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

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 107666/2007

STAHL YORK AVENUE COMPANY LLC.

VS

CITY OF NEW YORK

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, It is ordered that this ~~motion~~ Petition is decided per attached

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).

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

Dated: 9/11/08

EMILY JANE GOODMAN

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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In the Matter of the Application of,

STAHL YORK AVENUE COMPANY LLC,

Petitioner,

For an Order and Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

–against-

Index No.: 107666/07

THE CITY OF NEW YORK; THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION; ROBERT B. TIERNEY, in his capacity as Chair of the New York City Landmarks Preservation Commission; THE COUNCIL OF THE CITY OF NEW YORK; and CHRISTINE C. QUINN, in her capacity as Speaker of the Council of the City of New York,

Respondents.

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EMILY JANE GOODMAN, J.S.C.:

This dispute involves the issue of New York City's history and preservation of its landmarks both architecturally and culturally, versus construction and development of residential towers in Manhattan. This clash is resolved by consulting and reviewing the relevant record of almost two decades.

Petitioner Stahl York Avenue Company LLC asks this Court to annul the City's recent designation of two early 20th Century tenement buildings located on York Avenue between East 64th and East 65th Street (hereinafter, the Buildings) as New York City landmarks. Seventeen years ago, the New York City Landmarks Preservation Commission (LPC) designated as a landmark site the entire city block owned by petitioner known as the City and Suburban Homes

Company First Avenue Estate. That decision was reviewed by the now defunct Board of Estimate, which removed the two Buildings from the protected area in what papers submitted describe as a "political compromise," so that new construction could take place on that portion of the block, before approving the landmark designation of the rest of the First Avenue Estate. The Board of Estimate's decision was upheld by another judge of this Court on Article 78 review. However, a similar Board of Estimate modification to another full-city-block of light-court tenements[1] built by the City and Suburban Homes Company, known as the City and Suburban Homes Company York Avenue Estate, was overturned by the Appellate Division, First Department as an irrational exercise of the Board of Estimate's powers.

At the time of the earlier litigation, petitioner did not have any current plans to develop the Buildings. That changed in 2004, and when neighborhood residents learned of, and objected to, the possibility of a future development of the Buildings, they asked the LPC to amend the prior designation of the First Avenue Estate to include the Buildings. The LPC did so by unanimous vote on November 21, 2006. In the absence and in place of the Board of Estimate, the City Counsel approved the amended designation on February 1, 2007, explaining that they were reversing a "bad back-room deal" by the old Board of Estimate in order to fully preserve the First Avenue Estate as a landmark site. Petitioner has failed to establish that the amended designation of the First Avenue Estate is arbitrary or capricious and thus, the petition must be denied and this proceeding dismissed.

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[1]As discussed infra, "light-court" tenement buildings are buildings where the courtyards, stairways, hallways and apartment configurations were designed to maximize light and air, and were proposed as an economically-viable alternative to the dark, unventilated tenements of the period.

BACKGROUND

The 1990-1991 LPC, Board of Estimate and Prior Court Proceedings

On April 24, 1990, the LPC voted to designate a full block of tenement buildings bounded by York and First Avenues and East 64th and 65th Streets in Manhattan as a landmark site. This full-block complex of buildings is called the City and Surburban Homes Company First Avenue Estate.

According to the report prepared by a member of the LPC's Research Department in 1990 (the 1990 Designation Report), the First Avenue Estate was built between 1898 and 1915. It is the oldest extant project of the City and Suburban Homes Company (C&SHC). C&SHC was the most successful privately-financed, limited-dividend company which built low-cost housing developments to address the housing problems of the working poor at the turn of the century. The First Avenue Estate consists of fifteen individual "light-court" tenement buildings, buildings in which the courtyards, stairways, hallways and apartment configurations were all designed to maximize light and air, and were proposed as an economically-viable alternative to the dark, unventilated tenements of the period. The first two buildings located at 1168-1190 and 1194-1200 First Avenue were designed by the distinguished New York architect, James E. Ware. Ware won critical acclaim for the First Avenue buildings and was commissioned by C&SHC to design eleven more buildings on the site. With the completion of these buildings, C&SHC occupied the entire site it had acquired in 1896.

