

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

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**THE SKYSCRAPER SAFETY CAMPAIGN, INC.,
UNIFORMED FIRE OFFICERS ASSOCIATION, LOCAL
854, IAFF, AFL-CIO, et al.,**

Index No. 111870/03

Petitioners,

- against -

**PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
JOSEPH J. SEYMOUR, in his official capacity as Executive
Director of the Port Authority of New York and New Jersey,
LOWER MANHATTAN DEVELOPMENT CORP., JOHN C.
WHITEHEAD, in his official capacity as Chairman of the
L.M.D.C., WORLD TRADE CENTER PROPERTIES, L.L.C.,
WESTFIELD WTC LLC, WESTFIELD WTC HOLDING LLC,
SILVERSTEIN PROPERTIES, INC., and MARRIOTT
HOTEL SERVICES, INC.,**

Respondents.

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**MEMORANDUM OF LAW
IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS**

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THE SKYSCRAPER SAFETY CAMPAIGN, INC.,
UNIFORMED FIRE OFFICERS ASSOCIATION, LOCAL
854, IAFF, AFL-CIO, CATHERINE SALLY REGENHARD,
individually and as Chairperson of the Skyscraper Safety
Campaign, MONICA GABRIELLE, individually and as
Co-Chairperson of The Skyscraper Safety Campaign,
BRUCE DE CELL, BEVERLY ECKERT, JAMES RICHES,
RITA RICHES, AILEEN A. RYAN, GERARD JEAN-
BAPTISTE, COLLEEN RYAN, DIANA L.D. STEWART,
PETER A. GADIEL, THERESA MCGOVERN, ALBERT O.
REGENHARD and WILTON A. SEKZER, individually and
as supporters of The Skyscraper Safety Campaign and as
taxpayers in jurisdictions contained within the Bi-State Pact
States of New York and New Jersey which authorized creation
of the Port Authority of New York and New Jersey, PETER
GORMAN, individually and as President of the Uniformed Fire
Officers Association, ARTHUR J. PARRINELLO, individually
and as Treasurer of the Uniformed Fire Officers Association,
TRIBECA COMMUNITY ASSOCIATION, INC., BLEECKER
AREA MERCHANTS' AND RESIDENTS' ASSOCIATION,
INC., CAROL DE SARAM, individually, and as a member of the
Tribeca Community Association and as a taxpayer, CHARLES
WOLF, individually and as a representative of the Bleeker Area
Merchants' and Residents' Association and as a taxpayer,
CHRISTOPHER SHAYS, individually, as an elected member
of the Congress of the United States representing the 4th
Congressional District of Connecticut and as a supporter of
The Skyscraper Safety Campaign, CAROLYN MALONEY,
individually, as an elected member of the Congress of the
United States representing the 14th Congressional District of
New York and as a supporter of The Skyscraper Safety Campaign,

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**MEMORANDUM OF LAW
IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS**

Preliminary Statement

Petitioners respectfully submit this Memorandum of Law in Opposition to Respondents' Motion to Dismiss, dated August 21, 2003, seeking to dismiss this proceeding, or, to the extent it is not dismissed, convert this proceeding to an action at law. In lieu of a Statement of Facts, Petitioners incorporate the Amended Verified Petition, Affidavits and Exhibits annexed thereto and Petitioners' Memorandum of Law in Support of Petition for Declaratory Relief, and the Court is respectfully referred thereto.

**I. THE DISPUTE OF LAW IN THIS MATTER IS JUSTICIABLE AND
THE RELIEF SOUGHT IN THE PETITION DOES NOT
CONSTITUTE AN ADVISORY OPINION**

As the prayer for relief in the Amended Verified Petition ("Petition") clearly indicates, the relief sought would declare the respondents subject to the legal jurisdiction of the New York City Building and Fire Codes (the "Codes"), from which they currently purport to be exempt. (Am.Petition, at para. 25, 26). Whether the respondents voluntarily meet or exceed the Codes is completely irrelevant and an issue of fact not law. The question presented in the petition is whether the respondents are subject to the legal jurisdiction of the City of New York for purposes of

enforcing the Codes to protect the health, safety and welfare of the residents of the City of New York. Accordingly, the relief sought is not advisory in nature and that aspect of the motion to dismiss is properly denied.

The Respondent Port Authority has always, and continues, to claim it is exempt from the Codes. (Am. Petition, at para. 53, 54, Exhs. B, D, E, F, G, I and K). Throughout their Memorandum of Law, respondents argue that petitioners have failed to “set forth allegations describing any actual or future violation of the Codes. (Resp.MOL, pages 14-17). The dispute in the Petition pertains to the applicability of local Codes to the Port Authority. Accordingly, there is no dispute of fact, but only of law. Based upon the representations of the Port Authority, the respondents continue to maintain an exemption from the Codes. (Am. Petition, at Exhs D-H).

