SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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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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BRIEF OF AMICI,
FRIENDS OF THE UPPER EAST SIDE
HISTORIC DISTRICTS, ET ALIA

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INTRODUCTION

Petitioner-Appellant, Stahl York Avenue Co., LLC, owns one of a pair of extraordinary landmark housing developments. Both were built in the early 1900s as "light court tenements," by the City and Suburban Homes Company, "a privately financed company which built low-cost housing to address the early twentieth century living conditions of the working poor." Stahl York Ave. Co., LLC v. City of N.Y., 76 A.D.3d 290, 292 (1st Dep't 2010) ("Stahl I").

The unique characteristic of these low-cost apartments is their construction around large central open areas generously providing light and air to every tenant in every room, and to the common stairways. See Designation Report (A119-137, particularly A119-120[1]), and plans and photographs of the complex (A147-165, particularly including photo of a light court, A158, and photo of the Buildings, A165). Such construction contrasted with the prior standard "dumbbell" tenement in which light and air reached apartments by means of a small shaft between buildings or portions of buildings approximately midway between front and rear. (See A123). The Designation Report's photographs and

[1] ("A" references are to the Appendix filed by Appellant.)

plans also show an architecturally integrated design for the entire block. (A147-165).

Stahl bought the subject complex in 1977. Known as the First Avenue Estate "(FAE"), it lies between East 64th and East 65th Streets, York and First Avenues. The similar York Avenue Estate ("YAE"), also built by City and Suburban, is located 14 blocks to the north. The two Estates are unique in that they are the only existing light court tenements in the country covering an entire block. (Stahl I, 76 A.D.3d at 292). The Landmarks Preservation Commission designated both Estates as landmarks at the same time in April 1990, recognizing the significance of their plan, as well as their pioneering role in social housing reform. (Id.)

While the York Avenue Estate was constructed between 1901 and 1913, the First Avenue Estate was constructed between 1898 and 1915, making it the oldest extant example of model tenement housing constructed during this period. Although the two buildings facing York Avenue (the "Buildings," and the raison d'être of this case), designed by Philip Ohm, were the last to be completed as part of the FAE complex, they maintained strong visual homogeneity with the rest of the complex due to similarities in size, scale, use of materials, and

decorative details.[2] The "Other Buildings," designed by James Ware, utilize various applications of the light-court style of construction, incorporating various solutions such as side courts and rear alleyways to maximize light and ventilation for the units. The exploration of this housing type shows evolution in the building form and the fact that variation exists in the strategy employed by the two architects in different buildings on the block makes these buildings even more significant. (A133-134).

These culturally and historically driven designations complement a series of LPC designations of socially significant experiments in low cost housing, an important aspect of the City's growth and character. They include the Dunbar Apartments built between 1926 and 1928, and located in Harlem, described by the LPC as the "first large cooperative built for Blacks"; the First Houses built in 1935-1936, described as the "first public low-income housing project in the nation"; and Harlem River Houses built in 1936-1937, described as the "first federally-funded, federally-built, and federally-owned housing project in New York City.[3]

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[2] Some of these characteristics were compromised in an evident effort to discourage the landmark redesignation in 2006. (See page 5 below).

[3] The designation reports can be found at http://www1.nyc.gov/site/lpc/designations/designation-reports.page, by entering the name of the landmark in the finding box, then clicking the name in the next window.

At the time of the designations of the FAE and YAE such action was subject to approval of the Board of Estimate (BOE) which considered both together. Kalikow, 78/79 Company, which owned the YAE, planned to build a 977,000 square foot residential tower on the eastern portion of its site. It does not appear that Stahl had any similar plan for the FAE at that time. Ostensibly to accommodate Kalikow's plans, the BOE carved out from the YAE the intended development parcel and approved the designation except for that portion. At the same time, it carved out the site of the Buildings on the FAE parcel. (See A303-304, and Stahl I, 76 A.D.3d at 292). It appears that the BOE decision was not accompanied by any findings or other explanation of the reasoning behind its decision. (See A320). Appellant claims that this is a "deal" on which it is entitled to rely.

In consolidated actions, neighborhood associations sued to declare the carve-outs illegal. They lost at the trial level. (A309-322). The York Avenue case was then appealed to the First Department which held the BOE carve-out illegal as based on political and fiscal considerations rather than the criteria for designation specified in the Landmarks Preservation Law. Petitioners in the First Avenue case were financially unable to participate in the appeal. (See A. 304-305, Pars. 10-12; Coalition to Save City and Suburban Housing v. City of New York and Kalikow, 183 A.D.2d 531 (1st Dep't 1992), *lv. den.* 81 N.Y.2d 736 (1992)).

In 2006, having learned of a movement afoot to redesignate the Buildings, Appellant, evidently in order discourage the redesignation, obtained a Buildings Department permit to modify the Buildings and began the work just before the designation. The Commission voted the redesignation on November 21 (A320). Appellant finished removing much of the detail and installing larger windows, mostly after the redesignation. (A305-306, Pars. 14-16 and 18).

Just as the original designation was of a single landmark on a single landmark site (A143), the Commission maintained the concept that the entire FAE was to be protected as a unified landmark in the amendment by which it redesignated. The amendment added the Buildings back to the landmark site on the theory that they continued to form an integral part of the cultural and historical importance of the FAE project. (A305-306; A327). Stahl sued to void the redesignation but it was upheld. (A306, Pars. 20-21; Stahl York Avenue Co. LLC v. City of New York, Sup. Ct. N.Y. Co. (9/11/08), 2008 WL 4384479, *affirmed*, 76 A.D.3d 290, *lv. denied*, 15 N.Y.3d 714 (2010).

The Landmarks Preservation Law

The Landmarks Preservation Law (Admin. Code §§ 25-301 ff.) was adopted in 1965 in response to extensive and longstanding grassroots and political advocacy, as well as the catalyzing impact of the demolition of Penn Station.

In adopting the Landmarks Law, the City Council expressly recognized that "many improvements . . . having a special character or a special historical or aesthetic interest or value . . . have been uprooted, notwithstanding the feasibility of preserving and continuing the use of such improvements . . . and without adequate consideration of the irreplaceable loss to the people of the city of the aesthetic, cultural and historic values represented by such improvements." Admin. Code § 25-301(a). The City Council "declared as a matter of public policy that the protection, enhancement, perpetuation and use of [such] improvements . . . is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people." It established the Landmarks Preservation Commission to "effect and accomplish the protection, enhancement and perpetuation of such improvements . . . and of districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history. . . ." Admin. Code § 25-301(b).

The Landmarks Law is carefully and conservatively drafted to protect the constitutional rights of affected owners. Indeed it is safe to say that, in allowing de-designation of a landmark where the designation prevents the property from earning a "reasonable return" of 6% on assessed valuation, it gives owners far greater assurance of profitability than do the takings clauses of the Federal and New York State Constitutions. (See discussion below in Point I (B), pp. 22-24).

