

Before The New York City Landmarks Preservation Commission

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In the Matter of the Application of :  
ST. VINCENT’S CATHOLIC MEDICAL CENTERS :  
For a Notice to Proceed Under Section 25-309 :  
under Section 25-309 of the Administrative Code :  
of the City of New York :  
(O’Toole Hardship Application) :

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BRIEF OF PROTECT THE VILLAGE HISTORIC DISTRICT IN OPPOSITION TO THE APPLICATION

This Brief is submitted to the Landmarks Preservation Commission on behalf of Protect the Village Historic District (PVHD) and in opposition to the application of the St. Vincent’s Catholic Medical Centers to demolish the O’Toole Building on the basis of hardship. PVHD opposes the application and respectfully submits that the importance of the O’Toole Building and applicable law require that it be denied. This Brief focuses solely on the application for demolition and the legal issues connected with that proposal.

PVHD is a citizens’ advocacy organization formed in January 2008 for two purposes: First, to work to protect the Greenwich Village Historic District in general. Second, and more specifically, to protect the Historic District from the Rudin and St. Vincent’s proposals now before the Commission. In the six months since PVHD was formed, its membership has grown to some 900 individuals, reflecting the broad concern among New Yorkers that the landmarks protections enacted by the City

more than 40 years ago will be severely undercut if the proposals are approved. PVHD has participated actively in the LPC proceedings in an effort to keep that from happening and with the specific goal of protecting the Greenwich Village Historic District and the neighborhoods in which many of its members live.

### Introduction

The New York City Landmarks Preservation Law was approved by the City Board of Estimate and signed into law by Mayor Wagner in 1965. As the Commission states on its website:

“The Landmarks Law was enacted in response to New Yorkers' growing concern that important physical elements of the City's history were being lost despite the fact that these buildings could be reused. Events like the demolition of the architecturally distinguished Pennsylvania Station in 1963 increased public awareness of the need to protect the city's architectural, historical, and cultural heritage.”

The Law created the Landmarks Preservation Commission and, among other things, authorized it designate individual landmarks and historic districts, which, in turn, were to be accorded the special protections of the Law. Among other things, these protections included sharp limitations on the demolition of both individual landmarks and contributing structures within historic districts.

On April 29, 1969 – almost 40 years ago – the Commission designated the Greenwich Village Historic District as worthy of the protections of the Landmarks Law. This was not the first designation under the Law, but the District was the largest at the time, and it had taken several years of research to document its many historic features and the same several years of debate to agree up the district boundaries. It was a studied outcome reflecting more than a few compromises, but within the geographical

reach enfolded by the District lines, the goal was undoubted: the fabric of Greenwich Village – this absolutely unique world with its great stock of historic structures and rich Bohemian associations – was to be protected to the full extent that the law permitted.

Unfortunately, the protections did not hold up in all cases. In one of its least distinguished actions since the Landmarks Law was passed, a very distinguished Commission sanctioned the demolition of the Seton Building and Lowenstein Pavilion at St. Vincent's, resting much of its decision on the Hospital's representations that modernization was not only essential, but would serve it for many years into the future. The pedestrian buildings that replaced the older structures have remained eyesores in the Village ever since.

When, at the end of 2007, St. Vincent's filed its application to demolish eight buildings on the East Campus, plus the O'Toole Building to the west and replace them with a major hospital tower and a massive condominium development, it appeared that history might repeat itself. However, the current Commission has not let that happen. Standing up for O'Toole and standing behind the kind of protections the Landmarks Law was intended to provide, the Commissioners individually, one by one, spoke to the significance of the former National Maritime Union headquarters and the importance of preserving it, refusing to roll over, as its predecessors had done. As a result, St. Vincent's cannot raze the building simply because it wants to. If O'Toole is to be sacrificed, the Hospital must demonstrate that hardship that requires such a violent and history-defeating result; it must prove that the Constitution allows no other outcome.

Protect the Village Historic District believes deeply that the O'Toole Building represents so important a part of the City's history and architectural legacy that nothing short of absolute necessity can justify its extinction. As discussed at length below, PVHD also believes that St. Vincent's has come nowhere near demonstrating such necessity and that if the hardship application is approved, it will be a license for charities across the City to demolish historic structures that they own or acquire. Yet as fervently as we hold these views, it is for the Commission to make the determination. And it is to the Commissioners that we look to protect the Historic District and vindicate the Landmarks Law. You have brought us this far, but St. Vincent's is before you again seeking the same relief you denied them before.

The Landmarks Preservation Law created a Landmarks Preservation Commission not to preside over the demolition of the landmarks but to try to safeguard them to the greatest extent possible. This case is a test of the extent of that possibility. If the Commission saves O'Toole, it will have served its mission in a fashion that strengthens the Law and the future of preservation in our City. If it cannot – or will not – the consequences for the future will be very much different.

#### The Importance of the Curran/O'Toole Building Reviewed

Among the sites included within the Greenwich Village Historic District was the one on Seventh Avenue between 12<sup>th</sup> and 13<sup>th</sup> Streets that, then and now, supports the O'Toole Building. There, on May 16, 1964 – slightly less than five years before the District was approved – the National Maritime Union

had dedicated its new national headquarters (combined with a New York hiring hall) as the Joseph Curran Building.

Six weeks before its dedication, the Curran Building was reviewed by Ada Louise Huxtable, the architecture critic for *The New York Times*, who wrote:

“The National Maritime Union has built itself a battleship on Seventh Avenue. The union’s new national headquarters and New York offices are housed in a Frank Lloyd Wright-type of building in a city that boasts only one Frank Lloyd Wright original, the Guggenheim Museum.

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“Mr. Curran’s dream house . . . is already a New York landmark before its formal dedication.” (emphasis added)

Ms. Huxtable bemoaned the fact that cost considerations had foreclosed the use of poured concrete (as the architect, Albert Ledner, had proposed) and that the building had instead been constructed using more conventional steel-supported construction with a concrete overlay. She then continued as follows:

“Now that the worst has been said, let it be added that within the Wrightian esthetic, if one accepts the overlay, this is a very striking building, with many handsome details. Its architect is talented and conscientious. Its standards of design are high and painstaking.

“Even the structural compromise is turned to advantage by the use of all-glass walls on the fourth and fifth office floors behind the portholes, which temper glare and give a two-layered wall of intriguing effects. . .

“There is no reason why the N.M.U. could not have followed the line of least resistance and added another cheap, dull, routine box with a shiny façade a big sign to the New York scene. . .

“Or it could have treated itself to some Miami flash or the vulgar and ponderous marble banality that is the general level of most union national headquarters in Washington. It decided instead to go for

architecture. Whatever reservations may be held, New York needs more of those decisions (emphasis added) [from NY Times, 3/31/64]

Another observer on the scene at the time the Curran Building was dedicated was the writer, Mary Perot Nichols, who is quoted in Robert A. M. Stern's *New York, 1960*. According to Mr. Stern, Ms. Nichols wrote in the *Village Voice* that "the building was palatial and highly tasteful" and described the cornices as giving "the impression of either portholes or waves." Nichols added that "the whole thing has a Moorish quality recalling the rollicking days of the Barbary pirates."

A similar assessment was made by this Commission when the Greenwich Village Historic District was designated in 1969. Addressing the Joseph Curran Building (as it was known at the time), the Designation Report stated:

"The large five-story building of the National Maritime Union is a striking contemporary structure. Erected in 1962-63 from plans by Arthur A. Schiller and Albert Ledner, it serves both as its National Headquarters and as its Port of New York Office. The main portion of the building fronting on the Avenue is a glistening white, built above two curving glass-block walls. It has two overhangs at the top floors which are dramatized by their scalloped edge profiles. These overhangs produce an interesting play of light and shade. The rectangularized pattern of the jointing of the stone veneer lends a new dimension to the building, making us doubly aware of the various wall planes. . . Behind the main mass a six-story section rises up, extending through from street to street."

