

New York City Department of Transportation

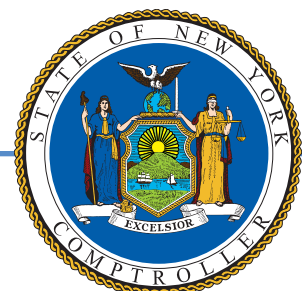
Controls Over Revocable Consents

Report 2018-N-1 | September 2020

OFFICE OF THE NEW YORK STATE COMPTROLLER

Thomas P. DiNapoli, State Comptroller

Division of State Government Accountability



Audit Highlights

Objectives

To determine whether the New York City Department of Transportation (DOT) has billed and collected the correct fees for revocable consents; whether DOT is ensuring that all structures meet the standards required by the Rules of the City of New York; and whether DOT is monitoring to ensure all structures requiring a revocable consent have one in place. Our audit covered the period from July 1, 2016 through July 29, 2019.

About the Program

A revocable consent grants an individual or organization the right to construct and maintain certain structures on, over, or under New York City streets and sidewalks. To obtain this right, the property owner must file a petition for the revocable consent with DOT's Office of Cityscape and Franchises (Office). Revocable consents are granted for a term of ten years. At the end of that period, they may be renewed. DOT charges an annual rate for eligible revocable consents, based on either a formula or a flat rate. Fees charged are assessed using criteria delineated in Title 34, Chapter 7 of the Rules of the City of New York (Rules).

The Office's review process is guided by the Rules, Chapter 14 of the New York City Charter (Charter), and the Office's standard operating procedures. As part of the process, the Office forwards petitions for consents to other City agencies for review, and holds public hearings regarding the consent. The Office also obtains required security deposits and certificates of liability insurance from the petitioner. Consents must also be approved by the Mayor's Office of Contract Services and registered with the City Comptroller.

According to the Office, as of June 20, 2018, there were 1,046 active revocable consents. The amounts billed were \$15.6 million for City Fiscal Year (CFY) ended June 30, 2017, \$16.0 million for CFY ended June 30, 2018, and \$16.2 million for CFY ended June 30, 2019. The Office reported it collected from 99.4 to 100 percent of the amounts billed.

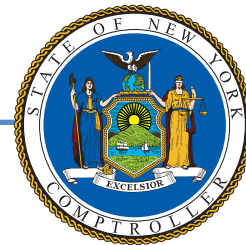
Key Findings

- We found that the Office did not bill and collect the correct annual rates for the majority of consents reviewed (21 of 25). The Office was inconsistent in its application of the Rules and did not always apply the Rules as written when calculating the annual rate to be billed. As a result, the grantees were undercharged an estimated \$1,056,242.
- For the same 25 consents reviewed, we found the Office did not comply with all of the procedures such as: having copies of the architectural plans for the structure for which the consent was granted (one consent); documenting that notices of public hearings and summaries of the proposed consents were published for at least 15 days in the City Record (three consents); documenting that notices of the public hearings were published twice in weekly newspapers as required (all 25 consents); documenting which City agencies the Office is required to notify and obtain approval from (all 25 consents); ensuring the required amount of liability insurance was obtained (\$51 million for 15 consents not obtained); and documenting that the required security deposits were obtained (\$140,900 for 3 consents).
- We also visited various neighborhoods and noted 42 structures that require a revocable consent,

and found that 41 were not in the Office's revocable consent database, and therefore do not have a consent and are not being billed.

Key Recommendations

- Comply with the Revocable Consent Rules, the City Charter, and the Office's procedures and maintain documentation to support all calculations and amounts charged to property owners.
- Prepare a checklist of requirements, such as needed documents, security deposit, insurance requirements, and agency approvals for each consent.
- Expand Office operations to include an examination of all structures to determine whether they require a consent, and notify the owner, where appropriate.



**Office of the New York State Comptroller
Division of State Government Accountability**

September 23, 2020

Ms. Polly Trottenberg
Commissioner
New York City Department of Transportation
55 Water Street
New York, NY 10041

Dear Commissioner Trottenberg:

The Office of the State Comptroller is committed to helping State agencies, public authorities, and local government agencies manage their resources efficiently and effectively. By so doing, it provides accountability for tax dollars spent to support government-funded services and operations. The Comptroller oversees the fiscal affairs of State agencies, public authorities, and local government agencies, as well as their compliance with relevant statutes and their observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations. Audits can also identify strategies for reducing costs and strengthening controls that are intended to safeguard assets.

Following is a report of our audit of the New York City Department of Transportation entitled *Controls Over Revocable Consents*. This audit was performed pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution and Article III, Section 33 of the General Municipal Law.

This audit's results and recommendations are resources for you to use in effectively managing your operations and in meeting the expectations of taxpayers. If you have any questions about this report, please feel free to contact us.

