To Be Argued By:
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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

STAHL YORK AVENUE CO., LLC,

Plaintiff-Petitioner-Appellant,

—against—

THE CITY OF NEW YORK; THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION; MEENAKSHI SRINIVASAN, in her capacity as Chair of the New York City Landmarks Preservation Commission,

Defendants-Respondents-Respondents.

REPLY BRIEF FOR PLAINTIFF-PETITIONER-APPELLANT

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INTRODUCTION

Stahl had a deal with the City: it agreed not to challenge the landmark designation for 13 of the FAE's 15 buildings, and in exchange, Stahl received permission to redevelop the other two, which lacked the same historical and architectural significance. The City successfully defended this deal in protracted litigation with anti-development groups. Then, after Stahl had spent over a decade investing in the redevelopment, the City abruptly disavowed the deal and landmarked the Buildings, thereby destroying their commercial value and wiping out Stahl's investment.

Stahl has stated a regulatory takings claim. Under the fact-intensive balancing test that governs here, Stahl's allegations plainly suffice. The City sidestepped this conclusion below primarily by convincing the trial court that it could "defer" to the LPC's factual findings. But that was legally erroneous. Because the takings claim was not presented to the LPC, its decision had nothing to do with whether a taking had occurred. Moreover, the trial court essentially allowed the LPC to immunize itself from constitutional review, which contravenes the most basic principles of due process.

The City now admits that it was improper for the trial court to defer to the LPC, even though the City itself had vigorously advocated for such deference below. In an attempt to salvage the judgment, the City instead takes a different

(and equally flawed) approach in the appeal. First, the City tries to recast the fact-sensitive takings inquiry as a bright-line rule that would require dismissal. Yet the authorities the City cites flatly reject its position and confirm the ad hoc nature of the inquiry. Indeed, not one of those cases grants a motion to dismiss a regulatory takings claim, let alone supports dismissal of a claim that, like Stahl's, finds ample support in the complaint's allegations.

Recognizing that the law does not favor it, the City also tries to put its own spin on the facts. But its factual arguments are no more persuasive than its legal ones. Instead of accepting the Complaint's allegations as true, the City raises factual disputes and urges this Court to resolve them in the City's favor. That, of course, is not proper on a motion to dismiss. Nor would the City's factual arguments prevail even if it were appropriate to consider them at the pleadings stage. For example, the City argues that the BOE's dissolution made it foreseeable that Buildings would be landmarked, when in fact the City itself continued to defend the BOE compromise long after the BOE ceased to exist, and the New York Supreme Court ratified the City's position. It was wholly improper for the trial court to resolve this factual dispute, and the other factual disputes the City raises, in favor of the City. Accordingly, the takings claim must be reinstated.

The City's attempt to defend the LPC from Stahl's Article 78 petition is equally meritless. In fact, the City does little to defend the LPC's flawed

reasoning. First, to justify including the entire landmark in the "improvement parcel," the City relies upon an impermissible post-hoc interpretation of the Landmarks Law—one that even the LPC never adopted—that contravenes the statute's plain meaning. The City also fails to explain how the Buildings' profitability can be determined without accounting for the massive renovation costs that would render the Buildings unprofitable. Nor does the City explain why those costs are "self-imposed," because it does not identify anything that Stahl did that gave rise to them. In fact, the renovation costs are unavoidable, and not "self-imposed." Once these errors are corrected, simple math indisputably demonstrates that Stahl cannot earn the requisite 6% return on the Buildings, and establishes Stahl's entitlement to hardship relief. Stahl's Article 78 position therefore should be granted.

I. The Takings Claim Was Erroneously Dismissed

A. Stahl Adequately Alleged That The Buildings Are The Relevant Parcel

The threshold question for the takings claim is what parcel of land the government has taken. The focus of this analysis is on "the economic expectations of the claimant with regard to the property." *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999); *accord Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) (emphasis on "the owner's reasonable expectations"). Where, as here, the owner alleges that it has "distinct economic

expectations for" different parcels located on "contiguous land," takings law "treats the parcels as distinct economic units."[1] *Lost Tree Village Corp. v. United States*, 707 F.3d 1286, 1293-94 (Fed. Cir. 2013); *see Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000) (parcel with unique development plans deemed separate from an adjacent unit).

