

## IN THE SPOTLIGHT

## TRANSPORTATION

## PARKING VIOLATIONS BUREAU

**Cheating broker suspended from PVB**

*Broker that represented vehicle owners before the Parking Violations Bureau fabricated documents to secure dismissals of summons.* Arye Wertzberger and his company Parking Expert, Inc., have been registered brokers with the Parking Violations Bureau since 2006. Registered brokers represent vehicle owners in challenging parking violation summons before the Parking Violations Bureau. The vehicle owners paid half of the avoided fine to Wertzberger and his company.

In 2019 the City charged Wertzberger and his company with engaging in a pattern of deceit and fraud before the Parking Violations Bureau by unlawfully procuring dismissals of 70 parking summonses on behalf of 66 different vehicle owners. The City alleged that Wertzberger intentionally fabricated documents offered to prove that the address stated on the summons did not exist. An inaccurate address is a defect sufficient to require the dismissal of the summons.

OATH Administrative Law Judge Ingrid M. Addison, after a hearing, upheld the charges. ALJ Addison found the knowing submission of false documents by Wertzberger and his company to be blatant and outrageous, and recommended that Wertzberger and his company's brokers' registrations be suspended for three years.

Wertzberger and his company appealed. The Appellate Division, First Department affirmed and upheld the three-year suspension. The Appellate Division found that the evidence supported the OATH decision that over a limited period of time Wertzberger and his company had submitted a large volume of documents that had been fabricated for the purpose of securing dismissal of parking summonses based on false addresses.

The Appellate Division also upheld the three-year suspension as justified by the extensive nature of the deceptive acts.

*Parking Expert, Inc. v. City of New York*, 183 N.Y.S.3d 420 (1st Dep't 2023); Dep't of Finance v. Parking Expert, Inc., OATH Index No. 1142/20 (March 30, 2021).

## FDNY

## FIRE APPARATUS ACCESS

**Condos lose special street claim**

*Two condominiums adjacent to Franklin Place, a mid-block alley in lower Manhattan, asked that Franklin Place be designated as a fire apparatus access road in order to prohibit parking next to condominiums.* The Franklin Place Condominium, joined by the 55 White Street Condominium, filed an article 78 petition seeking to compel the New York City Fire Department to declare Franklin Street a fire apparatus access road and to install "No Parking" signs. Franklin Place is a narrow public alley situated in Tribeca approximately 150 feet west of Broadway, running north-south paral-

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## CityLaw Breakfasts Return to New York Law School

Here is welcome news. This Fall CityLaw Breakfasts will return to in-person breakfasts at the Events Center at New York Law School. Covid-19 compelled the Law School to go remote and the CityLaw Breakfasts followed into cyberspace. The Law School has in the interim rebuilt the sound and video systems in the large and comfortable Events Center on the second floor of the Law School. We will be back with in-person breakfasts this Fall.

We thank New York Law School's dedicated IT staff which allowed the Center for New York City Law to continue to have breakfasts via Zoom webinars despite the closing of the Events Center. The Law School's events staff and IT staff's professionalism showed through with each breakfast and allowed attendance at the breakfasts to reach as high as 500.

We also thank our sponsors who stayed with us throughout: Consolidated Edson, Verizon, and the law firm of Greenberg Traurig. And we are especially grateful to all of you who voluntarily contributed each time you signed up for a breakfast.

The twenty CityLaw Breakfast speakers during the Covid-19 period covered almost every aspect of city government. We are grateful to these speakers who were willing to speak over Zoom.

Here is the list of Zoom breakfast speakers in the order they spoke. If you would like to view any of these breakfasts, go to [citylandnyc.org](http://citylandnyc.org) and search out the speaker's name. Each breakfast talk offers a revealing moment in New York City history.

Polly Trottenberg  
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James E. Johnson  
Richard Ravitch  
Kathryn S. Wylde  
Michael Arad

Hank Gutman  
Georgia Pestana  
Alvin Bragg  
Frederick P. Schaffer  
Gary P. Jenkins  
Mark Levine  
Jacques Jiha

Greg Russ  
Brendan McGuire  
David Banks  
Jessica S. Tisch  
Meera Joshi  
Rohit Aggarwala

Thank you all for your attendance, interest, and generosity.

*Ross Sandler*

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## SPOTLIGHT (CONT'D)

lel to Broadway, from White Street to Franklin Street.

The Franklin Place Condominium, located at 5 Franklin Place a/k/a 371 Broadway, is a newly constructed residential apartment building consisting of 20 stories with 52 residential apartments. The 55 White Condominium building, located at 55 White Street, is a residential apartment building located on the corner of Franklin Place and White Street.

The Franklin Place Condominium alleged that its only attended entrance is on Franklin Place. Immediately adjacent to its Franklin Place entrance is a private parking garage for the condominium's unit owners and residents. The garage's only means of ingress and egress is on Franklin Place.



The alley behind Five Franklin Place. Credit: CityLaw.

The two condominiums on Franklin Place wanted Franklin Place to be a fire apparatus access road in order to have “No Parking” signs placed on Franklin Place. The condominiums alleged that owners and occupants of other buildings on Franklin Place routinely parked vehicles on Franklin Place. The condominiums argued that the parked vehicles cut off vehicular access to Franklin Place from White Street at its northern end and substantially all access from Franklin Street at the southern end, as well as severely limiting access to the garage.

Four nearby building owners joined the proceed-

ing and opposed the designation of Franklin Place as a fire apparatus access road. They argued that the two condominiums were unlawfully seeking to restrict the historic uses of Franklin Place by preventing others from parking on the alley. They also challenged the claim that Franklin Place Condominium's main entrance was on Franklin Place, stating that the condominium also had an entrance on Broadway.

The Fire Department declined to designate Franklin Place a fire apparatus access road. The two condominiums then filed an article 78 petition to compel the Fire Department to make the designation.

Supreme Court Justice Shlomo S. Hagler ruled against the two condominiums, declared the designation of fire apparatus access roads to be a discretionary decision, and declined to order the Fire Department to designate the road.

The Appellate Division, First Department, affirmed, ruling that while the City's Fire Code defined fire apparatus access roads, the Code left designations to the discretion of the Fire Commissioner. The Appellate Division held that, as a discretionary matter, the court lacked authority to mandate a designation.

*Board of Managers of Franklin Place Condominium v. New York City Fire Department*, 183 N.Y.S.3d 387 (1st Dep't 2023).

## CITYREGS UPDATE\*

### RAT MITIGATION

## Criteria set for Rat Mitigation Zones

On May 4, 2023, the New York City Department of Health and Mental Hygiene held a public hearing to establish rules for determining the boundaries of rat mitigation zones. Rat mitigation zones are areas within the City where coordinated multi-agency efforts can be used to reduce high levels of rat activity and the conditions that support rats.

The City Council's Local Law 110 of 2022 required the Department of Health to designate rat mitigation zones. Under the proposed rules, the designation of rat mitigation zones will be determined by the number and percentage of inspections for rats that resulted in an order, agency referral or summons and the location of those properties; the number of rat baiting visits by the Department of Health; the number of 311 complaints about rats within any 12-month period; and the susceptibility for rat infestation on properties managed by the Parks Department.

The new rule proposed four rat mitigation zones.

- A Chinatown, East Village, Lower East Side Zone consisting of Community District 103;
- A Harlem Zone consisting of Community Districts 109, 110, and 111;

- A Grand Concourse Zone consisting of parts of Community Districts 203, 204, 205, 206 and 207; and
- A Bushwick, Bedford Stuyvesant, Prospect Heights Zone consisting of parts of Community Districts 303, 304 and 308.

Over 200 comments on the proposed rules were submitted online, with many residents in support of the rules and encouraging the Health Department to investigate rat infestations and establish rat mitigation zones in their neighborhoods.

The rules by the Health Department follow other actions directed at the rat infestation. Local Law 110 also enabled the Department of Sanitation to create new rules for when buildings may set out garbage and recycling. Earlier this year, Sanitation amended the rules to push the set out time for trash bags to 8 PM from 4 PM. In April 2023, Mayor Eric Adams appointed Kathleen Corradi as the City's first "rat czar," responsible for coordinating rat mitigation efforts between city agencies, community organizations, and private entities. The issue of rats has also been part of the ongoing conversation around outdoor dining, as the city continues to develop a permanent open restaurants program.

City Record at 1443 (April 3, 2023).

\* For comprehensive and timely notification of the City's regulations subscribe to *CityRegs*, a bi-weekly electronic newsletter.

## DECISIONS OF INTEREST

### BUILDINGS

#### GAS CODE VIOLATIONS

### Laundry operator held liable

*Laundry operator installed gas dryers that failed to meet Building code in the laundry room of an apartment house.* On February 26, 2019, Hercules Corp. leased a room from 46th Street Leaseholder LLC in an apartment building at 300 East 46th Street, Manhattan. Under the lease, Hercules was to install and operate card-metered laundry equipment to create a running laundry room for tenants.

