Index No. 100999-2014

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

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.

RESPONDENTS'/DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER OPPOSITION TO THE PETITION/COMPLAINT AND IN SUPPORTOF THEIR CROSS-MOTION TO DISMISS

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PRELIMINARY STATEMENT

Municipal Defendants –Respondents (hereinafter Respondents, THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION (hereinafter Landmarks, LPC or the Commission), NEW YORK CITY and MEENAKSHI SRINIVASAN in her capacity as Chair by their attorney Zachary W. Carter, Corporation Counsel of the City of New York, submit this Reply Memorandum of Law in opposition to the Stahl York Avenue Co LLC Petitioner-Plaintiff's (hereinafter Stahl or Petitioner) Memorandum of Law in Opposition to Cross Motion to Dismiss and Reply Memorandum of Law in Support of the Verified Petition and Complaint dated January 30, 2015 (hereinafter Petitioner's Memo of Law) and in opposition to the Affidavit of Jeremy Stern of January 29, 2015 (hereinafter Stern Affidavit)[1].

Since the City has Answered the New York Landmarks Conservancy and the Friends of the Upper East Side Historic District, the National Trust for Historic Preservation, the Preservation League of New York State, the Historic Districts Council, The Greenwich Village Society for Historic Preservation, Landmark West!, the First

[1] The same day that it filed this Petition, Petitioner also filed a federal action Stahl York Avenue Co LLC v. The City of New York and the New York City Landmarks Preservation Commission 14 CV 7665 (SDNY) (Judge Ramos) which alleges violations of due process based upon almost verbatim the same allegation in the Petition in this matter. The City has moved to dismiss that federal Complaint on the grounds of abstention and on the ground that the complaint does not state a cause of action because Petitioner has no right to a Notice to Proceed to demolish the Subject Buildings. That motion is returnable on March 27, 2015. We have informed the federal court of the pendency of this matter and hope for a swift resolution of the state proceedings as it will resolve most of the issues before the federal court.

Avenue Estate[2] and a number of elected officials[3] have filed motions seeking leave to appear as *amici* in support of the Commission. These motions are returnable on the return date of this Article 78 proceeding, February 23, 2015.

The Petition alleges that the LPC's Denial of the Notice to Proceed to allow it to demolish two buildings on the grounds of insufficient return was arbitrary and capricious and constitutes an unconstitutional taking. However The LPC found in 24 alternative scenarios that Petitioner was able to realize returns of 8.49% to 16.92%, significantly more than the statutorily mandated 6%. Additionally the Commission's finding of a reasonable return is a *prima facie* finding of no unconstitutional taking.

In response to the City's Answer to the Petition Petitioner has seemingly abandoned many of the claims it raised in the Petition and now focuses in on the alleged impropriety of only three of them. As was fully explained the Denial of the Notice to Proceed and in the Answer the LPC's utilization of these methods was proper and consistent with standard practices. Moreover as even Petitioner admits the LPC adopted the three methods of calculations Petitioner suggests in LPC's 'alternative" scenarios" and still found that Petitioner was able to realize a reasonable return

In response to the LPC's Motion to Dismiss the Complaint, Petitioner's main argument is that there are outstanding questions of fact which preclude granting such a motion. However LPC's Motion to Dismiss should be granted because LPC has

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[2] The Memorandum of Law of Amici Friends of the Upper East Side Historic Districts et alia of January 26, 2015 page 7 confirms that the Friends of the First Avenue Estate "were unable to appeal the Supreme Court's decision in <u>Coalition to Save City and Suburban Housing Inc v. City of NY and Stahl Avenue Co</u> 280680/90 (Sup Ct NY Co 1990) upholding the BOE's modifications due to insufficient resources."

[3] Congresswoman Carolyn B. Maloney; New York State Senator Liz Kruger; New York State Assembly member Rebecca Seawright; New York City Council Member Ben Kallos;and Manhattan Borough President Gail A. Brewer.

found no hardship and such a finding is *prima facie* a finding of no unconstitutional taking.

Thus the LPC's Motion to Dismiss should be granted and the Petition dismissed.

I THE PETITION MUST BE DISMISSED BECAUSE THE LPC'S ACTIONS WERE NEITHER ARBITRARY NOR CAPRICIOUS

For all of the Stahl's protestations about the Commission's methodology, which was fully explained in the Commission's moving papers and not rebutted by Stahl, the fact is that Petitioner's answering papers demonstrate that the buildings at issue, if operated reasonably and prudently by an owner not motivated by an animus to demolish them, can earn a reasonable return.