The City concedes that the trial court impermissibly deferred this analysis to the LPC. Yet the City nevertheless (1) claims that the relevant parcel must, as a matter of law, include all of the owner's contiguous holdings, and (2) denies that Stahl treated the Buildings differently from the Other Buildings. (City Br. 53-61). These arguments are wholly without merit.

1. The City suggests that there is a "rule" requiring this Court to treat the entire landmark as the relevant parcel. (City Br. 53-54). In fact, "the 'property interest' against which the loss of value is to be measured" may be "*the burdened*

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[1] The City pretends that only *Forest Properties* stands for this proposition (City Br. 59), when in fact it is widely accepted, *see, e.g.*, *Lost Tree Village*, 707 F.3d at 1293; *Palm Beach*, 208 F.3d at 1381; *Brace v. United States*, 72 Fed. Cl. 337, 348 (2006), *aff'd*, 250 F. App'x 359 (Fed. Cir. 2007) ("In applying the 'parcel' as a whole concept, the court must focus on 'the economic expectations of the claimant with respect to the property'. . . ."), including by the very cases on which the City purports to rely, *see Dist. Intown Properties Ltd. P'ship v. Dist. of Columbia*, 23 F. Supp. 2d 30, 36 (D.D.C. 1998), *aff'd*, 198 F.3d 874 (D.C. Cir. 1999) (holding that landowner's expectations are "important at the parcel definition stage because it sheds considerable light on the landowner's conception of how to identify the relevant property").

portion of the tract" as opposed to "the tract as a whole." *Lucas*, 505 U.S. at 1016 n.7 (emphasis supplied); *accord, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (whether relevant parcel is the "whole" property or only part of it is a "difficult, persisting question"). Thus, "even when contiguous land is purchased in a single transaction, the relevant parcel may be *a subset* of the original purchase." *Lost Tree Village*, 707 F.3d at 1293 (emphasis supplied).

Courts take "a 'flexible approach, designed to account for factual nuances,' in determining the relevant parcel." *Id.* (quoting *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994)). This "fact-intensive inquiry" cannot be resolved on "a motion to dismiss" if the plaintiff "sufficiently allege[s]" that the relevant parcel is a subset of a landmark. *2910 Georgia Ave. LLC v. Dist. of Columbia*, 983 F. Supp. 2d 127, 137 (D.D.C. 2013).

The cases that the City cites confirm this. Because of the fact-sensitive nature of the relevant parcel inquiry, these cases only resolved it *after* the development of a full factual record. *See Dist. Intown*, 198 F.3d at 884 (affirming grant of summary judgment); *Forest Props.*, 177 F.3d at 1367 (affirming trial verdict); *Mt. St. Scholastica, Inc. v. City of Atchison*, 482 F. Supp. 2d 1281, 1289 (D. Kan. 2007) (summary judgment); *Bevan v. Brandon Township*, 438 Mich. 385,

387-88 (1991) (affirming verdict on stipulated facts).[2] None of these cases suggest that the inquiry can be rotely decided at the pleadings stage.

Nor did *Penn Central* establish a bright line "rule" for identifying the relevant parcel. The City relies on *Penn Central*'s statement that courts should "focus[]" on "interference with the rights in the parcel as a whole," *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978), but that merely begs the question: what is the relevant "parcel"? The Supreme Court's point was that once the relevant parcel is identified, courts should not examine one aspect of that parcel (such as "air rights") to the exclusion of all others; the relevant parcel should instead be examined "as a whole." *Id*. But that does not address the antecedent question of how to identify the relevant parcel. Therefore, the courts have repeatedly rejected the City's interpretation of *Penn Central* and confirmed that "the 'parcel as a whole'" referenced in that case "does not extend" to all "holdings in the vicinity" of the structure whose development has been restricted. *Lost Tree Village*, 707 F.3d at 1292-93 (emphasis supplied); *accord, e.g., Palm*

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[2] *Smith v. Town of Mendon*, 4 N.Y.3d 1 (2004), cited by the City (at 54), is inapposite. The government in that case offered to permit development on a portion of the property "in exchange for" the imposition of "restrictions" on the remainder. *Id*. at 13. Yet the plaintiffs "reject[ed]" the offer and sought to preserve development rights for the entire property. *Id*. at 8. Consequently, even the plaintiffs did not contest that the entire property was the relevant parcel. *Id*. at 7-15. That is the opposite of what happened here; Stahl accepted a compromise similar to the one the *Smith* plaintiffs rejected, and thus expected to develop only a portion of the FAE.