As time passed, however, some of the criticism turned sour. Paul Goldberger, in particular, trashed the Building in his 1979 writings on New York architecture. But by then, the context, and much of the striking quality, of the structure had been lost as St. Vincent's turned it into an outpatient facility that

advertised itself as an adjunct hospital oddity. Broken up into a rabbit's warren of small offices, surrounded by a wrought-iron fence that largely obscured the glass-walled first floor on which the Building would otherwise have seemed to float, left to age as gray soot dimmed its white tiling, and completely separated from its historic maritime context, it is no wonder Mr. Goldberger and others did not find much about the O'Toole Building they could describe as distinguished.

It has taken this case and the work of contemporary architects and others, including the members of this Commission, to bring the O'Toole Building out of the shadows and shine a light on the remarkable features that make it a landmark and an important part of the City's cultural history. This work began with New York/Tri-State DoCoMoMo, whose detailed background paper on the Curran/O'Toole Building not only identified the architectural merits of the structure, but also provided important context in terms of its architect, Albert Ledner, and his relationships with Frank Lloyd Wright and the National Maritime Union. The DoCoMoMo document also placed the building in context within the Modernist Movement, of which the Guggenheim and Whitney Museums were perhaps more distinguished examples, but nonetheless of a kind with Curran/O'Toole.

Even before the Commission convened its hearings on the St. Vincent's application, the significance of the O'Toole Building was further underscored – and finally made public in the broadest sense – by Nicolai Ouroussoff writing in *The New York Times* on April 1 of this year:

“The application by St. Vincent's Catholic Medical Center calls for the demolition of nine structures on West 11<sup>th</sup> and 12<sup>th</sup> Streets, near Seventh Avenue, to make way for a towering new co-op building and

hospital. The threatened buildings range from the 1924 Student Nurses Residence Building to the 1963 O'Toole Building, one of the first buildings in the City to break with the Modernist mainstream as it was congealing into formulaic dogma.

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“The threatened demolition of the O'Toole Building is most troubling of all. Designed by New Orleans architect Albert C. Ledner, it is significant both as a work of architecture and a repository of cultural memory.

“It was built to house the National Maritime Union, as the era of longshoremen and merchant sailors was nearing an end. Its glistening white façade and scalloped overhang, boldly cantilevered over the lower floors, were meant to conjure an ocean voyage and a bright new face for the union. (Think of “On the Waterfront”). Its glass brick base, once the site of union halls, suggests an urban aquarium.

“In short, you don't need to love the building to grasp its historical value. Like Ledner's Maritime dormitory building on Ninth Avenue or Edward Durell Stone's Columbus Circle, the O'Toole represents a moment in time when some architects rebelled against Modernism's glass-box aesthetic in favor of ornamental facades.

“Viewed in this context, the O'Toole Building is part of a complex historical narrative in which competing values are always jostling for attention. This is not simply a question of losing a building; it's about masking those complexities and reducing New York history to a caricature. Ultimately, it's a form of collective amnesia.” (emphasis added).

At the initial LPC hearing (held the same day) on St. Vincent's application, DoCoMoMo presented testimony that echoed the findings in its background paper and urged the Commission to reject the Hospital's application to demolish O'Toole. By this time, others, including Community Board 2, had also come to recognize the historic and architectural importance of the structure. The significance of the Building was brought home even more pointedly by architect Françoise Bollack, whose historic preservation work includes the restoration of the State Capitol in Albany, in testimony that she gave on April 15:

“The [Curran/O’Toole] building was designed by Albert Ledner . . . . Ledner had studied with Frank Lloyd Wright . . . and his designs were influenced by ‘the master’ in their horizontal emphasis and their free-spirited use of quirky - sometimes “baroque” - forms. One only needs to think of the contemporary Marin County Civic Center, with its row of scalloped arches, designed by Wright in 1957-58 and built from 1959 to 1968, to understand the Curran/O’Toole building’s place in the American modern tradition of experimentation and in the heritage of Frank Lloyd Wright.

“In addition to the Curran/O’Toole Building, in the period between 1959 and 1966 New York saw the design and construction of several notable mid-century modern buildings: the best known of these are Wright’s world renowned 1959 Guggenheim Museum, also a New York City Landmark, and Marcel Breuer’s Whitney Museum designed in 1966, also a New York City Landmark.

“All three buildings share a similar scheme: they appear to float above the ground; they are cantilevered up and out in successive tiers and, when seen from the main façade, they appear to be free standing but are in fact attached to their block in the back. All three buildings present themselves as monuments in the urban fabric – distinct in their language, physically separate – and it is particularly significant that, while the Guggenheim and the Whitney are museums, the O’Toole building is the headquarters of a maritime union – a fitting monument in this area of the City . . . .

“The Curran/O’Toole building is an important building that charts the development of mid-century modern architecture in the United States and particularly in New York City. Along with the Solomon Guggenheim Museum and the Whitney Museum, it provides a spirited variation of Le Corbusier’s *Five Points of a New Architecture* . . . which called for (1) buildings to be built on pilotis (the O’Toole building “floats” on its two glass block drums, (2) to have roof gardens (the O’Toole roof was designed as a space to be enjoyed and the tunnel and cylindrical elevator penthouse give it a nautical feel), (3) a ‘free’ plan, (4) horizontal ribbon windows, (5) a free façade where windows can run from one end to the other (whereas this means strip windows in early modern architecture, in the case of O’Toole, Ledner gave Corbu’s rule a different formal interpretation).

“These highly idiosyncratic mid-century buildings are irreplaceable. The Curran O’Toole Building, in particular, as it looks to both the European tradition of LeCorbusier and the American tradition of Frank Lloyd Wright, has yet many lessons to teach – after three

decades of physical and intellectual neglect, we are just beginning to understand its architecture and its meaning.” (emphasis added).

At its May 6 public meeting, all 10 members of this Commission agreed that O’Toole is a building of significant architectural and cultural importance.<sup>1</sup>

Since then, the State of New York, through its Office of Parks, Recreation & Historic Preservation, has also weighed in on the importance of O’Toole. In a letter dated June 3, 2008, to Francoise Bollack, OPRHP wrote:

“We have completed our review of the State and National Register applications your graduate students submitted to our office on May 12, 2008 for the O’Toole Building (former National Maritime Union/ Joseph Curran Building) at 36 Seventh Avenue. Based on the documentation provided and additional in-house research, it is the opinion of the State Historic Preservation Office that the building individually meets the criteria for listing to the State and National Registers of Historic Places. I have attached a copy of the Resource Evaluation to this letter for your records.” (emphasis added)

In the Resource Evaluation, the State Historic Preservation Office emphasized both the architectural and the historic importance of O’Toole, noting how the building itself was a reflection of the history of the maritime industry that had centered on the West Side waterfront for more than 100 years. The National Maritime Union was one of the key players in this rich history, and the Curran Building, with its nautical

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<sup>1</sup> To be contrasted was the presentation and testimony of George E. Thomas, historic preservation witness for St. Vincent’s, at the April 1 LPC hearing. Dr. Thomas’s testimony was a “put down” of the O’Toole Building, with, as one example, Ms. Huxtable’s review reduced to a “comment.” Virtually every aspect of the structure was described in a contemptuous way (“With each floor larger than one below and finally the roof extending beyond the entire structure, the result is an aggressive, even threatening appearance that is made all the more so by its absolute lack of human scale.”) Comparisons to the Guggenheim and Whitney were noted, but in a fashion that was itself a “put down.” On April 15, St. Vincent’s presented Susan Snyder, a colleague of Dr. Thomas, to elaborate on his testimony. She went even further in an effort to dismiss the importance of O’Toole, asserting that it was a monument to a “corrupt union.” In fact, as the evaluation by the State Historic Preservation Office points out (see the text above), the Curran Building reflected a democratization of hiring practices for seamen (the Maritime Union represented sailors, not longshoremen) and the structure was a monument to the cleaning-up of corruption, a struggle in which the Maritime Union played an important role.

references, was intended to invoke the Union's important role in the seagoing culture of the City.