The Petition alleges that the LPC Denial of the Notice to Proceed utilized improper methodologies regarding six crucial factors. The City's Answer properly responded to all of these issues which Petitioner now calls "weeds."[4] Rather, Stahl now alleges that there are only three core issues that affect the outcome of the reasonable rate of return analysis: LPC's conclusion that the proper improvement site was the entire City & Suburban Complex and not just the lot on which the Subject Buildings sit; that LPC wrongly used the income approach to project post-renovation assessed value and finally that the City excluded some of the renovation costs as a self-imposed hardship. These arguments are either flatly refuted by, or justified in, the Denial of the Notice to Proceed itself, or, ultimately do not demonstrate that Stahl carried its burden of demonstrating a hardship.

[4] These issues include Petitioner's allegations that the LPC methodologies for post renovation operating expenses, vacancy and collection loss and construction loan interest were improper.

A. The Commission correctly concluded that in this situation the improvement parcel for purposes of the hardship should be all of the Tax Lots on Block 1459

The Commission was justified in concluding that the improvement parcel was the entire block, but also significantly analyzed the hardship solely in reference to the single tax lot on which the Subject Buildings sit. See §IB infra.

Petitioner argues that the Commission must myopically ignore overwhelming evidence that Stahl operated the Subject Buildings and the rest of the Other Buildings in the Complex as a single economic entity and adhere to a statutory definition that clearly was drafted with a simpler factual situation in mind. It claims that there was no "purported common management" of all of the buildings as a single economic unit. See Petitioner's Memo page 22. But the facts supporting this common management were admitted and conceded by Stahl. The same employees managed and maintained all of the buildings; the buildings shared boiler and other mechanical services (R60); they shared laundry services (R61); and they shared a single leasing office (R1119). And, with respect to the leasing office, it was undisputed that Stahl failed to take reasonable efforts to lease vacant apartments in any of the buildings, refusing to enhance its feeble efforts in any respect in the face of absurdly high vacancy rates when compared to other buildings in the area. Finally, Stahl's agents submitted documents to the City's Tax Commission seeking a lower assessment based on the representation that the buildings were operated as a single economic entity. (R2142, 2150).

Petitioner concedes that the Commission has the authority to interpret the Landmarks Law to make an "accurate apprehension of legislative intent." Petitioner's Memo page 23. It did that here to account for facts not anticipated by the statute. Petitioner, apparently, would bar the Commission and the Court from interpreting the

statute even if Stahl didn't contest that it operated the entire complex as a single economic unit. That cannot be, and is not the law. The purpose of the hardship provision is to be a safety valve to ensure that property that cannot earn a reasonable return has relief from landmark regulation. It is incumbent upon the Commission to ensure that its analysis is considering the proper economic unit. In most cases this will be the single tax lot on which an improvement sits. However, the Commission has the authority to interpret and apply the statutory language to account for different facts, see cases cited in Respondent's Memo of law at pages 41, 42 and 44, and, as here, to expand the strict statutory definition to include adjacent parcels owned by the same entity and operated as a single economic unit.

Petitioner claims that the LPC's interpretation of what the relevant tax lot is directly contravenes the plain words of the statute and cites Trump Equitable Fifth Avenue Co v. Gliedman 57 NY2d 588, 597 (1982) as alleged support. But the Commission's interpretation that here the full block is the relevant parcel does not "directly contravene" the plain words of the Landmarks Law and the Commission is entitled to interpret the provisions of the Landmarks Law to apply to the specific situation before it.[5]

B. **In Any Event, the Commission analyzed 24 different hardship scenarios that presumed the improvement parcel was only the lot on which the buildings resided**

The LPC's Denial of Notice to Proceed detailed and explained all of its assumptions and conclusions and systematically analyzed 24 different iterations of the

[5] Petitioner's Memo at page 22 note 11 alleges that "at even an 11% vacancy in the 13 Other Building there would have been more than enough vacancies to relocate any tenants from the Subject Buildings to comparable apartments in the Other Buildings." This fact is not in the Record before the Commission and may not be considered by the Court in this Article 78 proceeding. See infra pages 8-9.

hardship analysis to show that in each case the Subject Buildings could earn a reasonable return. (R2337-2338). The Commission detailed all of its reasoning and assumptions. These iterations were all limited to lot 22, the lot on which the Subject Buildings resided and not the entire Complex. In addition, eight of these scenarios utilized an assessed value calculated using the cost approach and including all renovation costs, and four also included all of the soft costs that Stahl requests. And, in each of these scenarios no hardship was shown. See Denial of Notice to Proceed (R2338).

