SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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In the Matter of the Application of

STERLING PLACE BK-NY BLOCK ASSOCIATION INC., NOÉMIE BONNET, and DANIEL SALK,

Petitioners,

For Judgment Pursuant to Articles 63 and 78 of the Civil Practice Law and Rules,

- against -

CITY OF NEW YORK, NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, HOPE STREET CAPITAL LLC, 959 STERLING PLACE GROUND OWNER LLC, and XYZ CORP./LLC,

Respondents.

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Index No. 510458/2022

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' ORDER TO SHOW CAUSE FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

HILLER, PC
Attorneys for Petitioners
641 Lexington Avenue, 29th Floor
New York, New York 10022
(212) 319-4000

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This brief is submitted on behalf of petitioners Sterling Place BK-NY Block Association Inc., Noémie Bonnet, and Daniel Salk, a coalition of residents of Crown Heights, Brooklyn (collectively, "Petitioners" or the "Coalition"), in support of their Order to Show Cause.

PRELIMINARY STATEMENT

By this Order to Show Cause, the Coalition seeks a temporary restraining order ("TRO") and preliminary injunction to stop developer-respondents Hope Street Capital LLC and 959 Sterling Place Ground Owner LLC (together, the "Developer") from proceeding with the Developer's plans for demolition, as well as the construction of a large apartment complex (the "Project" or "Proposed Apartment Complex") on landmark-protected property in the Crown Heights North Historic District II (the "Historic District"). The Project, which required review by respondent New York City Landmarks Preservation Commission ("LPC"), was, as reflected in the Petition, approved unlawfully through the grant of a certificate of appropriateness on December 9, 2021 ("COA"). *See* Petition, ¶¶1-2, 6, 12, Ex. 1; COA, Ex. 2.[1] Having been granted the COA in violation of the law, the Developer is now planning to imminently demolish a portion of the 19th-century Romanesque Revival and Gothic Revival-style Hebron Seventh Day Adventist Church and School, often referred to as the "Crown Jewel" of Crown Heights ("Church"), and substantially complete construction of the Proposed Apartment Complex on the Church's campus ("Campus") (Petition, ¶¶2, 4, 36, 185). Indeed, as discussed below, the Developer's construction activity, including excavation, has already started; is moving at a rapid pace; and wreaking havoc in the community. As demonstrated below, the circumstances herein warrant issuance of a TRO and Preliminary Injunction to enjoin the construction and demolition activity in connection with the Developer's Project.

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[1]Hereinafter, we rely upon the same abbreviations and other capitalized terms defined in the annexed Emergency Affirmation of Michael S. Hiller in Support of Order to Show Cause, dated April 28, 2022 ("Hiller Affirmation").

First, the Coalition is threatened with irreparable harm because, after the COA was issued, the Developer started moving rapidly to excavate the land in order to pour the foundation for the Proposed Apartment Complex. Unless enjoined, the Developer is on pace to substantially complete the construction of the Proposed Apartment Complex before this Article 78 Proceeding is heard by the Court, which would moot the Coalition's claims. As a matter of law, the construction of a building in violation of New York Law, and the threat of mooting a petitioner's claim, each independently constitute irreparable harm as a matter of law and equity (Point A, *infra*).

Second, the Coalition is likely to succeed on the merits of its claims. As reflected in the Petition, the LPC violated lawful procedure when issuing the COA. Under well-established New York Law, if a developer's plans, as embodied in an application for a COA, substantially change after the public hearing process has been closed, it must be reopened to allow members of the public to provide additional public testimony on the changed project. Here, the LPC, after closing the public hearing process on the Developer's application for the COA ("Application"), allowed the Developer to radically change its plans for the Project without affording the public the opportunity to testify with respect thereto. In fact, despite permitting the Developer to submit *three completely different designs* for the Project, the LPC convened only *one public hearing* on the Application ("Public Hearing"), *at which only the first design ("First Design") was presented*. Before the Developer presented its second design, then-City Council Member Robert E. Cornegy, Jr. wrote to the LPC and requested that the local community board have the opportunity to review and comment on any changed proposals, the LPC, through its General Counsel, refused. Then, when the Developer returned to the LPC – twice – to present its radically changed second and third designs, members of the public were required to sit silently and were prevented from addressing the LPC and

responding to the comments made by the Developer's architect and the Commissioners. And the Court need not rely upon the Coalition's assessment that another public hearing was required before the radically changed designs could be considered; *the LPC Commissioners and the Developer's own architect himself readily admitted (and, indeed, boasted) that the second and third designs had "dramatically changed" the Project from the First Design*. In fact, one of the Commissioners commented that the difference between the First Design (as to which the public was afforded to testify) and that which was approved (as to which no oral testimony was permitted), was almost like "*night and day*;" another Commissioner acknowledged that the changes were the product of the Developer's architect "*completely dissembling his previous scheme and really re-thinking*" the Project; and another Commissioner commented that the Developer's architect had to "*modify [his] scheme this much [so] many times*," and had to "*redesign this thing*...." Unfortunately, however, General Counsel to the LPC, who is neither an architect nor an LPC Commissioner, unilaterally decided, even before the second and third designs were presented to the Commissioners, that the LPC would not convene an additional public hearing. The LPC's failure to hold a second public hearing after substantial changes were made to the First Design of the Project constitutes a direct and undeniable violation of the Landmarks Law, and thus violated lawful procedure, warranting the grant of Article 78 relief (Point B(1), *infra*).

Further, the LPC's approval of the Project was arbitrary and capricious, as the Proposed Apartment Complex is an affront to the Historic District and will, *inter alia*, obstruct the views of the cherished, landmark-protected Church. Indeed, the Proposed Project was almost universally condemned by the public, public officials and the Community Board as a clear violation of the Landmarks Law. Thus, the Coalition is likely to succeed on the merits of its claims (Point B(2),

infra).

Lastly, the balancing of the equities weighs heavily in favor of granting the relief sought by the Coalition. It is well-established that the LPC's violations of the law and of lawful procedure, as well as the threatened irreparable harm to the Coalition, weigh heavily in favor of granting equitable relief. Put simply, there would be no harm or prejudice to the Respondents in temporarily halting the Project during the pendency of this Proceeding in order to preserve the *status quo* since the COA was unlawfully approved. By contrast, the irreparable harm threatened to the Coalition is substantial and imminent. Were demolition of part of the Church to occur or if construction of the Project were to be substantially completed, such actions cannot be readily undone, if at all. Thus, on balance, the Coalition is clearly entitled to equitable relief to maintain the *status quo* by enjoining and restraining activity in connection with the Project pending the outcome of this Proceeding (Point C, *infra*).

