FST CV 07-4010609 S	STAMFORD-NORWALK JUDICIAL DISTRICT	: SUPERIOR COURT
NORWALK PRESERVATION TRUST, INC. and CONNECTICUT COMMISSION ON CULTURE AND TOURISM	2008 FEB -6 A 11: 22	: JUDICIAL DISTRICT OF STAMFORD/NORWALK
V.		: AT STAMFORD
NORWALK INN AND CONFERENCE CENTER, INC.		: FEBRUARY 6, 2008

MEMORANDUM OF DECISION
ON PLAINTIFF'S APPLICATION FOR TEMPORARY INJUNCTION

Action for temporary injunction brought by Norwalk Preservation Trust, Inc., and the Connecticut Commission on Culture and Tourism, seeking to prohibit the city-authorized razing of a building at 93 East Avenue in Norwalk. Defendant owns the Norwalk Inn, on adjacent property, and bought the building in 2001 solely in order to demolish it and expand the hotel operation the defendant had long run at 99 East Avenue.[1]

At the time of its purchase, the ownership of defendant did not know there were potential

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[1] The court does not have documentation that defendant's principals were advised, prior to the 2001 purchase of subject property, that there was not problem of historic listing(s). However, it was not contested by the parties at trial; the court found credible, defendant's principal, Mr. Handrinos, that he so understood. Further, the notion is corroborated generally by Exhibit 1 to defendant's motion to dismiss. In said documents, the office of Norwalk's City Counsel informed the Mayor that 93 East Avenue was "outside the boundaries of the purportedly created Norwalk Green Historic District." Said letter, dated October 10, 2006, also referred to and relied upon *Gentry* v. *Norwalk*, 196 Conn. 596 (1985) in which the effort to create said district locally failed, due to procedural errors in promulgation. Apparently, no check was made of the National Register, except by plaintiffs. Our statutory scheme regarding historic preservation, C.G.S. § 22a-19a makes clear that National listings are protected in state enforcement.

or existing issues regarding the National Register of Historic Places. In fact, however, the property at 93 East Avenue is part of the Norwalk Green Historic District which is listed on the National Register. (Said listing occurred December 14, 1987, Exhibit 4) Indeed, the defendant had apparently come to understand, it is not disputed, via the City of Norwalk, that the site was clear of historic standing, apparently based upon a failure, locally, to promulgate it properly onto the local historic register, which local designation may also have not even included 93 East Avenue.[2] (See, *infra.*)

The building, whose exact age is unclear, circa late18th century, is not rendered historic, as some are, by events that transpired within it. Rather, it is said to represent a prominent style of architecture or architectural restoration prevailing in the 19th century. Beyond that notion, which is the thrust of the trial evidence, the brief of *amicus curiae*, National Trust for Historic Preservation and its Connecticut nominal twin, states as follows; "The central core of the historic house was originally built before the Revolutionary War, probably in the 1750s, by Samuel Grumman. The house was partially damaged during Battle of Norwalk in 1779, a battle which destroyed most of the town. In 1805, the house was sold from the Grumman family to the St. John family, and the house remained in the family for well over a century, until it was sold in 1925." The court makes no finding on this detailed historic suggestion. Beyond any significance of the building in and of its own, it is part of the historic Norwalk Green district.

Defendant obtained all zoning clearances for its expanded hotel on the site and injunctive

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[2] In plaintiff Trust's final brief, October, 2007, it is noted that a 2001 application filed by defendant indicated that this project would include demolition of a building "identified on the National Registry." (Exhibit 14). This does not totally refute the claim that the purchase of 93 East Avenue occurred without the knowledge of the defendant's principal.

action was brought by plaintiff trust as demolition loomed.[3]

At the lengthy trial of the preliminary injunction matter, the court was obliged to consider whether a prima facie case has been made by plaintiff(s) to the effect that defendant will unreasonably destroy the protected resource or whether demolition should be allowed because defendant has made out the "affirmative defense" that "considering all relevant surrounding circumstances and factors, there is no feasible and prudent alternative" to the intended demolition. (C.G.S. §22a-19 and 22a-17).

