STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ANITA YU, JOHN BOYER, and
MARY RAAB,

Plaintiffs,

v.

CITY OF ANN ARBOR,

Defendant.
_____/

Case No. 14-181-CC

Hon. Donald E. Shelton

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DEFENDANT CITY OF ANN ARBOR'S RESPONSE TO PLAINTIFFS' MOTION FOR SANCTIONS PURSUANT TO MCR 2.114

Defendant City of Ann Arbor ("City"), by its undersigned attorneys, responds to Plaintiffs' Motion for Sanctions Pursuant to MCR 2.114 as follows:

1. The City does not dispute the allegations in Paragraph 1.

2. The City admits the allegations in Paragraph 2.

3. The City admits the allegations in Paragraph 3.

4. The City neither admits nor denies the allegations in Paragraph 4 regarding the Plaintiffs' thoughts and motives for lack of information as to the Plaintiffs' thoughts and motives, but denies the remainder of the allegations in Paragraph 4 because they are untrue. The City further responds that Plaintiffs' Complaint speaks for itself and that responsibility for the lack of clarity and confusion as to the allegations and claims in the Complaint rests with the author(s) of the Complaint.

WHEREFORE, based on the foregoing and as argued in the City's accompanying Brief, the City asks this Court to deny Plaintiffs' Motion for Sanctions Pursuant to MCR 2.114, award the City its costs and attorney fees for having to defend against this motion, and grant such other relief as is appropriate in the interests of justice.

Dated: August 22, 2014

Respectfully submitted,

By: _____

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Attorneys for Defendant City
Office OF THE CITY ATTORNEY

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DEFENDANT CITY OF ANN ARBOR'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SANCTIONS PURSUANT TO MCR 2.114

Plaintiffs' Motion for Sanctions Pursuant to MCR 2.114 should be denied because it is premature and, more important, is without basis or merit.

INTRODUCTION - PROCEDURE

Plaintiffs' Motion for Sanctions Pursuant to MCR 2.114 is not properly before this Court for hearing on August 27, 2014, because counsel for Plaintiffs did not serve counsel for the City with a notice of hearing for this motion for August 27, 2014. A copy of Plaintiffs' Proof of Service for this motion accurately lists only the motion as being served on August 20, 2014, although Plaintiffs' brief in support was served as well. A copy is attached as Exhibit 1. If served by delivery, MCR 2.119(C)(1)(b) requires the notice of hearing for a motion to be served at least 7 days before the time set for the hearing.

The City files its response and brief in opposition to Plaintiffs' Motion to Disqualify Counsel, but objects to Plaintiffs' repeated disregard for the requirements of the court rules and suggests this motion should be deferred for hearing until it is properly noticed.[1]

ARGUMENT

I. PLAINTIFFS' MOTION FOR SANCTIONS IS PREMATURE

Plaintiffs' Motion for Sanctions for selected portions of the City's Initial Brief in support of its Motion for Summary Disposition is premature. A decision on Plaintiffs' Motion for Sanctions cannot be made until this Court reaches a decision on the City's Motion for Summary Disposition. Until then, a decision on Plaintiffs' Motion for Sanctions can only be based on speculation as to the Court's ultimate decision on the City's Motion for Summary Disposition, which will be done after review by the Court of all the briefs of the parties, and which will include as a necessary part of the decision, the Court's conclusions as to the merits of the City's

[1] In *Maldonado v Ford Motor Co*, 476 Mich 372, 375; 719 NW2d 809 (2006), the Michigan Supreme Court affirmed "the authority of trial courts to . . . prevent abuses so as to ensure the orderly operation of justice."

arguments.[2]

Undersigned counsel has found no case that has decided when a motion under MCR 2.114 should be filed, other than cases that address how quickly a motion under MCR 2.114 must be filed after dismissal or decision on a motion for summary disposition. See *Maryland Casualty Co v Allen*, 221 Mich App 26, 30-31; 561 NW2d 103 (1997) (holding that the timeliness standard for a motion for sanctions under MCR 2.114 is whether it was filed within a reasonable time and holding that motion for sanctions filed 5 months after summary judgment was timely).

The Advisory Committee Note to Fed R Civ P 11, the comparable federal court rule, states:

> "The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter." 97 FRD 165, 200-201 (1983). (Emphasis added.)

Although *Maryland Casualty,* 221 Mich App 30, notes that a motion under MCR 2.114(E) should be filed before a case is dismissed, it is clear that the court in *Maryland Casualty*, like the Advisory Committee in its Note to Rule 11, does not contemplate that a motion for sanctions would be filed - or heard and decided - before a decision on the merits of the pleading or motion to which the motion for sanctions is directed. Following the reasoning of *Maryland Casualty*, just as a court has the discretion to decide whether a motion for sanctions

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[2] Plaintiffs' Amended Response Brief was untimely served by mail on August 8, 2014, only 5 days before the previously scheduled August 13, 2014, hearing date instead of the 7 days required by MCR 2.116(G)(1)(a)(ii), and was not received by counsel for the City until the afternoon of August 11, 2014, barely 48 hours before the scheduled hearing. Needing to revise its preparation for oral argument and to replace its previously filed Reply Brief in light of Plaintiffs' Amended Response, and in the interest of maintaining the fairness of the judicial process as established by the applicable court rules, the City moved the hearing date for its motion and will file its Amended Reply Brief shortly to replace its now obsolete Reply Brief.

filed after a decision on a motion is timely, a court also must have the discretion to decide whether a motion for sanctions filed for hearing before a decision on a motion is premature. In this case, this Court should determine that Plaintiffs' motion for sanctions is premature. For this procedural reason alone, Plaintiffs' Motion for Sanctions should be denied.

Nevertheless, without conceding the Court need address the issues, the City responds to the substantive issues raised in Plaintiffs' Motion for Sanctions.

II. THE APPLICABLE STANDARD OF REVIEW

The City does not contest Plaintiffs' statement of the standard of review for a motion under MCR 2.114.

III. PLAINTIFFS' ARGUMENTS ARE WITHOUT MERIT

Plaintiffs' arguments focus on three aspects of the City's arguments (Plaintiffs' Brief at p. 1):

(1) That the City's argument that Plaintiffs' federal takings claims are unripe is without basis;

(2) That the City's argument that Plaintiffs' inverse condemnation and takings claims are time-barred is without basis; and

(3) That the City has mischaracterized the allegations and claims in Plaintiffs' Complaint.[3]

A. The City's Argument That Plaintiffs' Federal Takings Claims Are Unripe Is Warranted By the Facts and Existing Law

With respect to point (1),[4] the City relies on its arguments in its Initial Brief in Support of

[3] Plaintiffs do not criticize the City's arguments under MCR 2.116(C)(8) that Plaintiffs have failed to state a claim upon which relief can be granted.

[4] Argued in Point IV of Plaintiffs' Brief at pp. 11-13.

its Motion for Summary Disposition.[5]

Plaintiffs are not in a position to criticize the City for this argument, as Plaintiffs themselves have argued that their federal takings claims are unripe. See Plaintiffs' Brief in Support of Motion to Remand, attached as Exhibit 2 to the City's Initial Brief. Based on Plaintiffs' Motion to Remand, Judge Avern Cohn held that the U.S. District Court did not have jurisdiction to hear Plaintiffs' federal takings claims because they were not ripe. See the May 29, 2014, Order Granting Plaintiffs' Motion to Remand, attached as Exhibit 3 to the City's Initial Brief in support of its Motion for Summary Disposition.[6] In fact, at the end of the motion hearing, Judge Cohn commented to counsel for the City that he expected the City might move to dismiss Plaintiffs' federal takings claims as unripe after remand of the case to state court because the Plaintiffs would have the same problem with lack of ripeness in state court as they did in federal court. See Transcript of 5/28/14 motion hearing, p. 9, lines 16-23 (Plaintiffs' Exhibit C.)[7]

The City further notes that Plaintiffs' arguments as to the applicability and impact of *Bruley v City of Birmingham*, 259 Mich App 619; 675 NW2d 910 (2004), on this case does not take into account the Michigan Supreme Court's decision in *Electro-Tech, Inc v HF Campbell Co*, 433 Mich 57, 80-91; 445 NW2d 61 (1989), cert den 493 US 1021; 110 SCt 721; 107 LEd2d 741 (1990), in which the Court affirmed that the ripeness analysis in *Williamson County* applies to federal takings claims in Michigan state courts. Plaintiffs' arguments in reliance on *Bruley* fail

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[5] Plaintiffs have attached the City's Initial Brief as Exhibit A to their Brief in Support of their Motion for Sanctions.

[6] The federal court's order is based on *Williamson Cnty Reg'l Planning Comm'n v Hamilton Bank of Johnson City*, 473 US 172, 105 SCt 3108, 87 LEd2d 126 (1985), the leading case on the prerequisites for a federal takings claim to be ripe for consideration.

[7] The City does not argue that Judge Cohn's speculation as to the City's course of action on remand either binds this Court or substitutes for the City's analysis. However, that Judge Cohn considered as a likely course of action a motion in this Court to dismiss Plaintiffs' federal takings

to address or reconcile the City's right to remove Plaintiffs' federal takings claims to federal court once they have ripened, i.e., once this Court has rendered a decision on Plaintiffs' state inverse condemnation claims that is a denial of those claims or that Plaintiffs consider to be inadequate. See 28 USC 1441(a). See, also, the comments of Judge Cohn regarding the City's right to remove Plaintiffs' federal claims to federal court if Plaintiffs' state inverse condemnation claims are denied, thereby making their federal claims ripe for review. (Plaintiffs' Exhibit C; 5/28/14 Transcript, pp. 6-7.) The City has not argued that Plaintiffs' 5th Amendment claim should be dismissed simply because they are unripe; rather, the City has argued that Plaintiffs' 5th Amendment claims cannot ripen - either for decision by a federal court or by a state court - because Plaintiffs' state claims are time-barred.

Plaintiffs' arguments in Point IV of their Brief are just a rehash of arguments made in their Response Brief to the City's Motion for Summary Disposition, subsequently revised in their Amended Response Brief. Plaintiffs' arguments on these points will be heard when the City's Motion for Summary Disposition is heard, and after the City has submitted to the Court its Amended Reply Brief to respond to new and revised arguments in Plaintiffs' Amended Response Brief.[8]

Plaintiffs' use of this Motion for Sanctions as a back door way to having those arguments heard subverts the orderly process for the City's Motion for Summary Disposition to be heard

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claims as unripe is a further indication, for purposes of Plaintiffs' Motion for Sanctions, that the City's argument that Plaintiffs' federal takings claims are unripe is not without basis.

[8] Among other revisions and additions to their arguments, Plaintiffs have inserted a request for Summary Disposition under MCR 2.116(I)(2) into their Amended Response Brief, which requires a reply from the City.

and decided.[9]

B. The City's Argument That Plaintiffs' State Inverse Condemnation Claims Are Time-Barred Is Warranted By the Facts and Existing Law

With respect to point (2),[10] the City relies on its arguments in its Initial Brief in support of its Motion for Summary Disposition[11] and its arguments in its now obsolete Reply Brief. [12]

Plaintiffs' argument and assumption that their Complaint must be found to state an inverse condemnation claim (Plaintiffs' Brief p. 6) is addressed below in the City's response to point (3). However, even assuming for purposes of this argument that Plaintiffs have stated an inverse condemnation claim, it does not necessarily follow that the applicable statute of limitations is 15 years.

As argued by the City in its Initial Brief (Plaintiffs' Exhibit A) and in its now obsolete Reply Brief,[13] not all inverse condemnation claims are the same, and as evidenced by the decision in *Hart v City of Detroit*, 416 Mich 488; 331 NW2d 438 (1982), and as explained in the discussion and analysis in *Benninghoff v Tilton*, 284637, 2009 WL 3789981 (Mich Ct App 11/12/09), not all are subject to the 15 year statute of limitations.[14]

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[9] If Plaintiffs had not chosen to amend their Response Brief and to serve that Amended Response Brief on the City at the last minute, in violation of the applicable court rule, the City's motion for summary disposition would already have been heard by this Court. Plaintiffs' effort to convert the hearing on this motion for sanctions into a hearing on the City's motion for summary disposition also deprives the Court of the normal timing of opening and response briefs for a motion for summary disposition.

[10] Argued in Point III of Plaintiffs' Brief at pp. 6-11.

[11] Exhibit A to Plaintiffs' Brief in Support of their Motion for Sanctions.

[12] A copy of the City's Reply Brief is attached as Exhibit 2. Although the City will replace its Reply Brief with an Amended Reply Brief to address the new arguments in Plaintiffs' Amended Response Brief, the legal arguments in the City's Reply Brief are still good and address the arguments in Plaintiffs' original Response Brief, many of which are reiterated in Plaintiffs' Brief in support of their motion for sanctions.

[13] Exhibit 2.

[14] Plaintiffs' Exhibit A includes only the first four exhibits to the City's Initial Brief in Support of Summary Disposition; one of the missing exhibits is a copy of the *Benninghoff* case.

Judge Cohn did not hold that Plaintiffs' inverse condemnation claims were well-pleaded or would survive a motion for summary disposition. Because he held that the federal court did not have jurisdiction to hear Plaintiffs' claims, he made no rulings on the merits of Plaintiffs' claims or the adequacy of their complaint.

Plaintiffs rely on ¶48 of their complaint to "prove" they have asserted an inverse condemnation claim. However, ¶48 is conclusory at best and not sufficient to state a claim for a taking or inverse condemnation.

The City's argument relative to Plaintiffs' inverse condemnation claim is not premised on the Plaintiffs having "permitted or invited" the occupation. However, it has relevance as to what the applicable statute of limitations should be in a case such as this, where the Plaintiffs themselves undertook the FDDs on their properties through contracts with the plumbing contactors they selected, where the Plaintiffs had the opportunity not to proceed with their FDDs and instead challenge their obligation to perform FDDs on their properties, but chose not to and actively participated in the FDDs on their properties, only recently changing their minds regarding their FDDs. Even if they felt they acted under coercion, it was still the Plaintiffs who acted and undertook the installations.

More important, putting aside the voluntariness of Plaintiffs' participation, the City has distinguished inverse condemnation cases in which the 15 year statute of limitations applies from this case, because the facts and circumstances are not akin to adverse possession. The City does not own anything on or within Plaintiffs' properties. Aside from their conclusory assertions that the City or a third party is occupying their homes, Plaintiffs assert no credible, well-pleaded facts to support their bald conclusion that the City or a third party has an ownership interest in anything they claim is occupying their homes. Unsupported conclusions do "not suffice to state a

cause of action." *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 295; 516 NW2d 498 (1994); *NuVision v Dunscombe*, 163 Mich App 674, 681; 415 NW2d 234 (1987), lv den 430 Mich 875 (1988).

The City does not seek title to or other ownership interest in Plaintiffs' properties. That Plaintiffs do not like something they own and that they were required to install does not make this a case akin to adverse possession. As noted in *Hart*, and as later explained in *Benninghoff*, the 15 year statute of limitations applies in cases where the alleged inverse condemnation is akin to adverse possession. *Hart*, 416 Mich 497; *Benninghoff* at *20. Although the court in *Hart* noted that plaintiff Hart no longer owned the property for which she sought compensation, continued ownership was not the only factor to make the 15 year limit the applicable limit; it was the analogy to adverse possession that *Hart* identifies as the deciding factor. *Hart*, 416 Mich 499. The City's arguments as to what the applicable limitations period should be is addressed in its now obsolete Reply Brief (Exh. 2, at pp. 7-8).

Although all cases of adverse possession necessarily involve continuing ownership by the complaining party, not all cases involving continuing ownership by the complaining party amount to adverse possession. This is one of those cases. Like the plaintiff in *Hart*, Plaintiffs have no property rights to regain because they have lost no property rights. If more than 15 years were to pass after the FDDs on Plaintiffs' properties without challenge by the Plaintiffs, neither the City nor a third party would have any greater rights to Plaintiffs' properties than they have now or than they had in 2000, namely none, and Plaintiffs would not have any lesser rights to their properties than they have now or than they had in 2000. The FDDs on Plaintiffs' properties are not in the nature of adverse possession.

That Plaintiffs recognize or concede that the sumps, sump pumps and related equipment

in their homes have become an integral part of their homes is indeed found in the paragraphs of the complaint cited by the City:

¶30 - "The FDD was to be accompanied by the permanent installation of a sump pump and other equipment inside and outside of her home." ¶30 also relies on and incorporates by reference the attached Homeowner's Package (Exh. 2 to the Complaint), which states unambiguously on p. 11 that the sump pump and lines "are owned and maintained by the homeowner."

¶31 - Plaintiff Yu - not the City or a third party - selected and contracted with Hutzel Plumbing to do the FDD work on her property.

¶32 & ¶33 - The installation of the sump and related lines as an integral part of Plantiff Yu's house is decribed.

¶35 - Plaintiff Yu - not the City or a third party - operates and maintains the equipment (presumably, the sump pump).

¶37 - Plaintiffs Boyer and Raab completed their FDD.

Exh. 2 to the Complaint (the Homeowner's Package) is a public record, is attached by Plaintiffs to their Complaint and is part of their Complaint. Facts in attached exhibits that contradict allegations in a complaint trump those allegations. See *Irish v Woods*, 864 NE2d 1117, 1120 (Ind Ct App 2007); see also *N Ind Gun & Outdoor Shows v City of S Bend*, 163 F3d 449, 454-455 (CA7 1998) (noting that "a plaintiff may plead himself out of court by attaching documents to the complaint that indicate that he or she is not entitled to judgment").[15]

The City does not mischaracterize Plaintiffs' recognition or concession in ¶¶17-20 of their Complaint as to the reasons why, origins of, and process by which the FDD program was selected and undertaken by the City, in particular the number of homes impacted by sanitary

[15] Undersigned counsel did not find a Michigan case that addresses the effect of an exhibit attached to a complaint that contradicts an allegation in a complaint. MCR 2.113(F) provides for written instruments relied on for a complaint to be part of the complaint. The holdings in *Irish* and *N Ind Gun* reflect the general rule relative to exhibits attached to a complaint. Although Plaintiffs argue the Homeowner Manual is "self serving" and should not be considered, Plaintiffs acknowledge getting the Homeowner's Package and, therefore, knowing at the time they contracted for the FDDs at their homes that they would be the owners of their FDD equipment.

sewer backups into basements as acknowledged by Plaintiffs in those paragraphs (see ¶18). Plaintiffs' reliance on their ¶42 is reliance on a conclusory allegation, not supported and even contradicted by the factual assertions elsewhere in Plaintiffs' Complaint.

Where Plaintiffs' Complaint is not well-pleaded, asserts a plethora of allegations unrelated and irrelevant to their inverse condemnation or 5th Amendment claims, and in which Plaintiffs rely primarily on conclusory assertions unsupported by factual allegations and contradicted by their own exhibits - starting with the language of the FDD Ordinance itself (Exh. 1 to Plaintiffs' Complaint), and where counsel for Plaintiffs themselves are inconsistent in their assertions as to what claims they really are attempting to assert in the complaint, counsel for Plaintiffs cannot complain that some of their paragraphs have been misinterpreted or are cited for what they say, or for reasonable inferences based on what is alleged,[16] even if not intended by Plaintiffs or their counsel.