STATEMENT OF FACTS

For a statement of the facts, we respectfully refer the Court to the Petition (Ex. 1), and the accompanying Moving Affidavit of Noémie Bonnet, and the Moving Affidavit of Daniel Salk.

ARGUMENT

THE COALITION IS ENTITLED TO A TRO AND PRELIMINARY INJUNCTION

The purpose of a TRO and preliminary injunction is to preserve the *status quo* until a decision can be reached on the merits.[2] The elements necessary to obtain a TRO and preliminary

[2]*See, e.g. Merling v. Ash Development, LLC,* 198 A.D.3d 743, 746 (2d Dep't. 2021) (*citing 159 Smith, LLC v. Boerum Hill Property Holdings, LLC*, 191 A.D.3d 741 (2d Dep't. 2021)); *19 India Fee Owner LLC v. Miller*, 2021 WL 979300 (Sup. Ct. Kings Co. Mar. 11, 2021) (Joseph, J.) (citation omitted); *360 West 11th LLC v. ACG Credit Co. II, LLC*, 46 A.D.3d 367, 367 (1st Dep't. 2007); *Hoppman v. Riverview Equities Corp.*, 16 A.D.2d 631, 631 (1st Dep't. 1962).

injunction are "a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in the[] [movant's] favor."[3] As shown below, the Coalition meets each of these prongs and is entitled to a TRO and preliminary injunction because: (i) the Coalition is threatened with irreparable harm due to the Developer's impending construction of the Proposed Apartment Complex (Point A, *infra*); (ii) the Coalition is likely to succeed on the merits of its Article 78 claims (Point B, *infra*); and (iii) the balance of the equities weighs heavily in the Coalition's favor (Point C, *infra*).

A. THE COALITION IS THREATENED WITH IRREPARABLE INJURY

"Irreparable injury," has been held to mean "any injury for which money damages are insufficient."[4] An injury is irreparable, not only when there is no certain pecuniary standard for the measurement of damages, but also when, as here, "the harm in question cannot be undone."[5] Threatened actions by a party that would moot the subject proceeding also constitutes irreparable harm as a matter of law.[6] In particular, construction work involving the erection of a building constitutes irreparable harm because it cannot readily be undone and would therefore destroy the *status quo* and moot a pending proceeding. *See, e.g., Stockley v. Gorelik*, 24 A.D.3d 535 (2d Dep't.

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[3] *Aetna Insurance Company v. Capasso*, 75 N.Y.2d 860, 862 (1990); CPLR §6301.

[4] *Klein, Wagner & Morris v. Lawrence A. Klein, P.C.*, 186 A.D.2d 631, 633 (2d Dep't. 1992); *Stop BHOD v. City of New York*, 22 Misc.3d 1136(A), 2009 WL 692080 (Sup. Ct. Kings Co. Mar. 13, 2009); *Peyton v. PWV Acquisition LLC*, 2013 WL 2165330 (Sup. Ct. N. Y. Co. 2013) (internal citations omitted).

[5] *Peyton*, 2013 WL 2165330, at *2.

[6] *Gramercy Co. v. Benenson*, 223 A.D.2d 497, 498 (1st Dep't. 1996); *River Defense Committee v. Thierman*, 380 F. Supp. 91 (S.D.N.Y. 1975) (plaintiffs demonstrated irreparable harm would result where defendant's plan, if allowed to proceed, would render the litigation moot).

2005) (in action to enjoin defendants from constructing deck or other encumbrance, "*status quo* will not be preserved absent a preliminary injunction"); *Peyton,* 2013 WL 2165330, at *3 (if new construction were to replace parking lots, "there is no way the building would be torn down so tenants can have their parking lots back"); *Ithilien Realty Corp v. 180 Ludlow Dev. LLC*, 2010 WL 11253126, at *1 (Sup. Ct. N.Y. Co. July 2, 2010), *aff'd.*, 80 A.D.3d 455 (1st Dep't. 2011) (plaintiff would suffer irreparable harm if defendant were permitted to install external ventilation shafts which would permanently alter plaintiff's building); *see also Lesron Junior Inc. v. Feinberg*, 13 A.D.2d 90 (1st Dep't. 1961) ("It is settled beyond doubt that an action for injunctive relief is the appropriate remedy of an aggrieved property owner who seeks to bar the erection of a structure on adjoining or nearby premises in violation of express zoning regulations").[7]

Here, the Coalition is threatened with irreparable harm due to the Developer's construction of the Proposed Apartment Complex. The Developer has already begun its construction activity, and

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[7]Indeed, Courts have found proceedings to be moot where the *status quo* had changed due to the substantial completion of construction work which could not be readily undone without undue hardship. *See, e.g., Dreikausen v. Zoning Bd. of Appeals of City of Long Beach*, 98 N.Y.2d 165, 173 (2002) (holding that a party challenging construction work must seek preliminary injunctive relief or otherwise preserve the *status quo* to prevent construction from continuing during the pendency of the litigation in order to avoid the mootness doctrine); *Citineighbors Coal. of Historic Carnegie Hill ex rel. Kazickas v. New York City Landmarks Pres. Comm'n.*, 2 N.Y.3d 727, 728-29 (2004) (where construction project was substantially complete and developer spent $25 million, such work could not be readily undone without undue hardship)*; Diamond Asphalt Corp. v. Sandler,* 92 N.Y.2d 244 (1998) (injunctive proceeding moot because work was completely or substantially done)*; Schaffer v. Zoning Board of Appeals of Town/Village of Harrison, et al.,* 22 A.D.3d 501 (2d Dep't. 2005) (completion of swimming pool construction project rendered appeal moot); *Sutherland v. Corp*., 61 A.D.3d 479, 479-80 (1st Dep't. 2009) ("By the time this proceeding was commenced, the building project was substantially complete, petitioners had failed to seek preliminary injunctive relief, there was no evidence that construction work was performed in bad faith, and such work could not be readily undone without undue hardship"); *Ughetta v. Barile*, 210 A.D.2d 562, 563 (3d Dep't. 1994) (because plaintiffs commenced the action well after the challenged improvement was complete, an improvement they had knowledge about as it was ongoing, "[t]he completion of the improvements which are the subject of this appeal and which plaintiffs seek to have demolished render this appeal moot").

thus the threat is imminent. In fact, the Developer has begun excavating at the Project Site and by preparing to pour the foundation for the Proposed Apartment Complex (Noémie Moving Aff. ¶3; Daniel Moving Aff. ¶3; DOB Page, Ex. 3). As shown in photographs taken recently by Petitioners, there is an enormous hole in the middle of the Campus where the Developer intends to construct the Proposed Apartment Complex (Noémie Moving Aff. ¶3 and Ex. 1 thereto; Daniel Moving Aff. ¶3 and Ex. 1 thereto). Construction activity has been ongoing nearly every weekday, with the Developer's heavy machinery moving up and down the street from approximately 7AM until approximately 5PM each day (Noémie Moving Aff. ¶4; Daniel Moving Aff. ¶4). Plainly, the Developer is attempting a race to completion.