The Landmarks Law also allows the owner to sell "air rights" – the part of the building envelope permitted by zoning but not occupied by the landmarked buildings – to nearby properties. Appellant indicates that it intends to transfer rights from the Other Building to the site of the Buildings to be able to build a larger replacement than it could otherwise. (App. Br. 9; A80 Par. 35; A1359).

Interest of Amici

Amici are preservation and civic groups concerned with historic preservation issues, and elected officials representing the political districts in which the property at issue is located. The organizations represent various constituencies, ranging from the leading National and State preservation organizations to community groups within the City. Most of amici were signatories to amicus briefs filed in the Court below in this case.

Amici have in common a belief that the greatness of a city most often depends upon its respect for its past and its recognition that preservation of selected buildings and communities embodying the City's history provide comfort to its residents and reason for visitors to come and enjoy those elements of the City that distinguish it from other urban communities.

Amici recognize the importance of the City's Landmarks Preservation Commission and the extraordinary work it has done to identify, designate and protect worthy examples of the City's past.

Amici support the position of the Commission in its efforts to save the integrity of the City and Suburban Homes First Avenue Estate, an important example of an enlightened workers' housing movement active in the late 19th and early 20th centuries. The project consists of 15 six-story apartment buildings covering the entire block from First to York Avenues, and from East 64th to East 65th Streets. It is the product of wealthy and public spirited residents of the City who minimized their own financial return in order to build quality housing with reasonable rents. The sponsors meant to provide an example to be imitated by others.

Amici seek to preserve – intact – this historically and culturally significant landmark, and to sustain the Landmarks Preservation Commission's authority and flexibility to administer the Landmarks Law with both fairness and due regard for its mission. Amici oppose Appellant's plea for a trial in the absence of any demonstration that triable issues exist, recognizing that litigation delay has public costs not only in terms of judicial efficiency but also because it allows more warehousing of much-needed dwelling units, and continuing deterioration from lack of maintenance and repairs.

1. Elected Officials: The following Amici represent political districts in which the First Avenue Estate is a located.

Carolyn B. Maloney, Member of Congress, representing the 12th Congressional District of New York

Liz Krueger, New York State Senator, 28th District

Rebecca Seawright, New York State Assemblymember, 76th District

Ben Kallos, New York City Council Member

Gale A. Brewer, is the President of the Borough of Manhattan, an elective office. As such, she has a significant interest in historic preservation of buildings within the Borough of Manhattan, including the City and Suburban Homes First Avenue Estate. Under the City's Charter, the Borough President is responsible for making "recommendations to the mayor and to other city officials in the interests of the people of the borough . . ." and establishing and maintaining "a planning office for the Borough to assist the borough president in planning for the growth, improvement and development of the borough; [and] reviewing and making recommendations regarding applications and proposals for the use, development or improvement of land located within the borough. . . ."

2. Preservation and Civic Organizations:

Friends of the Upper East Side Historic Districts ("Friends"), founded in 1982, is an independent, not-for-profit membership organization dedicated to preserving the architectural legacy, livability, and sense of place of the Upper East Side. Friends regularly monitors, attends and testifies before the Landmarks Preservation Commission, Community Board, Design Commission and City Council in its effort to strike a balance between preservation and development on Manhattan's Upper East Side.

Friends led the effort to restore the integrity of the original full-block landmark site of the FAE and testified in favor of redesignation of the Subject Buildings before the LPC on November 14, 2006. Friends was amicus curiae in the December 14, 2009 brief submitted to the New York State Supreme Court Appellate Division in Stahl I. Friends testified three times before the LPC, urging the denial of the hardship application on January 24, 2012, June 11, 2013, and November 12, 2013. Friends contracted and submitted two supportive economic feasibility studies from HR&A Advisors, an industry-leading real estate, economic development and energy efficiency consulting firm.

The National Trust for Historic Preservation is a privately funded nonprofit organization, chartered by Congress in 1949, to further the historic

preservation policies of the United States, and to "facilitate public participation" in the preservation of our nation's heritage. (16 U.S.C. § 468). With the strong support of almost 200,000 members and supporters nationwide, including over 14,000 members in New York, the National Trust works to protect significant historic sites and to advocate for historic preservation as a fundamental value in programs and policies at all levels of government. This includes challenges to local administrative decisions that have the effect of undermining or circumventing the integrity of local ordinances nationwide. In carrying out its mission, the National Trust has participated as a party or amicus curiae in more than 200 cases in federal and state courts since 1970.

The Preservation League of NYS is New York's statewide historic preservation advocacy organization. Founded as a not-for-profit membership organization in 1974, the Preservation League invests in people and projects that champion the essential role of historic preservation in community revitalization, sustainable economic growth, and the protection of New York's historic buildings and landscapes. Based in Albany, the League leads advocacy, economic development, and education programs all across the state in support of these goals. The Preservation League has frequently been involved as an amicus in legal cases that challenge local administrative actions that undermine or circumvent the integrity of local preservation laws (e.g., revoking landmark designation,

misapplication of exemption standards such as hardship or special merit, and significant procedural violations).

All of the organizations listed below testified before the Commission concerning its application for hardship relief under review here.

The Municipal Art Society of New York ("MAS") is a not-for-profit corporation that fights for intelligent urban planning, design, and preservation through education, dialogue, and advocacy. MAS was an active proponent of adoption of the Landmarks Law, and has remained an advocate for historic preservation in New York City since that law was enacted.

MAS has been engaged in the preservation of the City and Suburban Homes First Avenue Estate since its initial designation in 1990. Most recently, MAS testified before the Landmarks Preservation Commission (LPC) in strong support of the amendment of the boundaries at the Estate to include the Buildings. In December 2009, MAS submitted a brief to this Court out of concern that Appellant's arguments to annul the redesignation of the Buildings threatened to undermine historic preservation throughout New York City.

The New York Landmarks Conservancy is a not-for-profit organization founded in 1973 by a small group of architects, lawyers, planners, writers, and preservationists eager to save and reuse New York City's landmarks. The Conservancy's programs have provided more than $40 million in grants and

low-interest loans, accompanied by countless hours of hands-on technical consulting, to restore homes, non-profit, cultural and religious institutions, revitalize neighborhoods and preserve the character of New York City for future generations. Among its endeavors, the Conservancy also testifies at public hearings held by the Landmarks Preservation Commission (the "LPC") on issues presented to the LPC for determination.

The Historic Districts Council is the advocate for all of New York City's historic neighborhoods. HDC works to ensure the preservation of significant historic neighborhoods, buildings and public spaces in New York City, uphold the integrity of New York City's Landmarks Law and further the preservation ethic. This mission is pursued through ongoing programs offering hands-on assistance to more than 500 community and neighborhood-based groups and through direct advocacy, public-policy initiatives, publications, educational outreach and sponsorship of community events.

