the reports, recommendations and suggestions of public and private agencies and civic groups in regard to traffic conditions and traffic control in the city;
- (11) prepare analyses of traffic accidents with a view to determining their causes and means for their prevention.”

Here, the New York City Charter’s enabling statute explicitly authorized DOT’s Commissioner to establish, determine, control, install and maintain the design, type, size and location of any and all signs, signals, marking, and similar devices directing or otherwise regulating and controlling vehicular and pedestrian traffic in the streets, and other public ways of the City. *See* New York City Charter §2903(a)(2).

Accordingly, this court finds Respondents’ administrative determination to implement the Morris Park Street Improvement Project, whereby it will install a flush pointed center median, left turn bays, bicycle lanes, and truck loading zones along Morris Park Avenue was an administrative act taken well within their statutory mandate pursuant to the New York City Charter.

## II. CPLR §7803(3)

Petitioners seek judicial review of Respondents' administrative determination to implement the Morris Park Street Improvement Project as they claim the determination was arbitrary, capricious and without a rational basis.

Under CPLR §7803(3), courts may review an administrative determination. The scope of the review is limited to a finding whether the agency's determination was arbitrary and capricious and lacked a rational basis. *See Matter of Weill v. NY City Dept. of Educ.*, 61 A.D.3d 407, 876 N.Y.S.2d 51(1st Dep't 2009). This review is deferential for it is not the role of the courts to weigh the desirability of any action or choose among alternatives. *See Matter of Save America's Clocks, Inc. v. City of NY*, 33 N.Y.3d 198, 124 N.E.3d 189, 100 N.Y.S.3d 639 (2019). It follows then, that if the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency. *Id.*

Petitioners contend Respondents' implementation of the Morris Park Street Improvement Project was arbitrary and capricious and not based upon a rational basis because: it was a generic road dieting plan<sup>2</sup> not specially tailored to Morris Park Avenue; Respondents "delisted" Morris Park Avenue in 2019 rendering it a non-priority area, thereby, eliminating the need for a road dieting plan; Respondents did not consider the long term traffic effects of the Morris Park Street Improvement Project with the installation of the planned Metro North train station; the disruption of public transportation services; and the hinderance of the ability of emergency vehicles to promptly and safely traverse Morris Park Avenue in emergency situations.

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<sup>2</sup> A Road Diet is generally described as removing travel lanes from a roadway and utilizing the space for other uses and travel modes. Road Diet Informational Guide, (visited Oct. 1, 2019) <https://safety.fhwa.dot.gov/road-diets/guidance/info-guide/ch1.cfm#s11>.



Petitioners also assailed Respondents' data set used to support their determination to implement the Morris Park Street Improvement Project. Petitioners rely on the affidavit of John Russo, a Los Angeles, California Mechanical Engineer, who averred that he based his expert opinion on DOT's publicly available data and plans for the Morris Park Street Improvement Project. Based on that data set, Mr. Russo opined that it appeared to indicate that the number of injuries and fatalities as a result of a vehicular accidents on Morris Park Avenue has dropped significantly in the past five years. Mr. Russo then asserted that due to the reduction in injuries and fatalities, Respondents lacked a rational basis to implement the Morris Park Street Improvement Project.

Further, Mr. Russo disagreed with DOT's empirical data demonstrating that similar road dieting plans such as the one implemented on White Plains Road in Bronx County, significantly reduced injuries and fatalities on that corridor. Moreover, Mr. Russo claimed that DOT did not consider the impact of spillover traffic onto neighborhood residential streets. Lastly, Mr. Russo opined that DOT did not consider the negative traffic effects that the Morris Park Project will have on the response time of emergency vehicles.

In opposition, Respondents disputed Petitioners' claims that the Morris Park Street Improvement Project was arbitrary and capricious in want of a rational basis. Respondents argued that based on comprehensive data collection and analysis, DOT identified the main safety traffic issues on Morris Park Avenue was speeding, double parking, and left turn pressure. Respondents then conducted a further traffic analysis with proposed traffic conditions and based on those results it recommended a "traffic calming" configuration be implemented.

In support of their findings, Respondents attached the affidavit of Navjodh Singh, a professional engineer licensed in transportation engineering and DOT's Director of

Transportation Analysis for Research Implementation. Mr. Singh averred that DOT creates data collection plans for all Street Improvement Projects, and that DOT during the month of March 2017 began taking video footage of Morris Park Avenue and making field visits during morning and evening peak hours of traffic. He further stated that based upon the number of vehicular accidents, the volume of vehicles overall, heavy vehicle presence, volume of heavy vehicles, and the general constraints of the existing traffic conditions along Morris Park Avenue, DOT's modeling software, recommended a re-design of Morris Park Avenue in order to reduce speeding and vehicular accidents. Therefore, he opined that the Morris Park Street Improvement Project called for the installation of a flush paint median, left turn bays, bicycle lane, and truck loading zones would have the desired "traffic calming effect," thereby, reducing speed and vehicular accidents along Morris Park Avenue.

