

LEADING THE MOVEMENT:  
INTERVIEWS WITH PRESERVATIONIST LEADERS IN NEW YORK'S CIVIC SECTOR

The Reminiscences of  
Jack Kerr

## PREFACE

The following oral history is the result of a recorded interview with Jack Kerr conducted by Interviewer Inna Guzenfeld on March 27, 2013. This interview is part of the *Leading the Movement: Interviews with Preservationist Leaders in New York's Civic Sector* oral history project.

The reader is asked to bear in mind that s/he is reading a verbatim transcript of the spoken word, rather than written prose. The views expressed in this oral history interview do not necessarily reflect the views of the New York Preservation Archive Project.

Jack Kerr speaks about his experiences working on *Penn Central Transportation Co. v. New York City*. This case was very significant in establishing the constitutionality of the New York Landmarks Law. The conversation then ranges to how he became interested in preservation law, significant cases, and his current activities in historical preservation. A few of the cases he worked for the Landmarks Conservancy, St. Vincent's Hospital's claim to the Landmarks Preservation Commission, and *St. Bartholomew's Church v. City of New York*, helped to establish the parameters of the then new Landmarks Law, and how it is applied today.

John J. Kerr, known as Jack, received his undergraduate degree from Boston College in 1972 and his J.D. in 1976 from Columbia Law School, where he was the Editor-in-Chief of the *Columbia Journal of Environmental Law*. Since 1983, he has been a partner in the law firm of Simpson Thacher & Bartlett, which he joined in 1978. He has written and lectured extensively on topics related to international arbitration and litigation. He is now a retired partner and takes on special international arbitration cases.

Transcriptionist: Jackie Thipthorpe

Session: 1

Interviewee: Jack Kerr

Location: Upper East Side, Manhattan,  
New York

Interviewer: Inna Guzenfeld

Date: March 27, 2013

Q: Today is March 27th, 2013. This is Inna Guzenfeld interviewing Jack Kerr, a preservation lawyer, and I think we can get started.

Kerr: All right.

Q: In the early '70s you were a law student at Columbia [University] and I know that in 1975 you wrote about the Lutheran Church case [*Lutheran Church v. City of New York*] in the *Columbia Journal of Environmental Law*. Did this ruling spark your interest in landmarks law?

Kerr: Actually, it didn't spark my interest in landmarks law. What brought me to landmarks law was my prior life as an archaeologist. Before going to law school I was a classical archaeologist and when I went to law school I was looking for a way that I could continue, in some respect, my interest in history, historic preservation and archaeology and I settled upon writing a student note on the topic. It's traditional that in your second year of law school you write a note of some sort, an academic piece. There was a newly formed environmental law journal at the school and I became interested in joining the staff of that journal, having discussed with them my idea of writing in the field of historic preservation and they felt that that was certainly within the area of environmental law that

would be of interest to them and their readers. I was fishing around for a topic and that's when I came across the Lutheran Church case and it seemed to be an important and appropriate case to write about and very timely. So that's truly how I came connected to the Lutheran Church case.

Q: And what about the case did you feel was timely or significant?

Kerr: Well, it was a case where the preservationists lost it in the end. As you know, the court found hardship and as a result the designation was removed from the Lutheran Church building and the Lutheran Church had the right to tear it down. They had put forward a convincing case of hardship based upon the building not serving the purposes of which they needed it, which was the headquarters of [Evangelical] Lutheran Church of America. It really was one of the first cases that was able to successfully apply the hardship exception to the Landmarks Law, which was of great interest of the time. The great irony of this of course is that the building was never torn down and it's now part of the Morgan Library [and Museum].

Q: Did you have any interactions with LPC [New York City Landmarks Preservation Commission] or the Municipal Art Society [MAS] and other preservation advocacy groups prior to your work on Penn Central [*Penn Central Transportation Co. v. New York City*]?

Kerr: I didn't other than to become aware of the commission and the work of the Municipal Art Society in the course of my research for the article. But I had no interaction formally with either organization before I began working on the Penn Central case.

Q: And coming from your background, were you interested primarily in preservation law or did the advocacy side interest you as well?

Kerr: I was attracted to become a lawyer because of the advocacy and I had always assumed I would go to law school from the time I started college. Even when I applied to college I distinctly remember listing pre-law as my area of interest. That didn't change until toward the end of my undergraduate years when I fell under the sway of a very excellent teacher who was a classicist and historian, probably the best historical classicist of his generation, Sterling Dow. He really sparked an interest in me in continuing in my study of history and he was the one who made it possible for me to do graduate work, continue working on a thesis and eventually work in the field on an archaeological excavation in Greece.

I decided to give that up and go to law school because I really did have this powerful desire to be an advocate and have a public life, an engaged public life, as opposed to an academic life, which I was, I think, on track for if I stayed in archaeology. I love the fieldwork in archaeology but I never really saw myself as being an academic full-time.

So that took me to law school but what drew me to preservation really was more the substantive interest. As a law student, I was keenly interested in land use and land use planning, in environmental law, and in preservation law. I thought there was a good chance that my career path would take me in that direction. When I was interviewing for a summer associate job at the beginning of my second year at Columbia, one of the law firms I interviewed with was Cahill, Gordon [ & Reindell, LLP] and by sheer happenstance the lawyer who was doing the interviewing that day for Cahill Gordon at Columbia was Ralph Menapace. When we got talking and he realized my background and he realized that I was writing an article on a historic preservation topic, he became very engaged and at the end of the interview he offered me a position for the summer at Cahill with a chance of working with him and others on the what was then the Penn Central case.

It was the substantive interest that really took me in that direction though I have to say that in the course of law school, just like studying history and archaeology sort of sidetracked my interest in law for a period, I became very interested in international law. When I finished at Columbia and took a two-year federal court clerkship in Portland, Oregon, I thought a lot about the two—environmental preservation law versus international law and I came to the conclusion that I wanted to do both, but the international law would be sort of my day job, what I really did professionally. But I wanted to find a way in my pro bono activity because after all, much of historic preservation work was being done pro bono by law firms, that I thought that I could find

a way to work in the preservation field as I had at Cahill for non-profit clients on a pro bono basis.

