

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

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In the Matter of the Application of

PROTECT THE VILLAGE HISTORIC DISTRICT, by Thomas  
E. Molner, Chair and Treasurer, HISTORIC DISTRICTS  
COUNCIL, DOCOMOMO NEW YORK-TRISTATE, THE  
HISTORIC NEIGHBORHOOD ENHANCEMENT ALLIANCE  
d/b/a Defenders of the Historic Upper East Side, LANDMARK  
WEST!, THE CAMBRIDGE OWNERS CORP, THE 175 WEST  
12<sup>TH</sup> STREET CONDOMINIUM, THE JOHN ADAMS  
OWNERS, INC., THOMAS E. MOLNER, GARY A. TOMEI,  
TREVOR STEWART, CAROL GREITZER, IAN E. WISE,  
CRAIG E. RAIA, PHILIP H. SCHAEFFER, MAURICE B.  
ZUCKER, NAOMI USHER, DAVID R. MARCUS, VICTORIA  
B. LAMB, MARILYN DORATO, BARBARA H. DATESH,  
E. GERALD SALIMAN and LOGAN LUCHSINGER,

Assigned to  
Justice Emily  
Goodman

Index No.  
102744/2009

Petitioners,

For a Judgment Pursuant to Article 78 of the  
Civil Practice Law & Rules

-against-

NEW YORK CITY LANDMARKS PRESERVATION COM-  
MISSION, ROBERT TIERNEY as Chair of the New York  
City Landmarks Preservation Commission, THE CITY OF NEW  
YORK and ST. VINCENT'S CATHOLIC MEDICAL CENTERS,

Respondents.

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**BRIEF AMICI CURIAE OF THE MUNICIPAL ART SOCIETY OF NEW YORK,**  
**THE NEW YORK LANDMARKS CONSERVANCY,**  
**THE NATIONAL TRUST FOR HISTORIC PRESERVATION,**  
**THE PRESERVATION LEAGUE OF NEW YORK STATE,**  
**THE GREENWICH VILLAGE SOCIETY FOR HISTORIC PRESERVATION,**  
**THE BROOKLYN HEIGHTS ASSOCIATION AND**  
**THE FRIENDS OF THE UPPER EAST SIDE HISTORIC DISTRICTS**

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## **PRELIMINARY STATEMENT**

Amici present this brief out of concern for the integrity of New York City's Landmarks Law and a shared belief that precedents set by the resolution of the important issues this case raises will have a lasting impact on historic preservation in New York City, and elsewhere. Amici respectfully submit this brief in the hope that it will assist this court in reaching its determination.

## **SUMMARY OF ARGUMENT**

This case juxtaposes the public interest in the preservation of landmarks and historic districts against the interest of an individual charitable organization in avoiding hardship allegedly caused by enforcement of New York City's Landmarks Preservation and Historic Districts Law (the "Landmarks Law"). Sensitivity to the difficulties that one of the City's most well-regarded non-profits faces in keeping its medical facilities up to date in today's challenging environment is commendable, but the City's Landmarks Preservation Commission ("LPC" or "the Commission") – the agency charged by law with the duty of protecting the City's cultural and architectural heritage – went too far in this case. By applying a test much more lenient than the courts have sanctioned, and inventing a campus-based exception to the Landmarks Law, the LPC has upset the finely tuned balance the law strikes between the rights and needs of non-profit property owners and the values of historic preservation. Even more disturbingly, the LPC's reasoning opens the door – far more than the Constitution requires – for non-profit owners of landmarks and buildings within historic districts to circumvent the requirements of the Landmarks Law.



The Landmarks Law charges the LPC with “effecting and furthering the protection, preservation, enhancement, perpetuation and use of landmarks... and historic districts.” N.Y.C. Admin. Code § 25-303(a). Inevitably, this duty brings the Commission into conflict with landowners who believe they could earn higher profits or reduce their operating costs by modifying their property in an historically inappropriate manner, demolishing it for redevelopment, or transferring it without the landmarks restrictions in place. The Landmarks Law itself, as well as the prohibitions against uncompensated takings of private property contained in the State and Federal Constitutions, addresses such conflicts.<sup>1</sup>

The Landmarks Law provides relief for commercial property owners who demonstrate to the satisfaction of the LPC that their property cannot earn a “reasonable return” as a result of the impact of the regulations. N.Y.C. Admin. Code § 25-309(a)(1).<sup>2</sup> The statute also addresses a narrow situation concerning non-profit owners: if the enforcement of the Landmarks Law renders the property unsuitable for the use to which it is currently devoted, as well as the use to which the owner devoted it to at the time of purchase, and the property would not yield a reasonable return for a commercial owner, the LPC may modify the restrictions on the property to facilitate a sale or long-term lease to another owner if the applicant can demonstrate that such sale or lease is contingent upon relaxation of the restrictions. N.Y.C. Admin. Code § 25-309(a)(2).<sup>3</sup>

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<sup>1</sup> References to the Constitution are to both the United States Constitution and the New York State Constitution. Unless otherwise indicated, we refer to the “takings” clauses of the U.S. Const. 5<sup>th</sup> Amendment as applied to the States through the 14<sup>th</sup> Amendment, and N.Y.S. Const. Art. I § 7.

<sup>2</sup> A “reasonable return” is defined by the statute as “a net annual return of six percent of the valuation of an improvement parcel.” N.Y.C. Admin. Code § 25-302(v)(1).

<sup>3</sup> St. Vincent’s did not invoke, and the LPC did not address, this section of the statute. Apparently, St. Vincent’s does not intend to transfer ownership of the O’Toole Building, so this section is inapplicable.

Because neither of those statutory provisions applies to its claim, Saint Vincent's Catholic Medical Centers of New York, d/b/a Saint Vincent's Catholic Medical Centers ("St. Vincent's") has invoked a judicially created hardship test first announced in Matter of the Trustees of Sailors' Snug Harbor in the City of New York v. Platt, 29 A.D.2d 376, 288 N.Y.S. 2d 314 (1st Dept. 1968) (the "judicial test"). In that case, the Appellate Division concluded that the non-profit owner of a landmark site would suffer an unconstitutional taking if application of the Landmarks Law would prevent it from performing its charitable functions on the property subject to the restriction. Snug Harbor, 29 A.D.2d at 378, 288 N.Y.S. 2d at 316. Accordingly, the Court held, the statute must be read to authorize the LPC to allow non-profit owners who wish to retain their property to make modifications necessary to accommodate their charitable use if strict application of the Landmarks Law would otherwise "prevent or seriously interfere" with such use. Id. The Snug Harbor court authorized the LPC to avoid an unconstitutional taking as measured by the then-applicable legal standard, namely whether the regulation goes "too far" in depriving the owner of its ability to perform its charitable mission. Id. (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)). In the decades since Snug Harbor, the hardship analysis has evolved to reflect an increasingly more precise and exacting regulatory takings standard. Takings analysis now hinges primarily on the "the severity of the impact of the law" on an owner's parcel. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978).<sup>4</sup> Pursuant to Penn Central, a regulatory taking is determined by an "ad hoc, factual

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<sup>4</sup> In Penn Central, the Court unambiguously endorsed historic preservation as a means of enhancing "the quality of life by preserving the character and desirable aesthetic features of a city," 438 U.S. at 129, and noted that the Landmarks Law, more than merely assuring a benefit to New Yorkers, is rightfully understood as preventing the harm to the public which stems from demolition of the City's historic resources, for it "[cannot] be asserted that the destruction or fundamental alteration of a historic landmark is not harmful." Id. at 133 n.30. The Court also discussed the reciprocity of advantage inherent in historic districts, as opposed to individual

inquir[y]” that considers the economic impact of the regulation, the investment-backed expectations of the owner and the character of the government action. Id. at 124. In the case of property owned by non-profits, the takings analysis turns largely on “whether the land-use regulation impairs the continued operation of the property in its originally expected use” and whether the owner can continue to use the property in the way that it has been using it. Rector, Wardens, and Members of the Vestry of St. Bartholomew’s Church v. City of New York, 914 F.2d 348, 356-57 (2d Cir. 1990).

The Snug Harbor court saw the non-profit hardship exception as a constitutional limitation to the Landmarks Law imposed by the Takings Clause. The decision does not, however, authorize the LPC to afford an owner greater relief than the Constitution requires. Indeed, the Commission would violate its statutory obligation to prevent the inappropriate alteration or destruction of protected structures if it were to grant relief beyond that which prevents a taking. Yet that is precisely what the LPC has done in this case: rather than apply current takings law to determine whether restrictions imposed by the landmarks regulations effect a taking of a building within an historic district, the Commission instead misapplied the judicial test and invented an exception to the hardship doctrine that goes far beyond what is required to avoid a Fifth Amendment taking. In breaking the hardship doctrine’s link to the Takings Clause, the LPC made an error of law, and acted arbitrarily and capriciously and contrary to its legislatively mandated duty to protect New York City’s landmarks. Its decision, accordingly, must be invalidated.

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landmarks, concluding that where the regulations are not imposed upon a single parcel, any “abstract decrease in value [stemming from the designation] will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties.” Id. at 140.

## **IDENTITY AND INTEREST OF AMICI**

Amici share a special interest in this matter, in part because of their longstanding dedication to preserving historic districts, but also because the LPC's action, if permitted to stand, would significantly weaken the ability of the Commission to protect New York City's most valuable historic resources by establishing adverse precedent that other non-profit institutions could use to justify destruction of protected property in their own real estate portfolios.

The Municipal Art Society of New York ("MAS") was an active proponent of the adoption of the Landmarks Law, and has remained an advocate for historic preservation in New York City since that law was enacted. To that end, MAS has participated as amicus curiae in nearly every significant litigation involving New York City's Landmarks Law.

The New York Landmarks Conservancy (the "Landmarks Conservancy") was founded in 1973 with a singular mission: to promote and facilitate the maintenance and restoration of historic properties through unique financial and technical programs, and advocacy at all levels of government. The Landmarks Conservancy has loaned and granted some \$33 million to property owners of all types; led efforts to landmark the public rooms of The Plaza Hotel and continues to work for the creation of Moynihan Station within the landmark Farley Post Office. The Landmarks Conservancy has participated in major preservation legal battles involving Grand Central Terminal, St. Bartholomew's Church and Ellis Island.

The following organizations also wish to be recognized as amici:<sup>5</sup>

The National Trust for Historic Preservation (the "National Trust") is a private non-profit organization chartered by Congress in 1949 to "facilitate public participation" in historic

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<sup>5</sup> The indicated additional organizations do not appear by counsel.

preservation, and to further the historic preservation policies of the United States. See 16 U.S.C. § 468. The National Trust has a particular interest in this matter because of the far-reaching impact that judicial affirmation of the LPC's "campus" exception could have on the application of local historic preservation ordinances throughout the United States. With the support of its 250,000 members nationwide, including more than 20,000 members in the State of New York, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. The National Trust has a long record of involvement in historic preservation litigation in New York.<sup>6</sup>

The Preservation League of New York State ("PLNYS") was established in 1974 to raise a unified voice for historic preservation in New York State. PLNYS, by and on behalf of its statewide membership promotes and assists in the preservation and restoration of historically and/or architecturally significant buildings, districts, sites and areas throughout New York State. By leading a statewide movement, sharing information and expertise, and through litigation, where necessary and appropriate, PLNYS promotes historic preservation as a tool to revitalize the Empire State's neighborhoods and communities.

