What Went Wrong: A Legal Perspective of Congestion Pricing in New York City

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Introduction

New York City’s population exceeds 8 million, and by the year 2030, it is projected to grow by one million.\(^1\) With more people, come more cars. Congestion in the Central Business District of Manhattan (“CBD”) is a “major problem,” and population growth will make this problem worse.\(^2\) Furthermore, congestion impacts New York City and its residents in more ways than one. According to the New York State Legislature, “traffic congestion in New York City’s business district has a severe adverse impact on public health, the environment of New York City and adjoining areas, and overall employment and job development.”\(^3\) As the legislature suggests, there are a number of reasons why New York City should take steps to mitigate congestion within its limits.

As a means of mitigating congestion and its associated economic, environmental, and public health concerns, the Mayor of New York City, Michael Bloomberg, sought to implement a road-pricing scheme called “congestion pricing.”\(^4\) The Environmental Protection Agency has defined congestion pricing as a “fee charged for driving on specific roadways during times of dense traffic.”\(^5\) Congestion pricing is intended to discourage the use of automobiles, especially

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\(^1\) Press Release, New York City Department of City Planning, City Planning demographers Paint Picture of City’s Future Population at 9.1 Million, Detailing How City Will Grow by 2030, Dec. 13, 2006. “Manhattan will see the second highest post-2000 growth.” Id.


\(^3\) 2007 N.Y. Laws ch. 384. Bruce Schaller noted how congestion pricing carries the potential to “reduc[e] congestion; generat[e] revenues to improve roads and public transportation; reduc[e] vehicle emissions and gasoline consumption; and improv[e] the efficiency of the city’s economy.” Schaller, supra note 2.


during peak hours, and encourage drivers to consider alternatives to driving.\textsuperscript{6} Economists have endorsed congestion pricing as the “single most viable approach to reducing traffic congestion,”\textsuperscript{7} and it has proven successful in cities like London and Stockholm, where it has reduced congestion by fifteen and twenty percent respectively.\textsuperscript{8} By defeating congestion pricing on April 7, 2008, the New York State Legislature suspended New York City’s ability to follow in the footsteps of its sister cities and become the first city in the United States to charge drivers a fee to enter its congested core.\textsuperscript{9}

Like many other land use decisions, congestion pricing was fought in the political arena. Since the Mayor and City Council of New York City lacked the authority to implement congestion pricing, it was necessary to build political support for the proposals, especially in the outer boroughs, before seeking approval from the Legislature. Despite the significant role politics plays in land use decisions, this paper approaches congestion pricing from a legal perspective.

The first section of this paper investigates the authority of New York City and New York State to regulate roads, including the authority to charge fees for the use of its roads. The second section discusses the history of congestion pricing in New York City and the shortcomings of the congesting pricing proposals, including the privacy and parking implications of congestion pricing. In light of the defeat of congestion pricing in New York City, the third section proposes and evaluates alternatives to congestion pricing.

\textsuperscript{6} Id.
\textsuperscript{7} U.S. Department of Transportation, http://www.fightgridlocknow.gov/docs/upafrfinal20061204.htm (last visited Apr. 27, 2008).
\textsuperscript{9} Id. As an aside, the secretary of transportation is opposed to raising gas taxes as a means of relieving congestion.
I. AUTHORITY OVER THE USE OF ITS ROADS: NEW YORK STATE VERSUS NEW YORK CITY

In the early nineteenth century, New York City ("City") became “seised in fee” of the streets of the City.\(^{10}\) Under § 178 of the Act of 1813, the former owners of the streets of the City (or what has become the streets) transferred their interests, voluntarily or compulsorily, to the corporation of the City.\(^{11}\) Significantly, the state (not the City) compensated the owners of the property for this taking,\(^{12}\) and the City, as trustee, holds the streets in trust for the benefit of the people of New York State (not New York City alone).\(^{13}\) In addition to being a trustee, the City has the authority to regulate its streets under article IX, § 2(c)(6) of the New York State Constitution, Municipal Home Rule Law § 10, and Vehicle and Traffic Law § 1604.\(^{14}\) However, the New York State Legislature ("Legislature") “retains ultimate control” over the streets,\(^{15}\) and any power delegated to the City is subject to the Legislature’s control.\(^{16}\)

Notwithstanding the constitutional and statutory authorization to regulate its streets, the City lacks the authority to “pass, enforce or maintain any ordinance, rule or regulation requiring from any owner of a motor vehicle or motorcycle . . . any . . . fee . . . for the use of the public highways.”\(^{17}\) Given this lack of authority, the City is dependent upon a delegation of authority from the Legislature to charge vehicles a fee to enter the congested core of Manhattan (or implement congestion pricing). Over the past twelve months, the Mayor has been lobbying the

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10 People v. Kerr, 27 N.Y. 188, 190 (1863); Revised Law of New York of 1813, § 118.
11 Kerr, 27 N.Y. at 210.
12 Id.
13 Kerr, 27 N.Y. at 211.
14 The Vehicle and Traffic Law uses the word “highway,” not streets, but defines a highway as “the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.” N.Y. VEH. & TRAF. § 118 (McKinney 2008).
15 AFL-CIO v. City of Albany, 72 N.Y.2d 96, 101 (1988); See People v. Kerr, 27 N.Y. 188, 213 (1863). “The city corporation . . . is but an agent of the State. Any control which it exercises over [the streets], . . . , is a mere police or governmental power delegated by the State, subject to its control and direction, and to be exercised in strict subordination to its will.” Id.
17 N.Y. VEH. & TRAF. § 1604 (McKinney 2008).
Legislature in order to gain approval for congestion pricing.\(^\text{18}\) Even though this paper views congestion pricing from a legal as opposed to a political perspective, the interrelationship between the former and the latter is undeniable.