Q: When you became involved with Penn Central as an associate at Cahill I believe it was still in the [New York] Court of Appeals.

Kerr: That's right.

Q: Can you describe the prevailing issues at that juncture, when you came in as an associate and whether you thought at the time the case would actually go to the [United States] Supreme Court?

Kerr: I don't think anyone at that time thought it would go to the Supreme Court. This was the summer of 1975 and we were still in the state court system and the issues we were dealing with were first and foremost whether landmarks preservation and in particular the New York City Landmarks Preservation Law was constitutional. Put historically, it had not been established yet whether landmarks preservation was an appropriate extension of the zoning power. That's why in those days land use law was so important in terms of crafting the arguments in the Penn Central case. I did a lot of research trying to determine the basis on which to argue that historic preservation was just a legitimate extension of basic zoning principles for which there was a huge body of case law including numerous Supreme Court cases.

But it had never been established that the landmarks preservation was a constitutional abuse of the zoning power. There was a principle in land use that zoning when applied to a large geographic area, fifteen city blocks or a neighborhood, where it touches everybody equally is a legitimate exercise of what is called the police power and the power of the state. On the other hand, something called spot zoning was not. In other words, you can't say, this is an area of ten-story commercial buildings but this little piece over here is only going to be one story. That would be discriminating. That's frequently been held unconstitutional when they tried to zone a particular parcel. So by analogy in historic preservation, one could argue that historic districts were more like appropriate zoning, but an individual landmark sounded a lot like spot zoning. Those people can do whatever they want with their building but you can't. That was a huge concern and we spent a lot of time researching that issue.

The other area we spent a lot of time thinking and researching was the Fifth Amendment Takings [Clause]—how far could a state go in regulating before it triggered the requirement to compensate. Related to that, I know Ralph Menapace spent a lot of time with economists and experts trying to figure a way to argue that having to maintain Grand Central [Terminal] as a railroad station was not a hardship to Penn Central. He probably spent a lot of time on the economic side of the takings issue, whereas I was focusing a lot more on the theoretical, the legal side of the Fifth Amendment Takings law. And of course sharing and working with Paul Byard and Dorothy Miner in all this, we worked as a team.



Q: I was going to ask—how did this team come together?

Kerr: Dorothy, Paul and Ralph were already working together when I stepped into the picture. The summer associate position is usually about a ten- or twelve-week position in the summer. When I showed up for work in early June, they had already been working on the case and I came in at a fairly early stage because I was doing some very basic research. So that's, I guess, the simple answer; I joined the team that was already in place.

Q: And you were working to prepare multiple briefs—one for the city and a friend of the court brief for MAS.

Kerr: We were the principal draftspersons of the MAS brief, which was ours to write. Cahill was representing MAS, and we were sort of a shadow, behind the scenes team coordinating with corporation council and Dorothy Miner doing the city's brief. Paul Byard at the time—I think this was in the transitional period when he was transitioning from law to architecture. I remember that summer he spent a lot of time out in the Hamptons at his summer house and we would have to send packages back and forth, but he was very much engaged in the very theoretical side of it and also working with me drafting.

Q: How long was your participation in the case? It sounds like you may have worked on it past your time as a summer associate.

Kerr: I did. I worked throughout the summer and then I worked as much as I could during the school year on a kind of as-needed basis.

Q: From what you recall, what were the immediate effects of the Supreme Court ruling on preservation in New York City?

Kerr: Well, I think number one it stated unequivocally that the New York City Landmarks Law was not unconstitutional and that it was a legitimate use of the powers of a city. It's interesting that it's referred to as the police power but includes zoning, which had never—I mean that was really up for grabs. With so many years between that decision and where we sit today, it's hard to really comprehend how on edge the preservation community was over this. An adverse decision from the Supreme Court could have killed the Landmarks Law and the Landmarks Preservation Commission and would have, I think, set the country on a very different course in terms of preservation.

It was a moment of jubilation but it also was an important moment in that with the Supreme Court having thoroughly dissected and analyzed the law, we had a sense of where the potential weak points were going forward and obviously the whole takings thing and hardship really was part of it. The fact it was a hardship provision, the factor of ways to ameliorate hardship were critical to the Supreme Court's accepting this as a constitutional use of the zoning power.

I think we felt we dodged a bullet. It's a great landmark case in itself in the sense that it established landmarking as a legitimate use of the zoning power countrywide, but it also meant that we had a lot of work ahead of us in terms of making sure that it was applied in a way that would keep it constitutional because you always have the question of whether a law is constitutional on its face—whether it's facially defective—or whether it's constitutional as applied. We still had to be concerned about the as-applied aspect in each case.

Q: Did you feel that it changed the application of the Landmarks Law or the discretion and power of LPC?

Kerr: I don't think it changed the law or impacted the discretion of the LPC. I think that it certainly made the LPC aware that it had to take the hardship issue very seriously and in necessary instances it may have to give up a landmarking if the hardship could not be addressed.

Q: So you were fairly young at the time and you're the last remaining member of that legal team.

Kerr: I was twenty-five years old that summer.

Q: What did you gain from your involvement in Penn Central and how do you feel that it prepared you for your future pro bono work in preservation law and advocacy?

Kerr: I think, number one, I formed lifelong friendships with the people I was working with and it wasn't just a friendship one cultivates working intensely with somebody over a period of time but we really shared a common interest, a very deep interest in historic preservation. I knew I'd like to find a way to continue working with these people and find other projects.

I also felt that historic preservation, the Landmarks Law are now here to stay and it is going to be a legitimate field with opportunities for lawyers like me, so it increased my appetite for doing more work in the field, especially given the fact that it was a very young field. I knew that there would be a lot of new and interesting cases as the parameters of the field became more defined. It really encouraged me to think that this is something I want to do and there will be opportunities in it and great people to work with.

