SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CAROL E. HUFF PART 32
Justice

BLACK CAR ASSISTANCE CORP, ET AL.

- V -

CITY OF NY, ET AL.

INDEX NO. 160327/13

MOTION DATE

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this [redacted]

motion is decided in accordance with accompanying memorandum decision

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: APR 23 2013

CAROL E. HUFF J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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BLACK CAR ASSISTANCE CORPORATION, THE LIVERY ROUND TABLE, INC., DIAL 7 CAR & LIMOUSINE SERVICE, INC., DIAL CAR, INC., ELITE LIMOUSINE PLUS, INC., FAST OPERATING CORP., DBA CARMEL CAR AND LIMOUSINE SERVICE, INTA-BORO ACRES, INC., LOVE CORPORATE CAR INC., ROYAL DISPATCH SERVICES, INC., VITAL TRANSPORTATION, INC., ARTHUR HARRIS, and ALEXANDER REYF,

Petitioners,

- against -

THE CITY OF NEW YORK; MICHAEL R. BLOOMBERG, in his official capacity as Mayor of New York City; the NEW YORK CITY TAXI & LIMOUSINE COMMISSION, a charter-mandated agency; and DAVID YASSKY, in his official capacity as Chairman and Commissioner of the New York City Taxi & Limousine Commission,

Respondents.

Index No. 100327/13

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CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioners seek to enjoin implementation of a proposed "e-hail" pilot program for medallion taxis.

The twelve-month e-hail program (the "Program") would enable passengers who have an app on their smartphone to communicate with a medallion taxi to request a pickup. The taxi driver, who would have a corresponding device and app, would confirm the request, indicate that the taxi is "off-duty" and proceed to pick up the passenger.

As stated in the Resolution Approving a Pilot Program to Evaluate Electronic Hail

Applications ("Program Resolution"), adopted by respondent New York City Taxi and Limousine Commission ("TLC") on December 13, 2012, the Program would last for twelve months, app providers would be subject to the approval of the TLC, and fares could be paid electronically through the e-hail app. The Program would be restricted in Manhattan south of 59th Street to a half-mile pickup range, and elsewhere to a mile and a half. Certain areas, such as airports and places with provisions for taxi lines, would be excepted; e-hail requests must not disclose the passenger's desired destination or other information about the passenger; and authorized apps must allow for "one-touch" acceptance of e-hails by the taxi driver. All licensed taxi drivers in the city are eligible to participate in the Program, but participation is optional.

Petitioners are, with one exception (Arthur Harris, an elderly person who does not own a smartphone), entities that represent or have financial interests in businesses that operate vehicles known as black cars or livery or for-hire cars (collectively, "black cars"). Black cars are distinguished from yellow medallion taxis in that, at least generally, they can be summoned by pre-arrangement through electronic communication devices (including phones, radios and, notably, apps for e-hailing), while taxis are procured by street hails. Petitioners contend that the Program will impermissibly blur the distinction between black cars and taxis deliberately set by legislative action.

Petitioners allege seven causes of action: First, that the Program violates New York City Administrative Code § 19-511(a), which requires licenses for communications systems used for arranging pickups; second, that the Program violates NYC Admin. Code § 19-507(a)(2), which prohibits drivers from refusing to pick up passengers without justifiable grounds; third, that the Program is not a permissible pilot program as provided for in NY City Charter § 2303; fourth,

that respondents failed to follow procedures required for rules changes pursuant to the New York City Administrative Procedure Act; fifth, that the TLC failed to follow its own rules for implementing pilot programs; sixth, that the Program violates the State Environmental Quality Review Act (SEQRA, 6 NYCRR § 617) and the City Environmental Quality Review rules (CEQR, 62 RCNY § 5-01 et seq.), because the TLC failed to perform a review of the Program's potential environmental impacts; and seventh, that the Program violates New York City Human Rights Law § 8-107(4) because it will have a disparate, discriminatory impact on the elderly.

By order dated April 8, 2013, Metropolitan Taxicab Board of Trade was given leave to intervene as a respondent.

This proceeding, brought pursuant to CPLR 7801 and 7803(3), is in the nature of mandamus to review. See Scherbyn v Wayne-Finger Lakes Bd. of Co-op. Educ. Serv., 77 NY2d 753, 757-78 (1991) (citations omitted):

> In a proceeding in the nature of mandamus to review . . . a court examines an administrative action involving the exercise of discretion. . . . [N]o quasi-judicial hearing is required; the petitioner need only be given an opportunity "to be heard" and to submit whatever evidence he or she chooses and the agency may consider whatever evidence is at hand, whether obtained through a hearing or otherwise. The standard of review in such a proceeding is whether the agency determination was arbitrary and capricious or affected by an error of law.