C. LPC Properly Used the Income Approach

Stahl insists, without citation to any statutory mandate or other authority that the Commission must use the same methodology when projecting assessed value, real estate taxes and depreciation. Nevertheless, the Commission did just that: it calculated the assessed value and real estate tax using the income approach, and applied the depreciation allowance – and found no hardship.

Stahl's complaint goes to the fact that the Commission also looked at a host of different scenarios that utilized various factors including projecting assessed value using the cost approach for renovating all 97 vacant apartments. And in each case it carefully explained why it was taking the approach it did. Stahl's insistence on uniformity is at odds with what a reasonably prudent owner would insist on and is yet another example of Stahl's determination to tear these historic buildings down.

The most telling example of this motivation is Stahl's insistence that projected real estate taxes be calculated utilizing the cost approach, notwithstanding that this would result in a huge tax bill, something that no prudent owner would seek. The Commission spent a lot of time explaining why it determined that the income approach was the best way to project post-renovation real estate taxes. First, the Department of

Finance explained that that was the methodology it uses when setting assessed value for an income producing property like the ones at issue here. Petitioner is wrong when it alleges that the Department of Finance (DOF) often uses the cost approach. The DOF has stated that for residential rental multiple dwellings the Department uses the income approach. (R2083, 2122). Second, projecting real estate taxes using the income approach resulted in a tax that was less than the tax if the cost approach was used, an outcome that a reasonably prudent owner would prefer.

Finally, and ironically, while Stahl insists that the cost approach must be used to project real estate taxes after renovation, its consultant Cushman & Wakefield presumed that the Subject Properties "will be re-assessed based on the stabilized income of the property," in other words the income approach, and argued that the Commission should project real estate taxes as 25 percent of effective gross income! See Cushman & Wakefield February 2009 Study (R65), and May 1, 2010 Study. (R133). To arrive at this estimate Cushman & Wakefield "examined the actual income and real estate taxes of rental apartment buildings throughout Manhattan," and found that real estate taxes as a percentage of effective gross income averaged 23.83%. Id. It concluded that this would be "a reasonable estimate of the real estate taxes." Id. Cushman & Wakefield abandoned this approach without comment in its letter dated July 1, 2011. (R168).

The Commission ultimately rejected Cushman's later methodology, instead it relied on the Department of Finance's formula, but noted that the Commission's projected real estate tax was consistent with, although a little less than, Cushman's estimate and almost identical with the average tax for Manhattan commercial properties. See Denial of Notice to Proceed. (R2335-2336). While the methodologies

might have been different, it is significant that in the first instance Cushman argued that this level of projected real estate tax after an extensive renovation would be reasonable. In contrast, Stahl now argues for a real estate tax that is a third higher than what Cushman originally thought was reasonable.[6]

Petitioner argues that LPC's decision is not entitled to "some special deference." Petitioner's Memo at page 21, note 9. This is rebutted by the cases in the City's Memo of Law pages at 40-41. The Court of Appeals has specifically emphasized that "[w]hen the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn there from, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute." Kurcsics v. Merchants Mut. Ins. Co 49 NY 2d 451, 459 (1980).

D. The LPC Properly Excluded Loan Interest

Petitioner alleges that LPC improperly refused to consider interest payments on construction loans from renovation costs in determining assessed value for depreciation. It did so because mortgage interest is not included when calculating a reasonable return under the hardship test. See Landmarks Law §25-309(v)(3)(a). Petitioner argues that the fact that the statute does not explicitly mention construction loan interest does not mean that it is silent, citing UMG Recordings Inc v. Escape Media Group Inc 107 AD3d 51, 58-59 (1st Dept 2013) as support. But, contrary to petitioner's

[6] The real estate tax according to Cushman & Wakefield for Case 1 of Exhibit 2 to the Stern Affidavit would be $577,849 (25% of the effective gross income of $2,311,397), as compared to Stahl's projection of $856,658. Compare Cushman & Wakefield May 1, 2010 Report (R133) with the Stern Affidavit Exhibit 2. The Commission projected real estate taxes would be $542,768. See Denial of Notice to Proceed Appendix B, Reasonable Return of Apartments Only at Rents of $40 per square leasable foot; $11.46/gsf operating expenses; 22% soft costs. (R2344).

argument, that case cites to the general legal principal of "*expression unius est exlusio alterious* which dictates that the specific mention of one thing implies the exclusion of others." Here, Landmarks Law §25-309(v)(3)(a) specifically excludes mortgage interest and amortization. Therefore, since loan interest is not mentioned it is impliedly excluded. Moreover, even Petitioner admits that LPC had an alternate scenario in which construction loan was included and, even under that scenario, petitioner was able to earn a reasonable return.

