

<b>9th &amp; 10th St. L.L.C. v New York City Landmarks Preserv. Commn.</b>
2008 NY Slip Op 33097(U)
November 12, 2008
Supreme Court, New York County
Docket Number: 115607/06
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDGE SHIRLEY WERNER KORNREICH  
*Inctio*

PART 54

Index Number : 115607/2006  
9TH & 10TH STREET L.L.C.  
vs  
NYC LANDMARKS PRESERVATION  
Sequence Number : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE 8/1/08  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, memoranda or \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1-2</u>
<u>3-5</u>
<u>6</u>

+ reviewed before Commission & Appendix to Petitioner's Memorandum of Law

Cross-Motion:  Yes  No

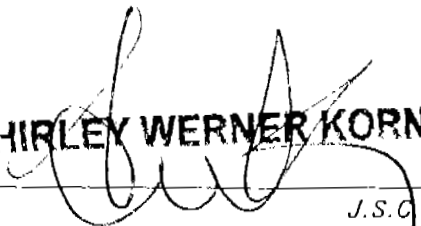
Upon the foregoing papers, it is ordered that this motion

**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).

**NOT TO BE DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.**

Dated: Nov. 12, 2008

HON. SHIRLEY WERNER KORNREICH



J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

THIS MESSAGE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF YORK  
COUNTY OF NEW YORK

-----X  
9<sup>th</sup> & 10<sup>th</sup> STREET L.L.C.,

Petitioner,

For a Judgment Pursuant to CPLR Article 78

-against-

THE NEW YORK CITY LANDMARKS  
PRESERVATION COMMISSION,

Respondent.

-----X  
KORNREICH, SHIRLEY WERNER, J.

Index No.: 115607/06

**DECISION  
and  
JUDGMENT**

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

In this Article 78 proceeding, petitioner 9<sup>th</sup> and 10<sup>th</sup> Street, L.L.C., challenges a determination of respondent, The New York City Landmarks Preservation Commission (Commission or respondent), dated June 20, 2006 (Determination). The Determination conferred landmark status on a former public school building located at 605 East 9<sup>th</sup> Street, New York, NY (P.S. 64). On September 13, 2006, the City Council of the City of New York issued Resolution 514 approving the Determination.

*Background*

The following facts concerning the architectural style of P.S. 64 are set forth in the Determination. P.S. 64 was built in 1904 through 1906. It was designed by C.B.J. Snyder in the French Renaissance Revival style with a slate-covered mansard roof. P.S. 64 is located between 9<sup>th</sup> and 10<sup>th</sup> Streets between Avenues B and C in the East Village, near Thompson Square Park. C.B.J. Snyder was an architect employed by the New York City Board of Education, who developed a distinctive H-plan for designing public schools at the turn of the twentieth century.

The H-plan created open terraces on the side streets to create outdoor recreational space, with the indoor spaces mid-block, a design that insulated classrooms from noise and provided light. In 1903, Snyder modified the H-plan to include an auditorium between the first floor and basement with direct access from the street, which allowed schools to function after hours as community centers for lectures, political functions and theatrical events. P.S. 64 is the oldest extant example of Snyder's modified H-plan.

The Determination also sets forth the following facts with respect to the historical and cultural life of P.S. 64, some of which are derived from expert reports provided to the Commission by Place Matters and AKRF Engineering, PC. At the turn of the century, the Committee on the Care of Buildings of the Board of Education determined that school playgrounds should be used for dramatic performances. P.S. 64 became a center for community lectures and dramatic performances for the immigrant community of the Lower East Side. In 1914-1915, P.S.64 took part in a progressive education program spearheaded by William L. Ettinger to provide vocational education to seventh and eighth graders. The progressive educator, Elizabeth Irwin, founder of the Little Red Schoolhouse, taught at P.S.64 from 1912-1921. Ms. Irwin devised a curriculum that separated children based upon I.Q. scores. When she left, P.S. 64 continued to use Ms. Irwin's methods. The P.S. 64 auditorium was used for speeches by notables such as Governor Alfred Smith, Mayor Jimmy Walker, and Franklin Delano Roosevelt.

In 1977, the school was closed due to lack of attendance, and a local non-profit organization, Adopt-A-Building, received a grant to train local young people in the construction trades. Adopt-A-Building rehabilitated P.S. 64 and moved into it. Beginning in 1979, CHARAS

and Adopt-A-Building formed El Bohío, a corporation which leased the building from New York City. El Bohío and Adopt-A-Building were part of a community preservation movement of citizen volunteers that took root on the Lower East Side and other parts of the City during the 1970s. In this period, P.S. 64 became a center for after-school programs, theatrical performances and visual art exhibits. The former school became a center for Latin culture, showcasing Latin artists. In addition, it promoted new film makers and showed revival films. El Bohío advanced significant work in urban ecology, with an emphasis on community gardens, and urban arts and culture.

Petitioner acquired title to P.S. 64 in 1999 through an auction conducted by the City of New York. The school was sold with a deed restricting development to “community facility use.” The New York City Department of Buildings denied petitioner a building permit to construct a nineteen-story dormitory on the site, on the ground that petitioner had an insufficient nexus to an educational institution. Petitioner challenged the determination. The Court of Appeals upheld the DOB’s determination on March 25, 2008.

On September 27, 2006, petitioner received a building permit from the New York City Department of Buildings for “[r]epairs and restoration to Facade. No changes to use, egress or occupancy.” Some of the decorative facade has been removed pursuant to this permit. The Commission does not dispute that petitioner has the right to alter the facade because the permit was granted before the Determination was made. Code §25-321.