Greenwich Village Society for Historic Preservation was founded in 1980 to preserve the architectural heritage and cultural history of Greenwich Village, the East Village, and NoHo. GVSHP is a leader in protecting the sense of place and human scale that define the Village's unique community.

Landmark West! has worked to achieve landmark status for individual buildings and historic districts on the Upper West Side and to protect them from insensitive change and demolition.

Friends of First Avenue Estate is a neighborhood association that has been involved with the current matter since the First Avenue Estate was first designated in 1990. Members of the Friends of First Avenue challenged the Board of Estimate's modifications to the landmark site in 1990 but were unable to appeal the Supreme Court's decision upholding the BOE's modifications due to insufficient resources.

ARGUMENT

Appellant presents two primary issues: Is its property "taken" by the impacts of landmark designation? And, did the Landmarks Commission wrongly decide that Appellant had failed to demonstrate that the property is incapable of earning a reasonable return so that Appellant is not entitled to relief under the Landmarks Law's "safety valve" hardship provision?

On the taking issue, Appellant clearly relies on the theory that it is protected by reasonable investment-backed expectations, but also mentions that it has suffered loss of "virtually all" economic value. Amici urge that there is no taking on either of these two theories. The regulatory limitations of landmark

designation do not, in this instance, impose a deprivation of all economic value; Appellant's own evidence confirms that the property remains economically productive. Nor has Appellant any reasonable investment-backed expectation of being able to redevelop the site of the Buildings by virtue of the vaguely limned "deal" Appellant claims to have made with the Board of Estimate in 1990. (App. Brf. 1, 9-10). The absence of a taking is firmly sustained by the law, and necessarily follows from the earlier decisions of this Court in the related cases of 400 East 64/65Street Block Ass'n. v. City of New York, 183 A.D.2d 531 (1st Dep't 1992), *lv. den.*, 81 N.Y.2d 736 (1992) (ruling carve-out by BOE in YAE case to be illegal); and Stahl I (ruling the re-designation of the FAE to be valid).

The Commission properly determined that Appellant failed to establish that the property (viewed as either the site of the Buildings or the entire block) is incapable of earning a reasonable return. Appellant's demands for accounting methods slanted in its own favor should be denied. The Law allows the methods the Commission adopted.

POINT I

APPELLANT HAS FAILED TO DEMONSTRATE THAT LANDMARK DESIGNATION RESULTS IN A TAKING IN THIS CASE

Appellant claims that the designation has imposed economic loss by depriving it of its investment-backed expectation of being able to develop the property by replacing the Buildings with a high-rise tower, and therefore effects a taking of its property.

Appellant also asserts that the designation has deprived the property of "virtually" all of its economic value. That claim appears to be a component of the investment-backed expectation claim. But it sounds so much like a now-discredited independent basis for claiming a taking that we will briefly address it.

In addition, Appellant advances the procedural theory that, because takings issues are fact-intensive, a trial is required.

A. The Proper Subject of Analysis is the Entire FAE, Not Just a Piece of It.

Regardless of what constitutional or statutory test is applied to an alleged taking or application for hardship relief, the first step must be to select the target of analysis, the relevant parcel or "denominator" of the fraction of which the numerator is the portion of that property lost to regulation. District Intown

Properties Ltd. Partnership v. District of Columbia, 198 F.3d 874, 879 (D.C. Cir. 1999), *cert. denied*, 531 U.S. 312 (2000). In this instance, the obvious choice is between the single lot containing the Buildings or the entire block containing the series of buildings designated as a single landmark.

Appellant preferred to use just the Buildings' lot as the base. In fact, it declined to provide necessary information to the Commission on its Other Buildings operations so the Commission could project return on the entire FAE. (A1358).

But takings law does not permit tailoring to achieve the desired result. Both the Commission and the Court below properly rejected Appellant's tailoring attempt.

"Takings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978). Rather, the law "requires courts to focus on the economic expectations of the claimant with regard to the property. * * * Where the developer treats legally separate parcels as a single economic unit, together they may constitute the relevant parcel."). Forest Properties, Inc. v. United States, 177 F.3d 1360, 1365 (Fed. Cir. 1999), *cert. denied sub nom.* RCK Properties, Inc. v. United States, 528 U.S. 951 (1999). See also Keystone Bituminous Coal Ass'n v.

DeBenedictis, 480 U.S. 470, 500 (1987) ("our takings jurisprudence forecloses reliance on . . . legalistic distinctions within a bundle of property rights" such as separating "support estates" from the entirety of underground mining rights).

Where there is a choice of parcels or interests to use as the base of analysis, the proper approach looks to practical realities rather than artificial distinctions. It looks to ownership, whether the various properties were acquired together, whether they are contiguous, whether they are operated as a unit, and similar factors. The choice should attribute little importance to the formality of lot lines cutting through what appears to be, and functions as, a single property. See District Intown, 198 F.3d at 879-882; cf. e.g., Keystone; Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 331 (2002) (imposition of a building moratorium must be assessed on basis of impact on the parcel, not just the temporal "stick" represented by the moratorium period).

District Intown[4] is particularly instructive because of its similarity to the present case. The case concerns an apartment building located on a large landscaped plot opposite the National Zoo. Since the 1930s, the D.C. government had regulated properties in the area to preserve open space near the Zoo. District Intown bought the subject property in 1961. In 1998, it caused the land (which had been a single lot) to be subdivided into a total of nine lots. The lots were

[4] See also the decision it affirms, 23 F. Supp. 2d 30, 35-36 (D.C. Dist. 1998).

maintained in single ownership and operated as a unit. The apartment house was on one lot; the others continued to serve their historic function as landscaped area with broad lawns surrounding the apartment house. Soon after the subdivision, District Intown applied for a permit to build townhouses on the eight surrounding lots and was turned down, first because of pending landmark legislation, and later because of the legislation's adoption. The owner sued, complaining that the eight lots were rendered entirely worthless by the denial of a building permit. With a strong focus on practical and economic realities showing integrated operation, the Court held that the nine lots must be treated as one. Thus, although a portion had become unbuildable, the entirety had not lost all value because the apartment house remained valuable.

A similar analysis was undertaken in the New York Court of Appeals' decision in the Penn Central litigation over Grand Central Terminal. But the Court went even further than District Intown by basing its economic analysis of the Railroad's operation on nearby hotels and office buildings owned by the Railroad and benefitting from their proximity to the Terminal. Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 333, 336 (1977). That reaches far beyond what the Commission did here in dealing with contiguous buildings having the same purpose and operated as a unit as the appropriate property unit for takings analysis.

