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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REPLY MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION OF FOR SUMMARY JUDGMENT AND IN OPPOSITION TO RESPONDENT'S CROSS-MOTION

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TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Cases **Pages**

Statutes Pages

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REPLY MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO RESPONDENT'S CROSS-MOTION

I. LAWS PERTAINING TO CITIZEN INITIATED REFERENDA MUST BE LIBERALLY CONSTRUED TO PRESERVE THE RIGHT OF CITIZENS TO PETITION GOVERNMENT

Though passing laws through direct democracy may be rare in New York State, Respondent is incorrect in stating that such rarity mandates "strict compliance" with the law creating the right to petition and referendum. Indeed, the courts have made clear that the law should be liberally construed to ensure the people's access to the right to petition. In holding that some of the signature requirements for a candidate designating petition do not apply to a municipal home rule referendum petition, the court held:

> The authority of the court should not be limited by technicalities in pleading in a proceeding of this nature. 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).

More recently, a New York court noted: "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).

We therefore respectfully submit that this court must review Petitioners' referendum petition with a view to preserving it for the ballot, not striking it from the ballot.

II. THE REFERNDUM PETITION EQUALS OR EXCEEDS THE REQUIRED NUMBER OF SIGNATURES

This point has been conceded by Respondent.

III. A BILL OF PARTICULARS TO AMPLIFY THE PLEADING WAS NOT REQUIRED TO BE SERVED WITH THE VERIFIED PETITION

Respondent does not and cannot dispute the fundamental fact distinguishing Lacorte from the case at bar, to wit, that this court is not bound by the Lacorte decision because Lacorte was an election law case and this matter is a proceeding brought under the municipal home rule law. Although Mun. Home R. Law § 24(1) refers to one particular provision of the election law, §16-116, that does not make this an election law case. NY Elec. Law, §16-116 is not itself a cause of action, it just provides that election law cases shall be brought as a special proceeding and that the cases must have preference over all other cases. The causes of action in the election law are

listed in Article 16 prior to §16-116. Lacorte was decided in the context of its cause of action NY Elec. Law, §16-102. This case must be determined in the context of its cause of action, Mun. Home R. Law § 37.

Since the court is not bound by the Lacorte decision, Respondent asks the court to dismiss this petition by analogy. Petitioners believe the two matters are highly distinguishable, and, bearing in mind 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 Verified Petition must not be dismissed.

Moreover, if the Court were inclined to require a bill of particulars be filed with the original petition, it could have found Petitioner's order to show Cause to be insufficient, and refused to sign on that basis. Had the Court done so, Petitioner would have been able to at least attempt to cure any defect found by the Court and resubmit the order to show cause with whatever additional material the Court required. However the Court did not reject the order to show cause. And by signing the order to show cause, the Court recognized that the Petition was legally sufficient to warrant a hearing, and in fact ordered one. That decision was proper for the reasons discussed in Petitioner's opening brief, and for the reasons discussed below.

A. The Number of Signatures in Issue

The number of valid signatures required by law to qualify for the ballot is the basis for every other number related to the process. It is well understood by petitioners and lawyers alike that raw number of signatures needed to qualify for the ballot must be a multiple of the valid signatures required, because there is no way to ensure the validity of every signature. The higher number of valid signatures required, the higher number of invalid signatures and – if contested –

the higher number of contested signatures there will be. Indeed, as was pointed out in Petitioners Memorandum of Law in support, only 2,374 signatures were invalidated in Dagan Lacorte's candidate designating petition, while 37,688 were invalidated here. Petitioners submit that the most important factor in the number of signatures invalidated was the number of valid signatures required.

Respondent disingenuously claims that "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." Page 19. Actually, when all is said and done, the number of signatures to be specified in Petitioners' Bill of Particulars is wholly dependent upon the quality of the Respondent's review of the petition – and the quality of that review was demonstrably poor. As was communicated to the court, even by Respondent's own sampling, two-thirds of signatures invalidated for "wrong addresses" should have been deemed valid. Of the total wrong addresses that Petitioners claimed should have been validated, that is an astounding 2,625 signatures which should not have been, but were wrongly invalidated by Respondent, more than enough to qualify for the ballot and to render such a Bill of Particulars wholly unnecessary.[1] Respondent nevertheless asks this court to reward him for this gross negligence (or worse).

