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### **Respondents' Motions Are Untimely**

CPLR Rule 404 requires that a motion to dismiss a special proceeding must be noticed within the time to answer. Rule 406 requires that it be heard at the same time as the petition is returnable.

The Petition in this case was served on May 26, 2005. Its return date was July 7, 2005 – some 40 days later – affording ample time to prepare answering or moving papers.

In violation of the CPLR rules, both Respondents waited to serve their motion papers until July 5, and both made their motions returnable on July 29, 2005 – 22 days after the original petition return date. Meanwhile, the City Department of Buildings had issued a demolition permit to allow the Museum to destroy the building facade whose preservation is at issue in this case – thereby threatening to moot the case by destroying the very subject matter before the motion can be heard. (See Exhibit J)

Petitioner objects to this strategy, done in direct violation of the CPLR, and moves to strike both motions as untimely.

### **Counterstatement of Facts**

#### **Subcommittee Inaction in 1996**

The City asserts that the failure of a Commission subcommittee to recommend designation of 2 Columbus Circle for Landmark protection in 1996 constituted “LPC’s expert opinion that the building at 2 Columbus Circle does not merit a public hearing.” (City Memo, p. 6.) The Wist Affidavit does not support any such conclusion. She concededly was not present in 1996 and offers no evidence or

documentary record of the basis for the subcommittee’s action. Had there been a public hearing and a public vote, the claim might have some substance. No affidavit has been provided from any of the actual participants, and Wist does not even supply hearsay as to what went on. (See Wist Aff., pars. 13-15.)

**“Nothing New” Claim**

The City memorandum states (at page 6):

“The Landmarks Commission Research Staff has looked at the RFE [of Petitioner] and determined that it does not contain any new information about the building that would suggest LPC should reconsider calendaring the building for a public hearing.”

Petitioner disputes this factual claim on its face. As the Court will see, the Landmark West! RFE (Exhibit I) itemizes twenty-one new developments since 1996 relating to 2 Columbus Circle that meet the statutory landmark designation criteria of having “special historical or aesthetic interest or value” (see NYC Charter § 25-301, Exhibit A to the Petition).

The City omitted the Landmark West! RFE from its moving papers, forcing Petitioner to do so to permit the Court to see for itself the incorrectness of the City’s assertion.

## **ARGUMENT**

### **POINT I**

#### **THE LPC SUBCOMMITTEE ACTION IN 1996 WAS NOT RES JUDICATA; AS WITH ANY DELIBERATE BODY, THE COMMISSION HAS THE POWER TO RECONSIDER – AND HAS PREVIOUSLY DONE SO ON OTHER LANDMARK DESIGNATIONS**

The City Charter establishes a public policy of protecting buildings such as 2 Columbus Circle “which represent or reflect elements of the city’s cultural, social, political and architectural history.” (Sec 25-302b(a); Petition Exhibit A.) The view of agency personnel at one moment in time does not control public policy for all time. Such views must always be subject to review and reconsideration to meet changing conditions and more enlightened thinking.

The United States Supreme Court has no hesitation in changing earlier decisions to meet new conditions or public policy. The New York City Landmarks Commission is no different.

Petitioner’s RFE (Exhibit I) provides detailed documentation of additional reasons why landmark designation of 2 Columbus Circle merits reconsideration – without bias or outside interference.

The Commission itself has shown no hesitation in changing its mind and reversing earlier decisions or designation – witness its recent actions on 240 Central Park South (Exhibit K) and Douglaston Hill Historic District (Exhibit L). It should do so here.

## **POINT II**

### **CONSIDERATION OF LANDMARK DESIGNATION AFFECTS SIGNIFICANT PRIVATE ECONOMIC AND PROPERTY INTERESTS AND IS A QUASI-JUDICIAL FUNCTION REQUIRING IMPARTIALITY AND OBJECTIVITY**

Administrative decisions that affect property rights are quasi-judicial in nature, and require that hearing officers be impartial and without bias. In its RFE, Petitioner duly requested Chair Tierney to recuse himself (Exhibit I). He failed to do so. Accordingly, the Court should exercise its authority to remove him from further participation in Commission proceedings relating to 2 Columbus Circle.

## **POINT III**

### **THE MUSEUM IS AN INTERESTED PARTY, WITH A DIRECT ECONOMIC INTEREST FOR ITSELF AND ITS PRINCIPAL BOARD MEMBER IN THE OUTCOME OF THE COMMISSION'S CONSIDERATION OF 2 COLUMBUS CIRCLE**

The City cites various instances where representatives of civic organizations (including Petitioner) communicated and met with Chair Tierney and various Commission members to argue for landmark designation for 2 Columbus Circle. (City Memo, pp. 7-8.) These are all groups representing community and public interests and their actions were entirely proper.