Courts of this State may not rule on “academic, hypothetical, moot or otherwise abstract questions.” Saratoga County Chamber of Commerce, Inc. V. Pataki, 2003 WL 21357342 (June 12, 2003). Furthermore, the hazard or injury to be justiciable must not be “wholly speculative and abstract”. New York State Inspection, Security and Law Enforcement Employees v. Cuomo, 64 N.Y.2d 233, 240, 485 N.Y.S.2d 719, 723 (1984). In Cuomo, petitioner correctional workers sought declaratory and injunctive relief after the State proposed the closing of the Long Island Correctional Facility. Id. The petitioner sought to block the closing alleging that should the facility at issue be shut-down, it would violate their right to a safe work environment, an environment “as free from hazards and risks to their safety as is practicable.” Id. Just as the Petitioners in Cuomo sought to ensure their safety and welfare, so to the Petitioners in this action seek to make their immediate surroundings as free from hazards which jeopardize their health and safety. Rather than being speculative, the Affidavits in support of the Petition clearly establish both past and future specific

injury based upon the Respondents failure to comply with the Codes.

Petitioner Peter Gorman joined this action individually and as President of the Uniformed Fire Officers Association (“UFOA”). (See Gorman Aff.). As Petitioner Gorman states that members of his organization assist in ensuring compliance with Codes. (Gorman Aff., paras. 2, 3). Further, Petitioner Gorman attests that none of the Respondents maintain a fire department and are exclusively reliant upon the New York City Fire Department (“NYFD”) and members of the UFOA for emergency response. (Id., para. 4). Petitioner Gorman attests that 343 members were killed on September 11, 2001 and that UFOA and NYFD members have a duty to respond to future emergencies on Port Authority property. (Id., para. 15, 16). Based upon the sworn affidavit of Petitioner Gorman, past and future injury is not speculative, but real, as the UFOA continues to respond to emergencies on Port Authority property.

Similarly, Petitioners Charles Wolf and Carol De Saram attest to past and future injury based upon the Port Authorities compliance or lack thereof with the Codes. Petitioner Charles Wolf joined this action individually and as Co-Chairman of the Bleeker Area Merchants’ and Residents’ Association (“BAMRA”). (See Wolfe Aff.). The wife of Petitioner Charles Wolf was killed in the terrorist attack of September 11, 2001. Petitioner Carol De Saram joined this action both individually and as President of the Tribeca Community Association (“TCA”).

Petitioners Wolf and De Saram live and work in the area immediately surrounding the site of the former World Trade Center. (Wolfe Aff., at paras. 1, 2, 3 & 4, De Saram Aff., at paras. 1, 2, 3, & 4). As the Petitioners Affidavits confirm, the effect of the events of September 11, 2001 has been devastating both “psychologically and financially.” (Wolfe Aff., at para. 6, De Saram Aff., at para. 5). Both allege past, continuing and future injury unique from the public should the

respondents not comply with the Codes at issue. The injuries include a lack of protection for the health and safety of BAMRA and TCA members living in communities immediately adjacent to the site of the former World Trade Center. Additionally, injury includes economic suffering by business and merchants in the community. (Wolfe Aff., at paras. 10, 11, De Saram Aff., at paras 7-11).

Based upon the foregoing and the Affidavits of Petitioners Catherine Sally Regenhard and Monica Gabrielle submitted on behalf of the Petitioner Skyscraper Safety Campaign, it is respectfully submitted that an actual controversy exists. Further, Petitioners collectively attest to past, continuing and future injury to the Petitioners. Petitioners therefore respectfully submit the Petition does not constitute an advisory opinion and that branch of the pending motion to dismiss is properly denied.

II. ALL PETITIONERS IN THIS ACTION HAVE STANDING

The Petitioners in this action have both individual and organizational standing to seek compliance with the Codes at issue. To establish standing, a party that seeks relief must have a “sufficiently cognizable stake in the outcome.” Council of the City of New York v. Giuliani, 183 Misc.2d 799, 806, 705 NYS2d 801, 807 (Sup. Ct. Queens County 1999). The Court must determine if the party seeking relief has or will suffer or sustain an injury. Mahoney v. Pataki, 98 NY2d 45, 52, 745 NYS2d 760, 763 (2002). The injury must then be related to the administrative action or lack thereof being challenged. Society of the Plastics Ind., Inc. v. County of Suffolk, 77 NY2d 761, 773, 570 NYS2d 778, 782 (1991), New York Public Interest Research Group, Inc. v. Insurance Information Inst., 140 Misc.2d 920, 531 NYS2d 1002 (Sup. Ct. New York County 1988), *aff’d*, 161

AD2d 204, 554 NYS2d 590 (1st Dept. 1990), New York Public Interest Research Group v. Whitman, 321 F.3d 316 (2nd Cir. 2003).