B. Record Accessibility

Unlike the Board of Elections in election law cases, the parties here all agree that the Respondent was under no obligation whatsoever to provide anything other than a threadbare letter of "non-compliance" and to make the original of the Respondent's notations on a copy of

[1] We do not wish to punish Respondent's counsel for his honesty and forthrightness with the court. We only use his percentage as a base line, understanding that a line by line conducted by the court would have almost certainly rendered a significantly higher percentage of wrongly invalidated signatures.

the petition available in his office for public inspection. To do otherwise, according to Respondent, would be "inconsistent with MHRL 37(5)."

Beyond that, Petitioners only legal recourse prior to bringing suit was the Freedom of Information Law. NY Pub. Off. Law Art. 6. Under the implementing rules of the City of New York, the City Clerk's Records Access Officer (not named on the City Clerk's web site) would have five days to initially respond to any records request. New York City, N.Y., Rules, Tit. 43, § 1-05. Notably, that does not mean the records are produced within five days, only that officer communicates with the requester within that time.

We finally note that in a past attempt at communication, Respondent was unresponsive. Specifically, prior to filing the referendum petition the undersigned emailed the City Clerk's office through its "contact us" portal to ask where the petition should be physically filed and to arrange its delivery. *See* contemporaneous time entry attached as exhibit A. The City Clerk's office did not respond. The City Clerk does not even divulge an office specific phone number. If you want to contact the office by phone, you are expected to dial 311.

Once this suit was initiated Petitioners delivered a letter to the Respondent requesting documents that would enable Petitioners to start reviewing the Respondent's specific findings. At that point we came to understand that Respondent was represented Mr. Kitzinger. After a series of errors that needed to be corrected by Respondent in producing the documents, and significant time expended by Petitioners identifying them, 36 hours and two business days later Petitioners finally had a complete copy of necessary documents. It was only then that Petitioners had a complete set to print hard copies from, as the electronic files of the document were unsuitable for use at the Board of Elections. Printing more than 7,200 odd length pages from a DVD was itself an expensive 24-hour process (10 printed pages per minute is 12 hours of actual

printing time). When all was said and done, it took three business days from request to have a usable copy of the documents that could be reviewed. In short, neither by law or policy, nor as a practical matter were the necessary documents available to petitioners in a way that would make it possible to complete a review and prepare a Bill of Particulars in five days.

C. Amount of Time Needed to Review Wrongly Invalidated Signatures

The Respondent takes the absurd position that Petitioners should have anticipated that he – a supposed impartial arbiter of the validity of our referendum petition – would wrongly invalidate thousands of valid signatures prior to him divulging that fact. Further, they claim that petitioners should have known ahead of time what the objection would be and have a response prepared in advance of having the actual knowledge of such objections. Had we dumped such a document on the court, we suspect we would be facing a motion from Respondent asking the court to void our Bill of Particulars as frivolous – and rightfully so.

The petitioners knew that they had enough valid signatures to qualify for the ballot, knowledge that has now been vindicated by this lawsuit.[2] It was reasonable to expect that Respondent would be an impartial and competent arbiter of signature validity. That Respondent now demands Petitioners to have anticipated ahead of time that he would invalidate thousands of signatures wrongfully and unlawfully and for what reason they would be invalidated is absurd. We must not incentivize hostile City Clerks to invalidate valid signatures with the knowledge that the review of tens of thousands of invalidated signatures and the preparation of a Bill of Particulars to be filed and served as part of the Verified Petition is an impossible task.

D. The Verified Petition put Respondent on Notice

[2] Respondent claims at footnote 9 of his response memo of law that Petitioners "concede" that approximately half of their signatures are invalid. Quite to the contrary, review of each of the Respondent's claimed invalids is simply not possible in the time frame given by the court. Petitioners, confident in their own claims of validity, simply stopped knowing they had sufficient signatures. Checking the 28,000+ "NR"s would literally take weeks, time the Petitioners did not have to complete their Bill of Particulars.

