SUPREME COURT FOR 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,

Index #: 100814/14

-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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MEMORANDUM OF LAW IN SUPPORT OF PETTIONER'S MOTION TO REJECT IN PART THE REFEREE'S REPORT AND RECCOMENDATION

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MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION TO REJECT IN PART THE REFEREE'S REPORT AND RECOMMENDATION

Petitioners submit this memorandum of law asking the court to reject the Report and Recommendation ("Report") of the Special Referee in part. For all sections of the Report not objected to below, Petitioners hereby move this court to confirm. All prior filings by Petitioners are hereby incorporated by reference.

I. THE REPORT MISSTATES THE STANDARD BY WHICH THIS REFERENDUM PETITION MUST BE JUDGED

The cases cited to by the Report to begin its discussion do indeed tell us that representative democracy is the norm and direct democracy the exception. Report p. 12. Therefore, the courts continue: "Direct legislation in cities must always rest on some constitutional or statutory grant of power. … Therefore, only within the framework provided by this County Reform Amendment (State Const. art. IX, § 8) may the delegated power be

exercised." Burke v. Kern, 287 N.Y. 203, 211 (1941). Petitioners do not dispute this caselaw. We understand it to mean that a referendum petition must comply with the State Constitution and the municipal home rule law. Petitioners understand that they have no other authority for this referendum petition other than what is provided in those constitutional and statutory provisions.

However, the Report imports into this language an implication that the laws governing citizen initiated referendum petitions should be strictly construed. The Report states: "…[for] the instant initiative, to be permitted to proceed, [it] must fall squarely and fully within the framework provided by the provision authorizing it." *Citing* Burke v. Kern. The caselaw says no such thing. The notion seems to come from Respondent's memorandum of law in opposition, which erroneously 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." Memorandum of Law in Opposition p. 12. [Emphasis added.] The notion of "strictness" appears nowhere in the cases. Explaining that direct democracy is the exception in New York does not imply a strict construction approach; it only explains that the opportunity to engage in direct democracy is limited to what is permitted in the Constitution and statute.

Indeed, the courts instruct to take a liberal approach when determining ballot access of a referendum petition; "We begin our analysis by recognizing that any attempt to prevent a permissive referendum should be viewed with utmost circumspection since the right to petition the government is deeply rooted in our democracy." Millar v. Tolly, 252 A.D.2d 872, 873 (3rd Dep't. 1998). In Potash v Malik, the court held:

> Statutory permissive referendum is the implementation of the ancient grant of petition to government. This grant became a right and had been perpetuated in almost every charter of free men from the Magna Carta to and including the Constitution of the United

> States and the Constitution of the State of New York. Not only is this right protected by statute in the City Home Rule Law but also in the Town Law and Village Law. This ancient and hallowed right of petition can be destroyed and lost to the electors if circumscribed by restrictive legislation or narrow interpretation of the statutes pertaining thereto. Every liberal interpretation must be given to the legislative enactments to the end that the right of petition be preserved to the electors…"

Potash v. Molik, 35 Misc. 2d 1, 3, (Sup. Ct. Erie Cty. 1962) aff'd, 17 A.D.2d 111, (4th Dep't. 1962). [Emphasis added.]

Undoubtedly, direct democracy in New York, in contrast with California, for example, is the exception and not the rule. It is also of course true citizens are not free to place any question on the ballot without legal authority. These truisms, however, do not imply a strict construction. Indeed, the ancient and hallowed right to petition must be liberally construed to preserve the right, not strictly construed to attack it.

We therefore submit to the court that the validity of the referendum petition must, on every issue, be judged with a view to preservation, not destruction.

II. THE PROPOSED AMENDMENT DOES NOT CONSTITUTE AN IMPERMISSIBLE ADVISORY REFERENDUM

Petitioners contend that the proposed amendment is in truth and in fact an amendment to the City Charter. Though the Report acknowledges that the collapse of 7 World Trade Center is a local concern appropriately addressed by this proposed law, it claims that the proposed law is "merely advisory" because: 1) "[t]he DOB already has authority to investigate the collapse of a building that is within its regulatory jurisdiction", and 2) "the intent of the proposed amendment cannot be effectuated as to 7 World Trade Center because subpoena authority will not extend to non-city employees." Report page 34-35. Petitioners argue both points below.