A threshold issue is petitioners' claim that the Program is merely a "faux" pilot program not authorized by the Charter. In their third cause of action petitioners contend that respondents acted beyond their powers in implementing the Program. The Charter provides: "The jurisdiction, powers and duties of the [TLC] shall include the regulation and supervision of the business and industry of transportation of persons by licensed vehicles for hire in the city, pursuant to provisions of this chapter." NY City Charter § 2303(a).

> Such regulation and supervision shall extend to: . . . The development and effectuation of a broad public policy of transportation affected by this chapter as it relates to forms of public transportation in the city, including innovation and experimentation in relation to type and design of equipment, modes of service and manner of operation, which for limited purposes and limited periods of time may depart from the requirements otherwise established for licensed vehicles pursuant to this chapter.

NY City Charter § 2303(b)(9).

Title 35 of the Rules of the City of New York ("RCNY") contains rules applicable to the TLC. 35 RCNY § 52-21(a) affirms that "experimentation through pilot programs [authorized by the Charter] may, for limited purposes and limited periods of time, depart from the requirements established in these Rules."

Petitioners focus on the requirement for "limited purposes and limited periods of time" in defining a pilot program, arguing that the Program has neither.

In contending that the Program is not time-limited, petitioners assert that effectively it is an implementation that cannot be reversed once in place. They argue that the TLC, after it withdrew contested proposed rule changes that would have implemented a permanent program, then proposed the experimental Program as a way to get around the process for rules changes. However, the Program's twelve-month time limitation clearly constitutes a "limited period." When the period is over, neither the TLC nor any other respondent can install the Program permanently by fiat, but still must hold hearings and adhere to other rules changing procedures. That an e-hail system might eventually be permanently implemented because the Program proved to be popular, effective and lawful is not a valid argument against it. Petitioners do not dispute that the TLC has implemented other pilot programs for as long as thirteen months without challenge. See Ashwini Chhabra 2/22/13 Aff., ¶ 44. In Samuelson v Yassky, 29 Misc3d

840 (Sup Ct, NY County 2010), cited by petitioners in connection with the "limited purposes" prong of the Charter provision, the court approved a twelve-month pilot program.

With respect to "limited purposes," petitioners argue that the Program is unlimited in that it is open to every licensed taxi driver in the city, every passenger in the city, and virtually every geographical area of the city. They cite Samuelson, supra, favorably as the only published case applying NY City Charter § 2303(b)(9), because the court upheld a program that was limited to five former bus routes. (The court did not specifically address the meaning of "limited purposes," and neither does the legislative history.) Petitioners, however, are confusing "purposes" and "extent." The extent of the Program is city-wide, but its purpose is to "test and evaluate smartphone electronic hail applications that can be used to request taxicab service." Program Resolution at 1. The purpose is limited in that it contains nothing permanent or mandatory. Any experiment to determine whether an e-hail program will work in New York City would require extensive participation to determine, for example, effects on street-hail availability and whether there would be sufficient numbers of participating taxi drivers to meet demand.

For these reasons, TLC's designation of the Program as a "pilot program" within the meaning of the Charter and RCNY is upheld. Accordingly, petitioners' third cause of action is denied.

In their first cause of action petitioners contend that the Program violates NYC Admin. Code § 19-511(a) in that it does not license app providers, which are analogous to base station operators. Section 19-511(a) provides: "The commission shall require licenses for the operation of two-way radio or other communications systems used for dispatching or conveying

information to drivers of licensed vehicles . . . and shall require licenses for base stations, upon such terms as it deems advisable. . . ." (Petitioners approvingly cite a TLC ruling that a license for a base station satisfies the licensing requirement for an e-hail "communications system." See Reply Memorandum of Law at 8, n 6; TLC Industry Notice #11-16, July 18, 2011.)

This provision of the New York City Administrative Code is not per se one of the rules from which respondents may "depart from" pursuant to NY City Charter § 2303(a) ("may depart from the requirements otherwise established . . . pursuant to *this chapter*) or 35 RCNY § 52-21(a) (may "depart from the requirements established in *these Rules*") (emphases added). However, the TLC has been given the authority to issue and set the conditions of licenses (§ 19-511[a], supra "[upon such terms as it deems advisable"]; 35 RCNY § 52-03) and it has done so with respect to base station operators, for example, in 35 RCNY § 59B-04 et seq. Thus, the Administrative Code requires the TLC to issue licenses, a requirement which may not be waived, but the TLC sets the license conditions, which may be "departed from."

In the Program the TLC proposes to issue temporary "authorizations" pursuant to a thirty-two page Memorandum of Understanding ("MOU") that repeats many of the requirements (such as insurance and bonding) for a license, but differs in certain respects including as to term. The renewable term for a base station license is three years (35 RCNY § 59B-06[a][1]), while the MOU authorization is for one year only and is terminable by the TLC without cause.