Respectfully submitted,

Division of State Government Accountability

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Glossary of Terms

Term	Description	Identifier
CFY	City Fiscal Year	<i>Key Term</i>
Charter	Chapter 14 of the New York City Charter	<i>Key Term</i>
CPI	Consumer Price Index	<i>Key Term</i>
DOT	New York City Department of Transportation	<i>Auditee</i>
Improvement	Defined in the Rules as a tangible thing or object that may be installed on, over, or under a street, or any private use of a street	<i>Key Term</i>
Office	DOT's Office of Cityscape and Franchises	<i>Office</i>
Rules	Title 34, Chapter 7 of the Rules of the City of New York	<i>Key Term</i>

Background

According to the Rules of the City of New York (Rules), as stated in Title 34: Department of Transportation, Chapter 7, a revocable consent means a grant of a right, revocable at will, (1) to any person to construct and use for private use pipes, conduits, and tunnels under, railroad tracks upon, and connecting bridges over inalienable property, (2) to an owner of real property or, with the consent of the owner, to a tenant of real property to use adjacent inalienable property for the purposes stated in section 7-04 of the Rules or as may be permitted by the rules of the Department of Information Technology and Telecommunications of the City of New York, or (3) to a public service corporation for facilities ancillary to, but not within, a franchise granted prior to July 1, 1990. To install a structure on, over, or under City property, a petition for a revocable consent must be filed with the New York City Department of Transportation's (DOT) Office of Cityscape and Franchises (Office). The permission is granted in exchange for compensation to the City. Revocable consents are granted for a term of ten years, and at the end of that period they may be renewed. DOT charges an annual rate for eligible revocable consents, based on either a formula or a flat rate for 37 improvements that are specified, in accordance with the Rules.

The property owners petition the Office for the revocable consents, which are generally for the sole use and benefit of the applicant. The Office walks the property owner through the process until its completion in accordance with the Rules, Chapter 14 of the New York City Charter (Charter), and the Office's standard operating procedures. As part of the review process, the Office forwards petitions for consents to relevant City agencies for review and holds public hearings regarding the consent. The Office also obtains required security deposits and certificates of liability insurance from the petitioner. Consents must also be signed by the Mayor's Office of Contract Services and registered with the City Comptroller. The consents are assigned a sequential number by the Office. This process began approximately in July 1990. Prior to July 1990, the numbers were issued by the former New York City Board of Estimate.

According to the Office, as of June 30, 2018, there were 1,046 active revocable consents. Consent fees are billed at the beginning of the fiscal year. The amounts billed were \$15.6 million for City Fiscal Year (CFY) ended June 30, 2017, \$16.0 million for CFY ended June 30, 2018, and \$16.2 million for CFY ended June 30, 2019. The Office reported it collected from 99.4 to 100 percent of the amounts billed.

Calculation of Annual Rate

The Rules list 37 improvements, such as benches, bridges, and planters, that require revocable consents at an annual rate. In addition, the Rules refer to a formula for calculating the annual rate. For all improvements that do not have an annual rate specified in the Rules, the rate for the first year is calculated according to a formula or the Minimum Annual Charge in the Rules, whichever is greater. The rate for each subsequent year is increased by a standard escalating factor "E" (see Exhibit).

Audit Findings and Recommendations

We found that the Office did not bill and collect the correct annual rates for 21 of the 25 consents reviewed. The grantees were undercharged an estimated \$1,056,242. The remaining four consents were appropriately not charged a fee. For all 25 consents sampled, the Office did not comply with one or more of the procedures such as publishing notices of public hearings, obtaining required security deposits, obtaining adequate liability insurance, and documenting needed approvals from other City agencies. In addition, we selected 42 structures on City streets and found that 41 of them were not in the Office's consent database, and therefore are not being billed. We also reviewed the Office's revocable consent database and found that it did not account for the status of all revocable consent petitions. DOT officials did not agree with our findings regarding the amounts that should have been billed. They added they do not have staff to visit properties in the City to observe whether the owners file petitions, as required.

Billing and Collection

- For one consent, the Office recalculated and renewed the consent every year, rather than recalculating the amount for the first year at renewal and applying the escalating factor for the remaining years of a ten-year term. The grantee was undercharged \$463,512 for fiscal years 2017 and 2018. As of April 2019, the Office had not received payment for fiscal year 2019, and will potentially also undercharge the grantee \$219,748 for fiscal year 2019 for a total undercharge of \$683,260. We found that the Office used the wrong Consumer Price Index (CPI) when performing this calculation and only charged 75 percent of the revocable consent rate, rather than the full amount. Although DOT officials indicated that the 25 percent reduction was pursuant to an agreement with the grantee, there was no justification in the Rules for the reduced charge.
- For six consents, the Office did not renew, or did not renew timely, the consents, and continued to bill at the same amount of the last annual payment from the previous consent, resulting in a total undercharge of \$313,322 for these six consents for the three years ended June 30, 2019.
- For two consents, the Office applied the formula to recalculate a new annual rate for the first year upon renewal. These two consents were undercharged a total of \$39,360. However, the Office used the wrong CPI and escalating factor for both of these consents. For one of them, the Office used the land value for CFY ended June 30, 2009 instead of CFY ended June 30, 2010.
- For one initial consent (not a renewal), the grantee was undercharged \$14,797. For this consent, the Office used an incorrect CPI, escalating factor, and rate relating to volume. The Office reviewed our calculation and agreed.
- For seven consents, the Office did not recalculate a new annual rate for the first year when the revocable consent was renewed, as required. Rather, it used the rate from the last year of the previous consents as the rate for the first year of the new consent. In subsequent years, the Office increased the rates by

an escalating factor, but used an incorrect factor for all seven, resulting in an undercharge of \$4,213 for the three years ended June 30, 2019.

