New York County Clerk's Index No. 100999/14

Court of Appeals

STATE OF NEW YORK

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.

MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

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September 24, 2018

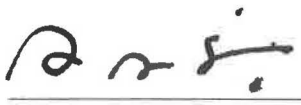
COURT OF APPEALS
OF THE STATE OF NEW YORK

STAHL YORK AVENUE CO., LLC, Plaintiff-Petitioner-Appellant, v. 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.	New York County Clerk Index No. 100999/2014 **NOTICE OF MOTION FOR PERMISSION TO APPEAL TO THE NEW YORK COURT OF APPEALS PURSUANT TO CPLR § 5602(a)(1)(i)**

PLEASE TAKE NOTICE that Appellant Stahl York Avenue Co., LLC ("Stahl") will move this Court, pursuant to CPLR § 5602(a)(1)(i) and Rule 500.22 of the Rules of Practice of the Court of Appeals, upon the record of the prior appeal in this case to the Appellate Division, First Department, and upon the papers submitted herewith, at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, on October 8, 2018, at 9:30 a.m., for an order granting permission to appeal to this Court from a Decision and Order of the Appellate Division, First Department, entered on May 22, 2018 (the "Decision and Order").

PLEASE TAKE FURTHER NOTICE that Stahl is also filing a Notice of Appeal from the Decision and Order, because Stahl is entitled to an appeal as of right under CPLR § 5601(b)(1). However, in an abundance of caution, Stahl alternatively seeks leave to appeal should this Court determine that there is no appeal as of right. *See, e.g.*, *Gorman v. Rice*, 24 N.Y.3d 1032, 1036 (2014) (party may "appeal[] as of right" and "alternatively[] s[eek] leave to appeal").

Dated: New York, New York
September 24, 2018



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Rule 500.1(f) Corporate Disclosure Statement

Plaintiff-Petitioner-Appellant Stahl York Avenue Co., LLC is not a publicly-held corporation. It has no subsidiaries or affiliates that are publicly traded.

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ATTACHMENTS

Plaintiff-Petitioner-Appellant Stahl York Avenue Co., LLC ("Stahl") appeals from a Decision and Order of the Appellate Division, First Department. Because the decision below "finally determines an action" that "directly involved the construction of the constitution of the state or the United States," Stahl is entitled to appeal as of right under CPLR § 5601(b)(1). However, in an abundance of caution, Stahl also moves for leave to appeal.

This case presents substantial federal constitutional questions about *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017), the recent U.S. Supreme Court decision interpreting the Fifth Amendment's Takings Clause. *Murr* established a new test for determining the relevant parcel of land when analyzing a regulatory takings claim. This "critical" question is usually "outcome determinative," *id*. at 1944, and the First Department's decision is the first application of *Murr* by an appellate court in New York State. But the First Department altered the *Murr* test, recasting it as one that is deferential to regulators instead of applying the requisite constitutional scrutiny to their actions. As a result, no such scrutiny has ever been applied to the City of New York's inexplicable decision here to "landmark" two undistinguished, outdated, tenement-style Manhattan apartment buildings, thereby breaking the City's promise to permit a desperately needed redevelopment and destroying the buildings' value.

This Court's intervention is needed to ensure that binding Supreme Court precedent is faithfully applied in New York. The pretextual landmarking of property routinely occurs in Manhattan, where 27% of the borough's lots are designated as landmarks. Left unchecked, the First Department's decision will unconstitutionally burden property owners, chill new development and limit the expansion of available housing. It will also create confusion over what regulations, if any, the New York courts will deem to be a taking. A decision in this case would not only clarify the law in New York, but would also have precedent-setting effect on regulatory takings law nationwide. As the first state high court to apply the new *Murr* test, this Court's opinion would serve as a guide to other state courts grappling with similar issues.

BACKGROUND

A. Timeliness Of The Motion

Respondents served Notice of Entry of the Appellate Division's Decision and Order by hand delivery on August 27, 2018. This motion was served on September 24, 2018, and is thus timely. *See* CPLR §§ 2103(b)(1), 5513(b).

B. Procedural History[1]

This appeal relates to two Stahl-owned, six-story walkup apartment buildings on East 64th Street near York Avenue in Manhattan (the "Buildings"):

In the 1990s, the City of New York agreed to permit Stahl to redevelop the buildings into a modern highrise. Fifteen years later, however, the City reneged on its promise and pretextually declared the buildings "landmarks," thereby precluding the redevelopment. After exhausting its Article 78 challenge to the landmark designation, Stahl unsuccessfully sought hardship relief under the New York City Landmarks Law. Consequently, Stahl brought a "hybrid" action in which it alleged that the landmark designation and the City's subsequent refusal to

[1] The background information set forth below assumes the truth of the Complaint's allegations.

grant hardship relief together violated the Fifth Amendment's Takings Clause and Article I, Section 7 of the New York State Constitution.[2]

1. *The Buildings*

The Buildings were constructed in the early 1900s as tenement housing. They contain 190 poorly designed apartments whose condition and layout render them unfit for modern tenants. The apartments average 370 square feet of leasable space and lack basic modern amenities, appliances and fixtures. Many units contain bedrooms too small to hold even a queen-sized bed. The Buildings also have obsolete electrical, mechanical and ventilation systems—deficiencies made worse by age and decay—and are not handicap accessible. (A77, ¶ 23-24). Most of the apartments are vacant, and many could not legally be rented without substantial renovations and lead paint abatement needed to make them habitable. (A78, ¶ 26).

2. *The 1991 Decision Not To Designate The Buildings As A Landmark*

A 13-building complex that Stahl also owns occupies the remainder of the city block on which the Buildings are situated. That entire block is known as the First Avenue Estate ("FAE"). In 1990, the New York City Landmarks

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[2] The hybrid action also included an Article 78 petition, but Stahl is not seeking review of the First Department's ruling affirming the denial of that petition. The same test applies to takings claims under the New York State and U.S. Constitutions. *See, e.g., Consumers Union of U.S., Inc. v. New York*, 5 N.Y.3d 327, 354, 357-58 (2005).

Preservation Commission ("LPC") designated the entire FAE as a landmark. (A79, ¶ 33). The LPC decided to include the Buildings even though they were built years later, designed by a different and less distinguished architect, and are in many other respects substantially different from the other 13 FAE buildings. (A78-79, ¶¶ 27, 30-31, 33). The LPC justified its designation based on the special historic and architectural aspects of the other 13 buildings, including the distinguished architect who designed them; the LPC largely ignored the Buildings. (A79, ¶ 33).

The New York City Board of Estimate ("BOE"), which then had authority to modify landmark designations, removed the two Buildings from the landmark in order to avoid designating an entire city block and "to allow for" at least some "development" there. (A80, ¶ 34). Stahl elected not to challenge the designation of the other 13 buildings largely because it retained the right to develop the two Buildings. (A80, ¶ 35). Community groups challenged the de-designation of the Buildings, but the City opposed them, and the New York Supreme Court dismissed their claim because the BOE compromise was "inherently reasonable." (*Id.*).

Stahl thus began preparing to demolish the Buildings and replace them with a modern condominium tower that included affordable housing units. (A81, ¶ 37). Stahl devoted substantial time, effort and internal resources to these plans, and hired architectural and legal professionals who laid the groundwork for the

redevelopment. (A81, ¶ 37). Because its ability to vacate many apartments in the Buildings was restricted by rent control and rent stabilization laws, Stahl left many apartments unleased as they became vacant. (*Id*.). Stahl also refrained from undertaking the substantial renovations and capital improvements needed to render some vacant apartments legally habitable, because it could not have earned a reasonable return from renting those apartments even after making what would have been extremely costly improvments. (A81, ¶ 38-39).

3. *The 2006 Landmark Designation*

In 2006, spurred on by "not in my backyard" interest groups, the LPC revisited whether to landmark the Buildings. Under the Landmarks Law, decisions about whether to designate property as a landmark are supposed to be based solely on its "historical or aesthetic … value" or "character." N.Y.C. Admin. Code §§ 25-301(a), 25-304(a). But the LPC ignored these factors, and added the Buildings to the FAE landmark in reliance upon unrelated factors like population density and access to air and light. (A83, ¶¶ 44-46).

This left Stahl in a predicament. Before the landmark designation, the property was worth up to $200 million, but only because of the prospect of building a modern highrise. (A82, ¶ 41). The designation barred any redevelopment. And because the apartments were outdated and many could not

legally be rented without substantial and costly renovations, there was no realistic way to make the Buildings profitable. (A81, ¶ 38-39).

Accordingly, in 2010, Stahl invoked the "hardship" provisions of the Landmarks Law, which provide relief from a landmark designation if the property will not "earn[] a [6%] return." N.Y.C. Admin. Code §§ 25-302(c), (v)(1); 25-309(a)(1). Stahl presented extensive evidence that the Buildings could not earn anything close to the requisite 6% return. (*See, e.g.*, A360-499). Nonetheless, based on a jerry-rigged analysis, the LPC denied Stahl's application. (A87 ¶ 63; A88 ¶ 67).

4. *Stahl's Lawsuit*

On September 22, 2014, Stahl filed a hybrid Article 78 petition challenging the denial of its hardship application and plenary claim alleging an unconstitutional taking against the City. Although joined in one action, the two claims are distinct, and each is assessed under different substantive laws and procedural rules. The Article 78 petition is reviewed on the "administrative record," and the sole issue is whether the agency's action was "arbitrary and capricious." *Koch v. Sheehan*, 21 N.Y.3d 697, 703-04 (2013). The plenary action, on the other hand, procedurally is treated like any other civil action. Among other things, it cannot be dismissed unless, assuming the allegations are true, the plaintiff has failed to state a claim.

See CPLR § 3211(a)(7); *Romanello v. Intesa Sanpaolo, S.p.A.*, 22 N.Y.3d 881, 887 (2013).

The City opposed Stahl's Article 78 petition and moved to dismiss the Takings Clause claim under CPLR § 3211(a)(7). On January 28, 2016, the New York Supreme Court entered a Decision, Order and Judgment denying Stahl's Article 78 petition and granting the City's motion to dismiss the plenary action. The court did not independently analyze the takings issue, and instead expressly deferred to the LPC's findings to dismiss the Takings Clause claim. (Ex. A at 31-32, 34).

Stahl filed a timely notice of appeal. On June 23, 2017, after briefing in the First Department was complete, the U.S. Supreme Court decided *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017). On June 26, 2017, Stahl sent a letter notifying the First Department of the *Murr* opinion, which was discussed extensively at the December 12, 2017 oral argument. (Ex. C; http://wowza.nycourts.gov/vod/vod.php?source=ad1&video=AD1_Archive_Dec12_13-58-50.mp4).

On May 22, 2018, the First Department issued a Decision and Order affirming dismissal of the Article 78 petition and the takings claim. *See Stahl York Avenue Co., LLC v. City of New York*, 162 A.D.3d 103, 112-16 (1st Dep't 2018).

JURISDICTIONAL STATEMENT

This action originated in the Supreme Court, New York County. The First Department's Decision and Order is a final determination that completely disposes of the matter below. Accordingly, this Court has jurisdiction over Stahl's motion for leave to appeal and its proposed appeal. *See* CPLR § 5602(a)(1)(i).

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. How to determine the relevant parcel for purposes of Takings Clause analysis, including whether and how to apply the factors in *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).

2. Whether a court adjudicating a hybrid Article 78 and plenary action may rely entirely on an administrative agency's fact-findings and record, and ignore the plenary complaint's allegations, when resolving a constitutional claim that is distinct from the issues before the agency and challenges the agency's conduct.

The questions raised here were preserved below. (Brief for Plaintiff-Petitioner-Appellant Stahl York Avenue Co., LLC dated Nov. 23, 2016, at 4, 22-41; Ex. C; http://wowza.nycourts.gov/vod/vod.php?source=ad1&video=AD1_Archive_Dec12_13-58-50.mp4).

REASONS FOR GRANTING LEAVE

In *Murr v. Wisconsin*, the U.S. Supreme Court clarified an important element of the regulatory takings inquiry—the determination of which parcel of land to use when analyzing whether a government regulation is a taking under the Fifth Amendment. *Murr* established a fact-intensive, three-factor balancing test for making this determination, which is typically dispositive of a regulatory takings claim. *Murr* also confirmed prior Supreme Court precedent establishing a separate, but equally fact-sensitive balancing test to determine whether the burdens imposed on the relevant parcel constitute a taking. These heavily fact-specific tests are almost never, if ever, resolved on a motion to dismiss.

The First Department misconstrued *Murr*. It lumped the entire FAE together for takings purposes, even though the City treats the two Buildings as a distinct lot under local law; that lot was purchased separately by its original owner; the Buildings were designed by a different architect and are now in demonstrably worse condition; Stahl operated the Buildings separately; and the City itself originally permitted their redevelopment. The First Department reached this result by ignoring one of the *Murr* factors entirely. For the other factors, it impermissibly adopted administrative agency factfindings contradicted by the Complaint when analyzing Stahl's takings claim—in conflict with Second Department and other states' appellate precedents. This Court's intervention is

needed to ensure that *Murr* is correctly applied and that there is independent judicial review of constitutional claims against administrative agencies.

A. The First Department's Decision Is At Odds With Recent U.S. Supreme Court Precedent On An Important Constitutional Issue

1. *The* Murr *Decision*

A "regulation … will be recognized as a taking" if it sufficiently "burdens" the property owner. *Murr*, 137 S. Ct. at 1942 (quotations omitted). For a regulation that results in "[a]nything less than a complete elimination of value," *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002) (quotations omitted), courts undertake a "factual inquiry" to determine whether it qualifies as a so-called "partial" regulatory taking. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). The resolution of a partial regulatory takings claim "depends largely upon the particular circumstances" in that case. *Id*. (quotations omitted); *accord Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012) (analysis is "situation-specific"). The key factors are: (1) the "economic impact of the regulation" on the property; (2) whether the regulation frustrates the property owner's "investment backed expectations"; and (3) the "character of the governmental action" (the "*Penn Central* test"). *Penn. Cent.*, 438 U.S. at 124.

Because courts must compare "the value that has been taken from the property with the value that remains in the property," the threshold task is to

"define the unit of property" at issue. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). This can have "profound implications for the legal sufficiency of [a] [p]laintiff's takings claim," *2910 Georgia Ave. LLC v. D.C.*, 234 F. Supp. 3d 281, 294 (D.D.C. 2017), and is often "outcome determinative," *Murr*, 137 S. Ct. at 1944; *accord Lost Tree Village Corp. v. United States*, 135 Fed. Cl. 92, 97 (Fed. Ct. Cl. 2017) ("relevant parcel" inquiry was "dispositive"); *Ciampetti v. United States*, 18 Cl. Ct. 548, 559 (1989) (same).

Murr established the standard for defining the relevant parcel. It is a fact-intensive, multi-factor test focused on the property owners' "reasonable expectations." *Murr*, 137 S. Ct. at 1945. Under *Murr*, courts "*must* consider" the following three factors: "[1] how [the land] is bounded or divided under state and local law"; "[2] the physical characteristics of the landowner's property"; and "[3] the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings." *Id.* at 1945-46 (emphasis added). The third factor requires courts to identify any countervailing economic benefits to the claimant's other holdings: "Though a use restriction may decrease the market value of the [regulated] property, the effect may be tempered if the regulat[ion] adds value to the remaining property." *Id*. at 1946. "That, in turn, may counsel in favor of treat[ing all of the claimant's holdings] as a single parcel." *Id*. However, if the use restriction "decrease[s] the market value of the [regulated

property] in an unmitigated fashion," that "counsel[s] against consideration of all the holdings as a single parcel." *Id*.

Murr confirmed that determining the relevant parcel and then applying the *Penn Central* factors to that parcel requires a "factual inquir[y], designed to allow careful examination and weighing of all the relevant circumstances." *Id*. at 1942, 1945-46, 1950. The analysis is "seldom appropriate for resolution on the pleadings." *White Oak Realty, LLC v. U.S. Army Corp of Eng'rs*, No. 13-4761, 2014 WL 4387317, at *9 (E.D. La. Sept. 4, 2014) (quotations omitted). Motions to dismiss partial regulatory takings claims are thus routinely denied because of the "fact-intensive" nature of the inquiry. *See, e.g.*, *2910 Georgia*, 983 F. Supp. 2d at 295; *Neumont v. Monroe Cty. Fla.*, 104 F. Supp. 2d 1368, 1371 (S.D. Fla. 2000) (takings claim could not "be resolved on a motion to dismiss").[3]

2. *The First Department Misconstrued* Murr

The First Department disregarded these principles. There is no serious dispute that, as alleged in the Complaint, the relevant parcel was the two Buildings,

[3] *See also M&N Materials, Inc. v. Town of Gurley, Ala.*, No. CV-14-S-184-NE, 2014 WL 2590473, at *3, 6 (N.D. Ala. June 10, 2014) (denying motion to dismiss regulatory takings claim); *New Horizon Inv. Corp. v. Mayor & Mun. Council of Belleville*, No. Civ. A. 04-3973 (KSH), 2005 WL 2237776, at *7 (D.N.J. Sept. 14, 2005) (same); *Colo. Springs Prod. Credit Ass'n v. Farm Credit Admin.*, 695 F. Supp. 15, 21 (D.D.C. 1988) (same); *Carpenter v. United States*, 69 Fed. Cl. 718, 731-32 (Fed. Cl. 2006) (same); *Sacramento Mun. Util. Dist. v. United States*, 61 Fed. Cl. 438, 441-42 (Fed. Cl. 2004) (same).

not the entire FAE. Regarding the first *Murr* factor, the City itself treats the Buildings as legally separate from the 13 other buildings under "local law," *Murr*, 137 S. Ct. at 1945, because "[t]he Buildings … comprise a single tax lot (Lot 22) while the [other buildings] comprise three distinct tax lots (Lots 1, 10, and 30)." (A86, ¶ 59). The physical characteristics of the Buildings are also distinct; they were designed by "a different and undistinguished architect" and are in visibly worse condition than the other buildings. (A78-79, ¶¶ 27, 31). Finally, there is no reason why landmarking the Buildings would somehow enhance the value of the other buildings, meaning that the third *Murr* factor also weighs in favor of treating the Buildings alone as the relevant parcel. Put simply, the Complaint could not be any more explicit that Stahl "reasonab[ly] expect[ed]" the Buildings to be treated separately, *Murr*, 137 S. Ct. at 1945; it managed them separately and spent 15 years preparing the Buildings (and only the Buildings) for redevelopment, based upon their numerous distinguishing characteristics and a judicially approved compromise endorsed by the City.

Yet the First Department held that under *Murr*'s "three-factor test … all of the lots within the FAE," and not just the Buildings, "should be treated as one parcel for taking analysis purposes." *Stahl*, 162 A.D.3d at 114-15. The court reached this conclusion only by fundamentally misconstruing *Murr*, ignoring the

Complaint and instead impermissibly relying upon the court's own misinterpretation of the administrative record.

Specifically, the First Department found that the first *Murr* factor supports its conclusion because the City supposedly "has placed all … lots" in the FAE "within one tax block." *Id*. at 115. But Stahl alleged, and the City has never disputed, that the Buildings and the FAE's other 13 buildings occupy separate tax lots. (A86, ¶ 59). Regarding the second *Murr* factor, the court failed to account for the critical distinctions between the Buildings' history and architecture and that of the other buildings, and instead concluded that "all of the buildings within the FAE" supposedly "share a common historical and architectural significance." *Stahl*, 162 A.D.3d at 115.

The First Department misconstrued the third *Murr* factor entirely. As explained, that factor requires analysis of whether the "regulation" "adds value" to the claimant's "other holdings." *Murr*, 137 S. Ct. at 1946. But the First Department did not even attempt to determine whether the landmark designation of the Buildings somehow benefited the other FAE buildings. Instead, in purporting to apply the third *Murr* factor, the First Department criticized Stahl for "warehousing … 44 apartments within th[e] two [B]uildings," suggesting that this may have diminished the value of the Buildings. *Stahl*, 162 A.D.3d at 115. But whether Stahl maximized the Buildings' value is irrelevant to the third *Murr*

factor.[4] The First Department appears to have replaced that factor with one in which landowners are penalized for any conduct that is perceived as detrimental to the value of the regulated properties.

