SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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In the Matter of the Application of

NEW YORK CITY COALITION FOR ACCOUNTABILITY NOW, INC., VALERIE LUCZNIKOWSKA, AND DONAL BUTTERFIELD,

Petitioners,

- against –

MICHAEL MCSWEENEY, CITY CLERK OF THE CITY OF NEW YORK,

Respondent,

For an order, pursuant to Article 16 of the Election Law And Municipal Home Rule Law 24 and 37, to compel Respondent to certify that the Petition conforms with all requirements of law.
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Index No. 100814/2014

Justice Paul Wooten

RESPONDENT MICHAEL MCSWEENEY'S MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DISMISS THE PETITION

Respondent Michael McSweeney, City Clerk and Clerk of the City Council (hereinafter, the "Clerk" or "McSweeney"), submits this memorandum of law in opposition to petitioners' motion for summary judgment and in support of his cross-motion for summary judgment. The verified petition (the "Verified Petition") seeks an order compelling him to certify that a petition proposing a referendum to amend the Charter of the City of New York (the "City Charter") by adding a provision requiring the Commissioner of Buildings (the "Commissioner") to investigate the collapse of any building that is not less than 20 stories high occurring on or after September 11, 2001, with the exclusion of One and Two World Trade Center (the "Referendum Petition"), filed pursuant to sections 24 and 37 of the New York

Municipal Home Rule Law, as being in compliance with "all the requirements of law." This proceeding essentially involves an attempt to improperly invoke State-created procedures for the revision of municipal charters, in order to require the Commissioner to undertake an investigation of the Sept 11, 2001, collapse of the building known as 7 World Trade Center.

The Clerk timely and properly determined that the Referendum Petition was fundamentally flawed, rendering it non-compliant with, among other statutes, the New York State Constitution, the New York Municipal Home Rule Law, and the New York State Financial Emergency Act for the City of New York (the "FEA"), § 2 of Chapter 868 of the Laws of 1975, *as amended*; N.Y. Unconsol. Law § 5401 *et seq*. (McKinney's 2014). Specifically, the Referendum Petition is legally invalid and may not be submitted to the voters for consideration at a general election because: (1) its financing plan pursuant to MHRL § 37(11) is deficient because it: (a) creates an unauthorized tax that cannot be imposed by the City of New York without authorizing State legislation; and (b) cannot be implemented consistent with the FEA; (2) it is misleading and fails to give voters adequate notice as to the purpose and effect of the proposed Charter amendment; (3) it mandates a reinvestigation of matters not primarily within the jurisdiction of the Department of Buildings (the "DOB") and therefore the proposed referendum would fundamentally be advisory in nature; and (4) it lacks a sufficient number of valid signatures.

Accordingly, notwithstanding the presence of a severability clause, because of the nature and extent of the proposed law's legal infirmities, the proposed Charter amendment contained within the Referendum Petition is not appropriate for submission to the City's electorate and the Clerk's determination should be sustained.

FACTS

On or about July 3, 2014, the New York City Coalition for Accountability Now ("NYCCAN") filed the Referendum Petition with the Clerk. The Clerk, pursuant to the MHRL, examined the Referendum Petition and, by letter dated August 4, 2014, certified to Melissa Mark-Viverito, the Speaker of the Council of the City of New York, that the Referendum Petition did not comply with "all the requirements of law" because: (1) it lacked a sufficient number of valid signatures, (2) the financing plan was legally deficient; (3) it was misleading and failed to give voters adequate notice of the purpose and effect of the proposed amendment; and (4) it constituted an advisory referendum. Memorandum of Law in Support of Petitioners' Motion For Summary Judgment ("Petitioners' Memo"), Exhibit A.

Petitioners commenced this action by filing a Verified Petition on or about August 7, 2014, seeking an order directing the Clerk to certify the Referendum Petition as being in compliance with "all the requirements of law." As of the date of this memorandum, the City Council has taken no action with regard to the Petition.

NYCCAN, although purporting to be interested in the safety of high-rise structures, has placed special and repeated emphasis on obtaining a re-investigation of the collapse of the building known as 7 World Trade Center, alleging that prior investigations were "imperfect." Affirmation of Stephen Kitzinger in Opposition to Petitioners' Motion for Summary Judgment and in Support of McSweeney's Cross-Motion For Summary Judgment, ¶ 6.

A. The financing plan.

The financing plan contained in the Referendum Petition provides for the establishment of a fund to be maintained by the City, through the Department of Buildings ("DOB"), in a separate interest-bearing account (the "Fund"). The Fund would contain up to approximately $3,000,000, and would be used as needed by the DOB to pay for investigations required by the proposed charter amendment. Referendum Petition, ¶ 6.

The Fund would be generated through the collection of a surcharge of .9% on all fee for all "Construction Permits" issued by the Department of Buildings, which Fund would be held separate and apart from all other City monies and used to pay the expenses of one or more continuing investigations in the fiscal year in which the revenues were collected or in subsequent fiscal years. *Id.*

The surcharge would continue to be imposed until the Fund contains $3,000,000 at which time imposition of the surcharge would be suspended. *Id.* In the event that the Fund's assets were to be expended (as a result of the costs of one or more investigations) to the point where the Fund contained less than $1,000,000, the surcharge would be reinstated. *Id.*

The Fund would be available regardless of whether an investigation were being conducted during a given fiscal year, and monies collected within a fiscal year would not necessarily be expended or obligated within that fiscal year. Such a funding plan is inconsistent with Generally Accepted Accounting Principles ("GAAP") that the City is obligated to follow in balancing its expense budget pursuant to the New York State Financial Emergency Act for the City of New York (the "FEA"). Section 2 of Chapter 868 of the Laws of 1975, as amended; N.Y. Unconsol. Law § 5401 *et seq.* (McKinney's 2014). Accordingly, such a Fund could not legally produce revenues that could be rolled from one fiscal year to the next, and thus could not support a lawful financing plan. Affidavit of Michele Mark Levine in Opposition to Petitioners'

Motion for Summary Judgment and in Support of Mcsweeney's Cross-Motion For Summary Judgment ("Levine Affidavit"), ¶ 8.

The City has issued bonds that remain outstanding as of the date of this affidavit (and have maturities as late as 2033), and that contain a covenant authorized by the FEA to be included in the City's debt. So long as these bonds remain outstanding, the City remains bound by certain provisions of the FEA, including that it maintain a balanced budget in accordance with GAAP. Levine Affidavit, ¶ 9.

Section 2-a of the FEA states that "the maintenance by the city of a balanced budget in accordance with generally accepted accounting principles and the city's borrowing practices are and will continue to be a matter of overriding state concern." N.Y. Unconsol. Law § 5403 (McKinney's 2014). In furtherance of this concern, § 8(1)(a) of the FEA requires:

> For the fiscal year ending June thirtieth, nineteen hundred eighty-two, *and for each fiscal year thereafter*, the city's budget covering all expenditures other than capital items shall be prepared and *balanced* so that the results thereof would not show a deficit when reported in accordance with generally accepted accounting principles and would permit comparison of the budget with the report of actual financial results prepared in accordance with generally accepted accounting principles.

N.Y. Unconsol. Law § 5410(1)(a) (McKinney's 2014) (emphasis added).

The italicized words in the preceding quotation highlight key components of this requirement: the City's budget must be balanced in accordance with GAAP, and the balance for each fiscal year is determined separately. Levine Affidavit, ¶ 10.

The import of this requirement is that each year's expenditures may not exceed the revenues of that same fiscal year, and such expenditures cannot be balanced using revenues generated by the City in previous fiscal years. Although this principle is not applied to funds

held by the City as a fiduciary for third parties or to funds with specified purposes that originate in other sources such as outside grants, this principle applies to revenues generated by the City through taxation and fees. Thus, pursuant to the FEA and GAAP, the City may not generally establish and maintain funds of City revenues to be held directly by a City agency and simply "rolled" from one fiscal year to the next to be used on an as-needed basis. To the extent that a given year's expenditures exceed that year's revenues, unencumbered revenues from the prior fiscal year cannot be applied to such expenditures, because improper deficit spending would result. Levine Affidavit, ¶ 11.

The import of this requirement is that each year's expenditures may not exceed the revenues of that same fiscal year, and such expenditures cannot be balanced using revenues generated by the City in previous fiscal years. Although this principle is not applied to funds held by the City as a fiduciary for third parties or to funds with specified purposes that originate in other sources such as outside grants, this principle applies to revenues generated by the City through taxation and fees. Thus, under the FEA and GAAP, the City may not generally establish and maintain funds of City revenues to be held directly by a City agency and simply "rolled" from one fiscal year to the next to be used on an as-needed basis. To the extent that a given year's expenditures exceed that year's revenues, unencumbered revenues from the prior fiscal year cannot be applied to such expenditures, because improper deficit spending would result. Levine Affidavit, ¶ 12.

The Comptroller's Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 2013 (the "CAFR") also recites the principle that current year expenditures are to be made using current year revenues: it states that the City's budget "covering all expenditures, other than capital items" must be "balanced so that the results do not show a deficit when

reported in accordance with generally accepted accounting principles" and further states that the General Fund's "balance must legally remain intact and is classified as nonspendable." CAFR at 76. Levine Affidavit, ¶ 13; CAFR, *available at* http://comptroller.nyc.gov/wp-content/uploads/documents/CAFR2013.pdf.

The Fund is evidently not intended to be operated in accordance with the requirements of the FEA and GAAP. Pursuant to the Referendum Petition, the Fund would be held by a City agency not acting as a fiduciary or agent for any outside party. It would simply be rolled from one fiscal year to the next, to be spent at the discretion of that agency in accordance with the requirements outlined by the Referendum Petition. The result, when reported in accordance with the FEA and GAAP, would prevent the revenues in the Fund from being spent in the succeeding fiscal year because the City is precluded from rolling expense budget revenues. Levine Affidavit, ¶ 14.

Even were the City no longer subject to the FEA, the City's Charter was amended in 2005, pursuant to a voter referendum resulting from the recommendations of a charter revision commission, to add a provision that imposes similar accounting requirements on the City. New York City Charter, § 258(a), (b)(1). This provision also defers to the FEA while it is in effect. New York City Charter, § 258(f). The Referendum Petition does not seek to amend this provision or otherwise address the conflict between this provision and the financing plan in the Referendum Petition. *See* Referendum Petition.

The Referendum Petition merely states that monies in the fund are to be "held separate and apart" until they are spent in accordance with the mandates of the petition. *Id.*, ¶ 6.