Beach, 208 F.3d at 1381; *Loveladies Harbor*, 28 F.3d at 1181; *2910 Georgia Ave.*, 983 F. Supp. 2d at 137.

There is no bright-line test for determining the relevant parcel. Courts instead use a nuanced, fact-based approach that focuses on the owner's economic expectations.[3]

2. The City tacitly acknowledges the factual nature of this inquiry by devoting a significant portion of its argument to the facts. But the Complaint plainly alleges that Stahl had "distinct economic expectations for" the Buildings. *Lost Tree Village*, 707 F.3d at 1294. The BOE cleaved the Buildings from the remainder of the FAE in 1990. When community groups challenged this decision, the City successfully opposed their efforts and affirmed Stahl's "rights to develop" the Buildings. (A80, ¶¶ 34-35). Stahl therefore spent the next 16 years preparing the Buildings for redevelopment, at considerable cost. (A82, ¶¶ 37-39).

According to the City, (1) Stahl should have known that the City would retract the compromise because the BOE was dissolved in 1990, and (2) the existence of some shared expenses and facilities at the FAE means that it was managed it as "a single economic entity." (City Br. 55, 58). These arguments are both premature and wrong.

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[3] The Supreme Court may shed additional light on this standard in *Murr v. Wisconsin*, No. 15-214, a regulatory takings case that was argued in March 2017, and is pending before the Court.

They are premature because they attempt to raise hotly contested factual disputes at the pleadings stage. Factual disputes like these cannot be resolved on a motion to dismiss, where the complaint's allegations must be accepted as true. *See, e.g.*, *2910 Georgia Ave.*, 983 F. Supp. 2d at 137 (denying motion to dismiss because "[t]he relevant 'property' for purposes of this case is a fact-intensive inquiry").

They are wrong because the City egregiously mischaracterizes the facts. The 1990 compromise was not extinguished by the BOE's disbandment. That compromise was not even the BOE's idea; it was the City Council President who initially proposed the compromise which he asked "BOE members to support and which was ultimately adopted." (A200). And the City continued to defend that compromise after the BOE ceased to exist. (A198-205; A318, 320). In the protracted community group litigation, the City maintained that the compromise was "desirable" and "proper" because it "allows as-of-right development" of the Buildings. (A200-03). Thus, by pointing the finger at the BOE, the City ignores the critical role that the City itself played in defending Stahl's redevelopment rights.

Loveladies Harbor is on point. (*See* Stahl Br. 27-28). The City appears to suggest that the parcel chosen by the court in that case differed from the parcel the landowner sought to develop pursuant to its compromise with the government.

(City Br. 60). That is simply false. That compromise allowed the landowner to develop "the 12.5 acre parcel at issue" and, as a consequence, the landowner expressly contemplated a "12.5 acre development." 28 F.3d at 1174. The court found that, pursuant to the compromise, "the relevant property for the takings analysis [was] the 12.5 acres." *Id*. at 1181. And it makes no difference whether the compromise in that case was part of a litigation settlement. Here, the City obtained *judicial approval* of the 1990 compromise, which is no less definitive. (A322).

Nor is there any serious dispute that Stahl's economic expectation for the Buildings differed substantially from its expectation for the Other Buildings. Stahl's redevelopment plans were for the Buildings alone. It kept the Buildings' apartments unrented as they became vacant, such that most of the apartments were empty by the time of the LPC's decision. And Stahl expended considerable time and energy on redevelopment planning solely for the Buildings. The Other Buildings, by contrast, were run like normal apartment buildings.[4] The trial court was not permitted to ignore these allegations on a motion to dismiss.

[4] The City correctly notes that Stahl might relocate some of the Building's tenants to the Other Buildings prior to redevelopment (City Br. 56), but that merely highlights Stahl's separate intentions for the two properties. Whereas Stahl wishes to demolish and redevelop the Buildings, it expects the Other Buildings to continue as the same rental properties where rent-controlled tenants can live.