Another important event that summer, which is kind of a footnote but had importance later, is that I met Whitney North Seymour [Sr.], who was working with the [New York] Landmarks Conservancy doing an amicus brief in the Penn Central case. Simpson Thacher [and Bartlett LLP] [STB] really hadn't been on my radar screen when I was interviewing law firms and that was probably a huge oversight on my part. I remember at some point he said to me, "When you get back to law school, in your third year, why don't you talk to us, consider coming to us." And so that seed was planted in my head and when I took a closer look at Simpson Thacher I realized I knew several people there quite well and that's where I eventually ended up.

Q: Simon Breines whom we interviewed a few years back talked about you a good deal and he said that the Landmarks Conservancy would not have survived its early years without the Simpson Thacher connection. What was the extent of your involvement with the Conservancy in the '70s and '80s when you joined STB?

Kerr: Well, when I joined STB in 1978, in the fall of '78—October 1978—after finishing a two year clerkship, one of the first people I went to go see was Whitney North Seymour. He said to me, in that very first meeting, that he was going to find a way to put me to work on Conservancy matters and he did. From the very start of my career at Simpson Thacher I was working with Whitney Seymour on a range of matters for the Landmarks Conservancy. As I recall, Laurie Beckelman was executive director at the time and we became fast friends and collaborators on many things.

In my early years, I spent a lot of time doing basic research and drafting of court documents whenever we were an amicus party or involved in any kind of litigation. That was my principal role because I was a litigator, that's the area of my practice at Simpson Thacher. But I also became very involved in everything from bylaws to governance and just the practical things that need to be done where a small organization needs an extra pair of hands. I attended all the board meetings as a sort of junior counsel and assistant to Whitney who was one of the founding members of the Conservancy and so Simpson Thacher was involved with the Conservancy right from the very beginning. I became a member of the board at the Conservancy in 1984, which is right after I became a partner

in the firm. And at that point there had been not only Whitney North Seymour but Donald Oresman, another Simpson Thacher partner had become very involved in the Conservancy and he was chairman of the Conservancy for a period when Laurie was the executive director.

There has always been senior partner involvement in the Conservancy on the board and recognition by the firm that the Conservancy was a pro bono client of longstanding and one of our oldest and continuous pro bono clients. We did a lot for them across the board over the years. I became sort of the point person at Simpson Thacher for anyone, any lawyer, any associate, even any paralegal, who had an interest in historic preservation and wanted to do something—they would find me and I would put them to work on Conservancy matters. There were years when we had ten or twelve people working on the Landmarks Conservancy ranging from pro bono litigation, tax advice, bylaws and governance advice, labor advice, and real estate advice. Those are the five areas of the firm that all contributed.

Q: I know that the Conservancy's work has always been different from that of other advocacy groups. Can you speak to some of the specific issues or cases you handled for them?

Kerr: Well, the Conservancy was an outgrowth of the Municipal Art Society and, as I looked into the archives and read a little bit, it seemed to me there were two major motivating objectives in forming a new organization. One was to have an organization

that was focused exclusively on historic preservation. The Municipal Art Society has many other interests including zoning and city governance and city art and a lot of other things, so this would be a more focused organization. Number two, the idea was that they wanted an organization that could do projects, that could own and manage real estate, hold easements and really get in the business of historic preservation, which really means being in some respects, in the real estate business. Those are the two aspects, and as a result you can imagine that there is a lot more lawyer involvement when they're doing things like that.

A good example is the Federal Archive Building, which the government actually turned over to the Conservancy as an intermediary, as part of de-accessioning it from the federal government and putting it to a non-profit beneficial use. That was a major real estate transaction and the fees that were generated to the Conservancy over the years as part of the rental income funded an entire fund at the Conservancy that was used for emergency rescue preservation efforts. It was a very important source of revenue for the Conservancy in achieving its objectives.

I think the next project after that was the Fraunces Tavern block and then the [Alexander Hamilton U.S] Customs House and so on, and the Conservancy was able to really get very much involved in the deal of preservation and not just advocacy of it.

Q: Going back to Penn Central, I know you worked on several hardship cases either directly or indirectly for LPC. Can you describe your involvement in the Church of St.

Paul and St. Andrew case [*Church of St. Paul and St. Andrew v. Barwick*]? I know this was a narrow ruling in LPC's favor.

Kerr: It's been so many years since I worked on that case and I haven't gone back to look at it recently for the narrow holding but I can talk generally about the case, certainly. It was a case that seemed to be around for a long time. It was a case where we felt it was going the way of Lutheran Church in a sense that it was almost hopeless, hopelessly a hardship. It was a church congregation that had dwindled down to a very small number. They didn't have any resources to maintain the building. They were looking for alternative uses and there are only so many churches that you can turn into concert halls. We always felt if this thing went to the test in court we'd probably lose and so a large part of working with them was trying to help them find some adaptive reuse, share the space with other congregations—many things were tried over the years. To me, the real work on that case was far broader than the actual final court litigation and the holding. It really showed how much work can be involved in dealing with a landmark property which has serious hardship issues and trying to ameliorate that. That's what I really recall about that case.

Q: As I understand, the ruling hinged on the fact that the church had claimed hardship but had not sought administrative remedies from LPC. They had not filed the appropriate paperwork.



Kerr: That rings a bell. I think you're right. This was kind of a Dorothy Miner masterpiece of technical procedure. They felt that the hardship was so apparent that they shouldn't have to go to the Landmarks Commission, that going straight to court should be an alternative, that they could prove in a court of law that they had a hardship and therefore they should be exempt from landmark designation. Maybe counsel on their side felt that the Landmarks Preservation Commission wouldn't give them as a neutral review as a court would. I don't know what was in their minds. The litigation was derailed because they failed to go to the Landmarks Commission to seek hardship and went right to court saying that was unconstitutional as applied to them.

That wasn't the end of the story because we always felt that all they had to do was go to the Landmarks Commission and if they were unhappy with the result, they would be back in court and they would be through that administrative gate, which was, I guess, going back to what I said—we spent a lot of time working with them to try to ameliorate the hardship so that they would not end up back in court.

Q: And when you say we—?