#### *Discussion*

Section 3020 of the New York City Charter (Charter) established the Commission and empowered it to designate landmarks after allowing public comment at a hearing. Designation

by the Commission is subject to recommendation by the City Planning Commission to the City Council after a public hearing, followed by approval by the City Council. *Id.* The Mayor has a right of veto, subject to override by a vote of two-thirds of the members of the City Council. *Id.* The Commission is composed of eleven members, including at least three architects, one historian, one city planner or landscape architect and one realtor. *Id.*

The Commission also is governed by §25-301 et seq. of the New York City Administrative Code (Code). The public policy purpose of the statutory scheme is to:

(a) effect and accomplish the protection, enhancement and perpetuation of such improvements and landscape features and of districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history; (b) safeguard the city's historic, aesthetic and cultural heritage, as embodied and reflected in such improvements, landscape features and districts; (c) stabilize and improve property values in such districts; (d) foster civic pride in the beauty and noble accomplishments of the past; (e) protect and enhance the city's attractions to tourists and visitors and the support and stimulus to business and industry thereby provided; (f) strengthen the economy of the city; and (g) promote the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.

Code § 25-301. 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, and which has been designated a landmark pursuant to the provisions of this chapter.

Code § 25-302(n).

A landmark designation subject to review under Article 78 must be upheld if it has support in the record, a reasonable basis in law, and is not arbitrary or capricious. *Teachers Ins. & Annuity Ass'n v. City of New York*, 82 N.Y.2d 35, 41 (1993). A court should defer to the expertise of the Commission when it determines that a landmark has "special historical or

aesthetic interest.” *Id.* at 42. In making a determination, the Commission is not limited to the facts, views, testimony or evidence submitted at the public hearing. Code §25-313(b).

Petitioner’s first challenge to the Determination is that it was based solely on public pressure. However, the appellate precedents which petitioner cites, all involve landmark designations that lacked any evidence other than public opinion. In this proceeding, the Commission relied upon architectural, cultural and historical evidence of experts and its own investigation, which concluded that P.S. 64 is of special architectural, cultural and historical significance. While petitioner presents experts who opine that P.S. 64 is insufficiently special from an architectural viewpoint and that its historical and cultural value is not significant enough for designation, this court cannot resolve a battle of experts so long as there is a rational basis for the Determination in the record.

Petitioner fails to contradict the Commission’s finding that P.S. 64 is the oldest extant Snyder school with an auditorium accessible from the street. Petitioner’s architect states that DeWitt Clinton High School boasts “a splendid lecture hall positioned for easy community use - a use that was made available many months *before* the P.S. 64 auditorium.” He does not state that DeWitt Clinton’s auditorium was accessible from the street. He further opines that the auditorium of P.S. 106, which was accessible from the street, was the first community access school auditorium in the world. However, he does not state whether P.S. 106 is extant. Moreover, even if P.S. 106 were extant, no authority supports the proposition that an improvement must be unique to qualify for landmark status.

Petitioner’s architectural expert also argues that other school buildings are more special and worthy of designation. Again, the standard is not whether P.S. 24 is the most special. The

issue is whether there was evidence before the Commission from which it could conclude that P.S. 64 is special. Under that standard, the Determination must be upheld.

Petitioner also notes that one of the special architectural features cited in the Determination is the ornate facade that petitioner has a permit to remove. The argument is unavailing because the Commission found other special architectural features that will remain.

With respect to the historical and cultural significance of P.S. 64, petitioner merely contradicts expert evidence that the school was an important cultural center or that the history the Commission cited is significant or specially connected to the building. The court cannot substitute its judgment for that of the Commission. Nor is petitioner correct that the determination of historical and cultural significance must rest on events that are more than thirty years in the past. The time limit in the statutory scheme relates to the age of an improvement only.

Finally, petitioner argues that by conducting the auction without designating P.S. 64 a landmark, the Commission is taking an inconsistent position with respect to the same property, rendering the Determination arbitrary and capricious. It is true that when an agency makes a determination on essentially the same facts as a prior decision, it must offer a valid explanation for doing so to avoid reversal by a reviewing court. *In re Charles A. Field Delivery Service, Inc.*, 66 N.Y.2d 516, 520 (1985). Petitioner urges that the auction of P.S. 24 triggered review under the State Environmental Quality Review Act (SEQRA), during which historical preservation must be considered. The Commission counters that the decision to auction the property was a Type II action exempt from SEQRA review because it was "routine ...agency administration and management," citing 6 NYCRR §617.5(c)(20).

[\* 8 ]

The court does not agree that the decision to auction P.S. 64 was made on essentially the same facts so as to bring this proceeding within the rule of *In re Charles A. Field Delivery Service, Inc., supra*. The record reflects that the City auctioned P.S. 64 because it was in need of repair and was being rented for very little money. The Commission has given a rational explanation for why it did not conduct a landmark evaluation at the time of the auction. Accordingly, it is

ORDERED, ADJUDGED and DECREED that the petition is denied and dismissed with prejudice, and the Clerk is directed to enter judgment accordingly.

Dated: November 12, 2008

  
\_\_\_\_\_  
J.S.C.

**UNFILED JUDGMENT**  
This judgment has not been filed by the County Clerk and notice of entry has not been given. To obtain entry, you must appear in person at the Judgment Clerk's Desk (Room 1412).