It is noteworthy that Respondent does not attempt to distinguish McMillan v. Commissioners of Elections of City of New York 41 Misc. 3d 1207(A) from the case at bar. In McMillan, the respondents in that case moved to dismiss the petitioners' initial pleading, claiming it did not give "sufficient" notice to respondents. The court rejected the argument, noting that a Bill of Particulars was filed well after the Verified Petition was filed. Instead, Respondent claims he is "not estopped" from seeking dismissal in the instant matter based on lack of notice. On this narrow matter we agree. Respondent may advance their motion and arguments, but submit that they must fail.

It is further noteworthy that Respondent does nothing to explain away the enormous differences, explained at length in our memo of law in support, between the language and context of the municipal home rule law and the election law. Respondent appears to discount the existence of more liberal language in the municipal home rule law than in the election law, to wit, that this court "shall determine any question arising thereunder and make such order as justice may require." Petitioners do not submit that this language enables this court to "disregard" binding precedent as Respondent claims (Resp. memo of law p.28-29). Rather, that this language is yet another example of how different this municipal home rule matter is from the designating petition election law matter in Lacorte. Tellingly, Respondent chooses to ignore the argument.

E. The Clerk Wrongfully Invalidated signatures where the Address Listed Did Not Match the "Address of Record"

The signers to the referendum petition affirmed that their "present place of residence is truly stated opposite my signature". These signers were under a duty to do so regardless of the address stated on their registration. Absent a claim that each of the signers fraudulently misstated their residential address, Respondent was under a duty to not invalidate these

signatures. Petitioners are not required to prove the true address of the signers beyond what the signer him or herself affirmed on the petition, unless evidence of fraud is produced by Respondent. This they did not do nor even allege. Indeed, the Respondent appeared to recognize as much by noting the voter serial number indicating that the signer was a registered voter in the city in the great majority of the "wrong addresses". On this basis alone, as pled in the Verified Petition, the referendum petition should be deemed to have a sufficient number of signatures. Furthermore, that Petitioners listed 90% of the total "wrong addresses" as valid in its Bill of Particulars is of no moment. In each of those instances, Petitioners found a matching voter registration. That is a wholly different matter from the argument in the Verified Petition and here, that Respondent as a matter of law wrongfully invalidated signatures because the stated address did not match the "address of record".

IV. The Financing Plan is Sufficient

The financing plan is a dedicated, non-speculative fee that is restricted narrowly to the regulated industry and complies with the requirements of the Financial Emergency Act.

A. The Financing Plan is Narrowly Tailored to the Regulated Industry

Respondent appears to claim that the financing plan fails to meet the standards set forth in Mun. Home R. Law 37(11) because 1) the industry being regulated is overbroad and 2) the revenue is not being exacted to regulate an industry at all. Petitioners contend that these arguments must fail.

1) The Financing Plan Is Not Overbroad

Respondent relies on false, wildly exaggerated made up "analogies" in an attempt to make the point that Petitioners' financing plan is a tax because it overbroad in its revenue assessment. The fee assessed in the proposed law applies to a singularly focused industry, the

construction business. We do not know what percentage of the population of New York City are owners of construction businesses subject to construction permit fees, but it is safe to assume that the percentage is lower than the percentage of New Yorkers who use the Department of Sanitation to haul their residential garbage (nearly 100%) or the percentage of drivers in New York State (approximately 74% of the adult population). [3]

Moreover, as explained in both Petitioners' and Respondent's memos of law, to distinguish between fees and taxes, the caselaw consistently speaks to revenues being assessed against regulated "occupations", "industries" or "businesses". *See e.g.* (Head Money Cases, 112 U.S. 580, 595–596 (1884) *("*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."); Radio Common Carriers of New York, Inc. v. State, 158 Misc. 2d 695, 698, (Sup. Ct. N.Y. Cty. 1993) ("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.").