II. THE HISTORY OF CONGESTION PRICING IN NEW YORK CITY

On April 8, 2008, the New York State Assembly defeated congestion pricing, albeit behind closed doors, by declining to vote on the proposal.\(^\text{19}\) New York City could have been the first city in the United States to charge vehicles a fee to enter its congested core.\(^\text{20}\) From the time when the Mayor proposed congestion pricing in the spring of 2007,\(^\text{21}\) residents of New York City and their representatives in government attacked and characterized the Mayor’s proposals as inequitable and invasive.\(^\text{22}\) Some aspects of the congestion pricing proposals were vulnerable, both politically and legally, and such vulnerability fueled the opposition and undermined efforts to lobby the Legislature successfully. The Mayor could have obviated the need to amend and defend the more controversial aspects of the congestion pricing proposals by, *inter alia*,

\(^\text{18}\) See William Neuman, *Drivers’ Fee Would Face Uphill Battle*, N.Y. TIMES, April 21, 2007 (quoting Mayor Bloomberg as saying that he would “fight like heck” to get the Legislature to approve congestion pricing).

\(^\text{19}\) Nicolas Confessore, *$8 Traffic Fee for Manhattan Fails in Albany*, N.Y. TIMES, April 8, 2008 (quoting Sheldon Silver as saying, “the congestion pricing bill did not have anywhere near a majority of the Democratic conference, and will not be on the floor of the Assembly”).


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proposing legislation with more privacy and parking protections.23 Simply put, the Mayor could have made congestion pricing more politically feasible by making components of the congestion pricing proposals less legally controversial.

This section retraces the evolution of congestion pricing in New York City, and discusses the shortcomings of Senate Bill 6068 and the Congestion Mitigation Commission’s recommendation to the Legislature, including the legally controversial aspects of these proposals. By retracing and discussing New York City’s missteps, this section serves as a resource for municipalities interested in implementing congestion pricing and as a reminder of the intergovernmental cooperation involved.

A. PlanYC 2030 and S. 6068

Mayor Bloomberg presented congestion pricing to the public in one proposal and to the Legislature in another. In his proposal to the public, the Mayor introduced congestion pricing as a component of a larger plan to enhance the quality of life in New York City called PlaNYC 2030.24 This plan is a guide for the future development of the city and is necessary “to increase open space, expand housing, deal with our congested roadways, create better mass transit options, increase our energy sources and stabilize our water supply or we simply won’t be able to continue the high quality of life we now enjoy.”25 Even though congestion pricing was one component among many, it was a significant component.26 In his proposal to the Legislature, the Mayor introduced congestion pricing with a piece of proposed legislation, which the Senate

26 INTERIM REPORT, supra note 24, at 4.
subsequently printed as Senate Bill 6068 (“S. 6068”). Along with the recommendation of the Congestion Mitigation Commission, this proposal bore the brunt of the criticism and is the focus of this section.

**B. Funding from the Federal Government**

The federal government played a role in congestion pricing in New York City, but compared to the Mayor, City Counsel, and State Legislature, its role was limited. Nevertheless, the federal government has the ability and the resources to influence land use decisions through, among other things, pricing mechanisms. More than thirty five years after William Vickrey proposed the theory behind congestion pricing, the U.S. Congress enacted the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). ISTEA is a way for the federal government to influence land use decisions by providing funding for projects other than highway construction, like congestion pricing in New York City. ISTEA is a source of funding for the U.S. Department of Transportation’s (“DOT”) “Congestion Initiative.” As part of this initiative, the DOT solicited proposals from metropolitan areas across the county to enter into an “urban partnership agreement” under which the metropolitan areas would pursue strategies to

