State of New York
Court of Appeals

Decided and Entered on the thirteenth day of December, 2018

Present, Hon. Janet DiFiore, *Chief Judge,* ***presiding***.

Mo. No. 2018-973
In the Matter of Stahl York Avenue Co., LLC,
Appellant,

v.

City of New York, et al.,
Respondents.

Appellant having appealed and moved for leave to appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, on the Court's own motion, that the appeal is dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and it is further

ORDERED, that the motion for leave to appeal is denied.

/s/ John P. Asiello
John P. Asiello
Clerk of the Court

[LOGO]

State of New York
Court of Appeals

John P. Asiello
Chief Clerk and
Legal Counsel
to the Court

Clerk's Office
20 Eagle Street
Albany, New York
12207-1095

Decided December 13, 2018

Mo. No. 2018-973
In the Matter of Stahl York Avenue Co., LLC,
Appellant,
v.
City of New York, et al.,
Respondents.

On the Court's own motion, appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

Motion for leave to appeal denied.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Rosalyn H. Richter
Sallie Manzanet-Daniels
Marcy L. Kahn
Cynthia S. Kern, JJ.

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Index 100999/14

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In re Stahl York Avenue Co., LLC,
Plaintiff/Petitioner-Appellant,

–against–

The City of New York, et al,
Defendants/Respondents-
Respondents.

– – – – –

Friends of the Upper East Side
Historic Districts, et al.,
Amici Curiae.

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(Filed May 22, 2018)

Plaintiff/petitioner appeals from the order and judgment (one paper), of the Supreme Court, New York County (Michael D. Stallman, J.), entered January 28, 2016, granting defendants/respondents' cross motion to deny the petition complaint, and dismissing the proceeding/action.

Shapiro Arato LLP, New York (Alexandra A.E. Shapiro, Eric S. Olney and Chetan A. Patil of counsel), and Kramer Levin Naftalis & Frankel LLP, New York (Paul D. Selver of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Aaron M. Bloom and Claude S. Platton of counsel), for respondents.

Michael S. Gruen, New York, for amici curiae.

KAHN, J.

On this appeal in this hybrid article 78/plenary action, we are asked to determine whether the denial by respondent New York City Landmarks Preservation Commission (LPC) of the hardship application of petitioner, Stahl York Avenue Co., LLC (Stahl), to demolish two buildings included within a designated landmark was without rational basis and whether Stahl is entitled to money damages on the ground that the inclusion of the two buildings within that designated landmark constitutes an unconstitutional taking (*see* US Const Amends V, XIV; NY Const, art I, § 7).

I. *Statement of Facts and Procedural Background*

In a prior appeal, this Court affirmed the dismissal of an action brought by Stahl to annul the LPC's determination, as approved by the New York City Council, to expand a previously designated landmark to include the two buildings in question (*see Matter of Stahl York Ave. Co. LLC v City of New York*, 76 AD3d

290 [1st Dept 2010], *lv denied* 15 NY3d 714 [2010] [*Stahl I*]).

A. Landmark Designation Approval

In 1990, the LPC designated an entire block of tenement buildings known as the First Avenue Estate (FAE) as an historic landmark. The block in question includes 15 six-story buildings that were built in the early 1900s as "light-court model tenements" – one of only two existing full-block light-court tenement developments in the United States.[1]

On August 21, 1990, the New York City Board of Estimate voted six to five to approve the LPC's designation of most of the FAE as a landmark, excluding the two buildings at issue here.

In September 2004, Community Board No. 8 adopted a resolution in favor of amending the FAE landmark designation to include the two buildings in question.

In 2006, the LPC voted in favor of including the two buildings in the FAE landmark designation.

On February 1, 2007, the New York City Council unanimously approved the LPC's decision to include the two buildings in the FAE landmark designation.

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[1] The other such tenement development, located on East 78th Street, is known as the "York Avenue Estate." It received landmark designation in 1990.

On September 22, 2014, Stahl commenced *Stahl I*, an article 78 proceeding challenging the LPC's determination and the City Council's approval of that determination as arbitrary and capricious, in light of the 1990 determination to exclude the two buildings from the FAE landmark designation. This Court held that the LPC and the City Council could revisit the earlier determination and that the exclusion of the two buildings from that designation was the result of a politically motivated "bad backroom deal" made under intense pressure from a major developer (*Stahl I*, 76 AD3d at 296 [internal quotation marks omitted]). As we noted in *Stahl I*, in introducing the amendment to the designation to the full City Council the Speaker of the City Council made an observation to the effect that the earlier determination to exclude the buildings from the designation was "a bad decision based upon improper considerations which had nothing to do with the buildings' historical or cultural significance" (*id.*).

B. Stahl's Hardship Application

Stahl then sought from the LPC a certificate of appropriateness approving the demolition of the two buildings on the ground of insufficient return, in accordance with Title 25 of the Administrative Code of the City of New York (§ 25-301 *et seq.*) (Landmarks Law). Stahl represented that it was entitled to a certificate of appropriateness pursuant to section 25-309 of the Landmarks Law because the expenses incurred in operating the two buildings in question, both before and after the payment of real estate taxes, significantly

exceeded the income that they generated, and that therefore it would be appropriate to demolish the buildings, build mixed-income condominium towers in their place, and use the proceeds from that redevelopment to perform renovations at the other buildings in the FAE.

In support of its hardship application, Stahl submitted two economic feasibility studies prepared by Cushman & Wakefield supporting its claim that there was no feasible scenario under which the buildings were capable of earning a "reasonable return" within the meaning of the Landmarks Law (Administrative Code § 25-309[a][1][a]). One of those two studies, issued in 2010, stated that the two buildings' units, 190 in total, each had small rooms, including bathrooms that required undersized tubs and toilets, tiny closets, and electrical systems that did not support modern usage, and that the buildings lacked sprinklers and other modern safety and security systems. According to that study, half of the 190 units were occupied and subject to rent stabilization or rent control, and the remaining units were vacant and could be leased at market rent. The study posited that if the necessary repairs and improvements were performed and the apartments within the two buildings, including the half subject to rent stabilization or rent control, were leased, their annual net return would be negative 2.87%, which would not meet the 6% minimum standard for "reasonable return" set by the LPC. According to the other study, issued in 2009, the vacant units in the two buildings, if improved, renovated and rerented, would yield an

annual return of 1.19%. That study also concluded that without the improvements, the annual return yielded by the vacant units would be .614%. Both studies analyzed the projected return from the combined two buildings separately from the other properties within the FAE.

On May 20, 2014, the LPC denied Stahl's hardship application. The LPC commissioners reasoned that the proper scope for reasonable return analysis was the FAE property as a whole. The LPC further opined that in computing depreciation allowance, Stahl mistakenly considered projected renovation costs not only for the 53 apartments that were vacant at the time that the LPC voted to confer landmark status upon the two buildings in 2006, but also for 44 additional apartments that became vacant after the inclusion of the two buildings in the landmark designation. The LPC observed that Stahl's anticipated renovation costs for apartments that Stahl had warehoused subsequently to the landmark redesignation was a self-imposed hardship. The LPC also rejected Stahl's "cost approach" accounting methodology for projecting post-renovation assessed value, finding that an "income approach" was more appropriate for rental property. The LPC performed an alternative reasonable return calculation using Stahl's assumptions and methods, which calculation showed that the two buildings were capable of earning a reasonable return.

C. The Instant Case

On September 22, 2014, Stahl commenced this hybrid article 78/plenary action against respondents City of New York and the LPC and its chairwoman, challenging the denial of its hardship application and seeking money damages.[2] Stahl maintained that the inclusion of the two buildings in question within the FAE landmark designation amounted to a taking in violation of the federal and state constitutions (*see* US Const Amends V, XIV; NY Const, art I, § 7). Stahl argued that the LPC reached the false and unreasonable conclusion that Stahl could earn more than a 6% return from the two buildings by misapplying its own standards and by refusing to consider the full costs that Stahl would incur to renovate the buildings. Stahl also argued that the entire FAE should not have been considered and that the LPC erred in using the income approach in its calculations rather than using the cost approach, as it had done in granting the hardship application of another developer in 1988.

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[2] On the same day, Stahl commenced an action against the City of New York and the LPC in the United States District Court for the Southern District of New York seeking an order annulling and setting aside the 2006 landmark redesignation and the denial of its hardship application, awarding compensatory damages, and awarding attorneys' fees and costs. That action was dismissed in a written opinion and order (*Stahl York Ave. Co., LLC v City of New York, et al.*, 2015 WL 2445071, 2015 US Dist Lexis 66660 [SDNY, No. 14 Civ. 7665 (ER), May 21, 2015]), which was affirmed by the United States Court of Appeals for the Second Circuit (641 Fed Appx 68 [2d Cir 2016]). On October 31, 2016, the United States Supreme Court denied Stahl's petition for a writ of certiorari (___ US ___, 137 S Ct 372 [2016]).

With regard to the taking issue, Stahl argued that before 2006, the two properties in question could have been sold for more than $100 million – and twice that much had they been redeveloped. Stahl maintained that the 2006 public hearing held by LPC prior to amending the FAE landmark designation improperly focused on concerns of politically influential local residents who sought to block any development in order to protect their own special interests and that LPC commissioners repeatedly made comments that prejudiced its application. Stahl also asserted that the LPC's 2006 determination to include the buildings within the landmark designation had had a severe economic impact on the value of the buildings, preventing it from earning a reasonable rate of return, and had interfered with its investment-backed expectations.

Respondents answered and cross-moved to dismiss the petition and complaint, arguing that the LPC had properly denied Stahl's hardship application. They contended that the relevant improvement parcel for purposes of determining the hardship application embraced the whole FAE, that the LPC's use of the income approach was proper, and that there was no unconstitutional taking because Stahl could continue to operate the buildings with low-scale rental units.

As indicated, Supreme Court dismissed the petition and granted respondents' cross motion to dismiss the taking claim. The court found that the relevant property for both the hardship and taking analyses was the FAE as a whole, that the income approach was

not improper, and that the LPC had rationally concluded that Stahl failed to demonstrate a hardship.

II. *Discussion*

A. Petitioner's Claim that Hardship Application Denial Was Irrational

1. Petitioner's contentions

On this appeal, Stahl contends that the LPC reached a false and unreasonable conclusion in determining that Stahl could earn more than a 6% return from the two buildings in question. Further, Stahl argues, the LPC erred in finding that the relevant improvement parcel was the entire FAE rather than the two buildings in question and in using the income approach rather than the cost approach.

2 Legal Standards

In reviewing an administrative agency determination, courts must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious, i.e., taken without sound basis in reason or regard to the facts (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

Section 25-309(a) of the Landmarks Law provides in relevant part that the LPC "shall" make a preliminary determination of insufficient return when an applicant for a permit "to demolish any improvement

located on a landmark site" is filed "and the applicant establishes to the satisfaction of the commission that . . . the improvement parcel (or parcels) which includes such improvement, as existing at the time of the filing of such request, is not capable of earning a reasonable return."

The "Definitions" section of the Landmarks Law (§ 25-302) contains the following relevant definitions:

"Landmark" is defined as any landmarked "improvement" (§ 25-302[n]);

"Improvement" is defined as "[a]ny building, structure, place, work of art or other object constituting a physical betterment of real property, or any part of such betterment" (§ 25-302[i]);

"Landmark Site" is defined as "[a]n improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof used as and constituting part of the premises on which the landmark is situated, and which has been designated as a landmark site . . . " (§ 25-302[o]); and

"Improvement parcel" is defined as "[t]he unit of real property which (1) includes a physical betterment constituting an improvement and the land embracing the site thereof, and (2) is treated as a single entity for the purpose of levying real estate taxes" (§ 25-302[j]).

3. Discussion

The LPC was entitled to require Stahl to establish that it could not earn a reasonable return on the entire landmark that it sought to alter, not the individual buildings in question. Although the Landmarks Law definitions, read together, appear ambiguous as to how to define a relevant "improvement parcel" for purposes of the instant hardship application, the LPC's interpretation was rational.

The entire FAE constitutes one landmark and one landmark site. Thus, the entire FAE development contains one "improvement," which is defined as "a physical betterment of real property, or any part of such betterment" (§ 25-302[i]). Stated otherwise, the FAE constitutes one unit of real property that includes that physical betterment.