New Yorkers whose residential trash is removed by the Department of Sanitation are not in the sanitation business, industry or occupation. Nor are New Yorkers who hold non-

[3] Statistics of the number of people with drivers licenses and the number of people over the age of 18 are here: http://dmv.ny.gov/statistic/2013licinforce.pdf http://quickfacts.census.gov/qfd/states/36000.html. The number is not exact insofar as 17 year olds can have driver's licenses but are not adults, but the number is very close to 74%.

commercial drivers licenses in the business of motor vehicle driving. Petitioners attempt to dramatize Petitioners' financing plan with misleading and false analogies should fail.

The Respondent sets forth case law illustrating the basic hornbook law on the distinction between fees and taxes. We disagree with little of it. However, in only one case does the Respondent appear to attempt to analogize the proposed fee here. In Phillips v. Town of Clifton Park Water Auth., 286 A.D.2d 834, 836 (3rd Dep't. 2001), quoted by Respondent at memo of law page 28, the court rejected a proposed fee as a tax because it asked a smaller group of residents to pay for the benefits to a much larger group, essentially a general population. This would be akin to asking a community of residents living adjacent to an interstate highway to pay for its improvements. Here, Respondent claims that the many are paying for the few, which we reject. Nevertheless, Phillips is inapposite.

Notably, Respondent does not attempt to distinguish two on point cases that Petitioners discuss in their memo of law, Am. Indep. Paper Mills Supply Co., Inc. v. Cnty. of Westchester, 65 A.D.3d 1173 (2nd Dep't. 2009) and Howitt Enterprises Sweden, Inc. v Monroe County Water Auth., 52 AD3d 1233 (4th Dep't. 2008), other than to describe the language as "unremarkable". The cases are on point with material facts and circumstances very close to the case at bar. Petitioners therefore submit that the fee is not overbroad.

2) Investigatory Functions Are A Part Of The Department Of Building's Regulatory Scheme.

Respondent appears to claim that investigation is not a regulatory activity, and that the proposed law would thrust an unfamiliar new type of investigatory authority on the Department of Buildings. He further claims that the purpose of the law is not regulatory.

Conducting investigations is hardly an unknown regulatory tool to the DOB. Indeed, the New York City Charter grants the specific power to the Commissioner of the DOB to conduct

investigations and inquires "where the public safety is involved" with subpoena power. The proposed law in the referendum petition would only make mandatory what is already contemplated and permissible in the City Charter. N.Y., Charter § 646.

As Respondent points out, the petition sets forth that a purpose of the proposed law is to ensure the safe and lawful use of buildings in the City. In pursuit of that purpose, the proposed law would make mandatory what is merely permissible now, the investigation by the DOB of high-rise collapses. Yet, Respondent then disregards the language of the proposed law – the very language on which signers relied to either sign or refuse to sign the petition – and superimposes his own judgment that the proposed law is not about regulation. He states: "there is no indication of a connection to a particular regulatory or enforcement concern. Instead, the purpose of the initiative... is to superimpose a new type of investigation upon DOB's normal regulatory activities, even if the investigation serves no role in promoting compliance or DOB's regulatory and enforcement activities..." Bizarrely, Respondent makes this statement even while providing an affidavit from DOB Engineer Dan Eschenasy, pointing out that the DOB investigates high-rise collapses.

Respondent's basis for this judgment is contained in his presentation of "facts" in his memorandum of law and accompanying affidavits, wherein Respondent actually proffers opinion testimony from a city employed engineer, Dan Eschenasy, that he chose not to subject to the cross-examination of a hearing. These expert opinions are clearly inadmissible insofar as Petitioners were not noticed about such testimony and not offered the opportunity to challenge them. Nevertheless, Mr. Eschenasy's belief that such "re-investigation does not appear likely to result in any new change in construction practices" because "The collapse of 7 World Trade

Center has already been investigated" is a flawed and insufficient basis for concluding that further investigation is unlikely to result in any new change in construction practices.