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29 *Hearings on the Transportation Plan for the National Capitol Region Before the Joint Committee on Washington Metropolitan Problems*, 86th Cong. 454 (1959).
31 Tirza S. Wahrman, *Breaking the Logjam: The Peak Pricing of Congested Urban Roadways Under the Clean Air Act To Improve Air Quality and Reduce Vehicle Miles Traveled*, 8 DUKE ENVTL. L. & POL’Y F. 181, 188-90 (1998) (stating that the goal of this “rarely used funding mechanism” is “to reduce vehicle motor usage”).
reduce traffic congestion.\textsuperscript{33} On June 22, 2007, the New York City Department of Transportation, New York Metropolitan Transportation Authority, and the New York State Department of Transportation submitted a proposal to the DOT’s Urban Partnership Program.\textsuperscript{34} In August of 2007, the federal government selected New York City’s proposal, and agreed to commit over three hundred and fifty million dollars to fund congestion pricing.\textsuperscript{35} However, in order to receive this funding, the City Council and the Legislature were required to approve congestion pricing by March 31, 2008, at the latest.\textsuperscript{36} Even though the federal funding was contingent upon the approval of congestion pricing from the City Council and the State Legislature, congestion pricing itself was contingent upon approval from the Legislature.\textsuperscript{37} In addition to forming a partnership with the federal government, the Legislature created a traffic mitigation commission to review the congestion pricing proposals and make recommendations to the Legislature.\textsuperscript{38}

\textit{C. Congestion Mitigation Commission}

Before evaluating the congestion pricing proposals, it is worthwhile to discuss the history of the Congestion Mitigation Commission, including the events preceding and succeeding the submission of its recommendation to the Legislature. As discussed \textit{supra}, New York City lacked the authority to implement congestion pricing and depended upon a delegation of authority from the Legislature.

\begin{itemize}
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{35} William Neuman, \textit{New York to Get U.S. Traffic Aid, but with Catch}, \textit{N.Y. TIMES}, April 15, 2007 (describing the restrictions on the use of the funding). Additionally, the U.S. Department of Transportation accepted proposals from Miami, Minneapolis, San Francisco, and Seattle.
\item \textsuperscript{37} 2007 N.Y. Laws ch. 384.
\item \textsuperscript{38} \textit{Id.}; 2007 N.Y. Laws ch. 384.
\end{itemize}
When the Legislature failed to act upon the Mayor’s proposal by the end of the legislative session in June of 2007, the future of congestion pricing appeared bleak. However, when it reconvened, the Legislature passed the Laws of New York, 2007, Chapter 384, which accomplished a number of things related to congestion pricing in New York City. First, it authorized the mayor to devise a plan to address congestion in Manhattan (“traffic congestion mitigation plan”). The traffic congestion mitigation plan was to include (a) the area of Manhattan to be covered by the plan; (b) the proposed amount of the congestion fee; (c) the technological means of implementing such a pricing scheme; and (d) exemptions from the congestion fee.

Second, it established the New York City Traffic Congestion Mitigation Commission (“CMC”) and authorized this seventeen-member body of appointees to “undertake a review and study of plans,” including but not limited to the Mayor’s plan, to mitigate traffic congestion and other health related concerns in New York City. The appointments to the CMC were divided between the Governor, the Mayor, the Speaker of the Assembly, the temporary president of the Senate, the Speaker of the City Council, and the minority leaders of the Senate and Assembly. To carry out its function, the CMC was equipped with tools such as the ability to “conduct hearings, take testimony and review information and proposals regarding traffic congestion in the city of New York.”

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41 *Id.*
42 *Id.*
43 *Id.*
45 2007 N.Y. Laws ch. 384; Kirsten Danis, *Hearings Begin on Congest Plan*, N.Y. DAILY NEWS, October 24, 2007; Karla Schuster, *Meeting of Traffic Group Poorly Publicized*, NEWSDAY, October 24, 2007 (stating that the commission was unsure whether or not the hearings were publicized enough).
therefore was not required to hold public hearings, it opened its meetings to the public and the
press, which may have created “unnecessary headlines.”\footnote{Matthew Schuerman, Congestion Pricing Headlines, N.Y. OBSERVER, September 26, 2007; Karla Schuster, Meeting of Traffic Group Poorly Publicized, NEWSDAY, October 24, 2007.} Additionally, the legislation required
the CMC to recommend a means of implementing the “traffic congestion mitigation plan,” called
the “implementation plan,” and this implementation plan to provide for a 6.3% reduction in the
average vehicle miles traveled.\footnote{The same percentage was submitted to the U.S. Department of Transportation for the Urban Partnership Agreement on June 22, 2007.} Third, and most importantly, the legislation authorized the
Mayor to implement the traffic congestion mitigation plan if the conditions set forth in the statute
were met.\footnote{2007 N.Y. Laws ch. 384.}

On January 31, 2008, the CMC submitted its recommendation to the Legislature.\footnote{CONGESTION MITIGATION COMMISSION, REPORT TO THE TRAFFIC MITIGATION COMMISSION & RECOMMENDED IMPLEMENTATION PLAN (2008), available at https://www.nysdot.gov/portal/page/portal/programs/congestion_mitigation_commission (click on final recommendation).} On March 31, a committee approved a home rule request on congestion pricing, six to three. Then,
pursuant to the home rule message requirement of the State Constitution, the congestion pricing
proposal went to the City Council for a full vote, and the City Council approved it by a vote of
thirty to twenty.\footnote{N.Y. CONST. art. IX, § 2; Diane Cardwell, City Counsel Approves Fee to Drive Below 60th, N.Y. TIMES, April 1, 2008.} In accordance with this act and the urban partnership agreement, the
Legislature was required to act upon the congestion pricing proposal by March 31, 2008 or risk
forfeiting over three hundred and fifty million dollars in federal funding.\footnote{2007 N.Y. Laws ch. 384, § 6. The legislation and urban partnership agreement use March 31, 2008 as the date by which the Legislature has to vote. However, the legislature did not vote on congestion pricing until April 7, 2008. Apparently, when the vote took place on April 7, 2008, it was not too late to vote.}

