

# WIDENER LAW REVIEW

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Volume 18

2012

Issue 2

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## FOREWORD: FITCH FORUM ON PRESERVATION LAW

ANDREW S. DOLKART\*

In the book *Preserving the World's Great Cities*,<sup>1</sup> author (and Columbia University adjunct professor) Anthony Tung examines the preservation of many remarkable places, from Athens to Amsterdam and New York to Beijing. Although he examines places rich in history, culture, and architecture, any tourist will note that some places are better than others in keeping physical remnants of the past and incorporating them into dynamic modern cities. And the underlying commonality for well-preserved places is not about quality of architecture or a benevolent climate but about the rule of law. Places with a strong legal framework for regulating places, and a culture that supports adherence to those rules, simply do better in preserving their historic character.

That the law is an integral part of the discipline of historic preservation in the United States, and particularly in New York City, is evident from the founding of the Historic Preservation Program at the Columbia University School of Architecture. Begun in 1964 by James Marston Fitch, the program is the nation's oldest graduate study of the art, the science, and the policies of preserving places. It grows out of, in part, immense anger and frustration on the part of New Yorkers—and many other Americans—that the monumental Penn Station by McKim, Mead & White of 1904-1910 had been demolished in 1963,<sup>2</sup> seemingly without regard to its importance in the urban landscape or architectural pantheon of the city. Fitch (as everyone who knew him, called him) incorporated a class on the law from the earliest days, and as the law itself was refined from general zoning rules to specific case law on the validity of historic preservation, the Preservation Law class within the Columbia University Historic Preservation Program became ever more important in the curriculum.

The official name of the institution—Columbia University in the City of New York—pinpoints a location that has been the legal touchstone of historic preservation since the 1978 Supreme Court decision in *Penn Central Transportation Co. v. New York City*,<sup>3</sup> which upheld the validity of municipal “landmark” laws as a contribution to the public good. Two important actors

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\* James Marston Fitch, Associate Professor of Historic Preservation and Director, Historic Preservation Program at Columbia University Graduate School of Architecture, Planning and Preservation.

1. ANTHONY MAX TUNG, *PRESERVING THE WORLD'S GREATEST CITIES: THE DESTRUCTION AND RENEWAL OF THE HISTORIC METROPOLIS* (2001).

2. Editorial, *Farewell to Penn Station*, N.Y. TIMES, Oct. 30, 1963, at 38; cf. Kim A. O'Connell, *Lead Us Not Into Penn Station*, NAT'L TRUST FOR HISTORIC PRES. (Apr. 1, 2008), <http://www.preservationnation.org/magazine/2008/books/>.

3. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

in that legal case, Dorothy Miner, Counsel for the New York City Landmarks Preservation Commission, and Paul S. Byard, part of the legal team and himself an architect and lawyer, went on to teach in the Historic Preservation Program for many years. Over their years associated with Columbia, both taught memorable classes on preservation law. In addition, Paul S. Byard served as Director of the Historic Preservation Program from 2000 – 2008. As Paul's successor as Director of the Historic Preservation Program, I am particularly honored to recognize the role of both people and place within New York City in developing and defending historic preservation law over the past several decades.

This law review volume is based on selected papers presented at the 2011 Fitch Forum held at Columbia University that examined the role of preservation law on the 45th anniversary of the creation of New York City's landmarks preservation legislation. The Fitch Forum is an annual colloquium on a current issue in historic preservation, invented and launched by Paul S. Byard, and named for the Historic Preservation Program's founder, James Marston Fitch. The 2011 Fitch Forum on Preservation Law and this related volume is an ideal way to honor earlier giants of our program, while also serving as an exciting venue for lawyers and preservationists to think about the current developments in American jurisprudence and to inspire future thinking and action to make historic places part of everyone's life.

## 2011 FITCH FORUM: PART ONE\*

### WELCOME & INTRODUCTIONS

Speakers: Mr. David Schnakenberg, Mr. Andrew S. Dolkart, & Mr. Anthony Wood

MR. DAVID SCHNAKENBERG: Good morning preservationists, good morning friends of preservation, and good morning everybody who made it out. We're really glad you're here. My name is David Schnakenberg. Many of you have received emails from me under the guise of 2011FitchForum@gmail.com. Most of those emails were sent between the hours of one in the morning and three in the morning so, sorry for that. I'm really excited about today's program. I'm going to get the ball rolling very quickly and then pass it off.

What we're here to do today is essentially to take stock of where preservation law is, both at the national and at the hyper-local level with our own landmarks ordinance here in New York City. We're going to open with our keynote speaker, who is going to discuss the state of preservation law and preservation policy throughout the nation. Then we're going to take a look at what's going on, on the ground, in three cities that are dealing with specific preservation issues: Chicago, Seattle, and Los Angeles. Then you guys get a break and we're going to come back and focus on the hyper-local. We're going to talk about New York City's Landmark Law and talk about whether it's living up to its expectations, what we might want to do to tweak the Law. We're going to finish the day by exploring some of the challenges and the opportunities that should inform preservation law and preservation policy going forward. Hopefully we'll have some fun.

We've got some really excellent speakers. We're all very lucky. Many of them have braved ice storms, blizzards, late trains, late planes, and late automobiles. But, I can say that everyone's here, which is really great for a February conference. And with that, I'm going to invite Andrew Dolkart to come up here and get started. Andrew is our host. He's the Director of the Historic Preservation Program here at the Graduate School of Architecture, Planning, and Preservation. He's also the James Marston Fitch Associate Professor of Historic Preservation, so it's very appropriate he get the day started at the Fitch Forum. So if you will come up, I will sit down, and you won't hear from me for quite awhile. Thanks everybody.

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\* The transcript that follows was produced from a contemporaneous audio recording of the 2011 Fitch Forum, 45 Years of Preservation Law: New York City and the Nation, the Past and the Future. The Forum was held on February 5, 2011 in the Wood Auditorium at Columbia University. The Forum was hosted by the Columbia University Graduate School of Architecture, Planning and Preservation. The transcript was formatted according to internal Widener Law Review standards and has been edited for grammar and clarity. Footnotes have been added throughout to aid in further reading.

MR. ANDREW S. DOLKART: I want to welcome everybody. I've been a hermit on sabbatical but I had to come off it for this event. This is the most perfect kind of conference for me because I did absolutely nothing in preparation. About a year and a half ago Tony Wood and Carol Clark came to me with this idea and I said, "Great, run with it," and they did. They really deserve an incredible amount of credit for organizing this, and putting this together, and getting all these people to come. It's a really appropriate conference for us to be having here on the 45th Anniversary of the Landmarks Law, which just about coincides with when the historic preservation program at Columbia was established. From the very beginning, Jim was very strong on trying to get students to understand the legal issues involved with historic preservation, both the foundations for preservation from a legal point of view and the problems.

When Carol and I were here together as students, one of the classes that we took was one of the first classes on preservation law and, interestingly, it was taught by Paul Byard at the same time he was in architecture school. He was both a lawyer and an architect. Later, Paul came to direct this Program, and brought in Dorothy Miner and we continued to have a really strong feel for legal issues. We miss Paul and Dorothy but we continue to kind of build on this idea that preservationists need to understand where we are and where we're going, and what the pluses and minuses are from a legal point of view; otherwise it will all just fall apart. I think it's really great that we're here to assess where we've been and where we are. So, I just want to welcome everybody. We're really thrilled that everybody is here. It's just so great to see so many familiar faces in the audience and I'm going to turn it over to Tony Wood.

MR. ANTHONY WOOD: Thank you Andrew and thank all of you for being here. There are those who accuse preservationists of being lost in the past. Ironically, the reality is that preservationists are lost in the present. We are so intensely focused on the present that we don't spend a lot of time reflecting on how we got where we are today or where we might want to be going. We just do, do, do. Other, wiser folks have suggested the value of a little bit of introspection. As Churchill reminds us, the further backward you can look, the further forward you're likely to see. So thank you for taking a day out of your very intense present to explore with us our past, where we've come in the last 45 years, the future, and where we might want to be going.

And what better place to step back, reflect, and project than an academic setting? Far from hearing rooms, court rooms, and back rooms, up in the hallowed halls or, in our case, the hallowed basement of academia; we have a safe place where we can think out loud, ask important questions, and openly and honestly explore extremely important matters. So, on behalf of the Historic Preservation Program of the Graduate School here, and myself and Carol, we want to add our welcome for your being here this morning.

It takes a village to put on a forum like this, and I want to give particular thanks to our co-sponsoring organizations: the law department of the National Trust for Historic Preservation, the James Marston Fitch Charitable Foundation, Preservation Alumni, and the Widener Law Review. Thanks also goes to our partner organizations. This is the first event I've been involved with that was totally promoted digitally and it seems to have worked; thanks to our partners and their wonderful digital network. We also owe a great debt of gratitude to the generous financial supporters of this event who have kept us out of debt. The list of wonderful supporters is in our program, and do commit their names to memory and thank them when you see them. I also need to particularly thank two of the lead funders, the Columbia University Graduate School of Architecture, Planning, and Preservation who put real money on the table in addition to space, and the Elizabeth and Robert Jeffe Preservation Fund for New York City of the National Trust for Historic Preservation. Beyond essential financial capital, a forum like today's is only possible with vast infusions of intellectual capital. So, a particular thanks goes out to all the experts participating in today's forum. Several people have literally traveled across the country to be here. An event like this also requires the skills and talents of many of the folks who've been co-organizing endless details behind the scenes, and we particularly need to thank our coordinator, David, for all his good work.

Today finds us well into the 45th Anniversary year of the passing of New York's Landmarks Law. Even Hallmark has failed to figure out a way to make a big deal out of a 45th Anniversary, but for our purposes, it's an important anniversary because it sets the stage for the golden anniversary of our Law. Leave it to two preservation planners to determine that the best way to celebrate the 45th anniversary of the Law is to use it as an occasion to do a checkup on preservation law and then, more specifically, New York's Law. Now, with the 50th Anniversary in our sights, it's the time to look nationally at the condition of preservation law and particularly at the state of New York's preservation law. How far have we come? What challenges and opportunities does preservation law face ahead, both nationally and locally? What are the actions we should be contemplating to make sure that when the golden anniversary arrives with the big cake and candles the Law glitters and shines as brightly as we need it to?

Preservation happens in a historical context. Much has changed since Mayor Wagner signed New York's Landmark Law in 1965 and President Johnson signed The National Historic Preservation Act in 1966. These laws reflect what was legally and politically achievable over four decades ago. What has changed since then? What changes are looming over us now? How has preservation law responded to those changes? How might it respond at the local and national level?

These are the many questions that will be addressed today. So, by 5:30 tonight, we may conclude that all is well in the world of preservation law, or

we may decide the challenges and opportunities of our time call for action. Whatever you and all of us conclude it will be the result of seriously and thoughtfully assessing the current state of preservation law and we can all only be better for having done so.

So to launch today's efforts, let me turn the podium over to Adele Chatfield-Taylor. Because everyone's more extensive bio was posted on our website, and we know you all go to those sites, we're not devoting too much of our time to reciting all that needs to be said about our speakers. All that I want to say about Adele is that in her seven years at the Landmarks Preservation Commission, several months of which I had the pleasure of sharing an office with Adele, I learned a lot. Her four years as a founder and first Director of the New York Landmarks Preservation Foundation, her tenure at the National Endowment for the Arts, her Presidency at The American Academy of Rome, her being a Trustee of the National Trust for Historic Preservation, all on top of her degree from this program and previous teaching in this field have made her one of the most thoughtful preservation thinkers of our time. She will both set an appropriate "Fitchian" tone for today's forum as well as introduce our keynote speaker. Join me in welcoming Adele.

#### KEYNOTE INTRODUCTION

Speaker: Ms. Adele Chatfield-Taylor

MS. ADELE CHATFIELD-TAYLOR: Thank you, Tony. Good morning everyone. How wonderful it is to be here for the 45th Anniversary and for the Fitch Forum, forty-four years after I enrolled in what was then known simply as the Fitch Program or the "Fitch thing." Let me thank the organizations for this marvelous gathering and for the honor of being involved, and salute, particularly, Martica Sawin for her incredible support of the Fitch legacy in all that she does.

My job this morning is to introduce our keynote speaker, and it's a great pleasure to have a chance to say a few words in that pursuit about Jerold Kayden. A lawyer as well as a city planner, Professor Kayden would've been a man after Fitch's heart. When Fitch founded the program, he actively sought to enroll the very diverse cross section of professionals and individuals who have always worked at historic preservation and the curatorial management of the "built world," as he later came to call it. He was unique in his eagerness to include what were then known as housewives and amateurs, never as a vague commitment to continuing preservation but specifically because he recognized that these were often the most skilled and effective preservationists to be found anywhere, not only in the United States but all over the world, and they had a great deal to share and teach.

Fitch nevertheless would have been delighted with Professor Kayden's impressive background. He is the Frank Backus Williams Professor of Urban Planning and Design at the Harvard University Graduate School of Design. His research and teaching focus on law and the built environment. As an urban planner and lawyer, Professor Kayden has served government and non-government organizations and private developers around the world. For the past fifteen years, he's been the principal constitutional counsel to the National Trust for Historic Preservation in Washington. Internationally, Professor Kayden has been a consultant to The World Bank, The International Finance Corporation, the United States Agency for International Development, and the United Nations Development Program working in China, Nepal, Armenia, the Ukraine, and Russia. Professor Kayden has received honors too numerous to recount, but I do want to note the recognition he received at the Graduate School of Design as the Teacher of the Year. He earned his undergraduate, law, and city and regional planning degrees all from Harvard. Subsequently, he served as law clerk to Judge James L. Oakes of the U.S. Court of Appeals for the Second Circuit and for U.S. Supreme Court Justice William J. Brennan, Jr. Professor Kayden's dazzling profile is perfect to set the stage for our discussions today.

In ancient Rome, the punishment for a person destroying a historic building was having one's hand chopped off. Our laws and policies date back not to ancient Rome, but at least 100 years to the Antiquity Act of 1906. These beautifully worded starting points, somewhat reminiscent of our Declaration of Independence, were the beginnings of our constitution and the establishment of the big ideas. Drawing the line in the sand and penalties were not as clear cut as they were in ancient Rome; but what has happened to the law in the last century, particularly in the last forty-five years, is an indication of how important this subject and this fight, if I may call it that, has become.

