[*1] SCANNED ON 2/10/2008

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

PRESENT: HON. PAUL G. FEINMAN PART 52

Justice

Index Number : 106646/2006
9TH & 10TH STREET LLC
VS.
BLOOMBERG, MICHAEL R., MAYOR
SEQUENCE NUMBER : 004
DISMISS ACTION

INDEX NO. 106646/2006
MOTION DATE 10/5/06
MOTION SEQ. NO. 004
MOTION CAL. NO.

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PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3
Replying Affidavits	4,5

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)

Dated: 12/5/06

J.S.C.

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

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

----------X

9TH & 10TH STREET LLC,

Plaintiff,

against

MAYOR MICHAEL R. BLOOMBERG, THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF BUILDINGS, BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, and LANDMARKS PRESERVATION COMMISSION,

Defendants.

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Index Number	106646/2006
Mot. Seq. No.	004
Submission Date	10-8-08
Mot. Cal. No.	1

DECISION AND ORDER

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Papers considered in review of this motion to dismiss:

Papers	Numbered
Defendants' Notice of Motion to Dismiss & Annexed Affidavits	1, 2
Defendants' Memo of Law in Support of Motion	3
Plaintiff's Memo of Law in Opposition to Motion	4
Defendants' Reply Affirmation in Support of Motion	5
Defendants' Reply Memo of Law in Support of Motion	

PAUL G. FEINMAN, J.:

Mayor Michael R. Bloomberg, the City of New York, New York City Department of Buildings, Board of Standards and Appeals of the City of New York, and Landmarks Preservation Commission (collectively referred to as "defendants" and/or "the City") move

pursuant to CPLR 3211 to dismiss the complaint against them. Plaintiff opposes the motion. For the reasons set forth below, the motion is granted in its entirety.

Factual and Procedural Background

Plaintiff 9th & 10th Street LLC acquired the property at 605 East 9th Street (a/k/a 305 East 10th Street), New York, New York from the City of New York at an auction on July 20, 1998 for the sum of $3.15 million (Compl. ¶¶ 8, 34; Defs. Affm. in Supp. of Mot. [hereinafter "Waters Aff."] ¶¶ 9, 10). Title to the property was transferred to plaintiff on July 21, 1999 subject to the following restriction: "Use and development of this subject property is restricted and limited to a 'Community Facility Use' as defined in the New York City Zoning Resolution (hereafter ZR) as existing on the date of the auction" (Compl. ¶¶ 11, 52-53; Pl. Memo of Law, p. 5; Waters Aff. ¶ 10). The premise is occupied by a 135,000 square foot five-story former New York City Public Elementary School (hereinafter "the building"), which was closed in 1977 (Compl. ¶ 29; Waters Aff. ¶ 9, Ex. A).

Plaintiff initially represented to the community that it would restore and maintain the building for education, healthcare or not-for-profit services (Waters Aff. ¶¶ 14, 15). According to plaintiff, it contemplated providing low-income housing and programs to seniors, and dozens of organizations initially expressed interest in leasing the property for this purpose (Compl. ¶¶ 64-67). Plaintiff alleges that City officials threatened these organizations with the loss of city and/or state funding if they were to occupy plaintiff's community facility (Compl. ¶¶ 70-75). Unable to lease the community space, plaintiff decided to build a dormitory on the property

(Compl. ¶76). Prior to filing its initial permit,[1] plaintiff had several meetings with Robert Tierney, Chair of the Landmark Preservation Commission (hereinafter "LPC") and Deputy Mayor Doctoroff's staff in which plaintiff expressed an interest in the building and submitted plans for the proposed dormitory (Pl. Memo of Law, p. 7).

