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

TIMOTHY BROWN

Petitioner,

-against-

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.

Index #110334/2010

AFFIRMATION IN OPPOSITION TO PETITIONER'S CROSS-MOTION TO AMEND THE PETITION

STATE OF NEW YORK
COUNTY OF NEW YORK } ss:

ADAM LEITMAN BAILEY, being an attorney duly licensed to practice law in the Courts of the State of New York, affirms the following to be true under penalties of perjury:

1. I am the principal of Adam Leitman Bailey, P.C., the attorneys for named Respondent SOHO PROPERTIES INC., as well as for non-party 45 Park Place Partners LLC, (hereinafter "45 PARK" or "Building Owner"), and I make this Affirmation in opposition to the cross-motion of Petitioner to amend the Petition in all respects based upon information and belief, and based on the contents of the file I maintain in this office.

INTRODUCTION

2. Petitioner TIMOTHY BROWN (hereinafter "BROWN") is an individual who is presumably resident in the State of New York.

3. According to the Amended Verified Petition, (attached to the Moving Affirmation at Exhibit "1"), BROWN was a member of the Fire Department of New York City and one of the first responders to the tragedy that occurred at the World Trade Center site on September 11, 2001.

4. BROWN has commenced this action to challenge the unanimous decision of Respondent THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, (hereinafter "LPC"), on August 3, 2010, which denied landmark status to the building located at 45 Park Place, New York, NY, (hereinafter "the Building").

5. BROWN filed an Amended Petition with the Court on or about November 24, 2010, which amended an original Petition to include Respondents MICHAEL BLOOMBERG, Mayor of the City of New York, THE NEW YORK CITY DEPARTMENT OF BUILDINGS, and SOHO PROPERTIES INC, (hereinafter "SOHO").

6. The owner of the Building is 45 Park Place Partners LLC.

7. Even pursuant to his previous amendment to the Petition, BROWN failed to name the owner of the Building as a Respondent and the time to do so has now expired.

8. BROWN is now attempting to correct that mistake retroactively by asserting that a present interposition of claims against 45 PARK would "relate back" to the timely, but meritless assertion of claims against SOHO.

9. BROWN also seeks costs and fees in making this motion simply because Respondent refused to condone BROWN's procedural improprieties or waive its rights with regard thereto.

10. As is set forth more fully in the annexed Memorandum of Law, the Building Owner could be inequitably affected by a judgment in this Article 78 action, and the Building Owner is therefore a necessary party.

11. SOHO and 45 PARK are distinct entities, with separate interests and separate portfolios, and the failure to name the owner of the Building at the center of this frivolous lawsuit cannot be an excusable mistake.

12. For this, and other reasons, Respondent filed a motion to dismiss dated January 6, 2011, to which Petitioner served opposition papers (undated). Respondent's Reply to that opposition will be addressed on separate papers.

45 PARK PLACE PARTNERS LLC IS A NECESSARY PARTY WHICH IS NOT UNITED IN INTEREST WITH SOHO PROPERTIES, INC.

13. 45 Park Place Partners LLC, is a domestic limited liability company, authorized to do business in the State of New York.

14. Named Respondent SOHO PROPERTIES, INC., (hereinafter "SOHO"), is a domestic corporation, also authorized to do business in the State of New York.

15. Both entities are separate and distinct businesses, and are separately licensed to do business in the State of New York.

16. According to the publicly available 'Automated City Register Information System', (ACRIS), 45 PARK is the owner of the Building located at 45 Park Place pursuant to a deed recorded on July 30, 2009.

17. This information has been publicly available on ACRIS since 2009.

18. Named Respondent SOHO is neither the owner nor the tenant of the Building and is not mentioned in any of the ownership documents. BROWN fails to set forth any specifics as to why SOHO and 45 PARK are vicariously liable for the acts of the other, as he would have to do in order to overcome the barrier to allow his pleading against one to relate back to the other.

19. Instead, BROWN merely lists a few examples where personnel who are associated with SOHO have been involved with work relating to the Building. This is insufficient to demonstrate that the interests of SOHO and 45 PARK are "so identical, intertwined and inextricably interwoven as to be indistinguishable", as alleged by Petitioner.

20. Indeed, on January 4, 2010, it was 45 PARK that was notified by the LPC, as owner of the Building, that the LPC wanted to hold a public hearing with 45 PARK regarding the landmark designation process, (see LPC letter of January 4, 2010, attached hereto at Exhibit "1").

21. A public hearing was held on August 3, 2010, and the LPC thereby denied landmark status to the building located at 45 Park Place, New York, NY.

22. As the Building Owner, 45 PARK would obviously be inequitably affected by a judgment in this action which seeks to accord landmark status to the Building, and therefore pursuant to CPLR §1001(a), 45 PARK is a necessary party.

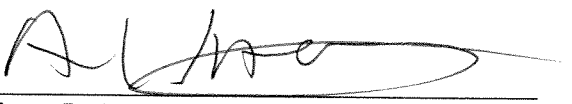
23. This has been the position of Respondent's counsel throughout this litigation, despite Petitioner's claims to the contrary. Indeed, Petitioner disperses blame for his fundamental mistake to everyone but himself. However, there is no legal justification to fix this error, and Petitioner's cross-motion must therefore be denied.

CONCLUSION

24. It is hereby submitted that the Building Owner is a necessary party, and that Petitioner's claims against SOHO cannot be said to relate back to 45 PARK. Accordingly, Petitioner's cross-motion should be denied and Respondent's underlying motion to dismiss should be granted.

Dated: New York, New York
February 4, 2011

Respectfully submitted,
Adam Leitman Bailey, P.C.
by



Adam Leitman Bailey
Dov Treiman
Pete J. Reid
120 Broadway, 17th Floor
New York, New York 10271
212-825-0365

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

TIMOTHY BROWN

Petitioner,

-against-

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.

Index #110334/2010

AFFIDAVIT OF SERVICE

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

JEANETTE RIVERA-SOTO, being duly sworn, deposes and says:

1. I am not a party to this action, am over eighteen (18) years of age, and have a business address at 120 Broadway, 17th Floor, New York, New York 10271.

2. On March 4, 2011, I served the within **AFFIRMATION IN OPPOSITION TO PETITIONER'S CROSS-MOTION TO AMEND THE PETITION** upon:

JACK L. LESTER, ESQ.
Attorney for Petitioner
261 Madison Avenue, 26th Floor
New York, New York 10016

VIRGINIA WATERS, ESQ.
Assistant Corporation Counsel
Corporation Counsel of the
City of New York
Attorney for Municipal Respondents
100 Church Street
New York, New York 10007
(212) 788-0822

by enclosing a copy of same in a postage-paid wrapper properly addressed to the recipient and depositing the wrapper in an official depository within the exclusive care and custody of the United States Postal Service within the City, County, and State of New York by First Class Mail.

JEANETTE RIVERA-SOTO

Sworn to before me this
4th day of March 2011

Notary Public

ELISSA GREENFIELD
NOTARY PUBLIC, STATE OF NEW YORK
NO. 01GR6217838
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES FEBRUARY 22, 2014

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

TIMOTHY BROWN

Petitioner,

-against-

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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AFFIRMATION IN OPPOSITION TO PETITONER'S CROSS-MOTION TO AMEND THE PETITION

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: March 4, 2011

Signature: _____

Print Signer's: Adam Leitman Bailey, Esq.

ADAM LEITMAN BAILEY, P.C.
Office and Post Office Address
120 Broadway, 17th Floor
New York, New York 10271
(212) 825–0365

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

TIMOTHY BROWN

Petitioner,

-against-

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.

Index
#110334/2010

REPLY TO PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION TO DISMISS

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

ADAM LEITMAN BAILEY, being an attorney duly licensed to practice law in the Courts of the State of New York, affirms the following to be true under penalties of perjury:

1. I am a partner of Adam Leitman Bailey, P.C., attorneys for named Respondent SOHO PROPERTIES INC., ("SOHO") as well as for non-party 45 Park Place Partners LLC, (hereinafter "45 PARK" or "Building Owner"), and I make this Affirmation in Reply to opposition to our motion to dismiss the action. I make this affirmation upon information and belief, the source of my information being the contents of the file I maintain in this action.

2. The relevant background facts as fully set forth in the moving my Affirmation dated January 6, 2011, ("the Moving Affirmation"), are incorporated herein.

3. Briefly, Petitioner TIMOTHY BROWN (hereinafter "BROWN"), is a former member of the New York Fire Department with an apparent curiosity about architecture, who commenced this action to challenge the unanimous decision of Respondent THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, (hereinafter "LPC") on August 3, 2010 which denied landmark status to the building located at 45 Park Place, New York, NY, ("the Building").

4. Named Respondent SOHO is neither the Building Owner nor the lessee and is not mentioned in any of the ownership documents.

5. Rather, the owner of the Building is 45 Park Place Partners LLC,

6. The statute of limitations for an Article 78 claim is four months from the date of the final decision. Petitioner BROWN's time to add 45 Park Place Partners LLC as a party expired on December 3, 2010 and he is therefore foreclosed from doing so now.

7. Additionally, Petitioner has failed to sustain his burden to demonstrate that he has suffered any injury as a result of the administrative decision and, furthermore, he has failed to sustain his burden to set forth how any injury that he would suffer is distinct from an injury to the general public.

8. Therefore, pursuant to CPLR 3211(a)(3), Petitioner does not have standing to bring the action.

9. For these reasons, and those that are additionally set forth in the Moving Affirmation and Memorandum of Law, this action should be dismissed with prejudice.

PETITIONER DOES NOT HAVE STANDING

10. In *Society of Plastics Industry, Inc. v. County of Suffolk,* 77 N.Y.2d 761, 570 N.Y.S.2d 778 N.Y. 1991, ("*Plastics*") the New York Court of Appeals set forth the requirements for standing, namely that Petitioner must demonstrate an 'injury in fact', as well as an injury that is distinct from the public at large:

> The existence of an injury in fact--an actual legal stake in the matter being adjudicated--ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute "in a form traditionally capable of judicial resolution." *(Schlesinger v Reservists to Stop the War,* 418 US 208, 220-221.) The requirement of injury in fact for standing purposes is closely aligned with our policy not to render advisory opinions *(see, Cuomo v Long Is. Light. Co.,* 71 NY2d 349, 354).
>
> Injury in fact thus serves to define the proper role of the judiciary, and is based on "sound reasons, grounded not only in theory but in the judicial experience of centuries, here and elsewhere, for believing that the hard, confining, and yet enlarging context of a real controversy leads to sounder and more enduring judgments." (Bickel, The Least Dangerous Branch, at 115 [1962].)
>
> *Plastics*, supra at 772-773

The Court also added:

> In land use matters especially, we have long imposed the limitation that the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large.
>
> *Plastics,* supra at 772-773

11. Petitioner BROWN has failed to set forth in the Petition how he will actually be harmed by the challenged administrative action.

12. Indeed, nowhere in the Petitioner's Amended Verified Petition (attached to the Moving Affirmation at Exhibit "1"), does BROWN allege any injury-in-fact to himself.

13. In opposition papers, Petitioner BROWN does concede that he does not live anywhere near the Building. However he now claims standing based on "the Building's proximity to the World Trade Center site and Petitioner's proximity to the very event that confers the historical importance on the Building".

14. In other words, because BROWN was a First Responder to the tragedies of September 11, 2001, he alleges standing to challenge this decision because a piece of the wreckage of one of the hijacked planes allegedly landed on the Building.

15. To be clear, in moving to dismiss this action, no one is questioning Mr. Brown's bravery, his injuries, his patriotism, or his understandable grief. However, that, in and of itself, is not sufficient to confer standing on Mr. Brown to challenge a decision of the LPC. There must be an injury in fact.

16. BROWN now alleges that he has standing to challenge the decision of the LPC because he has an "aesthetic, historical and emotional interest in seeing a structure that withstood a direct hit from one of the hijacked planes on 9/11 preserved in its current form."

17. However, he fails to set forth why he would be injured if another building were constructed on the same site.

18. BROWN claims that the Building suffered a direct hit from a wheel of one of the hijacked planes, which pierced the Building's roof and top stories. Respondent can neither confirm nor deny this claim, but what is almost certainly true is that the roof has long since been repaired, and the parts of the plane that landed on the Building have long since been removed.

19. In effect, the only connection that the Building now has with September 11, 2001 is that one might be able to circle the site on a map of downtown New York, as Petitioner has done, to show that a piece of wreckage once fell there. At best, Petitioner would be able to stand on the sidewalk on Park Place and imagine what might have happened ten years ago.

20. Nothing about the decision of the LPC to deny landmark status to the Building will change that.

21. Even assuming that Petitioner has a real interest in being able to physically visit Ground Zero to recall the memory of 9/11, he will still be able to visit a building located at 45 Park Place in the future. In short, there is nothing about the Building in its "current form" that connects it to 9/11.

22. It is this fact, among others, that distinguishes this matter from the case of *Ziemba v City of Troy*, 37 AD3d 68 (3d Dept. 2005) which involved an attempt to preserve a Native American burial ground.

23. Drawing parallels to the case at hand, BROWN argues that the Building is "very much analogous to a burial ground with special, sacred meaning to someone [with] a

distinct interest in this matter and would suffer a direct injury-in-fact if the Building were demolished."

24. However, the Building is not now, and never has been, a burial ground. No one died there; no remains were found there. Most importantly, there is nothing about it that today connects the Building with the terrible acts of September 11, 2001 and Ground Zero.

25. Therefore, BROWN cannot demonstrate standing to challenge the decision of the LPC.

26. Contrary to BROWN's allegations, the Building does not have an "inseparable connection to September 11th which justified landmark status." (Pet Feb Memo, page 3). Dozens of other buildings, including the World Financial Center, Winter Garden, Century 21, the Post Office, the Millennium Hotel and 45-47 Park Place, were partially damaged on 9/11 and there are hundreds of other buildings in the general vicinity on which debris fell on 9/11. BROWN alleges that the building is "unique" and different from other buildings surrounding the site, but Exhibit A to the Petition shows that 56 buildings were damaged by the events of 9/11 and at least ten buildings sustained major damage and survived.

27. What makes the Building unique is the unspoken elephant present in the room.

28. What makes the Building unique is not its history, but its proposed future.

29. For this is the Building that Islamophobic forces in this country have labelled as the site of the "Mega-Mosque at Ground Zero."[1] It bears repeating that the intended use is not a mosque, but a cultural center with multi-religional prayer space and that it is not "at Ground Zero."

30. It goes without saying that the First Amendment does not allow manipulation of the Landmarks Preservation process solely for the purpose of forbidding a particular type of religious worship.

31. Crucial to the legal analysis of this case is that even if BROWN's objection to tearing down the building were because he objected to its being torn down in favor of a grocery store, he still would lack standing or a cause of action.

32. That BROWN'S *real* objection to the Commission's action is based not on the building's history but on the building's future is made clear by his attorneys' website,[2] which states:

> **PDATE: Lawsuit Filed Challenging Ground Zero Mosque**
>
> We have filed a lawsuit today against the NYC Landmarks Preservation Commission (LPC) at the Supreme Court of the State of New York urging the court to nullify a decision yesterday by LPC - a decision that denies landmark status to a historic building clearing the way for an Islamic mosque to be built on the site.
>
> We represent Tim Brown, a firefighter and first responder, who survived the 9-11 attacks but lost 100 friends that day....
>
> We're hopeful that the court will nullify the Commission's vote and conclude what most New Yorkers and Americans understand - this site is sacred ground and not the place to build a mosque.

---

[1] See, for one of many examples, http://www.jihadwatch.org/2010/07/islamic-supremacist-mega-mosque-at-ground-zero-faces-its-only-nyc-hurdle-tomorrow.html, last visited March 4, 2011.

[2] http://www.aclj.org/TrialNotebook/Read.aspx?ID=983, last visited March 2, 2011.

> In addition to representing Tim Brown, we've heard from thousands of Americans who have signed on the Committee to Stop the Ground Zero Mosque.
>
> If you haven't had an opportunity to add your name, you can do so here.

33. Thus, the conclusion that BROWN's attorneys draw is that *the* purpose of their lawsuit is to block the construction of a mosque.

34. This court should draw the same conclusion and having so concluded, rule that any suit seeking to nullify the Landmarks Preservation Commission's decision because of the contemplated *future* use of the building simply does not lie.

Petitioner's injury is no different from that of the public at large

35. BROWN claims that he is uniquely placed to challenge the decision of LPC and that he is has a heightened and singular stake in the landmark status of the Building. As a "living representative of the historic structures," BROWN claims that he has standing to bring this proceeding.

36. BROWN offers no legal support for his claims and his perceptions, feelings and interests are insufficient to distinguish him from the general public.