Although Plaintiffs argue that the alleged "occupation" of Plaintiffs' properties by sumps, sump pumps and related equipment was required by the City and has, therefore, compromised their property rights, Plaintiffs' argument is premised on a continued misreading and repeated misrepresentation of the limited holding in *Loretto v Teleprompter Manhattan CATV Corp.*, 458 US 419; 102 SCt 3164; 73 LEd2d 868 (1982). *Loretto* applies only to an occupation of a person's property by something owned by the government or by a third party (not the owner) pursuant to authority granted by the government. 458 US 440 and fn 19. As briefed in the City's now obsolete Reply Brief (Exh. 2, at pp. 1-7), ownership of the cable company's attachment was a critical factor in *Loretto*, and ownership has continued to be a critical, deciding factor in cases decided under *Loretto*. Plaintiffs cite no case where a taking has been found under *Loretto* where

the property owner owns the thing they complain has caused a taking by occupying their property. None of the cases cited by Plaintiffs refutes the essential element in *Loretto*, that ownership of the occupying "thing" by the property owner means there is not a taking.

This Court need not and should not decide the merits of the City's statute of limitations argument in the context of Plaintiffs' Motion for Sanctions. As argued above relative to Plaintiffs' ripeness argument, Plaintiffs' use of this Motion for Sanctions as a back door way to having those arguments heard subverts the orderly process for the City's Motion for Summary Disposition to be heard and decided. If this is allowed, parties will be granted license to use this ruse as a means to avoid or even prevent having motions for summary disposition properly heard and decided.

C. The City's Analysis of Plaintiffs' Complaint and the Exhibits Attached Thereto Does Not Mischaracterize the Complaint

With respect to point (3),[17] some of which is addressed in the arguments above, the City has not mischaracterized Plaintiffs' Complaint, but has simply analyzed it as written by Plaintiffs. Plaintiffs' dissatisfaction with the City's reading of their Complaint arises from Plaintiffs' own failure to draft a well-pleaded Complaint.

Plaintiffs cannot complain about the City's analysis and interpretation of their Complaint that they don't like when it is due to their own poor drafting and their failure to plead claims upon which relief can be granted.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' Motion for Sanctions as prematurely filed, or should defer the decision on Plaintiffs' Motion until an appropriate time,

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[16] See *Peters v. Dep't of Corr.*, 215 Mich App 485, 486; 546 NW2d 668 (1996) (well-pleaded factual alleagtiosna dn reasonable inferences may be considered).

[17] Argued in Point II of Plaintiffs' Brief at pp. 2-5.

namely after the Court's decision on the City's Motion for Summary Disposition.

In the alternative, this Court should simply deny Plaintiffs' Motion for Sanctions because it is without merit.

Dated: August 22, 2014

Respectfully submitted,

By: _____

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Attorneys for Defendant City
OFFICE OF THE CITY ATTORNEY

INDEX OF EXHIBITS

Exhibit 1: Plaintiffs' Proof of Service for Plaintiffs' Motion for Sanctions Pursuant to MCR 2.114

Exhibit 2: Defendant City of Ann Arbor's Reply Brief in Support of Motion for Summary Disposition

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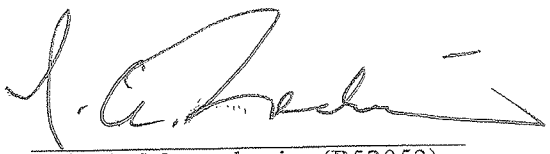
PROOF OF SERVICE

I hereby certify that I personally delivered to the above-named Attorneys for Defendant, at the Office of the City Attorney at the above address, a true and correct copy of the Plaintiffs' Motion for Sanctions Pursuant to MCR 2.114 in the above-entitled action on this 20th day of August, 2014.



Irvin A. Mermelstein (P52053)

Exhibit 2: Defendant City of Ann Arbor's Reply Brief in Support of Motion for Summary Disposition

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DEFENDANT CITY OF ANN ARBOR'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

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INTRODUCTION

Defendant City of Ann Arbor ("City") replies to Plaintiffs' Response Brief to the City's Motion for Summary Disposition. Notwithstanding the excess of words in their Response Brief,[1] Plaintiffs have not rebutted the City's arguments in favor of summary disposition of dismissal. The flaws in Plaintiffs' response, substantive and other, are addressed in the arguments below.

ARGUMENT

I. STANDARDS OF REVIEW

The City relies on its Initial Brief for the correct standards of review and what may be considered by the Court for motions under subsections (4), (7) and (8) of MCR 2.116(C).

II. PLAINTIFFS DO NOT STATE 5TH AMENDMENT TAKINGS CLAIMS UPON WHICH RELIEF CAN BE GRANTED AND THEIR ARGUMENTS UNDER THEIR POINTS II AND III ARE CONTRARY TO APPLICABLE LAW

Plaintiffs previously argued that their federal takings claims were not ripe (Plaintiffs' Brief in Support of Motion to Remand; Exh 2 to City's Initial Brief), but now sing a different tune and argue that their federal takings claims under the 5th Amendment are ripe for review and state valid claims for relief. The lack of ripeness of their claims is addressed below.

In *Loretto v Teleprompter Manhattan CATV Corp.*, 458 US 419; 102 SCt 3164; 73 LEd2d 868 (1982), the Court distinguished a physical occupation by the government or by a third party from a physical installation required by the government but owned by the property owner. Although Plaintiffs rely on the language in *Loretto* about a physical occupation "authorized by government" (458 US 426), they omit the discussion and context of that statement, which referred to a physical occupation by a third party and was the situation at issue in *Loretto*, but is not the situation here.

---

[1] Counsel for Plaintiffs have flaunted the Michigan Court Rules (MCR 2.119(A)(2)) in order to fit a 29 page brief into 20 pages.

Plaintiffs have cited no case where a court has found a 5th Amendment taking in a situation comparable to the situation alleged in their complaint. Plaintiffs ignore the Supreme Court's statement in *Loretto* that the *per se* taking rule is "very narrow," 458 US 442, and ignore the Court's explicit limitation on its holding in the case, noting the broad power of a state or local government to regulate housing conditions in general. 458 US 441. Essential to *Loretto* and cases that have followed *Loretto*, is the simple but critical factor of ownership. The decision in *Loretto* turned in large part upon the fact that the cable television company, not the landlord, owned the installation on the landlord's property. 458 US 440 and fn 19. In this case, the well pled allegations in Plaintiffs' complaint and the exhibits that can be considered by the Court[2] establish that neither the City nor a third party owns the sump pump, drain lines or related attachments installed by Plaintiffs on their properties, but that they are owned by the Plaintiffs. On that basis alone, Plaintiffs' argument that this case is a taking under *Loretto* fails.

Even when an installation is required by law, if the installation is owned by the property owner, the proper analysis is the multifactor analysis under *Penn Central Transp Co v New York City*, 438 US 104; 98 SCt 2646; 57 LEd2d 631 (1978), that applies to non-possessory government activity. *Loretto*, 458 US 440.

Ownership as a critical factor in a decision whether a taking has occurred is highlighted in *Board of Managers of Soho International Art Comm'n v City of New York*, 2004 WL 1982520, Case No. 01 Civ 1226(DAB) (SD NY 2004),[3] in which the court discussed at length how critical ownership is in a *per se* takings analysis and rejected cross motions for summary disposition

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[2] Plaintiffs improperly ask this Court to rely on affidavits attached to their prior motion for preliminary injunction and to their Response Brief. MCR 2.116(G)(4) provides that only the pleadings may be considered for a motion based on MCR 2.116(C)(8). No provision in the rules makes the affidavits attached to Plaintiffs' motions and briefs part of the pleadings that can be considered for purposes of MCR 2.116(C)(8).

[3] Copy attached as Exhibit 1.

because neither side had established ownership. *Id* at **18-20. In *Kaufman v City of New York*, 717 F Supp 84 (SD NY 1989), the court addressed a situation in which fireproofing materials that contained asbestos, previously approved by the City, were required to be sealed off and removed before any demolition, renovation or alteration of a building. 717 F Supp 86. The court observed, "The fact that a use regulation may have some impact on the physical characteristics of the land is unexceptional." 717 F Supp 93. The court went on to reject the plaintiffs' argument that an expansive definition of what constitutes a physical appropriation of property was in order:

> "In fact, applying a broad brush in construing whether a regulation works a physical appropriation of property flies in the face of the Supreme Court's express warnings against overly constricting the State's ability to regulate the use of property to protect the public welfare. *Loretto v Teleprompter Manhattan CATV Corp, supra*, 458 US at 441, 102 SCt at 3179." 717 F Supp 93.

The court in *Kaufman* reiterated the Supreme Court's emphasis in *Loretto* on the narrow scope of its ruling, 717 F Supp 93, and pointed to the Supreme Court's focus on the removal of ownership rights and the grant of rights to a third party to install equipment. 717 F. Supp at 94. Following the analysis in *Loretto*, the court denied the claim that the city's law requiring asbestos removal in the event of demolition, renovation or alteration of a building was a taking.

A case involving a city program similar in nature to the City's FDD program is *Cape Ann Citizens Ass'n v City of Gloucester*, 121 F3d 695, Case No. 96-2327 (CA 1 1997).[4] After the City of Gloucester was sued by the United States for violations of the federal and state clean water acts, the city entered into a consent decree that included a schedule for design and construction of an extension of the city's sewer system. The consent decree as then amended to allow use of Septic Tank Effluent Pump ("STEP") sewers. *Id* at *1. A STEP sewer require a STEP tank to be installed on a property, where it provides primary treatment to sewage from the property, and

[4] Copy attached as Exhibit 2.

from which the treated sewage then flows under pressure to the city's collection line, and through those lines to the wastewater treatment plant. *Id* at *1, fn 1. When some property owners refused to grant the easements required for the city to install and maintain the STEP tanks and ancillary equipment needed to connect the tanks to the sewer system, the city amended its regulations to allow property owners to install and maintain their own STEP tanks without conveying an easement to the city. *Id* at *1. The Court affirmed the District Court's denial of the plaintiffs' claims, including their takings claim. Citing *Loretto*, the Court noted that "States have broad authority to regulate housing conditions" and concluded, as a corollary, that a state or local government could regulate the disposal of sewage to protect the public health and prevent conditions that amount to a nuisance. *Cape Ann* at *5.

The Court relied on the Supreme Court's discussion in *Loretto* of the importance of ownership of the item installed and distinguished the case before it from one where there was a permanent physical invasion by a third party. Central to its analysis was that a property owner could install and own the STEP system on his or her property, or could opt to have the City of Gloucester do that. *Cape Ann* at **5-6. Of particular relevance to the present case, the Court stated, "Because the City could simply order homeowners to connect to the sewer, which would not be a taking, giving them the additional option of having the City perform the installation does not render the regulation a taking." Id at *6 (emphasis added).

The plaintiffs in *Cape Ann* further attempted an argument similar to the argument of Plaintiffs in the present case, that the STEP tanks are "integral components of the city's sewer." The Court rejected the argument in large part because,

> "The tank is simply a requirement imposed on the homeowner so that the homeowner's property can be connected to the sewer system. As such, it is not a taking. Rather, it is a reasonable requirement without which the property could not be connected to the sewer." *Id.*

The Court concluded that "consistent with *Loretto*," the regulation requiring the STEP tanks on private properties did not effect a taking. *Cape Ann* at *6. Like the STEP tanks in *Cape Ann*, a sump pump is necessary for a footing drain to operate properly and discharge water away from the house and there is no distinction between footing drains connected to sump pumps installed when a house was built, installed when a property owner installed a B-Dry type system, or installed as part of the FDD program.

In *Village of Menominee Falls v Michelson*, 104 Wis 2d 137; 311 NW2d 658 (1981), the Wisconsin Court of Appeals upheld a trial court decision that a homeowner had violated the City of Menominee's ordinance requiring her to disconnect her foundation[5] drain from the city's sanitary sewer and install a sump pump in her foundation drain. 104 Wis 2d 140. For her defense, the violator did not claim a taking, but claimed an unconstitutional retroactive application of the city's ordinance to her property, requiring her to disconnect at her own expense a foundation drain that had a previously approved connection to the city's sanitary sewer. 104 Wis 2d 142. The court held that the violator had no "vested right" to maintain the connection to the sanitary sewer, pointing out that the license (not right),

> "to connect with a municipal sewer system must at all times be contingent upon the ability of the system to dispose of the sewage. No one has any vested rights in the use of the sewers, nor can a municipality grant such a vested right. If, for any reason, the system will not handle sewage from a particular source by reason of its nature or quantity, it is within the power of the municipality to require that the sewer connection be discontinued, and it may be the duty of the municipality to do so in order to protect itself from possible liability for the creation of a nuisance." 104 Wis 2d 143 (citations omitted).

Plaintiffs repeatedly state that the City or some other party is occupying their houses, notwithstanding the actual provisions of the ordinance and the allegations in their complaint, and despite case decisions to the contrary. Their argument is similar to the plaintiffs' argument in

[5] Foundation drains and footing drains are the same.

Wilkins v Daniels, 744 F3d 409 (CA 6 2014), in which the plaintiffs challenged regulations for certain wild animals and reptiles, including a microchipping requirement, asserting a physical takings claim pursuant to *Loretto*. The Court of Appeals rejected the argument, relying on *Loretto* and *Tahoe-Sierra Pres Council, Inc v Tahoe Reg'l Planning Agency*, 535 US 302; 122 SCt 3164; 152 LEd2d 517 (2002), for the proposition that not every permanent physical invasion rises to the level of a taking; only those where the government itself takes physical possession of an interest in property, or authorizes a physical occupation of property by a third party. *Wilkins*, 744 F3d 418. Because neither the government nor a third party had occupied plaintiffs' property, the Court held there was no physical takings and rejected the takings claim. *Id*, 744 F3d 419.

Although Plaintiffs present a convoluted argument as to why they don't own their sump pumps and the lines to their footing drains (Point II, Section E; pp 9-10), their argument defies logic and common sense and is not based on well-pled allegations in their complaint. When a banister, toilet, water heater, furnace, window or kitchen counter is installed in a home by someone other than the homeowner, the homeowner generally doesn't own it before it is purchased, arrives and/or is properly installed. A sump pump and footing drain line is no different. That the Plaintiffs did not own their sump pumps or related parts while they were manufactured and assembled in the factory or in transit did not make them any less the owners of those sump pumps and lines once installed. The City has never argued otherwise.[6]

Plaintiffs do not cite a single case that has held a program or installation comparable to the City's FDD program to be a taking. In contrast, the City has cited several cases in its Initial Brief (pp 11-13) and in this Reply Brief that have held a comparable installation or program not to be a taking.

[6] The remainder of Plaintiffs' Section E (pp 11-12) is based on evidence outside the pleadings and must be disregarded as improper for purposes of the City's motion under MCR 2.116(C)(8).

Plaintiffs' assertions as to the time it took for their FDDs to be done[7] and the burdens on them as individuals are irrelevant to their physical occupation claims. Neither the time for the installation work to be done nor the maintenance obligations imposed on them as owners of the equipment are a compensable as a taking. The measure of compensation for a 5th Amendment or inverse condemnation taking is just the fair market value of the property taken on the date of the taking. See *City of Monterey v Del Monte Dunes at Monterey, Ltd*, 526 US 687, 734; 119 SCt 1624; 143 LEd2d 882 (1999), and *Detroit/Wayne Cnty Stadium Auth v Drinkwater, Taylor, & Merrill, Inc*, 267 Mich App 625, 633; 705 NW2d 549 (2005).

Finally, if Plaintiffs take a position that their claims stand or fall under *Loretto* and that an analysis under *Penn Central* is not appropriate, that is their choice. However, if the Court undertakes an analysis under *Penn Central*, as argued in the City's Initial Brief (pp 11-13), Plaintiffs' claims also fail under that analysis.

Plaintiffs' arguments under Michigan inverse condemnation law do not refute the City's arguments and do not save those claims from dismissal for failure to state claims upon which relief can be granted.

III. PLAINTIFFS' ARGUMENTS UNDER THEIR POINT IV(A) DO NOT REFUTE THE CITY'S ARGUMENT THAT THEIR INVERSE CONDEMNATION CLAIMS ARE TIME-BARRED

The applicable limitations period requires resolution of the holdings in *Hart v City of Detroit*, 416 Mich 488, 503, 331 NW2d 438 (1982), and *Difronzo v Village of Port Sanilac*, 166 Mich App 148; 419 NW2d 756 (1988), taking into account the observations of the courts in both

[7] In footnote 5 of their Response Brief, Plaintiffs complain about the time it took for their FDDs to be done, as if that were a taking. The logic of their argument would be that any installation under a City permit, including the visit by a City electrical, mechanical or plumbing inspector to inspect the installation, would be a physical occupation for which compensation was required. The visits to plan, to install the FDDs, and to check on the work done by Plaintiffs' contractors simply are not occupations of their properties.

decisions that there is no limitations period specified by statute for an inverse condemnation case. *Hart*, 416 Mich 503 *Difronzo*, 166 Mich App 152-154.

The 15 year period in MCL 600.5801(4) is a period for a property owner to act to recover land adversely occupied by another. Adverse possession by the City would require occupation by the City for the statutory period. *Hart*, 416 Mich 497. However, because Plaintiffs' own sump pumps and lines occupy their basement or crawl space floor and run under their foundations and land, there is no occupation of their property or claim to ownership of their property by the City. Without an occupation of property by the City, i.e., when the Plaintiffs "occupy" their own properties, their claim is not in the nature of adverse possession. Because Plaintiffs have not lost any title to or interest in their properties, because Plaintiffs own the items they claim "occupy" their properties, and because the City is not competing for ownership of their properties, this is not a situation akin to "adverse possession" and the 15 year limitation period applied in *Difronzo* is not appropriate. If it were now October of 2018 and more than 15 years had passed since the later of the two FDDs at issue, the City still would not have any ownership and the Plaintiffs still would not have lost any ownership in their homes, their sump pumps, their discharge lines or related attachments. As explained in *Benninghoff v Tilton*, 284637, 2009 WL 3789981 (Mich Ct App 11/12/09) (Exh 11 to City's Initial Brief), 2009 WL 3789981, at *20, the 15 year limitations period allows the property owner to regain their property and obtain compensation for the temporary taking before the occupier was ousted. Here, where there is no party to oust from Plaintiffs' properties and the situation is not analogous to an adverse possession claim, that basis for use of the 15 year period, as articulated in *Difronzo*, does not apply. Rather, the six year limitation period of MCL 600.5813, applied in *Hart,* should apply to bar Plaintiffs' claims.

IV. PLAINTIFFS' ARGUMENTS UNDER THEIR POINT IV(B) DO NOT REFUTE THAT THEIR FEDERAL TAKINGS CLAIMS ARE NOT RIPE

Plaintiffs argued (Exh 2 to City's Initial Brief) and the federal court already ruled in this case that Plaintiffs' federal takings claims are not ripe (Exh 3 to City's Initial Brief).

Plaintiffs now argue that their federal claims are ripe.

Even if Plaintiffs' federal takings claims were to proceed in this Court along with or following their state inverse condemnation claims, Plaintiffs recognize that their federal claims still must satisfy the *Williamson Cnty Reg'l Planning Comm'n v Hamilton Bank of Johnson City*, 473 US 172, 105 SCt 3108, 87 LEd2d 126 (1985), requirements for ripeness before they can be considered. Furthermore, asking this Court, as opposed to a federal court, to consider Plaintiffs' 5th Amendment claims does not cure the inability of those federal claims to ripen if Plaintiffs' inverse condemnation claims are time-barred. *Bruley v City of Birmingham*, 259 Mich App 619 (2004), changes neither that analysis nor the Michigan Supreme Court's holding in *Electro-Tech, Inc v HF Campbell Co*, 433 Mich 57, 80-91; 445 NW2d 61 (1989), cert den 493 US 1021; 110 SCt 721; 107 LEd2d 741 (1990), that the analysis in *Williamson* applies to federal takings claims in Michigan courts.