The U.S. Supreme Court noted the position taken by the Court of Appeals but did not base its affirmance on that position.[5]

The practical realities affecting the subject Buildings are fairly simple. They occupy an entire city block, are architecturally integrated with common design and planning, and generally look like a single structure (but for the defacement done by Appellant in an undisguised effort to defeat landmark designation). (See A149-165). They have been in single ownership since 1977, and have been operated as a single unit, sharing management and rental offices, heating equipment and laundry services (both of which are located in Other Buildings but service the Buildings), and maintenance services. (A1359). The Commission found that even the efforts to set the stage for razing the Buildings are thoroughly coordinated – empty apartments in the Other Buildings are being warehoused to accommodate tenants dislodged from the Buildings if Appellant is successful in this litigation. (A1359).

Frosting the cake of unified operations, Appellant indicates that, if it wins, the FAE will enter a stage of mutual cannibalization. FAE's owner will raze the Buildings, and it will transfer air rights from the Other Buildings to the

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[5] In a later case, the Supreme Court, in dictum, has criticized the New York opinion to the extent that it treated buildings owned by Penn Central "in the vicinity" as part of the relevant property. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992). Our reliance, however, does not extend that far as the lots here are contiguous.

Buildings site, enabling an increase in the height above what would otherwise be allowed.[6] Reciprocally, the new tower will then consume the heart of the Other Buildings by casting a shadow over their light courts during the morning hours.

The one notable exception to the wholly integrated treatment of FAE is that, as in the District Intown case, there are invisible property lines legally separating the entire FAE into four lots of varying sizes. Even so, Appellant has treated them as one for tax purposes, filing a single property tax report on all four for assessment purposes. (A1360). But the lot lines are as much a legal artifice as the "estate" distinction in Keystone (see page 18 above) and should similarly be disregarded.

We submit that a court must also consider the legitimate legislative objectives of the regulation. This is simply a matter of inter-branch deference. In this case, as in District Intown, the legislative purpose is to preserve entire landmarks as they are designated by an agency such as New York's Landmarks Preservation Commission. The Commission here designated the entire block as a single landmark for the very good reason that what particularly distinguishes it is its overall plan and its role in the development of affordable housing, not the

[6] As Appellant says, the BOE "deal" allowed it not only to build on the Buildings' site but to "retain" its legal "option to transfer unused development rights from the Other Buildings to the Buildings," an option available under e.g. Zoning Resolution 12-10 (zoning lot definition), and ZR 74-79 (transfers from landmark sites). (App. Br. 9; A80 Par. 35; A1359).

design quality of the 15 individual buildings. The effect of defining the denominator as two buildings out of 15 is to frustrate the regulatory objective undoing the unitary whole.

B. There Has Been No *Per Se* Taking.

The law of takings has evolved considerably over the past 50 years. The long prevalent rule of Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), provided little guidance beyond, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

In practice, "too far" tended to be measured by the degree of decrease in economic value of the affected parcel. Thus, zoning could constitute a taking of a parcel if it served to "destroy the greater part of its value." Vernon Park Realty v. City of Mount Vernon, 307 N.Y. 493, 498 (1954).

Penn Central, 438 U.S. 104 (1978), marked a transition to a subtler form of analysis. Recognizing that several Supreme Court cases had confirmed the validity of remarkably extensive restrictions on use of private property, the Court refocused attention on assessing policy factors and characteristics of the challenged action, such as the economic impact on the owner, particularly whether the regulation interferes unreasonably with distinct investment-backed expectations of the owner; whether the action is in the nature of a general balancing of conflicting

private interests as in the case of zoning; or whether the regulation is in the nature of a physical invasion – all with a view to determining whether a given regulation forces "some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole." (438 U.S. at 123).

Fourteen years later, the Court explicitly recognized a limited exception to the Penn Central approach by adopting a *per se* rule that a regulation depriving an owner of "*all* economically beneficial us[e]" of his property is a *per se* taking. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (emphasis in original). Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005), confirmed that elimination of "all" economic value means "all," not "virtually all."

New York courts have adopted the same analysis, determining whether a regulation goes "too far" by considering the factors identified in Penn Central. Consumers Union of U.S., Inc. v. State, 5 N.Y.3d 327, 357 (2005); Gazza v. New York State Dep't of Environmental Conservation, 89 N.Y.2d 603, 616 (1997).

We understand Appellant to assert only what it calls a "partial" taking, not a *per se* taking. (App. Br. 23). However, as Appellant alleges that "the designation destroyed virtually all of the Buildings' economic value." (App. Br. 32; A89 Par. 73; A101 Par. 121), it behooves the Court to close the door on any implication that there has been a *per se* taking.

Appellant has acknowledged in its own analysis of projected net return that, at worst, the Buildings can earn a return of at least 0.614% percent with no capital improvements, and 1.190% with capital improvements (A414-415), thereby implicitly acknowledging that there has been no *per se* taking.

C. Appellant Has Not Shown That the Designation Interferes with Its Reasonable Investment-backed Expectations.

The absence of a *per se* taking requires consideration of whether a taking has occurred under the Penn Central standards. Penn Central holds that whether a taking has occurred depends on many possible factors. One of those is whether the regulation has impacted economic value by materially interfering with the owner's "distinct investment-backed expectations," 438 U.S. at 124.

Appellant peculiarly applies the test as if reasonableness of the expectation were not an essential component, not even mentioning reasonableness. In fact, though unstated in Penn Central, reasonableness is necessarily implied, just as "reasonable" is necessary to modify "reliance" in the law of estoppel[7] and fraud.[8] In any event, the U.S. Supreme Court quickly closed this potential

[7] Gorman v. Town of Huntington, 12 N.Y.3d 275, 280 (2009).

[8] Perrotti v. Becker, Glynn, Melamed & Muffly LLP, 82 A.D.3d 495, 498 (1st Dep't 2011).

loophole-of-misunderstanding by adding "reasonable" before "investment backed expectations," only one year after the Penn Central decision, in Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). The modified phrase took hold. See e.g. Lucas, 505 U.S. at 1034 (Kennedy, J. concurring); Palazzolo v. Rhode Island, 533 U.S. 606, 617, 619, 626 (2001), and at page 655 (Breyer, J. dissenting).

There are two basic components to the "reasonable investment-backed expectations" test. First, the claimant must have reasonably entertained specific expectations which were later interfered with by regulatory action. Second, the claimant must have reasonably invested in those expectations. These components will be separately discussed in the next two sub-sections.

1. Appellant Did Not Have a Reasonable Expectation that It Could Develop the Property.

The claimant's expectation – in this case that it will be able to replace the Buildings with a tower whenever it chooses to do so – qualifies under the test only if it is distinct, specifically related to the regulatory action that ultimately interferes with it, and reasonable. Generalities ("I expect to be able to do anything I want with my home"), and dreams ("If what I would like to do is not regulated now, it never will be"), do not suffice.

