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

GREGG SINGER, SING FINA CORP. and
9TH & 10TH STREET LLC,

Petitioner,

VERIFIED ARTICLE 78 PETITION

Judgment Under Article 78 of the CPLR,

- against -

BILL DE BLASIO, both individually and in his official capacity as the Mayor of the City of New York,
THE NEW YORK CITY DEPARTMENT OF BUILDINGS,
and THE CITY OF NEW YORK,

Respondents.
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Petitioners, Gregg Singer, Sing Fina Corp., and 9th & 10th Street LLC ("Petitioner"), by and through its attorneys, Gerstman Schwartz LLP, as and for its Verified Complaint against Mayor Bill de Blasio ("Mayor de Blasio"), the City of New York ("the City" or "NYC") and the New York City Department of Buildings ("DOB" or the "Department") (collectively, the "Respondents"), hereby alleges as follows:

PRELIMINARY STATEMENT

1. It cannot be overstated that the Respondents shifting positions regarding the building that is the center piece of many years of public agitation and *Sturm und Drang* cannot be reconciled with any consistent rationale and proper governmental purpose. Historically, the Petitioner was conveyed this property, not incidentally by the Respondents, having purchased it at a DCAS[1] auction for fair market value as the highest bidder with a deed restriction that it must at

[1] Department of Citywide Administrative Services auction. www1.nyc.gov/site/dcas/business/real-estate-services.page [DCAS] … is the real estate arm of the City of New York… responsible for the .. disposition … of City

all times be used for a Community Facility Use. ***See* Exhibit 1 and 2.** Later, the Respondents imposed a requirement that before proceeding to development, ostensibly to avoid the risk of improperly granting a zoning bonus benefit available only for community facilities under the Zoning Resolution, Petitioner must evince such use to Respondent's satisfaction.[2] ***See* Exhibits 3-8**. Thereafter in 2009, evidently targeting this specific site, Respondents eliminated the floor area ratio ("FAR") zoning bonus afforded to all community facility development[3] in the area and the property, negating the need to monitor for a situation where a developer captures an incentive FAR zoning bonus unfairly because the 'as of right' FAR permitted for community facility development and residential development was now the same.[4] ***See* Exhibit 9.**

2. There is also ample evidence to suggest that at all times the real intent of Respondents has been to divest the Petitioner of fee simple "*by any means necessary*"[5] – a term actually bandied about by officials.[6] ***See* Exhibit 10-11.** Respondent's own words and course of

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property…. when agencies … downsize, certain properties are declared surplus and are relinquished to DCAS. Real Estate Service oversees these properties in the interim, until … deemed suitable for disposition.

[2] 1 RCNY § 51-01 ("Rule 51" or the "Dorm Rule")

[3] https://www1.nyc.gov/assets/planning/download/pdf/plans/east-village-lower-east-side/zoning_comparison.pdf ***See* Exhibit 9.**

[4] The Court of Appeals in 9th & 10th Street b BSA 10 NY 3d 264 (NY 2008) stated *"the terse opinion in Di Milla …**held that this possibility of 'future illegal use'** (Di Milla v Bennett 149 AD2d at 593 **was not a valid reason for withholding a building permit.** Di Milla and Baskin v Zoning Bd 48AD2d at 668-669 would be applicable here if it was clear that petitioner's proposed building would be used as a dormitory. If that were the case, the mere possibility that it could later be converted to illegal apartment use would not justify withholding a building permit*." In the instant case, just as in *DiMilia*, here DOB is "approving plans that comply with the ZR." There is a Deed Restriction that will only allow a Community Facility Uses and the downzoning of the property has evaporated any concern that this developer might capture FAR he does not deserve. Insofar as the Petitioner has presented quality Educational Dorm tenancies that were rejected by the Respondents for nonsensical reasons Di Milla and Baskin render the city's actions on this as-of-right permit application indefensible. The plans in *DiMilia* were for a one family house, a "conforming, complying home" *id.* DOB and the BSA denied the *DiMilia* developer his permit because they thought that the exact home delineated on the plans was going to be used by two families. But from examining the plans for the *DiMilia* house there was absolutely no way to tell whether, after construction, it would be occupied by one family or two. In exactly the same way, the plans in the present case are for a college or school dormitory, a "conforming, complying" dormitory within the zoning resolution.

[5] https://ny.curbed.com/2019/2/7/18215622/nyc-east-village-ps-64-mayor-bill-de-blasio. ***See* Exhibit 10**

[6] The incredibly cavalier attitude of Respondents to Petitioner's private property rights are really quite over the top. In reality, their conduct so egregious it brings to mind some of the dicta in *Matter of Kelo v. City of New London*, No. 04-108, slip op., 545 U.S. (June 23, 2005). There, the majority adopted a "rational basis" standard in evaluating takings. Justice Anthony Kennedy stated in his concurring opinion "[i]n sum, while there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse…that courts should presume

conduct demonstrate this is Respondent's ultimate aim. Respondent has interfered with, delayed or effectively rejected valid lease candidates fitting neatly within the Community Facility Use Category thereby preventing development and then punitively threatened the Petitioner for failing to develop the property. ***See* Exhibits 12-13.** Couple this with the Mayor's statement in October 2017,[7] to use the building that "**[t]o place [P.S. 64] in the hands of a private owner was a failed mistake. So I'm announcing tonight, the city's interest in reacquiring that building. We are ready to right the wrongs of the past and will work with Councilmember Mendez and her successor to get that done.**" ***See* Exhibit 15.**

3. To add insult to injury, when a newly renovated community center, literally up the block from the subject property, was up for sale for private development, the City's position was bizarrely, in sum and substance, "we do not need a community center here." ***See* Exhibits 16-17**. Yet, the imperative is apparently to divest this private property owner of this property because it was once city-owned property and current office holders want to make a political statement and "reacquire" it to correct a supposedly historical mistake made by a prior administration friendlier to privatization as a tool of economic development.

4. This course of conduct also demonstrates the sheer naked futility in requiring that the Petitioner exhaust all administrative remedies when in fact he has done so repeatedly only to have the rules of the game revised mid-game, the goal post moved and the referee drawn and quartered. Notwithstanding same, your Petitioner sought out a Zoning Resolution Determination,

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an impermissible private purpose." The history of this property is such that is feels like a slow motion taking with all the hallmarks of suspicion and abuse of procedures.

[7] The Mayor shockingly announced the city's interest in "reacquiring" petitioner's privately-owned building merely one day after Adelphi was forced to rescind its lease agreement solely due to the DOB: "Adelphi University, the most recent institution to express interest in dormitory space, backed out. A spokesman for the university, Todd Wilson, said in an email to the NY Times that the school was "concerned about the delays and difficulties that had been encountered by the developers getting the project approved."
https://www.nytimes.com/2018/06/01/nyregion/fight-over-charas-community-center.html ***See* Exhibit 14.**

and, on May 10, 2019, received a denial of Petitioner's application seeking to obviate the application of 1 RCNY § 51-01 ("Rule 51" or the "Dorm Rule") to P.S.64, which states, in pertinent part, that "to all new proposed student dormitories, without exclusions based on zoning regulation"… [must comply with Rule 51 [8]]…and that "the Dorm Rule does not provide a process or criteria for a waiver[9], so the Department cannot grant one." ***See* Exhibit 18-19.**

5. First of all, Rule 51 is a Rule of the City of New York and not a zoning regulation *per se*. Additionally, this narrow and self-serving conclusion is not supported by the Zoning Resolution and inaccurately states that the Department cannot grant a waiver.[10] Ultimately, however, it does serve to document the sheer futility in seeking any further redress from the Respondents proper. Indeed, important constitutional liberties are implicated and were Petitioner to wait any longer he will have no property rights left to save or vindicate. To further complicate matters, this development has been held hostage to powerful interests that have compromised the integrity of the agencies mandated by the New York City Charter to the point where the parties simply will not follow their own rules, and, in contravention of law, are responding to a Mayoral call to reacquire the property by "any means necessary" and give it to a political donor of Mayor Bill de Blasio and strip the Petitioner of his property rights.

6. The building and related permits held hostage by the Respondents are not truly discretionary actions. These should have been issued "as of right" but for the Respondents

[8] https://www1.nyc.gov/assets/buildings/rules/1_RCNY_51-01.pdf
[9] See NYC Administrative Code § 28-104.7.12 entitled Waiver of certain documents, states the following: The commissioner is authorized to waive the submission of any of the required construction documents and other data if review of such documents is not necessary to ascertain compliance with this code or not required for the phase of work for which a permit is sought.
[10] 1 RCNY §15-04 (2) When an owner seeks to amend his building's Certificate of Occupancy [sic] to provide for dormitory occupancy, he must submit an affidavit stating he will use the dormitory space only for sleeping accommodations of individuals on a month-to-month or longer-term basis (Adm. Code §27-265) and that the dormitory will be owned and operated by either a not-for-profit corporation or a school. Such amended Certificates of Occupancy shall provide that the dormitory may only be owned or operated by either a not-for-profit corporation or a school.

situationally tailoring new rules or reinterpreting old ones along the way to thwart the Petitioner in answer to naked political suasion, at times demanding relief outside the boundaries of law or agency precedents. Despite this not being truly discretionary, case law involving same encapsulates the situation nicely. "[C]ourts may set aside a … [discretionary] … determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure." In the Matter of Application of Goncalves Properties, LLC v. 2007 NY Slip Op. At best, here, Respondents are succumbing to powerful and targeted special interests and have acted at times either arbitrarily or illegally to appease these interests. That they might also be animated by political considerations does not empower the Respondents to set aside law or precedent or erect post hoc justifications to legitimize their otherwise capricious actions.

7. It has been said that "where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions… Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own."[11]

8. This is reflected in the words of George Washington, first delivered in 1789, etched in stone above the doors to the State Supreme Courthouse at 60 Centre Street in Manhattan, which endure to proclaim that "[t]he true administration of justice is the firmest pillar of good government."

[11] "Property" James Madison, National Gazette March 29, 1792

9. It would not be overstating that case to recount herein, that the Respondents have long since ceased to follow agency rules, the City's Administrative Code or standard practices, and, instead, have engaged in post-hoc rationalization to legitimize their actions while working tirelessly to support special interests for the singular goal of "reacquiring" Petitioner's privately owned property— the old P.S. 64. It would not be a stretch to suggest that one very powerful interest has used his "generosity" and political influence to apparently lower the cost of an attempted acquisition.

10. Petitioner lays out the modus of operandi employed by same below, bolstered by investigative journalism and relevant media reports to demonstrate a "tainted" process that does not deserve this Court's deference. The Respondents and the Mayor by the words and deed are knee deep in these shenanigans that have irrationally stymied Petitioner.

PARTIES TO THE ACTION

A. Petitioners.

11. Petitioner Gregg Singer ("Singer") is a member of 9th & 10th Street LLC, which owns P.S. 64, a former public elementary school located at 605 East 9th Street in New York, New York. Singer resides in New York, New York. Singer is also the President of Petitioner Sing Fina Corp.

12. Petitioner Sing Fina Corp. is the Manager of 9th & 10th Street LLC. Sing Fina Corp is a domestic business corporation operating under the laws of New York. It has a principal place of business in New York County.

13. Petitioner 9th & 10th Street LLC is a domestic limited liability company operating under the laws of New York. It maintains a principal place of business in New York County. It owns Old P.S. 64, which is located at 605 East 9th Street in New York, New York.

B. Respondents.

14. Respondent Bill de Blasio ("De Blasio") is the current Mayor of New York City and has held this position since January 1, 2014. He has publicly voiced his opposition to Petitioner's project, and he has been personally involved in supporting others in their quest against the Petitioner's project, or any other use, so that the building will be devalued to the point where other can acquire it for a fraction of its fair market value.

15. Respondent City of New York is a municipal corporation and a political subdivision of the State of New York.

16. Respondent New York City Department of Buildings ("DOB") is an agency operating under New York City and State laws.

JURISDICTION AND VENUE

17. This Court has jurisdiction pursuant to CPLR §3001.

18. This Court also has jurisdiction pursuant to CPLR §§7801-7806, to review actions by bodies or officers who have failed to perform a duty enjoined upon them by law.

19. Venue in the County of New York is proper pursuant to CPLR §§504(3), 506(b) and 503(a) as: (i) claims are asserted against the City and the cause of action arose in New York County; (ii) claims are asserted against officers whose principal officers are in New York County; and/or (iii) one of more of the parties resides in New York County.

RELEVANT FACTUAL BACKGROUND

20. The Petitioner's deed restricts the use of his property solely to Community Facility Use but Respondents have continually erected obstacles preventing Petitioner from utilizing the property as required by said restriction. Petitioner's historical and long since shelved 19-story building plans would have made use of a community facilities zoning allowance, allowing

petitioner to build a far larger building than if it were a simple residential building in the area (that is, 19 stories versus 10 stories), and, therefore, triggered the DOB's requirement of establishing an "institutional nexus" with a college or university prior to receiving a building permit - an mechanism intended for preventing the development of a residential building that would be higher (greater FAR) than normally permissible. After a down zoning centered on this property, no such incentive FAR bonus is available anymore for community facility development. Thus, there is no possibility of petitioner "taking advantage of the additional bulk available to dormitories under the community facility provisions of the Zoning Resolution." ***See*** **Exhibit 7, 20.**

21. The Board of Standards and Appeals ("BSA") in 2005 held a hearing to determine the legality of the pre-permit institutional nexus requirement. There, DOB argued that the institutional nexus requirement was necessary in light of the potential community facility use floor area bonus that would be awarded to Petitioner and that without some evidence of an affiliation, a developer could receive a windfall. The BSA's Board, entirely appointed by the Mayor, ruled that DOB's pre-permit requirements were a *reasonable exercise* of its authority and were consistent with the language of the Zoning Resolution.

22. Today, with the property having been down zoned over a decade ago by the powers that be -- no such windfall is possible and no pretext exists for this nexus requirement, and the history of the property is such that whenever the Petitioner has presented a well-qualified and compliant tenancy, by hook or crook the Respondents have done what they could to deter that tenancy from leasing said space rendering all a compete and utterly futile exercise.

23. Speaking of the powers that be, to complicate matters, a billionaire "philanthropist" and top political donor since at least 2005 has amply funded groups that took the lead in opposing

Petitioner's ability to develop his property.[12] ***See*** **Exhibit 21.** The amount of funds and manner in which funds have been deployed by him, and by groups or individuals or charities, has been the subject of media scrutiny of late on both coasts.[13] This is outlined at great length in the attached Petitioner's Affidavit[14] and bolstered by media reports and a multitude of exhibits. In the course of reviewing the Respondent's peculiar actions and statements, and in evaluating such under the arbitrary and capricious standard, the trier of fact may, after considering this backdrop, discount the need to afford Respondent's agencies the same level of deference or the assumption that they are/were acting in good faith. *See* Petitioner's Affidavit, annexed hereto as Exhibit A.

24. More importantly, Respondent's own over the top statements and deeds establish that the process has been tainted and deserves no such deference.

25. In any case, in 2005, the City passed 1 RCNY § 51-01, colloquially known as "Rule 51" or the "Dorm Rule." The history of this rule and its genesis is elaborated on in Exhibit A. The record is replete with the policy justifications underlying Rule 51, which "codified the Department's current practice of requiring an institutional nexus." 1 RCNY § 51-01. Moreover, *Matter of 9th and 10th St. L.L.C. v. Board of Stds. & Appeals of the City of New York*, 10 N.Y.3d 264 (2008), a Court of Appeals case involving the Petitioner in the instant matter, provides an extensive analysis regarding the purpose and applicability of Rule 51. The Court's decision essentially hinged on the following analysis:

> It would create needless problems if petitioner built a 19 story building, only to find that it could not use it in a legally-permitted way. The City would then face a choice between waiving the legal restrictions and requiring the building to remain vacant or

[12] https://www.crainsnewyork.com/article/20171129/OPINION/171129924/political-malice-and-the-denial-of-property-rights-in-nyc. ***See*** **Exhibit 21.**
[13] https://www.dailynews.com/2017/10/26/rethink-mayor-garcettis-behested-payments/
[14] *See* Exhibit A.

> be torn down. The City's officials did not act arbitrarily or capriciously in trying to avoid that dilemma. *Id*. at 270.

26. Simply put, today where Petitioner herein cannot seek to gain additional FAR under the Community Facility Use zoning bonus, this so-called "dilemma" simply does not exist. Here, the renovations would include only the existing building envelope. An analysis of the genesis of this rule and its statement of purpose and policy justifications requires no complex review of zoning regulations or building code or the like. It was intended to stop developers from being incentivized to provided Community Use square footage to capture additional FAR and do a larger build out than they would otherwise be entitled to if it was a pure residential building, but never finding a community facility use/tenant for the building despite receiving the additional FAR granted for CFU only. Decidedly simple and irrefutable.