Furthermore, the LPC did not confer a landmark designation on the 2 buildings in question that is separate from the earlier designation of the other 13 buildings within the FAE. Rather, the LPC chose to protect the FAE in its entirety by conferring a single landmark redesignation on the entire parcel.

Contrary to Stahl's argument, the entire landmark constitutes one improvement for hardship purposes, even though Stahl did not intend to demolish the entire landmark. The definition of "improvement" includes "any part of [the] betterment" of the real property in question (§ 25-302[i]). Thus, although the part of the improvement that Stahl sought to demolish was 2 of the 15 buildings within the FAE, Stahl was still

required to prove that the entire "improvement parcel," which includes the improvement in question, was not capable of earning a reasonable return.

Furthermore, the record reflects that the entire FAE was one "unit of real property" treated as a single entity for purpose of levying real estate taxes, i.e., the "improvement parcel." The FAE consists of four tax lots, but all four are within the one tax block comprising the FAE landmark site. This is further demonstrated by the fact that from 2007 to 2012, with respect to the FAE, Stahl made a single tax filing applicable to the entire tax block.

Moreover, the LPC also analyzed the hardship application solely with respect to tax lot 22 (which contains only the two buildings in question) and rationally determined that no hardship was demonstrated under a separate analysis of that tax lot because Stahl failed to demonstrate that those buildings, considered alone, were "not capable of earning a reasonable return" (Administrative Code § 25-309[a][1][a]).

Notwithstanding Stahl's argument to the contrary, it was not irrational for the LPC to exclude from its analysis the renovation costs for the 44 apartments within the two buildings that were kept vacant after the 2006 landmark designation. That argument, rejected by both the article 78 court and the federal courts (*see Stahl*, 2015 WL 2445071 at *16, 2015 US Dist LEXIS 66660 at *42-*46, 641 Fed Appx at 72), is unavailing. The LPC rationally chose values for the relevant variables, including rental rates, vacancy

rates, collection loss, and operating expenses, to calculate whether the buildings were capable of earning a reasonable return. Moreover, the LPC's calculations reflected the rational rejection of Stahl's own assumed values. Because the Landmarks Law defines "capable of earning a reasonable rate of return" as "[h]aving the capacity, under reasonably efficient and prudent management, of earning a reasonable return" (Administrative Code § 25-302[c]), the LPC appropriately concluded that Stahl had demonstrated inefficient management, by, inter alia, its imprudent decision to warehouse 44 apartments at the landmarked buildings in the hope of demolition.

Furthermore, the LPC's use of the "income approach" rather than the "cost approach" in making its determination was rational. The LPC neither contradicted its own precedent nor acted arbitrarily and capriciously in concluding that the income approach was the more appropriate method to measure assessed value in Stahl's rental scenarios (*see Stahl*, 2015 WL 2445071 at *16, 2015 US Dist LEXIS at *42-*46, 641 Fed Appx 68 at 72). The LPC demonstrated that its use of the income approach comported with the valuation method used by taxing authorities, whereas the cost approach would generate a higher assessed value for the buildings, resulting in higher real estate taxes (which would be contrary to efficient and prudent management practices). Moreover, even though the LPC had, in a 1998 hardship decision, used the cost approach to measure assessed value, in that case the owner sought to recoup its renovation costs by selling,

rather than by renting, as petitioner seeks to do (*see Stahl*, 641 Fed Appx at 72).

In any event, the record reveals that the LPC also performed more than 20 additional reasonable-return calculations using many of the assumptions that Stahl preferred, as well the "cost approach," all of which showed that the buildings were capable of earning a reasonable return. Thus, as the Second Circuit found, the errors Stahl points to do not materially affect the property's projected profit margin, since, even using petitioner's values and proposed methodology, the property's rate of return would still be above the 6% threshold for hardship relief under all renovation scenarios (641 Fed Appx at 72).

Finally, to the extent that Stahl complains that the LPC evinced prejudice against it by way of its commissioners' comments at the 2006 public hearings reflecting concern for preserving the buildings, that complaint is unsupported by the hearing record, which does not reflect any prejudice against Stahl. Rather, the record suggests that the LPC's members were appropriately familiar with the subjects of their regulation, had advance knowledge of the facts and law surrounding the application, and were committed to the goal for which their agency was created, i.e., landmarks preservation (*see generally Matter of 1616 Second Ave. Rest. v New York State Liq. Auth.*, 75 NY2d 158, 162 [1990]).

B. Petitioner's Unconstitutional Taking Claim

Stahl's other principal argument is that the LPC's inclusion of the two buildings in the FAE landmark designation amounted to an unconstitutional taking.

1. Legal Standards

The takings clause of the federal constitution prohibits governmental taking of "private property . . . for public use, without just compensation" (US Const Amend V).

A per se taking occurs if a regulation deprives the owner of all economically beneficial use of the property (*see Lucas v South Carolina Coastal Council*, 505 US 1003, 1019 [1992]), or a regulation may rise to the level of a taking under a multi-factor inquiry outlined in *Penn Cent. Transp. Co. v City of New York* (438 US 104 [1978]).

In *Penn Central*, the United States Supreme Court instructed that most regulatory takings cases should be considered on an ad hoc basis, with three primary factors to be weighed: the regulation's economic impact on the claimant, the regulation's interference with the claimant's reasonable investment-backed expectations, and the character of the government action (*id.* at 124).

The Penn Central multi-factor inquiry focuses on the magnitude of the economic impact of a regulatory action and the extent of that regulation's interference with property rights to determine if a regulatory action

constitutes a taking (*see Lingle v Chevron U.S.A. Inc.*, 544 US 528, 540 [2005]). In *Penn Central*, the owner of Grand Central Terminal argued that a restriction on its ability to add an office building on top of the station amounted to a taking of its air rights, but the Supreme Court concluded that the correct unit of analysis was the owner's "rights in the parcel as a whole" (438 US at 130-131). The Court noted that claimants cannot establish a takings claim "simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development" (*id.* at 130).

In the recent case of *Murr v Wisconsin* (___ US ___, 137 S Ct 1933 [2017]), the owners of two adjacent lots (referred to by the Court as Lots E and F) located alongside a river wished to sell Lot E but could not sell it separately from Lot F due to state regulations that forbade the sale of a parcel with less than an acre of land suitable for development. Lot E, by itself, did not meet that requirement, although it did meet the requirement when combined with Lot F. The owners sued the state, claiming that the state's regulatory action amounted to an unconstitutional taking.

The *Murr* Court treated the two lots as a single parcel in concluding that regulations preventing the separate sale of the two adjacent lots did not amount to an uncompensated taking. The Court observed that the establishment of lot lines was not dispositive of whether parcels should be considered separately or as a whole in a takings analysis. The Court reasoned that lot lines are established with varying degrees of

formality among the states, and are often subject to easy adjustment by landowners with minimal governmental oversight, leading to the risk of gamesmanship by landowners (*Murr*, 137 S Ct at 1948).

Rather, the *Murr* Court opined that the proper test for determining whether parcels should be treated separately or as a whole for takings analysis purposes is objective in nature and should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that its holdings would be treated as one parcel or as separate lots. The Court then set forth a three-factor test for this purpose. First, courts should give substantial weight to the property's treatment, and in particular how it is bounded or divided, under state and local law. Second, courts should look to the property's physical characteristics, including the physical relationship of any distinguishable tracts, the topography, and the surrounding human and ecological environment. Third, courts should assess the property's value under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings (*Murr*, 137 S Ct at 1944-1947).

Applying that three-factor test, the *Murr* Court first found that state and local regulations had effectively merged the two lots into one parcel. Second, the Court found that the two lots were contiguous and that their narrow shape made it reasonable to expect that their potential uses would be limited. The Court explained that because the lots were located along a river, the owners could reasonably anticipate that the

lots would be subject to federal, state and local regulations that would affect their enjoyment of the property. Third, the Court determined that the prospective value that Lot E brought to Lot F supported considering them as one parcel (*id.* at 1948-1949).

Having concluded that the property in question should be considered as a whole, the *Murr* Court found that there had been no taking, as the regulations in question did not result in depriving the owners of all economically beneficial use of their property. The Court arrived at this conclusion by applying the "more general test of *Penn Central*," which it found did not support the conclusion that the landowners had suffered a taking (*id.* at 1949). Specifically, the Court first found that an expert appraisal relied upon by the state courts refuted any claim that the economic impact of the regulation was severe. Second, the Court reasoned that the owners could not have claimed that they reasonably expected to sell or develop their lots separately, given that the lots were subject to regulations forbidding such separate sale and development, which regulations predated the owners' acquisition of both lots. Third, the Court found that the governmental action in question was a reasonable land-use regulation, enacted as part of a coordinated federal, state and local effort to preserve the river and surrounding land (*id.*).

In this case, application of the *Murr* analysis leads to the conclusion that all of the lots within the FAE, including the two buildings at issue, should be treated

as one parcel for taking analysis purposes. First, although the FAE is divided by lot lines (which, according to *Murr*, is not a proper basis for determining whether the land in question should be treated as one unified parcel), the City has placed all of those lots within one tax block and has designated it as one unified landmark. Second, the lots are contiguous and contained within one city block, and all of the buildings within the FAE share a common historical and architectural significance when treated as a unified parcel, i.e., the distinction of being one of the only two existing light-court model tenements in this country. Third, the only discernable adverse effect of including the two buildings in question within the designated landmark on the value of the property as a whole is one manufactured by the owner itself in warehousing the 44 apartments within those two buildings.

Considering the FAE property as a whole, here, as in *Murr*, the regulatory action at issue, which, in this case, is the LPC's amendment of the landmark designation to include the two buildings in question, did not result in complete deprivation of the owner's economically beneficial use of its property. The owner is still free to rent units within all of the buildings in the FAE, including the two buildings in question.

Application of the "more general" *Penn Central* test also supports the conclusion that petitioner has not suffered a taking. First, the extension of the FAE landmark designation to include the two buildings in question did not result in any further economic impact on Stahl beyond that resulting from preexisting legal

restrictions limiting Stahl's use of the property even absent landmark status, such as rent control and rent stabilization. Second, Stahl's reasonable investment-backed expectations were not destroyed by the inclusion of the two buildings within the FAE landmark designation. As the LPC determined, the buildings in question are capable of earning a reasonable return, limiting the designation's economic impact on petitioner. Third, the character of the government action in question favors the LPC, since, as the Court in *Penn Central* found, the "preservation of landmarks benefits all New York citizens and all structures" and "improv[es] the quality of life in the city as a whole" (*id.* at 134).

Accordingly, the order and judgment (one paper), of the Supreme Court, New York County (Michael D. Stallman, J.), entered January 28, 2016, granting defendants/respondents' cross motion to deny the petition-complaint, and dismissing the proceeding-action, should be affirmed, without costs.

All concur.

Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered January 28, 2016, affirmed, without costs.

Opinion by Kahn, J. All concur.

Renwick, J.P., Richter, Manzanet-Daniels, Kahn, Kern, JJ.

THIS CONSTITUTES THE DECISION AND
ORDER OF THE SUPREME COURT,
APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 22, 2018

/s/ Susanna M. Rojas
CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

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STAHL YORK AVENUE CO., LLC,

Plaintiff-Petitioner,

- against -

THE CITY OF NEW YORK; THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION; MEENAKSHI SRINIVASAN, in her capacity as Chair of the New York City Landmarks Preservation Commission,

Defendants-Respondents.

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DECISION, ORDER AND JUDGMENT

Index No. 100999/2014

(Filed Jan. 28, 2016)

HON. MICHAEL D. STALLMAN, J.:

In this "hybrid" Article 78 proceeding-action commenced by a notice of petition, Plaintiff-petitioner Stahl York Avenue Co., LLC (Stahl) seeks relief concerning two of its buildings, which since 2006, have been designated as landmarks by the New York City Landmarks Preservation Commission (LPC). Stahl's Verified Petition and Complaint seeks money damages as compensation for the alleged regulatory taking of the two buildings and an order vacating the LPC's denial of Stahl's hardship application. Apparently, given the hybrid nature of the pleading, defendants-respondents (hereinafter, respondents) simultaneously answered and cross-moved for dismissal of the lawsuit.