The terms are not necessarily clearly definable and, as Penn Central suggests, may vary in meaning with the facts. But there is guidance in cases.

It is fair to say that an expectation is not a certainty, but neither is it a mere desire. There must be a substantial objective foundation for the expectation. That might well be molded and limited by the existing regulatory regime in the relevant community. For example, if the community has laws that restrict development around an important public place (e.g. the National Zoo), it should anticipate that they will remain in place, and may be amended and tightened. One cannot expect to be able to freely alter one's building or property in such a place. See District Intown. If one is engaged in a business that may endanger consumers, one cannot expect that reports to regulatory agencies indicating potential dangers will remain confidential absent pre-report specific legislative assurance to the contrary. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005–06, 1009-10 (1984).

An irrational dream will not suffice. There must be more than a "unilateral expectation or an abstract need." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005–06 (1984), quoting Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 161 (1980). The contention that an owner may satisfy the reasonable expectation requirement simply by showing that it had believed that the property interest at issue "was available for development is quite simply untenable." Penn Central, 438 U.S. at 130.

Nor can a claimant rely on his personal interpretation of what the applicable law would allow in order to define his expectations. We live under a legal system that depends upon uniform application of justice rather than each person's subjective interpretation of the law. In contrast, Kaiser Aetna well illustrates that unquestionable fact or law provides a solid base for expectation. In Kaiser Aetna, the plaintiff acted on immutable Hawaiian property law recognizing a certain tidal pond as private property – immutable in the sense that canceling it would almost certainly constitute a taking as a direct conversion of private property for public use. When the plaintiff built a marina and housing, then deepened a channel to the ocean, the Army Corps of Engineers claimed that the deepening, which it had consented to, converted the private pond into public waters. The Court held that Kaiser Aetna had a reasonable expectation that the pond would retain its private character and voided the Army Corps claim.

Appellant premises its expectation on a so-called "deal" made in 1990. The Board of Estimate, which had authority then to approve, modify or disapprove LPC landmark designations, carved out portions of the FAE and the YAE ostensibly to enable the two owners to raze the carved-out buildings and develop more lucrative uses in their place. The simple answer at this point is that this Court has already decided the issue against this Appellant in a related case. The Court reasoned that the Board of Estimate never had the authority to over-ride

the original designation on the political grounds it invoked, and failed to invoke any proper factors prescribed by the Landmarks Preservation Law. Stahl I, 76 A.D. 3d 290, affirming Supreme Court's 2008 decision, 2008 WL 4384479 (Sup. Ct. N.Y. Co. 2008).

But even before those decisions, Appellant should have recognized that it never had any reasonable basis for an expectation that it would be permitted to raze the Buildings. It had bought in 1977, 12 years after adoption of the Landmarks Preservation Law. The mere fact that a regime of landmarks regulation was in place sufficed to put City property owners on notice that their property could be designated. (See District Intown, 198 F.3d at 883–84). In this case, there was every reason for Appellant to recognize that landmark designation of the property was likely, not just possible. The FAE clearly satisfied the broad characteristics set by the Law for designation, particularly including being over 30 years old and having "a special character or special historical . . . interest or value as part of the development, heritage or cultural characteristics of the city . . . ." NYC Admin. Code § 25-302(n). Even without such a law in place, an owner cannot reasonably expect that, over decades, zoning and other land use laws will not be enacted or amended to preclude what a buyer thought he might sometime do. See Spring Realty Co. v. New York City Loft Bd., 69 N.Y.2d 657 (1986) (concerning new rent regulation statute); Dawson v. Higgins, 197 A.D.2d 127, 137

(1st Dep't 1994) (amendment of existing statute to increase degree of rent regulation). But that conclusion is obviously all the clearer with an applicable law in place. (See District Intown). In fact, from 1977 through landmark designation in 1990, Appellant took no steps to raze or build. Having not acted, it had no right to rely on speculation that it would be allowed to act if and when it finally decided to and actually invested in that intention.

After the BOE carved out the Buildings from the designation, Appellant was promptly named a respondent in two consolidated cases, to restore the designation of the de-designated buildings at both the First Avenue Estate and the York Avenue Estate. Throughout the pendency of these cases, Appellant could not know what the outcome would be and could have no expectation of success. Appellant actually did prevail, but an appeal was taken in the York Avenue Estate case and the decision of the lower court was reversed. (Coalition/Kalikow). The Petitioner in the FAE case did not join the appeal because of lack of funding, but a determination that BOE lacked authority to carve out the YAE buildings would likely be deemed to apply to FAE, just as this Court actually ruled in Stahl I.

Beyond the uncertainties of litigation, there were obvious, serious, and seemingly insuperable, weaknesses in Appellant's case. Its claim of a "deal" is stated in vague generalities, unsupported by any direct evidence, not in terms usually associated with enforceability. Appellant does not claim that the "deal"

was made in writing, normally a sine qua non of binding obligations concerning real property. It implies that the "deal" was inferred from conduct, but does not explain how. So, it refers to "the 1990 compromise," and "the City's promise to allow redevelopment of the Buildings," and claims that "the purpose of the 1990 compromise was to preserve Stahl's rights to redevelop the Buildings, in exchange for Stahl's agreement not to challenge the 1990 landmark designation of the Other Buildings" (App. Br. 9, 26 and 28). But it cites no evidence that the alleged deal included any such "promise" by the City or any such "agreement by Stahl." [9]

Especially telling, Appellant does not explain how it could reasonably rely on a "deal" that the Board of Estimate, acting in an administrative capacity, lacked the power to make.[10] And were the BOE action valid, it would make no difference. The Commission and City Council had ample authority to re-designate on the basis of re-evaluation of the merits. They are not estopped, nor absolutely

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[9] An affidavit, made six months after the BOE decision, by a member of the staff of a member of the BOE purports to set forth her understanding of the unwritten deliberations. It does not suggest any "promise" by the City or "agreement" by Stahl. (A200-201, Pars. 6-9). If it did, the affidavit would still be incompetent as post hoc legislative history. McKechnie v. Ortiz, 132 A.D.2d 472, 475 (1st Dep't), *affirmed*, 72 N.Y.2d 969 (1988) ("The post-enactment statements of a member of the legislature, even one who sponsored the law in question, are irrelevant as to the law's meaning and intent").

[10] See Parkview Assocs. v. City of New York, 71 N.Y.2d 274, 281-282 (1988). As held in Coalition/Kalikow, 183 A.D.2d at 533, and confirmed in Stahl I, 76 A.D. 3d at 298, proceedings to designate a landmark are administrative, both in the LPC and the BOE.

bound by a prior ruling. See e.g. In re Perry, 90 A.D.3d 1434, 1435 (3rd Dep't 2011).