The balance of the lots on the block facing onto York Avenue remained in the hands of William C. Schemerhorn and did not become available until C&SHC purchased the site from his

heirs in 1913 and built the Buildings at issue herein. They were designed by C&SHC's architectural department, headed by Philip H. Ohm, as light-court tenement buildings which have courtyard entrances and feature decorative details inspired by the earlier Ware buildings on the block. The author of the 1990 Designation Report wrote that "[i]n addition to their similarities in plan, these buildings are related to the others on the block in size, scale, use of materials, and decorative detailing, thus giving the block a strong sense of visual homogeneity." Record (R.) 61.

At the same time that LPC designated the First Avenue Estate as a landmark site, the LPC also voted to designate as a landmark site another C&SHC housing development, known as the York Avenue Estate, which consists of fourteen buildings bounded by York Avenue and the FDR Drive and East 78th and 79th Streets. The York Avenue Estate is also a full block complex of buildings, constructed between 1901 and 1913.

On August 21, 1990, in its final session, the Board of Estimate voted 6 to 5 to approve the designation of thirteen buildings in the First Avenue Estate, but disapproved and excluded from the landmark site the Buildings in question. Likewise, the Board of Estimate voted 6 to 5 to approve the designation of ten buildings in the York Avenue Estate, but disapproved and excluded the designation of four buildings at the eastern end of the complex and FDR Drive. At that time, the owner of the York Avenue Estate, Kalikow 78/79 Company, planned on building a high-rise residential tower on the eastern portion of the site.

These modifications by the Board of Estimate to the First Avenue Estate and York Avenue Estate landmark sites were challenged by community and civic associations, environmental and historic preservation societies and groups in separate Article 78 proceedings

before other judges in this Court -- Matter of 400 East 64/65th Street Block Assn., et al. v The City of New York, et al., and Stahl York Ave. Co., Index No. 28068/90 (hereinafter, Stahl), and Coalition to Save City and Suburban Hous., Inc., et al. v The City of New York, et al. and Kalikow 78/79 Co., Index No. 25980/90 (hereinafter, Kalikow). The owners of both the First Avenue Estate and York Avenue Estate intervened in the proceedings, and the proceedings were consolidated by Justice Charles E. Ramos of the Supreme Court on the ground that they had a common legal question, which was whether the Board of Estimate's modifications of the LPC's designations of the two complexes were rational.

It was the Board of Estimate's position in these consolidated proceedings before the Court that the modifications were made as a "compromise" which allowed new development, such as the proposed Kalikow project, on the eastern portion of each site closest to the river to support the City's tax structure. The modifications were based on economic considerations such as the additional tax revenues, jobs and housing brought about by new residential construction. See Waters Affirm., Exh. B thereto: Affidavit of Victoria Streitfeld sworn to on Feb. 27, 1991, submitted in Stahl and Kalikow (Streitfeld Aff.), ¶¶ 6-9. The Board of Estimate chose to exclude the Buildings, because the proximity to the East River "would be most desirable for new construction," and also because the buildings being excluded were the youngest buildings in the complex. Streitfeld Aff., ¶¶ 6-9.

Intervenor-respondent Kalikow 78/79 Company cross-moved to dismiss the petition in Kalikow on the ground that the Supreme Court lacked subject matter jurisdiction, arguing that the action of the Board of Estimate in ruling upon a LPC designation is legislative and thus not subject to judicial review.

By order and judgment dated July 17, 1991, Justice Charles E. Ramos dismissed the petitions. First, in response to the argument by intervenor-respondent Kalikow 78/79 Company, the Court agreed that "the action of ruling upon the designation of LPC was quasi-legislative and political in nature and therefore not subject to judicial review" (Waters Affirm., Exh. G, p. 11), but that it was "also evident that the compromise by the [Board of Estimate] was itself inherently reasonable and cannot be described as arbitrary or capricious" (id., p. 12).

Only the Kalikow petition was appealed to the Appellate Division, First Department. The Supreme Court's decision as it related to the First Avenue Estate was not appealed. See R. 1764. On May 19, 1992, the First Department reversed the Supreme Court in Kalikow, and overturned the Board of Estimate's modification, re-establishing the LPC designation of the entire York Avenue Estate. The First Department ruled that the determination of the Board of Estimate was not a legislative act, beyond judicial review, but that in passing upon a designation of landmark status by the LPC, the Board of Estimate performs an administrative function, and judicial review is limited to whether the administrative determination was rationally based or arbitrary and capricious. 400 East 64/65th Street Block Assn. v City of New York, 183 AD2d 531, 532-33 (1st Dept), lv denied 81 NY2d 736, lv dismissed 81 NY2d 737 (1992).