The following organizations appear as Petitioners: Skyscraper Safety Campaign (“SSC”); Bleecker Area Merchants’ and Residents’ Association (“BAMRA”), Tribeca Community Association (“TCA”) and the Uniformed Fire Officers Association (“UFOA”)(Collectively known as the “Petitioner Organizations”). Where organizations seek standing to challenge administrative agency actions, there must exist concrete adversarial interests requiring judicial intervention. Society of Plastics, 77 NY2d at 772. To determine organizational standing, the Petitioner Organizations must demonstrate a harmful effect on at least one of its members; that the interests it asserts are germane to its purpose so as to satisfy the Court that it is an appropriate representative of those interests; and it must establish that the case would not require the participation of individual members. Id. 77 NY2d at 775. For the reasons that follow, all Petitioner Organizations meet the test for standing.

The SSC is a not-for-profit corporation which “advocates for safety in high-rise structures, including the proposed redevelopment of the site of the former World Trade Center.” (Aff. Regenhart, at para. 2). As the SSC is not a membership organization, its “members” are termed as supporters for purposes of this action. Supporters of the SSC include all individual and Petitioner Organizations named in this proceeding. Id. Many of the members of the SSC are families of victims of the terrorist attacks of September 11, 2001. The mission statement of the SSC states:

“to ensure the safety and security of all person who live, work, or fight fires in high rise buildings. This mission is also concerned with evacuation procedures and fire fighting techniques for skyscrapers, as well as for all buildings. The need for quality, safety, security and code compliance as a hallmark for all future buildings is paramount. We oppose the construction of any building that is unsafe for the public and the Fire Service. Educating the public and the Fire Service to become proactive to achieve these goals is a primary aim in

the aftermath of September 11, 2001.” Id.

The SSC maintains an expert advisory committee that has reviewed the proposed redevelopment at the site of the former World Trade Center. That advisory committee has expressed concern as to the proposed redevelopment as it pertains to compliance with the Codes. Id., see website for SSC at www.skyscrapersafetycampaign.org. Applying the three part test enunciated in Society of Plastics, the SSC has standing as a petitioner in this action.

Firstly, as the Affidavits of Petitioners Regenhard, Gabrielle, Gorman, Wolfe and De Silva and De Saram clearly establish, all are supporters of the SSC and have suffered or will suffer specific injury based upon the failure of the respondents to comply with the Codes. Furthermore, as an umbrella organization, SSC advocates for its organization members which include the BAMRA, TCA and UFOA petitioners. Petitioners Wolf and De Saram, on behalf of their members who live and work in the area immediately surrounding the site of the former World Trade Center, allege actual future injury should the respondents not comply with the Codes: primarily, harm including but not limited to endangering the health and safety of BAMRA and TCA members living in the community and economic suffering by business and merchants in lower Manhattan. (Wolfe Aff., at paras. 10, 11, De Saram Aff., at paras. 7-11).

Petitioner Peter Gorman joined this action individually and as President of the UFOA . Petitioner Gorman attests that none of the Respondents maintain a fire department and are exclusively reliant upon the New York City Fire Department (“NYFD”) and members of the UFOA for emergency response. Id., ¶4. Petitioner Gorman attests that 343 members were killed on September 11, 2001 and that UFOA members have a duty to respond to future emergencies on Port Authority property. Id., ¶¶ 5, 16. Based upon the sworn affidavits of the foregoing Petitioners in

their representative capacities, Petitioners respectfully submit that the first prong of the Society of Plastics test is satisfied by the Petitioner Organizations.

Secondly, the interests asserted by the SSC, BAMRA, TCA and UFOA are germane to each organizations purpose so as to satisfy the Court that it is an appropriate representative of those interests. The mission of the SSC has already been recited, infra. Similarly, BAMRA and TCA represent residents and business persons in the communities adjacent to or in close proximity to the site of the former World Trade Center. As already stated, both BAMRA and TCA have health and safety concerns resulting from the Respondents continuing non-compliance with the Codes. Additionally, economic suffering by business and merchants in lower Manhattan began after the events of September 11, 2001 and continue unabated. As stated in their affidavits, BAMRA and TCA members will continue to suffer actual harm should the Respondents not rebuild the site of the former World Trade Center in compliance with the Code. (Wolfe Aff., at paras. 10, 11, De Saram Aff., at paras. 7-11). As Petitioner Gorman attests in his Affidavit, members of the UFOA participate in inspections for Code compliance and are and will be first responders to emergencies at all Port Authority premises including the site of the former World Trade Center. (Gorman Aff., at paras. 3 - 6, 16, 17). Based upon the sworn affidavits of the foregoing Petitioners in their representative capacities, we respectfully submit that the second prong of the Society of Plastics test is satisfied.