On October 19, 2004, plaintiff applied to the New York City Department of Buildings (hereinafter "DOB") for a permit to construct a nineteen-story, 805 bed "college or school dormitory" building (Compl. ¶ 109). A "college or school dormitory" is a "Use Group 3" (UG3) community facility use, which falls within the terms of the property's deed restriction (Compl. ¶¶ 60,61; Waters Aff. ¶ 17, fn. 6). DOB interprets the ZR to require that a UG3 dormitory use be owned by or operated by, or on behalf of, a qualified educational institution to house students enrolled at its institution (Waters Aff. ¶18). Plaintiff is not such an institution and its proposed dormitory is not affiliated with any college or school (Waters Aff. ¶¶ 16, 18). Alternatively, DOB required plaintiff to show an "institutional nexus" with the proposed dormitory[2] (Waters Aff. ¶ 18). DOB objected to plaintiff's November 29, 2004 application in which it sought to substantiate the use as a dormitory, by submitting a deed or lease from an educational institution (Waters Aff. ¶ 21). DOB required plaintiff to demonstrate a legally binding relationship with an educational institution prior to the DOB's issuance of a permit authorizing the facility to be constructed and used as a UG3 dormitory (Compl. ¶ 172; Waters Aff. ¶ 21). On March 21,

[1] Five years elapsed from the time of plaintiff's purchase of the property to the time that it sought to put the property to its proposed use due in part to community litigation between El Bohio Public Development Corporation and Charas, Inc., the tenants of the building, who sought to prevent the City from selling the property and closing on its auction. (Pl. Memo of Law, p. 6; Waters Aff. ¶ 12).

[2] The DOB has now codified this requirement in Rule 1 § RCNY 51-01.

2005, DOB rejected plaintiff's position that its proposal qualified as a UG3 dormitory (Compl. ¶ 127).

On April 20, 2005, plaintiff filed an administrative appeal with the Board of Standards and Appeals of the City of New York (hereinafter "BSA"), which on October 18, 2005 denied plaintiff's appeal and affirmed the DOB's determination (Compl. ¶ 178). Also on October 18, 2005, the LPC calendared the building as a potential New York City Landmark and subsequently held a public hearing to consider the building's potential (Waters Aff. ¶ 26). On June 20, 2006, LPC designated the property as a landmark due to its special character, history and aesthetics, along with its value as part of the development and cultural heritage of New York (Waters Aff. ¶¶ 27, 28, Ex. F).

Plaintiff commenced two separate Article 78 proceedings. One proceeding challenged the landmark designation of its building by LPC. By decision and judgment dated November 12, 2008, another justice of the Supreme Court denied plaintiff's petition (*See, 9th & 10th St. LLC v NYC Landmarks Preservation Commission,* 2008 NY Slip Op. 33097(U), Sup. Ct. NY Co. Nov. 12, 2008). The court found that LPC's determination that the building was a landmark due to its historical and cultural significance was borne out by the evidence before the LPC, and was therefore not arbitrary or capricious. The court also found that LPC had given a rational explanation as to why it did not conduct a landmark evaluation at the time of the auction.

The other Article 78 proceeding was commenced in November 2005; in that proceeding plaintiff sought to set aside as arbitrary and capricious the BSA's determination upholding the DOB's decision regarding the proposed dormitory use (Compl. ¶ 182; Waters Aff. ¶ 23, Ex. D). By decision and judgment dated July 18, 2006, the court found the DOB and BSA's denial of

plaintiff's application was not arbitrary or capricious (*9th and 10th Street L.L.C. v Board of Standards and Appeals of City of New York*, 12 Misc. 3d 1183A [Sup. Ct, NY County 2006][Stallman, J.]). Plaintiff appealed, and by decision dated May 29, 2007, the Appellate Division, First Department reversed, holding that DOB's denial of plaintiff's application was an "impermissible administrative anticipatory punishment" and that it could not therefore deny a permit based on a possible future illegal use (*I/M/O 9th and 10th Street L.L.C. v Board of Standards and Appeals of City of New York,* 43 AD3d 36, 37 [1st Dept. 2007]). BSA appealed. The Court of Appeals, reversed the Appellate Division, holding that where "officials reasonably fear that the legal use proposed for a building will prove impracticable, it is not improper to insist on a showing that the applicant can actually do what it says it will do" (*I/M/O 9th and 10th Street L.L.C. v Board of Standards and Appeals of City of New York* 10 NY3d 264, 269 [2008]). The Court determined that the City officials did not act arbitrarily or capriciously in denying plaintiff's application for a building permit, reversed the Appellate Division's order and reinstated the Supreme Court's judgment dismissing the petition (10 NY3d at 270).