B. The Department of Buildings investigations.

The collapse of 7 World Trade Center has already been investigated, yet another re-investigation of the collapse of this structure does not appear likely to result in any new change in construction practices. Accordingly, such a re-investigation would, in effect, do nothing more than superimpose a new type of investigation upon DOB's normal regulatory activities, even if the investigation serves no role in promoting compliance with or DOB's regulatory and enforcement activities, and "even if a City, New York State, Federal, or other public or private entity conducted or participated in previous investigations." Affidavit of Dan Eschenasy, P.E., in Opposition to Petitioners' Motion for Summary Judgment and in Support of McSweeney's Cross-Motion for Summary Judgment ("Eschenasy Affidavit"), ¶ 4.

The unprecedented nature of the events of September 11, 2001, makes an investigation of those events particularly remote from the ordinary permitting and enforcement needs, as well as the more typical investigatory concerns, of the DOB. Notably, with the exception of the buildings that collapsed on September 11, 2001, the DOB is not aware of any "high-rise structure" that has experienced a "collapse" in the City as those terms are defined in the petition either before or after September 11, 2001. Eschenasy Affidavit, ¶ 5.

The DOB conducts investigations into structural collapses that occur within the city of New York. Eschenasy Affidavit, ¶ 6.

Such a re-investigation of the events of September 11, 2001, to be paid for by applicants for "Construction Permits" (as that term is obscurely but broadly defined in the petition), is untethered to the DOB's traditional regulatory activities, such as investigations that are reasonably connected to enforcement concerns. Eschenasy Affidavit, ¶ 7.

The re-investigation of the collapse of 7 World Trade Center would also likely provide little to no regulatory benefit, given that previous investigations and studies have been

conducted and have resulted in changes to the Building Code. DOB previously participated in studies of the World Trade Center collapses and published a set of recommendations, and DOB also worked with the National Institute of Standards and Technology ("NIST") during NIST's investigation of the collapse of 1, 2, and 7 World Trade Center. Many of DOB's and NIST's recommendations were ultimately incorporated into the City's Building Code to enhance the safety of the City's tall buildings. Eschenasy Affidavit, ¶ 8.

C. The Department of Buildings fees.

The .9% surcharge on "Construction Permits" would be imposed upon all applicants for a broad category of permits, not just those relating to buildings of at least 20 stories, and the primary purpose and effect of the surcharge would be to pay for a retrospective additional study of the unusual events that occurred on September 11, 2001, rather than a legitimate regulatory cost. Referendum Petition, ¶ 6.

The Referendum Petition, if adopted, would require the DOB to "conduct an Investigation into the cause or causes of each Collapse." The petition's definition of "Collapse" excludes the collapse of any buildings under twenty stories tall. *Id*., ¶¶ 2(d), 3.

The Referendum Petition estimates that implementation of the proposed local law will cost approximately $1,000,000 per year when an investigation is being conducted. To pay for this new expense, the Referendum Petition mandates adding a "surcharge of .9%" to existing fees "paid in connection with applications for all Construction Permits submitted to the Department [of Buildings]." The petition defines "Construction Permits" as "all permits encompassed in the term 'Construction Permits' as used in The City of New York Comprehensive Annual Financial Report of the Comptroller for the Fiscal Year Ended June 30, 2013." *Id*., ¶¶ 2(f), 6.

The Referendum Petition further requires that the funds raised through the .9% surcharge be kept in a special fund, used "only in connection with exercising the Department's responsibilities as set forth in the Act." *Id*.

The surcharge is not required to cover the costs of issuance, inspection and enforcement in relation to the DOB's "Construction Permits," as that term is defined in the Referendum Petition. In addition, as further explained below, the surcharge would likely bear no relation to the average cost of regulating construction permits. Affidavit of Edwin Pemberton in Opposition to Petitioners' Motion for Summary Judgment and in Support of McSweeney's Cross-Motion for Summary Judgment ("Pemberton Affidavit"), ¶ 8.

Although the term "Construction Permits" is not defined in the CAFR, it includes all construction-related filing and permit fees collected by DOB in FY 2013. According to the CAFR, $117,489,276 in revenue was collected in association with "Construction Permits" for Fiscal Year 2013. However, for that fiscal year, only approximately $36,000,000 came from filing and permit fees for buildings of at least twenty stories. Some of the construction-related permits issued in FY 2013 were wholly unrelated to tall buildings, such as the approximately 7,400 permits for one-, two-, and three-family homes, or the approximately 1,200 permits for septic tanks and sewer connections. Pemberton Affidavit, ¶ 9.

The .9% surcharge is not related to the permitting and regulatory scheme governing construction permits as that term is defined by the Referendum Petition. In the case of permits for small buildings and septic tanks, the mismatch is obvious. A builder of a one-family home benefits no more than any other citizen from the study of high-rise building collapses. In the case of permits to construct "high-rise structures" (as defined by the Referendum Petition),

the petition lacks a particularized regulatory benefit or purpose, particularly as it would apply retroactively to the events of September 11, 2001. Pemberton Affidavit, ¶ 10.

In fiscal year 2013, DOB collected $117,489,276 in revenue from Construction Permits, CAFR at 217, which would have generated $1,057,403 for the High-Rise Safety Initiative. However, as recently as fiscal year 2010, during the economic downturn, Construction Permit revenue was only $70,403,126, 2010 CAFR at 189, which would have generated only $633,628 under the terms of the proposed charter amendment. Pemberton Affidavit, ¶ 11.

The amount charged pursuant to the proposed surcharge would exceed the reasonable amount necessary to cover the costs of issuance, inspection and enforcement in relation to "Construction Permits" or any other regulatory costs of DOB that may lawfully be paid for by permit fees. Pemberton Affidavit, ¶ 12.

ARGUMENT

DIRECT DEMOCRACY IS VERY LIMITED UNDER THE LAWS OF THE STATE OF NEW YORK AND STRICT COMPLIANCE THEREWITH IS MANDATED.

Initially, it is important to note that in contrast to the practices of some other states, local laws initiated by the electorate are not the norm in New York and the conditions under which referenda are permitted are strictly controlled and prescribed by the State Constitution and statute. *See Molinari v. Bloomberg*, 564 F.3d 587, 608 (2d Cir. 2009) (in rejecting an argument that a referendum is required for the passage of a local law that changes the membership of the legislative body, stated that "direct democracy in New York is the exception, not the rule"); *Matter of Van Ness v. Cuevas*, Index No. 116570/97, slip op. at 8 (Sup. Ct. N.Y. Co. 1997), *aff'd*, 243 A.D.2d 283 (1st Dep't 1997), *app. dism'd, lv. to app. denied*, 90 N.Y.2d 963 (1997) (invalidated a petition to amend the Charter to remove the discretionary power of the Mayor to designate appropriate agency to maintain animal shelters, noting that "the rule of government by representation is the norm and government by direct action is the exception, infrequently permitted"); (invalidated a petition to amend the Charter regarding campaign finance, noting that direct legislative action is the exception "to the general rule of representative democracy"); *Matter of McCabe v. Voorhis*, 243 N.Y. 401, 413 (1926) ("Government by representation is still the rule. Direct action by the people is the exception."). Because the power of the City's electorate to amend local laws via petition is granted by state law, a petition that fails to meet any of the procedures and standards therein is unauthorized and invalid as a matter of law. As set forth below, the Referendum Petition is just such a petition as it not only fails to satisfy the basic requirements of the Municipal Home Rule Law, but also violates numerous provisions of New York's Constitution and substantive laws.

POINT II

THE REFERENDUM PETITION LACKED A SUFFICIENT NUMBER OF VALID SIGNATURES TO QUALIFY FOR PLACEMENT ON THE BALLOT.

To be valid, a petition seeking an amendment to the Charter of the City of New York must be signed by 30,000 qualified electors of the city of New York.[1] The Clerk, after reviewing the Referendum Petition, determined that it was signed by no more than 27,892 qualified electors. As such, the Referendum Petition is invalid and the Court need not consider the legal issues unless and until petitioners prove that the Clerk improperly determined that at least 2,108 signatures were invalid.

In their bill of particulars, petitioners, relying largely on *Cavallaro v. Schimel*, 194 Misc. 2d 788 (Sup. Ct., Nassau Cty., 2003), contend that the Clerk exceeded his authority in reviewing the signatures of the purported electors to determine whether or not such signatories were "qualified" under the MHRL. Petitioners' contention is misguided and unsupported by law. The review of the petition in *Cavallaro* was governed by N.Y. Town Law § 81[2] whereas the review of the Referendum Petition is governed by N.Y. MHRL § 24. Petitioners misleadingly assert that Town Law § 81 is "identical in all material ways" to MHRL §§ 24 and 37 and cite to the provisions relating to the forms of the petition. While the requirements concerning the form of petitions under each law may be substantially the same, petitioners ignore

[1] Qualified electors are "voters of the city who were registered and qualified to vote in such city at the last general election preceding the filing of the petition." N.Y. MHRL § 37(2). Here, that requires that such electors were registered to vote not later than October 11, 2013.

[2] Town Law § 81 authorizes the submission of petitions for specific and limited purposes, not including altering the basic governing document of the town. This contrasts with MHRL § 37, which is limited to propositions for amending a city charter.

MHRL § 24(1)(a) that, different from the Town Law, sets forth the requirement that the city clerk affirmatively review and determine whether or not a petition "complies . . . with all requirements of law." Town Law § 81 provides that:

> Such petition shall be subscribed and authenticated, in the manner provided by the election law for the authentication of nominating petitions, by electors of the town qualified to vote upon a proposition to raise and expend money.

N.Y. Town Law § 81(4).

MHRL § 24 provides that:

> The clerk shall examine each such petition so filed with him and not later than thirty days after the date of its filing, or forty-five days before the day of the election at which such referendum would appear on the ballot, whichever is earlier, shall transmit to the legislative body a certificate that he has examined it and has found that it complies or does not comply, as the case may be, with all the requirements of law.

N.Y. MHRL § 24(1)(a).

MHRL § 37(5) provides that:

> If he shall certify that there is an insufficient number of valid signatures, he shall make available to the legislative body a statement as to the number of signatures found to be invalid and the reasons for such invalidity, and shall make the same information available to the person by whom the petition was filed and make it, together with the petition and his notations of rulings thereon or relative thereto, a matter of public record in his office.

N.Y. MHRL § 37(5).