Thirdly, the interests asserted by the SSC, BAMRA, TCA and UFOA are representative of their membership and this matter does not require the participation of individual members of each of the organizations. No money damages are sought and the relief sought herein solely equitable in nature. The relief sought herein is identical for all named individual petitioners and Petitioner

Organizations. In addition to the Petitioner Organizations, many of the individual supporters of the SSC and UFOA have chosen to be named in the caption. Nineteen individual Petitioners are named, all of whom are supporters of the SSC, two members of Congress who support the SSC and Arthur J. Parrinello, Treasurer of the UFOA and representing himself and the members of his union. The vast majority of the SSC supporters named herein are family members of victims of the September 11, 2001 terrorist attack.

The Respondents claim that the Codes at issue are intended “to protect the health and safety of the public who enter buildings...[and that] the general effect on emergency services in neighborhoods where a disaster attributable to violation of the codes is well beyond the scope of that purpose”. (‘Resp.MOL, at 21). Respondents proffer this argument without any statutory basis and without citing to case-law as corroboration. As specifically articulated in the Amended Verified Petition, Petitioners submit that reliance on such a narrow reading of the Codes is fatally flawed. The Codes at issue were enacted to protect the health, safety and welfare of all inhabitants of the City of New York including: those that rent space in Port Authority buildings; work in Port Authority buildings; visit Port Authority Buildings; commute to work through Port Authority operated facilities; those required to be first responders to emergencies on Port Authority property; families of victims of the terrorist attack of September 11, 2001 who will travel at least annually to visit “ground zero”; and those who live and/or work in the communities immediately surrounding Port Authority Buildings. See Amended Verified Complaint and Exhibits annexed thereto. The Respondents narrow interpretation of the protective scope of the Codes is legally flawed and inconsistent with the statutory purpose of the Code.

Lastly, the Respondents claim that the Petitioners are outside the “zone of interest” of those

intended to be protected by the statute sought to be enforced. See Society of Plastics, 77 N.Y.2d at 773. In the land use context specifically, the Court of Appeals has stated that for standing purposes, “[Petitioners] must show that [they] would suffer direct harm, injury that is in some way different from that of the public at large.” 77 N.Y.2d at 774. The injury claimed in Society of Plastics was economic in nature, unlike the injury herein. The injury claimed herein is to the health, safety and welfare of the neighboring residents and business of Port Authority property, including but not limited to the site of the former World Trade Center. (See Am.Petition, Affidavits and Exhibits annexed thereto). Furthermore, Petitioners Gorman, Parrinello and the members of the UFOA are first responders required to enter into Port Authority premises during emergencies. As such, all Petitioners are within the zone of interest of those that the Codes were enacted to protect. Respondents’ reliance on Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc., 96 N.Y.2d 280, 727 N.Y.S.2d 49 (2001) is off-point as the damages in Madison Avenue Gourmet were purely economic damages. Madison Avenue Gourmet Foods was a tort based cause of action resulting from lost business allegedly due to the collapse of an elevator at a mid-town construction site. As this is not a case based upon a tort-theory and seeking economic damages, Madison Avenue Gourmet Foods is off-point.

III. PETITIONERS DO NOT SEEK STANDING AS PRIVATE LITIGANTS TO ENFORCE THE NEW YORK CITY BUILDING AND FIRE CODES

Respondents claim that the Petitioners seek to enforce the building and fire codes as private litigants. This argument misstates the relief sought in the Amended Verified Petition which seeks a declaratory judgment on whether the Codes apply to the Respondent and the proposed

redevelopment at the site of the former World Trade Center. Should this Court find that the Codes are applicable to the Respondents, the various mechanisms for enforcement cited by Respondents in their Memorandum of Law would then be available. (Resp.MOL, at 25).