However, the Museum and its employee, Respondent Beckelman, stand on entirely different footing. The Museum is an interested party whose economic interests will be directly affected by the Commission's action. The City Charter, as well as general principles of impartial adjudication, prohibit *ex parte* communications between an interested party and a hearing officer. (See citations in Petition pars. 14 and 23.)

The City's partial disclosure of records under FOIL of the series of such improper contacts fully warrants judicial action to prohibit further such communications and to order the disqualification of Chair Tierney. The group of emails was not, as asserted by the Museum's counsel (Strook memo, p 12), "carefully excerpted" by Petitioner. They are the complete set supplied by the LPC under FOIL. The redactions were all done by the City itself.<sup>1</sup>

#### **POINT IV**

#### **THE COMMISSION'S ABSOLUTE DISCRETION IS PREMISED ON ITS INDEPENDENCE; INTERFERENCE BY THE MAYOR OR BIAS OF THE CHAIR DESTROYS THE COMMISSION'S INTEGRITY AND SUBVERTS ITS PROPER GOVERNMENTAL FUNCTIONING**

The concept behind the establishment of the Landmarks Commission was to create an independent agency made up of experts in various fields related to art and architecture that would be free from political pressures and interference. The facts of this case show how that ideal can be corrupted. The Mayor ordered the Commission's Chair to participate in a press conference announcing support for the demolition of a structure that should otherwise be considered by the Commission for landmark designation, and the Chair himself has become a partisan ally of the prospective purchaser of the property and has prevented any reconsideration of its eligibility for landmark status. These are not accidents – they are plainly part of a carefully orchestrated plan by the Museum's principals, one of whom stands to gain substantial personal financial benefits as a by-product of the fundraising campaign premised on the demolition of 2 Columbus Circle.

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<sup>1</sup> Petitioner continues to believe that further disclosure of communications and redacted material requested under FOIL – but disallowed by the Court – would show additional instances of improper interference with the independence of the Commission, and respectfully suggests that the Court might now reconsider its earlier decision of April 4, 2005 (Exhibit I to City's Motion to Dismiss.)

The Courts provide the only realistic forum for correcting these wrongs, and that is why Petitioner has initiated this special proceeding. It offers no apology to anyone for its dogged determination to find an effective means to stop this undermining of the lawful mechanism for preserving the heritage of the City of New York in which so many citizens have placed their trust and confidence since the Commission's founding four decades ago.

The Court can save the independence of the Commission by acting firmly and promptly to exclude bias and political interference from its operations. Failure to do so will only encourage other monied property owners to follow similar improper courses of action in the future, making the Commission a parody of what its founders dreamed it would be.

#### **POINT V**

#### **BY DEPRIVING PETITIONER AND ITS CONSTITUENTS OF THEIR FIRST AMENDMENT RIGHTS TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES, RESPONDENTS COMMITTED A *PRIMA FACIE* TORT, AND SHOULD BE HELD ACCOUNTABLE FOR THEIR WILLFUL MISCONDUCT**

In our democracy, every citizen has the right to expect government to act fairly and responsibly on official matters brought to its attention. The right of citizen access to government is one of the fundamentals of the Federal and State Bill of Rights. Respondents have blocked that right of access in this case. By enlisting the office of the Mayor and by hiring a former Commission Chair to pressure the present Chair from doing his duty they have taken away the right of Petitioner and its constituents and other citizens to apply to the Landmarks Commission for an honest and reasoned

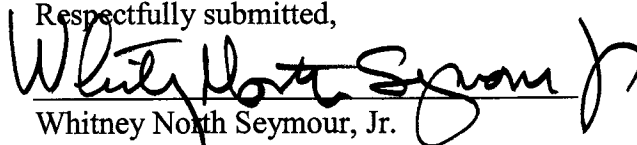
reconsideration of the landmark eligibility of 2 Columbus Circle. This deprivation of access to a governmental agency denies these individuals and groups of their civil rights. To prevent future recurrence – and to make up for the damage that has been done – the requested compensatory and punitive damages are an entirely proper remedy incidental to this proceeding.

### CONCLUSION

Justice Oliver Wendell Holmes correctly observed that “Men must turn square corners when they deal with the Government.” (*Rock Island RR v US*, 214 U.S. 141, 143 (1920)). Nowhere is that principle more applicable than in the operations of a government agency that is granted absolute discretion in making decisions affecting property rights and the public interest.

The conduct presented here requires the Court to act to preserve the agency’s integrity and independence from improper influences both within and without the City government.

Respectfully submitted,



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