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<sup>6</sup> Most recently, the National Trust participated as amicus curiae in Landmark West! v. Burden, 15 A.D.3d 308, 790 N.Y.S.2d 107 (App. Div.), *appeal denied*, 5 N.Y.3d 713, 840 N.E.2d 132, 806 N.Y.S.2d 163 (N.Y. 2005). Additionally, the National Trust, often in conjunction with the Preservation League of New York State, has participated in the following cases in New York state courts as *amicus curiae*: Aurora Coalition v. Village of Aurora, 292 A.D.2d 848, 738 N.Y.S.2d 637 (4<sup>th</sup> Dept. 2002), *appeal denied*, 98 N.Y.2d 608, 746 N.Y.S.2d 692 (2002); Save Our Main Street Buildings, Inc. v. Greene County Legislature, 293 A.D.2d 907, 740 N.Y.S.2d 715 (3d Dept. 2002), *appeal denied*, 98 N.Y.2d 609, 747 N.Y.S.2d 409 (2002); Teachers Ins. & Annuity Ass'n v. City of New York, 82 N.Y.2d 35, 603 N.Y.S.2d 399 (1993); 383 Madison Assoc's v. City of New York, 193 A.D.2d 518, 598 N.Y.S.2d 180 (1<sup>st</sup> Dept. 1993), *review denied*, 82 N.Y.2d 664, 610 N.Y.S.2d 151, *appeal dismissed*, 82 N.Y.2d 748, 602 N.Y.S.2d 806 (1993), *cert. denied*, 511 U.S. 1081 (1994); Shubert Organization, Inc. v. Landmarks Preservation Comm'n, 166 A.D.2d 115, 570 N.Y.S.2d 504, *appeal dismissed*, 78 N.Y.2d 1006, 575 N.Y.S.2d 456, *review denied*, 78 N.Y.2d 751, 570 N.Y.S.2d 504 (1991), *cert. denied*, 504 U.S. 946 (1992); Lutheran Church v. City of New York, 35 N.Y.2d 121, 359 N.Y.S.2d 7 (1974).

The Greenwich Village Society for Historic Preservation (“GVSHP”) was founded in 1980, and works to preserve the architectural heritage and cultural history of Greenwich Village, the East Village and NoHo, and to promote sound preservation and planning policies. Representing an area with multiple non-profit and educational institutions, GVSHP is interested in this matter because of the far-reaching impact the LPC's ruling in this case could have on the efficacy of New York City's Landmarks Law.

The Brooklyn Heights Association (“BHA”) is a not-for-profit neighborhood association dedicated to the preservation of historic resources in Brooklyn Heights, New York City's first historic district. Beginning in 1959, the BHA was a principal advocate for including provision for historic districts in a landmarks law and was the first district to be so designated (November 23, 1965.) Within the boundaries of the Brooklyn Heights Historic District there are numerous non-profit landowners who might attempt to use the Commission's campus-based rationale as adverse precedent to justify destruction of historic resources in their real estate portfolios.

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 Community Board, Art Commission and City Council in its effort to strike the right balance between the preservation and renewal of Manhattan's Upper East Side. Because the Upper East Side contains six historic districts, many of which are home to large non-profit institutions, Friends is particularly concerned the LPC's determination might upset that balance, and urges this court to reject the “campus” rationale offered by the LPC as grounds for the demolition of the O'Toole Building.

## BACKGROUND

The Landmarks Law was adopted in 1965 in response to extensive and longstanding grassroots and political advocacy, as well as the catalyzing influence of the oft-regretted demolition of Penn Station. The law's design was to preserve not only individual landmarks, but also historic districts. Inspired by the example of New Orleans' French Quarter, the Landmarks Law recognized that buildings with a range of aesthetic and historic values could, as an ensemble, define a unique and significant neighborhood.

The drafters of the Landmarks Law 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.” N.Y.C. 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, and established the LPC 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... .” N.Y.C. Admin. Code § 25-301(b).

The LPC established the Greenwich Village Historic District in 1969. (I. R. 1-57).<sup>7</sup> Defining the outer boundaries of historic districts is often quite difficult, as the character of a neighborhood seldom stops at a precise point. In the case of the Greenwich Village Historic

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<sup>7</sup> Citations to the Record of Proceedings before the Landmarks Preservation Commission Regarding the St. Vincent's Catholic Medical Center, volumes I – XXIX, pages 1 – 7877, are noted by a volume number, followed by an R, followed by the appropriate page number.

District, the Commission decided to include not just the traditional row houses and iconic streets that make up the district's core, but to extend the boundaries beyond the district's obvious features, incorporating a heterogeneous array of cultural, architectural and historic resources. (I. R. 1-57). The Commission noted in the Greenwich Village Designation Report (the "Designation Report") that "it is the summation of [the district's] qualities which make it such a memorable district, one which is not merely worthy of preservation but one which must be preserved at all costs." (I. R. 6). Although anyone touring the district will recognize that some structures contribute more than others to the ambience of the entirety, the Commission emphasized in the Designation Report that "the overriding consideration in creating an Historic District is the protection of an *entire outstanding area*." (I. R. 7) (emphasis added). That report stresses the Commission's purpose to "halt the piecemeal destruction" of the historic district, (I. R. 7), and to "check that process of attrition which eats away at [New York City's] best neighborhoods, bit by bit, piece by piece." (I. R. 6).

The boundaries of the carefully drawn district included the eight buildings then owned by St. Vincent's hospital, all located on the east side of Seventh Avenue, south of 12<sup>th</sup> Street.<sup>8</sup> (I. R. 28). Also included within the district's boundaries is the National Maritime Union / Joseph Curran Building, now referred to as the Edward and Theresa O'Toole Medical Services Building (the "O'Toole Building"), which is located on the west side of Seventh Avenue, north of 12<sup>th</sup> Street.<sup>9</sup> (I. R. 28).

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<sup>8</sup> Of the eight buildings originally designated, six remain. Two of the original eight were demolished in the 1980s: the Lowenstein building, which was replaced with what is now known as the Coleman building; and the Seton building, which was replaced with the Link building.

<sup>9</sup> The LPC lauded the O'Toole Building as a "striking contemporary structure" when it established the Greenwich Village Historic District in 1969. (I. R. 35-36). Further, the LPC recognized the O'Toole Building as a contributing resource to the historic district when it determined that St. Vincent's would not be permitted to demolish it pursuant to a Certificate of



St. Vincent's purchased the O'Toole Building four years after the Commission included it within the Greenwich Village Historic District. (XXI. R. 5381). St. Vincent's then adapted the O'Toole Building's interior so that it could be used for doctors' offices and as an outpatient clinic. (XXI. R. 5384). In 1979, the City Planning Commission allowed St. Vincent's to treat its properties on both sides of Seventh Avenue as a "large scale community facility development." Resolution of the City Planning Commission pursuant to Section 79-21 of the Zoning Resolution, August 20, 1979 (the "City Planning Resolution") (*annexed*). As is permitted under that zoning status, N.Y. City Zoning Resolution § 79-21, St. Vincent's pooled the air rights of all of the structures on these sites, including those from the O'Toole Building, and used them to expand its hospital complex on the east side of Seventh Avenue. (XXI. R. 5381).

St. Vincent's has alleged that its hospital facilities, located on the east side of Seventh Avenue, suffer various structural, mechanical and architectural deficiencies, rendering them unsatisfactory for modern hospital care. (VIII. R. 2058-74). According to St. Vincent's Existing Facility Condition Report (the "Facility Report"), the hospital facilities are "an assemblage of 8 distinct buildings," (VIII. R. 2066), which include the Spellman and Cronin buildings on 11<sup>th</sup> Street, the Nurses Residence and Reiss building on 12<sup>th</sup> Street, and the Link, Coleman and the Smith & Raskob buildings on Seventh Avenue (the "hospital complex"). (VIII. R. 2059-63). Notably, the Facility Report does not include the O'Toole Building, located on the west side of Seventh Avenue, as among the buildings that make up the hospital complex which St. Vincent's claims is obsolete, and St. Vincent's omits the O'Toole Building in its discussion of the inadequacy of "St. Vincent's Hospital" and "the existing hospital complex." (VIII. R. 2058-74). Indeed, in its Statement of Findings In Support of An Application For A Notice To Proceed

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Appropriateness. (XXIV. R. 6330-6385) (XXI. R. 5383). Thus, regardless of any debate over the building's architecture, the LPC is charged with protecting it as an historic resource.

Under Section 25-309 of the Administrative Code of the City of New York (the “Hardship Statement”), the hospital concedes that the O’Toole Building does not provide “any services... associated with St. Vincent’s Hospital role as an acute care and trauma center.” (XI. R. 2846).

As part of its effort to remedy the inadequacy of the eight-building hospital complex, St. Vincent’s submitted a series of applications to the LPC. The hospital sought Certificates of Appropriateness to demolish the “eight existing buildings comprising the Main Hospital Site” and replace them with a residential development. (I. R. 191). It also applied for a Certificate of Appropriateness to demolish the O’Toole Building and replace it with a full hospital and acute care and trauma center.<sup>10</sup> (I. R. 191-200). St. Vincent’s proceeded in that fashion in order to sell the site hosting the hospital complex on the east side of Seventh Avenue to a developer, then use the proceeds from that sale to demolish the O’Toole Building and construct a new hospital on the site. Once the new hospital is constructed, St. Vincent’s will close the old facility, and the developer will construct a luxury apartment complex on that site, demolishing some but not all of the existing structures. (I. R. 154).

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<sup>10</sup>Application for a certificate of appropriateness pursuant to N.Y.C. Admin. Code § 25-307 is a necessary precursor to an application for hardship relief pursuant to § 25-309. Section 25-307 states that when an applicant has submitted a permit to construct, reconstruct, alter or demolish any improvement or landmark site, “the commission shall determine whether the proposed work would be appropriate for and consistent with the effectuation of the purposes of [the Landmarks Law]. If the commission’s determination is in the affirmative on such question, it shall grant a certificate of appropriateness, and if the commission’s determination is in the negative, it shall deny the applicant’s request, except as otherwise provided in section 25-309 of [the Landmarks Law].” N.Y.C. Admin. Code § 25-307(a). The LPC is statutorily required to consider the following criteria in determining appropriateness: “(a) the effect of the proposed work in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done and (b) the relationship between the results of such work and the exterior architectural features of other, neighboring improvements in such district.” N.Y.C. Admin. Code § 25-307(b)(1). “In appraising such effects and relationship, the commission shall consider, in addition to any other pertinent matters, the factors of aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color.” N.Y.C. Admin. Code § 25-307(b)(2).