V. PLAINTIFFS' ARGUMENTS UNDER THEIR POINT V AND THEIR SECOND POINT V DO NOT REFUTE THE CITY'S ARGUMENTS THAT THEIR REQUESTS FOR INJUNCTIVE AND DECLARATORY RELIEF SHOULD BE DISMISSED

Plaintiffs continue to ignore the reality that they are not subject to further action by the City under the FDD Ordinance. What's done is done and these claims for relief are moot. They face no future acts that could be stopped by either injunctive or declaratory relief. As argued in the City's Initial Brief, Plaintiffs do not have standing to make arguments for relief on behalf of or contrary to the interests of non-parties. (City's Initial Brief pp 15-17, 18, 19-20) Plaintiffs

present no argument to refute the Court of Appeals' decision in *Lansing Sch Educ Ass'n v Lansing Bd of Educ (On Remand)*, 293 Mich App 506; 810 NW2d 95 (2011), that found declaratory relief improper if it adversely impacts non-parties. 293 Mich App 517-518.

Finally, although Plaintiffs introduce an argument that there are "threatened injuries" and "future trespasses" that might generate a multiplicity of suits, they do not identify even a single threatened or future action against any of them and the FDD Ordinance does not provide for further action relative to Plaintiffs' properties.

VI. PLAINTIFFS DO NOT REFUTE THAT MCL 213.23 AND 42 USC 1983 DO NOT PROVIDE THEM WITH CAUSES OF ACTION

Plaintiffs have not responded to the City's arguments that MCL 213.23 does not create a cause of action against a municipality (City's Initial Brief p 10). Nor have Plaintiffs responded to the City's argument that 42 USC 1983 does not create and is not the basis for any cause of action (City's Initial Brief p 8, fn 12). As a matter of law, those two claims must be dismissed.

CONCLUSION

Plaintiffs' complaint should be dismissed in its entirety with prejudice under MCR 2.116(C)(4), (7) and/or (8) for the reasons argued above. Defendant City also should be awarded its costs, including attorney fees, for having to defend against this action.

Dated: August 6, 2014

Respectfully submitted,

By: _____

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2004 WL 1982520
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

BOARD OF MANAGERS OF
SOHO INTERNATIONAL ARTS
CONDOMINIUM, Plaintiff,
v.
CITY OF NEW YORK, New York City
Landmarks Preservation Commission,
and Forrest Myers, Defendants.

No. 01 Civ. 1226(DAB). | Sept. 8, 2004.

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Opinion

OPINION

BATTS, J.

*1 Before the Court are Plaintiff Board of Managers of Soho International Arts Condominium's (the "Board") and Defendants City of New York (the "City"), the New York City Landmarks Preservation Commission's (the "Commission") (collectively the "City Defendants") Cross Motions for Summary Judgment to determine whether the Commission violated Plaintiff's rights under the First, Fifth, and Fourteenth Amendments of the United States Constitution, the New York State Constitution, and New York state law when it prevented the permanent removal of a prominent work of art (the "Work") installed on the exterior of Plaintiff's building located at 599 Broadway, New York, New York ("599 Broadway" or the "Building"). The Municipal Arts Society ("MAS") has also filed a Motion to File a Brief of Amicus Curiae; no party has filed any papers concerning the MAS' Motion. The Court accordingly GRANTS the Motion and will review the MAS' briefing papers.

For the reasons that follow, Plaintiff's Motion is DENIED in its entirety and City Defendants' Motion is GRANTED in part and DENIED in part.

I. FACTUAL BACKGROUND

The Court presumes familiarity with its Opinion of June 17, 2003, which granted in part and denied in part both Plaintiff Board's and Defendant Forrest Myers' ("Myers") Cross Motions for Summary Judgment. *Board of Managers of Soho International Arts Condominium v. City of New York,* 01 Civ. 1226(DAB), 2003 WL 21403333 (S.D.N.Y. Jun. 17, 2003) (hereinafter "*Board I*"), motion for reconsideration denied, 2003 WL 21767653 (S.D.N.Y. Jul.31, 2003) (hereinafter "*Board II*").

A. Origin of the Wall

599 Broadway ("599 Broadway" or the "Building") is a twelve-story loft structure, built in 1917 and organized into a condominium in 1983.[1] (Pl. 56.1 Stmt. ¶¶ 1, 5, 43; City Defs. 56.1 Stmt. ¶¶ 1–3.) An eight-story building abutted 599 Broadway on its northern side until it was torn down in the 1940s when the City widened Houston Street by eminent domain. (Pl. 56.1 Stmt. ¶ 6; City Defs. 56.1 Stmt. ¶ 4.) The condemnation and clearance of that building left only its southernmost wall intact, and this remnant was anchored to 599 Broadway by a series of braces to ensure structural support. (Pl. 56.1 Stmt. ¶ 8; City Defs. 56.1 Stmt. ¶ 4.)

This anchor system formed a rectangular grid pattern of seven rows with each row containing six braces. These forty-two braces were, in turn, affixed to 599 Broadway's exterior by rods which penetrated the Building's northern wall and were embedded in its floor slabs. (Pl. 56.1 Stmt. ¶ 8; City Defs. 56.1 Stmt. ¶ 4.)

In 1972, the then-owner of the Building Charles Tanenbaum ("Tanenbaum") consented to the installation of the Work on

599 Broadway's northernmost wall under the auspices of City Walls, Inc. ("City Walls"), a non-profit organization. (Pl. 56.1 Stmt. ¶¶ 9–11; City Defs. 56.1 Stmt. ¶ 5.) The Work was created by Myers, who utilized the braces on 599 Broadway and created a three-dimensional work by bolting four-foot aluminum bars perpendicularly to each of the forty-two steel braces on 599 Broadway's northern wall. (Pl. 56.1 Stmt. ¶ 11; City Defs. 56.1 Stmt. ¶ 7.) The necessary government permits were obtained by Tanenbaum and City Walls, and the Work was installed. (Pl. 56.1 Stmt. ¶¶ 9–20; City Defs. Reply to Pl. 56.1 Stmt. ¶¶ 9–20.)

*2 Affidavits from both sides state that the Work cost $10,000 to fabricate and install. (Topping Aff. ¶ 25; Silberman Aff. ¶ 18.) The Board has paid the bulk of the maintenance costs of the Work and 599 Broadway's exterior wall, although the Public Art Fund ("PAF") has contributed over the years a modest sum for the Work's upkeep. (Topping Aff. ¶ 6; Silberman Aff. ¶ 36.)

There are no documents in the record that indicate who owned the Work at the time of the installation. Neither party has submitted any evidence regarding whether any change in ownership has occurred since the Work's installation in 1973. Finally, as noted in *Board I,* "there is no documentation between [City Walls and Myers] addressing ownership of or title to the Work," and both Myers and Plaintiff Board "vigorously dispute" ownership and title. *Board I* at *4, *20 n.24.[2] City Walls and its successor PAF have never claimed a proprietary interest although they may have contributed significantly towards the Work's original creation and installation. *Board I* at *4 (noting that Plaintiff and Defendant Myers both acknowledged that the "cost of the project ... was funded by City walls with grants from Chase Manhattan Bank, the National Endowment for the Arts, and Tanenbaum").

B. Designation of Landmark District

Pursuant to the Landmark Preservation Law ("Landmarks Law"), N.Y.C.Code § 25–303, the Commission designated the SoHo–Cast Iron Historic District (the "District") on August 14, 1973 and designated its boundaries as Canal Street, Broadway, Crosby Street, and West Broadway.[3] (Pl. Exh. 32; Pl. 56.1 Stmt. ¶ 23; City Defs. 56.1 Stmt. ¶ 11.) The District encompasses twenty-six city blocks and about 500 buildings. (Pl. Exh. 32 at 1; City Defs. 56.1 Stmt. ¶ 11.) In designating the District, the Commission composed a SOHO–CAST IRON HISTORIC DISTRICT DESIGNATION REPORT ("Designation Report") in which it chronicled the buildings in the District and their historical and aesthetic importance and also detailed the rationales behind the creation of the District, including the fact that the District has a "collection of well preserved cast-iron structures, now unrivalled in the world." (Pl. Exh. 32 at 1.) The Report also remarked that the District "is fast becoming one of the most important creative centers of contemporary art in the nation," and credited this artistic revitalization as key to "the preservation of a unique concentration of structures of great historic significance." (Id. at 8.)

The Designation Report did not mention the Work explicitly; it referred to the actual Building only once, observing:

> 512–11
>
> # 599–601 (through to Mercer)
>
> (Southwest corner W. Houston)
>
> Completed: 9/5/1917
>
> Architect: J. Odell Whitenach
>
> Original Owner: Frederick Ayer
>
> Original Function: Store and lofts
>
> 12 stories; 6 bays (outer bays are double windows)
>
> (Id. at 50.)

The Report did not reference the Work because Myers had not yet completed it at the time of the District's designation. (Pl. 56.1 Stmt. ¶ 31; City Defs. 56.1 Stmt. ¶ 11.) Tanenbaum wrote to the Commission shortly after the District was designated to "raise a question with regard to the completion of a City Walls project now in progress." (Pl.Exh. 14.) Detailing the approvals the Work had already received from various city agencies, Tanenbaum indicated that the Work was currently in the process of installation, that he hoped "no formal proceedings will be necessary before [the] Commission," and that any advice was welcomed "as to what, if any, further steps" were required. (Id.) On September 19, 1973, the Commission responded to Tanenbaum, indicating that the Commission did not demand any further action. (Pl. Exh. 15 (citing section 207.20.0).[4])

C. Initial Efforts to Repair and/or Remove the Work

*3 On February 2, 1981, the Building's then-owner, 599 Associates, applied to the Commission for permission to make repairs to 599 Broadway's northern wall. (Pl. 56.1 Stmt. ¶ 46; City Defs. 56.1 Stmt. ¶ 14.) On March 11, 1981, the Commission granted its permission for the owner to undertake the necessary repair work (Pl.Exh. 21), which was duly performed. (Pl. 56.1 Stmt. ¶ 47; City Defs. 56.1 Stmt. ¶ 15.)

In 1983 and 1984, the Commission charged Plaintiff with violations of the Landmarks Law, because of its display of an unauthorized sign on the Building's wall. (City Record at 47–49;[5] City Defs. 56.1 stmt. ¶ 17.) The sign "partially obscure[d] the sculpture designed by Forrest Meyers [sic]," and the Board's application to continue the sign's display was denied by the Commission on September 19, 1984. (City Record at 49.)

By 1987, the northern wall was again in a state of disrepair. The Building's managing agent applied to the Commission for permission to apply waterproofing to the northern wall and to remove the Work on August 28, 1987 because the wall constituted "an unsafe condition." (Pl.Exh. 23.) The Commission responded by letter to the Building's request on September 14, 1987, in which it noted "that removal of the sculpture will require a public hearing because it is a highly visible addition to a designated building within the Soho—Cast Iron Historic District." (Pl.Exh. 24.) The letter recommended that the Building withdraw its request to remove the Work and instead to seek permission to repair the wall; the application for removal of the Work could then be submitted separately, thus obviating the need for a public hearing for urgent repairs. (Id.) The managing agent subsequently withdrew his request to remove the mural in order to repair the wall. (Pl. 56.1 Stmt. ¶ 49; City Defs. 56.1 Stmt. ¶ 18.) On March 22, 1988, the Commission issued a permit which outlined the authorized repair work, including the repair of the wall's masonry and waterproofing of both the Work and the wall. (Pl.Exh. 26.) There is no record that the Board submitted a application for removal for a decade.

In 1997, the Board again contemplated the repair of the wall and the removal of the work.[6] Plaintiff sought the Commission's permission on an emergency basis to remove the Work from the Building's northern wall on October 20, 1997. (Pl. Exh. 27; Pl. 56.1 Stmt. ¶ 51; City Defs. 56.1 Stmt. ¶ 20.)

The Commission approved the "interim removal of unstable steel braces, along with the attached projecting sculpture," and the easternmost row of braces was removed. (Pl.Exh. 28.) The Commission found that "the work would eliminate a potentially unstable condition, and that the work would allow for an inspection of the condition of the braces, structural attachments, and the underlying masonry, and enable the applicant to develop a proposal to address structural deterioration and future reinstallation of the sculpture, if feasible." (Id.) The permit did not indicate that reinstallation of the braces was required nor did it give a time frame for such an action; however, it did explicitly provide that "any future proposal ... to reinstall the sculpture, may be approved ... [and any] proposal to permanently eliminate portions, or the entirety, of the braces, sculpture, or the underling masonry, will be reviewed at a Public Hearing for a Certificate of Appropriateness." (Id.)

*4 The removal of the easternmost braces allowed for inspection of the extent of the deterioration of the wall and the bracing system. The masonry was in poor condition as were the channel irons and braces located both on the interior and exterior of the northern wall. (Pl. 56.1 Stmt. ¶¶ 53–55; City Defs. 56.1 Stmt. ¶¶ 31–32.) The Board retained Rand Engineering ("Rand") to investigate and recommend ways to repair the wall. In its Engineering Report ("Engineering Report"), Rand recommended that the bracing structure be internalized,[7] thus eliminating the structural elements upon which the Work was installed. (Pl. Exh. 29 at 9.) The Engineering Report further advised that were the Work to be reinstalled, a replica made of lightweight material and affixed in different locations than the original would avoid creating any structural problems. (Id.)

D. The Commission's Denial of the Certificate of Appropriateness

The Board then decided in 1997 that it would seek approval to remove the Work permanently. The Commission treated the application to remove the Work permanently as an application for a certificate of appropriateness ("COA") under the Landmarks Law. (Pl. 56.1 Stmt. ¶ 67; City Defs. 56.1 Stmt. ¶ 21.)

During the Commission's review of the Board's COA to remove the Work, Plaintiff submitted a proposal to keep the Work in place while installing an advertisement on the northern wall just above the Work. (City Record at 302–03.) However, because the Board felt that the proposal would not

be granted, Plaintiff withdrew the proposal at a May 16, 2000 hearing before the Commission, and has not filed another advertising proposal. (Pl. Response to City Defs. 56.1 Stmt. ¶ 8; City Record at 1115, 1163.)

The Commission held public hearings on the Board's application on January 27, 1998, June 29, 1999, May 16, 2000, and July 11, 2000. (Id. at 1000–1227.) At these hearings, Plaintiff, its lawyers, and Rand Engineering testified in support of the Board's application and also sent to the Commission various written submissions. (Id. at 1005–20; 1066–1074; 1078–88; 1115–44; 1170–71; 1198–1226.) The Commission also heard from the Myers and his wife (Id. at 1025–35; 1038–40; 1089–97; 1147–1156; 1189–1194), as well as an organized cadre of witnesses of art gallery owners, artists, art critics, celebrities and elected officials, who praised the Work as influential and important. (Id., *passim*.) [8] There was only one dissenting opinion, that of Louis Torres, an art critic, who told the Commission at length that under no circumstances was the Work to be considered a piece of art. (Id. at 1057–59.)

On October 18, 2000, the Commission voted unanimously to deny Plaintiff's application for a COA to remove the Work. (Id. at 1228–1268.) Its formal written denial on November 13, 2000 articulated the Commission's findings:

> that the sculpture, conceived of in the early 1970s and installed in 1973, is a highly acclaimed work of art ...; that the sculpture is by Forrest Myers, an important American artist; that Mr. Myers lived and worked in Soho during the 1960s and 1970s and was one of the pioneering artists who moved into Soho, that these artists adaptively reused the cast iron buildings and transformed the area into a nationally and internationally acclaimed center of contemporary and avant-garde art, and that Mr. Myers conceived of and installed the sculpture during this important time in the district's and city's history; that the sculpture was conceived of and installed contemporaneously with the designation of the district, that from the time it was installed in 1973, the sculpture became a symbol of Soho due to its presence at the prominent intersection of Broadway and Houston Street, and that during the intervening 28 years it has come to be known and experienced as the "gateway" to Soho; that the installation of the sculpture, through attachment to the pre-existing tie rods and channel irons that brace the northern facade has not damaged original or historic material; ... that the sculpture can be reinstalled and maintained on the refurbished wall without causing damage to the wall or building; that the placement of the sculpture and its scale and color do not detract from, and are harmonious with, the significant architectural features of the building and the historic district; that the sculpture is evocative and representative of a significant era in the district's and city's history, when the cast iron buildings were being adaptively reused by artists and the area was being transformed into a world class center for contemporary and avant-garde art, and which era and transformation contributed significantly to the preservation of the cast iron buildings; and therefore, for all the above reasons, the sculpture contributes to the special architectural and historic character of the historic district and that its permanent removal will adversely affect the district's special sense of place. Based on these findings, the Commission determined the [removal of the Work] to be inappropriate to the building and to the Soho–Cast Iron History District, and voted not to approve the application.
>
> *5 (Pl.Exh. 30.)

Shortly thereafter, Plaintiff brought suit in this Court.

During the pendency of this action, Plaintiff requested a Certificate of No Effect ("CNE") from the Commission to effectuate repairs on the northern wall of the Building. In early 2001, the Board submitted a revised application in accordance with the Commission's requirements, in which it proposed to remove the Work, repair 599 Broadway's northern wall, fabricate lightweight replicas of the Work, and reinstall the Work. (Pl. 56.1 Stmt. ¶ 76; City Record at 1694–1701.)

The Commission granted a CNE on August 27, 2002 which permitted the proposed repair work to commence. It specifically approved "removing existing steel channels and the attached projecting aluminum sculpture; cutting back existing through-wall bolts and filling the voids with grout; removing and replacing deteriorated brick ...; installing new aluminum channels and projecting aluminum sculpture, to match the existing [Work], anchored to the existing floor structure of 599 Broadway with new threaded stainless steel rods." (Pl.Exh. 31.) The Work would be affixed to the wall in slightly different locations than the original Work to protect the wall's structural integrity. (Pl. 56.1 Stmt. ¶ 80; City Defs. 56.1 Stmt. ¶ 36.)

E. Other Buildings and Attempts at Removal of Art in SoHo

The Work was not the only project that City Walls undertook in the 1960s and 1970s. In the SoHo–Cast Iron Historic District alone, City Walls oversaw the creation of at least three other prominently displayed artworks: (1) a wall painting on 600 Broadway ("600 Broadway") by artist Mel Pekarsky ("Pekarsky"), (2) a wall painting on 169 Mercer Street ("169 Mercer") by artist Dorothy Gillespie ("Gillespie"), and (3) a wall painting on 475 West Broadway ("475 West Broadway") by artist Jason Crum ("Crum"). (Pl. 56.1 Stmt. ¶ 66(a); City Defs. 56.1 Stmt. ¶¶ 51–59.) Like the Work, these three artworks were displayed on their respective buildings' exterior walls.