Having properly alleged that the Buildings were the relevant parcel, Stahl also stated a claim for a regulatory taking under the *Penn Central* test. With respect to the first *Penn Central* factor, Stahl detailed how the landmark designation destroyed the Building's value, explaining that the apartments cannot make money in their current condition, and the renovations permitted by the Landmark Law would be too costly to justify. (*See, e.g.*, A82, ¶ 41; A89-90, ¶¶ 73-76; A101, ¶ 121). For the second factor, Stahl alleged that the designation interfered with Stahl's "distinct investment backed expectations," *Penn Cent.*, 438 U.S. at 124, because Stahl took costly steps toward redeveloping the properties for over a decade following the City's initial 1990 decision to allow a modern highrise (A80-81, ¶¶ 36-39). But the lower courts improperly disregarded these allegations and relied instead upon the administrative record. *See, e.g.*, *2910 Georgia*, 983 F. Supp. 2d at 295; *Neumont*, 104 F. Supp. 2d at 1371.

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[4] In fact, as the Complaint alleges, Stahl had no choice but to leave these apartments vacant. Without the redevelopment, they would *lose* money in their current condition. And the Buildings could not be redeveloped until the apartments were vacated. Leaving the apartments unoccupied was therefore necessary to the planned redevelopment, which was the only way to make the apartments profitable. (A78, ¶ 26; A81, ¶ 38; A89-90, ¶¶ 75-76).

* * *

This Court should grant leave to ensure that binding U.S. Supreme Court precedent—and *Murr* in particular—is faithfully applied in New York. The federal courts have repeatedly confirmed that the Supreme Court's fact-senstive analysis of regulatory takings claims is not amenable to adjudication on the pleadings. Yet the First Department ignored the Complaint's allegations, engaged in its own *sua sponte* fact-finding, and relied upon a host of demonstrable falsehoods—all on a motion to dismiss. To our knowledge, the First Department's Decision and Order is the *only* reported decision resolving a regulatory takings claim on a motion to dismiss. *See supra* at 13; *accord, e.g.*, *Murr*, 137 S. Ct. at 1941 (resolving case on "summary judgment"). The First Department also effectively replaced the third *Murr* factor with a new, regulator-friendly factor designed to penalize property owners. This upends the delicate balance inherent in the *Murr* test, skews it in favor of the City and encourages the City's continued misuse of the Landmarks Law.

This case exemplifies how that Law has been improperly invoked in situations where there is no genuine reason for preservation, to prevent legitimate and economically beneficial development in New York City. Already, a full *27%* of Manhattan's lots are designated as a landmark. Gould Ellen *et al.*, *Fifty Years of Historic Preservation in New York City*, 22 (2016), *available at*

http://bit.ly/2930m6y. Pretextual landmark designations are most prevalent in high-income neighborhoods like the Upper East Side, where residents have the means to lobby and capture local politicians. These neighborhoods have preservation rates ranging from *30 to 70%*. Real Estate Board of New York, *An Analysis of Landmarked Properties in Manhattan* 4 (2013), *available at* http://bit.ly/1mQKrVp. A distorted, anti-propertyowner interpretation of *Murr* will serve only to continue this trend. This Court's intervention is needed to ensure that this controlling Supreme Court precedent is accurately and fairly applied.

B. The First Department's Decision Conflicts With Second Department Precedent

Stahl challenged the LPC's denial of its hardship application by bringing a hybrid takings action and Article 78 proceeding. (A67-68). Because individual claims within a hybrid action involve different procedures for their resolution, they are governed by different standards of review. When resolving an Article 78 claim, courts defer to the factual findings of the administrative agency. *Pell v. Bd. Of Ed. Of Union Free Sch. Dist.*, 34 N.Y.2d 222, 230-31 (1974). However, as the Second Department has acknowledged, no such deference is permitted in a related plenary action challenging the constitutionality of the agency proceedings. *See Brotherton v. Dep't of Envtl. Conservation of State of N.Y.*, 189 A.D.2d 814, 815-16 (2d Dep't 1993) (denying Article 78 petition challenging denial of development permit on wetlands parcel, but remanding for evidentiary hearing on takings

claim). Yet the First Department erroneously deferred to the LPC's factfinding when resolving Stahl's takings claim, and improperly predicated its resolution of that claim on the administrative record, thereby creating both a split with the Second Department and a conflict with other state courts.

The First Department ignored the Complaint and instead drew upon the administrative record in resolving the takings claim. For example, its erroneous assumption that all the buildings were on the same tax lot (discussed above) was based upon an LPC finding calculating Stahl's return under a provision in the Landmarks Law unrelated to Takings Clause analysis. *Stahl*, 162 A.D.3d at 115; Ex. A at 31-34. The First Department also deferred to the "LPC[']s] "determin[ations]" about Stahl's purported "expectations" for the Buildings in resolving the motion to dismiss. *See Stahl*, 162 A.D.3d at 115-16.

But the LPC made no determinations with respect to the takings claim, which was not before it. Stahl also had no opportunity to present evidence relevant to that claim. For example, Stahl was not even allowed to show how the landmark designation "dimin[ished] [the] value" of the Buildings, which is necessary to assess "the economic impact" of the designation under the Takings Clause. *Cienega Gardens v. United States*, 331 F.3d 1319, 1340-41 (Fed. Cir. 2003). Measuring this diminution in value would require a determination of (1) the value of the Buildings prior to the landmark designation, (2) the value of the Buildings

afterwards, and (3) the value of any alternative economic use of the property. None of those facts were before the LPC.

Even if the LPC had addressed Stahl's takings claim, it is for the courts, and not the LPC, to assess whether the LPC's conduct violates the Takings Clause. As appellate courts in other states have confirmed, "the plaintiff is entitled to a de novo review of the factual issues underlying its [constitutional] claim, unfettered by the [agency's] previous resolution of any factual issues." *Cumberland Farms, Inc. v. Town of Groton*, 262 Conn. 45, 69 (2002); *accord, e.g., Bencin v. Bd. of Bldg. & Zoning Appeals*, No. 92991, 2009 WL 3387695, at *2 (Ohio Ct. App. Oct. 22, 2009) (holding that an "administrative agency … cannot determine whether an ordinance is unconstitutional as applied to a particular parcel" and that such "constitutional claim[s] must be tried originally in the [trial court], with the court permitting the parties to offer additional evidence"); *Hensler v. City of Glendale*, 8 Cal. 4th 1, 15 (1994) (en banc) ("A property owner is, of course, entitled to a judicial determination of whether the agency action constitutes a taking."). The LPC administrative proceedings offered none of the protections afforded by a judicial proceeding; they lacked evidentiary rules, there was no testimony offered under oath, Stahl could not cross-examine adversarial witnesses, and Stahl's application was not adjudicated by a disinterested factfinder. Consequently, much of the "evidence" the LPC relied on fell far below the indicia of reliability required

in a court of law. And deference to a city or state agency would effectively permit the agency to immunize itself from constitutional review—which is precisely what happened here.

Nor are these issues limited to the Landmark Law. New York City and New York State together have numerous administrative agencies with adjudicatory bodies that hold hearings, receive evidence, depose witnesses, and resolve regulatory disputes. It is common for constitutional or statutory questions to arise from the agency's handling of these matters, and the resolution of those questions is beyond the purview of the agency. *See, e.g.*, *Brotherton*, 189 A.D.2d at 815-16 (denial of permit and related constitutional takings claim); *Thornton v. New York City Bd./Dep't of Educ.*, 125 A.D.3d 444, 444-45 (1st Dep't 2015) (Article 78 challenge to New York City Department of Education decision and related 42 U.S.C. § 1983 claim).

Though this Court has implicitly recognized that the deferential Article 78 standard does not apply to a plenary claim in a hybrid action, it has never explicitly articulated the correct standards to be applied in such an action. *See Spears v. Berle*, 48 N.Y.2d 254, 261 (1979) (affirming dismissal of Article 78 petition but remanding for additional fact-finding relevant to taking claim). Presumably that is why the lower courts erroneously deferred to the LPC and relied upon the administrative record in resolving Stahl's plenary claim. This Court should resolve

the split of authority within the Appellate Divison, and ensure that the proper standards of review are applied to hybrid Article 78 and plenary actions in the First Department, as they are in other states.

CONCLUSION

For the foregoing reasons, if the Court concludes that there is no appeal as of right, it should grant leave to appeal the Decision and Order of the Appellate Division.

Dated: New York, New York
September 24, 2018

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Attorneys for Plaintiff-Petitioner-Appellant
Stahl York Avenue Co., LLC

Exhibit A

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

---------- x

In the Matter of the Application of
STAHL YORK AVENUE CO., LLC,

Plaintiff-Petitioner,

-against-

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

Defendants-Respondents.

---------- x

NOTICE OF ENTRY OF DECISION, ORDER AND JUDGMENT

Index No. 100999/2014

PLEASE TAKE NOTICE that the within is a true copy of an Decision, Order and Judgment signed by the Honorable Michael D. Stallman, and dated January 8, 2016 which was duly entered and filed in the Office of the Clerk of the County of New York January 28, 2016.

Dated: New York, New York
February 3, 2016

ZACHARY W. CARTER
Corporation Counsel of the
City of New York
Attorney for Defendants-Respondents
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By: Rachel K. Moston
Rachel Moston
Assistant Corporation Counsel

To: Chetan A. Patil, Esq.
Counsel for Plaintiff-Petitioner
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New York, New York 10110
cpatil@shapiroarato.com

EA 1/11/16 FC

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN *Justice* **PART 21**

In the Matter of the Application of

STAHL YORK AVENUE CO., LLC,

Plaintiff- Petitioner,

- v -

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.

INDEX NO. 100999/2014

MOTION DATE 3/2/15

MOTION SEQ. NO. 001

The following papers, numbered 1 to 20 and papers filed in Motion Seq. Nos. 002-003 were read on this Article 78 petition.

Notice of Petition—Verified Petition—Affirmation—Exhibits 1-12, 13-25—Affidavits of Service	No(s). 1-6
Notice of Cross Motion to Dismiss—Answer—Affirmation—Exhibits A-F—Affidavit of Service; Memo of Law in Opposition—Affidavits of Service—Affirmation of Email Service	No(s). 7-11; 12-14
Memo of Law in Opposition to Cross Motion and Reply Memo of Law—Affidavit in Support of Reply Memo of Law of Service—Affidavit of Service	No(s). 15; 16-17
Reply Memo of Law in Further Opposition to Petition/Complaint—Affirmations of Email Service	No(s). 18-20
Order to Show Cause by New York Landmarks Conservancy for Leave to Appear as Amici Curiae—Affirmation—Exhibits A-B; Affidavits of Service	No(s). 1 (Seq. No. 002); 2 (Seq. No. 002)
Notice of Motion for Leave to Appear as Amici Curiae—Affirmation—Affirmation of Service; Memorandum of Law—Affirmation of Service	No(s). 1 (Seq. No. 003)
Notice of Motion for Leave to File a Sur-Reply by Plaintiff-Petitioner—Affirmation—Exhibit A—Affidavit of Service; Memorandum of Law; Affirmation in Opposition by Respondent-Defendant—Affirmation of Service; Memorandum of Law—Affirmation of Service	No(s). 1-3 (Seq. No. 004); 4-5 (Seq. No. 004)

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon the foregoing papers, it is ADJUDGED that this Verified Petition

(Continued...)

and Complaint is decided in accordance with the annexed Memorandum Decision, Order and Judgment.

Dated: January 8, 2016
New York, New York

_____, J.S.C.

1. Check one:..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:.....PETITION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

STAHL YORK AVENUE CO., LLC,

DECISION, ORDER AND JUDGMENT

Plaintiff-Petitioner,

Index No. 100999/2014

- 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.

HON. MICHAEL D. STALLMAN, J.:

In this "hybrid" Article 78 proceeding-action commenced by a notice of petition, Plaintiff-petitioner Stahl York Avenue Co., LLC (Stahl) seeks relief concerning two of its buildings, which since 2006, have been designated as landmarks by the New York City Landmarks Preservation Commission (LPC). Stahl's Verified Petition and Complaint seeks money damages as compensation for the alleged regulatory taking of the two buildings and an order vacating the LPC's denial of Stahl's hardship application. Apparently, given the hybrid nature of the pleading,

CONCLUSION

Stahl has not met its burden of demonstrating that respondents acted arbitrarily or capriciously or in violation of law by denying Stahl's hardship application. Stahl has not set forth a cause of action for an unconstitutional taking and thus has no viable claim either for money damages, costs or attorneys' fees.

Accordingly, it is

ORDERED and ADJUDGED that the petition-complaint is denied and the cross motion is granted and the proceeding-action is dismissed.

This constitutes the decision, order and judgment of this Court.

Dated: January 8, 2016
New York, New York

ENTER:

J.S.C.

Milton A. Tingling
Clerk

FILED
JAN 28 2016
COUNTY CLERK'S OFFICE
NEW YORK

Index No.: 100999/2014

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

STAHL YORK AVENUE CO., LLC,

Plaintiff-Petitioner,

-against-

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

Defendants-Respondents.

JUDGMENT

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New York, N.Y. 10007

Rachel K. Moston
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Moston R

EA 11/11/16 FC

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

AL

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

In the Matter of the Application of

STAHL YORK AVENUE CO., LLC,

Plaintiff- Petitioner,

- v -

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.

INDEX NO. 100999/2014

MOTION DATE 3/2/15

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Memo of Law in Opposition to Cross Motion and Reply Memo of Law—Affidavit in Support of Reply Memo of Law of Service—Affidavit of Service	No(s). 15; 16-17
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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon the foregoing papers, it is ADJUDGED that this Verified Petition

(Continued...)

Stahl York Avenue Co., LLC v City of New York, Index No. 100999/2014

and Complaint is decided in accordance with the annexed Memorandum Decision, Order and Judgment.

Dated: January 6, 2016
New York, New York

, J.S.C.

1. Check one:..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:.....PETITION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

----------X

STAHL YORK AVENUE CO., LLC,

DECISION, ORDER AND JUDGMENT

Plaintiff-Petitioner,

Index No. 100999/2014

- 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.

----------X

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

HON. MICHAEL D. STALLMAN, J.:

In this "hybrid" Article 78 proceeding-action commenced by a notice of petition, Plaintiff-petitioner Stahl York Avenue Co., LLC (Stahl) seeks relief concerning two of its buildings, which since 2006, have been designated as landmarks by the New York City Landmarks Preservation Commission (LPC). Stahl's Verified Petition and Complaint seeks money damages as compensation for the alleged regulatory taking of the two buildings and an order vacating the LPC's denial of Stahl's hardship application. Apparently, given the hybrid nature of the pleading,

defendants-respondents (hereinafter, respondents) simultaneously answered and cross-moved for dismissal of the lawsuit.

BACKGROUND

Prior Stahl Proceeding

Many of the underlying facts were described in a prior related decision, entitled *Matter of Stahl York Ave. Co., LLC v City of New York* (76 AD3d 290 [1st Dept], *lv denied* 15 NY3d 714 [2010] [*Stahl 1*]). On April 24, 1990, the LPC designated as a landmark a full block of residential buildings, known as the First Avenue Estate (FAE), bounded by York Avenue, First Avenue, East 65th Street and East 64th Street. The FAE is composed of 15 buildings, known as "light-court model tenements," that were intended to be alternatives to otherwise dark and poorly ventilated tenements. At issue are two of these buildings, both of which are six stories tall (Buildings) (*id.* at 291-292).

When the LPC designated the FAE as a landmark in 1990, it also designated a similar light-court tenement development as a landmark, consisting of 14 tenement buildings bounded by York Avenue and FDR Drive, and by East 78th and East 79th Streets, built between 1901 and 1913 (York Avenue Estate). The two "estates" are the only existing

full-block light-court tenement developments in the United States (*id.* at 292).

On August 21, 1990, the then existing Board of Estimate (BOE), which had powers to review LPC determinations, voted 6–5 to approve the LPC's designation of most of the FAE as a landmark, excluding from designation the two Buildings, and approved the designation as a landmark of the York Avenue Estate, but excluded four buildings located at the eastern end of that development (*id.*).

The BOE's actions were challenged in two article 78 proceedings filed in Supreme Court, New York County, which were consolidated. By order dated July 17, 1991, the Supreme Court dismissed the petitions and affirmed the BOE modifications. Only the decision in the York Avenue Estate matter was appealed. On appeal, the Appellate Division, First Department, "reversed the dismissal, overturned the BOE modification, and reestablished the LPC designation of the entire block of the York Avenue Estate as a historic landmark" (*Stahl 1,* 76 AD3d at 293, citing *Matter of 400 E. 64/65th St. Block Assn. v City of New York*, 183 AD2d 531 [1st Dept], *lv denied* 81 NY2d 736 [1992] [*Kalikow decision*]).

In 2004, Stahl obtained permits from the Department of Buildings (DOB) to perform work on exterior features of the Buildings (*id.*). On September 8, 2004, Community Board No. 8 adopted a resolution in favor of amending the landmark designation of the FAE to include the Buildings. At a public meeting held on November 21, 2006, the LPC unanimously approved the amendment (*id.*). On February 1, 2007, the City Council voted 47 – 0 to affirm the amendment, and the two Buildings were designated as landmarks (*id.* at 294).

In the *Stahl 1* article 78 proceeding, Stahl alleged that the LPC's and City Council's actions were arbitrary and capricious, and that the City Council failed to explain its reasons for deviating from the contrary 1990 BOE decision, which Stahl asserted was binding, based on stare decisis. Stahl also contended that both the developmental history of the Buildings and the alteration work performed on their facades rendered them unworthy of landmark designation *(id.)*.

The Appellate Division, First Department, rejected Stahl's argument, holding that the LPC and City Council had the authority to revisit the issue of whether the Buildings should be accorded landmark status, and that the LPC determination to do so was not irrational, in that the two Buildings

have a historical significance that justifies their designation as landmarks. The First Department held that the "LPC is statutorily authorized to amend any prior designation of a landmark," citing Title 25, Chapter 3 of the New York City Administrative Code [Landmarks Law] § 25–303 [c]) (*id.* at 297).

The First Department determined that the "BOE's 1990 decision to exclude the buildings from landmark designation was a 'bad backroom deal,' and was an 'inappropriate politically motivated action' made under 'intense political pressure from a powerful real estate developer'" (*id.* at 296). It also determined that, "when introducing the amendment to the full City Council, the Speaker of the Council described the BOE's decision to exclude the buildings from landmark designation as a bad decision based upon improper considerations which had nothing to do with the buildings' historical or cultural significance" (*id.*). According to the court's decisions, there was a prior finding in 1990 that the FAE "needed to be protected in its entirety as a socio-historic monument in the history of urban housing, and that, but for the existence of a political compromise at the time, the entire district would have been designated a landmark; that the determination was not appealed does not preclude the LPC and the City Council from revisiting the issue" (*id.* at 297).

Stahl's application to demolish the Buildings

On October 7, 2010, Stahl applied to the LPC to demolish the Buildings on the grounds that they were incapable of earning a "reasonable return" as defined in sections 25-302 (v) and 25-309 (a) (l) of the Landmarks Law (LPC Report, dated May 20, 2010, entitled *In the Matter of an Application for a Finding Pursuant to Section 25-309 (a) (l) of the Landmarks Law that 429 East 64th Street and 430 East 65th Street are Incapable of Earning a Reasonable Return* [LPC Report] at R 2311).[1]

As stated in the LPC Report, Stahl, in its application, sought to demolish the Buildings, and construct a new building on the site. Prior to the landmark designation in 2006, Stahl obtained DOB permits for facade work and window replacement. The LPC found that neither permit was sought to address any health or safety concerns, but rather to prevent the LPC from redesignating the Buildings as landmarks. The LPC found that Stahl stripped the Buildings of their ornament, installed new and inappropriate windows, stuccoed the Buildings, and painted them a garish reddish pink color. Nevertheless, on November 21, 2006 the LPC

[1] Submitted with the motion papers is the "*RECORD OF PROCEEDINGS BEFORE THE LANDMARKS PRESERVATION COMMISSION on Hardship Application regarding 429 East 64th St and 430 East 65th Street*" (Record), consisting of eight volumes and 2359 pages. References to the Record appear as R___).

unanimously voted to amend the designation report of the FAE to include the Buildings, which was affirmed by the City Council by resolution of February 1, 2007 (LPC Report at 2, R-2312).

As discussed above, through *Stahl 1*, Stahl challenged the designation: the Supreme Court, New York County found in favor of the LPC, the First Department affirmed, and the Court of Appeals denied leave to appeal (*Matter of Stahl York Ave. Co., LLC v City of New York*, 2008 NY Slip Op 32557(U) [NY County Sept 11, 2008], *aff'd*, 76 AD3d 290 [1st Dept], *lv denied* 15 NY3d 714 [2010] [*Stahl 1*]).