The LPC indicated at a public hearing on May 6, 2008, that the O'Toole Building could not be demolished under a Certificate of Appropriateness because of its significant contribution to the district, (XXI. R. 5383), and also suggested that demolition was appropriate for only four of the eight existing buildings that make up the hospital complex. (XXIV. R. 6382-83). Before the LPC took a formal vote on the applications, on May 12, 2008, St. Vincent's applied to demolish the O'Toole Building on hardship grounds, invoking the standard announced in Snug Harbor. (XI. R. 2847).

The LPC had not decided a non-profit's hardship application in nearly twenty years.<sup>11</sup> (I. R. 56-61). After a series of public hearings and meetings, the Commission approved St. Vincent's hardship application by the narrow vote of six to four on October 28, 2008. (XVIII. R. 7459-62).

Several months later, on May 12, 2009, the Commission issued its Final Determination of the Application For a Certificate of Appropriateness or Notice To Proceed To Demolish a Designated Building Pursuant To Section 25-309 of The Landmarks Law (the "Final Determination") (XXI. R. 5380-88). The Commission stated in the Final Determination that it relied on the judicial hardship analysis applicable to charitable organizations that was first announced in Snug Harbor and "was adopted and further elaborated by the Second Circuit in [Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990)]." (XXI. R. 5382). The LPC did not indicate, however, that the Second Circuit actually applied a far more exacting standard than the Snug Harbor court, as it

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<sup>11</sup> Before St. Vincent's filed its application to demolish the O'Toole Building pursuant to hardship, the last hardship application filed with the LPC was in 1993. That application, however, was withdrawn by the applicant in June of 1994. (I. R. 61). Until this matter, the last consideration of the judicial test for hardship by a New York court was in 1990, when the United States Court of Appeals for the Second Circuit ruled in Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990).

was required to do after the United States Supreme Court clarified the regulatory takings analysis in Penn Central in the interim between the two cases.

The Commission did not consider, as it must, whether the O'Toole Building would be "taken" by enforcement of the regulations imposed upon it by the Landmarks Law. Instead, in making its Final Determination, the LPC found that "the O'Toole Building is part of St. Vincent's campus located in adjacent and contiguous buildings on West 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> Streets," (XXI. R. 5381), and then used the alleged "campus" as a fulcrum for allowing demolition of any improvement on the alleged "campus" if necessary to relieve hardship affecting any other improvement on the "campus" the demolition of which it found to be impracticable (a theory referred to herein as the "campus-transfer rationale" or the "campus-transfer"). St. Vincent's did not describe the O'Toole Building as part of a "campus" in its applications for demolition (I. R. 191-200) and the LPC made no mention that it was treating the properties as a "campus" when it issued its preliminary determination of hardship on October 28, 2008. (XXVIII. R. 7391-7624). Indeed, neither St. Vincent's nor the LPC discussed this campus-transfer theory at the public hearing stage of the hardship evaluation process, during which time the record was open and the public might have commented on its reasonableness, and consequences. The LPC has not referred to multiple properties owned by a non-profit as a "campus" in its previous hardship determinations; nor does the Landmarks Law, or any of the cases discussing the hardship doctrine, authorize the LPC to consider disparate properties as a "campus" for purposes of determining hardship.

Nevertheless, the LPC's Final Determination states that "the commission has interpreted the judicial hardship test to apply to the *entire campus* and to permit the demolition of other buildings on the campus [i.e., the O'Toole Building], if St. Vincent's could demonstrate that the

existing hospital and emergency facilities are so inadequate as to satisfy the judicial hardship test, *notwithstanding that these other buildings might be capable of continuing their current uses.*” (XXI. R. 5383) (emphasis added). Thus, according to the LPC, a finding that one or more buildings on a “campus” are inadequate for their purpose allows the owner to demolish other buildings on that “campus” even where administration of the Landmarks Law has not been found to impose a hardship with respect to those buildings themselves.

## ARGUMENT

The takings jurisprudence on which the judicial test for hardship turns provides a framework to guide the proper analysis of whether a regulation effects a taking. The United States Supreme Court’s precedents “stake out two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes. First, where a government requires an owner to suffer a permanent physical invasion of her property – however minor – it must provide just compensation. A second categorical rule applies to regulations that completely deprive an owner of ‘all economically beneficial use’ of her property.” Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005) (internal citations omitted) (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992)). “Outside these two relatively narrow categories (and the special context of land-use exactions...), regulatory takings challenges are governed by the standards set forth in [Penn Central].” Id. New York courts employ 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, 840 N.E.2d 68, 84-85 (N.Y. 2005).

Penn Central requires an “essentially ad hoc, factual inquir[y]” which examines “the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations,” as well as the “character of the government action.” Penn Central, 438 U.S. at 124. While “the Penn Central factors...have served as the principal guidelines for resolving regulatory takings claims,” Lingle, 544 U.S. at 539, “the Supreme Court has recognized that there is no magic formula for determining when a taking has occurred,” Rector, Wardens, and Members of the Vestry of St. Bartholomew’s Church v. City of New York, 728 F.Supp. 958, 966 (S.D.N.Y. 1989), *aff’d*, 914 F.2d 348 (2d. Cir. 1990), and courts have stressed the “ad hoc” and multi-faceted nature of takings analysis.

Because the Penn Central analysis is framed in terms of economic impact, courts have had to extrapolate from its reasoning the appropriate parameters to use when evaluating whether a non-profit owner’s property has been taken. In Rector, Wardens, and Members of the Vestry of St. Bartholomew’s Church, the Second Circuit noted that “central to the [United States Supreme] Court’s holding [in Penn Central] were the facts that the regulation did not interfere with the historical use of the property and that the use continued to be economically viable.” 914 F.2d at 356. The St. Bartholomew’s Court determined that in “applying the Penn Central standard to property used for charitable purposes, the constitutional question is whether the land-use regulation impairs the continued operation of the property in its originally expected use,” and that “[s]o long as the [non-profit owner] can continue to use its property in the way that it has been using it...there is no unconstitutional taking.” *Id.* at 356-57.

Since the announcement of the judicial test in Snug Harbor, the Supreme Court also has made clear that the takings analysis must focus on the appropriate unit of property. Landowners

may not segment parcels to increase the likelihood that the application of a regulation will be held to have effected a taking of their property. Similarly, in a hardship determination, which is necessarily parallel to the takings determination, a landowner may not combine parcels to bolster its argument that hardship relief is warranted.

In applying hardship relief pursuant to the judicial test, the LPC, and this court, must tread a thin line between competing but equally compelling rights – the public’s interest in preserving historic resources and an owner’s interest in using its property as it wishes. If the LPC applies the hardship test too leniently, as it did here, an owner is unnecessarily, and impermissibly, allowed to harm the public by destroying a protected structure. If, conversely, the agency applies the test too stringently, an individual is forced “to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” Armstrong v. United States, 364 U.S. 40, 49 (1960).

The LPC’s determination that St. Vincent’s is entitled to demolish the O’Toole Building on hardship grounds materially departs from the relevant takings (and therefore hardship) framework, and, accordingly, was arbitrary and capricious and an error of law.<sup>12</sup> The agency

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<sup>12</sup> The standard of review in this instance is prescribed by New York’s Civil Practice Law and Rules § 7803(3), which states that “the only questions that may be raised in a proceeding under this article are ... whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion....” Conversely, relief under subsection (4) of § 7803, which invites a determination of whether an agency decision is grounded in substantial evidence, is appropriate where a proceeding is quasi-judicial. Application of the substantial evidence test is inappropriate where, as here, “[t]he public hearing provided for...is not the sort of adversary hearing involving cross-examination and the making of a record as is contemplated under C.P.L.R. § 7803(4).” Lutheran Church, 316 N.E.2d at 310, n.2, 35 N.Y.2d at 128 n.2 (N.Y. 1974). Nevertheless, the § 7803(3) standards incorporate the “substantial evidence” test as to adjudicated matters even if the hearing was conducted with lesser formality than is contemplated by § 7803(4). See, Pell v. Board of Ed. of Union Free School Dist. No. 1 of the Towns of Scarsdale and Mamoroneck, Westchester County, 34 N.Y.2d 222, 313 N.E.2d 321 (N.Y. 1974), Society for Ethical Culture v. Spatt, 425 N.E.2d 922, 51 N.Y.2d 449 (N.Y. 1980).

failed to recognize that the ruling in Snug Harbor provided for hardship relief only where an application of the Landmarks Law would effect a taking, and ignored the fact that the Snug Harbor analysis is inextricably intertwined with takings jurisprudence. Under that jurisprudence, St. Vincent's did not make the case that enforcement of the Landmarks Law would effect a taking of the O'Toole Building, so the LPC's finding that hardship relief was merited was arbitrary and capricious. Further, the LPC's invention of a campus-based exception to the judicial test flies in the face of the United States Supreme Court's repeated admonitions that property owners may not gerrymander the definition of their property, and is contrary to the language of the Landmarks Law, as well as forty years of the state and federal courts' application of the judicial hardship test. The LPC's decision to grant a hardship exception when it was neither constitutionally nor legislatively required to do so was erroneous. While an agency's determination should not be "disturbed if it has a rational basis in the record, a reasonable basis in the law, and is neither arbitrary nor capricious," Villas of Forest Hills Co. v. Lumberger, 128 A.D.2d 701, 703, N.Y.S. 2d 116, 118 (1st Dept. 1987), "[i]n an Article 78 proceeding, the reviewing court does not act as a rubber stamp, but, rather, exercises a genuine function and does not confirm a determination simply because it was rendered by an administrative agency." SoHo Community Council v. New York State Liquor Authority, 173 Misc. 2d 632, 635, 661 N.Y.S.2d 694, 696 (Sup. Ct., New York County 1997).<sup>13</sup>

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<sup>13</sup> The arbitrary and capricious test requires a reviewing court "to engage in a substantial inquiry," involving "a thorough, probing, in-depth review" even where neither the substantial evidence test nor de novo review are employed. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977). This is of particular importance where, as here, the applicable substantive law imposes an exacting standard to balance the public interest in preserving historic resources against an owner's property rights, as the hardship test does. The extent to which the court must comb through the administrative record to ensure that an historic preservation agency has adequately considered the evidence before it, including evidentiary inconsistencies, is well



**I. THE COMMISSION ERRED AS A MATTER OF LAW BY ALLOWING ST. VINCENT’S TO DEMOLISH THE O’TOOLE BUILDING ON THE BASIS OF HARDSHIP WITHOUT DETERMINING WHETHER APPLICATION OF THE LANDMARKS LAW WOULD EFFECT A TAKING OF THAT BUILDING**

**A. The Snug Harbor Hardship Test Has Evolved With Takings Jurisprudence.**

A few years after the passage of New York City’s Landmarks Law, a charitable organization dedicated to the care of retired seamen challenged the designation of buildings it owned, and the subsequent restrictions on the demolition and redevelopment of those buildings, as an unconstitutional taking. The Snug Harbor court noted the Landmarks Law’s hardship exception for commercial properties, and sought to fill the statute’s omission of such an exception for properties owned by non-profits. The court framed the LPC’s duty, and authority, in terms of the prevailing takings standard: “the question presented is whether in the particular instance regulation goes so far that it amounts to a taking. If it does, it is constitutionally prohibited.” Snug Harbor, 29 A.D.2d at 376, 288 N.Y.S. 2d at 314 (quoting Pennsylvania Coal, 260 U.S. at 415). Writing when historic preservation and landmarks jurisprudence was sparse, and regulatory takings law was relatively undeveloped, the Appellate Division reasoned that if the statutory definition of a hardship for commercial owners is whether “the continuance of the landmark prevents the owner from obtaining an adequate return,” then the “comparable test for a charity” would be whether the Landmarks Law “either physically or financially prevents or seriously interferes with carrying out the charitable purpose.” Id.