Further, Respondents asserted that the "traffic calming" configuration was revised in response to the community outreach, which was spearheaded by DOT's Bronx Borough Commissioner, Nivardo Lopez. In his affidavit, he averred that in compliance with New York City Administrative Code §19-101.2, he conducted several presentations and attended several meetings regarding the Morris Park Street Improvement Project, which included making a presentation to Community Board 11's Transportation Committee; meeting with Councilman Mark Gjonaj; meeting with Assemblyman Michael Benedetto; meeting with Senator Jeffery Klein's staff; presentation to Community Board 11's full board; meeting with the Van Nest Civic Association; meeting with the Morris Park Community Association; meeting with the Morris Park Leadership Improvement group; meeting with Morris Park Civic Association; and telephone and email notifications placing elected officials on notice of the implementation of the Morris Park Project.

In addition, Mr. Lopez averred that during the community outreach, different iterations of the Morris Park Project were proposed based on the community's concerns. Mr. Lopez asserted that after the initial iteration of the Morris Park Street Improvement Project was rejected by the community, DOT revised the project to eliminate the bike lanes. However, even after eliminating the bike lanes the community still rejected the project. Therefore, as a compromise DOT reduced the project to 50% of the corridor focusing on the sections of Morris Park Avenue where the highest concentrations of vehicular accidents occurred. Again, the community rejected the project, which caused DOT for a third time to revise the project, leading to the latest and current iteration of the Morris Park Street Improvement Project. Even with the several iterations, Mr. Lopez intimated that Respondents are still open to continued discussions with local businesses and the community to address their concerns.

Aside from Mr. Lopez' community outreach, the affidavit of Christopher Brunson, DOT's Director of Safety Projects and Programs, was offered, where he averred that DOT conducted merchant surveys that sought feedback from the named Petitioners with respect to the Morris Park Street Improvement Project prior to its implementation. Mr. Brunson averred that during the feedback period, none of the named Petitioners raised any concerns with their ability to receive deliveries at their stores nor did Respondents receive any objections or comments regarding the proposed truck loading zones, albeit contrary to particular Petitioners' affidavit averments.

Also, according to Respondents, the implementation of Street Improvement Projects like the Morris Park Street Improvement Project are not limited to the listed "priority corridors." They argued that their decision to implement a Street Improvement Project is based on corridors or intersections that statistically have high rates or severity of vehicular accidents. Respondents

posited that Morris Park Avenue was specifically chosen because of the traffic statistics of that corridor. From 2010-2014, there were 367 total injuries on Morris Park Avenue comprised of 282 vehicular related injuries, 14 bicyclist injures; and 71 pedestrian injuries. In addition, from 2013-2017, there were 337 total injuries on Morris Park Avenue comprised of 256 vehicular related injuries, 11 bicyclist injuries, and 70 pedestrian injuries. Thus, Respondents after consulting with various other administrative agencies including the Metropolitan Transportation Authority concluded that the best manner to address the aforementioned traffic concerns was to implement the Morris Park Street Improvement Project.

This court finds that Respondents demonstrated due consideration of the unique traffic conditions of Morris Park Avenue despite Petitioners' arguments to the contrary. This was exhibited by the empirical data collected for a span of seven years, real time firsthand data collected from Morris Park Avenue during peak hours of traffic, and Respondents' consideration of the community's concerns.

Therefore, after balancing Respondents' policy considerations of public health and safety as part of the greater community and as part of New York City's overall Vision Zero Plan juxtaposed to Petitioners' claims of any potential economic detriment<sup>3</sup> that may result from the implementation of the Morris Park Street Improvement Project, Respondents' interest in public health and safety must prevail.<sup>4</sup>

Accordingly, it is

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<sup>3</sup> The court notes that Petitioners failed to present any empirical data or findings from an expert witness to buttress their claim of economic detriment.

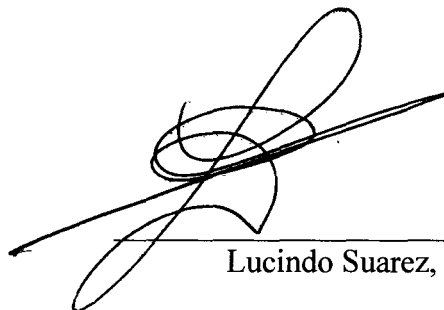
<sup>4</sup> Petitioners' request for preliminary injunctive relief is denied as Petitioners failed to demonstrate likelihood of success on the merits. *See Mirandi v. 210 W. 19th St. Condominium*, 248 A.D.2d 198, 669 N.Y.S.2d 592 (1st Dep't 1998). Likewise, Petitioners' request for attorneys' fees and costs is denied as they were not the prevailing party. *See Wittlinger v. Wing*, 99 N.Y.2d 425, 786 N.E.2d 1270, 757 N.Y.S.2d 234 (2003); *see also* CPLR §8601(a).

ORDERED, that Petitioners' petition for Article 78 relief, *inter alia*, is denied; and it is further

ORDERED, that the Temporary Restraining Order is vacated.

This constitutes the decision and order of the court.

Dated: October 17, 2019

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Lucindo Suarez, J.S.C.

**LUCINDO SUAREZ, J.S.C.**