27. In fact, the local Community Board 3, Andrew Berman of GVSHP, and even the DOB's General Counsel, Mona Segal, each stated that the purpose and need for Rule 51 is to stop bulk: *i.e.*, additional square footage that can be added to a building in certain zoning areas if the use is a "Community Facility Use." The current zoning at the old P.S. 64 building does not allow any additional square footage (*i.e.*, bulk, air rights or development rights). ***See*** **Exhibit 22.** Therefore, Rule 51 does not apply. ***See*** **Exhibits 4-5,7.**

28. After the 2008 down zoning which eliminated the community facility zoning bonus for the area, Petitioner subsequently filed for a building permit in 2012 with the DOB to renovate the 5-story P.S. 64 building into a Use Group 3 facility, which includes a college student dormitory and nonprofit with sleeping accommodations, after Cooper Union College ("Cooper Union") signed a 15-year lease agreement for the second-floor of the building in December 7, 2012 and the third-floor on February 22, 2013. ***See*** **Exhibit 23.**

29. On May 3, 2013, Petitioner obtained another lease from Joffrey Ballet, who also signed a ten-year lease for the ground floor and first floor of the building. ***See*** **Exhibits 24-25.** The DOB subsequently approved the as-of-right construction plans and issued work a permit allowing for the conversion and renovation of the entire building into a student dormitory or nonprofit with sleeping accommodations on August 22, 2014**. Exhibit 26.**

30. Petitioner submitted construction plans to the NYC Landmarks Preservation Commission ("LPC") in 2012 and 2013 for facade repair and roof replacement, new windows, structural alterations and general exterior repair, and removal of the chimney and received a Certificate of Appropriateness for the conversion of the entire building into a dormitory from LPC[15] on October 31, 2013. ***See*** **Exhibit 27 and 30.** After a lengthy review and public hearing, the LPC issued the permits as a 'Certificate of No Effect'[16] on April 4, 2013 for new windows; April 25, 2013 to repair the façade and roof replacement; August 13, 2013 for Chimney removal; and October 31, 2013 for general exterior and structural work; finding that Petitioner's full building renovation plans "*will return these significant elements to their historic appearance and aid in the long-term preservation of the building.*" ***See*** **Exhibits 27-31.** Simply stated, after an arduous approval process, LPC approved Petitioner's construction plans to renovate both the interior and exterior of the building and the DOB subsequently issued a building permit for demolition of the interior in anticipation of the full renovation of the building within the existing building envelope. ***See*** **Exhibit 32, 37.**

[15]In order to receive a Certificate of Appropriateness on proposed construction plans from LPC is a lengthy and very detailed review process. "Pursuant to Section 25-307 of the Administrative Code of the City of New York, the Landmarks Preservation Commission, at the Public Meeting of June 11, 2013, following the Public Hearing and Public Meeting of May 7, 2013, voted to approve certain alterations at the subject premises, as put forward in [petitioner's] application completed on April 11, 2013, and [petitioner was informed] in the Status Update Letter issued on June 17, 2013 (SUL 14-5201,LPC 14-2418). This approval will expire on June 11, 2019." ***See*** **Exhibit 30.**

[16] A Certificate of No Effect (CNE) is needed when the proposed work requires a Department of Buildings permit. CNEs are issued by LPC's staff preservationists, and do not require a public hearing before the full Commission or a presentation to the community board. https://www1.nyc.gov/site/lpc/applications/certificate-of-no-effect.page

31. The foregoing Landmarks' approvals have all since expired due to a DOB Stop Work Order on the building. ***See* Exhibit 35.** On April 10, 2017 and July 18, 2017 Petitioner, applied to renew said approvals, but such requests have been flatly ignored.[17] ***See* Exhibits 33-35.** The City's unwillingness to allow Petitioner's project to move forward, at the peril of the building's continuing deterioration is well documented.[18] ***See* Exhibit 35-36, 38-40.**

DOB PERMITS ISSUED IN 2014

32. In March of 2013, DOB issued demolition permits for the interior of the building, which Petitioner used to gut the interior of the building to make way for the newly renovated building. ***See* Exhibit 32**. Permit and typical interior photo of existing condition before and after demolition, annexed hereto as **Exhibits 41 and 42**. Critically on August 22, 2014, DOB issued building permits allowing for the conversion of P.S. 64 into a college student dormitory. ***See* Exhibit 26.**

DOB REVOKES PERMITS SUCCUMBING TO PRESSURE

33. Despite LPC's and DOB's approval of Petitioner's plans and the unequivocal language of the colleges' respective leases, DOB admittedly revoked the permits reacting solely to Council Member Mendez' letters to DOB demanding that DOB revoke validly issued permits. ***See* Exhibits 43-45.** Specifically, this Council Member falsely alleged that the Cooper Union Lease failed to satisfy Rule 51's 10-year requirement and that the Joffrey Ballet lease was vague

[17] See againwww1.nyc.gov/site/lpc/applications/permit-for-minor-work.page In most instances LPC is legally required to make a decision about …. applications within 20 [to 30] business days once the staff has confirmed that an application is complete, and includes the required materials. Other timeframes may apply but in this case LPC is simply ignoring the applicant which does not accord with their own rules.

[18] This is not surprising in light of the fact that Mr. Sosnick causes $1.1 million every year (since 2011-present) to be donated to the Landmark's Conservancy, which lobbies directly to the LPC.

because the school did not define what the terms "best effort" and "due diligence" meant in the lease agreement. *Id.*[19]

34. This Council Member also met with Cooper Union's President Bharucha and "told him I'm not happy with this dorm plan, the community is not happy...[T]here will be protests, and I will be joining in when that happens."[20] This Council Member then took to the streets and, with a bullhorn in hand. Shouted "*[t]here is no room, and no desire, and no way we will live with a dorm in our backyard*…Cooper Union needs to rescind whatever deal I believe it doesn't have *so [Petitioner] can give us back our building*."[21] Interestingly, members of the community gathered 900 signatures from people living in the neighborhood who support the renovation of the existing building into a college student dormitory. Petitioner gathered an additional 700 signatures from retail business owners in the East Village who support the dorm. ***See* Exhibits 46-48.**

35. The East Village Community Coalition, funded and created by the selfish and wealthy resident who lives in the penthouse of the adjoining building to PS64, also chimed in, immediately circulating an online petition demanding that Cooper Union not house its students at P.S. 64 after DOB issued the first building permit:

> "Respect our community. Respect this community treasure," the petition said of the old P.S. 64. "Dormitory use does not serve our community."[22]

36. Obviously, the Council Member's motive was to stop the construction of a dorm. This Council Member's demand that DOB permits be rescinded despite the approval of

[19] The Councilwoman's characterization of Cooper Union's commitment to use PS 64 as merely "speculative" is blatantly false, illogical, and contrary to the facts. Cooper Union's students were very excited about the new dorm opportunity at PS 64 and several emails from Cooper Union to the student body were sent on this as well. This is all in addition to the 15-year lease Cooper Union signed. ***See* Exhibits 49 and 50.**
[20] Sarah Ferguson, *Scaled-Down Dorm Pitched for Embattled CHARAS Site*, The Village Voicer (April 25, 2013), http://thevillager.com/2013/04/25/scaled-down-dorm-pitched-for-embattled-charas-site/.
[21] http://thevillager.com/2013/05/16/dormitory-foes-warn-cooper-dont-get-in-bed-with-singer/
[22] https://evgrieve.com/2013/04/more-details-on-plans-for-former-ps-64.html

Petitioner's plans by multiple City agencies and several universities, to say nothing of an outpouring of community support, further demonstrates the concerted effort to stop Petitioner's project "by any means necessary"[23] and the arbitrary and capricious actions of Respondents in responding solely to political pressure instead of applying its own rules. ***See* Exhibits 49 and 50.**

RELEVANT LAW

37. This record reflects Respondents folding to political pressure and fashioning retroactive justifications for an improper revocation. This amounted to acting, either illegally or arbitrarily, abusing their discretion and *succumbing to generalized community pressure*. See *In re Goncalves Prop., LLC v. Colson*, Index No. 0017183/2006 (Suf. Cnty. 2007). It also clearly smacks of the "unequal hand," and the "evil eye," complained of in a similar case Article 78 DOB case involving the stonewalling of a Petitioner's requested modification of a Certificate of Occupancy in the face of the Mayor's office trumpeting *"despite all the constitutional limitations, we stop at nothing when we try to put one of these places out of business."* There the Court of Appeals found that ***the existence of this motivation could suffice to taint the commissioner's enforcement*** of the building regulations…[and] … undermine the commissioner's claimed motivation, suggesting as it does more than the possibility that his finding of unsafe conditions ***was but a post hoc justification***." *303 West 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 693 (1979) (emphasis added).

38. In the instant matter, on September 22, 2014, just two weeks after this Council Member's letter to DOB complaining about the Joffrey Ballet's lease, DOB issued Stop Work Orders on Petitioner's permits. ***See* Exhibit 36**. Lest this be confused with a decision on the merits, the very next day, on September 23, 2014, DOB sent a letter to this same Council Member assuring

[23] https://ny.curbed.com/2019/2/7/18215622/nyc-east-village-ps-64-mayor-bill-de-blasio

her that it had acquiesced to her demands, making it abundantly clear that this decision was just what any politically savvy New Yorker might recognize: merely succumbing to generalized political pressure; a decision that had nothing to do with any of the alleged defects that were retroactively "discovered" and then applied as a post hoc justification. Although it is denied by the City, DOB certainly has bowed to continued and unremitting pressure from some politicians and self-styled community activists to reverse the City's decision in the late 1990's to sell the Property. Such bowing to community pressure to deny a permit for an as-of-right building is in and of itself "impermissible and arbitrary", *Fox v. City of Buffalo*, 60 AD2d 991 (4th Dept. 1978) (denying a building permit for a duty-free liquor store at the Canadian border where the use is permitted under the applicable zoning ordinance is illegal).

39. This starkly resembles the fact pattern in *303 West 42nd St. Corp. v. Klein*, 46 N.Y.2d 686 (1979) in which the "[p]etitioner met the test…[but]..*it alleged different treatment based solely on the nature of its tenant*…" *Id.* at 696 (emphasis added). As to the "*unequal hand*…in at least 21 other buildings having a single means of egress, less costly partial sprinklerization was all the DOB required…" *Id*. (emphasis added). As to the *"evil eye,"* at the same time that the DOB requested modification of the petitioner's COs, city officials, in particular *the Mayor's assistant* in charge of the Midtown Task Force, were unabashedly trumpeting that *"**despite all the constitutional limitations, <u>we stop at nothing</u> when we try to put one of these places out of business**." Id*. at 696-97 (emphasis added). As such, the existence of this motivation could "suffice *to taint the commissioner's enforcement of the building regulations*." *Id*. at 697 (emphasis supplied). Additionally, the petitioner argued that no action was taken by the DOB until the anti-pornography drive was undertaken, and two previous submissions of the building's plans for approval of alterations to higher floors, which would have also involved

a fire and safety review, had not generated an unfavorable administrative response. *Id.* Thus, the petitioner established more than the possibility that the DOB's finding of unsafe conditions was a post hoc justification. *Id*.

40. To be fair, Petitioner believes that Mayor De Blasio would probably be kinder and more *even handed* to pornographers than he has been to Petitioner, who merely seeks to build college student dorms allowable under the City's rezoning and authorized by the property's own deed restrictions. That Petitioner has been stymied at every turn perhaps is not all that surprising insofar as the Mayor has publicly vowed on two separate occasions, in October 2017 and August 2018, to take back this building "even by eminent domain if necessary" and return it to the community (or perhaps someone else?). ***See* Exhibits 11 and 15.** In *303 West 42nd St. Corp*. 46 N.Y.2d 686, *supra*, the Court of Appeals found a mere Mayoral assistant's comments amounted to taint requiring a DOB commissioner's actions to be revisited as suspect post hoc rationalizations unworthy of court deference.

41. Here, that a well-placed not-for-profit funded by that same top donor (*i.e.*, Aaron Sosnick) stated "the community's resolve to get this building back [will not be] diverted"[24] speaks for itself. The Respondents egged on by this band of merry men with little apparently respect for the notion of private property will stop at nothing to "reacquire" Petitioner's building is now apparent. That Respondents may in fact be robbing a small developer to effectuate transfer of this property to a very big and powerful developer and top political donor would be satirical if it was not quite so craven and lawless. *See* Exhibit A.

42. Furthermore, Petitioner's application is for an "as-of-right" building permit which is one that must be issued as a ministerial act by DOB, where DOB is not empowered to exercise

[24] https://patch.com/new-york/east-village/developer-behind-p-s-64-urges-city-buy-boys-club-building

discretion. *Matter of Filmways Communications v. Douglas*, 106 AD2d 185 (4th Dept. 1985), aff'd. 65 NY2d 878 (1985). The Building Code provides that "applications complying with the provisions of [the New York City Administrative Code] and other applicable laws and regulations shall be approved by the commissioner [of DOB]." Such non-discretionary applications are for as-of right permits, *Committee to Save Washington Square, Inc., v. Dormitory Authority,* 281 AD2d 770 (3rd Dept. 2001). The only apparent explanation for the City's unwillingness to issue this Owner its "as of right" permit is that pressure from local community activists, many of whom are acting for their own financial self-interest, has caused the City to single out this particular Owner for disparate treatment, which is patently improper.

FUTILITY ARGUMENT

43. Also, not surprisingly, frustrated with the state of affairs, both Cooper Union and the Joffrey Ballet ultimately cancelled their leases. Again, this procedural history warrants recounting not solely to demonstrate the arbitrary and capricious nature of the Respondent's historical actions but also to make abundantly clear the sheer futility in expecting any kind of fair disposition to be had by Petitioner in seeking any other administrative remedies from Respondents. After all, the proverbial fix is in and the Mayor has made clear what he expects of his employees and thusly the instant Petition is indeed ripe for adjudication

DOB's Shifting and Amorphous Interpretations of Rule 51's Requirements

44. From 2015 through August 2016, Petitioner sought DOB's assistance in interpreting Rule 51's requirements. During this time period, three Zoning Resolution Determinations ("ZRD 1")[25] were issued. First, on June 19, 2015, Petitioner sought a

[25]*See* www1.nyc.gov/site/buildings/business/determinations.page - Applicants may request Department determinations of the Zoning Resolution and Construction Codes (**2014 Construction Code**, **1968 Building Code**, and **Multiple Dwelling Law**). In NYC a ZRD1 is a Zoning Resolution Determination. This is an application to get a written ruling from the Department Of Buildings on the interpretation of a specific Zoning Code.

determination concerning whether a portion of the student dormitory could also be occupied and used during summer months by non-matriculated students and student interns. Importantly the Department ruled in the affirmative, finding that doing so was "in keeping with the mission of an educational institution." *See* Exhibit 13. This determination clarified the Department's position regarding summertime dormitory leasing. ***See* Exhibit 51.**

45. Second, on May 26, 2016, Petitioner requested that DOB "concur with the interpretation that proof of a qualified lease agreement for a portion of the building is sufficient to allow the issuance of a Permit for the entire building (within the existing Building envelope) in compliance with 1 RCNY 51-01." ***See* Exhibit 52**. Importantly, the Department again agreed as the Department already approved this same request in 2013. *Id.* ***See* Exhibit 54.**

46. Third, on August 4, 2016, Petitioner sought DOB's confirmation that a lease between an owner and an educational institution that authorizes the educational institution to license the beds in the leased premises is valid. The Department again answered in the affirmative. ***See* Exhibit 53.**

The Adelphi Lease and Respondents' Intent on Killing Another Tenancy in the Cradle

47. On August 2, 2016, Petitioner entered into yet another lease for the second and third floor of P.S. 64 with Adelphi University ("Adelphi") using language from the ZRD approvals Petitioner received from the DOB. ***See* Exhibit 56.** Just one week later, on August 11, 2016, Petitioner submitted the executed lease to DOB for approval. The DOB permit review process is routine and the New York City Administrative Code ("Administrative Code") § 28-104.2.7 requires the DOB to provide approval "promptly" within 40 days.[26] In addition, the Administrative

[26] NYC Administrative Code Section 28-104.2.7

Code Section 28-104.2.8 requires the DOB to provide notification of a rejection for all applications failing to comply with the code "promptly and no later than [40 days]."[27]

48. Here, despite the unequivocally simplistic nature of the lease review process, it took the DOB an *unprecedented*—and statutorily proscribed—period of *300-days* to review a basic, *as of right* permit application. This is 260 days longer than the time period mandated under the City's Administrative Code. This again clearly smacked of the "unequal hand" and "evil eye," and the existence of motivation sufficient to taint the DOB Commissioner's findings and prove a post hoc justification. *303 West 42nd St. Corp. v. Klein*, 46 N.Y.2d at 695-697. It is recited here primarily to evince futility in seeking further administrative remedies.

Genuine Community Support Ignored

49. Adelphi's Executive Vice President of Finance, Timothy Burton, wrote to Mayor de Blasio on November 28, 2016, imploring him to have DOB complete the review process, explaining that "it is necessary for Adelphi …to have its students move in on time for the beginning of the Fall 2018 school year … only 21 months away." ***See*** **Exhibit 55.** Mr. Burton even explained how the community would benefit from approving Adelphi's lease:

> …We are increasing our Manhattan presence and having a dorm for Adelphi's students is critical to that mission. The owner needs a building permit to help us meet that goal. This vacant building, once renovated, will provide affordable student housing for our students who will study at our Manhattan Center…The building plans have

[27] NYC Administrative Code Section 28-104.2.8
§28-104.2.8 Notification of rejection. Applications failing to comply with the provisions of this code and other applicable laws and rules shall be rejected and written notice of rejection, stating the grounds of rejection, shall be given the applicant promptly and not later than the date required in section 28-104.2.7.
Section 28-104.2.9
§28-104.2.9 Resubmission. Whenever an application has been rejected and is thereafter revised and resubmitted to meet the stated grounds of rejection, the revised application and construction documents shall be approved if they meet the stated grounds of rejection and otherwise comply with the provisions of this code and other applicable laws and rules or shall be rejected if they fail to meet the stated grounds of rejection or otherwise fail to so comply. Written notice of approval or written notice of rejection, stating the grounds of rejection, shall be given the applicant promptly and not later than 20 calendar days after the resubmission of such documents.

> already been approved by the DOB. I would appreciate any help you can provide to expedite obtaining the requested building permit from DOB. Thank you in advance for helping in our efforts to continue to attract talent from all over the world, as it is essential for our future. We expect to enroll almost 1,000 students, mostly from foreign countries, in our efforts to bring even more international students to the greatest city in the world. With your assistance this plan can become a reality." **Exhibit 55.**

50. Despite same, the Respondents continued to stonewall and slow walk their determination effectively killing yet another deal. Even more telling was the local community's outpouring of support. Indeed, in March of 2017, nearly *one thousand* local residents signed a petition requesting that DOB complete its review of Adelphi's lease. **Exhibits 46-48.** In this petition, the community explained that the building's vacancy has created an eyesore and a hotbed of crime. *Id*. Notably, the letter stated that **"[i]t is unfortunate that this issue has been hijacked by a very vocal and well-connected minority within our community who proclaims the entire area's support for their personal agenda, when nothing could be further from the truth**." ***See* Exhibit 57.**

51. Your Petitioner in his attached Affidavit also outlines considerable intrigue involving the mysterious buyer and top donor, as well as a cadre of not-for-profits and lobbying entities, that your Petitioner demonstrates are lobbying not just Respondents, but also contacting his lender in a backdoor attempt to capture his property after having twisted every rule and requirement possible to prevent Petitioner's development of same. *See* Exhibit A. This, too, amounts to a tainted process deserving no deference for the Respondent's irregular actions. *See*, generally, 46 N.Y.2d 686, *supra*.

Respondents Succeed in Killing Another Deal

52. In spite of the pleas from Adelphi's VP of Finance and the outpouring of community support—and despite the fact that Petitioner had already received a Certificate of Appropriateness from the Landmarks Preservation Commission and DOB already approved the construction plans and issued permits in 2014 and 2015—DOB nevertheless rejected Adelphi's lease application on April 20, 2017, and directed Adelphi to find relief at the Board of Standards and Appeals ("BSA") knowing full well this would kill the transaction. ***See*** **Exhibit 60**. But DOB's objections had absolutely nothing to do with the City's Zoning Resolution or Building Code; rather, DOB issued three candidly spurious objections: 1) claiming the Adelphi Dorm lease, which was virtually identical to the Cooper Union Dorm lease approved all those years ago **(Exhibit 62),** was not a lease *per se* despite the fact that Adelphi the premises, simply because Adelphi thereafter licensed the beds to students (which is standard protocol); DOB alleged that Adelphi's lease was merely an option to lease beds, which is patently false (indeed, if DOB's allegations were accurate, every single college and university in the City would violate the Zoning Resolution); 2) requiring a nonsensical and circular amendment to the lease; and 3) most absurdly, questioning whether Adelphi University—a college founded in 1896—actually qualified as a college or university. ***See*** **Exhibits 60-61**. This whole line of objections was clearly contrived as a post hoc justification for not having summarily approved same on day two or three instead of slow walking this transaction to death for some 266 days.

