

Supreme Court of the State of New York
County of Kings

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In the Matter of the Application of

John O'Rourke, William Larney, Jane Hickey, James
Freund, Marian Kelly, Daniel Horan, Andrezej Malk, Tracy
Gazzani, Michael Asarita, Kathleen Ryan, May McNally,
"Jane" Moyse, Margaret McLaughlin, Amanda Regnier,
Penny Denis, Quan Zhong, Michelina Mazziotta, Nicholas
Esposito, Annie Ma, Carrie Racanelli, Lee Thomas, Nina
Behan, Gina Colon, Lenore Montaperto, Joseph Sokoloski,
Vickie Deltoro, Robert McCarthy, Alwyn Chan Go,
Ruthann Adinolfi, Anthony Ilardi, Bouchra Ezznati, Xiao
Jun Chen, Bing Guo, Mohamed Hussein, Sofia Nawaz,
and Rhoel Macapobre

Index #
Date Filed:

Petitioners

-against-

Verified Petition

The City of New York, The New York City Department of
Sanitation, Kathryn Garcia as Commissioner of the New
York City Department of Sanitation, Henry Ehrhardt as
Director of the Bureau of Community Affairs of the New
York City Department of Sanitation, Bridget Anderson, as
Deputy Commissioner of Recycling and Sustainability of the
New York City Department of Sanitation, Andrew Pugliese,
as Brooklyn Borough Chief of the New York City
Department of Sanitation, and Nando Sala, as BK South
District Superintendent of the New York City Department
of Sanitation.

Respondents

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The Petitioners herein aver as follows:

First: This is an Article 78 proceeding to compel the respondents, the NYC Commissioner of Sanitation, the City of New York and the City of New York Sanitation Department, and other officials of the New York City Department of Sanitation to reverse the departmental determination to discontinue the collection of waste at the residential properties of the petitioners and to immediately restore said collections.

Statement of Facts

Second: Each petitioner is either a

1) homeowner of a one or two family home located on “dead end” streets within the Bay Ridge section of Community Board 10, Brooklyn, New York, i.e., Barwell Terrace, Hamilton Walk, Lafayette Walk and Wogan Terrace. (These have come to be known as “alley streets” in local parlance. Each of these alley streets is somewhat different from the usual street in New York City. The homeowners own to the center of the “street”. Typically, in the City of New York, homeowners own to the front of a lot line, and the City owns the sidewalk and street.) Exemplar Deeds for each walk or terrace is attached as exhibits 1A, 1B, 1C or 1D,

or

2) a homeowner of a one or two family home on the adjacent public streets crossing the entries to each of the dead end alley streets at right angles. (Hereinafter “the adjacent public streets”)

Second: Each alley street, despite its actual existence, is designated “unmapped” by the City.

Third: Though the residents of the alley streets pay taxes, as any homeowner, the alley streets are not maintained by the Department of Transportation and snow is not plowed by the Department of Sanitation.

Fourth: The streets are called “private”, though the owners advise they are certainly not “private”, in the dictionary sense. They are open to be traversed by the public and frequently are. They are not gated like a classic private community. (Photos 2A, 2B, 2C, 2D)

Fifth: Until recently, one of the few services provided by the City for at least fifty, and likely over 80 years to alley street residents had been standard “frontside” collection of garbage and waste. The residents set their containers at the property edge and sanitation collected the waste on a definite schedule, using a small collection truck, called a Motorized Litter Patrol truck (MLP), combined with manual collection. A DSNY worker walked down the street to collect the refuse, dumped it into a large barrel on a manually operated cart and rolled it to an MLP waiting at the adjacent public street. It was then dumped into the MLP collection bin. (Clifford Aff. Exh. 3)

Sixth: Upon information and belief, no problems have ever been encountered with this system. No known injuries have ever been sustained by any sanitation worker in the process of collection. There is no known indication of any complaint from the public, the residents or DSNY workers concerning the arrangement before February 27, 2017. (Beckmann Aff. Exh.4, Clifford Aff. Exh. 3).