37. All New Yorkers, indeed all thoughtful citizens of the United States and the world, have a desire to reflect on the events of September 11, 2001. Mr. Brown's feelings are not unique.

38. Neither is the Building unique. Dozens of buildings near the Ground Zero site had pieces of the plane wreckage or the Twin Towers fall on them, and indeed the entire Lower Manhattan area was blanketed in debris from the fallen buildings.

39. To have standing, Petitioner must demonstrate an injury distinct from the public in the particular circumstances of the case. Here Petitioner's claims are not unique and the Building at 45 Park Place is not unique. Therefore BROWN cannot show standing to challenge the decision of the LPC.

40. The very recent First Department case of *Citizens Emergency Committee to Preserve Preservation v. Tierney*, 70 A.D.3d 576, 896 N.Y.S.2d 41, N.Y.A.D. (1 Dept., 2010), (hereinafter "Tierney") was not addressed by Petitioner in his papers and is worth repeating because of similarities to the case at bar.

41. In *Tierney*, a self proclaimed advocacy group, purportedly dedicated to the preservation of landmarks, beyond those landmarks actually approved by the Landmarks Preservation Commission, brought an Article 78 proceeding, challenging the LPC's failure to take action on requests for landmark designation.

42. The Appellate Division set forth the requirements for standing in such matters:

> "To establish standing, an association or organization such as petitioner "must show that at least one of its members would have standing to sue" (*New York State Assn. of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211, 778 N.Y.S.2d 123, 810 N.E.2d 405 [2004]).
>
> In other words, petitioner must show that one or more of its members - as distinct from the general public - has suffered an injury in fact, and must demonstrate that the injury falls within the zone of interests protected by the legal authority being invoked (*Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 771-774, 570 N.Y.S.2d 778, 573 N.E.2d 1034 [1991]).

(Tierney, supra at 576)

43. In finding that the Petitioner failed to demonstrate standing, the Court stated that:

> "While the petition alleges that its members are dedicated to preservation, "interest" and "injury" are not synonymous (see *Matter of New York State Psychiatric Assn., Inc. v. Mills*, 29 A.D.3d 1058, 1059, 814 N.Y.S.2d 382 [2006], lv. denied 7 N.Y.3d 708, 822 N.Y.S.2d 482, 855 N.E.2d 798 [2006]). A general - or even special - interest in the subject matter is insufficient to confer standing, absent an injury distinct from the public in the particular circumstances of the case (see *Save the Pine Bush*, 13 N.Y.3d at 305-306, 890 N.Y.S.2d 405, 918 N.E.2d 917; *Matter of Heritage Coalition v. City of Ithaca Planning & Dev. Bd.*, 228 A.D.2d 862, 864, 644 N.Y.S.2d 374 [1996], lv. denied 88 N.Y.2d 809, 648 N.Y.S.2d 878, 671 N.E.2d 1275 [1996]).
>
> (*Tierney*, supra at 576-577)

44. As in *Tierney*, BROWN has failed to demonstrate a unique injury distinct from the public at large and therefore BROWN does not have standing.

PETITIONER HAS FAILED TO JOIN A NECESSARY PARTY AND, THE STATUTE OF LIMITATIONS NOW HAVING EXPIRED, THE PETITION MUST BE DISMISSED

45. It is beyond cavil that the owner of the building, 45 PARK is a necessary party to this Article 78 proceeding.

46. As directed by this Court, this argument is set forth more fully in Respondent's Opposition to Petitioner's Cross Motion to Amend the Pleadings.

47. In short, as of December 4, 2010 joinder became futile because the four month statute of limitations had expired.

48. The Petition of BROWN should therefore be dismissed for failure to join a necessary party.

CONCLUSION

49. It is therefore respectfully submitted that Petitioner BROWN lacks standing, which, coupled with the fact that the statute of limitations has now run and the Building Owner was not named as a party, requires that this action be dismissed.

Dated: New York, New York
March 4, 2011

Respectfully submitted,
Adam Leitman Bailey, P.C.
by

Adam Leitman Bailey
Dov Treiman
Pete J. Reid
120 Broadway, 17th Floor
New York, New York 10271
212-825-0365

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Respondents.

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AFFIDAVIT OF SERVICE

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

JEANETTE RIVERA-SOTO, being duly sworn, deposes and says:

1. I am not a party to this action, am over eighteen (18) years of age, and have a business address at 120 Broadway, 17th Floor, New York, New York 10271.

2. On March 4, 2011, I served the within **REPLY TO PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION TO DISMISS** upon:

JACK L. LESTER, ESQ.
Attorney for Petitioner
261 Madison Avenue, 26th Floor
New York, New York 10016

VIRGINIA WATERS, ESQ.
Assistant Corporation Counsel
Corporation Counsel of the
City of New York
Attorney for Municipal Respondents
100 Church Street
New York, New York 10007
(212) 788-0822

by enclosing a copy of same in a postage-paid wrapper properly addressed to the recipient and depositing the wrapper in an official depository within the exclusive care and custody of the United States Postal Service within the City, County, and State of New York by First Class Mail.

JEANETTE RIVERA-SOTO

Sworn to before me this
4th day of March 2011

Notary Public

ELISSA GREENFIELD
NOTARY PUBLIC, STATE OF NEW YORK
NO. 01GR6217838
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES FEBRUARY 22, 2014

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REPLY TO PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION TO DISMISS

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: March 3, 2011

Signature: 

Print Signer's: Adam Leitman Bailey, Esq.

ADAM LEITMAN BAILEY, P.C.
Office and Post Office Address
120 Broadway, 17th Floor
New York, New York 10271
(212) 825–0365

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Index
#110334/2010

AFFIRMATION IN OPPOSITION TO ORDER TO SHOW CAUSE

STATE OF NEW YORK
COUNTY OF NEW YORK } ss:

ADAM LEITMAN BAILEY, being an attorney duly licensed to practice law in the Courts of the State of New York, affirms the following to be true under penalties of perjury:

1. I am a partner of Adam Leitman Bailey, P.C., the attorneys for named Respondent SOHO PROPERTIES INC., as well as for non-party 45 Park Place Partners LLC, (hereinafter "45 PARK" or "Building Owner"), and I make this Affirmation in Opposition to the Order to Show Cause of Petitioner TIMOTHY BROWN (hereinafter "Petitioner" or "BROWN"). I make this affirmation upon

information and belief, the source of my information being the contents of the file I maintain in this action.

INTRODUCTION

2. Petitioner TIMOTHY BROWN is an individual presumably resident in the State of New York.

3. According to the Amended Verified Petition, (attached hereto at Exhibit "1"), BROWN was a member of the Fire Department of New York City and a first responder to the tragedy that occurred at the World Trade Center site on September 11, 2001.

4. BROWN has commenced this action to challenge the unanimous decision of Respondent THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, (hereinafter "LPC"), on August 3, 2010, which denied landmark status to the building located at 45 Park Place, New York, NY, (hereinafter "the Building").

5. BROWN filed an Amended Petition as of right with the Court on or about November 24, 2010, which amended an original Petition to include Respondents MICHAEL BLOOMBERG, Mayor of the City of New York, THE NEW YORK CITY DEPARTMENT OF BUILDINGS, and SOHO PROPERTIES INC as Respondents.

6. On or about January 11, 2011, BROWN brought on this Order to Show Cause which seeks, among other things, to enjoin issuance of permits to demolish parts of the Building, to enjoin any construction activity related to the Building, and to annul the determination of the LPC issued on August 3, 2010, which denied landmark status to the Building.

7. It requires no citation to law to establish that the standards in New York for the grant of a preliminary injunction are that the movant must demonstrate:

(i) a likelihood of ultimate success on the merits,

(ii) irreparable injury to the movant absent the injunction, and that

(iii) balancing of the equities favors the movant's position.

8. I respectfully refer the Court's attention to my accompanying Memorandum of Law, dated March 4, 2011, which is focused entirely on the issues surrounding likelihood of success.

9. Due consideration of these issues shows that the Petitioner lacks even a remote possibility of success.

10. First, the Building Owner could be inequitably affected by a judgment in this Article 78 action, which now attempts to impose restrictions on their right to develop its own property, and the Building Owner is therefore a necessary party.

11. In fact, and according to the publicly available ACRIS database, the owner of the Building is 45 Park Place Partners LLC.

12. The CLPR is clear that the statute of limitations for an Article 78 claim is four months from the date of the final decision. Here, the final decision was rendered on August 3, 2010 and the time for Petitioner BROWN to add the 45 Park Place Partners LLC as a party expired on December 3, 2010.

13. Accordingly, joinder is impermissible and would be futile and the within action should ultimately be dismissed pursuant to CPLR 3211(a)(5), CPLR 3211(a)(10), CPLR 1001(a) and CPLR 217(1) for failure to join the Building Owner as a necessary party[1].

14. Additionally, Petitioner BROWN has failed to demonstrate that he has suffered any injury as a result of the administrative decision and, furthermore, he has failed to set forth how any injury that he might suffer would be distinct from an injury to the general public, as he must in order to qualify to have standing to assert a cause of action, much less to establish one.

15. Therefore, pursuant to CPLR 3211(a)(3), as Petitioner does not have standing to bring this proceeding, there is no likelihood of ultimate success for Petitioner on the merits.[2]

16. Petitioner's motion for injunctive relief should be denied.

PETITIONER HAS NO LIKLIHOOD OF SUCCESS ON THE MERITS

45 Park Place Partners LLC is a Necessary Party

17. 45 Park Place Partners LLC, is a domestic limited liability company, authorized to do business in the State of New York.

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[1] A separate Motion to Dismiss has been filed simultaneously on several of the grounds cited herein.

[2] The extreme implausibility of anyone, even someone with standing, to show that the Landmarks Preservation Commission acted arbitrarily, capriciously, or on a mistake of law is beyond the scope of this affirmation, due to direction from this court to avoid cross-pollinating arguments that belong in different motions.

18. Named Respondent SOHO PROPERTIES, INC., (hereinafter "SOHO"), is a domestic limited liability company, which is also authorized to do business in the State of New York.

19. Each entity is a separate and distinct business, and each is separately licensed to do business in the State of New York.

20. 45 PARK is the owner of the Building located at 45 Park Place pursuant to a deed recorded on July 30, 2009, a fact noticed to the world at large on the publicly available 'Automated City Register Information System', (ACRIS), which records, among other things, deeds recorded by the City Register in four of the boroughs of the City of New York.

21. Named Respondent SOHO is neither the owner nor the tenant of the Building and is not mentioned in any of the ownership documents.

22. On January 4, 2010, 45 PARK, was notified by the LPC, as owners of the Building, that the LPC wanted to hold a public hearing with 45 PARK as a party regarding the landmark designation process, (see LPC letter of January 4, 2010, attached hereto at Exhibit "2").

23. A public hearing was held on August 3, 2010, and the LPC denied landmark status to the building located at 45 Park Place, New York, NY.

24. The grant of landmark status affects the rights of the owner or occupant of the landmarked building to alter the appearance or demolish the building.

25. As the Building Owner, 45 PARK would obviously be inequitably affected by a judgment in this action which seeks to accord landmark status to the Building, and therefore pursuant to CPLR §1001(a), 45 PARK is a necessary party.

As of the expiration of the statute of limitations for an Artcile 78 proceeding on December 3, 2010 to date, 45 PARK had not been joined in the proceeding.

The Statute of Limitations for Proceedings Brought Under Article 78 is Four Months

26. Petitioner BROWN seeks to challenge the final decision of Respondent THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, issued on August 3, 2010.

27. Pursuant to CPLR §217(1), a proceeding against a body or officer must be commenced within four months after the final determination by the City agency.

28. The LPC made its final determination regarding Landmark status at the public hearing on August 3, 2011.

29. Accordingly, Petitioner BROWN had until December 3, 2010 to commence an action against all necessary parties.

30. Petitioner BROWN failed to name the Building Owner as a Respondent and the time to join such an entity has now expired.

31. 45 PARK is a necessary party to this Article 78 proceeding.

32. As of December 4, 2010 such joinder became futile because the four month statute of limitations had expired.

Petitioner Lacks Standing To Sue

33. As is set forth more fully in the annexed Memorandum of Law, standing is a threshold requirement for a Petitioner seeking to challenge any governmental action. To meet the standing requirement a Petitioner must first show an "injury-in-fact," meaning that the individual bringing the challenge will actually be harmed by the challenged administrative decision. Mere conjecture is insufficient.

34. At no point in the Petitioner's Amended Verified Petition does BROWN actually allege that he will be injured by the decision of the LPC.

35. Though it is apparent that Petitioner BROWN feels passionately[3] about the decision of the LPC, an "interest" in the subject matter is insufficient to confer standing and Petitioner must demonstrate an injury-in-fact that is distinct from an injury to the public at large.

36. Unfortunately for Petitioner BROWN, he has not and cannot demonstrate such an injury.

37. A second prong of the "injury in fact" test is that the injury alleged must be one which is distinct from an injury to the public at large.

38. Petitioner has failed to demonstrate that he has suffered any injury as a result of the administrative decision and has failed to set forth how any potential injury would be distinct from an injury to the general public, as he must in order to establish

[3] Assuming without conceding that those passions are genuinely connected to architectural history and not actually rooted in his objection to the proposed future use of the premises.

standing to bring this suit. Therefore, pursuant to CPLR 3211(a)(3), Petitioner does not have standing to sue.

39. The Petition of BROWN will should therefore be dismissed as a result of the accompanying motion to dismiss, mooting this motion.

40. Accordingly, Petitioner's likelihood of success on the merits is nil and his request for injunctive relief must be denied.

PETITIONER HAS FAILED TO DEMONSTRATE THAT HE WILL BE IRREPARABLY INJURED ABSENT THE GRANTING OF THE INJUNCTION

41. For the same reason that Petitioner has failed to show any "injury-in-fact" as a result of the LPC's administrative decision, Petitioner is unable to demonstrate the "irreparable injury" necessary for the granting of injunctive relief

42. In support of his claim for irreparable injury Petitioner argues that demolition of the Building would irreparably harm the Building, (see Moving Affirmations of Brett Joshpe, Esq., and Jack L. Lester, undated, at page 7, hereinafter "Joshpe Aff.")

43. However, even assuming for the sake of the motion that Petitioner BROWN has a subsantial interest in architecture and U.S. history, Petitioner cannot demonstrate how he himself will be irreparably injured, as he must in order to satisfy the standards for a preliminary injunction.

44. Petitioner must show that he will be irreparably injured absent the granting of the preliminary injunction. Petitioner has not alleged any injury to himself at all, thus mandating the denial of the motion.

A BALANCING OF THE EQUITIES DOES NOT FAVOR THE MOVANT

45. There can be no equities to balance in favor of an individual who has no standing to challenge the administrative decision of the LPC in the first place.

46. As set forth above, BROWN's alleged interest in architecture and history is insufficient to confer him standing to bring this proceeding. Moreover, an affront to his purported interest is insufficient to demonstrate either injury-in-fact or an injury distinct from any to the public at large.

47. The non-party Building Owner clearly has a substantial and protectable property interest in the building, its use and its development.

48. Respondent SOHO PROPERTIES INC. has a substantial and protectable interest in proceeding with the development of a multi-cultural center at the site of the Building.

49. The decision of the LPC has nothing to do with Petitioner Timothy Brown.

50. Indeed, it would be wholly inequitable to impose restrictions on the use and development of the Building, based purely on the opinion of one individual who has no relation to the Building or the LPC.

PETITIONER'S DEMAND FOR DISCOVERY IS MOOT

51. Petitioner claims that he has "ample need" for discovery and that the leading case on the issue sets forth a threshold requirement that the moving party has established "in the first instance, the petitioner has asserted facts to establish a cause of action".

52. As discussed above, Petitioner does not have a valid cause of action and this matter should be dismissed.

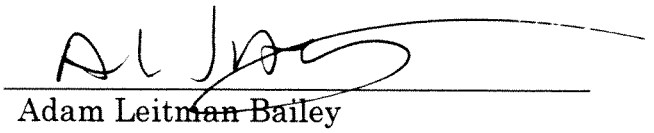
53. Accordingly, there is no need for discovery and Petitioner's request for depositions and documents should be denied.

CONCLUSION

54. Your Affirmant respectfully submits that the Building Owner is a necessary party, that joinder is futile because the statute of limitations has now run, and that, coupled with the fact that Petitioner BROWN lacks standing, this action should be dismissed. Petitioner's request for injunctive relief be denied., Petitioner's request for discovery is consequently moot.

Dated: New York, New York
March 4, 2011

Respectfully submitted,
Adam Leitman Bailey, P.C.
by



Adam Leitman Bailey
Dov Treiman
Pete J. Reid
120 Broadway, 17th Floor
New York, New York 10271
212-825-0365

Exhibit 1

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

----------x

TIMOTHY BROWN,

Index No.110334/10

Petitioner,

AMDENDED VERIFIED PETITION

-against-

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.