53. In the face of Adelphi's letter expressing the urgency of DOB's lease approval, the DOB knew full well that after its 8 month lease review, by directing Adelphi to seek relief through the BSA, *which would take a minimum of an additional seven months*, Adelphi would be forced

to abandon the lease and look for other space as it was clear that Adelphi needed the space ready for Fall 2018. That was exactly the point. Mission accomplished. ***See* Exhibit 64.**

54. In any event, despite the evident futility of same, Petitioner formally responded to each of DOB's objections by letter, enclosing an executed Lease Modification Agreement dated May 8, 2017, designed to cure DOB's objections. ***See* Exhibit 63**. Petitioner also scheduled a meeting with DOB Deputy Commissioner Bruno on May 17, 2017 to discuss the foregoing. On May 15, 2017, just two days before the scheduled meeting, Adelphi's counsel sent an email to DOB emphasizing the urgency of their decision. ***See* Exhibit 65**. In the letter, Adelphi's counsel informed DOB that "[Adelphi] University has the right of terminating [the lease] in the event that the construction is not reinstated by June 1, 2017," further emphasizing that the "consequence for both the developer and the University's ability to expand its New York City program if Adelphi terminates will be quite serious, as will those to the City's reputation." ***Id.***

55. The following day, on May 16, 2017, Petitioner wrote an email to the Deputy Commissioner and the others who were going to be present at the meeting in order to streamline the meeting by highlighting relevant documents, accentuating the urgency of the project given Adelphi's August 2018 deadline; however, *just one hour after Petitioner's email, and the day before the meeting was scheduled to take place*—and despite the unequivocal urgency of the DOB's approval—the DOB cancelled the appointment. *Id.* The very next day, on May 17, 2017—the day the scheduled meeting was supposed to take place—the DOB instead delivered a final determination, doubling down its prior objections and rejecting the modified lease. ***See* Exhibit 64.**

56. A few days later, on May 25, 2017, Petitioner wrote to Mona Sehgal, General Counsel for the DOB, requesting a meeting and emphasizing his willingness to work with DOB in

order to secure permits for P.S. 64, stating, in pertinent part, that: "Adelphi and ownership is prepared to fully cooperate with the building department so the building permits can be issued and the project can move forward." ***See*** **Exhibit 66-67.** After more than a month passed and DOB failed to reschedule the meeting, or even provide the courtesy of a response to Petitioner's email, Petitioners' counsel wrote DOB Commissioner Chandler a letter dated July 31, 2017, addressing all of the standing objections and including an executed Second Lease Modification Agreement dated June 22, 2017, for the DOB's review. ***See*** **Exhibit 68.**

57. Reading the original lease in conjunction with its two subsequent modification agreements, the final lease is virtually identical to Petitioner's lease with Cooper Union, which was previously approved by DOB. Under the modified lease, Adelphi and 9th & 10th Street LLC created a landlord-tenant relationship whereby Adelphi was given exclusive control of the second and third floors of P.S. 64 for a non-revocable term of 10 years.

58. Despite being practically identical to the Cooper Union lease, the language of which was ultimately approved and objection-free, the DOB again issued a final determination on August 22, 2017, rejecting the lease and refusing to lift all of its April 20, 2017 objections. ***See*** **Exhibit 69.**

59. As a direct result of DOB's conduct, Adelphi understandably revoked the lease on October 11, 2017.

60. For each of the foregoing reasons, it is beyond futile to expect that any City agency where the Respondents have appointment power will treat the Petitioner objectively or fairly and apply rules, regulations or laws without an "evil eye" an "uneven hand" given the obvious "taint." *See 303 West 42nd St. Corp*. 46 N.Y.2d at 693-697.

The Mayor's Public Proclamation

61. On October 12, 2017, the very day after Adelphi was forced to revoke its lease by Respondent's 266 day hostage lease crisis, the Mayor made a shockingly stark public proclamation that the City will take steps to "**reacquire**" Petitioner's property in order to "**right**" the so-called "**wrongs of the past and will work with Councilmember Mendez and her successor to get that done**."[28] Closing the loop, the EVCC posted the Mayor's statement *verbatim* on its website on the same day at 7:01 p.m., *more than thirty-minutes before the statement was made*. ***See*** **Exhibit 70.**

62. EVCC's agenda was then repeated by officials throughout the City.[29] Indeed, "Manhattan Borough President Gale Brewer says the building is **"perfect for eminent domain"** while [City Councilmember] Rivera says the city should "**by any means necessary**" bring the building "back to community use."[30] According to City Comptroller Scott Stringer, "[i]t's going to take another mayor to change this and do the right thing…We need Mayor de Blasio to keep his word."[31] City Council Member Rivera further stated that "[t]his is a blight on the East Village and the Lower East Side and we desperately need to take action as a city to **right the wrong** that is this building behind me…It's not just an eyesore, it has been neglected and it has the potential to be something so much greater and better for this community."[32]

63. Suddenly, Aaron Sosnick/EVCC's agenda was being repeated by prominent politicians throughout the City. ***See*** **Exhibit 71.** In so doing, Respondents succumbed to generalized community pressure whilst incidentally ignoring genuine grass roots community

[28] https://www.thevillager.com/2017/10/city-interested-in-reaquiring-old-p-s-64-mayor-tells-town-hall/
[29] http://evccnyc.org/blog/2017/10/12/old-p-s-64-charas-el-bohio-news-3/
[30] https://ny.curbed.com/2019/2/7/18215622/nyc-east-village-ps-64-mayor-bill-de-blasio
[31] https://ny.curbed.com/2019/2/7/18215622/nyc-east-village-ps-64-mayor-bill-de-blasio
[32] https://ny.curbed.com/2019/2/7/18215622/nyc-east-village-ps-64-mayor-bill-de-blasio

pressure that had called upon DOB to approve the Petitioner's student dorm leases. ***See* Exhibit 72.** The net result has exponentially devalued Petitioner's building, scared away of viable investors, lenders and other potential educational institutions, and prevented Petitioner from obtaining any additional loans.

64. At a media roundtable event on August 23, 2018, the Mayor made the following very public and completely fallacious statement, in pertinent part, that Petitioner

> has been exceedingly uncooperative…because **the City tried to have a productive conversation about purchase**...We've gotten nowhere so far. We're not giving up. We're working very closely with the councilmember, Carlina Rivera. I'm very frustrated with that owner**….Eminent domain, though it may not be an immediate option, is certainly something I want to know more about,.. but I had hoped the best solution here would be a direct purchase**," de Blasio explained. "That's not off the table. It's just **we're just not getting any cooperation** so far."[33]

65. Again, the Mayor's statement is patently and unequivocally false. ***See* Exhibit 75.** To date, the City has never once emailed, called or spoken to Petitioner about purchase the building. Unless the Mayor sees no distinction between a call by Mr. Paul Wolf, a private agent, made on behalf of a mysterious buyer who turns out to be a Mr. Sosnick controlled mega entity and "the City," the Mayor's statement must be labeled—to put it kindly—a fabrication. ***See* Exhibits 73-74.**

66. Moreover, if the Mayor's prior statement had not entirely diminished the value and potential of Petitioner's property, his August 23, 2018 statement certainly did. Lest there be any doubt, just one month later, on September 26, 2018, Petitioner's lender started foreclosure proceedings on the property. ***See* Exhibit 76.**

[33] https://www1.nyc.gov/office-of-the-mayor/news/435-18/transcript-mayor-de-blasio-holds-local-media-roundtable

67. No doubt, Aaron Sosnick through Paul Wolf and his EVCC/ La Vida Feliz Foundation is waiting in the wings to attempt to scoop up the property for a fraction of its fair market value. In fact, on February 5th, 2019, Wolf connivingly emailed Petitioner's lender on behalf of a "very interested" buyer to purchase the property for cash right out from under Petitioner's control before it goes to market, indicating that he "can move very quickly." **Exhibit 73-74.**

CURRENT RESPONDENT BAD FAITH

68. To date, the DOB refuses to issue Petitioner a permit to renovate the building. Consequently, on December 20, 2017, as a result of the Respondent's continuous efforts to thwart his project—no doubt taking heed of the Mayor's public statements that he will stop at nothing the "reacquire" the building—Petitioner filed a lawsuit seeking a declaratory judgement that Rule 51 does not apply to his proposed building plans. Petitioner's lawsuit was dismissed on ripeness ground on February 8, 2019.

69. As detailed herein, however, and given the latest machinations from the Respondents, it is clearly and absolutely futile for Petitioner to exhaust administrative remedies. This follows from the *uneven hand* and the *evil eye*, the stark and unmistakable direction that the Mayor has given to all his agencies and appointees, and, candidly, the clear and wanton disregard Respondents have consistently shown for their own precedents and protocols when dealing with Petitioner and this particular piece of private property.

70. It is fair to say that after nearly two-decades of obstruction by the Respondents stifling renovation and development, changing the rules of the game and killing tenants that would anchor financing after the Court's February 8, 2019 decision, the City has upped the ante.

71. Suddenly, the City has issued a barrage of violations and orders for "emergency short term" renovations—on a building the City has continuously promised to "reacquire"—that would be entirely unnecessary if DOB simply issued Petitioner a permit to renovate the building. **Exhibits 12-13, 77-80.** Over the past six months, the City has attempted to exhaust Petitioner's resources by serving him with piecemeal violations, each of which costs tens of thousands of dollars to repair and are significantly more costly and time consuming than a full renovation would be. ***See*** **Exhibit 78 and 79.**

Anonymous Phones From the Mayor's Office

72. In fact, on February 6, 2019, just two days before the Court's decision, 311 received a purportedly "anonymous" tip reporting cracks in the building, prompting the City to evacuate tenants of all the adjacent buildings and causing a media frenzy. ***See*** **Exhibit 81.** A DOB spokesman later determined that the building's cracks, although warranting a violation, posed no danger to the public. **Significantly, DOB's records prove that the so-called "anonymous" phone call was made *directly from the Mayor's Office of Emergency Management.* *See* Exhibit 77.** Yet again, all paths lead to City Hall and its tainted machinations.

73. On February 13, 2019, although DOB inspectors determined that there was no imminent danger of collapse, DOB nevertheless issued a full Vacate Order for the already vacant building, after "follow-up inspections prompted new concerns."[34] ***See*** **Exhibits 82-83.** Specifically, the February 13, 2019 Vacate Order cites "visible cracks, gaps and deterioration" in the "ornamental facade elements" on the East 10th Street-side of the building, which are purportedly at risk of falling into the street and onto neighboring properties. Additionally, according to the DOB, the "interior fire proofing are [sic] missing, thereby exposing structural

[34] https://ny.curbed.com/platform/amp/2019/3/1/18246724/east-village-old-ps-64-vacate-order-building-unsafe

steel members. These conditions have made the entire building and yards unsafe to occupy." ***See*** **Exhibit 83.**

74. Moreover, although Petitioner has worked diligently with the LPC since 2017 to repair conditions to the roof and windows in order to prevent water damage, on March 4, 2019, the LPC ordered Petitioner to "expeditiously" address deteriorating conditions at the vacant building. Specifically, LPC Commissioner Sarah Carroll issued a "Chair's Order" to Petitioner, alleging that the building is in a state of "disrepair," with masonry exposed to the elements, cracked chimneys, and "compromised" façade elements. ***See*** **Exhibit 84.** Curiously, LPC inspectors determined that immediate repairs are necessary, threating Petitioner with a penalty of $5,000 *per day* and legal action if he fails to comply. Just one week later, DOB issued Petitioner a Commissioner's Order, demanding that utilize a structural engineer to assess the building and its facade and provide the DOB with a report on its findings. ***See*** **Exhibits 85-86, 92.**

75. These citations coincide precisely with Mr. Sosnick/EVCC's retainer with HR&A Advisors to "oppose P.S. 64 as a dormitory." ***See*** **Exhibits 87-88 and 91, 92.** Yet again, taint.

76. Significantly, Petitioner's engineer submitted timely filings in both 2012 and 2013, seeking authorization for Petitioner to perform the very repairs that DOB and the LPC have now cited him for not completing; namely, facade repair, structural alterations and repairs, and removal of the chimney. **Exhibits 27-32**. Petitioner's submissions were initially approved but then Petitioner was forced to stop working when DOB issued Stop Work Orders in 2014. **Exhibit 36**. (*Again, oh tangled web*). As such, none of the foregoing repairs were completed because none were allowed. Nevertheless, in February 2017, Petitioner's engineer returned to the building after the LPC requested a Condition Report. Petitioner's engineer investigated the conditions and subsequently issued a report to LPC on February 17, 2017. ***See*** **Exhibits 41, 94-95.**

77. It is beyond noteworthy that Petitioner's engineer's report notes that the "interior fireproof" issues are a *direct and singular result of the DOB's refusal to issue Petitioner a full renovation permit.* **Exhibit 41.** Indeed, these so-called "defects" were created because DOB authorized Petitioner to perform interior demolition work but subsequently issued a Stop Work Orders prohibiting him from completing the renovations. **Exhibit 41.**

78. As a result of DOB's and the LPC's joint February and March of 2019 findings, in a joint letter dated March 14, 2019 directed at Respondents, several officials wrote a scathing letter to the Chair of the LPC, Sarah Carroll, admonishing Petitioner based on the LPC's March 4, 2019 findings. **Exhibit 86.** Specifically, these individuals allege that Petitioners alleged failure to replace a "severely deteriorated" tarp has "expos[ed] the brick beneath to snow, rain, wind, and sunlight. It appears that Mr. Singer's failure to maintain the tarp has compromised the stability of the building." **Exhibit 86.**

79. The foregoing letter demonstrates that Respondents, once again, are succumbing to generalized political pressure and that agency determinations are marked by hypocrisy, lies and circular logic. It was LPC that prevented Petitioner from replacing the very tarp that these officials claim resulted from Petitioner's negligence. Documentary evidence unequivocally proves that Petitioner wanted to protect the building, but the City would not let him. **Exhibits 95-98.**

80. On September 19, 2018, John Weiss, Deputy Counsel for the LPC, emailed Petitioner stating "**sorry for the delay in getting this information to you**. I've spoken to DOB staff and you should make an appointment to meet with the Manhattan Borough Commissioner to **discuss how the tarps will be installed** to arrange for a partial lift of the SWO to allow the work to occur." ***See*** **Exhibit 98.** That LPC's Deputy Counsel would delay on such an "urgent matter"

speaks for itself as Petitioner cannot take any remedial action whatsoever without LPC's express consent.

81. Consonant with Mr. Weiss' advice, Petitioner forwarded the email to DOB's Manhattan Commissioner, Marty Rebholtz, with a message that he wanted to discuss replacing the tarp. EXHIBIT. Petitioner followed up multiple times, but Mr. Rebholtz never responded. Exhibit. Without the City's approval, Petitioner was not authorized to perform any work on the building and then is attacked for not doing any work on the building. ***See* Exhibit 95.**

82. Petitioner submitted an Emergency Temporary Stabilization plan to the LPC to address the foregoing citations. On June 28th, 2019, the LPC approved Petitioner's plan and determined that he could move forward without a permit, as they were being undertaken in response to the DOB Commissioner's finding that the structural conditions were unsafe. ***See* Exhibit 93.**

83. Since this date, DOB and the LPC have inundated Petitioner with daily emails regarding the status of these repairs. **Exhibits 99-102**. Despite DOB's years of dilatory tactics and indifference, it was suddenly an urgent necessity and capable of expediting work. Recall Respondent's 266 days to examine a lease.

84. The irony of the City's conduct over the past six months is that Petitioner has been prevented from making *any renovations and repairs whatsoever* as a direct result of the DOB's refusal to issue Petitioner a building permit.

85. If DOB simply issues Petitioner a permit to renovate the building, he will not only repair the alleged defects, but would repair the *entire* building, thereby obviating the need for any further emergency work and saving both the City's and Petitioner's valuable and limited resources.

DISPARATE TREATMENT

86. To date, DOB continues to obstruct Petitioner's legal *as-of-right* project by treating it differently than any other as-of-right project in the City. Specifically, DOB permits all similarly situated developers to build; however, upon completion, DOB's can enforce its regulations, as well as the Zoning Resolution, by withholding the Certificate of Occupancy from developers who do not comply with these provisions. This is a serious hammer and a mechanism that benefits both developers and the City, ensuring that construction is completed in a timely, efficient and lawful matter. It is indisputable that the building for which Petitioner seeks a permit complies with the Zoning Resolution unless Owner subsequently **uses** it in violation of the Zoning Resolution. Moreover, even the city's alleged fear of a subsequent use of the building as an "apartment building" doesn't violate the zoning resolution but would be in violation of the deed restriction. The city's actions here is precisely the "anticipatory punishment for future wrongdoing" condemned in *DiMilia.*, *Baskin.* and *Sagaponack.*

FUTILITY AND RIPENESS

87. After being dismissed on ripeness grounds in February 2019, Petitioner was forced to seek administrative remedies before again seeking judicial intervention. As such, on March 14, 2019, Petitioner's expeditor submitted a CCD-1, a final determination request to DOB, seeking a determination that Rule 51 does not apply to P.S. 64, as it will not—and cannot—take advantage of the City's FAR bonus for Community Use Facilities, the foundation upon which the Rule was promulgated. **Exhibit 19.**

88. According to Petitioner's expediter, the DOB's conduct was an unprecedented occurrence, a fact that he articulated in an email directly to DOB Commissioner Rebholz on April 14, 2019, stating, in relevant part, that:

> We have submitted a CCD-1 under control number 57701 which seems to be a **hot potato**. It has been **punted back and forth between the borough and HUB**. it possible to get a read on this and have a conversation? ***See*** **Exhibits 103-104.**

89. At a meeting held at the DOB on May 3, 2019, with Petitioner, Petitioner's counsel, the New York City Law Department and several other City officials, DOB Manhattan Borough Commissioner Rebholtz agreed that Petitioner's CCD-1 application was a "hot potato," as it was bounced back and forth between the various divisions of the DOB for over a month, further delaying Petitioner's administrative relief.