On May 15, 2006, plaintiff filed the instant summons and verified complaint in which it asserts a first cause of action against all defendants for regulatory taking under the Fifth and Fourteenth Amendments to the U.S. Constitution and for deprivation of plaintiff's federal civil rights in violation of 42 U.S.C. § 1983 (Ver. Compl. ¶ 222). Plaintiff's second cause of action is asserted against all defendants for regulatory taking under Article I, Section 7 of the New York State Constitution (Ver. Compl. ¶ 235). Plaintiff's third cause of action against all defendants claims a violation of plaintiff's due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution and deprivation of plaintiff's federal civil rights in violation of 42

U.S.C. § 1983 (Ver. Compl. ¶ 244). The fourth cause of action, also asserted against all defendants, claims a violation of plaintiff's due process rights under Article I, Section 6 of the New York State Constitution (Ver. Compl. ¶ 253). The fifth cause of action, asserted against defendants Mayor Bloomberg and the City of New York only, alleges tortious interference with prospective business relations; plaintiff claims that defendants' "sole intent was to harm plaintiff"(Ver. Compl. ¶¶ 260, 264). Plaintiff also alleges that the Mayor "acted in his own self-interest" in interfering with plaintiff's prospective business relations (Compl. ¶¶ 156-158). The sixth cause of action, again only asserted against defendants Mayor Bloomberg and the City of New York, sounds in prima facie tort (Ver. Compl. ¶ 269). Plaintiff's seventh and final cause of action, for breach of the implied covenant of good faith and fair dealing, is alleged only against the City of New York (Ver. Compl. ¶ 275). Plaintiff seeks to recover an excess of $100 million in damages, plus punitive damages, costs, and attorney's fees (Ver. Compl. ¶¶ 22, 273).

In July 2006, defendants moved pre-answer to dismiss plaintiff's complaint pursuant to CPLR 3211. Service of notice of this motion triggered the automatic stay of discovery under CPLR 3214 (b). In August 2006, this court, with the consent of all parties, stayed all proceedings in this case pending final determination of the appeal of the Article 78 proceeding which, at that time, was *sub judice* in the Appellate Division, First Department. After the First Department rendered a decision in that matter, this court, by decision and order dated July 25, 2007, ordered the City's motion to dismiss restored to the calendar. The court also denied plaintiff's request for immediate discovery. The parties stipulated on October 23, 2007 to a further stay of this matter until after a ruling by the Court of Appeals on the City's denial of plaintiff's permit application (Waters Aff. ¶ 37). On October 4, 2007, plaintiff filed a motion for

a limited vacatur of the automatic stay of discovery under CPLR 3214 (b), which this court denied by decision dated January 23, 2008. On July 16, 2008, the City re-filed its motion to dismiss, which is now before the court.

Parties' Contentions

Defendants argue that they are entitled to dismissal on the grounds that the alleged improper action – DOB and BSA's denial of a building permit to plaintiff – has been upheld by the Court of Appeals as being a lawful act (Waters Aff. ¶ 6). Defendants contend that "the vast majority of plaintiff's complaint is barred by the doctrines of *res judicata* and collateral estoppel." Defendants further contend that plaintiff's other causes of action that are "not specifically precluded by the Court of Appeals decision, are largely based upon 'information and belief' and conclusory allegations with no factual support and should be dismissed" (Waters Aff. ¶ 7). Defendants also argue that plaintiff's claim alleging an unconstitutional taking by the LPC is not ripe, since plaintiff has neither applied for, nor has been denied, a permit by LPC (Waters Aff. ¶ 7). Defendants argue that there has been no tortious interference with prospective business relations, since "plaintiff has not alleged that any contract would have been entered into but for the City's actions nor that the actions were motivated solely by malice" (Waters Aff. ¶ 7). Finally, defendants argue that plaintiff's cause of action for prima facie tort should be dismissed because plaintiff has not pleaded malice nor special damages (Waters Aff. ¶ 7).