Snug Harbor stands for the proposition that where strict enforcement of the Landmarks Law goes so far that it would effect a taking, the property owner is entitled to relief pursuant to

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illustrated by the District Court’s thorough review in St. Bartholomew’s, 728 F.Supp at 967-74, and by Cornell University v. Beer, 16 A.D.3d 890, 791 N.Y.S.2d 682 (3d Dept. 2005).

the judicial hardship test. The Snug Harbor court followed a well-established pattern in tying variances and other exceptions to takings jurisprudence – the Standard State Zoning Enabling Act that formed the basis of most early zoning regulations had recommended that local governments be authorized to grant variances where the strict application of the regulation would effect a taking.<sup>14</sup> Variances and other exceptions were thus seen as “safety valves” to prevent local governments from suffering liability for takings in those instances in which strict application of the regulations would trigger the Fifth Amendment’s compensation requirements. See Deon v. Town of Brookhaven, No. 2005-13119, 2006 WL 2373430 at \*5 (Sup. Ct., Suffolk County, August 14, 2006) (noting that “variances serve as a safety valve, providing an administrative forum for relief which otherwise might only be obtainable in an action for a judgment declaring a zoning law unconstitutional as applied to a parcel of property.” (internal citations omitted)). Necessarily, the standard for such exceptions must follow takings jurisprudence, or the exceptions will either fall short of, or exceed, their purpose of avoiding takings liability. Of course, the state legislature may authorize the more liberal grant of variances, and the local government, where so authorized, may promulgate standards for the grant of variances that go beyond the Constitution’s requirements. Where the variance or hardship provision is read into a statutory scheme by a court, however, it must be tied to the takings standard, or the court will encroach upon the legislature’s powers.

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<sup>14</sup> See Carol M. Rose, Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy, 71 Cal. L. Rev. 837, 857 (1983) (“In the early SZE model of land use control, the variance process allowed exceptions from general zoning regulations where, due to special circumstances, the owner of a particular property would suffer special hardship by the strict application of the general ordinance, and where relaxing the regulation would not be ‘contrary to the public interest.’ In such hardship cases, the possibility of getting a variance allayed charges that the general ordinance was an unconstitutional ‘taking’ of property.”).

Accordingly, state and federal courts have continued to employ Snug Harbor in determining whether hardship relief is warranted, but have applied the underlying takings standard reflected in case law as it has evolved since the hardship test was first announced. In Lutheran Church in America v. City of New York, 316 N.E.2d 305, 35 N.Y.2d 121 (1974), the New York Court of Appeals explicitly adopted the Snug Harbor standard, declaring that “where designation would prevent or seriously interfere with the carrying out of [a non-profit organization’s] charitable purpose it would be invalid.” Id. at 311, 35 N.Y.2d at 131. The court properly framed the issue by reference to the takings test: did the church, a non-profit landowner whose use was severely restricted by a designation, suffer a taking so as to warrant hardship relief? The court found that the designation of the church property was so onerous that it did indeed qualify as a “naked taking,” and accordingly found hardship relief pursuant to Snug Harbor appropriate. Id. In concluding that hardship relief was warranted, the court focused on the fact that absent relief, “the use to which the property [had] been put ...would have to cease....” Id. at 310, 35 N.Y.2d at 129. The court also stressed that the property at issue was designated as a landmark long after the church began to use the parcel and noted that when it purchased the property, the church had no reason to expect limitations on its use. Id. at 307, 35 N.Y.2d at 124.

Subsequent to the Court of Appeals’ ruling in Lutheran Church, the United States Supreme Court, in Penn Central, made clear that determining whether a regulatory restriction so affects the value of property that the restriction constitutes a taking necessarily involves a case by case, multi-factor analysis. See 438 U.S. at 124. The Court identified three factors of particular significance to the inquiry: the economic impact of the regulation on the claimant, the extent to which the regulation interfered with “distinct investment backed expectations” and the

character of the government action. Id. The property at issue in Penn Central was owned by a for-profit entity, and the Court did not specifically address how the standards it articulated would apply to non-profit owners.

Shortly after Penn Central, the New York Court of Appeals was again confronted with a non-profit owner's opposition to a landmark designation. In Society for Ethical Culture v. Spatt, 425 N.E.2d 922, 51 N.Y.2d 449 (N.Y. 1980), the Society brought an Article 78 proceeding to annul the LPC's designation of its property. The Court of Appeals found that the application of the Landmarks Law "withst[ood] constitutional scrutiny" and noted that the Society had not demonstrated that the restrictions on the landmarks structure would "cause the charitable activity at that location to cease," as it had in Lutheran Church. Id. at 936, 51 N.Y.2d at 455. The court also stressed that the activities undertaken within the landmark were not wrongfully disrupted, "but rather the complaint is instead that the landmark stands as an effective bar against putting the property to its most lucrative use. *But there simply is no constitutional requirement that a landowner always be allowed his property's most beneficial use.*" Id., 51 N.Y.2d at 456 (emphasis added).

Following Society for Ethical Culture, the Supreme Court of New York was called upon to review a decision of the LPC in 1025 Fifth Avenue Associates, Inc. v. Marymount School of New York, 123 Misc.2d 756, 475 N.Y.S.2d 182 (Sup. Ct., New York County 1983). In Marymount, the LPC permitted the school, which was in an historic district, to build a rooftop addition pursuant to the judicial hardship test, and a neighboring homeowner's association challenged that decision. In applying the hardship standard, the LPC concluded that "the improvement had ceased to be adequate, suitable or appropriate *for carrying out the purposes to which it is now, and since acquisition, has been devoted.*" Id. at 759, 475 N.Y.S.2d at 184

(emphasis added). The Marymount court determined that the LPC had correctly applied the constitutional analysis when it granted hardship relief.

In St. Bartholomew's, the Second Circuit considered the judicial hardship test, and the appropriate application of its underlying takings analysis. In that case, St. Bartholomew's Church claimed that the LPC had violated the First, Fifth and Fourteenth Amendments when it denied the church's application to demolish part of its landmarked complex. St. Bartholomew's, 914 F.2d at 350. The church believed that its community house, adjacent to its primary place of worship and designated as part of the historic site, had become inadequate for church purposes and therefore could be demolished. Id. at 351-52. The church planned to replace the community house with a large office tower, and use the proceeds from that commercial use, as well as some of the physical space in the tower, to further the church's charitable mission. Id. at 351-52. Upholding the LPC's denial of a Final Determination pursuant to hardship, the Second Circuit reasoned that in applying the Penn Central standard so as to determine the appropriateness of hardship relief for a non-profit owner, the "constitutional question is whether the land-use regulation impairs the continued operation of the property in its originally expected use" and thereby effects an unconstitutional taking. Id. at 356. The Court noted that "although the regulation may 'freeze' the Church's property in its existing use and prevent the Church from expanding or altering its activities, Penn Central explicitly permits this." Id. "So long as the Church can continue to use its property in the way that it has been using it...there is no unconstitutional taking." Id. at 357. In framing its analysis, the Second Circuit relied on the reasoning of the district court, which had specifically focused on the impact that Penn Central had on Snug Harbor's hardship test:

At the outset it should be noted that the Supreme Court has never passed upon the constitutionality of a regulation, such as the landmark laws, as applied to the property of a charitable or religious institution. However, in dealing with commercial property, the Supreme Court has recognized that there is no magic formula for determining when a taking has occurred. Factors of particular significance, however, are the economic impact of the government action, *i.e.*, its interference with legitimate investment expectations, and the character of the government action....*These factors must be evaluated in light of the overriding rule that the Fifth Amendment contemplates continued use of a property as it was used in the past, and thus permits no substantial interference with the property owner's primary investment expectations or reasonable beneficial use. While the concept of legitimate investment expectations is not directly transferable to a charitable or religious institution, the concepts of reasonable beneficial use and the owner's primary expectations are equally applicable to both.*

St. Bartholomew's, 728 F.Supp. at 966 (emphasis added). Following the district court's reasoning, the Second Circuit applied the Penn Central factors to St. Bartholomew's Church and found that the historic designation did not effect a taking, and therefore upheld the denial of hardship relief. St. Bartholomew's, 914 F.2d at 357.

Thus, St. Bartholomew's indicates that assessments of whether a non-profit owner's property has been taken must focus primarily on "whether the land-use regulation impairs the continued operation of the property in its originally expected use" and whether it prevents the owner from "continu[ing] to use its property in the way that it has been using it." St. Bartholomew's, 914 F.2d at 356-57.<sup>15</sup> If it does, the landmarks designation is likely to be

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<sup>15</sup> In St. Bartholomew's, the Second Circuit examined whether, notwithstanding the landmarks regulations, the community house could continue to serve the church's current use of the building and also whether it could continue to serve the church's originally expected use of the property (in answer to the "constitutional question [of] whether the land-use regulation impairs the continued operation of the property *in its originally expected use*" the Court concluded that "the Landmarks Law does not effect an unconstitutional taking because the Church *can continue its existing charitable and religious uses* in its current facilities" St. Bartholomew's, 914 F.2d at 356-57 (emphasis added)) without clearly stating how the two uses relate. On the facts of St.

understood as taking the property and hardship relief is justified. In the absence of such a showing, however, no taking is threatened, and no hardship relief is warranted.<sup>16</sup>

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Bartholomew's (and, arguably, in the instant matter) it made no difference: the actual current uses were substantially identical to the originally intended uses. In Penn Central, 438 U.S. at 124, the United States Supreme Court made clear that both inquiries are relevant. Whether the regulation interferes with the building's current use speaks to the degree of impact upon the present value of the facility to its owner, a corollary to Penn Central's "economic impact" inquiry, 438 U.S. at 124. (See Lucas, 505 U.S. at 1017, expressing that value, for purposes of a takings analysis is not limited to monetary value but includes "beneficial use" as well). Whether the regulation interferes with the originally expected use is an application of Penn Central's "distinct investment-backed expectations" inquiry. Penn Central, 438 U.S. at 124.