The City Council may have approved congestion pricing, but its margin of victory was
narrow, and “opposition remained strong” afterwards.\footnote{Diane Cardwell, City Counsel Approves Fee to Drive Below 60th, N.Y. TIMES, April 1, 2008.} Since many aspects of the congestion
pricing proposals are beyond the scope of this paper, the discussion below is limited to the privacy and parking concerns, which were legally and politically significant.

D. A Critique of the Congestion Pricing Proposals

In May of 2007, the Mayor submitted a piece of proposed legislation on congestion pricing to the Assembly, the Senate, and the Governor.\(^53\) In June, the Senate printed the proposed legislation as Senate Bill 6068 ("S. 6068") and Assembly Committees held hearings with the mayor, members of the city administration, and academics who gave testimony on congestion pricing.\(^54\) Some aspects of this proposed legislation concerned members of the Assembly, and Assemblyman Richard Brodsky, who was asked to review the proposed legislation, characterized S. 6068 as "controversial."\(^55\) Assemblyman Brodsky compiled his findings in a report, which highlights the proposed legislation’s lack of privacy protections and parking permit requirements.\(^56\) The CMC’s recommendation addressed some of Assemblyman Brodsky’s concerns, but ultimately, the CMC’s recommendation failed to appease not only the Assembly, but also groups like the New York Civil Liberties Union ("NYCLU").\(^57\) As this paper suggests, the Mayor should have anticipated the outcry over aspects of the proposals, and could have avoided negatively publicity from members of the Assembly and civil rights groups by proposing legislation with more privacy and parking protections.\(^58\)

\(^{53}\) INTERIM REPORT, supra note 24, at 2.
\(^{54}\) Id. at 3.
\(^{55}\) Id. at 1.
\(^{56}\) Id. at 6 (stating that the “legislation contains no privacy requirements for data collected by the City” and “the legislation does not require residential parking permit programs”).
i. Privacy

S. 6068 called for hundreds of surveillance cameras to be installed in and around the congestion zone. The surveillance cameras would keep track of vehicles entering the congestion zone by collecting and storing the information contained on the license plates of these vehicles. Then, in theory, the government would use the data for billing purposes. Controversially, S. 6068 lacked privacy protections relating to the collection and storing of data, especially “language restricting the manner of operation, data collection, data storage retrieval and disposition.” Furthermore, since drivers would not have the option of paying in cash under S. 6068, they would not be able to “avoid having their vehicle information captured by a public agency, either via an E-Z Pass or license plate image.”

While the New York Civil Liberties Union (“NYCLU”) does not oppose congestion pricing, this “controversial” component concerned the NYCLU because “unchecked surveillance cameras compromise our privacy.” In its testimony before the Congestion Mitigation Committee, the NYCLU stressed the potential for the government, through the surveillance cameras, to track the movements of tens of thousands who drive in Manhattan’s CBD. For example, if subpoenaed, a spouse going through a messy divorce could use this information against another spouse suspected of cheating.

59 INTERIM REPORT, supra note 24, at 4.
61 Maureen B. Cavanaugh, On the Road to Incoherence: Congress, Economics, and Taxes, 49 UCLA L. Rev. 685, 718 (2002). “Objections to [Electronic Road Pricing] (including costs of its introduction, equity and privacy concerns, and avoidance possibilities that create other external effects) are likely to preclude its implementation on a large scale.” Id; INTERIM REPORT, supra note 24, at 6.
The Congestion Mitigation Commission, which is composed of thirty percent attorneys, acknowledged in its recommendation that tracking license plates implicates our privacy and recommended that the City “take appropriate steps to protect the privacy of drivers into the congestion pricing zone.” Specifically, the CMC suggested that the City comply with the privacy standards of the EZ-Pass system, which seems reasonable at first glance. But the NYCLU took issue with this suggestion because the privacy standards of the E-Z Pass system lack “clearly applicable privacy protections” and the NYCLU has been “unable to locate or obtain privacy standards that apply to personal information obtained through the E-Z Pass system.”