On July 2, 2019, during Hercules's work on the laundry room, there was a surprise inspection by the Department of Buildings. Buildings found that Hercules had failed to install an automatic sprinkler system and failed to install eight hard pipes as the final gas connection to the dryers in the laundry room. Buildings issued a violation to the building owner,



300 East 46th Street, Manhattan. Credit: Google Maps.

46th Street, alleging that leaseholder Hercules had installed gas flex connections instead of the hard piping as required, and charging that Hercules had not obtained the necessary Building permits for the work.

The violations required Con Edison to shut the building's gas service off, thus depriving approximately 179 apartments of cooking gas for stoves. In order to meet the Building code and resume gas service, owner 46th Street would have to install pressure tested gas shutoff lines, test each individual riser, and replace any riser that failed to meet standards, all at a cost of approximately \$75,000.

46th Street sued Hercules for breach of contract, alleging that Hercules improperly installed and operated the card-metered laundry room. Hercules defended by claiming that the inspection by Buildings was an intervening act that caused the loss of gas service.

Justice Nancy M. Bannon ruled in favor of owner 46th Street, granted summary judgment, and rejected the argument that the surprise inspection was a defense.

The Appellate Division, First Department, affirmed the decision in favor of owner 46th Street. The Appellate Division explained that the violations and shutdown of the gas in the building were direct consequences of Hercules's breach of contract, not the inspection by Buildings. Hercules breached its contract by failing to install a sprinkler system and hard-piped connections prior to the installation and operation of the laundry.

*46th Street Leaseholder LLC v. Hercules Corp.* 175 N.Y.S.3d 501 (1st Dep't. 2022).

#### RIGGER'S LICENSE

### License revoked over fatal injury

*General contractor with riggers license violated multiple Building Code provisions on construction job where worker fell from unpermitted scaffolding.* Wayne Bellet contracted to perform brick façade work on a six-story building located at 880 St. Nicholas Avenue in Manhattan. Bellet commenced the brick façade

work after his subcontractor constructed a 50-foot-tall supported scaffold. On June 22, 2019, a worker fell off the supported scaffold at the location and died.

The accident prompted a Department of Buildings investigation, which led to charges that Bellet and the subcontractor endangered the public safety and welfare by their negligence, incompetence, and lack of knowledge and disregard of relevant laws and the Building Code. Buildings charged that Bellet performed the façade work at 880 St. Nicholas Avenue without a permit, allowed workers to work without the required training, used a scaffold that did not have guardrails and toe boards, and failed to inspect the scaffold prior to use. As a remedy Buildings sought to revoke Bellet's special rigger's license.

OATH Administrative Law Judge Noel R. Garcia, following a hearing, sustained the charges and recommended that Bellet's special rigger's licenses be revoked.



880 St. Nicholas Avenue, Manhattan Credit: Google Maps.

Bellet filed an article 78 petition challenging the revocation of his special rigger's license. Bellet argued that Buildings had exceeded its authority in revoking his special rigger's license because all of the charges were related to his work as a general contractor at 880 St. Nicholas Avenue, not as a rigger.

The Appellate Division, First Department, rejected Bellet's argument and affirmed the revocation of his rigger's license. The Appellate Division noted that the City's Administrative Code authorizes revocation of such licenses on findings of negligence, incompetence and lack of knowledge, disregard of the Building Code or other acts that endanger public safety and welfare.

The court ruled that revocation of Bellet's rigger's license was a reasonable exercise of discretion. OATH found that the total square footage of brick replacement on the façade at 880 St. Nicholas Avenue required a permit; the support scaffolding was too tall to erect without a permit or design approval; the scaffold did not have toe boards or guardrails; the workers on the site did not have proper training; and the scaffold had not been inspected daily prior to use.

*Bellet Construction Co. v. Larocca*, 184 N.Y.S.3d 42 (1st Dep't 2023); *Dep't of Buildings v. Bellet & Bhutta*, OATH Index Nos. 0438/20 & 0439/20 (Nov. 9, 2020).

## CONFLICTS OF INTEREST

### POST-EMPLOYMENT WORK

#### Former DOB architect fined \$6k

*Former Department of Buildings architect worked as a private architect on a Manhattan project on which he had previously worked during his employment by Buildings.* David Jimenez worked for the Department of Buildings for seven years as a Plans Examiner. In 2009, Jimenez, while employed by Buildings, worked on an apartment building on 8th Avenue in Manhattan during which time Jimenez approved and rejected plans on five separate occasions. Jimenez's last action related to the 8th Avenue Project occurred in June of 2012 when he approved a post-approval amendment to the plans.

Jimenez left Buildings in late 2012. In 2013 Jimenez asked the New York City Conflicts of Interest Board how conflict of interest law would apply to his intended work as a private architect. The board notified Jimenez in writing that because Jimenez was a former public servant, Jimenez was not allowed to work on any matter with which he was personally and substantially involved while in City service.

Four years later in 2017, the owner of the 8th Avenue Project asked Jimenez to become the new architect of record for the 8th Avenue Project. Jimenez accepted and, as the architect of record for the 8th Avenue Project, Jimenez filed multiple documents with Buildings including PW-1 applications, Additional Information Forms, a Schedule A-Occupancy/Use Form, and an amended set of plans for renovation. On December 1, 2022, Jimenez withdrew as the architect of record for the 8th Avenue Project.

The Conflicts of Interest Board found that Jimenez had violated City Charter Section 2604(d)(4) by working on a project with which he had been personally and substantially involved while working for Buildings. The Board imposed a fine of \$6,000. Jimenez admitted to violating the City Charter and agreed to pay the \$6,000 fine.

*In the Matter of David Jimenez*, COIB Case No. 2021-429.

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### Tutor Perini wins contract claim

*Tutor Perini sued the State over increased costs on Long Island Expressway contract; State defended by seeking to rescind contract by citing defects in hiring minority and women owned businesses.* On July 19, 2000, the State of New York awarded Tutor Perini a contract to construct a complex roadway and to reconstruct a bridge at the Long Island Expressway/Cross Island Parkway interchange. The contract was plagued by delays which Tutor Perini asserts were the fault of the State. The last day of work was November 10, 2005. In August 2011, the State computed that Tutor Perini was due the sum of \$151,842,985.

In March 2012, Tutor Perini sued the State in the Court of Claims for additional costs attributed to extended overhead costs, rental costs of temporary concrete barriers, additional costs attributable to delays, design changes, and fees assessed by the State for lane closures during the project.

The State moved for summary judgment dismissing the claim based on illegality and fraud. The State alleged that Tutor Perini did not use the minority-owned and women-owned subcontractors which it had originally identified to meet the requirement that 18 percent of the work be performed by minority-owned and women-owned subcontractors. Further the State asserted that two of Tutor Perini's executives were involved in a criminal investigation involving the use of fraudulent minority-owned and women-owned subcontractors and were ultimately indicted on related charges. The State, in addition, counterclaimed, asserting that Tutor Perini did not comply with contract grievance procedures in seeking compensation for disputed charges.

Tutor Perini, in opposition, cross-moved for summary judgment dismissing the State's affirmative defenses and counterclaims, noting that an audit memorandum dated November 10, 2005, stated that the minority-owned and women-owned business participation in the project exceeded the 18 percent goals.

Court of Claims Judge Francis T. Collins granted partial summary judgement for Tutor Perini. Judge Collins noted that Tutor Perini satisfied the goal of using minority-owned and women-owned businesses for 18 percent of the work and therefore caused no injury to the State. Judge Collins, however, granted summary judgment in favor of the State on several monetary claims by Tutor Perini.

The Appellate Division, Second Department, affirmed and ruled in favor of Tutor Perini and against the State. The court agreed that Tutor Perini had not

committed fraud when it bid on the contract and that the contract was enforceable and could not be rescinded. The alleged illegality concerning minority- and women-owned businesses did not affect the contract price or amount due. Further, since 18 percent of the work was performed by minority-owned and women-owned subcontractors, the contract was performed in a legal fashion.

The court noted that the executives of Tutor Perini had been criminally charged but ruled that there was no evidence that their crimes disqualified Tutor Perini, which is a publicly traded corporation, from bidding. Accordingly, Tutor Perini established its entitlement to judgment as a matter of law dismissing the State's affirmative defenses and counterclaims.

With respect to the other State defenses, the court ruled that Tutor Perini had raised a triable issue of fact as to whether the State waived record-keeping requirements, and sent the case back for trial on the issue.

*Tutor Perini Corp v. State of New York*, 176 N.Y.S.3d 285 (2d Dep't 2022).