Although the Respondents purport to “meet or exceed” the Codes, Petitioners respectfully submit that the Respondents actions are not inconsistent with their representations. (Am.Petition, at paras. 53, 54, Exhibits B, D, E, F, G, I and K). For example, in People of the State of New York v. Rodriguez, 115 Misc.2d 866, 454 N.Y.S.2d 796 (Crim. Ct. Queens County 1982), the New York City Fire Department issued a violation to a hotel at Kennedy International Airport for its failure to install emergency lighting. 115 Misc.2d at 867. The Port Authority appeared in the action as *amicus curiae* for the purpose of arguing that the New York City Fire Department exceeded its jurisdiction when the violation was issued. Id. The Port Authority sought to have the violation dismissed arguing that the New York City Fire Department’s regulations are inapplicable because the Port Authority “as a bi-state agency is exempt from municipal regulations, and the hotel as a lessee of the Port Authority is likewise exempted.” The Court concluded that the New York City Fire Department lacked jurisdiction and the action was dismissed. 115 Misc.2d. at 870.

For the reasons contained in our Memorandum of Law filed contemporaneously with the Amended Verified Petition, Petitioners submit that the holding of this twenty-one year old case is out-dated and flawed. (see e.g. Am.Petition). However, as relevant herein, it clearly establishes that the Petitioners seek to clarify the Codes applicability to the Port Authority, not to seek enforcement of the Codes.

IV. PETITIONERS HAVE STANDING TO ASSERT THEIR THIRD CAUSE OF ACTION BECAUSE THEY ARE OBVIOUS AND INTENDED BENEFICIARIES OF ANY AGREEMENTS MADE AND

**ANY DUTIES ASSUMED BY THE PORT AUTHORITY TO ASSURE
THAT IT MEETS OR EXCEEDS THE CODES**

Respondents' argument that Petitioners do not have standing to enforce the MOUs - which were intended to protect the health, safety and welfare of the public **and** NYC emergency personnel - is misplaced, unduly limiting and it and fails to fully address the basis upon which petitioners seek relief in their Third cause of action. (see Point III[c], Respondent PA Memo of Law, pp. 23-24). Interestingly enough, notwithstanding the primary intent behind the MOUs (to protect the public), respondents have declined to even mention petitioner the Uniformed Fire Officers Association ("UFOA"), the obvious beneficiary of, and arguably a very party to the MOUs between the PA and the FDNY. Respondents also failed to mention petitioner community groups, which represent individuals and businesses in and around the site of the former WTC. In addition, respondents ignore the fact that petitioners are not simply seeking to enforce the MOUs; rather, petitioners seek a declaratory judgment that the respondents, by both the MOUs **and** representations to the public and City, have in fact assumed the **duty** to "meet or exceed the codes" and that as such, respondents have in fact consented to the jurisdiction of the codes. (Third Cause of Action)(Am.Petition, at para. 99). Further, respondents attempt to limit any duty (contractual or otherwise) by claiming, erroneously, that the purpose of the codes is only to protect "persons using buildings subject to the jurisdiction of the codes" (See, e.g., Resp.MOL, at 20), and that any contractual duty was owed only to the parties to the MOUs and intended beneficiaries. However, such duties and the intended beneficiaries of such duties are not simply owed to the FDNY and/or NYC Department of Buildings: they are owed to the public, tenants, and any visitors and emergency personnel entering and surrounding the entire site of the former WTC.

**Respondents Have Unduly Narrowed Both the Scope of Petitioners' Argument
and the Scope of the Codes**

Petitioners do not simply seek to “enforce the MOUs”, as respondents assert, but bring this proceeding based upon the MOUs **and** any “subsequent and/or ancillary agreements and/or supplements thereto, and by the acts, conduct, procedures, practices and/or representations of the Port Authority, including representations that it has “voluntarily” consented to jurisdiction . . . ”. (Third Cause of Action)(Am.Petition, at para. 99). As set forth in petitioners’ papers, respondents have made numerous representations and promises to the public, the City, emergency personnel, elected officials, etc. (see, e.g., PA Responses, Exhs. “I” and “K”). The PA has also represented to the public, elected officials, the City of New York and the FDNY that it “voluntarily” meets or exceeds local fire and building codes. (see, e.g., Letter of Francis J. Lombardi, dated February 28, 2003, “Lombardi Letter”, Exh. “I”). Respondent PA has made repeated representations to the public that it would “assure” that it “meets or exceeds the codes”. (Petitioners MOL, pp. 18-24).

As stated by petitioners, governmental entities may be bound by oral agreements/promises. Petitioners MOL, at 26; see, e.g., New York v. City of Schenectady, 186 Misc. 385; 60 N.Y.S.2d 911 (Sup.Ct., Schenectady County 1946)(State of New York sued City of Schenectady based upon oral, implied contract; held: city had necessary power and authority to contract and was bound by implied contract)(citing North River Electric Co. v. New York (48 A.D. 14, 62 N.Y.S. 726)(oral agreement between City Commissioner and utility company, executed contrary to manner prescribed by city charter, was not fatal to enforceability of agreement). Any standing analysis pertaining to contractual duties and obligations must take into account all promises and assurances made by respondents, as well as the broad duties imposed by the codes and the intended beneficiaries thereto.