District Intown, on which the City purports to rely (at 54-56), does not hold otherwise. First, the court in that case did not attempt to define the relevant parcel until discovery on the takings claim was complete. *Dist. Intown*, 198 F.3d at 878. *District Intown* in no way suggests that it would be appropriate to conduct this fact-sensitive inquiry at the pleadings stage. Second, *District Intown* defined the relevant parcel as the entire landmark in significant part because it had always been "treated as a single indivisible property" by "both the property-owner and the government." *Id*. at 880. The opposite is true here. The 1990 comprise divided the property into two parts and, until the LPC's sudden reversal, the City actively supported this division. (A80, ¶¶ 34-35). The property must therefore be divided the same way for purposes of Stahl's takings claim.

B. Stahl Adequately Alleged The Economic Impact Of The Landmark Designation

The key factor in a partial takings analysis is the severity of the economic impact of the challenged regulation on the property. *See Penn Cent.*, 438 U.S. at 124. This fact-intensive analysis, like the relevant parcel inquiry, cannot be resolved on a motion to dismiss. *See Cienega Gardens v. United States*, 331 F.3d 1319, 1341 (Fed. Cir. 2003) (observing that "specific findings of fact about the effects of the legislation on the plaintiffs are necessary to complete the analysis of the economic impact factor"); *McGuire v. United States*, 97 Fed. Cl. 425, 441 (2011) ("Summary judgment on this issue is premature" where "[t]he parties

disagree as to the measure of economic loss that [the claimant] suffered."). The Complaint here details how the LPC's decisions destroyed virtually all of the Building's economic value, thereby satisfying Stahl's obligation to plead a severe economic impact. (A89-90, ¶¶ 73-76).

The City again concedes that it was improper for the lower court to "defer" this inquiry to the LPC. Instead, the City claims that, (1) apart from the obstacles imposed by the Landmarks Law, the rent control laws might impede the Buildings' redevelopment, (2) Stahl supposedly "can still use the property in the same way that it could at the time of purchase," and (3) if renovated, the Buildings might earn a meager return. (City Br. 64-67). The City "failed to raise" the first two arguments "before the IAS court, and is therefore precluded from raising [them] on appeal." *Sosa v. Cumberland Swan, Inc.*, 210 A.D.2d 156, 157 (1st Dep't 1994). In any event, for the reasons stated below, all three arguments lack merit.

First, the rent control laws will not prevent the redevelopment. The City suggests that there are only two ways to demolish a building with rent controlled tenants: by waiting for them to vacate or establishing hardship at the 8.5% threshold. (City Br. 64-66). But the City ignores a third option, which is the one Stahl would actually use, that allows a building with "three or fewer" rent controlled tenants to "relocate" them or pay them a "stipend" in order to demolish the building. N.Y.C. Admin. Code § 26-408(b)(6); 9 N.Y.C.R.R. § 2524.5. The

City does not dispute that each of the Buildings has fewer than three rent controlled tenants, meaning that the rent control laws present *no* obstacle to redevelopment. N.Y.C. Admin. Code § 26-408(b)(6). Even if that were not the case, the rent controlled tenants could always be bought out—another option the City ignores. Until now, the City has *always* conceded that, if the landmark designation were lifted, "new construction could take place" on the Buildings site. (A200). This was how the City justified the 1990 compromise in the community group litigation, and the court explicitly adopted the City's reasoning. (A200-01, 322). The *only* reasonable inference to be drawn from this was that the Buildings could be redeveloped; certainly Stahl's expectation cannot be deemed unreasonable as a matter of law. *See, e.g.*, *Haberman v. City of Long Beach*, 298 A.D.2d 497, 498 (2d Dep't 2002) (holding that "[i]ssues of fact" concerning "the reasonableness of plaintiff's development expectations" must "be resolved at trial").

Second, the City claims that "no taking exists if an owner can still use the property in the same way that it could at the time of purchase," citing *Briarcliff Assocs. v. Town of Cortlandt*, 272 A.D.2d 488 (4th Dep't 2000). (City Br. 66). But here, Stahl *cannot* use the property in the same way that it could when it purchased the Buildings, because there was no landmark designation at that time. Moreover, *Briarcliff* does not suggest that *any* preexisting use will defeat a takings

claim. The court merely determined, following a bench trial, that owner failed to prove that the particular use at issue would "deprive[] [the owner] of [a] reasonable return on [its] investment." *Briarcliff*, 272 A.D.2d at 491. Here, Stahl alleges that it *would* be deprived of a reasonable return. Nor did the plaintiff in *Briarcliff* allege that it had relied to its detriment on the government's promise that the land could be used a particular way, as Stahl does here. The cases addressing that situation permit a landowner to rely on such a promise. *See, e.g.*, *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336, 347 (2001) (landowner may rely on statements by government after purchasing land); *Woodland Manor, III Assocs., L.P. v. Reisma*, No. C.A. PC89-2447, 2003 WL 1224248, at *14 (Sup. Ct. R.I. Feb. 24, 2003) (same).