The varieties of issues we will cover today, beginning with Professor Kayden's presentation, also indicate how much work there is still to be done and frankly, that we have barely begun. My own focus in the last twenty-plus years has been in expanding the American perspective on preservation, to incorporate a more global understanding of preservation solutions. The problems are usually all the same around the world, but the ways to solve them are ingeniously varied and worth understanding, particularly with what goes on outside the United States. In its interest, the American Academy of Rome now gives two fellowships and a residency named for James Marston Fitch, aimed at those of you who want to think about this outside of the United States. I hope you will apply and win. We hope someday soon to have a visit from our keynote speaker, Jerold Kayden.

## SPEECH: KEYNOTE ADDRESS

JEROLD KAYDEN\*

Today's birthday conference is entitled, as we can see, "45 Years of Preservation Law: New York City and the Nation, the Past and the Future." What does that tell us? Historic preservation is middle-aged: mature, experienced, time tested, realistic. No mid-life crisis looming here; although I can't help but remark on the fact that the actual birth date of New York City's Landmark Preservation Law, April 19th 1965,<sup>1</sup> is actually almost forty-six years ago, telling us that historic preservation law handlers are willing to shave almost a full year from its true age. Middle-age also means that it's time to hit the gym, take better care about what to eat, and start thinking about the next generation. Middle-age does also lead to some stocktaking, and that is what I'd like to do here this morning.

Necessarily selective and discriminating, I suppose a keynote presentation is looking at keynotes and the keynotes are chosen by the keynoter. So that's what I've done. I'm not covering everything but I am covering, I think, the high points of the past forty-five years, and I'm doing it in four parts. First, addressing the generic local ordinance that is, after all, the backbone of historic preservation law.<sup>2</sup> Next, I'll be talking about the surround of constitutional law, and especially where we stand together with the Penn Central framework first articulated by Justice Brennan and his colleagues on the Supreme Court in 1978.<sup>3</sup> Third, I'd like to talk a bit about the legal treatment of religious institutions, which, after all, own a few historic buildings; primarily their treatment under federal law and the, now almost all encompassing, Religious Land Use & Institutionalized Persons Act.<sup>4</sup> And finally, I'd like to discuss how historic preservation may be repositioned by its components, legally, to address the challenges of the next forty-five years. And I will do all of this in thirty-five minutes.

Although constitutional law itself has received much of the attention, the local historic preservationist is actually the foremost hero of our legal story. Through much of the twentieth century, local regulations of the built environment were handled almost exclusively by the zoning and related instruments, and standard zoning never concerned itself whatsoever with historic preservation. Zoning's trio, the violin, viola, and cello, of use and bulk restrictions affected what could be built, where it could be built, and how it

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\* Frank Backus Williams Professor of Urban Planning and Design and Director of the Master in Urban Planning Degree Program at the Harvard University Graduate School of Design.

1. Law of Apr. 19, 1965, No. 46, 1965 N.Y. Local Laws 261 (codified as amended at N.Y.C. ADMIN. CODE §§ 25-301 to 25-321 (West, Westlaw through Local Law 29 of 2011)).

2. *Id.*

3. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

4. Religious Land Use & Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. §§ 2000cc-2000cc5 (2006)).



could be built. Zoning was principally interested in controlling new development and not saying anything on its face about existing development.

Zoning was never meant, in fact, to preserve anything specific and never expressed a preference for the old versus the new. Indeed, the zeitgeist of zoning—certainly the zeitgeist of zoning through much of the twentieth century—was about simply regulating the shape of new development, if not stopping development at least earlier on. And even as it's known principally as a regulatory instrument, the deeper, darker reality of zoning is its creation of property right entitlements, expectations among landowners that they owned something that could be understood speculatively as a real estate asset and not just land and something that could be used in its existing state and existing use.

Indeed, if you go back and read the most famous, perhaps, land use decision rivaled only I think by *Penn Central*, the *Euclid v. Ambler*<sup>5</sup> decision of 1926 from the U.S. Supreme Court, it actually reads very, very much as a pro-property rights opinion, much more than a pro-regulation opinion. And that makes a lot of sense, given that it was authored by Justice Sutherland and joined by Justices who at the time were not interested in holding up regulation, but were interested in striking down, particularly national, regulation to the extent that it interfered with what were considered to be fundamental rights dealing with things like property and contract. Justice Sutherland and his colleagues in *Euclid* wanted to make sure that the single family home owners being protected in the village of Euclid by that town's zoning ordinance did not suffer grievous losses to property values occasioned not only by the intrusion of an industry coming up from Cleveland, but perhaps worse by the parasitic multifamily housing.

Zoning, then and through much of the twentieth century, was about the prevention of nuisance-like uses. The classic pig in the parlor, that's a pig in your living room, surely out of place—the notion of preventing harm to property owners from new development. What I've just described is not a historic preservation law regime. And indeed, historic preservation has benefited greatly in the establishment and subsequent maintenance of its separate and distinct legal regulatory regime at the local level, and especially from its separateness from zoning as I just described.

Historic preservation laws, with New York City's 1965 law being the most prominent, although not the first, rejected many of zonings foundational ideas. To begin with, obviously, the local historical preservation ordinance plugged a large hole left unaddressed in the existing rezoning regime: how do we think about existing great buildings and their contribution to the community before we get to historic districts? Historic preservation law at the local level doesn't take into account all of the interests served by the built environment. It's not a balancing ordinance, as is zoning. It's not necessarily in accordance with a comprehensive plan even though when you read New York's local law it does refer to the other interests and the institutional mechanisms of review.<sup>6</sup> But in

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5. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

6. N.Y.C ADMIN. CODE § 25-301 (describing the purpose as not just to preserve and perpetuate historic buildings but also to “stabilize and improve property values,” “foster civic

the main, at its base, it is historic preservation of buildings and districts that are privileged above all other purposes. Historic preservation law authorizes the regulation of specific, named buildings. That is revolutionary in terms of land use regulation. It actually cuts against the foundational notion of zoning, which is, after all, zones—zones of generic categories of development all subject to the same rule leading to and the responding to the uniform treatment of property owners within the zone.

The basic idea is that I will be treated the same as my neighbor, guaranteeing fairness and equity justice, a notion of equal protection. Justice Holmes in the *Pennsylvania Coal v. Mahon*<sup>7</sup> case from 1922, with the Supreme Court, talked about the idea of an average reciprocity of advantage. Yes, I may be restricted by this regulation, but so are all my neighbors. I get benefits from the restriction on their property just as they get benefits from the restriction on my property. That is not the model of historic preservation at all. Historic preservation, indeed, is legal spot zoning, and indeed spot zoning as a phrase is not illegal. It's only illegal when we add the adjective "illegal" in front of it.

Historic preservation law relies fundamentally on discretionary case-by-case decision-making rather than on zoning's rule-based approach. That was truer decades ago. Zoning itself has become much less rule-based with its approach, much less based on the notion of zones with rules, and has become much more of a discretionary case-by-case instrument of regulation. Historic preservation has really taken advantage of its legal ability to regulate districts as well as individual buildings, becoming, some would say, far more like, and others would say too much like, zoning, and I'll address that a little later. In fact, in terms of challenges going forward with the regime I spelled out at the local level, this first part, the backbone of historic preservation law, one of the big challenges is this notion of historic preservation administrators under existing law, expanding the reach of what they are doing to, in some ways, take over the planning function.

And indeed in cities around the country, one often finds people interested in planning solutions involving balancing the preservation of community character and scale with other things that are relevant to historic preservation, but that are in many ways transcendent, while many people dissatisfied with the planning legal regime and the zoning legal regime have turned to the historic preservation legal regime to achieve purposes that may not be at the fundamental core of what historic preservation is all about. In a new book that's just coming out right now, one of my Harvard colleagues, Ed Glaeser, in the book *Triumph of the City*,<sup>8</sup> which otherwise celebrates the city, takes a somewhat critical look at how historic preservation laws have now been applied broadly within cities, in particular New York City. In it, he cites ways

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pride," "attract...tourists," and "strengthen the economy of the city."); id. § 25-303 (describing review procedures).

7. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

8. EDWARD GLAESER, *TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER* (2011).

in which the historic preservation regime begins to control what can happen throughout great swaths of the city. I think there is some danger in this enormous expansion. This is not a call not to do historic districts by the way, but it is a call to recognize that there are statutory limits and legal concepts of *ultra vires* of the statute, meaning beyond the authority of the statutes, and we have to keep in mind the core ideas of historic preservation.

Another challenge going forward for the local ordinance is to deal with things like modernism and modern buildings. What's interesting is that law doesn't exist independent of the support to be provided by the people at which the level of the law operates, in this case local. But, the further that historic preservation veers away from popular understandings of what historic preservation is all about, the more it becomes vulnerable. Again, this is not a call to veer away from preserving modernist buildings, far from it. It is a call to situate all the activities conducted under the local preservation law within the sort of popular understanding, because law does operate within that protective armature and becomes vulnerable for the future when it begins to veer away from certain kinds of shared or popular understandings without the adequate education one would need.

Now, with that being said, as I've called for some boundaries or confines of what the local law may be, that doesn't mean that we shouldn't look at other laws that have an important impact at the local level on landmark preservation outcomes. And indeed, I do recommend the reconsideration of zoning to take account of things that are indeed affected by the demolition, alteration, and modification of buildings. Community character is the proper inquiry of zoning laws, even as it may be more narrowly the inquiry of historic preservation laws, and certainly zoning's propensity to create expectations among property owners of being able to develop. Thus, bringing out the need for historic preservation laws to destroy that idea is a conflict, and if we could indeed consider zoning and squeeze out some of the expectations and property rights that zoning has created, we then begin to create fewer problems for historic preservation, as it indeed requires property owners to maintain the building in its current form.

Another challenge for the local ordinance relates to what I call the tyranny of context: law's obsession with design conformity. That's actually the title of a book that I'm finishing right now. As one looks across the country, it's clear that in many cases, in most cases, administrators of historic preservation, interpreting words like "harmony" and "conformity" and "context" and "consistency" and "compatibility," have a constrained view of what those words may mean. It too often results in what I call the tyranny of context, in which there is an oversimplified reliance on the physical appearance of the surrounding environment to inform what can happen with new development within the historic district. Paul Byard's book, *The Architecture of Additions*,<sup>9</sup> addresses this idea of having a certain degree of flexibility on what the new can be without destroying the ultimate context. But, that ultimate context is not

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9. PAUL SPENCER BYARD, *THE ARCHITECTURE OF ADDITIONS: DESIGN AND REGULATION* (1998).

strictly physically based, but can be defined, temporally, culturally, in a broader geography than just the immediate surrounding area.

Now, administrators are not simply responding to some conservative notion of what to approve and disapprove as they interpret these words. They're responding to a review of judges who indeed are disdainful, or at least certainly nervous, about untethered discretion in arbitrary and capricious decision-making, about vague and ambiguous laws, and these judges indeed prefer the brick-brick outcome. If something is brick, the new buildings need to be brick. Just because the form is the same, the glass and steel are the same, doesn't mean it's contextual. If the surrounding neighborhood is Victorian or Colonial, then I can't understand, says the average-person judge, why an administrator under the local landmarks preservation law would allow anything else. That's the sort of education that is required for a judge, but judges in some reviewing end up promoting for administrators a sense that they better not veer too far.

And just in case anybody thinks this was a chimerical fear, all they have to read is *Hanna v. City of Chicago*<sup>10</sup> from 2009, an Illinois intermediate case in which the plaintiffs alleged that Chicago's landmark historic ordinance was unconstitutionally vague and ambiguous in violation of the state's constitutional due process clause. The court agreed, saying that they believed that the terms "value," "important," "significant," and "unique" are vague, ambiguous, and overly broad; they were not persuaded by the city's arguments that the commission members can be well-guided by these terms. And if you read the ordinance it would not strike any of us here today as outlandish that the terms provide guidance because we know even if there is flexibility there, we've got a commission of qualified members—except that the Illinois court said that the qualifications articulated for the commission members are vague. And finally, the court concluded that no criteria by which a person of common intelligence may determine from the face of the ordinance, there is no criteria of whether a building or district will be deemed to have value or importance. So that decision sits there.

All right, that's part one, review of local ordinances and their importance and some of the challenges that they face. The second, perhaps more celebrated, part of the past forty-five years is the constitutional surround, and that surround has been defined most particularly by that most famous of cases, the *Penn Central Transportation Co. v. New York City*<sup>11</sup> case. But, it sits within a debate about private property rights, more generally, and government regulation.

Can enough be said about the *Penn Central* case? More important, will more be said about it by Supreme Court Justices in the future? Do we need perhaps to designate the *Penn Central* opinion a landmark, thereby requiring the U.S. Supreme Court to file for a certificate of appropriateness in order to alter or modify, let alone overrule it? After all, *Penn Central* both validated and disseminated New York City's local Landmarks Law. Indeed, much of its

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10. *Hanna v. City of Chicago*, 907 N.E.2d 390 (Ill. App. Ct. 2009).

11. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

currency throughout the country is not owing simply to the fact that New York City is famous and important and when the city sneezes, the rest of the country catches a cold. Oh, that was about General Motors, I guess. But indeed, that Penn Central opinion described what a lot of local landmarks preservation law would look like, and lawyers read that opinion and now had a model for landmarking in their own home city. So let's remind ourselves what the case looked like back in 1978 when the opinion was actually written.

So, New York City had enacted our birthday boy or girl, the Landmarks Preservation Law, through which it attempted to preserve historic landmarks and districts. It established the Landmarks Preservation Commission with its eleven members, designating landmarks on a particular landmark site or historic district. A landmark was a building thirty-years old or older with special character and aesthetic historical interest. A historic district would be an area of landmarks and one or more styles of architecture. After the Commission designation, something called the Board of Estimates, which existed when I had more hair, would look at the relationships between the narrow view of historic preservation and the relationship of those decisions to the city's master plan, something that has never existed. Projected public improvements and other plans approve or disapprove the designations, and once designated a landmark, or located within a historic district, the Commission had the authority, as we know, to approve all the changes to the exterior at that time—alterations, improvements—and the owner had to keep the building exterior in good repair. There were three procedures for the owner to apply to change things: a certificate of no effect on protected architectural features, a general certificate of appropriateness, and finally, a certificate of appropriateness for insufficient return. I can't make enough money, so that's why it's appropriate for me to be able to change the building, and even potentially demolish the building.

The law authorized the transfer of development rights in New York to contiguous sites, which would be across the street and across the intersection, allowing other sites to buy, effectively, the unused development rights and expand their development potential by up to twenty percent. At the time of the case, over 400 landmarks in thirty-one historic districts had been designated, so this was a robust kind of law, and then we got to the facts of the case.