## TERMINATION OF CONTRACT

### Faulty work justified termination

*NYCHA terminated contractor who failed to meet NYCHA standards for exit doors and locks.* In October 2014, the New York City Housing Authority awarded Tycoon Construction Corp, a \$2,433,000 contract for work at the James Weldon Johnson Houses in East Harlem. The contract called for Tycoon to fabricate and install (i) painted exit doors, frames and window assemblies fabricated from galvanized steel; (ii) stainless steel exit doors; and (iii) stainless steel entryways, including doors, sidelights, transoms, windows, and metal coverings for the external surfaces of the front entryways. The contract also required Tycoon to replace wiring associated with existing entrance intercoms and magnetic door latches and to install new wireless intercom panels and new electromagnetic/



Part of the James Weldon Johnson Houses, Manhattan.  
Credit: Google Maps.

mechanical panic bar locking systems at seventeen individual buildings.

In May 2016, NYCHA inspectors visited Tycoon's fabricator and found that the doors and door frames manufactured for the project did not comply with the contract's specifications and approved shop drawings. Inspection of the doors and entryways Tycoon had installed at Johnson Houses revealed these same deviations and deficiencies. NYCHA inspectors also found numerous deficiencies in Tycoon's electrical work.

Tycoon requested and NYCHA granted three extensions of time to complete the contract work. The extensions were expressly at no additional cost to NYCHA and Tycoon agreed to make no claim for damages caused by delay.

Ultimately NYCHA terminated Tycoon's contract after paying Tycoon \$2,031,708 for its work under the contract. Tycoon sued NYCHA, alleging wrongful termination and demanded contract damages in the amount of \$2,999,987. NYCHA denied owing additional moneys to Tycoon.

Supreme Court Justice Debra A. James agreed with NYCHA and denied all but one of Tycoon's claims. Judge James dismissed Tycoon's claims based on wrongful termination, delay, and quantum meruit, but allowed Tycoon's claim to proceed for moneys owned as a result of NYCHA's termination of the contract.

The Appellate Division, First Department, affirmed, ruling that NYCHA had an unconditional right to terminate the contract and that Tycoon was not entitled to quantum meruit damages. NYCHA also was correct in denying payment for extra work and for delays based on Tycoon's failure to have made timely claims as required by the contract.

The Appellate Division agreed with the Supreme Court that Tycoon was entitled to a trial on the issue of termination for convenience costs and remanded the case to the Supreme Court to consider the factual basis for Tycoon's claim.

*Tycoon Construction Co. v. New York City Housing Authority*, 184 N.Y.S.3d 737 (1st Dep't 2023).

## EMPLOYMENT LAW

### COVID-19 VACCINATIONS

#### Unvaccinated DSNY worker reinstated

*Sanitation worker terminated following order by City Health Commissioner that all City employees to be vaccinated.* On October 20, 2021, NYC Health Commissioner, David Chokshi ordered that all City employees show proof of at least one dose of vaccination against COVID-19. A City employee who failed to provide proof of vaccination would be denied access to

their worksite. Commissioner Chokshi later extended the vaccination mandate to employees in the private sector. On March 24, 2022, Mayor Eric Adams signed Emergency Executive Order No. 62, that provided blanket exemptions for athletes, performers, and other artists.

George Garvey, along with other Department of Sanitation employees who were terminated, filed an article 78 petition against The City of New York challenging the orders and their terminations. Garvey claimed that he had natural immunity from prior infections.

Supreme Court Justice Ralph J. Porzio ruled in favor of George Garvey, voided the orders, and ordered that Garvey and the other petitioners be reinstated with back pay. Judge Porzio ruled that Commissioner Chokshi's order that imposed vaccination requirements on only a portion of the population was akin to legislating and therefore exceeded his administrative authority. Judge Porzio also ruled that Mayor Adam's order that exempted athletes, performers and certain artists was arbitrary and capricious. There was no rational reason to distinguish between different types of occupations with respect to a vaccine mandate.

The City of New York did not appeal. On February 6, 2023, Mayor Eric Adams rescinded the City's vaccine mandate. As of February 10, 2023, the COVID-19 vaccine is optional for current and prospective City employees.

*Garvey v. City of New York*, 180 N.Y.S.3d 476 (Sup. Ct. Richmond Cty 2022).

## ENVIRONMENTAL LAW

### TIDAL WETLANDS

#### Call-A-Head violated wetlands laws

*Call-A-Head constructed building and stored equipment in State tidal wetlands without permits.* In 2012 the New York State Department of Environmental Conservation charged Call-A-Head Portable Toilets, Inc. and Charles W. Howard with violating the State's environmental laws at three sites in Broad Channel, Queens. The DEC charged that Call-A-Head expanded its commercial structures without a State tidal wetlands permit, and also discharged the residual content of portable toilets into Jamaica Bay without a State pollutant discharge permit.

The three sites include the principal place of business of Call-A-Head and are located at 302-304 Cross Bay Boulevard, 210 Cross Bay Boulevard Broad Channel, and 40 West 17th Road, Broad Channel, Queens. The sites include land that is located entirely within the State's regulated tidal wetland area as depicted on

## ENVIRONMENTAL LAW (CONT'D)

State tidal wetlands map and also includes a parcel owned by the federal government that is part of the Gateway National Recreation Area. An individual, Charles W. Howard, acquired Site 3, 40 West 17th Road, on October 1, 2002 and was the owner of record of Site 3 at the time of the alleged violations.

At a hearing on the charges the DEC presented surveys, photographs, maps, inspection reports, summonses, and the testimony of multiple DEC employees who testified as to their observations with respect to the charged violations. When Call-A-Head failed to put on a case, the Administrative Law Judge closed the hearing, sustained the charges against Call-A-Head and Charles W. Howard, and recommended a penalty in the sum of \$300,000 for the violations at Site 1, jointly, and a civil penalty in the sum of \$7,500 on Howard for the violation at Site 3.

Call-A-Head and Howard filed an article 78 petition challenging the administrative order. They argued that they were not subject to the State's tidal wetlands laws. The Appellate Division, Second Department, rejected their argument and affirmed the administrative order.

Call-A-Head argued that Sites 1 and 3 were not subject to the State's tidal wetlands laws because they were separated from Jamacia Bay by railroad tracks and a road. The Appellate Court ruled, however, that the sites were governed by the State tidal wetland law as shown by the official State Tidal Wetlands map and as corroborated by testimony by the State's witnesses. The court also refused to reduce the fines, ruling that the penalties were not so large as to shock the conscience of the court.

*Call-A-Head Portable Toilets, Inc. v. NYS Department of Environmental Conservation*, 184 N.Y.S.3d 776 (2d Dep't 2023).

### SEWAGE OVERFLOWS

## DEP faulted on reporting overflows

*Riverkeeper*, an environmental organization, complained that the New York City Department of Environmental Protection, in violation of a State statute, failed to notify the public concerning sewage overflows. Riverkeeper, an environmental organization, filed an article 78 petition alleging that the New York City Department of Environmental Protection failed to report when, during rainstorms, the City's sewage systems discharged sewage directly into the waters around New York City in violation of the State's Sewage Pollution Right to Know Act, passed by the State legislature in 2012.

The State statute requires publicly owned sewage treatment plant operators to report to local and State health agencies within two hours after discovery of discharges of untreated sewage from combined sewer overflows into the surrounding waters. Combined sewers are sewers that carry both rainwater and sewage. The State statute also requires notification to the general public through electronic media within four hours of sewage discharges from the combined sewers.

Riverkeeper alleged that City DEP had adopted the practice of sending the required notifications only if, according to its modeling, DEP expected that enough sewage has been discharged to exceed State water quality standards. This restrictive interpretation of the State statute, Riverkeeper alleged, violated the express terms of the State statute, and jeopardized the health of those who live, work, or recreate on the waters and may come into contact with raw sewage.

The City moved to dismiss the petition, arguing that DEP's notification practices were in conformity with the State statute. Supreme Court Justice Joseph J. Esposito agreed with the City, granted the City's motion, and dismissed Riverkeeper's petition.

The Appellate Division, Second Department, reversed and reinstated Riverkeeper's petition. The Appellate Division ruled that there were bona fide factual and legal disputes concerning DEP's notification practices and that the lower court had erred in not addressing those disputes. The Appellate Division sent Riverkeeper's article 78 petition back to the lower court for adjudication on the merits.

*Riverkeeper v. N.Y.C. Department of Environmental Protection*, 184 N.Y.S.3d 620 (2d Dep't 2023).