- For four consents, the incorrect escalation or CPI was used and resulted in an undercharge of about \$1,290.

Monitoring of Requirements

Office procedures detail the steps to be taken to award revocable consents. Our review of the Office's files disclosed that it did not always comply with procedures as follows:

- There was no documentation for any of the 25 consents sampled that notices of the public hearings were published twice in a weekly newspaper designated by the Mayor.
- For the 25 consents sampled, the Office could not identify which relevant City agency approvals were required. We met with Office officials, who explained that their engineering staff determines what other agency approvals are required based on the nature of the structure and sends the request to those agencies without any additional management review.
- Consent agreements specify the insurance requirements that the grantee must maintain. We found that 15 of the grantees did not have the required amount of liability insurance, amounting to a total of approximately \$51 million of the \$205 million required for the 25 grantees sampled. For example, 11 grantees were underinsured a total of \$13.5 million for bodily injury, including death, for any one person.
- Six of the files did not have a current revocable consent signed by the grantee in the Office's files. The Office was still billing at the rate specified in the expired revocable consent.
- Five of the consents we sampled were for bridges, and required a total of six inspections during our audit scope. The Office made repeated, annual requests, but none of the six inspection reports were received. According to the Uniform Code of Bridge Inspection, which was established pursuant to Chapter 781 of the Laws of 1988, New York bridges are required to be inspected at least once every two years. We also noted that the most recent inspection for one of these bridges dated back to 2012.
- Three of the consents had no documentation that notices of public hearings and summaries of the proposed consents were published for at least 15 days in the City Record.
- Three files did not contain documentation that the Office had obtained the required security deposits, totaling \$140,900.

Testing Whether Structures on the Streets Have Consents

The Rules state that no person or entity shall install or maintain any of the improvements listed in the Rules without first obtaining a revocable consent from DOT. The Rules list 37 improvements that are eligible for revocable consents. Although the Rules do not specifically provide an oversight role to DOT for ensuring that structures on City streets are in compliance with requirements for obtaining revocable consents, DOT's mission and goals include providing for the safe movement of people and goods in New York City. By requiring consents to install structures on, over, or under City property, DOT helps ensure that there are no unsafe obstructions and impediments to pedestrian and vehicular traffic flow. Additionally, since the Office's mission is to grant consents in return for adequate compensation, DOT should ensure that all structures that require a revocable consent actually have one and that the fee is paid.

We visited various neighborhoods and noted 42 structures that, according to the Rules, would require a revocable consent and therefore should be in the Office's revocable consent database. Forty-one structures were not in the database, do not have a consent, and therefore were not being billed. Examples of structures that should have a consent include pedestrian bridges, overhead building projections, handicap ramps with railings, and steps/stoops.

We shared our results with Office officials, who advised us they do not have any inspectors and therefore can't check for structures that have been built without a consent. They also responded that 22 of the structures did not require a consent because they are either marquees (19) or canopies (2) or are not on city property (1). Officials stated that marquees were the Department of Buildings' jurisdiction and that, regardless, one of the 19 did not require a consent because it was grandfathered, since it existed before 1938. Officials did not further explain how these factors impacted their ability to issue a consent. Instead, they referred auditors to Chapter 32 of the New York City Administrative Code. However, our review of the definition of overhead projections which are subject to consents showed it did not differentiate between a marquee or canopy and overhead projection. Moreover, the Office has not issued additional guidance that clarifies this distinction. Officials also have not visited the structures to verify that they are indeed marquees or canopies. Regarding the one consent that the Office stated was not over City property, no documentation from the Department of Citywide Administrative Services was provided to support the transfer of ownership from the City to the new owner.

Recommendations

1. Comply with the Revocable Consent Rules, the City Charter, and the Office's procedures and maintain documentation to support all calculations and amounts charged to property owners.
2. Implement independent managerial review of the calculations.

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3. Bill revocable consent grantees for undercharges, as appropriate.
 4. Prepare a checklist of requirements, such as needed documents, security deposit, insurance requirements, and agency approvals for each consent.
 5. Expand Office operations to include an examination of all structures to determine whether they require a consent, and notify the owner, where appropriate.

Audit Scope, Objectives, and Methodology

The audit objectives were to determine whether DOT has billed and collected the correct fees for the revocable consents; whether DOT is ensuring that all structures meet the standards required by the City Rules; and whether DOT is monitoring to ensure all structures requiring a revocable consent have one in place. Our audit covered the period from July 1, 2016 through July 29, 2019.

To accomplish our objectives and assess related internal controls, we met with DOT officials to obtain and discuss their Rules and requirements. We obtained DOT's revocable consent database and selected a judgmental sample of revocable consent files to determine whether DOT followed its Rules and requirements for setting the annual rate and awarding consents. We chose our judgmental sample by stratifying the database by amount of the annual fee for CFY 2019 and selecting consents from each strata and multiple types of structures. We judgmentally selected City neighborhoods and looked for structures that would require a consent on the streets and sidewalks, and traced them to DOT's revocable consent database to determine whether all structures that require a consent have one. Judgmental samples by definition cannot be projected to the population as a whole. We also reviewed DOT's revocable consent database to determine whether it accounted for the status of all revocable consent petitions and consents that have been granted.