Penn Central owned Grand Central Terminal, that great, still great, 1913 Beaux-Arts masterpiece. The remaining one, Penn Station, happened to be demolished of course. And Penn Central also owned TDR—transfer development rights—eligible sites. In 1967, the Commission designated the terminal a landmark. One year later, Penn Central, which owns Grand Central Terminal, entered into a fifty-year renewable lease with a developer to construct an office tower above the terminal, or taking off some of the terminal, that would pay a million dollars during the construction and then three million a year thereafter, with bump-ups, and Penn Central would lose a little bit of money on what would be taken away. Two plans were submitted, both done by Marcel Breuer, and both plans, the fifty-five and the fifty-three-

story buildings, were rejected on the basis that they destroyed the landmark and indeed its urban design. I mean, imagine a tower above the Grand Central Terminal. Oh, that's the Pan Am building, that's right, or the Met Life building or whatever, but this was literally right above it.

So that's the case that was brought to the U.S. Supreme Court, and it's hard to imagine just how seminal it was and how new it was to be able to do this, just as I've argued that the whole preservation law really cut against, in a revolutionary or radical way, the legal approach to regulation of land by dealing with specific buildings, treating them specially. Here you would have the substantial property rights, admittedly millions and millions of dollars annually that capitalize and turn into a lot of money, taken away from the owner, who owned it before the designation strictly for landmark designation. Well, the Supreme Court, six to three, sided with the City of New York.

It reviewed the case under the Fifth Amendment to the United States Constitution: the "Just Compensation" or "Takings Clause," which states "nor shall private property be taken for public use without just compensation." First, the Court stated in unambiguous terms that landmarks preservation laws—this one in particular, but also in general—substantially advance a city's legitimate interest in historic preservation. This would be squarely within the ambit of the police power of a city to enact laws. By the way, that wasn't always true, and indeed if you look at the evolution of what local governments and states could enact, laws to advance the purposes, back at the turn of the century, aesthetics, historic preservation, purposes of those sorts would've been deemed outside the ambit of the local government to regulate. And indeed laws were struck down if they just promoted aesthetics, which would be also viewed as part of historic preservation as it were. Then, legal decisions evolved, and aesthetics coupled with the police power quartet of announcing health, safety, morals, and general welfare would suffice. But you couldn't have the aesthetics alone, and it wasn't until the mid-twentieth century that aesthetics, standing alone, would serve as a basis for regulation of the built environment.<sup>12</sup>

Well, in 1978 we have a clear, unambiguous statement that historic preservation could understand: the enactment of laws that would designate private property rights. Then we get to the meat of the case and what it's known for, which is this diminution of value for the owner of private property, and the U.S. Supreme Court said it was not a taking. It enumerated what has come to be known as the three factor inquiry or test,<sup>13</sup> to which judges, in reviewing historic preservation laws as applied, are directed to look: the economic impact of the action on the claimant, and then on the owner—its effect upon the owners distinct investment backed expectations—and to look also at the character of the action which has been a taking. And this underscores the purpose of the Just Compensation Clause, which is to assure

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12. *Berman v. Parker*, 348 U.S. 26, 33 (1954) (establishing that governmental regulations could be based solely on aesthetic considerations).

13. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

that government is not forcing some people alone to bear the public's burden, which in all fairness and justice should be borne by the public as a whole.

Again, that's one of the quandaries for us in historic preservation—that the landowner is being treated specially and the question is how special can he or she be treated. In the Penn Central case, applying these three factors, the Supreme Court began to at least suggest how far government could go. As Justice Holmes had put it in the *Pennsylvania Coal v. Mahon* case: if regulation goes too far, it will be recognized as a taking.

Well, was this too far? The Court, in applying these three factors to the facts here, said it wasn't too far. Why not? First, Penn Central had admitted, in what in hindsight was a strategic blunder, that it had earned a reasonable return on its primary expectation to what the terminal would use. So Penn Central was earning a reasonable return, and the Court said the fact that it can't earn this speculative return is of no consequence, constitutionally, to their decision. The Court cited the Law's authorization of transfer development rights that allowed the transfer to at least eight surrounding parcels, and said that this sort of transferability should be taken into account, and is by us considering the impact of the regulation.

Justice Brennan and his colleagues said that landmark designation was pursuant to a plan of uniformed comprehensiveness that has always provided solace and comfort to lawyers and judges reviewing laws to ensure that they are not picky-choosy. Now, Justice Rehnquist, then subsequently Chief Justice, and finally the late Chief Justice Rehnquist, had a strong disagreement with this point. He said that landmarks preservation laws designating a landmark were the anticipants of zoning. And you know what? He had a point there that one could easily argue, but so be it. This notion of framing more comprehensively has become part of what we do.

Finally, Penn Central argued that you look to the parcel as a whole rather than to simply that portion being regulated by the law, and in this case Penn Central had argued the taking was of our right to develop property as opposed to the terminal, so there was a 100 percent taking of everything. Justice Brennan and his colleague said: No, we don't look just at the regulated portion. We don't look just at the ten-foot set back from the front lot line that occurs at all suburban developments and say that has 100 percent been a taking, thus compensation must be paid. We look at the parcel as a whole. And, again, sitting on this parcel was Grand Central Terminal, which Penn Central had admitted earned a reasonable return.

And finally the Court said, "come back and reapply in the future, if there's a problem." Now, no one in this room, not me at the podium, not you in the audience, no one in the halls of the academy, across the street at Columbia Law School and law firms in developers' offices, in city planning departments, the judicial chambers, can tell any of us categorically what is too much economic impact, what is too much interference with distinctive investment backed expectations. In short, when do we know a taking has occurred? And that's a problem. It's been very disturbing to legal academics and legal

technicians because they really cannot say with any degree of authority definitively what the Penn Central rule means for any given case.

Now, people react and respond and adapt, and I think there's been great adaptability to this uncertainty, and I think in the work-a-day-world in which we live, historic preservation operates just fine. So, I think the concern about the Penn Central case really resides in a much smaller place than our overall world. We can say to be sure that property owners are not entitled to the highest use of their property, and government regulation, including historic preservation laws, can deprive them of significant amounts of value.

All right, future challenges: the property rights movement is certainly still an issue. The reaction in the *Kelo* case<sup>14</sup> in the City of New London, dealing with the related issue of eminent domain, reveals that we need to continue to be very sensitive to the notions of hardship, listening carefully for calls of reasonable return. We need to review some of the local ordinances to make sure that they are in correspondence with the requirements, allowing for a reasonable return and perhaps revisit that intellectually interesting, but little applied notion of transfer of development rights.

Third: religious landmarks. We recently celebrated another birthday on September 22nd, 2010, which was the tenth anniversary of the Religious Land Use & Institutionalized Persons Act.<sup>15</sup> This was a law enacted after some constitutional developments in the U.S. Supreme Court,<sup>16</sup> which basically left religious institutions owning religious facilities relatively under-protected in their view, and through the evolution of a political system in which religious institutions may be able to claim, in some ways, some would argue, more protection rather than less protection for what they do. Religious exercise, after all, is protected by the First Amendment even as there may be some conflict with the so called establishment laws, which says the government may not establish religion either or help religion too much. There's an inherent tension there. The statutory enactment of the Religious Land Use & Institutionalized Persons Act, some people say, created this statutory regime at the national level, guaranteeing that historic preservation laws could not substantially burden the religious exercise of religious institutions. That included facilities and buildings, so churches and mosques and temples and all that are blessed by the stewardship that we have of religious institutions and their facilities.<sup>17</sup>

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14. *Kelo v. City of New London*, 545 U.S. 469 (2005).

15. Religious Land Use & Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. §§ 2000cc-2000cc5 (2006)).

16. See Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 737-47 (2008) (discussing the pertinent judicial and legislative history leading up to RLUIPA); see also Karla L. Chaffee & Dwight H. Merriam, *Six Fact Patterns of Substantial Burden in RLUIPA: Lessons for Potential Litigants*, 2 ALB. GOV'T L. REV. 437, 443-47 (2009) (discussing "The Road Leading Congress to RLUIPA.").

17. 42 U.S.C. § 2000cc(a)(1) (2003) (requiring that all government land use regulations not substantially burden religious institutions except in furtherance of a compelling government interest, using the least restrictive means to achieve that compelling interest). But see *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (overturning the Religious Freedom Restoration Act



This led to the question: Would a landmark designation, or more significantly, would denial of a certificate of appropriateness to alter, modify, or demolish, be considered a substantial burden on the religious exercise of certain facilities? The answer has been, looking at the record in the judicial realm, no. The courts have been actually quite accommodating to the ability of local governments through landmarks preservation laws to treat religious institutions fairly similarly to the way other institutions are treated. A typical case has been the *Trinity Evangelical Lutheran Church v. City of Peoria*<sup>18</sup> case, in which a church bought an adjacent building, operated it as an apartment building for years, and about one year after the purchase, the church wanted to convert it to an additional assembly building for religious practice. After the landmarking—the church objected to the landmarking—it ended up in court. That court held that there was no substantial burden: it only effects one building, one location; doesn't stop the ministry from operating, even though yes, it limits its possibilities for expansion and adds a little bit to cost, but that's the price of doing business here. You're still in the business of religion, and so it's not a substantial burden.

That's been the judicial approach that we see now. A lot happens outside of courts, and we have to recognize—and its true—that dialogues between historical preservation or landmarks preservation commissions and churches, there is a little more negotiating leverage for churches by citing the Religious Land Use & Institutionalized Persons Act. It's harder to track that sort of special advantage that churches have. Certainly in the courts, and in any sort of argument one would finally make, it's "take a look at the courts." Substantial burden? Not something to be troubled with? And to the extent of course that *St. Bart's*<sup>19</sup> would want to be a fifty or seventy-five-story building taking down its community facility, that's not even religious exercise, even if the money is going to be used for a good cause, such as feeding the homeless or housing the homeless.

Okay, I'd like to conclude with a notion of re-positioning historic preservation law in the next forty-five years. We will be meeting here in the year 2056, and I've already actually agreed to give the keynote for the same honorarium I am receiving today, of course inflated to future value. I think I'd like to make three key points very briefly.

First, I think we need to strengthen historic preservation laws. We'll look at that I think a little bit later today. We can tinker with them to make them better. I think we can do better on insufficient returns or reasonable returns, but I would resist the temptation to broaden historic preservation laws as

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of 1993, 107 Stat. 1488, 42 U.S.C. §§ 2000bb-2000bb-4, as an unconstitutional exercise of Congress's power under section five of the Fourteenth Amendment). RLUIPA was a direct response to *City of Boerne* and should be read only as a statutory codification of existing Supreme Court jurisprudence. Ostrow, *supra* note 16, at 739-40 & n.102.

18. *Trinity Evangelical Lutheran Church v. City of Peoria*, No. 07-cv-1029 (C.D. Ill. Mar. 31, 2009), available at <http://lawoftheland.files.wordpress.com/2009/04/trinity-evangelical-v-city-of-peoria1.pdf> (order granting summary judgment).

19. *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990); see generally BRENT C. BROLIN, *THE BATTLE OF ST. BART'S* (1988).

such. I think they operate well within their confine if they are clearly understood. They are not substitutes for planning in the city, and I think we are strongest when we operate squarely in what historic preservation laws are understood to be. In the *New York Citineighbors*<sup>20</sup> case, interestingly, where the question was whether the Landmarks Preservation Commission decisions here in New York State would be subject to the State Environmental Quality Review Act, SEQRA,<sup>21</sup> the court understood just how narrow landmarks preservation designations and decision-making would be by calling the decisions of the Landmarks Preservation Commission ministerial<sup>22</sup> because they are so circumscribed in their decision-making and they really have nothing to do with the environment at large. One can contrast this, by the way, with the *Hanna*<sup>23</sup> decision in Chicago.

All right, so that's historic preservation laws. I would broaden, secondly, the rhetorical positioning of the value of historic preservation with another legal regime. Sustainability comes to mind, but also, the broader function of historic preservation after all is to maintain the connection between people and place. John Costonis writes about this in his superb book, *Icons and Aliens*,<sup>24</sup> talking about how the purpose of historic preservation is actually to guarantee an emotional stability. Cherished features of our environment are preserved not because they are beautiful, but because they reassure us by preserving, in turn, our emotional stability and world pace by frightening change. Now, that can be done within the broader array of laws. It's inherently done through historic preservation. I'm not suggesting that we rewrite those laws. We can talk about this, although I don't have time, in terms of even promoting the preservation of a skyline. And of course the New York City situation, now with the Empire State Building and Vornado's proposal<sup>25</sup> raises that very kind of thing. There are also plans in London dealing with its view management of St. Peter's and St. Paul's Cathedral and other facilities<sup>26</sup> that guarantee that even a skyline should be protected even if we don't do it necessarily under historic preservation laws themselves.

I'd like to conclude then with the following thought: Historic preservation of the environment could even most broadly be understood as a universal human right. Certainly we have the UNESCO World Convention, adopted back in 1972,<sup>27</sup> and its collection of cultural heritage, and we're not going to

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20. *In re Citineighbors Coal. of Historic Carnegie Hill v. N.Y.C. Landmarks Pres. Comm'n*, 811 N.E.2d 2 (N.Y. 2004).

21. See generally N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 2005).

22. *In re Citineighbors*, 811 N.E.2d at 4.

23. *Hanna v. City of Chicago*, 907 N.E.2d 390 (Ill. App. Ct. 2009).

24. JOHN J. COSTONIS, *ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE* (1989).

25. Charles V. Bagli, *A Fight on New York's Skyline*, N.Y. TIMES, Aug. 24, 2010, at A18, available at <http://www.nytimes.com/2010/08/24/nyregion/24empire.html>.

26. See GREATER LONDON AUTH., *THE LONDON PLAN: SPATIAL DEV. STRATEGY FOR GREATER LONDON* 223-28 (2011), available at <http://www.london.gov.uk/priorities/planning/londonplan>.

27. See generally Convention Concerning the Protection of the World Cultural and National Heritage, Nov. 16, 1972, U.N.E.S.C.O., available at <http://whc.unesco.org/archive/>

amend the 1948 Universal Declaration of Human Rights,<sup>28</sup> but one could easily imagine it saying everyone is entitled to enjoy the benefits of cultural heritage. And that, after all, is what the legal regime of historical preservation, at its broadest, is all about. Thank you very much.

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convention-en.pdf.