Seventh: On or about that date, petitioners and all residents on the alley streets received notices from DSNY, dated February 23, 2017, that beginning on March 13, 2017 waste collection service along the four streets in question would cease. (Exemplar Notice Exh. 5). Instead, the residents were instructed to place all refuse out for collection on the curb of the adjacent public street.

Eighth: Each notice stated, *inter alia*:

“The change is made because the private walkways/easements/alleyways are not accessible for sanitation trucks and sanitation workers cannot be entering and traversing through varices (sic- probably should be “various”) private properties to collect trash and recycling (which should be placed curbside on a public street). As result (sic - probably should be “As a result”), DSNY collection service could not continue via these passageways.” (Notice Exh. 5)

Ninth: As a result of the change :

1) residents have to bring heavy trash containers and rubbish as far as a City block for collection and then back, and many are elderly and feeble.

2) because Community Board 10 is within a collection district for organics, each home is asked to set out three containers - standard household garbage, recyclables and organics - necessitating multiple trips from home to the collection site, and in each direction and

3) all the trash and rubbish from the alley streets are now set out, twice weekly, in front of the private homes on the adjacent public streets.

Tenth: The consequences of number 3, above, are particularly substantial.

Eleventh: Because Wogan Terrace, for example, has 20 homes located on it, a minimum of **60** extra trash and recyclable containers are now being set out on the adjacent 94th Street curbside. That does not include the paper recyclables in large plastic bags, and the various other flotsam and jetsam, typically found in a New York City trash pile. At times, this completely obstructs the use of the sidewalk, forcing pedestrians to walk in the street, creating a dangerous condition, particularly for the local residents who habituate those sidewalks.

Twelfth: Similar issues exist on all the alley streets and adjacent public streets.

Thirteenth: The nearer a property on the adjacent public street to the alley street, the more garbage and trash is piled at that point. Because, as will be shown below, each property owner is responsible for abiding by the City laws regulating the set-out and take-in times of the trash receptacles, the adjacent public street homeowners will now be legally responsible for the unidentifiable trash receptacles of all the homeowners on the alley streets, leading to potential citations and fines and worse.

Fourteenth: Also, because DSNY has interpreted § 16-120(a) of the administrative code to prohibit putting one's trash receptacles (DSNY Brochure Exh. 6) at any curbside other than the one in front of one's residence or workplace, the alley street owners are, ironically, subject to a citation if they follow DSNY's new policy. In other words, the alley street owners must break the law to comply with the new DSNY policy and order.

Fifteenth: In response to the anomaly set forth in paragraph fourteenth above, on June 5, 2017, DSNY Director of Community Affairs, Henry Ehrhardt commanded DSNY workers not to "...issue violations to any property owners along the public street for any condition related to the practice." (Ehrhardt Letter, Exh. 7)

Sixteenth: However, there appears to be no method of distinguishing between which "conditions" are "related to the practice" and which are not. And there appears to be no way to distinguish who is in violation or who is not. Thus, no citations can be issued to anybody, even if not related to "the practice". The result will eventually be a local environmental disaster.

Seventeenth: Because the trash is all intermingled and unidentifiable on the adjacent public streets, it encourages dumping by others who have no relation whatsoever to either the alley streets or adjacent public streets involved, further exacerbating the quantity of trash on the adjacent public streets.

Eighteenth: As a result of this change in DSNY policy concerning trash collection procedures, each owner on the alley streets will likely suffer a significant financial loss because of a drop in property value due to the added physical or financial burden required of owners to dispose of trash.