----------x

Petitioner, by his attorneys, the AMERICAN CENTER FOR LAW & JUSTICE and JACK L. LESTER, ESQ. for the Petition herein, allege as follows:

PRELIMINARY STATEMENT

1. This proceeding concerns the fate of 45-51 Park Place in Manhattan ("the Building"), an iconic structure that symbolizes American capitalism and perseverance in the face of terrorism.

2. The Building, which connects two structures, 45-47 Park Place and 49-51 Park Place, survived a direct hit on September 11, 2001 and is part of the area now known as Ground Zero, less than three blocks from the site of the former World Trade Center.

3. The Building faces imminent demolition, as the land use process of New York City threatens to do what terrorists failed to accomplish and destroy a building that has been under consideration for landmark status for over twenty (20) years.

4. During that time, upon information and belief, the preservation community as well as the local Manhattan Community Board #1 (the "CB") have advocated and beseeched the New York City Landmarks Commission (the "LPC") to consider designating 45-47 Park Place a New York City landmark in light of its architectural and historical significance.

5. The LPC calendared the matter for landmark consideration in 1989 but refused to hold another public hearing on 45-47 Park Place until July 13, 2010, when political pressures surrounding a proposed mosque, known as the Cordoba House, at the Building site prompted the LPC suddenly to hold a hearing in mid-Summer, close the record a scant one week thereafter and then unanimously vote to deprive the Building of landmark status—all inside of only a few weeks.

6. The LPC closed the record prior to receiving any notification from the local CB of its vote on the landmarks issue, thus depriving the CB of its statutorily mandated advisory role in such matters and defying administrative precedent, without weighing or reviewing the considerable record and documentation compiled over twenty (20) years, without providing other interested parties and members of the public with a reasonable opportunity for public comment and without giving due consideration to the Building's most important feature: its connection to September 11, 2001.

7. As set forth below, the LPC acted in an arbitrary, capricious and unreasonable manner and allowed the intended use of the Building and political considerations, including pressures from New York City Mayor Michael Bloomberg, who appoints the LPC commissioners, to taint what should be a deliberative, unbiased

and apolitical process. This was accomplished in violation of procedural safeguards set forth in the New York City Charter and Administrative Code of the City of New York.

8. This is a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR"). Petitioner seeks a judgment annulling, vacating and setting aside the determination of Respondent, the LPC, as against the weight of the evidence, contrary to administrative procedure and precedent and violating the statutes, rules and regulations governing the landmarks process in the City of New York.

9. Petitioners also seek disclosure of relevant and material information pursuant to requests made to public agencies through the Freedom of Information Law. (See FOIL Requests annexed hereto as Exhibit "A").

JURISDICTION AND VENUE

10. This Court has jurisdiction pursuant to Article 78 of the CPLR to review a final action by the bodies or officers responsible for the land use classification of the Building and to compel compliance with FOIL requests.

11. Venue is proper in New York County pursuant to §506(b) because New York County is where the material events at issue took place and are taking place and where the LPC and several of the others respondents have their principal office.

PARTIES

12. Petitioner, Timothy Brown, is an American hero whose courage and bravery on September 11, 2001 embodies the American ideal. As a member of the Fire Department of New York City, he was one of the first responders on September 11, 2001, rushing to the site of the World Trade Center and risking his life to save others. He survived the worst terrorist attacks in history and the collapse of the World Trade Center

around him but lost nearly 100 of his friends on that day. He has since worked to organize and advocate on behalf of survivors and family members of the deceased and has been a tireless spokesman for honoring the victims' memory.

13. Since plans to demolish the Building were announced, Petitioner has argued for its preservation given its location at Ground Zero and the historical importance of the Building, which suffered a direct hit when the landing gear from one of the hijacked planes that destroyed the World Trade Center crashed through the roof of the Building. Petitioner and/or his counsel have attended not less than four CB and LPC meetings to argue on behalf of landmarking the Building, and Petitioner is generally concerned about preserving effected areas of Lower Manhattan and protecting the memory of the September 11, 2001 events.

14. Respondent, the New York City Landmarks Preservation Commission, was established pursuant to Chapter 74, Section 3020 of the New York City Charter.

15. The LPC has the power to establish and regulate landmarks. The Landmarks Preservation Law, codified at Title 25, Chapter 3 of the New York City Administrative Code ("Code"), declares:

> as a matter of public policy that the protection, enhancement, perpetuation and use of improvements and landscape features of special character or special historic or aesthetic interest or value is a public necessity and is required in the interest of health, prosperity, safety and welfare of the people. (emphasis added)

Code § 25-301 (b)

16. The Landmarks Law establishes a regulatory scheme which is designed, inter-alia, to

> effect and accomplish the protection, enhancement and perpetuation of such improvements . . . and of districts which represent or reflect elements of the city's cultural, social,

> economic, political and architectural history . . . safeguard the city's historic, aesthetic and cultural heritage, as embodied and reflected in such improvements . . . and districts . . . and promote the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.

Code§ 25-301 (b)

17. Upon receiving landmark designation, a building may not be altered or demolished without the LPC's approval pursuant to Code § 25-307 (a).

18. The LPC may only approve the alteration or demolition of a landmarked building after holding a public hearing pursuant to Code § 25-308.

19. Respondent, the Department of Buildings (the "DOB") is an agency of the City of New York responsible for enforcing provisions of the Building Code that will be at issue in this proceeding. The DOB must review all plans for the development of the Building. Permits must be issued for demolition of the current structure or excavation and foundation to support a new building. Development of a site cannot occur unless and until the DOB has approved the necessary permits. Furthermore, the DOB has responsibility for protecting the public's safety by ensuring that New York City buildings are not occupied without a valid certificate of occupancy or temporary certificate of occupancy. Upon information and belief, at least one of the Respondents has and continues to occupy the building without a valid certificate or occupancy or temporary certificate of occupancy, thus potentially risking the public's safety.

20. Respondent, Michael Bloomberg is the Mayor and Chief Executive Officer of the City of New York. Upon information and belief, the Mayor was in communication with the LPC advocating development of the Building and opposing landmark status. The Mayor possesses information relevant and material to this

proceeding. Petitioners have requested this information pursuant to FOIL and the Mayor and/or the Mayor's Office have refused to provide such information to date.

21. Respondents Soho Properties Inc. and Jane Doe and John Doe, upon information and belief, hold a beneficial interest in the Building or the planned project that would be located at the Building site, or are net lessees at 49-51 Park Place, and they are necessary parties under Article 78 of the CPLR.

FACTUAL BACKGROUND

22. The Building located at 45-47 Park Place was first calendared by the LPC in 1989 due to the Building's unique architectural features.

23. As one member of the LPC observed during the LPC's public ruling on the Building's status, the Building "is part of Ground Zero." (C. Moore, Landmarks Preservation Commission Hearing Transcript, Commissioner Moore, p. 21, line 25). The area known as Ground Zero sustained significant destruction from the September 11, 2001 terrorist attacks. The Building also stands in close proximity to the Tribeca Historic District and within approximately two blocks or approximately six hundred (600) feet of the site of the former World Trade Center.

24. This Building is the only one of its kind linking the growth of American free enterprise to the present day and the aftermath of the September 11, 2001 events, and it stands as a testament to the American ideal of economic, social and political freedom in the face of murderous ideology.

25. The Building at 45-47 Park Place merited landmark status prior to September 11, 2001, but its historical and cultural significance is even more important

and the Building even more worthy of preservation after the September 11 terrorist attacks.

26. The Building at 45-47 Park Place combines three crucial elements deserving of landmark status.

(a) It has overwhelming historical significance bridging two periods of American history;

(b) It maintains unique architectural features worthy of landmark status; and

(c) It may yield discoveries related to the events and aftermath of September 11, 2001 that will be lost forever if not preserved.

27. The Building at 45-47 Park Place is rich with inflections of fine mid-19th century architecture. It is an intact five (5) story 152-year old Italianate Renaissance palazzo style warehouse, which retains its original colonnade cast by Daniel Badger and Company and with upper floors that appear much as they did originally.

28. The LPC has recognized the architectural uniqueness of very similar properties in Lower Manhattan. In awarding landmark status to 311 Broadway, the LPC indicated that 311 Broadway is one of the few remaining palazzo-style buildings in Lower Manhattan and therefore merits landmark status.

29. The Building's architecture recalls not only mid-19th century New York City, but also 16th century Rome and Florence. The CB has even noted that the Building's façade is worthy of preserving and that the historic façade should be incorporated into any future design, saying in a resolution that "Community Board No. 1 Manhattan urges that in light of the redevelopment budget for this site that the historic

façade be carefully deconstructed, stored and incorporated into any future design for the site . . .". The Building's symmetrical square projecting lintels and second floor balconets were adopted in the 1840's and 1850's in cities across Britain for Store-and-Loft buildings on London's Farringdon Street North and New Coventry Street (both mid-1840's). The Building at 45-47 Park Place maintains a continuous cornice flanked by two scrolled brackets surrounded by an antefix.

30. Notwithstanding that the Tribeca Historic District does not encompass the site, its stand alone nature highlights the need to maintain this structure reflecting a mercantile period in our history and an architectural uniqueness that is rapidly disappearing from our physical landscape. The Building's uniqueness in the neighborhood justifies designation as a landmark according to administrative precedent established by the LPC throughout Lower Manhattan. In 1989, when the Building was calendared by the LPC for landmark consideration, the CB supported its designation as a landmark.

31. The same CB that recommended against landmarking the Building on July 27, 2010 voted 19-1 in a Committee on Landmarks, Art & Cultural Affairs resolution dated September 14, 1989, to recommend designating the Building a landmark, along with 28 other buildings. Hal Bromm of the CB expressed public support for landmarking it on behalf of the CB at the LPC's September 19, 1989 public hearing. The Committee for the Washington Market Historic District of the Tribeca Community Association also supported designating the Building an individual landmark.

32. In addition to the Building's architectural significance, it has a rich, virtually unparalleled, history that justifies landmark designation. The Building at 45-47

Park Place was constructed in the mid-19th Century for Paul Spofford and Thomas Tileston. They were pioneers in the shipping industry who inaugurated successful steam navigation into American mercantile and industrial development. They refused to navigate their ships under foreign flag to evade the Confederate blockage of Southern ports during the Civil War. They volunteered their vessels to the Union cause during the Civil War at great financial sacrifice in America's struggle for unity, freedom and racial equality.

33. The Building at 45-47 Park continued to be occupied into the late 19th Century by prestigious commercial enterprises, including occupancy by James P. Smith, a fancy foods importer, and by the American Press Association. From 1911 to 1925 it was the headquarters of Merck & Company. The Building had continuous usage, including by Drakenfield & Co., a developer of innovative manufacturing methods for the ceramics industry, and as a Burlington Coat Factory, until 2001, when, on September 11, landing gear from one of the hijacked planes crashed through the Building after exploding into the World Trade Center.

34. The Building at 45-47 Park Place was one of fewer than 20 buildings to suffer major damage, partial collapse or total collapse as a result of the September 11 attacks, according to a report by the Federal Emergency Management Agency ("FEMA"). (See relevant portions of the FEMA report attached hereto as Exhibit "B"). As such, the Building is one of just a handful of structures to sustain major damage on September 11, 2001 and remain standing, placing it in a unique category and distinguishing it from almost every other building within the vicinity of the September 11 carnage.

35. The Building remained dormant of commercial activity after September 11, and it now serves as a prayer center for people of the Muslim faith, potentially in violation of DOB regulations governing certificates of occupancy.

36. The Building at 45-47 Park Place stands as an iconic symbol to an uninterrupted linkage of the rise of American capitalism with our current quest to preserve our freedom and democracy. Therefore, and particularly in light of the damage it sustained—and survived—on September 11, it stands as part of the commemorative and educational experience of our shared political, cultural and historic heritage and should be preserved.

ADMINISTRATIVE PRECEDENT – HISTORIC AND ARCHITECTURAL SIGNIFICANCE

37. 45-47 Park Place's direct, unequivocal and dramatic connection to two eras in American history compels the granting of landmark status. Upon information and belief, there are over 25,000 properties that have been granted landmark status since 1965.

38. Upon information and belief, in the period between 2003 and 2008, the LPC awarded landmark status to approximately 1,972 buildings.

39. The LPC focused administratively during that time span in preserving buildings that recall New York City's 19th Century industrial heritage and architectural features that highlight the Italianate Renaissance palazzo-style.

40. A virtually identical replica to 45-47 Park Place is located at 23-25 Park Place. It too was calendared by the LPC in 1989 due to its unified facades, its elevations featuring Italianate details, its continuous stone cornice and its history as the base of operations of the *Daily News* during the 1920's. Unlike 45-47 Park Place, however, the

LPC *unanimously designated* 23-25 Park Place a landmark in 2007, despite the far greater historical, cultural and iconic significance of 45-47 Park Place.

41. The LPC, recognizing the obvious inconsistency in its treatment of 23-25 Park Place and 45-47 Park Place, paid lip service to proper protocol by noting in the official record that 23-25 Park Place has more architecturally significant features. In reality, these differences are immaterial, and, in fact, the unique historical importance of 45-47 Park Place, especially in light of September 11, provides a far more compelling justification for landmarking 45-47 Park Place. The disparate treatment of these two properties and towards their respective owners can be explained by the results-oriented, politically tainted deliberations of the LPC, which considered the proposed use of the Building site and the owners' plans to construct a 15-story mosque, plans that Respondent Mayor Michael Bloomberg adamantly and publicly supported.

42. Buildings located at 122 Chambers Street, 105-107 Chambers Street, 311 Broadway, 319 Broadway, 359 Broadway and 361 Broadway in Manhattan are all also individually landmarked buildings sharing the architectural style of the Building at issue in this proceeding.

43. Upon information and belief, approximately six percent (6%) of all landmarked structures in New York City have been landmarked solely due to historic significance.

44. Upon information and belief, the World Trade Center Site has been determined eligible for inclusion in the National Register of Historic Places.

45. Upon information and belief, the Metropolitan Transit Authority has agreed to preserve the buildings surrounding the World Trade Center Site in its development plans.

46. Upon information and belief, the New York State Registry of Historic Places is reviewing the building.

47. Upon information and belief, the Federal Government created the Heritage Emergency National Task Force to help libraries, museums, and archives by providing expert information and to salvage important historical artifacts in the wake of disasters. The agency is co-sponsored by FEMA and Heritage Preservation Inc. The Task Force is composed of more than 30 Federal Agencies and national service organizations. The Task Force has assessed the impact of September 11 on cultural and historic resources in Lower Manhattan.

48. Upon information and belief, the Task Force is still actively engaging in a complete inventory of historic artifacts buried or lost in the buildings surrounding the World Trade Center. To this day, a complete evaluation of human and material remains of that catastrophic event remains incomplete, and the rubble at the World Trade Center continues to yield discoveries.

49. Respondent, LPC's report and evaluation failed to account for or reflect any other governmental agency involvement, if any, or the investigation of artifacts and/or human remain to be discovered in the Building. Immediately following September 11, for example, it was assumed that Calder's 15-ton stabile Bent Propeller had been destroyed. However, pieces of the red steel sculpture have been recovered

recently. Similarly, boxes containing artifacts from the African Burial Ground have been unearthed beneath the debris surrounding the World Trade Center.

50. Media reports indicate that human remains were found as close as one block to the Building site, and, upon information and belief, a full comprehensive accounting of those remains has yet to be completed.

51. Highlighting the vulnerability of the rich history of buildings surrounding the World Trade Center, the World Monuments Fund added the entire area to a list of the World's most endangered sites. Upon information and belief, the LPC has failed to consult with any agency investigating the remains of September 11 in summarily rejecting landmark status for the Building.

52. Notwithstanding the fact that September 11 established 45-47 as an icon for surviving a direct hit from the landing gear of one of the attacking planes, the LPC utterly failed to account for this momentous historic event in a departure from administrative precedent. The LPC commissioners made only occasional passing references to the importance of 45-47 Park Place given the events of September 11, 2001, and why they justify landmark status, and the LPC completely failed to account for this significance in its official research report.

53. The commissioners demonstrated a remarkable degree of willful detachment in ignoring the relevance of those events, with one Commissioner even comparing the September 11 terrorist attacks and the damage that they caused to a highway guardrail. Commissioner Moore said, "I do think about the significance, though, of its connection to the events of September 11, 2001. However, I make it akin to a guardrail on a highway where fatalities occurred; the guardrail is not preserved . . .