E. **This Court Must Ignore the Stern Affidavit and Exhibits Thereto**

Footnote 37 in Petitioner's Memo says that Exhibits 1 and 2 to the Stern Affidavit are compiled from numbers used by LPC in the appendices to its final decision and therefore are part of the final decision and are part of the administrative record. This is not true. The analysis in the Stern Affidavit and in Exhibits 1 and 2 thereto were not part of the Record before the LPC and are not properly before this Court. It is well-established that "[j]udicial review of administrative determinations is confined to the facts and record adduced before the agency." Featherstone v. Franco, 95 N.Y.2d 550, 554 (2000). See also Khan v. New York State Dep't of Health, 96 N.Y.2d 879, 880 (2001). Therefore, a court may only consider those arguments or evidence contained in the administrative record. See 72A Realty Assocs. v. New York City Environmental Control Board, 275 A.D.2d 284, 286 (1st Dep't 2000); 77 Realty, LLC v. New York City Water Board, 16 A.D.3d 247 (1st Dep't 2005), leave to appeal denied, 2005 LEXIS 2710 (N.Y. October 27, 2005); Matter of Van Antwerp v. Bd. of Education for the Liverpool Central School Dist., 247 A.D.2d 676, 677 (3d Dep't 1998); Matter of Salesian Society, Inc. v. Village at Goshen, 256 A.D.2d 469 (2d Dep't 1998). Petitioner had four years and

many opportunities to make these submissions to the LPC. It may not do so now after the Record is closed and the Commission has made its determination.

But even if one accepts almost all of Stahl's arguments, the Stern Affidavit demonstrates that Stahl did not carry its burden of demonstrating that a hardship exists. Exhibit two to the Stern Affidavit assumes that the post-renovation assessed value is calculated using the cost approach for renovating all 97 vacant apartments, which increases the level of return required. Similarly, it includes a depreciation allowance based on renovating all 97 apartments and using all of Stahl's enhancement percentages (15% contingency and 32.29% soft costs, including interest on financing). It also projects real estate taxes based on an assessed value calculated using the cost approach. However, Exhibit 2, remarkably, shows that in every case a reasonable return exists if one substitutes the Commission's – and Cushman and Wakefield's - projected real estate tax for Stahl's projected tax. In fact, a reasonable return is found in each and every example in Exhibit 2[7] even if one uses Cushman's initial formula (25% of effective gross income) which results in a real estate tax that is higher than the Commission's projected tax.

The Commission submits that as a matter of law Stahl has failed to demonstrate that the Subject Properties cannot earn a reasonable return. The fact that one scenario in Exhibit 1, where all of Petitioner's assumptions are accepted, shows returns just under the required 6 percent supports the Commission's conclusion that Petitioner

[7] For example the real estate tax according to Cushman & Wakefield for Case 1 of Exhibit 2 would be $57,849. This is $278,809 lower that Stahl projects, thus increasing the net operating income to $571,827 ($293,018 +$278,809). Thus results in a return of 8.83% of the assessed value of $6,469,740. Returns for Cases 2-4 are Case 2 6.87%; Case 3 and Case 4 6.89&.

failed to carry its burden of demonstrating that it cannot generate a reasonable return if it operates the properties reasonably and prudently.

Significantly, even if the court were to find that this one scenario could demonstrate that Stahl had carried its burden, it still does not mean that there is a hardship in this case. Procedurally, if Stahl is determined to have carried its burden then, under the Landmarks Law, the Commission would make a "preliminary determination of insufficient return." Landmarks Law §25-3099a)(1)(b)(2). To alleviate the potential hardship, the Commission may recommend and the City can grant, partial or complete tax exemption, and deny the hardship application. Id at §25-309(e)(1).

Petitioner again alleges that the LPC Commissioners were biased based upon a statement of one Commissioner[8] ignoring again that the vote on the Denial of the Notice to Proceed was unanimous.

Based on all of the above, LPC has demonstrated that Stahl did not carry its burden of demonstrating that the Subject Properties were not able to realize a reasonable return; a conclusion that is amply supported by the Record.