Kerr: Well, I was at that time working with the Conservancy. I should say on behalf of the Conservancy, I think probably MAS as well, doing amicus briefs and working hand in glove with Dorothy Miner who was working with Corporation Counsel [of the New York City's Law Department] to do the city's brief, at least that was in the court part. But it

was really more the Conservancy and MAS working with St. Paul and St. Andrew trying to find a way around the hardship for them.

Q: It seems like you were working together but not necessarily on the same side with Dorothy at that point.

Kerr: Yeah. This followed a pattern where the Conservancy could do things the City couldn't. The Conservancy had funds it could bring to bear to help with a landmark by giving grants and so on to do repairs, it has a technical staff that could then advise a landmark owner, and it has an advocacy position where it could reach out to people to help do something for this church. For example, have you thought—there are two other congregations in your neighborhood that are renting space in a gymnasium? Maybe they'd be willing to rent certain hours a week to have services in your church. That's the kind of thing the City just couldn't and wouldn't get involved in whereas the Conservancy could.

Q: I know that STB filed one of—there were quite a few amicus briefs in the St. Bart's case [*St. Bartholomew's Church v. City of New York*], from a large coalition of advocacy groups. What was your involvement in St. Bart's?

Kerr: I was one of two lead counsel for the amicus parties involved in this case, principally with the Landmarks Conservancy, which was my client. Peter [Howard G.] Sloane of Cahill Gordon who had sort of taken over the historic preservation mantel from

Ralph Menapace was representing the Municipal Art Society and many other organizations signed on as amicus parties with us. But Peter Sloane and I were the lead counsel arguing on behalf of a whole range of pro bono pro preservation advocates—the City, Dorothy Miner, as usual, represented by Corporation Council and then all aligned with St. Bart's on the other side, though there was a group of dissenters from St. Bart's led by [J.] Sinclair Armstrong who were close to half of the congregation who were against this project. So they, too, were involved in the litigation.

It was unusual in the sense that Judge [John E.] Sprizzo, who was the federal district court judge who was assigned the case, gave the amicus parties prominence. Frequently, as an amicus party you submit a brief but you don't have the chance to really stand up and argue in court. Judge Sprizzo loved debate. An argument in his court wasn't, okay you've got a half hour to make your points and the judge takes notes and then goes off and decides the case. He had great intellectual curiosity and it was always a dialogue with him, so he gave us rights of audience to be able to participate in oral arguments and all the various stages of the hearings and so we were very much involved.

There was a Committee to Save St. Bart's that was formed I think principally by the Municipal Art Society but also by the Conservancy who was very much involved in this. It became quite a large ungainly committee that would meet from time-to-time, especially when decisions had to be made or when we were getting ready for an important court date to be able to marshal support and have people in the courtroom. But there was a small steering committee that met once a week for breakfast that really was the guiding

force behind this and that steering committee consisted of Brendan Gill, Philip Johnson, Jackie [Jacqueline Kennedy] Onassis and Whitney North Seymour. Whitney started taking me to these small breakfast meetings to take notes and do all the follow-up that needed to be done afterwards. After a couple of months of this he said to me, “You know, I’m too old to be getting up this early in the morning. I’m going to give you my seat on the steering committee.” He dropped off and I formally became a member of the committee and worked for the rest of the case meeting for breakfast once a week with this great group so I was involved not only with the litigation strategy, preparing the briefs and arguing in the court all the way up to the [United States Court of Appeals for the] Second Circuit, but also very much in the organizational side of it.

Q: How did this suit differ from previous challenges to the Landmarks Law that you had argued or been involved in?

Kerr: This was very different. I think to most people in the public it looked and sounded like a repeat of St. Paul and St. Andrews or even Penn Central, but it was very different in the sense that the principal thrust of the argument here, the constitutional challenge to law, was based on the First Amendment, the freedom of religion. There was really a movement that was gaining steam going on, of religious institutions concerned about the implications of the Landmarks Law for them. I think it was becoming accepted wisdom that fighting historic preservation and landmarks laws on the Fifth Amendment Takings basis was getting harder and harder because of Penn Central and other cases that began to apply Penn Central, including St. Paul and St. Andrew.

The new twist on this is that a religious property is different. The church needs the flexibility to make changes to the church and control its property in order to achieve its religious purpose and to deny that is state interference with religion. There was just no precedent out there for this—this was a really new challenge and the stakes were high because if this worked it could mean that religious properties were not covered by the Landmarks Law, that there's a First Amendment exception.

There was an interfaith group—I can't drop the name at the moment—who was really organizing the various religions in New York and nationally to really challenge landmarking for churches and to make an exception, even to the point of getting legislation passed.

Q: Was that RFRA, the Religious Freedom Restoration Act?

Kerr: That was the act they were eventually working on but the name of the group escapes me at the moment. It was something like the Interfaith Commission or something like that.

We had that issue to confront and, we were—again this involved going back to the books and doing a lot of research but it seemed to us that the best way to approach this was from the basis that religious buildings are governed by the same laws for fire regulation,

zoning and all the other things traditionally that they had never challenged, that they were somehow exempt, and they do impose a financial burden on an institution and so on.

The basis dynamic of the argument here was that St. Bart's, like many other churches, had a dwindling congregation. The church needed massive amounts of restoration and they didn't have the funds to do it. They had a new rector and he was looking for a way to deal with this and they decided that if they sold off the community house and plaza, which are part of the landmark, and knocked it down and let a developer build a high-rise apartment building on that plot—and the developer promised a certain number, I think six floors on the ground level for use by the church to replace the lost community house, plus also a percentage of the stream of income from the building to support its religious purposes. So the argument was, we need to do this to maintain our ability to worship here in a church and the money we will be getting will be used to achieve our religious mission and to deny us this on a landmark basis is interfering with religion.

It was a very appealing argument on a lot of levels that a lot of religious properties could accept and adopt. I distinctly remember Judge Sprizzo at one of our oral arguments putting the question to all counsel saying, "Let's say that I own St. Bart's Church on Park Avenue but our religious purpose is going to change. We are now instead of worshipping God and the Saints inside a domed church and using statues and other figures to remind you, we are going to worship the sky and what we need is not a church but a grass field open to the sky, so we need to tear down the church in order to achieve our religious purpose."