Finally, the Complaint alleges that absent the landmark designation, the Buildings would be worth up to $200 million. (A71-72, ¶ 2). But in every year since the Buildings were designated, Stahl has lost money operating them in their current condition, and there are "no prudent steps Stahl could take to ensure the Buildings generate a reasonable return." (A90, ¶ 76). The Complaint therefore satisfies Stahl's obligation to plead a "serious financial loss." *Cienega Gardens*, 331 F.3d at 1340. The City speculates that the Building's annual income might increase if the Buildings are renovated (City Br. 67), but ignores the Complaint's allegation that the renovations would cost "tens of millions" of dollars and the

"return that Stahl could obtain from renovating the apartments would be insufficient to recoup the renovation costs." (A89-90, ¶¶ 75-76). The factual disputes that the City tries to raise simply cannot be resolved on a motion to dismiss. *See, e.g.*, *Hendler v. United States*, 175 F.3d 1374, 1385 (Fed. Cir. 1999) ("The question of the economic impact of a particular regulatory action is of course fact-specific to the case.").

C. Stahl Adequately Alleged A Reasonable Investment-Backed Expectation

Finally, for the reasons set forth above (at 8-9), Stahl alleges that it reasonably anticipated the Buildings' redevelopment. (*See also* Stahl Br. 38-41). The City characterizes Stahl's expectation as "unilateral" (City Br. 68), but again ignores its own endorsement of the 1990 compromise. (A318, 320; A198-205). The City also characterizes the compromise as "irrational," relying on this Court's *Kalikow* decision. (City Br. 69). But *Kalikow* invalidated the compromise for the York Avenue Estate, not the FAE. Our opening brief explained why, unlike in *Kalikow*, the FAE compromise had a clear rationale consistent with the Landmarks Law—the Buildings were designed by a different architect, constructed at a different time, and built on a plot of land acquired at a different time and from a different seller than the Other Buildings. (Stahl Br. 40-41; A78-79, ¶¶ 30-31). The

City ignores these distinctions, and thus effectively concedes that there were very good reasons to exclude the Buildings from the landmark designation.[5]

* * * * * *

The Complaint plainly alleges a partial taking, but the lower court disregarded the Complaint's allegations, and instead resolved every factual dispute in the City's favor. That is impermissible on a motion to dismiss. Stahl's regulatory takings claim should be reinstated.

II. The Conclusion That Stahl Could Earn A Reasonable Return Was Arbitrary And Capricious

The lower court also erred by upholding the arbitrary and capricious denial of Stahl's hardship application. The LPC's reasoning is completely indefensible. (*See* Stahl Br. 41-56). The City fails to defend that reasoning, to the extent that it even tries. Any rational assessment of the record compels but one conclusion—that the Buildings cannot yield a reasonable return—and the Article 78 Petition therefore should be granted.

A. The Relevant Improvement Parcel Is The Buildings

The relevant "improvement parcel" is the Buildings, not the entire First Avenue Estate. (Stahl Br. 43-47). The Landmarks Law defines the "improvement

[5] The special interests that instigated the landmark designation, appearing here as amici, suggest (at 34-36) that Stahl's expectation was not backed by an investment. Yet, as the City itself concedes, the Complaint alleges that Stahl invested millions in the property and preparations for redevelopment with the expectation that the Buildings would be redeveloped. (A77, ¶ 22; A81, ¶ 37).

parcel" as the unit of property "treated as a single entity for the purpose of levying real estate taxes." N.Y.C. Admin. Code § 25-302(j). It is undisputed that the Buildings comprise a distinct tax lot and that the City has always taxed them separately from the Other Buildings. (A1359; Stahl Br. 44-45; City Br. 32-36). The LPC therefore violated the Landmarks Law by including the Other Buildings in the "improvement parcel."

