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

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TIMOTHY BROWN, Index No.110334/10

Petitioner,

-against-

REPLY AFFIRMATION

THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, MICHAEL BLOOMBERG, Mayor of the City of New York, THE NEW YORK CITY DEPARTMENT OF BUILDINGS, SOHO PROPERTIES INC., JANE DOE AND JOHN DOE,

Respondents.

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STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

BRETT JOSHPE, ESQ., of the American Center for Law & Justice, and JACK L. LESTER, ESQ., attorneys duly sworn to practice law in the Courts of the State of New York, affirm the following to be true under penalties of perjury.

1. We are Counsel for Petitioner, Timothy Brown, and as such are fully familiar with the facts and circumstances of this proceeding.

2. This Affirmation is submitted in reply to Respondents' Motion to Dismiss, opposition to Petitioners' Motion to Amend, and opposition to discovery.

Necessary Parties

3. Respondent, Soho Properties, Inc. ("Soho") having failed to address CPLR §203 in its motion to dismiss, now acknowledges in its opposition to the Motion to Amend that CPLR §203 applies and that the claims against both Soho and 45 Park Place

Partners, LLC ("Partners") arise out of the same transaction and that Partners had notice of the action. See Buran v. Copal, 87 NY2d 173 (Ct of Appeals 1995).

4. Now, however, Respondent disingenuously and incredibly claims that despite the voluminous documentation previously submitted to the Court demonstrating Soho's beneficial interest in developing the property, Soho is somehow not "united in interest" with Partners.

5. The documentation included:

a. Testimony of Sharif El-Gamal, Chairman and CEO of Soho and Partners;

b. Submissions to the Community Board by Soho;

c. Submissions to the New York City Department of Buildings ("DOB") by Soho;

d. Documents prepared by consultants retained by Soho, including reports by expediters, historians and architects;

e. Newspaper reports and articles chronicling communications with elected officials and Soho and direct quotes to the media by Soho professing "ownership";

f. Emails indicating Soho's ownership;

6. This is only a partial list of the documentation available, due to the fact that at this juncture discovery is not available to Petitioner.

7. The most striking and conclusive evidence, however, is the testimony of Sharif El-Gamal, the CEO and Chairman of Partners and Soho.

8. El-Gamal has repeatedly, in communications with the public and government officials and bodies, stated that Soho is the Owner of the Building and property at issue in this proceeding and that Soho will be developing the site.

9. Crucially, in the very administrative proceeding that is the subject matter of this Article 78 lawsuit, El-Gamal states unequivocally:

> My name is Sharif El-Gamal, and I am the Chairman and CEO of Soho Properties, the Owner of the site since 2009. (See Exhibit "A" to the Motion to Amend) (emphasis added).

10. Respondents' Counsel, representing Partners, in opposing our Motion to Amend, now implies that his own client lied in his testimony to an administrative tribunal, placing them in an ethically dubious situation and putting the credibility of Respondents at issue in this proceeding. Any documentation which would support Partners' ownership would also be based upon submissions made by Sharif El-Gamal to various City agencies including the New York City Department of Finance.

11. Mr. El-Gamal has made many representations to the Community Board, the Mayor and local elected officials to solicit support for his project indicating that Soho is the owner. Now, Mr. Bailey has placed El-Gamal's credibility in serious doubt. To attempt to gain a tactical advantage in a lawsuit, Mr. Bailey is asserting that his client would disavow a prior statement placed on the record in an administrative proceeding, implying that his client's testimony cannot be trusted.

12. Additionally, Mr. Bailey is implying that Shelly Friedman, a distinguished and leading land use attorney misled Respondent, Landmarks Preservation Commission, at the July 13, 2010 hearing when he testified that he represented Soho Properties, the "Owner of the Site". (See Exhibit "B" of the Motion to Amend").

13. Upon information and belief, Mr. Friedman's credibility and expertise has never been questioned in any forum, and he would have no motive to lie or mislead an administrative agency in this case regarding that fact.

14. Respondent's counselor also repeatedly misconstrues the law on this matter by equating the legal notion of "united in interest" with vicarious liability, and the negligence cases cited by Respondent, as they relate to vicarious liability, are inapplicable to an Article 78 proceeding, such as the case at bar.