Statutory Requirements

Authority

The audit was performed pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution and Article III, Section 33 of the General Municipal Law.

We conducted our performance audit in accordance with generally accepted government auditing standards. These standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

As is our practice, we notified DOT officials at the outset of the audit that we would be requesting a representation letter in which agency management provides assurances, to the best of its knowledge, concerning the relevance, accuracy, and competence of the evidence provided to the auditors during the course of the audit. The representation letter is intended to confirm oral representations made to the auditors and to reduce the likelihood of misunderstandings. Agency officials normally use the representation letter to assert that, to the best of their knowledge, all relevant financial and programmatic records and related data have been provided to the auditors. They affirm either that the agency has complied with all laws, rules, and regulations applicable to its operations that would have a significant effect on the operating practices being audited, or that any exceptions have been disclosed to the auditors. However, officials at the New York City Mayor's Office of Operations have informed us that, as a matter of policy, mayoral agency officials do not provide representation letters in connection with our audits. As a result, we lack assurance from DOT officials that all relevant information was provided to us during the audit.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions, and public authorities, some of whom have minority voting rights. These duties may be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these management functions do not affect our ability to conduct independent audits of program performance.

Reporting Requirements

We provided a draft copy of this report to DOT officials for their review and formal comment. Their comments were considered in preparing this final report and are attached in their entirety at the end of it.

DOT officials strongly disagreed with the audit results and conclusion, claiming

that the audit was flawed because of our methodology and because the auditors did not listen to what DOT officials explained on several occasions during the audit. The tonal quality of their response is unwarranted and unsupported. Their dissention notwithstanding, DOT officials agreed or partially agreed with three of the five recommendations, and indicated they have taken action to work toward amending the Rules to more clearly reflect their interpretation. They did not agree that there was a need for an independent review of the calculations or to expand their operations to include examining all structures to determine whether a revocable consent is required. We maintain our position that the audit results are accurate and support a need for DOT to revise the processes used to determine the fees for revocable consents. Our rejoinders to certain DOT comments are embedded within the response as State Comptroller's Comments.

Within 180 days after final release of this report, we request the Commissioner of the New York City Department of Transportation report to the State Comptroller, advising what steps were taken to implement the recommendations contained herein, and where the recommendations were not implemented, the reasons why.

Exhibit

Formula for Calculating Revocable Consent Annual Rates

Annual rate for the first year: R1 shall equal $C[V + (L \times M \times A)]$ or the Minimum Annual Charge, whichever is greater. The rate for the subsequent year is increased by a standard escalating factor “E.”

A = the maximum area of the improvement,

C = Change of Consumer Price Index (CPI) since July 1, 2003,

E = the standard escalating factor equal to the average annual percentage increase in the CPI for the preceding ten years,

L = the lower of the Current Transitional Assessed Value or the Actual Assessed Value of the Benefited Property for which the consent is being granted in dollars per square foot,

M = the applicable multiplier depending upon whether the improvement is a pipe, conduit, or some other structure,

R1 = the rate of compensation for the first year, and

V = the rate obtained from Table A in the Rules relating to the volume.

Agency Comments and State Comptroller's Comments



Department of Transportation

POLLY TROTTERBERG, Commissioner

June 26, 2020

Carmen Maldonado
Office of the State Comptroller
Division of State Government Accountability
59 Maiden Lane - 21st Floor
New York, NY 10038

Re: Draft Audit Report 2018-N-1, Issued May 28, 2020

Dear Ms. Maldonado:

The New York City Department of Transportation ("NYC DOT") is in receipt of the Office of the State Comptroller's draft report (2018-N-1) regarding its audit of the Controls Over Revocable Consents.

Please accept the following as the Agency's written response to the draft report:

NYC DOT does not agree with most of the findings, conclusions, and recommendations contained in this report. NYC DOT reached this conclusion because the methodology used to meet the audit objectives is flawed. Upon review of the draft audit report, we have concluded that most of the findings were unfounded because they are based on inaccurate, partially correct, or incomplete information – including an utter lack of understanding of the revocable consent process – which affects the validity of the analysis and report findings.

State Comptroller's Comment – It is surprising that DOT claims our methodology is flawed because, in prior correspondence, it agreed with many of our findings. Moreover, while DOT repeatedly states in its response that it could not reply to the findings because "specific backup" about the consents was not provided, that is untrue. DOT received three preliminary findings reports with the consent, the reportable conditions, and the basis for the audit results. As DOT officials are aware, a draft report presents audit results in summary format and does not include details about the deficiencies noted for each consent. Rather, this information was provided in detail to DOT in writing prior to the draft. The agency's failure to review these documents as part of its response is not a methodological failing of the auditors.

It should be noted that, despite good faith efforts to express our concerns regarding the factual accuracy of the report findings, including specific and detailed rebuttals of the audit team's assertions, no substantive revisions were ultimately made. The Comptroller's draft report fails to incorporate any of the information that NYC DOT provided to refute these claims.

