SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

In the Matter of an Article 78 Proceeding

CITIZENS EMERGENCY COMMITTEE
TO PRESERVE PRESERVATION,

Index No. 118023/06

Petitioner,

-against-

MICHAEL R. BLOOMBERG, Mayor of the City of New York,

Respondent

PETITIONER'S RESPONSE TO CITY'S MEMORANDUM IN OPPOSITION TO PETITION FOR MANDAMUS

Preliminary Statement

The City's well-written memorandum of law sounds superficially quite plausible, but unfortunately argues the wrong body of law-- law that does not apply to this case. This is not a petition to review the actions of an administrative agency, but an application to require a public official to perform a duty mandated by law.

The key words in Section 3020 of the City Charter appear in paragraph 2(a):

"The members of the Commission shall be appointed by the mayor...."

(Emphasis added.)

The Charter does not say the members "may" be appointed, but that they "shall" be appointed. The Mayor has discretion as to who he appoints, but not as to whether he will, or will not, make appointments.

This memorandum sets forth the correct law on the subject, including the citizens-voters' standing to bring an Article 78 petition without establishing injury in fact.

Possible Mootness

There is one note in the City's Memorandum that is of major significance – the statement that the Mayor has now nominated five candidates to fill vacancies on the Commission. If the Mayor fills the remaining three vacancies by June – as the City's Memorandum projects – CECCP will happily withdraw its Petition on grounds of mootness. The Court may therefore wish to delay acting on the Petition long enough to give the Mayor the opportunity to meet this self-imposed deadline.

Facts

One factual claim in the City's memorandum requires correction. The City's lawyer asserts that "The Administration of Mayor Bloomberg has been extremely supportive of the Landmarks Commission. Since Fiscal Year 2002, despite the City's fiscal constraints after September 11, 2001, the Commission's budget has gone from $3.2 million to $ 3.9 million, and the number of people working there has increased from approximately 52 to 61." (City Memo p. 6)

According to the Independent Budget Office and the City's own budget documents, however, the Landmarks Preservation Commission's (LPC) Budget actually decreased from $3.3 million in Fiscal Year 2002 to $3 million in Fiscal Year 2003. The agency did not receive equivalent funding to their 2002 budget until Fiscal Year 2005. It

is true that the Mayor and City Council have allocated additional funds for LPC in the current Fiscal Year and the Mayor has proposed a budget increase for LPC of $100,000 for Fiscal Year 2008. However, when the Mayor's proposed budget for LPC in FY 08 is compared to 1991 (adjusted to 1991 dollars), it is clear that the agency's "buying power" has shrunk by $1 million (19%) at the same time that its workload more than doubled (from 4,000 permit applications received per year to nearly 9,000). The Mayor's touted support has a long way to go before it reaches a parity with earlier LPC budget levels.

POINT I
FOR OVER A CENTURY, NEW YORK LAW HAS RECOGNIZED THE RIGHT OF CITIZENS TO ASK THE COURTS TO REQUIRE ELECTED OFFICIALS TO PERFORM THEIR STATUTORY DUTIES WITHOUT THE NEED TO PROVE "INJURY IN FACT"

The principle on which the present Petition is based is exactly the same as Kelly v. Van Wyck, Mayor, decided by the Supreme Court, Kings County, in 1901 (reported at 35 Misc. 210, 71 N.Y.Supp. 814). The facts were these:

> The terms of the four city magistrates mentioned in the petition concededly expired on the last day of April, 1901. Thereupon it became the duty of the mayor by a mandatory provision of the city charter (section 1394) to appoint their successors.

The Court pointed out that there is no requirement that a citizen must prove injury in order to obtain a writ of mandamus:

> The right of the petitioner as an elector of the city to a writ of mandamus to require the official duty of appointment to be performed is also beyond dispute. People v. Daley, 37 Hun. 461; People v. Halsey, 37 N.Y. 344; People v. Common Council of City of Brooklyn, 77 N.Y. 503, 33 Am.Rep. 659; People v. Palmer, 154 N.Y. 133, 47 N.E. 1084; People v. Cummings, 72 N.Y. 433. The electors have the right to have these offices filled as required by law. (Ibid.)
>
> (Emphasis added.)