Furthermore, the Respondent claims that the unprecedented nature of the events of 9/11 make investigation remote from the DOB's ordinary permitting and enforcement schemes. This statement is also undermined by Respondent's own claim that the building code was altered as a result of the investigation of the World Trade Center collapses. Respondent does nothing to substantiate his untested claim formulated by a biased expert that further investigation would not lead to enhanced safety regulations. Petitioners strongly disagree. However, without a hearing and cross-examination, it is not for this court or the parties to decide. If Respondent personally does not believe in the efficacy of the mandated investigations to serve the stated goals of the referendum petition, he should make that claim to the people who would vote on the proposal, not deny them their right and opportunity to weigh the pros and cons for themselves.

3) The Finance Plan is not Speculative

The financing plan is based on a cost estimate prepared by an expert, documents attached as exhibit B. In every case where expected expenses need to be budgeted in advance, there is always the possibility that revenues will come in short of expectations. To say that the possibility of such a scenario must scuttle the proposed law contained in the referendum petition would serve to utterly eviscerate the right of the people to petition in the municipal home rule law.

Moreover, cases consistently state that the 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. A grab of general revenues to partially make up

for any shortfall in revenues from the proposed fee cannot be read into the proposed law to defeat it.

4) The Financing Plan is in Compliance with FEA and GAAP

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..." [emphasis added]. Respondent claims that Petitioners were incorrect to cite to the covered organizations provisions of the FEA. Petitioners were not incorrect, because the fund would be outside of the city's budget covering all non-capital expenditures. Nevertheless, whether the correct characterization of the fund falls under "covered organizations" or the city's budget is immaterial to the analysis here. Both are subject to the same GAAP requirements.

The relevant question is whether the potential 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 can be properly considered an "expenditure" subject to the FEA. We submit it is not.

Respondent correctly points out that the FEA makes no specific distinction between anticipated and unanticipated expenditures. It speaks only to covered expenditures needing to be in balance. If it is extremely unlikely that a high-rise building collapse will occur in, for example, fiscal year 2016, then it is not a covered expenditure for budgeting purposes. Furthermore, that fees will be imposed when the law takes effect to pay for an investigation into the WTC 7 collapse does not violate the FEA or GAAP principles. The revenue raised for the expenditure and the costs of the investigation will be in balance.

V. THE REFERENDUM PETITIONS IS STRAIGHT FORWARD AND GIVES VOTERS ADEQUATE NOTICE TO VOTERS.

Respondent's objections to the petition contained in this section reveal his office's basic mistrust in the intelligence and judgment of the voters of the City of New York. Petitioners are reminded of this court's admonition of his predecessor, City Clerk Carlos Cuevas when Justice Gangel-Jacob stated "The plain language of the proposal adequately informs the exceedingly aware electorate of this City of the import of the proposal." Schrader v. Cuevas, 179 Misc. 2d 11 (Sup. Ct., NY Cty., 1998) aff'd, 254 A.D.2d 128, (1st Dep't. 1998).

A. Construction Permits has a Precise Meaning in the Proposed Law

If the Respondent believes that the meaning of the term "construction permits" is insufficiently defined in the City's Administrative Code, perhaps that is an issue to take up with the City Council. Had Petitioners defined the term in some way other than how the city and the law defines it, Respondent would surely claim that that too is misleading. Elsewhere, Respondent complains about the small font of the referendum petition. Imagine what the petition would look like if Petitioners had cut and pasted the administrative code pertaining to construction permit fees. "To require the volume of specific and sometimes minute information respondent would impose upon such an initiative in respect of its effect on existing law would do violence to the very referendum process itself, making it a right in name only." Id. Consistent with the cases cited to by both parties, the voters would know what they are called upon to vote for. Respondent is advancing the notion that the people cannot rely on the City's own understanding and definition of terms to advance a referendum under the MHRL. He must fail.

B. The Purpose of the Referendum Petition is Clear and Direct

The referendum states that all high-rise collapses since September 11, 2001 will be investigated. World Trade Center 1 and 2 are excluded, frankly, because the investigation of those buildings would only offer at best limited insight into building safety in the City. Indeed, a

high-rise structure being hit by a commercial jet liner is a truly extraordinary event, as is the case with WTC 1 and 2. A high-rise structure catching fire, on the other hand, is not an extraordinary event.[4]

The proposed law specifically mentions the date September 11, 2001. To claim that, somehow, the referendum petition is deceptive because it excludes WTC 1 and 2 while specifically making the proposed law retroactive to that infamous date is absurd. An effective way to mislead the public would have been to choose a random date prior to September 11, 2001, but this of course was not done. To the contrary, attached as exhibit C is a copy of the "rap sheet" for subscribing witnesses carrying petitions. Since September 11, 2001 is specifically referenced, it was expected that people would have questions about it. The answers suggested to the signature gatherers are straightforward. There is no misleading and no deception.

