

Before The New York City Landmarks Preservation Commission

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In the Matter of the Application of :
ST. VINCENT’S CATHOLIC MEDICAL CENTERS :
For a Notice to Proceed Under Section 25-309 :
of the Administrative Code of the City of New York :
:
(O’Toole Hardship Application) :

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REPLY BRIEF OF PROTECT THE VILLAGE HISTORIC DISTRICT IN OPPOSITION TO THE APPLICATION

This Reply Brief is submitted to the Landmarks Preservation Commission on behalf of Protect the Village Historic District (PVHD) and in opposition to the application of the St. Vincent’s Catholic Medical Centers to demolish the O’Toole Building on the basis of hardship. PVHD opposes the application and submits that the applicable law requires that it be denied. *This Reply Brief focuses solely on, and responds to, points made by Shelley Friedman, Esq., attorney for the applicants, at the Commission’s July 15 public hearing.*

POINT ONE

THE LANDMARKS LAW AND JUDICIAL PRECEDENT REQUIRE THAT THE HARDSHIP APPLICATION BE DENIED

1. The Basic Test for Hardship

In his oral remarks to the Commission on July 15, Mr. Friedman implied that the position PVHD has taken “through Mr. Butzel” is that the hardship test laid out in

Snug Harbor and Lutheran Church cases – i.e., that for a charity, hardship will be found “where maintenance of the landmark either physically or financially prevents or seriously interferes with the carrying out of the charitable purpose” – has been superseded by the Penn Central and St. Bartholomew’s decisions. This is not the case.

Instead, what we have laid out in our July 15 Brief is how the law of “hardship” has developed **since** the Snug Harbor and Lutheran Church cases, both of which preceded the Supreme Court and Second Circuit decisions. And the critical point in this regard is that made by the Second Circuit in the St. Bart’s case:

“Applying the *Penn Central* [Grand Central] standard to property used for charitable purposes, the constitutional question is whether the land-use [historic preservation] regulation impairs the continued operation of the property in its originally expected use.”

What does this mean? Exactly what it says – specifically, that **if the historic property in issue can continue to be used for its originally expected use, there is neither physical nor financial hardship**. There is no physical hardship because the facility continues to support the activity it was originally intended for, and there is no financial hardship because the maintenance of the facility is not financially confiscatory; that is, a “taking” by regulation which would violate the U.S. and State Constitutions.

Applying the Snug Harbor test, as elaborated on in Penn Central and St. Bartholomew’s, it is absolutely clear that demolition of the O’Toole Building is not supportable. There is no question that the facility can continue to be used, and is currently being used, for “its originally expected use” as an outpatient facility; and

there is no claim (nor could there be any) that its maintenance involves a financial hardship. That being the case, the LPC cannot approve the hardship application.

2. The Commission is Legally Obligated to Deny the Application

The Landmarks Preservation Law was passed to preserve historic buildings and historic areas. Under the legislation, this Commission was given the power to decide whether particular proposals that affected such buildings or areas were OK – i.e., “appropriate.” If so, the proposal could go forward; if not, that meant that it was too destructive of the historic asset to be allowed and could not proceed.

The Law recognized, however, that there could be situations in which the denial of “appropriateness” might leave owners with a non-performing asset that came in conflict with the constitutional guarantee against “taking” private property. As a result, the Legislature included exceptions in the Law intended to cover these situations (and only these situations). These are the “hardship” sections of the Landmarks Law, found at 25-309 *et seq.*

In the case of a private owner, the Law provided an exception if the landmark restriction resulted in a financial return of less than 6% a year. If this was the case, then even though the LPC had found the proposal “inappropriate”, it was obligated to allow it to proceed because otherwise there would have been an unconstitutional taking. If, on the other hand, the LPC determined that a return of 6% or greater could be realized with the restrictions in place, there was no hardship, the restrictions remained operative and the building in question could not be demolished or altered in the fashion that had been proposed.

Recognizing that charities do not generally deal in property in order to realize a “reasonable return,” the Law also included provisions meant to apply to potential hardship for not-for-profits. However, these provisions were limited to situations in which the charity proposed to sell a historic property that it owned and did not cover situations in which it wanted to demolish the structure. This is the situation that was the subject of the Snug Harbor case. The owner asked the court to declare the Landmarks Law unconstitutional as to charities because it provided no “hardship” exception when demolition was proposed. The court did not accept this claim but concluded that it could fill the gap by articulating a constitutional standard that would apply in such instances. This is the “financially or physically” standard Mr. Friedman has relied on (albeit, we believe, in an unduly cramped manner).¹

It is necessary, then, to consider how this legislative scheme, as elaborated on by the courts, applies in the current proceeding.