The apartments in the Buildings average 446 gross square feet and 371 leasable square feet. Most apartments are subject to rent stabilization; a small number are subject to rent control. According to Stahl, the mean average rent for an occupied apartment is approximately $840 per month; the median last listed monthly rent for vacant apartments is approximately $857 (LPC Report at 2, R-2312). At the time of the designation, there were 53 vacant apartments. Since then, Stahl has continued its policy of not re-renting apartments as they become vacant. At the time Stahl filed a hardship application, 107 apartments were vacant, and as of the date of

the LPC Report, there were 110 vacant apartments (LPC Report at 2-3, R-2312 - 2313).

On October 7, 2010, Stahl submitted its hardship application, together with a report by Cushman & Wakefield (C&W), dated February 5, 2009 (C&W Report) (LPC Report at 2, R-2313; R-001-098) and a second report by C&W, dated May 1, 2010 (R-099 - 165). Thereafter, the LPC and counsel for Stahl exchanged extensive correspondence regarding the LPC's requests for additional information pertaining to: (1) Stahl's belief that newly-renovated apartments would rent for less than the rent paid by the regulated tenants; (2) floor plans and apartment stacking; (3) the gross and leasable square footage of apartments in the other buildings in the FAE (Other Buildings); (4) amounts for "general conditions, overhead and profits" in the cost estimates, and the methodologies and criteria used in determining the appropriate level of apartment renovation; (5) the methodology used to determine which sample apartment lines to measure in the Other Buildings; (6) the use of the cost approach for projecting post-renovation assessed value; (7) why income from laundry facilities in

the Other Buildings was not considered for the Buildings; and (8) soft costs[2] (LPC Report at 3-7, R-2313 - 2317).

On January 24, 2012, the LPC held the first public hearing on the application. Stahl, together with its consultants, presented its case. HR&A, a consulting company representing opponents of the hardship application, estimated that vacant apartments could lease for an average of $49 per leasable square foot, or an average of $1,508 per apartment per month. In addition, members of the public and elected officials testified (LPC Report at 3, R-2313).

On June 11, 2013, the LPC held a second public hearing to allow Stahl to present its responses to public testimony given at the January 24, 2012 public hearing and its answers to the LPC's questions. HR&A also testified, adjusting its projection of average monthly rent to $1,432 to account for the effect of rent control and rent stabilization on increases to rent *(id.)*. On October 29, 2013, the LPC held a third public meeting to discuss the hardship application, and Stahl presented its responses to

---

[2] The petition defines "hard costs" as tangible construction costs, such as materials and labor, and "soft costs" as as nontangible construction costs such as architectural and engineering fees, insurance, and financing costs (petition, ¶ 96, n 5).

public testimony given at the June 11, 2013 public hearing (LPC Report at 3-4, R-2313 - 2314).

By decision dated May 20, 2014, the LPC denied the hardship application, stating that:

> "Pursuant to Section 25-309 (a) (1) of the Administrative Code of the City of New York, the Landmarks Preservation Commission, at the Public Meeting of May 20, 2014, after the Public Hearings of January 24, 2012 and June 11, 2013, and the Public Meeting of October 29, 2013, and after reviewing and considering the record, including all testimony and materials submitted on behalf of the applicant, and testimony and materials submitted by the public, voted to adopt the attached Resolution, dated May 20, 2014 (the 'Resolution'), to deny your application seeking a 'Notice to Proceed' to demolish 429 East 64th Street and 430 East 65th Street, in the Borough of Manhattan, finding that the applicant had failed to establish to the satisfaction of the Commission that the improvement parcel or parcels which include(s) the improvements, was/were not capable of earning a reasonable return"

(Letter dated May 29, 2014, from Robert B. Tierney, Chair of the LPC to Stahl at R-2310).

Allegations of the Petition-Complaint

Stahl alleges that it is a New York State limited liability corporation, "engaged in the business of real estate development, including the provision of apartment housing to New York City residents at affordable

rates" and owns the subject two Buildings and the Other Buildings of the FAE (petition, ¶ 15).

Respondents include the City; the LPC, a preservation agency in the City government, having powers and duties regarding the establishment and regulation of landmarks under the Landmarks Law; and Meenakshi Srinivasan as Chair of the LPC (*id.*, ¶¶ 16-18).

Stahl alleges that it acquired the FAE in 1977, along with an unrelated building at 1221 York Avenue, for the aggregate price of $5,725,000, because of its future development potential. The Buildings contain 190 apartments, allegedly of substandard quality by modern standards, and lack modern amenities, appliances, and fixtures. The Buildings allegedly have obsolete electrical, mechanical, and ventilation systems, and neither Building is disability-accessible. A large number of the apartments are currently vacant, and allegedly cannot legally be rented in their existing condition. Stahl asserts that the Buildings have limited appeal to a limited demographic, and are capable of generating only meager rental income (*id.*, ¶¶ 22-28).

The FAE was constructed by the City and Suburban Home Company (CSHC). CSHC financed and developed numerous "model tenement

projects" throughout the country, and was known for its "light-court" tenement style buildings, in which courtyards, apartments, and common areas were designed to maximize light and air. The Other Buildings of the FAE were completed in 1906, and are the oldest surviving example of CSHC's model tenement projects, and were designed by a renowned architect, James Ware. Stahl asserts that the Buildings were not designed by Ware, but by a different architect employed by CSHC, Philip Ohm, who also designed the York Avenue Estates, and whom Stahl dismisses as "undistinguished" (*id.*, ¶¶ 29-32).

Stahl alleges that, in 2004, it began to take steps that would enable it to carry out a redevelopment plan involving demolition of the Buildings and construction of a modern condominium tower. It claims that, in order to maximize the possibility of redeveloping the Buildings at the appropriate time, and avoid needlessly incurring the expense of repairs to the Buildings, which it planned to replace, Stahl kept apartments unleased as they became vacant, beginning at least as early as 2000 (*id.*, ¶¶ 37-38).

Stahl alleges that, immediately after it advised the local Community Board of Stahl's plans to redevelop the Buildings, the LPC notified Stahl that the LPC had calendared a public hearing to revisit the landmarking

issue, even though Stahl believed that the 16-year-old decision not to designate the Buildings as landmarks was long-settled and had been affirmed by the courts. Stahl asserts that, unencumbered by the landmark designation, the properties could have then been sold for nearly $100 million, even when discounting for the limited market for redevelopment projects of this size, and the risks inherent in real estate development generally. Stahl argues that, if it were to redevelop the properties itself – as it planned – the Buildings could be worth almost twice that amount (*id.*, ¶¶ 40-41).

At the public hearing held on November 14, 2006, Stahl presented a comprehensive memorandum in support of its position, explaining the historical, legal, and architectural support for preserving the BOE's decision. Stahl asserts that transcripts of the hearing reveal that the proceedings improperly focused on the concerns of politically influential local residents who sought to block any development to preserve their special interests. Stahl asserts that the LPC also repeatedly made comments suggesting that the LPC had prejudged Stahl's application, and simply would not permit redevelopment or even entertain the possibility that an actual hardship existed (*id.*, ¶¶ 42-45, 64).

After the Appellate Division affirmed the dismissal, discussed above, the New York Court of Appeals denied Stahl's motion for leave to appeal, exhausting Stahl's Article 78 challenge to the landmark designation. On October 7, 2010, Stahl requested a certificate of appropriateness authorizing demolition of the Buildings (with the intent to construct modern mixed-income condominium towers) on the ground of insufficient return, pursuant to Landmarks Law § 25-309 (*id.*, ¶¶ 52, 54, 60).

The petition concludes that the LPC's 2006 landmark designation has had a severe economic impact on the value of the Buildings, preventing Stahl from earning a reasonable rate of return, and has interfered with Stahl's investment-backed expectations. In each year since the designation, Stahl allegedly lost money on the Buildings because of their high vacancy rate, low rent, and high operating expenses. Stahl contends that even renovation of the Buildings would not solve the problem (*id.*, ¶¶ 73-75).

The petition also alleges that the LPC reached a false and unreasonable conclusion that Stahl could earn more than a 6% return by repeatedly misapplying the standards of the Landmarks Law, disregarding

its own directly applicable precedent, and refusing to consider the full costs that Stahl would incur to renovate the Buildings (*id.*, ¶ 84).

Stahl alleges that the LPC did not use the "cost" approach, a valuation method that the LPC applied in granting the hardship application of KISKA Developers, Inc. (KISKA), a case upon which the LPC stated it was relying. In KISKA, as here, the LPC considered multiple renovation scenarios, and, in each projected assessed value, it added renovation costs, and uniformly added a percentage of renovation costs to the initial assessed value to calculate real estate taxes. Stahl complains that the LPC attempted to distinguish away KISKA's use of the cost approach, by misreading KISKA (*id.*, ¶¶ 97-98), and that the LPC manipulated its analysis to achieve a predetermined result. For example, Stahl maintains that in calculating the denominator of the reasonable return equation and real estate taxes (based on a percentage of assessed value), the LPC applied the income approach instead of the cost approach. The LPC also discounted a significant amount of the actual renovation costs required on the ground that those costs were a "self-imposed hardship." Stahl concludes that, had the LPC not made these alleged errors, it would have

concluded that Stahl could not earn a reasonable return and was entitled to relief on the grounds of hardship (*id.*, ¶¶ 101-102, 118).

The petition contains two causes of action. The first alleges an unconstitutional taking of real property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution, 42 USC § 1983, and Article I § 7 of the New York State Constitution (*id.*, ¶¶ 123-124).

The second cause of action is a request for relief under Article 78 of the CPLR, asserting that the LPC actions are quasi-judicial, and thus reviewable under CPLR 7803 (3), and must be vacated because they are affected by an error of law, and were arbitrary and capricious (*id.*, ¶ 131).

Stahl seeks an order: (1) awarding just compensation in the amount of the fair market value of the Buildings on November 21, 2006, absent the unconstitutional taking, plus interest, which Stahl believes to be approximately $200 million; (2) vacating the LPC's denial of Stahl's hardship application as arbitrary and capricious and affected by an error of law, and remanding the matter for further proceedings; and (3) awarding attorney's fees and costs incurred in prosecuting this action.

Answer and Motion to Dismiss

Respondents contend that Stahl has not met its burden of showing that the Buildings are not able to earn 6% of the post renovation assessed value in the test year (2009), or that the financial assumptions and theories that the LPC used in makings its calculations were improper. Respondents urge that there has been no unconstitutional taking of Stahl's property because it may continue to be used for low-scale rental units. To estimate the income that the Buildings could generate, Stahl submitted four development scenarios to estimate renovation cost of vacant apartments and likely rents. Respondents indicate that the LPC rejected the four scenarios because they contained fallacies (Answer, ¶¶ 230, 237).

As a first affirmative defense, respondents state that the denial of the "Notice to Proceed" was rational and not arbitrary and capricious because the LPC properly determined that: (1) the relevant improvement parcel for the hardship application embraces all tax lots on Block 1459 (i.e., the FAE); (2) only the cost of the renovation of apartments vacant at the time of the designation should be considered in the hardship calculation for depreciation; (3) moderately renovated apartments in the "apartments only" scenario would likely generate rents of at least $35 - $40 per leasable

square foot: (4) apartments renovated under the "minimal habitability" scenario would likely result in vacant apartments renting for $28 per square foot: (4) the vacancy rate and collection loss should be 5%; (5) reasonable expenses of operating the Buildings after renovation should be similar to the Other Buildings plus 15%; (6) in the depreciation calculation, loan interest should be excluded; (7) certain forms of "other income" should be included; (8) the Buildings would generate a reasonable return even if the cost approach were used to determine post-renovation assessed value; and (9) the income approach should be used to project real estate taxes. For a second affirmative defense, respondents assert that the redesignation of the Buildings and the denial of the Notice to Proceed does not constitute a taking.

In opposition, Stahl argues that: (1) the motion to dismiss should be denied, because Stahl adequately alleged that (a) the relevant parcel for the takings analysis is the Buildings; (b) the landmark designation destroyed virtually all of the value of the Buildings; and (c) respondents interfered with Stahl's reasonable investment-backed expectations; and (2) the LPC's conclusion that the Buildings were capable of earning a reasonable return was arbitrary and capricious in that (a) the LPC wrongly

characterized the relevant improvement parcel; (b) the LPC irrationally ignored economic reality and rejected the cost approach; (c) the LPC's self-imposed hardship finding unfairly punishes Stahl for exercising its legal rights; (d) a proper application of the cost approach demonstrates that Stahl cannot earn a reasonable return; and (e) the LPC refused to include construction loan interest because of its erroneous interpretation of the Landmarks Law.

Federal Stahl Action

On the same day that Stahl commenced this proceeding (September 22, 2014), Stahl commenced a related action in the U.S. District Court for the Southern District of New York, involving the same subject matter as presented here, entitled *Stahl York Avenue Co., LLC v The City of New York and The New York City Landmarks Preservation Commission* (2015 WL 2445071, 2015 US Dist LEXIS 66660 [SD NY, May 21, 2015, No. 14-CV-7665 [ER]) (*Federal Stahl Action*), seeking an order: (a) annulling and setting aside the 2006 landmark designation and the denial of its hardship application; (b) awarding compensatory damages; and (c) awarding attorney's fees and costs.

Defendants in that action (the City and LPC) moved to dismiss pursuant to Rule 12 (b) (1) of the Federal Rules of Civil Procedure, arguing that the federal court should abstain from exercising its jurisdiction until the instant (state) action is resolved, and Rule 12 (b) (6), arguing that the complaint fails to state a claim upon which relief can be granted (2015 WL 2445071 at *6, 2015 US Dist LEXIS 66660 at *18).

The federal court noted that, to prevail on a cause of action under 42 USC § 1983, as sought by Stahl, "a plaintiff must establish, by a preponderance of the evidence, that (1) the defendant deprived it of a right secured by the Constitution or the laws of the United States and (2) in doing so, the defendant acted under color of state law" (2015 WL 2445071 at *7, 2015 US Dist LEXIS 66660 at *20). The federal court dismissed the action, holding that Stahl failed "to state a constitutionally protected property interest and, by extension, a valid § 1983 claim" (2015 WL 2445071 at *16, 2015 US Dist LEXIS 66660 at *46). In doing so, the Court stated that the LPC's:

> "decision-making process involved an extensive amount of discretion, rendering Stahl's chances of obtaining a hardship finding uncertain at best. Stahl's claim-that the Commission exceeded the bounds of its authority by exercising this discretion would make the Board nothing more than a rubber stamp and

> reduce its role in the process to a rote check of whether the proper filings had been made"

(*id.*, 2015 US Dist LEXIS 66660 at *45-46 [internal quotation marks and citation omitted]).

DISCUSSION

The takings clause of the Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use, without just compensation." "[T]he Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests or denies an owner economically viable use of his land" (*Lucas v South Carolina Coastal Council*, 505 US 1003, 1016 [1992] [internal quotation marks and citation omitted]). Neither of these circumstances is implicated here. (*See also Matter of Smith v Town of Mendon*, 4 NY3d 1, 8-9 [2004]).

Because "the decision to make landmark designations is administrative, rather than quasi-judicial in nature" (*Stahl 1*, 76 AD3d at 295; *Matter of Gilbert v Board of Estimate of City of N.Y.*, 177 AD2d 252, 252 [1991], *lv denied* 80 NY2d 751 [1992]), the court's "review is limited to a determination of whether the LPC's designation of the Buildings had a rational basis or, if, as petitioner contends, it was arbitrary and capricious"

(*Stahl 1* at 295; *Matter of Society for Ethical Culture in City of N.Y. v Spatt*, 68 AD2d 112, 116 [1st Dept 1979], *affd* 51 NY2d 449 [1980], *rearg dismissed* 52 NY2d 1073 [1981]). For the reasons discussed below, the record supports the finding that the LPC's denial of the Notice to Proceed was rationally based, and not arbitrary and capricious.

As a preliminary matter, Stahl argues that it would be premature to dismiss before a full record is developed. Nonetheless, issue is fully joined. Stahl commenced the lawsuit by a notice of petition and treated it as a special proceeding for summary determination on the papers, notwithstanding inclusion of a plenary claim. The parties have fully responded to each other's submissions. Indeed, the Court granted Stahl's request to file sur-reply papers (see Order of March 22, 2015 [Motion Seq. No. 004]). The matter was fully submitted for determination. Included with the motion papers is the full administrative record, consisting of eight volumes and 2359 pages. Stahl itself submitted two volumes of documents, containing 25 exhibits. Thus, no fuller record need be developed. Contrary to Stahl's contention, there are no material issues of fact that must be resolved.

Stahl argues that "the Landmarks Law heavily restricts Stahl's ability – or anyone else's for that matter – to engage in any use of the property other than the current, unprofitable one" (Stahl Mem. in Opp. at 10). However, the record belies Stahl's contention. In *Penn Cent. Transp. Co. v City of New York* (438 US 104, *reh denied* 439 US 883 [1978]), a decision upon which both sides rely, the United States Supreme Court stated:

> "[T]he New York City law does not interfere in any way with the present uses of the [Grand Central] Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel"

(*Penn Cent. Transp. Co. v City of New York,* 438 US at 136). Similarly, the designation of the Buildings as landmarks has not interfered with the historic use of the property to obtain rental income. "[A] property owner who challenges land regulation as a taking has a heavy burden of proof" and "must demonstrate, by dollars and cents evidence that under no permissible use would the parcel as a whole be capable of producing a reasonable return" (*Briarcliff Assoc. v Town of Cortlandt,* 272 AD2d 488, 491 [2d Dept 2000] [internal quotation marks and citations omitted], *lv denied* 96 NY2d 704 [2001]).

In rendering its determination, the LPC, in its Report, cited the following provisions of the Landmarks Law as relevant: section 25-309 (a) (1), requiring the applicant to establish that "the improvement parcel (or parcels) is not capable of earning a reasonable return." "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 purpose of levying real estate taxes" (section 25-302 [j]). "Reasonable return" is defined as a "net annual return of six per centum of the valuation of an improvement parcel" (section 25-302 [v] [l]).

The net annual return is defined as:

> "the amount by which the earned income yielded by the improvement parcel during a test year exceeds the operating expenses of such parcel during such year, excluding mortgage interest and amortization, and excluding allowances for obsolescence and reserves, but including an allowance for depreciation of two per centum of the assessed value of the improvement, exclusive of the land, or the amount shown for depreciation of the improvement in the latest required federal income tax return, whichever is lower"

(section 25-302 [v] [3]). "Test year" is defined as "(1) the most recent full calendar year, or (2) the owner's most recent fiscal year, or (3) any twelve consecutive months ending not more than ninety days prior to the filing [of

the request for hardship relief]" (section 25-302 [v] [3] [b]). "Valuation" is "the current assessed valuation established by the city, which is in effect at the time of the filing" of the hardship request (section [v] [2]) (LPC Report at 8).

As the applicant, Stahl had the burden of establishing to the LPC's satisfaction that a hardship exists (Landmarks Law § 25-309 [a] [1]). To meet its burden, and demonstrate that it could not obtain a reasonable return, Stahl submitted four scenarios for the test year 2009 to determine income (LPC Report at 8, R-2318). In the C&W Report, as part of Stahl's application, there is a finding that, with capital improvement, the property could yield a return of 1.190% based on the assessed valuation, and, without the capital improvement, a return of 0.614%. The C&W Report concludes "the imposition of the landmark designation on November 21, 2006 had rendered the property incapable of generating a sufficient and competitive economic return" (LPC Report at 27, R-2337).

The first scenario ("base building and apartment"), includes renovations to the base building (mechanical, electrical, plumbing, work on common areas, and facade work) as well as renovation of vacant apartments to a moderate level. C&W projects this scenario will yield an

average rent of $40 per leasable square foot for vacant apartments (LPC Report at 8, R-2318, citing C&W Report at 29). The second scenario ("apartments only") involves the same level of apartment renovations as the base building and apartments scenario, but without improvements to the base building. C&W projects this scenario will generate rents of $35 per leasable square foot (LPC Report at 8, R-2318, citing C&W Report at 36). The third scenario ("minimal habitability") involves no renovations to the base building, apartment renovations sufficient to cure fire and safety code issues, and includes substantial renovations such as new appliances for the bathrooms and kitchens. C&W projects this scenario would generate rents of only $20 per leasable square foot (LPC Report at 8, R-2318, citing C&W Report at 23). The fourth scenario involved putting elevators into the Buildings. C&W concluded this was infeasible and not financeable with outside financing (LPC Report T 9, R-2319, citing C&W Report at 19).

Respondents contend that, to reach the conclusion that none of these four scenarios would produce a reasonable return, Stahl relied on a number of questionable assumptions which the LPC found were unsupported, such as a projected 20% vacancy in a geographic area with

a 1.5% vacancy rate; rent of $600 or $888 in the Upper East Side, where rents elsewhere range from $1,500 to $2,200; and the failure to compare units in the Buildings to units in the Other Buildings, although they were similar in size and design and had rents of $1,336 for a studio and $1,616 for a one bedroom (Respondents' Mem. at 15, citing R-534).

