III. THE COURT SHOULD GRANT THE PETITIONERS APPLICATION FOR A TEMPORARY RESTRAINING ORDER

Petitioner seeks the issuance of a temporary restraining order and preliminary injunction in the above-entitled cause so as to preclude the affect of the mayor's veto and its affect until the issue of its appropriateness is more fully resolved after a hearing before this Court.

It is well settled that the objective of a preliminary injunction is to maintain the status quo. Tucker v. Toia, 54 A.D.2d 322 (4th Dept 1976). While a preliminary injunction is a drastic remedy and may only be used sparingly, the provisions of the CPLR § 6301 allow the issuance of a preliminary injunction "in any action." It has been well established that in order to prevail on an application for preliminary injunction, the petitioner must demonstrate:

1. A likelihood of ultimate success on the merits;
2. Irreparable injury absent the granting of the preliminary injunction; and
3. That a balancing of equities favors (the movant's) position.

See Barone v. Erie, 99 A.D.2d 129, 132 (quoting from Gambar Enters. v. Kelly Servs., 69 A.D.2d 297, 306); see also Nalitt v. City of New York, 138 A.D.2d 580 (2d Dept 1988) and Merrill Lynch Realty Associates v. Burr III, 140 A.D.2d 589 (2d Dept 1988).

In Moody v. Filipowski, 146 A.D.2d 675 (2d Dept 1989), the court in speaking about preliminary injunctions stated "As (was) stated in Tucker v. Toia, 54 A.D.2d 322, 325-326, however, 'it is not for this court to determine finally the merits of an action upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the status quo until a decision is reached on the merits. Hoppman v. Riverview Equities Corp., 16 A.D.2d 631; Weisner v. 791 Park Avenue Corp., 7 A.D.2d 75, 78-79 (further cites omitted)."

Most recently in a matter entitled In the Matter of Merscorp., Inc. v. Romaine, 295 A.D.2d 431, 743 N.Y.S.2d 562 (2d Dept 2002), the court stated:

> It is well established that the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court (see Doe v. Axelrod, 73 N.Y.2d 748, 750, 536 N.Y.S.2d 44, 532 N.E.2d 1272). In exercising that discretion, however, the Supreme court must consider several factors, including whether the moving party has established (1) a likelihood of success on the merits, (2) irreparable harm if the injunction is denied, and (3) a balance of the equities in favor of the injunction (see CPLR 6301, 6312(a); W.T. Grant Co. v. Srogi, 52 N.Y.2d 496, 517, 438 N.Y.S.2d 761, 420 N.E.2d 953; Clarion Assocs. v. D.J. Colby Co., 276 A.D.2d 461, 714 N.Y.S.2d 99).

Further, the concurring judge, while not agreeing that there was a likelihood of success on the merits, concurred in the granting of the preliminary injunction,

> as the Supreme Court failed to take into consideration and address the other factors which must be taken into account, namely, irreparable harm to the movant absent the granting of a preliminary injunction, and a balancing of the equities (see Melvin v. Union Coll., 195 A.D.2d 447, 448, 600 N.Y.S.2d 141). Where, as here, the case involves issues of first impression in the courts, it is appropriate to grant a preliminary injunction, "to hold the parties in status quo while the legal issues are determined in a deliberate and judicious manner" (Time Sq. Books v. City of Rochester, 223 A.D.2d 270, 278, 645 N.Y.S.2d 951, quoting Tucker v. Toia, 54 A.D.2d 322, 326, 388 N.Y.S.2d 475; State v. City of New York, 275 A.D.2d 740, 713 N.Y.S.2d 360; Sau Thi Ma v. Xuan T. Lien, 198 A.D.2d 186, 604 N.Y.S.2d 84).

It is therefore readily apparent that in this instance where the petitioner has more than substantiated the facts that the mayor in this instance vetoed the action of the Zoning Board of Appeals without any foundation, not having attended any of the extensive meetings or hearings and further not reviewing any of the material nor referring to it in his veto sheds substantial doubt on its being appropriate.