Cases cited by respondents are also inapplicable and distinguishable. Respondents cite to Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., 66 N.Y.2d 38, 495 N.Y.S.2d 1 (1985), for the proposition that “the Court of Appeals denied standing to the owner of a hotel with respect to a contract between a village and a demolition contractor for demolition of that hotel.” However, Fourth Ocean involved a contract for demolition between a city-promissee and a private demolition company-promissor that was hired to remedy a default by plaintiff hotel. The Court stated that “the work was being performed [by the demolition company] not as a means of benefitting plaintiff but to remedy plaintiff’s default in order to **protect the public** against a public nuisance as authorized by the ordinance.” (emphasis added) 66 N.Y.2d at 45. Further, the Court stated, “[n]or is there anything in the contract . . . which suggests an intent to benefit plaintiff.” Id. Again, as stated above, the obvious beneficiaries of the MOUs and the promises and assurances by the PA, were and are the public in and around the WTC site and NYC emergency personnel, which include petitioners and petitioner fire fighters the UFOA.

Respondents’ reliance upon Van-Tulco, Inc. v. Long Island Lighting Co., 214 A.D.2d 725, 625 N.Y.S.2d 629 (2nd Dept., 1995), is also misplaced. In Van-Tulco, an action to recover damages for tortious interference with contractual relations, two different contractors had two different contracts with the State Department of Transportation pertaining to the construction of a bridge. One contractor unsuccessfully argued that it was an intended beneficiary of the other party’s contract. This case as well is clearly distinguishable from the case at bar.

Respondents also incorrectly limit the analysis of standing and the beneficiaries of a contract. Primary elements to a contract, duty and reliance, are clearly present here. Indeed, a common

element to cases cited by respondents is that a “duty” is owed to an intended beneficiary. (i.e., in Fourth Ocean Putnam Corp. the Court noted that “the benefit” must be immediate in such a sense and to such a degree as to indicate the assumption of a duty to make reparation if the benefit is lost”). Id., 66 N.Y.2d 38, at 45, fn.4. The facts here are indisputable that the PA has not only assumed a duty to the public, its tenants, emergency services, etc., via the MOUs and numerous representations by agreeing to “meet or exceed the codes”, but the PA has **absolute control** over the premises at issue, especially with regard to safety and code compliance. The MOUs even mandate “self-inspection” of itself and its tenants. (November 1993 MOU, Exh. “D”; Gorman Aff., para. 8).

Case law reveals that when an entity has such control over a premises, it not only assumes a duty to all who enter and occupy these premises, and all who fall within a “zone of interest” of the premises, but it may be bound by any agreements to ensure safety in and around the premises. For example, in Palka v. Servicemaster Management Serv. Corp., 83 N.Y.2d 579, 590, 611 N.Y.S.2d 817 (Ct.App. 1994), a tort case involving a company contracted by a hospital to maintain the safety of the premises, the Court of Appeals held that:

“ . . . when a party contracts to inspect and repair and possesses the exclusive management and control of real or personal property which results in negligent infliction of injury, its assumed duty extends to noncontracting individuals reasonably within the **zone and contemplation** of the intended safety services. The defendant's obligation in a case such as this is circumscribed, therefore, not merely by the contract but also in light of the duty imposed by law based on the interrelationship of all the parties, as framed by the evidentiary record.”

(emphasis added). Id. According to the Court, the defendant “undertook a duty and breached the duty”. Id. The plaintiff (injured employee) was considered an intended beneficiary of the contract between the defendant company and the hospital. According to the Court, “[a]dditional guidance is again provided by that vast resource, Judge Cardozo: ‘There is nothing anomalous in a rule which

imposes upon A, who has contracted with B, a duty to C and D and others according as he knows or does not know that the subject-matter of the contract is intended for their use”. Id., at 587.

In Palka, the Court concluded that:

“the functions to be performed by [promissor-company] were not directed to a faceless or unlimited universe of persons. Rather, a known and identifiable group--hospital employees, patients and visitors--was to benefit and be protected by safety maintenance protocols assumed and acquired exclusively by [promissor-company]. It cannot reasonably claim that it was unaware or that it was entitled to be unaware that individuals would expect some entity's direct responsibility to perform maintenance services with ordinary prudence and care.”