Respondent further claims that it is "patently absurd to suggest that such stakeholders are not already on notice that any such collapse would be investigated by the City." Respondent's Memo of Law, page 45. He cites to the DOB web site, a page of a web site he apparently believes that people are more likely to "stumble upon" than the law. In fact, DOB is in no way mandated to conduct such investigations and, in fact, the collapse of WTC 7 was not investigated by the DOB.[5] Notably, Respondent cites to no authority that mandates such an investigation

[4] As discussed in Section VI, the NIST report cited to by Respondents in fact found that the fires in WTC 7 were not extraordinary: "[T]he fires in WTC 7 were similar to those that have occurred in several tall buildings where automatic sprinklers did not function or were not present. These other buildings did not collapse, while WTC 7 succumbed to its fires… Other than initiating the fires in WTC 7, the damage from the debris from WTC 1 had little effect on initiating the collapse of WTC 7." NIST NCSTAR 1A WTC Investigation pp. xxxv, xxxvii.

[5] The DOB's WTC Building Code Task Force was not an investigation and was intended solely to make recommendations regarding changes to design, construction and operating requirements in advance of the findings of the NIST WTC reports. Respondent also claims that DOB worked with NIST on its investigation of the collapse of WTC 1, 2 and 7; however, DOB is not listed as a cooperating organization in either report and is not included once in the WTC 7 report. Whatever DOB's involvement, it apparently was not extensive.

because no authority exists. Such investigations are *optional*, as is made clear in N.Y. City Charter §646.

VI. THE PROPOSED LOCAL LAW IS NOT AN ADVISORY REFERENDUM AND THE INVESTIGATIONS IT PROPOSES ARE WITHIN THE JURISDICTION OF THE DEPARTMENT OF BUILDINGS

As if the Respondent can look into the heart of the petitioners and signers, he concludes that this "referendum petition is more limited in many respects, but the underlying goal remains an investigation into the events of September 11, 2001..." Evidence of intent gleaned from such clairvoyance and mindreading, however, is ordinarily not admissible in court, even in a more liberal special proceeding such as this. Respondent's counsel was specifically asked by the undersigned at the first return date of this matter if he thought a trial would be necessary. He declined. Had he chosen to call any of the Petitioners or any person responsible for the referendum petition, he would have learned that the intention was as it appears to be in the language of the referendum petition, to improve high-rise safety in the City of New York. He would have further learned that investigating the collapse of 7 WTC, a high-rise structure that caught fire and subsequently suffered complete collapse, was an appropriate starting point for the endeavor. Since Respondent could have but chose not to call witnesses in this matter, he cannot now foist an intention – a false one at that – on them that totally contradicts the language and stated intent of the referendum petition. In doing so, Respondent also subverts the intention of the signers of the referendum petition.

Respondent points to three reasons why he believes the referendum is merely advisory. Respondent memo of law p. 49. First, Respondent claims that the referendum is not "primarily of local concern." Petitioners note that the Respondent appears to make no effort to substantiate this claim – except with hyperbole. Respondent states: "A local petition about the DOB may not

be used as a device to mandate an investigation into an international terrorist attack." Respondent memo of law p. 51. The petition mandates no such thing. Rather, it specifically excludes the buildings that were attacked by terrorists and mandates an investigation of the collapse of WTC 7 and all future high-rise collapses. The collapse of WTC 7 was incidental to the terrorist attack, occurring some seven hours after and from causes that were not extraordinary, according to the NIST report cited to by Plaintiffs:

> "[T]he fires in WTC 7 were similar to those that have occurred in several tall buildings where automatic sprinklers did not function or were not present. These other buildings did not collapse, while WTC 7 succumbed to its fires… Other than initiating the fires in WTC 7, the damage from the debris from WTC 1 had little effect on initiating the collapse of WTC 7."[6]

Respondent's claim that the complete collapse of a 47-story high-rise structure in a city with hundreds of high-rise structures is not "primarily of local concern" is patently absurd. Petitioners otherwise refer the court to their first memo of law showing that the subject of this referendum is very much of local concern.