The painting on 600 Broadway was completed before the designation of the SoHo–Cast Iron Historic District. In 1992 and 1996, the Commission approved two COAs which permitted the installation of large-scale advertisements on the exterior wall where the Pekarsky painting had stood. (Pl. Exhs. 35–37; City Defs. 56.1 Stmt. ¶ 52.) The owners of 600 Broadway never petitioned or received the approval of the Commission to remove the two-dimensional painting. Finally, none of the Commission's approvals of COAs in 1992 or 1996 mention whether Pekarsky's painting still existed. It's fate, and the Commission's role, if any, in it, are unclear. (Pl.Exhs.35–37.)

Gillespie's painting on 169 Mercer was created two years after the designation of the District, and the Commission explicitly approved of the artwork's display on the eastern part of the northern wall fronting Houston Street. (Pl. Exh. 38; Pl. 56.1 Stmt. ¶ 66(b); City Defs. 56.1 Stmt. ¶ 52.) Both parties agree that the two-dimensional painting soon deteriorated to the point where it was no longer visible. (Pl. 56.1 Stmt. ¶ 66(b); City Defs. 56.1 Stmt. ¶ 55.) In 1981, the Commission permitted the owners of the building to install new windows in the same place as Gillespie's work; there is no mention, however, of the art in the permit. (Pl.Exh. 40.) Fifteen years later, the Commission approved the installation of a large-scale advertisement where the painting had been, and Gillespie herself had given permission for the removal of her work and the installation of the advertisement. (Pl. Exh. 41; City Record at 228; City Defs. 56.1 Stmt. ¶ 55.) Again, the Commission's approval did not explicitly mention Gillespie's work. (Id.)

*6 475 West Broadway abutted a vacant lot in the 1960s, during which its owner consented to a two-dimensional wall painting to be painted by Crum. In the early 1980s, the owner of the vacant lot constructed a two-story building on his property. As a result, Crum's painting was significantly obscured, perhaps as much as half. (City Defs. 56.1 Stmt. ¶ 57.) In 1998 and 2000, the Commission approved the building owner's applications to install advertisements on the exterior wall where the Crum painting had been. (Pl. 56.1 Stmt. ¶ 66(c); City Defs. 56.1 Stmt. ¶¶ 58, 59.)

All three works of art were two-dimensional paintings that did not have any three-dimensional components nor were they incorporated into any special structural support system in their respective buildings (apart from being painted on the walls themselves). (Pl. 56.1 Stmt. ¶ 66; City Defs. 56.1 Stmt. 51–59.)

F. Procedural History of the Case

After the Commission's denial of the COA in the fall of 2000, Plaintiff filed this suit. The Board's Complaint contains six claims against the City, the Commission, and Myers. The claims against the City Defendants are: (1) a § 1983 claim alleging violations of the Plaintiff's First, Fifth, and Fourteenth Amendment rights, (2) a claim under New York law for the Commission's purported violations of the New York State Constitution which are analogous to the first cause of action, and (3) a claim alleging that the Commission exceeded its statutory jurisdiction under New York law pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR"). (Compl.¶¶ 62–75.) The sixth claim, which alleged that the Commission had improperly delegated power to a private citizen in violation of New York law was dismissed by a Stipulation of Dismissal, so ordered by this Court on July 24, 2003. (Stip., Jul. 24, 2003.)

As directed by the Court, Plaintiff and Defendant Myers filed cross motions for summary judgment, both of which the Court granted in part and denied in part in its June 17, 2003 Opinion.[9] Plaintiff and City Defendants now cross move for summary judgment on the first three claims in the Complaint.

II. DISCUSSION

A. Summary Judgment Standard

A district court should grant summary judgment when there is "no genuine issue as to any material fact," and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *see also Hermes Int'l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 107 (2d Cir.2000). Genuine issues of fact cannot be created by mere conclusory

allegations; summary judgment is appropriate only when, "after drawing all reasonable inferences in favor of a non-movant, no reasonable trier of fact could find in favor of that party." *Heublein v. United States,* 996 F.2d 1455, 1461 (2d Cir.1993) (citing *Matsushita Elec. Industr. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587–88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

In assessing when summary judgment should be granted, "there must be more than a 'scintilla of evidence' in the non-movant's favor; there must be evidence upon which a fact-finder could reasonably find for the non-movant." *Id.* (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). A court must always "resolv[e] ambiguities and draw [ ] reasonable inferences against the moving party," *Knight v. U.S. Fire Ins. Co.,* 804 F.2d 9, 11 (2d Cir.1986); however, the non-movant may not rely upon "mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." *Id.* at 12. Instead, when the moving party has documented particular facts in the record, "the opposing party must, 'set forth specific facts showing that there is a genuine issue for trial.' " *Williams v. Smith,* 781 F.2d 319, 323 (2d Cir.1986) (quoting Fed.R.Civ.P. 56(e)). Establishing such facts requires going beyond the allegations of the pleadings, as the moment has arrived " 'to put up or shut up.' " *Weinstock v. Columbia University,* 224 F.3d 33, 41 (2d Cir.2000) (citation omitted). Unsupported allegations in the pleadings thus cannot create a material issue of fact. *Id.*

*7 When a party fails to oppose a motion for summary judgment on a particular claim, "the district court may not grant the motion without first examining the moving party's submission to determine if it has met its burden of demonstrating that no material issue of fact remains for trial." *Vermont Teddy Bear Co., Inc. v. 1–800 Beargram Co.,* 373 F.3d 241, 244 (2d Cir.2004)(quoting *Amaker v. Foley,* 274 F.3d 677, 681 (2d Cir.2001)). "Moreover, in determining whether the moving party has met this burden of showing the absence of a genuine issue for trial, the district court may not rely solely on the statement of undisputed facts contained in the moving party's Rule 56.1 statement. It must be satisfied that the citation to evidence in the record supports the assertion." *Id.* at 244 (citing *Giannullo v. City of New York,* 322 F.3d 139, 143 n. 5 (2d Cir.2003)).

Finally, for cases in which both sides move for summary judgment, a district court need not grant judgment as a matter of law for one side or the other. *Schwabenbauer v. Bd. of Educ. of Olean,* 667 F.2d 305, 313 (2d Cir.1981). Instead, it must evaluate "each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Id.* at 314.

B. The Landmarks Preservation Law

In 1965, the New York City Council enacted the Landmarks Law "to protect historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character." *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 110, 98 S.Ct. 2646, 2651 57 L.Ed.2d 631 (1978). [10] Indeed, the City Council observed with obvious concern

> that many improvements ... having ... a special historical or aesthetic interest or value and many ... representing the finest architectural products of distinct periods in the [city's] history ... have been uprooted, notwithstanding the feasibility of preserving and continuing the use of such improvements ... and without adequate consideration of the irreplaceable loss to the people of the city of the aesthetic, cultural and historic values represented by such improvements.... In addition, distinct areas may be similarly uprooted or may have their distinctiveness destroyed, although the preservation thereof may be both feasible and desirable....
>
> N.Y.C.Code § 25–301a.

To ignore this reality would jeopardize "the standing of this city as a world wide tourist center and world capital of business, culture and government." Id. The Landmarks Law was thus enacted to promote

> as a matter of public policy [the protection of] improvements ... of special historical or aesthetic interest or value[, which] is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people. The purpose of this chapter is to ... safeguard the city's historic, aesthetic and cultural heritage[,] ... stabilize and improve property values in such districts[,] ... foster civic pride in the beauty and noble accomplishments of the past[,] ... protect and enhance the city's attractions to tourists and visitors[,] ... strengthen the economy of the city[,] and promote the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.
>
> *8 N.Y.C.Code § 25–301b.

To achieve these ends, the Landmarks Law vests authority to regulate historic preservation in the eleven-member Commission, which has the power "to designate historic districts and the boundaries thereof." N.Y.C.Code § 25–303a(4); N.Y.C. Charter § 3020(6). In designating such an area, the Commission follows an established procedure involving public hearings and other administrative processes, *see generally* N.Y.C.Code § 25–303, to determine whether a neighborhood contains improvements which have "a special character or special historical or aesthetic interest or value," "represent one or more periods or styles of architecture typical of one or more eras in the" city's history, and "cause such area, by reason of such factors, to constitute a distinct section of city." N.Y.C.Code § 25–302h.

Once an area is designated, the Commission may regulate and protect any "improvements," which is "[a]ny ... work of art or other object constituting a physical betterment of real property." N.Y.C.Code § 25–302i. Indeed, the Landmarks Law makes it illegal for "any person in charge of ... an improvement parcel ... located in an historic district ... to alter, reconstruct or demolish any improvement ... unless the commission has previously issued" a permit. N.Y.C.Code § 25–305. Such permission is generally granted through the issuance of either a certificate of no effect ("CNE") or a certificate of appropriateness ("COA").

The certificate of no effect essentially approves the construction, alteration, or demolition of an improvement because such work will not change or alter any architectural feature of the landmark or historical district and will be in harmony therewith. N.Y.C.Code § 25–306. The Commission must examine several factors, including whether "the proposed work would change, destroy or affect, any exterior architectural feature." Id.

A building owner may also petition the Commission for a certificate of appropriateness, which, if granted, permits the construction, alteration, or demolition of an improvement on the grounds that such proposed work will be appropriate to the historic district around it. Specifically, the Commission must weigh "the effect of the proposed work in ... affecting the exterior architectural features of the improvement upon which such work is to be done" and "the relationship between the results of such work and the exterior architectural features of other, neighboring improvements in such district." N.Y.C. 25–307b(1). Finally, in scrutinizing this relationship, the Commission must consider "the factors of aesthetics, historical and architectural values and significance...." Id. at (b)(2).

C. United States Constitutional Claims

Plaintiff and City Defendants have filed cross motions for summary judgment on the Plaintiff's First, Fifth, and Fourteenth Amendment claims.

1. The First Amendment

The First Amendment declares in part that "Congress shall make no law ... abridging the freedom of speech, or of the press." U.S. Const. Amdt. I. This deceptively simple "provision embodies '[o]ur profound national commitment to the free exchange of ideas," ' *Ashcroft v. American Civil Liberties Union,* 535 U.S. 564, 573, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002) (citation omitted), and has inspired vigorous debate on its scope and protections since its inception. The Supreme Court has held that the Amendment's protections encompass not only actual speech but an individual's symbolic or expressive conduct as well. *Virginia v. Black,* 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (citations omitted).

*9 First Amendment protections, while broad, are not absolute, *Regan v. Boogertman,* 984 F.2d 577, 579 (2d Cir.1993) (citing *Elrod v. Burns,* 427 U.S. 347, 360, 96 S.Ct. 2673, 2683, 49 L.Ed.2d 547 (1976)), and governments can place restrictions on speech in certain circumstances. *Young v. New York City Transit Authority,* 903 F.2d 146 (2d. Cir.1990) (upholding the constitutionality of an anti-begging ordinance); *New York City Unemployed and Welfare Council v. Brezenoff,* 677 F.2d 232, 237 (2d Cir.1982) (affirming speech restrictions at welfare centers and noting that "the First Amendment does not prohibit all regulation of expressive activities") (citations omitted). In cases involving expressive conduct, the "Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Young,* 904 F.2d at 153 (citation omitted).

As a threshold matter, artwork has been deemed "a quintessential form of expression," worthy of and requiring First Amendment protections. *People for the Ethical Treatment of Animals v. Giuliani,* 105 F.Supp.2d 294, 304 (S.D.N.Y.2000) (citing *Bery v.. City of New York,* 94 F.3d 689, 696 (2d Cir.1996)); *see also Serra v. U.S. General Servs. Administration,* 847 F.2d 1045, 1048 (2d Cir.1988). It is of no consequence that the Work has no particularized message,

Hurley v. Irish–American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 569, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (noting that limiting First Amendment protection to those things which convey "a narrow, succinctly articulate message" would mean not protecting "the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis"), and no parties challenge whether the Amendment applies to this Work or its display in this case.

Given the above, Plaintiff argues that the Commission's denial of its COA to remove the Work and its requirement in the CNE to reinstall the Work after repair constitute (1) an impermissible content based regulation because the Commission's decision is based on the content of the Work and (2) unconstitutionally compelled speech. As such, Plaintiff further contends that the Court must apply strict scrutiny.

a. First Amendment Jurisprudence Standard of Review

(1.) Content Based or Content Neutral

When conducting First Amendment analysis, courts examine challenged governmental regulations to discern whether they are content based or content neutral since "the scope of protection for speech generally depends on whether the restriction is imposed because of the content of the speech." *Universal Studios*, 273 F.3d at 450; *see also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 454–55, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (noting the distinct differences in the level of scrutiny between content neutral and content based laws); *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (same) (hereinafter *Turner I*).

***10** Content based regulations directly restrict speech because of its content and receive strict scrutiny. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). Such an action is not only presumptively invalid, *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), but "must be narrowly tailored to promote a compelling Government interest." *Playboy Entertainment Group*, 529 U.S. at 813 (citation omitted).

Content neutral laws, on the other hand, regulate matters unrelated to speech and only incidentally affect First Amendment rights. *Turner I*, 512 U.S. at 643 ("[L]aws that confer benefits or impose burdens on speech without reference to the ideas or the views expressed are in most instances content neutral.") The Supreme Court has applied intermediate scrutiny to these laws, requiring the regulation to "further an important or substantial governmental interest unrelated to the suppression of free speech, provided the incidental restrictions did not 'burden substantially more speech than is necessary to further' those interests." *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180, 186, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) (citation omitted) (hereinafter *Turner II*).

When making this determination, the threshold inquiry in speech cases is

> whether the government has adopted a regulation of speech because of disagreement with the message it conveys. *Community for Creative Non–Violence, supra*, 468 U.S., at 295, 104 S.Ct., at 3070. The government's purpose is the controlling consideration....Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech." *Community for Creative Non–Violence, supra*, 468 U.S., at 293, 104 S.Ct., at 3069 (emphasis added); *Heffron, supra*, 452 U.S., at 648, 101 S.Ct ., at 2564 (quoting *Virginia Pharmacy Bd., supra*, 425 U.S., at 771, 96 S.Ct., at 1830); *see Boos v. Barry*, 485 U.S. 312, 320–321, 108 S.Ct. 1157, 1163–1164, 99 L.Ed.2d 333 (1988) (opinion of O'CONNOR, J.).
>
> *Ward v. Rock Against Racism*, 491 U.S. 781, 791–92, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

Finally, "the validity of punishing [or restricting] some expressive conduct ... does not depend on the showing that the particular behavior or mode of delivery has no association with a particular subject or opinion." *Hill v. Colorado*, 530 U.S. 703, 736 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (Souter, J. concurring); *Masden v. Women's Health Center, Inc.*, 512 U.S. 753, 763, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) ("That petitioners all share the same viewpoint ... does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order").

Plaintiff Board argues that the Commission's refusal to allow removal of the Work and its requirement to reinstall the Work are content based determinations. The Commission allegedly acted because of its vehement disagreement with the Board's stance on the Work, and its approval of the Work's content unconstitutionally motivated its denial. The

Board also alleges that the Commission's reliance on the well-organized public defense of the Work implies that the Commission's actions were based on the Work's content. Accordingly, the Court should subject the Commission's action to strict scrutiny.

*11 City Defendants contend that the Commission's actions are content neutral and unrelated to speech. The Landmarks Law was enacted to further societal objectives distinct and apart from speech, and the Commission's application of the law conformed to the speech neutral purposes behind it. The Commission alleges it did not target or even refer to speech in its determination, and the court should therefore apply intermediate scrutiny here.

The Court finds that Landmarks Law was clearly enacted for purposes wholly unrelated to speech. Indeed, N.Y.C.Code § 25–301 explicitly states that "as a matter of public policy ... the protection ... of improvements ... of special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people ." The Law does not target or focus on speech or expressive activity, and its restrictions on First Amendment rights are merely incidental. Plaintiff has cited to no provision in the Landmarks Law which directly refers to speech or expressive conduct or even implies that the law exists or was enacted to regulate First Amendment activity.

While the Second Circuit has not examined such historical preservation laws in the freedom of expression context, other federal courts have concluded that such laws are content neutral. *See, e.g., Globe Newspaper Co. v. Beacon Hill Architectural Commission,* 100 F.3d 175, 183 (1st Cir.1996) (finding that a historic district's ban on newspaper racks was content neutral because the law "does not make or otherwise demand reference to the content of the affected speech, either in its plain language or in its application"); *see also Horton v. City of St. Augustine, Fla.,* 272 F.3d 1318, 1333–34 (11th Cir.2001) (holding a law content neutral, which regulated street performing in a historical district); *Messer v. City of Douglasville, Ga.,* 975 F.2d 1505, 1509 (11th Cir.1992) (ruling that a historic district's ban on signs was content neutral); *Northwestern University v. City of Evanston,* 2002 WL 31027981, 00 C 7309, at *12 (N.D.Ill. Sept. 11, 2002) (dismissing university's claim that the designation of a historical district which included the school and which would require the school to file a COA to alter its structures infringed on expressive activity and finding the law content neutral); *Burke v. City of Charleston,* 893 F.Supp. 589, 609–610 (D.S.C.1995) (finding regulation of sign on building wall in a historical district content neutral), rev'd on other grounds, 139 F.3d 401 (4th Cir.1998).

While pieces of art such as the Work may be expressive, the justifications given for the COA's denial and the CNE's reinstallation requirement were clearly content neutral. Indeed, the Commission specifically noted that the Work has significant historical value to the city, is aesthetically evocative of an important era in the district's history, and contributes to the general welfare purposes of the Landmarks Law. (Pl.Exhs.30, 31); *see also Globe Newspaper Co.,* 100 F.3d at 183 (finding that a historical preservation regulation was content neutral, "directed at aesthetic concerns," and "unrelated to the suppression of ideas"). The Court further observes that the word "speech" and its derivatives do not appear anywhere in the Commission's explications, and Plaintiff does not cite any language in the Commission's written determinations that corroborate Plaintiff's position that the Commissioners were attempting to regulate speech. *See Members of City Council of City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 804, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984) (finding a law content neutral because "[t]here is no claim that the ordinance was designed to suppress certain ideas that the City finds distasteful or that it has been applied to appellees because of the views that they express"). The City Defendants' justification, which is the controlling consideration in First Amendment analysis, is limited to aesthetic and historical terms. The Commission's determination therefore is clearly content neutral.

*12 Moreover, Plaintiff's couching its argument in terms of the Board's supposed "approval" of the Work's "content" incorrectly equates the Commission's actions with explicit approval of the content and message the Work conveys. Indeed, the Commission's written determinations do not express approval of, nor even refer to, the Work's content, and Plaintiff does not cite anything in the record to corroborate this assertion. It is not even clear what "message" the Board claims the Work conveys. Instead, if the Commission's denial demonstrates any approbation, it is for the Work's aesthetics rather than its "content." The Board's approval of the Work's artistic and historic value is content neutral, and moreover quite distinct from approval of the Work based on its subject matter. Indeed, one may laud on artistic merit Pablo Picasso's *Les Demoiselles d'Avignon,* which depicts some of Avignon's more worldly female denizens, without approving of the demoiselles' occupation, which is the painting's content. [11]

It is furthermore of no consequence that the Commission's actions may have an association with a particular opinion or group, most notably those who testified in opposition to the Board at the various public hearings held on the Board's applications to remove the Work. *Hill,* 530 U.S. at 736 (noting that a restriction on speech merely associated with a particular opinion does not render a law content based); *Madsen,* 512 U.S. at 763 (same). Indeed, Plaintiff's allegations that the Board was "caving in" to pronounced public pressure are conclusory because Plaintiff has not demonstrated any evidence which would suggest that this opinion was the motivating factor behind the regulation and also because the witnesses' testimony concerned the Work's artistic and historic prominence. Simply put, the Board has failed to proffer any evidence that the Commission's action was based on content.