In arguing otherwise, the City purports to rely upon (1) an unpreserved and erroneous interpretation of the Landmarks Law, (2) "consolidated" tax filings for properties that, in reality, were taxed separately, and (3) public policy arguments that contradict the statute. Nothing in the City's response justifies the LPC's disregard for the plain meaning of the Landmarks Law.

1. The City advances a new interpretation of the Landmarks Law on appeal. (City Br. 26-28). Though convoluted, it appears to be as follows. Landmarks Law Section 25-309(a) governs "application[s] for [] permit[s] to demolish any improvement located on a landmark site." Such a permit is allowable if "the improvement parcel (or parcels) which includes such improvement . . . is not capable of earning a reasonable return." *Id.* § 25-309(a)(1)(a). The City assumes, without support, that the "improvement" referenced in Section 25-309(a)(1)(a) must be the entire landmark. And, the argument goes, because an "improvement

parcel" includes an "improvement," the entire landmark must reside within the improvement parcel.

This argument fails for two reasons. First, the LPC did not interpret the statute this way (A1358-60), and "[i]t has . . . long been the rule that judicial review of an administrative determination is limited to the grounds presented by the agency at the time of its determination." *Scanlan v. Buffalo Pub. Sch. Sys.*, 90 N.Y.2d 662, 678 (1997). The City "violate[s] th[at] settled rule" by making "new arguments" in this appeal. *E. Pork Prods. Co. v. N.Y. State Div. of Hous.*, 187 A.D.2d 320, 322 (1st Dep't 1992) (internal quotation marks omitted). Where, as here, "the reasons [the] agency [itself] relie[d] on do not reasonably support its determination . . . the administrative order must be overturned." *Nat'l Fuel Gas Distr. Corp. v. Pub. Serv. Comm'n*, 16 N.Y.3d 360, 368 (2011).

Second, the City's interpretation of the Landmarks Law is frivolous. It disregards how the statute defines an "improvement parcel"—the unit of property "treated as a single entity for the purpose of levying real estate taxes." N.Y.C. Admin. Code § 25-302(j). The City is wrong to suggest that Section 25-309(a)(1) somehow permits the LPC to ignore this definition and include multiple tax entities in an improvement parcel. That Section allows a landowner to "demolish any improvement located on a landmark site" if "the improvement parcel (or parcels) which includes such improvement . . . is not capable of earning a reasonable

return." The Landmarks Law defines an "improvement" as "[a]ny building [or] structure . . . constituting a physical betterment of real property, or any part of such betterment." N.Y.C. Admin. Code. § 25-302(i). Thus, when Section 25-309(a)(1) refers to an "improvement," it means the "building," "structure," or "part" thereof that the owner wishes to "demolish . . . on [the] landmark site."

Here, the "improvement" is the Buildings, *i.e.*, the "structure" on the landmark site that would be demolished. The "improvement" is not the entire landmark, as the City suggests, because Stahl does not seek to demolish the entire landmark. The LPC conceded as much in its decision, which confirms that "the improvement" at issue in this case includes only the structure "the applica[nt] seeks to demolish," not the entire landmark. (A1355).

The City's reliance on *DGM Partners-Rye v. Bd. of Architectural Review*, 148 A.D.2d 608 (2d Dep't 1989), is misplaced. Unlike here, the landowner in *DGM* sought to "develop[] . . . the entire parcel" that was landmarked, as opposed to a mere portion of the landmark site. *Id.* at 609. The court therefore included the entire landmark in the improvement parcel. *Id*. In addition, *DGM* addressed the landmark statute governing the city of Rye. Unlike the New York City Landmarks Law, the Rye statute does not even use the term "improvement parcel," let alone define it. Rye Admin. Code §§ 117-2, 117-7. Here, by contrast, the Landmarks Law is crystal clear that the "improvement parcel" must constitute a single tax

entity. The LPC therefore was prohibited from including the Other Buildings in the improvement parcel.

2. The City next argues that Stahl "requested" that the City tax the Landmark's four separate tax lots on a consolidated basis. (City Br. 33-34). But the City does not dispute that it ultimately *precluded* Stahl from ever consolidating its filings, and instead taxed the Buildings on a standalone basis. (*See id*; Stahl Br. 44). The Landmarks Law defines an "improvement parcel" as the unit of property "treated as a single entity for the purpose of *levying* real estate taxes." N.Y.C. Admin. Code § 25-302(j) (emphasis supplied). Because the City has always treated the Buildings as a single entity when levying their real estate taxes, the Buildings alone constitute the relevant improvement parcel.