Second, Respondent claims that the DOB "already has the authority to investigate the collapse of a building." This argument is addressed in Section V. above. The DOB is not mandated to investigate collapses; it is optional. *See* N.Y. City Charter § 646. Furthermore, as discussed below, the lack of such a legal requirement played a role in the destruction of WTC 7 evidence prior to any investigation, including any potential investigation by the City.

Third, Respondent argues that the Referendum cannot be "effectuated because 7 World Trade Center is not under DOB's jurisdiction." Specifically, Respondent states "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

[6] NIST NCSTAR 1A, WTC Investigation, pp. xxxv, xxxvii. http://www.nist.gov/manuscript-publication-search.cfm?pub_id=861610

conducting the investigation mandated by the petition... Additionally, the DOB would not be able to inspect any Port Authority building without the Authority's express permission... Even if the Port Authority decided to assist 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." In fact, at this point in time access to the site and Port Authority employees would not at all be critical to an investigation of the collapse of WTC 7. It was mostly New York City Police, Fire and other emergency personnel who first responded to the scene, and it was widely reported that The City of New York took control of the site during and after the emergency, until approximately July 1, 2002.[7] Petitioners also note that NIST carried out the majority of its investigation of 7 World Trade Center's collapse after the new 7 World Trade Center had been constructed and with other operations ongoing at the WTC site. In any case, the fact that an investigation may be difficult to perform does not prohibit the City of New York from performing that investigation. For example, the New York Police Department may not always receive cooperation from the subjects of its investigations. Evidence may be difficult to acquire or be destroyed. Witnesses may be beyond the reaches of the department's jurisdiction and/or deceased. But this does not make the Police Department unable to investigate crime. The police perform investigations as best they can, based upon the information they can access using the tools legally available to them. The Petition does not require the DOB to do anything more than this.

Petitioners believe that the proposed law is necessary in part because of the experience of the City and DOB failing to conduct an investigation into the collapse of WTC 7, and the City's much-protested destruction of the steel debris at the site. The City's cleanup effort directly impeded the investigatory efforts of the American Society of Civil Engineers and FEMA

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

Building Performance Assessment Team by removing and destroying physical evidence from the site despite the objections of investigators and the public. The City's destruction of the physical evidence and its negative impact on the ongoing investigations is well-documented.[8] In the interest of furthering high-rise safety, the proposed charter amendment is intended to prevent such a scenario from repeating itself in the future by placing a responsibility to investigate any future high-rise collapse on the local jurisdiction that would have control of the collapse site and manage the cleanup of debris from the site. Petitioners note that in asserting that the referendum

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[8] *See e.g.* "In the month that lapsed between the terrorist attacks and the deployment of the BPAT Team, a significant amount of steel debris—including most of the steel from the upper floors—was removed from the rubble pile, cut into smaller sections, and either melted at the recycling plant or shipped out of the U.S. Some of the critical pieces of steel—including the suspension trusses from the top of the towers and the internal support columns—were gone before the first BPAT team member ever reached the site." Committee on Science, U.S. House of Representatives, March 6, 2002 Hearing Report. http://commdocs.house.gov/committees/science/hsy77747.000/hsy77747_0f.htm

"Normally when you have a structural failure, you carefully go through the debris field looking at each item – photographing every beam as it collapsed and every column where it is in the ground and you pick them up very carefully and you look at each element. We were unable to do that in the case of Tower 7." Jonathan Barnett, PhD, FEMA BPAT Investigator. The History Channel, Modern Marvels: Engineering Disasters 13, 2004. http://www.youtube.com/watch?v=HgCoV7phKa8