That's a hard question if you ever had that really come up, but I think the question we had was different because any source of revenue that goes to a church could be said to be a source of revenue necessary for religious purposes and if you argue that any government interference in any of those sources of revenue was an unconstitutional interference to religion you could see where that could go. I think ultimately that that's the way the judge saw the case, that this is not fundamental interference with their mission, it's simply a regulation of their assets and whether or not they would have a flow of income.

Q: I understand that at LPC they had done their research to discover that, in fact, the church had inaccurately claimed hardship when, in fact, they were not suffering economically to the extent that they had represented.

Kerr: That's where this dissenting group within the church who had access to the church's books and records and knew the church's finances were able to show they had substantial assets available to them, though not enough to completely renovate and restore the church. It became known that part of what was really driving this was that Reverend [Thomas D.] Bowers who was the new rector, really had in mind a nationwide radio ministry—I guess sort of like Bishop [Fulton John] Sheen—and in order to accomplish this he needed substantial funding and that this was part of his grand vision, which the dissenting members of the vestry and congregation cared little for. They saw that as not their mission. They were able to, being insiders of the church, really portray a

very different economic picture than the church was presenting. It was a great partnership because you had amicus parties in the city arguing the constitutional issues and constitutional law, the Landmarks Law, but you also had the dissenting congregation members who were very good at providing us with the facts and the facts that were ultimately very critical to the decision.

Q: Were you involved in some of the more recent religious hardship challenges to the Landmarks Law, such as West Park [Presbyterian Church]? I believe the Landmarks Conservancy filed an amicus brief.

Kerr: I was involved in every amicus brief the Conservancy filed until two years ago when I stepped down after being on the board since 1984. There were many cases that never got to court. It seemed like for a period of more than fifteen years we were working constantly with religious properties in one way or another to prevent them from essentially bringing claims in front of the Landmarks Commission or the courts challenging those designations.

We at the Conservancy, worked very closely with the Roman Catholic Diocese as they've been closing schools and churches and making them redundant. There's a similar effort with the Episcopal Church even seven years before and the Conservancy has gone through phases. Laurie Beckelman when she was head of the Conservancy was a tenacious fighter and she was not afraid of controversy, or going to court. She had great confidence—still does—in the court system. She had good lawyers, and it was at a time



when the whole field was in a high state of flux, it was still emerging and developing. I think the feeling certainly that she had and some other active board members, was that the best way to do this is to build upon the Supreme Court victory in Penn Central, continue to develop the law so that we know what we have and we can put to rest some of these issues that are going to come up over and over again.

Peg Breen today is much more of a conciliator but she's also the head of the Conservancy in a very different time—when the law has been basically settled. Now it's really more of a regulatory issue, it's an application of the law and the regulations. You've gone from having a fairly small number of individual landmarks and historic districts to now quite a large number of buildings covered one way or another by historic preservation in New York and it's a huge administrative nightmare. The Conservancy today is far less likely to get involved in litigation but try to work behind the scenes to head off litigation in the first instance and to use the resources available to it to try to achieve its objectives through negotiation.

I think you find that the current chair of the Landmarks Commission, Bob [Robert B.] Tierney, is of a similar mind. I think he is looking for ways to avoid conflict and to work by consensus and I guess that really gets into a whole other area of discussion—but getting back to your original question, up until a fairly short time ago the Conservancy was still very involved in filing amicus briefs in any local or national matter of historic preservation that had constitutional implications.

Q: Do you feel that hardship challenges have strengthened or weakened the Landmarks Law over time? There's probably no simple answer to that.

Kerr: I don't think it's weakened or strengthened it. I think it's made it necessary to apply the law more intelligently because as you'd have more and more precedents out there for what constitutes a hardship, or what an owner might get in return by challenging the basis of hardship—it becomes a fact of life that the Landmarks Commission has to deal with day in and day out, it's not a once in a blue moon sort of instance. The Conservancy I think and other advocate groups like Landmark West! which has really become much more involved in these issues, have been very good in finding ways to probe on the allegations of hardship, what to be on the look out for to see if it's a bona fide claim of hardship or whether it's basically a subterfuge to get out from under the Landmarks Law.

I think it's a necessary part of the law. If you look at the Penn Central case it's one of the saving aspects of the law that made it constitutional and I think that there's been a desire to avoid going back to the Supreme Court on a case where the city has arbitrarily decided there is not a hardship. You just don't want to go back and lose a case before either a major state level court or the Supreme Court that found that contrary to the Landmarks Commission's views there was a hardship and it's an unconstitutional application.

Q: What are your thoughts on St. Vincent's [Catholic Medical Center] and LPC actions in that case?

Kerr: St. Vincent's was a hard case because again it was an institution in dire financial straits. It had extremely valuable real estate assets given its location in the West Village and the need, if it was going to remain a functioning hospital, to have more state of the art operating theaters and everything else that goes with it. I think it was heading to be a classic hardship case. There were good arguments on both sides because some of their buildings worked perfectly well for the purposes they were being used for. The old Seamens Hall [O'Toole Building] that they wanted to tear down, and which really was the focus of a lot of the landmark debate, had been functioning for years as an outpatient clinic and it functioned very well. There was no real argument that it was no longer suitable to function as an outpatient clinic. It's just that they wanted to get into a real estate deal that would give them money to build a new building and that was where the new building would have to go because the real estate deal and the apartments were going to go on the other side of the avenue, so it's really part of Greenwich Village.

It had aspects of St. Bart's all over again—the stream of revenue will save you—but it was also a classic hardship case under the Fifth Amendment Takings and so on. The twist—and I think going into it before the Landmarks Commission there was general feeling that it would be decided similar to the way other cases had been decided, that there will be an analysis of the hardship and an application of the hardship principles and statute.

What made this different was the way the Commission decided to look at the whole St. Vincent's as one campus because it looked to us that St. Vincent's couldn't win the

argument that the Seamens Hall no longer functioned as an outpatient clinic or a hospital building. By bringing in the main hospital buildings, which were not—no one had an interest preserving them, they're not of any interest—they became part of the hardship equation, which changed the economics completely. It was that aspect of it that led the Conservancy in this part and others to want to challenge it and, in fact, did.