## HUMAN RIGHTS LAW

### LGBTQ RIGHTS

## University Pride group wins

*Yeshiva University Pride Alliance*, an undergraduate organization, was denied recognition by Yeshiva University. On several occasions Yeshiva University undergraduates sought Yeshiva University's approval for an official LGBTQ student organization. In 2022, the students sued the university after the latest refusal by Yeshiva University to recognize the Yeshiva University Pride Alliance, an LGBTQ student organization. The students asserted gender, sexual orientation, and association discrimination under the City Human Rights Law and the constitution.

Yeshiva University moved to dismiss the students' lawsuit, arguing that Yeshiva University is a religious and charitable organization and is therefore not cov-

ered by the City's Human Rights Law. Yeshiva University was founded in 1897 as an Orthodox Jewish seminary. In 1969, Yeshiva changed its charter to declare itself as a non-denominational institution of higher learning and to shift its religious teaching degree programs to a separate entity.

Supreme Court Justice Lynn Kotler ruled that Yeshiva University is covered by the City's Human Rights law and denied Yeshiva University's motion to dismiss the student's lawsuit.

On appeal, the Appellate Division, First Department, agreed with the lower court, rejected Yeshiva University's arguments, and upheld the complaint. The appellate court ruled that Yeshiva was no longer a religious corporation after its charter amendment in 1969, and thus is ineligible to qualify for the religious corporation exemption of the New York City Human Rights Law. The Appellate Court also held that certifying Pride Alliance would not intrude on Yeshiva's right to decide matters of faith and doctrine because the University already recognized LGBTQ+ student organizations in three of its graduate schools. The court further rejected Yeshiva University's argument that court-compelled recognition of the Pride Alliance would violate the university's free exercise of religion, expression, and its rights to association.

The court issued a permanent injunction compelling Yeshiva University to recognize the Pride Alliance as an official student organization of the University.

*YU Pride Alliance v. Yeshiva Univ.*, 211 A.D.3d 562 (1st Dep't 2022).

**CityLaw Comment:** Yeshiva University asked the United States Supreme Court to intervene and overrule the Appellate Division. In a five-four decision the Supreme Court rejected the request, ruling that Yeshiva University had to first seek judicial relief in State courts. *Yeshiva U. v. Pride Alliance*, 143 S.Ct. 1 (2022).

The Appellate Division denied Yeshiva University's motion for leave to appeal to the New York Court of Appeals on March 30, 2023. The lawsuit, as a result, was returned to the trial court to resolve the student's damages claim. Meanwhile, the student plaintiffs agreed to continue to meet and operate as an informal club pending the completion of the litigation.

## LAND USE

### ENVIRONMENTAL IMPACT

## Crown Heights rezoning upheld

*Neighbors challenged City approval of two 16-story developments in Crown Heights.* In 2018, Cornell Realty Management applied for a rezoning to develop two 16-story residential buildings at 931 Carroll Street

and 40 Crown Street in Crown Heights, Brooklyn. The total rezoned area would consist of 16 lots between Carroll Street to the north, Montgomery Street to the south, Franklin Avenue to the east and a line 300 feet west of Franklin Avenue between Franklin and Washington Avenues to the west. 931 Carroll Street is on the northern end, and 40 Crown Street is on the southern end of the proposed rezoning area. The majority of the area is undeveloped, but does currently include one residential building at 900 Franklin Avenue, a police station, and a few retail stores on the corner of Franklin Avenue and Carroll Street.

As permitted by the preexisting zoning designation, the developer could build residential buildings up to seven stories at either of the locations with ground-floor commercial space at 931 Carroll Street. The developer's application requested an up-zoning to increase the maximum building height to 17 stories with the inclusion of affordable units. The developer's application posited the creation of over 500 total residential units between the two buildings.

The application was approved by the City in 2019 despite facing substantial pushback from the community.

Following approval, Crown Heights residents and property owners, led by Alicia Boyd, filed an article 78 petition against the City. The opponents argued that the City Planning Commission abused its discretion in certifying the project for review without requiring the developer to produce an Environmental Impact Statement. They alleged that the Planning Commission did not address the potential impact the rezoning would have on water and sewer infrastructure.

The Planning Commission contended that it had properly applied a hypothetical model in accordance with its own guidelines to predict a reasonable worst case development scenario in regard to water and sewer infrastructure. The Planning Commission's technical handbook dictates that further investigation is only required when a rezoning would create 400 or more units above what could be built prior to the rezoning. The Planning Commission relied on the estimations given by the developer which stated that 284



The rendering of 40 Crown Street and 931 Carroll Street. Credit: NYC CPC.

## LAND USE (CONT'D)

such incremental units would be created.

Supreme Court Justice Reginald A. Brodie ruled in favor of the opponents and annulled the City's approval of the development. Judge Brodie ruled that the model applied by the Planning Commission was insufficient because it only covered the likely extent of the environmental impact of the project as hypothesized by the developer and not a scenario where the maximum number of units buildable under the rezoning were constructed. Judge Brodie found that the incremental units could exceed 400 if each unit were built to the minimum permissible square footage.

The City appealed.

The Appellate Division, Second Department, reversed the Supreme Court's decision. The Appellate Division approved the Planning Commission's preliminary investigation and found that the Supreme Court had relied on incorrect calculations in making its decision regarding the maximum number of buildable units. The Appellate Division ruled that the model used by Planning constituted an adequate investigation into the environmental impact of the proposed development, covered a reasonable worst case development scenario which did not need to be extended to the maximum buildable unit scenario, and made a negative declaration appropriate.

The opponents appeal to the New York Court of Appeals has since been denied and construction on the development, which is yet to commence, can move forward.

*Boyd v. Cumbo*, 177 N.Y.S.3d 712 (2nd Dep't 2022).

## LANDMARKS

### Historic property alteration okay

Owner sought to create new housing units connected to 1870's Mansion in Crown Heights North Historic District. In 2007, the Landmarks Preservation Commission designated Brooklyn's Crown Heights North neighborhood as a historic district. The Dean Sage Mansion at 839 St. Mark's Avenue is located within the Crown Heights Historic District. The mansion, constructed in the 1870s, boasts a historic parterre garden that runs along the side of the Mansion. An addition attached to the rear of the mansion was built in the 1930s. Landmarks, in its approval of the historic district, noted that style, scale, materials, and details made Dean Sage Mansion "one of the oldest and most important nineteenth-century mansions remaining" in the district.

In 2016, the current owners of the mansion, The Institute for Community Living, which operates the property as an assisted-living facility for adults with



Dean Sage Mansion, Brooklyn. Image courtesy of the NYC Landmarks Preservation Commission

mental disabilities, applied to Landmarks for permission to make alterations to the property. The Institute planned to remove the 1930's addition and replace it with a six-story, L-shaped residential building with wings where the existing addition are located but extending partially into the current location of the garden. The new building would be attached to the mansion by a one-story glass walkway. The application also contemplated restorations to be made to the mansion's facade.

Landmarks approved the application in 2017, finding that "the existing 1930's addition does not relate to the historic mansion in terms of style, scale, or materials and is not given an architectural style in the [Crown Heights North] designation report, therefore its demolition will not detract from the special historic and architectural character of the mansion or the Crown Heights North Historic District."

Landmarks also found that the removal of the 1930's structure would allow "for the perception of the [mansion] as a free-standing structure," and that the "deep setback location of the proposed building along St. Mark's Avenue will preserve the presence of the historic garden."

Following approval and before the alterations were to take place, the St. Mark's Block Association and the Crown Heights North Association filed an article 78 petition against Landmarks. The Block Associations alleged that, in approving the proposal, Landmarks had failed to consider adequately the elimination of a portion of the property's garden.

Kings County Supreme Court Justice Katherine Levine agreed with the Block Associations and annulled Landmarks' approval, finding that Landmarks' approval was arbitrary and capricious.

The Appellate Division, Second Department, reversed Justice Levine's decision and dismissed the proceeding. The Appellate Division found that Landmarks had properly weighed the loss of garden space against the proposed restoration of the mansion and the removal of the "historically insignificant" 1930's

addition. The Appellate Division emphasized Landmarks' finding that the primary historic components of the garden, including its perimeter wall and foot paths, would be maintained and that Justice Levine had improperly substituted her judgment for that of Landmarks.

*Hilbertz v. City of New York*, 179 N.Y.S.3d 696 (1st Dep't 2022).

## NUISANCES

### SELLING UNTAXED CIGARETTES

#### Untaxed tobacco sale ruled nuisance

*Retail store repeatedly sold untaxed cigarettes which violated Tax Law and Administrative Code of New York City.* New York City sued City Tobacco House, located at 4802 4th Avenue, Brooklyn, for creating a public nuisance for selling untaxed cigarettes multiple times over a six-month period.