Even municipal legislatures cannot promise that zoned property will never be down-zoned, that un-landmarked properties will never be landmarked, or that building codes will never be made stricter. See Caruso v. City of New York, 136 Misc. 2d 892, 895 (Sup. Ct. N.Y. Co. 1987), *affirmed,* 143 A.D.2d 601 (1st Dep't 1988), *affirmed,* 74 N.Y.2d 854 (1989), *cert. denied*, 493 U.S. 1077 (1990) (municipal legislatures have power to adopt and amend existing municipal laws, including amending laws adopted by popular vote).

This brings us to 2010 when this Court definitively confirmed the validity of the redesignation and the Court of Appeals denied leave to appeal, removing any reasonable basis for Appellant to entertain an expectation of ever being able to develop the Buildings site. Appellant confirmed its understanding of precisely that by asking the Commission for a hardship exception. During the course of LPC proceedings on the hardship application (which lasted four years), Appellant could not have had any reasonable expectation of being able to raze and build; a landmark designation was then in effect, obliging the Buildings Department to get a sign-off from LPC before issuing any demolition or building permit. (Admin. Code § 25-305(b)). That remains the situation today. So there is

still no basis for a reasonable expectation that Appellant could raze the Buildings and build on the site.

Finally, if Appellant won its Article 78 case, it would still have no reasonable expectation of demolishing as the Commission has the option of arranging alternative relief such as tax relief or other amelioration. (See Admin. Code § 25-309).

2. Appellant Did Not Reasonably Invest in Support of Its Purported Expectation.

Appellant's lack of any reasonable expectation based on the supposed BOE "deal" is dispositive. The absence of reasonable investment further undermines its case.

The investment requirement would appear to serve at least two functions. First, it may provide evidence of the expectation because of its direct relationship to a particular end. For example, if someone invests in laying a foundation, it would usually follow that he intends to build something more. Second, depending on the relative magnitude of the investment in relation to the cost of achieving the expectation, it may provide strong equities in favor of the claimant, as in Kaiser Aetna.

To qualify, an investment must be distinctly related to the specific expectation at issue (here the right to raze and build on landmarked property). See Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y.2d 124, 150-151 (1981), *reversed on other grounds*, 458 U.S. 419 (1982) (in buying her building, plaintiff had no distinct investment-backed expectation of being able to take in a few extra dollars from tenants if cable television reception were available).

The nexus must be clear; it cannot be obscured by reasonable probability that the investment was made for different reasons. See District Intown, where the possibility that purchase of the property with the intention of subdividing it was attenuated by allowing 27 years to pass before applying to subdivide. (198 F.3d at 876, 883).

The investment should also be substantial. The Court of Appeals decision in Loretto contrasts the millions of dollars of expenditure to create a private lagoon and marina community (Kaiser Aetna) with the absence of investment, and minimal loss of income, in Loretto. Investment may not have to be large in absolute terms, but it should be sufficient in a proportional sense to evidence the seriousness of intent. Thus "dollars and cents" proof is necessary. See Spears v. Berle, 48 N.Y.2d 254 (1979).

Appellant's conduct continually failed these tests.

From the date of purchase in 1977 until the BOE action in 1990 Appellant does not claim to have made any investment with a specific expectation of being able to demolish the Buildings. Its first and only claim of right rests on the rosy anticipation it derived from the BOE "deal." But still it did nothing for at least another ten years to back up that anticipation with investment. (App. Br. 10-11, claiming that first activity occurred around 2000).

Nothing happened in 2000 to give Appellant a greater claim of right. But Appellant claims to have "invested" in the following ways (though the evidence does not always support its contentions): (a) starting in or around 2000, by allowing apartments in the Buildings to remain vacant as tenants left, (b) subsequently, by reducing its former level of maintenance and repairs, and (c) starting in 2004, by working to an unspecified extent on redevelopment plans and hiring architects, and lawyers, for that purpose. (App. Br. 10-11; A81 Pars 38-39).

Looking at these claims from the vantage of 2000 and in light of the gaps between Appellant's argument and its evidence, the steps taken by Appellant are ambiguous at best, and exhibit the same nonchalant pace as prior action by Appellant:

(a) Warehousing vacated apartments without re-leasing them is not clearly relatable to an expectation of demolishing and redeveloping. It

could, as easily, relate to an intent to renovate apartments in batches large enough to gain economies of scale in buying new fixtures, appliances and construction supplies, and efficiently using construction workers. Appellant lends credence to this theory by conceding that the condition of these apartments is bad to the point of their being uninhabitable and even illegal. As the Petition states, the vacant apartments "cannot legally be rented in their current condition" which includes need for "renovations to electrical systems and plumbing fixtures, appliance repair and replacement, and lead paint abatement just to make them habitable." (A74 Par. 10). Thus, the apartments are carried vacant because they are not maintained to legal standards. Nevertheless, 29 paragraphs later in the same pleading, Appellant contradicts itself by asserting that it "ensured that the Buildings were maintained in accordance with the law." (A81 Par. 39). In the end, its own opacity undercuts the credibility of any claim that it "invested" in reliance on the "deal" by warehousing apartments.

(b) Likewise, the inconsistently described degree of reduction of maintenance and repairs related immediately above cannot be reliably construed as evidencing intent to demolish in reliance on the "deal." Appellant's (albeit contradictory) allegation that "the Buildings were maintained in accordance with the law," in effect denies material reduction

of maintenance and repairs. If reduction in maintenance and repairs occurred, it is readily construable simply as economizing until the expenditure becomes unavoidable.

(c) Appellant's allegation concerning preparing plans for future development, is described in only the most general terms in Appellant's Brief (App. Br. 10-11). Appellant conceded in its hardship application to the Commission dated October 1, 2010, that at that point (2010) it had not produced any specific plans for redevelopment, but had only done work "analyzing the economic feasibility of various redevelopment scenarios." (A343). Certainly the investment for such preliminary work is not equivalent to actual construction; rather, it bespeaks an inchoate interest in developing, but one that cannot grow into an intention without dependable findings that construction will yield a reasonable return. But that point had evidently not been reached as of October 1, 2010, as appears from the above-described application. And by then, this Court had confirmed the redesignation (Stahl I); Appellant had no expectations to invest in.

Moreover, to "invest" conventionally means "to employ (money) in the purchase of anything from which interest or profit is expected." (Oxford English Dictionary). The "investments" of (a) and (b) could better be described as *dis*investments.