Section 81 of the Town Law has been interpreted to mean that the town clerk may only review a petition for sufficiency to the same extent that a local Board of Elections may review of designating and/or nominating petition for sufficiency, including that the petition itself

is presumptively valid. *See* N.Y. Election Law § 154(1); *Cavallaro*, 194 Misc. 2d at 790 – 91 ("A town clerk's authority to access (sic) the validity of a petition filed pursuant to Town Law § 81 is established by the authority conferred upon the board of elections to review petitions filed before it. A board of elections' statutory power for a petition review extends only to the legal sufficiency of designating petitions filed before it. In *Matter of Wicksel v Cohen* (262 N.Y. 446, 449, 187 N.E. 634 [1933]), the Court of Appeals defined the parameters of a board of elections' authority to review otherwise unchallenged petitions. The Court held that it was within the power of the board of elections, and in this matter the Town Clerk, to review petitions in the execution of the ministerial duty of their office. This ministerial duty was limited by the Court to a review to determine whether the signatures on a petition were those of qualified voters in the electoral district or if any qualified voters may have signed the petition twice. The Court of Appeals did not expand the execution of this ministerial review to anything further than a determination of qualified voters' signatures or repeat signatures on a petition.") (internal citations omitted). In other words, the role of a town clerk in reviewing a petition is reactive and ministerial in nature.[3]

Quite to the contrary, section 24 of the MHRL places an affirmative duty on the City Clerk to "examine" the petition and certify "that it complies or does not comply . . . with all the requirements of law." Section 37(5) of the MHRL even requires that the clerk "a statement as to the number of signatures found to be invalid and the reasons for such invalidity." N.Y.

[3] Notably, the *Cavallaro* court observed that no objections were filed against the petition and therefore the clerk was without authority to conduct anything more than a very limited review of the petition. The MHRL does not provide for the submission of objections to a petition, but instead places an affirmative duty on the city clerk to examine and determine the sufficiency of the petition.

MHRL § 37(5). Such a review is quite different in both nature and scope from the review conducted under Town Law § 81. Here, the Clerk's review and determination of each signature as valid or invalid – for all reasons – was not only appropriate, but *required* pursuant to MHRL § 24. The law is clear that the clerk must determine whether or not the petition complies with ALL requirements of law – which necessarily includes the requirements concerning the validity or invalidity of each signature set forth in § 6-138(2) of the Election Law, which incorporates the requirements in § 6-134 of the Election Law. Such requirements include alterations within the petition, the printing of names, and the subscribing witness requirements – that is, the very review that petitioners contend that the Clerk was without authority to conduct. Furthermore, the Clerk was required to – and did – identify the reasons for the invalidity of signatures and made the Referendum Petition with his notations thereon available in his office as a public record and available for inspection. It is clear that the Clerk was not only authorized, but required, to review each signature and determine its validity for all reasons set forth in the Election Law.

Because the MHRL places an affirmative duty upon the Clerk to review the petition for compliance with all requirements of law – in contrast with the more limited duty imposed on town clerks by Town Law § 81 – it is clear that the Clerk's review was proper and his determination that the Referendum Petition lacked a sufficient number of signatures should be sustained.

POINT III

THE VERIFIED PETITION WAS DEFICIENT IN THAT IT FAILED TO IDENTIFY THE SIGNATURES THAT PETITIONERS SEEK TO RESTORE.

The Verified Petition fails to sufficiently plead the factual bases required to support consideration of petitioners' claims. Section 24 of the MHRL requires that a proceeding challenging the determination of the Clerk is to be "heard and determined in the manner prescribed by section 16-116 of the election law." N.Y. Mun. Home Rule Law, § 24(1)(a). Section 16-116 of the Election Law (the "Election Law") requires that a petition to validate a petition shall be heard on an Order to Show Cause and a verified petition. N.Y. Election Law, § 16-116.

Furthermore, N.Y. Civ. P. Law R. (the "CPLR") § 3013 requires that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved." N.Y. Civ. P. Law R. 3013. Therefore, pursuant to CPLR § 3013, a verified petition filed pursuant to § 16-116 of the Election Law is required to allege with specificity the factual bases supporting validation. *Lacorte v. Cytryn*, 109 A.D.3d 544, 545 ("'A validating petition must specify the individual determinations of a board of elections that the candidate claims were erroneous, including the signatures that the candidate claims were improperly invalidated' . . . Here, the validating petition was not sufficiently particularized to give notice of which determinations were claimed to be erroneous or *which signatures Lacorte claimed were improperly invalidated by the Rockland County Board of Elections*.") (internal citations omitted) (emphasis added) *aff'd* 21 N.Y.3d 1022, 1023 (2013) ("The Appellate Division properly

determined that the validating petition did not sufficiently specify which determinations of the board petitioner claimed were erroneous.").

Here, although petitioners commenced this special proceeding by obtaining an order to show cause based upon a verified petition, the Verified Petition fails to identify even a single signature that petitioners claim the Clerk improperly determined to be invalid. Accordingly, *Lacorte* requires that the Verified Petition be dismissed.

Notwithstanding that they failed to identify even a single specific signature that they allege was wrongfully determined to be invalid, petitioners argue that the Verified Petition was sufficiently pled because: (1) the Referendum Petition requires more signatures than a designating or nominating petition; (2) the City Clerk is not obligated to make all "necessary records" available to petitioners to review a referendum petition; (3) a petitioner under the MHRL has less time to review the clerk's determination and file a validating petition than does a candidate seeking to validate his or her petition; (4) it placed the Clerk on notice of the "series of transactions or occurrences" petitioners seek to prove; and (5) it contained an allegation that the Clerk wrongfully determined signatures to be invalid where the address set forth on the Referendum Petition did not match the address on file with the Board of Elections for the purported signatory. As set forth more fully below, petitioners' arguments are unavailing.

A. The number of signatures required is irrelevant to the requirement to specify the signatures sought to be restored.

Petitioners contend because the number of signatures that the Clerk determined to be invalid was so great, the Court of Appeals in *Lacorte* simply didn't "contemplate" that it would be applicable to all petition matters. Petitioners' Memo, p. 5. In support of this contention, petitioners cite to the number of signatures required to obtain ballot status for the

public offices of governor (15,000), member of Congress (3,500), and member of the state Assembly (1,500) and Senate (3,000). Petitioners miss the point – it is not the number of signatures required to obtain ballot status that is important for pleading purposes; it is the identification of signatures sought to be restored that must be identified. Such number could be as low as one or as high as the total number of signatures required to obtain ballot status. When all is said and done, the number of signatures to be specified in the verified petition is wholly dependent upon the quality of the underlying petition seeking placement on the ballot. In other words, had petitioners reviewed the signatures in advance of submitting them to the Clerk, they would have been well aware of the deficiencies that they now seek to overcome. This they apparently did not do.

Moreover, petitioners' contention concerning what the Court of Appeals did or did not contemplate in *Lacorte* is supported by neither the text of the statutes upon which that case was decided nor the language used by the Court of Appeals in its opinion. The Court of Appeals in *Lacorte* wrote succinctly that "[t]he Appellate Division properly determined that the validating petition did not sufficiently specify which determinations of the board petitioner claimed were erroneous." *Lacorte*, 21 N.Y.3d at 1023. There is nothing contained therein to suggest that the decision is cabined based upon the number of signatures required to obtain ballot status or the number of signatures that must be restored.[4] The language and the principle set forth therein are clear – to be sufficiently pled, a verified petition seeking the validation of a petition must identify each signature sought to be restored. It is clear that such a rule is

[4] Were such the case, a party submitting a petition could litter it with thousands upon thousands of bad signatures with the intent of claiming that he or she should have additional time to review any determination because so many signatures were determined to be invalid.

necessary given the short timeframe within which a court must consider and determine the petition. The rule is more important where the number of signatures to be restored is greater as it provides the court and respondent with sufficient time to properly litigate and determine the matter. Permitting a petitioner to delay in identifying the specific transactions and/or occurrences that he or she seeks to prove serves only to prejudice and disserve both the courts and respondents.

B. The Clerk made all "necessary records" available to petitioners to review the Referendum Petition.

Petitioners claim that they should not be held to the standard set forth in *Lacorte* because there was no requirement that the Clerk make all "necessary records" available to them to enable their review of the Referendum Petition. This is simply not accurate. First, the Clerk is required to make the Referendum Petition with his notations on it a public record in his office. MHRL § 37(5). This he did. Petitioners contend that he should have been compelled to deliver the Referendum Petition with his notations on it – a public record that is required to be maintained in his office by statute – to an office of the Board of Elections so that the petitioners here could review it "in conjunction with the central file voter registration." It would be inconsistent with MHRL 37(5) for the Clerk to have done as petitioners wanted. Moreover, as set forth in the Affirmation of Stephen Kitzinger in Response to the Order to Show Cause Dated August 7, 2014, the Clerk went well beyond his statutory obligations and provided – at no cost to petitioners – a digitized copy of the Referendum Petition with the Clerk's notations on it to petitioners within hours of their requesting it,[5] as well as a copy of the "Clerks' Report"[6] and a

[5] Petitioners only made this request *after* commencing the instant special proceeding.

spreadsheet identifying the duplicate signatures the next business day. Petitioners' Memo, Exhibit B, ¶¶ 12 – 18. Petitioners' complaint that they did not have access to the necessary documents is simply unfounded. Petitioners chose not to seek access to these documents until after they commenced this special proceeding. That is not a valid excuse for not meeting their obligations under the law.

C. Petitioners seeking to restore signatures to a referendum petition have more time to commence a special proceeding than putative candidates do under § 16-102 of the Election Law.

Petitioners claim that candidates seeking to validate designating or nominating petitions under the Election Law have more time under the Election Law than they do under the MHRL to prepare a verified petition and therefore the holding in *Lacorte* should not apply. Again, this contention is unsupported by fact or law.

First, pursuant to N.Y. Election Law § 16-102(2), a putative candidate has three days to commence a proceeding to validate a petition after a Board of Elections has determined said petition to be invalid, whereas the MHRL § 24(1)(a) provides petitioners with five days to commence a proceeding to validate the Referendum Petition following the Clerk's determination that it did not comply with "all the requirements of law." Of course, five days necessarily requires that a weekend is included and, as a result, the MHRL provides a minimum of seven calendar days to commence the proceeding.[7]

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[6] The "Clerks' Report" is essentially a summary of the Clerk's findings both in full and by petition volume.

[7] Also, commencement under the Election Law includes service of the Order to Show Cause and Verified Petition upon the respondents. Where the respondent is the City Clerk, the demands of service are easily met as the Clerk maintains an office that is open and where he is subject to

Continued…

Petitioners' argument that they would actually have longer under the Election Law to prepare a verified petition identifying the signatures to be restored is not based upon when the Board of Elections might act to determine the petition to be invalid, but from when they would be served with the specifications of objection identifying the challenged signatures – not the signatures ultimately determined to be invalid. Petitioners here could have simply begun their review of the signatures on the petition as soon as they were collected in an effort to identify which signatures were likely to be found valid, which ones were likely to be determined to be invalid and, of the latter, which ones had the potential to be restored by the Court if restoration proved to be necessary.[8] Moreover, petitioners now contend that the Clerk wrongfully invalidated signatures that where the address listed on the Referendum Petition differed from that in the Board of Elections' records. Of the 5,268 signatures that petitioners have now identified on their bill of particulars,[9] 3,723 are of this category. It is clear that petitioners could have reviewed the signatures in advance of filing the Referendum Petition with the Clerk in anticipation of this litigation, but apparently chose not to do so. As such, they can not now contend that the clear rule of law should not apply to them. Accordingly, the instant proceeding should be dismissed.