The court has concluded that the temporary injunction sought must be granted.

Plaintiffs have made the prima facie case required of them by C.G.S. § 22a-17 by virtue of showing the intended total destruction in the face of possible alternatives, which defendant, taking up its affirmative defense, failed to show not "feasible and prudent." The court has been asked to rule that all total destructions are prima facie "unreasonable," in the word employed by C.G.S. §22a-19a. It seems to this court that destructions may be deemed reasonable where no feasible or prudent alternative exists. In any event, this debate could have come down to a difficult legal wrangle about how the burden of proof operates. Here, it does not matter, for if it takes more than a mere historic listing and intended destruction, before throwing the issue to an "affirmative defense" by defendant, plaintiffs have done so. That is, plaintiffs showed by a bare preponderance

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[3] Defendant's mandatory waiting period of 90 days after the issuance of the permit to demolish the building would have allowed demolition on or about December 24, 2006. Well before said date, on December 6, 2006, the Superior Court issued an *ex parte* temporary injunction (*Karazin, J.*) Additionally, the same court granted the motion to intervene of co-plaintiff, the Connecticut Commission on Culture and Tourism. Trial with all the parties began on the temporary injunction on January 4, 2007 and consumed at least six (6) days of evidence. Earlier, two days in December, 2006 were devoted to motions, including defendant's motion to dismiss which was denied.

of the evidence that there is/are or may be reasonable/prudent alternative(s) and defendant has failed to show that there are not, as will be explained.[4]

Defendant's principal, Mr. Chris Handrinos, credibly testified that the hotel business in southwestern Connecticut has grown vigorously and that it has done so in the high-end or luxury spectrum. In order not to be squeezed out, or plummeted downward in perception, he needs to keep up with the trend via the ownership of additional new luxury rooms. His hope and intention, via demolition of 93 East Avenue, was to gain 57 rooms (with zoning ultimately allowing 44). (The current Inn has 71 rooms). He pointed out that there is a certain economy of scale which suggests that a certain increase in staff remains static whether "x" new rooms are added or whether "x-plus" rooms are added.

As against this "need," or in anticipation of it being presented, plaintiff proffered alternatives to the intended destruction which the court has concluded, have a certain potential higher than the flat impossibility defendant suggests.

They include: a) a renovation of 93 East Avenue, keeping the historic exterior appearance, with an addition, allowing 24 luxury rooms; b) at least 2 alternatives which utilize the land the defendant Inn now occupies, leaving 93 East Avenue alone, sold for office use or restored with a small number of rooms, along with expansion of the existing Inn.

Susan Olivier was the plaintiffs' proponent for renovation of, and addition to the historic subject building. Ms. Olivier is a principal in a realty consulting firm, who for 20 years has been

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[4] A brief by *amicus curiae* (The National Trust for Historic Preservation and the Connecticut Trust for Historic Preservation) has persuasively argued that defendant does not correctly interpret *City of Waterbury* v. *Town of Washington*, 260 Conn. 506 (2002) in its argument that plaintiffs have not met their *prima facie* burden. See, *amicus* brief, pp. 15-17.

a licensed architect with a masters degree "in real estate development with a focus on finance" from Columbia's School of Architecture, Preservation and Planning. (Transcript, January 10, 2007, p. 8).

Ms. Olivier addressed her market research for the area, regarding tourism growth and financial considerations. Additionally, she addressed occupancy rates and minimum sizes of luxury rooms.

Ultimately, Ms. Olivier concluded that 24 "luxury" rooms could be constructed within a restored and extended 93 East Avenue for "just over $2.2 million." (Id. At p. 64 and Exhibit 33).

Defendant Inn, via cross-examination of Ms. Olivier and expert testimony of defense witness architect Joseph Solta tended to undercut somewhat the potential seen by Ms. Olivier. Primary among these affirmative defense suggestions was that the number of rooms is, with Olivier's 24, 20 less than the city had allowed for a razed site; that Olivier's number was too optimistic, with 18 being more realistic (transcript, January 17, 2007, pp. 15-35); that, per Solta, the Olivier rehabilitation cost estimate was too low; that Olivier's Inn was detached from the defendant's current Inn; that the significant tax credit ($580,000 in Olivier's view) would not begin to be available until profits were made and that this was not until the third year, per Olivier's admission. Further, defendant argues that the direct road front proximity to busy East Avenue is antithetical to luxury overnight accommodation.