In opposition, plaintiff argues both that the City's regulatory taking is tantamount to condemnation requiring the City to compensate plaintiff and that, the City's "unreasonable and onerous regulatory actions," i.e., the landmarking of plaintiff's property, resulted in "a significant loss in the value of its Property," which also denotes a taking (Pl. Memo of Law, pp.

15, 17). Plaintiff also argues that, contrary to defendants' contentions, the legal doctrines of *res judicata* and collateral estoppel do not apply in this action (Pl. Memo of Law, p. 36). Plaintiff first contends that *res judicata* is inapplicable, because the taking claims in the Verified Complaint are not based solely on the denial of the building permit, and instead derive from the long series of illegal and improper acts taken by City officials, which resulted in the total loss of the property's value, as well as the improper landmarking of the property (Pl. Memo of Law, p. 38). Plaintiff next contends that collateral estoppel is also inapplicable, since the doctrine only bars relitigation of issues that were "actually litigated and determined" (Pl. Memo of Law, p. 39). Plaintiff argues that the Court of Appeals did not determine the issue of whether plaintiff was discriminatorily singled out for unprecedented treatment, whether the DOB's actions were part of a pattern of wrongdoing to thwart plaintiff's rights, or whether the acts of the DOB and other agencies stemmed from an improper political deal (Pl. Memo of Law, pp. 39-40).

Plaintiff also argues that City officials intentionally interfered with plaintiff's prospective business relations by "threatening a multitude of schools and universities, including New York University, with the loss of state and/or city funding should they 'get involved' with 9th & 10th St.'s project" (Pl. Memo of Law, p. 10). Plaintiff contends that a letter from the Puerto Rican Council dated April 1, 2005 states that the City is now "threatening the universities that could benefit by this proposed development project" (Pl. Memo of Law, p. 10).

Plaintiff further argues that in addition to the incidents of threats and economic coercion against non-profit organizations, schools, and universities, several City officials, including Mark Ricks, Senior Policy Advisor of Deputy Mayor Doctoroff and Josh Sirefman, Chief of Staff of the Deputy Mayor, overtly threatened to block plaintiff's project by informing plaintiff's

principal, Mark Singer, that they intend to "block any use of the property" by plaintiff, whether as a dormitory or any other community facility (Pl. Memo of Law, p. 12). According to plaintiff, Ricks informed plaintiff that in reference to any development on the property, "it ain't happening in this lifetime," and stated that "this is not about getting a fair deal. It's about what we are willing to give you" (Pl. Memo of Law, p. 13). Plaintiff states that the landmarking of the building occurred shortly after the officials' threats (Pl. Memo of Law, p. 14).

Finally, plaintiff argues that the City breached its covenant of good faith and fair dealing by selling the property to plaintiff with only Use Group 3 restrictions, and then subsequently changing the terms of the sale by landmarking the building seven years later (Pl. Memo of Law, p. 50). Plaintiff contends that the City acted in "various illegal and improper ways in order to deprive plaintiff of the right to receive the benefits under the 1999 contract" and thus, defendants' motion to dismiss the complaint in its entirety should be denied (Pl. Memo of Law, pp. 50-51).

Legal Analysis

Generally, on a motion to dismiss brought pursuant to CPLR 3211, the court must "accept the facts as alleged in the complaint as true, and accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Morgenthow &Latham v Bank of N.Y. Co., Inc.*, 305 AD2d 74, 78, *lv denied* 100 NY2d 512 [2003], quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *see also*, *Bishop v Maurer*, 33 AD3d 497, 498 [1st Dept. 2006]). The court, however, is not required to accept factual allegations, or accord favorable inferences, where the factual assertions are clearly contradicted by documentary evidence or where the legal conclusions are unsupportable based

upon the undisputed facts (*Igarashi v Higashi*, 289 AD2d 128, 128 [1st Dept. 2001]; *Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept. 2003]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept.1999], *aff'd* 94 NY2d 659, [2001]).