State Comptroller's Comment – We reviewed DOT's responses and all documentation provided during meetings and in response to the preliminary findings. Where DOT staff provided sufficient documentation to support a change, the audit results were revised. Disagreeing with the agency does not equate to a lack of understanding of the revocable consent process. The auditors understood the process, but found that the Office did not support the fees it charged for the consents that auditors sampled. Auditors found the files maintained by the Office were incomplete, with essential information missing, and not updated as required by the Rules governing the program. For example, the plans failed to show where conduits, pipes, and other equipment were located, and the land values needed for the fee calculation were not updated as required. Unlike the Office, we obtained land value information from another City agency. This accounted for several of the differences between the Office's calculation and the audit results.

Two years in, despite numerous meetings with NYC DOT staff, the auditors continue to lack a rudimentary understanding of the revocable consent process, despite the Office of Cityscape & Franchise's ("Office") repeated attempts to explain it. We will again provide this information below, in the hope that it will clear up some of the misconceptions in the Draft Report.

Background on Revocable Consents:

Section 362 of the New York City Charter defines a "revocable consent" to "mean a grant by the city of a right, revocable at will, (1) to any person to construct and use for private use pipes, conduits, and tunnels under, railroad tracks upon, and connecting bridges over inalienable property, (2) to an owner of real property or, with the consent of the owner, to a tenant of real property to use adjacent inalienable property for such purposes as may be permitted by rules of the department of transportation or the department of information technology and telecommunications or (3) to a public service corporation for facilities ancillary to, but not within, a franchise granted prior to the effective date of this section."

NYC DOT inherited the responsibility for revocable consents after the New York City Board of Estimate was disbanded in 1989. Many of the existing revocable consent structures were initially approved by the Board of Estimate, under that body's governing procedures. Indeed, a number of these structures are approaching 100 years in age. NYC DOT conducts its review within the confines of the Title 34, Chapter 7 of the Rules of the City of New York (the "Rules"), which have been amended on numerous occasions since their original adoption in 1990.

Pursuant to Charter §364(b), each revocable consent agreement is set for a fixed term. Typically, that term is ten years. When the term expires, the grantee of the revocable consent agreement ("Grantee") submits a petition for renewal, which is reviewed and approved by the Office in accordance with the Charter and Rules, and the parties enter into an agreement for another fixed term. The agreement sets forth the annual fee for

each year of the term. Prior to executing a new or renewal revocable consent agreement, the Office holds a public hearing regarding the structure and associated fees. After execution, the Office submits the agreement to the New York City Comptroller for registration. By that point, the annual fees are settled, and the Office issues the Grantee an invoice for the fee established in the agreement each year.

Only a prospective Grantee can initiate a petition for a revocable consent. If the Office becomes aware of an existing structure on the City's right-of-way that should have a revocable consent, we can ask an inspector from NYC DOT's enforcement office to issue a notice of encroachment pursuant to §19-133 of the New York City Administrative Code. A property owner may choose to remove the structure or petition for a revocable consent to dispense with the encroachment notice, but s/he may also choose to challenge the notice at the City's Office of Trials and Hearings (OATH) which can take months. If the property owner loses, the City will place a lien on the property, but s/he may still circumvent the revocable consent process.

State Comptroller's Comment – Despite “two years” and “numerous meetings,” DOT never shared this information with the auditors – a pattern of non-cooperation that hampered the audit process and resulted in the numerous delays and repeated meetings due to the incomplete and contradictory information provided. In this case, on multiple occasions, DOT officials claimed they had no mechanism in place to take action when they became aware of a structure that should, but did not, have a revocable consent.

This background is essential because it highlights a number of flaws in the audit team's review of the program. First, the stated purpose of the audit was ostensibly to review the Office's collections of annual fees. To correctly collect annual fees, the Office submits invoices in the amounts reflected for that fiscal year in the revocable consent agreement, then follows up with the Grantees until they have all paid their invoices. The audit team, however, disregarded the fees in the agreements and attempted to recalculate the fees themselves.¹ For example, for a collection on a 2016 invoice, they would review the associated agreement, which may have been executed in 2010 or 2012, recalculate the fee based on their limited knowledge of revocable consents and their own (flawed) interpretation of the Rules, then claim that the Office undercharged the Grantee. This insistence on pursuing this tactic demonstrates a complete lack of understanding of basic contract law, much less the Rules.

State Comptroller's Comment – The determination of whether the correct amount was billed for many of the disputed findings did not require any of those specialized fields. For example, the land values used for the calculation in some cases were outdated. Rather than using the current consent period as required, the Office used an older period. We obtained the correct land values from another agency whose professional staff maintain such information. In other cases, the incorrect CPI was applied. Auditors obtained and recalculated the fee with the correct

¹ Please note that the audit team did not include an architect, engineer, or planner, which would have been helpful in computing the relevant area and volume figures.

CPI. There were also four consents where the grantee did not renew the revocable consent timely. The Office did not adjust for any of the factors that change over time, such as CPI, as required and continued to bill at the old amount. Moreover, we engaged the services of a licensed architect to provide an independent review of 10 of the 25 sampled consents. Her comments supported our conclusions and identified additional findings. Specifically, her review found that the plans in seven files were incomplete or missing, that DOT calculations in some cases were not supported because the CPI was incorrect, the escalation rate was not applied correctly, and the land value was outdated. While DOT makes several baseless sweeping statements, the facts are the audit identified issues with the calculation that an independent expert agreed with; and in its response to the preliminary findings, DOT agreed that calculations for 7 of the 21 consents required corrections.