The actions of the mayor in this proceeding clearly constitute an arbitrary and capricious act. An arbitrary and capricious act has been held to be one which is taken without a sound basis in reason and without regard to the facts. Kenton Associates, Ltd. v. Division of Housing and Community Renewal, 225 A.D.2d 349, 639 N.Y.S.2d 16 (1st Dept 1996). The acts of the mayor in this matter were undertaken and based upon unconvincing grounds, in fact, no grounds, clearly was specious, unreasonable and not made in good faith. Montecalvo v. Columbia County, 180 Misc.2d 995, 695 N.Y.S.2d 235 (Sup. Ct. 1999).

Actions of the mayor were purely arbitrary, an erroneous decision and failed to consider undisputed fact in previous determinations made by the Zoning Board of Appeals with reference to the same matter. Board of Education, Hauppauge Union Free School District v. Ambach, 93 A.D.2d 210, 462 N.Y.S.2d 294 (3d Dept 1983).

The petition in this case is not asking the Court to substitute its judgment for that of the mayor, but rather to find that mayor's determination was irrational, failed an basis in fact and was not supported by any sound conclusions Save Our Forest v. Kingston, 246 A.D.2d 217, 675 N.Y.S.2d 451 (3d Dept 1998). In Save Our Forest, supra, the court further stated "They challenged respondents' administrative determinations as arbitrary and capricious and violative of controlling statutes and regulations. As such, petitioners' claims are justiciable (see Matter of King v. Cuomo, 81 N.Y.2d 247, 255; Jiggetts v. Grinker, supra, at 415; Matter of Constantine v. White, 166 A.D.2d 59, 61)."

Clearly, in Article 78 proceedings, the appropriate remedy for seeking judicial review of whether the determination by the mayor and the veto was arbitrary and capricious and an abuse of discretion. An administrative action, which is arbitrary,

capricious or an abuse of discretion, is subject to judicial review and annulment. CPLR 7803(3); Matter of Lafayette Storage & Moving Corp., 77 N.Y.2d 823, 566 N.Y.S.2d 198 (1991).

A consideration of the balancing of the equities further requires that the Court issue a temporary restraining order. A review of the facts indicates that if the mayor's veto is allowed to stand, the petitioner will be unable to meet the requirements of the New York State Department of Environmental Conservation. As indicated, the NYS DEC completed an extensive and detailed review of the site and its operations and issued a registration, which officially approved the use of the premises and the location for a crusher by the petitioners. The NYS DEC resolved all issues at that time. If the mayor's veto is permitted to stand, the petitioner will not be able to meet the deadlines and time requirements established by the NYS DEC and also the requirements of the ZBA with reference to modifications required at the property in accordance with their instructions. If the veto is permitted to stand, the mayor will, by his unfounded and unsupported action, defeat all of the other administrative agencies that have approved the petitioner's applications. If the temporary restraining order is issued, the petitioner would be able to move forward with the modifications required by the various administrative agencies, and if it would be eventually determined that the petitioner is not entitled to the relief sought, the petitioner would suffer the sole detriment in that it would have expended funds for the various modifications which could not then be used. The municipality and the mayor would suffer no detriment, and therefore reviewing all of the equities involved, the petitioner should be entitled to the temporary restraining order pending a full and final hearing on the evaluation by the court in this matter. The equities fully lie with the

petitioner in this case.

1. Petitioners can demonstrate a strong likelihood of success of the merits of this petition.

On a motion for a preliminary injunction, the burden of proof is on the movant to show that success on the merits is likely in the action, that irreparable injury will occur unless the injunction is granted, and that the balance of equities is in the movant's favor (see, Aetna Ins. Co. v. Capasso, 75 N.Y. 2d 860; Grant Co. v. Srogi, 52 N.Y.2d 496; NCN Co. v. Cavanagh, 215 A.D.2d 737). Moreover, "preliminary injunctive relief is a drastic remedy which will not be granted 'unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant.'" (Peterson v. Corbin, 275 A.D.2d 35, 36 (2nd Dept 2000)(quoting First Natl. Bank v. Highland Hardwoods, 98 A.D.2d 924 (3rd Dept 1983); see, Nalitt v. City of New York, 138 A.D.2d 580, 581 (2nd Dept 1988)). N.Y.C. v. Stringfellow's of N.Y., 253 A.D.2d 110 (1st Dept 1999) 684 N.Y.S.2d 544; New York Yankees Partner v. Sports-Channel, 126 A.D.2d 470 (1st Dept 1987).