First and Second Causes of Action - Regulatory Taking

The Takings Clause of the Fifth Amendment, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, provides that "nor shall private property be taken for public use, without just compensation" (US Const. Amd. V). The Takings Clause of the New York State Constitution contains a similar provision: "[p]rivate [p]roperty shall not be taken for public use without just compensation" (NY Const, art 1, § 7). The Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking" (*First English Evangelical Lutheran Church v County of Los Angeles*, 482 US 304, 315 [1987]).

Case law identifies two primary categories of regulatory actions that will be considered *per se* takings requiring just compensation under the Fifth Amendment: (1) "where government requires an owner to suffer a permanent physical invasion of her property" (*Lingle v Chevron*, 544 US 528, 538 [2005], quoting *Loretto v Teleprompter Manhattan Catv Corp.*, 458 US 419, 426 [1982]), and (2) where government regulations completely deprive an owner of "*all* economically beneficial use" of her property (*Lucas v S.C. Coastal Council*, 505 US 1003, 1019 [1992]). In the absence of a physical invasion or where there is less than a total deprivation of the economically beneficial use of property, the court, in determining whether a taking has occurred, considers relevant factors such as the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct

investment-backed expectations" and the "character of the governmental action" (*Penn Cent. Transp. Co. v New York City*, 438 US 104, 124 [1978]).

In the case at bar, there is an absence of physical possession of plaintiff's property by the government, and plaintiff fails to offer a persuasive explanation how the City's alleged actions, even if true, constitute a total loss of "all economically beneficial use" of the property requiring just compensation. Plaintiff's argument that the City's conduct in denying plaintiff a building permit is a regulatory action that is tantamount to condemnation, is wholly without merit. Plaintiff is not prohibited from all use of the property, and was permitted to build its desired dormitory, providing that it demonstrates the establishment of a proper institutional nexus between the occupancy of the building and a qualified educational institution as required by DOB Rule 1 § RCNY 51-01.

Alternatively, plaintiff contends that the City's regulatory action in landmarking the property "interfered with plaintiff's distinct investment-backed expectations" and therefore, constitutes a partial regulatory taking, for which plaintiff is entitled to just compensation. The law is well-settled that landmarking, in and of itself, is insufficient to constitute a "taking" (*see e.g., Penn Cent.*, 438 US at 134 [stating that "[i]t is, of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a 'taking.' Legislation designed to promote the general welfare commonly burdens some more than others."]).

Furthermore, *Tahoe-Sierra Pres. Council v Tahoe Reg'l Planning Agency* is dispositive of plaintiff's causes of action for regulatory taking (535 US 302 [2002]). In *Tahoe-Sierra*, landowners near a pristine lake brought suit against the defendant regional planning agency,

alleging that the development moratoria ordered by the agency constituted an unlawful taking of the landowners' property without compensation (535 US at 312-313). The United States Supreme Court held that the mere enactment of the regulations implementing the moratoria did not constitute a *per se* taking of the landowners' property. The Court stated that:

> A landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. *Under the ripeness rules, a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law.* As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established.

(535 US at 339-340) (*emphasis added*).

In other words, claims based on regulatory takings "are not ripe for judicial review until (1) the governmental entity charged with implementing the regulations has rendered a final decision regarding the application of the regulations to the property, and (2) the landowner has availed itself of the procedures provided by State law to obtain just compensation" (*Town of Orangetown v Magee*, 88 NY 2d 41, 50 [1996]). Until these steps have been taken, there is no clear indication that a taking has occurred or how "far" the regulation goes (*Orangetown* at 50-51; *but cf.*, *Palazzolo v Rhode Island*, 533 US 606, 625 [2001] [stating that where the extent of the regulations imposed is made clear, federal ripeness rules do not require a landowner to submit "further and futile applications" with other agencies]).