The First Department further ruled that the LPC "designated the complex as a 'landmark site' and not 14 individual buildings as 14 different 'landmarks.'" Id. at 533. Because the significance of the site "is that it is one of only two such light-court model developments remaining in the country which comprise an entire block," the Appellate Division held that "[t]he position that a part of the complex should be considered worthy of designation as a landmark . . . and part should not is inherently inconsistent." Id. Finally, it rejected the City's argument that

the Board of Estimate's decision constituted a legitimate compromise between preservation and development on the ground that the Board of Estimate improperly based its decision on factors outside the administrative record. Id. at 534.

The 2006-2007 LPC and City Council Proceedings

Petitioner alleges that, by 2004, the estimated potential value of the Buildings, if both free of landmark status and re-developed, exceeded the value of the existing buildings on the property by an amount in excess of $100 million. It, therefore, began to consider the redevelopment of the site, and retained both an architectural firm and a law firm for related advisory services. On September 7, 2004, petitioner obtained alteration permits from the Department of Buildings to do window replacement and exterior facade restoration work for the Buildings. The permitted work consists of stuccoing the Buildings' brick facades, changing the color from tan to red, enlarging window openings and replacing windows, and changing the Buildings' parapets, cornices and capstones.[2] The following day, the local Community Board adopted a resolution in favor of amending the First Avenue Estate landmark site to include the Buildings.

On October 10, 2006, LPC calendared the amendment of the First Avenue Estate landmark site to include the Buildings. LPC held a public hearing on November 14, 2006. Numerous people spoke and/or submitted written statements in favor of the amendment. A representative of the petitioner and the Real Estate Board of New York Inc. testified in opposition. The LPC approved the amendment to the designation by unanimous vote on

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[2]The construction permits were subsequently renewed on an annual basis and extended through December 15, 2007. Petitioner alleges in its Petition, filed in May of 2007, that it intends to complete the work. Petition, ¶36.

November 21, 2006.

The LPC filed the amendment to the designation with the City Planning Commission on December 1, 2006. The City Planning Commission submitted to the City Council its report, dated January 10, 2007, on the amendment, noting that the amendment did not conflict with any zoning or plans for development in the area. A public hearing before the City Council's Subcommittee on Landmarks, Public Siting and Maritime Uses was held on January 30, 2007. Nineteen people spoke in support of the amendment, while a representative of the petitioner and a resident of the First Avenue Estate spoke in opposition. The Subcommittee unanimously recommended affirming the amendment. The matter was then placed before the City Council's Committee on Land Use on January 31, 2007, who voted unanimously in favor with no abstentions.

The City Council held a public hearing on the amendment on February 1, 2007, and voted 47 in favor, 0 abstentions and 0 against the amendment. Resolution No. 704 affirming the amendment was passed that same day.

DISCUSSION

The "Landmarks Preservation and Historic District" law (Landmarks Law) was enacted, inter alia, to protect and perpetuate "the city's cultural, social, economic, political and architectural history" by designating improvements and landscape features having a special character or special historical or aesthetic interest as historic districts and landmarks. Admin. Code of City of NY, § 25-301(b). The eleven-member LPC must include at least three architects, one historian, one realtor, one city planner or landscape architect. NY City Charter, § 3020(1). A landmark is defined as "[a]ny improvement, any part of which is thirty years old or older,

which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation . . . ." Admin. Code of the City of NY, § 25-302(n). If, after an investigation of the premises or area under consideration, the LPC is disposed to decree landmark status, it must conduct a public hearing. Id., § 25-303(b). The designation of a landmark by the LPC is subject to review by the City Council, who may modify or disprove the designation. Id., § 25-303(g)(2).

LPC action taken pursuant to its authority under the Landmarks Law is considered to be administrative, as opposed to quasi-judicial. See Matter of Teachers Ins. and Annuity Assn. of Am. v City of New York, 82 NY2d 35, 41 (1993); Lutheran Church in Am. v City of New York, 35 NY2d 121, 128 (1974). Accordingly, "[l]andmark designations . . . [are] reviewable under CPLR § 7803, where error of law, arbitrariness or capriciousness or abuse of discretion (i.e., reasonableness) defines the scope of review." Lutheran Church in America, 35 NY2d at 128. "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." Pell v Board of Education, 34 NY2d 222, 231 (1974).