Against a backdrop which reveals a true paucity of case law exploring what should be the appropriate parameters or methods in weighing feasible and prudent alternatives, the court is forced to its own analysis for this rather unique situation.

One would think that the measure of feasibility of alternatives is not simply the hope or plan

of the owner proposing demolition. At the other, very distant end of a spectrum, perhaps a judicial officer should not deem feasible some, any, endeavor rather totally unrelated to the defendant's past or current business. It does seem appropriate to say that the reduced number of rooms plaintiff propounds do not create for defendant an imprudent or non-feasible alternative. A defendant cannot simply set the bar at 44 rooms (which the city allowed) and thus build a quasi-binding framework as to which anything less must be judicially seen as imprudent or not feasible.

The plaintiffs' Olivier proposal for an Inn at 93 East Avenue is clearly an "alternative" to destruction, of course, and this court concludes, with some trepidation, that it could, if barely, reside within the parameters of feasible and prudent.

There are other propositions plaintiffs proposed which, however, may tend to approach defendant's business expansion desires somewhat more closely and leave the 93 East site undisturbed, to be sold to office developers, or possibly developed as a small inn in conjunction with said other options.

These alternatives will be discussed briefly, infra. What is legally interesting about them is that the law, if this court has it correctly, may well embrace the possibility of feasible prudent alternatives being perceived outside the geographic contour of the historic site, on other property, owned by defendant, prior to the purchase of subject site. The court is of the opinion that it is legitimate to weigh the alternatives an owner has even when said alternative would take place on other property the defendant owns, already in use in the hotel business. The court feels that the scope of such consideration must be wide, even to include saleability, given the protective purposes the statute promotes and to guard against development presentations so narrow as to foster an impression of no alterative.

Turning to options beyond Olivier's, plaintiffs produced an expert with regard to expansion of the current Inn on its current site, adjacent, in part, to 93, at 99 East Avenue. Lee Levey is a self-employed licensed architect and a board member of plaintiff, Norwalk Preservation Trust, with experience in historic properties and zoning and construction costs (Transcript, January 12, 2007, pp. 145-151). Included amongst Mr. Levey's proposals was a 20 room expansion of defendant Inn's room capacity exclusively upon its own hotel property. (Exhibits 21 and 18, with and without a walkway connection to the present Inn). These rooms would be placed upon a second floor, over parking. The first part of Mr. Levey's initial concept would require a twenty-foot front yard setback variance. (Id. At p. 182). Another Levey concept contained 42 new rooms, in a detached structure, all on the current Inn's location. (Exhibit 36). Additionally, Levey described a "revised" 42 room alternative, which substituted underground parking instead of tiered parking.

Testimony of Mr. Levey also included that, as to this second concept, all that he proposed lay within the boundaries of the East Avenue Village District (a zoning district) and hotel uses are permitted therein by special permit, one of which was obtained for an earlier Norwalk Inn expansion (Id. at p. 204). No parking variances were said to be necessary (Id. at 205) although a front yard setback variance would be needed, just as for Levey's first concept. As noted, an underground garage is featured. Mr. Levey cost estimated his second, larger concept at $3,000,000. (Defendant's principal intended to spend twice said amount in the 93 East Avenue venture.) (Transcript, January 12, 2007, p. 143).

One of Mr. Levey's concepts was suggested by defendant to require a zone change, as it may involve more land need than the easier-to-obtain 25 foot encroachment. (The current Inn sits in a place that is/was a mix of commercial and residential)

Other facets, elicited upon cross of Mr. Levey and the direct testimony of Mr. Handrinos, suggested difficulty that would likely result regarding traffic flow, possibly trapping 18-wheel delivery trucks; an alleged motel-like appearance; the clumsy locale of the front desk with the need for guests to go outside to get to rooms after registering.