According to respondents, LPC performed 24 hardship scenarios to determine whether Stahl had carried its burden of demonstrating the properties could not generate a reasonable return after vacant apartments had been renovated. The LPC used some of the analysis and assumptions that Stahl used and some different ones that it determined were more reasonable (Respondents' Mem. at 15-16, 43; *see also* Reply Mem. at 6-7, citing LPC Report at 27-28, R-2337 - 2338). Respondents aver that the LPC calculated income, from rents and other sources, and determined costs incurred in operating the property. The LPC then computed whether the remaining sum, after subtracting projected expenses and operating costs from income, was less than 6% of the post-renovation assessed value of the property (*id.*, citing R-2318 - 2319; R-2337- 2338; R-2344 - 2347; R-2352 - 2355). In each case, according to respondents, the LPC found that Stahl was able to realize a reasonable return, through monthly

rents of $869, $1082, or $1236 per apartment based on projected rents of $28, $35, and $40 per gross square foot, and returns varying between 8.68% and 16.92%. Thus, the LPC concluded that Stahl had failed to demonstrate that the Buildings were incapable of earning a reasonable return, and it denied the application. In reaching its determination, the LPC made findings regarding income from renovated apartments; vacancy and collection loss; other income that could be generated by the property; operating and other expenses; depreciation; real estate taxes after renovation; and the property's assessed value after renovation. In each instance, the LPC discussed the issue in detail and explained how and why it reached its conclusions (Respondents' Mem. at 16).

Stahl argues that its purportedly erroneous assumptions are inconsequential. Rather, Stahl asserts that three core issues actually affect the outcome: (1) the definition of relevant improvement parcel; (2) whether the cost or income approach is the proper method for determining assessed value; and (3) whether Stahl's renovation costs should be reduced by half because some of those costs were purportedly a "self-imposed hardship." The Court now considers each in turn.

1. ***Relevant Improvement Parcel: entire tax block 1459 or exclusively the Buildings.***

The Buildings are situated on Manhattan tax block 1459, which is subdivided into four tax lots (lots 1, 10, 22 and 30). The Buildings are on tax lot 22. Both sides agree that the relevant regulation is Landmarks Law § 25–302 (j) which provides:

> "'Improvement parcel.' 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 purpose 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."

Respondents argue that the LPC properly decided that the relevant improvement parcel for the hardship application is all of the tax lots on Block 1459 because:

> (1) the Buildings were built as part of the larger complex, and are stylistically, and remain physically, related to the rest of the buildings on the block in terms of height, massing, and general layout;
>
> (2) the Buildings and the Other Buildings in the complex share common boilers and maintenance personnel;
>
> (3) Stahl operates one leasing office for all of the buildings in the complex;

(4) the laundry facilities located in some of the Other Buildings are available to tenants from all of the buildings in the complex, and income from laundry facilities is assigned to buildings throughout the complex;

(5) Stahl has managed the Other Buildings so as to facilitate its goal of demolishing the Buildings and redeveloping the site;

(6) Stahl has not made reasonable and prudent efforts to rent apartments in the Other Buildings, which explains the excessively high vacancy rate in these buildings as compared to the average for the area, and this supports the LPC's finding that the complex is managed as a single economic unit; and

(7) Stahl has filed consolidated filings for all of the lots on block 1459 for real estate tax purposes for at least the tax years 2007-2012.

For these reasons, respondents contend, the LPC rationally found that the improvement parcel for purposes of the hardship application should be Manhattan tax block 1459 in its entirety. Therefore, because Stahl's application is based on computations using only the two Buildings, and not the entire Lot, the LPC found that Stahl failed to meet its burden of showing that the Building cannot obtain a reasonable return (LPC Report at 10-11, R-2320-2321).

Stahl contends that whether it has managed all of the buildings of the FAE "as a single economic entity" is a highly contested factual assertion – not a legal argument – and it is not properly before the Court at this stage

of the litigation. Notwithstanding this assertion, Stahl has not identified any disputed factual issues. Rather, the dispute is the significance of the factors identified by the LPC in concluding that the improvement parcel is the entirety of tax lot 1459.

Stahl also contends that the fact that a landowner treats different buildings similarly for some purposes does not, by itself, establish, as a matter of law, that they must be treated as a single parcel for takings purposes. Stahl cites to the petition which sets forth numerous examples showing that Stahl actually treated the Buildings as a separate economic entity from the remainder of the FAE beginning in 1990, when the BOE severed the Buildings from the rest of the FAE. Stahl states that it crafted a distinct development plan for the Buildings, and has operated them accordingly, by keeping apartments unrented as they became vacant in preparation for the eventual redevelopment of the site. In addition, the Buildings are treated as a discrete parcel for tax purposes, both by the City's Department of Finance and by Stahl, which files various tax documents for the two Buildings, separate from the remainder of the FAE.

Stahl argues further that the landmarks law distinguishes between "improvement parcel" and "improvement site" and that the reasonable

return is based on the improvement parcel which is treated as a single entity for the purpose of levying real estate taxes (Landmarks Law § 25-309 [a] [l]). Allegedly, respondents do not dispute that the Buildings comprise a single tax lot (lot 22) while the Other Buildings of the FAE comprise three different tax lots (Lots 1, 10, and 30) and that, for tax purposes, the Department of Finance calculates an assessed value for Lot 22 alone, and does not include in that calculation any value for the remainder of the FAE.

Respondents have demonstrated that the determination that the entire lot is the relevant improvement parcel is rational and not arbitrary and capricious and, therefore, the agency determination must be upheld (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of 47 Ave. B E. Inc. v New York State Liq. Auth.*, 72 AD3d 465, 467 [1st Dept 2010]). The Landmarks Law affords the agency discretion given that, in determining reasonable return, the "net annual return" is "presumed to be the earning capacity of such improvement parcel, in the absence of substantial grounds for a contrary determination by the commission" (Landmarks Law § 25-302 [c]).

As found by the Appellate Division in 2010, the record demonstrated that there was a prior finding in 1990 that the FAE "needed to be protected in its entirety as a socio-historic monument in the history of urban housing, and that but for the existence of a political compromise at the time, the entire district would have been designated a landmark" (*Stahl 1*, 76 AD3d at 297). Hence, the record supports the LPC's determination that that the Buildings should be considered part of the entirety of the FAE, because the carving out of them in 1990 was an anomaly.

According to respondents, Stahl has filed consolidated filings for all of the lots on block 1459 for real estate tax purposes for at least the tax years 2007-2012 (see R-2142) and that, in making such a filing, Stahl filed a form "TC 166," notifying the Department of Finance that "two or more non-condo tax lots, operated as an economic unit or otherwise related for purposes of valuation, should be reviewed together as a consolidated unit" (see R-2150) (Respondents Mem. at 18-19). Respondents state further that the entire block was the subject of consolidated hearings before the City's Tax Commission in connection with applications for reductions in the assessed value of these properties (R-2144, R-2150). Although Stahl counters that the statute refers to tax assessments, not filings, as

discussed above, the disparate designations by the BOE in 1990 was a politically motivated anomaly, and should not have occurred (*see Stahl 1*).

> Moreover, several factors are used to determine the relevant parcel:
>
> "the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the unregulated lot . . . . An analysis focused on these factors is eminently sound and it mirrors the approach taken by other courts in regulatory takings cases"

(*District Intown Props. Ltd. Partnership v District of Columbia*, 198 F3d 874, 880 [DC Cir 1999], *cert denied* 531 US 812 [2000]). Accordingly, the LPC's determination as to the improvement parcel was rational.

Stahl states that the Court should not defer to the LPC concerning this issue (Stahl Mem. in Opp. at 23). However, if, as is the case here, "the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency" (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). The "courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise" (*id.*).[3]

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[3] The Court sees no basis on which to reach a different result than that reached by the LPC.

Stahl argues that its "distinct treatment of the Subject Buildings was a direct consequence of the BOE's decision to cleave them from the FAE, with the express purpose of 'allow[ing] for [as-of-right] development in the future'" (Stahl Mem. in Opp. at 8, citing petition, ¶ 34). Stahl asserts that, the City induced Stahl not to challenge the 1990 designation of the Other Buildings, because that designation expressly preserved Stahl's rights to develop the Buildings, and having done so, the City must accept the consequences of its actions on Stahl's development plans for purposes of Stahl's takings claim. Stahl's inducement and/or reliance claim is specious. To the extent that Stahl insinuates that the City should be estopped from reconsidering the BOE's determination, it is apodictic that estoppel does not lie for official acts absent an unusual factual situation (*see generally Advanced Refractory Tech., Inc. v Power Auth. of State of N.Y.*, 81 NY2d 670, 677 [1993].) No unusual factual situation is presented here.

That Stahl may have previously believed that it had the ability to develop the Buildings does not establish that a taking has occurred (*Penn Central Transp. Co.*, 438 US at 130). The "LPC is statutorily authorized to amend any prior designation of a landmark" (*Stahl 1*, 76 AD3d at 297; Landmarks Law § 25–303 [c]). This is particularly true here where an

expectation that the status of the Buildings was unlikely to change was unrealistic. In *Stahl 1*, the First Department stated:

> "The record compiled during the proceedings contains testimony before the City Council Subcommittee on Landmarks stating that the BOE's 1990 decision to exclude the buildings from landmark designation was a 'bad backroom deal,' and was an 'inappropriate politically motivated action' made under 'intense political pressure from a powerful real estate developer.' Additionally, when introducing the amendment to the full City Council, the Speaker of the Council described the BOE's decision to exclude the buildings from landmark designation as a bad decision based upon improper considerations which had nothing to do with the buildings' historical or cultural significance"

(76 AD3d at 296).

Stahl argues that when it acquired the Buildings, it intended to redevelop them, and had no reason to believe that "these unremarkable, outmoded, tenement-style apartment buildings could constitute a potential landmark at some point in the future" (Stahl Mem. in Opp. at 15). "[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable" (*Penn Cent. Transp. Co. v City of New York,* 438 US at 130).

Moreover, as noted by respondents, the unrealistic nature of Stahl's supposed expectation should have been apparent, at the latest, in 1992,

when the Appellate Division rendered its decision in *Kalikow*. In *Kalikow*, the Appellate Division reinstated the designation of the Landmarks Preservation Commission of the York Avenue Estate as a landmark (discussed above). It rejected the argument that the prior determination of the BOE was a legislative act, beyond the purview of judicial review, and found that the decision was not arbitrary and capricious. Thus, Stahl should have anticipated that its property would eventually face the same analysis.

Indeed, as the New York Landmark Conservancy cogently pointed out in an amicus memorandum of law, when Stahl acquired the FAE in 1977, it was occupied predominantly by rent regulated tenants, and thus, the reasonable expectation would have been that the "Subject Buildings would always be low-scale, rent regulated rentals that might one day be landmarked" (Amicus Memo. at 17). "[T]he critical time for considering investment-backed expectations is the time a property is acquired, not the time the challenged regulation is enacted" (*Meriden Trust & Safe Deposit Co. v Federal Deposit Ins. Co.*, 62 F3d 449 [2d Cir 1995]).

Furthermore, by characterizing the Buildings as "unremarkable, outmoded, tenement-style apartment buildings," Stahl is repeating the

assertion that it made in *Stahl 1*, when it argued that the Buildings "were the last to be constructed in the First Avenue Estate and were designed by a lesser-known architect," and, therefore, "they have no landmark value," an argument that the First Department deemed "unavailing" (*Stahl* 1, 76 AD3d at 299). This Court declines the implied–and improper–invitation to revisit the issue of the designation of the Buildings as landmarks, sustained by the First Department in *Stahl 1*.

2. *Whether the cost or income approach is the proper method for determining assessed value*.

Stahl argues that the LPC used the "income approach," rather than the "cost approach," to project assessed value, contending that the income approach ignores the significant cost of the substantial renovations that would be necessary for Stahl to earn any return on the Buildings. According to Stahl, the use of the income approach essentially ensures a finding that a property owner can earn a reasonable return post-renovations. Stahl also argues that, under the income approach, the LPC assumed the post-renovation assessed value of the Buildings was barely half of the cost of the renovations, and would consider a post-renovation rate of return "reasonable," even if it would take Stahl 32.8

years to pay for those renovations. Stahl asserts that the LPC also failed to explain why it used the cost approach to calculate assessed value in a prior hardship case (KISKA), but not here.

According to respondents, the LPC stated that it did not employ the cost approach in KISKA for development scenarios involving rental properties (Respondents' Mem. at 31, citing R-2284). They dispute the assertion that KISKA used the cost approach to adjust assessed value to reflect renovation costs, asserting that the LPC substituted the purchase price for the assessed value. In KISKA, the applicant analyzed several development scenarios, including ones involving the outright sale of the buildings or apartments, as well as for rental properties. They contend that the LPC found that, "'for calculating the potential value of the buildings as condominiums or individual townhouses, the costs of renovation should be treated as a one-time expense to be recouped upon the sale of the property. Accordingly, such costs would be added to the original sales price of each building before calculating the rate of return'" (Respondents' Mem. at 31-32, citing KISKA Preliminary Determination, at R-2284).

Respondents argue that the conclusion that post-renovation assessed value should not be calculated using the cost approach is

consistent with KISKA, which did not add renovation costs to the purchase price to determine assessed value in scenarios involving rental properties and not sales. As stated in the denial of the Notice to Proceed (i.e. LPC Report), this makes sense, because when a developer sells property it must recoup all of its costs at the point of sale, whereas rental property recoups the investment over time (Respondents' Mem. at 32-33, LPC Report at 26-27, R-2336 - 2337). Also, as stated in the denial of the Notice to Proceed, the LPC looked solely at the reasonable return of renovating units to a moderate level with no improvements to the base building, i.e., the apartments only scenario (Respondents' Mem. at 33, LPC Report at 13, R-2323).

In any event, respondents note that the LPC also computed the rate of return possible using only the two Buildings and the cost approach, and considering the renovation cost of all 97 vacant apartments, and that its computations showed that Stahl was able to earn returns between 8.68% and 9.96%, based on a profit of $549,832 (if apartments rented for $35 per gross square foot) and $644,821 (if apartments rented for $40 per gross square foot) (R-2338, 2357). The LPC analyzed the minimum habitability and the apartments only scenarios. The LPC calculated the rate of return

in relation to the post-renovation assessed value using both the income and cost approaches. Returns of more than 10% were achievable in 75% of the scenarios.

Stahl counters that the LPC analysis was inconsistent, in that it allegedly produced an irrational alternative calculation where: (1) in the denominator, assessed value was determined through the cost approach using renovation costs for 97 apartments; (2) for depreciation, assessed value was determined through the cost approach using renovation costs for 53 apartments; and (3) for real estate taxes, assessed value was determined through the income approach. Yet, as explained by respondents, the cost approach generates a higher assessed value than the income approach, and a prudent owner of a rental property would seek to have a lower assessed value, and therefore lower real estate taxes using the income approach. Real estate taxes are significantly higher if the cost approach is used to set assessed value, and, as stated in the LPC Report, "a reasonable prudent and efficient owner would seek to have as low a real estate tax as possible" (LPC Report at 25-26, R-2335 - 2336). Landmarks Law § 25-302 (c) acknowledges that "efficient and prudent

management" is part of the analysis equation in determining the capacity of earning a reasonable return.

3. *Whether Stahl's renovation costs should be reduced by half because some of those costs were purportedly a "self-imposed hardship."*

Respondents argue that it was rational for the LPC to exclude renovation costs for the apartments that were kept vacant after the redesignation in 2006, because, by doing so, Stahl assumed a business risk and thereby suffered a self-imposed hardship. Stahl argues that this conclusion is not rational, because Stahl would have incurred renovation costs regardless of its vacancy policy, and therefore those costs cannot be considered "self-imposed." Even assuming, for purposes of argument, that Stahl might have incurred some renovation costs, this finding is inconsequential. As demonstrated by respondents, Stahl's analysis is flawed, because it is based upon vacancy rates in the Other Buildings (also part of the improvement parcel tax block 1459, discussed above) and that improperly skewed the results against a finding of a reasonable return.

The LPC noted that it did not include a vacancy and collection loss factor in its 1988 KISKA decision – the last economic hardship application decided by the LPC – but that, given the large number of apartments in the

Buildings, a reasonable vacancy and collection loss factor should be included in calculating effective gross income. Thus, as noted in the decision in the *Federal Stahl Action* (2015 WL 2445071 at *16, 2015 US Dist LEXIS 66660 at *43-44), the LPC did rely on the KISKA decision for guidance, and honored its duty to "decide like cases the same way or explain the departure" (*Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 518 [1985] [internal quotation marks and citation omitted]). This Court concurs with the federal court's finding.

In determining effective gross income, the LPC found that it was "reasonable to subtract from the gross rental income a reasonable allowance for vacancy and collection loss" (LPC Report at 17, R-2327). Whereas C&W projected a vacancy and collection loss rate of 10%, relying on HR&A data, the LPC concluded that that a 5% vacancy and collection loss factor should be applied; the Buildings and the FAE are located in the Upper East Side of Manhattan, a "highly desirable residential neighborhood," and all of the apartments are regulated by rent regulations. According to City Habitat data cited by HR&A, the average vacancy rate for the Upper East Side averaged 1.5% between 2007 and 2011, with the highest rate being 2.38% in 2009. Approximately "two-thirds of vacancies

in pre-1947 rent stabilized buildings are re-rented in less than three months, and only 7% of these vacancies persist for longer than a year" (*id.*, citing HR&A Report, dated June 11, 2013 at 2).

Stahl testified that the Other Buildings have had a vacancy rate exceeding 20%, because the Buildings are six-story walkups, containing small sized apartments lacking amenities. C&W projected a vacancy and collection loss rate of 10%, but the LPC found this to be "anomalous, excessive and unsupported by the record" (*id.* at 18, R-2328).

The LPC found that "having many vacancies in the Other Buildings potentially facilitates Stahl's plans and desires to develop the site of the Subject Buildings," to enable the relocation of rent stabilized tenants from the Buildings slated for demolition. Stahl itself states that "to maximize the possibility of redeveloping the Buildings at the appropriate time and avoid needlessly incurring the expense of repairs to Buildings it planned to replace, Stahl kept apartments unleased as they became vacant, beginning at least as early as 2000" (petition, ¶ 38). Stahl cites this scheme of leaving apartment vacant for purposes of relocating tenants from the Buildings to the Other Buildings as evidence of a distinct treatment of the

properties. Rather, it shows the contrary: Stahl treated the entire FAE, including the two Buildings, as one integrated enterprise.

The LPC's analysis is well-reasoned. It is "not the province of the courts to second-guess thoughtful agency decisionmaking" (*Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 232 [2007]).

The LPC also determined that, even if warehousing does not account for the vacancy rate, it reflected Stahl's unreasonable management. Stahl had not increased its efforts to rent apartments or explored other avenues for renting apartments, notwithstanding the extremely high and unusual vacancy rates. The LPC found that the only efforts Stahl makes to rent apartments in the Other Buildings is the onsite rental office and listing them with the property manager Charles H. Greenthal. Stahl has not advertised apartments in other media (e.g., social media or newspapers) or listed them with multiple brokers. The LPC found that the on-line broker merely lists the telephone number of the onsite rental office, and that the broker neither provides floor plans, virtual tours, or other information on apartments in the Other Buildings, nor does it say whether there are any vacancies (LPC Report at 18, R-2328). As noted above, the LPC has

discretion to consider the owner's "efficient and prudent management" as part of the analysis in determining the capacity of earning a reasonable return (*see* Landmarks Law § 25-302 [c]). The LPC found that, faced with such a high vacancy rate when compared to the average for the area as a whole, a prudent owner would have made other efforts to rent apartments, and that Stahl's failure to change its general management approach, and intensify and diversify efforts to rent apartments, is unreasonable and imprudent (LPC Report at 19, R-2329).

Regarding soft costs and depreciation, Stahl contends that it was an error for the LPC to exclude construction loan interest, because the Landmarks Law requires the LPC to calculate the rate of return as "the amount by which the earned income yielded by the improvement parcel during a test year exceeds the operating expenses of such parcel during such year, excluding mortgage interest and amortization" (Landmarks Law § 25-302 [v] [3] [a]) and does not expressly exclude construction loan interest. It argues that, because the statute does not mention construction loan interest as a cost to be excluded from the calculation, the exclusion of it was contrary to law.