The Resource Evaluation reads, in part, as follows:

“Though less than 50 years of age -- and, thus, outside the period of significance for the National Register-listed Greenwich Village Historic District in which it is located -- the National Maritime Union headquarters building is exceptionally significant at the national level by meeting National Register Criterion A in the area of maritime labor history. The National Maritime Union was formed in 1937 and by 1946 had 73,000 members. By the mid-1950s, NMU undertook a major building program of hiring halls as a tangible expression of the union's fight to rid the maritime industry of corruption. . . .

“While NMU represented the seamen working aboard the ships rather than the longshoremen, the union sought to improve and professionalize the maritime industry by instituting fair hiring practices. The hiring hall was the keystone of fair employment practice. Jobs awarded through a union hiring hall were based on seniority and “time of breach” – how long a member had been without work.’ The construction of hiring halls in a progressive architectural design projected an image of reform related to the changes forced on the industry in the 1950s.

“NMU hired architect Albert C. Ledner, a student of Frank Lloyd Wright, to design hiring halls in port cities through the U.S. Ledner designed a total of 14 projects for the NMU between 1954 and 1968. In 1961, he began work on the largest of the projects – a national headquarters for the union's 35 port cities combined with a New York hiring hall. It made sense that NMU's headquarters be located in New York which was the country's busiest port in the postwar years. Dedicated in 1964, the headquarters was named after Joseph Curran, the union's founder and long-time president who served from 1937 to 1973.

“Affiliated with the AFL-CIO, the establishment of the NMU was part of the growing labor union movement in the United States during the 1930s and 1940s. From its inception, NMU membership was racially integrated. Under the leadership of Curran, NMU successfully fought to eliminate racial discrimination in hiring, wages, living accommodations and work assignments. The new hiring halls ensured a steady supply of experienced seamen for the shipping industry and reduced the corruption which had plagued the industry. ‘Curran worked to make American merchant seamen the best-paid maritime workers in the world. NMU established a 40-hour work week, overtime, paid

vacations, pension and health benefits, tuition reimbursement, and standards for shipboard food and living quarters.

“The main block of the Curran Building cantilevers above the two curving glass-block walls of its base, giving it the appearance of floating on its site. The concrete walls – covered with white ceramic tiles since 1966 to eliminate periodic cleaning and painting – progressively cantilever in increments as they ascend. The overhangs are accentuated by scalloped-edge profiles creating an interesting play of light and shadow. Ledner employed a nautical theme. The scalloped edges of the façade panels, for example, resemble the portholes of a ship when seen from straight on. The forms of the rooftop forms are reminiscent of a ship’s smokestacks.

“The first floor of the building originally housed a large hiring hall, which was divided into two spaces – one for deck and engine crews and one for stewards – by a large retractable scheduling board . . .

“The National Maritime Union headquarters meets Criterion C as a locally significant example of postwar Modern architecture employing expressive forms. It is part of a group of postwar buildings in New York that moved beyond the Rationalism of the International Style towards a more expressive form of organic architecture . . .

“The influence of Wright’s later work can be discerned in Ledner’s designs for the Curran Building and his other NMU hiring halls. ‘The design approach for each hall is well integrated with the site. In addition, the adjoining volumes, circulation, floor layouts, interior design and furnishings become part of a unified, interrelated composition.’ The ambitious program was decidedly modern in function and aesthetics. The circular forms used in elevation and plan for the Curran Building, for example, are reminiscent of Wright’s Marin County Civic Center (1957-1962)” (emphasis added).

The evaluation and conclusion of the SHPO underscores a point inherent in the testimony and presentations of others but not often made explicit: The Curran/O’Toole Building is deserving of protection not simply because it is located in the Greenwich Village Historic District, but very much in its own right. Both culturally and architecturally, the Building is significant and, indeed, remarkable on a stand-alone basis. If it were not in the Historic District, it would be equally as deserving of individual landmark status as the Summit Hotel on Lexington Avenue, or the Socony-

Mobil Building on 42<sup>nd</sup> Street, or Manhattan House on East 66<sup>th</sup> Street. Indeed, given its integral connection to one of New York's greatest historic industries – the maritime trade that was at the center of the City's evolution – the significance of Curran/O'Toole is arguably even greater than that of the three structures just cited (and many others). Its loss would be more than the loss of a building – it would be the loss of one of the few remaining physical links to Manhattan's shipping history. It would also represent the eradication of memory.

### The Hardship Application

In the face of the comments of the LPC Commissioners on May 6, St. Vincent's remains determined to demolish the O'Toole Building. In the initial phase of this proceeding, the Hospital argued that the demolition of the Building would be "appropriate" on the merits, without regard to any claim of hardship, and as noted in the footnote on page 8, offered the testimony of Dr. Thomas and Susan Snyder to debunk O'Toole's significance of the Building. This tack not having met with success, St. Vincent's is now asking the Commission to allow it to demolish O'Toole on the grounds of hardship. In doing so, the Hospital has not acknowledged or otherwise referenced the importance of the Building – it seems to have no regrets about tearing it down.

This is hardly new. Over the 35 years that St. Vincent's has owned O'Toole, it has paid little attention to the Building itself. It has dismembered the hiring hall with small offices. It has allowed tiles to fall from the façade and the roof garden to lapse into disuse. It has made access uninviting. And it has not maintained even the slightest reference to the Building's historic origins. This may be understandable

given the Hospital's primary mission, but it cannot be dismissed as irrelevant. *It is St. Vincent's reuse of O'Toole that has largely obscured its architectural and cultural value*; and it is the Hospital's indifference to the Building's history (and upkeep) that lulled not only itself, but also a significant portion of the public into a kind of stupor, out of which only these proceedings have awakened us. Fortunately, it is not too late to keep the wrecking ball from working its destruction.

Still, this Commission is faced with St. Vincent's "hardship" application, and it is legally obligated to pass judgment on it. But the basis for the application appears to be misplaced.

The inclusion of a "hardship" exception in the Landmarks Law was to provide a mechanism for relief when the restrictions under the Law made it impossible for an owner to realize a reasonable return on its investment in the property and thus might result in an unconstitutional "taking" of the property without just compensation. NYC Landmarks Preservation Law, §25-309. While the "hardship" provisions were primarily concerned with private ownership, a section was also included to cover charities, but this section was limited to cases where the charity proposed to sell the historic property and did not cover demolitions.