The NYCLU applauded the Congestion Mitigation Commission for acknowledging that the congestion pricing proposals implicate our privacy, but Donna Liberman, the executive director of the NYCLU, believes that the CMC should have gone farther and included “explicit, concrete privacy protections” to guard against the potential misuse of the information collected by the cameras and stored in databases. Furthermore, the NYCLU criticized the Traffic Mitigation Act for being “vague and imprecise,” and urged the legislature to incorporate privacy protections into the Traffic Mitigation Act. Additionally, it advocated for “independent

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65 Congestion Mitigation Commission, Report to the Traffic Mitigation Commission & Recommended Implementation Plan 72 (2008). One step that the CMC recommended was the adoption of an anonymous payment option. Id. at 67. Even though this privacy protection is agreeable to the NYCLU, the Traffic Mitigation Act failed to satisfy the NYCLU.
66 Id.
67 New York Civil Liberties Union, Legislative Memo: Congestion Pricing, www.nyclu.org/node/1700/print (last visited Apr. 27, 2008). In this legislative memo, the NYCLU proposes language that would have been satisfactory. Id.
69 S. B. 7243-B, 2008 (N.Y. 2008). The CMC’s recommendations were used to create the Traffic Mitigation Act.
70 New York Civil Liberties Union, supra note 67.
71 See Liberman, supra note 63 (noting that the number of surveillance cameras in New York City is “skyrocketing”).
oversight” of the surveillance system and for surveillance of only license plates, and not people in the car, pedestrians, storefronts, and residences.\textsuperscript{72} Donna Liberman emphasized that the information collected by the cameras should be used for billing purposes only and should not fall into the wrong hands, such as credit card companies, the IRS, or spouses going through a divorce.\textsuperscript{73} “To implement congestion pricing without these simple steps would subject thousands to the intrusive gaze of government peeping toms.” \textsuperscript{74}

Despite the NYCLU’s insistence on more privacy protections, the government’s action seems to comport with the Constitution. Notably, it is the NYCLU’s mission to protect the rights embedded in the Bill of Rights. To argue that the use of surveillance cameras involved in congestion pricing invades our privacy, the NYCLU would look to the Fourth Amendment,\textsuperscript{75} which protects our right “to be secure in [our] persons, houses, papers, and effects against unreasonable searches.”\textsuperscript{76} A “search” occurs when the government infringes upon a reasonable expectation of privacy.\textsuperscript{77} Our reasonable expectations of privacy are not only diminished in a car, but they are also diminished in places (like New York City) where surveillance cameras monitor and record our actions.\textsuperscript{78} Given the precedent in this area of the law, the “controversial” component of congestion pricing comports with the Fourth Amendment.\textsuperscript{79}

ii. Parking Permits

\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{76} U.S. CONST. amend. IV.
\textsuperscript{78} Cardwell v. Lewis, 417 U.S. 583, 590 (1974); New York v. Class, 475 U.S. 106, 112-13 (1986);
To Assemblyman Brodsky and others, not only did S. 6068 fail to protect privacy, but it also failed to protect the neighborhoods around the congestion zone.\(^{80}\) To circumvent the congestion fee, Manhattan-bound commuters would likely park near the border of the congestion zone and ride public transportation to their destinations.\(^{81}\) This would create a situation similar to the situation in Albany where the neighborhoods abutting the Capitol and Empire Plaza serve as parking lots for state employees.\(^{82}\) Even though the neighborhoods around the congestion zone are susceptible to this parking problem, the proposed legislation “does not require neighborhood residential parking permit programs,”\(^{83}\) which would undoubtedly impose restrictions based on residency.

As discussed supra, municipalities in New York are authorized to regulate highways within their boundaries\(^{84}\) but are prohibited from regulating highways inconsistently with the Constitution or any state law. In New York State Public Employees Federation, the Court of Appeals struck down an ordinance that permitted residents who purchased a permit to park in their neighborhoods but restricted non-residents from parking in such neighborhoods during the week.\(^{85}\) Similarly, in Speakerkits, the Court of Appeals struck down an ordinance that prohibited vehicles from parking in a residential area without a permit issued by the village.\(^{86}\) The Court of Appeals struck down these ordinances because they discriminated against non-residents and

\(^{80}\) INTERIM REPORT, supra note 24, at 6.

\(^{81}\) William Neuman, Mayor Offers Permit Parking to Help Traffic Pricing Plan, N.Y. TIMES, March 13, 2008 (discussing the parking problem that congestion pricing could create in the neighborhoods around the congestion zone). In the middle of March 2008, the Mayor was making a last ditch effort to build support for the congestion pricing proposal. The authority to issue the parking permits had been available since the summer of 2007, and thus, the Mayor was acting a little late. Id.

\(^{82}\) Slow Progress on Parking, ALBANY TIMES UNION, April 20, 1998; Progress on Parking, ALBANY TIMES UNION, August 15, 1997.

\(^{83}\) INTERIM REPORT, supra note 24, at 6.

