

# New York Law Journal

## Real Estate *Update*

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## Historic Properties

*Hardship Relief Can Be Claimed Under Certain Tests*

BY MEREDITH J. KANE  
AND KATHARINE L. McCORMICK

NEW York City's Landmarks Preservation Law (NYC Administrative Code §25-301 to -322) provides broad regulatory protections for public and private properties which are found by the Landmarks Preservation Commission to possess "special historical or aesthetic interest or value as part of the development, heritage, or cultural characteristics of the city, state, or nation." While preserving the architectural integrity of historically significant properties for the benefit of the entire public, the Landmarks Law imposes particular burdens on the individual owners of designated historic properties. Owners of landmarked property are not guaranteed that they will be able to use their property for its highest and best use (as cases like *Penn Central* have shown), but they do have a right to a reasonable return, or the charitable use equivalent. The constitutional balance that permits regulation of private property for the public good justifies a certain incursion onto private property rights, but a line is drawn when the detriment to a particular burdened property becomes too great. Determining where that line lies is to distinguish between acceptable regulation and the creation of a hardship.

Bringing a "hardship claim" under the

**Meredith J. Kane** is a partner and **Katharine L. McCormick** is an associate at Paul, Weiss, Rifkind, Wharton & Garrison LLP.

Landmarks Law is the statutory scheme under which property owners can obtain relief on the grounds that landmarks regulations prevent them from making a "reasonable return" on their property, or, in the case of a charitable property owner, frustrate the charitable purpose of the owner. But the process of applying for a hardship, described in §25-309 of the Landmarks Law, has been described in a

### LANDMARKS LAW



Meredith J.  
Kane



Katharine L.  
McCormick

New York legal practice guide as "the lengthiest, most complex and least frequently used of the processes required by the Landmarks Law."

### Statutory Provisions for Hardship

The Landmarks Law prescribes separate processes for considering hardship claims in commercial (non-tax exempt) and charitable (tax exempt) properties. The first step in each case is a determination by the Landmarks Preservation Commission (LPC), the body which administers the Landmarks Law, whether the applicant meets the statutory criteria for suffering a hardship. If the owner is determined to be suffering a hardship, various remedies can

be prescribed to alleviate the hardships imposed by landmark designation.

### Commercial (Non-tax Exempt)

**Properties:** Commercial owners of landmarked property may qualify for hardship treatment if they show that the property is "not capable of earning a reasonable return" and they intend expeditiously, if permitted, (i) to demolish the building immediately and build a new structure or terminate the operation of the improvement at a loss or (ii) to alter its structure so as to increase the rate of return. A "reasonable return" is defined as a net annual return of six percent of the valuation of the improvement parcel when "under reasonably efficient and prudent management," calculated over an annual period. The requirement that the applicant be prepared to demolish or alter immediately is presumably included to prevent applications being made in anticipation of some prospective, but as yet undetermined, investment opportunity.

If a commercial owner can make such a showing of economic hardship, the LPC is given a 60-day period within which to devise a plan to preserve the building while allowing it to earn a reasonable return. Tools available to the LPC include granting a tax exemption to the property, or authorizing alterations which meet the "appropriateness" standard under the Landmarks Law.

If the grant of a tax exemption, by itself, will enable the property to achieve a reasonable return, the owner will not be entitled to further hardship relief. If the plan includes property alterations, or means other than a tax exemption to achieve a

reasonable return for the property, the owner may accept or reject the plan. If accepted, the owner is authorized to perform the alterations set forth in the plan. If the LPC is unable to formulate a plan, or if a plan is rejected by the applicant, the LPC may recommend to the mayor that the City acquire a "protective interest" in the property, which may include the acquisition of the property itself by eminent domain. If such an interest is not acquired, and no other alternative will alleviate the hardship, the original application to demolish or alter the building will be granted.

**Charitable (Tax Exempt) Properties:** A charitable institution, such as a church or school, is treated differently than a commercial property owner when a determination of hardship is made. Because the statutory scheme presumes that charitable institutions are not driven by the same investment view towards their real estate holdings, the "reasonable return" test described above is not applicable to these property owners.

Owners of charitable property must instead make a showing that: (1) they have entered into a contract to sell their property or lease it for a minimum of 20 years and such contract is contingent on the issuance of a permit to demolish or substantially alter the property, (2) the property would not, if it were in commercial ownership, be capable of earning a reasonable return, (3) the property has ceased to be adequate, suitable or appropriate for the purpose to which it is devoted and the purpose to which it had been devoted when acquired and (4) the prospective owner or tenant intends, if permitted, to demolish the building and build a new structure, or alter its structure, with reasonable promptness.

If a charitable property owner meets these hardship criteria, the LPC is again given an opportunity to devise a plan to preserve the property. Among the LPC's options is to locate a purchaser or tenant for the property on terms identical to the

existing prospective purchaser or tenant, but who will use the property without demolishing or altering it. If the LPC is unable to locate a suitable purchaser or tenant within 180 days, the LPC's options are the same as with commercial properties, i.e., to recommend to the mayor that the City acquire a "protective interest" in the property, which may include the acquisition of the property itself by eminent domain. If such an interest is not acquired, the original application to demolish or alter the building will be granted.

Appeals from a determination of the

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Commission denying a hardship application from a charitable owner may be made either through judicial action or to a Hardship Appeals Panel formed pursuant to the New York City Charter §3021. The Hardship Appeals Panel consists of five members, and is independent of the LPC.

As noted above, a threshold requirement for a charitable property owner to meet the statutory hardship test is that the owner must have entered into an agreement for sale or long-term lease of the property for which the hardship claim is made. This means that charitable property owners who wish to adapt their property to their current needs or develop their property themselves do not meet the statutory criteria for a determination of hardship.

Being unable to obtain relief through statutory procedures, several charitable and religious organizations have litigated their hardship claims, giving rise to a judicial test which is applied to charitable properties for which there is no immediate buyer,

but for which a hardship claim is made. These cases frequently assert that the Landmarks Law is an unconstitutional taking of private property in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution. As in all judicial determinations, the holdings in these cases are frequently fact-specific and do not attempt to articulate a comprehensive review procedure.

The leading case in this area is *Sailors' Snug Harbor in the City of New York v. Platt*, 29 AD2d 376 (NY App. Div., 1968). The test articulated in *Sailors' Snug Harbor* was analogous to the "reasonable return" test set forth in the Landmarks Law for commercial properties. The *Sailors' Snug Harbor* court held that an organization could make a showing that the Landmarks Law was a taking, and thus unenforceable against a given property without just compensation, if "maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose." This test first articulated in this case has been adopted, with some differing interpretation and thus different results, in all subsequent judicial opinions. Other significant and useful cases that address hardship or takings claims under the Landmarks Law include: *Lutheran Church in America v. City of New York*, 35 NY2d 121 (NY 1974), *In re Society for Ethical Culture in the City of New York v. Spatt*, 51 NY2d 449 (NY 1980), *1025 Fifth Avenue, Inc. v. Marymount School of New York*, 475 N.Y.S. 2d 182 (NY Sup Ct, 1983), *Church of St. Paul and St. Andrew*, 67 NY 2d 510 at 514 (NY 1986), *Rector, Wardens and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F2d 348 (2d Cir., 1990).

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