Nineteenth: Faced with these issues, the petitioners herein sought the assistance of the local Community Board,, i.e., Board 10, Brooklyn. (BK10)

Twentieth: The Chair (Doris Cruz) and District Manager (Josephine Beckmann) of BK10 wrote a joint letter to DSNY Commissioner Kathryn Garcia on May 3, 2017 that, among other issues, asked for the restoration of frontside collection on the alley streets. (Ltr., Exh. 8)

Twenty First: On June 5, 2017, DSNY Director of Community Affairs, Henry Ehrhardt, responding for Commissioner Garcia, wrote in relevant part as follows:

"When reviewing the collection routes in Community Board 10, the Department discovered four private streets and alleys that were receiving collection that involved a DSNY-operated mobile litter patrol where a DSNY worker actually walked down the private street/alley to collect refuse and recyclables. The practice was done without direct knowledge of the office that handles all collection operations and in conflict with established department policy in place throughout the city.

Once this come to our attention, DSNY alerted all residents on February 27 that manual service along these four private streets and alleys would cease as of March 13, and residents would be required to place refuse out for collection on the curb adjacent to the public street. All residents were instructed to place their refuse and recyclable materials in front of the private street/alley adjacent to the public street. DSNY personnel have been instructed to not issue violations to any property owners along the public street for any conditions related to this practice.

The New York City Charter authorizes DSNY to make decisions related to the removal and disposition of refuse and recyclable materials. In order for DSNY to consider providing service within the confines of a private street or alley, DSNY must evaluate whether a DSNY employee can safely drive a 25 yard truck, alley truck, or specialized collection truck within the confines of a private street or alley. Such DSNY vehicle must be able to enter and exit such privately-owned area with normal maneuvering by the operator for accessibility. A written agreement must be executed and insurance must be provided. Under no circumstances will DSNY allow its workers to enter an alleyway or private street to provide collection services unless they are using the truck. This protects the safety of our workers.

The four private, unmapped streets and alleys in Bay Ridge would not qualify for such service as they do not meet the criteria listed above. It is true that your constituents may be receiving collection services in a different manner than before, but they are still receiving the same frequency of collection. While DSNY recognizes that this may be of some inconvenience to the residents along these private streets and alleys, the safety of our employees was a serious concern and

this change furthers the goal. " (Ehrhardt Letter, Exh. 7).

Twenty Second: In fact, contrary to the letter, Exh.7, in over fifty, and likely over eighty years of frontside collection on the alley streets, DSNY has never used a truck of any kind - let alone a 25 yard truck - to access the alley streets. DSNY has always used hand carts to collect the trash and bring it to a waiting small garbage truck, most recently an MLP. (Clifford Aff. Ex 3).

Twenty Third: In fact, despite DSNY's assertion in Exh.7 that the collection on the alley streets "...was done without *direct* knowledge of the office that handles all collection operations..." (emphasis added), the collections went on for more than fifty, and likely over eighty years, clearly establishing constructive notice of these operations and *de facto* departmental endorsement of "the practice. " (Clifford Aff. Exh. 3).

Twenty Fourth: In fact, despite DSNY's assertion in Exh. 7 that "the practice" is "in conflict with established department policy in place throughout the City", petitioners, after diligent search, have been unable to locate any such published policy and BK 10 is unaware of any such policy. (Beckmann Aff. Exh. 4).

Twenty Fifth: In fact, despite DSNY's assertion in Ex. 7 that creating a policy prohibiting DSNY workers from entering an alley street without a truck "protects the safety of the workers", in at least fifty, and likely eighty years of that "practice" on the alley streets, there are no known incidents of sanitation worker injury or accident to support such an assertion and petitioners are unaware of any study or other evidence that supports such an ill-founded contention. (Beckmann Aff. Exh. 4, Clifford Aff. Exh. 3)