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service during normal business hours. To the contrary, a putative candidate typically has to personally serve each and every objector to the petition within that three-day time frame.

[8] The vast majority of the signatures determined to be invalid were so determined because the signatories were not registered to vote in the city of New York. This information was available to petitioners at all times after such individuals signed the Referendum Petition.

[9] The Clerk determined that 37,688 signatures comprising the Referendum Petition were invalid. Petitioners here dispute less than 14% of those determinations and concede that approximately half of the signatures that they submitted were invalid.

D. The Verified Petition did not place the Clerk on notice of the "series of transactions or occurrences" that petitioners purport to seek to prove.

Petitioners, citing to *McMillan v. Commissioners of Elections of City of New York*, 41 Misc. 3d 1207(A); 2013 NY Slip Op 51609(U) (Sup. Ct., J. Wooten 2013),[10] contend that *Lacorte* is not controlling precedent. This dubious conclusion was apparently reached by petitioners because in a single case involving the Board of Elections in the City of New York, as represented by the Office of the Corporation Counsel, a bill of particulars was served pursuant to an order of the Court post-*Lacorte*, and that counsel for the Clerk, who was also counsel for the Board of Elections in *McMillan*, should be barred from asserting this argument. Setting aside the obvious – that the Clerk cannot be estopped based upon the actions of the Board of Elections, the *McMillan* court determined that the documents filed upon commencement were sufficient to constitute a Verified Petition and put the Board of Elections on notice of the occurrence challenged (*McMillan* concerned a challenge to finding that the cover sheet was defective, not the restoration of signatures). *McMillan*, 2013 NY Slip Op 51609(U), *8 – 10. In other words, while a bill of particulars may have been filed, it was wholly irrelevant to the determination.

Petitioners then contend that by alleging that the Clerk's determination as to the number of valid signatures was incorrect and that there were in excess of 30,000 valid signatures on the Referendum Petition, they put the Clerk on notice of the transactions or occurrences sought to be proven and, in general terms, why such determinations were incorrect. Petitioners' Memo, p.10. This is precisely what the Court of Appeals rejected in *Lacorte* and, accordingly, what this Court must reject here. Lastly, petitioners appear to allege that because the MHRL provides that Supreme Court "shall determine any question arising thereunder and make such

[10] Petitioners' memorandum mis-cites this case as being found at 41. Misc. 3d 1207.

order as justice may require," this Court may disregard Court of Appeals holdings, apparently in the "interests of justice." Petitioners offer no support – other than their *ipse dixit* statement – for this argument, because there is none.

E. The allegation that the Clerk wrongfully determined signatures to be invalid where the signatory's address set forth on the Referendum Petition did not match the address on file with the Board of Elections was insufficiently specific to put the Clerk on notice of the occurrences sought to be proven.

Petitioners argue that because they alleged that the Clerk improperly determined 4,153 signatures to be invalid due to providing an address on the Referendum Petition that differed from that on file with the Board of Elections, they provided sufficient notice of the transactions or occurrences sought to be proven. Citing cases from the Third Department, petitioners allege that a variance in the residence address stated on a petition from that on file with the Board of Elections is not a valid basis to determine the signature to be invalid. *Curley v. Zacek*, 22 A.D.3d 954, 956-57 (3d Dep't 2005).[11] Notwithstanding this argument, the Court of Appeals has held that the failure to include a correct residence address on a petition is grounds for determining the signature to be invalid. *Stoppenbach v. Sweeney*, 98 N.Y.2d 431, 433 (2002). In the absence of sufficient information to determine whether or not the address is correctly stated on the Referendum Petition, the Clerk was correct to determine that the signatures were invalid. *Zobel v. New York State Bd. of Elections*, 254 A.D.2d 520, 521 (3d Dep't 1998) ("here the evidence indicates that the challenged city and town listings set forth in

[11] Ironically, petitioners then argue, in the same section of their memorandum, that "[t]his is not a candidate petition, it is a petition brought and regulated by the municipal home rule law. The legal context of such a petition is totally distinguishable from the candidate petition context and therefore the cases ruling on candidate petitions are inapplicable and wholly inapposite." Petitioners' Memo, p. 13.

the nominating petition were incorrect and that the signers failed to accurately furnish the information required to validate their signatures").

Consistent with the above, in *Curley*, the opinion makes clear that the subscribing witness whose address listed on the petition didn't match the address on file with the Board of Elections actually testified as to correctness of his address. *Curley*, 22 A.D. 3d at 955 – 956. *See Matter of Fall v Luthmann*, 109 A.D.3d 540 (2d Dep't 2013) ("[W]ith the exception of the written statement of one signatory, Luthmann failed to submit any evidence, in the form of affidavits or otherwise, showing that the challenged signatures were valid. Under these circumstances, there is no basis in the record to disturb the Supreme Court's determination."). Petitioners did not (and could not) challenge the Clerk's findings prior to this proceeding, but the law is clear that some evidence is required to overcome a variation in address. Petitioners have, to date, failed to offer any such evidence and, therefore, the failure to identify the signatures sought to be restored in the Verified Petition is fatal to their efforts. *See*, *Lacorte*, *infra.*

In addition to and buttressing the foregoing, petitioners' bill of particulars belies their contention that they gave sufficient notice by alleging that the Clerk wrongfully invalidated ALL of the "wrong address" signatures. In their bill of particulars they acknowledge that all 4,153 signatures were not improperly determined to be invalid on account of the address stated by virtue of the fact that they only identify 3,723 "wrong address" signatures that warrant restoration, not ALL of the 4,153 that were determined to be invalid by the Clerk. As a result, it is clear that the generic allegation was not specific and therefore insufficient to meet the pleading standards set forth in CPRL 3013 and the Verified Petition must be dismissed.

POINT IV

THE REFERENDUM PETITION'S FINANCING PLAN IS DEFICIENT.

A. The proposed charter amendment would establish an unauthorized tax that cannot be imposed by the City of New York without authorizing State legislation, which is absent here.

The MHRL prohibits the Clerk from certifying as legally sufficient a petition for a proposed local law that requires the expenditure of money unless the petition contains "a plan to provide moneys and revenues sufficient to meet such proposed expenditures." MHRL § 37(11). Courts have held that financing plans cannot be too general or speculative, but rather must contain sufficient information to give voters an understanding of how the revenue necessary to implement the law will be generated. *See, e.g.*, *Matter of Schrader v. Cuevas*, 179 Misc. 2d 11, 22-23 (Sup. Ct. N.Y. County) (holding that a plan that relies on redirection of appropriations is too general to satisfy the requirement of MHRL § 37(11) and that there must be a plan to fund the increased costs), *aff'd*, 254 A.D.2d 128 (1st Dep't 1998). The Court of Appeals has explained the history and purpose of the financing plan requirement:

> Section 37(11) was enacted at the behest of the Conference of Mayors who were concerned that charter amendments involving substantial expenditures were being proposed or enacted without sufficient consideration of the cost and the means for financing them. At the behest of the Conference the statute was amended in 1951 to require that a financing plan be included in an initiative so that the electorate would be aware of the fiscal consequences of the proposal and could exercise their franchise intelligently.

Matter of Adams v. Cuevas, 68 N.Y.2d 188, 192 (1986) (citations omitted).

Financing plans must specify sources of revenue that are within the City's power to administer. Financial plans are insufficient "if based in whole or in part upon revenue from a

source over which the municipality does not exercise exclusive control." *Adams*, 68 N.Y.2d at 193. Municipalities have the ability to impose fees, but they do not have the authority to impose taxes without explicit authority from the State. NY Const. art. XVI, § 1 (reserving the taxing power for the State, absent explicit delegations); MHRL § 10(1)(ii)(a)(9-a) (granting localities the authority to charge fees); *see Castle Oil Corp. v. City of New York*, 89 N.Y.2d 334, 338-39 (1996). Therefore a valid financing plan may call for the City to impose fees, or raise existing taxes over which the City has control, but a plan may not require the imposition of an unauthorized tax – that is, a new tax or one that would exceed the existing delegated authority. *See Adams*, 68 N.Y.2d at 193 (holding that a financing plan failed to meet the statutory requirement because it relied on tax revenues that were subject to State legislative authorization.

The body of case law on the difference between taxes and fees is well-developed. Unlike taxes, fees have been described as a "visitation of the costs of special services upon the one who derives a benefit from them." *Jewish Reconstructionist Synagogue, Inc. v. Roslyn Harbor*, 40 N.Y.2d 158, 162 (1976) (emphasis omitted). The Court of Appeals has "long held" that "fees must be reasonably necessary to the accomplishment of the regulatory program," *People v. Novie*, 41 Misc. 3d 63, 71 (App. Term, 2d Dep't 2013), and that regulatory fees "must bear at least 'a rough correlation to the expense to which the State is put in administering its licensing procedures or to the benefits those who make the payments receive.'" *Matter of Walton v. N.Y. State Dep't of Corr. Servs.*, 13 N.Y.3d 475, 485 (2009) (citations omitted). Fees are therefore generally limited in that "the amount charged cannot be greater than a sum reasonably necessary to cover the costs of issuance, inspection and enforcement." *ATM One LLC v. Incorporated Vill. of Freeport*, 276 A.D.2d 573, 574 (2d Dep't 2000) (*quoting Torsoe Bros. Constr. Corp. v. Bd. of Trs.*, 49 A.D.2d 461, 465 (2d Dep't 1975)).

Fees that are imposed to generate revenue or to offset the cost of general governmental functions are not fees under the law; rather, they are unauthorized taxes and, therefore, invalid. *Torsoe Bros.*, 49 A.D.2d at 465. In other words, if the payer does not receive a particularized benefit and the fee is not based on the costs of the regulation, but rather the money goes to a more general governmental purpose, then that payment constitutes an unauthorized tax in contravention of the State Constitution. *See Am. Sugar Ref. Co. v. Waterfront Comm'n*, 55 N.Y.2d 11, 26-27 (1982); *see also Phillips v. Town of Clifton Park Water Auth.*, 286 A.D.2d 834, 836 (3d Dep't 2001) ("Because the subject fees impose the burden of these capital improvements upon a discrete group of residents, even though the benefit is enjoyed by all, the true nature of the subject source and storage fees is that of a prohibited tax." (citations omitted)).

The petition estimates that implementation of the new local law will cost approximately $1,000,000 per year when an investigation is being conducted. To pay for the new law, the petition mandates adding a "surcharge of .9%" to existing fees "paid in connection with applications for all Construction Permits submitted to the Department [of Buildings]." The petition defines "Construction Permits" as "all permits encompassed in the term 'Construction Permits' as used in [the CAFR]"

1. The revenue generated through the Referendum Petition's financing plan constitutes a tax because it is neither reasonably related to nor necessary to cover the costs of issuance, inspection, and enforcement of the permit process nor is it reasonably related to any enforcement concerns relating to the construction of "High-Rise Structures."