\(^{84}\) N.Y. CONST. art. IX, § 2; N.Y. MUN. HOME RULE § 10 (McKinney 2008); N.Y. VEH. & TRAF. § 1604 (McKinney 2008).


therefore were unconstitutional.\textsuperscript{87} The right to use highways, including use for parking and travel, “rests with the whole people of the state, not with the adjacent proprietors or the inhabitants of the surrounding municipality.”\textsuperscript{88}

Even though residents and non-residents have an equal right to use highways, the legislature has “ultimate control” over the highways and is free to create exceptions.\textsuperscript{89} Creating an exception for a small percentage of Manhattan residents would appear to be politically unpopular; however, S. 6068 delegated power to the City to issue parking permits around the congestion zone.\textsuperscript{90} S. 6068 may have been amended and the CMC’s recommendation may have addressed, to some extent, the privacy and parking issues of the proposals, but these seemingly curable aspects of the proposals continued to trouble the public, their representatives, and civil rights groups. The Mayor should have taken steps to lessen the negative publicity, especially since the City was technologically capable of minimizing any perceived invasion of privacy\textsuperscript{91} and would have been legally capable of issuing parking permits around the congestion zone.\textsuperscript{92} To be sure, it is easy to criticize retroactively, but resources were available to the Mayor and the City of New York to undercut the criticism directed at the congestion pricing proposals.

### III. An Evaluation of the Alternatives to Congestion Pricing in New York City

In \textit{Patterson v. Carey}, the Court of Appeals discussed the Jones Beach Parkway Authority, which was created in 1933 to finance and construct the Jones Beach State Parkway.\textsuperscript{93}

\begin{thebibliography}{99}
\bibitem{87} \textit{New York State Public Employees}, 72 N.Y.2d at, 99-100; \textit{Speakerkits}, 83 N.Y.2d, at 816-17.
\bibitem{88} \textit{People v. Kerr}, 27 N.Y.188, 199 (1863).
\bibitem{89} \textit{N.Y. Veh. & Traf.} § 1604 (McKinney 2008).
\bibitem{90} S. B. 6068, 2007 (N.Y. 2007).
\bibitem{91} \textit{Congestion Mitigation Commission, Report to the Traffic Mitigation Commission & Recommended Implementation Plan} 50 (2008).
\bibitem{92} S. B. 6068, 2007 (N.Y. 2007); \textit{Interim Report, supra} note 24, at 6.
\bibitem{93} \textit{Patterson v. Carey}, 41 N.Y.2d 714 (1977).
\end{thebibliography}
In 1956, due to a population explosion on Long Island, the Legislature undertook a massive road improvement program and empowered the Authority to “reconstruct, widen, and improve the Southern State Parkway.”\textsuperscript{94} In December of 1974, the Authority increased the rate of tolls charged by the authority for the use of the parkway, and a few weeks later, the legislature passed a statute rescinding the increase for the use of a parkway.\textsuperscript{95} The court struck down the statute for violating the due process clause of the State Constitution, the contract clause of the Federal Constitution, and interfering with the discretionary power of the Comptroller to supervise the financial accounts of public authorities.\textsuperscript{96}

\textit{Patterson} helps to illustrate the extent to which the attitude of the New York State Legislature has changed. In 1953, when faced with a population explosion and its associated traffic concerns, the legislature empowered the Jones Beach Parkway Authority to widen the roads for the purpose of reducing congestion.\textsuperscript{97} In 2007, over a half of a century later, the legislature did something else. Instead of dealing with congestion by widening the roads, the legislation created an opportunity for New York City to reduce congestion by providing a disincentive to drive.\textsuperscript{98} Even though this opportunity did not come to fruition, this change in the Legislature’s attitude toward congestion may make the Legislature more receptive to alternatives to congestion pricing. Indeed, the Laws of New York, 2007, Chapter 384 state that, “nothing in

\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id.; N.Y. PUB. AUTH. § 153-b(2) (McKinney 2008).
\textsuperscript{98} 2007 N.Y. Laws ch. 384; DAVID SCHRANK & TIME LOMAX, THE 2001 URBAN MOBILITY REPORT iii (2001), tti.tamu.edu/documents/ums/mobility_report_2001.pdf (reporting that road expansion is not the answer to congestion. While it decreases travel time, it is not the answer because in most cases there is not enough “space, money, and public approval to add enough road space to create an acceptable solution”).
this act shall otherwise prevent or limit the city of New York or the state of New York from taking other steps to mitigate traffic congestion.”

On April 7, 2008, the Legislature defeated congestion pricing, and New York City lost an opportunity to implement congestion pricing, at least temporarily, along with millions in federal funding. Even though “prospects for the bill returning any time soon appear dim,” there are other ways to reduce congestion in New York City. This section evaluates some of the alternatives to congestion pricing, including corridor pricing and increased parking costs, which the CMC considered but rejected in favor of the congestion pricing proposal.

A. Cordon Pricing versus Corridor Pricing

“Cordon pricing” is another name for the road-pricing scheme envisioned for the Central Business District of Manhattan and it operates by imposing a fee to enter a specific area. As an alternative to cordon pricing, authorities like the Thruway Authority could implement “corridor pricing,” which operates by imposing a fee to use a particular stretch of road. Not only is corridor pricing a common road-pricing scheme, but its flexibility is also attractive to governments seeking to tailor tolls to demand.