Id. The PA and all respondents have assumed this responsibility and duty to ensure the safety of all who visit and work at and around the site of the future WTC, and all who are within the zone and contemplation of the intended building and safety codes.

**All Petitioners Relied Upon and Still Rely Upon
the Promises, Assurances and Representations of the Port Authority**

Notwithstanding the above, the contractual element of reliance is obvious as well. For example, as stated in petitioners’ Memorandum of Law, and as supported by Peter Gorman, President of the UFOA:

“the FDNY has relied upon such representations and has acted accordingly to ensure the health, safety and well-being of the citizens of NYC and its fellow fire fighters and emergency personnel. (Gorman Aff., para. 16). NYFD fire fighters and emergency personnel have risked their lives, and continue to do so, based upon these explicit promises. Id. As applies to the redeveloped site, the FDNY will have to enter upon PA premises and dispatch its duties, at great risk to the lives of its fire fighters, in reliance upon such representations that the PA will comply with the NYC fire and building codes. (Gorman Aff., para. 16).”

Petitioners MOL, at 24-25. Based upon the above and the constant representations and assurances by the PA that it would “meet or exceed the codes”, the public and surrounding communities have

relied and continue to rely as well.

Petitioner's Memorandum of Law in Support sets forth the legal basis upon which the PA may be bound by such contracts. (see Petitioners Memo of Law, pp. 25-26). Respondents cannot dispute that petitioners as a whole are the intended beneficiaries of such promises by the PA - whether the MOUs and/or oral and/or written promises. In the least, respondents cannot dispute that petitioner UFOA and/or its individual officers were parties to the MOUs. As such, petitioners have standing to assert their Third cause of action.

V. RESPONDENTS' ARGUMENT THAT PETITIONERS' CLAIM FOR ATTORNEYS FEES SHOULD BE DISMISSED FOR FAILURE TO SERVE A NOTICE OF CLAIM IS CLEARLY ERRONEOUS BECAUSE SUCH A CLAIM IS NEITHER A "SUIT, ACTION OR PROCEEDING".

Respondents argue (Point IV) that petitioners' claim for attorneys fees must be dismissed for failure to comply with New York Unconsolidated Law Section 7107 ("7107"), namely, failure to file a notice of claim. Respondents rely upon 7107, specifically that any consent by the PA to suit is conditioned upon filing a notice of claim "in the case of any suit, action or proceeding for the recovery or payment of money". Obviously no causes of action brought by petitioners seek "the recovery or payment of money", so respondents do not challenge the jurisdiction of this proceeding in toto. Respondents, however, assert that petitioners' demand for costs and legal fees fits the statutory definition of "the recovery or payment of money". Respondents offer no legal support, case law or otherwise, for this contention.

Cases cited by respondents merely recite the well-known tenet that conditions to waiver by state entities must be strictly construed. As an example, respondents cite to Luciano v. Fanberg Realty, 102 A.D.2d 94, 475 N.Y.S.2d 854 (1st Dept. 1984), for the proposition that an action was

dismissed against the Port Authority for failing to comply with the statutory requirement of filing a notice of claim. (Resp. MOL, at 29). Respondents also note that in Luciano, the Appellate Division applied language construing Section 10 of the Court of Claims Act. The Court of Claims Act (“CCA”), which is analogous to New York Unconsolidated Law, Section 7101, *et seq.*, has a separate, distinct section wherein attorneys fees are expressly prohibited. (see CCA Sec. 27: “Taxation of costs, fees and disbursements: Except as provided in section 701 of the eminent domain procedure law . . . costs, witnesses' fees and disbursements shall not be taxed, **nor shall counsel or attorney's fees be allowed by the court to any party**”)(emphasis added). NY CLS Ct C Act § 27. New York Unconsolidated Law, Section 7101, *et seq.*, however, does not contain such clear language and merely states that a suit is conditioned upon filing a notice of claim “in the case of any suit, action or proceeding for the recovery or payment of money”.

New York practice and case law are clear that an application for attorneys fees is not in itself a “suit, action or proceeding”. Furthermore, statutes which permit an application for attorneys fees generally require that the same is sought by motion **after** petitioner is deemed a “prevailing party” on the merits of that suit, action or proceeding. For example, in this instant proceeding, where petitioners seek solely to vindicate a public interest, fees are recoverable pursuant to such statutes as CPLR 8600, *et seq.* (“New York State Equal Access to Justice Act”). According to the Act, “[i]t is the intent of this article . . . to create a mechanism authorizing the recovery of counsel fees and other reasonable expenses in certain actions against the state of New York”. Attorneys fees are designated as follows:

§ 8601. Fees and other expenses in certain actions against the state

(a) When awarded. In addition to costs, disbursements and additional allowances awarded . . . a court shall award to a prevailing party, other than the state, fees and

other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust.