The LPC noted that, although soft costs are normally not depreciable, it allowed some in KISKA to be included in the depreciation calculation. The LPC did not include construction loan interest because in KISKA, the only explicitly loan-related item included in the list of soft costs was the mortgage recording tax (LP Report at 24-25, R-2334-2335; *see also Federal Stahl Action,* 2015 WL 2445071 at *16, 2015 US Dist LEXIS 66660 at *43-44). In any event, Stahl has not shown that the inclusion of the construction loan interest would nullify the findings of a reasonable return.

Stahl contends that the LPC used a "manipulated" analysis to reach a "pre-ordained, result-oriented conclusion, born of bias against Stahl from the outset, that the hardship must be rejected, citing testimony of LRC Commissioners Perlmutter (R-1704, R-2206, R-2211); Bland (R-2235-2236); Devonshire (R-2238); and Tierney (Chair) (R-2194) (Stahl Mem. in Opp. at 21).

"[A]n impartial decision maker is a core guarantee of due process, fully applicable to adjudicatory proceedings before administrative agencies" (*Matter of 1616 Second Ave. Rest. v New York State Liq. Auth.*, 75 NY2d 158, 161 [1990]). "Disqualification is more likely to be required where an

administrator has a preconceived view of facts at issue in a specific case as opposed to prejudgment of general questions of law or policy" (*id.*). Nevertheless:

> "[A]dministrative officials are expected to be familiar with the subjects of their regulation and to be committed to the goals for which their agency was created. Thus, a predisposition on questions of law or policy and advance knowledge of general conditions in the regulated field are common, and it is expected that they will influence an administrator engaged in a legislative role such as rule making"

(*id.* at 162). Here, a review of the cited testimony does not show a prejudice against Stahl; rather, it indicates a concern to adhere to the principles underlying the Landmarks Law (*see* § 25-301) as well as exhibiting "advance knowledge of general conditions in the regulated field" (*Matter of 1616 Second Ave. Rest*, 75 NY2d at 162). Stahl highlights the statement by Commissioner Perlmutter that the "LPC's 'job' was 'not to be taken in' by Stahl's application" (Stahl Mem. in Opp. at 21, citing R-1704). A review of the Commissioner's entire testimony does not support the allegation of bias or prejudice.

Because Stahl has failed to meet its burden of proof on the second cause of action seeking Article 78 relief, challenging the denial of the hardship application, and because Stahl has failed to set forth a viable

cause of action for a taking without just compensation, respondents are entitled to dismissal of the plenary claim against them for money damages (*see Kent Acres Dev. Co., Ltd. v City of New York,* 41 AD3d 542, 550 [2d Dept 2007] [because the Supreme Court properly granted that branch of the motion of the City and the Department of Environmental Protection for dismissal of the cause of action against them to recover damages pursuant to Public Health Law § 1105 (1), and the record shows that the enforcement of those regulations did not effect a regulatory taking as a matter of law, the court also correctly granted that branch of the motion for dismissal of the cause of action to recover damages for a taking without just compensation]).

Stahl argues that, apart from the reasonable return issue, its takings claim will necessarily implicate additional facts not presented before the LPC, such as "facts relevant to the reduction in value of the Subject Buildings caused by the designation" (Stahl Mem. in Opp. at 14). Stahl does not identify those "additional facts."

To the extent that Stahl is again challenging the designation in 2006, which seems to be the case here, that issue has been disposed of by the Appellate Division in *Stahl 1*, and the Court of Appeals denied leave to

appeal, there being no automatic right to an appeal, in that the Appellate Division affirmance of the trial court's decision was unanimous. Moreover, "facts relevant to the reduction in value of the Subject Buildings caused by the designation" are not necessary, because whether the landmark designation caused a reduction in value to Stahl's property is not at issue here. Facts bearing on the relevant issue of the amount of that reduction, impacting on the "reasonable return" have been sufficiently presented to the Court.

For this reason, Stahl's citation to *Matter of Brotherton v Department of Envtl. Conservation of State of N.Y.* (189 AD2d 814 [2d Dept 1993]) is unavailing. There, the petitioner, the owner of a parcel of real property abutting a canal, filed an application to replace 200 feet of existing bulkhead and to introduce 500 cubic yards of fill to stabilize the bulkhead. Most of the petitioner's property was officially designated as tidal wetlands (*id.* at 815). The Department of Environmental Conservation of the State of New York denied the application, finding that the proposed bulkhead project would have adverse impacts upon the wetland (6 NYCRR 661.9 [b] [1] [i]). The Second Department affirmed, holding that substantial evidence supported the determination and that it was not arbitrary and capricious.

The evidence supported the determination that the project would impede the nourishing tidal flows and destroy the designated wetlands on the petitioner's property. Moreover, the petitioner did not establish that the bulkhead was reasonable and necessary to the continued use of his property (*id.*).

The Second Department also ruled, however, that the record of the administrative hearing was insufficient to determine whether the denial of the petitioner's application was so burdensome as to constitute a taking, in which case the department must either grant the application or commence condemnation proceedings. Thus, the Second Department remanded the matter for an evidentiary hearing to determine whether the wetlands regulations, considered together with the denial of the application would constitute an unconstitutional taking of the petitioner's property (*id.* at 816).

In *Matter of Brotherton,* an evidentiary hearing was held necessary, because the issue of whether the petitioner suffered an unconstitutional taking was not addressed. Therefore, no factual record was developed as to that issue. Here, however, the issue of the denial of the hardship application is integral to the issue of an unjust taking, and no additional facts need be adduced.

Finally, the Court rejects respondents' argument that the affidavit of Jeremy Stern, Stahl's "Facility Director," is inadmissible, because, they contend, it is outside of the administrative record. "Judicial review of an administrative determination is limited to the record before the agency and proof outside the administrative record should not be considered" (*Matter of Piasecki v Department of Social Servs.*, 225 AD2d 310, 311 [1st Dept 1996]). Contrary to respondent's argument, however, the affidavit and accompanying exhibits represent an analysis of the administrative record, not an enlargement of it. Nevertheless, Stahl's analysis fails to overcome the rational determination of the LPC that Stahl has not met its burden of demonstrating that it is incapable of achieving a reasonable return from the Buildings.

CONCLUSION

Stahl has not met its burden of demonstrating that respondents acted arbitrarily or capriciously or in violation of law by denying Stahl's hardship application. Stahl has not set forth a cause of action for an unconstitutional taking and thus has no viable claim either for money damages, costs or attorneys' fees.

Accordingly, it is

ORDERED and ADJUDGED that the petition-complaint is denied and the cross motion is granted and the proceeding-action is dismissed.

This constitutes the decision, order and judgment of this Court.

Dated: January 8, 2016
New York, New York

ENTER:

J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Index No. 100999/2014

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

In the Matter of the Application of
STAHL YORK AVENUE CO., LLC,

Plaintiff-Petitioner,

-against-

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

Defendants-Respondents.

NOTICE OF ENTRY OF DECISION, ORDER AND JUDGMENT

ZACHARY W. CARTER
Corporation Counsel of the City of New York
Attorney for Defendants- Respondents
100 Church Street
New York, N.Y. 10007

Of Counsel: Rachel Moston
Phone #: (212) 356-2190
Law Manager No.: 2014-034745

Due and timely service is hereby admitted.

New York, N.Y. ..... *, 2016* . . .

..... *Esq.*

Attorney for.....

Exhibit B

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Rosalyn H. Richter
Sallie Manzanet-Daniels
Marcy L. Kahn
Cynthia S. Kern, JJ.

5441
Index 100999/14

x

In re Stahl York Avenue Co., LLC,
Plaintiff/Petitioner-Appellant,

-against-

The City of New York, et al,
Defendants/Respondents-Respondents.

- - - - -

Friends of the Upper East Side
Historic Districts, et al.,
Amici Curiae.

x

Plaintiff/petitioner appeals from the order and judgment (one paper), of the Supreme Court, New York County (Michael D. Stallman, J.), entered January 28, 2016, granting defendants/respondents' cross motion to deny the petition complaint, and dismissing the proceeding/action.

Shapiro Arato LLP, New York (Alexandra A.E. Shapiro, Eric S. Olney and Chetan A. Patil of counsel), and Kramer Levin Naftalis & Frankel LLP, New York (Paul D. Selver of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Aaron M. Bloom and Claude S. Platton of counsel), for respondents.

Michael S. Gruen, New York, for amici curiae.

KAHN, J.

On this appeal in this hybrid article 78/plenary action, we are asked to determine whether the denial by respondent New York City Landmarks Preservation Commission (LPC) of the hardship application of petitioner, Stahl York Avenue Co., LLC (Stahl), to demolish two buildings included within a designated landmark was without rational basis and whether Stahl is entitled to money damages on the ground that the inclusion of the two buildings within that designated landmark constitutes an unconstitutional taking (*see* US Const Amends V, XIV; NY Const, art I, § 7).

I. *Statement of Facts and Procedural Background*

In a prior appeal, this Court affirmed the dismissal of an action brought by Stahl to annul the LPC's determination, as approved by the New York City Council, to expand a previously designated landmark to include the two buildings in question (*see Matter of Stahl York Ave. Co. LLC v City of New York*, 76 AD3d 290 [1st Dept 2010], *lv denied* 15 NY3d 714 [2010] [*Stahl I*]).

A. Landmark Designation Approval

In 1990, the LPC designated an entire block of tenement buildings known as the First Avenue Estate (FAE) as an historic landmark. The block in question includes 15 six-story buildings that were built in the early 1900s as "light-court model tenements" - one of only two existing full-block light-court

tenement developments in the United States.[1]

On August 21, 1990, the New York City Board of Estimate voted six to five to approve the LPC's designation of most of the FAE as a landmark, excluding the two buildings at issue here.

In September 2004, Community Board No. 8 adopted a resolution in favor of amending the FAE landmark designation to include the two buildings in question.

In 2006, the LPC voted in favor of including the two buildings in the FAE landmark designation.

On February 1, 2007, the New York City Council unanimously approved the LPC's decision to include the two buildings in the FAE landmark designation.

On September 22, 2014, Stahl commenced *Stahl I*, an article 78 proceeding challenging the LPC's determination and the City Council's approval of that determination as arbitrary and capricious, in light of the 1990 determination to exclude the two buildings from the FAE landmark designation. This Court held that the LPC and the City Council could revisit the earlier determination and that the exclusion of the two buildings from that designation was the result of a politically motivated "bad

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[1] The other such tenement development, located on East 78th Street, is known as the "York Avenue Estate." It received landmark designation in 1990.

backroom deal" made under intense pressure from a major developer (*Stahl I*, 76 AD3d at 296 [internal quotation marks omitted]). As we noted in *Stahl I*, in introducing the amendment to the designation to the full City Council the Speaker of the City Council made an observation to the effect that the earlier determination to exclude the buildings from the designation was "a bad decision based upon improper considerations which had nothing to do with the buildings' historical or cultural significance" (*id.*).

B. Stahl's Hardship Application

Stahl then sought from the LPC a certificate of appropriateness approving the demolition of the two buildings on the ground of insufficient return, in accordance with Title 25 of the Administrative Code of the City of New York (§ 25-301 *et seq.*) (Landmarks Law). Stahl represented that it was entitled to a certificate of appropriateness pursuant to section 25-309 of the Landmarks Law because the expenses incurred in operating the two buildings in question, both before and after the payment of real estate taxes, significantly exceeded the income that they generated, and that therefore it would be appropriate to demolish the buildings, build mixed-income condominium towers in their place, and use the proceeds from that redevelopment to perform renovations at the other buildings in the FAE.

In support of its hardship application, Stahl submitted two economic feasibility studies prepared by Cushman & Wakefield supporting its claim that there was no feasible scenario under which the buildings were capable of earning a "reasonable return" within the meaning of the Landmarks Law (Administrative Code § 25-309[a][1][a]). One of those two studies, issued in 2010, stated that the two buildings' units, 190 in total, each had small rooms, including bathrooms that required undersized tubs and toilets, tiny closets, and electrical systems that did not support modern usage, and that the buildings lacked sprinklers and other modern safety and security systems. According to that study, half of the 190 units were occupied and subject to rent stabilization or rent control, and the remaining units were vacant and could be leased at market rent. The study posited that if the necessary repairs and improvements were performed and the apartments within the two buildings, including the half subject to rent stabilization or rent control, were leased, their annual net return would be negative 2.87%, which would not meet the 6% minimum standard for "reasonable return" set by the LPC. According to the other study, issued in 2009, the vacant units in the two buildings, if improved, renovated and rerented, would yield an annual return of 1.19%. That study also concluded that without the improvements, the annual return yielded by the vacant

units would be .614%. Both studies analyzed the projected return from the combined two buildings separately from the other properties within the FAE.

On May 20, 2014, the LPC denied Stahl's hardship application. The LPC commissioners reasoned that the proper scope for reasonable return analysis was the FAE property as a whole. The LPC further opined that in computing depreciation allowance, Stahl mistakenly considered projected renovation costs not only for the 53 apartments that were vacant at the time that the LPC voted to confer landmark status upon the two buildings in 2006, but also for 44 additional apartments that became vacant after the inclusion of the two buildings in the landmark designation. The LPC observed that Stahl's anticipated renovation costs for apartments that Stahl had warehoused subsequently to the landmark redesignation was a self-imposed hardship. The LPC also rejected Stahl's "cost approach" accounting methodology for projecting postrenovation assessed value, finding that an "income approach" was more appropriate for rental property. The LPC performed an alternative reasonable return calculation using Stahl's assumptions and methods, which calculation showed that the two buildings were capable of earning a reasonable return.

C. The Instant Case

On September 22, 2014, Stahl commenced this hybrid article 78/plenary action against respondents City of New York and the LPC and its chairwoman, challenging the denial of its hardship application and seeking money damages.[2] Stahl maintained that the inclusion of the two buildings in question within the FAE landmark designation amounted to a taking in violation of the federal and state constitutions (*see* US Const Amends V, XIV; NY Const, art I, § 7). Stahl argued that the LPC reached the false and unreasonable conclusion that Stahl could earn more than a 6% return from the two buildings by misapplying its own standards and by refusing to consider the full costs that Stahl would incur to renovate the buildings. Stahl also argued that the entire FAE should not have been considered and that the LPC erred in using the income approach in its calculations rather than using the cost approach, as it had done in granting the hardship

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[2] On the same day, Stahl commenced an action against the City of New York and the LPC in the United States District Court for the Southern District of New York seeking an order annulling and setting aside the 2006 landmark redesignation and the denial of its hardship application, awarding compensatory damages, and awarding attorneys' fees and costs. That action was dismissed in a written opinion and order (*Stahl York Ave. Co., LLC v City of New York, et al.*, 2015 WL 2445071, 2015 US Dist Lexis 66660 [SD NY, No. 14 Civ. 7665 (ER), May 21, 2015]), which was affirmed by the United States Court of Appeals for the Second Circuit (641 Fed Appx 68 [2d Cir 2016]). On October 31, 2016, the United States Supreme Court denied Stahl's petition for a writ of certiorari (-- US --, 137 S Ct 372 [2016]).

application of another developer in 1988.

With regard to the taking issue, Stahl argued that before 2006, the two properties in question could have been sold for more than $100 million - - and twice that much had they been redeveloped. Stahl maintained that the 2006 public hearing held by LPC prior to amending the FAE landmark designation improperly focused on concerns of politically influential local residents who sought to block any development in order to protect their own special interests and that LPC commissioners repeatedly made comments that prejudiced its application. Stahl also asserted that the LPC's 2006 determination to include the buildings within the landmark designation had had a severe economic impact on the value of the buildings, preventing it from earning a reasonable rate of return, and had interfered with its investment-backed expectations.

Respondents answered and cross-moved to dismiss the petition and complaint, arguing that the LPC had properly denied Stahl's hardship application. They contended that the relevant improvement parcel for purposes of determining the hardship application embraced the whole FAE, that the LPC's use of the income approach was proper, and that there was no unconstitutional taking because Stahl could continue to operate the buildings with low-scale rental units.

As indicated, Supreme Court dismissed the petition and granted respondents' cross motion to dismiss the taking claim. The court found that the relevant property for both the hardship and taking analyses was the FAE as a whole, that the income approach was not improper, and that the LPC had rationally concluded that Stahl failed to demonstrate a hardship.

II. *Discussion*

A. Petitioner's Claim that Hardship Application Denial Was Irrational

1. Petitioner's contentions

On this appeal, Stahl contends that the LPC reached a false and unreasonable conclusion in determining that Stahl could earn more than a 6% return from the two buildings in question. Further, Stahl argues, the LPC erred in finding that the relevant improvement parcel was the entire FAE rather than the two buildings in question and in using the income approach rather than the cost approach.

2. Legal Standards

In reviewing an administrative agency determination, courts must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious, i.e., taken without sound basis in reason or regard to the facts (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1*

of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]).

Section 25-309(a) of the Landmarks Law provides in relevant part that the LPC "shall" make a preliminary determination of insufficient return when an applicant for a permit "to demolish any improvement located on a landmark site" is filed "and the applicant establishes to the satisfaction of the commission that . . . the improvement parcel (or parcels) which includes such improvement, as existing at the time of the filing of such request, is not capable of earning a reasonable return."

The "Definitions" section of the Landmarks Law (§ 25-302) contains the following relevant definitions:

"Landmark" is defined as any landmarked "improvement" (§ 25-302[n]);

"Improvement" is defined as "[a]ny building, structure, place, work of art or other object constituting a physical betterment of real property, or any part of such betterment" (§ 25-302[i]);

"Landmark Site" is defined as "[a]n improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof used as and constituting part of the premises on which the landmark is situated, and which has been designated as a landmark site . . . " (§ 25-302[o]); and

"Improvement parcel" is defined as "[t]he 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 purpose of levying real estate taxes" (§ 25-302[j]).

3. Discussion

The LPC was entitled to require Stahl to establish that it could not earn a reasonable return on the entire landmark that it sought to alter, not the individual buildings in question. Although the Landmarks Law definitions, read together, appear ambiguous as to how to define a relevant "improvement parcel" for purposes of the instant hardship application, the LPC's interpretation was rational.

The entire FAE constitutes one landmark and one landmark site. Thus, the entire FAE development contains one "improvement," which is defined as "a physical betterment of real property, or any part of such betterment" (§ 25-302[i]). Stated otherwise, the FAE constitutes one unit of real property that includes that physical betterment.

Furthermore, the LPC did not confer a landmark designation on the 2 buildings in question that is separate from the earlier designation of the other 13 buildings within the FAE. Rather, the LPC chose to protect the FAE in its entirety by conferring a

single landmark redesignation on the entire parcel.

Contrary to Stahl's argument, the entire landmark constitutes one improvement for hardship purposes, even though Stahl did not intend to demolish the entire landmark. The definition of "improvement" includes "any part of [the] betterment" of the real property in question (§ 25-302[i]). Thus, although the part of the improvement that Stahl sought to demolish was 2 of the 15 buildings within the FAE, Stahl was still required to prove that the entire "improvement parcel," which includes the improvement in question, was not capable of earning a reasonable return.

Furthermore, the record reflects that the entire FAE was one "unit of real property" treated as a single entity for purpose of levying real estate taxes, i.e., the "improvement parcel." The FAE consists of four tax lots, but all four are within the one tax block comprising the FAE landmark site. This is further demonstrated by the fact that from 2007 to 2012, with respect to the FAE, Stahl made a single tax filing applicable to the entire tax block.

Moreover, the LPC also analyzed the hardship application solely with respect to tax lot 22 (which contains only the two buildings in question) and rationally determined that no hardship was demonstrated under a separate analysis of that tax lot

because Stahl failed to demonstrate that those buildings, considered alone, were "not capable of earning a reasonable return" (Administrative Code § 25-309[a][1][a]).

Notwithstanding Stahl's argument to the contrary, it was not irrational for the LPC to exclude from its analysis the renovation costs for the 44 apartments within the two buildings that were kept vacant after the 2006 landmark designation. That argument, rejected by both the article 78 court and the federal courts (*see Stahl*, 2015 WL 2445071 at *16, 2015 US Dist LEXIS 66660 at *42-*46, 641 Fed Appx at 72), is unavailing. The LPC rationally chose values for the relevant variables, including rental rates, vacancy rates, collection loss, and operating expenses, to calculate whether the buildings were capable of earning a reasonable return. Moreover, the LPC's calculations reflected the rational rejection of Stahl's own assumed values. Because the Landmarks Law defines "capable of earning a reasonable rate of return" as "[h]aving the capacity, under reasonably efficient and prudent management, of earning a reasonable return" (Administrative Code § 25-302[c]), the LPC appropriately concluded that Stahl had demonstrated inefficient management, by, inter alia, its imprudent decision to warehouse 44 apartments at the landmarked buildings in the hope of demolition.