To compel the TLC to issue licenses for a full three years would be to defeat the purpose of an otherwise lawful pilot program, and, indeed, lend support to petitioners' own argument that the Program was intended to be permanent. The use of the term "authorization" in the MOU rather than "license," so as to avoid confusion as to what the MOU was granting, is a negligible

difference that is not sufficient to defeat the Program. Here, the authorization functions as a temporary, limited license, which of course is appropriate for a pilot program. Accordingly, petitioners' first cause of action fails.

And also, accordingly, respondents are permitted temporarily to waive the provision of 35 RCNY § 54-14 prohibiting the use of electronic devices while operating vehicles, since the rule is one that TLC may "depart" from in a pilot program. See 35 RCNY § 52-21(a), supra. Petitioners complain that taxi drivers' use of the "one touch" e-hail system will distract them and cause accidents, but neglect to point out that their own drivers are permitted to use such devices already, in addition to phones and two-way radios.

In their second cause of action petitioners contend that the Program violates NYC Admin. Code § 19-507(a)(2), which prohibits drivers from refusing "without justifiable grounds, to take any passenger or prospective passenger to any destination within the city." Petitioners argue that because a driver is free to accept or not accept an e-hail notification on the driver's smartphone, he or she can be selective about which passengers to pick up. Also, they argue that the driver can cancel an e-hail acceptance upon seeing the prospective passenger or upon seeing a "more attractive-looking" passenger.

In fact, at least on its face, the Program appears better aimed at avoiding discriminatory passenger selection. The driver must accept an e-hail without knowing the passenger's identity or destination. If the driver cancels the acceptance, the incident has been recorded so that a potential passenger complaint can be better investigated. In any event, one of the purposes of a pilot program such as this is to determine in real-world conditions whether discriminatory passenger selection will increase, decrease or remain the same under an e-hail program.

Accordingly, the second cause of action is denied.

In their fourth cause of action petitioners contend respondents violated Chapter 45 of the New York City Charter, the City Administrative Procedure Act ("CAPA"). NY City Charter § 1043 provides, "No agency shall adopt a rule except pursuant to this section," which prescribes procedures for such adoptions.

This Court has already found that the Program is a valid pilot program. Such programs do not require "rule" changes to be put into effect because 35 RCNY § 52-21(a) authorizes departures from rules. Petitioners' citation of Singh v Taxi & Limousine Commn., 282 AD2d 368 (1st Dept 2001) does not alter the extension of that finding to this cause of action. In Singh, the TLC sought to shorten the grace period for the renewal of an operator's license from six months to thirty days after the license expired. The court found: "The policy change, which materially affected the rights of all such licensees equally and without exception, effectively amounted to the adoption of a new 'rule.'" See also Miah v Taxi & Limousine Commn., 306 AD2d 203 (1st Dept 2001) (policy was deemed a rule when it "was intended to be applied generally to all cab drivers seeking renewal of their taxi drivers' licenses, without regard to individual circumstances or mitigating factors, and it is indisputable that it materially affected the rights of all such licensees equally and without exception.") The Program, which is limited in time and in which drivers participate at their own option, does not fall within these definitions of "rule." Accordingly, the fourth cause of action is denied.

In their fifth cause of action petitioners contend that respondents acted arbitrarily and capriciously in failing to comply with TLC procedures for initiating pilot programs. (After this proceeding commenced, the TLC amended the Program Resolution in response to several of

petitioners' objections in connection with these procedures.) With respect to pilot program proposals, 35 RCNY § 52-24 et seq establishes guidelines aimed at ensuring the thoroughness of the submission and of its review. Respondents counter that, since the TLC itself originated the proposal, the proposal was sufficiently well known to satisfy the purpose of these guidelines.

An administrative agency, "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference . . . " Partnership 92 LP & Bld. Mgt. Co. Vv State of N.Y. Div. of Hous. & Community Renewal, 46 AD3d 425, 429 (1st Dept 2007), aff'd 11 NY3d 859 (2008). The TLC's conclusion that it had sufficient information to evaluate the proposed Program was not arbitrary or capricious. Accordingly, the fifth cause of action is denied.

In their sixth cause of action petitioners allege violations of SEQRA and CEQR, supra, by failing to conduct a review of the potential environmental impacts of the Program. Petitioners have demonstrated that they have standing by alleging they would be affected by potential environmental harms such as increased traffic. See Committee to Preserve Brighton Beach and Manhattan Beach, Inc. v Planning Commn. of the City of New York, 259 AD2d 26 (1st Dept 1992).

Under both New York State and City law, "No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQRA." 6 NYCRR § 617.3(a). Pursuant to 6 NYCRR § 617.2(b) "actions" include:

> (1) projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure . . . :
> (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.