28. See generally Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

## 2011 FITCH FORUM: PART TWO

### KEYNOTE DISCUSSION

Moderator: Ms. Anne Van Ingen

Panelists: Mr. Tersh Boasberg, Mr. Paul Emondson, & Mr. Jerold Kayden

MR. SCHNAKENBERG: Thanks Jerold, so much. That was terrific, really that was great. We're now going to have sort of a keynote discussion where we're going to invite some people, also very talented and experienced lawyers, to come and respond to Jerold's comments. In order to do that, we wanted to moderate this conversation. The question is who could we have to moderate our response to Jerold's comments? Who's going to take the broadest possible view of preservation? Who knows everything that's going on and can focus that into a short response to a keynote that was so extensive? And you know, the solution was actually very easy—Tony immediately said, "Well there's only one person we can ask to do that, and that's Anne Van Ingen," who's going to join us as moderator of this discussion and she'll introduce her panelists to you.

Anne is the former Director of the Architecture, Planning and Design and Capital Projects at the New York State Council of the Arts, and she has run preservation consulting businesses. She works for a number of nonprofit agencies, or she has in the past. She's currently the President of the St. Regis Foundation, which is the land trust in the Adirondacks, and serves as Secretary of the James Marston Fitch Charitable Trust. In addition to the other things she's done, she is also an Adjunct Professor at the School of Architecture at Rensselaer Polytechnic Institute in Troy, New York. So what we'd like to do now is welcome Anne and her panel to come up. Let's welcome Anne Van Ingen to the podium. Thank you Anne.

MS. ANNE VAN INGEN: Good morning. Thank you all very much. I am, as you heard, between opportunities at the moment. I am a preservationist at large. I think that's how I'm describing myself at this moment in my life. I'm enjoying very much the opportunity to focus on particular projects. Tony and Carol, thank you very much for creating such an extraordinary day. It's some real serious substance, and I'm very happy to be a part of it. My role on the Board of the James Marston Fitch Charitable Trust is what brought me here today, and we're very happy to be co-sponsors and supporters today. Just as a quick side bar to all of you who are students here at Columbia, just as I was these many decades ago, I remember conferences just like this held in this room. This was Fitch's idea of how to bring preservation to people, and this was very much his idea of what this program should be; bring the smartest people from around the country to this room for your benefit. I remember well several conferences that were held here then, and what an important

impact it had on my own career. So I urge you all, I'm sure you're not shy, but don't be shy. Introduce yourselves to the people here today. This is an extraordinary line-up of people with some really remarkable intellectual firepower, and I hope you'll take advantage of it. Don't be shy.

I'm glad to be here to orchestrate this response to Jerold. Thank you very much for your particularly thoughtful comments, and I think what we're trying to do at this moment is operate, if you will, at the 50,000 foot level. We'll get down to the specifics of places and issues and cases in later sessions; but what we're trying to do now is set the content for those conversations. As we work through the day, we'll focus back in on New York City, but I think setting this national context is very important.

So, let me introduce our very distinguished respondents today, and I will do them simply in the order in which they're sitting. The first one being Paul Edmonson, who is and has been for many years, the Vice President and General Counsel of the National Trust for Historic Preservation in Washington. He serves as that organization's Chief Legal Officer, and in that role he oversees all legal services for the organization, including an active program of advocacy and litigation for historic preservation. He also oversees the organization's in-house corporate legal services in support of its broad preservation programs and activities, its regional offices, its historic sites, etcetera. He also supervises the Trust's Preservation Easement Program and legal education and outreach activities, all of which are, I'm sure you know, extensive. He's worked over the years with the Trust, with a wide variety of legal issues pertaining to the protection of historic resources in the United States, including constitutional issues, federal and preservation law matters, issues pertaining to local landmarks law, tax incentives for preservation, and preservation easements. Paul certainly has a broad and deep knowledge of national preservation issues, and I also know that Paul is very helpful. He always picks up the phone when people from around the country call for advice and counsel. He received his undergraduate degree from Cornell in Anthropology and Archeology, and then received his law degree from American University in 1981.

Sitting next to Paul at the end is Tersh Boasberg, who is a lawyer in Washington D.C., specializing in historic preservation. He was the Chair for the last ten years of their D.C. Historic Preservation Review Board, and has also been Chair of the D.C. Zoning Commission. He is also an Adjunct Professor of Law at Georgetown University Law Center, and teaches as well at the University's Master of Historic Preservation Program. He's been active in D.C. neighborhood and downtown preservation and zoning battles, as well as regional growth issues and Civil War battlefield protection. He was lead attorney, importantly, for protecting the Virginia battlefields of Manassas, Randy Station, and Kernstown and that grew his current Presidency of the Alliance to Preserve the Civil War Defenses of Washington. He is a founder of Preservation Action, a national grassroots organization of lobbying

organizations, where I first met Tersh, many years ago. He is a graduate of Harvard University and Yale Law School.

I've been told they don't care in which order they respond, so Paul, let's hear your response to Jerold's very thoughtful comments. Then, when the two of you have spoken, I will toss in a couple of general questions for your consideration, and then importantly, open it up to all of you. So if you all have questions, there will be an opportunity in a little bit to speak with any or all of our speakers. Thank you.

MR. PAUL EDMONSON: Well Anne, as always, I agree with everything that Jerold had to say.

MS. VAN INGEN: Of course.

MR. EDMONSON: Tersh?

MR. TERSH BOASBERG: I agree with you Paul.

MR. EDMONSON: Let me just go through a couple of the points that Jerold made, and comment on them, and then I'm going to bring up a couple of things that Jerold touched upon a little, but didn't go into much detail on. Just in order of the kind of outline of the framework that he laid out.

First of all, the value of having a separate legal regime for the regulation of preservation of historic properties, I think, has been demonstrated. Jerold made a strong case for that over the last forty-five years and we would get down to the legal precedence of Penn Central.<sup>1</sup> The effect of that case across the country has really been just tremendous, and we have a regime of landmark preservation in many cities and communities that is effective and important.

There is also a flipside of this. I think there's also been a significant level of influence because of zoning and planning in the last forty-five years, another tremendous benefit and advance in the field of preservation law. In many cases, when the Trust or statewide organizations are fighting, we're not fighting demolition of properties or inappropriate development effecting historic properties. We're not doing so under the rubric of the landmarks laws that were really the principal topic of Jerold's discussion and one of the reasons that we're here, but because of the influence of recognition of landmarks in the broader framework. It's the planning laws and the zoning laws that have some type of component for recognition of historic preservation. In many, many cases—we just actually completed one in Virginia with the situation of a Wal-Mart superstore on the battlefield—it has nothing to do with local landmark regulation, and everything to do with state and local

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1. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

planning laws and ignoring the preservations of the state scheme that require consideration of impacts on historic property. So, I just want to point that flipside out.

There's also, I would say over the last forty-five years, and Jerold alluded to this more in his closing statement, a recognition of the broader values in historic preservation, the contextual value. That's reflected both in zoning and planning, but also in preservation laws themselves; it's not simply whether something directly affects a particular building, but the setting of that building, and the broader contextual values that make that property important. It's also a recognition that there are a variety of criteria and factors that lead us to recognizing this has historical landmark value. A recognition that we're not simply trying to preserve, necessarily, the best and brightest or the particular landmark where George Washington slept, but individual properties that have meaning from a neighborhood value standpoint. And this expands well beyond the typical landmarks framework into cultural values for Native American and other types of cultural resources that are important for Native Americans across the country. I think that's one of the evolutions in historic preservation law over the last forty-five years—the broadening recognition of the values of culture and character.

I think whenever Jerold and I get together we're always talking about Penn Central because that's one of our favorite topics, since it really has stood the test of time. It is critically important; I call it a movement validator. When Penn Central was decided, I think Justice Brennan referenced 500 ordinances around the country. That's just in the years between 1965 and 1978, because many of those 500 ordinances were copycats—as D.C.'s was—of the New York City landmarks ordinance. Today that number stands closer to 2,600 across the country, and I think that's largely due to the Penn Central decision, the kind of stamp of approval by the U.S. Supreme Court. That doesn't mean—Jerold was clear that the issues of property rights are not behind us.

Certainly, we have a strong framework in the courts, leading with the Penn Central decision, for validating the rights of communities to protect these properties, but there are still tremendous property rights challenges that go on, as much in terms of rhetoric as in terms of legal action. We see it all the time. Tersh can probably speak to this in terms of Washington D.C. I experienced it in my own neighborhood in Washington D.C., with the attempt to designate parts of Chevy Chase with this surge of rhetoric in the framework of property rights, and it's been effective. It's blocked designations, even in cities which have sophisticated preservation regulatory schemes.

This framework has also impacted, and continues to impact, existing valid preservation laws in different places. Last year, there were attempts in Utah, at a state level, and at the community level in Houston, to dismantle the framework of preservation laws to one degree or another. I think every year we continue to deal with the issue of owner consent. And the attempt, if it's not in a local preservation ordinance, it's often sought to be added to the

preservation ordinance so that the property cannot be designated without the consent of the property owner.

These are all kind of framed in terms of property rights, but there's this other, more recent evolution of the concept of property rights, getting away from the takings clause and getting deep into the due process clause—Jerold's reference to the Hanna<sup>2</sup> decision in Chicago, there was also the Conner<sup>3</sup> decision in Seattle. Luckily, the Conner decision was a very strong rejection. It was a similar claim where a vagueness challenge to Seattle's preservation law was mounted under the theory of violations of both substantive and procedural due process, and we're seeing that kind of framework more commonly cited. I think that we still have to be very conscious of the fact that preservation, even though it stands on firm judicial grounds, is still very susceptible to these types of rhetorical challenges, and is sometimes creeping into the law itself.

There's RLUIPA.<sup>4</sup> Jerold talked about the fact that judicially, we have some strong decisions that really suggest that the statute is not really the threat, at least, again, from a legal action standpoint, that many of us feared when the law was being passed. Actually, I have to tell you, when the law was being passed, the Trust and our preservation partners were up on Capitol Hill trying to ensure that the standards that were included in the law were in fact tied to the constitutional standards, because we knew if that were the case, from a judicial standpoint, the impact would be fairly minimal. We have some strong cases at the judicial level but, again, as is the same in terms of the taking clause, we see the impact more in the rhetorical framework. I have to tell you there are many communities around the country where religious property owners are simply able to get local commissions to ignore, or to find a way to really not apply the laws. In some cases where the authority devolves to the city council it's really a political decision. In many cases we're seeing that there is a substantial impact of this federal law, again, not in the courts, but in the realm of rhetorical framing.

Let me just mention a couple other things that Jerold mentioned. This was also the 45th Anniversary of the National Historic Preservation Act,<sup>5</sup> it's also the 45th Anniversary of Section 4(f) of the Department of Transportation Act,<sup>6</sup> probably one of the strongest federal preservation laws on the books, and I guess I would use his analogy to a middle-aged person. I think the same kind of analogy can be applied both to the National Preservation Act,

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2. Hanna v. City of Chicago, 907 N.E.2d 390 (Ill. App. 2009).

3. Conner v. City of Seattle, 223 P.3d 1201 (Wash. Ct. App. 2009).

4. Religious Land Use & Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. §§ 2000cc-2000cc5 (2006)).

5. The National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915 (codified as amended at 16 U.S.C. §§ 470-470x-6 (2006)).

6. The Department of Transportation Act of 1966, § 4(f) Pub. L. No. 89-574, 80 Stat. 771 (codified as amended at 23 U.S.C. § 138 (2006)).



probably less so to Section 4(f). There was a time, probably about ten years after its enactment in the '70s, where there was a real invigoration, and we had the expansion of the scope of the National Historic Preservation Act for the properties that are eligible for the national register. There was a strengthening of the interpretation of Section 4(f) to be applied to constructive use of historic resources in parks.

Since that time though, looking back at that forty-five year framework, there has been some comfort—maybe too much comfort—on the part of federal agencies with process, and not so much with substance, and the Trust has actually done a study on this subject. I'm speaking particularly about Section 106 of the National Preservation Act,<sup>7</sup> which is really the part that has procedural control. We're finding that agencies in many cases have become very adept at essentially complying with the Act in terms of process, but without really taking a lot of effort to find substantive solutions to preservation issues, which was really the intent of the statute. So, we issued a report a couple of months ago called *Back to Basics*,<sup>8</sup> where we're urging federal agencies to re-look at their responsibilities under the National Historic Preservation Act.

It's interesting because these two legal frameworks really grew up side by side, which is another point. The federal preservation law and the National Preservation Act set out a partnership between the federal government, the state and local governments, and private entities of the private sector to advance historic preservation. This has become the core of the team of development of the national register, which is often brought in at the local level as the basis for local designation. And again, kind of looking back at that forty-five years and looking forward to the 50th anniversary coming up, I think it may be time for us to hit the reset button and identify where we are in this framework. There are some real challenges and there has been a recent survey done by the task force, Preservation Action. It hasn't been fully realized, but there is clearly a lot of satisfaction among the preservation community with the administration of the federal preservation program; and I think there is a real need to examine the structure and the way they interact with the state and local programs as well.

One final point, and I'll turn it over to Tersh. The time that we live in is particularly challenging at all of these levels and we're seeing the impacts at the federal, state, and local level with the cutbacks in funding. Preservation laws, whether we're talking about local preservation laws or federal preservation laws, are only as strong as the administrative structure that's there to

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7. National Historic Preservation Act § 470f (The above-referenced section can now be found here).

8. LESLIE E. BARRAS, NAT'L TRUST FOR HISTORIC PRES., SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT: BACK TO BASICS (2010), available at <http://www.preservationnation.org/resources/legal-resources/understanding-preservation-law/federal-law/section-106/back-to-basics.html>.

administer them. That's just an obvious truth, and that administrative structure is really in danger right now, simply because of the economy, the cut backs at the federal level in terms of federal funding, and the trickle-down effect at the local level. Many localities have been understaffed for years and now. They're actually at a point where they're having to cut back, they may have one person, and that one person is now gone, and their responsibilities have been passed along to someone in the planning office without the same level of specialty. So, there really is a crisis in the administrative structure that I think we need to really pay close attention to. It really can affect the way this whole movement is directed in the next five to ten years.