One of our audit objectives was to determine that the correct fee was billed and collected for the revocable consents reviewed. However, despite this having been explained to DOT on multiple occasions, DOT fails to understand that the billing and collection of the correct fee requires that the fee be correctly calculated.

As further discussed below, in addition to recalculating the fees, on at least one occasion, the audit team disregarded the plain language of an agreement in an attempt to claim a significant undercharge. Again, for the Office to adopt that practice would be a violation of the contract, one that is subject to a public hearing and a review by elected officials, community boards, and NYC DOT's sister agencies. Recalculating the fees would defeat the purpose of this comprehensive review process and undermine private entities' trust in their municipal government. We tried to explain these principles to the audit team on several occasions, but the Draft Report does not address any of these issues.

State Comptroller's Comment – We did not recommend that DOT adopt any practice that would violate the Rules. However, DOT officials did not provide any support for their position that the fees charged were correct. They also did not provide any support for their statement that the fees charged cannot be changed. It is critical that the fees calculated be correct.

Secondly, the audit team has not seemed to grasp that the Office is only able to collect fees for structures that have revocable consent agreements. Whether a particular structure's lack of a revocable consent agreement is a problem for the City or not, that problem would not be one of collections. The Office has no authority to invoice these property owners without an agreement, and we correctly do not try to do so. Similarly, because those structures lack revocable consent agreements, the Office is unable to include them in its database. The database is only meant to include active petitions and revocable consent agreements, not structures that have no consents. Private property owners do not notify the City when they install illegal encroachments, and we are unable to consistently monitor the 6,000 miles of City streets to identify all of them.

A Note on Collections:

Surprisingly, although the ostensible purpose of this audit was to assess NYC DOT's collection of revocable consent fees, the Draft Report does not provide total collection figures for the

years at issue. In the interest of providing a complete collection picture, we are providing those figures here. Please note that the “Invoiced” column lists the total sum of revocable consent invoices for each year, based on the annual fees listed in each revocable consent agreement:

State Comptroller’s Comment – An audit objective was to determine if DOT “has billed and collected the *correct* [emphasis added] fees” for the revocable consents reviewed. For a fee to be correct, it must be calculated correctly. To avoid misunderstandings, we explicitly informed DOT in writing, in three written preliminaries, that the audit objective included a determination of whether the Office calculated the correct rate. However, despite this information having been presented to DOT on multiple occasions, DOT yet again appears to have ignored information provided by the auditors.

Fiscal Year	Invoiced	Collected	Percent Collected
2017	\$16,238,424	\$16,222,287	99.9%
2018	\$16,421,328	\$16,333,894	99.4%
2019	\$16,695,789	\$16,695,789	100%

State Comptroller’s Comment – The draft report provided the amount billed but did not provide total collection figures for the years at issue. We have added the amounts collected to the report to provide a more complete picture. However, the accuracy of the amount billed was part of the original objective and DOT cannot negate the finding by ignoring it.

Key Finding:

We found that the Office did not bill and collect the correct annual rates for the majority of consents reviewed (21 of 25). The Office was inconsistent in its application of the Rules and did not always apply the Rules as written when calculating the annual rate to be billed. As a result, the grantees were undercharged an estimated \$1,056,242.

Response:

Throughout the audit process, in response to Preliminary Findings 1 through 4, NYC DOT has provided extensive rebuttal of consent-specific assertions by the auditors that billing and collections are not consistent with the rules. This finding does not indicate which consents are included in the 25, and as such the referenced undercharge amount is meaningless without specific backup.

State Comptroller’s Comment – While DOT states it disagrees with the auditors, in its response, DOT never makes it clear what specifically the basis is for its disagreement, as it states it does not have the detail to present a basis for disagreement. However, as refuted previously, DOT’s statements that it was not provided details of the noted deficiencies for each consent are incorrect.

In our review of the Preliminary Findings, however, NYC DOT observed that the audit team often overlooked critical information when opining whether NYC DOT billed the appropriate fees. For example, the audit team argued that NYC DOT substantially

undercharged the Battery Park City Authority (BPCA) in connection with a perpetual revocable consent agreement issued by the Board of Estimate. The audit team alleged that NYC DOT undercharged BPCA by \$463,512 for FY17 and 18 and \$219,748 for FY19 – for a total of \$683,260 – by charging only 75% of the standard revocable consent fee each year. As NYC DOT repeatedly explained, however, the revocable consent agreement itself expressly stated that NYC DOT should only charge 75% of the calculated rate. This agreement was executed prior to 1990, and thus prior to the existence of the Rules. NYC DOT has correctly abided by the terms of the contract for the past three decades. This aspect of the audit team’s finding, which accounts for 65% of the alleged shortfall, is in complete error.

State Comptroller’s Comment – While some of the revocable consents were approved by the Board of Estimate, the City Charter Section 365 Terms of agreements; enforcement (3) requires revocable consents to provide for adequate compensation to the City. DOT did not provide support that the fees charged are in compliance with this provision of adequate compensation or that it had ever reviewed the agreement’s compliance with this provision.