II. THE DETERMINATION BY THE COMMISSION OF A REASONABLE RETURN IS A *PRIMA FACIE* DETERMINATION OF NO UNCONSTITUTIONAL TAKING AND PETITIONER'S ASSERTION THAT A QUESTION OF FACT EXISTS IS INCORRECT

Petitioner alleges that the designation of the Subject Buildings and the denial of the hardship application together amount to an unconstitutional taking. Petition/Complaint para 4.

[8] Commissioner Perlmutter's comment must been seen in its full context. Specifically: "So just a premise, to preface all of this, our job here is to protest historic buildings and not to sort of be taken in by certain kinds of arguments by a landlord whose job – by a property owner whose goal is to tear a building down. We're supposed to be listening to testimony. And don't forget very many people at this table are architects or people involved in the construction and building industry."(R1704).

The purpose of the hardship provision in the Landmarks Law is to act as a safety valve from unconstitutional takings claims**.** As was noted in Sailors' Snug Harbor v. Platt 29 AD2d 376 (1st Dept 1968)

> Conceding the validity of regulation, the question presented is whether in the particular instance regulation goes so far that it amount to a taking. If it does, it is constitutionally prohibited. Chapter 8-A [of the Landmarks Law] provides some guidelines as to what constitutes an undue burden on commercial realty and provides relief in such instances (§207-8.0 subd.a).

(case cites omitted).

Once the LPC has found that there is no hardship, *prima facie* there is no taking. In Penn Central Transportation Co v. New York City 438 US 104, 136 (1978) the Supreme Court found no taking because the Terminal was able to realize a reasonable return on its investment.

This is clearly the law in New York. "A property owner must show by dollars and cents evidence that under no use permitted by the regulation under attack would the properties be capable of providing a reasonable return." De St Aubin v. Flacke 68 NY2d 66, 77 (1986); Gazza v. NYSDEC 89 NY2d 603, 618 (1987); Northern Westchester Professional Park Associates v. Town of Bedford 60 NY2d 492, 504 (1983) (no taking when the owner proves that he is able to realize a reasonable return from the property); Megin Realty Corp v. Baron 46 NY2d 891 (1979); Marcus Assoc v. Town of Huntington 45 NY2d 501 (1978). "To succeed on a constitutional challenge the owner must establish that no reasonable return may be realized from any permitted use." McGowan v. Cohalan 41 NY2d 434, 436 (1971).

Contrary to Petitioner's allegations the Court is not obliged to reach its own independent conclusion as to whether Stahl is able to earn a reasonable return.

Instead, insofar as the Court determines that LPC's determination that Stahl was so able was rational and reasonable and supported by the Record , the Court must rely on that determination in resolving Petitioner's taking claim. To support Petitioner's allegation of the need for a *de novo* determination Stahl relies on two non-New York cases - Cioffoletti v. Planning and Zoning Comm of Town of Ridgefield 209 Conn 544 (1989) and Hensler v. City of Glendale 8 Cal 4th 1, 16 (1994), which were based upon local Connecticut and California procedural codes and the one New York case which petitioner cites - Brotheron v. DEC of State of NY 189 AD2d 814 (2d Dept 1993), does not support petitioner's argument. In that case, the Court found "the Record of the administrative hearing is insufficient to determine whether the denial of petitioner's application is so burdensome as to constitute a taking" under special condemnation proceedings outlined by statute. The Record here is not insufficient. The 2359 page Record clearly shows that LPC rationally determined Petitioner is able to realize a reasonable return and this Court need not make an independent inquiry on this issue.

The only fact alleged in the Complaint in support of Stahl's partial takings claim is the denial of its hardship application. Stahl has not alleged any fact of financial loss in the Petition/Complaint that it did not allege before LPC in the hardship application. There are no other facts alleged in the Complaint which would show how the LPC designation reduces the value of the buildings. Thus, contrary to its allegations there is no need for discovery or for a hearing before this Court

Petitioner alleges that for purposes of this Motion to Dismiss the Court must accept all of the allegations in the Complaint as true. But the Complaint must contain allegations concerning each of the material allegations necessary to sustain

recovery under a viable legal theory. Connolly v. Havens 763 F.Supp 6 (SDNY 1991); Ebenstein v. Pritch 275 AD2d 56 (1st Dept 1949); Weidringer v. Sperry Rand Corp 10 Misc2d 194 (Sup Ct NY Co 1958); Piccini v. Myers 9 Misc2d 169 (Sup Ct NYCo 1957).