The alternatives skeletally alluded to here may not face perfectly clear sailing, if undertaken, through the regulatory process. But no injunction court can substitute itself for such administrative reviewers and accurately foresee the precise results. It might be noted, however, that it may also just be possible that defendant will be able to present a sympathetic plight to the municipal agencies, it having come to be surprised at the historic district hurdles, having been apparently advised by the city of the absence of such hurdles, and the fact that the agencies of the city had even been amenable to demolition of 93 East Avenue in the same cause, hotel expansion. Plaintiffs' presentation strategy may have been intended, in order to stay on the safe side of prudent, feasible, to pose as many rooms as possible. There looms the possibility too, however, that lesser numbers would encounter a warm embrace through the regulatory process. (Defendant's evidence left unclear what number of additional rooms would be economically unhelpful.)

It is true that all of the alternatives represent fewer new rooms than defendant sought. This factor alone cannot serve to drop alternatives out of the feasible and prudent atmosphere. Of course, each additional new room, may become, after an unspecified number, an administrative/overhead bargain, as Mr. Handrinos credibly notes, but this alone cannot suffice to brand unfeasible a lesser number of rooms. Were it otherwise, an applicant could claim unrealistically high needs in order to brand most posed alternatives imprudent. As noted, *supra*, the court did not find it shown by defendant that the lesser number of rooms to be gained, as

proposed by plaintiffs, would be unprofitable. Instead, one merely learned that there is a profit-efficiency at an unspecified point where each room is a bigger profit "bargain" because overhead would not rise proportionately.

As noted, our case law[5] leaves the judicial officer to ponder exactly where a bottom rung exists below which a suggested alternative is not "feasible."[6] It helps to recognize that part of the difficulty emanates from the somewhat compelling dilemma Mr. Handrinos confronts. His company bought the realty for the sole purpose of hotel expansion while he was unaware of its

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[5] Often during the trial the court requested any case law or law review articles which might illuminate varying methods of analysis, especially those which wrestled with how widely a court would range in the assessment of potentially feasible, prudent alternatives. The best way to characterize the results is to call them unavailing. Some of our Connecticut cases are discussed in the next footnote. One law review article sets out a concise history of the legislative development toward historic preservation. (71 No. Dak. L. Rev. 1031 (1995)).

[6] The cases listed below have been studied largely in pursuit of judicial methodology in determining alternatives. Little help was encountered. In each of the four, all superior court cases, the demolition intended was permitted. In several, the court not only received but credited denigration of the condition and/or historic significance of the subject site. (Here, co-plaintiff Commission urged upon the court that historic significance was a topic out-of-bounds to defendant, arguing that if it were of the belief that the historic quality were wanting, recourse had to be taken through efforts to persuade the "keeper" of the National Historic Register to delist the site). In none of the first four cases did the preservation forces present detailed expert testimony arguing the viability of an alternative. In some, the use the owner intended was felt to possess overwhelming public import, e.g., a magnet school. Elsewhere, the court was influenced by the utter hopelessness of economically restoring a site or its becoming useful at all. It is fair to say these cases did not blaze a trial for this court to follow. *Hill/City Point Neighborhood Action Group, Inc.* v. *City of New Haven, et al*, Superior Court, judicial district of New Haven, Docket No. CV 00 0437784 (July 21, 2000, *Meadow, J.T.R.*) (2000 Conn. Super. LEXIS 1885); *Warner* v. *Norwich*, Superior Court, judicial district of Hartford, Docket No. CV 292615 (May 23, 1984, *Aspell, J.*); *Friends of Hillhouse Avenue* v. *Yale University*, Superior Court, judicial district of New Haven, Docket No. CV 98 0419300 (April 28, 1999, *Meadow, J.T.R.*) (1999 Conn. Super LEXIS 1143); *Connecticut Historical Commission* v. *250 Waldemere Avenue Associates*, Superior Court, judicial district of Fairfield, Docket No. CV 86-232984 (March 6, 1987, *Jacobson, J.*) (*Amicus Curiae's* brief outlined the procedure and criteria germane to de-listing a property through the "Keeper of the National Register," pursuant to 36 C.F.R. § 60.15).

historic status; and the plan for a new hotel at 93 East Avenue was taken all the way through agency/board hurdles to the end piece, a demolition permit.