Petitioner first contends that the LPC and the City Council ignored relevant facts when they designated the Buildings as landmarks, because they are not, on their own, "special" in any architectural or historical sense and there is no principled basis to bundle them together with the rest of the First Avenue Estate landmark site. Petitioner bases this argument on the fact that the Buildings were built by a different and obscure architect, much later and on a different site. In addition, petitioner argues that, as a result of the recent construction work, the Buildings no longer share any of the significant architectural features identified by the LPC with the rest of the buildings in the First Avenue Estate, i.e, color, facade material, window size or detailing.

While the architect of the Buildings, Philip Ohm, is not as noted an architect as James E. Ware, the architect of the earlier First Avenue Estate buildings (see R. 70-71, 74), landmark status is not limited to buildings designed by noted architects or having some extraordinary architectural distinction. Society for Ethical Culture in City of New York v Spatt, 68 AD2d 112, 117 (1st Dept 1979), affd 51 NY2d 449 (1980); see also Shubert Org., Inc. v Landmarks Preserv. Commn. of the City of New York, 166 AD2d 115 (1st Dept 1991), appeal dismissed 78 NY2d 1006, lv denied 79 NY2d 751, cert denied 504 US 946 (1992). All that is required is that the LPC conclude, based on the record and its own expertise, that the buildings have some "special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation" Admin. Code of the City of NY, § 25-302(n). Here, the First Avenue Estate was not landmarked solely because of Ware's involvement in the project, but mostly on historical and cultural grounds. R. 140-41, 146, 154, 179, 262, 263, 311-12, 1478-81, 1728-29, 1748. According to the 1990 Designation Report, the First Avenue Estate is special because it is the "manifestation[] of the work of the nation's most successful builder of philanthropic housing and as an exploration of an important housing type" and because "it is one of only two full city block developments of light-court model tenements in the country . . ." R. 75. In addition, Ohm completed Ware's original concept for the First Avenue Estate by including arched passages leading to a central courtyard, with four corner entrances, in the design of the Buildings. R. 74.

Regarding the age of the Buildings, petitioner ignores the fact that the First Avenue Estate was built in stages from 1897 to 1915, not all at one time. The first buildings were built on First Avenue in 1900-1901; five buildings were built in 1903; and four buildings were built in 1905-

06. R. 71-74. These buildings were built on land the company acquired from the Colored Home and Hospital in 1896. R. 74. C&SHC was not able to purchase the remaining land on the block until 1913, when the land was purchased from the heirs of William C. Schermerhorn. Id. The company waited another year until it had completed its last building at the York Avenue Estate, before filing plans to develop the new property, and these last two Buildings were built in 1914-15. Id.

While the City argues that the "original concept" or "master plan" of both the First Avenue Estate and the York Avenue Estate was to construct a full-block development of light-court tenements, the cited pages in the Record does not actually support this claim.[3] However, according to the 1990 Designation Report, the company attributed its success, in part, to "large-scale production" and that "[w]herever possible large sites were acquired since they allowed maximum flexibility in planning while providing some measure of control over the character of a neighborhood." R. 69. In addition, in C&SHC's "Seventeenth Annual Report of the President" dated May 1913 (R. 498-510), it was reported that the purchase of the land fronting York Avenue had just been completed, that improving the property would be commenced shortly, and that "[w]hen these buildings have been constructed the company will have another completed block of model tenements" (R. 505), suggesting that it was indeed always the original intent of C&SHC to construct a full block development. And, in fact, this is what occurred at both sites and what makes them particularly noteworthy. As noted by the First Department in Kalikow, "[i]t is clear from both the extensive report by LPC and the report of the City Planning Commission that the

[3]See City's Memo. of Law at pp. 25-26, citing not to any historical records, but to pages 127, 134, 149, 166, 188 and 1738-39 of the Record, which merely contain the opinions of city council persons, a democratic state committeeman and residents of the First Avenue Estate.

significance of the site is that it is one of only two such light-court model developments remaining in the country which comprise an entire block." 400 East 64/65th St. Block Assn. v City of New York, 183 AD2d at 533; see also R. 75.