<sup>16</sup> While not controlling in this instance, the statutory hardship provisions for non-profits planning to sell their property also support the position that an applicant, to obtain hardship relief, must demonstrate an inability to continue both the existing and originally intended charitable uses of the subject property. Those provisions explicitly premise hardship relief for non-profit owners on the ability of such owners to enjoy the initially contemplated and continued use of the landmark site at which the hardship is alleged. Section 25-309 of the Landmarks Law provides that where the non-profit owner of an historic resource would sell or lease its landmark site but for the fact that such sale or lease is contingent upon easing of the landmarks regulations, that owner must demonstrate to the LPC, among other things, that the improvement is inadequate, unsuitable or inappropriate for its current use, as well as those purposes to which it was devoted when acquired, unless the owner had abandoned that purpose. N.Y.C. Admin. Code § 25-309(a)(2). The conjunctive mandate that the improvement must be both ill-suited to its owner's use, as well as inappropriate for realizing the owner's purpose at the time of acquisition, fits neatly within the judicial test as spelled out in post-Penn Central case law, which posits that a taking occurs, and hardship relief is warranted, when the designation significantly interferes with the "reasonable beneficial use and the owner's primary expectations." St. Bartholomew's, 728 F.Supp. at 966.

**B. Because The Landmarks Regulations Have Not Been Shown to Effect a Taking of the O’Toole Building Under Current Takings Jurisprudence, the LPC’s Grant of Hardship Relief Was Erroneous.**

**1. The Landmarks Regulations Do Not Impose a Physical Occupation of the O’Toole Building Nor Do They Effect A “Total Taking” of the Property.**

The United States Supreme Court has announced two types of regulatory actions that effect a *per se* taking of private property. The first of these *per se* takings, announced in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), occurs when the “‘character of the governmental action’ is a permanent physical occupation of property.” Id. at 435 (quoting Penn Central, 438 U.S. at 124). In these cases, a taking has occurred without regard to the economic impact on the owner, id., and a court need not employ a Penn Central analysis to determine whether compensation is warranted. The Landmarks Law does not authorize a permanent physical occupation as contemplated in Loretto, and accordingly, this *per se* rule does not apply.

The second class of regulations that constitute a *per se* taking consists of those which eliminate “all economically beneficial use” of the subject property. Lucas, 505 U.S. at 1019. The Lucas rule was explained by the United States Supreme Court in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002), where the Court made clear that the holding in Lucas is “limited to ‘the extraordinary circumstances when no productive or economically beneficial use of land is permitted.’” Id. at 330 (quoting Lucas, 505 U.S. at 1017).<sup>17</sup> In framing its rationale for the *per se* rule in Lucas, the Court noted that “the

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<sup>17</sup> “To emphasize the word ‘no’ relative to productive use, the Court pointed to a footnote in Lucas which explained that the categorical rule would not apply if the diminution in value were



total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." Lucas, 505 U.S. at 1017. The Court continued that a regulation extends beyond standard legislative practice when it permits no "productive or economically beneficial use of land..." Id. The beneficial or productive uses contemplated by the Court include the charitable missions of non-profit institutions. Just as the St. Bartholomew's court measured the impact of a regulation on a charitable owner's continued use of the subject property as a proxy for "legitimate investment expectations," 728 F.Supp. at 966, the total deprivation of value examined under the Lucas rule is applied in this context to measure the owner's ability to continue in its charitable mission at the landmark site notwithstanding the impact of the regulation. Where, as here, a non-profit owner is not entirely divested of its ability to perform its charitable function within the landmark, the *per se* rule announced in Lucas does not apply and an analysis pursuant to Penn Central is required.<sup>18</sup>

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95% instead of 100%. Anything less than a 'complete elimination of value' or a 'total loss,' the Court acknowledged, would require the kind of analysis applied in Penn Central." Friedenburg v. New York State Dept. of Environmental Conservation, 3 A.D.3d 86, 95, 767 N.Y.S. 2d 451, 458 (2d Dept. 2003) (quoting Tahoe-Sierra, 535 U.S. at 330 (quoting Lucas, 505 U.S. at 1019 n.8)).

<sup>18</sup> The rule announced in Lucas reveals the need to read Snug Harbor in light of subsequent takings jurisprudence. Snug Harbor suggests that where an application of the Landmarks Law "seriously interferes" with a non-profit owner's ability to carry out its charitable purpose, the regulation has gone so far that it amounts to a taking, warranting hardship relief. Snug Harbor, 29 A.D.2d at 376, 288 N.Y.S. 2d at 314. The Lucas rule, articulated by the United States Supreme Court over twenty years after Snug Harbor, makes clear, however, that mere interference (even if "serious") cannot alone trigger *per se* takings liability, but must instead be evaluated according to the factors articulated in Penn Central. Because Lucas requires a Penn Central analysis absent a total wipeout of the property's productive use, Snug Harbor's "seriously interferes" standard would be in conflict with Lucas unless it is read in light of the takings cases the Supreme Court decided after Snug Harbor articulated its rule. The continuing influence of Snug Harbor and its progeny lies in their shared proposition that the judicial test turns on whether an application of the landmarks regulations effects a taking of the property at issue, and that the analysis employed to make such a determination is governed by contemporary takings jurisprudence.

**2. Penn Central is the Appropriate Test to Determine Whether Hardship Relief Should Be Granted, But the Commission Failed to Consider the Penn Central Factors.**

In determining whether a regulation effects a taking pursuant to the analysis set forth in Penn Central, a court must undertake an “ad hoc” examination of the regulation’s impact on the owner, especially whether the regulation interferes with legitimate investment-backed expectations. Penn Central, 438 U.S. at 124. This analysis derives from the “overriding rule that the Fifth Amendment contemplates continued use of a property as it was used in the past, and thus permits no substantial interference with the property owner’s primary investment expectations or reasonable beneficial use.” St. Bartholomew’s, 728 F.Supp. at 966. When considering the taking of a non-profit owner’s landmark site for hardship purposes, the Second Circuit has concluded that the outcome of the Penn Central inquiry depends in large part on “whether the land-use regulation impairs the continued operation of the property in its originally expected use,” St. Bartholomew’s, 914 F.2d at 356, and whether “the continued use for present activities is viable.” Id., at 357. Just as the investment-backed expectations of commercial owners must be reasonable, see Kaiser Aetna v. U.S., 444 U.S. 164 (1979), so too must the expectations of non-profit owners.

The LPC erred as a matter of law when it failed to employ this analysis in determining whether or not regulation of the O’Toole Building imposed a hardship. Indeed, the Commission’s analysis was in direct conflict with the applicable takings standard by allowing for demolition “notwithstanding that [the building ultimately demolished] might be capable of continuing [its] current use.” (XXI. R. 5383). Absent a valid finding that the O’Toole Building has been “taken” by the landmarks restrictions despite its ability to continue certain specific uses,

the Commission's granting of St. Vincent's application to demolish the O'Toole Building was arbitrary and capricious.

While the LPC found that St. Vincent's purchased the O'Toole Building for "general hospital and medical purposes," (XXI. R. 5384), the agency did not assess, as it was required to do, whether denial of the hardship exemption would interfere with the building's continued use for those purposes.<sup>19</sup> Nor did the applicant itself argue that the impact of the regulations on the O'Toole Building effected a taking. Instead, St. Vincent's focused its application and supporting testimony on the inadequacy of the hospital complex, and not the possible inadequacy of the O'Toole Building. In short, the LPC has not found, as it must, that the impact of the regulations upon the O'Toole Building precludes the hospital's ability to operate the building "in its originally expected use," or to "continue to use its property in the way that it has been using it." St. Bartholomew's, 914 F.2d at 356-57.

Where the landmarks regulations have not been found to preclude the continued or originally expected use of a property in furtherance of its non-profit owner's charitable mission, hardship relief to preclude an unconstitutional taking is not justified.<sup>20</sup> The LPC erred as a

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<sup>19</sup> The LPC found that the hospital acquired the O'Toole Building for general hospital and medical purposes (XXI. R. 5384), and, accordingly, it is that use which must be frustrated by the regulations. However, such a finding may not be supported by the evidence before the Commission. St. Vincent's purchased the O'Toole Building and soon thereafter converted the site's interior for use as outpatient facilities and doctors' offices. (XXI. R. 5384). This calls into question whether the building actually was intended for general hospital use, and the Commission should, upon remand, adequately examine the evidence before it in reaching such a determination. For instance, St. Vincent's was so certain that the O'Toole Building would continue to be used as an outpatient facility with doctors' offices, and not in some manner requiring substantially greater bulk, that it exploited the site's previously unused development rights to expand the hospital complex east of Seventh Avenue.

<sup>20</sup> In considering St. Vincent's primary expectations, it should be noted that the hospital bought the O'Toole Building with the landmarks regulations already in place. While this fact alone is not dispositive (a "claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction," Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001)), it

matter of law in applying the hardship test without incorporating modern takings jurisprudence into its analysis. Further, the LPC's determination that hardship relief was warranted without finding that the regulation effected a taking of the O'Toole Building itself was arbitrary and capricious.

**C. The LPC Erred as a Matter of Law in Aggregating the O'Toole Site and the Hospital Complex into a "Campus" for the Purposes of Determining Hardship.**

In its Final Determination, the LPC announced that "the O'Toole Building is part of St. Vincent's campus located in adjacent and contiguous buildings on West 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> Streets." (XXI. R. 5381). Further, the LPC announced that it "has interpreted the judicial hardship test to apply to the *entire campus* and to permit the demolition of other buildings [i.e., the O'Toole Building] on the campus, if St. Vincent's could demonstrate that the existing hospital and emergency facilities...satisfy the judicial test, notwithstanding that these other buildings might be capable of continuing in their current use." (XXI. R. 5383). The LPC contends that where an owner can demonstrate that maintenance of any of the buildings on its "campus" which cannot be demolished pursuant to a certificate of appropriateness seriously interferes with the carrying out of its charitable purpose, other buildings on that "campus" may be demolished as hardship relief notwithstanding the fact that those buildings themselves fail to meet the legal criteria for the hardship variance. The Commission's novel position flies in the

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does merit consideration in the context of St. Vincent's hardship application, for "the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of [the purchasing party's expectations]." *Id.* at 633 (O'Connor, J., concurring). This "temporal relationship between regulatory enactment and title acquisition" is a factor which courts consider in evaluating a takings claim. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 335-36 (2002).

face of forty years of case law surrounding the judicial hardship test. It is contrary to the takings law on which that relief is based, directly contravenes the Landmarks Law, and is grounded in the irrelevant and unsupported conclusion that St. Vincent's has traditionally maintained a "campus" on both sides of Seventh Avenue. As such, it is an error of law to consider St. Vincent's property, in the aggregate, as a "campus" for purposes of the hardship analysis, and arbitrary and capricious to justify hardship relief based upon that agency-created exception. Because the LPC's hardship determination rests on the impermissible exception it has carved out for "campuses," the agency's decision must be reversed.