On one occasion, law enforcement officers found 8.4 cartons of untaxed cigarettes at the City Tobacco House and arrested one person for violating New York Tax Law. On another date, law enforcement found 28 packs of untaxed cigarettes, and another individual was arrested for violating the same tax law. On two separate occasions, undercover police officers purchased one pack of untaxed cigarettes from an employee at the store. Additionally, a search warrant led to the seizure of 64 packs of untaxed cigarettes and the arrest of a third person. New York State imposes a tax of \$4.35 per 20-cigarette pack, while New York City imposes an additional tax of \$1.50 per pack.

The City sued City Tobacco House arguing the Tobacco House's ongoing conduct is a public nuisance under the City Nuisance Abatement Law. City Tobacco House moved to dismiss the complaint, arguing that the Nuisance Abatement Law did not apply because selling untaxed cigarettes was not illegal and did not qualify as a public nuisance.

Supreme Court Justice Reginald A. Boddie granted City Tobacco House's motion to dismiss the complaint, agreed with City Tobacco House and dismissed the City's complaint.

On appeal, the Appellate Division, Second Department, reversed the Supreme Court order and ruled the sale of untaxed cigarettes was a public nuisance and subject to legal action under the City Nuisance Abatement Law. City Tobacco House created a public nuisance because they knowingly conducted the illegal sale of untaxed cigarettes, and the store was maintained as a gathering place for selling untaxed cigarettes. The Appellate Division sent the case back to the trial court for trial.

*City of New York v. Land and Bldg.*, 4802 4th Ave., 177 N.Y.S.3d 312 (2nd Dep't 2022).

## NYPD

### OPEN MEETINGS LAW

#### CCRB faulted but new rules survive

*The New York Civilian Complaint Review Board held an unpermitted closed meeting before adopting new rules on sexual misconduct.* In 2018, the New York City Civilian Complaint Review Board, an agency that investigates allegations of police misconduct, proposed changes to its rules that would allow the Civilian Complaint Review Board to investigate incidents of sexual misconduct. Among the proposed changes to its rules are its definition of "abuse of authority," a revised statement of purpose, and an amended definition of sexual misconduct.

The Civilian Complaint Review Board held a public hearing on January 13, 2021, on the proposed rules. After the hearing, the Civilian Complaint Review Board held an executive session in which a closed discussion of the rulemaking lasted less than ten minutes and consisted of legal advice by the General Counsel. A few brief comments were made that did not address particular comments or the text of the rules. No changes to the rules were proposed.

Following the adoption of the Civilian Complaint Review Board's rules, the Police Benevolent Association of New York filed an article 78 petition alleging that the Civilian Complaint Review Board's conduct at the executive session violated the Open Meetings Law. The Police Benevolent Association argued that the Civilian Complaint Review Board's General Counsel gave legal advice to agency members and that the proposed changes to the rules were discussed during the executive session.

New York Supreme Court Justice Laurence L. Love agreed with the Police Benevolent Association and voided the rules.

The Appellate Division reversed and upheld the Civilian Complaint Review Board's rules. The Appellate Division agreed with the Police Benevolent Association that the Civilian Complaint Review Board violated the Open Meetings Law when it discussed rulemaking and legal advice in the executive session but concluded the violation did not require sanctions.

The Appellate Division reasoned that courts have the discretion to apply sanctions when the Open Meetings Law is violated and may void an agency's actions upon a violation when good cause is shown. Good cause is shown if the agency acted intentionally or prejudiced the moving party.

## NYPD (CONT'D)

Sanctions are inappropriate in this instance because the Police Benevolent Association did not demonstrate they were intentionally excluded from the Civilian Complaint Review Board's meetings or that they were prejudiced in any way by the executive session. As a result, no relief is warranted.

*Lynch v. New York City Civilian Compl. Rev. Bd.*, 171 N.Y.S.3d 482 (1st Dep't 2022).

## CHOKEHOLDS

### City's new chokehold law upheld

*Police unions challenged chokehold law passed by Council following the death of Eric Gardner.* On June 18, 2020, the New York City Council passed Local Law 66 of 2020 in response to the 2014 death of Eric Gardner. Gardner was killed by an NYPD officer during his arrest after the officer used a chokehold on Gardner. Local Law 66 restricts certain methods of restraints police officers can utilize when making or attempting to make an arrest. The law makes it a crime for a police officer to use any restraint that restricts the flow of air or blood by standing on the chest or back in a manner that compresses the diaphragm, in the course of effecting or attempting to effect an arrest.

Police unions sued New York City. The police unions argued that the words "in a manner that compresses the diaphragm," stated in the law, makes the law unconstitutionally vague because ordinary police officers are unable to determine what conduct is prohibited and whether their conduct is causing an arrestee's diaphragm, an internal muscle, to be compressed.

Supreme Court Justice Laurence L. Love agreed with the police unions, ruled that the law is unconstitutionally vague, and declared that the law is void in its entirety.

On appeal the Appellate Division, First Department disagreed and upheld the law. The Appellate Division concluded that the portion of the law dealing with compressing the diaphragm is sufficiently clear to give police officers notice of what conduct is prohibited. The existence of other possible reasons for an arrestee's shortness of breath does not mean that the law is vague, Police officers are trained on the location and function of the diaphragm. Police officers are also trained to determine when the pressure they are exerting in the vicinity of the diaphragm is making it hard for the arrestee to breathe. Accordingly, the Appellate Division ruled that the law was constitutional and overruled the lower court's decision.

*Police Benevolent Ass'n of City of New York, Inc. v. City of New York*, 168 N.Y.S.3d 462 (1st Dep't 2022).

## PROPERTY

## INVERSE CONDEMNATION

### Owners lose compensation claim

*Staten Island property owners' land was surrounded by City land.* On December 1, 1994, Bruno Savo and Michael Savo purchased three lots in the Long Pond Park Preserve on Staten Island. The three non-adjacent lots are encircled by tracts owned by New York City. Prior to the purchase made by the Savos, the City had been using eminent domain for decades as a way to acquire the surrounding properties.

In 2006, the New York City Parks Department informed the Savos that the City would purchase their properties by eminent domain. Ten years later in August of 2016 the Savos inquired about the status of the Parks Department's planned acquisition and were told that the properties were "on our list to be acquired." In 2019, counsel for the Savos again reached out to the Parks Department. A representative responded that the properties were "on a list of potential acquisitions" but that "no funding was secured yet."

On November 26, 2019, the Savos sued the City seeking damages for inverse condemnation.

The City moved to dismiss the Savos' claim as time-barred under the three-year statute of limitations.

Supreme Court Justice Wayne M. Ozzie denied the City's motion to dismiss the Savos' case. Judgment was entered in favor of the Savos, and the City appealed.

The Appellate Division, Second Department, reversed, upheld the City's position, and dismissed the Savos' complaint. The court held that an inverse condemnation action accrues at the time the government takes the property and is subject to a three-year statute of limitations. The court further held the Savos did not raise a triable issue regarding equitable estoppel, since the Savos failed to proffer evidence that the City engaged in an affirmative act of misconduct or misrepresentation which would have prevented them from filing suit within the limitations period.

*Savo v. City of New York*, 176 N.Y.S.3d 79 (2nd Dep't 2022).

## STREET VENDING

## ART

### Street artist defeats summons

*A licensed spray paint artist was cited by the NYPD for selling his artwork on Broadway, Manhattan.* Bogdan Zhukovskiy, a licensed spray paint artist, set up and displayed his artwork on Seventh Avenue between 45th and 46th Streets in Manhattan in front of

the Forever 21 store for many years. Zhukovskyi creates various sized artwork using spray paint on photo paper or canvas and sells it to passersby.

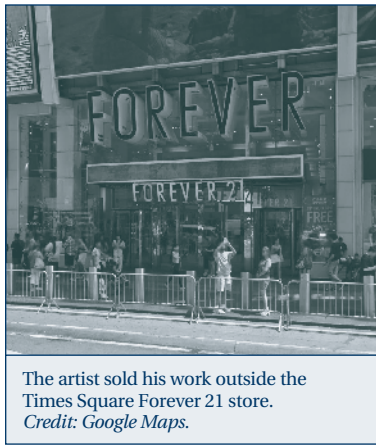
On July 9, 2022, at 10:07 p.m., an NYPD officer served a summons on Zhukovskyi for illegally selling merchandise at a restricted time and place. The summons failed to specify how Zhukovskyi displayed his artwork.

City regulations prohibit vendors from selling food or merchandise on Broadway, between 32nd and 53rd Streets every day from 8:00 a.m. to midnight. An exemption exists, however, for vendors who sell written matter or artwork without using any vehicle, pushcart, or stand.

Queens OATH Hearing Officer M. Tolan dismissed the charges against Zhukovskyi and the NYPD appealed.

On appeal, the OATH Board agreed with the Hearing Officer's decision. The OATH Board ruled that Zhukovskyi was allowed to sell his artwork at the place he did since he was not selling food or merchandise. The Board also found that Zhukovskyi was protected under the exemption since the summons was unclear as to whether Zhukovskyi used a vehicle, pushcart, or stand to set up his artwork.

