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

TIMOTHY BROWN

Petitioner,

-against-

THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, MICHAEL BLOOMBERG, Mayor of the City of New York, THE NEW YORK CITY DEPARTMENT OF BUILDINGS, SOHO PROPERTIES INC., JANE DOE AND JOHN DOE,

Respondents.

Index
#110334/2010

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

On the brief:
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PRELIMINARY STATEMENT

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

STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

The Court of Appeals wrote that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(*Red Hook*, supra at 530)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The New York Supreme Court at trial term wrote:

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: New York, New York
January 14, 2011

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

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

PRESENT: HON. MARILYN SHAFER, JSC PART 8

Index Number : 103373/2008

CITIZENS EMERGENCY

vs

TIERNEY, RPBERT B.

Sequence Number : 001

ARTICLE

INDEX NO. _____

MOTION DATE _____ NOV 21 2008

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Cross-Motion: ☐ Yes ☐ No

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

FILED

NOV 21 2008

COUNTY CLERK'S OFFICE
NEW YORK

NYS SUPREME COURT
RECEIVED
NOV 17 2008
MOTION SUPPORT OFFICE

CASE DISP

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

Dated: 11/14/08

MARILYN SHAFER

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

PRESENT: HON. MARILYN SHAFER PART 8
Justice

In the matter of the application of

CITIZENS EMERGENCY COMMITTEE TO PRESERVE PRESERVATION,

Petitioner,

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

-against-

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

Respondent.

INDEX NO. 103373/08

MOTION SEQ. NO. 001

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

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

Cross-Motion: [ ] Yes [ ] No

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

Upon the foregoing papers, the petition is granted.

Introduction

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

Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Accordingly, it is hereby

ORDERED that the petition is granted; and it is further

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

This reflects the decision and order of this Court.

Dated: 11/14/08

MARILYN SHAFER
J.S.C.

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