15. Underlying the doctrine of vicarious liability is the notion of authority or control over the alleged wrongdoer. See Hilliard v. Roc-Newark Assoc., 287 AD2d 691 (2d Dept 2001). The case of Hilliard supra, emphasizes the point that the concept of vicarious liability applies specifically to negligence cases. The Court stated as follows:

> In a negligence action, the defenses to two defendants will be identical, and thus their interests will be united, only where one is vicariously liable for the acts of the other.

16. In Connell v. Hayden, 83 AD2d 30 (2d Dept 1981) the court indicated that defendants are not united in interest when one can avoid liability by placing blame on the other. In this matter, the issue is the party's mutual interest in developing the property. See Matter of Cassidy v. New York City Department of Correction, 95 AD2d 733 (1st Dept 1983).

17. An article 78 proceeding is a lawsuit to challenge action or inaction by agencies and of state and local government. See CPLR § 7801. The claims in this matter relate to the arbitrary actions of the LPC and have not arisen by virtue of any wrongdoing on the part of the developer or title holders such that their defenses against the arbitrary and capricious actions of the LCP could be distinguished. There is no claim that either

Soho or Partners are tortfeasors or have any liability to Petitioner, and, thus, the principal of vicarious liability is inapplicable.

18. The inquiry in an Article 78 proceeding is simply whether or not the two entities have distinct or separate interests in the proceeding. See 27th Street Block Association v Dormitory Authority 302 AD2d 155 (1st Dept 2002).

19. In an Article 78 proceeding against a governmental agency, where, within the statutory period, a potential defendant is fully aware that a claim is being made against him with respect to the transaction or occurrence involved in the suit, and is, in fact, a participant in the litigation, permitting an amendment is consistent with the policies underlying the statute of limitations. See Duffy v. Horton Memorial Hospital, 66 NY2d 473 (Ct of Appeals 1985).

20. In relation back in cases such as this, to be united in interest, "it is not necessary to be joint contractors or to have a joint interest. If the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other then they are 'otherwise united in interest.'" Prudential Ins. Co. v. Stone, 270 NY 154, 159 (Ct of Appeals 1936). The facts of the case at bar are conclusive and leave no doubt that Soho and Partners are completely united in interest. They have the same principal owner, the same interest in developing the property, and the same attorney. Both entities have a proprietary and financial stake in the Building. Soho was even the very entity, contrary to Mr. Bailey's assertion in his affirmation, that the LPC notified regarding the landmarks hearing. (See Exhibit "A" annexed hereto).

21. Furthermore, Soho's interest in the property is not addressed in any way by Respondent. Respondent's Motion to Dismiss fails to address in any manner Soho's

interest in developing the site. No documentation is offered to dispute the plethora of information demonstrating Soho's retention of experts, architectural plans, application for permits and public relations campaign to develop the site as a result of their "beneficial interest in the Building or planned project" as alleged in paragraph "21" of the Petition. That allegation in the Petition is undeniably beyond dispute as demonstrated by the documentation provided to the Court and not contradicted by Respondents.

22. Clearly, to support a Motion to Dismiss, Respondent is obligated to offer documentation, testimony or an affidavit that would conclusively establish that Soho has no interest in building anything, despite statements and a plethora of documentation demonstrating their beneficial interest in developing the site. See T.R. America Chemicals v. Seaboard Sun. Co., 116 Misc2d 874 (Sup Ct New York Cnty 1982).

23. It is hornbook and fundamental law that on a motion to dismiss an Article 78 petition, all of allegations of the petitioner are to be deemed true, and the petitioner is to be accorded the benefit of every possible inference. Golden Horizon Terryville Corp. v. Prusinowski, 63 AD3d 930 (2d Dept 2009).

24. Moreover, a recent Court of Appeals case made it clear that the statute of limitations neither deprives a court of jurisdiction, nor even a litigant of a substantive right, but is merely a defense which may, if properly asserted, deprive a plaintiff of a remedy against that specific defendant. Matter of Romeo v. New York State Dept. of Education, 41 AD3d 1102 (3d Dept 2007). As a result, that court held that the trial court erred in dismissing the proceeding for failure to join a necessary party and directed that the necessary party be joined, at which time it could raise any defense it may have. See also Red Hook v. Board of Standards and Appeals, 5 NY 3d 452 (Ct of Appeals 2005).

