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Proceedings

And there is no evidence here that Mr. Brown, despite his commendable actions was injured in any way by the designation of 45-47 Park Place.

Thank you.

THE COURT: All right, Mr. Lester.

MR. LESTER: Yes, thank you.

Your Honor, I would like to go back to a point that we touched on only briefly in my opening statement. And that is the issue of discovery.

It is true that we were given thousands of pages of documents through discovery -- through the FOIL process. And within those documents we point out to the Court that there was active participation by the office of the Mayor with the Soho Properties in developing the mosque.

Now that we're not saying was wrong for the City to do that. It may have been a laudable public policy decision for the Mayor to advocate for the mosque.

But the e-mails were unmistakable. There are e-mails directly from whom people who work for the Mayor to Soho Properties asking and offering their assistance in the community board process, in the political process.

And there is even one e-mail that we pointed out where a representative of the Mayor says --

THE COURT: But, you know, that is the political process. And that's the, you know, whether it is the

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2 executive branch or the legislators, you know, members of  
3 the staff of City Council members work with either  
4 landlords, owners, tenants, community groups. That's what  
5 they do.

6 MR. LESTER: And we're not saying --

7 THE COURT: They work with them in terms of how to  
8 achieve particular goals. The issue is not that.

9 MR. LESTER: Right.

10 THE COURT: The issue is: Is there any indication  
11 that any improper communications were had from, whether it  
12 is City Hall or anybody else, with the Commissioner of  
13 Landmarks and/or the other members of the Commission?

14 MR. LESTER: Precisely. And that's what we've  
15 requested. Because of the information that we do have, the  
16 tip of the iceberg, we've requested that they provide us  
17 with any information they have; any documents, any  
18 communications, anything whatsoever which indicates that the  
19 Mayor's Office communicated with Landmarks Preservation  
20 Commission.

21 If the document doesn't exist, if there were no  
22 communications, if nothing untoward happened --

23 THE COURT: How is that part of this proceeding?  
24 Why isn't that -- you know, you've sent a demand, you've  
25 sent a FOIL request to the Mayor's Office.

26 They respond to you however they respond. They

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2 gave you documents or they claimed an exemption. And you  
3 have to commence an Article 78 proceeding within 10 days,  
4 you're being reminded, upon the denial assuming you have  
5 exhausted the administrative appeal process.

6 MR. LESTER: Right. And how it relates to this  
7 case is very simple.

8 That we -- we maintain that because there was no  
9 rational reason to distinguish these two buildings, 45 Park  
10 Place and 23 Park Place, and that as Gregory Deitrich points  
11 out, there is nothing in the record really that can  
12 demonstrate in what way 45 Park Place was different than 23  
13 Park Place or 311 Broadway.

14 We point out, as I've pointed out before, the issue  
15 of ownership, the issue of merchants, the issue of  
16 isolation.

17 And, again, we go back to 1989. And I think  
18 respondents have missed my point on that. The issue is not  
19 that this building was not designated in 1989. That's not  
20 the issue.

21 The issue was that in 1989 historic districts were  
22 created. This building and 28 others were excluded from the  
23 landmark district even though -- even though they were  
24 worthy of landmark status in the opinion of the Landmarks  
25 Preservation Commission.

26 And that, contrary to what Miss Waters says, that

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2 is in the record; the designation report. The historic  
3 foundation of this building -- the historic foundation of  
4 the documents that lead up to this proceeding is all in the  
5 record.

6 The 1989 designation report is relevant because in  
7 that report LPC, the staff which did all the research and  
8 investigation, points out all the reasons why this building  
9 should be given landmark status.

10 So if there is no objective factual reason and  
11 there was a pattern of support by the Mayor for the  
12 prospective use, even then, why doesn't the City just say  
13 the document doesn't exist?

14 I would like to point out that within an Article 78  
15 proceeding we cite the case Pleasant Valley, which is an  
16 Appellate Division 2d Department decision from 1999.