3. Finally, the City repeats the alleged public policy considerations that the LPC identified in its decision: that "all of the buildings of the First Avenue Estate share significant commonalities," and that "Stahl operated the First Avenue Estate complex as a single economic entity." (City Br. 30-31). But the statute defines "improvement parcel" according to how the Buildings are taxed, and the City concedes that the Buildings are taxed separately. An agency acts arbitrarily where, as here, it relies on policy considerations that are "inconsistent with the plain meaning of the statutory language." *Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 N.Y.2d 588, 595 (1982).

B. The Income Approach Is Irrational

In addition to analyzing the wrong parcel, the City utilized an irrational methodology—the income approach. The opening brief presented four reasons why the LPC acted arbitrarily and capriciously by adopting this approach. (Stahl Br. 47-53). Specifically, the income approach (1) is divorced from economic reality, (2) is not consistently followed by the DOF, (3) violates LPC precedent and (4) was applied inconsistently by the LPC. The City's response to these arguments is entirely superficial, and unavailing.

1. According to the City, the income approach "makes perfect sense" because "the owner of a rental property will recoup renovation costs over time" through income earned on the property. (City Br. 45). But that begs the question—will the owner earn *enough* income to recoup those costs within a "*reasonable*" time? N.Y.C. Admin. Code § 25-309(a)(1)(a). In other words, the City ignores the possibility that renovations costs will be prohibitively high, such that the amount of time it takes to recoup the costs would render the return unreasonable. Nor does the City dispute that this is precisely what would happen here: it could take Stahl up to *70 years* to recoup its renovation costs. (*See* Stahl Br. 48; A675, 682, 1169). Yet the income approach ignores these costs, and pretends the Buildings will immediately turn a profit. This is not a rational way of determining whether an owner suffers a hardship. Only the cost approach takes

account of the owner's costs and provides a rational assessment of the owner's likely return.[6] (Stahl Br. 48-49).

2. The LPC's stated reason for using the income approach is that the DOF does not consider renovation costs when assessing property value. (A1374). But the LPC is wrong. As explained in the opening brief, the DOF routinely takes account of renovation costs when conducting an assessment, and even "used [that] cost information to estimate . . . the value for" the Buildings here. (A1175). The City concedes that the DOF factors renovation costs into an assessment. (City Br. 44). Yet, to justify using the income approach, the City cites a single conclusory email from a DOF employee who claims that the DOF uses "the income approach" even when it accounts for renovation costs. (*Id.*). But factoring renovation costs into an assessment is, by definition, the cost approach (*see* Stahl Br. 50), and it is "arbitrary and capricious" for an agency to rely on "conclusory" statements to the contrary. *Farina v. State Liquor Auth.*, 20 N.Y.2d 484, 493 (1967).

3. Even if the LPC had a rational basis for using the income approach (there was none), it was still required to follow its own precedent adopting the cost approach. As our opening brief showed (at 51), the LPC used the cost approach in

[6] The City argues that the income approach leads to "lower projected real estate taxes" (City Br. 43), but ignores the opening brief's explanation for why this is irrelevant (Stahl Br. 49). The question is not how a taxpayer might want to calculate taxes, but instead how a property owner that incurs major renovation costs would assess whether the return on this investment is reasonable. As the opening brief explained (*id.*), no reasonable property owner would simply disregard those costs.

KISKA, and it was "arbitrary and capricious" for the LPC to "depart[] from its prior holding" without adequate explanation. *Collins v. Governor's Office of Employee Relations*, 211 A.D.2d 1001, 1003 (3d Dep't 1995).

The City concedes that *KISKA* used the cost approach for "scenarios involving renovation of the buildings for immediate post-renovation sale," but claims that the income approach was used instead for "scenarios that assumed the owner would be renting the buildings." (City Br. 46 (emphasis omitted)). According to the City, *KISKA* does not compel the cost approach here because Stahl envisions renting the Buildings' apartments instead of selling them. (*Id*.).

