



To: Participating Amici
From: David Schnakenberg, The Municipal Art Society of New York
Date: Wednesday, November 4, 2009
Re: *Protect the Village Historic District, et al., v. New York City Landmarks Preservation Commission, et. al.*

On Wednesday, November 4, 2009, 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 (the “amici”) filed a brief in the New York Supreme Court, New York County, as *amici curiae*, or friends of the court, to assist the court in resolving the issues presented in *Protect the Village Historic District, et. al, v. New York City Landmarks Preservation Commission, et. al.*

That case arises from the New York City’s Landmarks Preservation Commission’s (the “LPC” or the “Commission”) determination that St. Vincent’s Catholic Medical Centers (“St. Vincent’s”) may demolish the Edward and Theresa O’Toole Medical Services Building (the “O’Toole Building”) pursuant to the judicial test for hardship relief (the “judicial test”) from the New York City Landmarks Preservation and Historic Districts Law (the “Landmarks Law”). Succinctly, the judicial test is a complex analysis which provides that where the impact of the Landmarks Law will effect a “taking” of a non-profit property owner’s building (or other improvement), the LPC may grant that non-profit owner relief from the landmarks restrictions. That relief may include permission to demolish or substantially redevelop the otherwise protected structure.

Determining whether a non-profit owner’s property has been “taken” by a regulation is not a simple matter, and St. Vincent’s hardship application was the first to come before the LPC in nearly 20 years. After months of deliberation, the LPC determined that St. Vincent’s was entitled to demolish the O’Toole Building as hardship relief, but based its determination on a novel campus-based rationale that was announced after the close of public hearings on the matter. The LPC reasoned that where a non-profit owner of “campus” properties has

demonstrated to the agency's satisfaction that certain of those properties warrant hardship relief, and that it is impracticable to demolish them, other "campus" properties may be demolished to alleviate the hardship without an analysis of whether the buildings to be demolished themselves meet the criteria for relief (the "campus-transfer" rationale). Amici are concerned that this rationale is not grounded in applicable takings or hardship law, and creates a dangerous precedent that might be exploited by other owners of "campus" properties throughout New York City's historic districts.

Petitioners Protect the Village Historic District ("PVHD") allege that the LPC's approval of St. Vincent's hardship application misconstrued the Landmarks Law and failed to properly consider alternatives to the demolition of the O'Toole Building. Petitioners further argue that the impact of the landmarks regulations on the O'Toole Building do not warrant hardship relief under applicable law. Accordingly, they seek reversal of the agency's determination. Respondents, the LPC and St. Vincent's, argue through their counsel that the Commission properly applied the law, and that the agency's determination is supported by an extensive administrative record.

In filing the brief, *amici* have taken the uncommon step of supporting neither party to the litigation. The primary function of the submission is to assist the court in reaching its determination by outlining the proper judicial test for hardship relief, as well as the regulatory takings analysis on which that test is premised. The brief's argument is broken down into four points.

The first point traces the judicial test from its origin in Matter of the Trustees of Sailors' Snug Harbor in the City of New York v. Platt through its most recent, and comprehensive, judicial treatment in Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York. A review of these cases makes clear that a determination that hardship relief is appropriate depends on the outcome of a regulatory takings analysis. Where the impact of the regulation on a subject property has effected a "taking" of that property, hardship relief pursuant to the judicial test may be warranted. As takings jurisprudence has evolved, so too has the judicial test for hardship; 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. Pursuant to that jurisprudence, an assessment of whether the O'Toole Building has been taken is governed by the factors set forth in Penn Central Transp. Co. v. City of New York, with attention to the application of those factors in the context of non-profit owners, as explained in St. Bartholomew's. Another fundamental aspect of modern takings jurisprudence is the prohibition of the conceptual tailoring of a property interest to suit a takings claim.

The point concludes that because the LPC failed to properly employ the takings analysis in determining whether the O'Toole Building could be demolished pursuant to the judicial test, and because the campus-transfer rationale involved the gerrymandering of a property interest, the agency's determination was in error of law.

The second point in the brief's argument speaks to the LPC's ability to expand the judicial test by creating campus-based exceptions to the doctrine. The judicial test is meant to guard against unconstitutional takings of private property. Despite its difficult application, the test has not been incorporated into the landmarks statute or otherwise expanded by the legislature. Accordingly, the Commission is not permitted to grant relief pursuant to the judicial test beyond that which is necessary to preclude an unconstitutional taking. It is beyond the discretion of the LPC to supplement the Landmarks Law, but in employing the campus-transfer rationale, that is precisely what the agency did.

The third point speaks to the dangerous precedent for circumventing the Landmarks Law that *amici* fear is set by the LPC's application of the campus-transfer rationale in this matter. The theory that St. Vincent's property, in the aggregate, constitutes a "campus" and that an "inter-campus" transfer of hardship is permitted in certain circumstances, is not limited in its application to the property at issue. Because the imperative to protect New York City's historic resources is so great, and the financial incentive to circumvent the Landmarks Law's restrictions so compelling, the LPC's misapplication of the hardship analysis poses a significant threat to New York City's historic resources.

The brief's final point concludes that while the LPC's application of the Landmarks Law was in error because it rested, in large part, on the campus-transfer rationale, *amici* do not take a position as to whether, pursuant to a properly applied judicial test for hardship, the regulatory impact of the Landmarks Law is sufficient to warrant hardship relief at the O'Toole Building.