90. Finally, on May 10, 2019, the Commissioner Rebholtz issued a final determination that Rule 51 applies to Petitioner's project, even though it is merely a *renovation within the existing building envelope* and does not seek to add additional FAR. According to Commissioner Rebholtz:

> the provisions of 1 RCNY 51-01 are applicable to all new proposed student dormitories, without exclusions based on zoning regulations, including whether or not the proposed UG 3 use is eligible for a higher FAR than a UG 2 use. **Moreover, the Dorm Rule does not provide a process or criteria for a waiver, so the Department cannot grant one.** Therefore, there is no basis to find that the Dorm Rule is inapplicable or waived and the request to "temporarily waive the requirements of Rule 51-01 [until the TCO stage] is hereby denied. ***See*** **Exhibit 18.**

91. Additionally, after the court dismissed Petitioner's previous action on ripeness grounds, Petitioner sought a determination from DOB regarding whether one floor constitutes "part of the building." Consequently, DOB issued a CCD1 (construction code determination) on May 10, 2019, claiming that Rule 51 applies and that a tenant is required "in part" of the building in order to obtain a work permit. ***Id***. Petitioner then sought confirmation from DOB that leasing of a single floor would constitute "part of the building" under Rule 51. **Exhibit 105.**

92. On August 12, 2019, Commissioner Rebholtz, signed a CCD1 stating that the leasing of a single floor is in fact "part of a building" under Rule 51; however, Petitioner cannot

renovate and build out the space completely on the vacant floors without a tenant first leasing those floors. ***See* Exhibit 105.**

93. Not so incredibly, this determination is the **exact opposite** of what the DOB determined on August 8, 2013 and May 26, 2016 when the DOB issued a ZRD1 (zoning determination) that Petitioner was *authorized* to renovate and build out on the vacant floors. **Exhibit 105.** Thus, the DOB's August 12, 2019 ruling is unequivocally and demonstrably **arbitrary and capricious**, per se, as it has absolutely no justifiable legal or factual basis whatsoever.

94. Simply stated, DOB's determinations are specious, contradict the City's Administrative Code and smack of the application of an "uneven hand," "evil eye" and post hoc justifications the court's need not defer to. Commissioner Rebholtz is deliberately obstructing Petitioner's project in like manner to his "tainted" 1979 predecessor in *303 West 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, *supra*, because the City's Administrative Code *explicitly authorizes Commissioner Rebholtz to issue a waiver in this exact situation*. *See* NYC Administrative Code § 28-104.7.12.

95. Indeed, NYC Administrative Code § 28-104.7.12, entitled Waiver of certain documents, states the following:

> The **commissioner is authorized to waive the submission** of any of the **required construction documents and other data** if review of such documents is **not necessary to ascertain compliance with this code or not required for the phase of work for which a permit is sought**. *Id*. (Emphasis added).

96. Thus, despite Commissioner Rebholz's determination, the City's Administrative Code expressly authorizes him to issue a waiver of Rule 51's requirement for Petitioner to submit

a lease before obtaining a construction permit, as the express purpose of the Rule is wholly inapplicable. *Id*.

More Evidence of Taint: Petitioner's FOIL Requests Denied

97. In an act of wanton disregard for law, the City continuously evades Petitioner's request for relevant documents on the New York State Freedom of Information Law ("FOIL"), thereby hindering Petitioner's ability to compile more evidence demonstrating the Respondent's orchestrated assault against his project. In fact, *the City has entirely ignored and/or failed to respond to multiple FOIL requests submitted by the Petitioner*. **Exhibits 106-111.**

98. For example, on December 22, 2018, Petitioner submitted a FOIL request to DOB seeking a variety of pertinent records related to P.S. 64. **Exhibit 109.** DOB acknowledged receipt of the FOIL request and promised a response on or about Thursday, March 28, 2019; however, to date, *DOB has still failed to provide a complete response* and Petitioner's request remains open. **Exhibit 109.**

99. Similarly, on February 8, 2019, after Comptroller Stringer stated publicly that P.S. was a "top budget priority," Petitioner submitted another FOIL request seeking "[a]ll communications sent to and/or from comptroller Scott Stringer's office in regard to P.S. 64 (formerly known as Charas) from January 1, 2015- February 8, 2019." **Exhibit 110.** After delaying its FOIL response multiple times, five months later, on July 11, 2019, denied Petitioner's foil request, in part, alleging that Petitioner's request is purportedly "overly broad" but that "[t]o locate potentially responsive communications, **I asked certain staff members whether they had any communications** related to "P.S. 64". ***See*** **Exhibit 110.**

100. The absurdity of the City's response cannot be overstated, as it is not only disingenuous but also undermines the very purpose of the Freedom of Information Law: *i.e.*, to

hold the government accountable. *See* New York Public Officers Law, Article 6, Section 84-90. Indeed, to "ask[] certain staff members whether they had any communications related to "P.S. 64", allows the government to treat the law as discretionary and conceal any potentially incriminating emails, as they have undoubtedly done in this case.

101. To alleviate any doubt that the City is deliberately withholding information from Petitioner, in response to the January 10, 2017 email from Paul Wolf, a Trustee of Aaron Sosnick's La Vida Velez foundation, to New York City's Commissioner of City Planning, Carl Weisbrod seeking to purchase P.S. 64 out from under Petitioner while Petitioner was awaiting the DOB's review of the Adelphi lease, Petitioner requested "all electronic communications, including attachments to same, concerning 605 East 9th Street, New York, New York, a/k/a PS 64 (Block 392, Lot 10) that were sent OR sent by any employee or agent of the Department of City Planning from January 1, 2014 – present." ***See* Exhibits 108 and 111.** The City initially responded with a *single document*, denying that any other records existed exist, *including the January 10, 2017 email from Paul Wolf to Carl Weisbrod that Petitioner already had in his possession*. **Exhibit 111.**

102. Consequently, *after being caught in a blatant lie*, Petitioner's representative, Nicole Epstein, responded to the City's FOIL response by attaching the January 10, 2017 Paul Wolf email, and stating the following:

> Strangely and quite conveniently, an email sent to and by DCP in regards to PS64 (see attached) was left out of the FOIL response. Somehow, all DCP could find is an email that was sent 3 days ago from Andrew Berman. Please advise on this discrepancy as the attached email shows there are 100% documents that under the law, must be disclosed in a FOIL response, that the city is withholding. Also be advised that this email will be forwarded to the committee of open government and I will forward it to the press and an investigative reporter if the correct and complete documents

> are not sent immediately. I look forward to your response. ***See* Exhibit 111.**

103. Within minutes of the foregoing email, Ms. Epstein received a phone call from Department of City Planning ("DCP") Assistant Counsel, Calin Rodman—a phone call the City explicitly acknowledges in a subsequent letter addressed to Ms. Epstein—angrily demanding to know how Ms. Epstein acquired the foregoing email (which, evidentially, the City had intended to conceal) and providing what can only be described as a lame excuse as to why no other documents were produced.

104. Subsequently, Petitioner appealed the City's initial FOIL response and sent an additional FOIL request seeking "all emails sent between Paul Wolf and Carl Weisbrod from 1/1/2014-present." ***See* Exhibit 111**. On March 1, 2019, Mr. Rodman emailed Ms. Epstein states that based on Petitioner's initial request "**DCP's Manhattan Office staff were not familiar with any communications at the site. As such, it was determined that a search of archived email accounts was not warranted**." *Id.*

105. Yet again, the City violated the City's FOIL search protocol and undermined the very purpose of the Freedom of Information Law by asking the individuals whom are potential subjects of the search itself whether they were "familiar with" such communications. Then, according to Mr. Rodman, based on DCP's objective assessment, DCP unilaterally determined that a search was "not warranted."

106. To say that the City's response reeks of taint is an understatement. By responding in such a manner, Mr. Rodman has indicated that government is vested with the unfettered discretion to unilaterally curate and censor its responses to FOIL requests. But this is not how the law works and Petitioner is entitled to these documents as a matter of law. *See* New York Public Officers Law, Article 6, Section 84-90, Freedom of Information Law. Even giving

the City the benefit of the doubt, Mr. Rodman's response is absurd, as it relies solely on the memory of individuals who may or may not have been involved in such communications. Regardless, the City's response is both egregious and telling.

107. To date, the City has still failed to adequately respond to both Petitioner's appeal and Petitioner's subsequent FOIL requests.

108. To add insult to injury, on June 3, 2019, in an attempt to explain the unprecedented delay, the City, quite conveniently, alleged that:

> **The City's search service provider encountered technical difficulties which resulted in the system being down for several weeks. This was a citywide issue that left us unable to work on requests involving email archives. Our access to the software has been restored and we're working through a backlog of requests. We will get back to you shortly with a revised timeframe to complete the search.** Exhibit 108.

109. Taken in its full context, the City's response is patently absurd. This is particularly true in consideration of the fact that this office has received responses to other FOIL requests during the same period of purported "technical difficulties." Indeed, there appears to be a pattern insofar as Petitioner's even more specific request for "[a]ll emails to and from former Department of City Planning Commissioner Carl Weisbrod from January 5, 2017 - January 15, 2017 in regard to PS 64," a mere ten-day period, was met with a very similar response after the City failed to even acknowledge Petitioner's FOIL request within the legally mandated five-day period. ***See* Exhibit 113.** Specifically, Petitioner's request included an *unredacted* copy of Carl Weisbrod's email in which he forwarded Paul Wolf's email directly to the Mayor's top two senior aides, Deputy Mayors, Anthony Shorris and Alicia Glen. ***See* Exhibit 74.** On July 23, 2019, *nearly two months after* the City's June 3, 2019 response blaming "technical difficulties" for the delay, *supra*, the City again responded that **"[d]ue to ongoing issues with the City's email**

archive search software, we are temporarily unable to create new email searches for former employees. **As a result, we estimate that a final response will be issued on or about Friday, December 13, 2019**." ***See*** **Exhibit 113.**

110. Not only did the City proffer the same preposterous excuse about so-called "technical difficulties"—which is a blatant and outright lie—the City delayed its response for another five months, until December 13, 2019. *Id.*

111. Apparently, the City is trying to delay just long enough for Petitioner's lender to finalize its foreclosure against Petitioner. One hopes it is not indicative of intentional spoilage of records.

112. The City's conduct is not only suspicious and unacceptable, it is an illegal affront to the laws that were promulgated with the express purpose of facilitating government transparency.

113. Indeed, the Legislative Declaration of New York Public Officers Law, Article 6, Section 84-90, Freedom of Information Law, states the following:

> The legislature hereby finds **that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions**. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.
>
> As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, **it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible**.
>
> **The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society**. **Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality**. The legislature therefore declares that government is the public's business and that the public,

> individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.

114. Yet, the City continues to shroud itself "with a cloak of secrecy" in defiance of the law. Evidently, the Mayor and the City believes that freedom of information is a discretionary function and that it operates above the law.[35] But the City is mistaken, and the bad actors must be held accountable.

115. While this administration has time and again been called to task for its lack of transparency and failure to comply with Foil against the backdrop of the Respondents' conduct with regard to Petitioner and his property, this should not be countenance. It is clear that the City has tried to actively conceal its records pertaining to P.S. 64 and postpone its responses long enough to ensure that it has "reacquired" the building and that any records establishing its conspiracy to disenfranchise Petitioner are perhaps permanently archived or moot. Ultimately, the foregoing also stands as proof positive the futility of expecting anything like a fair shake and this matter is indeed ripe for adjudication.

STANDARD OF REVIEW

116. Pursuant to CPLR § 7803, an administrative determination may be challenged where "a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." *Id*; *see also Matter of Aponte v. Olatoye*, 30 N.Y.3d 693 (2018) (internal citations omitted) ("In reviewing an administrative agency determination, [courts] must ascertain whether there is a rational basis for the action in

[35] **De Blasio is for 'transparency,' until he's not** By Kyle Smith September 7, 2014 - "I will increase transparency with a series of reforms of the Freedom of Information Law," candidate de Blasio told the New York City Bar in an interview published in 2013….[Yet] …Meanwhile, the unanswered FOIL requests are piling up…Asked about burying FOIL requests he promised to treat as lovingly as a mom does her kid's crayon portraits, de Blasio told Capital New York, "I'm no lawyer." https://nypost.com/2014/09/07/de-blasio-is-for-transparency-until-hes-not/

question or whether it is arbitrary and capricious"); *see also Matter of Gilman v. New York State Div. of Hous. & Community Renewal*, 99 N.Y.2d 144 (2002).

117. "The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact." *Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck*, 34 N.Y.2d 222 (1974). "On the merits, in reviewing an administrative agency determination, [courts] must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious." *Matter of Natasha W. v. New York State off. Off of Children & Family Servs.*, 32. N.Y.3d 982 (2018) (internal citations omitted); *see also Matter of Peckham v. Calogero*, 12 N.Y.3d 424 (2009).

118. "An agency's action is arbitrary and capricious where it lacks a "sound basis in reason" or "rational basis" in the record. *Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck*; *see also Matter of Natasha W.*, 34 N.Y.3d 222 (1974) (internal citations omitted) ("Arbitrary action is without sound basis in reason and is generally taken without regard to the facts."). The courts can interfere when there is "no rational basis for the exercise of discretion or the action is without sound basis in reason . . . and taken without regard to the facts." *Matter of Save America's* Clocks, Inc. v. City of New York, 33 N.Y.3d 198, 207 (2019); *see also Matter of Society for Ethical Culture in City of N.Y. v Spatt*, 68 A.D.2d 112, 116, (1st Dep't 1979) (the court's "inquiry is directed to a determination of whether the commission's (decision) had a rational basis or, if, . . . it was arbitrary and capricious").

119. Moreover, "[a]dministrative rules are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context." *New York State Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (1991). An agency's

determination is arbitrary and capricious where it fails to properly evaluate the evidence presented or reaches a conclusion contradicted by the evidence. *See Trump on the Ocean, LLC v. Cortez-Vasquez*, 76 A.D.3d 1080 (2d Dep't 2010). An agency's conduct may be "declared null and void upon a compelling showing that the calculations from which it is derived are unreasonable." *Axelrod*, 78 N.Y.2d at 166, *supra* (internal citations omitted)

120. When an agency decides to alter a previously stated position, it must articulate its reasons for doing so. *In re Charles A. Field Delivery Serv.*, 66 N.Y.2d 516 (1985). "Unless such an explanation is furnished, a reviewing court will be unable to determine whether the agency has changed its prior interpretation of the law for valid reasons, or has simply overlooked or ignored its prior decision…Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made." *Id*. at 52*; See also Matter of Richardson v. Commissioner of N.Y. City Dept. of Social Services*, 88 N.Y.2d 35 (1996); *In re 2084-2086 BPE Assocs.,* 15 A.D.3d 288 (1st Dep't 2005); *Matter of Civic Ass'n of the Setaukets v. Trotta*, 8 A.D.3d 482 (2nd Dep't 2004); *Matter of Klien v. Levin*, 305 A.D.2d 316, 317-20 (1st Dep't.).

121. Even if adequate grounds exist for an administrative determination, the determination will be annulled if the grounds upon which the agency relied were inadequate or improper, or, if the purported grounds were merely pretextual. *See In re AVJ Realtv Corp.*, 8 A.D.3d 14 (1st Dep't 2004). Judicial review of administrative determinations is limited to the grounds invoked by the administrative body at the time of the decision. *Id; see also Mtr. of Stone Landing Corp. v. Bd. of Appeals*, 5 A.D.3d 496 (2d Dep't 2004); *Mtr of Cerame v. Town of Perinton Zoning Bd. of Appeals*, 6 A.D.3d 1091 (4th Dep't 2004); *Mtr. of Civil Serv.*

Emplovees Ass'n. Inc. v. N.Y. State Pub. Emplovment Relations Bd., 276 A.D.2d 967 (3d Dep't 2000), *lv. denied*, 96 N.Y.2d 704 (2001).

122. Further, agency determinations must reach the proper result for the appropriate reason. Where a proper result is founded on improper reasoning, the remedy is a remand for reconsideration. *Mtr. of Scherbvn v. Wavne-Finger Lakes BOCES*, 77 N.Y.2d 753 (1991); *Mtr. of Montauk Improvement. Inc. v. Proccacino*, 41 N.Y.2d 913, 913-14 (1977); *Mtr. of Parkmed Assocs. v. N.Y. State Tax Comm.*, 60 N.Y.2d 935 (1983). In *Montauk Improvement*, *supra,* the Court of Appeals stated:

> [A] reviewing court, in dealing with a determination ... which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis (citation omitted). *Id*. at 913.

See also Mtr. of Barrv v. O'Connell, 303 N.Y. 46, 51-52 (1951); *Fink v. Cole,* 136 N.Y.S.2d 810, 812-13 (Sup. Ct. N.Y. County 1954), *affd.,* 286 A.D.2d 73 (1st Dep't 1955), *rev'd on other grounds*, 1 N.Y.2d 48 (1956); *Mtr. of Tamulinas v. Bd. of Educ.*, 279 A.D.2d 527 (2d Dep't 2001); *Mtr. of Bruns v. Hanna*, 101 A.D.2d 1015, 1016 (4th Dep't 1984); *Mtr. of Baker v. Town of Mt. Pleasant*, 92 A.D.2d 611 (2d Dep't 1983); *Mtr. of Golisano v. Town Bd. of Macedon*, 31 A.D.2d 85, 87-88 (4th Dep't 1968); *Mtr. of Blum v. D'Angelo*, 15 A.D.2d 909, 910 (1st Dep't 1962).

FIRST CAUSE OF ACTION
(For Writ of Mandamus Pursuant to CPLR § 7803(1))

RESPONDENTS' CONDUCT IS ARBITRARY AND CAPRICIOUS BECAUSE RULE 51 DOES NOT APPLY TO THE CASE AT BAR.

A. DOB should be compelled to issue the 'as of right permit' to allow restoration of the existing building for use as Community Facility Use as permitted under the City's Zoning Resolution and which Petitioner is entitled to under DOB's own rules.

a. Petitioner is not required to exhaust administrative remedies because multiple exceptions to the general rule apply.

123. As a general rule, "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law." *Watergate II Apartments v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978).

124. But it is well-settled that there are multiple exceptions to the general rule in which the exhaustion of remedies principal is not required. *See Id; see also Walton v. New York State Dept. of Correctional Services*, 8 N.Y.3d 186, 196 (N.Y. 2007). Indeed, one need not exhaust administrative remedies when: (1) doing so would be futile; (2) the disputed issue is a pure question of law, not requiring the expertise of the agency; (3) there is permissive language in the code; or (4) or an agency's action is challenged as unconstitutional. *Walton v. New York State Dept. of Correctional Services*, 8 N.Y.3d 186, 196 (N.Y. 2007); *see also East End Resources, LLC v. Town of Southold Planning Bd.*, 135 A.D.3d 899 (2d Dep't 2016); *Matter of Town of Riverhead v. Central Pine Barrens Join Planning & Policy Commn.*, 71 A.D.3d 679 (2d Dep't 2010).

i. In light of the circumstances, it would be futile for Petitioner to exhaust administrative remedies.

125. In the pursuit of a final decision in land-use cases, Petitioners may be excused from the typically required procedures if they can demonstrate that those procedures would be futile. *See East End Resources*, 135 A.D.3d at 901; *see also Walton v. New York State Dept. of Correctional Services*, 8 N.Y.3d 186. For example, a property owner is excused from obtaining a final determination if pursuing an appeal to a zoning board of appeals would be futile. *See East End Resources*, 135 A.D.3d at 901.