As a result, it fell to the courts to establish the criteria for "hardship" for charities proposing demolition, which was done initially in Matter of Trustees of Sailors' Snug Harbor in the City of New York v. Platt, 29 A.D.2d 376 (App. Div. 1<sup>st</sup> Dept, 1968). The basic test formulated by the court was that for a charity, the equivalent of a "taking" occurred when the facility would prevent or significantly interfere with the

charity from carrying out its essential mission if the demolition was not allowed. This test was later elaborated on in the landmark *Grand Central* and *St. Bartholomew's* cases, discussed at greater length in Point One below. Quoting the Court in the *St. Bart's* case:

“Applying the *Penn Central* [Grand Central] standard to property used for charitable purposes, the constitutional question is whether the land-use [historic preservation] regulation impairs the continued operation of the property in its originally expected use.” (emphasis added)

St. Bartholomew's Church v. City of New York, 914 F. 2d 348, 356 (2<sup>nd</sup> Cir. 1990).

St. Vincent's “hardship” case does not meet this or any other test. The Hospital's claim is explicitly limited to the O'Toole Building, yet the hardship itself has nothing to do with that structure. To the contrary, the O'Toole Building is being used, and can continue to be used, for its originally expected use as doctors' offices and outpatient clinics. The heart of St. Vincent's claim, set forth in Section 2.0 of its hardship application, is that the Hospital's facilities on the east side of Seventh Avenue do not permit it to carry out its charitable purposes. But that reality – if it is a reality – has nothing to do with O'Toole, which continues to serve, and serve well, as St. Vincent's outpatient arm.

In short, it is not O'Toole that is creating the “hardship.” Instead, in what can only be described as a giant leap of faith, St. Vincent's argues it that should be allowed to tear down O'Toole not for any limits inherent in that historic structure, but because its East Campus facilities are inadequate. O'Toole enters the picture only because St. Vincent's happens to own it, not because there is any hardship attached to it. And that is not enough.

Under the Landmarks Preservation Law, “hardship” applies to structures, not to institutions. Whatever St. Vincent’s problems, they are not caused by O’Toole. This being the case, and as discussed at greater length below, the demolition of O’Toole is not sanctioned by the Landmarks Law.

## ARGUMENT

### POINT ONE

#### THE O’TOOLE BUILDING DOES NOT CREATE A HARDSHIP FOR ST. VINCENT’S UNDER THE LANDMARKS PRESERVATION LAW

It is important at the outset to think of the O’Toole Building as Grand Central. Not that it rises to the same level of brilliance as Grand Central, although like the Terminal, its merits have been obscured by reconfiguration and neglect and the diminution of the industry it once served. Who would have foreseen that once the Kodak sign was removed from the station and the walkways to the Lower Level were opened up and the night sky of the ceiling was cleaned to reveal the constellations and the deep blue it had once been and the façade was spruced up that what had been a rather skuzzy haunt of the homeless would be transformed back into the original glorious spaces that we revel in today. And so it might be with O’Toole – should the day ever arrive – with the open spaces of its hiring hall restored, the warren of offices reconfigured, the entrances opened up, and the rooftop garden in bloom once again.<sup>2</sup>

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<sup>2</sup> Another parallel is that the proposal in each case contemplated a huge tower to replace the generally low-rise historic structures. In the case of Grand Central, the tower would have “preserved” the Terminal but so obscured its historic importance as to lead the LPC to turn it down. In the case of the Curran/O’Toole Building, the new tower would require the complete demolition of the historic structure.

But that is not the parallel we mean to emphasize. Rather, it is important to think of O’Toole – and all other important landmarks – as Grand Central because the law that protected Grand Central is the law that applies also to O’Toole. The value of particular landmarks will vary (for the reasons given above, we believe O’Toole to be of very high value), but whatever their respective merits, once identified, each is deserving of the protections of the Landmarks Law; and those protections were largely defined in the Grand Central case – Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978)(hereinafter “Penn Central”).

In that case, Penn Central, the owner of Grand Central, proposed to build a 55-story office tower on top of the Terminal. If permitted, this would have vastly increased the value of the property to Penn Central. But because Grand Central had been designated an individual landmark under the Landmarks Preservation Law, the proposal was subject to the restrictions of that law and required LPC review. After several hearings, the Commission rejected the new office tower, finding that its impact on the Beaux Arts Terminal would effectively destroy its historic character. Penn Central was left to use the station as a station; it could not derive from it the immense returns it has expected from the new office tower.

Penn Central appealed, claiming that the LPC’s action constituted a “taking” of private property for public purposes without the payment of just compensation. In time, the case reached the Supreme Court of the United States, where Penn Central argued that it was being singled out to bear an unfair burden for the benefit of the public, and that if the public wanted the benefits of a preserved Grand Central, they

had to pay for it or let the office tower go forward. Justice Brennan, writing for the Court, rejected this claim, emphasizing that limitations on the use of property are a common part of our shared societal burdens, as reflected in zoning ordinances in place across the country, and that as long as the property could be used profitably for a present or some future use, there would be no “taking.” As Justice Brennan wrote in distinguishing cases that Penn Central argued were to the contrary:

“Unlike the governmental acts in *Goldblatt, Miller, Causby, Griggs, and Hadacheck*, the New York City law does not interfere in any way with the present uses of the 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 Central, 438 U.S. at 136. (emphasis added)

This test is determinative of the current proceeding. St. Vincent’s acquired the Curran/O’Toole Building in 1973 and promptly adapted it to an outpatient facility for the Hospital. For the last 35 years, the Building has continued to be used for the same purposes. The restrictions imposed on its use by the Landmarks Law “do not interfere in any way with the present uses” of the Building. Its inclusion as a landmark within the Greenwich Village Historic District “not only permits but contemplates that [St. Vincent’s] may continue to use the property precisely as it has been used for the past [35] years.” “So the law does not interfere with what must be regarded as [St. Vincent’s] primary expectation concerning the use of the parcel.”

It is not often that a case such as that involving Curran/O’Toole is precisely on all fours with the earlier definitive precedent, but as the quotations above show, that is the situation here. There is no hardship – physical or financial – imposed on St.

Vincent's by O'Toole. There is nothing about O'Toole that prevents St. Vincent's from carrying out its charitable mission. To the contrary, O'Toole continues to serve that mission by providing facilities that are essential to any functioning hospital – a place for its doctors to have their offices and a place for outpatients to come to see them and be treated.

St. Vincent's attempts to do an end-run around the Penn Central holding by referencing conditions on the East Campus that it claims keep it from pursuing its charitable mission. Even if this is so – and in our view, the claim is very much in question – that might justify allowing the Hospital to demolish or modify its East Campus facilities on the basis of hardship, but it provides no justification for destroying O'Toole. Under the Landmarks Law, hardship is referenced to specific structures, not to general institutional problems. There is no precedent for allowing the demolition of a historic structure because certain other facilities do not work the way the owner wants them to; and there is no law that supports such a position. If the Commission were to allow it, it would, of course, set a precedent, but one having no legal basis to rest on, and equally important, one that would bode ill indeed for landmarks protection in the future.

The conclusion that the O'Toole Building does not create a hardship for St. Vincent's is further buoyed by the decision of the United States Court of Appeals for the Second Circuit in St. Bartholomew's Church v. The City of New York, 914 F. 2d 348 (1990). In that case, St. Bartholomew's proposed to demolish its landmarked community house and build in its place a 47-story office tower. Claiming "hardship" under the same section of the Landmarks Law that St. Vincent's invokes to support

the demolition of O'Toole, the Church asserted that (1) it could not carry out its charitable purposes due to the restrictions imposed by the Law and (2) the only way it could carry out those purposes was to demolish the community house and build an office tower that would generate the revenues necessary to achieve such purposes. This Commission denied the "hardship" application and, on appeal, the District Court and the Court of Appeals upheld that decision.