MR. BOASBERG: I agree with almost everything that you said Paul, but I do want to say, "Oh, to be middle-aged again." Working toward that, I want to thank all of you for being here. It's nice to see so many friends, so many people who I worked with in Chicago, Seattle, New York, Los Angeles, and other places. It's a really great tribute to the leadership that New York has shown. And a special thanks to Adele who starts off everything. I did happen to hear her as a keynote speaker in Washington, when she received an award from the National Building Museum; it was well deserved. I also want to nod toward Dorothy Miner and Paul Byard. In a very personal connection, Dorothy was in my wife's class at Smith, and was actually at our wedding fifty years ago, and Paul Byard's older sister was one of two bridesmaids. So I feel very, very connected to all of you. And more than that, as Paul said, the Washington D.C. law, which was not enacted until 1978 because it didn't get self-rule until 1973—which is a sore subject in Washington and we're still trying to get a vote—was modeled after New York City law. We look to New York City, as so many other cities around the country do, for the interpretation. The problems come to New York City in much larger numbers than they do in any other city. They also seem to come first. You have a very active preservation constituency. I happen to think you have a very fine Landmarks Commission. You have a lot of intelligent people around the edges, and you have new groups like the Historic Districts Council. We model ourselves on you, and what you do here is so important to us, I cannot tell you. We're very grateful that the Penn Central case arose in New York, that the St. Bart's<sup>9</sup> case arose in New York, Sailors' Snug Harbor,<sup>10</sup> all of the other cases. These are cases which we rely on all the time.

Briefly, let me just say, Jerold, your first point in terms of keeping separate the zoning and the historic preservation, certainly the statutory scheme, I think is worth a great advantage. The only people that hate it are the developers. They hate it because they have to go both before a historic preservation commission, and a zoning commission; and they don't know where to start,

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9. *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990)

10. *In re Trs. of the Sailors' Snug Harbor v. Platt*, 288 N.Y.S.2d 314 (N.Y. App. Div. 1968).

and we don't really know where to start either. We have a Commissioner that says it doesn't matter where you start. To us it does matter because so much of what you do in one case can influence the others. When we make a decision on a case that's pending before a commission we always say, "Nothing herein shall influence in any way the decision of the body making announcements on zoning." So I think that's very important.

The other thing is, after having served ten years as Chair in Washington and a couple years as Chair in the zoning commission, I'm very scared about historic preservation. An actual truth: there are not a lot of people in our city, probably here, that really understand historic preservation has a very esoteric feel. You have to have some kind of background, you have to have some kind of field, you have to have traveled. It takes a lot to understand the nuances of historic preservation, and if it were broader applied, like the universal right to historic preservation, there's nothing that scares me more than to put it up by the First Amendment or the Fourth Amendment. I like operating under the radar. I like being somewhat difficult.

In a class we teach at Georgetown, one of the questions always is, "Well why don't you have all of the District of Columbia declared a historic preservation district?" And, in truth, it all probably qualifies because it's all more than fifty years old. We don't even have a fifty-year rule in the District, but most of the buildings are older. If we propose to have the whole District of Columbia become a historic district, they would not only kill that, but they would probably start reversing all the historic districts that are already there. So we've begun very, very gradually by taking the most obvious individual historic districts—in Washington's case Georgetown and Capitol Hill—and then slowly move in to add others, as there is local interest in the neighborhood.

Our staff, unlike New York City's staff, which of course is much larger, gets a lot done with a small amount of people; they do the research. We don't have the money or the staff to do research on historical districts. We leave it up to the community, and that generally works very well, and we have a very long process to become a historic district. Paul's comment about owner consent is a genuine worry. One of the things that worries me—a number of things worry me about owners consent in historic landmarks—is once they get a statute that says you have to have owners consent in historic districts, there's going to be an order of consent in landmarks, and then you will not have another landmark in the city of Washington, or in any city of the United States. So this is very scary stuff as Jerold rightfully pointed out. Rehnquist's dissent in *Penn Central*<sup>11</sup> is still very alive, and I am scared to death if *Penn*

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11. See generally *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138-53 (1978) (Rehnquist, J., dissenting). The general idea behind Justice Rehnquist's dissent is that it is unfair to declare a building a landmark and impose the costs of such a declaration solely on the owner of the building. Rather, such costs should be distributed to the community as a whole. His opinion reads,

Central got to the Supreme Court out of an owner's consent, I'm not sure it would've passed at all. It may have been alright for historic districts, but I'm not sure. So I am very worried about that, and I am also very worried about the RLUIPA. As Paul says, a lot of it is in the rhetoric. Although there are a couple of cases which are a little bit scary, the threat is that now there is a religious institution or foundation which will seek out any case that it can find and take it to higher court.

We had a test case, in a way, in Washington on the Third Church of Christ, Scientist,<sup>12</sup> which was a perfect storm for anti-preservation cases. It was a 1971 building that everyone called ugly. It was not only that, but it was Brutalist, even though it was built by the Pei firm. It was built one year before the National Gallery, but it was unfinished concrete, or "brute" as the French would say. The congregation had fallen. It was built to house 400 people. There were forty people in the church, and they basically couldn't afford to keep it up. So, we had to landmark the building because it was extremely prominent as a modernist building. But Jerold, you're absolutely right, people don't understand modernism. Even the mayor came out; luckily our mayor doesn't have anything to do with designation. In fact, we have, in many ways, an under the radar scheme. Only the Historic Preservation Commission can decide whether to designate landmarks or historic districts, and there is no appeal to City Council, or to the mayor, and any appeal to the court is based on traditional law of administrative appeals. You have to be arbitrary and capricious, and believe me, we are not arbitrary and capricious. We may be slow, and we may be labored, but we are not arbitrary and capricious, which means it's virtually impossible to upset anything we do. So we have to be extremely careful about that.

We had, in the testimony, forty experts talking about why this building was important, and how in Washington D.C. it was one of the most important buildings built in 1971. Not that 1971 was the greatest year for buildings and for religious architecture, but as a subcategory it was heralded. It even had the Dean of the Catholic University School of Architecture say that this was the

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In August 1967, Grand Central Terminal was designated a landmark over the objections of its owner Penn Central. Immediately upon this designation, Penn Central, like all owners of a landmark site, was placed under an affirmative duty, backed by criminal fines and penalties, to keep "exterior portions" of the landmark "in good repair." Even more burdensome, however, were the strict limitations that were thereupon imposed on Penn Central's use of its property.

Id. at 140-41. Mr. Boasberg contends that that if owner consent were required under the statute at issue in Penn Central then the case would have been decided differently.

12. Llewellyn Hinkes-Jones, *The Case for Saving Ugly Buildings*, THE ATLANTIC, <http://www.theatlanticcities.com/design/2012/01/case-saving-ugly-buildings/913/> (last visited Jan. 10, 2012); Marc Fisher, *D.C. Lets Church Tear Down Brutalist Atrocity*, WASH. POST (May 13, 2009, 7:30 AM), [http://voices.washingtonpost.com/rawfisher/2009/05/dc\\_lets\\_church\\_tear\\_down\\_bruta.html](http://voices.washingtonpost.com/rawfisher/2009/05/dc_lets_church_tear_down_bruta.html).

one building he really liked more than any in D.C.. Now, I'll leave that to your judgment as to what other things the Dean would've liked in Washington, but this was the best one.

Anyway, we had nobody to testify against it, so we had to designate it. We had a lot of political pressure not to designate. There was a lawsuit filed by the Church and I won't go into detail. The developer claimed not only First Amendment, but RLUIPA, and we were worried about RLUIPA, because it was picked up by the press. When it got into court, the first thing the federal Judge, hearing a motion said was, "You mean to tell me there's no restriction at all on a church that you're going to landmark and there's no cost involved? Who's paying you? Don't you have to hire a lawyer?" And he threw us all back because this was designation. It wasn't even a denial of a Certificate of Appropriateness and all we did was deny a demolition from it. We didn't even deny something else that they could've done to the church. Anyway, to make a long story short, the case was settled, but it went off on an interesting ground, which I think is a reason that RLUIPA may be less worrisome; it went off on the ground of hardship. It went off on the Fifth Amendment ground that they didn't have enough money, which is in our statute, as you know. We have a built-in hardship amendment clause, at least most of you do. Therefore, rather than decide whether fixing up the church would have been a substantial burden on the religion, it was much easier to decide that yes indeed, it would've been a substantial hardship. So it went off on Fifth Amendment ground, not that it ever got decided in court, but that was the basis of the settlement and I'm glad it was settled. Had that gone up to the Court of Appeals and maybe the Supreme Court, I don't think we would've had a landmark church in the country. I'm very worried about that going up to the Supreme Court.

Let me just say a couple of things constructively and then I'll stop. One of the things I would like to see—one of the most constructive things in terms of local law, and I agree with Jerold, a lot of the Historic Preservation Act, a lot of the national, a lot of the federal stuff is leadership national—but, I would like to see the tires really hit the road at the local level. You've got to have local laws protect your buildings. There's no other answer to demolition provisions, and we at the local level are pretty ignorant of what one another is doing. We don't have the Preservation Law Reporter anymore. It's very hard to find out what other local communities do, and you have to pay \$1500 for the Trust conference, so that's a serious problem. Of course you can get an advisor that's a speaker, but if you can't, I hope someone would take the leadership role, and maybe have a conference on local laws, maybe have a once-a-year meeting someplace.

Get together, that's the first thing. The second thing is, we also have a kind of perfect storm case at 227 Pennsylvania Avenue, which is a block right north of Congress, where we had a 122-year-old row of buildings. There was one two story building in a row of three story and four story buildings. Of course

somebody comes in and wants to put a third floor. Why? To get a view of the Capitol for the office executives. That's Washington. You talk about tyranny of context. This was a terrible problem, because on Capitol Hill, the houses are small and very fragile, and most of them are two stories. If you allow a third story on every house in Capitol Hill, it would completely change the nature of Capitol Hill. Here was this building where its two neighbors were slightly taller; what to do? Anyway, we approved the building, but it was later turned down. Which brings up the vagueness of statutes and the value of precedent in administrative cases. This is the problem, I am always arguing for more and more rules so that we don't have arbitrariness, so we don't have capriciousness, and basically, so you take the political equation out of it permanently. If you have raw discretion which doesn't have some kind of basic growth, then you get right back into the old days. So that is the problem, and I think that will go on. So anyway, that's all I have. Thank you.

MS. VAN INGEN: Well, thank you both very much. I marched in here with a list of questions, thinking if they don't touch on these things, I will ask these questions, and well you've touched on virtually everything; we certainly appreciate it. Thank you. Again, keeping this at the general level, you talk about there being 2600 global ordinances across the country—that's a lot of legal matter, a lot of issues that come up across the country—but looking ahead, do you see what's next? Any of the three of you? Jerold you sort of had your shot at this, but Paul and Teresh, do you see what's next? What are we missing in some of these laws? Do you see new developments in the law? Anything exciting coming out from these 2600 ordinances around the country that we can look to? Perhaps some positive new development?

MR. BOASBERG: Let me just speak very quickly. Our law is working, we have a terrific law. We have lots of statutory interpretation, we have a website which records all these cases, and we don't have any problems with the law. We have problems with educating people, and we have age-old problems with building political consensus, but the law itself I think has been pretty good.

MR. EDMONSON: I would agree with that. There have been a number of phases in terms of development of historic preservation of local landmarks. There were quite a few cookie cutter laws based on New York's. In the '70s, there was another kind of phase. In the late '80s, I'm probably dating myself here, D.C. had done a number of updated versions that were adopted and added things, for example, like stronger economic hardship provisions which require much more detail on what actually is the economic hardship that faces the property owner. That's the kind of detail that makes it easier to understand and administer the laws. There have been a number of additional provisions over the years, such as demolition by neglect, which is a big issue in many communities. Now we're seeing many have good landmark laws with good

provisions in them, but there are administrative issues in terms of whether there is political will to litigate against property owners, or take the step of actually fencing and fixing and putting liens on properties that are in need of repair.

There are those phases, but I think I agree with Tersh, that it's really more in—well there are two things. One is the actual administration of the laws and the education of the commissioners in many cases, making sure that they understand their responsibility and actually follow a fairly sophisticated process in applying their responsibilities. After Penn Station, Bob Stipe, another person who has really led this movement over the years, said, "Now that the Supreme Court has come out with that, we need to turn our attention to what is the other area of vulnerability, and that is procedure." Procedures, due process, and failure to comply with procedural requirements of law. It's still an issue, and that leads the kind of decisions that Commissions make every day. In some cases, they are vulnerable. We're seeing that in terms of some of the more recent challenges. So, there are plenty of those types of challenges ahead.

MS. VAN INGEN: Jerold, do you want to add anything?

MR. KAYDEN: No.

MS. VAN INGEN: Alright. I do have one other quick question. You touched briefly on the skyline protection issue, certainly with the recent issue of the Empire State Building. I'm just wondering if any of you know of other situations, or can you reflect on other communities that have dealt with that particular issue? I suspect this is one that's going to be lingering for a bit in New York City.

MR. KAYDEN: It's a totally standard kind of thing we've been doing through legislation; "viewshed protection." It's normally been a natural phenomenon, natural elements that have been protected in terms of buildings that mar the view, but it's very, very standard, and it's been done for a decade. Nothing revolutionary in the United States whatsoever. We have, of course, had concerns about skylines in New York City itself. Just months ago, the Jean Nouvel Tower design proposed to be at the Museum of Modern Art wanted to be 200 feet higher than what was otherwise allowed, and was turned down by the City Planning Commission on the basis, in part, that it was going to interfere with the Empire State Building.<sup>13</sup> So, it's not as if we don't make

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13. See Nicolai Ouroussoff, *Next To MoMA, A Tower Will Reach for the Stars*, N.Y. TIMES, Nov. 15, 2007 at E1, available at <http://www.nytimes.com/2007/11/15/arts/design/15arch.html>; Justin Davidson, *Colossus*, N. Y. MAGAZINE, May 10, 2010, available at <http://nymag.com/arts/architecture/features/65749/>.

decisions in New York City and elsewhere that deal with the potential impact of a building on a skyline.

Now, it's true that within existing historic preservation laws, it's hard to see how they can be administered in a way to address this at all, and I don't suggest that it necessarily be handled within existing historic preservation laws. I do want to keep them fundamentally cabined to deal with the traditionally understood issues. But I do point out that, yes, there are these laws that exist as separate and distinct laws. I don't know exactly where they would go. I can imagine them being in the zoning regime. It's dealing with new development just as the Nouvel design was dealing with the City Commission.