The Complaint herein does nothing more than make vague allegations of an unconstitutional taking. It does not allege, as it must, dollars and cents evidence of the economic value of its property that has been destroyed. Spears v. Berle 48 NY2d 254, 262 (1979; Village Bd of Village of Fayettevile v. Jarrold 53 NY2d 254 (1981). Throughout its Memorandum of Law, petitioner consistently alleges that there has been a partial taking. But there are no facts alleged in the Complaint which set forth the amount of damages of a partial taking. The Complaint does not allege what Stahl's claimed return of the property is after the taking[9], how the denial of the hardship application exactly diminishes the value of the property, or that Stahl cannot continue to utilize the property as a rental property.

Moreover, in its Wherefore Clause (a) Stahl seeks "just compensation in the amount of the fair market value of the Buildings on November 21, 2006 absent the unconstitutional taking, plus interest on that amount from that date until the date of payment, which Stahl believes to be approximately $200 million." Presumably this is the full value of the two buildings and Stahl might only be entitled to such full value if there were a total taking which Stahl has not pled elsewhere in the Complaint. Thus, it is not clear from the pleading if Stahl is alleging a total or a partial taking.

Furthermore there is no basis in law or fact for damages to be the fair market value of the property. Procedurally Stahl applied to demolish the buildings on the

[9] Paragraph 11 of the complaint alleges a return of 1.19% return but the Stern Affidavit alleges returns of almost 6%.

ground that it could not operate them in a reasonably prudent manner and earn a reasonable return. (R1). If it had been successful in its hardship application the Commission would have issued a Notice to Proceed to demolish the buildings. See Landmarks Law §25309(g)(2)(b). That is the full relief it would have been entitled to. It would not have been entitled to build a new 10 FAR[10] building on the newly vacant lot without LPC approval as the land would still be part of the landmark site of the FAE. A finding of hardship would not de-designate the site or otherwise take it out of LPC's jurisdiction

To construct anything on the then vacant site Stahl would have had to then file a separate application for a new building, and any such building would have to go through the normal hearing and review process and meet the criteria for appropriateness under the Landmarks Law. §25-307. So for example it would be standard for the Commission to require a new building to match or be consistent with the existing neighboring buildings in the FAE complex, in this case an appropriately designed and massed five-story buildings with perhaps, a set-back penthouse. Stahl could apply for a taller building and, if it was denied, bring a new hardship application based on the situation at that time.

Thus at the moment Stahl's damages would be, at most, a temporary taking for the time between the Denial of the Notice to Proceed and a subsequent decision by this court that a hardship should have been granted to allow the buildings to be demolished.

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[10] See note 15 in City's Answer.

Petitioner alleges that its taking claim may not be decided on this Motion to Dismiss because there are three areas of outstanding questions of fact on which the Court needs discovery: 1) how much the Subject Buildings lost in value as result of the 2006 landmark designation; 2) whether the relevant site is the entire landmark site or just the two Subject Buildings; and 3) what Stahl's development expectations were at the time it acquired the property. All of these alleged facts would only be relevant if the LPC had not found that the property was capable of earning a reasonable return. Since LPC has rationally made the reasonable return determination there can be no taking and thus there is no need to inquire into any of these areas.

A. LPC Has Already Determined That There is No Taking

On the first alleged question of how much the Subject Buildings lost in value as a result of the landmark designation**,** the Court would only have to reach this question if it found that there were a taking and Stahl's property interest destroyed and the Court were making a damage determination. Here, the LPC has reasonably found that the Subject Buildings are capable of earning a reasonable return, hence there is no taking and no damage determination is necessary. Contrary to Petitioner's allegations, the finding by the Commission of no hardship constitutes a *prima facie* determination of no unconstitutional taking.

Petitioner claims that the Court must determine whether in these factual circumstances if the landmark designation had a sufficient economic impact to constitute a taking of Stahl's property. But the LPC determined that Stahl was able to realize a reasonable return in 24 alternative scenarios, thus there is no taking based upon the full factual Record before the LPC.

Petitioner alleges that the Court must accept as true the allegations in paragraphs 73-76 of the Petition/Complaint that the designation has destroyed virtually all of the property's economic value. Paragraph 74 states that "Stahl has lost money on the Buildings because of their high vacancy rate, low rent and high operating expenses." However, as is explained in the LPC's Answer, the high vacancy rate is self-created, the low rents are a result of rent regulation, Stahl's decision not to continue to upgrade the apartments and thereby increase the rents each time there was a vacancy, and high operating expenses have nothing to do with the landmark designation of the buildings. The losses alleged to be connected to these factors on their face have nothing to do with the LPC's designation of the building.