Last I looked, we do not landmark the sky, but I wish we could." (Landmarks Preservation Commission Hearing Transcript, Commissioner Moore, p. 22, line 13-25).

54. Commissioner Moore's statement implied that the LPC would have liked to landmark the property, if only it could, and that the LPC was unable to account for the events of September 11 in considering whether to landmark the Building. The comparison of one of the most momentous events in our nation's history—a deliberate ideological mass-murder and an attack on all Americans—to a highway pileup illustrates the degree to which the LPC failed to consider relevant factors in deciding not to landmark the Building and is evidence of an irrational abuse of discretion.

55. Another LPC commissioner said that "With regard to the building's history . . . the most interesting occupant was probably the American Press Association from 1893 to 1910, but I do not find this single piece of the building's history compelling evidence to warrant designation." (Landmarks Preservation Commission Hearing Transcript, Commissioner Chapin, p. 16, lines 4-13). Again, such testimony reveals how the LPC failed to consider the full historical importance of the Building, not just with respect to September 11, but the entire history of the Building and its occupants, including Merck & Co., which stationed its headquarters at the Building at one time.

56. When the LPC did pay lip service to the Building's historical importance and connection to September 11, it did so in a manner that, like Commissioner Moore's statement above, was calculated to make a casual listener believe that the LPC wanted to landmark the Building but was simply unable to do so. For instance, Commissioner Byrns said,

> The standards of quality for an individual landmark are much higher than those for buildings in a landmark district. They might including [sic] the

> design by a noted architect or being associated significantly with a historic event, or it might be a building of such rarity such as a federal house, that even modest examples should be preserved . . . . While the case for 45 Park Place scores points in several categories, it does not make the final mark in my book . . . . Its main historical significance is its association with the events of 9-11. But the debris field around Ground Zero was widespread, and one cannot designate hundreds of buildings on that criterion alone."
>
> (Landmarks Preservation Commission Hearing Transcript, Commissioner S. Byrns, p. 26-27, lines 3-4).

Notwithstanding that Commissioner Byrns misstated the legal standard by constructing a new criterion for considering individual landmarks versus buildings in landmark districts—itself evidence of abuse of discretion—the Commissioner also falsely implied that landmarking the Building would have been impractical because it would require landmarking hundreds of other buildings. But, as stated previously, 45-47 Park Place is not just any building or even any building that suffered damage on September 11; it is one of fewer than a dozen buildings to have suffered major damage on that day and still remain standing, and it is the only one in which landmark status has been considered.

57. The LPC engaged in other procedural irregularities that demonstrate an abuse of discretion and violation of administrative precedent. For instance, one LPC Commissioner noted that "both the community board and the City Council representative are opposed to designation." (Landmarks Preservation Commission Hearing Transcript, Commissioner L. Ryan, p. 24, lines 21-23). However, the LPC closed the record on 45-47 Park Place prematurely and prior to the CB's vote on whether to recommend for or against landmark status. Although Petitioner asserts that the LPC acted improperly in closing the record prior to the CB vote, it nonetheless did so, and, therefore, could not

have validly considered the CB's official position on the matter, especially since other interested parties who wished to submit testimony were precluded from doing so once the record was closed.

58. The LPC also inappropriately received correspondence directly from the legal counsel for the owners of the Building. Shelley Friedman wrote to mark Silberman and Kate Daly of the LPC after the LPC's public hearing on the Building that the hearing was "Billed in the index as clearing a major hurdle." (A copy of this email is attached hereto as Exhibit "C"). Upon information and belief, there may exist other correspondence between the owners of the Building and/or their representatives and the LPC that Respondent has yet to provide Petitioner and which provide evidence of undue influence and an abuse of discretion.

59. Finally, the LPC also clearly considered the Building's proposed use in deciding whether or not to designate it a landmark, which explains the LPC's disparate treatment of this Building with others. This is evidenced by Imam Feisal Abdul Rauf's letter to Chairman Robert Tierney on July 7, 2010, which appears in the LPC's record and which emphasized the religious use of the building, stressed the "overwhelming support of our neighbors on Community Board 1" and urged the LPC to "decide to forego designation of 45 Park Place so that we can continue to worship and grow on this site as both Americans and Muslims." While the LPC was prohibited from considering such use in its decision-making process—but clearly did—it was also required to genuinely account for the Building's historical importance in light of September 11th—it clearly did not.

FOIL REQUESTS

60. On or about July 30, 2010, and thereafter, Petitioner sent letters to the LPC, the DOB, and the Office of the Mayor, among other local, state and federal agencies, to obtain inter-alia documents, memos, notes, correspondence, permits, applications and/or plans relating to the landmarking process, demolition, development, lease, sale and/or occupancy of the Building at issue in this proceeding, as well information about searches for human remains in or around the Building.

61. Significantly, documents will shed light on any political influence or pressure placed during the landmarks process.

62. Some of the public agencies and officials named in this proceeding have not complied with FOIL, in particular, documents regarding communication with the Mayor's Office, and by the Mayor's Office, despite their obligations pursuant to Article 6 of the Public Officers Law of the State of New York and despite Petitioner's unquestioned need for these documents.

63. Upon information and belief, the issuance of demolition permits are imminent and the failure of the governmental Respondents to disclose the documents requested in Petitioner's FOIL request will cause irreparable harm in that the subject matter of this proceeding will be destroyed prior to a full and fair adjudication of the merits of this proceeding.

64. Compliance with Petitioner's FOIL requests after the demolition of the Building will defeat and prejudice the very purpose of Petitioner's document requests.

65. Upon information and belief, the intended use of the Building has infected the land use review process and militated against an analytical and deliberative review of the Building's historical and architectural significance.

66. Upon information and belief, the staff of the LPC recommended that the Building be considered for landmark status in 1989, and members of the local Community Board and concerned citizens have and continue to seek having the Building listed on the State and National Registers of Historic Places.

67. Despite the foregoing, and contrary to administrative precedent, Respondent, the LPC, refused to consider the views of any relevant and/or involved public agency and closed the public record a scant one week after hastily announcing a public hearing and prior to a vote of the CB.

68. Respondent, the LPC, has failed in any meaningful manner to explain the differential treatment accorded this Building, as contrasted with buildings of very similar architectural features with less historical significance.

69. Respondent, the LPC, has failed to analyze and fully evaluate the Building's unique and direct connection to the events of September 11, 2001.

70. Petitioner is seeking a full and fair disclosure of all relevant and material information at this early stage in the development process, prior to the project reaching the point of "no return," which will render any proper request or judicial intervention moot.

AS AND FOR A FIRST CAUSE OF ACTION

71. Petitioner repeats and realleges paragraphs "1" through "70".

72. It is hornbook administrative law that "where an administrative agency does not follow its own precedents in deciding a case involving the same factors as other cases, the agency must set forth its reasons for the departure, or the reviewing court must reverse the agency decision as arbitrary and capricious as a matter of law." See Citadino

v. Bellacosa, 136 Misc. 2d 999 (Sup. Ct. N.Y. Co. 1987) (Dontizin, J.) citing Chas A. Field Delivery Svcs., 66 N.Y. 2d 516 (1985).

73. By denying landmark status to the Building, by deviating from historical procedures and precedents and by allowing political pressures to impact the result, the LPC engaged in an arbitrary and capricious abuse of discretion in contravention of administrative precedent.

AS AND FOR A SECOND CAUSE OF ACTION

74. Petitioner repeats and realleges paragraphs "1" through "73".

75. Respondent, the LPC, is mandated by Code § 25-303 (b) to hold a public hearing in order to designate a landmark site.

76. Public hearings must afford the public a reasonable right to participate and be heard and for their testimony and documents to be considered and evaluated.

77. The record of such public hearing must be considered prior to a determination. The LPC received thousands of written submissions from all across the country, the vast overwhelming majority of which supported landmark designation due to the Building's historical importance in light of September 11, 2001.

78. Respondent, LPC's failure to review, or consider the public record including the closure of the record prior to a vote of the Community Board was violative of the New York City Charter Chapter 70 § 2800 (d) (2) and an arbitrary and capricious abuse of discretion and violative of Code § 25-313 (b), which mandates the public be accorded a reasonable opportunity to be heard.

AS AND FOR A THIRD CAUSE OF ACTION

79. Petitioner repeats and realleges paragraphs "1" through "78".

80. Respondent, LPC's failure to evaluate or consider remains of September 11, 2001, or to consult with involved or participating Federal or State Agencies in declining to designate the site a landmark, was an arbitrary and capricious abuse of discretion and violative of law.

AS AND FOR A FOURTH CAUSE OF ACTION

81. Petitioners repeat and reallege paragraphs "1 through "80" as if fully set forth herein.

82. The failure of the governmental Respondents to disclose relevant and material documents requested in Petitioner's FOIL Request hinders, impedes, prejudices and frustrates the ability of Petitioners to safeguard the Building and prevent its demolition prior to a full and fair judicial determination.

83. In the absence of governmental compliance with Petitioner's FOIL Request, Petitioner cannot insure compliance with legal issues raised in this proceeding.

84. In the absence of governmental compliance with Petitioners' FOIL Request, Petitioners cannot pursue their administrative remedies as they relate to the approval of plans pertaining to the issuance of building, demolition, excavation and/or foundation permits.

85. The failure of governmental agencies to comply with Petitioner's FOIL Request is violative of Article 6 of the Public Officers Law of the State of New York and is an arbitrary and capricious abuse of discretion.

86. Relief under mandamus is appropriate where the right to such relief is clear, and the duty sought to be compelled is performance of an act required to be performed by law, and involving no discretion.

WHEREFORE, Petitioners seek an Order: (1) Compelling the governmental agency Respondents to comply with their statutory obligations and disclose the information requested in Exhibit "A" annexed hereto; (2) Enjoining and restraining the DOB from issuing any permits or approvals to commence demolition or excavation on the project until a final judicial decision has been issued in this matter; (3) Annulling the determination of LPC as arbitrary, capricious and violative of law; and (4) Granting Petitioner such other and further relief as this Court deems just and proper, including Court costs and legal fees.

Dated: New York, New York
October 13, 2010

Brett Joshpe, Esq.
American Center for Law and Justice

Jack L. Lester, Esq.

Exhibit 2

NYC
Landmarks Preservation Commission

Kate Daly
Executive Director
kdaly@lpc.nyc.gov

1 Centre Street
9th Floor North
New York, NY 10007

212 669 7926 tel
212 669 7797 fax

January 4, 2010

45 Park Place Partners, LLC
552 Broadway, Suite 6N
New York, NY 10012

Re: 45-47 Park Place, Manhattan

Dear Sir or Madam:

I write to follow up my letter of November 18, 2009. As you may be aware, the Landmarks Preservation Commission is the New York City agency responsible for designating and regulating the city's landmarks and historic districts. These properties have special historic, architectural, cultural, and/or aesthetic significance as part of the heritage of the city, state, or nation.

Last winter I reached out to the owner of this property to inform him of the Commission's continued interest in pursuing the building at 45-47 Park Place as a potential individual New York City landmark. A public hearing about the building was held by the Commission in 1989, and I would like to schedule an additional public hearing on **Tuesday, March 23, 2010** so that the Commission can move forward with the designation process.

I enclose some information about the Commission's work and the effects of designation. The Commission is proposing to designate the exterior, not the interior, of your building; our only concern about interior work would be to ensure that the work did not affect the exterior of the building. The Commission does not regulate use.

I would like to meet with you or your representative to discuss the designation process and the regulatory impact of designation. Please contact me or my assistant Megan Schmitt at (212) 669-7924 or by email (mschmitt@lpc.nyc.gov) at your earliest convenience to arrange a meeting. Thank you.

Sincerely,

Kate Daly

Kate Daly

Enc.

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

TIMOTHY BROWN

Petitioner,

-against-

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.

Index #110334/2010

AFFIDAVIT OF SERVICE

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

JEANETTE RIVERA-SOTO, being duly sworn, deposes and says:

1. I am not a party to this action, am over eighteen (18) years of age, and have a business address at 120 Broadway, 17th Floor, New York, New York 10271.

2. On March 4, 2011, I served the within **AFFIRMATION IN OPPOSITION TO ORDER TO SHOW CAUSE** upon:

JACK L. LESTER, ESQ.
Attorney for Petitioner
261 Madison Avenue, 26th Floor
New York, New York 10016

VIRGINIA WATERS, ESQ.
Assistant Corporation Counsel
Corporation Counsel of the
City of New York
Attorney for Municipal Respondents
100 Church Street
New York, New York 10007
(212) 788-0822

by enclosing a copy of same in a postage-paid wrapper properly addressed to the recipient and depositing the wrapper in an official depository within the exclusive care and custody of the United States Postal Service within the City, County, and State of New York by First Class Mail.

JEANETTE RIVERA-SOTO

Sworn to before me this
4th day of March 2011

Notary Public

ELISSA GREENFIELD
NOTARY PUBLIC, STATE OF NEW YORK
NO. 01GR6217838
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES FEBRUARY 22, 2014

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

TIMOTHY BROWN

Petitioner,

-against-

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,

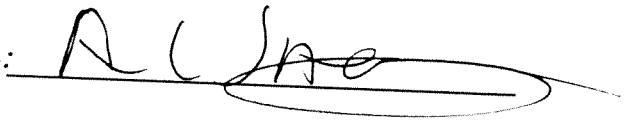
Respondents.

Index #110334/2010

AFFIRMATION IN OPPOSITION TO ORDER TO SHOW CAUSE

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: March 3, 2011

Signature: 

Print Signer's: Adam Leitman Bailey, Esq.

ADAM LEITMAN BAILEY, P.C.
Office and Post Office Address
120 Broadway, 17th Floor
New York, New York 10271
(212) 825–0365

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

TIMOTHY BROWN

Petitioner,

-against-

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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#110334/2010

**RESPONDENT SOHO PROPERTIES INC.
MEMORANDUM OF LAW
IN OPPOSITION TO PETITIONER'S
ORDER TO SHOW CAUSE**

On the brief:
Adam Leitman Bailey
Dov Treiman
Pete J. Reid

ADAM LEITMAN BAILEY, P.C.
Attorneys for Respondent
Soho Properties, Inc.
120 Broadway, 17th floor
New York, New York 10271
Tel: 212-825-0365
Fax: 212-825-0999

PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted on behalf of named Respondent SOHO PROPERTIES, INC, (hereinafter "SOHO"), in opposition to Petitioner's Order to Show Cause which seeks, among other things, to enjoin the issuance of permits to demolish parts of the Building, to enjoin any construction activity related to the Building, and to annul the determination of the LPC issued on August 3, 2010, which denied landmark status to the Building.

It requires no citation to law to establish that the standards in New York for the acquisition of a preliminary injunction are that the movant must demonstrate:

(i) a likelihood of ultimate success on the merits,

(ii) irreparable injury to the movant absent the injunction, and that

(iii) a balancing the equities favors the movant's position.

This Memorandum of Law is focused entirely on the issues surrounding likelihood of success and is therefore similar in content to Respondent's Motion to Dismiss, dated January 14, 2011, which was brought contemporaneously by Order to Show Cause and which is also currently before this Court.

Said motion seeks an Order pursuant to CPLR §3211(a)(3), CPLR §3211(a)(5), CPLR §3211(a)(10), CPLR §1001(a) and CPLR §217(1) dismissing the Amended Verified Petition of TIMOTHY BROWN for failure to join the Building Owner as a necessary party, and on the ground that joinder is now futile because the statute of limitations has now run, and further because the Petitioner lacks standing to sue.

For the same reasons, Petitioner will be unable to demonstrate a likelihood of success on the merits and, accordingly, his Order to Show Cause should be denied.

STATEMENT OF FACTS

The relevant background facts as fully set forth in the accompanying Affirmation of Adam Leitman Bailey dated March 4, 2011, ("the Bailey Affirmation"), are incorporated herein.

Briefly, Petitioner TIMOTHY BROWN (hereinafter "BROWN"), is a former member of the New York Fire Department with a purported avocational curiosity about architecture, who has commenced this action to challenge the unanimous decision of Respondent THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, (hereinafter "LPC") on August 3, 2010 which denied landmark status to the building located at 45 Park Place, New York, NY, ("the Building").

Named Respondent SOHO is not the Building Owner and is not mentioned in any of the ownership documents. Rather, the owner of the Building is 45 Park Place Partners LLC, (hereinafter "Building Owner" or "45 PARK"). The actual ownership of the building is not only a matter of constructive notice to the entire world (New York Real Property Law Article 9) but as a practical matter is knowledge readily available to anyone with a computer device capable of accessing the internet, thanks to New York City's ACRIS system. In short, particularly with reference to land in Manhattan, anyone with the will to know can ascertain within five minutes who owns what.