This Commission has found that the demolition of the O’Toole Building would be “inappropriate.” As a result, it may only be demolished if “hardship” can be shown. **This is not a discretionary standard – one that the Commission can apply or not apply as it wishes – but is rather mandated by the Legislature that passed the Landmarks Law.** As in the case with a private owner, there can only be a finding of “hardship” if St. Vincent’s would be unconstitutionally denied the use of its

¹ As pointed out in PVHD’s July 15 Brief, Mr. Friedman’s narrow “either/or” interpretation of the Snug Harbor decision is belied by the sections of the opinion that follow immediately after the court articulated that test. These sections make it clear that financial and physical were not separated in that case. To the contrary, the court considered both. And that is what should be done in this proceeding. As just one example, time and again in its presentations, St. Vincent’s has asserted that it would cost too much to renovate its East Campus facilities. That is a financial claim, not a physical one, as is a great deal of the case the Hospital has presented.

property. That the institution might not reap the maximum benefit of the use of the property that would be available in the absence of the regulation is irrelevant. If the Hospital's property is not being "taken" unconstitutionally, the Commission cannot override its initial finding that demolition would be inappropriate. St. Vincent's can apply for an exception, but in the absence of constitutional hardship, the Commission cannot grant it, just as it cannot grant an exception to a private owner if it can realize a reasonable return.

As we have discussed under Heading 1 above, the judicial cases make it clear that if a facility can continue to be operated for its originally intended use, there is nothing unconstitutional about a restriction against its demolition. This is clearly the situation with the O'Toole Building and, accordingly, there is no unconstitutional hardship. That being the case, the Commission must deny St. Vincent's application for an exception. For the Commission to do otherwise would not only breach its statutory responsibilities, it would override the legislation and the Legislature that created it. This is beyond its power. It would also be a huge disservice to landmarks preservation in our City.²

POINT TWO

THE PRE-EXISTING REGULATIONS APPLICABLE TO THE O'TOOLE BUILDING MAY NOT BE DETERMINATIVE BUT SHOULD BE DECISIVE

While Mr. Friedman understandably took PVHD'S initial submission on pre-existing regulations as a complete bar to finding hardship in this case, that is not our position, as was made clear in our July 15 Brief. To begin with, the Gazza and Anelo

² If the Legislature – in this case, the City Council – wishes to change the law, it may do so, of course. But the Commission cannot do so.

cases do not deny an owner the right to seek regulatory approvals – what they rather stand for is that an owner cannot do so on the basis of a claimed “taking” (equivalent to the charitable “hardship”); and that the denial of an application cannot constitute a taking or hardship. So Mr. Friedman is correct that the fact that regulations were in place when St. Vincent’s acquire O’Toole does not bar it from *seeking* a “hardship” exception.

However, Mr. Friedman is incorrect in suggesting that St. Vincent’s has a right to *receive* such an exception. As we have just pointed out, because “hardship” has not been established under the applicable legal standards, the Commission does not have discretion to grant the application.

Nor is this the limit of the limit of the disqualification. And this is the point we have made regarding the fact that St. Vincent’s acquired the O’Toole property after the Landmarks Law was in place. While that fact may not be an absolute bar to a claim of hardship, it places an extraordinary burden on an applicant to show that despite the presence of existing restrictions, it had what the Supreme Court has described as “reasonable investment expectations” that the property would not have to comply with the Law.

There has been no such showing here. The world around the site has not changed significantly since the property was acquired (due, no doubt, in significant part to the presence of the Landmarks regulations). Far from it, the landscape and land uses surrounding the O’Toole Building are largely the same as they were when it was acquired, and fabric of the neighborhood is likewise largely unchanged. In

short, nothing has happened to support the contention that the Hospital's investment-backed expectations at the time of acquisition "reasonably" included the idea that the property would not be bound by the regulations then in place. Consequently, in these circumstances, the fact that St. Vincent's acquired the O'Toole Building after the restrictions were in place is a bar to any finding of constitutional hardship.