Early in its decision, the Second Circuit noted that the Landmarks Law had

“. . . drastically restricted the Church's ability to raise revenues to carry out its various charitable and ministerial programs. In this particular case, the revenues involved are very large because the Community House is on land that would be extremely valuable if put to commercial use. 914 F.2d at 355

Nonetheless, the Court concluded that this diminution of commercial value did not constitute a "taking", finding that "the Supreme Court's decision in Penn Central compels us to hold otherwise."

"In *Penn Central*, the Supreme Court held that the application of New York City's Landmarks Law to Grand Central Terminal did not effect an unconstitutional taking. . . . The Supreme Court squarely rejected Penn Central's claim that the building restriction had unconstitutionally 'taken' its property. Central to the Court's holding were the facts that the regulation did not interfere with the historical use of the property and that that use continued to be economically viable . . ." 914 F. 2d at 356.  
(emphasis added)

The Court continued as follows:

"Applying the *Penn Central* standard to property used for charitable purposes, the constitutional question is whether the land-use regulation impairs the continued operation of the property in its originally expected use. We conclude that the Landmarks Law does not effect [such] an unconstitutional taking . . . In both cases, the deprivation of commercial value is palpable, but as we understand *Penn Central*, it does not

constitute a taking so long as continued use for present activities is viable. 914 F. 2d at 356-57. (emphasis added)

Here, again, the holding is on point. As long as the Community House could continue to be used for the purposes it had long served, the restrictions imposed by the Landmarks Law were not a taking of the charity's property interest and thus were not unconstitutional. The same situation pertains with O'Toole. The Building's "continued use for present activities is viable" – it can continue to be used for outpatient clinics and doctors' offices, as it has been for the past 35 years. The restrictions do not create a hardship, and there is, therefore, no basis for allowing the Hospital to demolish O'Toole and eviscerate memory.

## POINT TWO

### ST. VINCENT'S CANNOT CLAIM HARDSHIP BECAUSE THE LANDMARKS RESTRICTIONS WERE ALREADY IN PLACE WHEN IT ACQUIRED O'TOOLE

As noted previously, the LPC approved the designation of the Greenwich Village Historic District in April 1969, four years after the Board of Estimate had approved the Landmarks Preservation Law. At that time, the Curran Building (as it was then known) was the headquarters of the National Maritime Union, for which it had been built, and also supported the New York hiring hall for the Union.

As also noted previously, the Designation Report singled the Building out as "a striking contemporary structure" and continued at some length to explain the elements that made it so. This was not a passing reference, but a focused description that set the Building apart from other structures. Only five years old at the time, the Curran Building was not described in the historical terms used to characterize the brownstone

and townhouse fabric of the Village. Rather, the Report focused on its modern architecture and how it reflected the role that it served. Not “run of the mill,” but “striking;” not Greek Revival or Federal, but “contemporary.”

St. Vincent’s acquired the Curran Building in 1973, when the features that led it to be singled out in the Designation Report (and also in Ada Louise Huxtable’s review) were still in place. It bought the Building knowing it to be in the Greenwich Village Historic District and aware that it was subject to the restrictions of the Landmarks Preservation Law. Since the Hospital presumably had competent legal counsel, as well as a policy insuring title, we can assume that it was also aware that the Building was identified specifically in the Report. Moreover, St. Vincent’s was already familiar with the Landmarks Law and the restrictions it imposed as a result of its efforts to clear the Triangle site.

Given all this, St. Vincent’s clearly understood when it purchased the Curran Building that the structure was specially protected under the Landmarks Law, and no doubt, that fact was reflected in the purchase price (the entire new building, *including* the land, cost only \$6.4 million). But this made no difference to the Hospital, because it did not plan to add to the structure or alter it externally. The Curran Building was acquired with the expectation that it would be used for doctor’s offices and outpatient services, and the internal alterations necessary to adapt the structure to these uses did not require exceptions for the restrictions. The Hospital’s investment-backed expectations, in short, were to use the building within its existing skin.

Those expectations continue to be fulfilled – O’Toole, as Curran was renamed, is still useful, and used, for the purposes for which it was acquired; and it can continue to be used in that way. Under the Penn Central and St. Bartholomew’s decisions, this defeats any claim that demolition is justified due to hardship.

But there is an equally important legal doctrine that applies here – one tied closely to the concept of reasonable investment-backed expectations. And that is this: When a buyer purchases property that is already subject to restrictions on its use, he, she or it cannot thereafter complain that the restrictions deprive it of reasonable use of that property, even if the restrictions foreclose a reasonable return (or, in the instance of a charitable organization, prevent it from pursuing its mission.)

The leading case in New York is Gazza v. NYS Department of Environmental Conservation, 89 N.Y.2d 603, decided by the Court of Appeals in 1997. This case involved a homeowner who sought relief from restrictive wetlands regulations that he said constituted a “taking” of his property, because as a result of the restrictions and the denial of his request for a variance, the owner was unable to build on it. Noting that the owner had acquired the property after the regulations were in place, the New York Court of Appeals held that there was, and could be, no taking, since the owner had known of the restrictive regulations when he bought the property and thus taken it subject to the regulations. Thus, he could not complain of a “taking.”

“Although petitioner's permit application was entitled to due consideration, petitioner's claim that the denial of his variance was a "taking" must fail because he never owned an absolute right to build on his land without a variance. As stated in *French Investing Co. v City of New York* (39 NY2d 587, 597), "[i]t is recognized that the 'value' of property is not a concrete or tangible attribute but an

abstraction derived from the economic uses to which the property may be put." Since the enactment of the wetland regulations, the only permissible uses for the subject property were dependent upon those regulations which were a legitimate exercise of police power. Petitioner cannot base a taking claim upon an interest he never owned. The relevant property interests owned by the petitioner are defined by those State laws enacted and in effect at the time he took title and they are not dependent on the timing of State action pursuant to such laws." 89 N.Y. 2d at 818.

As a result, he had neither the right nor a basis to complain. St. Vincent's situation is identical, and it cannot complain that the landmark regulations which protect O'Toole constitute a "hardship" for it, any more than the wetlands regulations limiting Gazza's ability to use his property constituted a legal "taking" (the equivalent of "hardship" under the Landmarks Law).

On the same day the Court of Appeals handed down its decision in Gazza, it also decided Anelo v. Zoning Board of Dobbs Ferry, 89 N.Y. 2d 535 (1997), a case in which a property owner had been denied a variance from a "steep slope" ordinance, making it impossible for her to build anything on the plot. Echoing its decision in Gazza, the Court of Appeals wrote:

"On appeal to this Court, petitioner's main argument is that the denial of a variance from the steep-slope ordinance works a taking of her property. Petitioner's takings claim must fail because she never acquired an unfettered right to build on the property free from the steep-slope ordinance. Petitioner purchased the property in 1991, two years *after* the steep-slope ordinance was enacted. This statutory restriction thus encumbered petitioner's title from the outset of her ownership and its enforcement does not constitute a governmental taking of any property interest owned by her." 89 N.Y. 2d at 540.

Gazza and Anelo were both decided two years before the decision in Palazzolo v. Rhode Island, 533 U.S. 606 (2001), in which the U. S. Supreme Court held that the

single fact that a property was acquired after regulations were in place should not be regarded as conclusive in the face of a “taking” claim. However, a majority of the Justices agreed that this factor was very important in reaching any conclusion regarding a claimed taking, because it bore so significantly on the central criterion laid down by the Supreme Court – namely, whether the regulation defeated an investor’s “reasonable investment-backed expectations.” Where a regulation is already in place at the time of a purchase, the buyer has a heavy burden indeed to demonstrate that it had reasonable investment-backed expectations that it would not have to comply with the restrictions. This is the real force of the Gazza and Anelo cases, and it is equally as applicable to St. Vincent’s in this LPC proceeding as it was to the plaintiffs in the two leading New York decisions. Indeed, as we have already discussed, St. Vincent’s acquired the Curran Building to use for doctors’ offices and outpatient clinics, which it could do within the restrictions of the Landmarks Law, and there is nothing about O’Toole today that defeats those expectations.