A. The Proposed Amendment Alters the City Charter and Thus in Truth and Fact is an Amendment to the City Charter

The City Charter may be amended "by the procedure of initiative and referendum if the proposed local law alters or changes any provision contained in the charter, although it would appear to be an open question whether additions to the charter unrelated to its existing provisions may be accomplished by such procedure." Cassese v. Katz, 26 A.D. 2d 248, 250 (1st Dep't. 1966) *aff'd.*18 N.Y.2d 694 (1966) *See also* Adams v. Cuevas, 133 Misc. 2d 63, 66, (Sup. Ct. 1986) *aff'd*, 123 A.D.2d 526 (1st Dep't. 1986) *aff'd*, 68 N.Y.2d 188 (1986). The Report erroneously uses the standard that a proposed amendment to the Charter is only permissible and not merely advisory if it "expands the authority" of the Department of Buildings ("DOB"). Leaving behind the semantic question of whether making mandatory that which is optional is an "expansion" or not, expansion is simply not the standard. The Report points to no authority stating such a standard because no such authority exists.

The proposed law would require that the DOB investigate high-rise collapses. If the referendum does not pass and the *status quo* was maintained, the DOB would merely have the option to investigate such a collapse, something they declined to do with respect to World Trade Center 7.[1] It is clearly within the jurisdiction of the DOB to conduct such investigations, as they already have the discretion to choose to do so. It clearly relates to the Charter, and it clearly alters the charter, making mandatory that which is optional.

If the voters of New York choose to mandate their own authorities to investigate a high-rise collapse within the jurisdiction of the City, as opposed to leaving it up to bureaucratic

[1] The Charter provision reads: "The commissioner shall have the power and duty to conduct such inquiries as may assist him in the performance of the functions of the department where the public safety is involved and for such purpose he shall have subpoena power to compel the attendance of witnesses, to administer oaths, examine witnesses and to compel the production of books, papers and documents." New York City, N.Y., Charter § 646.

choice, they are free to do so. Whether this is an "expansion" of authority or not is of no legal consequence.

B. A Successful Investigation can be Conducted of WTC 7 Specifically and therefore the Intent of the Referendum can be Effectuated

The Report's conclusion that the intent of the referendum cannot be effectuated because "subpoena authority will not extend to non-city employees" is flawed legally and factually. The Report misconstrues the plain meaning of paragraph 4 of the petition, which states that the DOB "shall not be authorized, under this Act, to exercise subpoena power over any non-City public official…" This means that the subpoena power shall not extend to public officials who are employed by entities other than the City of New York. It does not mean, as the Report concludes, that only City of New York employees may be subpoenaed.

The mistake is critical, because the Report relies on this misapprehension to conclude that the investigation of WTC 7 cannot be effectuated: "[G]iven the limited scope of the proposed DOB subpoena power, coupled with the fact it is beyond cavil that non-City employees, such as, NIST personnel, private investigators, contractors, experts, consultants, will not be subject to the proposed subpoena power contemplated under the HRSI, the investigation of the collapse will be materially limited and 'impossible to effectuate.' "

The subpoena power is much broader than the Report indicates. Under the actual subpoena authority granted by the proposed amendment, in addition to City employees, former building occupants and many of the private contractors and organizations that worked on the WTC cleanup, for example, may be subpoenaed. The DOB would have the authority to subpoena employees and people not employed by the City under NY C.P.L.R. §2302(a). *See also* New York City Comm'n on Human Rights v. Cush, 180 A.D.2d 444, 445 (1st Dep't. 1992).