Indeed, the construction activity has been so intense and disruptive in the Crown Heights neighborhood that it is has been the subject of numerous 311 complaints by neighbors (Noémie Moving Aff. ¶6; Daniel Moving Aff. ¶7). The Developer's excavation and construction activities have been extremely noisy and have caused extensive vibrations in surrounding homes (Noémie Moving Aff. ¶4; Daniel Moving Aff. ¶4). Worse, multiple residents, including Petitioners, who live near the project site ("Project Site") on Sterling Place have reported that, since the excavation began, they have experienced such extensive vibrations within their homes, to the point that objects have been falling off of shelves (Noémie Moving Aff. ¶4; Daniel Moving Aff. ¶4). Petitioners and other neighbors of the Project Site are deeply concerned that their homes are at risk of severe damage (Noémie Moving Aff. ¶4). In mid-February 2022, a full Stop Work Order was issued by the New York City Department of Buildings ("DOB") and served upon the Developer due to, *inter alia*, the Developer's failure to provide the proper pre-construction documentation, including a monitoring

report to the DOB, in contravention of its Site Safety Plan (DOB Website Pages, Ex. 3).[8]

If not enjoined by the Court, demolition of part of the Church will occur and the construction of the Proposed Apartment Complex will soon be substantially completed. Once demolition occurs, it cannot be reversed; and once constructed, the erection of the Proposed Apartment Complex cannot be readily undone.[9] The Proposed Apartment Complex is expected to have a 315'-long streetwall and include sections with six and seven stories at heights rising to 80'. Because of the proposed height and complexity of the Proposed Apartment Complex, the Developer would undoubtedly claim that undoing such massive construction work, after further work is performed up to substantial completion, would constitute an undue hardship.[10]

The Coalition thus easily meets the showing required for threatened irreparable harm. As reflected above, impending construction of the Proposed Apartment Complex, the process of which is already well underway, constitutes irreparable harm as a matter of law. Accordingly, the first prong required for entitlement to a temporary restraining order and preliminary injunction is satisfied.

B. THE COALITION HAS DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

As for the second prong, the Coalition need only demonstrate a probability of success on the merits[11] or at least the existence of sufficiently serious questions going to the merits to make them

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[8]The Stop Work Order was subsequently vacated.

[9]*See Weeks Woodlands Ass'n., Inc. v. Dormitory Auth. of State*, 95 A.D.3d 747 (1st Dept. 2012) *aff'd.,* 20 N.Y.3d 919 (2012); *Citineighbors,* 2 N.Y.3d at 728-29*; Peyton,* 2013 WL 2165330, at *2.

[10]*See Citineighbors,* 2 N.Y.3d at 729.

[11]*Aetna*, 75 N.Y.2d at 862.

a fair ground for litigation.[12] These requirements "do[] not compel a demonstration that success on the merits is practically a certitude."[13] Rather, "it is sufficient if petitioners make a *prima facie* showing of a 'right to relief,'" with the actual proof of the case left to a final hearing on the merits.[14]

Indeed, the Courts have been clear that:

> even when facts are in dispute, the *nisi prius* court can find that a plaintiff has a likelihood of success on the merits, from the evidence presented, though such evidence may not be "conclusive"….[15]

Furthermore, "[w]here…denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be reduced."[16]

In determining the merits of a claim in an Article 78 proceeding, the reviewing Court exercises a genuine, judicial function, and does not simply confirm a determination because it was

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[12] *Pashaian v. Eccelston Properties, Ltd.*, 88 F.3d 77, 87 (2d Cir. 1996) (applying New York law).

[13] *Egan v. New York Care Plus Insurance Co.*, 266 A.D.2d 600, 601 (3d Dep't. 1999) (affirming grant of injunction); *accord Int'l. Union of Operating Engineers, Local No. 463 v. City of Niagara Falls*, 191 Misc. 2d 375, 743 N.Y.S.2d 236, 240 (Sup. Ct. Niag. Co. 2002) (injunction granted: "The showing of a likelihood of success on the merits required before a preliminary injunction may be properly issued need not be equated with the showing of a certainty of success") (citation omitted).

[14] *Int'l. Union of Operating Engineers*, 191 Misc. 2d at 380 (*citing Tucker v. Toia*, 54 A.D.2d 322 (4th Dep't. 1976)). *See also State v. City of New York*, 275 A.D.2d 740 (2d Dept. 2000); *Merscorp., Inc. v. Romaine*, 295 A.D.2d 431, 434 (2d Dep't. 2002).

[15] *Ma v. Lien*, 198 A.D.2d 186, 187 (1st Dep't. 1993)*;Ruiz v. Meloney*, 26 A.D.3d 485, 486 (2d Dep't. 2006) (*accord*)*; Ying Fung Moy v. Hohi Umeki,* 10 A.D.3d 604, 605 (2d Dept. 2004) (*accord*); *see also Four Times Square Associates, L.L.C. v. Cigna Investments, Inc.*, 306 A.D.2d 4, 5 (1st Dep't. 2003) ("It is well settled that a likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence is inconclusive"); *see also* CPLR §6312(c).

[16] *North Fork Preserve, Inc. v. Kaplan,* 31 A.D.3d 403, 406, (2d Dep't. 2006) (*citing State*, 275 A.D.2d 740); *see also Ying Fung Moy,* 10 A.D.3d at 605; *Ma*, 198 A.D.2d at 187 (internal citations omitted).

rendered by an administrative agency.[17] Courts regularly annul agency determinations which are: (i) not supported by substantial evidence, (ii) arbitrary and capricious, (iii) precipitated by an error of law, and/or (iv) otherwise unlawful.[18] Not only is judicial review "mandated when the agency has acted illegally, unconstitutionally, or in excess of its jurisdiction,"[19] but further, an Article 78 petition _must_ be granted when an agency has: (i) "failed to perform a duty enjoined upon it by law," (ii) made a determination "in violation of lawful procedure," or (iii) taken action that is "affected by an error of law or arbitrary and capricious or an abuse of discretion."[20]

Here, as set forth below, the Coalition has a strong likelihood of success on the merits of its Article 78 claims because the Petition demonstrates that the LPC: (a) committed errors of law and violated its own procedures by failing to conduct a second public hearing after the Developer substantially deviated from the First Design presented to the LPC at the only public hearing (Point B(1), *infra*); and (b) acted arbitrarily and capriciously in granting the COA (Point B(2), *infra*).