126. "That is, a property owner need not pursue such applications when a zoning agency…has dug in its heels and made clear that all such applications will be denied." *Id*. at 901; *see also Lehigh Portland Cement Co. v. N.Y.S. Dep't of Envtl. Conservation*, 87 N.Y.2d 136, 142 (1995) (pursuit of administrative remedies futile in light of agency's longstanding

policy regarding the interpretation of a statute); *Watergate II Apartments v. Buffalo Sewer Authority,* 46 N.Y.2d at 57, *supra* (exhaustion rule need not be followed when resort to an administrative remedy would be futile); *Lehigh Portland Cement Co. v. N.Y.S. Dep't of Envtl. Conservation*, 87 N.Y.2d 136, 142 (1995) (futility exists where "the administrative agency . . . clearly and unequivocally stated its long-standing position."); *G. Heilman Brewing Co., Inc. v. N.Y.S. Liq. Auth.*, 237 A.D.2d 203 (1st Dep't 1997) ("[I]n view of Respondent's firm statement of policy, it is evident that resort to administrative remedies . . . would have been futile . . . ."); *Matter of Counties of Warren & Washington, Indus. Dev. Agency v. Vill. of Hudson Falls Bd. of Health*, 168 A.D.2d 847, 848 (3d Dep't 1990) ("[E]xhaustion of remedies . . . would be futile since the [review] Board had clearly demonstrated by their prior attempts to halt [petitioners'] project . . . that petitioners are not likely to receive an unbiased review from the Board.").

127. Indeed, "the salutory goals of relieving the courts of the burden of deciding questions entrusted to an agency, preventing premature judicial interference [with the work of the agency,] and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its expertise and judgment" would not be served by mechanically applying the exhaustion rule when it would be an exercise in futility and a waste of administrative and judicial resources to require a petitioner to seek an appeal from an administrative agency merely for the subsequent agency to restate the same bases for denial. *Friedman v. Rice*, 30 N.Y.3d 461, 474-475 (2017) (futility established where agency demonstrated "unwavering position" regarding to petitioner's requests). Particularly, in the context of land use—such as the instant matter—the finality rule cannot be "mechanically applied." *East End Resources, LLC*, 135 A.D.3d at 900-901. Rather, the "courts must take a pragmatic approach and, when it is plain the resort to

an administrative remedy would be futile, an article 78 proceeding should be held ripe…" *Walton v. New York State Dept. of Correctional Services*, 8 N.Y.3d 186, 196 (2007) (internal citations omitted).

128. Similarly, the futility exception is indelibly intertwined with the concept that a petitioner who is faced with irreparable harm need not exhaust administrative remedies. *See Watergate II Apartments v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978); *Bankers Trust Corp. v. N.Y. City Dep't of Fin.*, 1 N.Y.3d 315 (2003); *Matter of Holzman v. Commission on Jud. Conduct*, 93 A.D.3d 431 (1st Dep't 2012).

129. Another "exception to the finality requirement exists where the municipal entity uses repetitive and unfair procedures in order to avoid a final decision." *East End Resources, LLC*, 135 A.D.3d at 900-901, *supra* (internal citation omitted). Indeed, "[g]overnment authorities may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision for purposes of the finality requirement", nor is a property owner "required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination." *Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) ("Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision"); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999) ("requiring [the owners] to persist with this protracted application process to meet the final decision requirement would implicate the concerns about disjointed, repetitive, and unfair procedures."); *East End Resources, LLC*, 135 A.D.3d at 901.

130. Although these two exceptions to the finality requirement—futility and unfair/repetitive procedures—are distinct concepts, in the instant case, the analyses for the two are

the same. Petitioner argues that although the DOB made a final decision, seeking another final decision from the BSA would be futile because the City used—and in all likelihood will continue to use—repetitive and unfair procedures in order to avoid a final decision. This is demonstrated by the most recent arbitrary and capricious action in which Mr. Rebholtz determined that Petitioner cannot renovate and build out the space completely on the vacant floors without a tenant first leasing those floors. ***See*** **Exhibits 96, 105, 110.**

131. To this end, the case at bar is strikingly similar to *Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014), where the Second Circuit held that a town's unfair and repetitive maneuverings resulted in futility. In *Sherman*, the Petitioner, an experienced real estate developer, purchased an undeveloped parcel of land zoned for residential use, hoping to develop the property into a mixed use residential and recreational development including 385 units of housing, an equestrian facility, baseball filed and tennis courts. *Id*. at 558. After the Town's Planning Board began to review the developer's proposal, the Town began erecting constant obstacles to Petitioner ever reaching a final determination from the Planning Board or the Town on his application. *Id*. at 558-560. These obstacles spanned over a decade and included a one-and-a-half-year moratorium on major subdivision approvals (which only affected the Petitioner), multiple changes to the Town's zoning regulations after the Petitioner had submitted updated plans, refusal by the Board to place Petitioner's proposals on the agenda and several reneged project approvals by the Board. *Id*.

132. The Town's machinations cost the Petitioner millions of dollars in taxes, interest, carrying costs and expensing, exhausting him financially to the point of facing foreclosure and potential personal bankruptcy. *Id*. at 560. Consequently, the Petitioner sued the Town arguing, *inter alia*, that the Town's actions amounted to an unconstitutional taking. *Id*. The District Court

dismissed the Petitioner's claims holding that the Petitioner failed to show that seeking a final decision from the town would be futile and that his claims were therefore unripe. *Id*.

133. The Second Circuit Court of Appeals overturned the Southern District's, holding that in consideration of the Town's tactics, the Petitioner was not required to obtain a final determination from the Town and that his claims were ripe and adequately alleged. *Id*. at 563. Specifically, the Court found that:

> [s]eeking a final decision would be futile because the Town used — and will in all likelihood continue to use — repetitive and unfair procedures, thereby avoiding a final decision. Sherman is therefore not required to satisfy the first prong of *Williamson County*. This conclusion is consistent with the principles behind *Williamson County*. The final decision requirement ensures that a court knows how far a regulation goes before it is asked to determine whether that regulation "goes too far." In this case, we are not dealing with any one regulation but the Town's decade of obstruction. A final decision is not necessary to evaluate whether that obstruction was itself a taking. *Id*.

134. The Court noted that although it is not always easy to distinguish procedures that are simply frustrating from procedures that are unfair or would be futile to pursue, "*when the government's actions are so unreasonable, duplicative, or unjust as to make the conduct farcical, the high standard is met.*" *Id*. (emphasis added). Thus, although the Town will "likely never put up a brick wall in between [the Petitioner] and the finish line," the finish line will "always be moved just one step away until [the Petitioner] collapses." *Id*.

135. Similarly, in *Lehigh Portland Cement Co. v. N.Y.S. Dep't of Envtl. Conservation*, 87 N.Y.2d 136, 142 (1995), the Petitioner submitted petitions to an agency for permission to use waste materials instead of raw materials in its cement manufacturing process. The Petitioner invoked the provisions of the Uniform Procedures Act, "which authorizes a procedure to induce prompt administrative determinations of permit applications." *Id*. at 141. The

agency, however, took the long-standing position that the Uniform Procedures Act did not apply to the *Lehigh* Petitioner's petitions. *Id* at 141. When the Petitioner brought a declaratory judgment action against the agency, the agency argued that the case should be dismissed because the Petitioner did not seek an administrative ruling as to the applicability of the Uniform Procedures Act to the Petitioner's petitions. *Id*. The Court of Appeals ruled that the pursuit of administrative remedies would have been futile because of the agency's clear and unequivocal statement regarding its long-established position was that it was not governed by certain statutory timeframes, which affected the status of Petitioner's claims. *Id*. at 142-143. The Court noted that the agency's definitive position left the Petitioner "in the dark as to when it could expect" its application to be processed. *Id*. at 141.

136. Although both state and federal courts in New York have yet to determine the precise contours of the futility exception, the foregoing case law, along with decisions from neighboring judicial circuits and appellate divisions, are instructive on this issue. *See Cmty. Servs. for the Developmentally Disabled of Buffalo v. Town of Boston*, 2018 WL 1795644 (W.D.N.Y. 2018).

137. For example, in *City of Monterey v. Del Monte Dunes*, 920 F.2f 1496 (9th Cir. 1990), *aff'd.*, 526 U.S. 687 (1999), the Ninth Circuit held that the seeking of a final decision would be futile under circumstances similar to both Sherman, 752 F.3d 554, and the instant case. In that case, the property owners' proposal to develop a property with 344 residential units was denied by the planning commission, but the city planners stated that a proposal with 264 units would be favorably received. *Id*. at 1502. The owners 264-unit plan was also denied, and the city planners then stated that a 224-unit proposal would be favorably received. *Id*. The owners' 224-unit plan was subsequently denied and the owners' appealed to the city council. *Id*. The city council

sent the project back to the planning commission requesting that it consider a 190-unit plan; however, the owners' 190-unit plan was also denied *Id*. When the owners again appealed to the city council, their plan was approved contingent on the satisfaction of fifteen conditions. *Id*. at 1503. The owners submitted a reformed plan that substantially met these conditions, but this was also denied by both the planning commission and city council. *Id*. at 1504-1506. But none of this constituted a "final decision."

138. The Ninth Circuit held that the property owners did not have to exhaust their administrative remedies. *Id.* at 1505. The court found that "[r]equiring [the owners] to persist with this protracted application process to meet the final decision requirement would implicate the concerns about disjointed, repetitive, and unfair procedures…" *Id*.; *see also*, *Kittay v. Giuliani*, 112 F. Supp 2d 342 (S.D.N.Y. 2000), *aff'd*, 252 F.3d 645 (2d Cir. 2001) (internal citations omitted) (the futility "exception was created to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved.").

139. Here, as in both *Sherman* and *City of Monterey*, *supra*, requiring Petitioner to persist with a similar protracted application process would implicate the same concerns. *See Id.* at 752 F.3d 554 at 562. This case concerns two decade's worth of red tape doled out by the City through the Respondents. Over the last 20 years, the City has made it abundantly clear that Petitioner's efforts to obtain approval for—or even a fair shake at—his project are futile as their ultimate goal is to "take back" petitioner's privately owned building "by any means necessary".

ii. Futility is further established insofar as the BSA is merely another arm of City Hall.

140. Petitioner's attempt to appeal the DOB's decision regarding the applicability of Rule 51 to P.S. 64 would be futile as the BSA's inherent bias is apparent. Indeed,

the BSA it merely an extension of City Hall, as it consists of five commissioners, each of whom were hand selected and appointed by Mayor DeBlasio, and, therefore, are invariably connected to the Mayor's interests.[36] Mayor DeBlasio made his own motives abundantly clear in an October 2017 Town Hall meeting in which he stated the following, in pertinent part:

> **Decisions made a long time ago were a mistake…To place [P.S. 64] in the hands of a private owner was a failed mistake. So I'm announcing tonight, the city's interest in reacquiring that building. We are ready to right the wrongs of the past and will work with Councilmember Mendez and her successor to get that done.**[37]

141. The Mayor's publicly expressed agenda has been echoed by a multitude of elected City officials. For example, as recently as February of 2019, Manhattan Borough President Gale Brewer stated that the building is "perfect for eminent domain" while Rivera says the city should "**by any means necessary**" bring the building "back to community use."[38] Similarly, in February 2019, City Comptroller Scott Stringer stated that "It's going to take another mayor to change this and do the right thing," **City Comptroller Scott Stringer** said at a Thursday news conference outside of the long-vacant building. "**We need Mayor at all times relevant hereunder to keep his word**."[39] Also in February of 2019, City Council Member Carlina Rivera stated that Petitioner's building **is a blight on the East Village and the Lower East Side and we desperately need to take action as a city to right the wrong that is this building** behind me…It's not just an eyesore, it has been neglected and it has the potential to be something so much greater and better for this community."[40]

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[36] www1.nyc.gov/site/bsa/about/about.page ***"The Board, pursuant to the 1991 City Charter, contains five full-time, Mayoral-appointed commissioners."***
[37] www.thevillager.com/2017/10/city-interested-in-reaquiring-old-p-s-64-mayor-tells-town-hall/
[38] ny.curbed.com/2019/2/7/18215622/nyc-east-village-ps-64-mayor-bill-de-blasio
[39] ny.curbed.com/2019/2/7/18215622/nyc-east-village-ps-64-mayor-bill-de-blasio
[40] https://ny.curbed.com/2019/2/7/18215622/nyc-east-village-ps-64-mayor-bill-de-blasio

142. The Mayor's next step came ten months later, at a media roundtable on August 23, 2018, when adding malicious insult to plaintiff's ongoing injury the Mayor publicly stated that the petitioner "has been exceedingly uncooperative…because the city tried to have a productive conversation about purchase...We've gotten nowhere so far. We're not giving up. We're working very closely with the councilmember, Carlina Rivera. I'm very frustrated with that owner***….Eminent domain, though it may not be an immediate option, is certainly something I want to know more about,.. but I had hoped the best solution here would be a direct purchase***," de Blasio explained. "That's not off the table. It's just we're just not getting any cooperation so far."[41]

143. Not only did the Mayor never once reach out to the petitioner in between his October 2017 statement and August 2018 statement, **but to this day**, plaintiff has never received a single offer, email nor call from the Mayor or anyone in his office ever. In fact, plaintiff was so shocked at the brazenness of the Mayor's lie, that plaintiff went to the press and challenged the Mayor to release any phone logs, emails, texts, or letters to substantiate the Mayor's claim.

Lender Foreclosing – No Permits to Build

144. These statements made by the Mayor were the final death blow to Petitioner, as the property's lender is trying to foreclose on the property because it now feared that Petitioner would lose the building as a result of the City's unlawful actions. These sentiments have also reverberated throughout the echelons of City government and have clearly permeated the individual City agencies including the DOB and BSA.

145. In fact, in addition to the DOB rejecting—and reneging approval for—a multitude of Petitioner's proposals using spurious and irrational reasoning, at best, Respondents

[41] https://www1.nyc.gov/office-of-the-mayor/news/435-18/transcript-mayor-de-blasio-holds-local-media-roundtable

were erecting other major impediments to thwart Petitioners efforts including, but not limited to, the following: targeting and designating P.S.64, alone, as an historical landmark, even though the City passed on the opportunity to landmark the building before putting it up for auction; the City adopted Rule 51 during the pendency of—and in direct response to—Petitioner's appeal to the BSA regarding the DOB's denial of Petitioner's 19-story building permit application from 2005; the City adopted an unprecedented rezoning of the entire geographical area encompassing P.S.64 in 2008, categorically preventing Petitioner from utilizing the City's Community Facility bonus, available to all other developers in every other part of the City.

146. Time and time again, Petitioner has done his best to adapt and acquiesce to the barrage of assaults; however, it is evident that although the DOB will "likely never put up a brick wall in between [Petitioner] and the finish line," the finish line will "always be moved just one step away until [the Petitioner] collapses." *Sherman v. Town of Chester,* 752 F.3d 554 at 563. It is also worth noting that here, like *Sherman*, 752 F.3d at 564, Petitioner has adequately alleged a taking insofar as the City's actions prevented the Petitioner from making any economic use of his property, the City interfered with the Petitioner's reasonable investment-backed expectations, and the City's conduct was unfair, unreasonable, and in bad faith. *Sherman*, 752 F.3d at 564.

147. Therefore, it is evident that any effort by Petitioner to seek relief from the DOB or BSA would be utterly futile.

iii. The DOB has engaged in repetitive and unfair procedures in order to prevent Petitioner from obtaining interior demolition and construction permits.

148. Even a perfunctory analysis of the efforts taken by the DOB and the observable taint obstructing Petitioner's project demonstrates the futility of requiring Petitioner to exhaust administrative remedies. The following is merely a sampling of the instances fully

elucidated in the summary of facts, *supra*, of how the DOB has continuously engaged in repetitive and unfair procedures to avoid a final decision:

- **Fall 2004: filed for building permits with the DOB for 19 story building**;
- November 29, 2004: DOB issued six objections.
- March 21, 2005: DOB issued a decision refusing to remove one of its objections.
- April 20, 2005: I filed BSA appeal;
- **May 2005: Rule 51 was formally adopted**;
- October 18, 2005: BSA issued decision upholding the DOB's determination that an institutional nexus is a reasonable pre permit requirement;
- **June 2006: P.S. 64 became an historical landmark**;
- **February 2013: filed for a building permit** with the DOB to renovate PS 64 into a Use Group 3 facility within the existing building envelope, which includes a college student dormitory and nonprofit with sleeping accommodations after **Cooper Union signed a 15-year lease agreement for the second-floor of the building in December 7, 2012 and the third-floor on February 22, 2013.**
    - Additionally**, on May 3, 2013, Joffrey Ballet signed a ten-year lease for the ground floor and first floor of the building.**
- **March 2013: DOB issued interior demolition permits**
- **August 8, 2013: DOB approved plans to renovate and build out vacant floors**
- **August 22, 2014: DOB issued work permits** allowing for the conversion of Old PS 64 into a dorm;
- **September 3, 2014: Councilmember Mendez sent a letter to the DOB requesting a final determination that the Joffrey Ballet lease was not complaint with ZR22-13 and that the Cooper Union lease was not compliant with Rule 51.**
- **September 22, 2014**: **Just over two weeks after Councilmember Mendez's letter and despite the fact that it had previously approved my application, DOB issued a stop work order with six objections;**
    - **The very same day, the DOB sent a letter to Councilmember Mendez informing her that it had acquiesced to her demands and issued a stop work order.** Enclosed was the stop work order itself.
- **June 17, 2015: All objections were resolved**;
- **July 13, 2015: New work permits were issued by the DOB**;
- **July 31, 2015: DOB issued new objections**, demanding that revised executed leases be submitted;
- **August 4, 2015: Just four days later, DOB issued another stop work order**;
- October 21, 2015: DOB issued a letter indicating its intent to revoke the 2015 permits;
- **March 2, 2016: DOB again revoked permits;**
- **May 26, 2016**: DOB approved a ZRD1 zoning determination authorizing to renovate and buildout vacant floors
- **August 11, 2016: I submitted a new lease for Adelphi University to the DOB**;
- **April 20, 2017:** DOB issued three illogical objections including an objection that it did not recognize Adelphi as an accredited college or university, claimed they were in

violation on another property (nothing to do with old PS64 and in fact ended up DOB was wrong) and said Adelphi lease was an option to lease beds/not a lease

- **May 17, 2017**: **DOB again issued the same objections**;
- **July 31, 2017**: **My counsel sent a letter to the DOB Commissioner addressing each of the objections and including an executed lease modification agreement**;
- **August 22, 2017:** The **DOB refused to lift any of its April 2017 objections**
- **September 10, 2017: I spoke with Mayor de Blasio in Tompkins Square Park and explained that I had complied with Rule 51**;
- **September 14, 2017: I followed up with a letter to Mayor de Blasio, reassuring him that I had complied with Rule 51. (Exhibit 114)**
- **October 23, 2017:** At the DOB's suggestion, I attempted to schedule a meeting with DOB.
- **November 16, 2017: A representative from the DOB emailed me and reiterated its objections, stating that** "**I do not feel that a meeting is warranted at this time**."
- **February 6, 2019: City Hall- The Big Show:** The city blocks off 10th street at Avenue B and C and vacates the buildings neighboring old PS64 claiming the building is unsafe and falling. DOB, NYPD, FDNY and Con Ed all had at least three vehicles there for the show. DOB engineer Marco Frias comes out of the building in the afternoon with his team of engineers and speaks to me and the fire chief and says" there is no eminent danger or threat, open up the streets and tell people they can go back into their buildings". A follow up engineering report confirms same. My attorney found out that someone from the Mayor's office called into 311 to start the show. **Since then, the DOB has sent weekly—if not daily—emails pushing for so-called "emergency" work to renovate this building on a piecemeal basis**.
- **May 10, 2019:** After the February 2019 state court Judge said we weren't ripe we submitted the question to DOB does Rule 51 apply since we don't have additional development rights (square feet) to build. DOB responded with a ZDR1/CCD1, zoning/construction code determination stating Rule 51 still applies and part of the building needs to be leased to get a permit.
- **August 12, 2019:** I inquired to DOB to confirm that leasing one floor satisfies Rule 51 and DOB issued a ZRD/CCD1 stating it does but you cannot build out the vacant floors without a signed lease for those floors. **This is the direct opposite of DOB's approval to build out the vacant floors on August 8, 2013 and May 26, 2016 and is totally without question Arbitrary and Capricious**.