Notably, LPC has done nothing more than designate plaintiff's property a New York City landmark. It has not determined what changes are prohibited as a result of that landmark designation. There are no allegations that plaintiff has followed the "reasonable and necessary

steps" with LPC to determine the extent of any restrictions resulting from the landmark designation. And, there are no allegations that plaintiff has even filed an application with LPC to make any changes to its building. Thus, defendants correctly argue that, absent a final determination by LPC as to what changes plaintiff may make to its property, plaintiff's claim for regulatory taking is not ripe (*see e.g., Dougherty v Town of N. Hempstead Bd. of Zoning Appeals*, 282 F3d 83, 88 [2d Cir. 2002]).

The court need not reach the issue of whether the City's landmarking of the property at issue actually interfered with plaintiff's investment-backed expectations, since based on the allegations contained in plaintiff's complaint, dismissal of the claims for regulatory taking under both federal and state law is warranted (*see Wantanabe Realty Corp. v City of New York*, 315 F. Supp. 2d 375, 401 [SD NY 2003] [analyzing state and federal takings claims together because "there is no suggestion that these state constitutional provisions are any more expansive ... than their federal counterparts"]).

Third and Fourth Causes of Action - Violation of Plaintiff's Due Process Rights

It is axiomatic that the Fourteenth Amendment protects individuals from the deprivation of life, liberty, or property without due process of law (US Const. Amend. XIV). Similar to an equal protection claim, "a cause of action under the due process clause cannot stand absent a final determination" (*Board of Managers of Soho Int'l Arts Condo. v City of New York, et al*, 2004 US Dist. LEXIS 17807, *84 [SD NY, Sept. 8 2004], citing *Dougherty*, 282 F3d at 88-89).

Generally, the doctrine of *res judicata*, or claim preclusion, gives binding effect to the valid final judgment of a court of competent jurisdiction and bars relitigation of any claims that were "necessarily decided" therein (*see Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8,

13 [2008]; *see also, Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]). Under New York's transactional analysis approach to deciding *res judicata* issues, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*Matter of Josey v Goord*, 9 NY3d 386, 389-390 [2007], quoting *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]).

Here, plaintiff's claim for a due process violation based on DOB and BSA's denial of its building permit application is barred by the equitable doctrine of *res judicata*. In an Article 78 proceeding brought by plaintiff to challenge the agencies' determination, the New York Court of Appeals held that the City officials did not act arbitrarily or capriciously in denying plaintiff a building permit (10 NY3d at 270). The Court found that the actions taken by DOB in requiring plaintiff to demonstrate an institutional nexus with the educational institution was necessary for the department to receive adequate assurances that the dormitory use would be possible (10 NY3d at 270). Because this claim was "necessarily decided" by a court of competent jurisdiction, plaintiff is now barred from relitigating this very matter. It should be noted that because plaintiff's claim for regulatory taking on the basis of LPC's landmark designation[3] is not ripe, any claim for violation of substantive due process based on that claim must also be dismissed.[4]

Fifth Cause of Action - Tortious Interference with Prospective Business Relations

[3] Plaintiff correctly argues that its claim for regulatory taking based on the landmark designation of the property is not barred by *res judicata*, since this claim could not have been brought in the Article 78 proceeding. The June 20, 2006 landmark designation did not occur until sometime after the filing of the earlier proceeding.

[4] Plaintiff's claim for violation of due process rights based on enforcement is not properly before the court, since this claim was not raised in plaintiff's complaint and appeared for the first time in plaintiff's memo of law in opposition to the motion to dismiss.

Under New York law, a cause of action for tortious interference with prospective business relations requires an allegation that plaintiff would have entered into the business relationship but for the defendant's wrongful conduct (*Vigoda v DCA Productions Plus Inc.*, 293 AD2d 265, 266-67 [1st Dept 2002]). Plaintiff must establish that the defendant "engaged in the use of wrongful or unlawful means to secure a competitive advantage" over plaintiff, or that the defendant "acted for the sole purpose of inflicting intentional harm" on the plaintiff (*see Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 190 [1980]). "Wrongful means include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure" (*Guard-Life*, 50 NY2d at 191).