There have been, by the way, other efforts. There's a case called *United States v. Arlington County and Arland Towers*,<sup>14</sup> which was a United States District Court case dealing with a proposal by a developer to build four office towers and a hotel in Rosslyn. The United States government brought a public nuisance suit claiming that the construction of those four office towers, plus the hotel, would indeed be a public nuisance. Why? Because they would be a visual intrusion on the core of our Capital City, the District of Columbia, and the plan, which emphasized, among other things, horizontality, and seeing in the background these towers across the Potomac, would interfere with that. That was an actual case that went before a judge. He heard expert witnesses, he looked at photographs, he did an onsite visit. He finally concluded that, for the average person, these four office towers and the hotel, would not mar the experience of visiting the Washington Monument and the Lincoln Memorial and other parts of the core of the capital. But, it was discussed, and one can imagine experts coming forth with all the tools we have now that suggest that it would indeed mar things.

The most up to date sort of treatment of this was done by the Mayor of London, Red Livingston, formerly known as "Red Ken," who did his London Management View Framework<sup>15</sup> and laid out a series of protective corridors dealing with river viewsheds and townscape viewsheds. There are lots of view sheds that are protected by this London plan which is effectively a planning law in London, including a view from Richmond, going to St. Peter's and it's a powerful instrument, totally uncontroversial. We simply want this skyline, which provides us with a sense of who we are, where we are, a pneumatic device as Kevin Lynch would put it or as Mumford would've put it, or Costoris in Ions; we protect it. So it's certainly something that's on the table. I'm not saying one way or the other what should happen with Vornado's whatever it is, 1500-foot tower.<sup>16</sup>

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14. *United States v. Cnty. Bd. of Arlington*, 487 F. Supp 137 (E.D. Va. 1979).

15. GREATER LONDON AUTH., PROTECTING LONDON'S STRATEGIC VIEWS (2012), available at <http://www.london.gov.uk/priorities/planning/vision/supplementary-planning-guidance/view-management>.

16. Charles V. Bagli, A Fight on New York's Skyline, N.Y. TIMES, Aug. 23, 2010, at A18 available at <http://www.nytimes.com/2010/08/24/nyregion/24empire.html>.



## AUDIENCE QUESTION &amp; ANSWER

MS. VAN INGEN: Should we open it up to questions from the audience? So, there must be questions. Yes?

AUDIENCE MEMBER: I'm wondering if Mr. Kayden knew the particulars of the Kelo case?

MR. KAYDEN: Sure, *Kelo v. City of New London*,<sup>17</sup> a 2005 case, five to four decision, very close at the Supreme Court, upholding a broad notion of public purpose of what would justify the government's exercise of its so called eminent domain. Penn Central was about regulations, and whether regulations go too far and can be similar to the more classic, eminent domain taking where government actually takes your property from you. The government now owns it, pays you, as some property owners would say, just compensation, and now you don't have it, and turns it over to a private developer. This has been a controversial thing, by the way, for the historic preservation movement, because a lot of historic buildings were in fact taken and destroyed into urban renewal. So we have a sort of conflicted attitude towards this, though there are other cases where it enhances historic preservation.

The court legally released what to many of us was an uncontroversial decision, which allowed the government through its planning, the taking of existing, non-blighted single family houses; that was what was so controversial there. Kelo was just an average person, not a poor person—oh, there we can take automatically—but this was just an average person, someone that actually looked like everybody. This was on Parade Magazine, yet the government took her house and gave it over to a big, bad, nasty Boston developer. By the way, none of this is even happening anymore. The house hasn't been moved at all, not true, no development has occurred, in order to create jobs and additional tax revenues. And the Court said five to four, from a constitutional point of view, with all of our legal precedents starting with *Berman v. Parker*,<sup>18</sup> and going through *Hawaii Housing Authority v. Midkiff*,<sup>19</sup> it's no problem, five to four. The outcry politically, what was shocking to people, was Justice Stevens, now off the court but who wrote the Kelo opinion, a month or so later in Las Vegas, said something interesting. He said, "Had I been a legislator I would've not done what I did as a judge. I was forced as a judge to do this, but I wouldn't have done it." It's a politically controversial issue, and it has led to roughly forty or so states amending their eminent domain statutes, to make it harder for governments to exercise the power of eminent domain, especially when

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17. *Kelo v. City of New London*, 545 U.S. 469 (2005).

18. *Berman v. Parker*, 348 U.S. 26 (1954).

19. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

the object that's being taken is not blighted or otherwise downtrodden, and of course when it's being given from one private owner to another.

MR. EDMONSON: Let me just tag onto that. One aspect of the shift by legislatures addressing the Kelo issue has been, as Jerold said, these forty or so laws around the country to restrict the ability of government to exercise the power of eminent domain. But often attached to these laws are provisions that are also intended to restrict the regulatory takings authority. Buried in some of these laws is language that's often essentially designed to undo some of the provisions, or some of the principles that we're seeing in the Penn Central case. So, you have to be really careful in reading and parsing through some of the legislative proposals that have come out in the name of fixing the Kelo problem, because they often go much beyond the issue of eminent domain.

MS. VAN INGEN: Yes?

AUDIENCE MEMBER: I just wanted to make a correction about what you said about the Empire State Building having something to do with getting rid of those 200 feet on the top of the Nouvel building. I was on the team that defeated that building. Hopefully, they're not building it, regardless of how many feet it is, because I believe the bank building is over 200 feet. It had something to do with light and air, although it's a silly decision, because 200 feet isn't going to do anything for us, but it did not have anything—they may have mentioned it, they did mention it, but that was not the major reason.

MR. KAYDEN: Right. No, as I said it as among other things. I referenced that because, of course, Vornado presents a similar situation.

MS. VAN INGEN: Thank you. Yes, in the back right there with the glasses?

AUDIENCE MEMBER: Thank you. Regarding references made to the dissent in Penn Central; what's the best shot that the dissent took at Penn Central that preservationists need to be on guard about in cases of this kind for resurrection that we're talking about? What was the best argument?

MR. KAYDEN: It's unfair. That's it. I just can't emphasize how important that is. Paul, he has the landmark building, just Paul, and he turns to Tersh, Anne, and I, and says "Why me?" And we can say, "Well you have a great beard and more hair," well not more than Anne of course, "and you're historic and you're special." And he says, "Well, but I didn't know at the time when I bought it and now it's coming." It's just unfair. It's not comprehensive, and that attitude still prevails. That's what the whole private property movement is about, picky-choosy kind of regulations. It's one thing that applies across the board. That's why zoning was done in zones, to be across the board. All of us

in this room are in the same zone, so fine. Misery loves company, fine we're all restricted. The restrictions on Paul, Tersh, and I benefit Anne, just as the restrictions benefit them.

The best argument I've got is: read the Penn Central case, six to three, 1963. It's many, many years later, and Justices will keep arguing that way. It's a political battle, I don't know what would happen now. I am nervous about the Penn Central case. I think it's the one shoe I'm still waiting to drop. I think the reaction to Kelo was astonishing. I think it all depends on who's on the Court, it really does. I mean, let's face it, these appointments are outcome determinative on the opinions and what they say.

MR. EDMONSON: I think life and law are not fair is the bottom line.

MS. VAN INGEN: As a comment, I think a thread through what we heard today, the underpinning of much of what we do in this field, historic preservation, needs to be better with its messaging; we need to master the mass communication systems. We need to go viral; we need to be reaching out way beyond those that are sitting in the room today. I know that's an obvious statement, but we have to keep thinking about that. The world is changing, our ability to message has changed, and we really need to be in control of that and get out to a much broader audience. There needs to be an understanding of what we're trying to do here, so these nuances are not just in these little esoteric conversations we have. I need to give us time for one more question, right there.

AUDIENCE MEMBER: Actually it relates to what you just said, and when Mr. Kayden says "popularly understood." There's no popular understanding. There might be popular understating amongst historic preservationists, but amongst people broadly, it is obscure, as Tersh said. Not only that, it's obscure to people in the field you know, to commissioners on historic preservation commissions. From an Olympian point of view, I just wonder why can't the law be easier? Why is it that to explain to even someone who's interested in this it takes like five lectures? You know, there is a lecture for where the federal role is, where the state role is, where the local role is, where there are landmarks and there are districts, and where there's design guide. It's just so complicated, and it would be wonderful if it could be simpler. I think one could spread the message better if it wasn't so complicated. That's it.

MR. KAYDEN: See, I think you're right. I think you're absolutely right but I would say two things. I think it's crucial that it be very, very technical. It's just what Tersh actually said and what I suggested as well. This is a technical area and it's fine that we've got historic preservation, it has a traditional definition. I do suggest that we stick with traditional ideas of what historic preservation is so people don't begin to say, "Well, that's not historic preservation, you're

really sort of going well beyond what it is.” So within our area, I don’t mind because that’s what ends up being legally challenged. The notion that it has a technical aspect to it which requires expertise, I think that’s great for the sort of ongoing protections.

I think the point you’re making though, which is a powerful one, and what I’ve suggested, is there is a rhetorical positioning that could be detached from the technical aspects of the law itself. And that rhetorical position; that’s the point I was trying to make, Tersh. It’s not that I want there to be a universal human right that’s actually enforced in law, it’s not going to happen anyway, but I do think that people should understand that historic preservation is much more than George Washington slept here or a particular architectural style. It’s really something about human psychology, emotional stability, of giving us sort of a tether, an anchor, something that’s physical so we know who we are and where we are at a time when we’re looking more at brain and MRI scans. This is, I think, a very powerful, important part. I think we all know it intuitively, we may not have loved the World Trade Center towers but boy, did we miss them when they were finally gone. This notion of the built environment as being part of who we are as human beings, I think has a rhetorical positioning, a powerful place to put historic preservation without changing the technical nature of what the legal regime is such that when we go to court we are dealing with expertise.

MR. BOASBERG: This would be an appropriate point to remember the wonderful New Yorker cartoon out in front of a complex which says “The Andersons: A Complex Relationship.”

MS. VAN INGEN: And on that note, thank you very much.

MR. SCHNAKENBERG: Thank you Anne and Jerold and Paul and Tersh.

# THE NEW YORK CITY LANDMARKS LAW: EMBRACING LITIGATION AND MOVING TOWARD A PROACTIVE ENFORCEMENT PHILOSOPHY

BENJAMIN BACCASH\*

An administrative law is effectively non-existent in the eyes of the regulated if adherence to it, and non-compliance with it, yield the same outcome. For an administrative law to be most valuable, the government must take enforcement action against the non-compliant. If enforcement action is not taken, the law at hand is stripped of its meaning and power, rendered mere words on paper lacking substance, importance, and pursuance. Statutes that are not enforced, whether a result of poor legal grounding or the lack of enumerated recourse, are farces. An administrative statute is only as strong as the enforcement system utilized to uphold it.

This reality becomes apparent when examining the New York City Landmarks Law, which gives the Landmarks Preservation Commission (LPC) the power to protect and regulate local historic resources deemed significant. Signed by Mayor Robert Wagner in April of 1965, the Landmarks Law was the product of a growing concern for threatened historic architecture and a simultaneous awareness and appreciation of cultural heritage in New York City and nationwide. This article will examine the evolution of enforcement of the Landmarks Law from its signing to date, exemplifying the importance of litigation and a proactive enforcement philosophy to its successful administration. Following this examination, this article will present an explanation of the system as it currently functions, as well as options for its future enhancement.

## I. A LAW IN ITS INFANCY (1965-1978)

In its early years, the Landmarks Preservation Commission exercised very little official enforcement. In part, this was due to the Landmarks Law's sole mechanism of enforcement being criminal prosecution. This meant that to compel owners to respond to issued violations, the LPC had to prosecute them in criminal court alongside those accused of assault, robbery, and

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murder. Otis Pearsall, one of New York City's early preservation advocates, decided to work within what the law provided. He stated,

Given the [fact] that there was no other alternative, [I thought] maybe we could get the local precinct to take some action . . . [S]o I prepared . . . a desk book, which had the Landmarks Law in it . . . which I took down to the 84th [police] precinct house . . . and gave it to the desk sergeant, [in the hopes that the police would enforce the law].<sup>1</sup>

Not knowing what exactly to do with Pearsall's desk book, the sergeant called the LPC and spoke with Frank Gilbert, Secretary of the LPC at the time, who told the police sergeant to simply throw it away. In other words, according to Pearsall, there was no intention to enforce the Landmarks Law criminally and his efforts were consequently thwarted.<sup>2</sup>

Lenore Norman, Executive Director of the LPC in the early 1970s, called the criminal enforcement system "ridiculous" because of the difficulty in its initiation, rendering it an unrealistic recourse.<sup>3</sup> While Notices of Violation could be issued without the involvement of counsel, their power was limited—perhaps even non-existent. No matter how minor or egregious a violation, formal legal action was necessary to officially enforce the law. This required the involvement of the New York City Corporation Counsel Office which, in the words of Pearsall, "ha[d] a lot of fish to fry."<sup>4</sup> This method of enforcement was undoubtedly inefficient, cumbersome and, some would argue, inappropriate.

According to Ron Roth, a LPC staff member from 1970 to 1976, enforcement action was seldom taken during his tenure. Roth said, "Enforcement was not in [the Commission's] vocabulary" at the time. There simply was "no push to do it."<sup>5</sup> He continued by explaining that if there were minor or moderate violations and they weren't easy to resolve, the LPC would let them be.<sup>6</sup> If a community complained incessantly about a violation of the Landmarks Law, LPC staff would conduct a site visit and, if an unlawful condition existed, issue a Notice of Violation and, in rare cases, issue a Stop Work Order.<sup>7</sup> In the uncommon instance that a Notice of Violation was issued, the property owner at hand would be unable to get any permits from the Department of Buildings (DOB) so long as an LPC-issued violation was outstanding. This meant that only if the property owner intended to perform work requiring permits from the DOB would they be forced to correct their LPC violations. This was a strategic roadblock that afforded the LPC some

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1. Interview with Otis Pearsall (Feb. 18, 2010) (on file with the Widener Law Review).

2. Interview with Otis Pearsall, *supra* note 1.

3. Interview by Marios Drakos with Lenore Norman, Exec. Dir., N.Y.C. Landmark Pres. Comm'n, in N.Y., N.Y. (Oct. 15, 2008) (on file with the Widener Law Review).

4. Interview with Otis Pearsall, *supra* note 1.

5. Telephone Interview with Ron Roth, N.Y.C. Landmark Pres. Comm'n (Feb. 9, 2010) (on file with the Widener Law Review).

6. *Id.*

7. *Id.*

bargaining power necessary in the curing of violations, otherwise violations could simply stagnate, remaining unresolved and thus ineffective. No mechanism, even at the time of sale of a property, absolutely forced a violation to be cured.