Finally, petitioner argues that a glaring deficiency in the 2006 Designation Report is the failure to meaningfully address the one circumstance that has significantly changed since 1990, i.e., that the Buildings were undergoing a facelift that was transforming their appearance and eliminating any visual homogeneity with the rest of the buildings in the First Avenue Estate. Petitioner freely admits that this work was undertaken solely to protect its rights to develop the site. See R. 179-80. It argues that any external resemblances as to ornamentation or window design have been eliminated by the construction, scheduled to be completed in December 2007.

The response to this argument is three-fold. First, at the time that the 2006 Designation Report was written and the Buildings were re-designated by the LPC, only some of the work permitted by the permits had been done. See R. 1502, 1507-09, 1518-20, 1540-43. Second, even if the work has been completed, the Record below fully supports the re-designation of the Buildings, because their architectural significance is not solely in their facade or architectural detail, but in the site plan, the light courts, the size and the general design of the Buildings which has not been changed. LPC Commissioner Todd, at the time of the original designation in 1990, was cited as noting that "surface ornamental detailing was a secondary concern because the law provides a broad view of what constitutes architecture, not just the appearance, the facades, but the whole building and its history and purpose." R. 141-42. The recent construction work has not changed the size, shape, height or footprint of the Buildings -- they are still six-story "light-court" tenement buildings with courtyard entrances and an abundance of windows, which will

have been only slightly enlarged and modified (see Petition, ¶39). The new color of the Buildings is not the garish deep red color as depicted in the artist's rendering of the Buildings submitted by the petitioner (see id., ¶37), rather the photographs submitted by both sides show a much lighter color red (see id., ¶38; Forster Aff., Exhs. thereto; Czaja Aff., Exhs. 1 and 1 thereto). As a whole, the Buildings are still easily recognizable as part of the First Avenue Estate complex.

Third, the physical alterations to the Buildings do not change their historical and cultural significance. In a letter to the LPC dated November 14, 2006, Andrew S. Dolkart, the James Marston Fitch Associate Professor of Historic Preservation at the Columbia University School of Architecture, Planning and Preservation and author of "A Dream Fulfilled," a study of C&SHC written in 1988 (R. 145), pointed out that:

> No case has ever been made that City and Suburban's model tenements should be landmarks because they are significant for architectural design or for the high quality of ornamentation. [P]roponents of the designation of the two City and Suburban complexes have argued that the importance of these model tenements lies in their historical significance, as major examples of progressive housing; as large block-square complexes unique in the history of American reform housing;. . . .and as successful inspirations for later progressive housing such as that built by the Phipps' and by the federal government.

R. 311-12.

Accordingly, petitioner has failed to demonstrate that either the LPC or the City Council overlooked relevant facts in reaching their respective determinations that the Buildings are deserving of landmark status as part of the First Avenue Estate.

Petitioner next argues that the City Council's actions in approving the amendment to the First Avenue Estate designation is arbitrary and capricious, because it did not have or articulate

reasonable grounds for its departure from the 1990 Board of Estimate determination. Petitioner cites to Matter of Charles A. Field Delivery Serv., Inc. (66 NY2d 516, 517 [1985]), in which the Court of Appeals held that "[a] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious."

This argument is unpersuasive for several reasons. While there is no question that the City Council succeeds to the Board of Estimate's reviewing authority under the landmarks preservation law following the latter's abolishment in 1989 (see New York City Charter § 3020[8], [9]; Admin. Code of the City of NY, § 25-303[f], [g]), the two entities are not the same in size, composition and manner of conducting business. The Board of Estimate was comprised of the mayor, comptroller, City Council president, each of whom had two votes, and the presidents of each of the five boroughs, each of whom cast one vote. Board of Estimate of the City of New York v Morris, 489 US 688, 690-691 (1989) (citing former Sections 61 and 62 of the New York City Charter). The New York City Council is comprised of 51 members elected from each of the council districts throughout the five boroughs. As noted by one court,

> The Board of Estimate was abolished, and its power distributed elsewhere, as part of sweeping City Charter amendments proposed by the New York City Charter Revision Commission (see, Final Report of NY City Charter Rev Commn.[Jan. 1989-Nov. 1989]), which were enacted by the voters at the November 7, 1989 general election. The New York City Charter Revision Commission had been formed following the determination by the Federal court in Morris v Board of Estimate, 592 F Supp 1462 [ED NY1984], aff'd 831 F2d 384, aff'd 489 US 688 [1989]), which had held that the voting distribution of the Board of Estimate members was violative of the constitutional requirement of one person, one vote. The Commission, in making its proposals to amend the City Charter to address the issue of voting distribution, also had as one of its objectives to build greater community participation in policy debates and decisions (see, Final Report of NY Charter Rev Commn, at 4 [Jan. 1989-Nov. 1989).