B. What the Relevant Site is is a Legal Question

The second issue - determination of the relevant site - is a legal determination which LPC made based upon the full factual Record before it - not one which requires a new factual determination by this Court. Petitioner alleges that there are questions of fact on the issue of the relevant lot which it presented to LPC which LPC discounted. However all of these facts were submitted to LPC when it determined that a reasonable return could be made. That Stahl is unhappy with the LPC's legal conclusions from these facts does not mean that Stahl was not given a full and fair opportunity to submit them.

Additionally what site should be used by the Court to determine whether there has been a taking is a question of law, not of fact. See cases in Respondents' Memo of Law at pages 50-53. Indeed, Petitioner in its Memo of Law at pages 21-24 acknowledges that the question of what the relevant parcel is is a question of law, not fact.

C. Petitioner's Reasonable Investment-Backed Expectation is Not a Question of Fact

The third alleged question - what Stahl's factual expectations were when it acquired the property – is also not relevant since LPC has already found that a reasonable return may be made. Thus the investment-backed expectation test has no application unless and until the Court were to find that the LPC determination was arbitrary and capricious.

Even if the investment-backed expectation test were relevant at this time, which it is not, it would show that Petitioner as a matter of law should have known of the possible application of the Landmarks Law to the site and therefore it had no reasonable investment- backed expectation that it might be able to develop the property without the potential of its being designated.

Petitioner says that it is a question of fact whether it knew in 1977 when it bought the buildings that it would be subject to the 1965 Landmark law. Petitioner put into the Record that it was the owner of a number of other landmark properties (R1189, 1374, 1375). Thus it was aware of the Landmarks Law. It is not contested that the block is unique - one of only two full city-block developments of light-court model tenements in the county. Stahl York Avenue Co LLC v. City of New York 76 AD3d 290 (1st Dept 2010) (hereinafter Stahl). Thus, the complex is not the corner bodega or cigar shop, two examples that Petitioner cites in its Memo of Law. (Petitioner's Memo, page 16).

Even if there were to be a hearing on this issue, the City would not have to prove as a matter-of-fact that Stahl knew that LPC was definitely going to landmark these buildings. It would only have to show that Stahl, because of the existing Landmarks Law should have known that the property was potentially subject to being landmarked.

(emphasis added). District Inwood Properties Ltc. Partnership et al v. District of Columbia 198 F3d 987, 883 (DC Cir 1999). "It knew or should have known…that any state authorization it may have received was subordinate to national statutes." M & J. Coal Co v. US 47 F3d 1148, 1154 (Fed Cir 1995).

For example, in Appolo Fuels Inc. v. US 381 F3d 1338, 1349 (Fed Cir 2004), the Court concluded that in light of the regulatory environment at the time Apollo purchased the leases at issue, it could have 'reasonably anticipated' the possibility of a LUM decision prohibiting the mining of a part or all of its leases, and thus there was no taking. "The reasonable expectations test does not require that the law existing at the time of processing would impose liability…. The critical question is whether extension of existing law could be foreseen as reasonably possible." Commonwealth Edison v. US 271 F3d 1327, 1357 (Fed Cir 2001).

Moreover, "The subjective expectations of the Appellants are irrelevant. The critical question is what a reasonable owner in the Appellant's position should have anticipated." Chancellor Manor v. US 331 F3d 891 (Fed Cir 2003); Appolo Fuels Inc, supra, 381 F3d at 1349, note 5; Commonwealth Edison Co v. US ,supra 27 F3d at 1348.

As a matter of law a Petitioner cannot allege that it had an investment-backed expectation in a highly regulated field which it relied on for 29 years (from 1977 until 2006) and not expect that the application of the laws to its premises would not change in the interim. "*Lucas* teaches us that a buyer's reasonable expectations must be put in the context of the underlying regulatory regime." District Inwood supra 198 F3d at 883 *citing* Lucas v. South Carolina Coastal Council 505 US 1003, 1030 (1992). Petitioner relies on Cienega Gardens v. US 331 F3d 1319 (Fed Cir 2003), but that case

notes that when it determines investment-backed expectations it also considers "statutes and regulations as a matter of law." Id at 1346.