See also Winter v. Board of Assessors of Nassau County, 311 N.Y.S.2d 684, 689 (S.Ct. Nassau County, 1969):

> It appears that an association of day camps operating on Long Island is the moving force behind this proceeding, and that petitioner's husband is an attorney who represents at least one day camp which is not operated on tax exempt property. This does not remove the petitioner's status to bring this action as a taxpayer, and indeed, her motives are irrelevant. Any citizen may present his petition for the enforcement of mandatory duties imposed upon officials, Carmody-Wait 2nd 50 § 145.255; CHOB Associates Inc. v. Board of Assessors, 45 Misc.2d 184, 257 N.Y.S.2d 31, aff'd 22 A.D.2d 1015, 256 N.Y.S.2d 550, aff'd 16 N.Y.2d 779, 262 N.Y.S.2d 501, 209 N.E.2d 820.

POINT II
THE COURT OF APPEALS HAS LEFT NO DOUBT THAT AN ASSOCIATION HAS STANDING TO REPRESENT THE INTERESTS OF ITS MEMBERS WHO INDIVIDUALLY HAVE STANDING TO SUE

Chief Judge Kaye's opinion in Matter of Dental Society v. Carey, 61 N.Y. 2d 330 at 333-334 (1984) makes it clear that an association may sue on behalf of members who individually have standing to sue:

> The standing of an organization such as respondent to maintain an action on behalf of its members requires that some or all of the members themselves have standing to sue, for standing which does not otherwise exist cannot be supplied by the mere multiplication of potential plaintiffs. Additionally, the interests which the organization seeks to protect must be germane to its purposes, the court should be satisfied that the organization is an appropriate one to act as the representative of the group whose rights it is asserting, and neither the relief requested nor the claims asserted must require participation of the individual members. (Hunt v. Washington State Apple Adv. Comm., 432 US 333.) It is enough to allege the adverse effect of the decision sought to be reviewed on the individuals represented by the organization (Matter of Douglaston Civic Assn. v. Galvin, 36 NY2d 1, 7); the complaint need not specify individual injured parties. (National Organization for Women v. State Div. of Human Rights, 34 NY2d 416.)

The Chief Judge reiterated this principle in Society of Plastics v. Suffolk, 77 N.Y.2d 761 at 775 (1991).

POINT III
THIS ACTION WAS BROUGHT BY BOTH CECCP'S SENIOR EXECUTIVE OFFICER AND BY ITS TREASURER IN FULL COMPLIANCE WITH CPLR RULE 1025

The City argues (City Memo p. 19) that this proceeding was not brought by its president or treasurer as specified by CPLR §1025 and therefore must be dismissed.

If the Court will refer to paragraph 3 of the Petition, it will see that the action was brought by and on behalf of both its de facto president (Acting Chair) (William E. Davis, Jr.) and by the association's treasurer (Katherine Wood) (Acting Treasurer).

The Court will also see from the Verification page that the Petition was signed and verified by Mr. Davis.

The action is brought in full compliance with the letter of the CPLR provision and with its purpose to insure that the action is authorized by the appropriate responsible officers.

CONCLUSION

The City's legal arguments are irrelevant to the long-standing and undisputed New York law that citizens always have standing to ask the courts to direct public officers to perform their mandatory statutory duties..

However, the City's common sense argument that this action may become moot is welcome news. If the Mayor fills all remaining vacancies on the Commission by June, CECCP will be delighted to withdraw its Petition on the ground of mootness.

Respectfully submitted,

Dated: New York, New York
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WHITNEY NORTH SEYMOUR, JR.
425 Lexington Avenue, Room 1721
New York, New York 10017
Tel: (212) 455-7640
Fax: (212) 455-2502

GABRIEL NORTH SEYMOUR
200 Route 126
Falls Village, CT 06031
Tel: (860) 824-1412

Attorneys for Petitioner