Of course, in this case, Petitioner seeks no remedy from Respondent private party since this is an Article 78 proceeding.

Estoppel

25. Assuming arguendo that El-Gamal lied to LPC but is telling the truth now and that all the evidence regarding Soho's interest in the buildings was false, the doctrine of Estoppel applies.

26. Representations made by El-Gamal, as chairman and CEO of Partners and Soho, had the authority to bind both parties.

27. Application of the doctrine of estoppel is based upon apparent authority. It arises when a principal places an agent in a position where it appears that the agent has certain powers which he or she may not possess. If a third person holds the reasonable belief that the agent was acting within the scope of his [or her] authority and changed his position in reliance on the agent's act, the principal is estopped to deny that the agent's act was not authorized. See King World Productions v. Financial News Network, Inc., 660 FSupp 1381, 1383 (SDNY 1987)

> So as the principal's words and conduct make it reasonable to believe that an agent has authority to take certain action, a third party relying on that reasonable belief need not inquire further. Id.

28. El-Gamal has engaged in a continuous campaign both publicly and privately on behalf of Soho to develop the site. The public, therefore, has a right to rely on El-Gamal's statements. Where a principal engages in words or conduct that give rise to the appearance that an agent has the authority to enter into a transaction, then the principal will be bound if a third-party reasonably relies upon that appearance of authority. See Hallock v. State, 64 NY2d 224 (Ct of Appeals 1984).

Petitioner's Standing

29. Petitioner, Tim Brown, has standing to challenge the LPC's determination. The City's overly formulaic "definition" of what constitutes Ground Zero—which it derives from the wholly non-authoritative source, Wikipedia—while castigating Petitioner for fabricating a definition of Ground Zero without authority—only validates Petitioner's standing argument and demonstrates that, at the very least, questions of fact exist that must be presumed in favor of Petitioner at this stage of the proceeding. The City's argument also implies that it might concede Petitioner has standing if the former World Trade Center site—or if "Ground Zero," as the City interprets it—were at issue (January 19, 2011 Proceeding Transcript, at 32; 17-21).

30. Not only does that line of argument defy logic—that Petitioner would have standing but for the approximately 600 feet that separates 45-47 Park Place from the edge of the World Trade Center site—but it should foreclose dismissal of the case on these grounds.

31. The question of what constitutes Ground Zero is a factual, not a legal, one. It is Petitioner's contention that the site is part of Ground Zero, and all factual issues must be interpreted in favor of the Petitioner on a motion to dismiss. See T.R. America Chemicals v. Seaboard Sun Co. 116 Misc2d 874 (Sup Ct New York Cnty 1982), Sheridan v. Town of Orangetown, 21 AD3d 365 (2d Dept 2005) (A motion to dismiss must be denied if it cannot resolve all factual issues as a matter of law, and conclusively dispose of all Petitioner's claims).

32. Furthermore, the City's argument for why the Petitioner does not have standing—and why the Ziemba case is not relevant—is slightly baffling. The City states

that it is irrelevant if body parts were found on or near the subject property, but it provides no reason for why that fact would be so. Clearly New York courts have recognized injury-in-fact based upon the emotional connection to human remains, as Ziemba revealed.

33. We cannot say for certain if body remains might have been or could be located on the property. To this day, there has still not been a full accounting of all remains in the aftermath of 9/11. Petitioner sent out well over a dozen FOIL requests to various local, state, and federal agencies seeking information about the possibility of remains in that area. Most agencies did not have relevant information because cataloguing remains has generally been a fragmented and uncoordinated effort.

34. Just last year, nearly 10 years after the 9/11 attacks, more human remains were found from those attacks. As such, it is impossible to say now for sure that remains could not be found in the vicinity of the subject building, as even the City acknowledges in Paragraph 16 of its Answer where it "den[ies] knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 26(c) of the Amended Petition."

35. Certainly the reason why this would be relevant to Petitioner should be obvious. Those remains could be from his closest friends, 93 of whom died on 9/11. Why the City cannot comprehend how that confers upon Petitioner an interest *and injury in fact* distinct from the public at large is incredible.

36. The City also states that 45-47 Park Place is not a monument to 9/11—despite the fact that it suffered a direct hit from the attacks—but is simply nothing more than a five story loft and store building that formerly housed the Burlington Coat Factory.