**1. The Campus-Transfer Exception is Inconsistent with Takings Law, and by Extension the Hardship Test, Because it Allows the Property Owner to Manipulate the Definition of the Property at Issue.**

In asserting that a regulation has effected a taking, a property owner may not define the subject property in such a way that it is tailored to reflect the regulatory impact. The United States Supreme Court has long recognized that a takings inquiry that focuses on whether a regulation goes too far will depend upon an appropriate definition of the "denominator" against which the effect of the regulation on the property's value is to be measured. Lucas, 505 U.S. at 1016 n.7.<sup>21</sup> While the Court has been unable to draw a bright line rule about how best to define the denominator, a fundamental tenet of takings jurisprudence is that courts do not permit

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<sup>21</sup> Essentially, the so-called "denominator question" is whether the destruction of a particular property right, such as air rights, should be thought of as a taking of the property as a whole. Where the property right affected by the regulation, the "numerator," is characterized as the entirety of the owner's property subject to constitutional protection (i.e., the same as the "denominator") then takings liability is inevitable. Lucas, 505 U.S. at 1016 n.7. To avoid manipulation of the takings doctrine, therefore, courts do not permit owners to artificially tailor their property interest to match the right they allege is taken by a regulation.

property owners to “gerrymander” the boundaries of their property to bolster their takings claim. Usually, property owners try to carve their property into finer slices, and the courts have made clear that they will not tolerate such “conceptual severance” – the “stratagem of dividing a unitary property into its various component physical segments or its various integral property interests.” Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 488, 84 N.Y.2d 385, 402 (N.Y. 1994). As the Court announced in Penn Central: “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.” 438 U.S. at 130-31.

Courts prohibit manipulation of the definition of property because they recognize that conceptual severance would allow every plaintiff to segment its property according to the effects of a regulation, and thereby establish that a regulation destroys 100% of the segment’s value, triggering the government’s obligation to provide compensation. “[D]efining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every ... [regulatory restriction] would become a total ban.” Tahoe-Sierra, 535 U.S. at 331.

By combining the O’Toole Building with the hospital complex, the LPC has engaged in what might be coined “conceptual joinder.” Just as dividing a property interest into segments so that a landmarks regulation appears to have taken the entire interest perverts the takings analysis, joining separate properties together so that the effect the regulations have on one landmark parcel is transferred to a different parcel distorts the nature of hardship relief.<sup>22</sup> If its distinct buildings

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<sup>22</sup> The need to prohibit “conceptual joinder” is easily understood in the context of physical and inverse condemnations. With respect to a physical condemnation, an owner of contiguous parcels could not, by virtue of one such parcel being condemned, assert that compensation is warranted for the adjacent property that was not condemned. The same principle applies in the case of inverse condemnation, in which courts must guard against strategic manipulations of a

and parcels are joined into a “campus,” a non-profit owner can justify the destruction of any improvement that it owns within an historic district – so long as the improvement is on the “campus” – in order to alleviate its inability to use any of its other properties for their current or originally expected charitable uses.<sup>23</sup>

Hardship relief is meant to provide a safety valve to ensure that an application of the Landmarks Law to a particular improvement site does not effect a taking. We could find no cases in which the takings clause has been read to require compensation for a parcel that could be profitably developed on the ground that a regulation prohibits development on other properties held by the same owner. Nor should hardship relief be granted to allow for the demolition of a protected building that has not been shown to have been “taken” by the landmarks regulations on the grounds that the impact of those regulations on other sites make the non-profit’s use of those other sites difficult.

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claimant’s property interest. Inverse condemnation is a means of securing damages where an entity imbued with the power of eminent domain sufficiently interferes with the property rights of a landowner so as to warrant compensation for a taking. Evans v. City of Johnston, 96 Misc.2d 755, 410 N.Y.S.2d 199 (Sup. Ct., Fulton County 1978). In inverse condemnation actions, a claimant could increase both the likelihood and amount of compensation if she could define her property interest broadly. For example, a highway widening that inadvertently flooded a neighboring landowner’s lot might give rise to a claim of inverse condemnation. If the owner of the flooded lot held title to multiple, contiguous properties, it would be unreasonable and impermissible for her to claim that all of them had been “taken” where only one had been damaged. It would be similarly inappropriate for her to claim that the property “taken” was not that which was damaged but an adjacent property she holds that would provide her with a more favorable claim for damages. By analogy, the LPC should not be able to define St. Vincent’s property so that the O’Toole Building is seen as suffering from the regulatory taking alleged at the hospital complex.

<sup>23</sup> It is illustrative to consider the LPC’s campus exception applied conversely: just as the agency is not permitted to *deny* hardship relief because of the viability of continued use at a contiguous, co-owned parcel, it may not *grant* such relief because of the inability to cure deficiencies at a neighboring property.

## **2. The Campus-Transfer Rationale is Inconsistent with the Landmarks Law.**

The Landmarks Law defines an “improvement” as “any building, structure, place, work of art or other object constituting a physical betterment of real property, or any part of such betterment.” N.Y.C. Admin. Code § 25-302(i). An “improvement parcel” is the unit of real property which “(1) includes a physical betterment constituting an improvement and the land embracing the site thereof, and (2) is treated as a single entity for the purposes of levying real estate taxes, provided however, that the term “improvement parcel” shall also include any unimproved area of land which is treated as a single entity for such tax purposes.” N.Y.C. Admin. Code § 25-302(j). The term “improvement,” accordingly, does not contemplate a multi-parcel campus, and the statutory hardship provision does not consider the designation’s impact on the “owner” or “person in control” of the property (each of those terms is defined separately by the statute), but on the subject improvement site itself. Further, the term “campus” does not appear anywhere in the Landmarks Law.

The Snug Harbor hardship test was designed to be comparable to the hardship provision for commercial owners. That provision is limited to “improvements” and “improvement parcels.” N.Y.C. Admin. Code § 25-309(a)(1).<sup>24</sup> Under its terms, an owner may obtain permission from the LPC to demolish or alter a specific “improvement” only upon proving that

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<sup>24</sup> Like the hardship standard for commercial owners, the statutory hardship provision governing non-profit owners who wish to sell their protected sites is improvement specific. That section of the Landmarks Law requires a showing that “the *improvement parcel* which includes such *improvement*, as existing at the time of the filing of such request, would not, if it were not exempt in whole or in part from real property taxation, be capable of earning a reasonable return” and that “such *improvement* has ceased to be adequate, suitable or appropriate for use for carrying out both (1) the purposes of such owner to which it is devoted and (2) those purposes to which it had been devoted when acquired...” N.Y.C. Admin. Code § 25-309(a)(2)(b),(c) (emphasis added).



the “improvement parcel” on which it is located is incapable of earning a reasonable return. N.Y.C. Admin. Code § 25-309(a)(1)(a).<sup>25</sup> Pursuant to these site-specific provisions of the Landmarks Law, an owner may not obtain permission under § 25-309 to demolish a building on a particular “improvement parcel” because she is experiencing a hardship on a different “improvement parcel.”

The O’Toole Building and the hospital complex are not a single improvement parcel as called for in the statute. The New York City Tax Map makes clear that while all of the buildings that make up the hospital complex on the east side of Seventh Avenue constitute a single tax lot (Tax Block 607, Tax Lot 1), the O’Toole Building (Tax Block 617, Tax Lot 55) is distinct. It therefore violates the spirit of the Landmarks Law to treat the O’Toole Building and the hospital complex as “a single entity for the purposes of levying real estate taxes” as hardship relief requires. N.Y.C. Admin. Code § 25-302(j). The LPC’s invention of a campus-transfer theory seeks to rewrite the law and expand the definition of an improvement parcel, but such revisions are the prerogative of the City Council, not the Commission.

The LPC based its campus-transfer rationale, in part, upon the finding that “since the early 1980s, all of the buildings in the hospital campus were combined into a large scale zoning lot to enable the construction of new hospital and emergency buildings on Seventh Avenue, the Coleman Building and the Link Pavilion (approved by the Commission).” (XXI. R. 5381). While it is true that the City Planning Commission approved certain authorizations involving a large-scale community facility development, that distinction does not render all of the hospital’s

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<sup>25</sup> Other aspects of the regulatory scheme also suggest that the improvement parcel is the proper denominator with respect to the Landmarks Law. For instance, the consequences of violations of the law are governed in significant part by reference to the improvement parcel: the Commission may impose civil penalties for violations measured by the fair market value of the relevant improvement parcel. N.Y.C. Admin. Code § 25-317(1).

property a single lot, nor does it invite the LPC to deviate from controlling law by treating all of St. Vincent's properties in the aggregate for the purposes of a hardship analysis.

On August 20, 1979, the City Planning Commission passed a resolution "pursuant to Section 79-21 of the Zoning Resolution, granting authorization in connection with a large-scale community facility development consisting of the property of St. Vincent's Hospital on the easterly side of Seventh Avenue... and on the westerly side of Seventh Avenue, extending from Greenwich Avenue to West 13<sup>th</sup> Street, Borough of Manhattan..." City Planning Resolution, at 1. The hospital applied for authorization to "(1) distribute the permitted floor area and lot coverage for all zoning lots within the developments without regard for zoning lot lines; (2) to locate the proposed building without regard for the height and setback regulations which would otherwise apply along portions of streets wholly within the development; and (3) to locate the proposed building without regard to the rear yard regulations which would otherwise apply along portions of lot lines abutting other zoning lots within the development." City Planning Resolution, at 1-2.<sup>26</sup> St. Vincent's did not apply pursuant to Section 79-21 of the Zoning Resolution, nor could it have done so, to unify the individual tax lots so as to meet the definition of an improvement parcel as it is spelled out in the statute and has been applied in hardship cases. Moreover, the City Planning Commission's resolution does not suggest that the application was intended to further "general hospital and medical purposes," as the LPC noted in its Final Determination, (XXI. R. 5384), but instead that it was submitted so as to enable development of a "proposed building." City Planning Resolution, at 1.

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<sup>26</sup> The application involved St. Vincent's proposal to "demolish the [Seton and Lowenstein buildings] and replace them with a single 16 story building on the easterly side of Seventh Avenue, extending from West 11<sup>th</sup> Street to West 12<sup>th</sup> Street." City Planning Resolution, at 1.

A large scale community facility development is “a development or enlargement predominantly for community facility uses on a tract of land containing a single zoning lot or two or more zoning lots that are contiguous or would be contiguous but for their separation by a street or a street intersection, which tract of land (a) has or will have an area of at least three acres; and (b) is designated as a tract, all of which is to be used, developed or enlarged as a unit.” N.Y. City Zoning Resolution § 12-10. It is through this designation that St. Vincent’s was able to use the air rights from the O’Toole Building to further development at the hospital complex.