POINT 1: THE OWNER OF A BUILDING IS A NECESSARY PARTY TO ANY ACTION THAT MAY DETERMINE THAT ITS BUILDING IS A NEW YORK CITY LANDMARK

The definition of necessary party has been strictly construed. It is limited to those cases where the court's determination would adversely affect the rights of the non-parties (*Matter of Castaways Motel v. C.V.R. Schuyler*, 24 N.Y.2d 120, 299 N.Y.S.2d 148, 247 N.E.2d 124 [1969], rearg. granted 25 N.Y.2d 896, 304 N.Y.S.2d 1031, 251 N.E.2d 152 [1969]), adhered to on rearg. 25 N.Y.2d 692, 306 N.Y.S.2d 692, 254 N.E.2d 919 [1969]; *Henshel v. Held*, 13 A.D.2d 771, 216 N.Y.S.2d 41 [1st Dept.1961].

On August 3, 2010, the LPC unanimously determined that the Building would not be accorded Landmark status and the Building Owner has subsequently proceeded with redevelopment plans.

If the decision of the LPC were reversed by the Court, clearly the rights of the Building Owner would be adversely affected.

The Court of Appeals considered a similar set of facts in *Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Standards*, 5 N.Y.3d 452, 839 N.E.2d 878, N.Y.,(2005), (hereinafter "*Red Hook*") where a nonprofit organization of local business owners challenged a City administrative decision, but failed to name the landowners (Imlay).

The Court of Appeals wrote that:

> Plainly, Imlay was a necessary party, and should have been joined in the proceeding at its inception. Having invested significant resources in pursuing its plan to convert the commercial space to luxury apartments, the developer "might be inequitably affected by a judgment" overturning the variance that permitted residential conversion (CPLR 1001[a]).
>
> (*Red Hook*, *Supra* at 456.)

Further, the Court reasoned that while both Imlay and the City had the same immediate purpose in opposing the article 78 petition – that of maintaining the status of the variance - that, in and of itself, did not create a unity of interest such that an action against Imlay related back to the filing date of the petition (supra at 456, *see also* CPLR 203 [c]; *and see Matter of*

Emmett v. Town of Edmeston, 2 N.Y.3d 817, 781 N.Y.S.2d 260, 814 N.E.2d 430 [2004]).

Here it is unquestionable that 45 PARK would be inequitably affected by a judgment overturning the Commission's decision not to landmark the building, and that, therefore, it is a necessary party. Likewise, there is no unity of interest with the City.

POINT 2 – THE STATUTE OF LIMITATIONS FOR AN ARTICLE 78 PROCEEDING IS FOUR MONTHS

A CPLR Article 78 proceeding to review a determination of a public body or officer must be brought within four months of the date when the determination is "final and binding upon the petitioner" (CPLR 217(1); see also CPLR 7801(1); *Matter of Carter v. State of N.Y., Exec. Dept., Div. of Parole*, 95 N.Y.2d 267, 270, 716 N.Y.S.2d 364, 739 N.E.2d 730).

The Court of Appeals has identified two requirements for fixing the time when agency action is final and binding upon the petitioner:

> "First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party"
>
> *Matter of Best Payphones, Inc. v. Department of Info. Tech. & Telecom. of City of N.Y.*, 5 N.Y.3d 30, 34, 799 N.Y.S.2d 182, 832 N.E.2d 38.

Here, the LPC Board reached a final unanimous decision on August 3, 2010, (see decision annexed to Bailey Affirmation at Exhibit "4") and that four month statute of limitations period expired on December 3, 2010.

POINT 3 – TO JOIN THE BUILDING OWNER TO THE PROCEEDING NOW WOULD BE FUTILE AS THE STATUTE OF LIMITATIONS HAS EXPIRED

Joining 45 PARK now to this Article 78 proceeding would be a futile gesture because the four-month statute of limitations has now expired. While it is theoretically possible that 45 PARK might have waived its statute of limitations defense, it too retained Adam Leitman Bailey, PC to represent its interest and Adam Leitman Bailey has set forth in his affirmation that there is and will be no such waiver.

The Court of Appeals in *Red Hook*, *supra*, *passim*, cites numerous cases where the four-month statute of limitations had run and Petitioners had failed to join a landowner as a necessary party, resulting in dismissal:

In *Ferrando v. New York City Bd. of Standards and Appeals*, 12 A.D.3d 287, 785 N.Y.S.2d 62, N.Y.A.D. (1 Dept., 2004), in a proceeding brought pursuant to CPLR Article 78, the First Department stated that Petitioner's failure to join the owner of the premises for which the disputed certificate of occupancy was issued, constituted a failure to join a necessary party (*see also, Matter of Manupella v. Troy City Zoning Bd. of Appeals,* 272 A.D.2d 761, 707

N.Y.S.2d 707 [2000]). The *Ferrando* Court reasoned that since the applicable statutory period had expired and the owner could no longer be joined, and that proceeding in his absence would potentially be highly prejudicial to him, the proceeding was properly dismissed (*see* CPLR 1001 and 1003).

In *East Bayside Homeowners Ass'n, Inc. v. Chin*, 12 A.D.3d 370, 783 N.Y.S.2d 305, N.Y.A.D. (2 Dept. 2004), another proceeding pursuant to CPLR article 78, the Appellate Division held that the Supreme Court had properly dismissed a proceeding for failure to timely join the landowner as a necessary party. The Court stated that the Petitioner's failure to adequately explain why it did not include the landowner as a respondent in a timely manner, despite being aware of its identity, precluded it from proceeding in the landowner's absence.

Here, not only is the identity of the Building Owner a matter of public record, but with the ease of use of the ACRIS system, any middle school student sitting with a bedroom computer could pull up the relevant information with less than a minute invested in research time. In this computerized age, such land records, while perhaps still technically merely constructive notice to the world are, for practical purposes, tantamount to actual notice. In short, nobody (particularly a lawyer) has any plausible excuse for not getting an Owner-Respondent right in an action affecting the recorded interests of a party in a Manhattan property.

In *Manupella v. Troy City Zoning Bd. of Appeals*, 272 A.D.2d 761, 707 N.Y.S.2d 707, N.Y.A.D. (3 Dept., 2000), the Court held that the owner of real property subject to a variance challenge generally is a necessary party because the owner will be inequitably and adversely impacted if the zoning board decision were to be annulled and that further, as the Statute of Limitations had run, the Supreme Court had properly declined to exercise its discretion to join the landowner as a party.

And in *O'Connell v. Zoning Bd. of Appeals of Town of New Scotland*, 267 A.D.2d 742, 699 N.Y.S.2d 775, N.Y.A.D. (3 Dept., 1999), the Court found that it was unmistakably clear that the owner of the subject real property to whom the challenged use variance was issued, might well have been inequitably and adversely affected if the relief requested in the petition had been granted and, thus, he was a necessary party, Additionally, the landowner did not voluntarily appear in the action and joining him under the circumstances where the Statute of Limitations had expired was disfavored by the courts.

Having cited to the above four cases, the Court of Appeals in *Red Hook* came to the following natural conclusion:

> Several of the foregoing cases involve - like the present case - an omitted landowner, a land-use challenge and a lapsed statute of limitations, leading us to conclude with the obvious lesson: omitting the landowner from the litigation may be fatal.

(*Red Hook*, supra at 530)

More recently, in *Windy Ridge Farm v. Assessor of Town of Shandaken*, 11 N.Y.3d 725, 894 N.E.2d 1183 (N.Y., 2008), the Court of Appeals confirmed that the dismissal of Petitioner's Article 78 proceeding was similarly warranted for Petitioner's failure to join necessary parties, once the Applicant had established the expiration of the four-month limitations period.

Here, as in *Windy Ridge*, and all of the aforementioned cases, the movant has established that Petitioner has failed to join a necessary party, that the four-month limitations period has expired and that the building owner will not waive the Statute of Limitations defense. Accordingly, as this case cannot proceed in the absence of the owner of the Building, the matter should be dismissed and therefore Petitioner cannot demonstrate a likelihood of success on the merits.

POINT 4 – SOHO AND 45 PARK ARE NOT UNITED IN INTEREST

Petitioner cites a few random examples that allegedly prove that 45 PARK and SOHO are the same entity. Such examples include "Sharif El-Gamal is the Chairman and CEO of SOHO and 45 PARK", "SOHO and 45 PARK maintain the same office located at 552 Broadway, Suite 6N", and that SOHO's architect worked on a permit for the site.

For two separate entities to be considered "united in interest," they must "stand or fall together", as where one is vicariously liable for the acts of the other. The alleged similarities in location and personnel of SOHO and 45 PARK fall far short of that standard.

McKinney's CLPR 203 practice commentaries point to *Zehnick v. Meadowbrook II Associates,* 2005, 20 A.D.3d 793, 799 N.Y.S.2d 604 (3 Dept), as an instructive opinion on the unity-of-interest prong of the three-part test for "relation back", for such cases where a new defendant is joined after expiration of the statute of limitations, (*McKinney's CPLR § 203*, Supplementary Practice Commentaries).

In *Zehnick*, following a snow storm, plaintiff slipped and fell in the parking area of a housing complex. The complex consisted of two adjoining properties separately owned by partnership *A* and partnership *B.* The two partnerships were, as here, distinct legal entities, created at different times and composed mostly of different partners. However, they had one common general partner and shared the same management office space, property superintendent, snow removal contractor and insurer. Plaintiff timely sued *A* alone, but *A* established that *B* owned the area where plaintiff's accident occurred.

By the time plaintiff joined *B* as a defendant, the statute of limitations had expired, and the Appellate Division refused to apply the relation back rule. Despite the intermingling of resources and personnel, no "joint venture,

partnership or agency" relationship existed between *A* and *B* such that vicarious liability would arise. The fact that *B* could be charged with notice of the action based on the intermingled employees and agents was not enough.

Similarly, in *Raymond v. Melohn Properties, Inc.* 47 A.D.3d 504, 851 N.Y.S.2d 17 N.Y.A.D. (1 Dept.,2008), following the commencement of an action against, inter alia, the managing agent of the building, Plaintiff sought leave to amend the complaint to add a new defendant on the basis that she only recently learned that it was the owner of the building.

The Court held that although the managing agent and new owner shared commonalities, including shareholders and officers, that in and of itself was not sufficient to establish that the two entities were "united in interest".

The *Raymond* Court added that the two entities had different defenses to plaintiff's claims and their interests were not such that they would stand or fall together (*see Xavier v. RY Mgt. Co.,* 45 A.D.3d 677, 846 N.Y.S.2d 227 [2 Dept. 2007]).

Here, 45 PARK, as owner of the Building would have different defenses and interest to SOHO, an unrelated entity with no legal interest in the Building. In a nutshell, SOHO's most essential defense is, "I don't own the building" while 45 PARK's most essential defense is, "The LPC's actions were neither arbitrary nor capricious." SOHO has no reason to care about

arbitrariness; 45 PARK can't deny ownership. The defenses are completely different.

Related corporations "are united in interest only where one corporation is vicariously liable for the acts of the other," and, in order for such vicarious liability to exist, " '[t]he parent corporation must exercise complete dominion and control [over] the subsidiary's daily operations" ' (*Feszczyszyn v. General Motors Corp.* 248 A.D.2d 939, 669 N.Y.S.2d 1010 N.Y.A.D. (4 Dept.,1998). *see Hilliard v. Roc-Newark Assoc.,* 287 A.D.2d 691, 692, 732 N.Y.S.2d 421 (2 Dept, 2001); *Rotoli v. Domtar,* 224 A.D.2d 939, 940, 637 N.Y.S.2d 894) (4 Dept. 1996).

There is nothing in the record to suggest that either SOHO or 45 PARK exercise complete dominion and control over the other's daily operations or indeed any dominion at all. Any alleged representation by SOHO to the Commission that it owned the building is therefore not a representation by 45 PARK that SOHO owned the building. This is clear from the evidence before this Court that the Commission itself invited 45 PARK to enter into the process and was not content with any communications it may have had with SOHO.

Accordingly, there is nothing in the record to indicate that SOHO and 45 PARK are vicariously liable for the acts of the other

However, the record is abundantly clear, as even a brief perusal of ACRIS confirms, that 45 PARK is the owner of the Building, and that SOHO have no ownership interest in the Building.

As a consequence, the claims against SOHO cannot "relate back" to 45 PARK and Petitioner, having failed to name a necessary party within the appropriate statute of limitations, cannot show a likelihood of success on the merits.

POINT 4 – PETITIONER LACKS STANDING TO SUE: NO INJURY IN FACT

Standing is a threshold requirement for a Petitioner seeking to challenge any governmental action, *New York State Ass'n of Nurse Anesthetists v. Novello,* 2 N.Y.3d 207, 810 N.E.2d 405 (N.Y.,2004) ("Novello").

In that case, the Court of Appeals wrote that the two-part test for determining standing was a familiar one:

> First, a plaintiff must show "injury in fact," meaning that plaintiff will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural. Second, the injury a plaintiff asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted.
>
> *Novello, supra at 2*

Here, Petitioner BROWN has failed to set forth how he will actually be harmed by the challenged administrative action.

Nowhere in the Petitioner's Amended Verified Petition (attached to the Bailey Affirmation at Exhibit "1"), does BROWN allege any injury-in-fact to himself.

Accordingly, as in *Novello*, this court need not reach the other components of the standing requirement.

Petitioner merely alleges that the building itself will be injured, claiming that the Landmarks Preservation Commission (LPC), "threatens to do what terrorists failed to accomplish and destroy a building". However, Petitioner BROWN fails to even speculate as to how he personally will be injured.

POINT 5 – PETITIONER LACKS STANDING TO SUE: NO INJURY DISTINCT FROM THE PUBLIC

Petitioner BROWN'S asserted fascination for American history and architecture is insufficient alone to confer him standing to bring an Article 78 proceeding.

A general—or even special—interest in the subject matter is insufficient to confer standing, absent an injury distinct from the public in the particular circumstances of the case (see *Save the Pine Bush, Inc. v.*

Common Council of City of Albany, 13 N.Y.3d 297, 890 N.Y.S.2d 405, NY, (2009)).

Therefore, pursuant to CPLR 3211(a)(3), Petitioner does not have standing to sue.

The very recent First Department case of *Citizens Emergency Committee to Preserve Preservation v. Tierney*, 70 A.D.3d 576, 896 N.Y.S.2d 41, N.Y.A.D. (1 Dept., 2010), (hereinafter "Tierney") considered a similar issue and distinguished the "injury-in-fact" from an "interest".

In that case, an advocacy group dedicated to supporting the objectives of the Landmarks Preservation Commission (LPC), brought an Article 78 proceeding, challenging the LPC's failure to take action on requests for landmark designation.

The New York Supreme Court at trial term wrote:

> The Petitioner is an advocacy group comprised of committed preservationists dedicated to supporting the objectives of LPC. Many of its members are professionals employed in the field of preservation. The involvement of advocacy groups in the preservation process is specifically acknowledged in the LPC's own description of its activities, *inter alia,* to assist in the evaluation of Requests for Evaluation (RFE) submitted by ".... advocacy groups ..." This Court finds Petitioner's interest and involvement in the preservation of the City's landmarks is not the same as that suffered by the public at large. Petitioner has alleged an "injury in fact" sufficient to satisfy the test for standing. (See full opinion attached hereto as an Appendix)

The Appellate Division rejected this analysis and set forth the actual requirements for standing in such matters:

> "To establish standing, an association or organization such as petitioner "must show that at least one of its members would have standing to sue" (*New York State Assn. of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211, 778 N.Y.S.2d 123, 810 N.E.2d 405 [2004]).
>
> In other words, petitioner must show that one or more of its members - as distinct from the general public - has suffered an injury in fact, and must demonstrate that the injury falls within the zone of interests protected by the legal authority being invoked (*Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 771-774, 570 N.Y.S.2d 778, 573 N.E.2d 1034 [1991]).
>
> (*Tierney* in the Appellate Division, supra at 576)

In finding that the Petitioner failed to demonstrate standing to sue, the Court stated that:

> "While the petition alleges that its members are dedicated to preservation, "interest" and "injury" are not synonymous (see *Matter of New York State Psychiatric Assn., Inc. v. Mills*, 29 A.D.3d 1058, 1059, 814 N.Y.S.2d 382 [2006], lv. denied 7 N.Y.3d 708, 822 N.Y.S.2d 482, 855 N.E.2d 798 [2006]). A general - or even special - interest in the subject matter is insufficient to confer standing, absent an injury distinct from the public in the particular circumstances of the case (see *Save the Pine Bush*, 13 N.Y.3d at 305-306, 890 N.Y.S.2d 405, 918 N.E.2d 917; *Matter of Heritage Coalition v. City of Ithaca Planning & Dev. Bd.*, 228 A.D.2d 862, 864, 644 N.Y.S.2d 374 [1996], lv. denied 88 N.Y.2d 809, 648 N.Y.S.2d 878, 671 N.E.2d 1275 [1996]).
>
> The petition does not allege that petitioner's members have been affected differently from any other members of the public. To the contrary, it alleges that petitioner's

members and members of the public are similarly affected by the Commission's action."