Furthermore, the LPC's use of the "income approach" rather than the "cost approach" in making its determination was rational. The LPC neither contradicted its own precedent nor acted arbitrarily and capriciously in concluding that the income approach was the more appropriate method to measure assessed value in Stahl's rental scenarios (*see Stahl*, 2015 WL 2445071 at *16, 2015 US Dist LEXIS at *42-*46, 641 Fed Appx 68 at 72). The LPC demonstrated that its use of the income approach comported with the valuation method used by taxing authorities, whereas the cost approach would generate a higher assessed value for the buildings, resulting in higher real estate taxes (which would be contrary to efficient and prudent management practices). Moreover, even though the LPC had, in a 1998 hardship decision, used the cost approach to measure assessed value, in that case the owner sought to recoup its renovation costs by selling, rather than by renting, as petitioner seeks to do (*see Stahl*, 641 Fed Appx at 72).

In any event, the record reveals that the LPC also performed more than 20 additional reasonable-return calculations using many of the assumptions that Stahl preferred, as well the "cost approach," all of which showed that the buildings were capable of earning a reasonable return. Thus, as the Second Circuit found, the errors Stahl points to do not materially affect the

property's projected profit margin, since, even using petitioner's values and proposed methodology, the property's rate of return would still be above the 6% threshold for hardship relief under all renovation scenarios (641 Fed Appx at 72).

Finally, to the extent that Stahl complains that the LPC evinced prejudice against it by way of its commissioners' comments at the 2006 public hearings reflecting concern for preserving the buildings, that complaint is unsupported by the hearing record, which does not reflect any prejudice against Stahl. Rather, the record suggests that the LPC's members were appropriately familiar with the subjects of their regulation, had advance knowledge of the facts and law surrounding the application, and were committed to the goal for which their agency was created, i.e., landmarks preservation (*see generally Matter of 1616 Second Ave. Rest. v New York State Liq. Auth.*, 75 NY2d 158, 162 [1990]).

B. Petitioner's Unconstitutional Taking Claim

Stahl's other principal argument is that the LPC's inclusion of the two buildings in the FAE landmark designation amounted to an unconstitutional taking.

1. Legal Standards

The takings clause of the federal constitution prohibits governmental taking of "private property . . . for public use,

without just compensation" (US Const Amend V).

A per se taking occurs if a regulation deprives the owner of all economically beneficial use of the property (*see Lucas v South Carolina Coastal Council*, 505 US 1003, 1019 [1992]), or a regulation may rise to the level of a taking under a multi-factor inquiry outlined in *Penn Cent. Transp. Co. v City of New York* (438 US 104 [1978]).

In *Penn Central*, the United States Supreme Court instructed that most regulatory takings cases should be considered on an ad hoc basis, with three primary factors to be weighed: the regulation's economic impact on the claimant, the regulation's interference with the claimant's reasonable investment-backed expectations, and the character of the government action (*id.* at 124).

The Penn Central multi-factor inquiry focuses on the magnitude of the economic impact of a regulatory action and the extent of that regulation's interference with property rights to determine if a regulatory action constitutes a taking (*see Lingle v Chevron U.S.A. Inc.*, 544 US 528, 540 [2005]). In *Penn Central*, the owner of Grand Central Terminal argued that a restriction on its ability to add an office building on top of the station amounted to a taking of its air rights, but the Supreme Court concluded that the correct unit of analysis was

the owner's "rights in the parcel as a whole" (*438* US at 130-131). The Court noted that claimants cannot establish a takings claim "simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development" (*id.* at 130).

In the recent case of *Murr v Wisconsin* (- US -, 137 S Ct 1933 [2017]), the owners of two adjacent lots (referred to by the Court as Lots E and F) located alongside a river wished to sell Lot E but could not sell it separately from Lot F due to state regulations that forbade the sale of a parcel with less than an acre of land suitable for development. Lot E, by itself, did not meet that requirement, although it did meet the requirement when combined with Lot F. The owners sued the state, claiming that the state's regulatory action amounted to an unconstitutional taking.

The *Murr* Court treated the two lots as a single parcel in concluding that regulations preventing the separate sale of the two adjacent lots did not amount to an uncompensated taking. The Court observed that the establishment of lot lines was not dispositive of whether parcels should be considered separately or as a whole in a takings analysis. The Court reasoned that lot lines are established with varying degrees of formality among the states, and are often subject to easy adjustment by landowners

with minimal governmental oversight, leading to the risk of gamesmanship by landowners (*Murr*, 137 S Ct at 1948).

Rather, the *Murr* Court opined that the proper test for determining whether parcels should be treated separately or as a whole for takings analysis purposes is objective in nature and should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that its holdings would be treated as one parcel or as separate lots. The Court then set forth a three-factor test for this purpose. First, courts should give substantial weight to the property's treatment, and in particular how it is bounded or divided, under state and local law. Second, courts should look to the property's physical characteristics, including the physical relationship of any distinguishable tracts, the topography, and the surrounding human and ecological environment. Third, courts should assess the property's value under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings (*Murr*, 137 S Ct at 1944-1947).

Applying that three-factor test, the *Murr* Court first found that state and local regulations had effectively merged the two lots into one parcel. Second, the Court found that the two lots were contiguous and that their narrow shape made it reasonable to

expect that their potential uses would be limited. The Court explained that because the lots were located along a river, the owners could reasonably anticipate that the lots would be subject to federal, state and local regulations that would affect their enjoyment of the property. Third, the Court determined that the prospective value that Lot E brought to Lot F supported considering them as one parcel (*id.* at 1948-1949).

Having concluded that the property in question should be considered as a whole, the *Murr* Court found that there had been no taking, as the regulations in question did not result in depriving the owners of all economically beneficial use of their property. The Court arrived at this conclusion by applying the "more general test of *Penn Central*," which it found did not support the conclusion that the landowners had suffered a taking (*id.* at 1949). Specifically, the Court first found that an expert appraisal relied upon by the state courts refuted any claim that the economic impact of the regulation was severe. Second, the Court reasoned that the owners could not have claimed that they reasonably expected to sell or develop their lots separately, given that the lots were subject to regulations forbidding such separate sale and development, which regulations predated the owners' acquisition of both lots. Third, the Court found that the governmental action in question was a reasonable

land-use regulation, enacted as part of a coordinated federal, state and local effort to preserve the river and surrounding land (*id.*).

In this case, application of the *Murr* analysis leads to the conclusion that all of the lots within the FAE, including the two buildings at issue, should be treated as one parcel for taking analysis purposes. First, although the FAE is divided by lot lines (which, according to *Murr*, is not a proper basis for determining whether the land in question should be treated as one unified parcel), the City has placed all of those lots within one tax block and has designated it as one unified landmark. Second, the lots are contiguous and contained within one city block, and all of the buildings within the FAE share a common historical and architectural significance when treated as a unified parcel, i.e., the distinction of being one of the only two existing light-court model tenements in this country. Third, the only discernable adverse effect of including the two buildings in question within the designated landmark on the value of the property as a whole is one manufactured by the owner itself in warehousing the 44 apartments within those two buildings.

Considering the FAE property as a whole, here, as in *Murr*, the regulatory action at issue, which, in this case, is the LPC's

amendment of the landmark designation to include the two buildings in question, did not result in complete deprivation of the owner's economically beneficial use of its property. The owner is still free to rent units within all of the buildings in the FAE, including the two buildings in question.

Application of the "more general" *Penn Central* test also supports the conclusion that petitioner has not suffered a taking. First, the extension of the FAE landmark designation to include the two buildings in question did not result in any further economic impact on Stahl beyond that resulting from preexisting legal restrictions limiting Stahl's use of the property even absent landmark status, such as rent control and rent stabilization. Second, Stahl's reasonable investment-backed expectations were not destroyed by the inclusion of the two buildings within the FAE landmark designation. As the LPC determined, the buildings in question are capable of earning a reasonable return, limiting the designation's economic impact on petitioner. Third, the character of the government action in question favors the LPC, since, as the Court in *Penn Central* found, the "preservation of landmarks benefits all New York citizens and all structures" and "improv[es] the quality of life in the city as a whole" (*id.* at 134).

Accordingly, the order and judgment (one paper), of the

Supreme Court, New York County (Michael D. Stallman, J.), entered January 28, 2016, granting defendants/respondents' cross motion to deny the petition-complaint, and dismissing the proceeding-action, should be affirmed, without costs.

All concur.

Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered January 28, 2016, affirmed, without costs.

Opinion by Kahn, J. All concur.

Renwick, J.P., Richter, Manzanet-Daniels, Kahn, Kern, JJ.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 22, 2018

CLERK

PLEASE TAKE NOTICE that an Order, of which the within is a copy, was duly entered in the office of the Clerk of the Appellate Division of the Supreme Court in and for the First Judicial Department on May 22, 2018.

Dated: August 27, 2018

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for Respondents
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New York, New York 10007

By: _____
AARON BLOOM
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To:

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New York County Clerk's Index No. 100999/14

New York Supreme Court
Appellate Division: First Department

In re Stahl York Avenue Co., LLC,

Plaintiff-Petitioner-Appellant,

against

The City of New York, et al.,

Defendants-Respondents-Respondents.

- - - - - -

Friends of the Upper East Side Historic Districts, et al.,

Amici Curiae.

APPELLATE DIVISION
ORDER AND NOTICE OF ENTRY

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for Respondents
100 Church Street
New York, New York 10007

Date and timely service of a copy of the within Order and Notice of Entry is hereby admitted.

New York, N.Y. _____, 2018
_____, Esq.
Attorney for _____

Exhibit C

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June 26, 2017

Via Hand Delivery

Chief Clerk Susanna Molina Rojas
Appellate Division, First Department
Supreme Court of the State of New York
27 Madison Avenue
New York, NY 10010

Re: *Stahl York Ave. Co. v. City of New York et al.*, No. 100999/14

Dear Ms. Rojas:

We represent Plaintiff-Appellant Stahl York Avenue Co., LLC ("Stahl") in the above-referenced appeal. We write to respectfully advise the Court of supplemental authority relevant to this appeal, which was decided after Stahl submitted its reply brief. On June 23, 2017, the United States Supreme Court decided *Murr v. Wisconsin*, No. 15-214, which resolves a regulatory takings claim at the summary judgment stage. *Murr* discusses the fact-intensive standard governing how to define the relevant parcel in a regulatory takings case. We enclose the *Murr* opinion for the Court's review.

Respectfully submitted,

Alexandra A.E. Shapiro

Cc: Aaron M. Bloom, Esq.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MURR ET AL. *v.* WISCONSIN ET AL.

CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN

No. 15–214. Argued March 20, 2017—Decided June 23, 2017

The St. Croix River, which forms part of the boundary between Wisconsin and Minnesota, is protected under federal, state, and local law. Petitioners own two adjacent lots—Lot E and Lot F—along the lower portion of the river in the town of Troy, Wisconsin. For the area where petitioners' property is located, state and local regulations prevent the use or sale of adjacent lots under common ownership as separate building sites unless they have at least one acre of land suitable for development. A grandfather clause relaxes this restriction for substandard lots which were in separate ownership from adjacent lands on January 1, 1976, the regulation's effective date.

Petitioners' parents purchased Lots E and F separately in the 1960's, and maintained them under separate ownership until transferring Lot F to petitioners in 1994 and Lot E to petitioners in 1995. Both lots are over one acre in size, but because of their topography they each have less than one acre suitable for development. The unification of the lots under common ownership therefore implicated the rules barring their separate sale or development. Petitioners became interested in selling Lot E as part of an improvement plan for the lots, and sought variances from the St. Croix County Board of Adjustment. The Board denied the request, and the state courts affirmed in relevant part. In particular, the State Court of Appeals found that the local ordinance effectively merged the lots, so petitioners could only sell or build on the single combined lot.

Petitioners filed suit, alleging that the regulations worked a regulatory taking that deprived them of all, or practically all, of the use of Lot E. The County Circuit Court granted summary judgment to the State, explaining that petitioners had other options to enjoy and use their property, including eliminating the cabin and building a new residence on either lot or across both. The court also found that peti-

tioners had not been deprived of all economic value of their property, because the decrease in market value of the unified lots was less than 10 percent. The State Court of Appeals affirmed, holding that the takings analysis properly focused on Lots E and F together and that, using that framework, the merger regulations did not effect a taking.

Held: The State Court of Appeals was correct to analyze petitioners' property as a single unit in assessing the effect of the challenged governmental action. Pp. 6–20.

(a) The Court's Takings Clause jurisprudence informs the analysis of this issue. Pp. 6–11.

(1) Regulatory takings jurisprudence recognizes that if a "regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415. This area of the law is characterized by "ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances." *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 322 (citation and internal quotation marks omitted).

The Court has, however, identified two guidelines relevant for determining when a government regulation constitutes a taking. First, "with certain qualifications . . . a regulation which 'denies all economically beneficial or productive use of land' will require compensation under the Takings Clause." *Palazzolo* v. *Rhode Island*, 533 U. S. 606, 617 (quoting *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1015). Second, a taking may be found based on "a complex of factors," including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Palazzolo*, *supra,* at 617 (citing *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 124). Yet even the complete deprivation of use under *Lucas* will not require compensation if the challenged limitations "inhere . . . in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership." *Lucas*, 505 U. S., at 1029.

A central dynamic of the Court's regulatory takings jurisprudence thus is its flexibility. This is a means to reconcile two competing objectives central to regulatory takings doctrine: the individual's right to retain the interests and exercise the freedoms at the core of private property ownership, cf. *id.*, at 1027, and the government's power to "adjus[t] rights for the public good," *Andrus* v. *Allard*, 444 U. S. 51, 65. Pp. 6–9.

(2) This case presents a critical question in determining whether a regulatory taking has occurred: What is the proper unit of property against which to assess the effect of the challenged governmental action? The Court has not set forth specific guidance on how to identify

the relevant parcel. However, it has declined to artificially limit the parcel to the portion of property targeted by the challenged regulation, and has cautioned against viewing property rights under the Takings Clause as coextensive with those under state law. Pp. 9–11.

(b) Courts must consider a number of factors in determining the proper denominator of the takings inquiry. Pp. 11–17.

(1) The inquiry is objective and should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel or as separate tracts. First, courts should give substantial weight to the property's treatment, in particular how it is bounded or divided, under state and local law. Second, courts must look to the property's physical characteristics, including the physical relationship of any distinguishable tracts, topography, and the surrounding human and ecological environment. Third, courts should assess the property's value under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings. Pp. 11–14.

(2) The formalistic rules for which the State of Wisconsin and petitioners advocate do not capture the central legal and factual principles informing reasonable expectations about property interests. Wisconsin would tie the definition of the parcel to state law, but it is also necessary to weigh whether the state enactments at issue accord with other indicia of reasonable expectations about property. Petitioners urge the Court to adopt a presumption that lot lines control, but lot lines are creatures of state law, which can be overridden by the State in the reasonable exercise of its power to regulate land. The merger provision here is such a legitimate exercise of state power, as reflected by its consistency with a long history of merger regulations and with the many merger provisions that exist nationwide today. Pp. 14–17.

(c) Under the appropriate multifactor standard, it follows that petitioners' property should be evaluated as a single parcel consisting of Lots E and F together. First, as to the property's treatment under state and local law, the valid merger of the lots under state law informs the reasonable expectation that the lots will be treated as a single property. Second, turning to the property's physical characteristics, the lots are contiguous. Their terrain and shape make it reasonable to expect their range of potential uses might be limited; and petitioners could have anticipated regulation of the property due to its location along the river, which was regulated by federal, state, and local law long before they acquired the land. Third, Lot E brings prospective value to Lot F. The restriction on using the individual lots is mitigated by the benefits of using the property as an integrated whole, allowing increased privacy and recreational space, plus an

Syllabus

optimal location for any improvements. This relationship is evident in the lots' combined valuation. The Court of Appeals was thus correct to treat the contiguous properties as one parcel.

Considering petitioners' property as a whole, the state court was correct to conclude that petitioners cannot establish a compensable taking. They have not suffered a taking under *Lucas*, as they have not been deprived of all economically beneficial use of their property. See 505 U. S., at 1019. Nor have they suffered a taking under the more general test of *Penn Central*, *supra*, at 124. Pp. 17–20.

2015 WI App 13, 359 Wis. 2d 675, 859 N. W. 2d 628, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion. GORSUCH, J., took no part in the consideration or decision of the case.

SUPREME COURT OF THE UNITED STATES

No. 15–214

JOSEPH P. MURR, ET AL., PETITIONERS *v.*
WISCONSIN, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN, DISTRICT III

[June 23, 2017]

JUSTICE KENNEDY delivered the opinion of the Court.

The classic example of a property taking by the government is when the property has been occupied or otherwise seized. In the case now before the Court, petitioners contend that governmental entities took their real property—an undeveloped residential lot—not by some physical occupation but instead by enacting burdensome regulations that forbid its improvement or separate sale because it is classified as substandard in size. The relevant governmental entities are the respondents.

Against the background justifications for the challenged restrictions, respondents contend there is no regulatory taking because petitioners own an adjacent lot. The regulations, in effecting a merger of the property, permit the continued residential use of the property including for a single improvement to extend over both lots. This retained right of the landowner, respondents urge, is of sufficient offsetting value that the regulation is not severe enough to be a regulatory taking. To resolve the issue whether the landowners can insist on confining the analysis just to the lot in question, without regard to their

ownership of the adjacent lot, it is necessary to discuss the background principles that define regulatory takings.

I

A

The St. Croix River originates in northwest Wisconsin and flows approximately 170 miles until it joins the Mississippi River, forming the boundary between Minnesota and Wisconsin for much of its length. The lower portion of the river slows and widens to create a natural water area known as Lake St. Croix. Tourists and residents of the region have long extolled the picturesque grandeur of the river and surrounding area. *E.g.*, E. Ellett, Summer Rambles in the West 136–137 (1853).

Under the Wild and Scenic Rivers Act, the river was designated, by 1972, for federal protection. §3(a)(6), 82 Stat. 908, 16 U. S. C. §1274(a)(6) (designating Upper St. Croix River); Lower Saint Croix River Act of 1972, §2, 86 Stat. 1174, 16 U. S. C. §1274(a)(9) (adding Lower St. Croix River). The law required the States of Wisconsin and Minnesota to develop "a management and development program" for the river area. 41 Fed. Reg. 26237 (1976). In compliance, Wisconsin authorized the State Department of Natural Resources to promulgate rules limiting development in order to "guarantee the protection of the wild, scenic and recreational qualities of the river for present and future generations." Wis. Stat. §30.27(1) (1973).

Petitioners are two sisters and two brothers in the Murr family. Petitioners' parents arranged for them to receive ownership of two lots the family used for recreation along the Lower St. Croix River in the town of Troy, Wisconsin. The lots are adjacent, but the parents purchased them separately, put the title of one in the name of the family business, and later arranged for transfer of the two lots, on different dates, to petitioners. The lots, which are referred to in this litigation as Lots E and F, are described

in more detail below.

For the area where petitioners' property is located, the Wisconsin rules prevent the use of lots as separate building sites unless they have at least one acre of land suitable for development. Wis. Admin. Code §§ NR 118.04(4), 118.03(27), 118.06(1)(a)(2)(a), 118.06(1)(b) (2017). A grandfather clause relaxes this restriction for substandard lots which were "in separate ownership from abutting lands" on January 1, 1976, the effective date of the regulation. § NR 118.08(4)(a)(1). The clause permits the use of qualifying lots as separate building sites. The rules also include a merger provision, however, which provides that adjacent lots under common ownership may not be "sold or developed as separate lots" if they do not meet the size requirement. § NR 118.08(4)(a)(2). The Wisconsin rules require localities to adopt parallel provisions, see § NR 118.02(3), so the St. Croix County zoning ordinance contains identical restrictions, see St. Croix County, Wis., Ordinance §17.36I.4.a (2005). The Wisconsin rules also authorize the local zoning authority to grant variances from the regulations where enforcement would create "unnecessary hardship." § NR 118.09(4)(b); St. Croix County Ordinance §17.09.232.

B

Petitioners' parents purchased Lot F in 1960 and built a small recreational cabin on it. In 1961, they transferred title to Lot F to the family plumbing company. In 1963, they purchased neighboring Lot E, which they held in their own names.

The lots have the same topography. A steep bluff cuts through the middle of each, with level land suitable for development above the bluff and next to the water below it. The line dividing Lot E from Lot F runs from the riverfront to the far end of the property, crossing the blufftop along the way. Lot E has approximately 60 feet of river

frontage, and Lot F has approximately 100 feet. Though each lot is approximately 1.25 acres in size, because of the waterline and the steep bank they each have less than one acre of land suitable for development. Even when combined, the lots' buildable land area is only 0.98 acres due to the steep terrain.