149. Every time Petitioner submitted or was going to submit a proposal to the DOB, the City or the DOB imposed another roadblock, sending Petitioner back to the drawing board. Particularly telling are the instances in which the DOB had granted Petitioner permits only to renege as a result of direct political interference or specious reasoning. The City' strategy of sabotage and attrition has depleted Petitioner's financial resources and destroyed his investment. These are precisely the type of repetitive and unfair procedures the Court in *Sherman*, and the

various decisions from concurrent federal and state jurisdictions, have held obviate the need to exhaust administrative remedies.

150. To date, the DOB refuses to issue Petitioner a permit to renovate the building. Consequently, on December 20, 2017, as a result of Respondents continuous efforts to thwart his project, and the Mayor's public statements that he will stop at nothing the "reacquire" the building, Petitioner filed a lawsuit seeking a declaratory judgement that Rule 51 does not apply to his proposed building plans. ***See*** **Exhibit 115**. Although Petitioner's lawsuit was dismissed on ripeness ground on February 8, 2019, as described in above and in further detail herein, it is clearly futile for Petitioner to exhaust administrative remedies.

151. In any event, despite nearly two-decades of inaction, since the Court's February 8, 2019 decision, the City has suddenly began issuing a barrage of violations for "emergency short term" renovations—on a building the City has continuously promised to "reacquire"—that would be entirely unnecessary if DOB simply issued Petitioner a permit to renovate the building. ***See*** **Exhibits 77-86.** Instead, over the past six months, the City has attempted to exhaust Petitioner's resources by serving him with piecemeal violations, each of which costs tens of thousands of dollars to repair and is significantly more costly and times consuming than a full renovation would be.

152. Significantly, Petitioner's engineer's report notes that the "interior fireproof" issues are a direct and singular result of the DOB's refusal to issue Petitioner a full renovation permit**. Exhibit 41**. Indeed, these so-called "defects" were created because DOB authorized Petitioner to perform interior demolition work but subsequently issued a Stop Work Orders prohibiting him from completing the renovations.

153. As a result of DOB's and the LPC's joint February and March of 2019 findings, in a joint letter dated March 14, 2019, City officials, including Councilmember Carlina Rivera, Manhattan Borough President Gale Brewer, Comptroller Scott Stringer, and several other elected officials wrote a scathing letter to the Chair of the LPC, Sarah Carroll, admonishing Petitioner based on the LPC's March 4, 2019 findings. ***See*** **Exhibit 86**. Specifically, these individuals allege that Petitioners alleged failure to replace a "severely deteriorated" tarp has "expos[ed] the brick beneath to snow, rain, wind, and sunlight. It appears that Mr. Singer's failure to maintain the tarp has compromised the stability of the building*." Id.*

154. The foregoing letter exposes the City's hypocrisy, lies and circular logic. Indeed, it was the LPC itself that has prevented Petitioner from replacing the very tarp hat these elected officials erroneously claim resulted from Petitioner's negligence. The evidence unequivocally proves that Petitioner wanted to protect the building, but the City would not let him. Specifically, on September 19, 2018, John Weiss, Deputy Counsel for the LPC emailed Petitioner stating "**sorry for the delay in getting this information to you**. I've spoken to DOB staff and you should make an appointment to meet with the Manhattan Borough Commissioner to **discuss how the tarps will be installed** to arrange for a partial lift of the SWO to allow the work to occur." ***See*** **Exhibit 39.** It is quite odd that the LPC's Deputy Counsel would delay such an "urgent matter," particularly since Petitioner cannot take any remedial action whatsoever without LPC's express consent.

155. Heeding to Mr. Weiss' advice, Petitioner forwarded the email to DOB's Manhattan Commissioner, Marty Rebholz, with a message that he wanted to discuss replacing the tarp. When Mr. Rebholz failed to respond, Petitioner followed up multiple times; however, despite

Petitioner's diligence, Mr. Rebholz never responded. **Exhibit 39, 95-98.** Without the City's approval, Petitioner was not authorized to perform any work on the building. *Id.*

156. Petitioner submitted an Emergency Temporary Stabilization plan to the LPC to address the foregoing citations. **Exhibit 93.** On June 28th, 2019, the LPC approved Petitioner's plan and determined that he could move forward without a permit, as they were being undertaken in response to the DOB Commissioner's finding that the structural conditions were "suddenly" unsafe. *Id*. Since this date, DOB and the LPC have inundated Petitioner with daily emails regarding the status of these repairs. **Exhibits 99-103.** Oddly, despite DOB's years of dilatory tactics and indifference, it was suddenly able to expedite work.

157. The irony of the City's conduct over the past six months is that Petitioner has been prevented from making *any renovations and repairs whatsoever* as a direct result of the DOB's refusal to issue Petitioner a building permit. If DOB simply issues Petitioner a permit to renovate the building, he will not only repair the alleged defects, but will repair the *entire* building, thereby obviating the need for any further emergency work and saving both the City's and Petitioner's valuable and limited resources. **See Exhibit 116.**

158. Additionally, Mr. Sosnick's influence over the City and its various agencies is obvious. Indeed, Mr. Sosnick is inextricably intertwined—and has given millions of dollars to—every organization that is either actively lobbying against Petitioner's project or that actively fought to landmark the building and downzone the area in order to prevent Petitioner from furthering his original development plans. ***See*** **Exhibits 118-127.** These groups include the EVCC, which receives $60,000 yearly, the Greenwich Village Society for Historic Preservation and the Historic Districts Council, each of which have received $250,000 every year since 2011, and the New York City Landmarks Conservancy, which has received *$1.1 million dollars every year since*

2011. *Id.* This is particularly troubling in light of the fact that local activist groups, such as the Greenwich Village Society for Historic Preservation, falsely proclaim to be independent, citizen-funded community groups when, in reality, they are a merely a wholly owned subsidiary of Mr. Sosnick.

159. To this end, the City has done everything in its power to thwart Petitioner's efforts to prove these connections. In fact, in what can only be described as an act of clear self-preservation and desperation, the City continuously evades Petitioner's request for relevant documents on the New York State Freedom of Information Law ("FOIL"), thereby hindering Petitioner's ability to compile more evidence demonstrating the Respondents' orchestrated assault against his project. In fact, *the City has entirely ignored and/or failed to respond to multiple FOIL requests submitted by the Petitioner*. **Exhibit 107.**

160. The instances in which the City has responded have included nothing more than additional obstruction and outright lies. This includes the City's efforts to withhold information concerning emails from Mr. Sosnick's agent and Trustee, Paul Wolf, to New York City's Commissioner of City Planning, Carl Weisbrod seeking purchase P.S. 64 out from under Petitioner while Petitioner was awaiting the DOB's review of the Adelphi lease. **Exhibits 111, 113, 136.** Here, although the City initially responded that no such documents existed, Petitioner responded with unequivocal proof that such documents do exist. **Exhibit 111**. After being caught red handed in a blatant lie, the City immediately Petitioner's representative angrily demanding to know how Petitioner acquired this evidence which, evidentially, the City had intended to conceal) and providing what can only be described as a lame excuse as to why no other documents were produced.

161. Subsequently, Petitioner appealed the City's initial FOIL response and sent an additional FOIL request seeking the same documents. Petitioner's representative later received a response from the City that "**DCP's Manhattan Office staff were not familiar with any communications at the site. As such, it was determined that a search of archived email accounts was not warranted**." *Id*. This was the *second time* in which the City had *admittedly* violated the City's FOIL search protocol and undermined the very purpose of the Freedom of Information Law by asking the individuals whom are potential subjects of the search itself whether they were "familiar with" such communications. Then, according to Mr. Rodman, based on DCP's objective assessment, DCP unilaterally determined that a search was "not warranted."

162. To say that the City's response wreaks of corruption is an understatement. By responding in such a manner, Mr. Rodman has indicated that government is vested with the unfettered discretion to unilaterally curate and censor its responses to FOIL requests. But this is not how the law works and Petitioner is entitled to these documents as a matter of law. *See* New York Public Officers Law, Article 6, Section 84-90, Freedom of Information Law. Even giving the City the benefit of the doubt, Mr. Rodman's response is absurd, as it relies solely on the memory of individuals who may or may not have been involved in such communications. Regardless, the City's response is egregious.

163. To add insult to injury, on June 3, 2019, in an attempt to explain the unprecedented delay, the City, quite conveniently, alleged that "technical difficulties" have prevented it from responding to Petitioner's various requests. **Exhibit 108.**

164. Apparently, the City is trying to delay long enough for the lender to finalize its foreclosure against Petitioner, or, perhaps this is how long it will take the City to delete their archives and shred the records. The City's conduct is not only suspicious and unacceptable, it is

an illegal affront to the laws that were promulgated with the express purpose of facilitating government transparency.

165. Indeed, the Legislative Declaration of New York Public Officers Law, Article 6, Section 84-90, Freedom of Information Law, states that "**a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions**….**The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society**. **Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality**." *Id*. (Emphasis added).

166. Yet, the City continues to shroud itself "with a cloak of secrecy" in defiance of the law. Evidently, the Mayor and the City believes that freedom of information is a discretionary function and that it operates above the law. But the City is mistaken, and the bad actors must be held accountable.

167. It is clear that the City has tried to actively conceal its records pertaining to P.S. 64 and postpone its responses long enough to ensure that it has "required" the building and that any records establishing its conspiracy to disenfranchise Petitioner have vanished.

168. Petitioner has, therefore, satisfied the futility standard, as the City's conduct has been so unreasonable, duplicative, [and] unjust as to make the conduct farcical." *Id*.; *see also Ctys. of Warren & Washington Indus. Dev. Agency v. Vill. of Hudson Falls Bd. of Health, 168 A.D.2d 847*, 848 (3d Dep't 1990) ("exhaustion of remedies before the Board would be futile since the Board and it's attorney have clearly demonstrated by their prior attempts to halt the project that petitioners are not likely to receive an unbiased review from the Board).

iv. The DOB has clearly dug in its heels and made clear that any application Petitioner submits will be denied.

169. The DOB has maintained its long-standing position that Rule 51 applies to Petitioner's building. This is evidenced by DOB's May 10, 2019 denial of Petitioner's application seeking to obviate the application of Rule 51 to P.S.64. *See* DOB ZRD1/CCD1 Response Form, annexed hereto as **Exhibit 18.** In its Denial, the DOB stated that Rule 51 applies "**to all new proposed student dormitories, without exclusions based on zoning regulation**" and that "**the Dorm Rule does not provide a process or criteria for a waiver, so the Department cannot grant one**." The DOB's response expressly demonstrates the DOB's long-standing position that Rule 51 does not provide for exclusions under any circumstance and the DOB will therefore never grant Petitioner's request. *Id*.

170. In light of the foregoing, it is incontrovertible that the DOB has "dug in its heels and made clear that all such applications will be denied." *See East End Resources*, 135 A.D.3d at 901. Given the DOB's long-standing position, requiring Petitioner to persist with a protracted application process to meet the final decision requirement would implicate the very concerns about disjointed, repetitive and unfair procedures that the exhaustion requirement seeks to avoid. *See City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999); *see also Sherman v. Town of Chester,* 752 F.3d 554 at 563.

v. Petitioner is not required to exhaust administrative remedies because he is facing imminent and irreparable harm.

171. In *Sherman*, the court found futility where, *inter alia*, "[o]ver ten years, Sherman was forced to spend over $5.5 million on top of the original $2.7 million purchase. As a result, he became financially exhausted to the point of facing foreclosure and possible personal bankruptcy." *See Sherman*, 752 F.3d at 563. Here, Petitioner has faced the same challenged and

similarly faces the very same imminent and irreparable harm. Not only has Petitioner been forced to expend over $73 million—$70 million over the purchase price—but his property is currently being foreclosed on. There is no question that Petitioner is currently unable to produce the approximately $50 million necessary to stop the foreclosure; however, if the Court determines that Rule 51 does not in fact apply, then the DOB will be forced to issue Petitioner a building permit. This will immediately reaffirm the value of the property, enable Petitioner to solicit additional investors and lenders to thwart foreclosure and/or convince the debtee-bank that foreclosure is unnecessary, and to find a tenant or tenants to provide the building with a consistent stream of revenue to pay the building's debt and operating expenses once renovated.

172. In fact, Madison Realty Capital provided Petitioner with a Term Sheet affirming that if he obtained a construction permit it would lend him the money to pay off the current bridge loan by providing a construction loan. **Exhibit 117.** Thus, the Court's determination regarding the application of Rule 51 to the instant matter will have a dispositive impact on Petitioner's ability to obtain an additional loan and prevent foreclosure.

173. To this end, requiring Petitioner to appeal the DOB's decision to the BSA—a process that took over *eight months* the last time he tried—in light of the irreparable harm presented by the impending foreclosure action would be futile. *See Uzwii v. Robins*, 133 A.D.2d 695, 697-698 (2d Dep't 1987) ("faced with imminent eviction, it would have been futile for the petitioner to pursue the agency's application process and await its determination."). Lest there be any doubt about the futility of appealing to the BSA, Petitioner's prior appeal to the BSA to interpret the "proof of ownership or control" provision of Rule 51 has been pending for nearly two years, since September 21, 2017. *See* BSA Calendar Number 2017-271-A.[42]

[42] https://www1.nyc.gov/site/bsa/applications/active-applications.page

vi. Exhaustion of administrative remedies is not required because the determination of whether Rule 51 applies is purely a question of law.

174. The Court of Appeals recently affirmed its long-standing precedent that a court's deference to an administrative agency has an important, foundational limit: "where the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency. In such a case, courts are free to ascertain the proper interpretation from the statutory language and legislative intent." *Matter of Wegmans Food Mkts., Inc. v. Tax Appeals Tribunal of the State of N.Y.*, 2019 N.Y. Slip Op 05184 (2019) (internal citations omitted); *see also International Union of Painters & Allied Trades, Dis. Council No. 4 v. New York State Dept. of Labor*, 32 N.Y.3d 198 (2018); *Seittelman v. Sabol*, 91 N.Y.2d 618, 625 (1998); *Sievers v. City of New York, Dep't of Bldgs.*, 146 A.D.2d 473, 473 (1st Dep't 1989) ("While ordinarily the doctrine of exhaustion of administrative remedies would require petitioner to bring his claim before the Board of Standards and Appeals, where the only question raised is a question of law, viz., whether the sign violates the Zoning Resolution, [t]he expertise of the Boards of Standards and Appeal is not involved and has no relevancy to the case at bar.").

175. Here, Petitioner seeks a declaratory judgment that Rule 51 does not apply to buildings, such as Petitioner's, that seek only to renovate the interior of the building. This dispute hinges on the construction of the statutory and regulatory framework of Rule 51, rather than a substantive factual dispute between the parties relating to the building itself. Indeed, it is undisputed that Petitioner seeks only to renovate the interior and exterior of the building and that the plans submitted to the DOB do not reflect a floor area ratio ("FAR") in excess of what is permitted by the applicable regulations (and that Petitioner is, in fact, prohibited from utilizing the City's community facility use zoning bonus FAR).

176. The applicability of Rule 51 in such instances is purely a question of law insofar as it requires a court to interpret the applicability—or lack thereof—of Rule 51 in light of the statutory language and legislative intent. Therefore, "because this dispute turns on the construction of the relevant . . . regulatory framework, rather than a substantive factual dispute, the matter falls within the exceptions to the exhaustion of administrative remedies doctrine"); *G. Heilman Brewing Co*., 237 A.D.2d at 203, *supra*, ("a declaratory judgment action may be maintained to challenge the . . . application of a particular statute without exhausting administrative remedies."); *Rosenberg v. 135 Willow Co.*, 130 A.D.2d 566, 567 (2d Dep't 1987) ("The only question raised here is a question of law as to whether the Petitioner's long-term parking lease violates New York City Zoning Resolution § 25-412. Therefore, the expertise of the Board of Standards and Appeals is not involved and has no relevancy in the case at bar." (internal quotation marks omitted)); *Kravitz v. DiNapoli*, 122 A.D.3d 1199, 1202 (3d Dep't 2014) (finding an exception to the exhaustion doctrine where "the allegations in the petition [did] not raise an issue of fact that should initially be addressed by the administrative agency having responsibility so that the necessary factual record can be established.") (internal quotation marks omitted).

vii. Petitioner is not required to exhaust administrative remedies under the permissive language of the statute.

177. Where the language in a code section is permissive as opposed to mandatory, exhaustion of administrative remedies is not required. *Matter of Custom Topsoil, Inc. v. City of Buffalo*, 81 A.D.3d 1363, 1365 (4th Dep't 2011) (emphasis added) (petitioners not required to file appeal to a zoning board where statute provided that "an appeal *may* be filed" with the Board of Appeals); *see also Triomphe Disc Corp. v. Chilean Line*, 93 A.D.2d 228, 231 (1st Dep't 1983) (exhaustion is not prerequisite because "[t]he statute is clearly couched in permissive

terms, providing in pertinent part that any person may file with the commission a complaint"); *Green v. Safir*, 174 Misc. 2d 400, 404-05 (Sup. Ct. N.Y. Cty. 1997).