(*Tierney*, supra at 576-577)

Here, Petitioner BROWN'S only nexus to the Building is that "Petitioner and/or his counsel have attended not less that four Community Board and LPC meetings to argue on behalf of landmarking the Building", and "Petitioner is generally concerned about preserving effected areas of Lower Manhattan and protecting the memory of the September 11, 2001 events." (see Amended Verified Petition attached to Bailey Affirmation at Exhibit "1", paragraph 13).

Accepting BROWN'S claims as true, the fact that he and/or his counsel have attended four Community Board meetings is not sufficient to demonstrate an injury-in-fact.

Moreover, Petitioner BROWN has failed to allege that he has been affected any differently by the LPC's decision from any other members of the public.

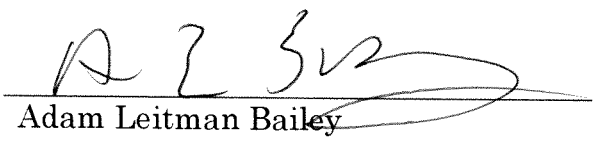
His intellectual curiosity about architectural history and preservation is not synonymous with an injury distinct from the public and therefore BROWN has further failed to demonstrate standing.

CONCLUSION

For all of the reasons set forth herein, in the Bailey Affirmation and exhibits attached thereto, in the corresponding motion to dismiss, and in the pleadings, Petitioner's Order to Show Cause should be denied and BROWN'S Amended Petition should be dismissed, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
March 4, 2011

Respectfully submitted,
Adam Leitman Bailey, P.C.
by



Adam Leitman Bailey
Dov Treiman
Pete J. Reid
120 Broadway, 17th Floor
New York, New York 10271
212-825-0365

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

TIMOTHY BROWN *Petitioner,* -against- 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.*	Index #110334/2010 **AFFIDAVIT OF SERVICE**

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

JEANETTE RIVERA-SOTO, being duly sworn, deposes and says:

1. I am not a party to this action, am over eighteen (18) years of age, and have a business address at 120 Broadway, 17th Floor, New York, New York 10271.

2. On March 4, 2011, I served the within **RESPONDENT SOHO PROPERTIES INC. MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S ORDER TO SHOW CAUSE** upon:

JACK L. LESTER, ESQ.
Attorney for Petitioner
261 Madison Avenue, 26th Floor
New York, New York 10016

VIRGINIA WATERS, ESQ.
Assistant Corporation Counsel
Corporation Counsel of the
City of New York
Attorney for Municipal Respondents
100 Church Street
New York, New York 10007
(212) 788-0822

by enclosing a copy of same in a postage-paid wrapper properly addressed to the recipient and depositing the wrapper in an official depository within the exclusive care and custody of the United States Postal Service within the City, County, and State of New York by First Class Mail.

JEANETTE RIVERA-SOTO

Sworn to before me this
4th day of March 2011

Notary Public

ELISSA GREENFIELD
NOTARY PUBLIC, STATE OF NEW YORK
NO. 01GR6217838
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES FEBRUARY 22, 2014

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

TIMOTHY BROWN

Petitioner,

-against-

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,

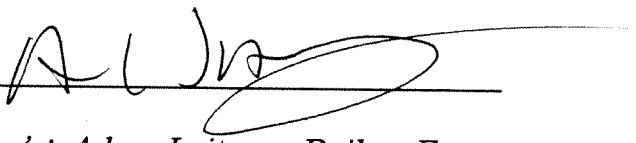
Respondents.

Index #110334/2010

RESPONDENT SOHO PROPERTIES INC MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S ORDER TO SHOW CAUSE

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: March 4, 2011

Signature: 

Print Signer's: Adam Leitman Bailey, Esq.

ADAM LEITMAN BAILEY, P.C.
Office and Post Office Address
120 Broadway, 17th Floor
New York, New York 10271
(212) 825–0365

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

TIMOTHY BROWN

Petitioner,

-against-

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.

Index
#110334/2010

RESPONDENT SOHO PROPERTIES INC.
MEMORANDUM OF LAW
IN SUPPORT OF
MOTION TO DISMISS

On the brief:
Adam Leitman Bailey
Dov Treiman
Pete J. Reid

ADAM LEITMAN BAILEY, P.C.
Attorneys for Respondent
Soho Properties, Inc.
120 Broadway, 17th floor
New York, New York 10271
Tel: 212-825-0365
Fax: 212-825-0999

PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted on behalf of named Respondent SOHO PROPERTIES, INC, (hereinafter "SOHO"), in support of its motion for an Order pursuant to CPLR §3211(a)(3), CPLR §3211(a)(5), CPLR §3211(a)(10), CPLR §1001(a) and CPLR §217(1) dismissing the Amended Verified Petition of TIMOTHY BROWN for failure to join the Building Owner as a necessary party, and on the ground that joinder is now futile because the statute of limitations has now run, and further because the Petitioner lacks standing to sue.

STATEMENT OF FACTS

The relevant background facts as fully set forth in the accompanying Affirmation of Adam Leitman Bailey dated January 14, 2011, ("the Bailey Affirmation"), are incorporated herein.

Briefly, Petitioner TIMOTHY BROWN (hereinafter "BROWN"), is a former member of the New York Fire Department with a purported avocational curiosity about architecture, who has commenced this action to challenge the unanimous decision of Respondent THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, (hereinafter "LPC") on August 3, 2010 which denied landmark status to the building located at 45 Park Place, New York, NY, ("the Building").

Named Respondent SOHO is not the Building Owner and is not mentioned in any of the ownership documents. Rather, the owner of the Building is 45 Park Place Partners LLC, (hereinafter "Building Owner" or "45 PARK"). The actual ownership of the building is not only a matter of constructive notice to the entire world (New York Real Property Law Article 9) but as a practical matter is knowledge readily available to anyone with a computer device capable of accessing the internet, thanks to New York City's ACRIS system. In short, particularly with reference to land in Manhattan, anyone with the will to know can ascertain within five minutes who owns what.

POINT 1: THE OWNER OF A BUILDING IS A NECESSARY PARTY TO ANY ACTION THAT MAY DETERMINE THAT ITS BUILDING IS A NEW YORK CITY LANDMARK

The definition of necessary party has been strictly construed. It is limited to those cases where the court's determination would adversely affect the rights of the non-parties (*Matter of Castaways Motel v. C.V.R. Schuyler*, 24 N.Y.2d 120, 299 N.Y.S.2d 148, 247 N.E.2d 124 [1969], rearg. granted 25 N.Y.2d 896, 304 N.Y.S.2d 1031, 251 N.E.2d 152 [1969]), adhered to on rearg.

25 N.Y.2d 692, 306 N.Y.S.2d 692, 254 N.E.2d 919 [1969]; *Henshel v. Held*, 13 A.D.2d 771, 216 N.Y.S.2d 41 [1st Dept.1961].

On August 3, 2010, the LPC unanimously determined that the Building would not be accorded Landmark status and the Building Owner has subsequently proceeded with redevelopment plans.

If the decision of the LPC were reversed by the Court, clearly the rights of the Building Owner would be adversely affected.

The Court of Appeals considered a similar set of facts in *Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Standards*, 5 N.Y.3d 452, 839 N.E.2d 878, N.Y.,(2005), (hereinafter "*Red Hook*") where a nonprofit organization of local business owners challenged a City administrative decision, but failed to name the landowners (Imlay).

The Court of Appeals wrote that:

> Plainly, Imlay was a necessary party, and should have been joined in the proceeding at its inception. Having invested significant resources in pursuing its plan to convert the commercial space to luxury apartments, the developer "might be inequitably affected by a judgment" overturning the variance that permitted residential conversion (CPLR 1001[a]).
>
> (*Red Hook*, *Supra* at 456.)

Further, the Court reasoned that while both Imlay and the City had the same immediate purpose in opposing the article 78 petition – that of maintaining the status of the variance · that, in and of itself, did not create a

unity of interest such that an action against Imlay related back to the filing date of the petition (supra at 456, *see also* CPLR 203 [c]; *and see Matter of Emmett v. Town of Edmeston,* 2 N.Y.3d 817, 781 N.Y.S.2d 260, 814 N.E.2d 430 [2004]).

Here it is unquestionable that 45 PARK would be inequitably affected by a judgment overturning the Commission's decision not to landmark the building, and that, therefore, it is a necessary party. Likewise, there is no unity of interest with the City.

POINT 2 – THE STATUTE OF LIMITATIONS FOR AN ARTICLE 78 PROCEEDING IS FOUR MONTHS

A CPLR Article 78 proceeding to review a determination of a public body or officer must be brought within four months of the date when the determination is "final and binding upon the petitioner" (CPLR 217(1); see also CPLR 7801(1); *Matter of Carter v. State of N.Y., Exec. Dept., Div. of Parole*, 95 N.Y.2d 267, 270, 716 N.Y.S.2d 364, 739 N.E.2d 730).

The Court of Appeals has identified two requirements for fixing the time when agency action is final and binding upon the petitioner:

> "First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party"

Matter of Best Payphones, Inc. v. Department of Info. Tech. & Telecom. of City of N.Y., 5 N.Y.3d 30, 34, 799 N.Y.S.2d 182, 832 N.E.2d 38.

Here, the LPC Board reached a final unanimous decision on August 3, 2010, (see decision annexed to Bailey Affirmation at Exhibit "4") and that four month statute of limitations period expired on December 3, 2010.

POINT 3 – TO JOIN THE BUILDING OWNER TO THE PROCEEDING NOW WOULD BE FUTILE AS THE STATUTE OF LIMITATIONS HAS EXPIRED

Joining 45 PARK now to this Article 78 proceeding would be a futile gesture because the four-month statute of limitations has now expired. While it is theoretically possible that 45 PARK might have waived its statute of limitations defense, it too retained Adam Leitman Bailey, PC to represent its interest and Adam Leitman Bailey has set forth in his affirmation that there is and will be no such waiver.

The Court of Appeals in *Red Hook*, *supra*, *passim*, cites numerous cases where the four-month statute of limitations had run and Petitioners had failed to join a landowner as a necessary party, resulting in dismissal:

In *Ferrando v. New York City Bd. of Standards and Appeals*, 12 A.D.3d 287, 785 N.Y.S.2d 62, N.Y.A.D. (1 Dept., 2004), in a proceeding brought

pursuant to CPLR Article 78, the First Department stated that Petitioner's failure to join the owner of the premises for which the disputed certificate of occupancy was issued, constituted a failure to join a necessary party (*see also, Matter of Manupella v. Troy City Zoning Bd. of Appeals,* 272 A.D.2d 761, 707 N.Y.S.2d 707 [2000]). The *Ferrando* Court reasoned that since the applicable statutory period had expired and the owner could no longer be joined, and that proceeding in his absence would potentially be highly prejudicial to him, the proceeding was properly dismissed (*see* CPLR 1001 and 1003).

In *East Bayside Homeowners Ass'n, Inc. v. Chin*, 12 A.D.3d 370, 783 N.Y.S.2d 305, N.Y.A.D. (2 Dept. 2004), another proceeding pursuant to CPLR article 78, the Appellate Division held that the Supreme Court had properly dismissed a proceeding for failure to timely join the landowner as a necessary party. The Court stated that the Petitioners' failure to adequately explain why they did not include the landowner as a respondent in a timely manner, despite being aware of its identity, precluded them from proceeding in the landowner's absence.

Here, not only is the identity of the Building Owner a matter of public record, but with the ease of use of the ACRIS system, any middle school student sitting with a bedroom computer could pull up the relevant information with less than a minute invested in research time. In this computerized age, such land records, while perhaps still technically merely constructive notice to the world are, for practical purposes, tantamount to

actual notice. In short, nobody (particularly a lawyer) has any plausible excuse for not getting an Owner-Respondent right in an action affecting the recorded interests of a party in a Manhattan property.

In *Manupella v. Troy City Zoning Bd. of Appeals*, 272 A.D.2d 761, 707 N.Y.S.2d 707, N.Y.A.D. (3 Dept., 2000), the Court held that the owner of real property subject to a variance challenge generally is a necessary party because the owner will be inequitably and adversely impacted if the zoning board decision were to be annulled and that further, as the Statute of Limitations had run, the Supreme Court had properly declined to exercise its discretion to join the landowner as a party.

And in *O'Connell v. Zoning Bd. of Appeals of Town of New Scotland*, 267 A.D.2d 742, 699 N.Y.S.2d 775, N.Y.A.D. (3 Dept., 1999), the Court found that it was unmistakably clear that the owner of the subject real property to whom the challenged use variance was issued, might well have been inequitably and adversely affected if the relief requested in the petition had been granted and, thus, he was a necessary party, Additionally, the landowner did not voluntarily appear in the action and joining him under the circumstances where the Statute of Limitations had expired was disfavored by the courts.

Having cited to the above four cases, the Court of Appeals in *Red Hook* came to the following natural conclusion:

> Several of the foregoing cases involve - like the present case - an omitted landowner, a land-use challenge and a lapsed statute of limitations, leading us to conclude with the obvious lesson: omitting the landowner from the litigation may be fatal.

(*Red Hook*, supra at 530)

More recently, in *Windy Ridge Farm v. Assessor of Town of Shandaken*, 11 N.Y.3d 725, 894 N.E.2d 1183 (N.Y., 2008), the Court of Appeals confirmed that the dismissal of Petitioner's Article 78 proceeding was similarly warranted for Petitioner's failure to join necessary parties, once the Applicant had established the expiration of the four-month limitations period.

Here, as in *Windy Ridge*, and all of the aforementioned cases, the movant has established that Petitioner has failed to join a necessary party, that the four-month limitations period has expired and that the building owner will not waive the Statute of Limitations defense. Accordingly, as this case cannot proceed in the absence of the owner of the Building, the matter must be dismissed.

POINT 4 – PETITIONER LACKS STANDING TO SUE: NO INJURY IN FACT

Standing is a threshold requirement for a Petitioner seeking to challenge any governmental action, *New York State Ass'n of Nurse Anesthetists v. Novello,* 2 N.Y.3d 207, 810 N.E.2d 405 (N.Y.,2004) ("Novello").

In that case, the Court of Appeals wrote that the two-part test for determining standing was a familiar one:

> First, a plaintiff must show "injury in fact," meaning that plaintiff will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural. Second, the injury a plaintiff asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted.
>
> *Novello, supra at 2*

Here, Petitioner BROWN has failed to set forth how he will actually be harmed by the challenged administrative action.

Nowhere in the Petitioner's Amended Verified Petition (attached to the Bailey Affirmation at Exhibit "1"), does BROWN allege any injury-in-fact to himself.

Accordingly, as in *Novello,* this court need not reach the other components of the standing requirement.

Petitioner merely alleges that the building itself will be injured, claiming that the Landmarks Preservation Commission (LPC), "threatens to

do what terrorists failed to accomplish and destroy a building". However, Petitioner BROWN fails to even speculate as to how he personally will be injured.

POINT 5 – PETITIONER LACKS STANDING TO SUE: NO INJURY DISTINCT FROM THE PUBLIC

Petitioner BROWN'S asserted fascination for American history and architecture is insufficient alone to confer him standing to bring an Article 78 proceeding.

A general—or even special—interest in the subject matter is insufficient to confer standing, absent an injury distinct from the public in the particular circumstances of the case (see *Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297, 890 N.Y.S.2d 405, NY, (2009)).

Therefore, pursuant to CPLR 3211(a)(3), Petitioner does not have standing to sue.

The very recent First Department case of *Citizens Emergency Committee to Preserve Preservation v. Tierney*, 70 A.D.3d 576, 896 N.Y.S.2d 41, N.Y.A.D. (1 Dept., 2010), (hereinafter "Tierney") considered a similar issue and distinguished the "injury-in-fact" from an "interest".

In that case, an advocacy group dedicated to supporting the objectives of the Landmarks Preservation Commission (LPC), brought an Article 78

proceeding, challenging the LPC's failure to take action on requests for landmark designation.