Again, however, the significance of the Building is a question of fact, not law, and, given that the Respondents produced no countervailing documentation or evidence to refute those assertions, then Petitioner's allegations must be taken as true in considering Respondents' motion to dismiss[1].

37. Finally, the City brazenly and shamelessly asserts that "Mr. Brown amazingly states that he has standing superior to all other persons affected by 9/11." Nowhere does Petitioner make that claim, only that he has suffered an injury distinct from *the public at large*, a fact that is undeniably true. At no point does he claim to have standing superior to all those affected on 9/11, only that he is the only one who brought suit and that the universe of people who have been impacted to the degree Mr. Brown has is relatively small *when compared to the public at large*.

38. Petitioner's emotional and aesthetic interest in the Building is far more significant that the petitioner's in Heritage Coalition Inc. v. City of Ithaca 228 AD2d 862 (3d Dept 1996). In Heritage, petitioner was interested in the history of a building and the sincerity of her allegation was based upon her using building as an example in her classes—far different from Petitioner's involvement in one of the most historically significant moments in our nation's history and the Building's intricate connection to those events.

39. The cases that the City cites reveal nothing more than black letter law on the standing issue and do not negate Petitioner's argument. For instance, Citizens

[1] The City lists several other buildings that suffered major damage on 9/11 and makes the outrageous claim that they are not inseparably connected to 9/11. We disagree. Nonetheless, despite the City's outrageously callous disregard for the surrounding environment that was effected by 9/11, we need not delve deep into the merits—or lack thereof—of such an assertion. Those other buildings are not at issue in this case. So far as we know, they have not been considered for landmark status. As such, this case, and this Building is *sui generis*.

Emergency Committee to Preserve Preservation v. Tierney, 70 AD3d 576 (1st Dept 2010) stands for the proposition that for a preservation group to have standing, one of the members must have standing and that "In environmental or preservation matters, standing may be established by proof that agency action will directly harm the petitioner's members in their use or enjoyment of the natural resources or area in question." It is worth noting that "use or enjoyment" are ways in which standing may be established, not the only two ways in which they must be established. In Citizens Emergency Committee to Preserve Preservation, the petitioner held a general, rather than specific interest in the matter, because petitioner was a preservation group that was challenging the LPC's failure to take action on six buildings, specifically, and the LPC's procedures more generally. There was nothing about the buildings that gave the petitioners any particular interest. That is very different from the case at hand where the subject Building suffered a direct hit from one of the planes on 9/11 and is in effect a monument to that historic event, an event that deeply shaped Petitioner's life and in which he played a direct role.

40. In New York State Psychiatric Assn v. Mills, 29 AD3d 1050 (3d Dept 2006), the court denied standing to a group of psychiatrists who were challenging the state licensure requirements. The court held that the alleged injury did not fall within the zone of interest that the law sought to protect because the challenged law sought to protect the public and the patients, not the psychiatrists. Id, 384. Here, Petitioner's injury clearly falls within the zone of interests that the Landmarks Law seeks to protect, namely architecturally and historically significant preservation.

41. Obviously, the public importance of the issue is not directly relevant to standing in an arbitrary and capricious challenge to a landmarks decision—although it is

a relevant factor in a mandamus action—as the City observes. See Trude v. Town Bd of the Town of Chohocton, 17 Misc 3d 1104A, 2007 NY Misc LEXIS 658 (Sup Ct Steuben Cnty 2007). As the Court in Trude again confirmed, however, what is relevant is the zone of interest that the law seeks to protect, which, in this case, is historical and architectural preservation. Petitioner has properly pled, and supplemented with supporting affidavits, that he would indeed suffer injuries that the law seeks to protect, and, therefore, Respondents' efforts to dismiss the case must be denied.

42. The case at bar is also easily distinguishable from Long Island Pine Barrens Soc'y Inc. v. Planning Bd. of the Town of Brookhaven, 213 AD2d 484 (2d Dept 1995) because in that case petitioners were challenging a property development, and they were neither in close proximity to the development nor did they have an aesthetic, emotional, or historic interest in preservation.