1. THE LPC VIOLATED THE LANDMARKS LAW BY FAILING TO CONDUCT A PUBLIC HEARING AFTER THE DEVELOPER SUBSTANTIALLY DEVIATED FROM ITS FIRST DESIGN COMPRISING THE APPLICATION

Section 25-308 of the Landmarks Law (Chapter 27 of the N.Y.C. Administrative Code) states, in pertinent part:

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[17] *Gramatan Ave. Assocs. v. State Div. of Human Rights*, 45 N.Y.2d 176, 181 (1978).

[18] *See, e.g., Mohr v. Edwards*, 305 A.D.2d 414, 414 (2d Dep't. 2003); *Sexton v. Zoning Bd. of Appeals*, 300 A.D.2d 494, 497 (2d Dep't. 2002); *Byrne v. Board of Standards and Appeals*, 5 A.D.3d 261 (1st Dep't. 2004).

[19] *N.Y.C. Dep't. of Environmental Protection v. N.Y.C. Civil Service Comm'n.,* 78 N.Y.2d 318, 323 (1991).

[20] CPLR 7803(1), (3); *See, e.g., Ray v. City of New York,* 2020 WL 863986 (Sup. Ct. N.Y. Co. 2020); *Brittain v. Village of Liverpool*, 172 Misc.2d 201, 212 (Sup. Ct. Onondaga Co.), *app. dismissed*, 248 A.D.2d 1031 (4th Dep't. 1998).

> The commission shall hold a public hearing on each request for a certificate of appropriateness.[21]

Further, §25-313(b) of the Landmarks Law requires that:

> At any such public hearing, the commission shall afford a <u>*reasonable opportunity*</u> for the presentation of facts and the <u>*expression of views by those desiring to be heard*</u>....[22]

These requirements cannot unilaterally be restricted or eliminated. The "inexorable safeguard" of "a fair and open hearing," is necessary to protect "the liberty and property of the citizen" in "administrative proceedings of a quasi-judicial nature." *New York Southern Coal Terminal Corp. v. Woolley*, 35 N.Y.S.2d 443 (Sup. Ct. N.Y Co. 1942) (*citing Morgan v. U.S.*, 304 U.S. 1, 58 (1938)). *See also Stanford v. Summers*, 157 Misc. 698, 701 (Sup. Ct. Erie Co. 1936) ("Under our democratic form of government, a public hearing is, when required by statute, an inalienable right" and "the right of the private individual to reach the ear of those who make the laws can only be preserved by keeping intact the sacred right of public hearings"). Moreover, the right to a fair and open public hearing "is essential to the legal validity of administrative agency [review] and maintenance of public confidence therein." *Orbach v. New York State Urban Development Corp.*, 110 Misc.2d 720, 724 (Sup. Ct. N.Y. Co. Sept. 10, 1981) (internal citations omitted).

Indeed, the ability to engage in advocacy in the presence of public officials and representatives constitutes a critical fiber in the bundle of rights comprising the Free Speech guaranteed by the First Amendment. *See 600 West 115th Street Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 137 (1992), *cert. denied*, 508 U.S. 910 (1993) (the "scheme of governance embodied in the First Amendment has come to have as its central metaphor the New England town meeting, where *citizens*

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[21]N.Y.C. Admin. C. §25-308.

[22]N.Y.C. Admin. C. §25-313(b) (emphasis added).

can come forward to be heard in a full and free debate of matters of civic concern") (emphasis added). In *600 West 115th Street Corp*, the Court of Appeals held that an individual's speech before a New York City Community Board hearing in opposition to another person's permit application was protected by the First Amendment as part of "public debate." *Id.* at 137-38. Similarly, as one Court has explained:

> The goal of citizen participation in public hearings is to give individuals an opportunity to voice their concerns freely ... *By participating in these hearings, the City is able to take into account the views of all stakeholders and reach the best-informed decision. Furthermore, public hearings themselves are expressions of our First Amendment rights to freedom of speech* ... Debate and freedom of speech are bedrock principles of our democracy and should never be compromised. [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

Parkhouse v. Stringer, 55 A.D.3d 1, 9 (1st Dep't. 2008) (*citing* John Stuart Mill, *On Liberty*, at 35–36 (Ticknor and Fields 1863)) (emphasis added); *see also Schaus v. Town Bd. of Town of Clifton Park, Saratoga Cty.*, 83 Misc. 2d 726, 729 (Sup. Ct. Saratoga Co. 1975) ("The public hearing provides a forum for the expression of public opinion and also affords to persons who own land which will be affected by the proposal an opportunity formally to protest and to appear and present their views against the adoption of the proposed measure" (*citing* 1 Anderson, American Law of Zoning, s 4.11, p. 168.); *Brown v. City of Jacksonville*, 2006 WL 385085 (M.D. Fla. Feb. 17, 2006) (*enjoining enforcement of rule depriving the plaintiff from attending and speaking at City Council meetings*; preliminary injunction, *granted*); *Cyr v. Addison Rutland Supervisory Union*, 60 F. Supp. 3d 536, 547-48 (D. Vt. 2014) (plaintiff's "speech may not have had the same effect on the school board or other members in attendance at school board meetings were he not physically present").

Importantly, under New York Law, a new public hearing must be held whenever a proposal before the LPC or other land-use agency or commission substantially deviates from that which was proposed at a prior public hearing ("Substantial Deviation Rule"). As the Court recently ruled under circumstances very similar to those present here, "[t]he law is well-settled and is undisputed that another public hearing would have been required if the revised proposal substantially deviated from the initial proposal." *Ray,* 2020 WL 863986 at *1 (certificate of appropriateness vacated and annulled) (*citing In re Katrina Maxtone-Graham v. Landmarks Preservation Comm'n. of City of New York,* 1 A.D.3d 295, 295 (1st Dep't. 2003)).

As set forth in the Petition, the LPC's grant of the COA herein without a second public hearing was in direct violation of the Substantial Deviation Rule (Petition, ¶¶151-78). The Developer herein presented a total of three substantially different design proposals to the LPC in connection with its Application. Nevertheless, the LPC convened just one Public Hearing on the Application (*Id.* ¶59). The Public Hearing was held solely at the time that the Developer's First Design proposal, in October 2020, was heard (*Id.* ¶¶59-66). The LPC failed to convene a public hearing on either the Developer's second design, proposed in March 2021 ("Second Design") or its third and final design, which was proposed by the Developer and approved by the LPC in May 2021 ("Third Design" or "Approved Design") (*Id.* ¶¶106, 120, 123, 138). No public hearing was held with respect to the Second Design or the Approved Design, despite that they each substantially deviated from the First Design (*Id.* ¶¶135, 160).