Twenty Sixth: In fact, despite DSNY's assertion, in the last paragraph of Exh. 7, that the reason for the change in policy is that "...the safety of our employees was a serious concern and this change furthers the goal", that statement conflicts with the information BK 10's understanding that the change in policy was driven by the fact that the "MLP alley truck with two sanitation

workers, formerly responsible for the alley streets and regular cleaning *was discontinued* as a direct result of the organics program because personnel was needed to collect bulk items on a single bin collection truck.” (emphasis added) (Beckmann Aff. Exh. 4). And that assertion by DSNY also conflicts with DSNY's own assertion in paragraph four on the first page of Exh. 7, in which it acknowledged issues with the “litter/dump-out conditions *normally* addressed by Motorized Litter Patrol crews”. [i.e. MLP crews] (emphasis added) As explained in Ms. Beckman’s affidavit, Ex. 4, the MLP crews who did street cleaning (i.e., litter/dump out) were *the same MLP crews* assigned to do collections at the alley streets.

Twenty Seventh: These MLP trucks were assigned to a bi-weekly scheduled route for the alley streets, as well as to collect trash from approximately 30 other public locations (alleys, lanes, narrow overpasses inaccessible by a truck etc) where DSNY workers would manually clean and collect trash and bring it to the MLP. (Beckman Aff, Ex. 4)

Twenty Eighth: However, after the inception of the District Wide Organics Recycling program, DSNY made significant changes to its motorized fleet to accommodate that program. Essentially, new large trucks with split collection bins (one side for solid waste, the other for organics) were added to the fleet and the MLPs were essentially lost, making it impossible for DSNY to continue the MLP cleaning services on a bi-weekly scheduled basis. (Parenthetically, there were other negative consequences resulting from the fleet change causing district wide havoc in the collection of bulk refuse, and hundreds of complaints to 311 and BK10). (Beckmann Aff, Exh. 4; DSNY Ltr. Exh. 7)

Twenty Ninth: Upon information and belief, DSNY did no Environmental Impact Study and issued no negative declaration as to the significance of any environmental impact engendered by this new trash collection policy.

Thirtieth: To date, the DSNY continues to collect the alley street waste from the adjacent public streets, not from the frontside of the alley street homes.

Thirty First: Petitioners assert that this DSNY decision and policy is an arbitrary and capricious determination, contrary to City and State Law and the DSNY Commissioner, and each of the respondents, should be ordered to discontinue the current flawed waste collection policy on the alley streets and restore the frontside collection of waste to the involved alley streets forthwith.

Law

Thirty Second: The following allegations are made by petitioners upon information and belief as advised by their attorney.

City Law

Thirty Third: The Department of Sanitation was created by Chapter 31 of the New York City Charter. Pursuant to §751 of the Charter DSNY is headed by a Commissioner of Sanitation and under §753(a) the Commissioner has

“...charge and control of the streets and the disposal of, and [is] responsible for all those functions and operations of the city relating to the cleanliness of the streets and the disposal of waste, including, without limitation the following: ...(2) the removal and disposition of ashes, street sweepage, garbage, refuse, rubbish and waste; ...(4) the removal of encumbrances from the streets....

Thirty Fourth: To aid in the discharge of his or her duties and the exercise of his or her powers the Commissioner

“may adopt regulations specifying the kind of ashes, garbage, refuse , rubbish or other material or substance that will be collected by the city, from whom it will be taken, the manner in which it shall be arranged, the time when it will be collected and the place at which it shall be deposited for collection, and may prescribe civil penalties for violations thereof.” Charter §753(b).

Thirty Fifth: The charter is clear that such regulations “...shall be enforced by order of the commissioner.” Charter §753(c). In other words, it is a duty, not an option, and a purposeful intent not to enforce the law by the Commissioner would, in and of itself, be unlawful.

Thirty Sixth: The commissioner may also adopt regulations:

“...controlling the use of sidewalks and gutters by abutting landowners and occupants for the disposition of sweepings, garbage, refuse and rubbish, and may provide that the violation thereof shall be punishable by civil penalty. Such penalties shall be submitted to the council and when approved by it shall be published and enforced in like manner as local laws.” Charter §753(d).

These regulations are published in the Rules of the City of New York.