*NYPD vs. Bogdan Zhukovskyi*, OATH Appeals Unit, Appeal No. 2201239 (December 15, 2022).



## TAX

### CORPORATE TAX

#### Tax upheld on foreign corporation

*City imposed tax sale of New York City asset.* In 2010, Goldman Sachs Petershill Fund Offshore Holdings Corporation, operating out of London, sold its minority interest in Claren Road Asset Management, LLC for over \$54 million. Holdings Corporation had no property or employees in New York City, but Claren Road conducts business in New York City.

New York City imposed a New York City general corporate tax assessment on the capital gain Holdings Corporation made from the sale of its minority interest in Claren, LLC. The tax totaled over \$5 million including interest.

Holdings Corporation appealed the tax assessment to the New York City Tax Appeals Tribunal. Holdings Corporation argued that because Holdings Corporation is not located in New York City and does not conduct business in New York City, it should not be subject to the tax just because Claren Road does business in New York City.

Administrative Law Judge Sandra M. Rodriguez-Diaz for the New York City Appeals Tribunal ruled against Holdings Corporation, finding that Holdings Corporation was subject to the tax because Holdings Corporation made its money from Claren Road's business activities in New York City. Judge Rodriguez-Diaz also held the imposition of the tax was proper because the City provided the environment for Claren Road to have a prosperous business.

On appeal, the Appellate Division, First Department affirmed the Tax Appeals Tribunal and upheld the tax assessment on Holdings Corporation. Claren Road's business activities within New York City provided the necessary nexus between New York City and Holding Corporation's capital gain from the sale of its minority interest in Claren Road.

*Goldman Sachs Petershill Fund Offshore Holdings (Delaware) Corp. v. New York City Tax Appeals Tribunal*, 167 N.Y.S.3d 458 (1st Dep't 2022).

## TORTS

### SLIP AND FALL

#### City defeats slip and fall claim

*Pedestrian slipped on ice four days after storm.* On January 28, 2016, Israel Nass slipped on a patch of ice while walking on a paved, painted triangular area adjacent to the Fraser Square traffic circle on Kings Highway in Brooklyn. The last snowfall, according to meteorology reports, was four and a half days prior to the day of the accident.



Part of the traffic circle on Kings Highway, Brooklyn. Credit: Google Maps.

## TORTS (CONT'D)

Israel Nass sued the City of New York to recover damages for personal injuries sustained from the slip and fall. The City moved for summary judgment on the grounds that it did not cause the icy condition and had no notice. Supreme Court Justice Katherine Levine denied the City's motion.

The Appellate Division, Second Department, reversed the Supreme Court's decision, dismissed Nass's complaint, and ruled that the City did not create an icy condition or have constructive notice of the ice patch. Climatological data introduced by the City showed that the outside temperature was above the freezing mark for two days before the accident. There was no significant precipitation, and although on the morning of the accident, the temperature was below freezing, the City had not removed any snow in the subject area.

*Nass v. City of New York*, 177 N.Y.S.3d 653 (2nd Dep't 2022).

### QUALIFIED IMMUNITY

## Drunk driver held solely liable

*A drunk driver and his passenger sustained injuries in a car crash on the Queensboro Bridge's South Outer Roadway exit ramp.* On March 28, 2011, Norman Grant Riddell spent several hours at a bar before driving on the Queens bound, Queensboro Bridge South. At around 4:00 a.m. while on the Outer Roadway exit ramp near the intersection of Queens Plaza South and Crescent Street, Riddell bumped into a guardrail while driving 10-30 miles over the speed limit. Riddell lost control of his car and crashed into a pedestrian on the sidewalk and several storefronts. An hour after the accident, a blood sample from Riddell revealed that he was driving under the influence.

Riddell and his passenger separately sued New York City for negligently planning and designing the Outer Roadway exit ramp and for failing to place proper signs along the bridge and exit ramp. The driver and passenger argued that signs should have been placed to warn motorists of the sharp right turn on the Outer Roadway exit ramp.

The City defended by asserting qualified immunity based on prior engineering studies. The City relied on a 1998 study and 2008 renovations of the Outer Roadway exit ramp of the Queensboro Bridge. The study and renovation had led to increased sight distances and improved traffic flows.

Supreme Court Justice Bruce M. Balter dismissed the driver and passenger's claims against the City. On appeal, the Appellate Division, Second Department, agreed with the Supreme Court and ruled that the City was protected by qualified immunity. The City had



The intersection coming off the Queensboro Bridge where Riddell drove his car into a building, seen boarded up on the left. Credit: Google Maps.

adequately studied the design of the bridge and the City's designs were reasonably based on that study.

The court also found that the lack of signs by the bridge and exit ramp did not contribute to the accident. Rather, the driver was solely responsible for the accident since he was drunk and driving over the speed limit.

*Riddell v. City of New York*, 177 N.Y.S.3d 95 (2nd Dep't 2022); *Cohen v. City of New York*, 176 N.Y.S.3d 303 (2nd Dep't 2022).

### TREES

## State not liable for driver death

*Man died while driving on the NYS Thruway when a tree fell on man's car causing him to lose control of his vehicle and collide with the guardrail.* Barry Shapiro was driving northbound on the New York State Thruway on March 2, 2018, during a severe nor'easter storm with heavy rainfall, snow, and winds up to speeds of 47 miles per hour. At around 4:25 p.m. in the town of Greenburgh in Westchester County at the 11-mile mark, a healthy 70-foot black lotus tree, standing on a steep hill 30-feet from the roadway's right-side, was split by the storm's impact and plummeted through Shapiro's roof and front windshield. Upon impact, Shapiro lost control of his vehicle and collided with the guardrail causing tragic injuries resulting in his death.

Judith Jay, Barry Shapiro's wife, sued the New York State Thruway Authority for failure to maintain the roadway and remove the foreseeable risk the hazardous black lotus tree presented to motorists. Shapiro's wife argued that the Thruway Authority failed to properly inspect the tree and remove the tree upon notice of the apparent and dangerous characteristics of the tree's tall height, close proximity to the roadway, and its positioning on a steep hill. Experts for Shapiro's wife asserted the black lotus tree had a hazardous lean towards the thruway and that black lo-

tus trees have a shallow root system, which creates a foreseeable risk and put the Thruway Authority on a heightened notice to remove the tree.

The Thruway Authority responded that it properly inspected the roadway by conducting weekly drive-by inspections of roadside trees. The Thruway Authority presented expert testimony that the fallen black lotus tree was fully healthy, the root system was not shallow, and the tree's lean was normal and consistent for roadway trees with unobstructed sunlight. The Thruway Authority's experts also stated that it was the recent weather patterns and the extreme forces of the nor'easter that caused this otherwise healthy tree to collapse.

The Court agreed with the Thruway Authority and dismissed Shapiro's complaint. The Court found that the Thruway Authority was not liable for the unforeseeable incident that led to Barry Shapiro's tragic death.

*Jay v. State*, 175 N.Y.S.3d 431 (N.Y. Ct. Cl. 2022).

## TRANSPORTATION

### PERMIT DISPUTE

#### **\$1.5k fine for steel plate in road**

*Plumbing contractor left a steel plate over a hole in the street beyond the allotted time of its work permit.* Subsurface Watermain & Sewer Contracts, Inc., obtained a permit to repair a watermain leak located adjacent to a residential dwelling at 1250 45th Street in Brooklyn. The permit, valid from January 25 through February 23, 2021, allowed Subsurface to open the public roadway to install a new watermain and sewer service. On January 25, 2021, Subsurface excavated the roadway, completed the necessary work, filled the hole, and placed a steel plate over it. The workers were unable to repave the road due to construction debris containers in the area.

Nine months later, on October 24, 2021, a Department of Transportation officer issued a summons charging that Subsurface had not restored the road within the allotted time of their work permit and had instead left a steel plate to cover the work. The road was eventually repaved by Subsurface on November 16, 2021, after the work permit expired.

At an OATH hearing on February 3, 2022, Subsurface argued that it was not in violation of its permit because it had completed the permitted work to repair the watermain within the required time. The Department of Transportation responded that the repaving of the street opening was required under the permit and that a separate permit was needed if Subsurface intended to leave the steel plate in the road-

way beyond the expiration date of the permit.

Hearing Officer C. Barba sided with the Department of Transportation and fined Subsurface \$1,500. Subsurface appealed.

The OATH Appeals Unit affirmed the hearing officer's decision and upheld the fine of \$1,500. Subsurface was required to repave the road under the permit and offered no explanation for why it could not have the construction debris removed in order to repave the road. The Appeals Board also agreed with Transportation that Subsurface should have obtained a new permit when Subsurface realized that it was unable to repave the road within the allotted time.