43. Similarly, the court in Save Our Main Street Buildings v. Greene County Legislature, 293 AD2d 907, 909 (3d Dept 2002) held that the petitioners who were challenging a SEQRA determination who "would be no different for them than for the public at large."

44. The City also cites Matter of Abrams v. New York City Transit Authority et. al., for the proposition that Petitioner is not part of a distinct class. In Abrams the court held that petitioners lacked standing to sue the NYC Transit Authority to control the noise on the subway because "A private citizen who does not show any special rights or interests in the matter in controversy, other than those common to all taxpayers and citizens, has no standing to sue." Id. at 70 (citation omitted). Here, however, Petitioner has shown (and certainly has properly pled) that he is part of a class distinct from the

public at large. As a first-responder who lost 93 friends on 9/11 and who has advocated for preserving memorials to 9/11, Petitioner is most certainly part of a sub-class of persons that is distinct from the general public and he would indeed suffer an injury in fact. The Abrams court also acknowledged that the legal trend was moving towards a "liberalized attitude towards standing." Id. at 71.

45. In Douglaston Civic Association v. Galvin, 36 NY2d 1, 6 (Ct of Appeals 1974), the Court also acknowledged the liberalized view towards standing and the fact that land cases should be decided on the merits, rather than on restrictive standing rules.

46. Finally, Respondents are attempting to discredit Petitioner and undermine his argument for standing by questioning his motivations—and the motivations of his counsel—for bringing this case. These are irrelevant factors and merely an attempt to silence Petitioner and create a smokescreen based on motivations to try and divert the Court's attention from the clearly disparate treatment afforded this Building. We will not even dignify the childish, school-yard-type allegations of "Islamophobia" with a response. What is relevant, however, is the legal standard for standing and for a motion to dismiss and the fact that all allegations of Petitioner must be presumed true. As such, Respondents' speculations about Petitioner's motivations are utterly irrelevant and must be disregarded.

Petitioner's Need for Discovery

47. The City makes much of the fact that various agencies, including the LPC, have produced "thousands of pages" of documents and that nothing in the LPC record indicated that the Mayor's Office influenced the deliberations. The City also states that "Since this Court is limited to reviewing the Record of the Commission's proceedings in

determining whether the LPC's actions were supported by the Record, Petitioner's attempt to bring these other matters into this proceeding, is nothing but an attempt to divert the Court from the limited issue at hand."

48. The City would have one believe "that the communications between LPC and Office of the Mayor were mundane and related to such matters as a briefing sheet with factual background of the building."

49. In fact, documents received to date show unmistakably that the Mayor's Office was an active participant in constructing a political and media strategy for getting through the landmarks process and in dealing with any obstacles to the project. (See Exhibit "E" to Petitioner's Order to Show Cause). For instance, Imam Feisal Abdul Rauf emailed Nazli Parvizi in the Mayor's Office on May 15, 2010 (before the LPC hearing), saying "Our lawyer whom we have retained to advise us on getting 45 Park Place de-designated as a proposed landmark, which is the reason why we approached the Local Community Board, has sent us his comments below . . . . I welcome your thoughts and advice." Parvizi responded, "this is a huge deal . . . I know that Julie [menin] is incredibly anxious to get the letter and she was really upset to hear that such a landmarking issue exists and was not even mentioned. My recommendation is . . . send the letter to julie asap and keep her on your good side . . . . What the letter will do, I hope, is get the media attention off of everyone's backs and give you guys time to regroup on your strategy as discussed." Another email from Daisy Khan to Sharif El-Gamal and members of the Mayor's Office on May 7, 2010 said, "Dear All: Just spoke to Commissioner Nazli Parvizi. She will call Julie Mennon [sic] to thank them for passing the resolution and ask how she can assist."

50. Documents received to date also clearly demonstrate, as the developers' attorney, Shelly Friedman's, emails reveal, Chairman Tierney's susceptibility to political influences in the process.

51. The issue at hand is a factual question, not a legal one: namely, whether the Mayor's Office—or other outside parties—influenced the LPC's deliberations in a manner that caused them to treat this Building differently than they would have otherwise. To the untrained reader, the City's repeated assertion that this was not the case might seem sufficient. However, a careful reading of the City's response leads to the inescapable conclusion that, indeed, there is more to the story than has been revealed to date, thus bolstering the case for why discovery is necessary.