Currently, fees are imposed on drivers to cross bridges and go through tunnels in and around New York City such as the Tappan Zee Bridge, George Washington Bridge, Whitestone Bridge, and the Holland and Lincoln Tunnels. Under the Traffic Mitigation Act, drivers

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100 Nicholas Confessore, $8 Traffic Fee for Manhattan Fails in Albany, N.Y. TIMES, April 8, 2008 (stating that an Assemblyman from Queens “estimated that opinion among Democrats ran four to one against the plan”).
101 Id.
102 CONGESTION MITIGATION COMMISSION, REPORT TO THE TRAFFIC MITIGATION COMMISSION & RECOMMENDED IMPLEMENTATION PLAN 51 (2008).
104 Id.
105 Id.
would have been charged a congestion fee on top of any fee charged to cross a bridge or go through a tunnel.\textsuperscript{107} However, any bridge or tunnel fee imposed on a driver could have been used as a credit toward the congestion fee.\textsuperscript{108} For example, drivers commuting from New Jersey could have applied their bridge toll as a credit toward congestion pricing (and avoided the congestion pricing fee) whereas drivers commuting from Brooklyn and Queens would have been charged the full cost of congestion pricing. This inequitable component of congestion pricing helps to explain the strong opposition from political figures in the outer boroughs like Queens and Brooklyn.\textsuperscript{109} With or without congestion pricing, in order to discourage New Jersey residents from driving to Manhattan, the Authorities responsible for the bridges and tunnels in and around New York City (like the Thruway Authority) would have to raise their tolls.\textsuperscript{110} To determine whether or not this alternative to congestion pricing is feasible, and for ease of discussion, the following focuses on the New York State Thruway Authority (“Thruway Authority”). The Thruway Authority has authority over the Tappan Zee Bridge,\textsuperscript{111} which is a suitable candidate for congestion pricing due to its popularity among commuters.\textsuperscript{112} Since the Tappan Zee Bridge is a popular bridge to take to New York City, an increase in its tolls should have an impact on driving habits.

\textsuperscript{107} S. B. 7243-B, 2008 (N.Y. 2008).
\textsuperscript{108} Id.
\textsuperscript{109} Jeffrey Harmatz, \textit{Commission Recommends, Officials Respond}, QUEENS LEDGER, Feb. 7, 2008 (stating that congestion pricing has been “met with disapproval by an overwhelming amount of elected officials and community leaders in Brooklyn and Queens”).
\textsuperscript{110} Christopher Jones, Testimony to the New York City Traffic Mitigation Commission, Public Hearing at Hofstra University, (October 24, 2007) (stating how without congestion pricing “there will be even greater pressure to raise tolls on bridges and tunnels . . . further exacerbating the inequities between those who now pay to drive into Manhattan and those who do not”).
\textsuperscript{111} N.Y. PUB. AUTH. § 356 (McKinney 2008).
\textsuperscript{112} New York State Thruway Authority, \url{http://www.nysthruway.gov/index.shtml} (click on Tappan Zee Bridge link) (last visited April 27, 2008).
The State Legislature has empowered the Thruway Authority to “fix and collect tolls,” and like other public authorities in the state, to increase tolls for the use of any highways under its jurisdiction. However, prior to increasing tolls, the Thruway Authority must comply with, in particular, § 2804 of the Public Authority Law and the requirements under § 608 and § 609 of the General Revenue Bond Resolution. Under § 2804 of the Public Authorities Law, the Thruway Authority must submit a detailed report setting forth, among other things, the need for the increase, a schedule of outstanding notes and bonds at the end of its fiscal year, the projected impact of the increase on future use of the highway and on revenues accruing to the authority.

Section 2804 also requires the comptroller to review this detailed report along with the proposed increase. However, as the Court of Appeals held in *Patterson*, this latter requirement interferes with the discretionary power of the comptroller. Section 2804 also requires the Thruway Authority to hold public hearings, reevaluate the proposal after the hearings, and may modify the proposal if it deems “necessary or advisable.” While § 2804 sets forth a number of procedural requirements with which the Thruway Authority must comply prior to increasing tolls, it does not appear to present any substantive obstacles to the implementation of the proposed increases, unlike the General Revenue Bond Resolution.

The Authority’s authority to charge tolls is “subject to agreements with note and bond holders.” One such agreement is the New York State Thruway’s General Revenue Bond Resolution (“Bond Resolution”), which was adopted pursuant to the Public Authorities Law.

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113 N.Y. PUB. AUTH. § 354(8) (McKinney 2008); N.Y. PUB. AUTH § 2804 (McKinney 2008); N.Y. VEH. & TRAF. § 1630(4) (McKinney 2008); NEW YORK STATE THRUWAY AUTHORITY, GENERAL REVENUE BOND RESOLUTION (2007).
114 N.Y. PUB. AUTH § 2804 (McKinney 2008).
115 *Id.*
117 N.Y. PUB. AUTH. § 2804 (McKinney 2008).
118 N.Y. PUB. AUTH., tit. 9,art. 2 (McKinney 2008).
In its Bond Resolution, the Authority covenants that it will fix and collect tolls such that its net revenues will equal the Net Revenue Requirement for each fiscal year.\textsuperscript{119} Furthermore, the tolls to be established “may consist . . . of . . . congestion pricing.”\textsuperscript{120}