Many of the other alleged shortfalls that the audit team mentioned in the Preliminary Findings involved the annual fee calculations for renewals of existing revocable consents. Many of these revocable consents were executed prior to July 1, 2016, and thus are outside of the scope of this audit. Please note that the audit team did not allege that NYC DOT submitted invoices in amounts listed in the revocable consent agreements. Instead, they argued that NYC DOT should have recalculated the fees and charged a higher figure than the one the parties had agreed to. The Rules are silent regarding renewal calculation procedures, and NYC DOT repeatedly informed the audit team that we disagreed with their interpretation of the Rules. In the interest of clarity, however, NYC DOT will work towards amending the Rules to more clearly reflect our interpretation.

State Comptroller’s Comment – Multiple interpretations would not be possible if DOT had a written process. Moreover, repeatedly stating that is how DOT interprets this is not adequate support that DOT is appropriately interpreting the Rules.

Finally, the audit covered the period of more than three years, beginning on July 1, 2016 (the start of the City’s Fiscal Year 2017), and continuing until July 29, 2019 (almost one month into the City’s Fiscal Year 2020). During that time, the Office collected over \$49 million in annual fees. The audit team’s finding of an alleged \$1,056,242 shortfall represents only 2% of the Office’s total collections for those three years. If we remove the BPCA fees (\$683,260), the shortfall decreases to \$372,982, which represents less than 1% of the total collections. Therefore, even if the rest of the finding were accurate, it would represent only a minute fraction of the overall collections.

State Comptroller’s Comment – The audit results represent a sample of only 25 revocable consents and resulted in over \$1 million in findings. As it was a judgmental sample, OSC did not project it to the population. However, the error rate of the sample was 84 percent. Claiming that this somehow indicates a de minimis error rate either is disingenuous or demonstrates a lack of understanding of how statistics work. Moreover, given the City is experiencing a significant fiscal

crisis, taking the position that collection of additional revenue is irrelevant is inappropriate.

Key Finding:

For the same 25 consents reviewed, we found that the Office did not comply with all of the procedures such as: having copies of the architectural plans for the structure for which the consent was granted (one consent); documenting that notices of public hearings and summaries of the proposed consents were published for at least 15 days in the City Record (three consents); documenting that notices of the public hearings were published twice in weekly newspapers as required (all 25 consents); documenting which City agencies the Office is required to notify and obtain approval from (all 25 consents); ensuring the required amount of liability insurance was obtained (\$51 million for 15 consents not obtained); and documenting that the required security deposits were obtained (\$140,900 for 3 consents).

Response:

Again, because the audit team did not specify which revocable consents they are referring to in the Draft Report, it is difficult to respond to these findings in detail. As a general matter, however, below are NYC DOT's responses:

State Comptroller's Comment – We disagree that DOT was not provided the revocable consents reviewed with the details. As previously mentioned, we issued three preliminary findings with the details during fieldwork. DOT replied to all of three and included additional documents such as proof of insurance and security deposits. We checked all of the records for items such as public hearing advertisements and notices. The draft report reflected any revisions required based on new information from DOT.

- *Having copies of the architectural plans for the structure for which the consent was granted (one consent)* – This assertion is not referenced in any of the Preliminary Findings, so NYC DOT does not know which revocable consent is at issue here.
- *Documenting that notices of public hearings and summaries of the proposed consents were published for at least 15 days in the City record (three consents)* – The auditors were made aware of the fact that public hearing advertisements and notices are kept in a separate advertising file and were provided access to the file.
- *Documenting that notices of the public hearings were published twice in weekly newspapers as required (all 25 consents)* – The auditors were made aware of the fact that public hearing advertisements and notices are kept in a separate advertising file and were provided access to the file.
- *Documenting which City agencies the Office is required to notify and obtain approval from (all 25 consents)* – Required City agency approvals are secured for all consents in compliance with the Rules. Note that relevant agency and commission approvals are necessary for grantees to apply for construction permits. NYC DOT will consider creating a checklist for future revocable consent approvals, however.

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- *Ensuring the required amount of liability insurance was obtained (\$51 million for 15 consents not obtained)* – The Draft Report does not specify which 15 consents are referenced, so it is difficult to respond with specific details. The audit team did allege a failure by NYC DOT to obtain liability insurance for a number of revocable consents in the Preliminary Findings. In the vast majority of those cases, the audit team overlooked the relevant certificate of insurance or overlooked and/or disregarded an applicable umbrella insurance policy (including, in one instance, a \$25 million umbrella insurance policy).

State Comptroller's Comment – We did not disregard any insurance policies that were in the files DOT provided initially or in response to the preliminary findings. The draft report results reflected our review of all records provided.

- *Documenting that the required security deposits were obtained (\$140,900 for 3 consents)* – The Draft Report does not specify which 3 consents are referenced. The audit team did allege a failure by NYC DOT to obtain security deposits for several revocable consents in the Preliminary Findings. In all but one case, NYC DOT has the appropriate security deposit; in that sole exception, NYC DOT has requested the deposit from the Grantee.

Key Finding:

We also visited various neighborhood and noted 42 structures that require a revocable consent and found that 41 were not in the Office's revocable consent database, and therefore do not have a consent and are not being billed.