I've had numerous conversations with people at the Commission about this and I don't think they ever thought the preservation community would react to this the way they did. I think they thought this was a limited application but creative use of principles within the Landmarks Law to achieve this result and essentially avoid St. Vincent's going bankrupt and not being able to do this deal. I think there is a lot of, I won't say overt political pressure, but I think everyone felt the seriousness of the situation because St. Vincent's was a very important part of the West Village community and if it didn't do this deal, it looked like it was going to go bankrupt.

I think this, it's still pressing—even though the deal didn't go through, the case became moot and the decision of the Landmarks Commission is still on the record and it will be used, I'm sure, as precedent in some other context, most likely by NYU [New York University], and that's a concern.

Q: That's interesting. Can you speak a bit more as to how you see that application of the Law affecting a case like NYU?

Kerr: Well, in its basic principle if, for example, they have a building they want to demolish that's either within a historic district or an individual landmark, which still functions perfectly well as a classroom, under traditional notions of hardship unless they can show it no longer was suited to the purpose for which it had been used and intended—this is kind of the non-profit standard—that would be a step towards proving hardship.

If they can now argue on a campus-wide basis that this building combined with these other buildings are really a drag on our finances and you don't just look at this building and whether maintaining this particular building is a hardship but if you add all these others to it, it becomes significantly easier I think to make a case that the whole ensemble has a problem that could lead to a finding of hardship. It is not necessarily successful but it just changes the whole focus of hardship; you're looking now at other buildings owned by the same owner and whether together there's a hardship.

Q: From your perspective, going back several decades, how has the LPC's interpretation and application of the Landmarks Law evolved over time as the agency itself has evolved and different administrations have come and gone?

Kerr: Well, if you had asked me this question four or five years ago I think my answer would have been the commission is shifting it's main purpose from an organization that designates landmarks and historic districts to now maintaining and regulating them—the whole permitting process, giving notices of neglect, basically, administering and

preserving the wealth of individual and historic district landmarks that they have. I think we've all worried about the administrative burden and the cost of doing that.

I thought there were all the signs that that's where it was trending, but there's been a recent and a tremendous boom in new historic districts, especially in outer boroughs, so it seems to me that maybe it was premature to say that the commission's moving from a designating body to an administering body. I think this recent spate of new historic districts comes primarily for two, two reasons: one, there had always been a sense that the outer boroughs were not getting their fair share of recognition of historic districts and buildings. I think that there was a period of time when there were so many obvious buildings in Manhattan that were of international significance and national significance that were not yet landmarked that they were a higher priority, and so that was the focus in the '60s, '70s, '80s and even into the '90s. There are still some startling buildings that have not been landmarked and often for very complex reasons. There's always been a recognition that at some point, more time should be spent in the outer boroughs.

Secondly, I think that especially under this current administration, the [Michael R.] Bloomberg administration, neighborhood groups have found landmarking a historic district the most effective way of gaining control over scale, size and neighborhood because other aspects of the zoning seem to be closed to them. There is a very pro-development bias in this administration and it has served New York well in many ways, but I think neighborhoods that feel threatened by losing the scale of their environment turn to creating a historic district

as a way to slow down development. So I think the two together have led to really a very active period of creating new historic districts.

Q: How do you feel that some of these preservation advocacy groups have evolved in number, scale, and scope in the last two to three decades?

Kerr: I think that the main advocacy groups have matured and are no longer resorting regularly to the courts to oppose development and to take on challenges to the Landmarks Law. I think there continues to be, as we were talking about earlier, an evolution more towards recognizing that the most effective way to protect landmarks is not constantly being in court but to educate owners on the benefits of historic districts and landmarking and to provide funds when necessary for rescue or helping individual homeowners and shop owners restore their buildings in the right way. Maybe it's going to be twenty percent more expensive to use the right materials but if you can get a grant of a few thousand dollars from the Conservancy maybe that will help. It's looking as a more complicated approach than just advocacy and litigation. I think with the Conservancy and MAS and some others there's that maturing process. I also see—and it's refreshing—that there are constantly new groups being formed, often single-issue, single-purpose groups. I think people recognize the power of advocacy groups in historic preservation and that they see historically how other groups have done it and the success they've had. I think that there's a great awareness today that organization is important and can be successful if sustained.

One other aspect of all this is the last time Dorothy Miner and I saw Ralph Menapace was over dinner downtown after work one night and the subject we were discussing is building the case for the proposition that historic preservation and landmarks laws add value to communities rather than diminish the value of communities. It seemed to be a knee-jerk reaction all the time that if you create a historic district, you limit development and property values are going to fall, or if you designate this building it's going to diminish the building's value because when I sell it it has all these restrictions and an owner is limited in what he or she can do.

We felt anecdotally that this is not right, that it may be in some cases, but by in large, especially for historic districts, if you look Brooklyn Heights the value that being a historic district has created for those properties and you could say the same for Georgetown, Washington, the French Quarter in New Orleans, they're prominent examples. We were looking for someone to do the research and eventually write it up and we felt rather than fighting this battle over and over again in the courts on hardship issues, wouldn't it be good to have some definitive studies that we could point to.

With Ralph's untimely death that project got sidetracked for a long time, but I'm thrilled to see that that work has continued in many aspects. There have been articles written and research done, and that's the kind of maturing I think that all of these preservation organizations should be doing. They should be looking at the bigger picture and doing credible studies to persuade the public that this is not a bad thing and that this can actually be a great benefit of being part of a historic district.



Q: It seems that with certain cases like 2 Columbus Circle, the relationship between advocacy groups and the commission has grown quite contentious. In fact, there was some discussion of actually suing the Landmarks Preservation Commission for failing to fulfill its administrative duties because the groups felt that under recent administrations it had become an open door for developers.

Kerr: Yes.

Q: What are your thoughts on that?