Moreover, important information relating to the cause of WTC 7's collapse may be obtained by interviewing City employees about their observations at the WTC site before, during and after the collapse of WTC 7. The City of New York was chiefly responsible for coordinating the emergency response on 9/11 and assumed control of the site until July, 2002.[2] Specifically, members of the Office of Emergency Management and the Fire Department were present at the site of WTC 7 where they determined several hours in advance that WTC 7 would very likely collapse, and, based on this determination, made the decision to remove firefighters from the building and to establish a "collapse zone" where no one was permitted to enter until after the collapse .[3]

Furthermore, and most critical to the technical analyses that would be conducted in an investigation of the WTC 7 collapse, there is a wealth of publicly available information about the building's design and its collapse including structural drawings, which can be used to model the building's collapse, the FEMA and NIST reports, and thousands of photographs and videos.[4] Indeed, all but one of the seven tasks outlined in the Petitioners' cost estimate for investigating the collapse of WTC 7 can be implemented using publicly available information. Frankly, the claim that a DOB investigation of the WTC 7 collapse cannot be "effectuated" because its subpoena power is limited to everyone except public officials working for non-City governmental entities is simply implausible.

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[2] *See e.g.* http://www.nytimes.com/2001/12/25/nyregion/25TOWE.html?pagewanted=2

[3] Dean E. Murphy, Editor, "September 11: An Oral History," New York, NY: Doubleday, 2002, p.175-176. *See also* FDNY Oral History 9110154, p. 10. http://graphics8.nytimes.com/packages/html/nyregion/20050812_WTC_GRAPHIC/met_WTC_histories_full_01.html

[4] See e.g. http://911datasets.org/index.php/Main_Page, which as of 9/18/14 contained 256,673 files related to the WTC disaster, including 172,724 files gathered by NIST during the course of its WTC investigations and released pursuant to Freedom of Information Act requests. NIST FOIA #11-209 and #12-009 contain structural drawings for WTC 7.

We further remind the court that the parties appear here on a summary judgment motion. There has been no hearing on the issue as to whether an investigation can be effectuated or not without the ability to subpoena non-City public officials, it is being brought up for the first time at the summary judgment stage. Regardless, even if it was a contested issue, the more appropriate forum to decide whether the investigation of WTC 7 would be a worthwhile endeavor is the ballot box, not the court. It is especially true since there has been no hearing on the facts.

III. THE PETITION PROVIDES A LEGITIMATE FINANCING PLAN

The Report claims that the financing plan is deficient because 1) it is not a fee but a tax, and 2) that the plan is not based on reliable factual studies and statistics. Report p. 25. Each is addressed below.

A. The .9% Surcharge on Construction Permit Fees is a Fee and Not a Tax

The distinction between a fee and a tax rests on whether the assessed revenues are being exacted from members of an industry, occupation or business and used to regulate or control the said industry, occupation or business. In the oft quoted Supreme Court case of Head Money Cases, the court explained: "A license fee has for its primary purpose the regulation or restriction of a business deemed in need of public control, the cost of such regulation being imposed upon the business benefited or controlled, whereas the primary purpose of a tax is to raise money for support of the government generally." Head Money Cases, 112 U.S. 580, 595–596 (1884). More recently, this court held: "Whether an exaction is a tax or a fee depends on whether its purpose is to raise revenue or to regulate an industry or services…. A tax is defined as a levy made for the purpose of raising revenue for a general governmental purpose; a fee is enacted principally as

an integral part of the regulation of an activity and to cover the cost of regulation." Radio Common Carriers of New York, Inc. v. State, 158 Misc. 2d 695, 698, (Sup. Ct. N.Y. Cty. 1993).

The Report does not address the most recent appeals court case in the state dealing with the issue of fees versus taxes, and cited in Petitioners' memoranda of law, Am. Indep. Paper Mills Supply Co., Inc. v. Cnty. of Westchester, 65 A.D.3d 1173 (2nd Dep't. 2009). There, the court held that a revenue assessment, specifically fees assessed against waste transfer stations, to fund the Solid Waste Commission's "general operations" was a fee and not a tax. The waste transfer station owner challenging the law argued that since the assessment would pay for all the operations of the Solid Waste Commission, few of which related to waste transfer, it was an impermissible tax. The Report and Respondent make a similar argument, to wit, that since some in the construction industry who would be assessed would not specifically be regulated by the plan that is funded with the surcharge here, it is an impermissible tax and not a fee. However, the Second Department rejected this reasoning.