The twelve-month Program arguably falls within subsection three, "adoption of agency . . . resolutions that may affect the environment." Once it is found that an action exists, the agency must make a determination as to whether it is a Type I or Unlisted action that requires an Environmental Impact Statement, or a Type II action, which does not. The statute's non-exhaustive list of Type I actions includes land use or resource management plans, changes in zoning, acquisition or transfer of more than 100 acres of property, and construction of or additions to certain buildings. 6 NYCRR § 617.4(b)(1 through 9). "Unlisted" activities encompass activities affecting agricultural zones, historic sites, or parkland or open space. 6 NYCRR § 617.4(b)(8 through 10). The Program does not implicate any of these enumerated Type I or Unlisted actions. In deciding whether an action implicates a non-enumerated activity, SEQRA requires the agency to consider a number of other criteria listed in 6 NYCRR § 617.7(c)(1)(i through xii). Of possible relevance, the criteria include such factors as "substantial adverse change . . . in traffic or noise levels" (i), or "the creation of a hazard to human health" (vii).

There is no indication that the Program will have such effects. Petitioners' two experts' affidavits contending that the prospective Program will have substantial environmental impacts is undercut by their failure to make any mention of evidence already available – the unrestricted use by petitioners' fleets of e-hail applications since May 2011 (Petition, ¶ 48).

Since it is not a Type I or Unlisted action, the Program falls within Type II actions not

subject to review under SEQRA. See Civic Assn. of Utopia Estates, Inc. v City of New York, 175 Misc2d 779, 782 (Sup Ct, Queens County 1998) ("[C]ase law does not compel the conclusion that a formal declaration of action Type is required in cases where, as here, the action is clearly a Type II action and not subject to SEQRA review."), aff'd 258 AD2d 650 (2d Dept 1999). Accordingly, the sixth cause of action is denied.

In their seventh cause of action petitioners contend that the Program violates New York City Human Rights Law § 8-107(4), which prohibits discrimination on the basis of age. Petitioner Arthur Harris is an elderly person who states that he does not own a smartphone and does not intend to purchase one, and fears that as a result of the Program there will be fewer taxis available for street hails.

This section of the Human Rights Law pertaining to public accommodations applies to "any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation . . ." The TLC is not a place or provider of public accommodations, however, but a governmental entity that licenses and regulates such providers. In Noel v New York City Taxi & Limousine Commn., 687 F3d 63, 72 (2d Cir 2012), the court found that, for purposes of the Americans with Disabilities Act, "the TLC [did] not violate the ADA by licensing and regulating a private taxi industry that fail[ed] to afford meaningful access to passengers with disabilities." Petitioners argue to include the TLC as a "manager or superintendent" within the list defining "person," above, but cite no case law supporting their position.

In any event, there is no clear evidence that the Program will have a potential disparate impact on the elderly. A national poll cited by petitioners' expert, which shows a smaller

percentage of smartphone ownership by the elderly, may not accurately reflect the situation in New York City. And as more uses are found for smartphones (such as is reflected in the worldwide growth of e-hail applications), more people might come to use them. A possible beneficial effect upon the elderly is the potential ability to more efficiently locate an available taxi, reducing time spent standing or walking.

In addition to asserting these seven specific causes of action, petitioners devote much argument in the petition and other papers to the contention that granting medallion taxis the ability to use e-hail apps is impermissible in light of a general legislative intent to limit taxis strictly to street hails in order to avoid taxi unavailability and passenger discrimination. (Petitioners cannot and do not contend that any legislature intended to establish or maintain black cars' economic advantage with respect to new technologies.)

Petitioners point to no statute that directly supports their contention. Medallion taxis have the exclusive right to respond to street hails (NYC Admin. Code § 19-502[1]), and black cars may pre-arrange pickups but are prohibited from picking up street hails (NYC Admin. Code § 19-507[a][4]). In 1985 the TLC – not the City Council or other legislative body – mandated that medallion taxis were prohibited from using two-way radio communications by March 1987 (TLC Resolution, Feb. 13, 1985), finding that "the problem of taxicab unavailability has been severely exacerbated by the growth of medallion taxicab radio groups in recent years whose members service radio customers thereby making their taxicab unavailable for street hails." Id.

Even if they could point to a legislative scheme in that context, petitioners have not demonstrated that the 1985 radio-dispatch situation with taxis is sufficiently comparable to the proposed e-hail Program so that the same problems of taxi unavailability and passenger

discrimination are destined to occur. The Program is aimed at determining whether such issues and others will arise, before the TLC must commit to more permanent rulemaking.

Accordingly, it is

ADJUDGED that the petition is denied, the restraining order is lifted, and the proceeding is dismissed.

Dated: APR 23 2013

CAROL E. HUFF
J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).