Kerr: Two Columbus Circle was a very controversial building from the day it was built and it was controversial as it went into decline and had no use, apparently, and then with the proposed renovation. Number one, I think the preservation community was split, seriously divided, on whether this building should be a landmark or not. The policy committee of the Landmarks Conservancy looked at this very closely and very carefully not once but twice and could not develop a consensus either way. The committee was split virtually right down the middle. Those who passionately felt it should be preserved and landmarked the others said we shouldn't be fighting this battle; this is not that quality of building.

As a result, the Conservancy never took a formal position before the commission or anywhere else on whether it should be a landmark. The Conservancy instead took the position that this building should have its day before the Landmarks Commission. The

Landmarks Commission should thoroughly analyze it, have hearings with public input and make a determination. That was the Conservancy's view and the commission was taking the position that they were not going to calendar it, it didn't merit calendaring, We always felt that was just a disastrous view because you're not letting the public come forward and you're not making a decision on merits. You're just saying as a perfunctory preliminary matter you're not going to calendar it.

Now things don't get calendared before the commission for a range of reasons. I sort of alluded to this earlier, that there are some what many people would think were obvious landmarks in New York that have not been landmarked. If you look into why sometimes you'll find out that the owner is dead against it and the commission doesn't want to fight and there is no development plan afoot, so they figure they have time.

In other cases, the staff on a very preliminary basis has decided they're not interested in presenting, which could be devastating to a small advocacy group who live near the building and feel very strongly about it. There are various reasons why, and when the commission says we're not going to calendar it, we're not going to have a hearing on this, there are always conspiracy theorists who come out and say, "Well, the fix is in or the mayor has said hands off or whatever." And it just added fuel to the fire. I think that aspect of it is what really incensed some of the advocacy groups like Landmark West! and it became ugly.

I had the experience of Mike [Whitney North] Seymour [Jr.]—Whitney's son is a retired partner of the firm, and he has an office on the seventeenth floor and he was the lead counsel

for Landmark West! challenging the commission and going after Bob Tierney and others. Eight floors above him I was working on the Conservancy side of it and we never talked to each other about it but that's how divided this was. It was a divisive case and I think the wounds haven't all healed.

Q: Are there any other preservation cases besides the big ones that you've worked on that you consider significant?

Kerr: There have been some, I think really in all respects, significant, others may be particularly significant to me. Certainly one that comes to mind is *New Jersey v. New York*, which was the question of who owns Ellis Island, is it in New Jersey or is it in New York. That really is a states' rights issue. The case was filed in the U.S. Supreme Court under its original jurisdiction mandate, I think it was a original jurisdiction case number 179—I may be off by a few—which means that since the time of formation of the republic there have only been 179 cases with original jurisdiction in the Supreme Court and these are usually boundary disputes between states. It was a very complicated case on the law and the history and it was a fascinating case in that respect because it made you go back and read all the original charters on the creation of the colonies, New Jersey and New York, and how those rights developed over time.

In a nutshell, under the original grants from the king of England, New York included the Hudson River, so New Jersey started at the Jersey shoreline. In the 1600s and 1700s that really wasn't much of an issue, but in the 1800s as commerce picked up, especially along

the river, you realize that if you own land in New Jersey and you build a wharf out into the water, your wharf is in New York and therefore to the extent New York taxes and regulates commerce, even though you live in New Jersey and your factory is in New Jersey your wharf is in New York. And for decades New Jersey tried to negotiate with New York to move the boundary to the middle of the Hudson, which is what you would normally find between other states where the river is the boundary and New York declined for years and years and why should it.

Eventually, there was litigation, there were requests for intervention by the president. It all got resolved when New York finally agreed to draw the line down the middle of the Hudson River. The question became, well what happens when you get to the New York Harbor. They eventually decided to continue the line right through the Harbor and out through the Verrazano-Narrows. Actually, not the Verrazano-Narrows because Staten Island is New York but down through I guess the Arthur Kill—

Q: The Kill Van Kull.

Kerr: Right, so it was between Staten Island and New Jersey. But when you do that line a couple of islands including Ellis Island, fell on the New Jersey side of this line going down the Hudson and the agreement was that the islands in the harbor remain in New York but New Jersey owned the rights to the seabed and what was important there were oysters, which are a very important commercial part of New York Harbor.

Fast forward to years later when Ellis Island was expanded, literally, rock and dirt from building the New York City subways was carted out and used as landfill at Ellis Island and everyone understood and assumed that Ellis Island continued to be in New York. Well, the basis for New Jersey's claim was that all that dirt is sitting on their oyster beds. The original island, they said no question, it's New York and it's basically the arrivals hall, but all the rest, especially the hospital aspect, is New Jersey.

The interest of the Conservancy and the National Trust [for Historic Preservation] had little to do with these ancient treaties and agreements and riparian rights and so on; it had to do with the physical property there. If it's in New York, the New York City Landmarks Law governs the buildings, leaving aside the rights of the federal government here for a moment. If it was in New Jersey, the jurisdiction was Jersey City, which had virtually no landmarks preservation law, it was de minimis. So there was great concern about whether—and there were rumors New Jersey wanted to build a casino there and do other things. There was a concern that if New Jersey owned it, New Jersey had very different ideas on what to do with it, whereas New York seemed to be content to let the buildings lie fallow while they found a grand plan to use them or do something. New York has so many other things going on in the Harbor that it wasn't a tourist or an economic imperative to do anything to develop the island.

I was engaged by the Conservancy and National Trust to represent the historic preservation interests of the buildings and we were granted the status of a participant and this case was actually tried in the Supreme Court Building. It was the first case ever tried in the Supreme

Court Building in Washington. They only hear appeals and arguments on appeals, but this was actually tried there. Ultimately the court decided that—they sided with New Jersey with a view that the original core is New York, but the landfill part is New Jersey. This really required the two states to come together and jointly manage Ellis Island and it's been very successful so far. I think we were lucky that the governor at the time, Christie [Christine T.] Whitman was actually very intelligent in the way she dealt with this.