BACKGROUND

Prior Stahl Proceeding

Many of the underlying facts were described in a prior related decision, entitled *Matter of Stahl York Ave. Co., LLC v City of New York* (76 AD3d 290 [1st Dept], *lv denied* 15 NY3d 714 [2010] [*Stahl 1*]). On April 24, 1990, the LPC designated as a landmark a full block of residential buildings, known as the First Avenue Estate (FAE), bounded by York Avenue, First Avenue, East 65th Street and East 64th Street. The FAE is composed of 15 buildings, known as "light-court model tenements," that were intended to be alternatives to otherwise dark and poorly ventilated tenements. At issue are two of these buildings, both of which are six stories tall (Buildings) (*id.* at 291-292).

When the LPC designated the FAE as a landmark in 1990, it also designated a similar light-court tenement development as a landmark, consisting of 14 tenement buildings bounded by York Avenue and FDR Drive, and by East 78th and East 79th Streets, built between 1901 and 1913 (York Avenue Estate). The two "estates" are the only existing full-block light-court tenement developments in the United States (*id.* at 292).

On August 21, 1990, the then existing Board of Estimate (BOE), which had powers to review LPC determinations, voted 6–5 to approve the LPC's designation of most of the FAE as a landmark, excluding from designation the two Buildings, and approved the designation as a landmark of the York Avenue Estate, but

excluded four buildings located at the eastern end of that development (*id.*).

The BOE's actions were challenged in two article 78 proceedings filed in Supreme Court, New York County, which were consolidated. By order dated July 17, 1991, the Supreme Court dismissed the petitions and affirmed the BOE modifications. Only the decision in the York Avenue Estate matter was appealed. On appeal, the Appellate Division, First Department, "reversed the dismissal, overturned the BOE modification, and reestablished the LPC designation of the entire block of the York Avenue Estate as a historic landmark" (*Stahl 1*, 76 AD3d at 293, citing *Matter of 400 E. 64/65th St. Block Assn. v City of New York*, 183 AD2d 531 [1st Dept], *lv denied* 81 NY2d 736 [1992] [*Kalikow decision*]).

In 2004, Stahl obtained permits from the Department of Buildings (DOB) to perform work on exterior features of the Buildings (*id.*). On September 8, 2004, Community Board No. 8 adopted a resolution in favor of amending the landmark designation of the FAE to include the Buildings. At a public meeting held on November 21, 2006, the LPC unanimously approved the amendment (*id.*). On February 1, 2007, the City Council voted 47 – 0 to affirm the amendment, and the two Buildings were designated as landmarks (*id.* at 294).

In the *Stahl 1* article 78 proceeding, Stahl alleged that the LPC's and City Council's actions were arbitrary and capricious, and that the City Council failed to explain its reasons for deviating from the contrary

1990 BOE decision, which Stahl asserted was binding, based on stare decisis. Stahl also contended that both the developmental history of the Buildings and the alteration work performed on their facades rendered them unworthy of landmark designation (*id.*).

The Appellate Division, First Department, rejected Stahl's argument, holding that the LPC and City Council had the authority to revisit the issue of whether the Buildings should be accorded landmark status, and that the LPC determination to do so was not irrational, in that the two Buildings have a historical significance that justifies their designation as landmarks. The First Department held that the "LPC is statutorily authorized to amend any prior designation of a landmark," citing Title 25, Chapter 3 of the New York City Administrative Code [Landmarks Law] § 25–303 [c]) (*id.* at 297).

The First Department determined that the "BOE's 1990 decision to exclude the buildings from landmark designation was a 'bad backroom deal,' and was an 'inappropriate politically motivated action' made under 'intense political pressure from a powerful real estate developer' " (*id.* at 296). It also determined that, "when introducing the amendment to the full City Council, the Speaker of the Council described the BOE's decision to exclude the buildings from landmark designation as a bad decision based upon improper considerations which had nothing to do with the buildings' historical or cultural significance" (*id.*). According to the court's decisions, there was a prior finding in 1990 that the FAE "needed to be protected in its entirety as

a socio-historic monument in the history of urban housing, and that, but for the existence of a political compromise at the time, the entire district would have been designated a landmark; that the determination was not appealed does not preclude the LPC and the City Council from revisiting the issue" (*id.* at 297).

Stahl's application to demolish the Buildings

On October 7, 2010, Stahl applied to the LPC to demolish the Buildings on the grounds that they were incapable of earning a "reasonable return" as defined in sections 25-302 (v) and 25-309 (a) (1) of the Landmarks Law (LPC Report, dated May 20, 2010, entitled *In the Matter of an Application for a Finding Pursuant to Section 25-309 (a) (1) of the Landmarks Law that 429 East 64th Street and 430 East 65th Street are Incapable of Earning a Reasonable Return* [LPC Report] at R 2311).[1]

As stated in the LPC Report, Stahl, in its application, sought to demolish the Buildings, and construct a new building on the site. Prior to the landmark designation in 2006, Stahl obtained DOB permits for facade work and window replacement. The LPC found that neither permit was sought to address any health or safety concerns, but rather to prevent the LPC from

[1] Submitted with the motion papers is the "*RECORD OF PROCEEDINGS BEFORE THE LANDMARKS PRESERVATION COMMISSION on Hardship Application regarding 429 East 64th St and 430 East 65th Street*" (Record), consisting of eight volumes and 2359 pages. References to the Record appear as R___).

redesignating the Buildings as landmarks. The LPC found that Stahl stripped the Buildings of their ornament, installed new and inappropriate windows, stuccoed the Buildings, and painted them a garish reddish pink color. Nevertheless, on November 21, 2006 the LPC unanimously voted to amend the designation report of the FAE to include the Buildings, which was affirmed by the City Council by resolution of February 1, 2007 (LPC Report at 2, R-2312).

As discussed above, through *Stahl 1*, Stahl challenged the designation: the Supreme Court, New York County found in favor of the LPC, the First Department affirmed, and the Court of Appeals denied leave to appeal (*Matter of Stahl York Ave. Co., LLC v City of New York*, 2008 NY Slip Op 32557(U) [NY County Sept 11, 2008], *aff'd*, 76 AD3d 290 [1st Dept], *lv denied* 15 NY3d 714 [2010] [*Stahl 1*]).

The apartments in the Buildings average 446 gross square feet and 371 leasable square feet. Most apartments are subject to rent stabilization; a small number are subject to rent control. According to Stahl, the mean average rent for an occupied apartment is approximately $840 per month; the median last listed monthly rent for vacant apartments is approximately $857 (LPC Report at 2, R-2312). At the time of the designation, there were 53 vacant apartments. Since then, Stahl has continued its policy of not re-renting apartments as they become vacant. At the time Stahl filed a hardship application, 107 apartments were vacant, and as of the date of the LPC Report, there were 110 vacant apartments (LPC Report at 2-3, R-2312 - 2313).

On October 7, 2010, Stahl submitted its hardship application, together with a report by Cushman & Wakefield (C&W), dated February 5, 2009 (C&W Report) (LPC Report at 2, R-2313; R-001-098) and a second report by C&W, dated May 1, 2010 (R-099 - 165). Thereafter, the LPC and counsel for Stahl exchanged extensive correspondence regarding the LPC's requests for additional information pertaining to: (1) Stahl's belief that newly-renovated apartments would rent for less than the rent paid by the regulated tenants; (2) floor plans and apartment stacking; (3) the gross and leasable square footage of apartments in the other buildings in the FAE (Other Buildings); (4) amounts for "general conditions, overhead and profits" in the cost estimates, and the methodologies and criteria used in determining the appropriate level of apartment renovation; (5) the methodology used to determine which sample apartment lines to measure in the Other Buildings; (6) the use of the cost approach for projecting post-renovation assessed value; (7) why income from laundry facilities in the Other Buildings was not considered for the Buildings; and (8) soft costs[2] (LPC Report at 3-7, R-2313 - 2317).

On January 24, 2012, the LPC held the first public hearing on the application. Stahl, together with its consultants, presented its case. HR&A, a consulting company representing opponents of the hardship

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[2] The petition defines "hard costs" as tangible construction costs, such as materials and labor, and "soft costs" as as nontangible construction costs such as architectural and engineering fees, insurance, and financing costs (petition, ¶ 96, n 5).

application, estimated that vacant apartments could lease for an average of $49 per leasable square foot, or an average of $1,508 per apartment per month. In addition, members of the public and elected officials testified (LPC Report at 3, R-2313).

On June 11, 2013, the LPC held a second public hearing to allow Stahl to present its responses to public testimony given at the January 24, 2012 public hearing and its answers to the LPC's questions. HR&A also testified, adjusting its projection of average monthly rent to $1,432 to account for the effect of rent control and rent stabilization on increases to rent (*id.*). On October 29, 2013, the LPC held a third public meeting to discuss the hardship application, and Stahl presented its responses to public testimony given at the June 11, 2013 public hearing (LPC Report at 3-4, R-2313 - 2314).

By decision dated May 20, 2014, the LPC denied the hardship application, stating that:

> "Pursuant to Section 25-309 (a) (1) of the Administrative Code of the City of New York, the Landmarks Preservation Commission, at the Public Meeting of May 20, 2014, after the Public Hearings of January 24, 2012 and June 11, 2013, and the Public Meeting of October 29, 2013, and after reviewing and considering the record, including all testimony and materials submitted on behalf of the applicant, and testimony and materials submitted by the public, voted to adopt the attached Resolution, dated May 20, 2014 (the 'Resolution'), to deny your

> application seeking a 'Notice to Proceed' to demolish 429 East 64th Street and 430 East 65th Street, in the Borough of Manhattan, finding that the applicant had failed to establish to the satisfaction of the Commission that the improvement parcel or parcels which include(s) the improvements, was/were not capable of earning a reasonable return"

(Letter dated May 29, 2014, from Robert B. Tierney, Chair of the LPC to Stahl at R-2310).

Allegations of the Petition-Complaint

Stahl alleges that it is a New York State limited liability corporation, "engaged in the business of real estate development, including the provision of apartment housing to New York City residents at affordable rates" and owns the subject two Buildings and the Other Buildings of the FAE (petition, ¶ 15).

Respondents include the City; the LPC, a preservation agency in the City government, having powers and duties regarding the establishment and regulation of landmarks under the Landmarks Law; and Meenakshi Srinivasan as Chair of the LPC (*id.*, ¶¶ 16-18).

Stahl alleges that it acquired the FAE in 1977, along with an unrelated building at 1221 York Avenue, for the aggregate price of $5,725,000, because of its future development potential. The Buildings contain 190 apartments, allegedly of substandard quality by modern standards, and lack modern amenities, appliances, and fixtures. The Buildings allegedly have obsolete

electrical, mechanical, and ventilation systems, and neither Building is disability-accessible. A large number of the apartments are currently vacant, and allegedly cannot legally be rented in their existing condition. Stahl asserts that the Buildings have limited appeal to a limited demographic, and are capable of generating only meager rental income (*id.*, ¶¶ 22-28).

The FAE was constructed by the City and Suburban Home Company (CSHC). CSHC financed and developed numerous "model tenement projects" throughout the country, and was known for its "light-court" tenement style buildings, in which courtyards, apartments, and common areas were designed to maximize light and air. The Other Buildings of the FAE were completed in 1906, and are the oldest surviving example of CSHC's model tenement projects, and were designed by a renowned architect, James Ware. Stahl asserts that the Buildings were not designed by Ware, but by a different architect employed by CSHC, Philip Ohm, who also designed the York Avenue Estates, and whom Stahl dismisses as "undistinguished" (*id.*, ¶¶ 29-32).

Stahl alleges that, in 2004, it began to take steps that would enable it to carry out a redevelopment plan involving demolition of the Buildings and construction of a modern condominium tower. It claims that, in order to maximize the possibility of redeveloping the Buildings at the appropriate time, and avoid needlessly incurring the expense of repairs to the Buildings, which it planned to replace, Stahl kept apartments unleased

as they became vacant, beginning at least as early as 2000 (*id.*, ¶¶ 37-38).

Stahl alleges that, immediately after it advised the local Community Board of Stahl's plans to redevelop the Buildings, the LPC notified Stahl that the LPC had calendared a public hearing to revisit the landmarking issue, even though Stahl believed that the 16-year-old decision not to designate the Buildings as landmarks was long-settled and had been affirmed by the courts. Stahl asserts that, unencumbered by the landmark designation, the properties could have then been sold for nearly $100 million, even when discounting for the limited market for redevelopment projects of this size, and the risks inherent in real estate development generally. Stahl argues that, if it were to redevelop the properties itself – as it planned – the Buildings could be worth almost twice that amount (*id.*, ¶¶ 40-41).