To be sure, the Court need not take the Coalition's own word (or even the word of expert architect David P. Helpern) for the fact that there were substantial deviations to the designs herein.[23]

[23] *See* Affidavit of Architect David P. Helpern, sworn to on April 8, 2022 ("Helpern Aff."), Ex. 11.

In fact, the Developer's own architect (the "Developer's Architect") and the LPC Commissioners commented that both the Second and Approved Designs substantially deviated from the First Design. Specifically, the Developer's Architect and the LPC Commissioners both acknowledged in March 2021, during the Second Public Meeting, that "*you can see the dramatic change*" between the First and Second Designs. *See* Petition, ¶111; March Public Meeting Video.[24] Commissioner Lutfy stated that the revised proposal was a "*new design*;" the multiple differences between the First and Second Designs were "*tremendous*" and that comparing the two Designs was almost "*like night and day*." *See* Petition, ¶113; March Public Meeting Video. Commissioner Goldblum stated that the Second Design was the product of the Developer's Architect ***"completely disassembling his previous scheme and really re-thinking it."*** *See* Petition, ¶114; March Public Meeting Video. Several of the Commissioners, including, for example, Commissioners Holford-Smith and Chapin, agreed that the Proposed Project had changed insofar as the Second Design "*now reads as much more residential than commercial or institutional*." *See* Petition, ¶115; March Public Meeting Video. Despite all of these comments by the Developer's Architect and the Commissioners, the LPC inexplicably did not address the Substantial Deviation Rule and did not reopen the public hearing process. *See id.* ¶116.

In May 2021, the Developer then proposed and presented its Approved Design, which included yet *additional*, substantial changes from the First Design beyond the already "tremendous" and "dramatic" changes featured by the Second Design. *See* Petition, ¶¶125-26. Once again, both the Developer's Architect and the LPC Commissioners agreed that these further changes to the design caused the Application to be significantly different that the First Design. For example, the Developer's Architect acknowledged that there was now "*significant change to the roof scape on*

[24] *See* LPC Public Meeting March 16, 2021, https://www.youtube.com/watch?v=4VNV4zm1M-E ("March Public Meeting Video").

both volumes" (*i.e.* the East and West Buildings). *See* Petition, ¶128; May Public Meeting Video.[25] The Developer's Architect also noted that pushing back the top floor on the East Building (closest to the row houses) "*makes a pretty dramatic change*." *See id*. ¶129. The Commissioners openly agreed with the Developer's Architect that there were dramatic changes between the First and Approved Designs. For example, Commissioner Goldblum stated that the Proposed Project has "***come a long way***"and noted the difficulties of architects to **"*modify their scheme this much this many times*."** *See* Petition, ¶131; May Public Meeting Video. Similarly, Commissioner Devonshire observed that the Developer's Architect "must have been cringing the entire time that ***he's had to redesign this thing***...." *See* Petition, ¶132; May Public Meeting Video.

Despite acknowledging that there were significant changes in the designs, the LPC Commissioners never even discussed, let alone voted upon, whether another public hearing was warranted under the circumstances (Petition, ¶¶136-37). Instead, prior to the Second Public Meeting, the General Counsel to the LPC, in response to a letter from then-City Council Member Cornegy, requesting formal community review, decided none was necessary (Silberman March 9, 2021 Email, Ex. 4; *see also* Cornegy March 9, 2021 Letter, Ex. 5). Critically, this decision by the General Counsel was made *before* the Second Design was even presented to the LPC Commissioners! *See* Ex. 4 ("the revised design *will be presented* to the Commissioners at a public meeting") (emphasis added). In other words, the decision about whether to convene a second LPC public hearing was rendered solely by the LPC's General Counsel and not by the Commissioners after having an opportunity to review the revised design as presented to them by the Developer. Thus, not only did the LPC not render a determination on this issue; the Commissioners weren't even afforded the

[25] *See* LPC Public Meeting May 11, 2021, https://www.youtube.com/watch?v=XxMOKv7Zdps ("May Public Meeting Video").

opportunity to consider it! Given the absence of any determination by the Commissioners, the Court may refer to the Commissioners' comments plainly showing that they viewed the deviations in the Developer's multiple design proposals to be substantial.

A comparison of the First Design and the Approved Design, based upon the Developer's presentation materials submitted to the LPC, is shown below:

***First Design* (October 2020 Presentation Materials)**

***Approved Design* (May 2021 Presentation Materials)**

Compare October 20, 2020 Presentation Materials at 39, Ex. 6 *with* May 11, 2021 Presentation Materials at 12, Ex. 7. *See also* Helpern Aff. ¶3. The above renderings, which were copied from the Developer's own presentation materials, leave no doubt that the Approved Design substantially

deviates from the First Design. Indeed, the First and Approved Designs barely resemble one another. And, as discussed above, the Developer's Architect and the LPC Commissioners acknowledged that the Application had completely changed after the public hearing process was wrongfully closed at the Public Hearing. Thus, not only does our comparison of the Developer's multiple Designs reveal substantial deviations from the First Design; the Developer's Architect made the existence of substantial deviations in the Designs a featured element of his second and third presentations before the LPC. *See* March Public Meeting Video; May Public Meeting Video.

Virtually the exact circumstances present herein were also present in this Court's recent decision in *Ray, supra*. In *Ray*, an initial public hearing was held on a developer's application for a certificate of appropriateness; after the LPC disapproved of the initial proposal, the developer made substantial revisions and returned to the LPC for further review. 2020 WL 863986 at *1. The LPC did not hold another public hearing, but merely held public ***meetings*** at which members of the public are not permitted to testify. *Id.* The petitioners therein, comprised of community members, brought an Article 78 proceeding on the grounds that the LPC's failure to convene a second public hearing after the developer had revised its initial proposal was a violation of lawful procedure. *Id*. The Court therein granted the petition, ruling that "the final design so deviated from the original design that an additional public hearing on the new design was required." *Id.* at *1-2. *See Maxtone-Graham*, 1 A.D.3d at 295 ("The parties [which included the LPC] agree that the issuance of the certificate of appropriateness would have required a second public hearing had the proposal, considered at the public meeting in response to community objections, been a substantial deviation from that originally presented")); *LCS Realty Co., Inc. v. Incorporated Village of Roslyn*, 273 A.D.2d 474, 475 (2d Dep't. 2000) ("[T]here were substantial changes between the draft environmental

impact statement and the final generic environmental impact statement, and thus *new public hearings are warranted*") (emphasis added); *Incorporated Village of Island Park v. J.E.B. Associates, Inc.*, 21 Misc.2d 249, 251-52 (Sup. Ct. Nassau Co. June 9, 1959) ("[A]fter a public hearing has been held on a proposed ordinance and thereafter certain changes are made, *a further public hearing must be held* to consider such changes before the ordinance can be finally adopted") (emphasis added). *See also Village of Mill Neck v. Nolan,* 259 N.Y. 596, 597 (1932) (concluding that a zoning ordinance was not adopted in conformity with certain provisions of the Village Law because a new public hearing was not held after substantial and extensive changes were made to the originally proposed ordinance).