> [t]he fact, however, that a transfer station fee may be used to fund the Commission's general operations does not automatically render the fee an unconstitutional tax. *In American Sugar Ref. Co. of N.Y. v. Waterfront Commn. of N.Y. Harbor*, 55 N.Y.2d 11, 26–27, the Court of Appeals explained that "[a] license fee has for its primary purpose the regulation or restriction of a business deemed in need of public control, the cost of such regulation being imposed upon the business benefitted or controlled, whereas the primary purpose of a tax is to raise money for support of the government generally." Here… the Solid Waste Law was enacted to eradicate the influence of organized crime on the solid waste hauling industry. Additionally, the cost of such regulation is imposed on the business benefitted or controlled by such regulation… Any fees obtained are used only to fund oversight of the solid waste industry, and not for the support of government generally. Such funding methods by both municipalities and the state have previously been deemed to be fees as opposed to taxes (see *City of Buffalo v. Stevenson*, 207 N.Y. 258, 262–263,; *American Assn. of Bioanalysts v. Axelrod*, 106 A.D.2d 53, 55).

Id. at 1175-1176. Am. Indep. Paper Mills Supply Co., Inc. is on point with the case at bar.

B. The Surcharge is Based on Reliable Data

The Report claims that the "proposed amendment does not amplify any correlation between the .9% surcharge and the $1 million annual expense to any associated cost for the HRSI." First, Petitioners note that the proposed amendment need not explain the correlation between the surcharge and the cost of the proposed law, and neither the Report nor the Respondent points to any authority for such a requirement. Indeed, to explain the "factual and statistical basis" as the Report claims Petitioners needed to include, would make the petition and the law unwieldy, leaving Petitioners open to other challenges.

Nor does any authority require the Petitioners to come forth with a "statistical and factual basis" for the fee absent discovery or a trial, both of which the Respondent decided to forego. Nevertheless, when challenged, Petitioners produced an estimated two year budget for such an investigation. The Report and Respondent objected to its lack of verification, but in the context of a summary judgment motion, where the "statistical and factual basis" for the surcharge was not challenged either by the Respondent's City Clerk's letter or in any court proceedings prior to the motion, Petitioners' contend that it is not their burden to carry at the summary judgment stage. Regardless, sufficient basis is provided for the fee.

Moreover, the Report and Respondent mischaracterize Jewish Reconstructionist Synagogue of N. Shore v. Incorporated Vil. Of Roslyn Harbor, 40 N.Y.2d 158 (1976) as standing for the proposition that "reliable factual studies and statistics" must form the basis for the fee. Report at p. 25. The Court stated: The fees also "should be assessed or estimated on

the basis of reliable factual studies or statistics" [*citations omitted*]. Put another way, the yardstick by which the reasonableness of charges made to an applicant in an individual case may be evaluated is the experience of the local government in cases of the same type." Id. at 163. [Emphasis added.] The Report actually acknowledges that in fiscal year 2013, $1,057,276 in revenue based on the proposed fee, indicating that the yardstick used was entirely appropriate under Jewish Reconstructionist Synagogue. That some years generated more revenue, while others generated less, does not defeat the financing plan. Caselaw consistently states that revenues and expenditures need not be an exact match. *See e.g.* Joslin v. Regan, 63 A.D.2d 466, 471-472, (4th Dep't. 1978) *aff'd*, 48 N.Y.2d 746 (1979). Unexpected shortfalls or increases in budgeted revenues and expenditures are always to be expected. It is understood from the language of the petition that investigations would be paid for as revenues are received from the fee.

IV. THE FINANCING PLAN IS COMPLIANT WITH THE FEA

The Report does not address Petitioners' fundamental argument. The FEA states that "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…" FEA §5410. Petitioners submit that the immediate expenditure, to investigate the collapse of WTC 7, is balanced by expected revenues from the construction permit fee surcharge. Petitioners further submit that the potentiality for an expense in a future year in connection with an investigation of an event that is possible in future years, but very unlikely in any given year, is not an "expenditure" covered in the "the city's budget" in any given year and thus not subject to the FEA.