At the public hearing held on November 14, 2006, Stahl presented a comprehensive memorandum in support of its position, explaining the historical, legal, and architectural support for preserving the BOE's decision. Stahl asserts that transcripts of the hearing reveal that the proceedings improperly focused on the concerns of politically influential local residents who sought to block any development to preserve their special interests. Stahl asserts that the LPC also repeatedly made comments suggesting that the LPC had prejudged Stahl's application, and simply would not permit redevelopment or even entertain the possibility that an actual hardship existed (*id.*, ¶¶ 42-45, 64).

After the Appellate Division affirmed the dismissal, discussed above, the New York Court of Appeals denied Stahl's motion for leave to appeal, exhausting Stahl's Article 78 challenge to the landmark designation. On October 7, 2010, Stahl requested a certificate of appropriateness authorizing demolition of the Buildings (with the intent to construct modern mixed-income condominium towers) on the ground of insufficient return, pursuant to Landmarks Law § 25-309 (*id.*, ¶¶ 52, 54, 60).

The petition concludes that the LPC's 2006 landmark designation has had a severe economic impact on the value of the Buildings, preventing Stahl from earning a reasonable rate of return, and has interfered with Stahl's investment-backed expectations. In each year since the designation, Stahl allegedly lost money on the Buildings because of their high vacancy rate, low rent, and high operating expenses. Stahl contends that even renovation of the Buildings would not solve the problem (*id.*, ¶¶ 73-75).

The petition also alleges that the LPC reached a false and unreasonable conclusion that Stahl could earn more than a 6% return by repeatedly misapplying the standards of the Landmarks Law, disregarding its own directly applicable precedent, and refusing to consider the full costs that Stahl would incur to renovate the Buildings (*id.*, ¶ 84).

Stahl alleges that the LPC did not use the "cost" approach, a valuation method that the LPC applied in

granting the hardship application of KISKA Developers, Inc. (KISKA), a case upon which the LPC stated it was relying. In KISKA, as here, the LPC considered multiple renovation scenarios, and, in each projected assessed value, it added renovation costs, and uniformly added a percentage of renovation costs to the initial assessed value to calculate real estate taxes. Stahl complains that the LPC attempted to distinguish away KISKA's use of the cost approach, by misreading KISKA (*id.*, ¶¶ 97-98), and that the LPC manipulated its analysis to achieve a predetermined result. For example, Stahl maintains that in calculating the denominator of the reasonable return equation and real estate taxes (based on a percentage of assessed value), the LPC applied the income approach instead of the cost approach. The LPC also discounted a significant amount of the actual renovation costs required on the ground that those costs were a "self-imposed hardship." Stahl concludes that, had the LPC not made these alleged errors, it would have concluded that Stahl could not earn a reasonable return and was entitled to relief on the grounds of hardship (*id.*, ¶¶ 101-102, 118).

The petition contains two causes of action. The first alleges an unconstitutional taking of real property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution, 42 USC § 1983, and Article I § 7 of the New York State Constitution (*id.*, ¶¶ 123-124).

The second cause of action is a request for relief under Article 78 of the CPLR, asserting that the LPC

actions are quasi-judicial, and thus reviewable under CPLR 7803 (3), and must be vacated because they are affected by an error of law, and were arbitrary and capricious (*id.*, ¶ 131).

Stahl seeks an order: (1) awarding just compensation in the amount of the fair market value of the Buildings on November 21, 2006, absent the unconstitutional taking, plus interest, which Stahl believes to be approximately $200 million; (2) vacating the LPC's denial of Stahl's hardship application as arbitrary and capricious and affected by an error of law, and remanding the matter for further proceedings; and (3) awarding attorney's fees and costs incurred in prosecuting this action.

Answer and Motion to Dismiss

Respondents contend that Stahl has not met its burden of showing that the Buildings are not able to earn 6% of the post renovation assessed value in the test year (2009), or that the financial assumptions and theories that the LPC used in makings its calculations were improper. Respondents urge that there has been no unconstitutional taking of Stahl's property because it may continue to be used for low-scale rental units. To estimate the income that the Buildings could generate, Stahl submitted four development scenarios to estimate renovation cost of vacant apartments and likely rents. Respondents indicate that the LPC rejected the four scenarios because they contained fallacies (Answer, ¶¶ 230, 237).

As a first affirmative defense, respondents state that the denial of the "Notice to Proceed" was rational and not arbitrary and capricious because the LPC properly determined that: (1) the relevant improvement parcel for the hardship application embraces all tax lots on Block 1459 (i.e., the FAE); (2) only the cost of the renovation of apartments vacant at the time of the designation should be considered in the hardship calculation for depreciation; (3) moderately renovated apartments in the "apartments only" scenario would likely generate rents of at least $35 - $40 per leasable square foot: (4) apartments renovated under the "minimal habitability" scenario would likely result in vacant apartments renting for $28 per square foot: (4) the vacancy rate and collection loss should be 5%; (5) reasonable expenses of operating the Buildings after renovation should be similar to the Other Buildings plus 15%; (6) in the depreciation calculation, loan interest should be excluded; (7) certain forms of "other income" should be included; (8) the Buildings would generate a reasonable return even if the cost approach were used to determine post-renovation assessed value; and (9) the income approach should be used to project real estate taxes. For a second affirmative defense, respondents assert that the redesignation of the Buildings and the denial of the Notice to Proceed does not constitute a taking.

In opposition, Stahl argues that: (1) the motion to dismiss should be denied, because Stahl adequately alleged that (a) the relevant parcel for the takings analysis is the Buildings; (b) the landmark designation

destroyed virtually all of the value of the Buildings; and (c) respondents interfered with Stahl's reasonable investment-backed expectations; and (2) the LPC's conclusion that the Buildings were capable of earning a reasonable return was arbitrary and capricious in that (a) the LPC wrongly characterized the relevant improvement parcel; (b) the LPC irrationally ignored economic reality and rejected the cost approach; (c) the LPC's self-imposed hardship finding unfairly punishes Stahl for exercising its legal rights; (d) a proper application of the cost approach demonstrates that Stahl cannot earn a reasonable return; and (e) the LPC refused to include construction loan interest because of its erroneous interpretation of the Landmarks Law.

Federal Stahl Action

On the same day that Stahl commenced this proceeding (September 22, 2014), Stahl commenced a related action in the U.S. District Court for the Southern District of New York, involving the same subject matter as presented here, entitled *Stahl York Avenue Co., LLC v The City of New York and The New York City Landmarks Preservation Commission* (2015 WL 2445071, 2015 US Dist LEXIS 66660 [SD NY, May 21, 2015, No. 14-CV-7665 [ER]) (*Federal Stahl Action*), seeking an order: (a) annulling and setting aside the 2006 landmark designation and the denial of its hardship application; (b) awarding compensatory damages; and (c) awarding attorney's fees and costs.

Defendants in that action (the City and LPC) moved to dismiss pursuant to Rule 12 (b) (1) of the Federal Rules of Civil Procedure, arguing that the federal court should abstain from exercising its jurisdiction until the instant (state) action is resolved, and Rule 12 (b) (6), arguing that the complaint fails to state a claim upon which relief can be granted (2015 WL 2445071 at *6, 2015 US Dist LEXIS 66660 at *18).

The federal court noted that, to prevail on a cause of action under 42 USC § 1983, as sought by Stahl, "a plaintiff must establish, by a preponderance of the evidence, that (1) the defendant deprived it of a right secured by the Constitution or the laws of the United States and (2) in doing so, the defendant acted under color of state law" (2015 WL 2445071 at *7, 2015 US Dist LEXIS 66660 at *20). The federal court dismissed the action, holding that Stahl failed "to state a constitutionally protected property interest and, by extension, a valid § 1983 claim" (2015 WL 2445071 at *16, 2015 US Dist LEXIS 66660 at *46). In doing so, the Court stated that the LPC's:

> "decision-making process involved an extensive amount of discretion, rendering Stahl's chances of obtaining a hardship finding uncertain at best. Stahl's claim-that the Commission exceeded the bounds of its authority by exercising this discretion would make the Board nothing more than a rubber stamp and reduce its role in the process to a rote check of whether the proper filings had been made"

(*id.*, 2015 US Dist LEXIS 66660 at *45-46 [internal quotation marks and citation omitted]).

DISCUSSION

The takings clause of the Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use, without just compensation." "[T]he Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests or denies an owner economically viable use of his land" (*Lucas v South Carolina Coastal Council*, 505 US 1003, 1016 [1992] [internal quotation marks and citation omitted]). Neither of these circumstances is implicated here. (*See also Matter of Smith v Town of Mendon*, 4 NY3d 1, 8-9 [2004]).

Because "the decision to make landmark designations is administrative, rather than quasi-judicial in nature" (*Stahl 1*, 76 AD3d at 295; *Matter of Gilbert v Board of Estimate of City of N.Y.*, 177 AD2d 252, 252 [1991], *lv denied* 80 NY2d 751 [1992]), the court's "review is limited to a determination of whether the LPC's designation of the Buildings had a rational basis or, if, as petitioner contends, it was arbitrary and capricious" (*Stahl 1* at 295; *Matter of Society for Ethical Culture in City of N.Y. v Spatt*, 68 AD2d 112, 116 [1st Dept 1979], *affd* 51 NY2d 449 [1980], *rearg dismissed* 52 NY2d 1073 [1981]). For the reasons discussed below, the record supports the finding that the LPC's denial of the Notice to Proceed was rationally based, and not arbitrary and capricious.

As a preliminary matter, Stahl argues that it would be premature to dismiss before a full record is developed. Nonetheless, issue is fully joined. Stahl commenced the lawsuit by a notice of petition and treated it as a special proceeding for summary determination on the papers, notwithstanding inclusion of a plenary claim. The parties have fully responded to each other's submissions. Indeed, the Court granted Stahl's request to file sur-reply papers (see Order of March 22, 2015 [Motion Seq. No. 004]). The matter was fully submitted for determination. Included with the motion papers is the full administrative record, consisting of eight volumes and 2359 pages. Stahl itself submitted two volumes of documents, containing 25 exhibits. Thus, no fuller record need be developed. Contrary to Stahl's contention, there are no material issues of fact that must be resolved.

Stahl argues that "the Landmarks Law heavily restricts Stahl's ability – or anyone else's for that matter – to engage in any use of the property other than the current, unprofitable one" (Stahl Mem. in Opp. at 10). However, the record belies Stahl's contention. In *Penn Cent. Transp. Co. v City of New York* (438 US 104, *reh denied* 439 US 883 [1978]), a decision upon which both sides rely, the United States Supreme Court stated:

> "[T]he New York City law does not interfere in any way with the present uses of the [Grand Central] Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65

> years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel"

(*Penn Cent. Transp. Co. v City of New York*, 438 US at 136). Similarly, the designation of the Buildings as landmarks has not interfered with the historic use of the property to obtain rental income. "[A] property owner who challenges land regulation as a taking has a heavy burden of proof" and "must demonstrate, by dollars and cents evidence that under no permissible use would the parcel as a whole be capable of producing a reasonable return" (*Briarcliff Assoc. v Town of Cortlandt*, 272 AD2d 488, 491 [2d Dept 2000] [internal quotation marks and citations omitted], *lv denied* 96 NY2d 704 [2001]).

In rendering its determination, the LPC, in its Report, cited the following provisions of the Landmarks Law as relevant: section 25-309 (a) (1), requiring the applicant to establish that "the improvement parcel (or parcels) is not capable of earning a reasonable return." "Improvement parcel" is the "unit of real property which (1) includes a physical betterment constituting an improvement and the land embracing the site thereof, and (2) is treated as a single entity for the purpose of levying real estate taxes" (section 25-302 [j]). "Reasonable return" is defined as a "net annual return of six per centum of the valuation of an improvement parcel" (section 25-302 [v] [1]).