Thirty Seventh: The City Charter defines a “street” for purposes of the above sections to include a

“street, avenue, road, *alley, lane*, highway, parkway, boulevard, concourse, *driveway*, culvert and crosswalk, and every class of public road, square and place, except a wharf, pier, bulkhead of slip by law committed to the custody and control of any other agency.” (Emphasis added). Charter§755.

This definition is echoed in The New York City Administrative Code §16-601(3).

Thirty Eighth: Pursuant to law,

“...the Department *will provide collection service* for ashes and solid waste generated by occupants of *residential buildings*, public buildings and special use buildings, excluding, however, all commercial occupants of said residential buildings, unless such service is otherwise authorized...”. (Emphasis added) RCNY §16-1-02 .

Thirty Ninth: This obligation to provide collection service to all residential buildings, as set forth in paragraph thirty eighth above, is not limited to the waste generated by occupants of residential

buildings on public streets, nor does the rule exclude collection from residences on private streets. Likewise, the obligation to provide collection service is not limited by the width or ownership of the street.

Fortieth: The obligation to provide collection service to all residential buildings, as set forth in paragraph thirty eighth above, does not mandate curbside set-out by the resident or curbside collection by the department.

Forty First: “Curbside collection” is defined at RCNY §16-1.01 as

“collection service where building waste and/or designated recyclable material collected by the Department is placed at the curbside of such building in containers or bundles which are then manually emptied by Department personnel into collection *vehicles*.” (emphasis added).

Forty Second : the Oxford English Dictionary defines a “vehicle” as “A thing used for transporting people or goods, especially on land, such as a car, lorry, or *cart*.” (Emphasis added). The word vehicle is not limited to motor vehicles.

Forty Third: Pursuant to a combined reading of Administrative Code §16-120(c) and a recently effective rule, 16 RCNY §1-02.1, all refuse must be stored in the building or dwelling or at the rear of the building or dwelling and shall not be placed out for collection “earlier than 4 PM on the day before scheduled collection.” But, again, like 16 RCNY § 16-1.02, that section does not mandate curbside set-out by the resident and does not mandate curbside collection by the Department.

Forty Fourth: Although 16 RCNY §1-02.1, which was only effective on May 5, 2017 (after the policy change at issue became effective) does say that solid wastes may not be placed “out by the *curb*” (emphasis added) earlier than 4:00PM, that mandate is only a limitation on residents who actually receive curbside collection. It does not express either a policy or a requirement that the

Department use curbside collection in all residential situations. Indeed, some residential buildings, like those on the streets at issue, do not even have curbs, literally making "curbside" collection, impossible.

State Law

Forty Fifth: Pursuant to SEQRA (the State Environmental Quality Review Act, Chapter 8 of the Environmental Conservation Law), no "action" can go forward before the requirements of SEQRA are met. ECL§8-0109(2).

Forty Sixth: Under ECL§8-0105, relevant "actions" include:

- (I) projects or activities directly undertaken by any agency; or projects or activities supported in whole or part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies; or projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies;
- (ii) *policy, regulations, and procedure-making*. (Emphasis added)

Forty Seventh: This definition is further refined by 6 CRR-NY 617.2(b) as including:

- (2) agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions;
- (3) adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that may affect the environment; and
- (4) any combinations of the above.

Forty Eight: ECL §8-0109(4) further provides that

As early as possible in the formulation of a proposal for an action, the responsible

agency shall make an initial determination whether an environmental impact statement need be prepared for the action. When an action is to be carried out or approved by two or more agencies, such determination shall be made as early as possible after the designation of the lead agency.

With respect to actions involving the issuance to an applicant of a permit or other entitlement, the agency shall notify the applicant in writing of its initial determination specifying therein the basis for such determination. *Notice of the initial determination along with appropriate supporting findings on agency actions shall be kept on file in the main office of the agency for public inspection.* (Emphasis added).