In fact, the deviations in the Developer's multiple designs herein are even more substantial than those in the developer's designs in *Ray*. Here, the differences between the First Design and the Second and Approved Designs are much more pervasive. The First Design was comprised of a single proposed building ("Single Proposed Building") with a continuous street wall that would extend 350' in length, and to a height of 60' with no setback until the penthouse, which would be set back 20 feet from the facade (the "First Design"). The Single Proposed Building would also have featured: (1) a gable roofed end piece at the corner of New York Avenue and Sterling Place to house, in its cellar, a gymnasium ("Gabled Roof"); (2) the lengthy building mass to house residential apartments along Sterling Place; and (3) a common one-story foyer in the middle of the Single Proposed Building ("Central Foyer"). The Single Proposed Building was also designed to nearly abut the adjacent row houses on Sterling Place. *See* October Presentation Materials, Ex. 6 at p. 39. *See* Helpern Aff. ¶¶11-12.

In the Second Design, the significant changes from the First Design included, *inter alia*:

- the Single Proposed Building was converted into a Multi-Building Proposal, with two distinct buildings of six stories each to the east and west ("East Building" and "West Building," respectively), with a common entryway on Sterling Place ("Common Entryway");

- this Multi-Building Proposal included, for the first time, a 25' gap between the East Building and the adjacent existing rowhouses, whereas in the First Design, there was virtually no separation whatsoever between the Single Proposed Building and the adjacent rowhouses;

- the overall facade along Sterling Place was changed and "simplified;"

- the metal and glass "window wall" components on the north façade were changed to masonry (brick) with mostly double hung windows;

- the entire base of the Multi-Building Proposal was given additional articulation and texture "to ground the building and address the pedestrian scale;"

- the design of the roof was also modified by changing the material used on the top floor and dormers from metal to brick, using diamond shaped zinc shingle cladding on the roof, and the use of a metal expression on the top floor on the rear side of the Proposed Apartment Complex (*i.e.*, the side facing the Church);

- the portion of the new West Building changed the Gabled Roof, which was substantially "simplified;" the height of the proposed volume was reduced by one floor; and its setback off New York Avenue was increased by 10 feet;

- six stories of new balconies were added to the East Building;

- the overall massing and square footage was reduced by approximately 14,000 sf.; and

- the curb cut and garage ramp were relocated from the west side (on New York Avenue) of the Single Proposed Building to the new East Building.

See Petition, ¶110; Helpern Aff. ¶15; *see also* March 2021 Presentation Materials, Exhibit 11 to Petition (Dkt. No. 18).

Thereafter, the Developer presented its Third Design, which proposed even more substantial changes than the Second Design, including, *inter alia*:

- extending the masonry piers on the ground floor and adding a brick bulkhead to reduce the commercial look of the floor apartments;

- pushing back the top floor on the eastern portion of the East Building on Sterling Place by 10 feet, and by five feet on the eastern side adjacent to the row houses;

- introducing a recess on the West Building;

- eliminating the "projecting brick gables" which had wrapped onto the Sterling Place facade; and

- adding a "shed portion" to the common entryway (connecting the East and West Buildings) to reduce its (the common entryway's) apparent overall height, accentuating the separation between the East and West Buildings and the disconnected/interrupted roofline (whereas in the First Design, the Proposed Project consisted of a Single Proposed Building with a continuous roofline).

See Petition, ¶126; Helpern Aff. ¶20; May 2021 Presentation Materials, Ex. 7.

It bears emphasis that both the Developer's Architect and the LPC Commissioners agreed, by their numerous comments, that the Developer's proposal, from the First Design to the Approved Design, had substantially changed. These comments include, *inter alia*, that:

- there was a "*new design*;"

- the changes were "*tremendous*" and almost "*like night and day*;"

- the Approved Design was the product of the Developer's Architect "*completely disassembling his previous scheme and really re-thinking it*;"

- the revised plan *now reads much more residential* instead of commercial;

- the Proposed Project had "*come a long way*;"

- the Developer's Architect had to "*modify [his] scheme this much this many times*;"

- the Developer's Architect "*had to redesign this thing*...."

See March Public Meeting Video; May Public Meeting Video. *See supra*.[26]

Given how fundamentally different the Application became once the Developer submitted the Second and Third Designs, New York Law required the LPC to schedule a new public hearing, at which the public would be invited to offer testimony and respond to any oral presentation by the Developer. *Ray,* 2020 WL 863986 at *1-2; *Maxtone-Graham,* 1 A.D.3d at 295; *LCS Realty Co.,* 273 A.D.2d at 475; *Incorporated Village of Island Park*, 21 Misc.2d at 251-52; *Village of Mill Neck,* 259 N.Y. at 597. Instead, the LPC merely convened a series of public ***meetings*** – again, permitting only public observation, but not public participation. According to the LPC's website, a public ***hearing*** "provide[s] an opportunity for the public to ***testify in person*** before the Commission," whereas a public ***meeting*** "provide[s] an opportunity for the public to ***observe subsequent discussion*** amongst the Commissioners ... ***after the hearing is closed***."[27] The New York Department of State defines a public hearing as "an official proceeding of a governmental body or office, during which the public is accorded the right to be heard."[28] And pursuant to the Substantial Deviation Rule, the LPC must hold a new public ***hearing*** (not a meeting) each time a proposal contained in an application for a certificate of appropriateness is substantially modified ***after*** a public hearing has already been held. *See, e.g., Ray,* 2020 WL 863986; *Maxtone-Graham,* 1 A.D.3d at 295. Public ***meetings***, at which members of the public are not permitted to testify, are insufficient. *See Ray,* 2020 WL 863986.

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[26]In *Ray*, 2020 WL 863986, some of the Commissioners had made a few comments that the developer's proposal designs therein were different, but they were not nearly as many as those herein.

[27]https://www1.nyc.gov/site/lpc/hearings/for-the-public.page, last visited April 28, 2022 (emphasis added).

[28]*Conducting Public Meetings and Public Hearings*, New York Department of State, Division of Local Government Services, 2008, p. 6, Exhibit 13 to Petition (Dkt. No. 20).