52. Most important than what the City's FOIL responses have revealed to date are what they do not reveal. Specifically, the Mayor's Office claimed two exemptions under the Public Officer's Law, including one for "intra-agency and inter-agency materials." That means that any communications between the Mayor's Office and the LPC would not have been provided to Petitioner. If no such communications existed, then it is unlikely that the Mayor's Office would have felt compelled to claim such an exemption. Therefore, it is highly likely that there are additional materials that are relevant to a disputed issue of fact in the case. Petitioner has been unable to examine these materials and they will remain unavailable unless the Court orders discovery, thus demonstrating Petitioner's need.

53. The Court should be unmoved—and quite, frankly, suspicious—of the City's continued assertion that "There are no documents in the Record reflecting communications between the Office of the Mayor . . .". This suspicion should be

heightened when one considers the Mayor's Office's advocacy on behalf of the developers prior to the LPC hearing. One should certainly not expect the LPC to document in the record the political pressure that it was under to not landmark the Building.

54. The only way to accept the City's argument that discovery is unnecessary and that factual matters outside of the record cannot be considered, is to accept the proposition that the LPC's determination was *per se* rational and beyond reproach. But the case law is clear: simply because an agency proffers an explanation, any explanation at all, does not insulate the agency from an arbitrary and capricious claim. If that were the case, then it would mean that if someone bribed the LPC not to landmark a building, and the LPC complied and offered pretextual reasons for why it made its decision, then it could still not be challenged—unless of course the LPC noted in the record that it was bribed. Such an utterly absurd result would render the law meaningless. Of course, that is not what the law says and not what it intends. It is Petitioner's claim that the LPC abused its discretion and merely offered pretextual reasons for its decision, which was actually dictated by political pressure. That is a factual question and one that can only be resolved by further access to the communications to and from the Mayor's Office.

55. The City's citation of legal authority only bolsters the Petitioner's argument for discovery. Petitioner has demonstrated an "ample need" for discovery based upon the limited availability of documents obtained through FOIL, that the information is "material and necessary" because it shows active participation from the Mayor's Office, and that discovery will resolve a disputed matter of fact. See Stapleton Studios, LLC v. City of New York. 7 AD3d 273, 275 (1st Dept 2004); Town of Walkhill

v. NYS Bd of Real Prop. Services 274 AD2d 856 (3d Dept 2000); General Electric Co. v. Macejka, A.D.2d 896 (3d Dep't 1986); Matter of Allocca v. Kelly 44 AD3d 308 (1st Dept 2007); Town of Pleasant Valley v. NYS Bd. Of Real Property Svcs, 253 AD2d 8 (2d Dep't 1999); Matter of Shore, 109 A.D.2d 842, 844 (2d Dep't 1985).

56. Petitioner has ample need because discovery is the only way to resolve this factual matter, namely the level of the Mayor's active involvement in attempting to sway the LPC. That information is crucial to the resolution of the case, and, insofar as it is in dispute, can only be resolved through discovery. The affidavits of architectural expert Gregory Dietrich also clearly establish that the LPC's disparate treatment of 45-47 Park Place and 23-25 Park Place and 311 Broadway was indeed irrational, and, thus, the LPC's reasoning is entirely relevant.

57. Furthermore, the City's argument for why discovery should be denied is completely circular. It cites Price v. NYC BOE 51 AD3d 277, 293 (1st Dept 2008) and Matter of Tivoli Stock, LLC v. New York City Dep't of Housing Preserv. and Dev., 14 Misc.3d 1207A, 831 N.Y.S.2d 363 (N.Y.S. Sup. Ct., N.Y. Co 2006) for the proposition that discovery should be denied when the respondent has made a showing to "credibly support the agency's determination" and then argues that the record supports the LPC's determination. However, that argument amounts to the following: Petitioner should be denied discovery that would reveal the LPC's motivation and arbitrariness and capriciousness because the LPC's decision was not arbitrary and capricious.

58. Whether the LPC's determination was arbitrary and capricious, again, is based upon disputed facts. Petitioner alleges that the decision was based upon active Mayoral advocacy that is revealed through FOIL responses. However, the Mayor's

Office has claimed two exemptions under the Public Officer's Law, including one for "inter-agency" materials that would further reveal such pressures. It defies credibility for the City to claim that this information is irrelevant (See Arnot-Ogden Memorial Hospital v. Blue Cross of Central New York, 122 Misc2d 639 (Sup Ct Chemung Cnty 1984)) and the fact that the City is so ardently resisting a limited discovery request only betrays the relevancy of the request and the City's fear for what discovery might reveal.