178. New York City Charter ("NYC Charter") Chapter 26, Section 648 pertains to appealing a decision from the DOB and states the following:

> **Appeals <u>may</u> be taken** from decisions of the commissioner and of a deputy commissioner or the borough superintendent acting under a written delegation of power filed in accordance with the provisions of section six hundred forty-two or subdivision (c) of section six hundred forty-five of this chapter, to the board of standards and appeals as provided by law. NYC Charter 26-648 (emphasis added)

179. Similarly, NYC Charter, Chapter 27, "Board of Standards and Appeals," Section 669, "Procedure on appeals," states that "[a]n appeal may be taken by any person aggrieved or by the head of any agency." *Id*. at §27-669.

180. In *Custom Topsoil, Inc.*, the petitioners initiated an article 78 proceeding seeking, *inter alia*, to compel the City of Buffalo to issue an amended construction permit. *Id*. at 1364. The respondent moved to dismiss the action on the grounds that the petitioners had failed to exhaust their administrative remedies. *Id*. at 1365. The court denied the respondent's motion to dismiss, holding that the relevant provision of the City's code, which stated, in pertinent part, that "in case it is alleged by an appellant that there is error…in any order, requirement, decision, grant or refusal made by…[an] administrative official…an appeal *may be filed*…" is permissive, and that the petitioners were therefore not required to exhaust administrative remedies. *Id*. at 1365.Similarly, here, based on the permissive language of NYC Charter §§ 26-648 and 27-669, Petitioner is not required to exhaust administrative remedies in order to appeal the DOB's determination.

b. Rule 51 does not apply because Petitioner does not receive additional FAR under the Community Facility Use Zoning Allowance and the building is not "oversized.

i. Legislative history and legislative intent are integral to statutory interpretation and must be examined through all available sources.

181. The prevailing view of the Court of Appeals has been, wisely, that the overarching duty of the courts in statutory interpretation is always to ascertain the legislative intent through examination of all available legitimate sources. *See People v. Wallace*, 31 N.Y.3d 503, 507 (2018); *see also Yatauro v. Mangano*, 17 N.Y.3d 420, 427 (2011) ("When presented with a matter of statutory interpretation, our primary consideration is to ascertain and give effect to the intention of the Legislature."). "Generally, inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history." *Wallace*, 31 N.Y.3d at 507, *supra*, citing *Matter of Sutka v. Conners*, 73 N.Y.3d 395, 403 (1989); *see also ATM One, LLC v. Landaverde*, 2 N.Y.3d 472 (2004).

182. "The legislative intent is the great and controlling principle, and the proper judicial function is to discern and apply the will of the [enactors]." *Matter of Sedacca v. Mangano*, 18 N.Y.3d 609, 615 (2012), citing *Norstrom v. A.W. Chesterton Co.*, 15 N.Y.3d 502 (2010). "Literal meanings of words are not to be adhered to or suffered to defeat the general purpose and manifest policy intended to be promoted." *Council of the City of New York v. Giuliani*, 93 N.Y.2d 60 (1999) (internal citations omitted); *Matter of Sutka v. Conners*, 73 N.Y.3d at 403, *supra*.

183. Chief Judge Breitel articulated the Court of Appeal's predominant opinion in *New York States Bankers Assn. v. Albright*, 38 N.Y.2d 430, 436 (1975):

> **Absence of facial ambiguity is [] rarely, if ever, conclusive**. The words men use are never absolutely certain in meaning; the limitations of finite man and the even greater limitations of his

> language see to that. Inquiry into the meaning of statutes is never foreclosed at the threshold; what happens is that often the inquiry into intention results in the conclusion that either there is no ambiguity in the statute, or that for policy or other reasons the prior history will be rejected in favor of the purportedly explicit statement of the. Then it is often said with more pious solemnity than accuracy, that the clarity of the statute precludes inquiry into the antecedent legislative history. *Id*. (emphasis added).

184. The Court then proceeded to approvingly quote the Supreme Court's opinion in *United States v. American Trucking Assns.*, 310 U.S. 534 (1940):

> Frequently, however, even when the plain meaning did not produce absurd results but merely *an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words*. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on "superficial examination." *New York States Bankers Assn. v. Albright*, 38 N.Y.2d at 437, *supra* (emphasis added).

185. Courts must, therefore, be cautious not to elevate the plain-meaning rule to a point of interpretive primacy, as this approach would be antithetical to the Court of Appeals' precedents. *See*, *e.g.*, *People v. Wallace*, 31 N.Y.3d 503, 507 (2018). Indeed, legal scholars have long criticized the plain-meaning doctrine as frustrating legislative objectives, placing unrealistic demands upon the legislative process, oversimplifying the task of interpretation and for, in and of itself, creating new interpretive problems. *See*, *e.g.*, Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation In The "Modern" Federal Courts*, 75 Colum L Rev 1299 (1975); *see also* Cunningham, Levi, Green and Kaplan, *Plain Meaning and Hard Cases,* 103 Yale LJ 1561 (1994).

186. Simply stated, even if a court were to encounter a rare instance in which the words of a statute are so utterly and indisputably clear—notwithstanding the parties' dispute

over their meaning—that the court could properly interpret the statute's meaning simply by reading its words, this is *not* that case.

187. As will discussed in further detail herein, the legislative history underlying Rule 51 clearly and unequivocally demonstrates that the Rule serves absolutely no function whatsoever to the case at bar. In fact, although the Rule was originally created, at least in part, to address Petitioner's building, the concerns expressed by the proponents and promulgators of the Rule are no longer an issue; namely, Petitioner seeks only to renovate the interior and exterior of his building, which completely conforms to the applicable zoning resolution. Thus, the DOB's finding that Rule 51 applies even though Petitioner is not seeking to increase the building's FAR is wholly erroneous.

ii. The legislative history and purpose of Rule 51 prove that Rule 51 does not apply to Petitioner's case.

188. The sole legislative purpose underlying the promulgation of 1 RCNY § 51-01 was to prevent developers from employing a common "bait-and-switch" tactic taking advantage of the City's Community Facility bulk allowance without actually building a facility to benefit the community. This often created a windfall for unscrupulous developers, who never intended on making good on their promise, while leaving the City bereft. *See*, *e.g.*, *Matter of 9th and 10th St. L.L.C. v. Board of Stds. & Appeals of the City of New York*, 10 N.Y.3d 264 (2008), discussed *infra*. According to the "Statement of Basis and Purpose" for Rule 51, the express purpose of the Rule is to address the "bait-and-switch" issue by preventing developers from treating a Use Group 3, "Community Facility" building, that is entitled to bulk benefits the same as a Use Group 2, residential building, that, although otherwise identical, is not entitled to such benefits. *See* 1 RCNY § 51-01.

189. This express legislative purpose finds further support through the testimony presented before and during the Department of Building's Public Hearing addressing the proposed Rule 51 on April 4, 2005, before the Rule was adopted.

For example, in support of DOB's public hearing regarding the proposed promulgation of Rule 51, Community Board 3, Manhattan submitted a letter to the City stating that the "**absence of such criteria has allowed developers to use the community facility/dormitory designation to obtain bulk benefits with no assurance that the enlarged building will, in fact, be utilized as a dormitory**." *See* Exhibit 5.

190. Similarly, Andrew Berman, Executive Director of the GVSHP, submitted a letter to the City addressing identical concerns in support of the Rule's adoption. Exhibit 4. GVSP June 12, 2017 letter. Specifically, Mr. Berman stated, the following, in relevant part:

> As you know, neighborhoods like the East Village have seen woefully inappropriate development of dorms utilizing the bonus currently afforded for dorm development… However, the problems created by the dormitory zoning bonus is now no longer simply limited to inappropriately-scaled development. There is now also the increasing threat of fraudulent development taking place utilizing this dubious provision of the zoning text, and seemingly increasing difficulty in policing such abuses. *Id*.

191. These sentiments were even likewise echoed by Stephen McGrath, a Deputy Chief in the New York City Law Department's Appeals Division and the DOB's own General Counsel, Mona Seghal, in response to a Court of Appeals decision involving Petitioner in the instant matter, which was decided before Rule 51 was adopted by the City, discussed *infra*. *See* Exhibit 7. According to Mr. McGrath, "[o]ne of the City's main concerns was that, given the developer had no formal affiliation with an educational institution, he would not be providing

the City with a community facility - but rather, he would be building a profitable residence building that would be higher than normally permissible."

192. Even the DOB itself acknowledged that "[t]his developer lacked proof of an affiliation with an educational institution, yet attempted to take advantage of the additional bulk available to dormitories under the community facility provisions of the Zoning Resolution. Today, the Court of Appeals agreed with our decision to deny a building permit to the developer. This is an important step toward preventing abuse of the community facility provisions are intended for uses that actually provide services to the community."

193. It is therefore clear that the express purpose of Rule 51 was to prevent unscrupulous builders from taking advantage of the City's Community Facility bulk allowance without actually building a facility to benefit the community

194. As will be discussed in further detail below, here, P.S. 64 is neither a Class A building, nor is it currently eligible to receive an additional Floor Area Ratio ("FAR") (*i.e.*, "bulk") different from a residential Use Group 2 due to its Community Facility Use status. Thus, the purpose underlying Rule 51 is irrelevant and inapplicable to the instant matter.

iii. Rule 51 does not apply to Petitioner's case.

195. An administrative regulation is valid only to the extent that it is consistent with the agency's principles and goals.

196. In light of the legislative history and purpose underlying Rule 51, and the facts and circumstances of this case, Petitioner respectfully requests a determination that Rule 51 does not apply to P.S. 64's current proposed use. A determination concerning the application of Rule 51 and an interpretation of its legal parameters is a pure question of law and remains within the province and duty of the Court. Such a determination will hopefully remedy the rampant

inconsistencies that have become the new normal for the P.S. 64 student dormitory renovation project.

197. For this reason, a declaratory judgment would be both useful and necessary, in that Petitioner's goal is to determine (so that it may comply with) the standards applicable to renovating its building into a student dormitory, and a declaratory judgment from this impartial Court may be the only avenue for relief.

198. Petitioner seeks a declaratory judgment from this Court holding that Rule 51 is inapplicable to the P.S. 64 proposed college student dormitory use because Rule 51 was adopted for a very specific reason not applicable to this case. Namely, Rule 51 was created for the purpose of helping the DOB prevent "bait-and-switch" developments which benefit from the additional FAR available to Community Facility Uses only to subsequently turn into residencies that would not have received the additional FAR had they been proposed as residencies. Under the current FAR regulations, this concern is no longer valid in the context of this project because residential lots in Petitioner's zoning districts (R7A and R8B) are now subject to the same FAR as Community Facility Uses in those districts. Therefore, given these circumstances, building permits can be issued to renovate Old P.S. 64 into a dormitory without Petitioner having to provide a lease prior to construction. Prior to both occupancy and obtaining a Certificate of Occupancy from DOB, Petitioner will provide the DOB with a lease from an appropriate educational institution or a nonprofit organization demonstrating that the building is not residential and in compliance with the Community Facility Use, as per NYC zoning and the deed.

199. Indeed, "[a] mainstay of New York City's policy for zoning is as-of-right development…. so long as the proposed use is one of the Uses Permitted As of Right' in the City's Zoning Resolution, a developer who also satisfies the Building Code can simply file its

architectural plans with the Department of Buildings and begin construction upon issuance of a building permit….The advantage of as-of right development is predictability: *development can proceed 'in accordance with pre-set regulation rather than with case-by-case exercise of discretion by officials*." *Neville v. Koch*, 79 N.Y.2d 416, 426 (1992) (internal citations omitted).

200. To this end, the preservation of one's "rights" in an "as-of-right" development project is entirely contingent on the agency discharging its duties in good faith. It is, therefore, imperative that this Court cut through the subterfuge and recognize Petitioner's proposal for what it is: an *as-of-right* construction plan in full compliance with the City's Zoning Resolution and Building Code.[43] An agency's obfuscation—under the guise of the need for a final determination—as the DOB has engaged in here, is not an acceptable justification from a supposedly "expert" governmental agency. Simply stated, despite the DOB's contentions, this is not a complicated issue and Rule 51 does not apply.

c. The Court should issue a Writ of Mandamus compelling the DOB to issue Petitioner a building permit because the DOB's denial was arbitrary and capricious.

i. Writ of Mandamus.

201. A Writ of Mandamus is available to compel a public official to perform a duty enjoined by law, where there is a "clear legal right" to the relief requested. *Klostermann v. Cuomo*, 61 N.Y.2d 525 (1984); *see also Mtr. of DiBlasio v. Novello*, 28 A.D.3d 339 (1st Dep't 2006).

[43] An as-of-right development complies with all applicable zoning regulations and does not require any discretionary action by the City Planning Commission or Board of Standards and Appeals. https://www1.nyc.gov/site/planning/zoning/glossary.page#as_of_right_dev

202. Although a mandamus proceeding is typically used to compel the performance of a duty that is ministerial in nature and involves no exercise of judgment or discretion, the Court of Appeals has observed that "[w]hat has been somewhat lost from view is [the] function of mandamus to compel acts that officials are duty-bound to perform, regardless of whether they may exercise their discretion in doing so." *Klostermann v Cuomo*, 61 N.Y.2d 525, 540 (1984).

203. Additionally, "[c]ourts have recognized that the exhaustion requirement may be relaxed in the context of mandamus or prohibition where a petitioner faces irreparable injury in awaiting ordinary avenues of review…" *Id*. at 342; *see also Matter of City of Newburgh v Public Empl. Relations Bd. of State of N.Y.*, 63 N.Y.2d 793 (1984).

ii. The DOB cannot deny a permit based on its perceived future illegal use.

204. At the outset, it is necessary to note that a building permit cannot be denied on the basis of a possible future illegal use. *See Matter of Baskin v. Zoning Bd. Of Appeals of Town of Ramapo*, 40 N.Y.2d 942 (1976); *see also Di Milia v. Bennett*, 149 A.D.2d 592, 593 (2d Dep't 1989); *Kam Hampton I Realty Corp. v. Board of Zoning Appeals*, 273 A.D.2d 385, 387 (2d Dep't 2000).

205. For the past forty-five years, the prevailing law in New York State has reflected Justice Shapiro's dissent in *Baskin v. Zoning Bd. Of Appeals of Town of Ramapo*, 48 A.D.2d 667 (2d Dep't 1975), in which he condemns the reliance on the "mere evanescent possibility of future violation." *Id*.at 668. The language of Justice Shapiro's dissent was ultimately adopted the Court of Appeals in its subsequent decision in *Matter of Baskin v. Zoning Bd. Of Appeals of Town of Ramapo*, 40 N.Y.2d 942, *supra*, overruling the Second Department. As articulated by Justice Shapiro:

> It is clear that the existence of a mere opportunity for future evasion or violation of law does not raise a presumption that such violation in fact actually presently exists . . . The standard, therefore, is not designed or potential use, but actual use. If, in fact, [the planned structure] is to be barred because it might, at some future time, possibly be used by later owners or occupants for a use which violates the existing one-family limitation, the effect would be to visit on the present lawful users and occupiers of the home anticipatory punishment for future wrongdoing by another, a concept contrary to the basic principles of Anglo-Saxon law. *Baskin v. Zoning Bd. Of Appeals of Town of Ramapo*, 48 A.D.2d at 668-669.

206. The Second Department decision in *Di Milia v. Bennett*, 149 A.D.2d 592, *supra*, is likewise instructive insofar as it is analogous to the instant matter and exemplifies the clear and consistent law of New York prohibiting administrative anticipatory punishment. In *Di Milia*, a developer attempted to amend its already The DOB denied that amendment because the proposed building could potentially be converted into a two-family residence, which would violate the applicable zoning rules. *Id*. The BSA affirmed. *Id*.

207. The developer appealed the BSA's decision to the trial court, which annulled the BSA determination holding that "to prohibit the houses based on *a possible future illegal use* was arbitrary and capricious." *Id.* at 593. The Second Department affirmed, finding that the the standard to be applied is "the actual use of the building in question, not its possible future use." *Di Milia v. Bennett* 149 A.D.2d at 593.

208. Similarly, in *Kam Hampton I Realty Corp. v. Board of Zoning Appeals*, 273 A.D.2d 385, *supra*, the petitioners opposed a permit issued to their neighbor to construct a home office, library and gym in her home. The neighbors argued that the design of the structures indicated that the building would be used as a dwelling in violation of the applicable zoning code. *Id*. at 387. The court held that the neighbors' "claim that the design

of the structures indicate that they would be used for dwelling purposes is based on pure speculation." Indeed, "the law does not permit [the zoning board] to speculate that a permit applicant will use a structure for purposes not permitted by the village's code." *Id*; *see also Ass'n of Friends of Sagaponack v. Zoning Bd. Of Appeals*, 287 A.D2d 620 (2d Dep't 2001) (internal citations omitted) ("ZBA properly rejected the petitioners' speculative claims that the (40,000 square foot) residence was destined for use other than as a single-family residence, as the standard 'is not designed or potential use, but actual use.").

iii. The DOB's May 10, 2019 determination that Rule 51 applies was arbitrary and capricious because none of the justifications underlying Rule 51 exist in this case, and, therefore DOB's decision was predicated solely on a perceived future illegal use, which is impermissible as a matter of law.

209. In 2008, in *Matter of 9th and 10th St. L.L.C. v. Board of Stds. & Appeals of the City of New York*, 10 N.Y.3d 264 (2008), the Court of Appeals ruled on an issue involving the Petitioner in the instant matter. At the time, although apartment buildings in the relevant zoning district were limited to 10 stories, a building owner could seek an exception by building a student dormitory or a "community facility" up to 19-stories high. Petitioner hoped to utilize this exception by building a 19-story dormitory at the site of P.S.64 and sought the DOB's approval. *Id*. at 268-269. The DOB requested that Petitioner substantiate that the building would be utilized as a dormitory by demonstrating that a college or coalition of colleges would take over the deed to the property or provide a lease for the property containing a lease term of at least 10 years. Petitioner argued, albeit erroneously, that he did not have to establish an "institutional nexus" with a local college or university prior to obtaining DOB approval.

210. The Court of Appeals rejected Petitioner's argument, explaining that:

> It would create needless problems if petitioner built a 19 story building, only to find that it could not use it in a legally-permitted way. The City would then face a choice between waiving the legal restrictions and requiring the building to remain vacant or be torn down. The City's officials did not act arbitrarily or capriciously in trying to avoid that dilemma. *Id*. at 270.

211. Petitioner concedes that the Court of Appeals' ruling in *Matter of 9th and 10th St. L.L.C*. was appropriate and agrees with the court's logic. Certainly, it would be no more than prudent to seek such assurances when building owners seek to increase their FAS beyond that which is the permissible under the relevant zoning provisions. *Id*. at 270.

212. But the holding of *Matter of 9th and 10th St. L.L.C* has been applied too rigidly, creating a new dilemma and an issue of first impression. That is, where, as here, a building owner does not—and cannot—seek to gain additional FAR under the Community Facility Use zoning bonus, is nevertheless required to comply with Rule 51. Under these circumstances, this requirement is irrational because it does nothing to protect against the evils that Rule 51 was promulgated to shield against: namely, the "bait-and-switch" development tactics referenced by the court in *Matter of 9th and 10th St. L.L.C*. Yet, the City has effectively utilized Rule 51 as a sword to affirmatively attack and destroy Petitioner's development dreams. But the City cannot use the Rule as both a sword and shield.