Although *written* comments by the public were submitted in opposition to the Second and Third Designs, such correspondence cannot reasonably substitute for a "passionate deliverance of [one's] message in person" to public officials empowered to protect the community in which a speaker lives.[29] *See* Daniel Pet. Aff. ¶11, Ex. 8. Indeed, over 1,000 letters were submitted to the LPC in connection with the Proposed Project and it would be virtually impossible for the LPC Commissioners (or even their staff) to read them all, or even a tenth of them (Noémie Pet. Aff. ¶13, Ex. 9)

More importantly, members of the public, although permitted to provide written submissions *in advance of* public meetings, cannot respond to an applicant's oral presentation made to the LPC *during* public meetings. Consequently here, the Developer got a free pass; the Developer appeared at the Second and Third Public Meetings and provided full presentations concerning an entirely new project without any opposition to those presentations because the LPC did not permit anyone to address the LPC to testify in response.

Consistent with the evidence in the record that the Developer completely changed the project following closure of the public hearing process, the Commissioners, who had expressed overwhelming *opposition* to the Application at the Public Hearing, *voted in its favor* after a few minutes of discussion at the Third Public Meeting.[30] Plainly, the Commissioners were moved to change their votes, not because revisions to the Application were minor or technical, but rather because it had "come a very long way" due to substantial deviations made by the Developer's Architect (Petition, ¶131; May Public Meeting Video). And the dozens of community members who

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[29] *See Brown*, 2006 WL 385085 at *4.

[30] *Compare* May Public Meeting Video *with* LPC Public Meeting Video, Nov. 17, 2020 https://www.youtube.com/watch?v=et4BGESipmY ("November Public Meeting Video")

were prepared to testify in opposition and explain why this Project was so antithetical to the Historic District were resigned to silence, without their voices being heard on the design that was ultimately approved by the LPC. The LPC was required to re-open the public hearing process and its failure to do so constitutes a violation of lawful procedure and an error of law, requiring annulment and reversal of the COA. *Ray,* 2020 WL 863986; *Katrina Maxtone-Graham,* 1 A.D.3d at 295; *LCS Realty Co.,* 273 A.D.2d at 475; *Incorporated Village of Island Park,*, 21 Misc.2d at 251-52; *Village of Mill Neck,* 259 N.Y. at 597.

Petitioners thus have a strong likelihood of success on the merits of this claim, far exceeding what is required on this motion for a TRO and preliminary injunction. *See, e.g., Aetna*, 75 N.Y.2d at 862; *Ying Fung Moy,* 10 A.D.3d at 605.

2. THE LPC ACTED ARBITRARILY, CAPRICIOUSLY AND IRRATIONALLY IN ISSUING THE CERTIFICATE OF APPROPRIATENESS

The criteria for the grant or denial of a certificate of appropriateness are set forth in §25-307 of the Landmarks Law. This section provides that, in determining whether to grant or deny a certificate of appropriateness, "the commission shall determine whether the proposed work would be appropriate for and consistent with the effectuation of the purposes of this chapter." N.Y.C. Admin. C. §25-307(a).[31] Specifically, with respect to historic districts, §25-307(b) states:

(1) In making such determination with respect to any such application

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[31]The purposes of the Landmarks Law are, to, *inter alia:* "effect and accomplish protection, enhancement and perpetuation of ... [historic] districts which represent or reflect elements of the city's cultural, social, economic, political, and architectural history; safeguard the city's historic, aesthetic, and cultural heritage, as embodied and reflected in such ... [historic] districts;... foster civic pride in the beauty and noble accomplishments of the past; protect and enhance the city's attractions to tourists and visitors and the support and stimulus to business and industry thereby provided" and "promote the use of historic districts ... for the education, pleasure and welfare of the people of the city." N.Y.C. Admin. C. §25-301(b).

> for a permit to construct, reconstruct, alter or demolish an improvement in an historic district, the commission shall consider (a) the effect of the proposed work in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done and (b) *the relationship between the results of such work and the exterior architectural features of other, neighboring improvements in such district*.
>
> (2) In appraising such effect and relationship, the commission shall consider, in addition to any other pertinent matters, the factors of aesthetic historical and architectural values and significance, architectural style, design, arrangement, texture, material and color.

N.Y.C. Admin. C. §25-307(b) (emphasis added).

Here, the LPC's approval of the Proposed Project and grant of the COA was arbitrary and capricious. The Proposed Project, far from protecting or enhancing the Historic District, is plainly inconsistent with, and an affront to, the Historic District. The massing and scale of the Proposed Project is jarringly large in relation to the other buildings in the Historic District. The East and West Buildings of the Multi-Building Proposal, which are more than six-stories tall and rise to an elevation of 80', would obscure the Church and tower over the adjacent, approximately 35' tall rowhouses on Sterling Place. *See* Daniel Pet. Aff. ¶¶3, 4, Ex. 8; Noémie Pet. Aff. ¶3, Ex. 9. Further, the 315' continuous streetwall length of the Multi-Building Proposal would be, by far, the longest in the Historic District. The lengthy streetwall is especially inappropriate because it contains no setbacks off the street on which it runs, unlike existing lengthy buildings in the Historic District (Petition, ¶¶142-43).

Most egregiously, the Proposed Project approved by the COA is an overwhelming distraction from the Church, the "Crown Jewel" of Crown Heights and the Historic District (Petition, ¶36; Noémie Pet. Aff. ¶¶2-3; Daniel Pet. Aff. ¶4). The LPC's Designation Report for the Historic District describes the Church, originally built in 1889, as "*the district's only 19th-Century institutional*

building, and one of its most impressive examples of Romanesque Revival architecture" (Designation Report Excerpts, Ex. 10 at 4, 12) (emphasis added). Nevertheless, the Proposed Project would not allow for any street-level views of the historic Church Building from Sterling Place (Noémie Pet. Aff. ¶3; Daniel Pet. Aff. ¶4). The massive Multi-Building Proposal would significantly block the row of stained-glass windows on the southern facade of the Church Building (*Id.*). And the Proposed Project would eliminate much of the existing open space on the site of the Church Property. *See* Noémie Pet. Aff. ¶2; Daniel Pet. Aff. ¶3.