Appellant obtained an alteration permit from the Buildings Department approximately two years before November 14, 2010, the date of its memorandum to the Commission in which it argued that, "Whatever features may exist on the [Buildings] today (and [Stahl] does not acknowledge that there are any) will be removed pursuant to work which the Company has initiated under the valid Department of Buildings work permit it has held for the past two years." (A169; and see A183). That work consisted of removing ornamental detail, applying stucco to the exterior, and installing new, larger, windows. (A16). On October 10, 2006, when the Buildings were calendared by LPC for hearing on redesignation, no work had been done yet. (A251 Par. 159). The work began sometime in the next seven weeks preceding November 21, 2006, the date the LPC re-designated the Buildings, but most was done after that date. (A323; A305 Pars. 14-16); A252 Par. 162).

This is the only investment involving actual demolition (albeit insignificant in scope as it did not involve structural demolition, only removal of ornament and enough window framing to enlarge the windows). But, like all of Appellant's actions, it was ambiguous. The passage of two years between obtaining the permit and acting on it suggests that Appellant did not intend to go through with the alterations unless it felt it had to. And, although Respondent describes the alteration work as "an effort to defeat redesignation" (A305 Par. 16),

it was not a reasonable investment for that purpose. Appellant was surely aware that the Commission had designated the FAE because of its historical and cultural significance, not its architectural prowess;[11] though the report is respectful of the architects, it does not describe the complex as a thing of exceptional beauty, rather describing the ornamentation as standard for the era and making only a boilerplate reference to "special character, special historical and aesthetic interest, and value as part of the development, heritage, and cultural characteristics of New York City." (A142-143; see Admin. Code §25-302(n)). The Commission in fact noted the work Appellant had recently begun and redesignated anyway. (A325).

Certainly, Appellant's disfigurement of the Buildings in 2006 did not evidence an unequivocal intention to demolish and redevelop. Enlarging windows is diametrically inconsistent with an intent to demolish. Why pay for larger new windows if one intends to break them?

Compare all of this to the closely analogous issue of reliance required to "vest" under a lawfully issued building permit or similar land use approval, which is subsequently withdrawn because of a valid change of law such as amendment of the zoning law. There the rule requires (a) that the landowner have

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[11] It indirectly acknowledges the paucity of architectural merit in its memorandum to the Commission: "Even where a designation is based on a building's historic associations and not on its architectural qualities, the building must retain exterior architectural features sufficient to connect it to those associations." (A16).

demonstrated "a commitment to the purpose for which the permit was granted" by (b) effecting "substantial changes" in the form of "substantial improvements" to the site and (c) incurring substantial expenses to further the development," (d) such that denying vesting would result in "serious loss rendering the improvements essentially valueless." Glacial Aggregates LLC v. Town of Yorkshire, 14 N.Y.3d 127, 136 (2010). Actual construction activity is required. In contrast, an owner who has established a hobby of keeping pigeons on his property has no "vested right" to continue doing so in the face of a newly adopted law prohibiting the practice because the cost of discontinuing is insignificant. People v. Miller, 304 N.Y. 105, 109 (1952). Miller illustrates that even an actual continuing use coupled with some presumably small investment may not give rise to a reasonable expectation that the use may continue. It should make a party that has made little to no investment (and certainly no shovel-in-the-ground sort) in support of a mere dream of ultimately re-developing a landmark property very wary of a rude awakening.

D. Appellant Must Demonstrate the Existence of Triable Issues as to The Alleged Taking. It Has Failed to Do So.

The right to a trial is an essential element of our legal system. But it is conditioned upon a showing that there are triable issues of fact. (See CPLR 3212). There has been no such showing here.

The case was commenced by Stahl on a Notice of Petition demanding summary judgment, on the return date, on takings as well as Article 78 claims. (A67). That, not only explicitly, but by the terms of CPLR 3212(c), invites the Court to grant summary judgment to a party other than the movant. Thus, if Stahl failed to adduce sufficient evidence to establish a triable issue, Justice Stallman did exactly what he should have done in dismissing both the takings and Article 78 claims of Stahl's case.

Stahl's failure to adduce sufficient evidence is not for lack of a voluminous record to which both sides amply contributed. (See A32).

Although there are, of course, differences between the two causes of action – the first for taking, the second for alleged errors in administrative proceedings (Article 78) – the two are closely related. In both, the key issue is whether the City unduly compromised Appellant's interest in its real property. Formally, in the administrative proceeding, the issue was cast primarily as a question of the degree of economic value removed; in the takings case, as a

question of both the degree of value removed, and interference with reasonable investment-backed expectations. A component issue as to both questions is how to define the relevant property.

The record is replete with evidence on all of these issues from both parties. If either wished to introduce further evidence it could have done so both in the LPC proceedings and in the judicial proceedings. Stahl especially, having moved for summary judgment on all issues, must have recognized its right to submit whatever evidence it believed necessary.

The purpose here, of course, is not to deprive a party of a legitimate need to present its case at trial. Amici are concerned, however, that Appellant's battle has lasted for many years, in the course of which the public interest has suffered by such acts of Appellant as stripping the Buildings of their architectural detail, reducing maintenance and repairs, and warehousing apartments that could be available for people needing low-rent accommodations.

POINT II

THE LANDMARKS PRESERVATION COMMISSION HAS FOLLOWED APPROPRIATE PROCEDURES IN DETERMINING THAT THE PROPERTY IS CAPABLE OF EARNING A REASONABLE RETURN; ITS DECISION IS NOT ARBITRARY OR CAPRICIOUS

Appellant poses an array of objections to the Commission's methodology in passing on Appellant's application for a certificate of appropriateness to demolish pursuant to Admin. Code § 25-309 on the ground of inability of the property to earn a reasonable return as a result of the designation. Rather than discuss every intricacy of every accounting decision, we will highlight the latitude the Landmarks Law allows the Commission in the reasonable return proceeding.

A. General Considerations.

Section 25-309 was evidently adopted to provide a safety valve against constitutional attack on the Landmarks statute. Cf. Trustees of Sailors' Snug Harbor in City of New York v. Platt, 29 A.D.2d 376 (1st Dep't 1968) (assuming it was legally necessary for the Court to extend similar relief to charitable owners). The Section should be construed liberally to accomplish that purpose within the constraint that a "reasonable return" is defined as six percent of assessed value. (Section 25-302(v); see McKinney's Statutes §96).

The Commission by no means abused the extensive latitude the Law allows it. For example, although a landmark may often be a single building, nothing says that it must be. (See Admin. Code § 25-309, contemplating multiple parcels). If the landmark consists of two or more buildings, designated as a single landmark because of their unitary relationship,[12] the Commission's duty to protect the landmark in its entirety would be frustrated if it were obligated to allow demolition of any particular part because that part, standing alone, cannot earn a reasonable return. Such a construction would be absurd and cannot be accepted unless compelled by the only available reading of the statute as a whole. If, as posited, the purpose of Section 25-309 is to provide a limited constitutional safety valve, that obviously applies whether the landmark is one or many buildings.