Given that St. Vincent’s acquired the O’Toole Building after the landmark regulations affecting it were in place, there is another important reason why the Commission should not find hardship in this instance. **If it held otherwise, it would be a disastrous precedent.** Suppose, for example, that the property St. Vincent’s owned was not O’Toole but the Jefferson Market Courthouse, which had been converted to provide doctors’ offices. Although it functioned well in that role, it was the only property St. Vincent’s owned where it could build its new tower, and the Hospital claimed hardship. It had known when it acquired the Courthouse of the landmark restrictions but now it was asking permission to demolish the Courthouse

and effectively remove it from the Historic District. This is exactly the situation that pertains with respect to O'Toole, and if demolition is allowed here, then it would have to be allowed for the Courthouse. The consequences would be profound.

**Indeed, under such a legal interpretation, any charity could acquire a landmark property and then claim hardship because the building was not suited to its charitable mission.** For example, St. Vincent's could buy a landmarked building tomorrow (or *any* property in a Historic District), wait a few years, then turn around and say it needed the property for a high-rise hospital and research facility, claiming it was necessary to demolish the historic structure in order to carry out its charitable purposes. Given that St. Vincent's, by selling off its East Campus, will be hemming itself in, this is not a far-fetched scenario. Yet the precedent will be set.<sup>3</sup>

Of equal concern, charities that today own individual landmarks or properties within historic districts that they are using within the restrictions of the Landmarks Law will be encouraged to take the same tack as St. Vincent's is taking here, seeking to replace those properties with new construction that better serves their charitable purposes or generates revenues they claim are needed to support those purposes. For example, NYU or the New School could decide that the only way they can provide more dormitory space, which is essential to carrying out their charitable missions, was to demolish a row of Greenwich Village townhouses and construct a

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<sup>3</sup> A candidate property for another "hardship" exception could well be the Triangle Site, which St. Vincent's already owns. If the Commission should approve the current application to demolish O'Toole, and five years or 10 years hence, the Hospital concluded that it had to expand in order to fulfill its charitable mission, there will be little the Commission could do to turn it down. A finding of hardship in this case will be all but determinative of the issue.

large new building in their place. It would be all but impossible to distinguish such a request from the one St. Vincent's is making here. And many other examples could be suggested, ranging from a church "needing" to build a new community house to an institution like Trinity, with its vast real estate holdings, identifying special needs that could only be served by replacing a historic structure. Should such a precedent be set, the long-range ramifications will be severe, to say the least.

This Commission has faced other applications that involved very high stakes, with significant potential fall-out. One of the first, and certainly the most important, was **Grand Central**, where the continued magnificence of the Terminal was not the only issue. It was also apparent that if Penn Central could not build as it had proposed, the corporation could well go under – a reality that came to pass, with the loss of both fortunes and jobs, a couple of years after the Supreme Court decision. A second was **St. Bartholomew's**, where the Church's claim that it could not carry out its charitable mission using the existing Community House evoked great sympathy in many sectors of the City. Yet in each of these instances – and despite the external pressures – the commissioners at the time stood firm in their duty and ruled in favor of preservation at the expense of economic well-being and charitable pleas.

That was not easy to do, but they did it. Moreover, each of the decisions generated a judicial precedent that has not only justified the Landmarks Law, but filled it out and given it a greater reach than it was thought to have before. That, in turn, has led to an increasing number of designations of both individual landmarks and historic districts, all at a time when they are needed most. This Commission has carried that flag with distinction. It should not, and need not, backtrack in this case.

The law is clear. It is up to this Commission to enforce it. We respectfully urge it to do so.

### POINT THREE

BECAUSE THE HARDSHIP ST. VINCENT'S CLAIMS WOULD  
BE SELF-CREATED, IT CANNOT SERVE AS A BASIS FOR  
SETTING ASIDE THE RESTRICTIONS OF THE LANDMARKS  
LAW AND ALLOWING THE DEMOLITION OF O'TOOLE

It is almost black letter law in New York State that when an owner of property has created its own hardship, from which it seeks relief by way of a variance or special exception, it is not entitled to such relief, whatever the hardship. For the most part, holdings to this effect have arisen in cases where an owner has acquired property that is already subject to the restrictions from which it is seeking relief. E.g. Matter of Clark v. Zoning Board of Hempstead, 301 N.Y. 86 (1950); Matter of Cowan v. Zoning Board of Smithtown, 41 N.Y.2d 591 (1977); Matter of First National Bank of Downsville v. City of Albany Board of Zoning Appeals, 216 A.D.2d 680 (1995). These holdings further reinforce the points made above in this Brief regarding the consequences of St. Vincent's having acquired the O'Toole Building knowing that the property was subject to the restrictions of the Landmarks Law.

In this case, however, there is another aspect of St. Vincent's actions that, in our view, constitutes a form of self-imposed hardship. This is the Hospital's decision to sell its entire East Campus for future residential use. In the earlier phase of this proceeding, the justification for selling was that the money was needed to finance construction of the new hospital tower on the O'Toole site. But that argument is no part of St. Vincent's hardship claim. To the contrary, it is solely on the basis of

“physical hardship” that the Hospital now seeks to demolish O’Toole. For the purposes of the hardship application, then, the proposal to sell off the entire East Campus is discretionary, not something mandated by financial necessity. Yet it is as a result of this action that St. Vincent’s is left with O’Toole as its only alleged alternative. It is difficult to imagine a clearer instance of self-created hardship.

Of course, St. Vincent’s asserts that the East Campus cannot be rehabilitated to support the operations of a modernized hospital. However, this claim is very much in question.

To begin with, St. Vincent’s said otherwise to its creditors in its recent bankruptcy proceeding. Specifically, it represented that:

“Since it began working in July, 2006, CIT [the real estate consultant retained by St. Vincent’s] has undertaken an extensive analysis of the Manhattan Campus and has determined that SVCMC may be able to maximize value by selling certain buildings in their Manhattan Campus and building a new state-of-the art hospital on the property currently occupied by the O’Toole Building (on the west side of Seventh Avenue). The Debtors (and the Committees) have been advised that accomplishing such a reconfiguration of the SVCMC’s real estate is dependent on numerous levels of regulatory approval, including zoning approvals, that could take three (3) to five (5) years, and actually completing the sale of certain buildings and the construction of a new hospital on the O’Toole Building location could take several more years after regulatory approvals are received. Furthermore, SVCMC understands that the success of this alternative requires not only finding an appropriate development partner but also substantial philanthropy. Given the length of time that this effort would require, the Plan is not based on this effort or its ultimate success. Success in this effort, however, would greatly enhance SVCMC’s ability to perform in the future in accordance with the Plan. And if the effort is not successful, SVCMC will be required to expend substantial funds to rehabilitate the current Manhattan Campus to address identified deferred maintenance and capital improvements. (emphasis added)

Second, in the earlier stage of this proceeding, St. Vincent's did not assert that it would be impossible to rehabilitate the East Campus to create a modern hospital – it rather claimed it would be much more expensive to do so [see Ballinger's Existing Facility Condition Report, September 2007]. In fact, we believe that the Ballinger Report significantly overestimates the cost of a renovation scenario by failing to take account of using Cabrini on a phased interim basis and thus extending the schedule for construction well beyond what would actually be required. However, whether or not that is the case, St. Vincent's is not seeking a hardship finding on the basis of financial necessity – it has expressly excluded such concerns from its application to the Commission. *As a result, the issue before the Commission is not what it might cost to rehabilitate the East Campus – it is limited to whether it is physically feasible.* As to this, St. Vincent's own consultant has already opined that it is.