*DOT v. Subsurface Watermain & Sewer Contractors, Inc.*, OATH Appeals Unit Appeal No. 2200158 (April 28, 2022).

### DRIVERS LICENSE

#### **Drivers license revocation upheld**

*Driver whose DWI conviction had been sealed sought a new driver's license.* John Boyle was convicted of three alcohol-related driving offenses between 1999 and 2020. The New York State Department of Motor Vehicles revoked Boyle's license after his third offense.

Following the revocation, Boyle obtained a court order sealing his first offense, a driving while intoxicated conviction from 1999. Boyle then reapplied for a driver's license. The Department of Motor Vehicles denied his application based on a lifetime review of Boyle's driving record which included all three offenses including the 1999 sealed conviction.

Boyle filed an article 78 petition arguing that the DMV acted unlawfully in considering Boyle's sealed conviction when reviewing his re-licensure application.

Supreme Court Justice David A. Weinstein dismissed Boyle's claim, ruling that the DMV could consider sealed convictions in making relicensing determinations. Boyle appealed.

The Appellate Division, Third Department, rejected Boyle's appeal and affirmed the denial of his driver's license. The State vehicle and traffic law states that, when reviewing a re-licensure application, the DMV must conduct a lifetime review, and if the review shows that an applicant has three or four alcohol-related driving convictions within a 25-year span, the DMV must deny the application. Under the Executive Law, the DMV is expressly permitted to consider sealed convictions in this lifetime review. Because of this, the Court ruled that the DMV acted lawfully in reviewing Boyle's sealed conviction in their review of his re-licensure application.

*Boyle v. NYS Department of Motor Vehicles*, 177 N.Y.S.3d 762 (3rd Dep't 2022).

# CONFLICTS OF INTEREST ENFORCEMENT ACTIONS

Full Text Available on CityAdmin.org

| NAME, TITLE & AGENCY                                                                                      | DESCRIPTION                                                                                                         | PENALTY*                                                                             | COIB CASE NO. |
|-----------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------|---------------|
| <b>Settlements</b>                                                                                        |                                                                                                                     |                                                                                      |               |
| Robert Alexis<br>Captain<br><i>NYC Dept of Corrections</i>                                                | Accepted funds from subordinates after he was suspended without pay for workplace incident                          | \$6,250 fine                                                                         | 2021-174a     |
| Natalia Nikulina<br>Social Worker<br><i>NYC Dept of Health + Hospitals</i>                                | Received and sent emails for her private outside employer on her City email account                                 | \$1,200 fine                                                                         | 2022-175      |
| David Jimenez<br>Plans Examiner<br><i>NYC Dept of Buildings</i>                                           | Worked for a private employer on a project he worked substantially on while working for the city                    | \$6,000 fine                                                                         | 2021-429      |
| Anna Brooks<br>Geologist<br><i>NYC Dept of Environmental Protection</i>                                   | Pursued employment with a private firm while engaged in work for the City related to that firm                      | \$1,000 fine                                                                         | 2022-173      |
| Winter Boyd<br>Computer Technician<br><i>NYC Dept of Education</i>                                        | Took multiple school electronic devices home for personal sale and use; used school's credit card for personal use. | \$1,000 fine; agency issued 35-day suspension valued at \$10,189                     | 2021-491      |
| Ingrid Lewis-Martin<br>Deputy Borough President<br><i>Brooklyn Borough President's Office</i>             | Gave a loan to a friend and got that friend hired to City positions and helped with promotions                      | \$1,000 fine                                                                         | 2022-475      |
| Eric Charles<br>Custodian<br><i>NYC Dept of Citywide Admin Services</i>                                   | Created fake parking placard                                                                                        | DCAS six-day suspension valued at \$948; forfeit day of annual leave valued at \$158 | 2022-642      |
| Joshua Mathew<br>Senior Director of Business Centers<br><i>NYC Dept of Finance</i>                        | Used City phone, email and position to contact city agency on behalf of his private business                        | \$1,500 fine                                                                         | 2021-317      |
| Tameka Simmons<br>Supervising Special Officer<br><i>NYC Dept of Citywide Admin Services</i>               | Used City parking placard for personal vehicle                                                                      | Eight-day suspension from agency valued at \$1,975                                   | 2022-651      |
| Eon John<br>Associate Housing Inspector<br><i>NYC Dept of Housing Preservation and Development</i>        | Performed work for Uber during times he was required to work for HPD                                                | HPD one-day suspension valued at \$269.85                                            | 2022-148      |
| <b>Letters</b>                                                                                            |                                                                                                                     |                                                                                      |               |
| Mark Yosef<br>Former Agency Attorney<br><i>NYC Dept of Consumer and Worker Protection</i>                 | Represented for no fee a private business in a lawsuit against a City Council Member                                | Warning letter issued                                                                | 2022-252      |
| *Penalty does not necessarily include independent disciplinary action, if any, taken by employee's agency |                                                                                                                     |                                                                                      |               |

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## **Governor Announces Over \$390 Million for Ten Affordable and Supportive Housing Projects Across the State, Four in NYC**

On January 19, 2023, Governor Kathy Hochul announced that over \$390 million was awarded through bonds and subsidies for affordable and supportive housing statewide. With additional private funding, over \$600 million is expected to be invested to preserve over 1,600 units in ten projects across the state, including four projects within New York City. The four New York City projects are Bedford Green House Phase II in Fordham Heights in the Bronx; Shepherd Glenmore in East New York, Brooklyn; Crotona Belmont Senior Housing in East Tremont in the Bronx; and River View Towers in Hamilton Heights, Manhattan. Bedford Green will be 17 stories with 116 affordable units. Shepard Glenmore will be seven stories with 123 affordable units. Crotona Belmont will be ten stories with 134 affordable units. River View Towers will be a 25-story Mitchell-Lama cooperative development.

Governor's Office: Governor Hochul Announces More than \$390 Million in Financing to Build More than 1,600 Affordable and Supportive Homes Across New York State (January 19, 2023).

## **Mayor Reveals Task Force Recommendations to Convert Underused Office Space to Housing**

On January 9, 2023, Mayor Eric Adams announced a set of recommendations from the Office Adaptive Reuse Task Force for changes to state laws and city zoning requirements to make it easier for the conversion of underused office space to housing. The recommendations include the expansion of flexible conversion standards for high-density office districts and for buildings constructed before 1990. Other recommendations include conversions for a broader range of housing types like supportive housing and tax incentive programs to support the production of affordable and mixed-income housing. Currently 200 million square feet of office space is eligible for conversion under current regulations, but these recommendations could open conversions for an additional 136 million square feet of underused office space.

Mayor's Office: "Mayor Adams Unveils Recommendations to

Convert Underused Offices into Homes" (January 9, 2023).

## **City Planning Commissioner Discusses Zoning for Carbon Neutrality Amendment Ahead of Public Review Process**

On January 30, 2023, the City Planning Commission held a review session and overview discussion for the proposed Zoning for Carbon Neutrality amendment, one of the three City of Yes amendments proposed by Mayor Eric Adams last year. The Zoning for Carbon Neutrality amendment aims to reduce or eliminate unnecessary restrictions within the zoning text that inhibit a developer or building owner from using sustainable technology and design in their properties. The commissioners raised several concerns. Commissioner Gail Benjamin asked if building owners would be able to fund conversions or upgrades even if the city removed the regulatory roadblocks. Commissioner Joseph Douek asked about creating zoning incentives for energy creation. Commissioner Juan Camilo Osorio encouraged the agency to work with the environmental justice movement. Commissioner David Gold asked about the agency's outreach with building owners and other impacted stakeholders.

CPC: The City of Yes Special Presentation Review Session (January 30, 2023)

## **City Announces Roadmap for Citywide Composting Program**

On February 1, 2023, Mayor Eric Adams and Department of Sanitation Commissioner Jessica Tisch revealed a new roadmap for the creation and implementation of a citywide composting program. The program will be the nation's largest and will roll out over the next 20 months. The new program will establish a weekly collection of compostable materials. The program uses efficiencies that help manage costs, including dual-bin trucks and managing the right size of a workforce to handle the program and reduce overtime. To participate, residents do not need to sign up, and will only need to set out compostable materials in a separate bin on their recycling day. While the city-provided compost brown bins are available, the new program also allows residents to use any bin of 55 gallons or less

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with a secure lid. The program will first restart in Queens, expand to Brooklyn this October, expand to the Bronx and Staten Island in March 2024, and expand to Manhattan in October 2024.

Mayor's Office: Mayor Adams Announces Roadmap for Nation's Largest Compost Collection Program, Including Achieving Decades-Long Goal of Providing Curbside Service to Every New York City Resident (February 1, 2023).