So the worst fears for preservations were not realized but I have to say of all my cases that I've had in historic preservation it was the most interesting both in terms of the issues but also with the novelty of being back in the Supreme Court and this time trying a case in the Supreme Court rather than having it there under the traditional argument court and at a time when I was a very junior lawyer of the team.

A couple of other cases, you probably know about some of them, the Tobacco Warehouse case [*Brooklyn Heights Assn. v. NYS Office of Parks and Recreation*]?

Q: Yes.

Kerr: Which the Conservancy was very much involved in, which had a very good outcome, both in terms of establishing that the [United States] Department of Interior rules about how parks are handled applies to New York City as well as other individuals and organizations.

And a little farther afield, I live in Princeton, New Jersey and I seem to constantly be involved in historic preservation issues there and it really started some years ago with the Institute for Advanced Study, which owns in addition to its campus, a magnificent parcel of several hundred acres of ancient forest land, hardwood forest, and farmland. Two farms in particular have been continuously farmed since the 1600s and still look like it could be in the 1600s, nothing has changed in that landscape. And it's bordered by the old Quaker meeting house, which is the oldest building in that area of New Jersey and it's really the start of the community that became Princeton [University]. The Institute decided in order to enhance their foundation—they were drawing down on funds that had been set up for them from day one and it was not enough to really continue to support them. They needed to take assets and increase their resources and this was seen to be a fallow asset.

So rather than go about a capital campaign they decided to enter into a deal with a developer to develop the farmland and woods into clustered suburban housing and a couple of us from Simpson Thacher who lived in the Princeton area organized an advocacy group and began showing up at zoning board meetings and other things and eventually it led to litigation. The story turns out very well because the Institute ultimately agreed that if we could raise a certain amount of money they would be willing to sell the development rights, so we raised somewhere around eighteen million dollars, a lot of it from the New Jersey State [Department of Environmental Protection] Green Acres Fund, but a lot of individual contributions too, to purchase the development rights from the Institute and put them in permanent trust.

Q: That's great!

Kerr: It had a very happy ending and it's still there today and it's a tremendous resource to the community.

Q: You said that until a couple of years you were involved in every amicus brief submitted the Conservancy. Are you still working pro bono on any preservation cases?

Kerr: I'm not doing anything for the Conservancy. I am doing a few things. It seems that there have been numerous instances in my life where my opponent later became a close ally. When the St. Bart's litigation finally ended and the rector left and a new rector was brought in and the church started going through a healing process of bringing the congregation back together again, they came to the Conservancy and the Municipal Art Society and said, "Look, numerous times in the course of litigation you said to us if you would drop this lawsuit you would work with us to raise money to restore the church. We're now turning to you to do that." We helped them set up what was going to be called the St. Bart's [Bartholomew's] Conservancy. It raises money not from the congregation but from unaffiliated sources, so, for example, one of the great contributors has been the Waldorf Astoria. Now they don't want to give money to a church but they'll give it to secular foundation in order commit it to the restoration of a church.

Kent Barwick and I became the MAS and Conservancy delegates to St. Bart's Conservancy and we've been working with them now for more than fifteen years to organize a capital



campaign to approach their neighbors on Park Avenue, corporate neighbors, to help restore the church. And the Conservancy, principally Roger Lang and Alex Herrera, have been very involved in advising the church on what projects to undertake and how to undertake them, starting with the leaders coming down from the roof which actually go through the walls in the church and were in terrible shape and causing a lot of water damage.

That's one and I've continued to work. We're not doing litigation for St. Bart's anymore but it's more restoration fundraising. A similar thing happened with the Institute for Advanced Study, I eventually went on the board there and I've become very involved at the Institute. They about the Princeton Battlefield State Park which is a Revolutionary War battlefield and they have a project to build some additional faculty housing. A number of groups—the re-enactors who regularly re-enact the Battle of Princeton, have taken the view that where the Institute wants to build the faculty housing even though it's not part of the park is actually part of the battlefield, an important part of the battlefield. So there have been threats of litigation and there have been challenges in the zoning process and I find myself again kind of a mediator in that.

My role has become sort of a conciliator and a mediator these days more than an advocate. I should also just say that my focus today is more on international historic preservation. I joined the board of trustees of the World Monuments Fund three years ago so a lot of my time and effort today is with the World Monuments Fund and there it is a whole range of things from the legal work one has to do in order to undertake an operation in a foreign

country, whether it be an affiliate of the World Monuments Fund or simply hiring the local team and getting all the rights and permits you need in order to restore a project.

Q: From all your recollections have you retained any records related to your legal or advocacy work in preservation, or are it all at STB and other law firms where you've worked?

Kerr: The answer is yes. I'm a real packrat, I keep almost everything and I do have files for all the cases I worked on. They would tend to be my working file of all the things that I generated and worked on when I worked on a case or the extensive Landmarks Conservancy files from board meetings and committee meetings. A lot of them focused on the policy committee which is the committee that determines the Conservancy's positions on various issues and that's really day-to-day the real preservation at least the advocacy part of the Conservancy functions.

The firm also has records but the firm has a retention policy whereas I don't. I should but I don't, so I don't know how much of really old files the firm would still have. I doubt, for example, that Whitney North Seymour's files have survived, though it's possible some have, and that would certainly center on the creation of the Conservancy, his involvement in the Penn Central case and so on, though I'm assuming you might be interviewing his son Mike and Mike may know whether they have any of Whitney's historic preservation files.

Q: And have you considered archiving your papers with any collections as a resource for law students and researchers?

A: I haven't up until now and I think it's only because I was probably too busy with my other work to think much about it and hadn't focused on whether anyone would really want these things. When I retired as a partner at Simpson Thacher two years ago I had to go through the process of moving to a smaller office and had to confront my files and actually go through them and organize them. So I know that there's a lot there. I now know where it is, I have an index, so I guess I could think seriously about making these available to a center and I'd be happy to talk to you or someone else about that.

Q: That would be great. So I think this concludes our interview, or at least part one. Thank you for sharing all of your knowledge as a preservation lawyer in all these cases.

Kerr: Well, I'm very happy to. Thank you very much.

[END OF INTERVIEW]