The Court therefore finds that the Commission's determinations were content neutral.

(2.) Compelled Speech

As a concomitant right to freedom of speech, the First Amendment also acknowledges the right of the individual "to refrain from speaking at all" since "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Wooley v. Maynard,* 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). Compelled speech strikes at the very heart of "our view of personhood, which encompasses what the Supreme Court later referred to as 'freedom of thought,' 'freedom of mind' and a 'sphere of intellect and spirit,' " *Carroll v. Blinken,* 957 F.2d 991, 996 (2d Cir.1992) (citations omitted), and the protection from compelled speech is essential to the maintenance of a free republic. *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 641, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) ("Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.").

*13 The Supreme Court has applied the compelled speech doctrine to cases in which individuals or entities were forced by the state to speak, *Wooley, passim* (forbidding a state from requiring an individual to display "Live Free or Die" on his license plate); *Barnette,* 319 U.S. at 638–41 (precluding a state from making a minor student recite the pledge of allegiance), or to include the words of others in the course of their own expressive activities. *See Pacific Gas & Electric Co. v. Public Utilities Commission of California,* 475 U.S. 1, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (declaring unconstitutional a state agency's requirement that a corporation place a consumer organization's newsletter in its bills to customers); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974) (holding that a state could not require a newspaper to print a politician's response to a negative editorial in the newspaper).

The Supreme Court safeguards this important right by applying strict scrutiny to cases where compelled speech is at issue. *Wooley,* 430 U.S. at 716–17 (requiring the government interest to be compelling and the means narrowly tailored). Indeed, the Court has in recent cases analogized the standards for a compelled speech case to those that govern one involving content based regulations. *See Riley v. National Federation of the Blind of North Carolina, Inc.,* 487 U.S. 781, 797–98, 108 S.Ct. 2667, 2677–78, 101 L.Ed.2d 669 (1988) (finding that a state law compelling disclosure of certain facts in the solicitation of charitable donations was subject to strict scrutiny because it mandated the content of a speaker's speech).

Plaintiff argues that the Commission's mandate that the Work be displayed on 599 Broadway's northern wall forces the Board to speak. Specifically, the Work's display ostensibly demonstrates to the public at large the Board's approval of the Work and its message. This forced display thus constitutes compelled speech.

City Defendants contend that the Commission's action did not in anyway invoke the doctrine of compelled speech. They point out that none of the cases to which the Board has cited in its papers actually deals with expressive conduct, but rather situations in which an individual is actually forced to speak discrete and ideological messages. Accordingly, the court cannot use the compelled speech doctrine to evaluate Board's First Amendment arguments.

The Court agrees with the City and finds that the Board has not demonstrated that the Commission's actions here are tantamount to compelled speech. As a threshold matter, the doctrine of compelled speech encompasses only actual speech. Plaintiff has cited no cases where solely expressive conduct has ever been deemed compelled speech by the Supreme Court (or any other federal court). The Supreme Court's precedents, cited *ante,* have instead all involved actual speech, which carried a particularized and explicit ideological message. The Third Circuit has noted that the application of the compelled speech doctrine to a case

involving solely expressive conduct would be inappropriate, finding that "the compulsion to which [Plaintiff] objects does not involve *words,* which convey a clear ideological message" in "contrast to *Wooley* [and] *Barnette." Troster v. Pennsylvania State Dept. of Corrections,* 65 F.3d 1086 (3d Cir.1995) (distinguishing a case involving a requirement that a correctional officer wear a United States flag on his uniform from the Supreme Court's compelled speech cases). This Court agrees that case law requires the state to compel actual speech and not mere conduct.

*14 The cases upon which Plaintiff relies to make its compelled speech argument are clearly inapposite to the present case where it is patently clear that the Work does not speak, use or display actual words conveying an ideology or particularized message. *See, e.g., Washington Legal Foundation v. Massachusetts Bar Foundation,* 993 F.2d 962, 977 (1st Cir.1993) ("The IOLTA Rule does not compel the plaintiffs to display, affirm or distribute ideologies or expression allegedly advocated by the IOLTA program or its recipient organizations. Direct compelled speech, therefore, is not an issue in this case.") Accordingly, the compelled speech doctrine is inapposite.

In the end, City Defendant's rationales, like the law itself, focus not on the content of the Work's expression or the use of 599 Broadway's northern wall to speak a particular message but rather emphasize the Work's historical and aesthetic value to the Historical District and its furthering the goals of the Landmarks Laws. Accordingly, the Court will apply a content neutral analysis to determine whether the Commission's actions here furthered a substantial state interest and did not unduly burden the Board's speech rights more than necessary to achieve its ends.

b. Substantial State Interest

To uphold a content neutral regulation, a court must first satisfy itself that the law furthers a substantial state interest unrelated to regulating or restricting speech. *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). The Supreme Court has held that aesthetics are a substantial governmental interest well within the police power of the state to regulate. *Taxpayers for Vincent,* 466 U.S. at 805 ("It is well settled that the state may legitimately exercise its police powers to advance esthetic values."); *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (seven justices finding a ban on billboards for aesthetic purposes a substantial government interest); *Penn Central,* 438 U.S. at 129 ("States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city ... and appellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural or cultural significance is an entirely permissible governmental goal."); *Berman v. Parker,* 348 U.S. 26, 33, 75 S.Ct. 98, 102, 99 L.Ed.2d 27 (1954) (noting that "[t]he concept of the public welfare is broad and inclusive" and includes the power of the state to legislate for the "spiritual as well as physical, aesthetic as well as monetary") (citation omitted).

Lower courts have, in the context of First Amendment challenges to historic districts, also declared aesthetics a substantial government interest, *Globe Newspaper,* 100 F.3d at 187 (noting in a First Amendment challenge to a historic district regulation that aesthetics is recognized "as [a] significant government interest[ ] legitimately furthered through ordinances regulating First Amendment expression in various contexts") (quoting *Gold Coast Publications, Inc. v. Corrigan,* 42 F.3d 1336, 1345 (11th Cir.1994) (internal quotations omitted)). The Eleventh Circuit has held that "government has a more significant interest in the aesthetics of designated historical areas than in other areas." *Messer,* 975 F.2d at 1510.

*15 Plaintiff argues that no government interest exists in this case because the interest is directly related to restricting speech. Specifically, the Board claims that the asserted aesthetic interest is "precisely the suppression of artistic expression of which the Commission disapproves, and the compulsion of expression of which it does approve." (Pl. Reply Memo. of Law at 10.) The Court should find that the content neutral test has not been met.

City Defendants contend that the Commission has a substantial governmental interest in promoting and preserving the aesthetics of the SoHo–Cast Iron Historical District. They cite to many cases in which courts have found aesthetics a substantial interest and argue that the aesthetic goals are completely unrelated to the suppression of the Board's speech.

The Court finds that there is no evidence in the Commission's written determinations that it was targeting speech or that the asserted interest in aesthetics relates to speech rights at all. Plaintiff does not cite to any portion of the record to support its assertion. *See Young,* 903 F.2d at 159 (holding that in the context of a transportation authority's anti-begging ordinance,

"[t]here is nothing in the record to suggest even remotely that the TA's interests in stopping begging arise because the TA objects to a particularized idea or message" and finding the interest unrelated to restricting speech). The aesthetic interest is unrelated to speech because the Commission was not seeking to compel the Board to speak by displaying the mural but rather attempting to preserve a prominent Work it deemed integrated with the District's architecture and aesthetics and an important artistic work in itself. Plaintiff's argument is thus unavailing.

c. No More Burdensome Than Necessary

The Court must additionally ensure that the regulation adopted restricts speech "no greater than is essential to the furtherance of that interest." *United States v. O'Brien,* 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968). Towards this end, the element is "satisfied so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," and that the "means chosen do not burden substantially more speech than is necessary to further the government's legitimate interests." *Turner I,* 512 U.S. at 662 (citations omitted) (internal quotations omitted).

The Supreme Court has explicitly noted that "content neutral regulations are not 'invalid simply because there is some imaginable alternative that might be less burdensome on speech.' " *Turner II,* 5 U.S. at 217 (citing *United States v. Albertini,* 472 U.S. 675, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985)). "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, ... the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 217–18 (citing *Ward,* 491 U.S., at 800, 109 S.Ct., at 2758). Furthermore, a court should not sit in place of the legislature or agency and determine what it believes to be the most appropriate means. *See Young,* 903 F.2d at 161 ("We do not believe that *United States v. O'Brien* ... assigns to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endows the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.") (citation omitted); *see also, Turner II,* 520 U.S. at 218 ("It is well established a regulation's validity 'does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests.' ') (citation omitted).

***16** It is clear that the Commission's denial of the COA and its permit to repair and reinstall the Work furthers the substantial government objective of preserving aesthetics in an historic district much more effectively than absent such governmental action. Indeed, without the Commission's determinations, it is beyond dispute that the Work would be permanently removed and the government objective clearly frustrated. That the Work could have been placed somewhere else as Plaintiff asserts is irrelevant; the Court should not substitute its own judgment for that of the Commission's and cannot declare the Commission's determination unconstitutional merely because an imaginable, less-restrictive alternative exists. Besides, the Commission's purpose is to preserve specific buildings and areas—a purpose which often entails site-specific restrictions. [12]

The Commission's actions, furthermore, do not burden substantially more speech than necessary. The Commission has only incidentally affected the Board's speech rights to the exact nature of the government interest: preservation of an architectural and artistic Work. The required fabrication of lighter parts also does not burden speech in anyway; the Board does not explain how these replicas actually affect or restrict its speech rights. Finally, the regulations imposed here do not eliminate other avenues through which the Board can speak. *See Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 295, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (holding that a content neutral regulation prohibiting protestors from sleeping on the Mall to protest homelessness did not prevent speakers from "delivering to the media, or to the public by other means, the intended message concerning the plight of the homeless"); *Young,* 903 F.2d at 161 ("In addition, the regulation at issue 'leave[s] open ample alternative means of communication.") (citing *Ward,* 491 U.S. at 802).

The Court finds that the Commission's denial of a COA to remove the Work permanently and its mandate that the Work be reinstalled after repairs are content neutral, that the substantial government interest in aesthetics is unrelated to speech, and that the means chosen do not substantially burden speech more than necessary. Accordingly, the Plaintiff's Motion for Summary Judgment on its First Amendment claims is DENIED and City Defendants' Motion is GRANTED.

2. The Fifth Amendment

The Fifth Amendment of the Constitution has long made plain that private property may not be "taken for public use, without just compensation" by the government. U.S. Const. Amdt. V. The Amendment's purpose "is to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." ' *Eastern Enterprises v. Apfel,* 524 U.S. 498, 522, 118 S.Ct. 2131, 2146, 141 L.Ed.2d 451 (1998) (citation omitted). The classic example of a Fifth Amendment violation is a direct physical taking, which invariably involves the acquisition or physical appropriation of land by the government or a party authorized by the government. *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 322 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) (noting that the doctrine is "as old as the Republic"); *see also Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (taking found where a law required landlords to allow cable operators to place permanent cable routers on their buildings); *United States v. General Motors Corp.,* 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed.2d 311 (1945) (government taking hold of a lease and occupying the property constituted a taking).

*17 In recent years, however, this constitutional provision, commonly referred to as the Takings Clause, has been expanded to include economic regulations that deprive owners of the full use or value of their property. *Eastern Enterprises,* 524 U.S. at 522–23, 118 S.Ct. at 2146 (1998). The cases in which courts have applied the economic regulation analysis to challenged laws or regulations do not usually involve permanent physical invasions but rather prohibitions of private use or the economic outlay by private individuals to comply with government regulations. *See Tahoe–Sierra,* 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) (regional planning agency's moratoria on development of parcels); *Palazzolo v. Rhode Island,* 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001) (regulation that prevented landowner from building a beach club); *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (regulation banning construction on beachfront properties); *Agins v. City of Tiburon,* 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) (zoning law that allowed for only single-family dwellings on land parcels); *Penn Central,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (regulation prohibiting construction on parcel of land); *id.* at 126 (discussing Supreme Court cases in which compliance with regulations involved significant monetary outlays by individuals or corporations) (citing *Atchison, T. & S.F. R. Co. v. Public Utilities Comm'n,* 346 U.S. 346, 74 S.Ct. 92, 98 L.Ed.2d 51 (1953)); *United States v. Central Eureka Mining Co.,* 357 U.S. 155, 78 S.Ct. 1097, 2 L.Ed.2d 1228 (1958) (governmental board's order closing nonessential gold mines during war); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) (regulation that prevented a coal company from mining coal in a particular fashion).

The distinction between physical and economic regulation takings rests on the nature of the government conduct. In distinguishing these two analyses, the Supreme Court has noted the comparison between

> two wartime takings cases, *United States v. Pewee Coal Co.,* 341 U.S. 114, 116, 71 S.Ct. 670, 95 L.Ed.2d 809 (1951), in which there had been an "actual taking of possession and control" of a coal mine, and *United States v. Central Eureka Mining Co.,* 357 U.S. 155, 78 S.Ct. 1097, 2 L.Ed.2d 1228, in which, "by contrast, the Court found no taking where the Government had issued a wartime order requiring nonessential gold mines to cease operations.
>
> *Id.* at 324 n. 18 (citing *Loretto,* 458 U.S. at 431).

Thus, the nature of government conduct is either affirmative, such as when a government itself takes physical possession of a privately owned mine, or it is negative, as when a government merely prohibits a privately owned mine from operating.

This distinction is more than just semantic, for it defines the very Fifth Amendment standard a court applies in a Takings Clause analysis. Economic regulations that "prohibit a property owner from making certain uses of her private property" are examined by "essentially ad hoc, factual inquiries ... designed to allow careful examination and weighing of all relevant circumstances." *Id.* (internal quotations omitted) (citation omitted). Such inquiries include (1) the economic impact of the regulation, (2) the extent to which the regulation has interfered with reasonable investment-backed expectations, and (3) the character of the governmental action. *Penn Central,* 478 U.S. at 124 (citations omitted). A court must examine these factors in relation to the parcel as a whole rather than as discrete parts thereof. *Tahoe–Sierra,* 535 U.S. at 326–27. Finally, "two independent hurdles" must be met before an economic regulation can even be analyzed as a possible taking: (1) plaintiff must have received a "final decision regarding the application of the [challenged] regulations to the property at issue from the government entity charged with

implementing the regulations" and (2) plaintiff must have sought "compensation through the procedures the State has provided for doing so." *Suitum v. Tahoe Regional Planning Agency,* 520 U.S. 725, 734, 117 S.Ct. 1659, 1665, 137 L.Ed.2d 980 (1997) (citations omitted) (internal quotations omitted).

***18** On the other hand, physical takings typically require a less factually intense analysis. "When the Government physically takes possession of an interest in property for some public purpose, it has a *categorical* duty to compensate the former owner ... regardless of whether the interest that is taken constitutes an entire parcel or merely part thereof." *Brown v. Legal Foundation of Washington,* 538 U.S., 216 233, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003) (citation omitted) (emphasis added). This *per se* rule does not depend on the nature of the physical invasion as "even a minimal 'physical occupation of real property' requires compensation under the Clause." *Palazzolo,* 533 U.S. at 617 (citations omitted). Furthermore, a taking does not require that the government itself appropriate the property at issue; it can also occur when the government authorizes a third party to occupy since "an owner suffers a special kind of injury when a *stranger* directly invades and occupies" his property. *Loretto,* 458 U.S. at 436 (emphasis in original); *Building Owners and Managers Ass'n Int v. F.C.C.,* 254 F.3d 89, 97 (D.C.Cir.2001) (observing that "the *per se* taking rule applies to regulations that 'require the landlord to suffer the physical invasion of his building by a third party" ') (citation omitted).

The Supreme Court, however, has cautioned that since "[1] and-use regulations are ubiquitous" and "most of them impact property values[,][t]reating them all as *per se* takings would transform governmental regulation into a luxury few governments could afford." *Tahoe–Sierra,* 535 U.S. at 324. Indeed, in *Loretto,* where the high court declared that a New York law which authorized cable companies to effect "a direct physical attachment of plates, boxes, wires, bolts and screws to the building, completely occupying space ... along the building's exterior wall" constituted a taking, the majority opinion stated that the *per se* rule is a "very narrow" one. *Loretto,* 458 U.S. at 438, 442. The majority explicitly limited the case's holding, mindful that

> [t]his Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.... Consequently, our holding today in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers....
>
> *Id.* at 441 (citations omitted).

What made these laws merely economic regulations for Fifth Amendment analysis rather than direct physical takings like the cable law was the simple fact of ownership. *See* Lawrence A. Tribe, American Const. Law (2d ed.1988) (observing that "the majority concedes that its analysis turns upon the fact that the CATV company, rather than the landlord, *owns* the offending installation.") (emphasis in original). Indeed, the Court noted that it would be "a different question from the question before us," if the landlord owned the installation since "[o]wnership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation." *Id.* at 441 n. 19. Thus, ownership by the property owner of a physical installation, even if required by law, would not require him "to suffer the physical occupation of a portion of his building by a *third party,"* and such regulations would "be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity." *Id.* (emphasis added). Ownership accordingly plays a crucial role in determining the nature of government conduct in physical occupation cases. If the physical occupation belongs to a third party, it is a direct physical takings to which a *per se* rule is applied. However, a physical occupation owned by the property owner himself is merely an economic regulation governed by the "ad hoc, factual" inquiry of *Penn Central.*

***19** It is clear to the Court that by the Commission's determinations, the Board cannot permanently remove the Work and must reinstall it. The Work's reinstallation will entail the physical occupation of a portion of 599 Broadway's northern wall as even City Defendants concede. (City Def. 56.1 Stmt. ¶¶ 36, 37 (noting that evidence in the record establishes that "[t]he Commission conditioned the removal of the sculpture and repair of the side of the building on the reinstallation of" the Work and that the reinstallation will "not ... cause damage to the building"); *see also* Pl. Exh. 31.) [13]

What is not clear, however, is who owns the Work itself. Neither the Board nor City Defendants cite to any documents or other evidence in the record that establish ownership of the Work at any point in its history. The parties to the current Motions do not raise the issue of ownership as key nor discuss it at any length in their papers. The Board has previously

asserted a proprietary interest in the Work. (Pl. Memo. of Law in Oppos. to Def. Myers' Cross–Motion at 1–4.) Indeed, while it was not dispositive or material to the resolution of the previous Motion, the Court noted in *Board I* that both the Board and Myers vigorously disputed ownership of and title to the Work. *See Board I,* 2003 WL 21403333 at *20 n. 24 ("The question of title and ownership over the Work is one that the parties to this motion vigorously dispute."). That issue remains unresolved between Plaintiff or Myers, and the Court notes that City Walls, who financed a large portion of the original installation has never indicated what proprietary rights in the Work, if any, it believes it has. Finally, the replicas which the Board fabricated for reinstallation further complicates an already uncertain ownership question. [14]

In the absence of a definitive owner for the Work, both Plaintiff and City Defendants' respective takings arguments are overbroad and untenable. Indeed, to adopt Plaintiff's contention, the Court would be essentially overlooking the holding in *Loretto* and finding that any physical occupation is tantamount to a *per se* taking regardless of ownership. This would seriously hobble the Landmarks Law by potentially transforming every regulation into a direct physical occupation; it also ignores *Loretto*'s express indication that some physical invasions do not amount to *per se* takings. Similarly, the Commission's argument that this case only presents an economic regulation prohibiting a specific use is overbroad and untenable. Adopting such an argument, the Court would effectively contravene *Loretto*'s holding by transforming all physical occupation cases into mere economic regulations.