At this time, the Commission was very small, with only five staff members during most of the 1970s.<sup>8</sup> The number of historic resources it regulated was much fewer than today, with a total of 5576 designated landmarks in 1970 and 9767 in 1976.<sup>9</sup> Roth explained that even though enforcement action was not often taken, he did keep a watchful eye.<sup>10</sup> Roth attributed the maintenance of a street presence, albeit minimal, to discouraging non-compliance. While not an official policy, Roth and other staff members in the early years of the LPC, as he recalls, regularly walked historic districts to stymie “the tide of [potential] violations”.<sup>11</sup> The areas that they walked were determined by the number and degree of complaints they would receive.<sup>12</sup> While walking the preservation beat, LPC staff would not always issue violations in an official capacity but they interacted with property owners and tenants, explaining what the law required, what was allowed under it and what was not.<sup>13</sup> Otis Pearsall referred to these efforts as inefficient “jaw boning pure and simple.”<sup>14</sup> However, Roth insisted that these measures were useful in maintaining compliance with the Landmarks Law.<sup>15</sup>

Journalist Roberta Gratz described the LPC of this period as exhibiting a “timid attitude.”<sup>16</sup> However, it must be noted that at the time, preservation was not incorporated into the civic discourse as it is today. The practice of “preserving old buildings was considered by many as simply a means of opposing progress or change.”<sup>17</sup> The LPC was well aware of this and accordingly seemed to have believed that it was necessary to mind its actions. Some contest that, at this time, the LPC was “the worst enemy of the work it professed to do.”<sup>18</sup> During this period, even “preservation advocates were lulled into complacency.”<sup>19</sup> In other words, those who were expected to have been most critical of the Commission were timid, too. It is no surprise, then, that if the LPC was reluctant to vehemently carry out its purpose and felt that it had to tread lightly, that the law was not frequently enforced. The LPC was a new agency practicing a new type of regulation.

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8. Anthony C. Wood, *Is Landmark Designation Finished?*, VILLAGE VIEWS, Winter 1987, at 42.

9. *Id.* at 40.

10. Telephone Interview with Ron Roth, *supra* note 5.

11. *Id.*

12. *Id.*

13. *See Id.*

14. Interview with Otis Pearsall, *supra* note 1.

15. *See* Telephone Interview with Ron Roth, *supra* note 5.

16. ROBERTA BRANDES GRATZ, *THE BATTLE FOR GOTHAM: NEW YORK IN THE SHADOW OF ROBERT MOSES AND JANE JACOBS* 45 (2010).

17. *Id.* at 35.

18. *Id.* at 46.

19. *Id.* at 47.

At this time, regulatory historic preservation was not established as it is today. Frank Gilbert, then Secretary of the LPC, kept a sign on his desk that read: "This Law Raises Great Constitutional Questions."<sup>20</sup> Gilbert explained that there was a general awareness amongst the LPC staff that the Landmarks Law would be tested; it was inevitable.<sup>21</sup> The LPC was conducting itself largely according to a purpose that had not yet been declared constitutional, but knew that in the near future the Landmarks Law would be challenged and that its affirmation was not a guarantee. In other words, the carpet could be pulled right from under their feet at any moment.

From 1965 to 1978, the LPC was swimming in largely uncharted waters. While written and enacted as law, historic preservation, as a type of regulation, had not withstood constitutional challenge yet.<sup>22</sup> Beverly Moss Spatt, a Chair of the LPC during this time period, said "We had to move carefully before—we were new and untested."<sup>23</sup> Geoffrey Platt, the LPC's first Chairman, described his primary objective: "to preserve the Landmarks Preservation Commission."<sup>24</sup> Otis Pearsall stated, "[The LPC] had no confidence that they would be there tomorrow."<sup>25</sup> In other words, the continued existence of the LPC was not guaranteed and because of this, preservation historian Anthony C. Wood noted, "[c]onservatism and caution became the commission's mantra."<sup>26</sup> As one of the earliest local historic preservation regulatory agencies in the United States, the historical record suggests that the LPC did not function with confidence in its purpose during this time.<sup>27</sup> This seems to include the attitude and effort applied to enforcement of the Landmarks Law in the Commission's early years.<sup>28</sup> When compounded with its only method of

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20. Interview with Frank Gilbert, Sec'y, N.Y.C. Landmark Pres. Comm'n (Apr. 13, 2010) (on file with the Widener Law Review).

21. *Id.*

22. Even though it was cautious in its activities, the LPC was forced to be defensive as part of its self-preservation efforts. Between 1965 and 1978, aspects of the New York Landmarks Law were questioned in *Manhattan Club v. Landmarks Pres. Comm'n*, 273 N.Y.S.2d 848, 850-52 (N.Y. Sup. Ct. 1966), *Trs. of Sailors' Snug Harbor v. Platt*, 288 N.Y.S.2d 314, 315-16 (N.Y. App. Div. 1968), and *Lutheran Church In America v. City of New York*, 35 N.Y.2d 121, 123-24, 132 (N.Y. 1974). While questioned in these cases, the Landmarks Law was neither outright affirmed nor negated on the grounds of historic preservation as a legitimate regulatory basis.

23. Paul Goldberger, *Landmarks Commission Survives a Decade, but Road Ahead is Rocky*, N.Y. TIMES, Apr. 19, 1975, at 47.

24. ANTHONY C. WOOD, *PRESERVING NEW YORK: WINNING THE RIGHT TO PROTECT A CITY'S LANDMARKS* 377 (2008).

25. Interview with Otis Pearsall, *supra* note 1.

26. WOOD, *supra* note 24, at 377.

27. Roth noted that the LPC was not respected by other, more established city agencies at the time. Telephone Interview with Ron Roth, *supra* note 5.

28. The languishment of the Towers Nursing Home, which was designated an individual landmark in 1976, is an example of LPC's resignation when it came to enforcement during this period. After the nursing home was closed down for neglecting its patients, Bernard Bergman, the owner and operator, let it fall into disrepair. Wista Jeanne Johnson, *Towering Expectations: A Community Fights for a SoHa Landmark*, VILLAGE VOICE (Nov. 21, 2000), <http://www.villagevoice.com/2000-11-21/news/towering-expectations/1/>.



enforcement—criminal prosecution—the LPC was subject to a confluence of inability and hesitance.

Then, the LPC was sued by the Penn Central Transportation Company.<sup>29</sup> The inevitable constitutional challenge that Frank Gilbert expected was underway. The Penn Central case saw the New York State Supreme Court issue an opinion on January 21, 1975.<sup>30</sup> Then, on June 23, 1977 the highest court in New York State, the Court of Appeals, issued its own opinion.<sup>31</sup> While the Landmarks Law was upheld in both instances, Penn Central Transportation Company was relentless in seeking a judgment in its favor and appealed repeatedly.<sup>32</sup> It was clear that the Commission's fate would be determined. As Penn Central's case climbed the ladder of the court system, the LPC anxiously awaited the decision. Was the New York City Landmarks Law constitutional or not?

## II. A SYSTEM IS GROWN (1978-1994)

It was not until *Penn Central Transportation Co. v. City of New York*<sup>33</sup> that the LPC's mission and purpose was upheld by the Supreme Court of the United States. Historic preservation was deemed a constitutional form of regulation.<sup>34</sup> This victory, it seems, would prove esteem-building for the LPC in the coming years. Additionally, it would have a profound effect, albeit indirectly, on the development of the enforcement system. In *Penn Central*, the plaintiff brought action against New York City and the LPC on the grounds that the Commission's denial of attempts to construct a tower atop a designated landmark, Grand Central Terminal, constituted a taking of their private property.<sup>35</sup> The Supreme Court of the United States found in favor of the city and the LPC for a number of reasons.<sup>36</sup> It ruled that the refusal of the LPC to issue a permit did not constitute a taking, reasoning that historic preservation was in the best interest of the City as a whole, as the protection of historical resources contributed to maintaining and improving the general quality of life in New York City.<sup>37</sup> Otis Pearsall, a historic preservation stalwart active in the enactment of the Landmarks Law, believes that before the *Penn Central* decision, the LPC did not know if what it was doing was constitutional. "It

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29. *Penn Cent. Transp. Co. v. City of New York*, 377 N.Y.S.2d 20, 26 (1975).

30. MARJORIE PEARSON, *NEW YORK CITY LANDMARKS PRESERVATION COMMISSION (1962-1999): PARADIGM FOR CHANGING ATTITUDES TOWARDS HISTORIC PRESERVATION* 59 (2010).

31. *Penn Cent. Transp. Co. v. City of New York*, 366 N.E.2d 1271 (N.Y. 1977).

32. Geoffrey Brown, *Preservation, Private Property and the Law*, *VILLAGE VIEWS*, Spring 1987, at 13, 32-40.

33. 438 U.S. 104 (1978).

34. *Id.* at 138.

35. *Id.* at 107.

36. See generally *id.* at 127-37. This article will not explore the particulars of the *Penn Central* case. Rather, it is concerned with the case as it relates to the affirmation of the New York City Landmarks Law as constitutional and the case's correlation to the development of an enforcement system.

37. *Id.* at 132.

was afraid of its own shadow.”<sup>38</sup> Preservation historian Anthony Wood states, “The Landmarks Preservation Commission chose to risk the law to save the terminal. If the law was unable to save Grand Central, what good was it?”<sup>39</sup> The Landmarks Law proved able. Penn Central had a huge effect on the previously untested field of legislative preservation and ultimately affirmed the LPC’s purposes.

The New York City Landmarks Law and the LPC had been tested and its mission and principles were upheld. No longer was the Landmarks Law a paper tiger. This decision seems to have enabled, indirectly and perhaps subconsciously, the LPC to begin to enforce its statute. At the time, the LPC was headed by Kent Barwick who had been appointed to his position by Mayor Edward Koch.<sup>40</sup> Barwick was a Nieman Fellow at Harvard University, a former Executive Director of the Municipal Art Society, and a former Executive Director of the New York State Council on the Arts.<sup>41</sup> At the LPC, Barwick was responsible for a total of 582 individual landmarks, thirty-one historic districts, twelve interiors, and six scenic landmarks.<sup>42</sup> According to Marjorie Pearson of the LPC, “the legally mandated regulatory side of the Commission’s work was [Barwick’s] immediate concern.”<sup>43</sup> “With the future of the [L]andmarks [L]aw secured, Barwick and the Commission could pursue designations that previously seemed too problematic or too contentious.”<sup>44</sup> There was a conscious change made to the way the Commission would act. Bolstered by the recent Supreme Court ruling in Penn Central, the LPC began to pursue enforcement as well.

In 1981, three years after Penn Central was decided, Tom Reynolds, an architecture student who was contemplating going to law school, entered the offices of LPC and inquired about the possibility of an internship with the agency.<sup>45</sup> After speaking with various staff people, Reynolds met Dorothy Miner, Special Counsel to the LPC at the time. Miner played a critical role in the Penn Central case.<sup>46</sup> Miner, who was described as “casual, almost frumpy

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38. Interview with Otis Pearsall, *supra* note 1.

39. WOOD, *supra* note 24, at 377.

40. PEARSON, *supra* note 30, at 71.

41. *Id.* at 70.

42. *Id.* at 72.

43. *Id.* at 71.

44. *Id.* at 72.

45. Interview with Tom Reynolds (Feb. 9, 2010) (on file with the Widener Law Review).

46. See generally PEARSON, *supra* note 30. The Penn Central case was argued by the Corporation Counsel Office, deferring to Miner for advice and guidance. There seems to have been a high level of cooperation between Miner and the Corporation Counsel Office at the time. At a panel organized by the New York Preservation Archive Project held on June 10, 2008, Miner voiced her appreciation for the Corporation Counsel Office generally, stating “it was good to have a team of four hundred down the street on my side. And I always appreciated the incredible support I got.” Dorothy Miner, Remarks at New York Preservation Project: Making the Best Better: 35th Anniversary Celebration of the 1973 Amendments to NYC’s Landmarks Law Panel Discussion (June 10, 2008), available at [http://www.nypap.org/sites/default/files/landmark\\_law\\_amendment\\_panel\\_transcript\\_edited.pdf](http://www.nypap.org/sites/default/files/landmark_law_amendment_panel_transcript_edited.pdf). Miner was hired in 1974 as assistant to Frank Gilbert. PEARSON, *supra* note 30, at 67. When Gilbert left the LPC

[in] style—no makeup, loose dresses, hair in benign disarray,”<sup>47</sup> was “[i]ntimately familiar with preservation law” and a “fierce, immovable stickler.”<sup>48</sup> She had a fine legal mind and was “intensely committed to her work and fiercely protective of the institution and its statutory birthright.”<sup>49</sup> Miner hired Reynolds as her first intern and tasked him with surveying the Greenwich Village Historic District and how the Landmarks Law was enforced there. After completing this survey, Reynolds learned that enforcement had received very little, if any, attention up until that point in time. Reynolds discovered countless violations resulting from the minimal level of enforcement before his hiring. Subsequently, Miner directed him to extend his survey to Brooklyn Heights. Reynolds reached similar conclusions with regard to enforcement there as well.<sup>50</sup>

In the process of conducting these studies and interacting with LPC staff, Reynolds became the go-to person for enforcement issues even though he was simply an intern. Complaint phone calls that previously were directed to whichever preservation staff member was available became Reynolds’ responsibility. In becoming the de facto Enforcement Officer, Reynolds began to build a rapport with those individuals who were consistently filing complaints. These people were members of various community groups around the city who were quickly becoming constituents of preservation enforcement and subsequently became supporters of Reynolds. With a growing and vocal constituency, enforcement became a bigger part of the LPC’s duties and Reynolds was hired as a full time staff member.<sup>51</sup>

As the LPC’s first full time staff person dedicated to enforcement, Reynolds was responsible for upholding the protected status of approximately 10,000 designated landmarks. Before Reynolds was hired, the historical record suggests that enforcement was a low priority for the LPC. When complaints were received, they were generally handled in an ad hoc fashion, amounting to being recorded in a poorly organized binder that was stowed in a drawer and rarely consulted for the purposes of curing the violation.<sup>52</sup> Reynolds and Miner took enforcement of the Landmarks Law to the next level. Reynolds stated, “[w]e were creating this system out of thin air.”<sup>53</sup> Together, Reynolds and Miner developed an investigatory procedure which remains in place at the LPC even today. Reynolds would check if any permits had been issued for a property and, if so, what work was specifically approved. Reynolds would then conduct a site visit to see if work was being done without a permit or had been done in discordance with a permit. To aid in this effort, Reynolds would

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later that year, which Marjorie Pearson stipulates was the result of differences with Spatt, who some called a maverick, Miner was promoted to lead counsel. *Id.* at 55, 58, 67.