Petitioner tries to misapply language in Palazzolo 533 US 606, 628 (2001) to the investment-backed expectation area. But "[t]he majority opinion [in Palazzolo] did not address the bearing of the regulatory environment at the time of land acquisition on the reasonable investment-backed expectations prong of the *Penn Central* analysis." Apollo Fuels Inc, supra 381 F3d at 1348. Thus, Petitioner's argument that the cases in the City's Memorandum page 61-62 are all pre-Palazzolo and no longer good law is without merit.[11]

In response to a controlling Second Circuit case saying that the time reasonable - backed investment expectation is determined is when the property is acquired - Meriden Trust and Safe Deposit Co et al v. FDIC 62 F3d 449, 454 (2d Cir 1995) - Petitioner claims that the position is contravened by a Supreme Court case from Rhode Island - Woodland Manor III Assocs LP v. Reisma No CA PC89-2447, 2003 WL 12242at *14 (Sup Ct RI Feb 24, 2003) and a Court of Federal Claims Connecticut case - Laguna Gatuna Inc v. US 50 Fed CtCl 336 347 (Ct Cl 2001). These cases, however, are rebutted by numerous Circuit Court cases: Mehaffey v. US 499 Fed Appx 18, 2012 US App LEXIS 25178 (Fed Cir 2012) (reasonable investment-backed expectations are measured at the time the claimant acquires the property); Chancellor Manor v. US 331 F3d 891 (Fed Cir 2003) (time of analysis is time of entry into the program); Apollo Fuels Inc, supra, 381 F3d at 1349 ("Apollo's reasonable investment backed expectations are

[11] However Justice O'Connor in her concurring opinion in Palazzolo noted that "this holding does not mean the timing of the regulations enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis" Palazzolo supra533 US at 633.

shaped by the regulatory regime in place as of the date it purchased the leases at issue"); Rith Energy v. US 247 F3d 1355, 1364 (Fed Cir 2001) ("Plaintiff could not have had a reasonable investment-backed expectation that it would not be subject to … restraints when it acquired the coal leases [because] SMCRA was enacted eight years before [the plaintiff] purchased the coal leases" at issue.).

Petitioner's claim that an evidentiary hearing is required on the issue of reasonable investment-backed expectations is also incorrect. As recognized by the court in Appollo "[t]here are also circumstances where the question of reasonable expectations can be resolved without a factual hearing merely by the examination of the legal regime existing at the time of the action or acquisition." Apollo supra 381 F3d at 1350 (examination of regulatory scheme at time of lease acquisition sufficient, so no hearing is required). In Apollo the law which was alleged to have effected a taking was passed a decade before the lease was acquired so the statute gave notice sufficient to defeat reasonable investment-backed expectations. That is exactly the situation here where the Landmarks Law was passed in 1965 twelve years before Petitioner acquired the property. See also Commonwealth Edison v. US 271 F3d 1327, 1348 (Fed Cir 2001) ("Nor does the question [of reasonable expectations] require an evidentiary hearing. Edison's subjective expectations are irrelevant. The question is what a reasonable company in Edison's position should have anticipated.").

Petitioner's argument that the carve out from the designation from the First Avenue Estate had a clear rationale consistent with the Landmarks law unlike the designation in Kalikow because the Subject Buildings were designed by a different architect, constructed at a later time and were built on a plot of land acquired at a

different time was specifically discounted by the First Department. “Petitioner’s arguments that since the buildings were the last to be constructed in the First Avenue Estate and were designed by a lesser—known architect, they have no landmark value, is also unavailing.” See Stahl York Avenue Co LLC v. City of New York 76 AD3d 290, 299 (1st Dept 2010).

Thus, contrary to Petitioner’s claim Stahl is not entitled to have its constitutional taking claim resolved *de novo* after discovery and the presentation of additional evidence to this court. Rather, its taking claim was decided, and rejected, when the Commission determined that the property was able to earn a reasonable return.

CONCLUSION

The Petition must be dismissed because the LPC reasonably and rationally concluded that Petitioner did not meet its burden under the Landmarks Law of showing that the Subject Buildings were not able to earn 6% of the post renovation assessed value in the test year. Moreover, the financial assumptions and theories that the Commission used in makings its calculations were rational and proper based and on the record before the Commission. Therefore, the Court must affirm the LPC's Denial of the Notice to Proceed since it was not arbitrary or capricious.

There has been no taking of Petitioner's property since the Commission rationally and properly found that the property is able to realize a reasonable return. This is a *prima facie* finding of no unconstitutional taking. Therefore, there is no question of fact for this Court on the taking claim and the City's Motion to Dismiss must be granted

Dated: New York, New York
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