17 In an Article 78 proceeding discovery is permitted  
18 if you can show that responding to the discovery would not  
19 be prejudicial to the City or unduly burdensome."

20 So what we're asking for is not unduly burdensome,  
21 if the documents don't exist --

22 THE COURT: But they have responded and they have  
23 responded with an exemption. And then you know what? Take  
24 whatever appeal process through the agency that responds and  
25 then you bring the 78.

26 MR. LESTER: Well, the problem with that --

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2 THE COURT: I don't know if that's in the context  
3 of this proceeding; that you are going have to, you know,  
4 the FOIL request determined or challenged.

5 MR. LESTER: The problem with that is in exhausting  
6 our administrative remedies on the FOIL issue, we would be  
7 prejudiced. Because if the information exists within the  
8 context of the FOIL that they have claimed an exemption for  
9 and we get the documents a year from now after the  
10 conclusion of the Article 78 proceeding on the Foil, it  
11 would be too late to bring it in here.

12 So as your Honor knows in the Watergate decision  
13 against the City of Buffalo, exhaustion of administrative  
14 remedies is not required if to exhaust -- and your Honor has  
15 written -- your Honor wrote a decision on this very point in  
16 the 220 Central Park South case, where we requested an  
17 environmental review during pendency of that administrative  
18 proceeding.

19 THE COURT: Yes. And as you well know, Mr. Lester  
20 since you were the lawyer on that case, that case was  
21 reversed.

22 MR. LESTER: But not on those grounds. Your Honor,  
23 it was not reversed on that ground.

24 THE COURT: You know, unlike some, I learn.

25 MR. LESTER: Your Honor, it was not reversed on  
26 that ground. On the exhausted issue it was reversed. That

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2 part of your Honor's decision was upheld.

3 As your Honor points out, it would have been futile  
4 because to exhaust our administrative remedies would have  
5 prejudiced us in that administrative proceeding.

6 Same thing here. To exhaust our administrative  
7 remedies in the FOIL would preclude us from bringing it  
8 here.

9 So my point is, as Miss Waters indicates, a simple  
10 point. If the document doesn't exist, say there was no  
11 communication from the Mayor's Office to LPC; the Mayor did  
12 not communicate in anyway to influence the decision of the  
13 agency that he appoints. That would be improper, nobody  
14 disputes that.

15 Nobody disputes that if the Mayor reached out to  
16 LPC on this political issue to influence their decision,  
17 that would violate the administrative code, it would violate  
18 the objective standards set forth in the code, and it would  
19 violate -- it would be arbitrary and capricious.

20 So if that document doesn't exist say it doesn't  
21 exist. That's all we're asking for, is a showing on that.

22 If it is exempt, the information can even be shown  
23 in camera. If they are, for some reason, confidential and  
24 shouldn't be released to the public but it bears on this  
25 case, your Honor could issue a protective order.

26 And that is even in the case law on discovery; "the

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2 Court can fashion a remedy on discovery to assist in the  
3 resolution of the underlying Article 78 proceeding." So I  
4 think that's a crucial point in this case.

5 And I would be happy to address any other questions  
6 your Honor may have.

7 THE COURT: That's it for now.

8 MR. LESTER: Thank you.

9 THE COURT: Mr. Leitman Bailey, anything on  
10 rebuttal?

11 MR. LEITMAN BAILEY: Only one point that I have.

12 The eight hundred pound guerilla in the room is the  
13 freedom of religion. Courts in the United States of America  
14 and New York have found that when freedom of religion are  
15 involved it gets a higher scrutiny. That the right to  
16 prayer where they want to prayer, when they want to prayer  
17 is sacrosanct and before you, besides all the other  
18 technical issues.

19 THE COURT: I think everybody has agreed, at least  
20 for purposes of the argument today, that the use of the  
21 building is not at issue in this proceeding. So let's put  
22 that aside, all right?

23 Let's try to take that emotion out of it and stay  
24 focused on perhaps somewhat, for lack of a better term --  
25 let's let the issue of standing -- and I always avoid this  
26 because I have trouble saying it -- the disutility of this