The New York Supreme Court at trial term wrote:

> The Petitioner is an advocacy group comprised of committed preservationists dedicated to supporting the objectives of LPC. Many of its members are professionals employed in the field of preservation. The involvement of advocacy groups in the preservation process is specifically acknowledged in the LPC's own description of its activities, *inter alia,* to assist in the evaluation of Requests for Evaluation (RFE) submitted by ".... advocacy groups ..." This Court finds Petitioner's interest and involvement in the preservation of the City's landmarks is not the same as that suffered by the public at large. Petitioner has alleged an "injury in fact" sufficient to satisfy the test for standing. (See full opinion attached hereto as an Appendix)

The Appellate Division rejected this analysis and set forth the actual requirements for standing in such matters:

> "To establish standing, an association or organization such as petitioner "must show that at least one of its members would have standing to sue" (*New York State Assn. of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211, 778 N.Y.S.2d 123, 810 N.E.2d 405 [2004]).
>
> In other words, petitioner must show that one or more of its members - as distinct from the general public - has suffered an injury in fact, and must demonstrate that the injury falls within the zone of interests protected by the legal authority being invoked (*Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 771-774, 570 N.Y.S.2d 778, 573 N.E.2d 1034 [1991]).
>
> (*Tierney* in the Appellate Division, supra at 576)

In finding that the Petitioner failed to demonstrate standing to sue, the Court stated that:

> "While the petition alleges that its members are dedicated to preservation, "interest" and "injury" are not synonymous (see *Matter of New York State Psychiatric Assn., Inc. v. Mills*, 29 A.D.3d 1058, 1059, 814 N.Y.S.2d 382 [2006], lv. denied 7 N.Y.3d 708, 822 N.Y.S.2d 482, 855 N.E.2d 798 [2006]). A general - or even special - interest in the subject matter is insufficient to confer standing, absent an injury distinct from the public in the particular circumstances of the case (see *Save the Pine Bush*, 13 N.Y.3d at 305-306, 890 N.Y.S.2d 405, 918 N.E.2d 917; *Matter of Heritage Coalition v. City of Ithaca Planning & Dev. Bd.*, 228 A.D.2d 862, 864, 644 N.Y.S.2d 374 [1996], lv. denied 88 N.Y.2d 809, 648 N.Y.S.2d 878, 671 N.E.2d 1275 [1996]).
>
> The petition does not allege that petitioner's members have been affected differently from any other members of the public. To the contrary, it alleges that petitioner's members and members of the public are similarly affected by the Commission's action."
>
> (*Tierney*, supra at 576-577)

Here, Petitioner BROWN'S only nexus to the Building is that "Petitioner and/or his counsel have attended not less that four Community Board and LPC meetings to argue on behalf of landmarking the Building", and "Petitioner is generally concerned about preserving effected areas of Lower Manhattan and protecting the memory of the September 11, 2001 events." (see Amended Verified Petition attached to Bailey Affirmation at Exhibit "1", paragraph 13).

Accepting BROWN'S claims as true, the fact that he and/or his counsel have attended four Community Board meetings is not sufficient to demonstrate an injury-in-fact.

Moreover, Petitioner BROWN has failed to allege that he has been affected any differently by the LPC's decision from any other members of the public.

His intellectual curiosity about architectural history and preservation is not synonymous with an injury distinct from the public and therefore BROWN has further failed to demonstrate standing.

CONCLUSION

For all of the reasons set forth herein, in the Bailey Affirmation and exhibits attached thereto, and in the pleadings, the instant motion should be granted in its entirety and BROWN'S Amended Petition should be dismissed, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
January 14, 2011

Respectfully submitted,
Adam Leitman Bailey, P.C.
by

Adam Leitman Bailey
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212-825-0365

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

PRESENT: HON. MARILYN SHAFER, JSC PART 8

Index Number : 103373/2008

CITIZENS EMERGENCY

vs

TIERNEY, RPBERT B.

Sequence Number : 001

ARTICLE

INDEX NO. _____

MOTION DATE _____ NOV 21 2008

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion pursuant to attached

FILED

NOV 21 2008

COUNTY CLERK'S OFFICE
NEW YORK

NYS SUPREME COURT
RECEIVED
NOV 17 2008
MOTION SUPPORT OFFICE

CASE DISP

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

Dated: 11/14/08

MARILYN SHAFER

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

PRESENT: HON. MARILYN SHAFER PART 8
Justice

In the matter of the application of

CITIZENS EMERGENCY COMMITTEE TO PRESERVE PRESERVATION,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

ROBERT B. TIERNEY, Chair of the New York City Landmarks Preservation Commission, and KATE DALY, Executive Director of the New York City Landmarks Preservation Commission,

Respondent.

INDEX NO. 103373/08

MOTION SEQ. NO. 001

The following papers, numbered 1 to 7, were read on this petition:

	PAPERS NUMBERED
Notice of Petition, Verified Petition – Exhibits	1,2
Memorandum of Law	3
Verified Answer – Affidavit – Exhibits	4,5
Memorandum of Law	6
Reply Memorandum of Law	7[1]

Cross-Motion: [ ] Yes [ ] No

[1] Respondent submitted an unauthorized sur-reply which has not been considered.

Upon the foregoing papers, the petition is granted.

Introduction

This is an Article 78 proceeding for prohibition and mandamus regarding the review and designation of landmarked buildings and districts by the Landmarks Preservation Commission.

Background

The "Landmarks Preservation and Historic District" law (Landmarks Law) was enacted, *inter alia*, to protect and perpetuate "the city's cultural, social, economic, political and architectural history" by designating improvements and landscape features having a special character or special historical or aesthetic interest as historic districts and landmarks. (*Admin. Code of City of NY*, § 25-301(b)) The eleven-member LPC is appointed by the Mayor for three-year terms and must include at least three architects, one historian, one realtor, one city planner or landscape architect. There must be at least one resident of each borough and ten of the eleven positions are unsalaried. (*NY City Charter*, § 3020(1))

A landmark is defined in the statute as "[a]ny improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation ...." (*Admin. Code of the City of NY*, § 25-302(n)) If, after an investigation of the premises or area under consideration, the LPC is disposed to decree landmark status, it must conduct a public hearing. (*Id.*, § 25-303(b)) The designation of a landmark by the LPC is subject to review by the City Council, who may modify or disprove the designation. (*Id.*, § 25-303(g)(2)) LPC action taken pursuant to its authority under the Landmarks Law is considered to be administrative.

The LPC has several primary functions: designating landmarks; issuing work permits for the over 25,000 buildings within its jurisdiction; and enforcing permit violations. It employs 65 full time and three part-time staff members, including 16 professionals who *inter alia* research potential landmarks, draft detailed designation reports, and assist in the evaluation of Requests for Evaluation (RFE) submitted by " the public, property owners elected officials, advocacy groups, and other interested parties."

New York has lost significant landmarks, including the Metropolitan Opera House and the original Pennsylvania Station. LPC jurisdiction over a building attaches only after it votes to designate that building. Any work for which the Department of Buildings has issued a permit prior to designation, including demolition, may proceed after designation.

Petitioner, Citizen's Emergency Committee to Preserve Preservation (CEPP), is a voluntary unincorporated public education and citizens advocacy association dedicated to supporting the purposes and objectives of the LPC. It consists of residents and taxpayers of the City and State of New York, described as "committed preservationists," including a former member of the LPC; the author of a recently published book, Preserving New York; the director of a graduate program in historic preservation; and the executive director of a leading preservation advocacy organization. The petition alleges that the LPC's designation process has become statutorily and constitutionally flawed. In derogation of statutory specification: (1) the Chairman has usurped the power of the full LPC and acts as the sole advancer of properties[2]; (2) the LPC has unreasonably delayed submission of designation proposals; and (3) the LPC has

[2] In its website, the LPC states: "Ultimately the decision whether to bring the property forward to the full commission for review is made by the Chair." (*www.nyc.gov/html/lpc*)

failed to establish and consistently apply landmark designation standards. Negative landmark designations are made in secret and without explanation by the Chairman only, an abuse of power and a violation of the statute which has prevented or delayed consideration of many potential landmark properties.

The petition seeks both general and specific relief. Generally, it seeks to make the LPC's procedures more transparent and fair by: (1) insuring that every disposition is made on the record; (2) publishing clear standards for designation; (3) presenting all properties for which an RFE is received to the full Commission; and (4) presenting negative as well as positive recommendations to the Commission.

Specifically, the petition requests this Court to direct that 6 proposed properties or districts whose RFE's have been pending for years, be presented for consideration:

1. "Fish building", 1150 Grand Concourse, Bronx. RFE pending 35 months;

2. John Street/Maiden Lane Historic District, Manhattan. RFE pending 52 months;

3. Park Slope Historic District Expansion, Brooklyn. RFE pending 79 months;

4. Fort Greene/BAM Historic District Expansion. RFE pending 77 months;

5. Pacific Street Branch Library, Brooklyn. RFE pending 51 months; and

6. St. Saviour's Church, Queens. RFE pending 69 months.

The LPC argues, in opposition, that the petitioner lacks standing to bring this proceeding, since any injury suffered by its members is the same as that suffered by any member of the public. It argues that the petition fails to state a cause of action because the statute vests the LPC with exclusive discretion to determine which building or groups of buildings should be considered for designation. Finally, the LPC argues, its procedures are fair. An RFE

Committee, consisting of the Chairman, Executive Director, Director of Research, Director of External affairs and Special Assistant to the Executive Director meets every two to four weeks to evaluate each RFE and determine which meet the threshold criteria set forth in the Landmarks Law. If the Committee determines that a property merits further consideration, a photograph, statement of significance and the Committee's recommendation is sent to each Commissioner. After considering comments from the Commissioners and determining how it fits into the agency's priorities, the Chair decides whether to recommend that the full Commission calendar a public hearing to formally consider the property. For the full commission to consider every RFE would create an unworkable burden.

With respect to the specific relief sought, the LPC concedes that 5 of the properties are meritorious:

1. "Fish building", 1150 Grand Concourse, Bronx, has been under review, since 2001, as part of a potential "Grand Concourse Historic District;"

2. John Street/Maiden Lane Historic District, Manhattan was surveyed in the 1990's and a portion of the area has the potential to be a historic district. It is not an LPC priority because the LPC's current emphasis is devoted to designation in boroughs other than Manhattan;[3]

3. Park Slope Historic District Expansion, Brooklyn and 4. Fort Greene/BAM Historic District Expansion was requested in 2001. It is not an LPC priority because approximately half the buildings designated as landmarks in the City are located in Brooklyn historic districts and LPC is pushing forward communities in other sections of Brooklyn;

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[3] The Court notes that a review of the LPC website on Nov. 6, 2008 revealed that most of the currently designated landmarks were located in Manhattan.

5. Pacific Street Branch Library, Brooklyn, was deemed to be of merit in 2004. The Commission staff has "reached out" to the agency which occupies the City-owned building to "allay concerns about how designation might impact the provision of mandated public services"; and

6. St. Saviour's Church, Queens, was considered and rejected in 1995 and in 2006.

Discussion

The law is clear that in matters of "great public interest" a citizen may maintain a mandamus proceeding to compel a public officer to do his or her duty. (*Hebel v West*, 25 AD3d 172 [3d Dept 2005]) An article 78 proceeding in the nature of mandamus is an appropriate remedy to compel performance of a statutory duty that is ministerial in nature, but not one in respect to which an officer may exercise judgment or discretion, unless such judgment or discretion has been abused by arbitrary or illegal action. (*Id*) The preservation of New York City's rich history, independent of political and commercial pressure, is a matter of "great public interest."

We turn first to the petitioner's standing. Standing involves a threshold determination by the court as to whether it is authorized to adjudicate the merits of a dispute, rather than an actual adjudication of the merits. (*New York State Assn. of Nurse Anesthetists v Novello*, 2 N.Y.3d 207 [2004] [R.S. Smith, J., dissenting] |"Standing is a complicated subject at best, and there is always the danger that it will become a black box, from which a judicial conjurer can extract the desired result at will"])

To confer standing, there must be a determination that the challenged action would cause

the petitioner direct harm. While standing principles are broadly construed in actions such as this, it remains incumbent upon the party challenging administrative action to show that it would suffer direct harm, injury that is somehow different from that of the public at large. (*Society of Plastics Indus v County of Suffolk*, 77 NY2d 761 [1991]) Under prevailing case law, an organization lacks standing unless it can demonstrate that one or more of its members would have standing to sue. (*Long Island Pine Barrens Society, Inc v Town Board of East Hampton*, 293 AD2d 616 [2d Dept 2002])

Aesthetic or quality of life type of injuries have consistently been recognized by the courts as a basis for standing. (*Matter of Committee to Preserve Brighton Beach & Manhattan Beach v Planning Commission of the City of New York*, 259 AD2d 26 [1st Dept 1999])

The Petitioner is an advocacy group comprised of committed preservationists dedicated to supporting the objectives of LPC. Many of its members are professionals employed in the field of preservation. The involvement of advocacy groups in the preservation process is specifically acknowledged in the LPC's own description of its activities, *inter alia*, to assist in the evaluation of Requests for Evaluation (RFE) submitted by " .... advocacy groups... " This Court finds Petitioner's interest and involvement in the preservation of the City's landmarks is not the same as that suffered by the public at large. Petitioner has alleged an "injury in fact" sufficient to satisfy the test for standing articulated by the Supreme Court:

> We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons "for whom the aesthetic and recreational values of the are will be lessened" by the challenged activity.(*Friends of the Earth v Laidlow*, 528 US 167 [2000])

We turn next to the adequacy of the petition. Courts will not interfere with municipal

decisions which involve questions of judgment, discretion, allocation of resources and priorities inappropriate for resolution in the judicial arena. (*Matter of Abrams v New York City Transit*, 39 NY2d 990 [1976]) Where entitlement to a benefit is subject to agency discretion, a party's expectations can only rise to a protected property interest where the agency's discretion is so narrowly circumscribed as to virtually assure conferral of the benefit. (*See, Matter of Daxor Corp. v State of N. Y. Dept. of Health,* 90 NY2d 89[1997])

LPC argues that calendaring a property by the LPC is a discretionary action, citing three trial level cases, two of which are unreported. (*Matter of Suckenik v Koch*, 20281/79 [NY Cty 1980] (unreported); *Matter of Deane v City of New York Department of Buildings*, 177 Misc 2d 687 [NY Cty 1998]; and *Save the Cottages and Gardens v City of New York*, 114543/98 [NY Cty 1998] (unreported))

We do not deem these cases to be controlling and they are, at any rate, distinguished. The properties in *Deane* and *Save the Cottages* had been explicitly denied consideration by the LPC. Since a demolition permit had been issued for the property in *Save the Cottages*, the petition was moot. *Suckenik*, decided 30 years ago, does not have a perspective on the pervasive pattern of arbitrary action complained of in the petition.

Petitioner argues the relief it seeks, that final dispositions of every RFE be timely done by the full LPC, in public and on the record, is ministerial. To implement such procedures would in no way infringe upon the LPC's discretion. It would merely require the process be more transparent. This Court agrees.

The court has jurisdiction to entertain a proceeding to determine whether an agency has failed to perform a duty enjoined upon it by law. (*Matter of Fehlhaber v O'Hara*, 53 AD2d 746

[3d Dept 1976]) The Court of Appeals has repeatedly confirmed that administrative agencies owe a duty of fairness to its applicants and fairness requires a hearing be held and a determination rendered promptly. (*Matter of Utica Cheese, Inc v Barber, et al*, 49 NY2d 1028 [1980][granting an Article 78 petition to compel the Commissioner of the Department of Agriculture and Markets act on a milk dealer license application which had been pending for 16 months within 90 days])

> What was complained of [in *Utica Cheese*] was the failure to take any action on a license application and the relief sought was the performance of a non-discretionary duty enjoined by law, namely, some action on the license one way or another. (*Hamptons Hosp & Med Center, Inc v* Moore, 52 NY2d 88 [1981])

To allow RFE's to languish is to defeat the very purpose of the LPC and invite the loss of irreplaceable landmarks. The LPC has utterly failed to articulate any reasonable basis for its failure to consider five referenced RFE's which, by its own admission, are meritorious. Its action is, then, arbitrary and capricious. Under similar considerations, the Court of Appeals compelled the New York City Department of Sanitation to implement a City-wide recycling program:

> (G)ranting petitioners the relief they seek here would not involve the courts in resolving political questions or making broad policy choices on complex societal and governmental issues, involving the ordering of priorities. ... Petitioners are not seeking any change in legislative policy or reordering of priorities; "they ask only that the program be effected in the manner that it was legislated." *(Klostermann v Cuomo*, 61 NY2d 525 [1984]). Nor is the justiciability of this dispute affected by the fact that the implementation of these mandatory provisions entails some exercise of discretion on the part of respondents. We held in *Klostermann* that an action seeking compliance with a statutory directive is not rendered nonjusticiable "merely because the activity contemplated ... may be complex and rife with the exercise of discretion" Compliance with almost any statutory directive will involve some measure of discretion exercised by those implementing its terms, but this will not render nonjusticiable a claim which asks the courts to compel compliance with a statute that is otherwise mandatory on its face. Mandamus may "compel acts that officials are duty-bound to perform, regardless of whether they may exercise their discretion in doing so" *(id.*, at 540). The judgment below conforms to this principle. (*Natural Resources Defense Council v New York City Department of Sanitation*, 83 NY2d 215 [1994])

This Court finds that, in light of all the circumstances, the LPC's failure to take any action on certain RFE's is arbitrary and capricious. This Court directs the LPC to promulgate procedures whereby: (1) all RFE's are submitted to the RFE Committee within 120 days of receipt thereof; and (2) all Committee's recommendations, whether positive or negative, be reported, on the record, to the full LPC.

