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Diamond Tries New Tactic in Lawsuit vs. City

by Brooklyn Eagle (edit@brooklyneagle.net), published online 12-16-2011

BROOKLYN — Robert (Bob) Diamond, the Brooklyn rail fan — whose tours of the long-unused 19th century tunnel under Atlantic Avenue and plans for a private trolley line in Red Hook were scuttled by city agencies — has a new attorney who is taking a new tack in representing Diamond.

As the Eagle reported recently, Diamond and his Brooklyn Historic Railway Association are suing the City of New York, the city Department of Transportation (DOT), the Fire Department and several high-level officials for more than \$100 million. The suit was filed on Dec. 1 in Brooklyn Supreme Court.

Diamond's troubles, which are well known to longtime readers of this paper, are outlined in the complaint. Diamond, using old documents, discovered the abandoned tunnel, which was last used by the Long Island Rail Road in the early 1860s, in 1980. In 1986, after approval by several city agencies, he and the city approved a 10-year agreement by which he was allowed to use the tunnel.

After years of conducting historical tours of the tunnel, with a manhole on Atlantic Avenue as the entrance and exit, according to the court document, he was informed by the DOT that he had to renew his "revocable consent" agreement for another 10 years. Then, in 2009, after he started to install another manhole as an entrance/exit, the DOT objected.

Soon, DOT began putting conditions on his tunnel tours. Eventually, after he and Rooftop Films planned a film showing inside the tunnel, Fire Commissioner Salvatore Cassano wrote to the DOT, saying he was concerned that having that many people inside the tunnel might constitute a hazard. Afterward, the document says, DOT banned Diamond or the BHRA from the tunnel, even to correct "alleged deficiencies."

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As for the Red Hook trolley route, which would have used historic trolleys that Diamond and the BHRA obtained during the 1990s, the BHRA and DOT came to an agreement that the DOT would sponsor the organization for a federal grant for a local trolley system. Diamond received the grant after satisfying federal requirements by putting up some of the organization's own money, says the court document.

In 2000, Diamond also obtained city ULURP (Uniform Land Use Review Process) for the trolley project and began laying tracks in several local streets. DOT gave its approval for this, although this, too, was termed a "revocable consent."

However, starting around 2001, according to the court document, the DOT gradually pulled its support for the project, eventually stopping payments and announcing it would not sponsor the BHRA for another grant. In 2003, the court document says, the DOT "revoked its consent" for the project and ripped out rails, catenary wires and signals from local streets.

Diamond's new attorney, Gabriel Salem of New Basin, said earlier attorneys erred when they took the city's word that the agreements between Diamond and BHRA and the city were "revocable consent." "They were basically just begging the city for another chance," he said.

Salem maintains that the agreements should never have been considered revocable consent in the first place, and that in fact, Diamond was a "franchisee."

In 1986, the now-defunct Board of Estimate, then the city's highest governing body, recommended that the DOT give Diamond a 50-year agreement. "A 50-year agreement can only be tied to a franchisee," says Diamond. Also, the agreement as it was eventually approved specified that Diamond give the city a percentage of his earnings from use of the tunnel. "Usually, only franchise agreements have percentages," said Salem. "Revocable consent agreements are almost always a flat fee and usually apply only to private property [not a tunnel] beneath a city street."

In addition, Salem charged that the city, in some of its actions, violated regulations. "The fire commissioner recommended that consent [for use of the tunnel] be revoked, but he never went down there. It was only based on pictures to the web site."

The letter by Cassano, Salem charged, was couched in language to make it seem like a recommendation, "but it was in effect a vacate order." If it were officially issued as a vacate order, he said, the city would have to cite particular violations.

While to many people the difference between a franchise and revocable consent may be blurry, "Ann Koenig [DOT executive director of franchises, concessions and revocable consent, who signed several letters to Diamond and the BHRA cited in the document] should know the difference," said Salem.

In the Red Hook trolley case, while DOT officials in 2003 were widely quoted as saying that Diamond had failed to raise enough private matching funds, "that's just what they told the newspapers," said Salem. "They never sent [Diamond] any e-mail or letter saying he had to raise funds."

In response, a spokesperson for the New York City Law Department told the Eagle, "The City withdrew its revocable consent owing to serious public safety concerns cited by FDNY, arising from the conditions in and the difficulty of access to the tunnel."

Diamond and the BHRA are seeking reinstatement of the trolley franchise and \$25 million in compensation; or alternatively \$135 million in compensatory damages plus more damages of lesser amounts as well as punitive damages.

— Raanan Geberer
Brooklyn Daily Eagle

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