"[O]fficials at the Department of Design and Construction, including Michael Burton, had decided to ship virtually all of the steel to scrap yards, where it would be cut up, shipped away, and melted down for re-use before it was inspected... Burton cleared the decision with Richard Tomasetti of Thornton-Tomasetti Engineers. Months later, Tomasetti would say that had he known the direction that investigations into the disaster would take, he would have adopted a different stance. But the decision to quickly melt down the trade center steel had been made." New York Times reporters James Glanz and Eric Lipton. James Glanz and Eric Lipton, "City in the Sky: The Rise and Fall of the World Trade Center," New York, NY: Times Book, Henry Holt and Company, 2003, p.330

"Officials in the mayor's office declined to reply to written and oral requests for comment over a three-day period about who decided to recycle the steel and the concern that the decision might be handicapping the investigation. 'The city considered it reasonable to have recovered structural steel recycled,' said Matthew G. Monahan, a spokesman for the city's Department of Design and Construction, which is in charge of debris removal at the site." New York Times reporters James Glanz and Eric Lipton James Glanz and Eric Lipton, New York Times, "Experts Urge Broader Inquiry in Towers' Fall," December 25, 2001. http://www.nytimes.com/2001/12/25/nyregion/25TOWE.html?pagewanted=1

petition's sole purpose is a re-investigation of the events of September 11, 2001, Respondent blatantly ignores the proposed law's mandate requiring the City to investigate future high-rise collapses.

In support of his claim that the referendum petition is "merely advisory", the Respondent relies heavily on the Richmond County case of Fossella v. Dinkins, 130 Misc.2d 52, but his reliance is misplaced. In that case, Petitioners sought to prevent the city from allowing the U.S. military to use city property for maintaining nuclear weapons. Fossella v. Dinkins, 128 Misc. 2d 822, 823, 493 N.Y.S.2d 947, 949 (Sup. Ct. 1985) aff'd and remanded, 114 A.D.2d 340, 493 N.Y.S.2d 859 (1985). The court held that since the federal government did not need the approval of the city to use the property, the referendum was merely advisory. Fossella v. Dinkins, 130 Misc.2d 52 at 62. In other words, the referendum if passed would accomplish no practical objective, but, as one of the Petitioners in that case stated with reference to the proposed law, it would send the city and federal government a strong message that the "arms race had gone on long enough." Id. at 61.

If the referendum here passed, it would have an unmistakable practical effect, to *require* the DOB to investigate high-rise building collapses. That practical effect would effectuate the referendum petition's articulated and actual purpose, high-rise safety. Unlike the referendum in Fossella, which would not prevent the federal government from using city property for nuclear weapon storage and maintenance, this proposed law would achieve its desired effect if passed by the voters.

VII. THE FINANCING PLAN IS SEVERABLE AND EASILY REVISED

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. Furthermore, 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.

VIII. THE AFFIDAVITS SUBMITTED BY RESPONDENT MUST BE PRECLUDED FROM CONSIDERATION IN THIS MATTER

Without notice to Petitioners, and without offering an opportunity for a hearing and cross-examination, Respondent purports to offer facts from expert employees of the City of New York. The affidavits, and the portions of Respondent's memorandum of law that rely on these affidavit to proffer facts, must be precluded from consideration by this court.

In special proceedings, motions for summary judgment shall be determined by the court "to the extent that no triable issues of fact are raised." These affidavits assert dubious and hotly contested "facts". The rules related to summary determinations in special proceedings are the same as in any other matter before the court, "triable material issues of fact cannot be determined on affidavits but must be referred to an evidentiary hearing for resolution. CPLR § 3212(b)." Matter of Dwyer's Estate, 93 A.D.2d 355, 362-63 (1983). Having no notice and no opportunity to cross-examine, Petitioners respectfully submit that the affidavits submitted by Respondent must be precluded.

For all the foregoing reasons, we respectfully request that the court rule that the Verified Petition herein not be dismissed, that Respondent's certificate of non-compliance was erroneous and further that the referendum petition complies with all laws.

Dated: Brooklyn, NY
September 10, 2014

Respectfully submitted,

/S/_____
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