Council of City of New York v Giuliani, 183 Misc 2d 799, 816 (Sup Ct, Queens County 1999). Thus, unlike the Charles A. Field case, where the same agency -- the Unemployment Insurance Appeal Board -- did not follow its own precedent and ruled differently on the same issue, the City Counsel was an entirely different body than the Board of Estimate, and had the authority and procedures to reach a different result.

Thus, unlike Charles A. Field, this not a case about treating similarly-situated applicants differently. Rather, this case is about amending a landmark designation, and there is nothing in the Landmarks Law that prohibits the LPC from "re-designating" a property that either the Board of Estimate or the City Council has rejected. Section 25-303(c) of the Administrative Code explicitly gives the LPC "the power, after public hearing, to amend any [prior] designation."

Additionally, a reviewing agency, whether the Board of Estimate or the City Council, was statutorily authorized to modify landmark designations and has affirmed on several occasions designations that had previously been denied. See Respondents' Mem. of Law in Opp. to the Petition, at n. 12, pp. 32-33. In Gilbert v Board of Estimate of the City of New York, NYLJ, July 16, 1990, at 23, col 3 [Sup Ct, NY County], affd 177 AD2d 252 [1st Dept 1991], lv denied 80 NY2d 751 [1992]), the petitioner challenged the Board of Estimate's 1987 approval of the LPC's extension of the South Street Seaport to include Block 106, alleging it was arbitrary because the Board of Estimate had excluded Block 106 from the historic district ten years earlier. The petitioner in that case had alleged, similar to the argument made herein, that the Board of Estimate had failed to follow its own ruling when presented with the same facts. However, the Supreme Court found that the LPC was acting within its statutory authority when it re-evaluated the designation of Block 106, noting that "[l]andmark designation is not static; it is an on-going

process subject to revisions based on current conditions." In affirming, the First Department similarly found that the Board of Estimate, acting in its administrative, rather than quasi-judicial capacity, is not precluded from reconsidering a prior determination in light of a subsequent designation by the LPC. Gilbert, 177 AD2d at 253.

Further, Charles A. Field is also distinguishable on the ground that an important development occurred in the time between the Board of Estimate's 1990 determination and the City Council's 2007 vote. In 1991, the First Department reversed Kalikow, and ruled that the Board of Estimate had improperly based its decision on factors outside the administrative record. Id. at 534. The Chairperson of the Subcommittee on Landmarks, Public Siting and Maritime Uses, Jessica Lappin, advised her colleagues of this history at the January 30, 2007 meeting (R. 1764), and the administrative record contains other references to the litigation (R. 125, 350, 364).

Petitioner argues that Kalikow does not support the City Council's reversal of the Board of Estimate's 1990 decision not to include the Buildings in the First Avenue Estate landmark because, in reinstating the landmark designation of the four buildings of the York Avenue Estate, the First Department allegedly emphasized that the York Avenue Estate "was originally designed as and should properly be considered as a full-block complex, and that the Board of Estimate had not explained why it removed four of the buildings from the designation." Petitioner's Reply, at pp. 7-8. However, the First Department's opinion in Kalikow makes no mention of the original design of the York Avenue Estate, but merely stated that the significance of the site "is that it is one of only two such light-court model developments remaining in the country which comprise an entire block" (Kalikow, 183 AD2d at 533), a description which equally applies to the First Avenue Estate. More importantly, the Court's reasoning that the Board of Estimate acted

irrationally to break up a "landmark site" to balance preservation and development interests is fully applicable to the Board of Estimate's modification of the First Avenue Estate designation.

Moreover, the City Council's approval of the LPC's amended designation was not accomplished without articulating reasonable grounds for departure from the Board of Estimate's 1990 determination. When introducing the vote before the City Council, Speaker Christine Quinn had these comments:

> In 1990, in what some refer to as the Board of Estimate's going out of business sale, a lot of things happened literally in the middle of the night. And one of the things that happened in the middle of the night was part two buildings in the City [sic] -- two buildings which are part of the City and Suburban buildings on the Upper East Side, all of which had been landmarked and gone through the Landmarks Preservation Commission process, two of those were dedesignated [sic] as landmarks, and this was an action that has really stuck in the craw of the Upper East Side and preservation advocates and affordable housing advocates for those 16 years, and people kept working and focused and knew that if they were determined, there would be a day when that wrong was righted, and those two buildings would be made landmarks again. . . . .