V. THE SEVERABILITY CLAUSE SHOULD SAVE THE FINANCING PLAN SHOULD IT BE DEEMED FLAWED

Though we acknowledge that if this court deems the substance of the proposed amendment "merely advisory" in accordance with the Report, severability cannot save it. However, Petitioners contend that the finance plan, should it be rejected by the court, may be saved.

Judge Cardozo wrote "Our duty is to save, unless in saving we pervert." People ex rel. Alpha Portland Cement Co. v Knapp, 230 NY 48, 60 (1920). This oft quoted phrase in New York state and federal courts is of particular importance in connection with a referendum petition, where our courts have held that "any attempt to prevent a permissive referendum should be viewed with utmost circumspection since the right to petition the government is deeply rooted in our democracy." Millar v. Tolly, 252 A.D.2d 872, 873 (3rd Dep't. 1998). The court has a duty to interpret the law liberally "to the end that the right of petition be preserved to the electors…" Potash v. Molik, 35 Misc. 2d 1, 3, (Sup. Ct. Erie Cty. 1962) aff'd, 17 A.D.2d 111, (4th Dep't. 1962).

In determining the question of severance, "[t]he answer requires first an examination of the statute and its legislative history to determine the legislative intent and what the purposes of the new law were, and second, an evaluation of the courses of action available to the court in light of that history to decide which measure would have been enacted if partial invalidity of the statute had been foreseen. Westinghouse Elec. Corp. v. Tully, 63 N.Y.2d 191, 196 (1984). The court in Westinghouse examined three different courses of action to save the statute and ultimately decided that one such action could serve the legislative intent of the statute. In the recent Court of Appeals case in People v. Marquan M., Petitioners asked the court to rewrite the

law to save it from its constitutional infirmities. People v. Marquan M., 2014 WL 2931482 at 7 (2014). The court declined in that particular case, stating "the doctrine of separation of governmental powers prevents a court from rewriting a legislative enactment through the creative use of a severability clause when the result is incompatible with the language of the statute." The reasons for denying the Petitioners request there do not exist here.

First, there is no "separation of powers" issue here. This is a referendum petition initiated directly by the people. As noted above, the court has a duty to attempt to preserve a citizen initiated referendum petition. Potential infringement on the legislature's privilege is not in issue here. Nor are Petitioners asking this court to act as a legislature. The limited severance proposed herein is of a minimal nature and, as explained in Petitioners first Memorandum of Law, clearly compatible with the language and intent of the proposed law. Exhibit "A" indicates the manner in which the proposal can be minimally severed, thus saving the referendum petition signed by more than 65,000 signers and staying true to the legislative intent of the proposal.

Petitioners submit that the court should reject the Report for the reasons set forth above and confirm the Report in all other matters.

Dated: Brooklyn, NY
September 18, 2014

Respectfully submitted,

/S/

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EXHIBIT A

6. **Financing Plan Under New York State Municipal Home Rule Law Section 37**

Paragraph 11. ~~There shall be established a special fund, to be known as the New York City High-Rise Safety Fund, for receipt and maintenance of m~~Moneys sufficient to meet expenditures necessary for implementation of the Act~~. Such expenditures~~, which are estimated to be approximately $1.0 million (one million dollars) per year when an Investigation is being conducted,~~. The Fund assets~~ shall be obtained ~~and maintained~~ by adding a surcharge of .9% to all fees required to be paid in connection with applications for all Construction Permits submitted to the Department, which surcharge (i) shall first take effect ~~on the Effective Date~~when the Department commences an Investigation, and (ii) shall cease to be in effect ~~at any time Fund assets exceed $3.0 million (three million dollars)~~when the Department has completed such Investigation and has published a report detailing and analyzing the results of such Investigation.~~, and (iii) shall, after ceasing to be in effect, be re-imposed at any time Fund assets are depleted below $1.0 million (one million dollars). All moneys collected from said surcharge shall be deposited into the Fund, which shall be an interest-bearing account and which shall be held separate and apart from any other funds or monies of the Department or City.~~ The moneys ~~in the Fund~~obtained by adding such surcharge may be expended only by the Department, at the discretion of ~~and pursuant to the control of~~ the Commissioner, and only in connection with exercising the Department's responsibilities as set forth in the Act.