The lots remained under separate ownership, with Lot F owned by the plumbing company and Lot E owned by petitioners' parents, until transfers to petitioners. Lot F was conveyed to them in 1994, and Lot E was conveyed to them in 1995. *Murr* v. *St. Croix County Bd. of Adjustment*, 2011 WI App 29, 332 Wis. 2d 172, 177–178, 184–185, 796 N. W. 2d 837, 841, 844 (2011); 2015 WI App 13, 359 Wis. 2d 675, 859 N. W. 2d 628 (unpublished opinion), App. to Pet. for Cert. A–3, ¶¶4–5. (There are certain ambiguities in the record concerning whether the lots had merged earlier, but the parties and the courts below appear to have assumed the merger occurred upon transfer to petitioners.)

A decade later, petitioners became interested in moving the cabin on Lot F to a different portion of the lot and selling Lot E to fund the project. The unification of the lots under common ownership, however, had implicated the state and local rules barring their separate sale or development. Petitioners then sought variances from the St. Croix County Board of Adjustment to enable their building and improvement plan, including a variance to allow the separate sale or use of the lots. The Board denied the requests, and the state courts affirmed in relevant part. In particular, the Wisconsin Court of Appeals agreed with the Board's interpretation that the local ordinance "effectively merged" Lots E and F, so petitioners "could only sell or build on the single larger lot." *Murr*, *supra*, at 184, 796 N. W. 2d, at 844.

Petitioners filed the present action in state court, alleging that the state and county regulations worked a regula-

tory taking by depriving them of "all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot." App. 9. The parties each submitted appraisal numbers to the trial court. Respondents' appraisal included values of $698,300 for the lots together as regulated; $771,000 for the lots as two distinct buildable properties; and $373,000 for Lot F as a single lot with improvements. Record 17–55, 17–56. Petitioners' appraisal included an unrebutted, estimated value of $40,000 for Lot E as an undevelopable lot, based on the counterfactual assumption that it could be sold as a separate property. *Id.*, at 22–188.

The Circuit Court of St. Croix County granted summary judgment to the State, explaining that petitioners retained "several available options for the use and enjoyment of their property." Case No. 12–CV–258 (Oct. 31, 2013), App. to Pet. for Cert. B–9. For example, they could preserve the existing cabin, relocate the cabin, or eliminate the cabin and build a new residence on Lot E, on Lot F, or across both lots. The court also found petitioners had not been deprived of all economic value of their property. Considering the valuation of the property as a single lot versus two separate lots, the court found the market value of the property was not significantly affected by the regulations because the decrease in value was less than 10 percent. *Ibid.*

The Wisconsin Court of Appeals affirmed. The court explained that the regulatory takings inquiry required it to "'first determine what, precisely, is the property at issue.'" *Id.*, at A–9, ¶17. Relying on Wisconsin Supreme Court precedent in *Zealy* v. *Waukesha*, 201 Wis. 2d 365, 548 N. W. 2d 528 (1996), the Court of Appeals rejected petitioners' request to analyze the effect of the regulations on Lot E only. Instead, the court held the takings analysis "properly focused" on the regulations' effect "on the Murrs' property as a whole"—that is, Lots E and F together. App.

to Pet. for Cert. A–12, ¶22.

Using this framework, the Court of Appeals concluded the merger regulations did not effect a taking. In particular, the court explained that petitioners could not reasonably have expected to use the lots separately because they were "'charged with knowledge of the existing zoning laws'" when they acquired the property. *Ibid.* (quoting *Murr*, *supra*, at 184, 796 N. W. 2d, at 844). Thus, "even if [petitioners] did intend to develop or sell Lot E separately, that expectation of separate treatment became unreasonable when they chose to acquire Lot E in 1995, after their having acquired Lot F in 1994." App. to Pet. for Cert. A–17, ¶30. The court also discounted the severity of the economic impact on petitioners' property, recognizing the Circuit Court's conclusion that the regulations diminished the property's combined value by less than 10 percent. The Supreme Court of Wisconsin denied discretionary review. This Court granted certiorari, 577 U. S. ___ (2016).

II

A

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." The Clause is made applicable to the States through the Fourteenth Amendment. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897). As this Court has recognized, the plain language of the Takings Clause "requires the payment of compensation whenever the government acquires private property for a public purpose," see *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 321 (2002), but it does not address in specific terms the imposition of regulatory burdens on private property. Indeed, "[p]rior to Justice Holmes's exposition in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922), it was

generally thought that the Takings Clause reached only a direct appropriation of property, or the functional equivalent of a practical ouster of the owner's possession," like the permanent flooding of property. *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1014 (1992) (citation, brackets, and internal quotation marks omitted); accord, *Horne* v. *Department of Agriculture*, 576 U. S. ___, ___ (2015) (slip op., at 7); see also *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 427 (1982). *Mahon*, however, initiated this Court's regulatory takings jurisprudence, declaring that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U. S., at 415. A regulation, then, can be so burdensome as to become a taking, yet the *Mahon* Court did not formulate more detailed guidance for determining when this limit is reached.

In the near century since *Mahon*, the Court for the most part has refrained from elaborating this principle through definitive rules. This area of the law has been characterized by "ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances." *Tahoe-Sierra*, *supra*, at 322 (citation and internal quotation marks omitted). The Court has, however, stated two guidelines relevant here for determining when government regulation is so onerous that it constitutes a taking. First, "with certain qualifications . . . a regulation which 'denies all economically beneficial or productive use of land' will require compensation under the Takings Clause." *Palazzolo* v. *Rhode Island*, 533 U. S. 606, 617 (2001) (quoting *Lucas*, *supra*, at 1015). Second, when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on "a complex of factors," including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the char-

acter of the governmental action. *Palazzolo, supra,* at 617 (citing *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 124 (1978)).

By declaring that the denial of all economically beneficial use of land constitutes a regulatory taking, *Lucas* stated what it called a "categorical" rule. See 505 U. S., at 1015. Even in *Lucas*, however, the Court included a caveat recognizing the relevance of state law and land-use customs: The complete deprivation of use will not require compensation if the challenged limitations "inhere . . . in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership." *Id.*, at 1029; see also *id.*, at 1030–1031 (listing factors for courts to consider in making this determination).

A central dynamic of the Court's regulatory takings jurisprudence, then, is its flexibility. This has been and remains a means to reconcile two competing objectives central to regulatory takings doctrine. One is the individual's right to retain the interests and exercise the freedoms at the core of private property ownership. Cf. *id.*, at 1028 ("[T]he notion . . . that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture"). Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.

The other persisting interest is the government's well-established power to "adjus[t] rights for the public good." *Andrus* v. *Allard*, 444 U. S. 51, 65 (1979). As Justice Holmes declared, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the

general law." *Mahon*, *supra*, at 413. In adjudicating regulatory takings cases a proper balancing of these principles requires a careful inquiry informed by the specifics of the case. In all instances, the analysis must be driven "by the purpose of the Takings Clause, which is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Palazzolo, supra*, at 617–618 (quoting *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960)).

B

This case presents a question that is linked to the ultimate determination whether a regulatory taking has occurred: What is the proper unit of property against which to assess the effect of the challenged governmental action? Put another way, "[b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'" *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 497 (1987) (quoting Michelman, Property, Utility, and Fairness, 80 Harv. L. Rev. 1165, 1992 (1967)).

As commentators have noted, the answer to this question may be outcome determinative. See Eagle, The Four-Factor *Penn Central* Regulatory Takings Test, 118 Pa. St. L. Rev. 601, 631 (2014); see also Wright, A New Time for Denominators, 34 Env. L. 175, 180 (2004). This Court, too, has explained that the question is important to the regulatory takings inquiry. "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." *Concrete Pipe & Products of Cal., Inc.* v. *Con-*

struction Laborers Pension Trust for Southern Cal., 508 U. S. 602, 644 (1993).

Defining the property at the outset, however, should not necessarily preordain the outcome in every case. In some, though not all, cases the effect of the challenged regulation must be assessed and understood by the effect on the entire property held by the owner, rather than just some part of the property that, considered just on its own, has been diminished in value. This demonstrates the contrast between regulatory takings, where the goal is usually to determine how the challenged regulation affects the property's value to the owner, and physical takings, where the impact of physical appropriation or occupation of the property will be evident.

While the Court has not set forth specific guidance on how to identify the relevant parcel for the regulatory taking inquiry, there are two concepts which the Court has indicated can be unduly narrow.

First, the Court has declined to limit the parcel in an artificial manner to the portion of property targeted by the challenged regulation. In *Penn Central*, for example, the Court rejected a challenge to the denial of a permit to build an office tower above Grand Central Terminal. The Court refused to measure the effect of the denial only against the "air rights" above the terminal, cautioning that "'[t]aking' 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.

In a similar way, in *Tahoe-Sierra*, the Court refused to "effectively sever" the 32 months during which petitioners' property was restricted by temporary moratoria on development "and then ask whether that segment ha[d] been taken in its entirety." 535 U. S., at 331. That was because "defining the property interest taken in terms of the very regulation being challenged is circular." *Ibid.* That ap-

proach would overstate the effect of regulation on property, turning "every delay" into a "total ban." *Ibid.*

The second concept about which the Court has expressed caution is the view that property rights under the Takings Clause should be coextensive with those under state law. Although property interests have their foundations in state law, the *Palazzolo* Court reversed a state-court decision that rejected a takings challenge to regulations that predated the landowner's acquisition of title. 533 U. S., at 626–627. The Court explained that States do not have the unfettered authority to "shape and define property rights and reasonable investment-backed expectations," leaving landowners without recourse against unreasonable regulations. *Id.*, at 626.

By the same measure, defining the parcel by reference to state law could defeat a challenge even to a state enactment that alters permitted uses of property in ways inconsistent with reasonable investment-backed expectations. For example, a State might enact a law that consolidates nonadjacent property owned by a single person or entity in different parts of the State and then imposes development limits on the aggregate set. If a court defined the parcel according to the state law requiring consolidation, this improperly would fortify the state law against a takings claim, because the court would look to the retained value in the property as a whole rather than considering whether individual holdings had lost all value.

III

A

As the foregoing discussion makes clear, no single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors. These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. The

endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition. Cf. *Lucas*, 505 U. S., at 1035 (KENNEDY, J., concurring) ("The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved").

First, courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law. The reasonable expectations of an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property. See *Ballard* v. *Hunter*, 204 U. S. 241, 262 (1907) ("Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings"). A valid takings claim will not evaporate just because a purchaser took title after the law was enacted. See *Palazzolo*, 533 U. S., at 627 (some "enactments are unreasonable and do not become less so through passage of time or title"). A reasonable restriction that predates a landowner's acquisition, however, can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property. See *ibid.* ("[A] prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned"). In a similar manner, a use restriction which is triggered only after, or because of, a change in ownership should also guide a court's assessment of reasonable private expectations.

Second, courts must look to the physical characteristics of the landowner's property. These include the physical

relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation. Cf. *Lucas*, *supra*, at 1035 (KENNEDY, J., concurring) ("Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit").

Third, courts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings. Though a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty. A law that limits use of a landowner's small lot in one part of the city by reason of the landowner's nonadjacent holdings elsewhere may decrease the market value of the small lot in an unmitigated fashion. The absence of a special relationship between the holdings may counsel against consideration of all the holdings as a single parcel, making the restrictive law susceptible to a takings challenge. On the other hand, if the landowner's other property is adjacent to the small lot, the market value of the properties may well increase if their combination enables the expansion of a structure, or if development restraints for one part of the parcel protect the unobstructed skyline views of another part. That, in turn, may counsel in favor of treatment as a single parcel and may reveal the weakness of a regulatory takings challenge to the law.

State and federal courts have considerable experience in adjudicating regulatory takings claims that depart from these examples in various ways. The Court anticipates

that in applying the test above they will continue to exercise care in this complex area.

B

The State of Wisconsin and petitioners each ask this Court to adopt a formalistic rule to guide the parcel inquiry. Neither proposal suffices to capture the central legal and factual principles that inform reasonable expectations about property interests.

Wisconsin would tie the definition of the parcel to state law, considering the two lots here as a single whole due to their merger under the challenged regulations. That approach, as already noted, simply assumes the answer to the question: May the State define the relevant parcel in a way that permits it to escape its responsibility to justify regulation in light of legitimate property expectations? It is, of course, unquestionable that the law must recognize those legitimate expectations in order to give proper weight to the rights of owners and the right of the State to pass reasonable laws and regulations. See *Palazzolo*, *supra*, at 627.

Wisconsin bases its position on a footnote in *Lucas*, which suggests the answer to the denominator question "may lie in how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." 505 U. S., at 1017, n. 7. As an initial matter, *Lucas* referenced the parcel problem only in dicta, unnecessary to the announcement or application of the rule it established. See *ibid.* ("[W]e avoid th[e] difficulty" of determining the relevant parcel "in the present case"). In any event, the test the Court adopts today is consistent with the respect for state law described in *Lucas*. The test considers state law

but in addition weighs whether the state enactments at issue accord with other indicia of reasonable expectations about property.

Petitioners propose a different test that is also flawed. They urge the Court to adopt a presumption that lot lines define the relevant parcel in every instance, making Lot E the necessary denominator. Petitioners' argument, however, ignores the fact that lot lines are themselves creatures of state law, which can be overridden by the State in the reasonable exercise of its power. In effect, petitioners ask this Court to credit the aspect of state law that favors their preferred result (lot lines) and ignore that which does not (merger provision).

This approach contravenes the Court's case law, which recognizes that reasonable land-use regulations do not work a taking. See *Palazzolo*, 533 U. S., at 627; *Mahon*, 260 U. S., at 413. Among other cases, *Agins* v. *City of Tiburon*, 447 U. S. 255 (1980), demonstrates the validity of this proposition because it upheld zoning regulations as a legitimate exercise of the government's police power. Of course, the Court's later opinion in *Lingle* v. *Chevron U. S. A. Inc.* recognized that the test articulated in *Agins*—that regulation effects a taking if it "'does not substantially advance legitimate state interests'"—was improper because it invited courts to engage in heightened review of the effectiveness of government regulation. 544 U. S. 528, 540 (2005) (quoting *Agins*, *supra*, at 260). *Lingle* made clear, however, that the holding of *Agins* survived, even if its test was "imprecis[e]." See 544 U. S., at 545–546, 548.

The merger provision here is likewise a legitimate exercise of government power, as reflected by its consistency with a long history of state and local merger regulations that originated nearly a century ago. See Brief for National Association of Counties et al. as *Amici Curiae* 5–10. Merger provisions often form part of a regulatory scheme

that establishes a minimum lot size in order to preserve open space while still allowing orderly development. See E. McQuillin, Law of Municipal Corporations §25:24 (3d ed. 2010); see also *Agins*, *supra*, at 262 (challenged "zoning ordinances benefit[ed] the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas").

When States or localities first set a minimum lot size, there often are existing lots that do not meet the new requirements, and so local governments will strive to reduce substandard lots in a gradual manner. The regulations here represent a classic way of doing this: by implementing a merger provision, which combines contiguous substandard lots under common ownership, alongside a grandfather clause, which preserves adjacent substandard lots that are in separate ownership. Also, as here, the harshness of a merger provision may be ameliorated by the availability of a variance from the local zoning authority for landowners in special circumstances. See 3 E. Ziegler, Rathkopf's Law of Zoning and Planning §49:13 (39th ed. 2017).

Petitioners' insistence that lot lines define the relevant parcel ignores the well-settled reliance on the merger provision as a common means of balancing the legitimate goals of regulation with the reasonable expectations of landowners. Petitioners' rule would frustrate municipalities' ability to implement minimum lot size regulations by casting doubt on the many merger provisions that exist nationwide today. See Brief for National Association of Counties et al. as *Amici Curiae* 12–31 (listing over 100 examples of merger provisions).

Petitioners' reliance on lot lines also is problematic for another reason. Lot lines have varying degrees of formality across the States, so it is difficult to make them a standard measure of the reasonable expectations of property

owners. Indeed, in some jurisdictions, lot lines may be subject to informal adjustment by property owners, with minimal government oversight. See Brief for California et al. as *Amici Curiae* 17; 1 J. Kushner, Subdivision Law and Growth Management §5:8 (2d ed. 2017) (lot line adjustments that create no new parcels are often exempt from subdivision review); see, *e.g.,* Cal. Govt. Code Ann. §66412(d) (West 2016) (permitting adjustment of lot lines subject to limited conditions for government approval). The ease of modifying lot lines also creates the risk of gamesmanship by landowners, who might seek to alter the lines in anticipation of regulation that seems likely to affect only part of their property.

IV

Under the appropriate multifactor standard, it follows that for purposes of determining whether a regulatory taking has occurred here, petitioners' property should be evaluated as a single parcel consisting of Lots E and F together.

First, the treatment of the property under state and local law indicates petitioners' property should be treated as one when considering the effects of the restrictions. As the Wisconsin courts held, the state and local regulations merged Lots E and F. *E.g.,* App. to Pet. for Cert. A–3, ¶6 ("The 1995 transfer of Lot E brought the lots under common ownership and resulted in a merger of the two lots under [the local ordinance]"). The decision to adopt the merger provision at issue here was for a specific and legitimate purpose, consistent with the widespread understanding that lot lines are not dominant or controlling in every case. See *supra,* at ___. Petitioners' land was subject to this regulatory burden, moreover, only because of voluntary conduct in bringing the lots under common ownership after the regulations were enacted. As a result, the valid merger of the lots under state law informs the

reasonable expectation they will be treated as a single property.

Second, the physical characteristics of the property support its treatment as a unified parcel. The lots are contiguous along their longest edge. Their rough terrain and narrow shape make it reasonable to expect their range of potential uses might be limited. Cf. App. to Pet. for Cert. A–5, ¶8 ("[Petitioners] asserted Lot E could not be put to alternative uses like agriculture or commerce due to its size, location and steep terrain"). The land's location along the river is also significant. Petitioners could have anticipated public regulation might affect their enjoyment of their property, as the Lower St. Croix was a regulated area under federal, state, and local law long before petitioners possessed the land.

Third, the prospective value that Lot E brings to Lot F supports considering the two as one parcel for purposes of determining if there is a regulatory taking. Petitioners are prohibited from selling Lots E and F separately or from building separate residential structures on each. Yet this restriction is mitigated by the benefits of using the property as an integrated whole, allowing increased privacy and recreational space, plus the optimal location of any improvements. See Case No. 12–CV–258, App. to Pet. for Cert. B–9 ("They have an elevated level of privacy because they do not have close neighbors and are able to swim and play volleyball at the property").

The special relationship of the lots is further shown by their combined valuation. Were Lot E separately saleable but still subject to the development restriction, petitioners' appraiser would value the property at only $40,000. We express no opinion on the validity of this figure. We also note the number is not particularly helpful for understanding petitioners' retained value in the properties because Lot E, under the regulations, cannot be sold without Lot F. The point that is useful for these purposes is

that the combined lots are valued at $698,300, which is far greater than the summed value of the separate regulated lots (Lot F with its cabin at $373,000, according to respondents' appraiser, and Lot E as an undevelopable plot at $40,000, according to petitioners' appraiser). The value added by the lots' combination shows their complementarity and supports their treatment as one parcel.

The State Court of Appeals was correct in analyzing petitioners' property as a single unit. Petitioners allege that in doing so, the state court applied a categorical rule that all contiguous, commonly owned holdings must be combined for Takings Clause analysis. See Brief for Petitioners i ("[D]oes the 'parcel as a whole' concept . . . establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes"). This does not appear to be the case, however, for the precedent relied on by the Court of Appeals addressed multiple factors before treating contiguous properties as one parcel. See App. to Pet. for Cert. A–9–A–11, ¶¶17–19 (citing *Zealy* v. *Waukesha*, 201 Wis. 2d 365, 548 N. W. 2d 528); see *id.*, at 378, 548 N. W. 2d, at 533 (considering the property as a whole because it was "part of a single purchase" and all 10.4 acres were undeveloped). The judgment below, furthermore, may be affirmed on any ground permitted by the law and record. See *Thigpen* v. *Roberts*, 468 U. S. 27, 30 (1984). To the extent the state court treated the two lots as one parcel based on a bright-line rule, nothing in this opinion approves that methodology, as distinct from the result.