As an aside, St. Vincent's insistence that it cannot phase reconstruction of the East Campus to allow its rehabilitation as a modern hospital is surprising in view of the fact that this must have been exactly what it did when it demolished Lowenstein and Seton and replaced them with Coleman and Link. Moreover, there was no other hospital standing empty when the earlier demolition and reconstruction were carried out. Today, in contrast, Cabrini offers the option of interim facilities that are already in place but not being used.

It seems to us clear that the real reason St. Vincent's is seeking to sell the East Campus is, as it originally acknowledged, to generate funds to build the new tower on O'Toole. That, however, is a discretionary choice, and if the Hospital continues to

pursue that course, it will have created its own hardship. That cannot serve as the basis for eradicating O'Toole.

#### POINT FOUR

#### THE HARDSHIP TEST ST. VINCENT'S INVOKES IS NOT THE CORRECT TEST OF HARDSHIP UNDER CURRENT LAW.

St. Vincent's asserts that the applicable test for hardship under the Landmarks Law is set forth in Matter of Trustees of Sailors' Snug Harbor in the City of New York v. Platt, 29 A.D.2d 376 (1968), in the following language:

"The criterion for commercial property is where the continuance of the landmark prevents the owner from obtaining an adequate return. A comparable test for a charity would be where maintenance of the landmark either physically or financially prevents or seriously interferes with the carrying out of the charitable purpose."

St. Vincent's contends that this single sentence in a lengthy opinion controls the entire reach of this and all other hardship proceedings, emphasizing – and relying upon – the disjunctive nature of the test. It is enough, St. Vincent's claims, that landmark status physically prevents the carrying out of its charitable purposes, making irrelevant the question of whether there is any financial hardship.

That this strained interpretation of the law is incorrect is reflected in the section of the Snug Harbor opinion that immediately follows the language quoted above. Unlike St. Vincent's, the court did not stop with the simplified test that Hospital invokes, but went on to add:

- "In this instance [i.e., at Snug Harbor], the answer would depend on the proper resolution of subsidiary questions, namely:

- whether the preservation of the buildings would seriously interfere with the use of the property,
- whether the buildings are capable of conversion to a useful purpose without excessive cost, or
- whether the cost of maintaining them without use would entail serious expenditures – all in light of the purposes and resources of the petitioner.”

It is apparent from these subsidiary questions that the Snug Harbor court did not believe that a case of hardship could be made out simply because of physical limitations. To the contrary, other relevant factors included (1) whether the buildings could be converted to a useful purpose without excessive cost (which is clearly the case with O’Toole, which already serves its purpose very well) and (2) whether the cost of maintaining them would entail serious expenditures “in the light of the purposes and resources of petitioner.” In short, the Court clearly indicated that it was not enough that the Snug Harbor buildings were physically incapable of supporting the institution’s charitable purposes; it was also necessary to consider financial factors, including whether the buildings could be maintained “without use” at a reasonable cost in light of the resources of the institution.” In view of this language, there is no basis for St. Vincent’s claim that Snug Harbor supports a finding of hardship without regard to the Hospital’s financial condition.

If there were any doubt about this conclusion, it was answered decisively in the St. Bartholomew’s case. The principal claim of the Church was that its existing Community House was physically inadequate to allow it to pursue its charitable mission. The Second Circuit addressed this question, but not in isolation; it also looked closely at St. Bartholomew’s financial resources, as well as the costs of renovating and/or maintaining the existing facility. In each instance, it concluded

that the Church had not sustained its burden of proof. In the end, the holding that should be conclusive here is the one we have identified in Point One above – i.e., that the Community House could continue to be used for its current activities and thus there was no constitutional deprivation of property under the test laid out in Penn Central. But the case was also decisive in recognizing that physical and financial hardship cannot be separated, as St. Vincent’s has contended can be done in this proceeding. Applied to the present case, the holding in St. Bartholomew’s compels the conclusion that there is no hardship that justifies the demolition of O’Toole, and beyond that, that St. Vincent’s restrictive reading of the hardship standard is mistaken.

#### POINT FIVE

#### THE RELEVANCE OF ALTERNATIVES

PVHD submits that it is not necessary to consider alternatives in the context of the hardship application that St. Vincent’s has submitted. That application is limited to the O’Toole site, so the focus of the Commission’s evaluation must be limited to O’Toole. In this context, it is clear beyond any doubt that O’Toole does not create a hardship for St. Vincent’s. It can continue to be used as it has for 35 years to support St. Vincent’s outpatient services. Under the Penn Central and St. Bartholomew’s decisions, that fact is determinative. Moreover, as discussed in Point Two above, because it acquired the O’Toole Building with the landmarks restrictions already in place, St. Vincent’s had no reasonable investment-backed expectations that it would be allowed to demolish the structure and build a high rise tower there. Thus, it has no basis for claiming hardship.

That being said, we would like to make several observations regarding St. Vincent's crabbed interpretation of the alternatives that need to be considered and the lack of evidentiary support for its assertions regarding the feasibility of the alternatives it purports to address.

First, St. Vincent has taken the position that the only alternative sites that it need consider are those it owns or leases. This artificial limitation is without precedent and without legal basis. To the contrary, this Commission has itself made it clear in earlier proceedings that an applicant claiming "hardship" must investigate all potentially feasible alternatives. Thus, in the Marymount School case, where Marymount invoked "hardship" to justify building a gymnasium on the roof of its landmarked school building, the Commission required it to investigate alternatives such as leasing space at other gym facilities (clearly not owned or leased by Marymount at the time) and sharing space with other schools. Beyond that, the Commission directed the School to meet with the developer of a new residential building about to go into construction to see whether a gym could be incorporated in that facility. In the end, none of these options proved feasible and the LPC allowed Marymount to proceed with the rooftop gym. But in no way was the search for alternatives limited to properties that the School owned or leased.

Here, moreover, there are options that are realistic on a *prima facie* basis. For example, if St. Vincent's were to sell its East Campus to the Rudins and also sell O'Toole for adaptive reuse, it would generate hundreds of millions of dollars that could be used to acquire another site (or to expand its existing property on Sixth

Avenue) and provide the equity for a new tower. This is a realistic alternative that could resolve many of the conflicts inherent in this case. In our view, the Commission cannot limit the consideration of alternatives to sites St. Vincent's owns. It is a matter of public record that there are many commercial sites available on the West Side, and the Commission has both the right and the obligation to insist that the Hospital evaluate these on an independent basis. In addition, the LPC should insist that the possible acquisition of properties adjoining the St. Vincent's Sixth Avenue site be addressed. Indeed, we believe this option is sufficiently compelling on its face that the Commission itself must investigate it to ensure an objective evaluation.

Second, there needs to be a far greater investigation of the feasibility of St. Vincent's reworking its East Campus Buildings to create a modernized hospital. St. Vincent's asserts that this is not possible because it would have to close major services down for several years while it rebuilt several of the existing buildings and renovated others. But this bare claim is not supported with any evidence and is drawn into question by past experience. Specifically, only 20 years ago, St. Vincent's demolished Seton and Lowenstein and replaced them with Coleman and Link and did so without closing down key services. If that was possible before, it is difficult to understand why it should not be possible again with proper phasing.