Also, the Commission is charged with exercising judgment as to particular accounting decisions in order to ensure that the calculation of the landmark's potential return on assessed value fairly reflects the operational realities of the particular landmark, including, as in this case, the necessity of forecasting many possible scenarios for improving the condition of the landmark and its earning capacity. That charge specifically calls for the Commission to determine whether existing and proposed management methods are "reasonably efficient and prudent" and allows it to reject earning capacity figures calculated for

[12] See A143 and A327 at which the LPC designated the entire FAE as a single landmark.

a current "test year" where there are reasonable grounds for doing so (Secs. 25-302(c), and 25-302(v)(3)(a)); the burden is on the applicant to establish reasonable return "to the satisfaction of the commission" (Sec. 25-309). Of necessity, if the applicant asserts that the property must be further improved beyond its present condition in order to earn a reasonable return, the Commission may critically examine the methods used by the applicant to estimate and amortize costs of improvement, and the estimated income and expenses of operation in the landmark's improved condition.

B. The Commission Properly Based Its Analysis on the FAE as a Whole.

The Commission has explained its reasoning well as to each aspect of its analysis of the reasonable return process. (A1355-1397; and see A269-297 Pars. 246-326). We will address in detail only the Commission's decision that the entire FAE, not just the Buildings, was the proper base of analysis. This is an issue which could well arise again. Establishment of appropriate precedent is, therefore, of special interest to Amici.

The landmark here consists of 15 buildings on four tax lots. Appellant seeks permission to demolish only two of the 15 buildings in the FAE, and urges that only those two Buildings and the tax lot on which they are located,

rather than the entire landmark, may be considered in determining capacity to earn a reasonable return.

The statutory analysis begins with Section 25-309(a)(1) which provides in relevant part, "in any case where an application for a permit to demolish any improvement located on a landmark site . . . establishes to the satisfaction of the commission that . . . (a) the improvement parcel (or parcels) which includes such improvement . . . is not capable of earning a reasonable return," the Commission shall offer an appropriate solution short of demolition, or permit the requested demolition.

An "improvement" is simply a physical betterment to land. (Section 25-302(i)). An "improvement parcel" is a tax parcel on which an improvement is located. (Section 25-302(j)).

The "landmark site" (defined in Section 25-302(o)) in this case is designated in the designation resolution as the entire block, including all four tax lots. (A327).

Appellant argues that its own choice to demolish only improvements on tax lot 22 compels selection of that one "improvement parcel" as the base for determining hardship. (A104, Par. 133, citing Section 25-302(j)). This misconstrues the statute by ignoring that the definition, as definitions tend to do, defines in the singular – a single improvement parcel consists of a single tax lot –

while ignoring that the operative provision, Section 25-309, contemplates consideration of the "parcel (*or parcels*) which includes such improvement" ("such improvement" being the improvement the applicant wishes to demolish). (Emphasis added). The grammar may be wanting, but the meaning is clear. If the target segment is located on one improvement parcel, and there are other improvement parcels in the complex containing other segments of the landmark, then it is appropriate to determine reasonable return on the basis of the landmark as a whole.

It should be noted that, when the Commission designates a landmark, it must also designate the "landmark site" containing it (Section 25-303(b)), and that site may include abutting tax lots containing other parts of the landmark (Section 25-302(o)). At the same time, nothing precludes the Commission from designating each of the 15 "improvements" on four adjoining lots as a distinct and separate landmark. Thus, the Commission, having twice designated the 15 buildings as a single landmark, must be presumed to have had a reason, in this case clearly stated in the two designation resolutions: the 15 buildings are a unit, similarly laid out and designed, aesthetically cohesive, and intended to be operated as a unitary housing development. (A119-166; A323-332). One would compromise the entire landmark by removing any part of it.

The Commission's analysis was also consistent with the precedent of constitutional takings cases concerning identification of the base parcel or "denominator." (See pages 16-19). Thus, the Commission considered single ownership, unitary management, coordinated design and physical plan. Given the origin of the statute as a constitutional safety valve, following constitutional precedent is more than appropriate. Indeed, it would be absurd to analyze the hardship as if the Buildings were isolated, unrelated in any sense to the rest of the landmark, and not dependent on the Other Buildings for core mechanical and management services. The statute does not require that and the Commission would have no reason to engage in artifice by analyzing the ability of only one segment of the composite to earn a reasonable return. If, for example, the composite is able to realize the benefits of economies of scale, it would be absurd to compel the Commission to ignore that basic economic fact. The statute should not be construed to generate an absurdity.

The Commission discharged its primary duty to "protect" and "perpetuate" the cultural heritage of the City (Section 25-301(b)), while conscientiously discharging the further duty under Section 25-309 of determining whether the improvement parcel *or parcels* which, as a whole, include the

improvements that Appellant would like to demolish, are incapable of earning a reasonable return.[13]

C. Leeway in Debate Must Be Tolerated.

Finally, Appellant complains that the Commission evidenced prejudice because some Commissioners made individual comments at the hearings that reflected concern for preserving buildings that have been duly landmarked, and whose landmark designation has been sustained by the Council and the courts. (Petition Pars. 45, 64-65). Such criticism is misplaced. Some leeway in debate must be tolerated simply in order to assure rigorous consideration by the Commission as a whole. What ultimately counts is whether the decision on which a vote is taken is, within its four corners, well-considered and fair, or is arbitrary and capricious.

At least equally important is that the Commission clearly has a fundamental duty, stated in strong terms in the Landmarks Law (Section 25-301), to promote the preservation of landmark quality structures for the benefit of the

[13] Section 25-302(c), defining "capable of earning a reasonable return," is not inconsistent. It provides that "the net annual return . . . yielded by an improvement parcel during the test year . . . shall be presumed to be the earning capacity of such improvement parcel." The singular here should be construed as having a plural effect where appropriate to reconcile this definition with the clear meaning of Section 25-309. The authority to do that is assured by the ending of the definition: "in the absence of substantial grounds for a contrary determination by the commission."

general public and the welfare of the City, and zealously to protect the integrity of designated landmarks and historic districts. Its additional duty to permit demolition in the unfortunate event that a landmark is determined to be incapable of earning a reasonable return, plus the inability of the Commission to develop and effectuate a plan to avoid demolition by, for example, reducing taxes on the affected improvement or arranging its sale, must be exercised in utmost good faith. But the latter duty does not supplant the former, it supplements it.

CONCLUSION

Appellant has failed to demonstrate that the landmark designation of the First Avenue Estate, and the Commission's administration of the landmark, constitute a regulatory taking, and has failed to demonstrate that the Commission acted unlawfully or arbitrarily and capriciously in ruling that Appellant has failed to demonstrate that the property, whether viewed in its entirety or as the Buildings standing alone, is incapable of earning a reasonable return under prudent and efficient management. The decision below should be affirmed.

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Respectfully submitted,

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