The petition requires that the funds raised through the .9% surcharge be kept in a special fund, used "only in connection with exercising the Department's responsibilities as set forth in the Act." The petition provides that the DOB's "Investigatory Responsibilities" are to

"conduct an Investigation into the cause or causes of each Collapse." The petition's definition of "Collapse" excludes the collapse of any buildings under twenty stories tall.[12]

Petitioners contend that the .9% surcharge is a fee, not a tax, because it "is undisputed that the fees are being exacted from members of an industry to regulate said industry – construction." Plaintiffs' Memo, p. 25 (*citing Am. Indep. Paper Mills Supply Co., Inc. v. Cty. of Westchester*, 65 A.D.3d 1173 (2d Dep't 2009)). In support of this statement, petitioners string together unremarkable quotations from decisions addressing the distinction between fees and taxes. As set forth more fully below, petitioners' argument fails in two respects. First, their definition of the "industry" being regulated is quite overbroad. The entities constructing high-rise structures are quite different from those installing septic tanks and building one-, two-, and three-family homes. To analogize to the motor vehicle context, it would be no different than the New York City Department of Sanitation imposing a fee on all households to investigate the handling of industrial waste (under the umbrella of regulating the production of waste generally) or the New York State Department of Motor Vehicles imposing a special "fee" on all license holders to conduct a study of commercial truck driver safety standards (under the umbrella of regulating moving vehicles). There is a substantial disconnect between the payers of the

[12] The petition defines "Collapse" as "any incident, occurring on or after September 11, 2001, in which, in the Commissioner's judgment, a portion comprising most or all of a High-Rise Structure has collapsed to the ground, other than in the normal course of intentionally razing such High-Rise Structure for purposes of real property development, and in response to which the City has conducted rescue operations or debris removal at the site of such High-Rise Structure." The petition defines "High-Rise Structure" as "any building, whether used for commercial, residential, or other purposes, and without regard to its classification or categorization under any Law, that (i) has or had a height of at least 20 stories, and (ii) is or was located in the City. This term shall not, however, include the buildings that, on and prior to September 11, 2001, were located at and known as 1 World Trade Center and 2 World Trade Center."

proposed "surcharge" and those who would be regulated and benefited by the proposed investigations.

The term "Construction Permits" is not defined in the CAFR.[13] The "Construction Permits" line in the CAFR includes all construction-related filing and permit fees collected by it in FY 2013.[14] According to the CAFR, $117,489,276 in revenue was collected in association with "Construction Permits" for that fiscal year. Of that revenue, only approximately $36 million came from filing and permit fees for buildings of twenty stories or more. Some of the construction-related permits issued in FY 2013 were wholly unrelated to tall buildings, such as the approximately 7,400 permits for one-, two-, and three-family homes, or the approximately 1,200 permits for septic tanks and sewer connections.

Second, even if the surcharge were limited to construction permits for buildings of at least twenty stories, it is not being exacted to regulate an industry. While the "whereas" clauses of the petition merely refer generally to the "safe and lawful use of buildings in the City" and assert that the investigations that would be mandated by the petition would be "in the best interest of the City," there is no indication of a connection to a particular regulatory or enforcement concern. Instead, the purpose of the initiative, particularly its retroactive component defining "collapse" to include incidents occurring on or after September 11, 2001, is to superimpose a new type of investigation upon DOB's normal regulatory activities, even if the

[13] The 2013 CAFR may be reviewed online at http://comptroller.nyc.gov/wp-content/uploads/documents/CAFR2013.pdf.

[14] It would be virtually impossible for any voter to determine what the term "Construction Permits" means in the context of the petition. As set forth more fully below, this failure impairs a voter's ability to understand the consequences of the Referendum Petition and renders it non-compliant with the MHRL.

investigation serves no role in promoting compliance or DOB's regulatory and enforcement activities, and "even if a City, New York State, Federal, or other public or private entity conducted or participated in previous investigations." In short, it is clear that this "surcharge," which would primarily fund a new investigation of the events of September 11, 2001, constitutes, under New York law, an unauthorized tax. *See Am. Ass'n of Bioanalysts v. N.Y. State Dep't of Health*, 75 A.D.3d 939, 945 (3d Dep't 2010) (upholding a lower court's decision disallowing the use of fee-generated revenue to pay for research costs that were not demonstrably necessary for administering the regulatory program); *Nitkin v. Adm'r of Health Servs. Admin.*, 91 Misc. 2d 478, 479 (Sup. Ct. N.Y. County 1975) (explaining that "a fee cannot include a charge for the general regulation of the industry"), *aff'd*, 55 A.D.2d 566 (1st Dep't 1976), *aff'd*, 43 N.Y.2d 673 (1977).

At its core, the .9% surcharge is insufficiently related to the permitting and regulatory scheme governing construction permits, particularly as that category of permits is defined by the petition. *See Matter of Walton*, 13 N.Y.3d at 485. In the case of permits for small buildings and septic tanks, the mismatch is obvious, as described above – a builder of a one-family home benefits no more than any other citizen from the study of high-rise building collapses; that is, he receives no particularized benefit as the payer of the fee. In the case of permits to construct "high-rise structures" (as defined by the petition), the petition lacks a particularized regulatory benefit or purpose, particularly as it would apply retroactively to the events of September 11, 2001.

As further discussed below, the primary immediate effect of the petition is to require the investigation of the collapse of 7 World Trade Center, and possibly 3 World Trade

Center, both of which occurred on September 11, 2001.[15] The unprecedented nature of the events that day makes an additional investigation of those events at this late date extremely remote from DOB's ordinary permitting and enforcement needs, as well as the more typical investigatory concerns. Notably, with the exception of the buildings that collapsed on September 11, 2001, DOB has not been able to identify any "high-rise structure" that "collapsed" in the City as those terms are defined in the petition – either before or after September 11, 2001. Fees should not be "based on a sample of one" and instead should be based on "prevailing practices . . . developed over a range of experience" and on the basis of average experience, in order to "avoid idiosyncratic or atypical charges." *Jewish Reconstructionist Synagogue*, 40 N.Y.2d at 164; *see also Valentino v. County of Tompkins*, 45 A.D.3d 1235, 1237 (3d Dep't 2007) (citing earlier case law for the principle that a fee must "bear a reasonable correlation to the average, associated cost of the service provided"). A "surcharge" that is linked to a single, unprecedented tragedy is by its nature not based upon an actual or projected range of experience, providing further indication that it is not reasonably related to ordinary regulatory needs or costs.

The investigation of the collapse of 7 World Trade Center would also likely provide little to no regulatory benefit that would be consistent with an authorized fee. DOB previously studied the World Trade Center collapses and published a set of recommendations. N.Y. CITY DEP'T OF BLDGS. WORLD TRADE CTR. BLDG. CODE TASK FORCE, FINDINGS AND RECOMMENDATIONS (2003), http://www.nyc.gov/html/dob/downloads/pdf/wtcbctf.pdf. The

[15] The website about the petition says that the referendum will lead to an investigation of the collapse of 7 World Trade Center. High-Rise Safety Initiative, www.highrisesafetynyc.org/about/ (last visited September 4, 2014). Three World Trade Center was a twenty-two story building that largely collapsed on September 11, 2001, but it is not mentioned on the petition's website. FED. EMERGENCY MGMT. AGENCY, WORLD TRADE CTR. BLDG. PERFORMANCE STUDY 3-1 (2002).

majority of these recommendations were incorporated into the City's Building Code in 2004 to enhance the safety of the City's tall buildings. *See* Local Law No. 26 of 2004; N.Y. CITY COUNCIL COMM. ON HOUS. AND BLDGS., REPORT OF THE INFRASTRUCTURE DIV. 2-3 (June 7, 2004), *available at* http://legistar.council.nyc.gov/View.ashx?M=F&ID=660450&GUID=B616F9ED-E255-48A9-A8A8-A407F87A4885 (stating that Local Law 26 incorporated thirteen of the twenty-one DOB Task Force recommendations into the Building Code). The DOB also worked with the NIST during NIST's investigation of the collapse of 1, 2, and 7 World Trade Center. The City Council, upon recommendation of the Department, added provisions to the Building Code pursuant to the recommendations of NIST reports. *See* Local Law No. 141 of 2013; N.Y. CITY COUNCIL COMM. ON HOUS. AND BLDGS., REPORT OF THE INFRASTRUCTURE DIV. 8 (June 25, 2013), *available at* http://legistar.council.nyc.gov/View.ashx?M=F&ID=2550938&GUID=803AC116-B07A-49B3-9844-2FFB1F2A8F46 (detailing certain NIST recommendations being incorporated into the Building Code).

Moreover, as the United States Court of Appeals for the Second Circuit has recently recognized, in light of the unique events of September 11, 2001, 7 World Trade Center "would have collapsed regardless of any negligence ascribed . . . to the design and construction of 7WTC." *Aegis Ins. Servs., Inc. v. 7 World Trade Company, L.P.*, 737 F.3d 166, 180 (2d Cir. 2013). The Court further noted that it "is simply incompatible with common sense and experience to hold that defendants were required to design and construct a building that would survive the events of September 11, 2001." *Id.* In short, given the extraordinary circumstances that led to the collapse of the World Trade Center buildings on September 11, 2001, the proposed

surcharge would primarily fund a re-investigation that would not be likely to result in any additional regulatory benefit, even as related to taller buildings. Such a re-investigation of the events of September 11, 2001 and hypothetical future anomalous calamities, to be paid for by applicants for "Construction Permits" (as that term is obscurely but broadly defined in the petition), is untethered to the traditional regulatory activities that may be funded by permit revenues.[16]

2. The projected revenue and expenses described in the Referendum Petition's financing plan is wholly speculative and does not provide for what must be done in the event that the Fund is insufficient to pay for an investigation.

Finally, it is unclear if the .9% surcharge would be sufficient to cover the costs of the High-Rise Safety Initiative. The petition estimates (without supplying a basis for the estimate) that implementation of the new law will cost $1,000,000 per year when an investigation is being conducted. In 2013, the Department collected $117,489,276 in revenue from Construction Permits, CAFR at 217, which would have generated $1,057,403 for the High-Rise Safety Initiative. However, as recently as 2010, during the economic downturn, Construction Permit revenue was only $70,403,126, 2010 CAFR at 189, which would have generated only $633,628 for this purpose. If an investigation were conducted that required more funds than provided for in the proposed charter amendment, the Referendum Petition does not specify what DOB is to do when available resources are fully expended – that is, to terminate or suspend the investigation. However, DOB could not rely on general budgetary revenues to

[16] Further, a permitting-related enforcement or regulatory purpose for investigation by the DOB of the events of September 11, 2001 is even more remote in light of the fact that the buildings that collapsed in the course of those tragic events were within the governmental jurisdiction of the Port Authority of New York and New Jersey and therefore not subject to DOB regulation and enforcement.

implement the initiative; financing plans may not rely in whole or in part on general funding sources. *Adams*, 68 N.Y.2d at 192; *Matter of Schrader*, 179 Misc. 2d at 22 ("Reliance on general budgetary procedures to fund increased costs is insufficient to satisfy the requirements of [MHRL § 37]." (citations omitted)), *aff'd*, 254 A.D.2d 128 (1st Dep't 1998). To the extent that the financing plan would require funding from unspecified sources or the normal budgetary processes, it fails on that account as well. *Matter of Schrader*, 179 Misc. 2d at 22-23.