Moreover, there is an added factor today that was not in play during the prior demolition and reconstruction. That is the presence of a largely empty **Cabrini Hospital**, which recently closed. *St. Vincent's is already moving its inpatient psychological services to Cabrini, taking three or four floors for this purpose, and it has recently used the Cabrini facilities to house patients displaced from Coleman as the*

*result of a fire.* These two actions clearly indicate that Cabrini could be used on an interim, phased basis to support services displaced from the East Campus as replacements were being built for Coleman, Link and Cronin. This would not, as St. Vincent's has claimed, require a huge, duplicative investment, because the Cabrini facilities are themselves relatively modern and would only be used on an interim basis. Furthermore, such an approach would not involve a physical separation any more distant than that of existing hospitals. For example, at Lenox Hill, many of its major services have been moved to the former Manhattan Eye, Ear, Nose & Throat facility, which is almost exactly the same distance from the main Lenox Hill Campus as Cabrini is from the East Campus. And, of course, many other hospitals, such as New York Presbyterian, have widely separated facilities. Indeed, one has to wonder whether St. Vincent's would not be better off by taking over Cabrini permanently, which would provide room for expansion that will not exist if the current plan to sell the East Campus and place the entire hospital on the O'Toole site is pursued.

Third – but probably more important than anything else – because this is a hardship proceeding in which St. Vincent's is seeking *an exception* from the current landmarks restrictions, the Hospital has the burden of proving that there are no reasonable alternatives to demolishing O'Toole. *This is a burden which it has not even begun to meet.* Virtually everything that St. Vincent has offered to support its claim of hardship – and everything it has presented in terms of alternatives – has been in the form of conclusory assertions.

With the sole exception of the Report on Current Conditions (which examines only how one might renovate the existing facilities, not how renovation might be com-

bined with rebuilding, and even then exaggerates the probable costs), the Hospital has not submitted one iota of real evidence on the potential of using Cabrini on an interim basis. Nor has it presented any evidence regarding alternative sites, including the potential of acquiring the properties next to its Sixth Avenue property in order to provide a larger footprint for building the Hospital tower at that location. Beyond conclusory statements that it cannot be done, St. Vincent's has not offered any evidence on what new construction on the East Campus would be needed to meet its needs and what the costs of carrying out such a program would be. It has said nothing about the potential of reusing Coleman, which apparently serves very well as a facility for patient beds, while reworking its base and creating new facilities on the Link and Cronin sites to provide modern emergency and intensive care units.

In short, St. Vincent's has not come close to meeting its burden of proof in this proceeding. In the regard, moreover, at least as far as we are aware, the Commission has not done much to correct the situation by demanding that the Hospital present evidence on the record that PVHD and other members of the public can digest and attempt to rebut. This is considerably different from the role the LPC took in the St. Bartholomew's case, where it not only enlisted experts of its own to examine the applicant's case, but also allowed witnesses offered by a consortium of historic preservation groups to review the applicant's claims and provide their input.

It is worth remembering that in this proceeding, the Commission represents the public interest in historic preservation. In a similar situation, in the landmark Scenic Hudson case involving the preservation of natural beauty and national historic shrines,

the Second Circuit had the following to say about the role of a similarly-empowered agency – the Federal Power Commission:

“In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission. . . . The Commission has an affirmative duty to inquire into and consider all relevant facts” Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F. 2d 608, 620 (2<sup>nd</sup> Cir. 1965).

In this proceeding, St. Vincent’s presentation has left such huge gaps in the record that it would be difficult for the Commission itself to remedy them. But to begin with, it can insist that the Hospital come forward with hard evidence sufficient to support a *prima facie* claim of hardship. Among other things, the Commission should require St Vincent’s to provide an independent evaluation of alternatives, and not just those sites it owns or leases. If it fails to do so, St. Vincent will not have met its burden of proof and that should end the matter. If, on the other hand, it offers evidence that the Commission deems persuasive, then the LPC should not only make its own independent inquiries but allow the public to provide its input, as was done in the St. Bartholomew’s proceeding.

#### POINT SIX

#### THE COMMISSION MUST COMPLY WITH THE STATE ENVIROMENTAL QUALITY REVIEW ACT IN THIS PROCEEDING

The Commission has taken the position that the State Environmental Quality Review Act, and the State and City regulations issued pursuant to the Act, do not apply to its actions. However, to the extent that the courts have supported this view [see, e.g., Matter of Citineighbors Coalition v. New York City Landmarks Preservation

Commission, 306 A.D.2d 113 (1<sup>st</sup> Dept, 2003), *appeal dismissed on other grounds*, 2 N.Y.3d, 2004), they have done so in connection with “appropriateness” determinations. A “hardship” proceeding is a very different kind of review process, involving many of issues that SEQRA is intended to address, not least of all alternatives and impact on irreplaceable resources. In this case, therefore, we believe that the Commission is obligated to comply with SEQRA before making its decision.

This should not impose any hardship on the Commission because St. Vincent’s will also be seeking zoning and other land use approvals from the City Planning Commission, the City Council and, possibly, the Board of Standards & Appeals. Given the magnitude of the St. Vincent’s and Rudin proposals, there can be no doubt that an environmental impact statement will have to be prepared; and indeed, St. Vincent’s has already acknowledged this to be the case. For that EIS, the City Planning Commission will presumably be the lead agency. As a result, the major burden of preparing the EIS will fall to the Planning Commission, with the LPC acting as a participating agency and focusing on its area of expertise – i.e., historic preservation. To a significant extent, this could relieve the Commission of the obligation to make an expansive investigation of feasible alternatives, though it would have the capacity to share in this investigation and comment on the options. In making its final decision, the Commission will still focus on the key issues under the Landmarks Law and case precedent, but it will be informed by the material contained in the FEIS, including, for example, studies that would show what kind of impacts the traffic generated by the development would have on the Historic District.

Awaiting the preparation of an EIS will, of course, delay the Commission's decision. But this would have no prejudicial effect on St. Vincent's, which cannot move forward with its plans until the ULURP process is complete, the City Council has acted and the State Health Department has given its approval. Even the earliest of these events is unlikely to occur much before the LPC has acted; and it will surely have made its decision well before the last of the required approvals is given. Thus, there will be no prejudice to St. Vincent's. This being the case, the Commission can well afford to wait until an EIS is complete before it acts. More importantly, SEQRA requires that it do so.

#### CONCLUSION

This is a case of great consequence. The protections provided by the Landmarks Law will either be strengthened or a significant breach in the armor it offers will be made, one that will have profound implications for the preservation of historic structures in our City. As we have shown, there is no reason for the Commission to create such a breach. To the contrary, the law, as set forth in the Penn Central and St. Bartholomew's cases, is to the opposite effect, providing that as long as a historic structure can continue to be used for its present activities, there is no hardship. And this conclusion is strengthened by the cases holding that where an owner acquires property already subject to restriction, it cannot thereafter claim hardship as a result of the restriction, since it could have no reasonable investment-backed expectations that it would be excused from compliance.

The decisions of previous Commissioners are what has led to the critically-important judicial precedents, which have in turn strengthened both the mandate and the hand of the LPC and allowed it to protect ever larger areas of our City. This Commission has carried that flag with distinction, adding 15 historic districts and almost 100 individual landmarks to the catalogue of protected areas and assets; and New York is much the richer for these actions. Yet no decision the Commission has yet made will be as important as the one it is called on to make in this proceeding. No other decision will have had such broad implications. No other result will more decisively affect the future of historic preservation in the City.

PVHD believes that the decision the Commission should make is clear on the facts and clear on the law. We urge it to reject St. Vincent's hardship application, and we submit, with all respect, that it is obligated to do so.

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Respectfully submitted,

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