The City mischaracterizes *KISKA*. In fact, the *KISKA* opinion's "reasonable return calculations" included "reno[vation] costs" even for "rental units." (A1336). The City itself conceded below that the LPC "us[ed] the cost approach" "*every time* [it] calculated assessed value in *KISKA*." (A107, 244, 1322). Moreover, the City's distinction between sale and rental scenarios is illusory. Renovation costs need to be recouped regardless of whether the property is rented or sold after the renovations are completed. It makes no sense to suggest that only a selling owner is harmed by inadequate post-renovation returns; an owner who receives inadequate rental income also suffers a hardship.

KISKA used the cost approach, and the City's attempt to distinguish *KISKA* fails for multiple independent reasons. Because the LPC cannot explain its "failure

to conform to [the *KISKA*] precedent," its decision must be "revers[ed] on the law as arbitrary." *In re Charles A. Field Delivery Serv., Inc.*, 66 N.Y.2d 516, 520 (1985).

4. Finally, the LPC assigned the same term ("assessed value") different meanings in different parts of the *same mathematical equation*. Specifically, that term included renovation costs with respect to depreciation, but not for the equation's other factors. (Stahl Br. 52-53). The City does not even attempt to explain why. This "inherently contradictory" analysis is yet another reason why the LPC's decision was arbitrary and capricious, and why it must be reversed. *See, e.g.*, *KSLM-Columbus Apartments, Inc. v. N.Y. State Div. of Hous.*, 5 N.Y.3d 303, 315 (2005) (rejecting agency analysis that was "inherently contradictory").

C. The LPC Arbitrarily Excluded Renovation Costs For 44 Vacant Apartments

The LPC erroneously concluded that renovation costs for 44 of the apartments were "self-imposed" because Stahl elected to warehouse the apartments instead of renting them. (Stahl Br. 19). But costs are only "self-imposed" if the landowner's conduct is what gives rise to them; by definition, costs that arise from other factors are not self-imposed. Though the City details Stahl's decision to warehouse the units (City Br. 39-42), it never explains how this decision gave rise to any renovation costs, and thus fails to substantiate the LPC's determination that the costs were self-imposed.

Indeed, warehousing the apartments did not impose renovation costs on Stahl. The apartments need to be renovated not because of anything Stahl did to them, but because they were built a long time ago and have become outmoded.[7] The renovations would be equally necessary if Stahl began renting the apartments instead of warehousing them, which is what the City wants Stahl to do.[8] (City Br. 39-40). For these reasons, the renovation costs for the 44 apartments were unavoidable, not self-imposed. The City's failure to present any alternative explanation for these costs underscores the arbitrary and capricious nature of the LPC's conclusion.

D. The LPC's "Alternative" Calculation Applied The Same Irrational Methodology As The Original Calculation

As explained in the opening brief (at 54-56), the LPC's "alternative" calculations that purported to be "based on the cost approach" did not actually use that approach. The "alternative" calculations instead used the income approach with respect to certain variables, thereby ensuring that the result would remain

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7 *Farash Corp. v. City of Rochester*, 275 A.D.2d 957 (4th Dep't 2000), cited by the City (at 40), does not compel a different result. The "economic hardship" in that case resulted directly from the owner's "neglect of maintenance" on the property, and thus was truly "self imposed." *Id*. at 958. Here, by contrast, Stahl did nothing to increase the renovation costs.

8 The City maintains (at 42) that it was appropriate to include post renovation income from these apartments in the hardship calculus, without explaining why the costs needed to generate that income should be excluded. (*See* Stahl Br. 53-54). And it is undisputed that Stahl cannot be required to renovate the apartments to obtain permission to demolish those same apartments. (City Br. 39-40).

adverse to Stahl. On appeal, the City concedes that the "alternative" calculations did in fact "use[] the income approach." (City Br. 49). The City also admits that most of these calculations continued to exclude renovation costs from 44 of the apartments, based on the LPC's flawed theory of "self-imposed hardship." (City Br. 50-51). Thus, it is now undisputed that the LPC's "alternative" scenarios did not do what the LPC claimed they would do—namely, apply the cost approach consistently throughout the reasonable return formula. And the City does not dispute that if the LPC had consistently applied the cost approach, Stahl's hardship petition would have been granted. (*Id*.).

The LPC's contrary conclusion, like the others detailed above, was completely indefensible. For this reason, the LPC's arbitrary and capricious decision cannot stand.

CONCLUSION

For the foregoing reasons, this Court should reverse the Supreme Court's order granting the City's motion to dismiss and denying Stahl's Article 78 petition.

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Respectfully submitted,

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