Forty Ninth: Amongst other things, to determine if an environmental impact statement is necessary, the responsible agency must determine the significance of any environmental impact. The regulations provide specific guidance in the criteria that must be considered in arriving at the determination of significance of an “unlisted” action. (As will be discussed later, this case involves an unlisted action. See 6 CRR-NY 617-3, 617-4 and 617.5).

Fiftieth: That regulation states that the mandatory criteria listed “...are considered significant adverse impacts on the environment”, and thus would trigger the requirement of a full Environmental Impact Statement. Among those criteria are :

1) a substantial adverse change in existing air quality, 2) the creation of a material conflict with a community’s current plans or goals as officially approved or adopted, 3) the impairment of the character or quality of important historical, archeological or aesthetic resources or of existing community or neighborhood character, 4) the creation of a hazard to human health, 5) a substantial change in the use, or intensity of use, of land...or its capacity to support existing uses.

Fifty First : To determine whether the action may cause one of the listed adverse impacts, the agency must consider reasonably related long term, short term, direct and cumulative impacts including other simultaneous or subsequent actions which are included in, likely to be undertaken or dependent upon any long range plan of which the action under consideration is a part.

Fifty Second: In turn, the significance of a likely adverse impact, i.e. whether it is material ,

substantial, large or important, is assessed in connection to the setting, probability of occurrence, duration, irreversibility, geographic scope, magnitude and number of people affected.

Fifty Third: An Article 78 proceeding may be used to challenge the final determination of a body or officer.

Fifty Fourth: The questions that may be raised by an Article 78 proceeding, among others, are 1) whether the body or officer failed to perform a duty enjoined upon it by law, 2) whether the body or officer proceeded or is proceeding without or in excess of jurisdiction, 3) whether a determination was affected by an error of law or 4) whether the determination was arbitrary and capricious . CPLR §7803.

Fifty Fifth: In the instant proceeding the petitioners contend that DSNY's determination to discontinue frontside collection on the alley streets in question and to introduce a new policy of waste collection at the curb of the adjacent streets of the alleys:

1) is arbitrary and capricious and in excess of the jurisdiction of the commissioner in that the reasons given for the change in policy are demonstrably untrue;

2) is arbitrary and capricious in that the respondents have declined to collect waste from the "private streets" here involved, even as the DSNY continues to enter upon and collect waste from other private properties throughout the City.

3) is affected by an error of law, i.e., the mistaken belief that curbside collection is mandatory on residential users and that the sanitation department may not collect waste on private property;

4) is affected by an error of law in that the new collection policy on the alley streets orders the petitioners to violate the Administrative code by placing waste receptacles in front of residential properties other than their own.

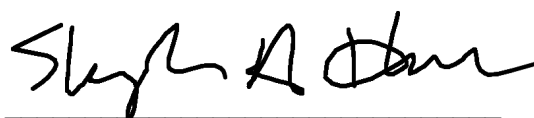
5) is affected by an error of law in that the new collection policy requires the Commissioner to forego a duty enjoined upon her by law, i.e., the enforcement of a City law forbidding the placement of a waste receptacle in front of a neighboring building;

6) violates the DSNY's obligation to comply with State Law in that the new collection policy is an unlisted action under the Environmental Control Law of the State of New York which change cannot proceed in the absence of either a negative declaration of significant environmental impact or completion of a full Environmental Impact Statement and Environmental study.

Wherefore petitioners seeks judgment 1)annulling the decision and policy of the respondents to discontinue collection of waste from the front of the residential buildings on Barwell Terrace, Hamilton Walk, Lafayette Walk and Wogan Terrace, Brooklyn, New York, as set forth in a notice to the respondents and other residents of said streets which notice was distributed on February 27, 2017 and which policy was effectuated on March 13, 2017 and 2) compelling the respondents to immediately restore said collections as they existed prior to March 13, 2017.

Dated: Brooklyn, New York
June 26, 2017

Respectfully submitted.



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