R. 1793-94. Council Member Jessica Lappin also stated her belief that it was a "very exciting day. You don't get too many do-overs in government, and that's what this is, a rare opportunity to right a wrong, to fix what was a bad back-room deal done in the middle of the night at 3:00 in the morning that was a mistake." R. 1794. The testimony revealed that the prior Board of Estimate action was considered to be an arbitrary compromise, made for political reasons with a powerful and well-connected real estate developer (R. 131, 136-37, 162, 176, 1713), not based on architectural or historical merits (R. 176, 1713). Finally, the press release issued by the City Council's Office of Communications dated February 1, 2007 refers to the Board of Estimate's actions with respect to the First Avenue Estate as a "mistake" that is being reversed in order to preserve the entire full city block development of light-court tenement buildings. Shapiro

Affirm., Exh. 11.

In Corona Realty Holdings, L.L.C. v Town of N. Hempstead (32 AD3d 393 [2d Dept 2006)]), a case cited in support of the petition, the Court reversed a town board's 2004 designation of a country club as a historical landmark because it was based upon the same facts which were presented to the same town board in 1996 when landmark status for the property was rejected, and the town board failed to offer any explanation for its failure to follow the 1996 precedent. Here, as discussed above, the City Council was not basing its decision on the same facts presented to the Board of Estimate in 1990 and the City Council clearly articulated its reasons for arriving at a different decision.

Finally, petitioner maintains that the Landmarks Law cannot be used as a pretext to regulate zoning issues, and that the transcripts of the various public hearings in this matter reveal that the focal point of the debate was concern that redevelopment of the Buildings might have an adverse effect on the views and cross-breezes available to residents of nearly apartments, and the population density of the neighborhood.

There is no basis for the Court to adopt Petitioner's theory that the LPC "misconstrue[d] zoning matters for landmark matters." Shubert Org., Inc. v Landmarks Preserv. Commn., 166 AD2d at 121, supra. Admin Code, ch. 3 § 25-304. The comments by various members of the public, including local residents, cannot be attributable to the LPC, which is required by law to hold a public hearing before making a designation. The LPC consistently determined that the entire First Avenue Estate should be landmarked due to its historical and cultural significance, and there is nothing in the record to indicate that its actions in 2006 to re-designate the Buildings were motivated solely by community pressures and impermissible political considerations, as

petitioner contends.

In addition, the ironic effect of a 28-story tower on the eastern edge of the First Avenue Estate, is a landmark issue partly due to the historical significance of these "light-court" tenements that were designed to maximize light and air. As Council Member Jessica Lappin noted to the LPC on November 14, 2006, the owner's plan for a 28-story building "would destroy the meaning and validity of having a full block light-court tenement because it would mean no light and no air for the other 13 buildings. This would go from being a light-court tenement to a dark-court tenement and we can't let that happen." R. 128. The comments of LPC Commissioner Ryan, cited by petitioner as evidence that the LPC was improperly motivated by zoning issues, in reality, are merely the recognition that "if these buildings are lost they will be replaced by something that eliminates the light and air to the buildings that remain that are still designated." R. 1484.

Where, as here, there is a rational basis for the administrative decision, a court may not substitute its judgment for that of the LPC. City of New York v Shakespeare, 202 AD2d 237, 237 (1st Dept), lv dismissed 84 NY2d 923 (1994); Shubert Org., Inc. v Landmarks Preservation Commn., 166 AD2d at 120, supra. Because the LPC's decision to amend the First Avenue Estate landmark site to include the Buildings, unanimously affirmed by the City Council, is neither arbitrary nor capricious nor in violation of law, and there existed a rational basis for the determination, the petition must be denied and this proceeding dismissed.

Accordingly, it is hereby

ADJUDGED that the petition is denied, without costs and disbursements, and the proceeding dismissed.

This Constitutes the Decision and Judgment of the Court.

Dated: September 11, 2008

ENTER:

J.S.C.

EMILY JANE GOODMAN

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).