B. The financing plan in the proposed charter amendment cannot be implemented consistent with the FEA.

If a petition's financing plan cannot be reconciled with the FEA, it must be rejected. *See Matter of Gamble v. Dinkins*, Index No. 8798/76 (Sup. Ct. N.Y. County) (rejecting referendum petition for mandated police and fire staffing in part because the proposed law "conflicts with chapters 868, 869 and 870 of the Laws of New York adopted . . . to meet the financial crisis facing the City of New York"), *aff'd*, 55 A.D.2d 861 (2d Dep't 1976). In this case, the financing plan cannot be implemented as proposed, intended and specified by the drafters of the Referendum Petition, due to the requirements of the FEA and GAAP. This provides yet another independent and sufficient ground for determining that it does not comply with "all requirements of law."

Petitioners contend, without citation to law or GAAP, that the Referendum Petition provides for the creation of a "special revenue fund" that is not subject to the FEA and, consequently, not required to conform to GAAP. This theory is based upon the allegation that the "balanced-budget requirement of the FEA, however, extends only to expenditures included in the budgets of covered organizations" and because "such expenditures would not be anticipated

at the start of any given fiscal year." Petitioners' Memo, p. 26. Petitioners are wrong on both counts.

First, petitioners have misconstrued the FEA, by citing an irrelevant provision related to "covered organizations." A separate sentence of the same paragraph of the FEA, quoted below, applies directly to the City's budget covering all non-capital expenditures, which would include the Fund created by the Referendum Petition, and requires that the budget be balanced for each fiscal year in accordance with GAAP. N.Y. Unconsol. Law § 5410(a)(a) (McKinney's 2014); FEA, § 8(1)(a). Second, the Referendum Petition requires an investigation into the September 11, 2001, collapse of the building known as 7 World Trade Center (and, likely, the collapse of the building known as 3 World Trade Center). Accordingly, the Referendum Petition in fact anticipates the expenditure of funds upon the effective date of the proposed charter amendment were it to be adopted. As a result, petitioners' arguments that "expenditures from the High-Rise Safety Fund would be unanticipated and emergency in nature, and thus not included in DOB's annual budget," Petitioners' Memo, p. 26, are without merit. Further, this distinction between anticipated and unanticipated expenditures is not contained in the FEA and is irrelevant to the GAAP balanced budget requirement – indeed, the distinction appears in Petitioners' Memo without any supporting citation. Similarly, the Petitioners' Memo refers (at p. 26) to a "special revenues fund" as if this concept somehow permits an exception to the FEA requirement, but whether the Fund is denominated in this manner or not is irrelevant. As set forth below, because the Fund would be subject to the FEA and, because it runs afoul of GAAP, it may not be implemented as contemplated by the financing plan. The plan therefore cannot be implemented to produce the necessary revenue under state law and is invalid.

The Referendum Petition's financing plan provides for a fund to be maintained by the City, through the Department, in a separate interest-bearing account. The Fund would contain up to approximately $3,000,000, and would be used as needed by DOB to implement the Referendum Petition's requirements. The Referendum Petition contemplates that permit surcharge revenues collected by the City would be used to fund expenses of one or more continuing investigations. The Fund would continue to grow until it reached $3,000,000, at which time imposition of the surcharge would be suspended. In the event that the Fund's assets were depleted (through the costs of one or more investigations) such that there was less than $1,000,000 remaining, the surcharge would be re-imposed. In short, the fund would be available regardless of whether an investigation were being conducted during a given fiscal year, and moneys collected within a fiscal year would not necessarily be expended or obligated within that fiscal year. This plan of operation is inconsistent with principles of accounting that apply to the City's budgeting pursuant to the FEA, and therefore cannot be implemented.

The FEA was enacted in response to the fiscal crisis that New York City faced in the mid-1970s. In response to the budgetary and borrowing practices that had fueled the crisis, the State Legislature enacted a set of procedures and restrictions to reform those practices, and created the New York State Financial Control Board (originally known as the Emergency Financial Control Board) to oversee compliance with the FEA. A further set of amendments by Chapter 777 of the Laws of 1978 created much of the modern FEA statutory scheme.[17]

[17] Section 13 of the FEA provides that the FEA terminates on July 1, 2008, or on the date when certain bonds are discharged, whichever comes later. N.Y. Unconsol. Law § 5418 (McKinney's 2014). Those bonds contain a covenant authorized by the FEA to be included in the City's debt. Because the City has issued such bonds with maturities as long as 30 years, the FEA remains in effect and could continue through at least 2033 unless all bonds containing the relevant covenant

Continued…

Section 2-a of the FEA states that "the maintenance by the city of a balanced budget in accordance with generally accepted accounting principles and the city's borrowing practices are and will continue to be a matter of overriding state concern." N.Y. Unconsol. Law § 5403 (McKinney's 2014). In furtherance of this concern, § 8(1)(a) of the FEA requires that:

> For the fiscal year ending June thirtieth, nineteen hundred eighty-two, *and for each fiscal year thereafter*, the city's budget covering all expenditures other than capital items shall be prepared and *balanced* so that the results thereof would not show a deficit when reported in accordance with generally accepted accounting principles and would permit comparison of the budget with the report of actual financial results prepared in accordance with generally accepted accounting principles.

N.Y. Unconsol. Law § 5410(1)(a) (McKinney's 2014) (emphasis added).[18]

The italicized words in the preceding quotation highlight key components of this requirement: the City's budget must be balanced in accordance with GAAP, and the balance for each fiscal year is determined separately. This provision, as noted above, applies to the City directly and is distinct from a sentence concerning "covered organizations," apparently relied upon by the petitioners, that appears later in the same paragraph.

The import of this requirement is that each year's expenditures may not exceed the revenues of that same fiscal year, and such expenditures cannot be balanced using revenues generated by the City in previous fiscal years. Although this principle is not applied to funds

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are discharged. (Certain provisions of the FEA, not at issue here, have expired by their own terms pursuant to § 2(12) of the FEA. *See* N.Y. Unconsol. Law § 5402(12) (McKinney's 2014).)

[18] A requirement similar to this one was inserted into the City's Charter in 2005 as § 258(a). This change was made as a result of a voter referendum, at the recommendation of a charter Continued…

held by the City as a fiduciary for third parties or to funds with specified purposes that originate in other sources, such as outside grants, this principle applies to revenues generated by the City through taxation and fees. Thus, pursuant to the FEA and GAAP, the City may not generally create funds of City revenues to be held directly by a City agency and simply "rolled" from one fiscal year to the next to be used on an as-needed basis. To the extent that a given year's fiscal expenditures exceed that year's revenues, unencumbered revenues from the prior fiscal year cannot be applied to such expenditures, because improper deficit spending would result.

The principle described above, that current year expenditures are to be made using current year revenues, is rooted in the FEA and GAAP and is neither new nor novel. The CAFR (referred to in the Referendum Petition's obscure definition of "Construction Permits") also recites this principle: it states that the City's budget "covering all expenditures, other than capital items," must be "balanced so that the results do not show a deficit when reported in accordance with generally accepted accounting principles" and further states that the General Fund's "balance must legally remain intact and is classified as nonspendable." CAFR at 76.

The fund created by the Referendum Petition is evidently not intended to be operated in accordance with the requirements of the FEA and GAAP. The fund would be held by a City agency not acting as a fiduciary or agent for any outside party. It would be rolled from one fiscal year to the next, to be spent at the discretion of the DOB in accordance with the requirements outlined in the Referendum Petition. The result, when reported in accordance with the FEA and GAAP, would prevent the funds from being spent in the succeeding fiscal year because the City is precluded from rolling expense budget revenues. The Referendum Petition

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revision commission. The provision in the Charter is consistent with the FEA, and explicitly defers to the FEA while it is in effect. *See* N.Y. City Charter § 258(f).

does not address this fatal defect. Instead, the petition merely states that monies in the fund are to be "held separate and apart" until they are spent in accordance with the mandates of the petition. This financing approach cannot be implemented consistent with the mandates of the FEA and GAAP.

In an effort to overcome this fatal defect, petitioners now contend that this Court should amend the Referendum Petition to:

> provide for the imposition of a temporary .9% surcharge on construction permit fees when and for as long as an investigation is being conducted. The amended language of the law would read: "Financing Plan Under New York Municipal Home Rule Law Section 37 Paragraph 11. Moneys sufficient to meet the expenditures necessary for the implementation of the Act, which are estimated to be approximately $1.0 million (one million dollars) per year when an Investigation is being conducted, shall be obtained by adding a surcharge of .9% to all fees required to be paid in connection with applications for all Construction Permits to the Department, which surcharge (i) shall take effect when the Department commences an Investigation, and (ii) shall cease to be in effect when the Department has completed such Investigation and published a report detailing and analyzing the results of such Investigation.[19]

Petitioners' Memo, p. 26. To substantially rewrite the financing plan that would be submitted to the electorate would place the Court in the position of writing legislation, and the Court may not do this. In *Matter of Sinawski v. Cuevas*, 133 Misc. 2d 72 (Sup. Ct., N.Y. Co. 1986), *aff'd*, 123

[19] Even this proposed reformation fails because the surcharge is only imposed "when and for as long as an investigation is being conducted." Of course, an investigation cannot begin until funds are allocated and funds would never become available for allocation as the surcharge is only imposed while an investigation is ongoing. Additionally, for the reasons set forth more fully above, this formulation, too, suffers from the deficiency that it is unknown if the funds raised would even be sufficient to fund the investigation if the surcharge were ever imposed.

A.D.2d 548 (1st Dep't 1986), where the petitioners suggested that the City Council could easily correct the problems in their referendum petition, the Court noted that:

> In their papers and at oral argument petitioners have sought to dismiss these objections as hypertechnical and as points which could be easily rectified by the City Council. The proposed local law must, however, stand on its own and its validity cannot be determined based upon how it may be amended or altered by the City Council. There is no justification to burden the City Council, the court or the electorate with a simplistic approach to a complex problem.

Sinawski, 133 Misc. 2d at 77. As set forth in *Sinawski*, the proposed charter amendment as set forth in the Referendum Petition must rise or fall on its own merits and is not subject to reformation by the Court or the City Council.