Other courts have noted the importance of ownership as a decisive factor. *See e.g., Kaufman v. City of New York,* 717 F.Supp. 84, 93–94 (1989) (finding that a law requiring landlords who were renovating their buildings to seal off whole areas which contain asbestos was not a taking because the "regulations clearly allow plaintiffs to maintain all their [ownership] rights of control over the manner in which compliance with the law is achieved") (citing *Loretto,* 458 U.S. at 441–42 n. 19); *GTE Northwest, Inc. v. Public Utility Comm'n of Oregon,* 321 Or. 458, 900 P.2d 495, 503 (Or.1995) (Graber, J.) (finding a taking where a law vested ownership of a physical installation with a third party rather than the landowner and noting that "[t]he fact of ownership is ... not simply incidental").

*20 As with the VARA claim in *Board I,* the parties have not proffered any evidence on a genuine issue of material fact. [15] The Court is precluded from granting summary judgment in light of this. Accordingly, both the Board's and City Defendants' Motions for Summary Judgment on their Fifth Amendment claims are DENIED.

3. The Equal Protection Clause of the Fourteenth Amendment

The Fourteenth Amendment to the Constitution precludes any state from denying "to any person within its jurisdiction the equal protection of the laws." Const. Amdt. XIV. It is axiomatic that the Clause "is essentially a direction that all persons similarly situated should be treated alike." *Zahra v. Town of Southhold,* 48 F.3d 674, 683 (2d Cir.1995) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985)); *see also Lisa's Party City, Inc. v. Town of Henrietta,* 185 F.3d 12, 16 (2d Cir.1999). The prototypical claim arising from this Clause "involves discrimination against people based on their membership in a vulnerable class." *Harlen Assocs. v. Incorporated Village of Mineola,* 273 F.3d 494, 499 (2d Cir.2001).

The Second Circuit, however, has also "long recognized that the equal protection guarantee ... extends to individuals who allege no specific class membership but are nonetheless subjected to invidious discrimination at the hands of government officials," *id.* (citing *LeClair v. Saunders,* 627 F.2d 606, 608–10 (2d Cir.1980)), even though such a claim is a "murky corner of equal protection law in which there are surprisingly few cases." *LaTrieste Restaurant and Cabaret, Inc. v. Village of Port Chester,* 40 F.3d 587, 590 (2d Cir.1994) (citation omitted). Originally, this "class of one" cause of action required that the plaintiff prove: "(1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, sex, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Id.* at 590; *Lisa's Party City,* 185 F.3d at 16 (same). In 2000, the Supreme Court decided *Village of Willowbrook v. Olech,* 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam), in which the high court noted that

> [o]ur cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.

Id. at 564.

The "animus" requirement is notably absent from the Supreme Court's formulation. [16] *Cobb v. Pozzi,* 363 F.3d 89 (2d Cir.2004), appears to recognize that *Olech* did, in fact, eliminate the illicit motivation element. *Id.* at 111 (noting that "the Supreme Court did not depart from well settled equal protection principles in *Olech*" and that equal protection claims may be brought by a "class of one" where "the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment") (quoting *Olech,* 528 U.S. at 564). [17] Accordingly, the *Olech* formulation is controlling here.

***21** The Second Circuit has required in Fourteenth Amendment equal protection claims that a final determination must be obtained before a standing claim is ripe for adjudication. *Dougherty v. Town of North Hempstead Bd. of Zoning Appeals,* 282 F.3d 83, 88–89 (2d Cir.2002).

In proving disparate treatment, "similarly situated" means that "the persons with whom plaintiff compares [itself] must be 'similarly situated in all material aspects.' " *Estate of Morris v.. Dapolito,* 297 F.Supp.2d 680, 686 (S.D.N.Y.2004) (citation omitted). "[E]xact correlation, [however], is neither likely nor necessary," and "the test is whether a prudent person would think them roughly equivalent." *DePace v. Flaherty,* 183 F.Supp.2d 633, 640 (S.D.N.Y.2002) (quoting *Penlyn Dev. Corp. v. Inc. Vill. of Lloyd Harbor,* 51 F.Supp.2d 255, 264 (E.D.N.Y.1999)). In other words, "apples should be compared to apples." *Estate of Morris,* 297 F.Supp.2d at 686 (quoting *Dartmouth Review v. Dartmouth College,* 889 F.2d 13, 19 (1st Cir.1989)). Additionally, a plaintiff must demonstrate that the defendants knew of others similarly situated such that their differential treatment of plaintiff was intentional. *Giordano,* 274 F.3d at 751 (dismissing a "class of one" claim because plaintiff could not prove that the city doctors who recommended his discharge actually knew that a similarly situated employee was treated differently). Indeed, "[k]nowledge is ordinarily required to establish the first element [of a selective treatment claim]." *Diesel v. Town of Lewisboro,* 232 F.3d 92, 104 (2d Cir.2000) (citation omitted).

To demonstrate "rational basis," a court need only satisfy itself that "there is any reasonably conceivable state of facts that could provide rational basis" for the decision, and no violation of equal protection has occurred. *Moccio v. New York State Office of Court Admin.,* 95 F.3d 195, 201 (citing *Heller v. Doe,* 509 U.S. 312, 320, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257 (1993)). Only when a land-use board acts with "no legitimate reason for its decision" can a "class of one" claim proceed. *Harlen,* 273 F.2d at 500. When examining such a decision for rational basis, " '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it'... whether or not the basis has a solid foundation in the record." *Heller,* 509 U.S. at 320–21 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364, 93 S.Ct. 1001, 21 L.Ed.2d 289 (1973)). Indeed, not only is the decision accorded a strong presumption of constitutionality, *Beatie v. City of New York,* 123 F.3d 707, 712 (2d Cir.1997), but the government entity does not even have the "obligation to produce evidence to sustain the rationality" of its decision. *Garcia v. S.U.N.Y. Health Services Center,* 280 F.3d 98, 109 (2d Cir.2001) (citation omitted). Finally, the Supreme Court reaffirmed in *Heller* that "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations —illogical, it may be, and unscientific." *Heller,* 509 U.S. at 321 (quoting *Metropolis Theatre Co. v. Chicago,* 228 U.S. 61, 69–70, 33 S.Ct. 2184, 57 L.Ed.2d 730 (1913)).

***22** As a threshold matter, neither party has briefed the issue of ripeness, but the Court nonetheless finds that the denial of the COA to remove the Work permanently does constitute a final determination by the agency which holds the ultimate authority in the matter. However, to the extent that the claim relates to selective treatment stemming from applications for outdoor advertising space in the District, there has been no final determination as the Board withdrew its proposal before the Commission could grant or deny it, (City Record at 1115, 1163), and the Court cannot accordingly adjudicate that portion of the claim.

a. Intentional Disparate Treatment of Those Similarly Situated

Plaintiff cites three specific buildings, 600 Broadway, 169 Mercer, and 475 West Broadway which it claims are similarly situated to its own and which demonstrate the intentional disparate treatment. It is undisputed that all three buildings fall within the boundaries of the Soho Cast–Iron Historic District and all at one point displayed wall murals. These artworks were created under the auspices of City Walls, the same organization responsible for the creation of the Work. Unlike 599 Broadway, all three buildings applied for and received the consent of the Commission to place large-scale advertisements on their exterior walls.

City Defendants argue that the three buildings are not similarly situated. The Work is a sculpture which is an entirely different medium from the three wall paintings to which Plaintiff cites. The murals on all three were badly deteriorated, and "none of them involved a work of the stature of 'The Wall' which won the respect and support of the museum, artistic and preservation community." (City Defs. Memo. of Law at 35.)

(1.) 600 Broadway

There is no evidence that the owners of 600 Broadway ever applied for a COA to remove the wall mural as the Board did in the instant case. Instead, the only documents Plaintiff has presented regarding this building involve COAs in which the Commission approved the placement of large advertisements onto the exterior wall of the building. (Pl. Exh. 35 ("The proposal as approved consists of painting a sign on the north masonry wall ... [which will feature] the letters 'DKNY'."); Exh. 36 ("The proposed work consists of the installation of a painted sign" for Nike); Exh. 37 (same for Fila).) Nowhere in these documents is the mural by Pekarsky mentioned nor is its removal contemplated or discussed. There is also no evidence that the mural remained on the wall at the time of the application for a COA. Furthermore, the Pekarsky painting was two-dimensional while, as City Defendants note and Plaintiff does not contest, the "Work" is the "only three-dimensional City Wall project ever commissioned." (City Defs. 56.1 Stmt. ¶ 46.) These facts alone clearly distinguish 600 Broadway from the situation of the instant case. Indeed, unlike 599 Broadway, the COAs did not involve removal of an existing artwork but only the display of advertising. It is materially different such that a prudent person would not find the situation similar. Accordingly, the Court finds that 600 Broadway is not similarly situated.

(2.) 169 Mercer and 475 West Broadway

*23 Unlike 600 Broadway, the Commission admits that it permitted removal of the artworks that existed on 169 Mercer and 475 Broadway's exterior walls. (City Defs. Memo. of Law in Oppos. at 6.) Like the Pekarsky painting, however, both works were two-dimensional while, as noted above, the Work was the only three-dimensional artwork of its kind. As such, both differ in material respects from the Work and are not similarly situated for equal protection analysis. *See Burke,* 893 F.Supp. at 599 (finding a three-dimensional, site-specific work not similarly situated to an artist's painting because in part it was not a "mural" at all).

Moreover, in the case of 169 Mercer, the actual artist herself indicated that she had no objection to the removal of her work from the building's exterior wall. At 475 West Broadway, the painting by Crum was featured on an exterior wall abutting a vacant lot. When a new building was constructed there, it partially obscured the painting. The Landmarks Commission has no legal ability to control building heights and could not have saved the painting if it wanted. N.Y.C.Code § 25–304 ("Nothing contained in this chapter shall be construed as authorizing the commission, in acting with respect to any historic district ... to regulate or limit the height and bulk of buildings...."). Thus, by the time of the owner's application to remove the painting, up to half of the painting was permanently obscured by the new construction. This fact distinguishes 475 West Broadway materially from 599 Broadway. The Court therefore finds that both 169 Mercer and 475 West Broadway are not similarly situated.

Accordingly, the Court finds that none of the three works of art to which Plaintiff cites are similarly situated to its own. The Board has thus failed to demonstrate evidence of an essential element to its Equal Protection claim.

b. Rational Basis

Plaintiff argues that the Commission lacked any rational basis for making its determination, rendering its denial of a COA arbitrary and irrational. It attacks the aesthetics justification of the Board by maintaining that the Commission cannot "decide which works of visual art it considers to be finest." (Pl. Reply Memo. of Law at 19.) It further points out that there can be no "principled reason why, having allowed all of the other murals that were crated in the 1960's and 1970's to disappear," the Board must replace the Work after it effectuates repairs on its Building. (Id. at 20.)

City Defendants argue that the Commission did have a rational basis in refusing to grant the COA to remove the Work. The Commission, they argue, is specifically charged with determining artistic and historic merit. As such, the Commission can discern between those works of art or historic and architectural features it deems important and those it does not.

The Commission's determination detailed many legitimate rationales for treating the Work differently from others. The Commission heard testimony from several notable artists, gallery owners, and art critics regarding the historical importance of the Work. (*See,* Part I.D, *supra.*) This

testimony provided facts regarding the historic and aesthetic importance of the Work—facts from which the Commission could rely in its determination. Plaintiff does not demonstrate any portion of the record where similar conclusions were made about the other three artworks. This disparity alone is enough to sustain the distinction in treatment of the Work by the Commission.

*24 Plaintiff's contention that the Commission cannot make such aesthetic determinations regarding the quality of a work of art is both disingenuous and unavailing. The Landmarks Law explicitly charges the Commission with determinations regarding "aesthetic, historical and architectural values and significance" when making ruling on applications for COAs. N.Y.C.Code § 25–307 b.(2). While matters of aesthetics may be inherently subjective, it does not preclude government decision making in the area. Indeed, the very purpose of the Commission is to designate historic landmarks and districts, a process which necessarily entails aesthetic and historic considerations and discernment. *See First National Bank of Highland Park v. Village of Schaumburg,* 85 C 2427, 1987 WL 17468 at *6 (N.D.Ill. Sept.21, 1987) (dismissing an equal protection challenge to the designation of a historical district since "[t]he Village's disparate treatment of land reflects its legislative determination that a particular section of town contains sufficient links—tangible or otherwise—which are worthy of preservation"). The Commission could not designate an "historic district" without determining whether a particular area had "a special character or special historical or aesthetic interest or value" or protect a "landmark" without deciding if "any improvement, any part of which is thirty years old or older ... has a special character or special historical or aesthetic value" *See* N.Y.C.Code § 25–302. Moreover, Plaintiff tacitly concedes this point when in its papers it explains at great length how the Commission found that the proposed advertisements at 600 Broadway, 169 Mercer, and 475 West Broadway were not inconsistent with the architectural surroundings. (Pl. Memo. of Law at 21–22.) Necessary to these findings were qualitative aesthetic and historic considerations. The Board then is trying to have its cake and eat it too: it argues that the Commission should have made aesthetic determinations similar to those it made regarding the advertisements at 600 Broadway, 169 Mercer, and 475 West Broadway but cannot undertake similar analysis respecting the quality of those artworks. They are all qualitative decisions. If in designating an area historic, the Commission can discern between areas that are more worthy of protection for historic or aesthetic concerns than surrounding areas, so too can the Commission distinguish between artworks that are more worthy of protection on historic and aesthetic grounds than others. Finally, the Commission's actions were not just for aesthetic reasons but for historic ones as well, and the Board does not assail the Commission's ability to discern between artworks and buildings on that ground.

The City Defendants argue that the COA hearing transcripts reveal that the Commission's primary concern with the removal of the Work was concern for the aesthetic and historical importance of the Work. This Court will not substitute its judgment for that of this legislative body.

*25 Since as discussed above, it is clear that the Board has failed to demonstrate any evidence that the Commission acted without a rational basis in making its determination regarding the Work's removal or that there are any similarly situated individuals, that portion of the Board's Equal Protection claim is without merit. Also, since the claim regarding the advertising signage lacks ripeness, the Court has no power to adjudicate that portion of the Board's Equal Protection claim. Accordingly, the Court DENIES the Board's Motion for Summary Judgment and GRANTS City Defendant's Motion on the portion of the claim involving the removal of the Work and DISMISSES that portion of the claim concerning the guidelines for outdoor advertising in the District.

4. The Due Process Clause of the Fourteenth Amendment

It is axiomatic that the Fourteenth Amendment protects individuals from the deprivation of life, liberty, or property without due process of law. U.S. Const. Amt. XIV. Like an equal protection claim, a cause of action under the due process clause cannot stand absent a final determination. *Dougherty,* 282 F.2d at 88–89 (adopting the *Williamson* ripeness requirements for due process claims under the Fourteenth Amendment).

As a threshold matter, the exact nature of Plaintiff's claim is unclear. Plaintiff does not address this claim in any of its papers before the Court. Indeed, in its opening brief, Plaintiff does not even list the due process claim as one of its causes of action. (Pl. Memo. of Law at 13.) The Complaint, however, states in pertinent part that

> [t]o the extent that the Commission's treatment of plaintiff purports to be based on some form of general policy, the Commission has violated the rights of plaintiff ... to the due process ... because the Commission never has promulgated

written rules, given property owners notice of its policies or practices, or otherwise published written standards that purport to guide its decision-making.

Compl. ¶ 65.

The Board references its claim only obliquely, observing in its papers that there "are [no] established standards by which the ... Commission regulates signage within any historic district." (Pl. Response to City Defs. 56.1 Stmt. ¶ 19.) Thus, the Board seeks only a due process claim regarding the unpublished standards governing advertising permits.

Plaintiff does not make any arguments on this claim. City Defendants, on the other hand, argue that the Commission has not violated the Board's due process regarding the lack of written regulations on the Commission's specifications for advertising space. Not only do they point out that the Board does not address the issue in its papers, City Defendants cite to the Plaintiff's own 56.1 Statement in which it admits that there are several factors that the Commission scrutinizes when determining whether to permit outdoor advertising signage in an historic district. (Pl. 56.1 Stmt. 63; *but see* Pl. Response to City Defs. 56.1 Stmt. ¶ 19.)

*26 It is obvious to the Court that no final determination regarding the Board's desire to place large-scale advertisements on its exterior wall has ever occurred. Indeed, by the Board's own admission, "[P]laintiff withdrew its proposal to install an advertising sign above the mural." (Pl. Response to City Defs. 56.1 Stmt. ¶ 8; *accord* City Record at 302–03; 1115, 1163.) The withdrawal precluded a final determination by the Commission and thus this case is not ripe for adjudication. *See Dougherty,* 282 F.3d at 88 (finding a due process claim unripe because the zoning board had not yet rendered a decision on a possible variance to a land use restriction).

Since the claim is not ripe, the Court cannot reach the merits. Accordingly, the Court DENIES both parties' respective Motions for Summary Judgment and DISMISSES the claim.

D. New York State Constitutional Claims

It is well established that the New York State Constitution contains provisions similar to the First, Fifth, and Fourteenth Amendments of the federal Constitution, which protect freedom of speech and property owners from takings by the state without just compensation. N.Y. Const. Art. I, § 8 ("Every citizen may freely speak ... and no law shall be passed to restrain or abridge the liberty of speech or of the press."); id. at Art. I, § 7(a) ("Private property shall not be taken for public use without just compensation."). The state constitutional provisions, however, are not necessarily coterminous with their federal counterparts. Indeed, New York's highest tribunal has held that "the minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of this State's constitutional guarantee of freedom of expression." *People ex rel. Arcara v. Cloud Books, Inc.,* 68 N.Y.2d 553, 557–58, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986). In the takings context, the Court of Appeals has not defined the extent of the state's takings clause; it has at least found them equal in protective scope. *Seawall Assocs. v. City of New York,* 74 N.Y.2d 92, 102–106, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989) (analyzing a takings case and finding a takings under both the federal and state constitutions).

Plaintiff argues that state constitution provides greater protections in both the First and Fifth Amendment contexts, thus providing an alternative and stronger basis for finding constitutional violations in this case.

City Defendants contend, on the other hand, that the state constitution does not confer any broader protections than that of the federal constitution when causes of action arise under the First and Fifth Amendments.

1. Freedom of Speech

Neither party has briefed this issue in depth. Nevertheless, it is clear to the Court that New York's Court of Appeals has held that the New York State Constitution grants broader First Amendment rights to individuals under a content neutral analysis. Specifically, the Court of Appeals has added a more stringent element to an *O'Brien* claim, namely that the law must be "no broader than needed to achieve its purpose." *Town of Islip v. Caviglia,* 73 N.Y.2d 544, 559, 542 N.Y.S.2d 139, 540 N.E.2d 215 (1989) (citation omitted). Essentially, this additional element requires that the state pursue only those means that directly secure the governmental interest. *See id.* ("In absence of evidence that such means were not adequate ... we judged the relief requested by the District Attorney broader than necessary to control the illegal conduct.").