While the LPC suggests that the designation renders the alleged “campus” a single lot, the relevant section of the Zoning Resolution provides for the flexible treatment of *multiple* lots within such a development; it does not redefine the relevant improvement parcel with respect to the hardship test or establish the metes and bounds of the lots contained within a large scale development for purposes of a takings analysis. An examination of the section of Zoning Resolution pursuant to which the St. Vincent’s resolution was passed illustrates the point: Section 79-21 of the Zoning Resolution provides an exhaustive list of the benefits that may accrue from designation as a large scale community facility development.<sup>27</sup> Designation allows

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<sup>27</sup> Section 79-21 of the Zoning Resolution provides:

When a #large-scale community facility development# includes two or more #zoning lots# which are contiguous or would be contiguous but for their separation by a #street#, the City Planning Commission may, in appropriate cases, upon application, authorize the permitted #floor area#, #lot coverage#, #dwelling units# or #rooming units#, or the required #open space# for all #zoning lots# within the #development#, to be distributed without regard for #zoning lot lines#, may modify the minimum required distance between #residential buildings# as set forth in Section 23-70 (MINIMUM REQUIRED DISTANCE BETWEEN TWO OR MORE BUILDINGS ON A SINGLE ZONING LOT), provided such reduction does not exceed 15 percent of that required by Section 23-71, may authorize the location of #buildings# without regard for #front yard# or height and setback regulation which would otherwise apply along portions of #streets# wholly within the #development#, and, further, may authorize the location of #community facility buildings# without regard to #side# or #rear yard# regulations which

for redistribution of floor area, lot coverage, dwelling units, rooming units or open space among the zoning lots within the large scale community facility development. Designation also empowers City Planning to modify requirements with respect to distances between buildings and to authorize the location of buildings otherwise precluded by applicable zoning regulations.

Designation, does not, however, render multiple properties a single “campus” entity. Nothing in Section 79-21 of the Zoning Resolution creates singularity of parcel, nor does that section of the Zoning Resolution, among the many opportunities it provides for flexibility in planning, grant any agency the authority to deviate from the Landmarks Law. The LPC has erred in ignoring the definition of an improvement parcel in the Landmarks Law, and was arbitrary and capricious in constructing a campus-transfer theory that has no basis in fact or law.

### **3. The Campus-Transfer Rationale is Inconsistent with Hardship Case Law.**

The cases interpreting the hardship exception, including decisions of the New York Court of Appeals and the Second Circuit, have uniformly analyzed the appropriateness of hardship relief solely by reference to the individual landmarked building for which the hardship exception was sought.

When it first applied the Snug Harbor test, in Lutheran Church, the New York Court of Appeals framed its analysis in terms of the property at issue, and concluded that “the existing building [was] totally inadequate” for the church’s continued use of the premises. Lutheran

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would otherwise apply along portions of #lot lines# abutting other #zoning lots# within the #development#.

Words in the text of the Zoning Resolution which are bounded by hatch marks (#) are defined in section 12-10 of the Zoning Resolution.

Church, 316 N.E.2d at 311, 35 N.Y.2d at 131. In Society for Ethical Culture, the non-profit's property included two buildings, only one of which was landmarked. The non-profit attempted to bring the adjacent buildings into the calculation, arguing that "the designation also effectively prevents the development of the adjacent school building portion of the tract which, although not the subject of the landmark designation, is physically and functionally related to the Meeting House through common interior passageways and utility systems." Society for Ethical Culture, 415 N.E.2d at 924, 51 N.Y.2d at 453-54. The Court rejected the argument, noting that "the record indicates that the buildings could be demolished separately," but more importantly, rejecting the notion that the non-profit had a right to demolish the landmark in order to "exploit the full economic value of the Central Park West Property." Id., 51 N.Y.2d at 453. Ultimately, the Ethical Culture Court distinguished between the landmark and the non-profit's entire holdings, explaining that the focus should be on whether the "eleemosynary activities *within the landmark*" were wrongfully disrupted. Id. at 926, 51 N.Y.2d at 456 (emphasis added).

In St. Bartholomew's, when the Second Circuit explicitly incorporated Penn Central's takings analysis into the Snug Harbor hardship test, it too rejected a claim that a landmark had to be demolished in order to address the inadequacy of adjacent properties. The Church in St. Bartholomew's argued that it needed to demolish its landmarked community building in order to erect a commercial office tower on the site, from which it would derive revenue that would allow it to make repairs on the adjacent landmarked church and otherwise "carry on and expand the ministerial and charitable activities that are central to its religious mission." 914 F.2d at 353. The Second Circuit, however, upheld the district court's determination that the "Church failed to prove that the *Community House* is fundamentally unsuitable for its current use and that the cost

of repair and rehabilitation is beyond the financial means of the Church.” Id. at 357 (emphasis added).

The hardship inquiry, like the takings analysis on which it rests, depends upon the accurate definition of the property interest. Takings jurisprudence, the Landmarks Law itself, and the cases applying Snug Harbor and its progeny all point in the same direction – the charitable use at issue in the takings inquiry is only that “*within the landmark*” that is the subject of the application (here, the O’Toole Building). Society for Ethical Culture, 415 N.E.2d at 926, 51 N.Y.2d at 456 (emphasis added). The LPC may allow demolition of a landmark under the hardship test first announced by Snug Harbor if the takings analysis set forth in Penn Central and St. Bartholomew’s reveals that the impact of the landmarks regulations would “[impair] the continued operation of *the property* in its originally expected use.” St. Bartholomew’s, 914 F.2d at 356 (emphasis added). In creating the campus-transfer exception to the Landmarks Law, however, the LPC ignored takings jurisprudence, broke with forty years of controlling hardship case law and disregarded the plain language of the statute, all of which insist that the relevant parcel to determine a hardship is the improvement site itself.

**II. IT IS ARBITRARY AND CAPRICIOUS, AN ABUSE OF DISCRETION AND AN ERROR OF LAW TO GRANT HARDSHIP RELIEF BEYOND THAT WHICH IS CONSTITUTIONALLY REQUIRED WHERE, AS HERE, THERE IS NO LEGISLATIVE AUTHORIZATION TO DO SO**

The LPC is charged with enforcing the Landmarks Law and may not grant relief from its restrictions absent legislative authorization or constitutional requirement. While the City Council has written hardship variances into the statute that apply to commercial owners and non-profit owners who wish to alienate their property, “there is no express provision governing the

instant situation.” Lutheran Church, 316 N.E.2d at 313, 35 N.Y.2d at 135 (Jasen, J. dissenting). Accordingly, the only relief available to non-profit owners is that which is constitutionally required to preclude a taking of their property. (“The question ...is whether in the particular instance regulation goes so far that it amounts to a taking. If it does, it is constitutionally prohibited.” Snug Harbor, 29 A.D.2d at 378, 288 N.Y.S. 2d at 316). Where, as here, the Commission has found no such taking, and the City Council has not expressly provided for an extra-constitutional variance, it is arbitrary and capricious and an error of law to grant an applicant hardship relief and permit the demolition of an historic resource.

Despite the fact that the Landmarks Law explicitly calls for the LPC to protect New York City’s historic resources, many of which “...having a special character or special historical or aesthetic interest or value ... have been uprooted, notwithstanding the feasibility of preserving and continuing [their use],” N.Y.C. Admin. Code § 25-301(a), the agency has taken it upon itself to modify the judicial test to permit the demolition of a protected structure. The Commission’s campus-transfer exception is neither constitutionally required nor legislatively sanctioned and as such it is an error of law and an impermissible abuse of the agency’s discretion.

“An agency, by law, is not allowed to legislate by adding ‘guidance requirements’ not expressly authorized by statute.” HLP Properties, LLC v. New York State Dept. of Environmental Conservation, 21 Misc. 3d 658, 669, 864 N.Y.S.2d 285, 293 ( Sup. Ct., New York County 2008) (internal citations omitted). Moreover, “if the grant of a variance is destructive of the purposes to be achieved by the ordinance, there is a clear invasion of the legislative process.” Held v. Giuliano, 46 A.D.2d 558, 559, 364 N.Y.S.2d 50 (3d Dept. 1975). Here, the LPC has gone beyond the statutory variances, despite the fact that “it is of more than minor significance that the [Landmarks Law] has not been amended” upon judicial notice of its

shortcomings. Church of St. Paul and St. Andrew v. Barwick, 496 N.E.2d 183, 199, 67 N.Y.2d 510, 535 (N.Y. 1986) (Meyer, J. dissenting).

To unlawfully supplement the Landmarks Law is beyond the discretion of the LPC. Moreover, the LPC's campus-transfer exception frustrates the purpose of the judicial test by permitting demolition beyond that which is necessary to prevent an unconstitutional taking; the Final Determination acknowledges that in this case the LPC is granting a hardship variance "notwithstanding that [the O'Toole Building] might be capable of continuing [its] current uses." (XXI. R. 5383). Because a critical factor in this case is "whether the land-use regulation impairs the continued operation of the property in its originally expected use," St. Bartholomew's, 914 F.2d at 356, and the Commission has not otherwise found that the O'Toole Building has been "taken," such relief is arbitrary and capricious, and an error of law.

### **III. THE LPC'S IMPERMISSIBLE CAMPUS-TRANSFER EXCEPTION CREATES A DANGEROUS PRECEDENT FOR CIRCUMVENTING THE LEGAL PROTECTION OF NEW YORK CITY'S HISTORIC RESOURCES**

Both New York and Federal courts have recognized that landmarks protection is a worthy municipal priority, and it has "long been accepted that a government may reasonably restrict an owner in the use of his property for the cultural and aesthetic benefit of the community." Society for Ethical Culture, 415 N.E.2d at 925, 51 N.Y.2d at 454; Penn Central, 438 U.S. at 129 (noting that historic preservation enhances the quality of urban life). Notwithstanding the well-established appropriateness of landmarks protection, however, "New York has [already] lost significant landmarks, including the Metropolitan Opera House and the original Pennsylvania Station." Citizens Emergency Committee To Preserve Preservation v. Tierney, No. 33130(U),



2008 WL 5027203, at \*3 (Sup. Ct., New York Co., November 14, 2008). The reason that landmarks are continually under threat is simple: there is overwhelming pressure upon the owners of landmark sites to convert them to their most profitable use. This is particularly true in New York City, where “urban landmarks typically do not exhaust the building potential of their location and may be designed for uses different from neighboring buildings. As urban concentration increases, the demands for additional housing and commercial space become all the more incessant and sharpen the debate whether the value of historic preservation counterbalances whatever limitations may thereby be imposed on urban growth.” Lutheran Church, 316 N.E.2d at 313, 35 N.Y.2d at 134 (Jasen, J. dissenting). It is because the imperative to protect landmarks is so great, and the financial incentive to circumvent the Landmarks Laws’ restrictions so compelling, that the LPC’s perversion of the hardship analysis poses such a significant threat to New York City’s historic resources.

The LPC announced in its Final Determination that the O’Toole Building is part of a “campus” consisting of “adjacent and contiguous buildings... all of which are within the Greenwich Village Historic District.” (XXI. R. 5381).<sup>28</sup> The agency noted that the O’Toole Building was acquired in 1973, and that “it has been part of the hospital campus since that time.” (XXI. R. 5381). Based upon this distinction, “the Commission has interpreted the judicial test to apply to the entire “campus” and to permit the demolition of other buildings on the “campus,” if

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<sup>28</sup> The basis for the LPC’s conclusion that the O’Toole Building is “adjacent and contiguous” to the hospital complex on the east side of Seventh Avenue is unclear. The O’Toole Building is separated from the hospital buildings by both Seventh Avenue and 12<sup>th</sup> Street. Neither the Zoning Resolution nor the Landmarks Law defines the term “contiguous,” and so the plain meaning of the word applies: sharing an edge or boundary; deriving from Latin *contingere*, to touch. American Heritage Dictionary of the English Language, 397 (4th ed. 2000). The presumed contiguity cannot stem, in and of itself, from the large scale community facility development, as such a development allows for the designation of lots that are either contiguous, or “would be contiguous but for their separation by a street.” (NY City Zoning Resolution § 79-21).