The net annual return is defined as:

> "the amount by which the earned income yielded by the improvement parcel during a test year exceeds the operating expenses of such parcel during such year, excluding mortgage interest and amortization, and excluding allowances for obsolescence and reserves, but including an allowance for depreciation of two per centum of the assessed value of the improvement, exclusive of the land, or the amount shown for depreciation of the improvement in the latest required federal income tax return, whichever is lower"

(section 25-302 [v] [3]). "Test year" is defined as "(1) the most recent full calendar year, or (2) the owner's most recent fiscal year, or (3) any twelve consecutive months ending not more than ninety days prior to the filing [of the request for hardship relief]" (section 25-302 [v] [3] [b]). "Valuation" is "the current assessed valuation established by the city, which is in effect at the time of the filing" of the hardship request (section [v] [2]) (LPC Report at 8).

As the applicant, Stahl had the burden of establishing to the LPC's satisfaction that a hardship exists (Landmarks Law § 25-309 [a] [1]). To meet its burden, and demonstrate that it could not obtain a reasonable return, Stahl submitted four scenarios for the test year 2009 to determine income (LPC Report at 8, R-2318). In the C&W Report, as part of Stahl's application, there is a finding that, with capital improvement, the property could yield a return of 1.190% based on the

assessed valuation, and, without the capital improvement, a return of 0.614%. The C&W Report concludes "the imposition of the landmark designation on November 21, 2006 had rendered the property incapable of generating a sufficient and competitive economic return" (LPC Report at 27, R-2337).

The first scenario ("base building and apartment"), includes renovations to the base building (mechanical, electrical, plumbing, work on common areas, and facade work) as well as renovation of vacant apartments to a moderate level. C&W projects this scenario will yield an average rent of $40 per leasable square foot for vacant apartments (LPC Report at 8, R-2318, citing C&W Report at 29). The second scenario ("apartments only") involves the same level of apartment renovations as the base building and apartments scenario, but without improvements to the base building. C&W projects this scenario will generate rents of $35 per leasable square foot (LPC Report at 8, R-2318, citing C&W Report at 36). The third scenario ("minimal habitability") involves no renovations to the base building, apartment renovations sufficient to cure fire and safety code issues, and includes substantial renovations such as new appliances for the bathrooms and kitchens. C&W projects this scenario would generate rents of only $20 per leasable square foot (LPC Report at 8, R-2318, citing C&W Report at 23). The fourth scenario involved putting elevators into the Buildings. C&W concluded this was infeasible and not financeable with outside financing (LPC Report T 9, R-2319, citing C&W Report at 19).

Respondents contend that, to reach the conclusion that none of these four scenarios would produce a reasonable return, Stahl relied on a number of questionable assumptions which the LPC found were unsupported, such as a projected 20% vacancy in a geographic area with a 1.5% vacancy rate; rent of $600 or $888 in the Upper East Side, where rents elsewhere range from $1,500 to $2,200; and the failure to compare units in the Buildings to units in the Other Buildings, although they were similar in size and design and had rents of $1,336 for a studio and $1,616 for a one bedroom (Respondents' Mem. at 15, citing R-534).

According to respondents, LPC performed 24 hardship scenarios to determine whether Stahl had carried its burden of demonstrating the properties could not generate a reasonable return after vacant apartments had been renovated. The LPC used some of the analysis and assumptions that Stahl used and some different ones that it determined were more reasonable (Respondents' Mem. at 15-16, 43; *see also* Reply Mem. at 6-7, citing LPC Report at 27-28, R-2337 - 2338). Respondents aver that the LPC calculated income, from rents and other sources, and determined costs incurred in operating the property. The LPC then computed whether the remaining sum, after subtracting projected expenses and operating costs from income, was less than 6% of the post-renovation assessed value of the property (*id.*, citing R-2318 - 2319; R-2337 - 2338; R-2344 - 2347; R-2352 - 2355). In each case, according to respondents, the LPC found that Stahl was able to realize a reasonable return, through monthly

rents of $869, $1082, or $1236 per apartment based on projected rents of $28, $35, and $40 per gross square foot, and returns varying between 8.68% and 16.92%. Thus, the LPC concluded that Stahl had failed to demonstrate that the Buildings were incapable of earning a reasonable return, and it denied the application. In reaching its determination, the LPC made findings regarding income from renovated apartments; vacancy and collection loss; other income that could be generated by the property; operating and other expenses; depreciation; real estate taxes after renovation; and the property's assessed value after renovation. In each instance, the LPC discussed the issue in detail and explained how and why it reached its conclusions (Respondents' Mem. at 16).

Stahl argues that its purportedly erroneous assumptions are inconsequential. Rather, Stahl asserts that three core issues actually affect the outcome: (1) the definition of relevant improvement parcel; (2) whether the cost or income approach is the proper method for determining assessed value; and (3) whether Stahl's renovation costs should be reduced by half because some of those costs were purportedly a "self-imposed hardship." The Court now considers each in turn.

1. ***Relevant Improvement Parcel: entire tax block 1459 or exclusively the Buildings.***

The Buildings are situated on Manhattan tax block 1459, which is subdivided into four tax lots (lots

1, 10, 22 and 30). The Buildings are on tax lot 22. Both sides agree that the relevant regulation is Landmarks Law § 25–302 (j) which provides:

> "'Improvement parcel.' The unit of real property which (1) includes a physical betterment constituting an improvement and the land embracing the site thereof, and (2) is treated as a single entity for the purpose of levying real estate taxes, provided however, that the term 'improvement parcel' shall also include any unimproved area of land which is treated as a single entity for such tax purposes."

Respondents argue that the LPC properly decided that the relevant improvement parcel for the hardship application is all of the tax lots on Block 1459 because:

> (1) the Buildings were built as part of the larger complex, and are stylistically, and remain physically, related to the rest of the buildings on the block in terms of height, massing, and general layout;
>
> (2) the Buildings and the Other Buildings in the complex share common boilers and maintenance personnel;
>
> (3) Stahl operates one leasing office for all of the buildings in the complex;
>
> (4) the laundry facilities located in some of the Other Buildings are available to tenants from all of the buildings in the complex, and income from laundry facilities is assigned to buildings throughout the complex;

> (5) Stahl has managed the Other Buildings so as to facilitate its goal of demolishing the Buildings and redeveloping the site;
>
> (6) Stahl has not made reasonable and prudent efforts to rent apartments in the Other Buildings, which explains the excessively high vacancy rate in these buildings as compared to the average for the area, and this supports the LPC's finding that the complex is managed as a single economic unit; and
>
> (7) Stahl has filed consolidated filings for all of the lots on block 1459 for real estate tax purposes for at least the tax years 2007-2012.

For these reasons, respondents contend, the LPC rationally found that the improvement parcel for purposes of the hardship application should be Manhattan tax block 1459 in its entirety. Therefore, because Stahl's application is based on computations using only the two Buildings, and not the entire Lot, the LPC found that Stahl failed to meet its burden of showing that the Building cannot obtain a reasonable return (LPC Report at 10-11, R-2320-2321).

Stahl contends that whether it has managed all of the buildings of the FAE "as a single economic entity" is a highly contested factual assertion – not a legal argument – and it is not properly before the Court at this stage of the litigation. Notwithstanding this assertion, Stahl has not identified any disputed factual issues. Rather, the dispute is the significance of the factors identified by the LPC in concluding that the improvement parcel is the entirety of tax lot 1459.

Stahl also contends that the fact that a landowner treats different buildings similarly for some purposes does not, by itself, establish, as a matter of law, that they must be treated as a single parcel for takings purposes. Stahl cites to the petition which sets forth numerous examples showing that Stahl actually treated the Buildings as a separate economic entity from the remainder of the FAE beginning in 1990, when the BOE severed the Buildings from the rest of the FAE. Stahl states that it crafted a distinct development plan for the Buildings, and has operated them accordingly, by keeping apartments unrented as they became vacant in preparation for the eventual redevelopment of the site. In addition, the Buildings are treated as a discrete parcel for tax purposes, both by the City's Department of Finance and by Stahl, which files various tax documents for the two Buildings, separate from the remainder of the FAE.

Stahl argues further that the landmarks law distinguishes between "improvement parcel" and "improvement site" and that the reasonable return is based on the improvement parcel which is treated as a single entity for the purpose of levying real estate taxes (Landmarks Law § 25-309 [a] [1]). Allegedly, respondents do not dispute that the Buildings comprise a single tax lot (lot 22) while the Other Buildings of the FAE comprise three different tax lots (Lots 1, 10, and 30) and that, for tax purposes, the Department of Finance calculates an assessed value for Lot 22 alone, and does not include in that calculation any value for the remainder of the FAE.

Respondents have demonstrated that the determination that the entire lot is the relevant improvement parcel is rational and not arbitrary and capricious and, therefore, the agency determination must be upheld (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of 47 Ave. B E. Inc. v New York State Liq. Auth.*, 72 AD3d 465, 467 [1st Dept 2010]). The Landmarks Law affords the agency discretion given that, in determining reasonable return, the "net annual return" is "presumed to be the earning capacity of such improvement parcel, in the absence of substantial grounds for a contrary determination by the commission" (Landmarks Law § 25-302 [c]).

As found by the Appellate Division in 2010, the record demonstrated that there was a prior finding in 1990 that the FAE "needed to be protected in its entirety as a socio-historic monument in the history of urban housing, and that but for the existence of a political compromise at the time, the entire district would have been designated a landmark" (*Stahl 1*, 76 AD3d at 297). Hence, the record supports the LPC's determination that that the Buildings should be considered part of the entirety of the FAE, because the carving out of them in 1990 was an anomaly.

According to respondents, Stahl has filed consolidated filings for all of the lots on block 1459 for real estate tax purposes for at least the tax years 2007-2012 (see R-2142) and that, in making such a filing, Stahl filed a form "TC 166," notifying the Department of

Finance that "two or more non-condo tax lots, operated as an economic unit or otherwise related for purposes of valuation, should be reviewed together as a consolidated unit" (see R-2150) (Respondents Mem. at 18-19). Respondents state further that the entire block was the subject of consolidated hearings before the City's Tax Commission in connection with applications for reductions in the assessed value of these properties (R-2144, R-2150). Although Stahl counters that the statute refers to tax assessments, not filings, as discussed above, the disparate designations by the BOE in 1990 was a politically motivated anomaly, and should not have occurred (*see Stahl 1*).

Moreover, several factors are used to determine the relevant parcel:

> "the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the unregulated lot. . . . An analysis focused on these factors is eminently sound and it mirrors the approach taken by other courts in regulatory takings cases"

(*District Intown Props. Ltd. Partnership v District of Columbia*, 198 F3d 874, 880 [DC Cir 1999], *cert denied* 531 US 812 [2000]). Accordingly, the LPC's determination as to the improvement parcel was rational.

Stahl states that the Court should not defer to the LPC concerning this issue (Stahl Mem. in Opp. at 23). However, if, as is the case here, "the court finds

that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency" (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). The "courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise" (*id.*).[3]

Stahl argues that its "distinct treatment of the Subject Buildings was a direct consequence of the BOE's decision to cleave them from the FAE, with the express purpose of 'allow[ing] for [as-of-right] development in the future'" (Stahl Mem. in Opp. at 8, citing petition, ¶ 34). Stahl asserts that, the City induced Stahl not to challenge the 1990 designation of the Other Buildings, because that designation expressly preserved Stahl's rights to develop the Buildings, and having done so, the City must accept the consequences of its actions on Stahl's development plans for purposes of Stahl's takings claim. Stahl's inducement and/or reliance claim is specious. To the extent that Stahl insinuates that the City should be estopped from reconsidering the BOE's determination, it is apodictic that estoppel does not lie for official acts absent an unusual factual situation (*see generally Advanced Refractory Tech., Inc. v Power Auth. of State of NY*, 81 NY2d 670, 677 [1993].) No unusual factual situation is presented here.

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[3] The Court sees no basis on which to reach a different result than that reached by the LPC.

That Stahl may have previously believed that it had the ability to develop the Buildings does not establish that a taking has occurred (*Penn Central Transp. Co.*, 438 US at 130). The "LPC is statutorily authorized to amend any prior designation of a landmark" (*Stahl 1*, 76 AD3d at 297; Landmarks Law § 25–303 [c]). This is particularly true here where an expectation that the status of the Buildings was unlikely to change was unrealistic. In *Stahl 1*, the First Department stated:

> "The record compiled during the proceedings contains testimony before the City Council Subcommittee on Landmarks stating that the BOE's 1990 decision to exclude the buildings from landmark designation was a 'bad backroom deal,' and was an 'inappropriate politically motivated action' made under 'intense political pressure from a powerful real estate developer.' Additionally, when introducing the amendment to the full City Council, the Speaker of the Council described the BOE's decision to exclude the buildings from landmark designation as a bad decision based upon improper considerations which had nothing to do with the buildings' historical or cultural significance"

(76 AD3d at 296).