59. As the City concedes, Courts sometimes allow discovery in special proceedings if the demands are "carefully tailored." City of Glen Cove Industrial Dev. Agency 2009 NYMisc LEXIS 6045 (Sup Ct Nassau Co 2009). Petitioner's demands are carefully tailored. This is not part of a fishing expedition, nor does Petitioner seek all information between the developers and any City agency. This is a carefully tailored attempt to discover relevant information—and the only information—that would bear on the dispositive factual question upon which the case is based.

Arbitrary and Capricious.

60. As the Affidavits of Gregory Dietrich, an expert in the field of architectural history states, "there is no rational aesthetic or architectural basis for the NYC-LPC's rejection of the subject building as a New York City landmark." Clearly, there can be no conclusion that the LPC's decision was rational as a matter of law entitling Respondents to a dismissal.

61. Courts have clearly held that although administrative agencies are entitled to deference, they are not entitled to absolute deference or to treat similar situations completely differently. Furthermore, an agency's pretextual justification for a supposedly rational decision does not establish such decision as rational *per se*. See

Matter of Rudey v. New York Landmarks Preservation Commission, 182 AD2d 61, 63 (1st Dept 1992), (the Appellate Division upheld the reversal of LPC for treating like situations differently, saying about the LPC's justified distinction, "[t]his distinction provides no rational aesthetic or architectural basis for the LPC's disparate treatment of petitioners."); Matter of Cornell Univ. v. Ithaca Landmarks Preservation Commission, 16 AD3d 890 (3rd Dept 2005), (Simply because an agency lines the record with evidence that allegedly provides a rational basis for its decision does not preclude a court from recognizing the pretextual nature of that evidence and concluding that the decision was arbitrary and capricious; Matter of Corona Realty Holdings v. Town of North Hempstead, et. al., 32 AD3d 393 (2nd Dept 2006), citing Matter of Charles A. Field Delivery Serv., 66 NY2d 516, 520 (Ct of Appeals 1985), ("[a]n agency's failure to provide a valid and rational explanation for its departure from its prior precedent 'mandates a reversal, *even though there may be substantial evidence in the record* to otherwise support the determination.'" (emphasis added)).

Lack of Prejudice to Respondents

62. The court in 27th Street v. Dormitory Authority, 302 AD2d 155 (1st Dept 2002) indicated that failure to join a necessary party does not require dismissal of the proceeding. CPLR 1001(b) provides that when a person who should be joined cannot be because jurisdiction over him can only be obtained by his consent or appearance, the Court may fashion a remedy that allows joinder of the necessary party and the proceeding to advance on the merits. The critical element of CPLR 1001 is due process and the opportunity to be heard before one's rights or interests are adversely affected. See Matter of Martin v. Ronan, 47 NY2d 486, 490 (Ct of Appeals 1979). The court, when justice

requires, may allow the action to proceed without his being made a party. CPLR 1001(b) list five factors: (1) the prejudice that may accrue from non-joinder to the defendant or to the person not joined, (2) whether plaintiff has another effective remedy if the action would be dismissed for non-joinder, (3) whether and by whom prejudice might have been avoided, or may in the future be avoided, (4) the feasibility of a protective provision by order of the court or in the judgment and (5) whether an effective judgment may be rendered in the absence of the person who is not joined. In 27th Street, the court granted the private party leave to intervene in order to enable the matter to be determined on the merits. In this proceeding, Sharif El Gamal, as a participant, would clearly not be prejudiced if an additional entity, which he also controls, is brought into this proceeding.

Conclusion

63. For the reasons set forth above, Soho is a proper party to this proceeding and is united in interest with Partners, the Petitioner has standing and has demonstrated an ample need for discovery of relevant information and the LPC's decision was arbitrary and capricious.

WHEREFORE, Petitioner respectfully requests that Respondents' Motion to Dismiss be denied in all respects and Petitioners Motion to Amend be granted.

Dated: New York, New York
March ___, 2011

Yours, etc.

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