Response:

As we have explained to the audit team on numerous occasions, the revocable consent process is petitioner-driven, and the Office does not have enforcement staff. The Office cannot force a property owner to apply for a revocable consent and complete the approval process. Furthermore, NYC DOT cannot bill a property owner for a structure that is not subject to a revocable consent.

State Comptroller's Comment – On multiple occasions, we inquired whether the Office has any operating practices to identify a structure on the City's right-of-way that should have a revocable consent. We were advised there was no mechanism available to the Office to ensure that a property owner petition for a revocable consent. However, on page 2 of DOT's response, there is a clear description of the steps that the Office can take by using DOT's enforcement office. There is no indication of additional costs to DOT. Furthermore, DOT could do a risk assessment to determine if there are areas in the City where there is a higher chance that property owners may not have revocable consent.

Property owners that do not abide by the Rules should not be allowed to enjoy the benefits of not paying for the structures, while other owners that comply with the Rules have to pay.

In the Draft Report, the audit team expresses confusion regarding marquees, canopies, pre-1938 structures and other characteristics that make a structure ineligible for a revocable consent, so we will explain further here. In addition to the Rules, there are numerous other City rules and regulations that allow private property owners to install structures in the right-of-way. If a particular type of structure is otherwise permitted pursuant to one of these rules and regulations, no revocable consent is required. For example:

- Chapter 32 of the Building Code lists several types of as-of-right encroachments that a property owner can install without any additional approvals. Marquees, in many circumstances, are one type of such encroachment. Indeed, both the Building Code specifies that certain types of structures require revocable consents only if they exceed the dimensions set forth in the Building Code. (Building Code §3201.9.)
- The Building Code expressly grants permission for any property owner to maintain as constructed any structure that has been in place on the right-of-way since January 1, 1938. No revocable consent is required for these structures. (Building Code §3201.6.)
- Canopies require only a permit, pursuant to NYC DOT's Highway Rules. No additional approval is required. (Title 34, Chapter 2, §2-04.)
- Pursuant to Charter §362, NYC DOT can issue revocable consents only on the City's inalienable property. Therefore, structures on non-City property are exempt from the revocable consent requirement. (Numerous streets within the five boroughs are privately owned.)

Recommendation #1:

Comply with Revocable Consent Rules, City Charter, and the Office's procedures and maintain documentation to support all calculations and amounts charged to property owners.

Response: Partially Agree

NYC DOT agrees with this recommendation and will continue to comply with the Rules, as well as all other relevant laws and rules relating to revocable consents, and will continue to maintain documentation to support all calculations and amounts charged to property owners. This audit revealed that with respect to any missing documents and incorrect calculations presented by the auditor's findings, the files were, in most cases, 15 to 20 years old and are only relevant to this audit to the extent that the Office billed grantees for the values agreed upon in the revocable consent agreements.

With respect to calculations of annual fees for renewal agreements, NYC DOT and the audit team disagree regarding the correct interpretation of the applicable rules. Although NYC DOT stands by its interpretation, in the interest of clarity, we will work towards amending the Rules to more clearly reflect our interpretation.

Recommendation #2:

Implement independent managerial review of the calculations.

Response: Disagree

This managerial review is already in process, and NYC DOT will continue to conduct independent managerial review of calculations and document retainage to minimize error.

State Comptroller's Comment – The reviews that were in place were not independent of those responsible for the initial calculation and documentation. If that were the case, the files would not be missing plans, updated land values, public hearing advertisements, and notices, just to name a few.

Recommendation #3:

Bill revocable consent grantees for undercharges, as appropriate.

Response: Partially Agree

NYC DOT will review internally; however, NYC DOT will continue to assess fees in accordance with executed revocable consent agreements.

Recommendation #4:

Prepare a checklist of requirements, such as needed documents, security deposits, insurance requirements, and Agency approval for each consent.

Response: Agree

A comprehensive checklist is in the process of being drafted.

Recommendation #5:

Expand office operations to include an examination of all structures to determine whether they require a consent, and notify the owner, where appropriate.

Response: Disagree

This recommendation needs more clarification. Given the amount of resources needed to address this recommendation, it would be beneficial to NYC DOT if the audit team can recommend a specific, feasible and cost effective approach to ensuring that all structures that require a consent have one.

State Comptroller's Comment – This could be accomplished at little or no cost to DOT. For instance, DOT could request other City agencies that inspect property as a rule to share information: for example, the Department of Buildings during safety inspections and construction site visits and the Department of Finance during its field observations for assessing property.

Sincerely,

A handwritten signature in blue ink, appearing to read 'mcraven', with a stylized flourish at the end.

Michelle Craven
Assistant Commissioner for Cityscape and Franchises
DOT

Cc: Commissioner Trottenberg; J. Jarrin, Exec. D/C, DOT; M. Forgione, COO, DOT; S. Pondish, General Counsel DOT; R. Livermon, Director DOT; J. Economos, Dep. Director, DOT; J. Thamkittikasem, Director, Mayor's Office of Ops; F. Ardolli Assoc. Dep. Director, Mayor's Office of Op; B. Hamed, Chief of Staff, Mayor's Office of Ops

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