Stahl argues that when it acquired the Buildings, it intended to redevelop them, and had no reason to believe that "these unremarkable, outmoded, tenement-style apartment buildings could constitute a potential landmark at some point in the future" (Stahl Mem. in Opp. at 15). "[T]he submission that appellants

may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable" (*Penn Cent. Transp. Co. v City of New York*, 438 US at 130).

Moreover, as noted by respondents, the unrealistic nature of Stahl's supposed expectation should have been apparent, at the latest, in 1992, when the Appellate Division rendered its decision in *Kalikow.* In *Kalikow*, the Appellate Division reinstated the designation of the Landmarks Preservation Commission of the York Avenue Estate as a landmark (discussed above). It rejected the argument that the prior determination of the BOE was a legislative act, beyond the purview of judicial review, and found that the decision was not arbitrary and capricious. Thus, Stahl should have anticipated that its property would eventually face the same analysis.

Indeed, as the New York Landmark Conservancy cogently pointed out in an amicus memorandum of law, when Stahl acquired the FAE in 1977, it was occupied predominantly by rent regulated tenants, and thus, the reasonable expectation would have been that the "Subject Buildings would always be low-scale, rent regulated rentals that might one day be landmarked" (Amicus Memo. at 17). "[T]he critical time for considering investment-backed expectations is the time a property is acquired, not the time the challenged regulation is enacted" (*Meriden Trust & Safe Deposit Co. v Federal Deposit Ins. Co.*, 62 F3d 449 [2d Cir 1995]).

Furthermore, by characterizing the Buildings as "unremarkable, outmoded, tenement-style apartment buildings," Stahl is repeating the assertion that it made in *Stahl 1*, when it argued that the Buildings "were the last to be constructed in the First Avenue Estate and were designed by a lesser-known architect," and, therefore, "they have no landmark value," an argument that the First Department deemed "unavailing" (*Stahl* 1, 76 AD3d at 299). This Court declines the implied–and improper–invitation to revisit the issue of the designation of the Buildings as landmarks, sustained by the First Department in *Stahl 1.*

2. *Whether the cost or income approach is the proper method for determining assessed value.*

Stahl argues that the LPC used the "income approach," rather than the "cost approach," to project assessed value, contending that the income approach ignores the significant cost of the substantial renovations that would be necessary for Stahl to earn any return on the Buildings. According to Stahl, the use of the income approach essentially ensures a finding that a property owner can earn a reasonable return post-renovations. Stahl also argues that, under the income approach, the LPC assumed the post-renovation assessed value of the Buildings was barely half of the cost of the renovations, and would consider a post-renovation rate of return "reasonable," even if it would take Stahl 32.8 years to pay for those renovations. Stahl asserts that the LPC also failed to explain why

it used the cost approach to calculate assessed value in a prior hardship case (KISKA), but not here.

According to respondents, the LPC stated that it did not employ the cost approach in KISKA for development scenarios involving rental properties (Respondents' Mem. at 31, citing R-2284). They dispute the assertion that KISKA used the cost approach to adjust assessed value to reflect renovation costs, asserting that the LPC substituted the purchase price for the assessed value. In KISKA, the applicant analyzed several development scenarios, including ones involving the outright sale of the buildings or apartments, as well as for rental properties. They contend that the LPC found that, " 'for calculating the potential value of the buildings as condominiums or individual townhouses, the costs of renovation should be treated as a one-time expense to be recouped upon the sale of the property. Accordingly, such costs would be added to the original sales price of each building before calculating the rate of return' " (Respondents' Mem. at 31-32, citing KISKA Preliminary Determination, at R-2284).

Respondents argue that the conclusion that post-renovation assessed value should not be calculated using the cost approach is consistent with KISKA, which did not add renovation costs to the purchase price to determine assessed value in scenarios involving rental properties and not sales. As stated in the denial of the Notice to Proceed (i.e. LPC Report), this makes sense, because when a developer sells property it must recoup all of its costs at the point of sale, whereas rental property recoups the investment over time (Respondents'

Mem. at 32-33, LPC Report at 26-27, R-2336 - 2337). Also, as stated in the denial of the Notice to Proceed, the LPC looked solely at the reasonable return of renovating units to a moderate level with no improvements to the base building, i.e., the apartments only scenario (Respondents' Mem. at 33, LPC Report at 13, R-2323).

In any event, respondents note that the LPC also computed the rate of return possible using only the two Buildings and the cost approach, and considering the renovation cost of all 97 vacant apartments, and that its computations showed that Stahl was able to earn returns between 8.68% and 9.96%, based on a profit of $549,832 (if apartments rented for $35 per gross square foot) and $644,821 (if apartments rented for $40 per gross square foot) (R-2338, 2357). The LPC analyzed the minimum habitability and the apartments only scenarios. The LPC calculated the rate of return in relation to the post-renovation assessed value using both the income and cost approaches. Returns of more than 10% were achievable in 75% of the scenarios.

Stahl counters that the LPC analysis was inconsistent, in that it allegedly produced an irrational alternative calculation where: (1) in the denominator, assessed value was determined through the cost approach using renovation costs for 97 apartments; (2) for depreciation, assessed value was determined through the cost approach using renovation costs for 53 apartments; and (3) for real estate taxes, assessed value was determined through the income approach. Yet, as explained by respondents, the cost approach

generates a higher assessed value than the income approach, and a prudent owner of a rental property would seek to have a lower assessed value, and therefore lower real estate taxes using the income approach. Real estate taxes are significantly higher if the cost approach is used to set assessed value, and, as stated in the LPC Report, "a reasonable prudent and efficient owner would seek to have as low a real estate tax as possible" (LPC Report at 25-26, R-2335 - 2336). Landmarks Law § 25-302 (c) acknowledges that "efficient and prudent management" is part of the analysis equation in determining the capacity of earning a reasonable return.

3. ***Whether Stahl's renovation costs should be reduced by half because some of those costs were purportedly a "self-imposed hardship."***

Respondents argue that it was rational for the LPC to exclude renovation costs for the apartments that were kept vacant after the redesignation in 2006, because, by doing so, Stahl assumed a business risk and thereby suffered a self-imposed hardship. Stahl argues that this conclusion is not rational, because Stahl would have incurred renovation costs regardless of its vacancy policy, and therefore those costs cannot be considered "self-imposed." Even assuming, for purposes of argument, that Stahl might have incurred some renovation costs, this finding is inconsequential. As demonstrated by respondents, Stahl's analysis is flawed, because it is based upon vacancy rates in the Other Buildings (also part of the improvement parcel tax

block 1459, discussed above) and that improperly skewed the results against a finding of a reasonable return.

The LPC noted that it did not include a vacancy and collection loss factor in its 1988 KISKA decision – the last economic hardship application decided by the LPC – but that, given the large number of apartments in the Buildings, a reasonable vacancy and collection loss factor should be included in calculating effective gross income. Thus, as noted in the decision in the *Federal Stahl Action* (2015 WL 2445071 at *16, 2015 US Dist LEXIS 66660 at *43-44), the LPC did rely on the KISKA decision for guidance, and honored its duty to "decide like cases the same way or explain the departure" (*Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 518 [1985] [internal quotation marks and citation omitted]). This Court concurs with the federal court's finding.

In determining effective gross income, the LPC found that it was "reasonable to subtract from the gross rental income a reasonable allowance for vacancy and collection loss" (LPC Report at 17, R-2327). Whereas C&W projected a vacancy and collection loss rate of 10%, relying on HR&A data, the LPC concluded that that a 5% vacancy and collection loss factor should be applied; the Buildings and the FAE are located in the Upper East Side of Manhattan, a "highly desirable residential neighborhood," and all of the apartments are regulated by rent regulations. According to City Habitat data cited by HR&A, the average vacancy rate for the Upper East Side averaged 1.5% between 2007

and 2011, with the highest rate being 2.38% in 2009. Approximately "two-thirds of vacancies in pre-1947 rent stabilized buildings are re-rented in less than three months, and only 7% of these vacancies persist for longer than a year" (*id.*, citing HR&A Report, dated June 11, 2013 at 2).

Stahl testified that the Other Buildings have had a vacancy rate exceeding 20%, because the Buildings are six-story walkups, containing small sized apartments lacking amenities. C&W projected a vacancy and collection loss rate of 10%, but the LPC found this to be "anomalous, excessive and unsupported by the record" (*id.* at 18, R-2328).

The LPC found that "having many vacancies in the Other Buildings potentially facilitates Stahl's plans and desires to develop the site of the Subject Buildings," to enable the relocation of rent stabilized tenants from the Buildings slated for demolition. Stahl itself states that "to maximize the possibility of redeveloping the Buildings at the appropriate time and avoid needlessly incurring the expense of repairs to Buildings it planned to replace, Stahl kept apartments unleased as they became vacant, beginning at least as early as 2000" (petition, ¶ 38). Stahl cites this scheme of leaving apartment vacant for purposes of relocating tenants from the Buildings to the Other Buildings as evidence of a distinct treatment of the properties. Rather, it shows the contrary: Stahl treated the entire FAE, including the two Buildings, as one integrated enterprise.

The LPC's analysis is well-reasoned. It is "not the province of the courts to second-guess thoughtful agency decisionmaking" (*Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 232 [2007]).

The LPC also determined that, even if warehousing does not account for the vacancy rate, it reflected Stahl's unreasonable management. Stahl had not increased its efforts to rent apartments or explored other avenues for renting apartments, notwithstanding the extremely high and unusual vacancy rates. The LPC found that the only efforts Stahl makes to rent apartments in the Other Buildings is the onsite rental office and listing them with the property manager Charles H. Greenthal. Stahl has not advertised apartments in other media (e.g., social media or newspapers) or listed them with multiple brokers. The LPC found that the on-line broker merely lists the telephone number of the onsite rental office, and that the broker neither provides floor plans, virtual tours, or other information on apartments in the Other Buildings, nor does it say whether there are any vacancies (LPC Report at 18, R-2328). As noted above, the LPC has discretion to consider the owner's "efficient and prudent management" as part of the analysis in determining the capacity of earning a reasonable return (*see* Landmarks Law § 25-302 [c]). The LPC found that, faced with such a high vacancy rate when compared to the average for the area as a whole, a prudent owner would have made other efforts to rent apartments, and that Stahl's failure to change its general management approach, and

intensify and diversify efforts to rent apartments, is unreasonable and imprudent (LPC Report at 19, R-2329).

Regarding soft costs and depreciation, Stahl contends that it was an error for the LPC to exclude construction loan interest, because the Landmarks Law requires the LPC to calculate the rate of return as "the amount by which the earned income yielded by the improvement parcel during a test year exceeds the operating expenses of such parcel during such year, excluding mortgage interest and amortization" (Landmarks Law § 25-302 [v] [3] [a]) and does not expressly exclude construction loan interest. It argues that, because the statute does not mention construction loan interest as a cost to be excluded from the calculation, the exclusion of it was contrary to law.

The LPC noted that, although soft costs are normally not depreciable, it allowed some in KISKA to be included in the depreciation calculation. The LPC did not include construction loan interest because in KISKA, the only explicitly loan-related item included in the list of soft costs was the mortgage recording tax (LP Report at 24-25, R-2334-2335; *see also Federal Stahl Action*, 2015 WL 2445071 at *16, 2015 US Dist LEXIS 66660 at *43-44). In any event, Stahl has not shown that the inclusion of the construction loan interest would nullify the findings of a reasonable return.

Stahl contends that the LPC used a "manipulated" analysis to reach a "pre-ordained, result-oriented conclusion, born of bias against Stahl from the outset, that

the hardship must be rejected, citing testimony of LRC Commissioners Perlmutter (R-1704, R-2206, R-2211); Bland (R-2235-2236); Devonshire (R-2238); and Tierney (Chair) (R-2194) (Stahl Mem. in Opp. at 21).