Plaintiff alleges that defendants acted with the intent to harm plaintiff by their denial of the building permit and subsequent landmark designation of plaintiff's property. However, these actions were undoubtedly directed at plaintiff. The law is clear that the "wrongful means" element of a claim for tortious interference with prospective business relations requires "a showing that the challenged wrongful conduct was not directed at the plaintiff but at parties with which the plaintiff had or sought to have a business relationship" (*Havana Cent. NY2 LLC v Lunney's Pub, Inc.*, 49 AD3d 70, 74 [1st Dept. 2007], citing *Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004]).

Plaintiff's claim of wrongful means lacks foundation in the factual allegations of the complaint, even accepting them as true, as this court must on a motion to dismiss. Plaintiff alleges that City officials threatened to withhold state and/or local funding from any entity that engaged in business with plaintiff. Nevertheless, assuming the truth of these allegations, mere threats to withhold funding are insufficient to rise to the level of conduct evidencing the use of

wrongful means (*see e.g., Guard-Life*, 50 NY2d at 191 [stating that "wrongful means" do not include persuasion alone, even though it may be knowingly directed at interference with the contract]). Plaintiff has failed to allege facts tending to show that defendants engaged in physical violence, fraud, misrepresentation, etc., with any party with whom plaintiff sought to have a business relationship, in order to satisfy the "wrongful means" element of the claim.

Moreover, plaintiff alleges in its complaint that the Mayor "acted in his own personal self-interest with the goal of being re-elected" and that the Mayor's "sole intent was to harm plaintiff." Indeed, these are two entirely contradictory assertions. It is impossible for a defendant's actions to be labeled, on one hand, as an act in his own personal self-interest in garnering favor with voters, and on the other hand, characterize that same conduct as an act done solely with the intent to harm plaintiff. If an act is done by a politician to curry favor with the electorate, while it may also benefit the politician, it is necessarily designed to effectuate the will of the public and cannot therefore be done solely with the intent to harm another. Here, the plaintiff's own complaint establishes that there was another purpose than to solely cause plaintiff harm. The complaint also fails to identify with any particularity which contracts or prospective contracts were allegedly interfered with by defendants. Therefore, plaintiff's claim for tortious interference must be dismissed.

Sixth Cause of Action - Prima Facie Tort

In cases where a traditional tort remedy exists, a party will not be precluded from pleading a cause of action for prima facie tort, as alternative relief (*Freihofer v Hearst Corp.*, 65 NY2d 135, 143 [1985]). To assert a cause of action for prima facie tort, the requisite elements must be established: (1) the intentional infliction of harm, (2) which results in special damages,

(3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful (*Curiano v Suozzi*, 63 NY2d 113, 117 [1984], citing *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 332 [1983]). "A critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages" (*Curiano*, 63 NY2d at 117). Special damages must be "fully and accurately stated with sufficient particularity as to identify and causally relate the actual losses to the allegedly tortious acts" (*Broadway & 67th St. Corp. v New York*, 100 AD2d 478, 486 [1st Dept. 1984]). It should be noted that "there is no recovery in prima facie tort unless malevolence is the sole motive for defendant's otherwise lawful act or, ... unless defendant acts from 'disinterested malevolence' by which is meant 'that the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another'" (*Burns*, 59 NY2d at 222).

Here, plaintiff's claim for prima facie tort largely mirrors the claim asserted in its fifth cause of action. Plaintiff does not sufficiently allege, by factual allegations rather than speculation or innuendo, the elements of prima facie tort. Inasmuch as the allegations of the complaint make it clear that defendants' motive with respect to their treatment of plaintiff was, at least in part, to promote the Mayor's self-interest of being re-elected, i.e., curry favor with the voters, and thus not solely to harm plaintiff, plaintiff's cause of action for prima facie tort is not viable (*see e.g., Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983] [dismissing cause of action for prima facie tort where, although plaintiffs allege intentional and malicious action, they do not allege that defendants' sole motivation was "disinterested malevolence"]; *see also e.g., Hessel v Goldman, Sachs & Co.*, 281 AD2d 247, 248 [1st Dept.