213. Where the DOB does not grant an additional FAR or bulk bonus, it is illogical and irrational for DOB to require an institutional nexus *before* issuing a building permit. Here, the Community Facility Use zoning bonus was eliminated for an entire geographical area including P.S. 64. *NYC Zoning Resolution §§ 22-12 & 22-13*. This means that the irrespective of whether a building is zoned as a UG2, residential development, or UG3, "Community Facility," they were restricted by the same maximum FAR. *Id*. Petitioner therefore *will not and cannot under any circumstances* increase the building's FAR or bulk.

Instead, Petitioner's current building permit application seeks only to renovate the interior of the building, an issue entirely outside the purpose and scope of Rule 51. In other words, Petitioner's building is and will always be in compliance with the City's Zoning Resolution.

214. Nevertheless, on May 10, 2019, Commissioner Rebholz issued a final determination stating, in sum and substance, that:

> the provisions of 1 RCNY 51-01 are applicable to all new proposed student dormitories, without exclusions based on zoning regulations, including whether or not the proposed UG 3 use is eligible for a higher FAR than a UG 2 use. **Moreover, the Dorm Rule does not provide a process or criteria for a waiver, so the Department cannot grant one.** Therefore, there is no basis to find that the Dorm Rule is inapplicable or waived and the request to "temporarily waive the requirements of Rule 51-01 [until the TCO stage] is hereby denied. **Exhibit 18.**

215. First, Mr. Rebholtz's determination is specious and contradicts the City's Administrative Code. Thus, Commissioner Rebholtz is either incompetent or he is deliberately obstructing Petitioner's project because the City's Administrative Code explicitly authorizes Commissioner Rebholtz to issue a waiver in this exact situation. *See* NYC Administrative Code § 28-104.7.12 Indeed, NYC Administrative Code § 28-104.7.12, entitled Waiver of certain documents, states the following:

> The **commissioner is authorized to waive the submission** of any of the **required construction documents and other data** if review of such documents is **not necessary to ascertain compliance with this code or not required for the phase of work for which a permit is sought**. *Id*.

216. Therefore, despite Commissioner Rebholtz's determination, the City's Administrative Code expressly authorizes him to issue a waiver of Rule 51's requirement for Petitioner to submit a lease before obtaining a construction permit, as the express purpose of the Rule is wholly inapplicable. *Id*.

217. Second, here, the City would not be faced with the type of Hobson's Choice feared by the Court of Appeals in *Matter of 9th and 10th St. L.L.C. v. Board of Stds. & Appeals of the City of New York*, 10 N.Y.3d at 270; namely, the "choice between waiving the legal restrictions and requiring the building to remain vacant or be torn down." *Id*. This concern does not exist here because Petitioner seeks only to renovate the interior and exterior of the building within the existing framework and convert the building into a use that conforms with the applicable Zoning Resolution, the deed restriction and the buildings landmark status. *See*, *e.g.*, *Matter of Chelsea Bus. & Prop. Owners' Assn., LLC v. City of New York*, 924 N.Y.S.2d 308 (2011) ("**[h]ere the construction involves interior renovations of an existing building, and it cannot be said that interior renovations may result in harm comparable to that resulting from the erection of a new building**."). This conclusion does not change even if "the renovations may include replacement of much of the interior infrastructure including the HVAC, electrical and fire systems, and the replacement of all floors, the roof and the basement such that they may fairly be characterized as a 'gut renovation []" *Id*.

218. Even assuming, *arguendo*, that Petitioner cannot establish an institutional nexus after renovating the interior of his building, the DOB could simply deny or revoke the building's Certificate of Occupancy and the building would remain vacant, albeit fully renovated, thereby maintaining the status quo. At worst, this temporary and easily remedied issue hardly constitutes the type of immutable "dilemma"—like a fully constructed 19-story building—predicating the Court of Appeals' decision in *Matter of 9th and 10th St. L.L.C. v. Board of Stds. & Appeals of the City of New York*, 10 N.Y.3d at 270.

219. Yet, the DOB has determined that Rule 51 is applicable to P.S. 64 without providing any explanation whatsoever as to its application. Exhibit ___. The reason for this is simple: there *is* no explanation. Instead, the DOB has impermissibly based its denial on the evanescent possibility of future violation; *i.e.*, that Petitioner might not establish an institutional nexus. *See* in *Matter of Baskin v. Zoning Bd. Of Appeals of Town of Ramapo*, 40 N.Y.2d 942, *supra*. This is precisely the type of improper administrative anticipatory punishment that the courts in *Matter of Baskin v. Zoning Bd. Of Appeals of Town of Ramapo*, 40 N.Y.2d 942, *Di Milia v. Bennett*, 149 A.D.2d 592, and its progeny overturned.

220. Without a rational basis upon which to justify its decision, it is hard to envision a scenario in which the DOB's conduct could be any more arbitrary and capricious.

iv. By Requiring Pre-Permitting Documentation, DOB Has Engaged in an Illegal Usurpation of Legislative Authority for an As of Right Application.

221. DOB has taken upon itself the supposed power to require Petitioner to meet a condition that is found nowhere in the Zoning Resolution in order to build its as-of-right Dormitory. There was simply no requirement in the Zoning Resolution in 1999, the year Owner bought the Property, that a builder of a "college or school dormitory" provide pre-permitting documentation related to the use of the facility once built. The City Planning Commission and the City Council changed this very clause in the Zoning Resolution in 2004, by adding the word "student" and thus limited dormitories to occupancy by students. But the Commission and the Counsel, the two bodies vested by law in New York City to change the Zoning Resolution, did not add any documentation requirement for all dormitories regardless of FAR. Indeed, it was the "dilemma" of improperly granting additional bulk zoning benefits that the NYS Court of Appeals

ruled in the city's favor in 2008 as the only rationale that allowed the DOB to require proof of an institutional nexus pre-permit.

222. It is a violation of New York law for DOB to amend or add to the Zoning Resolution through misuse of the permitting process. The legislative power over land use is granted to municipalities by General City Law § 20(24), and in New York City is exercised by the City Planning Commission under the Charter, §§ 200 and 201. DOB, on the other hand, is a technical enforcement agency; its job is to carry out the law, including the Zoning Resolution, not to create it.

223. An agency determining a proposed land use, applying a zoning code or resolution to the facts of a particular application, must issue a permit if the application meets all the requirements of the code or resolution. The agency has no power to add additional conditions, for that is legislating and is beyond the agency's authority. It must act "upon fulfillment of the conditions mandated in the delegation of power contained in the zoning ordinance. *Matter of Nassau Children's House, Inc. v. Board of Zoning Appeals*, 77 A.D.2d 898, 899-900, 430 N.Y.S.2d 683, 686 (2d Dept. 1980). See also *Chem-Trol Pollution Services, Inc. v. Board of Appeals*, 65 AD2d 178, 179 (4th Dept. 1978) ("While the ultimate use of the excavation site and the responsibility of possible seepage contaminating the environment are legitimate concerns of the town, it has adopted no local laws or ordinances granting it any authority to regulate the construction and operation of a landfill and the Board of Appeals may not utilize the excavation permit requirement to fill this void.").

224. Since the New York City Zoning Resolution does not impose "standards" on "dormitories," other than that they be occupied by college or school students, DOB cannot impose additional requirements as a condition of granting a permit where as here, there is no

rationale or justification to impose this pre-permit requirement where there is no risk of the zoning resolution or building code being violated since there is no chance of bonus FAR. Indeed, the DOB has gone to great lengths to avoid ever having to provide a rationale as to why it must impose the pre-permit requirement here when there is no additional FAR that may harm the city. Instead, the City takes the position of "the rule says so." Rather, to enforce the zoning ordinance, it can impose a restriction on the actual use of a building, which in New York City is done through the issuance and enforcement of a certificate of occupancy, NYC Code §§ 26-222, 27-223. See *Town of Huntington v. Five Towns College Real Property Trust*, 293 A.D.2d 467, 740 N.Y.S.2d 107 (2d Dept. 2002), upholding denial of a special use construction permit for a dormitory where the plan did not meet the minimum lot area in the Town zoning code for such a special use permit.

225. Unlike the City Planning Commission, which can legislate land use policy subject to the review of the City Council, DOB is solely an enforcement agency. Its task and power is defined in the City Charter, Chapter 26, § 643: The department shall enforce, with respect to buildings and structures, such provisions of the building code, zoning resolution, multiple dwelling law, labor law and other laws, rules and regulations as may govern the construction, alteration, maintenance, use, occupancy, safety, sanitary conditions, mechanical equipment and inspection of buildings or structures in the city, ...

226. DOB's rule-making power, like that of all technical and enforcement agencies, is limited to promulgating a rule that implements or applies law or policy, or prescribes the procedural requirements of an agency ..." New York City Administrative Procedure Act, 45 NYC charter § 1041(5). The scope of DOB's rule-making power, both under its own organic statute and under the Administrative Procedure Act, has been narrowly confined: The Buildings Department, like any municipal line agency, is a creature of statute. Through its duly appointed

commissioner it exercises that jurisdiction granted by statute. The duties of the Buildings Commissioner, as set forth in the City Charter, deal "exclusively" with structural and technical matters: the enforcement of the building code, the inspection of premises, the review of plans and the issuance of permits. N.Y.C. Charter Sec. 643(b) et seq. General Irving conditions are not within his jurisdiction... It is improper for the Buildings Commissioner to use revocation of a building permit as punishment for activity outside the scope of his jurisdiction, of which he has no independent knowledge, as a means of effecting policies of other city agencies. It is an insidious practice which can only compromise the integrity and effectiveness of an official who must independently evaluate the technical sufficiency of building plans. *Tafnet Realty Corporation v. New York City Department of Buildings*, 116 Misc. 2d. 609, 455 N.Y.S.2d 341, 343-44 (Sup. Ci. N.Y. Co. 1982).

227. When the New York City Council wishes to delegate its "legislative rule-making authority", it must do so in "unmistakable language" or the delegation is ineffective. *Bio Apple Food Vendors' Ass'n v. Street Vendor Review panel*, 90 N.Y.2d 402 (Court of Appeals 1997) (upholding Local Law 14 regulating the location of mobile food vendors in Manhattan). The Court of Appeals has ruled consistently that policy making is a legislative function and not one inherent in the enforcement power of an administrative agency. See, e.g., *Matter of Broidrick v. Lindsay*, 39 N.Y.2d 641, 385 N.Y.S.2d 595 (Court of Appeals 1976): "But no matter how appropriate the area of racial discrimination is for flexible standards of enforcement, the regulations issued by the executive to implement anti-discriminatory legislation may not create a different policy, not embraced in the legislation, toward minority discrimination. Such executive action would constitute an impermissible exercise of legislative power vested by the New York City Charter in the city council (citations omitted)."

228. In *Boreali v. Axelrod*, 71 N.Y.2d 1, 523 N.Y.S.2d 464 (1987), the Court of Appeals considered a smoking ban regulation issued by the state's Public Health Council. There the court determined that the Council had overstepped its regulatory authority by creating a regulatory scheme based upon economic and social concerns, in the absence of any legitimate legislative guidance: "While the Legislature has given the Council broad authority to promulgate regulations on matter concerning the public health, the scope of the Council's authority under its enabling statute must be deemed limited by its role as an administrative rather than a legislative body.... In view of the political, social and economic, rather than technical, focus of the resulting regulatory scheme, we conclude that the Council's actions were taken ultra vires and that the judgment of the courts below, which declared the Council's regulations invalid, should be affirmed....Thus, to the extent that the agency has built a regulatory scheme on its own conclusions about the appropriate balance of trade-offs between health and cost to a particular industries in the private sector, it was 'acting solely on [its] own Ideas of sound public policy' and was therefore operating outside of its proper sphere of authority. This conclusion is particularly compelling here, where the focus is on administratively created exemptions rather than on rules that promote the legislatively expressed goals, since exemptions ordinarily run counter to such goals and, consequently cannot be justified as simple implementations of legislative values (citations omitted."

229. No one contests that DOB has the power to require, as a matter of enforcement, that a college or school student dormitory be used as a college or school student dormitory and proof of an institutional nexus pre-permit when additional zoning FAR is being utilized. But for DOB to compel an "institutional nexus" as a pre-permit condition of being able

to build what can only result in a building that is compliant with the zoning resolution even when vacant, is to usurp the legislative function, in violation of law.

v. Only Direct Precedent For Establishing That A Building Is A Dormitory, DOB Rule 15-04, Establishes That There Is No Pre-Permitting Documentation Requirement Other Than An Owner's Certificate.

230. There is one precedent regarding dormitories appearing in the DOB Rules prior to Owner's application; it is Rule 15-04, and is concerned with fire safety. DOB well knows how to enact rules to ascertain whether a building is being used as a dormitory or as another form of housing. Rule 15-04, dealing with fire safety requirements in certain residential hotels, such as sprinkler systems and elevator in readiness provisions, deals specifically with dormitories. Under Rule 15-04, dormitories are exempted from these onerous obligations in order to avoid having to comply with the fire safety regulations in question.

231. In promulgating Rule 15-04, DOB contemplated that owners of some buildings that could be viewed from an architectural perspective either as single room occupancy facilities or dormitories, might contend that they were in fact dormitories. Accordingly, DOB provided, in Rule 15-C4(e), that "to qualify as a dormitory, the building's current Certificate of Occupancy must indicate use as a dormitory." Rule 15-04 goes on to provide: "When an owner seeks to amend his building's Certificate to provide for dormitory occupancy, he must submit an affidavit stating he will use the dormitory space only for sleeping accommodations of individuals on a month-to-month or longer-term basis (Admin. Code § 27-265) and that the dormitory will be owned and operated by either a not-for-profit corporation or a school."

232. The final requirement specifies that the "institutional nexus" to a not-for-profit corporation or school, the precise requirement upon which Owner's permit has been denied, is established by affidavit of the building's owner. Thus, past practice of DOB is not to require pre-

permitting documentation of institutional nexus or control in every situation. In its own Rules, where the extremely important issue of fire safety is concerned, DOB accepts the representation of the owner that a "dormitory" will have the required nexus to a particular category of institution.

233. Accordingly, the Court should issue a mandamus ordering the DOB to issue Petitioner a building permit.

SECOND CAUSE OF ACTION
(For Writ of Prohibition Pursuant to CPLR § 7803(2))

RESPONDENTS' CONDUCT IS ARBITRARY AND CAPRICIOUS BECAUSE RESPONDENTS ARE APPLYING STANDARDS, RULES AND/OR QUALIFICATIONS THAT ARE NOT AUTHORIZED BY THE STATUTE.

234. Pursuant to CPLR § 7803(2), a writ of prohibition is available where "there is a clear legal right and only where an officer acts without jurisdiction or in excess of powers, in a proceeding over which there is jurisdiction, in such a manner as to implicate the legality of the entire proceeding…" *Galin v. Chassin*, 217 A.D.2d 446 (1st Dep't 1995). *See also Mtr. of Doe v. Axelrod*, 71 N.Y.2d 484 (1988); *see also Hamptons Hospital & Medical Center, Inc. v. Moore*, 52 N.Y.2d 88 (1981) ("An article 78 proceeding may lie in the absence of a final determination where the relief sought is by way of prohibition")

a. This Court should issue a writ of prohibition enjoining the DOB from acting on their Notice of Violation dated June 28, 2019 requiring certain alleged emergency repairs.

235. For the sake of judicial economy, Petitioner relies on the argument set forth in First Cause of Action, *supra*.

236. In sum, as described above, over the past six months, the City and DOB have prevented Petitioner from making any renovations to the building. Yet, the City has simultaneously issued Petitioner a multitude of violations forcing Petitioner to undergo

"emergency repairs," which would be deemed unnecessary if DOB would simply issue Petitioner construction and renovations permits. These so-called "emergency repairs" are far more costly and time consuming a full renovation would be. Further demonstrating the Respondents' arbitrary and capricious conduct, DOB has recently tasked Petitioner with the onerous and costly requirement of providing a weekly engineering report about the condition of the building's exterior, while continuing to refuse him a building permit to renovate the entire interior and exterior of the building. **Exhibit 116.**

237. Despite the City's decades of dormancy, within days of the Court's decision dismissing Petitioner's prior claims on ripeness grounds, the City began a barrage of assaults against Petitioner's building, which have continued to this very day. This assault includes a purportedly "anonymous tip" received by 311, within two days of the Court's decision, reporting cracks in the building, prompting the City to evacuate tenants of all the adjacent buildings. **Exhibit 77.** Perplexingly, the so-called "anonymous tip" was made directly from the Mayor's Office of Emergency Management, thereby proving unequivocally that the City is involved in a very deliberate and targeted campaign to stop Petitioner's project dead in tracks. **Exhibit 77.**

238. During the past two decades, and particularly in the past six months, Petitioner has been prevented from making any renovations and repairs whatsoever as a direct result of the DOB's refusal to issue Petitioner a building permit. If DOB simply issues Petitioner a permit to renovate the building, he will not only repair the alleged defects, but will repair the *entire* building, thereby obviating the need for any further emergency work and saving both the City's and Petitioner's valuable and limited resources.

239. Therefore, the City and DOB have clearly exceeded their authority and a write of prohibition is warranted. *See Scarsdale v. Jorling*, 168 Misc. 2d 1 (N.Y. Sup Ct. 1995) (Article 78 petition, alleging that City agency exceeded its authority warranted writ of prohibition).

WHEREFORE, Petitioner respectfully requests an Order of Judgment (1) pursuant to Article 78 of the Civil Practice Law and Rules directing and compelling Respondents and its agencies, officers and employees to issue a permit authorizing Petitioner to convert the existing building to a Use Group 3, College Student Dormitory for Community Facility Use; (2) pursuant to Article 78 of the Civil Practice Law and Rules enjoining the New York City Department of Buildings from acting on their Notice of Violation dated June 28, 2019, which requires certain alleged emergency repairs; and (3) granting such other and further relief as this Court deems just and proper and (4) costs, disbursements, and attorneys' fees; and (5) such other and further relief as this Court may deem just and proper.

Dated: Garden City, New York
September 9, 2019

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ATTORNEY'S VERIFICATION

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

I, the undersigned, an attorney admitted to practice in the Courts of the State of New York, state that I am Randy E. Kleinman, Esq., the attorney of record for the within action; I have read the foregoing VERIFIED PETITION and know the contents thereof; the same is true to my knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe to be true. The reason this verification is made by me and not my client is because I maintain my law office in a County other than where my client maintains his residence. The grounds to my belief as to all matters not stated upon my own knowledge are based upon communications with my client.

Dated: Garden City, NY
September 9, 2019

RANDY E. KLEINMAN, ESQ.