After the First Design was presented, the Commissioners emphasized the need to maintain more open space on the Church Property, such as the inclusion of a courtyard, to preserve the "campus"-like feel, including the air and greenery that has always existed around the historic Church (Petition ¶¶90, 189). However, the Approved Design, with its Multi-Building Proposal, shows an even greater reduction of open space (including greenspace) between the Church and the Proposed Project than was presented in the First Design (*Id.* ¶190). The LPC nevertheless voted in favor of, and the LPC thus approved, an out-of-context design which is inconsistent with the Historic District, which deprives community members and passersby of views of the Church Building, and of cherished open space and greenery on the Church Property (*Id.* ¶191; Noémie Pet. Aff. ¶¶2, 3; Daniel Pet. Aff. ¶¶3, 4). It is unsurprising then, that multiple preservationist groups testified in opposition to the Project; the local community board (Brooklyn CB8) overwhelmingly rejected the Project; dozens of community members testified in opposition to the Project; elected public officials expressed their opposition to the Project; over 1,000 letters in opposition to the Project were submitted to the LPC; and the community created a petition in opposition to the Project that consists

of over 8,000 signatures (Petition, ¶¶67-70, 73, 107, 124).[32]

The LPC's grant of the COA herein therefore clearly constitutes arbitrary, capricious and irrational decision-making, and thus Petitioners have a strong likelihood of success on the merits of this claim as well. *See, e.g., Aetna*, 75 N.Y.2d at 862; *Ying Fung Moy,* 10 A.D.3d at 605.

C. THE BALANCE OF THE EQUITIES WEIGHS HEAVILY IN FAVOR OF GRANTING THE TRO AND PRELIMINARY INJUNCTION

The Coalition's request for a TRO and preliminary injunction should also be granted because the balance of equities in this case weighs heavily in favor of the Coalition, which merely seeks to preserve the *status quo* – specifically, preserving the site in its current condition rather than permitting the Developer to demolish a part of the Church building or substantially complete construction of the Proposed Apartment Complex. Maintaining the *status quo* is often preferred on a balance of the equities. *See, e.g.*, *Masjid Usman, Inc. v. Beech 140, LLC,* 68 A.D.3d 942 (2d Dep't. 2009) ("A balance of the equities likewise favors the granting of preliminary injunctive relief to maintain the status quo pending the resolution of the action")*; see also Republic of Lebanon v. Sotheby's*, 167 A.D.2d 142, 145 (1st Dep't. 1990) (awarding injunctive relief where the "equities lie in favor of preserving the *status quo*"); *Barbes Rest. Inc. v. ASRR Suzer, 218, LLC*, 140 A.D.3d 430, 432 (1st Dep't. 2016) (*accord*). Further, balancing of the equities "requires the court to look to the relative prejudice to each party accruing from a grant or a denial" of preliminary injunctive relief. *Ma*, 198 A.D.2d at 187; *Deutsch v. Grunwald,* 165 A.D.3d 1035, 1037 (2d Dep't. 2018) ("The plaintiff would suffer irreparable injury absent the relief sought and the balance of the equities favors

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[32]By stark contrast, the LPC received only about four letters in support; and the only person who testified in support of the Proposed Project was the Chair of the school board at the Church and a leader at the Church, whose support was, no doubt, heavily influenced by the fact that it was *his* Church that was slated to receive funding from the Developer for restoration of the Church Building (Petition, ¶¶71-72, 107, 124).

the plaintiff given the prejudice that the plaintiff would suffer from a denial of the requested relief"); *see also Louis Foodservice Corp. v. Konstantinos Vouyiouklis*, 2002 WL 31663230, at *4 (Sup. Ct. Kings Co. Aug. 26, 2002) (*accord*).

In addition, it is well established that, where the government has failed to follow the law and proper procedure, the equities tip in favor of the petitioner. *See, e.g., Connor v. Cuomo*, 161 Misc. 2d 889, 897 (Sup. Ct. Kings Co. 1994) ("A balancing of the equities also favors petitioners. Respondents may not utilize the condemnation process as a mechanism to avoid compliance with local laws…and to bypass any meaningful formal community review"); *Lee v. N.Y.C. Dept. of Hous. Pres. & Dev.,* 162 Misc.2d 901, 912 (Sup. Ct. N.Y. Co. 1994) ("Based on petitioners' ample proof that respondents have committed substantive and procedural violations, the balance of equities tips in favor of granting petitioners a stay").

Here, the balancing of the equities heavily weighs in favor of protecting the Coalition from irreparable harm and maintaining the *status quo*. If the Proposed Projected were allowed to be constructed while this Proceeding is pending, the LPC's violation of lawful procedure, as alleged in the Petition, would be disregarded. As shown in Points A-B *supra*, not only is there a substantial likelihood of success on the merits of the Coalition's claims, but the denial of injunctive relief here would render any final judgment in favor of the Coalition moot and ineffectual, since demolition cannot be reversed and the Proposed Apartment Complex, once substantially completed, could not be readily undone without undue hardship.[33] There would, therefore, be significant and irreparable harm to the Coalition if injunctive relief were to be denied.

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[33]*See, e.g., Sforza v. Nesconnset Fire Dist.*, 184 A.D.2d 631, 632 (2d Dep't. 1992); *Green Harbour Homeowners' Association, Inc. v. Ermiger,* 67 A.D.3d 1116, 1117 (3d Dep't. 2009) ("as there is no proof of prejudice and the injunction preserves the *status quo*, the equities balance in favor of plaintiff")*; 360 West 11th LLC*, 46 A.D.3d 367; *Moody*, 146 A.D.2d 675; *Gramercy*, 223 A.D.2d at 498.

By contrast, there would be no such harm or prejudice to the Developer if such relief were to be granted. There is simply no need for the Developer to proceed with construction before the pending Article 78 proceeding is heard, especially given that the COA granting permission for the work is unlawful. In fact, more harm is likely to result to the Developer were it to proceed with construction now and then later ordered by the Court to demolish or undo the construction of the Proposed Apartment Complex should the Coalition prevail in this proceeding. Simply put, the Coalition, made up of community residents who live in close proximity to the Project Site in the Historic District, should not be subjected to enduring construction of the Proposed Apartment Complex in their neighborhood when there is a substantial likelihood that the construction would need to be undone at the conclusion of this proceeding. *See* Noémie Moving Aff. ¶¶3-6; Daniel Moving Aff. ¶¶3-7.

The Developer may contend that the TRO and injunctive relief sought here would cause delays in constructing their Proposed Apartment Complex. However, there was no legal basis for the LPC to approve construction of the Proposed Apartment Complex in the first instance (*see supra*). In other words, since the Developer has no actual right to proceed with construction, the Developer is not entitled to the opportunity to race to completion of the Proposed Apartment Complex before this proceeding is heard.

CONCLUSION

In view of the foregoing, the Coalition is entitled to an order and judgment, temporarily restraining and preliminarily enjoining the Developer from proceeding with any demolition construction or excavation activity, as set forth in the Proposed Order to Show Cause, and any and all other relief in favor of the Coalition the Court deems just and proper.

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Respectfully submitted,

HILLER, PC
Attorneys for Petitioners
641 Lexington Avenue, 29th Floor
New York, New York 10022
(212) 319-4000

By: ______________________
Michael S. Hiller
Jason E. Zakai