Arguments must be analyzed in terms of plaintiff's burden with respect to the first element of the preliminary injunction standard. That is, plaintiff is required to make "a prima facie showing of a right to relief." (McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Company, Inc., 114 A.D.2d 165, 172-173 (2nd Dept 1986), lv. denied 67 N.Y.2d 606 (1986)). Sur La Table Ltd. v. Rosenthal, 173 A.D.2d 325 (1st Dept 1991) 575 N.Y.S.2d 281. This they have done.

In conjunction with likelihood of success, the existence of factual disputes in the record does not necessarily preclude the issuance of preliminary injunctive relief, which would preserve the status quo and result in no harm or prejudice to the enjoined party

(see, Melvin v. Union College, 195 A.D.2d 447, 448 (2nd Dept 1993); Preferred Equities Corp. v. Ziegelman, 155 A.D.2d 424, 426 (2nd Dept 1989); Mr. Natural v. Unadulterated Food Prods., 152 A.D.2d 729, 730 (2nd Dept 1989); CPLR 6312 N.Y.C.P.L.R.(c)). Council of NYC v. Giuliani, 248 A.D.2d 1 (1st Dept 1998) 679 N.Y.S.2d 14.

In terms of the second requirement, as noted, the equities clearly favor the plaintiff since a preliminary injunction would preserve the status quo, as provided by the temporary restraining order, without any detrimental effect upon the agency (see, Gramercy Company v. Benenson, 223 A.D.2d 497, 498 (1st Dept 1996)). Insofar as concerns, irreparable injury, plaintiff has demonstrated a potential for injury, since its legal remedies will not be as efficient or effective as its equitable one, in terms of the constitutional issues raised herein.

Plaintiff meets its burden of demonstrating, by competent proof (see, Faberge Intl. v. Di Pino, 109 A.D.2d 235, 240 (1st Dept 1985)), the likelihood of success on the merits, irreparable injury in the absence of injunctive relief and that the equities weigh in its favor (see, Sutton, DeLeeuw, Clark & Darcy v. Beck, 155 A.D.2d 962 (4th Dept 1989)). A party moving for a preliminary injunction need not establish a certainty of success on the merits (see, Parkmed Co. v. Pro-Life Counselling, 91 A.D.2d 551, 553 (1st Dept 1982); Tucker v. Toia, 54 A.D.2d 322 (4th Dept 1976).

2. The Plaintiffs Will Suffer Irreparable Harm Without An Injunction.

Irreparable harm is an injury for which a subsequent award of money damages cannot be adequate compensation. Id. at 72. To make an adequate showing of irreparable harm the movant must set forth facts proving that the harm is imminent and not remote or speculative. Reuters Ltd. v. United Press Int'l Inc., 903 F.2d 904,907 (2d Cir. 1990). In

the instant case the harm which will befall petitioners reaches far beyond the contracts which will necessarily be terminated if an injunction is not granted. Indeed, these proceedings and the stigma associated with the denial of relief represents harm that cannot be wholly compensated by money damages.

This is particularly important because should this court allow the veto to stand, and then rule in petitioners' favor, it will be too late, and petitioners' reputation will have been irreparably damaged. The reputation and good will which petitioners have cultivated over 20 years will be gone. The Second Circuit has recognized that the threatened loss of customers' good will and damaged reputation is irreparable harm sufficient to support the issuance of a preliminary injunction. Id. at 908 See also, Jacobson Co., Inc., v. Armstrong Cork Co., 548 F.2d, 438, 445 (2d Cir. 1977); Fonas Corp. v. Decard Services, Inc., 787 F. Supp 44, 48 (E.D.N.Y. 1992); Towers Financial Corp. v. Dunn & Bradstreet, Inc., 803 F. Supp. 820 (S.D.N.Y. 1992).