*27 The Commission's determinations here, as the Court has already noted under the federal standard, burden the speech interests of Plaintiff to the exact nature of the government's interest. There is no more direct means of securing the

Commission's interest in the District's preservation and aesthetics than by requiring Plaintiff to maintain the Work where it has resided for the past three decades. To "suggest alternative provisions amounts to nothing more than a disagreement with the [Commission] over how much corrective action is wise and how best it may be achieved," and such judicial usurpation of legislative functions is highly discouraged. *Town of Islip,* 73 N.Y.2d at 560, 542 N.Y.S.2d 139, 540 N.E.2d 215. Moreover, there are alternative channels of communication open to the Board. *Stringfellows of New York, Ltd. v. City of New York,* 91 N.Y.2d 382, 402, 671 N.Y.2d 406 (1998) (requiring "the City ... assure reasonable alternative avenues of communication"). Finally, the Court of Appeals cases that have dealt with this higher standard are inapposite to the case at bar since all three recent cases involved sex shop/adult bookstore closure orders and zoning ordinances. *See Stringfellow's of New York,* 91 N.Y.2d 382, 671 N.Y.S.2d 406, 694 N.E.2d 407 (zoning law affecting the placement of adult-oriented businesses); *Town of Islip,* 73 N.Y.2d 544, 542 N.Y.S.2d 139, 540 N.E.2d 215 (same); *Arcara,* 68 N.Y.2d 553, 510 N.Y.S.2d 844, 503 N.E.2d 492 (one-year closure order of adult bookstore for unrelated illegal acts performed by patrons).

Since New York's free speech protection was not violated here, the Court accordingly DENIES Plaintiff's Motion for Summary Judgment and GRANTS City Defendant's Motion.

2. The Takings Clause

The Court of Appeals in *Seawall Associates* found a taking under both the New York state and federal constitutions where New York City required that vacant single-room occupancy units be rented to new tenants. 74 N.Y.2d at 102–06, 544 N.Y.S.2d 542, 542 N.E.2d 1059. However, unlike the court in *Arcara,* the state tribunal never explicitly stated that the state constitutional protections were higher than the federal takings clause.

Finally, given the uncertainty of ownership at this point and the absence of any explicit language from the Court of Appeals that the state constitution's just compensation clause is broader than the federal constitution's, it would be premature to rule on the state taking claim here. Accordingly, the Court adopts its analysis of the Fifth Amendment as discussed above and DENIES both Plaintiff's and City Defendants' respective Motions for Summary Judgment.

3. The Fourteenth Amendment Claims

Finally, the parties only cursorily broach the state equal protection and due process claims contained in the Complaint. Plaintiff acknowledges that the standards that govern New York's version of the Fourteenth Amendment are essentially co-extensive with the federal Constitution. *Golden v. Clark,* 76 N.Y.2d 618, 563 N.Y.S.2d 1, 564 N.E.2d 611 (1990); *Central Sav. Bank in City of New York v. City of New York,* 280 N.Y. 9, 10, 19 N.E.2d 659 (1939). As such, the Court adopts its above discussion of the Fourteenth Amendment claims and accordingly DENIES Plaintiff's Motion for Summary Judgment and GRANTS City Defendant's Motion.

E. Article 78 Claims

***28** Article 78 of New York's Civil Practice Law and Rules establishes a court procedure by which administrative determinations by state and local entities may be challenged. NY CPLR §§ 7801 *et seq.* Specifically, § 7803 limits the scope of the proceedings; "[t]he only questions that may be raised in [such] a proceeding" are "whether the body ... proceeded ... in excess of jurisdiction" or "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." NY CPLR § 7803.

Article 78, however, is a "novel and special creation of state law" and provides "a purely state procedural remedy." *Birmingham v. Ogden,* 70 F.Supp.2d 353, 372 (S.D.N.Y.1999) (citations omitted). Such proceedings differ "markedly from the typical civil action brought in [federal] court," *Camacho v. Brandon,* 56 F.Supp.2d 370, 380 (S.D.N.Y.1999), "were designed for the state courts, and are best suited to adjudication there." *Lucchese v. Carboni,* 22 F.Supp.2d 256, 258 (S.D.N.Y.1998). Indeed, Article 78 by its own terms vests jurisdiction exclusively in the state supreme court and in rare instances the state appellate division. N.Y. CPLR 7804(b) ("A proceeding under this article shall be brought in the supreme court [as specified by state law]."); *id.* (Practice Commentary 7804:2) (noting that the law grants "exclusive subject matter jurisdiction" to the state courts); *Cartagena v. City of New York,* 257 F.Supp.2d 708, 710 (S.D.N.Y.2003) ("State law does not permit Article 78 proceedings to be brought in federal court.").

"Federal courts are loathe to engage in" the adjudication of such singularly state matters. *Reyna v. State University of New York College at New Paltz,* 00 Civ. 733, 2001 WL 282953 at *3 (S.D.N.Y. Mar.20, 2001). Indeed, district courts in this circuit have consistently declined to exercise supplemental jurisdiction under 28 U.S.C. § 1367 over Article 78 claims.

See Cartegena, 257 F.Supp.2d at 710 (refusing to allow amendment of a complaint to allege an Article 78 claim); *Adler v. Pataki,* 204 F.Supp.2d 384, 396 (N.D.N.Y.2002) (noting federal "courts have refused to exercise supplemental jurisdiction over Article 78 claims in numerous recent cases, even where a plaintiff has one or more viable federal claims before the court" and dismissing an Article 78 claim); *Reyna,* 2001 WL 282953 at *3 (declining to hear an Article 78 claim under supplemental jurisdiction); *Verbeek v. Teller,* 114 F.Supp. 139, 142–43 (E.D.N.Y.2000) (same); *Birmingham,* 70 F.Supp.2d at 372 (same); *Camacho,* 56 F.Supp.2d at 380 (remitting "him to state court to seek review of his termination through the special vehicle the state has provided for such review"); *Lucchese,* 22 F.Supp.2d at 258 (declining to exercise supplemental jurisdiction). [18]

This Court agrees with the reasoning of these cases. The Article 78 proceeding is a unique state procedural law best left to the expertise of the state courts, the very places where the state legislature intended such actions to be tried. Furthermore, "the interests of judicial economy are not served by embroiling this court in a dispute over local laws and state procedural requirements." *Birmingham,* 70 F.Supp.2d at 372.

*29 Accordingly, the Court declines to exercise supplemental jurisdiction over this claim. Both Plaintiff and City Defendants' Motions for Summary Judgment on this claim are DENIED and the claim is hereby DISMISSED without prejudice. [19]

III. CONCLUSION

Having examined the record, the parties briefs, and the pleading papers, the Court has for the reasons discussed above, determined that:

1. Plaintiff Board's Motion for Summary Judgment is DENIED in all respects;

2. City Defendants' Motion for Summary Judgment is GRANTED on the First Amendment and Fourteenth Amendment due process and equal protection claims except that portion of the Fourteenth Amendment due process claim involving advertising signage.

3. City Defendant's Motion for Summary Judgment is DENIED regarding the takings claim under the federal and state constitutions, the due process claim of the fourteenth Amendment, the equal protection claim of the Fourteenth Amendment relating to advertising, and the Article 78 proceeding;

4. Plaintiff's claims under the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause relating to the advertising signage, and Article 78 of New York's CPLR are DISMISSED.

Having determined each party's respective Motions for Summary Judgment, the Court observes that the following claims have survived this and the Court's June 17, 2003 Opinion:

1. Both Plaintiff Board and Defendant Myers' claims under the Visual Artist Rights Act, 17 U.S.C. § 101 *et seq.*

2. Plaintiff's takings claim under the federal and state constitutions.

On these matters only, the Court sets the following pretrial submissions dates;

Joint Pre–Trial Statement ("JPTS"), Requests to Charge and Proposed Voir Dire are to be filed no later than November 12, 2004;

Memoranda of law addressing those issues in the JPTS are also to be filed no later than November 12, 2004;

Responses to the Memoranda are to be filed no later than November 29, 2004.

All submissions shall be in accordance with the Individual Practices of Judge Deborah A. Batts, as amended July 14, 2004. See Individual Practices, available at: http://www.nysd.uscourts.gov/Individual_Practices/Batts.pdf

SO ORDERED.

Footnotes

1 For the time period relevant to this motion, the Building has had several owners. The first was Charles J. Tanenbaum, who owned the building when the Work was first proposed and built in 1973. (Pl. 56.1 Stmt. ¶ 10; City Defs. 56.1 Stmt. ¶ 5.) In December 1980, the Building was bought by 599 Associates. (Pl. 56.1 Stmt. ¶ 41; City Defs. 56.1 Stmt. ¶ 14.) In April 1981, Soho Landmark Associates,

acquired a 50% share in the Building from 599 Associates. (Pl. 56.1 Stmt. ¶ 42.) Broadway Houston Associates then acquired an interest in 599 Associates on March 17, 1983, and later that year, the Building was converted into condominiums. (Pl. 56.1 Stmt. ¶ 43; City Defs. 56.1 Stmt. ¶ 16.) The Board is the governing body of the condominium conversion and may bring an action on behalf of the owners of the condominium units. N.Y. Real Prop. § 339–dd ("Actions may be brought or proceedings instituted by the board of managers in its discretion, on behalf of two or more of the unit owners ... with respect to any cause of action relating to the common elements or more than one unit.")

2 "As between Tanenbaum and Myers, both the Board and Myers agree that the two men never entered into a written agreement concerning the Work, its design, construction, ownership, title, or duration." *Board I,* 2003 WL 21403333 at *3.

3 The statute states in relevant part: "[T]he Commission shall have the power to ... designate historic districts and the location and boundaries thereof...." N.Y.C.Code § 25–303.

4 Section 207.20.0 codified as N.Y.C.Code § 25–321 states in pertinent part: "The provisions of this chapter shall be inapplicable to the construction ... or any improvement ... in a historic district ... where a permit for the performance of such work was issued by the department of buildings ... prior to the effective date of the designation."

5 In a bewildering move, the City Defendants "dumped" nearly 850 pages from the Records of Proceedings before the Landmarks Preservation Commission into their submissions. This undifferentiated hodgepodge, containing transcripts, letters, and other documents, is untabbed, and no meaningful reference was made to any document which would give a clue to that document's beginning or end. The City Defendants' frequent lotto-like references in their papers to this mass may have justified its inclusion to them. They certainly did not to the Court.

6 As noted in *Board I,* this action "prompted Myers to write another letter, this time through his attorney, Richard Altman, dated March 13, 1997, the letter stated that any attempt to remove the Work would violate various federal and state laws, such as" the Visual Artists Rights Act, the New York's Artists' Authorship Rights Act, and New York common law. *Board I,* 2003 WL 21403333 at *5.) These would form the main claims for which Plaintiff would seek declaratory judgment against Myers in its Complaint. (Compl.¶¶ 76–85.)

7 The Report states in pertinent part that "[i]n order to avoid many of the defects of the current bracing system, the new bracing system should be an internal pinning system, with the new pins attaching to the steel spandrel beams rather than being embedded in the floor slabs." (Pl. Exh. 29 at 6.) The Report further elaborated that this new internal bracing system would allow for more pins, spaced closer together than the current steel rods, to stabilize the wall and would overcome the "[a] significant disadvantage of any external bracing system such as the one currently in place" which presently create "a path for on-going water penetration." (Id. at 8.)

8 Numerous speakers testified that the Work was an influential artwork, central to the identity and history of the SoHo–Cast Iron Historic District. (*See, e.g.,* id. at 1055 ("[T]he identity of SoHo as a unique arts district, SoHo's identity as the first industrial district in the country to be designated an historic district and SoHo's identity as the most significant district in this city to celebrate our cherished status as the world capital of art. That identity, SoHo's identity, and this wall are all inextricably bound together.") (testimony of Roberta Brandes Gratz)). The Director of PS1, in conjunction with the Museum of Modern Art, urged the Commission to save the Work because it "is truly a historic work of art from a period that signaled New York's early prominence in the art world." (Id. at 1155.) Eleanor Heartley, an art critic, observed that "artists actually created the conditions that have made for the neighborhood's current prosperity, and yet much of that evidence of their importance there is beginning to be obliterated." (Id. at 1057.)

9 In that Opinion, the Court granted Plaintiff's Motion for Summary Judgment on two of the Board's causes of action and on four of Myers' counterclaims. The Court denied Plaintiff's Motion for Summary Judgment on its VARA claim and denied all of Myers' Motions. *Board I,* 2003 WL 21403333 at *26. The Court denied both the Board's and Myers' Motions to Reconsider. *Board II, passim.*

10 The Landmarks Law was enacted pursuant to an enabling act of the state legislature, which "declares that it is the public policy of the State of New York to preserve structures and areas with special historic or aesthetic interest or value and authorizes local governments to impose reasonable restrictions to perpetuate such structures and areas." *Penn Central,* 438 U.S. at 110 n. 5 (citing N.Y. Gen. Mun. Law § 96–a (McKinney 1977)).

11 Indeed, the Board relies on the fact that the Commission has acknowledged that the Work "was a recognized work of art of the highest quality." (Pl. Reply Memo. of Law at 7.) Even if the Court assumes that this was the motivating factor behind the Commission's action, this rationale does not in any way implicate the Work's content since it directly addresses aesthetic concerns completely apart from speech.

12 In theory, any building or artistic improvement on it could be "moved" to another location as Plaintiff suggests. However, the whole premise behind the Landmarks Law, that certain areas have distinct architectural, aesthetic, historic, and cultural value would be eviscerated if the Law could not actually protect the integrity of those specific areas.

13 The Court has also found that where the plaintiff first consented to or invited the physical occupation, a physical invasion has not occurred and the *per se* rule does not apply. *Yee v.. City of Escondido,* 503 U.S. 519, 529, 112 S.Ct. 1522, 1528, 118 L.Ed.2d 153 (1992); *F.C.C. v. Florida Power Corp.,* 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987). However, the justices also declared that "[a] different case would be presented were the statute ... to compel a landowner over objection to rent his property or to refrain

in perpetuity from terminating the tenancy." *Yee* 503 U.S. at 529. While it is clear that the Board's predecessor explicitly consented to the Work's initial installation (Pl.Exhs.8, 9, 11, 14), the issue of consent is not dispositive since requiring a perpetual occupation, as the Commission is essentially doing here, could transform it into a taking. What is key to that determination here is ownership; *Yee* is distinguishable because it was a tenant, an obvious third party, who would have been authorized by the government to occupy property indefinitely.

14 The Court has reviewed both Plaintiff Board and Defendant Myers' briefing papers in the motions at issue in *Board I*, which discussed at length competing claims of ownership over the Work. The Board argued that Myers did not have any documentation that indicated or implied that he had ever had any proprietary interest in the Work. Furthermore, the Board claimed that the Work had become a fixture upon its property and by operation of law was owned by the Board. Myers contended that he owned the Work as the creator behind it, that no document ever demonstrated that he had transferred or sold his ownership to the Work to any person or entity, and that the Work is not a fixture.

Under New York law, a fixture must meet three criteria:

> (1) actual annexation to the real property or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold.
>
> 59 N.Y.Jur.2d Fixtures § 2 (citations omitted).

In examining whether the actual annexation is so affixed to the property in a manner befitting a fixture, courts look to the removability of the annexation. *New York Life Ins. Co. v. Allison,* 107 F. 179, 185–86 (2d Cir.1901). As the Court made clear in *Board I* and *Board II* neither party has proffered any evidence whether the Work was removable or not. This fact alone prevents the Court from determining whether the Work is a fixture and thus owned by Board. The Court notes further that it is in dispute whether City Walls intended or expected the artwork to be a "permanent accession to the freehold."

15 Plaintiff's mention of *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) is inapposite here and does not require the Court to find a taking regardless of the ownership issue. Nollan requires only that an "essential nexus" exist between any conditions a government entity imposes for the issuance of a permit and a "legitimate governmental end" that would justify denial of the permit. 483 U.S. at 836–37. Plaintiff contends that the conditioning of the Work's reinstallation on a permit to repair its wall lacks the required logical connection to the government end of preserving the Work. The argument is, however, unavailing. Not only was the Building required by the Landmarks Law to be kept in "good repair," but so was the Work, which was an improvement in itself. See N.Y.C.Code § 25–311 ("Every person in charge of an improvement on a landmark site or in an historic district shall keep in good repair (1) all exterior portions of such improvement."). There was no need for an essential nexus because the Commission could require compliance with the law regarding both the wall and the Work. Thus, the independent duty to keep the Work in good repair makes the "essential nexus" argument inapplicable.

Finally, the Court is mindful that the Board challenges the entire application of the Landmarks Law to the Work. That determination, however, is not appropriate here but rather in the Article 78 claim to challenge the assertion of jurisdiction by the Commission.

16 Prior to *Cobb,* the Second Circuit had consistently refused to rule on the scope and impact of *Olech* in "class of one" cases. *Hayut v. State University of New York,* 352 F.3d 733, 754 (2d Cir.2003) ("[W]e decline to resolve whether *Olech* changed this Circuit's requirement that a class-of-one plaintiff alleging an equal-protection violation show an illicit motivation.") (quoting *Giordano v. City of New York,* 274 F.3d 740, 751 (2d Cir.2001)) (internal quotations omitted); *DeMuria v. Hawkes,* 328 F.3d 704, 707 and n. 2 (2003); *Harlen Assocs.,* 273 F.3d at 499–500.

17 In *Longmoor v. Wilson,* 02 CV 1595(JBA), 2004 WL 1660374 (D.Conn. Jul. 23, 2004), the court observed that "more recently the Second Circuit has implied" that *Olech* removed the animus requirement. *Id.* at *7 (citing *Cobb*). This would be in accordance with holdings of district judges in this circuit. *See Miner v. New York State Department of Health,* 02 Civ. 3180(MBM), 2004 WL 875264 at *4 (S.D.N.Y. Apr. 12, 2004); *Rossi v. City of New York,* 246 F.Supp.2d 212, 217 (S.D.N.Y.2002) (collecting cases).

18 In fact, the only Article 78 claim to be adjudicated in federal court appears to be an action where Judge Sand allowed an Article 78 proceeding to be removed from state court. The case, however, directly concerned a matter already before Judge Sand and had been the subject of protracted litigation as well as a recent Supreme Court decision. *Yonkers Racing Corp. v. City of Yonkers,* 858 F.2d 855 (2d Cir.1988). As Judge Chin has noted, however, "[t]he Second Circuit did not discuss the issue of whether an Article 78 proceeding could be brought in federal court" and noted explicitly the exceptionality of the case. *Cartagena,* 257 F.Supp.2d at 709.

19 The Court notes that the lawsuit was filed on February 16, 2001, which occurred well before the four month statutory period for Article 78 claims ended. N.Y. C.P.L.R. § 217. As 28 U.S.C. § 1367 makes clear, "[t]he statute of limitations has been tolled during the pendency of this action, and continues to be tolled for a period of 30 days from the date of this Order." *Birmingham,* 70 F. Supp .2d at 373 n. 14 (citing 28 U.S.C. § 1367). Thus, the statute of limitations has not expired, and the time calculation must be tolled for the period between the Complaint's filing date and 30 days from the date of this Opinion.

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121 F.3d 695
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA1 Rule 36 for rules regarding the citation of unpublished opinions.)
United States Court of Appeals, First Circuit.

CAPE ANN CITIZENS ASSOCIATION, et al., Plaintiffs-Appellants,
v.
CITY OF GLOUCESTER, et al., Defendants-Appellees.