St. Vincent’s could demonstrate that the existing hospital and emergency facilities are so inadequate as to satisfy the judicial hardship test, notwithstanding that these other buildings might be capable of continuing their current uses.” (XXI. R. 5383). As one dissenting commissioner stated when the Final Determination was issued, “the campus approach taken by the Commission majority is not only mistaken, if applied, it would gut the Landmarks Law going forward.” (XXIX. R. 7787).

The LPC’s Final Determination is premised upon the following proposition: where contiguous properties owned by a single non-profit institution and within an historic district are all put to use to further that institution’s charitable mission, they make up a “campus,” and where the demolition of certain of those properties is impracticable, by virtue of that “campus” distinction a hardship found at one parcel may warrant the demolition of another parcel, even where the parcel to be demolished has not been found to warrant hardship relief itself.<sup>29</sup> Because this new campus-transfer rationale has no grounding in applicable law, it appears to have been created to accommodate St. Vincent’s hardship application.

The Commission’s campus-transfer exception poses a significant threat to the protections afforded New York City’s historic resources. New York City is home to many large and iconic non-profit landowners. Many of these non-profits, including colleges and universities, religious organizations, museums and medical centers own historic resources, and many of those resources

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<sup>29</sup> The LPC attempts to support its campus-transfer exception, and to suggest its uniqueness, by highlighting the fact that all of the property at issue is contained in a “large scale zoning lot.” (XXI. R. 5381). As discussed in point I, *infra*, St. Vincent’s properties are not a single zoning lot, and in any event the zoning distinction (a large scale community facility development) has no bearing on St. Vincent’s hardship application. Moreover, because the LPC specifically found that the alleged “campus” predates the large scale community development facility (noting that the O’Toole Building became part of the “campus” seven years before the City Planning resolution that created the large scale community development facility, (XXI. R. 5381)), the additional distinction fails to limit the precedential impact of the LPC’s decision.

are within the boundaries of historic districts. If the exception carved out by the LPC is allowed to stand, these owners, when confronted with the challenging constraints to development that are all too common in the City's complex and dense environment, might invoke the campus-transfer rationale as it has been articulated by the Commission. Pursuant to the LPC's campus-transfer theory, a non-profit owner need not show that the protected building itself has ceased to be useful; it need only show that the subject property is on the same "campus" as another building that has outlived its usefulness and that the obsolete building, for institutional or technical reasons, cannot be demolished and replaced with one that will adequately serve the non-profit's charitable mission. There is little distinction between the case the LPC made for granting the hardship exception to St. Vincent's and the argument that educational and research institutions might make about the need to keep science labs operating, or to keep classrooms in use during the school year, or that cultural institutions might make about the need to keep a theatre from having to close its doors and lose revenue and audience support during its renovation.

To assess the potential impact of the Commission's campus-transfer theory, MAS undertook a study of parcels in New York City that are similarly situated to those owned by St. Vincent's. Using data provided by the New York City Departments of City Planning and Finance as included in LotInfo 2004, and the latest available data from the LPC (updated through 2008), MAS evaluated property within historic districts held by owners of tax exempt lots classes 4-7, which is limited to churches, synagogues, monasteries, etc.; "charitable institutions" including lodging houses, fire associations, nurseries and certain religious uses and; colleges, schools, hospitals and asylums. It quickly became clear that the LPC's exception to the rule is broad enough that it might apply to a significant number of tax exempt institutions that own property throughout the city's historic districts because they too would fit the profile created by

the Commission. Certain of the findings of this study are presented in the affidavit of David Schnakenberg, *annexed*. Amici do not impugn the stewardship that any of these non-profits have provided for protected sites, nor do amici predict that those non-profits will take advantage of the loophole the LPC has created, but it is important to consider the consequences of an exception as broadly applicable as that which was announced to permit the demolition of the O'Toole Building.

Most of the buildings preserved for their historic or architectural significance are quite old, and, accordingly fall short of providing optimal facilities for their owners. Considering the scarcity of urban real estate, it is almost certain that redevelopment and consolidation of the type that St. Vincent's proposes often will be seen by owners as an attractive alternative to preservation.<sup>30</sup> There is a necessary balance between the public interest in providing for a safe, livable and vibrant city, and the rights of property owners. That balance requires that the regulatory takings analysis focus on the use (and value) that remains in a subject property, and not on how much use or value that property's owner might be able to wrest from the parcel absent the regulation at issue. "There simply is no constitutional requirement that a landowner always be allowed his property's most beneficial use." Society for Ethical Culture, 415 N.E.2d at 926, 51 N.Y.2d at 456. The campus-transfer exception announced by the LPC to justify the demolition of the O'Toole Building improperly expands the hardship variance that courts have

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<sup>30</sup> In addition to providing a loophole for large non-profit institutions that already own significant resources within historic districts, the LPC's campus-transfer exception creates a perverse incentive for non-profit property owners. Under the campus-transfer theory, strategic non-profits could purchase protected sites within historic districts that are in close proximity to their other holdings for the purpose, ultimately, of demolishing them and using the land to replace one of their existing facilities. Because St. Vincent's bought the O'Toole Building years after the designation of the Greenwich Village Historic District imposed restrictions on its use, the campus-transfer rationale on which the LPC relies would not be restricted to those owners who bought a property and only later saw it designated.

read into the Landmarks Law, and ignores the courts' careful limitation of that variance to just what is necessary to avoid unconstitutional takings. Ultimately, the LPC's granting of hardship relief in this case does violence to the courts' conscientious effort to limit relief to those situations in which an applicant can demonstrate that strict application of the Landmarks Law to an individual improvement site would effect a taking of that same site by impairing the continued operation of the property in its originally expected or current charitable use. St. Bartholomew's, 914 F.2d at 356.

If the City Council wishes to provide a broader hardship variance, or to otherwise adjust the balance between the needs of the non-profits that contribute so much to the City and the need to preserve the City's history, it may, of course, do so. But the LPC is charged with carrying out the Landmarks Law as it now stands, which requires it to protect and preserve the City's historic resources. To import a broad and not easily containable campus-transfer theory into decisions about hardship undermines the finely tuned balance reflected in the Landmarks Law, as expanded by Snug Harbor, and puts New York City's irreplaceable historic resources in serious jeopardy.

**IV. THE AGENCY'S DETERMINATION CANNOT REST ON A CAMPUS-TRANSFER RATIONALE, AND IN THE ABSENCE OF A FINDING THAT THE REGULATORY IMPACT OF THE LANDMARKS LAW HAS EFFECTED A TAKING OF THE O'TOOLE BUILDING ITSELF, ST. VINCENT'S IS NOT ENTITLED TO HARDSHIP RELIEF**

The LPC's hardship determination (1) was based on an erroneous application of the law, (2) exceeded the Commission's authority as an agency of the City of New York in modifying the "judicial test," and (3) has created a dangerous precedent that may have a devastating effect on the preservation of landmark buildings and historic districts throughout

New York City. For these reasons, this court should reverse the Commission’s hardship determination.

Because St. Vincent’s seeks hardship relief to demolish the O’Toole Building, it is that building to which the judicial test, as outlined by amici, must be addressed. To properly apply the judicial test, the LPC must consider whether application of the landmarks regulations to that building would constitute a taking by precluding the non-profit from continuing to use the building as originally expected or as it had in the past, in furtherance of its charitable mission. The Commission, in applying the regulatory takings inquiry, must employ an “essentially ad hoc, factual inquir[y].” Penn Central, 438 U.S. at 124. Extending from Penn Central’s call for an examination of the “economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations,” id., the regulatory takings analysis for non-profit owners who seek hardship relief turns largely, but not entirely, on whether the impact of the landmarks restrictions “impairs the continued operation” of the building in its current or “originally expected use” for the non-profit’s charitable mission. St. Bartholomew’s, 914 F.2d at 356-57. Ultimately, the regulatory impact of the landmarks restrictions must be measured by reference to St. Vincent’s ability to continue to achieve its longstanding charitable mission at the O’Toole Building.

Because the LPC’s proceedings did not focus, as they should have, on whether application of the Landmarks Law to the O’Toole Building effects a taking of that site, it is not clear whether evidence contained in the administrative record supports a hardship determination.<sup>31</sup>

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<sup>31</sup> Amici do not offer a conclusion as to whether the landmarks regulations have effected a taking of the O’Toole Building. We note, however, without commenting on its sufficiency, the lengthy record on which the LPC based its determination and evidence therein that respondents rely on to

Instead of investigating whether application of the Landmarks Law would effect a taking of the O'Toole Building, and therefore warrant hardship relief, the LPC appears to have ignored the link between the judicial hardship test and takings law, and improperly concluded that the campus-transfer theory allowed it to treat all of St. Vincent's property as if it were a single site, and to shift an alleged hardship at one group of buildings to another building on that site. On that basis, the LPC approved the demolition of the property without making a determination that St. Vincent's could not maintain its charitable mission through its continued or originally expected use of the O'Toole Building. The LPC's misapplication of the judicial test, and its unwarranted introduction of a bypass of the proper analysis, threatens to allow hardship relief to become the rule rather than the exception for non-profit owners of landmarks and protected buildings throughout New York City's historic districts.

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suggest the inadequacy of the O'Toole Building for St. Vincent's originally expected and continued use. Amici do not foreclose the possibility that such evidence might ultimately establish a hardship without reliance on the erroneous campus-transfer rationale.

## CONCLUSION

Amici respectfully submit that the LPC's decision in this matter rests on material errors of law, was arbitrary and capricious and an abuse of discretion. In light of the foregoing, amici urge this court to reverse the LPC's hardship determination.

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New York, New York

VANDENBERG & FELIU, LLP

By:\_\_\_\_\_

Michael S. Gruen  
*Attorney for The Municipal Art Society of New York*  
110 East 42<sup>nd</sup> Street  
Suite 1502  
New York, New York 10017  
(212) 763-6800

SIMPSON THACHER & BARTLETT LLP

By:\_\_\_\_\_

John J. Kerr, Jr.  
*Attorney for The New York Landmarks Conservancy*  
425 Lexington Avenue  
New York, New York 10017  
(212) 455-3805

By:\_\_\_\_\_

Vicki Been  
*Attorney for The Municipal Art Society of New York*  
New York University School of Law  
40 Washington Square South  
Vanderbilt Hall, Room 314-H  
New York, NY 10012  
(212) 998-6223

On the Brief:  
David Schnakenberg  
*Ralph C. Menapace Fellow in Urban Land Use Law at The Municipal Art Society of New York*  
(Application for admission to practice as an attorney and counselor-at-law in the State of New York pending)