However, one cannot utilize these factors as a "credit" to defendant, and, more readily hold defendant to be without feasible and prudent alternative. To do so would further complicate an already difficult analysis. Additionally, such a bad precedent would tend over time to encourage like-situated parties to self-inflict the wounds of getting into fixes relatively "unaware" they had done so. It cannot and should not be the law that a protected building's existence suffers greater jeopardy when one who would demolish it has also suffered from being misled or ignorant as to the building's status.

Additionally, the decision to deny demolition is not rendered easier by the fact that 93 East Avenue is probably closer to the, say, undistinguished end of the historic spectrum. Its appearance today is forlorn and no great historic event or person is closely tied to it. Its apparent use, in the recent period before defendant's purchase, was the rental of some single rooms to boarders. Yet one must keep in mind that buildings can be listed, as this one is, because it is purportedly an integral part of an historic district. Were courts to shrink the protection the law may intend for this (merely-part-of-a-district) sort of structure, then piece by piece, districts might be destroyed via the exceptions. [7] [8]

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[7] As noted in an earlier footnote, some courts have entertained evidence in denigration of the historic value of a subject property. This happened here in a limited realm largely related to costs of rehabilitation. It was repeatedly suggested by the Culture and Tourism Commission that if defendant quarreled with the "value" of the property historically, he should take it up with the federal office of the "Keeper" of the register. The evidence did not contain information or opinions as to said procedure and/or success, especially with regard to buildings which are listed for being part of a district. The question might be posed as to whether certain "integral" parts ought not more easily be allowed to fall to "progress" (and enhanced municipal revenue). But the law in this arena has not yet been enriched with the wisdom that comes from battle after battle. It is largely for this

For the reasons outlined, the temporary injunction against demolition is granted.[9]

The injunctive relief ordered is not, one will note, a permanent injunction. That is left to the normal course of judicial events. It may be that by such time new or more thoroughly detailed information will document greater absence or unlikelihood of using the site or expanding at the Inn's current site, in which case a court may determine no prudent or feasible alternative exists.

Nadeau, J.

NADEAU, J.

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reason that this court points to the space between a temporary and permanent injunction. In such an interim, more information will possibly be obtained and provided for a more clearly correct resolution before a future court.

[8] No bond need be posted. C.G.S. § 52-472 does not require it where a "state or . . . a public officer" is involved; and for "good cause" the court chooses not to demand it of the not-for-profit co-plaintiff Trust.

[9] The court is struck by many facets of this litigation and the underlying statutory scheme. Preservation actions are permitted, and it would seem, are often brought at the eleventh hour, when the bulldozers are idling, after years of review by municipal agencies. Nothing apparently requires a posting which would make clear the historic nature of a property either on site or upon land records. Enforcement is initiated largely by local volunteers, then possibly joined by the state commission. Benign neglect may rule; no funds are devoted to preservation. The effort to preserve against demolition may appear to take on the appearance of a constructive taking without compensation. This notion was not presented to this court, largely because, one would suspect, of the remarks found in *Figarsky* v. *Historic District Commission*, 171 Conn. 198, 206 (1976). One can foresee the future of this property being the centerpiece of a battle over whether a court must monitor maintenance, to insure against a natural death of the property, a process it would appear is ineluctably underway. Further, the law is not yet enriched with clarifying law as to how one weighs feasible and prudent alternatives. This court was persuaded, as noted, to sift alternatives that did not involve use of the subject property at all, beyond selling it. Nor, does the law, as noted in footnote 5, clearly invite the weighing of historic value; as a result zealous "protection" of all structures against all incursions may often stifle tax revenue for municipalities.

Decision entered in accordance with the foregoing. All counsel and pro se parties notified. 2-6-2008 K. Gulley (TMC)