Considering petitioners' property as a whole, the state court was correct to conclude that petitioners cannot establish a compensable taking in these circumstances. Petitioners have not suffered a taking under *Lucas*, as they have not been deprived of all economically beneficial use of their property. See 505 U. S., at 1019. They can use the property for residential purposes, including an

enhanced, larger residential improvement. See *Palazzolo*, 533 U. S., at 631 ("A regulation permitting a landowner to build a substantial residence . . . does not leave the property 'economically idle'"). The property has not lost all economic value, as its value has decreased by less than 10 percent. See *Lucas*, *supra*, at 1019, n. 8 (suggesting that even a landowner with 95 percent loss may not recover).

Petitioners furthermore have not suffered a taking under the more general test of *Penn Central*. See 438 U. S., at 124. The expert appraisal relied upon by the state courts refutes any claim that the economic impact of the regulation is severe. Petitioners cannot claim that they reasonably expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots. Finally, the governmental action was a reasonable land-use regulation, enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land.

* * *

Like the ultimate question whether a regulation has gone too far, the question of the proper parcel in regulatory takings cases cannot be solved by any simple test. See *Arkansas Game and Fish Comm'n* v. *United States*, 568 U. S. 23, 31 (2012). Courts must instead define the parcel in a manner that reflects reasonable expectations about the property. Courts must strive for consistency with the central purpose of the Takings Clause: to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U. S., at 49. Treating the lot in question as a single parcel is legitimate for purposes of this takings inquiry, and this supports the conclusion that no regulatory taking occurred here.

The judgment of the Wisconsin Court of Appeals is affirmed.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 15–214

JOSEPH P. MURR, ET AL., PETITIONERS *v.*
WISCONSIN, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN, DISTRICT III

[June 23, 2017]

CHIEF JUSTICE ROBERTS, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

The Murr family owns two adjacent lots along the Lower St. Croix River. Under a local regulation, those two properties may not be "sold or developed as separate lots" because neither contains a sufficiently large area of buildable land. Wis. Admin. Code §NR 118.08(4)(a)(2) (2017). The Court today holds that the regulation does not effect a taking that requires just compensation. This bottom-line conclusion does not trouble me; the majority presents a fair case that the Murrs can still make good use of both lots, and that the ordinance is a commonplace tool to preserve scenic areas, such as the Lower St. Croix River, for the benefit of landowners and the public alike.

Where the majority goes astray, however, is in concluding that the definition of the "private property" at issue in a case such as this turns on an elaborate test looking not only to state and local law, but also to (1) "the physical characteristics of the land," (2) "the prospective value of the regulated land," (3) the "reasonable expectations" of the owner, and (4) "background customs and the whole of our legal tradition." *Ante,* at 11–12. Our decisions have, time and again, declared that the Takings Clause protects private property rights as state law creates and defines them. By securing such *established* property rights, the

Takings Clause protects individuals from being forced to bear the full weight of actions that should be borne by the public at large. The majority's new, malleable definition of "private property"—adopted solely "for purposes of th[e] takings inquiry," *ante,* at 20—undermines that protection.

I would stick with our traditional approach: State law defines the boundaries of distinct parcels of land, and those boundaries should determine the "private property" at issue in regulatory takings cases. Whether a regulation effects a taking of that property is a separate question, one in which common ownership of adjacent property may be taken into account. Because the majority departs from these settled principles, I respectfully dissent.

I

A

The Takings Clause places a condition on the government's power to interfere with property rights, instructing that "private property [shall not] be taken for public use, without just compensation." Textually and logically, this Clause raises three basic questions that individuals, governments, and judges must consider when anticipating or deciding whether the government will have to provide reimbursement for its actions. The first is what "private property" the government's planned course of conduct will affect. The second, whether that property has been "taken" for "public use." And if "private property" has been "taken," the last item of business is to calculate the "just compensation" the owner is due.

Step one—identifying the property interest at stake—requires looking outside the Constitution. The word "property" in the Takings Clause means "the group of rights inhering in [a] citizen's relation to [a] . . . thing, as the right to possess, use and dispose of it." *United States* v. *General Motors Corp.*, 323 U. S. 373, 378 (1945). The Clause does not, however, provide the definition of those

rights in any particular case. Instead, "property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1001 (1984) (alteration and internal quotation marks omitted). By protecting these established rights, the Takings Clause stands as a buffer between property owners and governments, which might naturally look to put private property to work for the public at large.

When government action interferes with property rights, the next question becomes whether that interference amounts to a "taking." "The paradigmatic taking . . . is a direct government appropriation or physical invasion of private property." *Lingle* v. *Chevron U. S. A. Inc.*, 544 U. S. 528, 537 (2005). These types of actions give rise to "*per se* taking[s]" because they are "perhaps the most serious form[s] of invasion of an owner's property interests, depriving the owner of the rights to possess, use and dispose of the property." *Horne* v. *Department of Agriculture*, 576 U. S. ___, ___ (2015) (slip op., at 7) (internal quotation marks omitted).

But not all takings are so direct: Governments can infringe private property interests for public use not only through appropriations, but through regulations as well. If compensation were required for one but not the other, "the natural tendency of human nature" would be to extend regulations "until at last private property disappears." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922). Our regulatory takings decisions, then, have recognized that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Ibid.* This rule strikes a balance between property owners' rights and the government's authority to advance the common good. Owners can rest assured that they will be compensated for particularly onerous regulatory actions, while governments maintain

the freedom to adjust the benefits and burdens of property ownership without incurring crippling costs from each alteration.

Depending, of course, on how far is "too far." We have said often enough that the answer to this question generally resists *per se* rules and rigid formulas. There are, however, a few fixed principles: The inquiry "must be conducted with respect to specific property." *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 495 (1987) (internal quotation marks omitted). And if a "regulation denies all economically beneficial or productive use of land," the interference categorically amounts to a taking. *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1015 (1992). For the vast array of regulations that lack such an extreme effect, a flexible approach is more fitting. The factors to consider are wide ranging, and include the economic impact of the regulation, the owner's investment-backed expectations, and the character of the government action. The ultimate question is whether the government's imposition on a property has forced the owner "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 123 (1978) (internal quotation marks omitted).

Finally, if a taking has occurred, the remaining matter is tabulating the "just compensation" to which the property owner is entitled. "[J]ust compensation normally is to be measured by the market value of the property at the time of the taking." *Horne*, 576 U. S., at ___ (slip op., at 15) (internal quotation marks omitted).

B

Because a regulation amounts to a taking if it completely destroys a property's productive use, there is an incentive for owners to define the relevant "private property" narrowly. This incentive threatens the careful balance

between property rights and government authority that our regulatory takings doctrine strikes: Put in terms of the familiar "bundle" analogy, each "strand" in the bundle of rights that comes along with owning real property is a distinct property interest. If owners could define the relevant "private property" at issue as the specific "strand" that the challenged regulation affects, they could convert nearly all regulations into *per se* takings.

And so we do not allow it. In *Penn Central Transportation Co.* v. *New York City*, we held that property owners may not "establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest." 438 U. S., at 130. In that case, the owner of Grand Central Terminal in New York City argued that a restriction on the owner's ability to add an office building atop the station amounted to a taking of its air rights. We rejected that narrow definition of the "property" at issue, concluding that the correct unit of analysis was the owner's "rights in the parcel as a whole." *Id.,* at 130–131. "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one strand of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus* v. *Allard*, 444 U. S. 51, 65–66 (1979); see *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 327 (2002).

The question presented in today's case concerns the "parcel as a whole" language from *Penn Central.* This enigmatic phrase has created confusion about how to identify the relevant property in a regulatory takings case when the claimant owns more than one plot of land. Should the impact of the regulation be evaluated with respect to each individual plot, or with respect to adjacent plots grouped together as one unit? According to the majority, a court should answer this question by considering a number of facts about the land and the regulation at issue. The end result turns on whether those factors

"would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." *Ante,* at 12.

I think the answer is far more straightforward: State laws define the boundaries of distinct units of land, and those boundaries should, in all but the most exceptional circumstances, determine the parcel at issue. Even in regulatory takings cases, the first step of the Takings Clause analysis is still to identify the relevant "private property." States create property rights with respect to particular "things." And in the context of real property, those "things" are horizontally bounded plots of land. *Tahoe-Sierra,* 535 U. S., at 331 ("An interest in real property is defined by the metes and bounds that describe its geographic dimensions"). States may define those plots differently—some using metes and bounds, others using government surveys, recorded plats, or subdivision maps. See 11 D. Thomas, Thompson on Real Property §94.07(s) (2d ed. 2002); Powell on Real Property §81A.05(2)(a) (M. Wolf ed. 2016). But the definition of property draws the basic line between, as P. G. Wodehouse would put it, *meum* and *tuum.* The question of who owns what is pretty important: The rules must provide a readily ascertainable definition of the land to which a particular bundle of rights attaches that does not vary depending upon the purpose at issue. See, *e.g.,* Wis. Stat. §236.28 (2016) ("[T]he lots in [a] plat shall be described by the name of the plat and the lot and block . . . for all purposes, including those of assessment, taxation, devise, descent and conveyance").

Following state property lines is also entirely consistent with *Penn Central.* Requiring consideration of the "parcel as a whole" is a response to the risk that owners will strategically pluck one strand from their bundle of property rights—such as the air rights at issue in *Penn Central*—and claim a complete taking based on that strand alone.

That risk of strategic unbundling is not present when a legally distinct parcel is the basis of the regulatory takings claim. State law defines all of the interests that come along with owning a particular parcel, and both property owners and the government must take those rights as they find them.

The majority envisions that relying on state law will create other opportunities for "gamesmanship" by landowners and States: The former, it contends, "might seek to alter [lot] lines in anticipation of regulation," while the latter might pass a law that "consolidates . . . property" to avoid a successful takings claim. *Ante,* at 11, 17. But such obvious attempts to alter the legal landscape in anticipation of a lawsuit are unlikely and not particularly difficult to detect and disarm. We rejected the strategic splitting of property rights in *Penn Central*, and courts could do the same if faced with an attempt to create a takings-specific definition of "private property." Cf. *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 167 (1998) ("[A] State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law").

Once the relevant property is identified, the real work begins. To decide whether the regulation at issue amounts to a "taking," courts should focus on the effect of the regulation on the "private property" at issue. Adjacent land under common ownership may be relevant to that inquiry. The owner's possession of such a nearby lot could, for instance, shed light on how the owner reasonably expected to use the parcel at issue before the regulation. If the court concludes that the government's action amounts to a taking, principles of "just compensation" may also allow the owner to recover damages "with regard to a separate parcel" that is contiguous and used in conjunction with the parcel at issue. 4A L. Smith & M. Hansen, Nichols' Law of Eminent Domain, ch. 14B, §14B.02 (rev.

3d ed. 2010).

In sum, the "parcel as a whole" requirement prevents a property owner from identifying a single "strand" in his bundle of property rights and claiming that interest has been taken. Allowing that strategic approach to defining "private property" would undermine the balance struck by our regulatory takings cases. Instead, state law creates distinct parcels of land and defines the rights that come along with owning those parcels. Those established bundles of rights should define the "private property" in regulatory takings cases. While ownership of contiguous properties may bear on whether a person's plot has been "taken," *Penn Central* provides no basis for disregarding state property lines when identifying the "parcel as a whole."

II

The lesson that the majority draws from *Penn Central* is that defining "the proper parcel in regulatory takings cases cannot be solved by any simple test." *Ante,* at 20. Following through on that stand against simplicity, the majority lists a complex set of factors theoretically designed to reveal whether a hypothetical landowner might expect that his property "would be treated as one parcel, or, instead, as separate tracts." *Ante,* at 11. Those factors, says the majority, show that Lots E and F of the Murrs' property constitute a single parcel and that the local ordinance requiring the Murrs to develop and sell those lots as a pair does not constitute a taking.

In deciding that Lots E and F are a single parcel, the majority focuses on the importance of the ordinance at issue and the extent to which the Murrs may have been especially surprised, or unduly harmed, by the application of that ordinance to their property. But these issues should be considered when deciding if a regulation constitutes a "taking." Cramming them into the definition of

"private property" undermines the effectiveness of the Takings Clause as a check on the government's power to shift the cost of public life onto private individuals.

The problem begins when the majority loses track of the basic structure of claims under the Takings Clause. While it is true that we have referred to regulatory takings claims as involving "essentially ad hoc, factual inquiries," we have conducted those wide-ranging investigations when assessing "the question of what constitutes a '*taking*'" under *Penn Central*. *Ruckelshaus*, 467 U. S., at 1004 (emphasis added); see *Tahoe-Sierra*, 535 U. S., at 326 ("[W]e have generally eschewed any set formula for determining *how far is too far*" (emphasis added; internal quotation marks omitted)). And even then, we reach that "ad hoc" *Penn Central* framework only after determining that the regulation did not deny all productive use of the parcel. See *Tahoe-Sierra*, 535 U. S., at 331. Both of these inquiries presuppose that the relevant "private property" has already been identified. See *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 295 (1981) (explaining that "[t]hese 'ad hoc, factual inquiries' must be conducted with respect to specific property"). There is a simple reason why the majority does not cite a single instance in which we have made that identification by relying on anything other than state property principles—we have never done so.

In departing from state property principles, the majority authorizes governments to do precisely what we rejected in *Penn Central*: create a litigation-specific definition of "property" designed for a claim under the Takings Clause. Whenever possible, governments in regulatory takings cases will ask courts to aggregate legally distinct properties into one "parcel," solely for purposes of resisting a particular claim. And under the majority's test, identifying the "parcel as a whole" in such cases will turn on the reasonableness of the regulation as applied to the claim-

ant. The result is that the government's regulatory interests will come into play not once, but twice—first when identifying the relevant parcel, and again when determining whether the regulation has placed too great a public burden on that property.

Regulatory takings, however—by their very nature—pit the common good against the interests of a few. There is an inherent imbalance in that clash of interests. The widespread benefits of a regulation will often appear far weightier than the isolated losses suffered by individuals. And looking at the bigger picture, the overall societal good of an economic system grounded on private property will appear abstract when cast against a concrete regulatory problem. In the face of this imbalance, the Takings Clause "prevents the public from loading upon one individual more than his just share of the burdens of government," *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 325 (1893), by considering the effect of a regulation on specific property rights as they are established at state law. But the majority's approach undermines that protection, defining property only after engaging in an ad hoc, case-specific consideration of individual and community interests. The result is that the government's goals shape the playing field before the contest over whether the challenged regulation goes "too far" even gets underway.

Suppose, for example, that a person buys two distinct plots of land—known as Lots A and B—from two different owners. Lot A is landlocked, but the neighboring Lot B shares a border with a local beach. It soon comes to light, however, that the beach is a nesting habitat for a species of turtle. To protect this species, the state government passes a regulation preventing any development or recreation in areas abutting the beach—including Lot B. If that lot became the subject of a regulatory takings claim, the purchaser would have a strong case for a *per se* taking: Even accounting for the owner's possession of the other

property, Lot B had no remaining economic value or productive use. But under the majority's approach, the government can argue that—based on all the circumstances and the nature of the regulation—Lots A and B should be considered one "parcel." If that argument succeeds, the owner's *per se* takings claim is gone, and he is left to roll the dice under the *Penn Central* balancing framework, where the court will, for a second time, throw the reasonableness of the government's regulatory action into the balance.

The majority assures that, under its test, "[d]efining the property . . . should not *necessarily* preordain the outcome in *every* case." *Ante,* at 10 (emphasis added). The underscored language cheapens the assurance. The framework laid out today provides little guidance for identifying whether "expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." *Ante,* at 12. Instead, the majority's approach will lead to definitions of the "parcel" that have far more to do with the reasonableness of applying the challenged regulation to a particular landowner. The result is clear double counting to tip the scales in favor of the government: Reasonable government regulation should have been anticipated by the landowner, so the relevant parcel is defined consistent with that regulation. In deciding whether there is a taking under the second step of the analysis, the regulation will seem eminently reasonable given its impact on the pre-packaged parcel. Not, as the Court assures us, "necessarily" in "every" case, but surely in most.

Moreover, given its focus on the particular challenged regulation, the majority's approach must mean that two lots might be a single "parcel" for one takings claim, but separate "parcels" for another. See *ante,* at 13. This is just another opportunity to gerrymander the definition of

"private property" to defeat a takings claim. The majority also emphasizes that courts trying to identify the relevant parcel "must strive" to ensure that "some people alone [do not] bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Ante,* at 20 (internal quotation marks omitted). But this refrain is the traditional touchstone for spotting a taking, not for defining private property.

Put simply, today's decision knocks the definition of "private property" loose from its foundation on stable state law rules and throws it into the maelstrom of multiple factors that come into play at the second step of the takings analysis. The result: The majority's new framework compromises the Takings Clause as a barrier between individuals and the press of the public interest.

III

Staying with a state law approach to defining "private property" would make our job in this case fairly easy. The Murr siblings acquired Lot F in 1994 and Lot E a year later. Once the lots fell into common ownership, the challenged ordinance prevented them from being "sold or developed as separate lots" because neither contained a sufficiently large area of buildable land. Wis. Admin. Code §NR 118.08(4)(a)(2). The Murrs argued that the ordinance amounted to a taking of Lot E, but the State of Wisconsin and St. Croix County proposed that both lots together should count as the relevant "parcel."

The trial court sided with the State and County, and the Wisconsin Court of Appeals affirmed. Rather than considering whether Lots E and F are separate parcels under Wisconsin law, however, the Court of Appeals adopted a takings-specific approach to defining the relevant parcel. See 2015 WI App 13, 359 Wis. 2d 675, 859 N. W. 2d 628 (unpublished opinion), App. to Pet. for Cert. A–9, ¶17 (framing the issue as "whether contiguous property is

analytically divisible for purposes of a regulatory takings claim"). Relying on what it called a "well-established rule" for "regulatory takings cases," the court explained "that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein." *Id.*, at A–11, ¶20. And because Lots E and F were side by side and owned by the Murrs, the case was straightforward: The two lots were one "parcel" for the regulatory takings analysis. The court therefore evaluated the effect of the ordinance on the two lots considered together.

As I see it, the Wisconsin Court of Appeals was wrong to apply a takings-specific definition of the property at issue. Instead, the court should have asked whether, under general state law principles, Lots E and F are legally distinct parcels of land. I would therefore vacate the judgment below and remand for the court to identify the relevant property using ordinary principles of Wisconsin property law.

After making that state law determination, the next step would be to determine whether the challenged ordinance amounts to a "taking." If Lot E is a legally distinct parcel under state law, the Court of Appeals would have to perform the takings analysis anew, but could still consider many of the issues the majority finds important. The majority, for instance, notes that under the ordinance the Murrs can use Lot E as "recreational space," as the "location of any improvements," and as a valuable addition to Lot F. *Ante,* at 18. These facts could be relevant to whether the "regulation denies all economically beneficial or productive use" of Lot E. *Lucas*, 505 U. S., at 1015. Similarly, the majority touts the benefits of the ordinance and observes that the Murrs had little use for Lot E independent of Lot F and could have predicted that Lot E would be regulated. *Ante,* at 18. These facts speak to "the economic impact of the regulation," interference with

"investment-backed expectations," and the "character of the governmental action"—all things we traditionally consider in the *Penn Central* analysis. 438 U. S., at 124.

I would be careful, however, to confine these considerations to the question whether the regulation constitutes a taking. As Alexander Hamilton explained, "the security of Property" is one of the "great object[s] of government." 1 Records of the Federal Convention of 1787, p. 302 (M. Farrand ed. 1911). The Takings Clause was adopted to ensure such security by protecting property rights as they exist under state law. Deciding whether a regulation has gone so far as to constitute a "taking" of one of those property rights is, properly enough, a fact-intensive task that relies "as much on the exercise of judgment as on the application of logic." *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340, 349 (1986) (alterations and internal quotation marks omitted). But basing the definition of "property" on a judgment call, too, allows the government's interests to warp the private rights that the Takings Clause is supposed to secure.

I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 15–214

JOSEPH P. MURR, ET AL., PETITIONERS *v.*
WISCONSIN, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN, DISTRICT III

[June 23, 2017]

JUSTICE THOMAS, dissenting.

I join THE CHIEF JUSTICE's dissent because it correctly applies this Court's regulatory takings precedents, which no party has asked us to reconsider. The Court, however, has never purported to ground those precedents in the Constitution as it was originally understood. In *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922), the Court announced a "general rule" that "if regulation goes too far it will be recognized as a taking." But we have since observed that, prior to *Mahon*, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, *Legal Tender Cases*, 12 Wall. 457, 551 (1871), or the functional equivalent of a 'practical ouster of [the owner's] possession,' *Transportation Co.* v. *Chicago*, 99 U. S. 635, 642 (1879)." *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1014 (1992). In my view, it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment. See generally Rappaport, Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May, 45 San Diego L. Rev. 729 (2008) (describing the debate among scholars over those questions).