We have considered the other arguments raised by the parties and find them to be without merit.

Accordingly, it is hereby

ORDERED that the petition is granted; and it is further

ORDERED that respondent submit, within ninety (90) days of the date hereof, proposed regulations consistent with this decision.

This reflects the decision and order of this Court.

Dated: 11/14/08

MARILYN SHAFER
J.S.C.

Check one: [ ] FINAL DISPOSITION **[ ] NON-FINAL DISPOSITION**

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

TIMOTHY BROWN

Petitioner,

-against-

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.

Index
#110334/2010

**RESPONDENT SOHO PROPERTIES INC.
MEMORANDUM OF LAW
IN OPPOSITION TO PETITIONER'S
CROSS-MOTION TO AMEND THE PETITION**

On the brief:
Adam Leitman Bailey
Dov Treiman
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PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted on behalf of named Respondent SOHO PROPERTIES, INC, (hereinafter "SOHO"), in opposition to Petitioner's cross-motion to amend the petition.

STATEMENT OF FACTS

The relevant background facts as fully set forth in the accompanying Affirmation of Adam Leitman Bailey dated February 4, 2011, ("the Bailey Affirmation"), and the moving Affirmation of Adam Leitman Bailey dated January 6, 2011, ("the Moving Affirmation"), are incorporated herein.

Briefly, Petitioner TIMOTHY BROWN (hereinafter "BROWN"), is a former member of the New York Fire Department with a purported avocational curiosity about architecture, who has commenced this action to challenge the unanimous decision of Respondent THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, (hereinafter "LPC") on August 3, 2010 which denied landmark status to the building located at 45 Park Place, New York, NY, ("the Building").

Named Respondent SOHO is neither the Building Owner nor the lessee and is not mentioned in any of the ownership documents.

Rather, the owner of the Building is 45 Park Place Partners LLC, (hereinafter "Building Owner" or "45 PARK").

POINT 1: THE OWNER OF A BUILDING IS NOT UNITED IN INTEREST WITH ANOTHER CORPORATE ENTITY WITH WHOM IT SHARES PERSONNEL AND OFFICE SPACE

Petitioner cites a few random examples that allegedly prove that 45 PARK and SOHO are the same entity. Such examples include "Sharif El-Gamal is the Chairman and CEO of SOHO and 45 PARK", "SOHO and 45 PARK maintain the same office located at 552 Broadway, Suite 6N", and that SOHO's architect worked on a permit for the site.

For two separate entities to be considered "united in interest," they must "stand or fall together", as where one is vicariously liable for the acts of the other. The alleged similarities in location and personnel of SOHO and 45 PARK fall far short of that standard.

McKinney's CLPR 203 practice commentaries point to *Zehnick v. Meadowbrook II Associates,* 2005, 20 A.D.3d 793, 799 N.Y.S.2d 604 (3 Dept), as an instructive opinion on the unity-of-interest prong of the three-part test for "relation back", for such cases where a new defendant is joined after expiration of the statute of limitations, (*McKinney's CPLR § 203,* Supplementary Practice Commentaries).

In *Zehnick*, following a snow storm, plaintiff slipped and fell in the parking area of a housing complex. The complex consisted of two adjoining properties separately owned by partnership *A* and partnership *B.* The two partnerships were, as here, distinct legal entities, created at different times

and composed mostly of different partners. However, they had one common general partner and shared the same management office space, property superintendent, snow removal contractor and insurer. Plaintiff timely sued *A* alone, but *A* established that *B* owned the area where plaintiff's accident occurred.

By the time plaintiff joined *B* as a defendant, the statute of limitations had expired, and the Appellate Division refused to apply the relation back rule. Despite the intermingling of resources and personnel, no "joint venture, partnership or agency" relationship existed between *A* and *B* such that vicarious liability would arise. The fact that *B* could be charged with notice of the action based on the intermingled employees and agents was not enough.

Similarly, in *Raymond v. Melohn Properties, Inc.* 47 A.D.3d 504, 851 N.Y.S.2d 17 N.Y.A.D. (1 Dept.,2008), following the commencement of an action against, inter alia, the managing agent of the building, Plaintiff sought leave to amend the complaint to add a new defendant on the basis that she only recently learned that it was the owner of the building.

The Court held that although the managing agent and new owner shared commonalities, including shareholders and officers, that in and of itself was not sufficient to establish that the two entities were "united in interest".

The *Raymond* Court added that the two entities had different defenses to plaintiff's claims and their interests were not such that they would stand

or fall together (*see Xavier v. RY Mgt. Co.,* 45 A.D.3d 677, 846 N.Y.S.2d 227 [2 Dept. 2007]).

Here, 45 PARK, as owner of the Building would have different defenses and interest to SOHO, an unrelated entity with no legal interest in the Building. In a nutshell, SOHO's most essential defense is, "I don't own the building" while 45 PARK's most essential defense is, "The LPC's actions were neither arbitrary nor capricious." SOHO has no reason to care about arbitrariness; 45 PARK can't deny ownership. The defenses are completely different.

Related corporations "are united in interest only where one corporation is vicariously liable for the acts of the other," and, in order for such vicarious liability to exist, " '[t]he parent corporation must exercise complete dominion and control [over] the subsidiary's daily operations" ' (*Feszczyszyn v. General Motors Corp.* 248 A.D.2d 939, 669 N.Y.S.2d 1010 N.Y.A.D. (4 Dept.,1998). *see Hilliard v. Roc-Newark Assoc.,* 287 A.D.2d 691, 692, 732 N.Y.S.2d 421 (2 Dept, 2001); *Rotoli v. Domtar,* 224 A.D.2d 939, 940, 637 N.Y.S.2d 894) (4 Dept. 1996).

There is nothing in the record to suggest that either SOHO or 45 PARK exercise complete dominion and control over the other's daily operations or indeed any dominion at all. Any alleged representation by SOHO to the Commission that it owned the building is therefore not a representation by 45 PARK that SOHO owned the building. This is clear

from the evidence before this Court that the Commission itself invited 45 PARK to enter into the process and was not content with any communications it may have had with SOHO.

Accordingly, there is nothing in the record to indicate that SOHO and 45 PARK are vicariously liable for the acts of the other

However, the record is abundantly clear, as even a brief perusal of ACRIS confirms, that 45 PARK is the owner of the Building, and that SOHO have no ownership interest in the Building.

As a consequence, the claims against SOHO cannot "relate back" to 45 PARK and Petitioner's motion must be denied.

Further, any amendment to a pleading cannot be allowed if the resultant pleading will not, of itself have merit. In this respect, the Petitioner faces an insurmountable barrier, in that not only did he name the wrong Respondent, but he is not a qualified Petitioner. He undeniably lacks standing.[1]

---

[1] This court has directed the parties to keep the issues separate and distinct as regards each of the sets of motions. Therefore, Respondent Soho does not here dwell at length on why the Petitioner lacks standing, but leaves that to the accompanying motion to dismiss the Petition for failure to state a cause of action, *inter alia.*

POINT 2: THE OWNER OF A BUILDING IS A NECESSARY PARTY TO ANY ACTION THAT MAY DETERMINE THAT ITS BUILDING IS A NEW YORK CITY LANDMARK

The definition of necessary party has been strictly construed. It is limited to those cases where the court's determination would adversely affect the rights of the non-parties (*Matter of Castaways Motel v. C.V.R. Schuyler*, 24 N.Y.2d 120, 299 N.Y.S.2d 148, 247 N.E.2d 124 [1969], rearg. granted 25 N.Y.2d 896, 304 N.Y.S.2d 1031, 251 N.E.2d 152 [1969]), adhered to on rearg. 25 N.Y.2d 692, 306 N.Y.S.2d 692, 254 N.E.2d 919 [1969]; *Henshel v. Held*, 13 A.D.2d 771, 216 N.Y.S.2d 41 [1st Dept.1961];

On August 3, 2010, the LPC unanimously determined that the Building would not be accorded Landmark status and 45 PARK has subsequently proceeded with redevelopment plans.

If the decision of the LPC were reversed by the within Court, clearly the rights of 45 PARK would be adversely affected.

The interests and rights of SOHO would essentially be untouched.

The Court of Appeals considered a similar set of facts in *Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Standards*, 5 N.Y.3d 452, 839 N.E.2d 878, N.Y.,(2005), (hereinafter "*Red Hook*") where a nonprofit organization of local business owners challenged a City administrative decision, but failed to name the landowners (Imlay).

The Court of Appeals wrote that:

> Plainly, Imlay was a necessary party, and should have been joined in the proceeding at its inception. Having invested significant resources in pursuing its plan to convert the commercial space to luxury apartments, the developer "might be inequitably affected by a judgment" overturning the variance that permitted residential conversion (CPLR 1001[a]).
>
> (*Supra* at 456.)

Further, the Court reasoned that while both Imlay and the City had the same immediate purpose in opposing the article 78 petition – that of maintaining the status of the variance - that, in and of itself, did not create a unity of interest such that an action against Imlay related back to the filing date of the petition[2] (supra at 456, *see also* CPLR 203 [c]; *and see Matter of Emmett v. Town of Edmeston,* 2 N.Y.3d 817, 781 N.Y.S.2d 260, 814 N.E.2d 430 [2004]).

Here it is unquestionable that 45 PARK could be inequitably affected by a judgment, and that, therefore, it is a necessary party.

There is no unity of interest with SOHO, an unrelated entity with whom 45 PARK merely share office space and personnel, therefore there can be "relation back".

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[2] Thus, even if SOHO did, at the hearings, convey the impression that it owned the property, that, at most, speaks in favor of the propriety of naming SOHO in this proceeding as an *additional* party, but does nothing to get Petitioner off the hook for failing to name 45 PARK.

POINT 3 – A LANDOWNER IS A NECESSARY PARTY WITH UNIQUE INTERESTS AND THEREFORE THERE CAN BE NO RELATION BACK

The Court of Appeals in *Red Hook*, supra, cited numerous cases where the four-month statute of limitations had run and Petitioners had failed to join a landowner as a necessary party:

In *Ferrando v. New York City Bd. of Standards and Appeals*, 12 A.D.3d 287, 785 N.Y.S.2d 62, N.Y.A.D. (1 Dept., 2004), in a proceeding brought pursuant to CPLR Article 78, the First Department stated that Petitioner's failure to join the owner of the premises for which the disputed certificate of occupancy was issued, constituted a failure to join a necessary party (*see Matter of Manupella v. Troy City Zoning Bd. of Appeals,* 272 A.D.2d 761, 707 N.Y.S.2d 707 [2000]). The Court reasoned that since the applicable statutory period had expired and the owner could no longer be joined, and that proceeding in his absence would potentially be highly prejudicial to him, the proceeding was properly dismissed (*see* CPLR 1001 and 1003).

In *East Bayside Homeowners Ass'n, Inc. v. Chin*, 12 A.D.3d 370, 783 N.Y.S.2d 305, N.Y.A.D. (2 Dept. 2004), another proceeding pursuant to CPLR article 78, the Appellate Division held that the Supreme Court had properly dismissed a proceeding for failure to timely join the landowner as a necessary party. The Court stated that the Petitioners' failure to adequately explain why they did not include the landowner as a respondent in a timely manner,

despite being aware of its identity, precluded them from proceeding in the landowner's absence.

Here, not only is the identity of the Building Owner a matter of public record, but with the ease of use of the ACRIS system, any middle school student sitting with a computer in his or her bedroom could pull up the relevant information with less than a minute invested in research time. In this computerized age, such land records, while perhaps still technically merely constructive notice are, for practical purposes, tantamount to actual notice.

In short, nobody has any plausible excuse for not getting a Respondent right in an action affecting the recorded interests of a party in a Manhattan property.

Indeed Petitioner has offered no reasonable excuse for the failure to use ACRIS, and on that basis alone, such requests to "relate back" have previously been denied without further review, *Baker v. Town of Roxbury*, 220 A.D.2d 961, 632 N.Y.S.2d 854, N.Y.A.D.,1995.

This is not the first iteration of this Petition, but now the third that BROWN seeks to make. While BROWN may have rushed to get the Petition out the door the day after the LPC made its decision, it was several months later that it served an Amended Petition to add a supposed owner as a party. It was incumbent at that time for BROWN to choose the right one, one based on ACRIS research.

Petitioner's excuse that a representative from SOHO may have once claimed to own the Building, has nothing to do with the rights that the correct owner has in the property. Similarly, 45 PARK has the right to be named in the very short limitations period the Legislature prescribed.

In *O'Connell v. Zoning Bd. of Appeals of Town of New Scotland*, 267 A.D.2d 742, 699 N.Y.S.2d 775, N.Y.A.D. (3 Dept., 1999), the Court found that it was unmistakably clear that the owner of the subject real property to whom the challenged use variance was issued, might well have been inequitably and adversely affected if the relief requested in the petition had been granted and, thus, he was a necessary party, Additionally, the landowner did not voluntarily appear in the action and joining him under the circumstances where the Statute of Limitations had expired was not favored by the courts.

Having cited to the above four cases, the Court of Appeals in *Red Hook* came to the following natural conclusion:

> Several of the foregoing cases involve - like the present case - an omitted landowner, a land-use challenge and a lapsed statute of limitations, leading us to conclude with the obvious lesson: omitting the landowner from the litigation may be fatal.

(*Red Hook*, supra at 530)

More recently, in *Windy Ridge Farm v. Assessor of Town of Shandaken*, 11 N.Y.3d 725, 894 N.E.2d 1183 (N.Y., 2008), the Court of

Appeals confirmed that the dismissal of Petitioner's Article 78 proceeding was similarly warranted for Petitioner's failure to join necessary parties, once the Applicant had established the expiration of the four-month limitations period.

Here, as in *Windy Ridge*, and all of the aforementioned cases, the Movant has established that Petitioner has failed to join a necessary party and that the four-month limitations period has expired. Accordingly, as it would be highly prejudicial to allow the case to proceed in the absence of the owner of the Building, the matter should be dismissed.

CONCLUSION

For all of the reasons set forth herein, in the Bailey Affirmation, and in the pleadings and exhibits attached thereto, Petitioner's cross-motion should be denied and the underlying motion to dismiss should be granted in its entirety together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
March 4, 2011

Respectfully submitted,
Adam Leitman Bailey, P.C.
by

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

TIMOTHY BROWN

Petitioner,

-against-

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.

Index #110334/2010

AFFIDAVIT OF SERVICE

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

JEANETTE RIVERA-SOTO, being duly sworn, deposes and says:

1. I am not a party to this action, am over eighteen (18) years of age, and have a business address at 120 Broadway, 17th Floor, New York, New York 10271.

2. On March 4, 2011, I served the within **RESPONDENT SOHO PROPERTIES INC. MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S CROSS-MOTION TO AMEND THE PETITION** upon:

JACK L. LESTER, ESQ.
Attorney for Petitioner
261 Madison Avenue, 26th Floor
New York, New York 10016

VIRGINIA WATERS, ESQ.
Assistant Corporation Counsel
Corporation Counsel of the
City of New York
Attorney for Municipal Respondents
100 Church Street
New York, New York 10007
(212) 788-0822

by enclosing a copy of same in a postage-paid wrapper properly addressed to the recipient and depositing the wrapper in an official depository within the exclusive care and custody of the United States Postal Service within the City, County, and State of New York by First Class Mail.

JEANETTE RIVERA-SOTO

Sworn to before me this
4th day of March 2011

Notary Public

ELISSA GREENFIELD
NOTARY PUBLIC, STATE OF NEW YORK
NO. 01GR6217838
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES FEBRUARY 22, 2014

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

TIMOTHY BROWN

Petitioner,

-against-

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,

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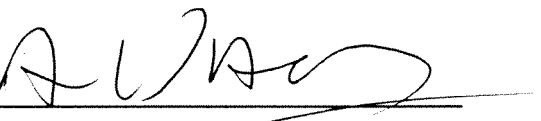
Index #110334/2010

RESPONDENT SOHO PROPERITES INC. MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S CROSS-MOTION TO AMEND THE PETITION

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: March 3, 2011

Signature: 

Print Signer's: Adam Leitman Bailey, Esq.

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