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### **CPC Hears Application for Mixed-Use Building in Gravesend**

On February 1, 2023, the City Planning Commission held a public hearing for a mixed-use development at 58 Nixon Court in Gravesend, Brooklyn. The current site consists of four vacant lots between Nixon Court and Shore Parkway. Coney Island Hospital is located across Ocean Parkway from the proposed site. The application was originally certified as a proposed nine-story building with 21 units, including five affordable units. An alternative proposal was presented to the City Planning Commission at this public hearing seeking a seven-story building with 16 units, including four affordable units. Under both proposals, the building would include eight residential parking spaces and include a commercial overlay to enable ground floor retail space. The alternative proposal arose from issues Brooklyn Community Board 13 had with the project, concerned the rezoning would allow a neighboring building to expand.

CPC: 58 Nixon Court Rezoning (C 210170 ZMK, N 210171 ZRK, February 1, 2023).

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### **City Council Approves Reform Temple of Forest Hills Rezoning**

On February 2, 2023, the City Council voted to approve a rezoning that would enable the redevelopment of the Reform Temple of Forest Hills to a ten-story mixed-use building that includes a new temple and residential space. The Reform Temple of Forest Hills is currently located at 71-11 112th Street in Forest Hills, Queens. The new development will be a ten-story building with 153 units, including 38 permanently affordable units. The building will also have a new enlarged temple facility, 66 attended parking spaces in the cellar and 102 bike parking spaces. The temple and community spaces, including classrooms, a flexible multipurpose sanctuary space and offices, will be fully ADA accessible. The new facility will provide more space and meet the accessibility needs of the growing congregation. The City Planning Commission voted to approve

the application on December 14, 2022. At a previous public hearing, seven people testified in support and none in opposition.

CC: Reform Temple of Forest Hills Rezoning (Res 0497, 0498-2023, February 2, 2023).

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### **Landmarks Votes to Calendar Bronx Opera House**

On February 14, 2023, the Landmarks Preservation Commission voted to calendar the Bronx Opera House for consideration as an individual landmark. The Bronx Opera House is located at 436-442 East 149th Street in the South Bronx. The Bronx Opera House is a four-story building built in the Italian Renaissance Revival style from 1912 to 1913 by architect Geroge Keister. The Bronx Opera House first served as part of the "Subway Circuit," or a theater where Broadway productions could be tested in outer boroughs before going on regional or nationwide tours. After World War II, the Bronx Opera House became home to several nightclubs following a migration of tens of thousands of Puerto Ricans to New York City. Performers Tito Rodriguez, Charlie Palmieri and Johnny Pacheco were among the many who performed at the nightclubs at the Bronx Opera House. The building was purchased by a church in the 1980s, and redesigned and opened as the Opera House Hotel in 2013.

LPC: Bronx Opera House - 436-442 East 149th Street (LP-2667, February 14, 2023).

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### **Comptroller Announces Two New NYCHA Audits**

On February 22, 2023, Comptroller Brad Lander joined New York City Housing Authority (NYCHA) residents to announce two new NYCHA-related audits. The first audit targets NYCHA's repair process and the second targets eviction rates at certain developments. The subject of the audits was determined by a committee of 21 NYCHA residents from all five boroughs. The committee was created last December to steer a "resident-powered audit" process since residents will have a better perspective of the ongoing issues in their buildings. The first audit will analyze how NYCHA selects contractors for repair work, the quality of the repair work, and what evaluations are done. The second audit will examine eviction rates at RAD/PACT developments. PACT developments are in the Permanent Affordability Commitment Together program, which unlocks more funding and allows developments to receive enhanced property management, expanded

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on-site social services, and comprehensive renovations. The audit will examine the eviction rates in PACT developments, compare the eviction rates to before these developments were converted, and to see if reasons for eviction have changed.

Comptroller: NYCHA Residents Join NYC Comptroller to Announce Audits of Repair Processes and Eviction Rates at the Housing Authority (February 22, 2023).

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### **Landmarks Holds Public Hearing for Proposed Linden Street Historic District in Bushwick**

On February 28, 2023, the Landmarks Preservation Commission held a public hearing for the proposed Linden Street Historic District, located in Bushwick, Brooklyn. The proposed district consists of 32 brick and brownstone row houses located from 3 through 13 Linden Street on the south side of the street and 15 through 55 Linden Street on the north side of the street between Bushwick Avenue and Broadway. The proposed historic district would be the first in Bushwick. The row houses were constructed between 1885 and 1901 by several Brooklyn architects and depict a variety of architectural styles. The houses share common traits like height, color, materials, recessed entries, decorative cornices, and fenestration patterns along the facades. While minor repairs have been done to replace doors, windows or metalwork, the houses have good integrity of their original construction and visually complement each other. Several residents testified in support of the historic district. One housing advocate opposed the designation as it could limit development of housing in the area.

LPC: Linden Street Historic District (LP-2665, February 28, 2023).

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### **City Celebrates Groundbreaking for Gowanus Canal Overflow Protection Project**

On March 15, 2023, Mayor Eric Adams and city and federal agency officials celebrated the groundbreaking for the first of two underground storage tanks that will protect the Gowanus Canal in Brooklyn. The two tanks will collect sewer overflow during storms and prevent that overflow from entering the Gowanus Canal. The project will also include the creation of 3.6 acres of new public waterfront space. The two tanks will have a combined capacity to collect 12 million gallons of water. The overflow water is held in the tanks until the storm passes, and then the overflow waste water is pumped back into the sewer system and sent to a wastewater resource recovery facility to be treated. Overall, the city has ap-

proximately 1.3 billion gallons of wastewater daily, and during wet weather the system can handle over double that volume, but once those systems reach capacity the excess water is discharged into local waterways to avoid backup into local homes and businesses. While those buildings are protected, the wastewater then pollutes local waterways.

Mayor's Office: Mayor Adams, EPA Break Ground on \$1.6 Billion Project to Protect Gowanus Canal From Sewage Overflow, Add 3.6 Acres of Public Waterfront Space (March 15, 2023.)

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### **Governor Announces Investment in Statewide Fair Housing Testing Program**

On February 24th, 2023, New York State Governor Kathy Hochul announced a state-wide, \$2.2 million investment in New York's Fair Housing Testing Program. The expansion will be overseen and administered by New York State Homes and Community Renewal's Fair and Equitable Housing Office. The purpose of the Fair Housing Testing Program is to increase investigations into housing discrimination and enhance education and outreach efforts for fair housing rights, including for individuals with a history of involvement with the criminal justice system. The program will contract with six non-profit organizations to test for discrimination in renting and buying in 48 counties across the state. The Fair Justice Housing Center will perform the testing for New York City.

Governor's Office: Governor Hochul Announces Expanded Efforts to Combat Housing Discrimination Across New York (February 24, 2023).

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### **City Council Introduces Bill to Shorten Street Resurfacing Timelines**

On February 2, 2023, Council Member Justin L. Brannan introduced Introduction No. 905 of 2023 in the New York City Council. The bill aims to ensure that all street resurfacing work is completed within two weeks from the start date. To enforce this change, the bill would call on the New York City Department of Transportation to confirm that all street resurfacing work be finalized within two weeks of the start of the work. If more than two weeks are needed for the work to be completed, Transportation must notify the surrounding community as to why additional time is needed and the new expected timeline for completion. The bill aims to create a simplified and coordinated process among all involved parties, thus improving the efficiency of street resurfacing projects.

CC: Stated Meeting, (Int 905-2023, February 2, 2023).

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## RECENT EVENTS

### CITY LAW BREAKFAST SERIES

Jessica S. Tisch, Commissioner of the Department of Sanitation spoke at the 184th CityLaw Breakfast on February 16, 2023. Commissioner Tisch discussed how the COVID-19 pandemic affected cleanliness in the city as budget cuts restricted many DSNY services. Restoring and enhancing those sanitation services is a priority for the Adams administration. Commissioner Tisch said that the agency has identified new approaches on improving cleanliness in the city. Targeted neighborhood task forces will identify areas that need additional cleaning sweeps. Areas like underpasses or greenways that easily accumulate trash were originally out of the DSNY's jurisdiction but are now included in sweeps. Changing trash set out and pick up times can reduce the amount of time rats have to access food sources. Commissioner Tisch also discussed the new citywide composting program that will roll out over the next 18 months. The agency is also increasing enforcement of illegal dumping through the installation of cameras at common dumping sites. Finally, the city is examining containerization and looking at factors like how to install containers on streets with limited curb space or impacts on parking. Commissioner Tisch said that working for city government has been "one of the greatest gifts of my life," as she is happy that every place she's gone to she's had the opportunity to make a positive change.



*Full CityLaw Breakfast video can be watched at [www.citylaw.org](http://www.citylaw.org).*

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