Under the Public Authorities Law and the Bond Resolution, the Thruway Authority has the authority to implement congestion pricing, but it also has a fiduciary obligation to its bondholders to “operate the Thruway in a sound and economical manner.”\textsuperscript{121} This obligation, coupled with the covenant to satisfy the net revenue requirement, seems to act as a limitation on the authority of the Thruway Authority to increase tolls. The idea behind congestion pricing is to reduce congestion (or the number of vehicles on the road), and fewer vehicles crossing the Tappan Zee Bridge could reduce the revenue of the Thruway Authority.\textsuperscript{122} Consequently, the Thruway Authority must consider to what extent congestion pricing will impact its revenue and how fluctuations in its revenue will impact its fiduciary obligation to operate the Thruway in a “sound and economic manner.”\textsuperscript{123} To illustrate this point with an extreme scenario, if the Thruway Authority implemented an extremely high congestion fee and discouraged drivers from using the Tappan Zee Bridge, the Thruway Authority might violate the above referenced provisions of the General Bond Resolution.

Currently, the Thruway Authority has imposed a congestion fee for commercial vehicles crossing the Tappan Zee Bridge.\textsuperscript{124} Instead of limiting congestion pricing to commercial

\textsuperscript{119} New York State Thruway Authority, General Revenue Bond Resolution, § 609(1)(a) (2007).
\textsuperscript{120} Id. at § 609(2).
\textsuperscript{121} Id. at § 608.
\textsuperscript{122} If congestion pricing works, and fewer cars are paying tolls, the Thruway Authority might not satisfy its obligations under the Bond Resolution, unless the increases in the tolls makes up for revenue lost.
\textsuperscript{123} New York State Thruway Authority, General Revenue Bond Resolution, § 608 (2007).
\textsuperscript{124} New York State Thruway Authority, http://www.nysthruway.gov/about/factbook/part2.html (last visited April 27, 2008).
vehicles, the Thruway Authority should investigate the viability of increasing tolls for non commercial vehicles.

B. Increased Parking Costs

Transportation Alternatives, an advocate for public transport, has summoned the Mayor and the City Council “to do what is within their own power to reduce traffic congestion.” Among other things, it has proposed that parking garages within the congested core increase their parking fees. Professor Cavanaugh at Washington and Lee University School of Law would support this alternative to congestion pricing over other alternatives, because she believes that congestion pricing is the best solution to the problem of congestion and that charging more to park is the second best solution. Since a parking pricing mechanism appears to cast as wide a net as congestion pricing, and provides a disincentive to drive, it may have the potential to reduce congestion to the same extent as congestion pricing. Furthermore, unlike congestion pricing, the city would not have to rely on approval from the legislature to implement such a system. By raising the parking tax for garages, the City could coerce parking garages to increase their parking fees. This alternative could succeed in New York City because a majority of the people who park in Manhattan park for free. Additionally, the City could

127 Id.
128 This line of thought assumes that the drivers who were going to be subject to the congestion fee were going to pay to park.
129 N.Y. TAX § 1212-A(a) (McKinney 2008); Lysandra Ohrstrom, Activists Break From Huddle After Congestion Pricing Defeat, N.Y. OBSERVER, April 7, 2008.
130 CONGESTION MITIGATION COMMISSION, REPORT TO THE TRAFFIC MITIGATION COMMISSION & RECOMMENDED IMPLEMENTATION PLAN 34 (2008).
131 Id.
encourage public employees to take public transportation by reducing the 142,000 parking placards that it issues to police officers and other public employees.\textsuperscript{132}

\textbf{CONCLUSION}

In defeating congestion pricing, the Legislature forfeited over three hundred and fifty million dollars in federal funding. This was unfortunate. The City could have used this money to reduce pollution, and improve and expand its public transportation system. There are several reasons why congestion pricing, in general, lacks public support.\textsuperscript{133} Members of the public could view congestion pricing as (1) an assault on our right to travel, or (2) yet another tax, or (3) incapable of changing our driving habits, or (4) an invasion of privacy.\textsuperscript{134} Inevitably, politics, while conspicuously absent from this paper, plays a big role in land use decisions. Presumably, the elected officials in the Assembly were doing what they are supposed to be doing and were representing the interests of their constituents. As this paper suggests, one way to make congestion pricing more politically feasible is to make it less legally controversial. In order for congestion pricing to have a future in New York City, the Mayor needs to do a better job at appealing to the public and building public support. One way for the Mayor to appeal to the public is to incorporate more privacy and parking protections into the next congestion pricing proposal. This would silence some of the opponents and undercut the arguments of the others.

\textsuperscript{132} William Neuman & Al Baker, \textit{No Parking Spot? Here are about 142,000 Reasons}, NY TIMES, March 6, 2008.


\textsuperscript{134} Tirza S. Wahrman, \textit{Breaking the Logjam: The Peak Pricing of Congested Urban Roadways Under the Clean Air Act To Improve Air Quality and Reduce Vehicle Miles Traveled}, 8 DUKE ENVT. L. & POL’Y F. 181, 204 (1998).