"[A]n impartial decision maker is a core guarantee of due process, fully applicable to adjudicatory proceedings before administrative agencies" (*Matter of 1616 Second Ave. Rest. v New York State Liq. Auth.*, 75 NY2d 158, 161 [1990]). "Disqualification is more likely to be required where an administrator has a preconceived view of facts at issue in a specific case as opposed to prejudgment of general questions of law or policy" (*id.*). Nevertheless:

> "[A]dministrative officials are expected to be familiar with the subjects of their regulation and to be committed to the goals for which their agency was created. Thus, a predisposition on questions of law or policy and advance knowledge of general conditions in the regulated field are common, and it is expected that they will influence an administrator engaged in a legislative role such as rule making"

(*id.* at 162). Here, a review of the cited testimony does not show a prejudice against Stahl; rather, it indicates a concern to adhere to the principles underlying the Landmarks Law (*see* § 25-301) as well as exhibiting "advance knowledge of general conditions in the regulated field" (*Matter of 1616 Second Ave. Rest*, 75 NY2d at 162). Stahl highlights the statement by Commissioner Perlmutter that the "LPC's 'job' was 'not to be taken in' by Stahl's application" (Stahl Mem. in Opp.

at 21, citing R-1704). A review of the Commissioner's entire testimony does not support the allegation of bias or prejudice.

Because Stahl has failed to meet its burden of proof on the second cause of action seeking Article 78 relief, challenging the denial of the hardship application, and because Stahl has failed to set forth a viable cause of action for a taking without just compensation, respondents are entitled to dismissal of the plenary claim against them for money damages (*see Kent Acres Dev. Co., Ltd. v City of New York*, 41 AD3d 542, 550 [2d Dept 2007] [because the Supreme Court properly granted that branch of the motion of the City and the Department of Environmental Protection for dismissal of the cause of action against them to recover damages pursuant to Public Health Law § 1105 (1), and the record shows that the enforcement of those regulations did not effect a regulatory taking as a matter of law, the court also correctly granted that branch of the motion for dismissal of the cause of action to recover damages for a taking without just compensation]).

Stahl argues that, apart from the reasonable return issue, its takings claim will necessarily implicate additional facts not presented before the LPC, such as "facts relevant to the reduction in value of the Subject Buildings caused by the designation" (Stahl Mem. in Opp. at 14). Stahl does not identify those "additional facts."

To the extent that Stahl is again challenging the designation in 2006, which seems to be the case here,

that issue has been disposed of by the Appellate Division in *Stahl 1*, and the Court of Appeals denied leave to appeal, there being no automatic right to an appeal, in that the Appellate Division affirmance of the trial court's decision was unanimous. Moreover, "facts relevant to the reduction in value of the Subject Buildings caused by the designation" are not necessary, because whether the landmark designation caused a reduction in value to Stahl's property is not at issue here. Facts bearing on the relevant issue of the amount of that reduction, impacting on the "reasonable return" have been sufficiently presented to the Court.

For this reason, Stahl's citation to *Matter of Brotherton v Department of Envtl. Conservation of State of N.Y.* (189 AD2d 814 [2d Dept 1993]) is unavailing. There, the petitioner, the owner of a parcel of real property abutting a canal, filed an application to replace 200 feet of existing bulkhead and to introduce 500 cubic yards of fill to stabilize the bulkhead. Most of the petitioner's property was officially designated as tidal wetlands (*id.* at 815). The Department of Environmental Conservation of the State of New York denied the application, finding that the proposed bulkhead project would have adverse impacts upon the wetland (6 NYCRR 661.9 [b] [1] [i]). The Second Department affirmed, holding that substantial evidence supported the determination and that it was not arbitrary and capricious. The evidence supported the determination that the project would impede the nourishing tidal flows and destroy the designated wetlands on the petitioner's property. Moreover, the petitioner did not

establish that the bulkhead was reasonable and necessary to the continued use of his property (*id.*).

The Second Department also ruled, however, that the record of the administrative hearing was insufficient to determine whether the denial of the petitioner's application was so burdensome as to constitute a taking, in which case the department must either grant the application or commence condemnation proceedings. Thus, the Second Department remanded the matter for an evidentiary hearing to determine whether the wetlands regulations, considered together with the denial of the application would constitute an unconstitutional taking of the petitioner's property (*id.* at 816).

In *Matter of Brotherton*, an evidentiary hearing was held necessary, because the issue of whether the petitioner suffered an unconstitutional taking was not addressed. Therefore, no factual record was developed as to that issue. Here, however, the issue of the denial of the hardship application is integral to the issue of an unjust taking, and no additional facts need be adduced.

Finally, the Court rejects respondents' argument that the affidavit of Jeremy Stern, Stahl's "Facility Director," is inadmissible, because, they contend, it is outside of the administrative record. "Judicial review of an administrative determination is limited to the record before the agency and proof outside the administrative record should not be considered" (*Matter of Piasecki v Department of Social Servs.*, 225 AD2d 310,

311 [1st Dept 1996]). Contrary to respondent's argument, however, the affidavit and accompanying exhibits represent an analysis of the administrative record, not an enlargement of it. Nevertheless, Stahl's analysis fails to overcome the rational determination of the LPC that Stahl has not met its burden of demonstrating that it is incapable of achieving a reasonable return from the Buildings.

CONCLUSION

Stahl has not met its burden of demonstrating that respondents acted arbitrarily or capriciously or in violation of law by denying Stahl's hardship application. Stahl has not set forth a cause of action for an unconstitutional taking and thus has no viable claim either for money damages, costs or attorneys' fees.

Accordingly, it is

ORDERED and ADJUDGED that the petition-complaint is denied and the cross motion is granted and the proceeding-action is dismissed.

This constitutes the decision, order and judgment of this Court.

Date: January 8, 2016
New York, New York

ENTER:

/s/ Michael D. Stallman
J.S.C.

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

STAHL YORK AVENUE CO., LLC, Plaintiff-Petitioner, vs. THE CITY OF NEW YORK; THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION; MEENAKSHI SRINIVASAN, in her capacity as Chair of the New York City Landmarks Preservation Commission, Defendants-Respondents.	Index No. 100999-2014 Hon. Michael D. Stallman Motion Sequence No. 1

PLAINTIFF-PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO CROSS MOTION TO DISMISS AND REPLY MEMORANDUM OF LAW IN SUPPORT OF THE VERIFIED PETITION AND COMPLAINT

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* * *

[13] Finally, the City suggests that Stahl's constitutional claim should be dismissed because the LPC has already found that Stahl can earn a reasonable rate of return. Mem. at 58. This argument is another example of the City's efforts to dispute the allegations in the Complaint. As set forth in the Complaint and for the reasons discussed *infra* in Part II, the LPC's decision was arbitrary and capricious, and Stahl has already demonstrated that it cannot earn a reasonable return in the administrative proceeding. Moreover, the resolution of the Article 78 petition does not control the outcome of the takings claim. The Article 78 petition is resolved solely on the administrative record under a deferential Article 78 standard of review, whereas Stahl is entitled to have its constitutional takings claim resolved *de novo*, after discovery and the presentation of additional evidence to this Court. This Court is obliged to reach its own independent conclusion as to whether Stahl is able to earn a reasonable rate of return. *See Cioffoletti v. Planning and* [14] *Zoning Comm'n of Town of Ridgefield*, 209 Conn. 544, 551

(1989) ("[T]rial court should decide the taking issue de novo in light of all the evidence properly presented to it, including, but not limited to, the administrative record."); *Hensler v. City of Glendale*, 8 Cal. 4th 1, 16 (1994) (en banc) (where administrative hearing does not involve judicial protections such as swearing of witnesses and direct and cross-examination, "the administrative record is not an adequate basis on which to determine if the challenged action constitutes a taking"). Indeed, even apart from the reasonable return issue, Stahl's takings claim will necessary implicate additional facts not presented before the LPC—in particular, facts relevant to the reduction in value of the Subject Buildings caused by the designation. *See, e.g.*, *Brotherton v. Dep't of Envtl. Conservation*, 189 A.D.2d 814, 816 (2d Dep't 1993) (denying Article 78 petition on administrative record, but remanding for evidentiary hearing on takings claim).

* * *

To Be Argued By:
CHETAN A. PATIL

New York County Clerk's Index No. 100999/14

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

STAHL YORK AVENUE CO., LLC,

Plaintiff-Petitioner-Appellant,

—against—

THE CITY OF NEW YORK; THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION; MEENAKSHI SRINIVASAN, in her capacity as Chair of the New York City Landmarks Preservation Commission,

Defendants-Respondents-Respondents.

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* * *

[4] **QUESTIONS PRESENTED**

* * *

2. May a court defer to an agency concerning the agency's own alleged constitutional violations?

The lower court answered yes.

3. Is a plaintiff asserting that an administrative agency has violated its constitutional rights entitled to present evidence in a judicial forum to adjudicate its claims?

The lower court answered no.

* * *

[29] The lower court also appeared to defer to the LPC's supposed determination of which parcel was relevant to the takings claim. (A42). This was legally erroneous for three reasons.

First, the LPC made no such determination. Nor could it have done so, as it was merely deciding whether to grant the hardship application—not whether denying the application would violate the Takings Clause.

Second, because the takings claim was not before the LPC, Stahl had no opportunity to present evidence demonstrating its "economic expectation[ ]" of what the relevant parcel would be. *Forest Props.*, 177 F.3d at 1365. In a hardship proceeding, the LPC only identifies the "improvement parcel" under the Landmarks Law. What constitutes an "improvement parcel" depends solely on how the City levies taxes on the property, and not how the claimant expects to use the property. § 25-302(j) (defining the parcel for the hardship application as "[t]he unit of real property which . . . is treated as a single entity for the purpose of levying real estate taxes"). But it is the claimant's expected use that determines the relevant parcel for purposes of the takings analysis.[3] The lower court dismissed Stahl's constitutional claim without affording Stahl the opportunity to develop and [30] present evidence showing that, based on Stahl's expectations, the Buildings were the relevant parcel.

Finally, even if the LPC had addressed Stahl's takings claim, it would not be entitled to deference. It is for the courts, and not the LPC, to assess whether the

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[3] The City conceded below that the Landmarks Law's definition of an improvement parcel "has no relevance . . . for purposes of a takings claim." (A300).

LPC's conduct violates the Takings Clauses of the United States and New York Constitutions. *See, e.g.*, *Cumberland Farms, Inc. v. Town of Groton*, 262 Conn. 45, 69 (2002) ("[T]he plaintiff is entitled to a de novo review of the factual issues underlying its inverse condemnation claim, unfettered by the [zoning] board's previous resolution of any factual issues."); *Hensler v. City of Glendale*, 8 Cal. 4th 1, 15 (1994) (en banc) ("A property owner is, of course, entitled to a judicial determination of whether the agency action constitutes a taking."); *Bencin v. Bd. of Bldg. & Zoning Appeals*, No. 92991, 2009 WL 3387695, at *2 (Ohio Ct. App. Oct. 22, 2009) (holding that an "administrative agency . . . cannot determine whether an ordinance is unconstitutional as applied to a particular parcel" and that such "constitutional claim[s] must be tried originally in the court of common pleas, with the court permitting the parties to offer additional evidence"); *cf. N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 612 F.2d 644, 648-49 (2d Cir. 1979) (refusing to defer to fact-finding of state-agency-defendant in action alleging that it violated the Fourteenth Amendment); *Johnson v. Charles City Cmty. Sch. Bd. of Educ.*, 368 N.W.2d 74, 84 (Iowa 1985) ("The authorities which in general require [31] courts to yield to non-arbitrary administrative determinations uniformly provide an exception for constitutional questions."). Otherwise, a city or state agency could immunize itself from constitutional review—which is precisely what the court below erroneously allowed the LPC to do.

Stahl more than adequately alleged facts demonstrating its economic expectation that the Buildings were a distinct parcel, separate from the remainder of the FAE. This disputed issue of fact cannot be resolved on a motion to dismiss.

* * *

[33] It is not entirely clear why the lower court found these allegations insufficient. The court appears to have determined that (1) despite the restrictions imposed by the Landmarks Law, Stahl may still "use . . . the property to obtain rental income" (A33); and (2) deference was owed to the LPC's purported finding that the Buildings can yield a "reasonable" economic return (A37-38; A60; A61). Assuming that was the basis for the lower court's ruling, then as demonstrated below, it erred as a matter of law and should be reversed.