For the reasons set forth above, the Referendum Petition's financing plan is therefore legally deficient in multiple respects. Accordingly, the Referendum Petition fails to meet "all the requirements of law" and subsequently may not be placed on the ballot at the next general election. MHRL §§ 24(1), 37(11).

POINT V

THE REFERENDUM PETITION IS MISLEADING AND FAILS TO GIVE VOTERS ADEQUATE NOTICE AS TO THE PURPOSE AND EFFECT OF THE PROPOSED CHARTER AMENDMENT.

Courts have consistently held that referendum proposals must provide the voters adequate notice as to the meaning and implications of the proposed Charter amendment. *See Matter of Grenfell (Lawyer)*, 269 A.D. 600, 603 (3d Dep't) ("The voters are entitled to know precisely the extent and nature of the proposed changes submitted."), *aff'd*, 294 N.Y. 610 (1945); *Matter of Lenihan v. Blackwell*, 209 A.D.2d 1048, 1050 (4th Dep't 1994) (rejecting Charter amendment proposal because voters were not informed of the purpose and effect of the proposed amendment). Petitions must also be properly drafted and not contain ambiguous language. *See Sinawski*, 133 Misc. 2d at 76-77 (invalidating petition proposing procedures for the recall of elected officials in part because the petition was ambiguously drafted), *aff'd*, 123 A.D.2d 548 (1st Dep't 1986).

In addition to the legal deficiencies described above, the Referendum Petition is legally insufficient because it misleads voters as to its purpose and effect and also fails to adequately define a key term ("Construction Permits"), preventing voters from being able to "evaluate the impact of the initiative on them and make an informed choice on the issue." *Adams*, 68 N.Y. 2d at 193.

A. The term "Construction Permits" is vague and does not place the public on notice of the scope and extent of the proposed "surcharge."

"Construction Permits" is defined such that it would be virtually impossible for any voter to understand which permits would be subject to the surcharge described in the Referendum Petition. The Referendum Petition states, "'Construction Permits' shall mean all

permits encompassed in the term 'Construction Permits' as used in [the CAFR]." Petitioners now contend that because this term appears precisely once in "the entire 397 page report" and has "its own unique budget line," its meaning is unambiguous. Petitioners' Memo, p. 16. Notably, petitioners never state what they believe it means or how one would determine what permits are encompassed in the term "Construction Permits." Moreover, because of the manner in which the term is defined in the Referendum Petition, voters would be required to review the CAFR in an effort to understand the definition of "Construction Permits" as used in the Referendum Petition.[20] This is improper.

A referendum petition is considered insufficient when it requires voters to examine provisions contained outside of it in order to understand the proposal being voted on. *See Matter of Grenfell*, 269 A.D. at 603-04. Second, even presuming that a voter had a copy of the CAFR, the term "Construction Permits" is not defined in the report, but is only a line item on page 217 that represents one of DOB's various revenue sources. Nothing in the CAFR identifies which types of permits are encompassed within "Construction Permits" as the term is used therein, nor is the term defined or clarified elsewhere. Petitioners now cite in their Memorandum of Law (p. 16) to Administrative Code § 28-112.2, which sets forth various permit fees, but even if extremely savvy voters were to find their way past the Referendum Petition and then stumble upon this code section in the course of investigating the meaning of a single phrase in the CAFR, those imaginary voters would be thwarted. The section does not even define or generally use the term "construction permit."

[20] Of course, for the reasons set forth below, a voter reviewing the CAFR to determine the meaning of "Construction Permits" would find that effort unavailing and have no better understanding of the scope and nature of the term.

In addition, the meaning of the term is further obscured by the fact that its definition in the Referendum Petition explicitly removes it from its ordinary and natural meaning. "Construction Permits" in fact, and contrary to intuition, includes permits for minor alterations, such as curb cuts and interior work, and even temporary sheds and septic tank installations. As a result, it is a virtual certainty that voters would have no understanding of who would be paying for the investigations mandated by the Referendum Petition. In short, because voters would not be able to understand the meaning nor appreciate the import of this key term from the face of the Referendum Petition, a term that is essential to understanding the scope and nature of the financing plan, the Referendum Petition fails to inform voters "precisely what they are called to pass upon," and is thus insufficient. *Matter of Grenfell*, 269 A.D. at 604; *see Curcio v. Boyle*, 147 A.D.2d 194, 196-97 (2d Dep't 1989).

B. The Referendum Petition is misleading about its actual purpose which is to require the City to reinvestigate the events of September 11, 2001.

The Referendum Petition misleads voters as to its actual purpose and intent, which is to investigate/reinvestigate the September 11, 2001 collapse of one or more World Trade Center buildings. Although petitioners allege in their memorandum of law that the language of the proposed law is "very clear" and "straight forward," they later state, in a single sentence on page 20 what the Referendum Petition never honestly says in an entire page of small font:

> The proposed local law seeks to cause the DOB to investigate all covered high-rise collapses in the future, and one such collapse in the past, the collapse of WTC 7 on September 11, 2001.

Petitioners' Memo, pp 15, 20. Instead, petitioners seem to expect voters to remember the layout of the World Trade Center and understand that there was another building of at least twenty

stories (or maybe two buildings, if 3 WTC counts as a high-rise structure that collapsed) that collapsed on September 11, 2001.

Petitioners further allege that another immediate effect of the proposed local law "would be to put stakeholders in high-rise structures in the city on notice that a collapse would be investigated by the City." Petitioners' Memo, p. 15. It is patently absurd to suggest that such stakeholders are not already on notice that any such collapse would be investigated by the City. As set forth above, there have been numerous studies of the collapses that occurred on September 11, 2001, including at least one by the DOB. Furthermore, a review of DOB's website reveals not only the report from the WTC Task Force, but also reports on collapses of smaller structures within the city of New York. *See* http://www.nyc.gov/html/dob/html/codes_and_reference_materials/reports.shtml (last visited September 3, 2014).

The Referendum Petition, in an effort to avoid discussing its true intent, asserts that "in cities across the country, as a result of construction and design defects, natural and man-made disasters, and other causes, buildings of various types, including high-rise structures, have suffered collapse." Building collapses, however, are far from a common or normal occurrence. In fact, to DOB's knowledge, the only "high-rise structures" in the city of New York that have "collapsed" (as those terms are defined in the petition) as of the date of this memorandum are World Trade Center buildings that collapsed as a result of the events on September 11, 2001.

On September 11, 2001, three World Trade Center buildings suffered complete collapse following the terrorist attacks: 1 and 2 World Trade Center (the "Twin Towers") and 7

World Trade Center.[21] The collapse of the Twin Towers led to the destruction of the remaining four buildings in the World Trade Center complex (3, 4, 5, and 6 World Trade Center). *See, e.g.*, *Aegis Ins. Servs.*, 737 F.3d at 171 (quoting FED. EMERGENCY MGMT. AGENCY, WORLD TRADE CTR. BLDG. PERFORMANCE STUDY 1-8 (2002)); *see also* WTC Timeline, http://www.wtc.com/about/wtchistory-wtc-timeline (last visited July 14, 2014). Shortly thereafter, the Federal Emergency Management Agency ("FEMA") and NIST commenced investigations of the World Trade Center collapses, which culminated in several extensive and detailed reports, including the FEMA World Trade Center Building Performance Study (in 2002) and numerous NIST reports about the collapses of 1, 2, and 7 World Trade Center (in 2005 and 2008). In addition, in March 2002, DOB commenced a World Trade Center Building Code Task Force to review the events and conditions that led to the collapses and to determine whether modifications to then-existing building design, construction, and operating requirements were needed. The Task Force issued its findings and recommendations in February 2003, and as noted above, changes to the Building Code were also ultimately adopted as a result of the various investigations of the collapses.

Dissatisfied with prior investigations of the World Trade Center collapses, the New York City Coalition for Accountability Now ("NYC CAN") attempted a ballot initiative in 2009, seeking to amend the Charter to establish a temporary independent commission to investigate the events of September 11, 2001.[22] That petition was ultimately found legally

[21] Although 3 World Trade Center may have experienced "collapse" as the term is defined in the petition, unlike 1, 2, and 7 World Trade Center, it did not suffer a complete collapse.

[22] NYC CAN submitted the current High-Rise Safety Initiative petition. Letter from Leo Glickman, Stoll, Glickman & Bellina LLP, to Michael McSweeney, City Clerk (July 3, 2014) Verified Petition, Exhibit A (stating that Mr. Glickman is submitting the petition on behalf of Continued…

deficient. Among the reasons the petition failed was that the investigation of an attack by international terrorists amounted to an effort to address matters not primarily of a local concern, as well as an impermissible advisory referendum on the "efficacy of the governments' (local, state, federal) investigation of the attacks." *Burke v. Bd. of Elections*, Index No. 110779/09, slip op. at 12 (Sup. Ct. N.Y. County Sept. 25, 2009) (Crespo, Special Ref.), *confirmed*, *Burke v. McSweeney*, Index No. 110779/09 (Sup. Ct. N.Y. County Oct. 8, 2009).

Although this petition is styled as a "High-Rise Safety Initiative" associated with generally ensuring "the safe and lawful use of buildings in the City," its only immediate effect (and a key purpose based on the website about the petition) would be to further investigate the collapse of 7 World Trade Center and possibly 3 World Trade Center.[23] *See* High-Rise Safety Initiative, About the High-Rise Safety Initiative, http://highrisesafetynyc.org/about/ (last visited September 3, 2014); NYC CAN, Channel Your Voice, http://nyccan.org/join.php (last visited September 3, 2014). The petition obfuscates this purpose – a purpose already found improper during NYC CAN's last ballot initiative attempt – not only by failing to acknowledge that the proposed charter amendment would require an investigation into the collapse of 7 World Trade Center on September 11, 2001, but also by expressly excluding 1 and 2 World Trade Center from the category of buildings that would be investigated under its provisions. Those provisions

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NYC CAN). Despite some conflicting statements in the press, according to NYC CAN's own website circa 2009, NYC CAN submitted the previous petition as well. *NYC CAN Files Petition*, NYCCAN.ORG, archived page *available at* https://web.archive.org/web/20090830054246/http://nyccan.org/nyccanfilespetition.php.

[23] The "High-Rise Safety Initiative" website places specific emphasis on 7 World Trade Center, but it is unclear whether the destruction of 3 World Trade Center would also be subject to investigation under the provisions of the petition. *See* High-Rise Safety Initiative, About the High-Rise Safety Initiative, http://highrisesafetynyc.org/about/ (last visited September 4, 2014).

thereby suggest that its scope does not include collapses that resulted from the September 11, 2001, terrorist attacks.