No. 96-2327. | Aug. 13, 1997.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [Hon. William G. Young, *U.S. District Judge*]

Attorneys and Law Firms

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Linda Thomas Lowe, General Counsel, Legal Department, City of Gloucester, for appellee City of Gloucester.

Before TORRUELLA, *Chief Judge,* BOWNES and CYR, *Senior Circuit Judges.*

Opinion

TORRUELLA, *Chief Judge.*

*1 In 1979, the Commonwealth of Massachusetts ("the Commonwealth") sued the City of Gloucester ("the City") for violating the Massachusetts Clean Water Act, Mass. Gen. Laws ch. 21, §§ 26-53. The City agreed to the entry of a final judgment that required it, *inter alia,* to prepare a facilities plan to identify and remedy the pollution in North Gloucester.

In 1989, the United States brought an action in federal court, alleging that the City was in violation of the Clean Water Act, 33 U.S.C. § 1252 *et seq.* (CWA). The Commonwealth intervened as a party plaintiff and alleged that the City was violating both the state and federal clean water acts. The complaints in federal court alleged, *inter alia,* that the City was discharging pollutants into the waters of the United States and the Commonwealth, in violation of its National Pollutant Discharge Elimination System ("NPDES") permit, issued by the Environmental Protection Agency pursuant to the Clean Water Act.

In 1991, the City agreed to the entry of a consent decree. The agreement included a schedule for the design and construction of an extension of the sewer system to North Gloucester. The decree was amended several times thereafter. In 1993, it was amended to give the City discretion to use Septic Tank Effluent Pump ("STEP") sewers rather than a combination of conventional gravity sewers and pressure sewers. [1]

The City decided to use STEP sewers in the Annisquam and Lane's Cove areas in January 1994. The City initially intended to install all the STEP pumps, tanks, and ancillary equipment needed to connect individual properties to the collection system. The decree was amended in 1995 to reflect this decision. When some homeowners refused to grant the City the easements necessary to allow the City to install the septic tanks and pumps, the City offered them the option of doing the work themselves.

As of October 28, 1996, the City had completed the construction of the main and lateral lines of the STEP sewers in Annisquam and approximately seventy percent of the lines for Lane's Cove.

Plaintiffs-appellants, the Cape Ann Citizens Association, initiated suit in Massachusetts Superior Court in February 1996. After the suit was brought, the City amended its regulations to allow individual owners to install and maintain their own STEP tanks without conveying an easement to the City.

The City removed the action to federal district court. The Commonwealth and the United States intervened as defendants. Treating the matter as a case stated on the pleadings, the district court ruled for the City. The plaintiffs now appeal on a variety of grounds. We affirm.

I. Validity of Consent Decree

Appellants present several theories in an attempt to have the 1991 consent decree declared void. None of their arguments are persuasive.

First, they claim that they have standing to challenge the consent decree under federal law. We need not decide the standing issue as the government agrees that appellant has standing.[2] Assuming *arguendo* that appellants have standing, we would normally turn to examine the substance of their claim regarding the consent decree. They have, however, failed to put forward a federal claim for relief. They argue only the standing issue, omitting any discussion of a substantive federal claim.

*2 In the absence of a federal claim, we consider the state law claim advanced by appellants. The only state law claim presented is based on Mass. Gen. Laws ch. 40, § 53. In relevant part, the statute reads:

> If a town ... [is] about to raise or expend money or incur obligations purporting to bind said town for any purpose or object or in any manner other than that for and in which such town has the legal and constitutional right and power to raise or expend money or incur obligations, the supreme judicial court may, upon the petition of not less than ten taxable inhabitants of the town, determine the same in equity, and may, before the final determination of the cause, restrain the unlawful exercise or abuse of such corporate power.

Mass. Gen. Laws ch. 40, § 53.

Appellants' claim fails because it has been brought too late. It is well settled that Mass. Gen. Laws ch. 40, § 53 is preventative. "The statute does not authorize the correction of wrongs wholly executed and completed. It is not retroactive." *Fuller v. Trustees of Deerfield Academy & Dickinson High Sch.*, 252 Mass. 258, 259 (1925). Actions under the statute must be brought before obligations are incurred. *Kapinos v. Chicopee*, 334 Mass. 196, 198 (1956). In *Kapinos*, the court found that petitioners were not entitled to relief under Mass. Gen. Laws ch. 40, § 53 because "the construction companies had practically completed their work under the contract when this petition was brought." *Id.* at 199.

The construction of the sewers required under the consent decree is similarly advanced. It is undisputed that of approximately 510 homes that must be connected, approximately 450 had been connected as of September 1996. Of those that remain, some will not need to be connected because they have adequate on-site systems. Appellants do not dispute that the sewer system is almost completed. We find, therefore, that Mass. Gen. Laws ch. 40, § 53 does not offer appellants an avenue for relief.

Appellants next claim that the consent decree was void on the ground that it was entered into by the mayor *ultra vires*. The district court disagreed, stating that "under the city charter of the City of Gloucester, the mayor of the city as the city's chief executive officer was empowered, at least on its face, to enter into the consent decree." Transcript of Hearing, October 28, 1996, at 56.

We need not decide the issue, however, because, although appellants discuss their standing to bring such a claim, they fail to argue the merits of their *ultra vires* claim.

It is well settled that this court will consider only those arguments that have been properly briefed and put before it.

> [I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.... It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work.... Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.

*3 *Willhauck v. Halpin*, 953 F.2d 689, 700 (1st Cir.1991) (citations omitted); *see also Ramos v. Roche Prods.*, 936 F.2d 43, 51 (1st Cir.1991) (brief must contain full statement of issues presented and accompanying arguments). Appellants have failed to provide us with argument that supports their *ultra vires* claim and, accordingly, we consider that claim to have been waived.

II. Did the Consent Decree Violate the CWA?

The federal and state clean water acts are administered through a permitting system called the National Pollutant Discharge Elimination System ("NPDES"). Under this system, owners of point sources must obtain an NPDES Permit.[3] Pursuant to the Clean Water Act, 33 U.S.C. § 1251-1387, the EPA issued the City an NPDES permit.[4]

Appellants claim that the consent decree is inconsistent with the Clean Water Act because the NPDES permit conditions governing the Gloucester storm drains were not developed in conformity with the Act's regulatory scheme. Because the effluent limitations in the NPDES permit were based upon water quality standards rather than the effluent limitations guidelines promulgated by the EPA, appellants argue that the limits in the permit are unenforceable.[5]

Appellants' argument is that "reliance on water quality data alone to enforce the construction of a sewer was inconsistent with the enforcement scheme carefully developed under the Clean Water Act and deprived the district court of jurisdiction of the enforcement action." Appellants' Brief at 11. In other words, appellants argue that only specific effluent limitations stated in the NPDES permit, and not water quality data, can be enforced by courts. In support of this argument, appellants cite *Northwest Environmental Advocates v. City of Portland,* 11 F.3d 900, 906-10 (9th Cir.1993). That case, however, was subsequently vacated by the Ninth Circuit in *Northwest Environmental Advocates v. City of Portland,* 56 F.3d 979, 981 (9th Cir.1995), *cert. denied,* 116 S.Ct. 2550 (1996). In the latter opinion, the Ninth Circuit concluded, in light of *PUD No. 1 of Jefferson County v. Washington Department of Ecology,* 511 U.S. 700 (1994), that "[b]y introducing effluent limitations into the CWA scheme, Congress intended to improve enforcement, not to supplant the old system." *Northwest Environmental Advocates,* 56 F.3d at 986. "[N]owhere does Congress evidence an intent to *preclude* the enforcement of water quality standards that have not been translated into effluent discharge limitations." *Id.* Furthermore, in *PUD No. 1 of Jefferson County,* the Supreme Court held that the Clean Water Act allows states to enforce broad water quality standards. *Id.* at 713-21.

In an attempt to rescue their claim, appellants' seek to demonstrate that the CWA is intended to take into account the costs of eliminating the discharge of pollutants. Even assuming that appellants' view of the goals of the CWA is correct, they have nevertheless failed to demonstrate that the consent decree violated the Act. Appellants fail to show that it is impermissible for consent decrees to consider water quality standards. They have also failed to show that the goals of the CWA were ignored when the consent decree was established. We do not believe, as appellants' position would require, that a consent decree must enumerate the objectives of the CWA and state that it has taken each into account. Thus, appellants offer little more than a vacated case, *Northwest Environmental Advocates,* 11 F.3d at 906-10, and a generalized discussion of the goals of the CWA. We find this insufficient to establish that the consent decree violates the CWA.

III. Connection to Common Sewer

*4 Appellants' next argument alleges that the City's Board of Health lacked the authority to order a landowner to connect to the STEP sewer unless and until the City had installed the STEP tank on the landowner's property.

The Board of Health is explicitly granted the authority to order connection to a common sewer:

> The board of health of a town may require the owner or occupant of any building upon land abutting on a public or private way, in which there is a common sewer, to connect the same therewith by a sufficient drain....

Mass. Gen. Laws ch. 83, § 11.

Appellants argue that the STEP sewer system is not a "common sewer" for the purpose of section 11 because the sewer system requires, in order to function, the pressure supplied by the individual STEP tanks and requires the pretreatment of sewage provided by these tanks. Accordingly, the argument goes, the STEP tanks are an integral part of the STEP sewer and must be installed before the board of health is empowered to order connection under section 11.

In the absence of relevant Massachusetts case law, we find that this argument runs counter to the common sense reading of the term "common sewer." The requirement of pretreatment certainly cannot undermine the authority to order connection under section 11. It is no less a "common sewer" merely because some treatment takes place in the STEP tank-sewage is still sent through a set of shared pipes to a treatment plant. Similarly, the fact that pressure from the STEP tanks is required for the sewage system to operate does not render it something other than a "common sewer." No

authority is cited by appellants for the proposition that the need for pressure from the STEP pumps implies that there is no "common sewer" prior to the STEP tank connection. A sound interpretation of "common sewer" would include the STEP sewer system at issue in which a set of common pipes transport sewage from individual properties to a common treatment facility.

Without any support for appellants' argument, we are unwilling to accept their creative interpretation of state law, which would add unprecedented nuances to the plain meaning of the statute. *See Doyle v. Hasbro,* 103 F.3d 186, 192 (1st Cir.1996) (stating that this court must exercise caution when considering a new application of state law, and that we will not do so without a strong argument in favor of the desired application).

IV. The Takings Claim

Appellants argue that the regulations requiring the grant of an easement to the City in exchange for the City's installation of the STEP tanks on homeowners' properties violate the Takings Clause of the Fifth Amendment.

The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, *see Chicago, B. & Q.R. Co. v. Chicago,* 166 U.S. 226, 239 (1897), provides: "[N]or shall private property be taken for public use, without just compensation." One of the purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

*5 On the other hand, the authority of state and local governments to engage in land use planning has been sustained against constitutional challenge. *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926). "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922).

It is within the power of government to enact land-use regulation, and such regulation does not effect a taking if it " 'substantially advance[s] legitimate state interests' and does not den[y] an owner economically viable use of his land." *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 834 (1987) (quoting *Agins v. Tiburon,* 447 U.S. 255, 260 (1980)). "States have broad authority to regulate housing conditions." *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 440 (1982). It follows that the state is entitled to regulate the disposal of sewage in order to protect the public health and to prevent conditions that amount to a nuisance. *See Town of Holden v. Holden Suburban Supply Co.,* 343 Mass. 187, 187 (1961). Every community must find some mechanism to dispose of its sewage. To do so effectively, a sewer system of some form is required, and connection to that system can be mandated without there being a taking.

In the instant case, the City's regulation governing the disposal of sewage can be satisfied in one of three ways. First, the homeowner can demonstrate that the sewage treatment on his or her property provides no point source pollution and is in compliance with municipal and state regulations governing sewage systems. Second, the homeowner can install a STEP system at his or her own expense. Third, the homeowner can allow the City to install and maintain the STEP system at its expense upon the granting of an easement allowing the City to come upon the land.

In *Loretto,* the Supreme Court found a taking where New York law required a landlord to allow the installation of cable facilities on his premises. The basic rule applied in *Loretto* is that "a permanent physical occupation authorized by government is a taking." 458 U.S. at 426. The Court added that "[s]o long as the[ ] regulations do not require the landlord to suffer the physical invasion of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory government activity." *Loretto,* 458 U.S. at 440 (citing *Penn Central Transp. Co.,* 438 U.S. 104). By implication, where there is a permanent physical invasion by the government or a third party, there will normally be a taking.

The instant case, however, does not fall under the permanent physical invasion rule of *Loretto.* The important distinction is explained in footnote 19 of *Loretto,* which states:

> If § 828 required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation. Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation. The

> fact of ownership is, contrary to the dissent, not simply "incidental," it would give a landlord (rather than a CATV company) full authority over the installation except only as government specifically limited that authority. The landlord would decide how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, esthetic, and other effects of the installation. Moreover, if the landlord wished to repair, demolish, or construct in the area of the building where the installation is located, he need not incur the burden of obtaining the CATV company's cooperation in moving the cable.

*6 *Id.* at 440 n. 19.

In the instant case, the homeowner has the option of installing and owning the STEP tanks if the homeowner does not want the City to do so. This option distinguishes the case from *Loretto*. Because the City could simply order homeowners to connect to the sewer, which would not be a taking, giving them the additional option of having the City perform the installation does not render the regulation a taking.

Appellants make much of their claim that even if the system is privately installed, "ownership" of the tanks remains with the City. In fact, appellants appear to concede that there is no taking if the object placed on the homeowner's property is owned by the homeowner. "The critical distinction in *Loretto* between use regulations, which are ordinarily noncompensatory, and a 'permanent physical occupation of property,' which is always compensatory, is the ownership and control of the object placed on the homeowner's property." Appellants' Brief at 14.

Appellants' argument that the STEP tanks are not privately owned is as follows:

> The only practical difference between STEP tanks which are considered privately owned ... and maintained and those which are not is in the identity of the installation and maintenance people. It would seem more would be required to distinguish ownership and control. The tanks clearly perform a public function. The tanks are integral components in the city's sewer. The city's sewer cannot perform its function without the tanks.

Appellants' Brief at 14.

Appellants have not, however, offered any practical method for distinguishing a privately owned installation and a publicly owned one. We are not convinced by appellants' claim that STEP sewers are different from other sewers because the STEP tanks are required for the system to operate. It is true that the STEP tanks perform the necessary function of allowing solids to settle out of the wastewater before the latter is discharged into the collection system. This function, however, is for the benefit of the homeowner alone. The tank is simply a requirement imposed on the homeowner so that the homeowner's property can be connected to the sewer system. As such, it is not a taking. Rather, it is a reasonable requirement without which the property could not be connected to the sewer.

We believe that the option of installing and maintaining the STEP system oneself provides the homeowner ownership of the STEP tank. As discussed in footnote 19 of *Loretto*, the homeowner's ability to install the system himself or herself grants the homeowner "full authority over the installation except only as government specifically limited that authority." *Id.* at 440 n. 19.

For this reason, and consistent with *Loretto*, we find that the regulations do not work a taking.

V. The Easement

Appellants claim that even if there is no taking, there is no need for the City to demand an easement in exchange for one dollar in order to install the STEP tanks. In support of this claim, they cite Mass. Gen. Laws ch. 83, § 1, which allows a city to take an easement by eminent domain if necessary for the construction and maintenance of common sewers. The STEP tanks, however, are not part of a "common sewer," as required by Mass. Gen. Laws ch. 83, § 1. Rather, they are part of a "particular sewer" which is governed by Mass. Gen. Laws ch. 83, §§ 3 and 24. *See P & D Service Co. v. Zoning Board of Appeals of Dedham*, 359 Mass. 96, 101 (1971) (stating that the line connecting a building to a

municipal sewer system is a "particular sewer"). The sewer system is, as discussed *supra,* a common sewer. The STEP tank, however, is more accurately characterized as part of the line connecting a property to the municipal sewer. Sections 3 and 24 do not authorize municipalities to take an easement by eminent domain for the construction of particular sewers. Furthermore, appellants appear to admit that an easement is required. "Early on it became apparent that easements would be necessary for the installation and maintenance of city-owned utilities on private property." Appellants' Brief at xii.

VI. Vagueness

*7 Finally, appellants claim that the regulations are void for vagueness. Having reviewed the regulations, we find this argument to be without merit. In our view, a person "of ordinary intelligence" is able to understand the meaning of these regulations. *United States v. Batchelder,* 442 U.S. 114, 122 (1979); *Doe v. Superintendent of Schs. of Worcester,* 421 Mass. 117, 134 (1995).

VII. State Law Issues

Two additional issues are raised by appellants: First, that the most the Board of Health can fine a landowner for failure to obey an order to connect to the sewer is $200 and, second, that the City must install the STEP tanks when requested to do so by the homeowner. These issues were not reached by the district court. In its ruling from the bench, the district court stated that "as to any aspects of the case not adjudicated by the declaration from the bench ... the cause is remanded to the Massachusetts Superior Court." Judgment of the District Court, October 28, 1996. Because appellants do not challenge the propriety of the remand order, we will not consider their arguments on the merits. Accordingly, we leave these issues to the Massachusetts Superior Court.

VIII. Conclusion

For the reasons stated herein, we *affirm* the judgment of the district court. Costs to appellees.

Parallel Citations

1997 WL 459079 (C.A.1 (Mass.)), 27 Envtl. L. Rep. 21,532

Footnotes

1 A STEP sewer system includes STEP tanks located on the household's property. Household sewage flows into the STEP tank where it receives primary treatment, essentially consisting of the sludge's settling to the bottom of the tank and being digested by bacteria. The sludge-reduced liquid effluent then flows under pressure to the STEP sewer line and to the city treatment plant. The sewer lines serving STEP sewers are narrower than the lines serving conventional gravity sewers. Conventional gravity sewers convey wastewater, including both liquids and solids, to the treatment plant by means of gravity. Pressure sewers include pumps that grind the sewage before it is transported under pressure to the collection system.

2 The district court also agreed that appellants had standing to challenge the consent decree on the grounds that the defense of lack of standing was waived when the case was removed to federal court.

3 A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

4 The permit was originally issued in 1975 and was reissued in 1985.

5 Effluent limitations refer to restrictions on the quantities, rates and concentrations of pollutants which are discharged from a point source. Water quality based standards limit discharges based on the desired conditions of a particular waterway. *See Arkansas v. Oklahoma,* 503 U.S. 91, 101 (1992).

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ANITA YU, JOHN BOYER, and
MARY RAAB,

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v.

CITY OF ANN ARBOR,

Defendant.
_____/

Case No. 14-181-CC

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PROOF OF SERVICE

I hereby certify that I mailed, first class postage prepaid, a true and correct copy of the City's Reply Brief in Support of Motion for Summary Disposition in the above entitled matter to the above-named counsel for the Plaintiffs at the above addresses this 6 day of August, 2014.

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PROOF OF SERVICE

I hereby certify that I mailed, first class postage prepaid, a true and correct copy of Defendant City of Ann Arbor's Response to Plaintiffs' Motion for Sanctions Pursuant to MCR 2.114, Defendant City of Ann Arbor's Brief in Opposition to Plaintiffs' Motion for Sanctions Pursuant to MCR 2.114 and this Proof of Service to the above-named counsel for Plaintiff, this August 22, 2014. A courtesy copy was also sent to Plaintiffs' counsel via their email address of record.

Alex Keszler

Alex Keszler, Legal Assistant