In his remarks, Mr. Friedman also suggested that it would make no sense to deny a hardship application because regulations had been in place at the time the property was acquired, and he made reference to variance procedures under the zoning code as running counter to such an interpretation. But the Landmarks Law and the zoning code are completely different legislative enactments with quite different purposes. The zoning code is intended to direct the course of development, while the basic purpose of the Landmarks Law is to preserve historic structures and the fabric of historic districts. As a result, the variance procedure under the zoning code is an entirely different animal, not limited to constitutional hardship but rather intended to bring flexibility to the application of the code, with the Board of Standards & Appeals given granted a great deal of discretion on a case-by-case basis. In sharp contrast, as noted above, the "hardship" criterion under the Landmarks Law is a constitutional test only. Consequently, Mr. Friedman is mistaken insofar as he suggested that hardship criteria under the zoning code had any relevance to St. Vincent's application.

Even more importantly, far from making no sense to deny hardship because regulations were already in place when property was acquired, it would largely gut the Landmarks Law to hold otherwise. Mr. Friedman's own comments reflect this

reality. Thus, he suggested that whatever the consequence of acquiring property with regulations already in place, at the very least that rule should not apply when, as is the case with O'Toole, the property had complied with the regulations for 35 years. Yet if this argument were accepted, the older and more historic structures became, the greater the justification for allowing them to escape the strictures of the law. Needless to say, this would have a devastating effect on historic preservation in the City. This is all the more the case because one of the central tenets of the Landmarks Law is to encourage (and even require) adaptive reuse in order to protect historic buildings and historic districts. It is one thing to argue, as owners do under the zoning code, that circumstances surrounding a property have so changed as to justify a departure from restrictions that no longer make much sense. But one of the central purposes of the Landmarks Law is to keep that from happening in historic districts. To this end, the fact that a structure was already "burdened" with historic preservation restrictions at the time of acquisition should be taken as a largely decisive factor if the Law is to be effective.

Mr. Friedman made reference to the "holding period" when he attempted to undercut the idea that if St. Vincent's is allowed to demolish O'Toole on the basis of hardship in pursuing its charitable mission, that will be an open invitation for other charities to do the same and a precedent that will be nearly impossible to distinguish. But where is the distinction? If it is intended to be how long a charity has held the property before asking to demolish it, that may serve as an immediate brake, but over time, as charities reach the holding limit – whether five years or 10 years or 30 years – the protections accorded by the Landmarks Law to the properties charities own will

disappear. More than that, how many properties currently owned by charities in Greenwich Village (much less in historic districts across the City) have been held by them for 30 years or more? In all likelihood, it is a startling large number, all of which would be exempted under Mr. Friedman's logic. People often warn of allowing the camel to get its nose under the tent; here, it would not be just the nose, but the entire head and neck and probably a large part of the body.

An unfortunate reality that cannot be avoided is that if the Commission approves St. Vincent's hardship application in this case, it WILL be a precedent of immense (and unfortunate) dimensions and one that will surely lay the way for many other charities' hardship applications in the future. It would be a sad legacy for this Commission to leave.

POINT THREE

ST. VINCENT'S CLAIMED HARDSHIP IS SELF-IMPOSED

In his July 15 presentation, Mr. Friedman rejected the idea that self-imposed hardship had any application in this case. In this regard, he was correct in stating that the legal concept of "self imposed hardship" has largely been developed under the variance provisions of zoning codes; and he was also correct that as articulated in those cases, whether an owner acquires property when restrictions are already in place is not decisive and, under certain circumstances, does not apply to charities.

However, in referencing "self-imposed hardship" in our July 15 Brief, we did not have in mind the concept as developed under zoning codes (though several such cases were cited reinforcing our other points relevant to post-restriction acquisitions).

To the contrary, the arguments we have advanced regarding self-imposed hardship have nothing to do with when the O'Toole Building was acquired. Rather, PVHD's contention is that St. Vincent's claimed "necessity" to demolish the O'Toole Building is the result of its plan to sell the East Campus to the Rudins. We have spelled out this position in the July 15 Brief on pp. 28-31 and will not repeat it here, respectfully referring the Commissioners to those pages.

CONCLUSION

For the reasons set forth herein and in our July 15 Brief, the Commission should deny St. Vincent's hardship application.

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Respectfully submitted,

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