2001] [plaintiff's allegations in his complaint indicating that defendants acted in their self-interest, and not solely out of disinterested malevolence, are admissions fatal to his cause of action for prima facie tort]).

The court also notes that there are no allegations outlining special damages, and such would be necessary to support the claim for prima facie tort. Plaintiff alleges only that "as a result of defendants Mayor and the City's conduct, it has incurred significant costs, including carrying charges and attorney's fees, amounting to more than $100 million." Because this general allegation fails to fully and accurately state the alleged damages with sufficient particularity as to identify and causally relate the actual losses to the allegedly tortious acts, it is insufficient to support a cause of action for prima facie tort (*see e.g., Vigoda v DCA Prods. Plus Inc.*, 293 AD2d 265, 266 [1st Dept. 2002] [finding plaintiffs' allegation of lost future income, conjectural in identity and speculative in amount to sustain a cause of action for prima facie tort]; *see also e.g., Spinale v 10 W. 66th St. Corp.*, 291 AD2d 234, 235 [1st Dept. 2002] [cause of action for prima facie tort was properly dismissed in light of plaintiffs' inability to demonstrate that they had sustained special damages]).

Seventh Cause of Action - Breach of Implied Covenant of Good Faith and Fair Dealing

"Implicit in every contract is a promise of good faith and fair dealing, which is breached when a party acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement" (*AJW Partners, LLC v Cyberlux Corp.*, 2008 NY Slip Op 52020 [U], *11, quoting *Skillgames, LLC v Brody*, 1 AD3d 247, 252 [1st Dept. 2003]). To assert a cause of action for breach of an implied covenant of good faith and fair dealing, plaintiff must "adequately allege

that the defendant injured the plaintiff's right to receive the benefits of the parties' agreement" *(EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 22 [2005]). Where no party has acted in a way to prevent the performance of or the rights under the contract, the claim must fail (*Silvester v Time Warner, Inc.*, 1 Misc. 3d 250, 258 [Sup. Ct, NY County, 2003]).

Under New York law, the doctrine of collateral estoppel, also known as issue preclusion, serves to bar a party from "relitigating in a subsequent action or proceeding an issue that was "raised, necessarily decided and material in the first action," and if the party "had a full and fair opportunity to litigate the issue in the earlier action" (*Pinnacle Consultants v Leucadia Natl. Corp.*, 94 NY2d 426, 432 [2000], quoting *Gramatan Home Inv. Corp. v Lopez,* 46 NY2d 481, 485 [1979]; *see also*, *Buechel v Bain*, 97 NY2d 295, 303 [2001]; *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]).

In the case at bar, defendants seek to preclude relitigation of plaintiff's seventh cause of action, arguing that it is identical to the issue that was decided in the earlier and related Article 78 proceeding. In the Article 78 proceeding arising out of the proceedings before the Board of Standards and Appeals, the Court of Appeals determined that defendants' conduct in denying plaintiff's building permit was neither arbitrary nor capricious. Thus, to the extent that plaintiff alleges that the City breached its implied covenant of good faith and fair dealing by DOB's failure to grant plaintiff the "as-of-right" building permit and DOB's other "arbitrary and capricious documentation requirements," the cause of action is dismissed. And, to the extent that plaintiff alleges that BSA acted arbitrarily and capriciously in affirming the DOB's requirement of an "institutional nexus" to educational institutions, the cause of action for breach

of implied covenant of good faith and fair dealing is also dismissed. These issues are the same as those already litigated in the Article 78 proceeding.

It is therefore

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the judgment and order of the court.

Dated: December 5, 2008
New York, New York

J.S.C.