The obscurity of the defined class of "construction permits" that would be burdened by the financing plan and the complete lack of candor to voters about the sole immediate effect, and apparent key purpose, of the Referendum Petition, distinguish it from the petition in *Matter of Schrader*, 179 Misc. 2d 11 at 20-21, a case heavily relied upon by petitioners in which the Court found, in *dicta*, that the language of that petition adequately informed the public, but invalidated the petition on other grounds.

In short, the Referendum Petition does not inform voters that construction permit surcharges would be levied primarily (and likely exclusively) to reinvestigate the collapse of 7 World Trade Center and potentially other events of September 11, 2001, or, as further discussed in Section V below, that the initiative is a pared-down reattempt to seek a vote on matters already deemed to be inappropriate for the ballot initiative process. This "paucity of information" as to what voters are actually being called upon to approve is fatal to petitioners' efforts. *Matter of Curcio v. Boyle*, 147 A.D.2d 194, 197 (1st Dep't 1989). Because the petition does not clearly communicate "the purpose and effect of the proposed amendment," it is invalid as a matter of law and should not be certified. *Matter of Lenihan*, 209 A.D.2d at 1050; *cf. Matter of Mavromatis v. Town of W. Seneca*, 55 A.D.3d 1455, 1456 (4th Dep't 2008) ("A proposed proposition . . . is appropriately invalidated if it is misleading."); *Marcoccia v. Suffolk County Bd. of Elections*, 309 A.D.2d 958, 959 (2d Dep't 2003) (holding that a proposition was properly annulled because it misled voters as to which taxpayers would be affected by the proposed local law).

POINT VI

THE PROPOSED CHARTER AMENDMENT MANDATES AN INVESTIGATION OF EVENTS NOT PRIMARILY WITHIN THE JURISDICTION OF THE DEPARTMENT OF BUILDINGS AND THEREFORE CONSTITUTES AN UNAUTHORIZED ADVISORY REFERENDUM.

Petitioners contend that the Referendum Petition does not constitute an advisory referendum because it would actually constitute a substantive amendment to the City Charter as it would "extend the [DOB's] existing investigatory authority to high-rise collapses." Petitioners' Memo, p.16. As set forth more fully below, petitioners' argument is unavailing because: (1) the Referendum Petition is primarily concerned with the investigation of an incident that is not primarily of local concern; (2) the DOB already has the authority to investigate the collapse of a building, high-rise or other, when that building is within its regulatory jurisdiction; and (3) the intent of the Referendum Petition cannot be effectuated because 7 World Trade Center is not under DOB's jurisdiction and there are other barriers to undertaking a reinvestigation of the collapse of that building.[24]

It is well-established that the petition process may not be used to address matters that are fundamentally of national or international scope. *Matter of Silberman v. Katz*, 54 Misc. 2d 956, 962 (Sup. Ct. N.Y. County) (invalidating petition seeking to establish a municipal office to coordinate anti-Vietnam War efforts), *aff'd*, 28 A.D.2d 992 (1st Dep't 1967); *Burke v. Bd. of*

[24] Among other barriers is the destruction of structural steel from 7 WTC. *See e.g.*, http://highrisesafetynyc.org/about/ (last visited September 3, 2014) (The NIST report "was imperfect . . . because the destruction of the steel in the building's cleanup necessitated over-reliance on a computer model for its investigation.") As the steel has been destroyed, any new investigation would have to utilize computer models as well – the alleged fault petitioners have with the NIST study. *See id*.

Elections, Index No. 110779/09, slip op. at 10 (noting that the petition process may not be used to address matters that "are not primarily a local concern"); *see also Citizens for an Orderly Energy Policy v. County of Suffolk*, 90 A.D.2d 522 (2d Dep't) (striking from the ballot an advisory referendum concerning a nuclear power plant "in the absence of express constitutional or statutory authority"), *appeal dismissed*, 57 N.Y.2d 1045 (1982). Petitions addressing national or international issues are merely advisory referenda, and are not permitted on the ballot. *Fossella v. Dinkins*, 130 Misc. 2d 52, 62 (Sup. Ct. N.Y. County) (holding that a referendum seeking to discourage the Navy from housing nuclear weapons in New York City was an impermissible advisory referendum), *aff'd on other grounds*, 110 A.D.2d 227 (2d Dep't), *aff'd on other grounds*, 66 N.Y.2d 162 (1985); *Silberman*, 54 Misc. 2d at 959 ("'[A]n advisory referendum by a city is not authorized.'" (citation omitted) (*quoting Kupferman v. Katz*, 19 A.D.2d 824, 824 (1st Dep't), *aff'd*, 13 N.Y.2d 932 (1963))).

In *Fossella v. Dinkins*, petitioners sought to prevent New York City from buying or leasing land that the Navy could use to establish a nuclear weapons facility. *Fossella*, 130 Misc. 2d at 56. While that petition only sought to amend the City Charter and affect local land use, *see id*. at 59, the court noted it was empowered to "look beyond the form" of the petition and "search for the ultimate goal of this proposal," *id*. at 61. The court determined that the actual goal of the proposal was to create a public relations problem, thus prompting the Navy to build the facility elsewhere. *See id*. at 62-63. Given the mismatch between the petitioners' objectives and their abilities (the Navy could always potentially use eminent domain to get the necessary land), the petition was essentially "nothing more than a public opinion poll." *Id*. at 62.

As noted above in Section IV, NYC CAN was involved in a previous referendum petition attempt to amend the City Charter by establishing an independent commission to

investigate the events of September 11, 2001. That petition was legally invalid for numerous reasons, including the fact that it was an impermissible advisory referendum. *Burke v. Bd. of Elections*, Index No. 110779/09, slip op. at 12 (Crespo, Special Ref.). The Referendum Petition is more limited in many respects, but the underlying goal remains an investigation into the events of September 11, 2001, particularly the collapse of the building known as 7 World Trade Center. A local petition about the DOB may not be used as a device to mandate an investigation into an international terrorist act.

The drafters of the Referendum Petition appear to have responded to the *Burke* decision by fashioning a new petition that recognizes the significant jurisdictional limitations of the DOB; in so doing, they have highlighted the advisory nature of this effort. For example, the Referendum Petition states that DOB is not authorized to subpoena any "non-City public official." To DOB's knowledge, the only buildings currently covered by the petition are former World Trade Center buildings under the jurisdiction of the Port Authority of New York and New Jersey. The Port Authority is not a City agency, which means that pursuant to the terms of the Referendum Petition, DOB could not exercise subpoena power over any Port Authority officials while conducting the investigation mandated by the petition. *See, e.g.*, *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 35-37 (1994) (explaining that the Port Authority is an entity created by bi-state compact); NAT'L INST. OF STANDARDS AND TECH., STRUCTURAL FIRE RESPONSE AND PROBABLE COLLAPSE SEQUENCE OF WORLD TRADE CENTER BUILDING 7, VOL. 1 11 (2008) (stating that 7 World Trade Center was built on Port Authority land). Additionally, the DOB would not be able to inspect any Port Authority building without the Authority's express permission. *See* N.Y. Unconsol. Law § 6612 (McKinney 2014) (stating that New York City's local laws, rules and regulations apply to the World Trade Center when the Port Authority and

the City *agree* to apply specific laws or rules to the World Trade Center). Even if the Port Authority decided to assist the DOB in its investigations, there are new structures and operations at the World Trade Center site, creating a substantial obstacle to investigating the causes of the collapse of 7 World Trade Center. The cumulative effect of these limitations, combined with the context of an international terrorist act of unprecedented scope, limit the legal and practical effect of the Referendum Petition to such an extent that it can fairly be characterized as no more than an impermissible "public opinion poll" on the efficacy of the previous local, state, and federal investigations into the tragic events of September 11, 2001. *Silberman*, 54 Misc. 2d at 962 (determining that since the office created by the petition would not be able to fulfill the petition's goals, the "net result at best would be a public opinion poll at taxpayers' expense"); *Burke v. Bd. of Elections*, Index No. 110779/09, slip op. at 12.

Finally, even if advisory opinion referenda were permissible, the Referendum Petition does not even function as a coherent opinion poll. By not mentioning the only likely effect of the petition (that is, to investigate the collapse of 7 World Trade Center, and possibly that of 3 World Trade Center, on September 11, 2001), the petition may mislead voters into supporting an initiative styled as one on the safety of tall buildings. That concern is addressed in greater detail in Section IV above.

POINT VII

THE SEVERABILITY CLAUSE DOES NOT RENDER THE PETITION VALID.

The petition contains a severability clause, which attempts to ensure that any finding of invalidity regarding particular paragraphs of the petition will not affect the remainder of the proposed local law. However, the extensive nature of the flaws in this petition makes application of the severability clause impossible. The application of a severability clause depends on "whether the legislature 'would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether.'" *Greater N.Y. Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100, 110 (2d Cir. 1999) (citations omitted) (finding that a local law could be severed because the provision found preempted by federal law did not affect the validity and enforceability of the other provisions); *Nat'l Advertising Co. v. Town of Niagara*, 942 F.2d 145, 148 (2d Cir. 1991) (finding that a town's sign ordinance could not be severed because the valid and invalid provisions were intertwined, making it impossible to excise the invalid provisions).

The legal objections to this petition are fundamental. The MHRL prohibits the Clerk from certifying as legally sufficient a petition for a proposed local law that does not contain a valid financing plan. MHRL § 37(11). Moreover, severance of the financing plan is fatal to the Referendum Petition because if such provision were severed, there would be no financing plan at all as required by MHRL § 37(11), thereby causing the Referendum Petition to not be in compliance "with all the requirements of law." *Adams*, 68 N.Y.2d at 191 – 92.

Additionally, there is no part of the petition that could be removed in order to make the petition anything other than a misleading advisory referendum. Referenda that are "manifestly invalid in a substantive respect" may not be saved by utilizing a severability clause. *Fossella*, 66 N.Y.2d at 167 (stating it would be "inappropriate" to allow the petition at issue on

the ballot in any form due to problems at the "core" of the petition); *Burke v. McSweeney*, Index No. 110779/09 (Sup. Ct. N.Y. County Oct. 8, 2009) (concluding that the petition to investigate 9/11 was too extensively flawed to be saved through its severability clause). Given the Referendum Petition's numerous serious flaws, and the fact that the Court may not reform the Referendum Petition to cure its defects (if such defects were even curable), the severability clause can not be used to save the Referendum Petition. Therefore, the petition should not be placed on the ballot.

CONCLUSION

As set forth herein, because the Petition does not comply with "all the requirements of law" as it must pursuant to Section 37 of the Municipal Home Rule Law, and its deficiencies are so great that it can not be saved by its severability clause, regardless of the number of valid signatures submitted in support of the Petition, respondent Michael McSweeney respectfully requests that the Court enter an order denying petitioners' motion for summary judgment, granting his cross-motion for summary judgment and declaring the Petition invalid and therefore ineligible for placement on the ballot, and for such other and further relief as is just and proper.

Dated: New York, New York
September 4, 2014

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