* * *

2. The lower court was not permitted to defer to the LPC's skewed economic impact "analysis." As set forth above, the LPC's alleged constitutional violations must be reviewed *de novo.* As many courts have held, judicial review is needed most of all for determining the critical issue of the regulation's economic impact on the property. *See, e.g.*, *Cumberland Farms*, 262 Conn. at 63 (refusing to "accord preclusive effect to the board's findings" because doing so "would be to vest the board with the responsibility of deciding the facts underlying the [34] plaintiff's constitutional claim and, in effect, would give the board the authority to settle

the issue raised by that claim"); *Hensler*, 8 Cal. 4th at 15-16; *see also Brown v. Painesville Twp. Bd. of Zoning Appeals*, No. 2004-L-047, 2005 WL 2709586, at *5 (Ohio Ct. App. Oct. 21, 2005) ("[T]he trial court cannot substitute its duty of responsibility for reaching a decision by deference to the [agency].").

The LPC administrative proceedings offered none of the protections afforded by a judicial proceeding; they lacked evidentiary rules, there was no testimony offered under oath, Stahl could not cross-examine adversarial witnesses, and Stahl's application was not adjudicated by a disinterested factfinder. Consequently, much of the "evidence" the LPC relied on fell far below the indicia of reliability required in a court of law. The LPC relied, for example, on anecdotal opinions of unidentified persons with no knowledge of the facts (*see* A913 (citing opinion of random person in fashion industry as "evidence" that apartments were marketable); A1248, A1292 (citing unverified reactions of anonymous individuals as evidence of what rent Stahl could charge)); prejudicial non-sequiturs (*see* A1260 (asserting that apartments could be made marketable because occupied apartments have "personality")); and other patently unreliable evidence (*see* A1265 (claiming vacancy rate proffered by Stahl could not be verified because one Commissioner supposedly "was unable to locate the [Buildings'] rental office")).

[35] Deference under these circumstances would defeat the constitutional rights of property owners without any legitimate process. In *Healing v. California Coastal Commission*, for example, the plaintiff

brought a hybrid action challenging the administrative denial of his application for a development permit and asserting a takings claim. 22 Cal. App. 4th 1158, 1165-66 (Cal. Ct. App. 1994). The defendant-commission argued that the trial court was required to determine the takings claim on the basis of the administrative record, without a trial on the merits. *Id.* at 1169. The court disagreed and held that the plaintiff was entitled to present evidence anew at trial. *Id.* at 1170. The court noted that the administrative record was "created under circumstances where . . . witnesses are not sworn, testimony is not presented by means of direct or cross-examination but rather by narrative statements, and the Commission does not have the authority to issue subpoenas or compel anyone to attend its hearing." *Id.* Simply put, an administrative hearing under these circumstances was not "a satisfactory substitute for an evidentiary trial on the takings issue." *Id.* at 1177; *see also Hensler*, 8 Cal. 4th at 16 (where "the administrative hearing is not one in which the landowner has a full and fair opportunity to present evidence relevant to the taking issue, one in which witnesses may be sworn, and testimony presented by means of direct and cross-examination, the administrative record is not an adequate basis on which to determine if the challenged action constitutes a taking"); *Cioffoletti v. Planning &* [36] *Zoning Comm'n of Town of Ridgefield*, 209 Conn. 544, 551 (1989) ("[T]he trial court should decide the taking issue de novo in the light of all the evidence properly presented to it, including, *but not limited to*, the administrative record."); *cf. N.Y. State Ass'n*, 612 F.2d at 649 ("Clearly, deference

to a state agency's fact-finding is inappropriate once that agency is the defendant in a discrimination suit.").[4]

By rotely adopting the LPC's analysis, the lower court also precluded Stahl from proffering critical takings-related evidence that was not before the LPC. (A32). Whether a taking occurred depends on how the landmark designation "dimin[ished] [the] value" of the Buildings. *Cienega Gardens*, 331 F.3d at 1340 (internal quotation marks omitted). Measuring this diminution in value requires a determination of (1) the value of the Buildings prior to the landmark designation, (2) the value of the Buildings afterwards, and (3) the value of any alternative economic use of the property.[5] None of those facts were before the LPC, which is [37] another reason for reversal. *See, e.g.*, *Spears v. Berle*, 48 N.Y.2d 254, 261, 264 (1979) (remanding for additional fact-finding relevant to regulation's economic impact); *Brotherton v. Dep't of Envtl. Conservation of State of N.Y.*, 189 A.D.2d 814, 815-16 (2d Dep't 1993) (denying Article 78 petition challenging denial of development

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[4] Deference to the LPC would effectively preclude judicial determination of takings claims brought against any regulation that (like the Landmarks Law) provides for a hardship exception. A takings claim is unripe until the hardship process is exhausted. *See, e.g.*, *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 522 (1986). Thus, if deference were owed to the denial of the hardship application, then no takings claim would ever succeed.

[5] Contrary to the lower court's opinion (A59), Stahl did "identify th[e] 'additional facts' " it intended to present in support of the takings claim. These facts appear both in the Complaint itself (A89, ¶ 73; A101, ¶ 121) and in Stahl's opposition to the City's motion to dismiss (A334).

permit on wetlands parcel, but remanding for evidentiary hearing on takings claim);[6] *see also Cioffoletti*, 209 Conn. at 551 (plaintiff was entitled to introduce additional evidence beyond administrative record because "an administrative agency is incompetent to decide" takings claim); *Bencin*, 2009 WL 3387695, at *2 (noting that appellate courts have reversed trial courts that "denied the parties the opportunity to present evidence in a de novo hearing as to constitutional challenges to zoning codes as applied to the subject property").

Finally, even if some deference were owed to the LPC (and none is), the LPC's denial of Stahl's hardship application was arbitrary and capricious. *See infra* Part II. For all of these reasons, the lower court's deference to the LPC was erroneous.

* * *

[6] The lower court distinguished *Brotherton* purportedly "because the issue of whether the petitioner suffered an unconstitutional taking was not addressed" by the trial court in that case. (A61). That misses the point. *Brotherton* confirms that courts do not simply defer to an agency's decisionmaking when adjudicating a takings claim, and instead should conduct their own "evidentiary hearing," as the trial court was ordered to do on remand. 189 A.D.2d at 815-16.

App. 81

New York County Clerk's Index No. 100999/14

Court of Appeals

STATE OF NEW YORK

STAHL YORK AVENUE CO., LLC,

Plaintiff-Petitioner-Appellant,

—against—

THE CITY OF NEW YORK; THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION; MEENAKSHI SRINIVASAN, in her capacity as Chair of the New York City Landmarks Preservation Commission,

Defendants-Respondents-Respondents.

MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

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[9] * * *

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. How to determine the relevant parcel for purposes of Takings Clause analysis, including whether and how to apply the factors in *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).

2. Whether a court adjudicating a hybrid Article 78 and plenary action may rely entirely on an administrative agency's fact-findings and record, and ignore the plenary complaint's allegations, when resolving a constitutional claim that is distinct from the issues before the agency and challenges the agency's conduct.

The questions raised here were preserved below. (Brief for Plaintiff-Petitioner-Appellant Stahl York Avenue Co., LLC dated Nov. 23, 2016, at 4, 22-41; Ex. C; http://wowza.nycourts.gov/vod/vod.php?source=adl&video=AD1_Archive_Dec12_13-58-50.mp4).

[18] * * *

B. The First Department's Decision Conflicts With Second Department Precedent

Stahl challenged the LPC's denial of its hardship application by bringing a hybrid takings action and Article 78 proceeding. (A67-68). Because individual claims within a hybrid action involve different procedures for their resolution, they are governed by different standards of review. When resolving an Article 78 claim, courts defer to the factual findings of the administrative agency. *Pell v. Bd. Of Ed. Of Union Free Sch. Dist.*, 34 N.Y.2d 222, 230-31 (1974). However, as the Second Department has acknowledged, no such deference is permitted in a related plenary action challenging the constitutionality of the agency proceedings. *See Brotherton v. Dep't of Envtl. Conservation of State of N.Y.*, 189 A.D.2d 814, 815-16 (2d Dep't 1993) (denying Article 78 petition challenging denial of development permit on wetlands parcel, but remanding for evidentiary hearing on takings [19] claim). Yet the First Department erroneously deferred to the LPC's factfinding when resolving Stahl's takings claim, and improperly predicated its resolution of that claim on the administrative record, thereby creating both a split with the Second Department and a conflict with other state courts.

The First Department ignored the Complaint and instead drew upon the administrative record in resolving the takings claim. For example, its erroneous assumption that all the buildings were on the same tax lot (discussed above) was based upon an LPC finding calculating Stahl's return under a provision in the

Landmarks Law unrelated to Takings Clause analysis. *Stahl*, 162 A.D.3d at 115; Ex. A at 31-34. The First Department also deferred to the "LPC['s] "determin[ations]" about Stahl's purported "expectations" for the Buildings in resolving the motion to dismiss. *See Stahl*, 162 A.D.3d at 115-16.

But the LPC made no determinations with respect to the takings claim, which was not before it. Stahl also had no opportunity to present evidence relevant to that claim. For example, Stahl was not even allowed to show how the landmark designation "dimin[ished] [the] value" of the Buildings, which is necessary to assess "the economic impact" of the designation under the Takings Clause. *Cienega Gardens v. United States*, 331 F.3d 1319, 1340-41 (Fed. Cir. 2003). Measuring this diminution in value would require a determination of (1) the value of the Buildings prior to the landmark designation, (2) the value of the Buildings [20] afterwards, and (3) the value of any alternative economic use of the property. None of those facts were before the LPC.

Even if the LPC had addressed Stahl's takings claim, it is for the courts, and not the LPC, to assess whether the LPC's conduct violates the Takings Clause. As appellate courts in other states have confirmed, "the plaintiff is entitled to a de novo review of the factual issues underlying its [constitutional] claim, unfettered by the [agency's] previous resolution of any factual issues." *Cumberland Farms, Inc. v. Town of Groton*, 262 Conn. 45, 69 (2002); *accord, e.g.*, *Bencin v. Bd. of Bldg. & Zoning Appeals*, No. 92991, 2009 WL

3387695, at *2 (Ohio Ct. App. Oct. 22, 2009) (holding that an "administrative agency . . . cannot determine whether an ordinance is unconstitutional as applied to a particular parcel" and that such "constitutional claim[s] must be tried originally in the [trial court], with the court permitting the parties to offer additional evidence"); *Hensler v. City of Glendale*, 8 Cal. 4th 1, 15 (1994) (en banc) ("A property owner is, of course, entitled to a judicial determination of whether the agency action constitutes a taking."). The LPC administrative proceedings offered none of the protections afforded by a judicial proceeding; they lacked evidentiary rules, there was no testimony offered under oath, Stahl could not cross-examine adversarial witnesses, and Stahl's application was not adjudicated by a disinterested factfinder. Consequently, much of the "evidence" the LPC relied on fell far below the indicia of reliability required [21] in a court of law. And deference to a city or state agency would effectively permit the agency to immunize itself from constitutional review—which is precisely what happened here.

Nor are these issues limited to the Landmark Law. New York City and New York State together have numerous administrative agencies with adjudicatory bodies that hold hearings, receive evidence, depose witnesses, and resolve regulatory disputes. It is common for constitutional or statutory questions to arise from the agency's handling of these matters, and the resolution of those questions is beyond the purview of the agency. *See, e.g.*, *Brotherton*, 189 A.D.2d at 815-16 (denial of permit and related constitutional takings

claim); *Thornton v. New York City Bd./Dep't of Educ.*, 125 A.D.3d 444, 444-45 (1st Dep't 2015) (Article 78 challenge to New York City Department of Education decision and related 42 U.S.C. § 1983 claim).

Though this Court has implicitly recognized that the deferential Article 78 standard does not apply to a plenary claim in a hybrid action, it has never explicitly articulated the correct standards to be applied in such an action. *See Spears v. Berle*, 48 N.Y.2d 254, 261 (1979) (affirming dismissal of Article 78 petition but remanding for additional fact-finding relevant to taking claim). Presumably that is why the lower courts erroneously deferred to the LPC and relied upon the administrative record in resolving Stahl's plenary claim. This Court should resolve [22] the split of authority within the Appellate Divison, and ensure that the proper standards of review are applied to hybrid Article 78 and plenary actions in the First Department, as they are in other states.

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