....

(b) Application for fees. A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application which sets forth (1) the facts supporting the claim that the party is a prevailing party and is eligible to receive an award under this section, (2) the amount sought, and (3) an itemized statement from every attorney or expert witness for whom fees or expenses are sought stating the actual time expended and the rate at which such fees and other expenses are claimed.

NY CLS CPLR § 8601 (2003). An “action” is, according to the statute, “any civil action or proceeding brought to seek judicial review of an action of the state”. (CPLR 8602 [a]). It is clear that attorneys fees are not considered a “suit, action or proceeding” pursuant to 7101, and are merely incidental thereto. Had the Legislature intended to prohibit such fees, it would have clearly stated so, as in the Court of Claims Act, § 27, supra.

VI. THIS PROCEEDING WAS PROPERLY BROUGHT AS A SPECIAL PROCEEDING PURSUANT TO CPLR ARTICLE 78

Respondents argue that this proceeding, which was properly brought by service on all necessary parties of a Notice of Petition and Verified Petition, should be converted to an action. (Point VI). Respondents’ request should be denied as an improper attempt to further delay these proceedings and complicate what is essentially a question of law brought properly pursuant to CPLR Article 78.

As set forth herein, the relief petitioners seek is appropriate for an Article 78 proceeding. Petitioners seek to determine, essentially, whether respondents must operate under the jurisdiction of NYC codes and, in conjunction with the same, whether the PA is acting beyond the scope of its enabling legislation by re-constructing the WTC, and is thus not entitled to any alleged immunities.

See Arietta v. State Bd. of Equalization & Assessment 37 A.D.2d 431, 326 N.Y.S.2d 325 (1971, 3d Dept)(Article 78 proceeding proper to determine if there has been action in excess of delegated authority or in disregard of standards prescribed by the Legislature). Petitioners are not seeking to determine the constitutionality of any legislation or challenge a legislative enactment. Lund v. Town Bd. of Philipstown, 162 A.D.2d 798, 557 N.Y.S.2d 712 (3d Dept 1990); Merced v. Fisher, 38 N.Y.2d 557, 381 N.Y.S.2d 817 (1976). Case law reveals that, as here, a petitioners' request for relief in the nature of a declaratory judgment (CPLR 3001) is consistent with, and may be made in conjunction with a special proceeding pursuant to Article 78. See, e.g., Sutherland v. Glennon, 221 A.D.2d 893, 634 N.Y.S.2d 259 (1995, 3d Dept).

Respondents argue that "Petitioners have not even attempted to identify the provision in the CPLR or any other statute, which authorizes this civil judicial proceeding to be prosecuted as a special proceeding." (Resp.MOL, at 33). Notwithstanding the fact that petitioners are not required by the CPLR to do so, petitioners respectfully request that should the Court deem it necessary, the petitioners be permitted to amend their Amended Petition to state the same and/or that the Court take judicial notice of the same.

CPLR Article 78 provides in part that:

"The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or
2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction".

NY CLS CPLR § 7803 (2003). Although it has been held that an Article 78 proceeding is the appropriate means to review a determination of a public official interpreting a statute he is empowered to administer, it is not the exclusive means, and use of declaratory judgment action has been approved in appropriate circumstances. Conrad v. Regan, 155 A.D.2d 931, 548 N.Y.S.2d 957

(4th Dept. 1989). In Sutherland v. Glennon, 221 A.D.2d 893, 634 N.Y.S.2d 259 (1995, 3d Dept), it was held that a declaratory judgment portion of a hybrid case should have been converted to an Article 78 proceeding where petitioners were not challenging the constitutionality of any statutes or regulations, but rather their petition claimed only that an agency violated certain governing laws, and the relief sought was an annulment of agency's determination. See also Heimbach v. Mills, 54 A.D.2d 982, 389 N.Y.S.2d 24 (1976, 2d Dept).

Respondents also argue that petitioners' contractual claim cannot be asserted in a special proceeding. However, while generally contract claims may not be asserted in an Article 78 proceeding, there are exceptions. See, e.g., State Div. of Human Rights v. NYS Dept. of Correctional Svcs., 90 A.D.2d 51, 68, 456 N.Y.S.2d 63, 73 (2nd Dept. 1982)(some contracts "with a public dimension" are subject to Article 78).

Finally, in the interests of judicial economy and based upon the public interest nature of this matter, this petition should remain as a special proceeding.

Conclusion

For all of the reasons set forth above, Respondents' motion should be denied in its entirety.

Dated: New York, New York
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