47. BRENT C. BROLIN, *THE BATTLE OF ST. BARTS* 195 (1988).

48. David W. Dunlap, Obituary, Dorothy Miner, 72, *Legal Innovator*, Dies, N.Y. TIMES, Oct. 23, 2008, at B13.

49. BROLIN, *supra* note 47, at 195.

50. Interview with Tom Reynolds, *supra* note 45.

51. *Id.*

52. *Id.*

53. *Id.*

compare the current state of the landmark with photographs taken at the time of designation.<sup>54</sup> Based on these efforts, which altogether served to create a baseline, Reynolds would next attempt to determine whether or not an unpermitted alteration, constituting a violation of the Landmarks Law, had occurred.<sup>55</sup>

Reynolds envisioned his position as Enforcement Officer as being “service delivery” to those who filed complaints.<sup>56</sup> Community groups and members of the public complained to him and results of his efforts were expected, not necessarily from the Commission, but from the public. In fact, residents of the Upper East Side took matters into their own hands to complement Reynolds’ role. Halina Rosenthal, founder of Friends of the Upper East Side Historic District, the eponymous preservation advocacy group, formed a monitoring program “where many residents [were] self-appointed blockwatchers who ke[pt] their eyes peeled for alterations that [were] not approved by the Landmarks Preservation Commission”.<sup>57</sup> The subject of an article entitled ‘I Spy’ on 73d: Blockwatchers Stop Alteration which appeared in *The New York Times* in 1987, Rosenthal’s program proved successful and an unpermitted concrete and brick rear addition to a designated limestone row house was discovered. The LPC was subsequently notified, an investigation followed, and a Stop Work Order was issued.<sup>58</sup> Identifying the potential effectiveness of the efforts of community groups in enforcing the Landmarks Law, the Municipal Art Society, in conjunction with the LPC, held an event in which the formation of similar groups was encouraged.<sup>59</sup>

As a result of all of the complaints filed by community groups, Reynolds found himself going into the field at least every other day. Gene Norman, then Chairman of the LPC, called Reynolds “the sheriff.”<sup>60</sup> While this sobriquet conveys a level of visible authority, Reynolds noted that his investigations were conducted in as discreet a manner as possible.<sup>61</sup> Reynolds also explained that sometimes it was necessary just to get up and leave the office to avoid phone calls, some of which were complaints while others were contentious responses to Notices of Violation, which were innumerable; the fact that the LPC was “wildly understaffed” did not help.<sup>62</sup> While en route to investigate a particular complaint, Reynolds would visually inspect buildings

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54. Interview with Tom Reynolds, *supra* note 45. It seems that photographs were included in designation reports for the sake of the historical record and for the permit-review process. There is no indication that the practice of photographing protected landmarks had to do with enforcement.

55. *Id.*

56. *Id.*

57. ‘I Spy’ on 73d: Blockwatchers Stop Alterations, *N.Y. TIMES*, May 31, 1987, at R1. It must be noted that just after the Landmarks Law was enacted, Otis Pearsall and the Brooklyn Heights Historic District had a similar blockwatchers program that dissolved due to logistical issues.

58. ‘I Spy’, *supra* note 57.

59. Interview with Tom Reynolds, *supra* note 45.

60. *Id.*

61. *Id.*

62. *Id.*

under the purview of the LPC along the way and, if an obvious violation of the Landmarks Law was occurring or had occurred, take action accordingly. Reynolds did this type of informal monitoring often but was never able to quantify the amount of time or number of buildings inspected as part of his efforts.<sup>63</sup>

In speaking of his experiences issuing violations, Reynolds stressed the need to be practical. If he saw something which he determined to be a violation because there were no permits on file but he considered it to be appropriate, he just left it alone. There was no point, from Reynolds' perspective, to issue a violation. The Preservation Staff could not have handled it and he would have overwhelmed them with the applications necessary to rectify the violations.<sup>64</sup> Reynolds described his most effective tools in enforcing the Landmarks Law as being the telephone and the ability to withhold permits until violations were cured, what some would later call the "hostage policy."<sup>65</sup> He stated that he would sometimes scream at people on the telephone and other times calmly recite what he called the Landmarks Preservation Commission Miranda Rights: "Any addition or alteration or change that you make requires the prior issuance of a permit. In the absence of that permit and you've done the work, you're now in violation. The first step that I recommend in your addressing this is to submit to us an application for the legalization continuing to do said work."<sup>66</sup> Reynolds credited Dorothy Miner with the policy to withhold permits until the building was cured of its violations. He described the interpretation of the law behind this policy, stating, "[The Commission] evaluate[s] the conditions of the appropriate laws in a holistic way. [I]f there was a...violation on the property, we would issue no more permits until holistically, the building [was compliant]. So DOB couldn't issue permits without our permits. T]his had a huge impact on our ability to enforce [the Landmarks Law]."<sup>67</sup> While surely he could be persuasive on the telephone, Reynolds described the policy to only issue permits when the property was holistically compliant as "the most important [and effective] tool that [the LPC had]."<sup>68</sup>

Even though he described himself as curt and understanding of how the policies under which he enforced the Landmarks Law could have been construed as stubborn, Reynolds posited that it was never about collecting a fine. It was about curing the violations, defined as an owner's response by filing an application with the Preservation Staff to legalize the unpermitted work.<sup>69</sup> If he was unsure as to whether a condition was a violation, Reynolds would err on the side of caution. Reynolds indicated that this happened more

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63. Interview with Tom Reynolds, *supra* note 45.

64. *Id.*

65. Interview with Simeon Bankoff, Exec. Dir., Historical Dist. Council (Nov. 9, 2009) (on file with the Widener Law Review); Interview with Mark Silberman, Gen. Counsel, N.Y.C. Landmarks Pres. Comm'n (Apr. 16, 2010) (on file with author).

66. Interview with Tom Reynolds, *supra* note 45.

67. *Id.*

68. *Id.*

69. *Id.*

than he would have liked. As part of the baseline from which he was judging the current condition of the buildings, the designation reports often lacked adequate documentation—both archival and photographic—to accurately assess the situation at hand. In the case that a Notice of Violation was issued, it was composite, including multiple conditions in violation.<sup>70</sup> If the circumstance called for a more immediate action, a Stop Work Order was issued and was delivered in person, sometimes accompanied by a member of the New York City Police Department.<sup>71</sup> In the 1980s, the NYPD stopped cooperating and refused to accompany the LPC any longer on such deliveries for fear that corruption and bribery might occur.<sup>72</sup>

At approximately the same time, following disputes between the real estate community and the preservation community over the significance and designation of the Rizzoli and Coty Buildings, the Cooper Committee was formed to assess the LPC.<sup>73</sup> According to Anthony C. Wood, the Cooper Committee was the Koch administration's way of advancing its agenda and getting the LPC under control in response to complaints from the real estate community.<sup>74</sup> He further stated that the Cooper Committee was not seen as a preservation-friendly committee.<sup>75</sup> In 1986, the Cooper Committee mailed its report to Mayor Edward Koch. Among its recommendations to improving the function of the LPC, the Cooper Committee suggested “[e]stablishing a ‘cadre’ of four or five Buildings Department inspectors who would be specially trained to monitor landmarks and buildings in historic districts for violations.”<sup>76</sup> The Committee also recommended “[g]iving the Environmental Control Board the power to hear violations and impose penalties.”<sup>77</sup> In 1988, the Mayor formed an initiative to amend the Landmarks Law and promulgate the recommendations of the Cooper Committee.<sup>78</sup> The Mayor proposed that the Department of Buildings should be the primary enforcer of the Landmarks Law and landmarks violations should be heard at the ECB.<sup>79</sup> Preservation advocates were vehemently opposed to these changes.<sup>80</sup>

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70. Interview with Tom Reynolds, *supra* note 45.

71. *Id.*

72. *Id.* Reynolds recounted one instance in which an elderly property owner attempted to bribe him. Reynolds instructed the man to stop and did not accept the bribe. *Id.*

73. Jesus Rangel, *City Procedures on Landmarks to be Reviewed*, N.Y. TIMES, Feb. 26, 1985, at B4.

74. Anthony C. Wood, *The Historic City Committee: Any Lessons for Today?*, LANDMARKS45, <http://www.landmarks45.org/> (last visited Apr. 15, 2012).

75. *Id.*

76. David W. Dunlap, *Landmarks May Get New Rules: Koch Proposes Changes in Designation Process*, N.Y. TIMES, May 11, 1988, at B1.

77. Dunlap, *supra* note 76. The Environmental Control Board (ECB) is an administrative venue that hears violations issued by New York City government agencies that relate to quality of life issues. N.Y.C. Env'tl Control Bd., NYC.GOV, <http://www.nyc.gov/html/ecb/html/home/home.shtml> (last visited Apr. 15, 2012).

78. *The Mayor's Initiatives*, VILLAGE VIEWS, Spring-Summer 1988, at 33, 39.

79. *Id.* at 40.

80. *Id.* at 33. It would seem that this opposition was not necessarily the result of the ideas set forth but more likely the product of a contentious relationship between the interests represented by the Cooper Committee and the Mayor's Initiative: the real estate community and

The Historic City Committee was formed, in part, as a response to the Cooper Committee as preservationists felt that they needed their interests represented to the Mayor.<sup>81</sup> The Historic City Committee, a group comprised of real estate professionals, lawyers, and preservationists organized by the Municipal Art Society in partnership with then-LPC Chairman Gene Norman, conducted a study on the LPC. As part of this study, the Committee looked at the enforcement division, comprised of Reynolds, reporting to Miner, and identified a number of deficiencies as well as a single strength: the LPC's refusal to issue new permits on buildings subject to uncorrected violations—i.e., the hostage policy.<sup>82</sup> In terms of problems, The Historic City Committee identified the enforcement staff as inadequate, although it mentioned that Tom Reynolds had “worked energetically pursuing compliance with the law”; citing the eight hundred Notices of Violation the previous year, 160 of which were accompanied by a Stop Work Order, spurred by twelve hundred complaints resultant in subsequent investigations.<sup>83</sup> The Historic City Committee identified the burdensome nature of having to go to court to enforce the Landmarks Law, necessitating the involvement of the Corporation Counsel Office.<sup>84</sup> The Committee also noted that fines that accompanied landmarks violations were “widely perceived as inadequate deterrents.”<sup>85</sup> To address these problems, the Historic City Committee compiled a set of recommendations that reiterated and expanded on the Cooper Committee's recommendations with regard to enforcement, including:

[F]irst . . . the enlargement of the present enforcement staff, now consisting of but one full-time member, that monitors landmarks and districts for violations; second, consideration of expanding the jurisdiction of the Environmental Control Board and adding landmarks violations to the area of environmental violations; third, the Committee proposes exploring the possibility of amending the Landmarks Law to permit private right of action suits to be brought against violators by bona fide groups with a recognized preservation interest.<sup>86</sup>

Otis Pearsall was responsible for the latter recommendation, what he termed the “private attorney general” ability.<sup>87</sup> If the law were amended to allow such

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the preservation community, respectively. At this time, there seemed to have been a veritable tug of war and the winner would control the future of the LPC.

81. Wood, *supra* note 74. During this time, a Committee was also formed by the New York State Senate Committee on Investigations, Taxation, and Government Operations to assess the state of the LPC. The committee later produced a report entitled *A Bureaucratic Nightmare*, which outlined some of the deficiencies of the LPC at the time. However, enforcement was not addressed. See N.Y. STATE COMM. ON INVESTIGATIONS, TAXATION, AND GOV'T OPERATIONS, *A BUREAUCRATIC NIGHTMARE: A STAFF REPORT ON THE OPERATIONS OF THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION* (1988).

82. HISTORIC CITY COMM., *NEW YORK: THE HISTORIC CITY* 30 (1989).

83. HISTORIC CITY COMM., *supra* note 82, at 30-31.

84. *Id.* at 30.

85. *Id.*

86. *Id.* at iii.

87. Interview with Otis Pearsall, *supra* note 1.

actions, community groups that met a certain standing, based on membership and time of founding, could initiate legal action against property owners in violation. According to Pearsall, LPC counsel Dorothy Miner vehemently opposed this idea and believed that the absolute power to prosecute must be left in the hands of the Commission.<sup>88</sup> Accordingly, this and the other two recommendations were not realized and substantial changes to the enforcement system of the LPC would not come for nearly a decade. Since The Historic City Committee echoed recommendations made by The Cooper Committee, historic preservation advocates rejected its findings even though it was formed to represent their interests. This is yet another reason why the progress of enforcement was years away.

In January of 1992, three years after The Historic City Committee study was released, the LPC took what would seem to be its first step in proactively enforcing the Landmarks Law in court.<sup>89</sup> Under Chair Laurie Beckelman, the LPC, in conjunction with the City's Corporation Counsel Office, sued eighteen property owners focused about Canal Street for their non-compliance with the Landmarks Law.<sup>90</sup> These efforts were part of a citywide cleanup policy adopted by Mayor Rudolph Giuliani and his administration.<sup>91</sup> This seemingly uncharacteristic action of the LPC, as suggested by the historical record up until this point, was also prompted by the SoHo Alliance's persistence in filing complaints not only with the LPC but also with the Manhattan District Attorney's Office.<sup>92</sup> As part of the SoHo-Cast Iron Historic District, these eighteen properties were subject to the Landmarks Law and, accordingly, all work being done required a permit from the LPC. However, these property owners ignored requirements and unlawfully installed signage and awnings and altered their storefronts as, at the time, "[l]andmarks compliance . . . [had] often been considered irrelevant."<sup>93</sup> As a result of these unpermitted alterations and accretions, neighborhood residents described the area as having taken on a "'flea market' atmosphere."<sup>94</sup> The lawsuits filed by

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88. Interview with Otis Pearsall, *supra* note 1. A related anecdote was recounted by former LPC Commissioner Stephen M. Raphael. As the first LPC Commissioner who was also a lawyer, Raphael explains that Miner was very wary of him and his intentions. In making small talk, Miner learned that Raphael attended Columbia University and took a class taught by her father who was a history professor there. At their next meeting, Miner approached Raphael and said, "You got an 'A' in my father's class," having gone home and checked the records of her deceased father. Raphael confirmed that to be the case and from this point forward, Miner and Raphael maintained an amicable relationship. Interview with Stephen Raphael (Mar. 2, 2010) (on file with author).

89. Christopher Gray, *On a Garish Thoroughfare, Oh-So-Slow Compliance*, N.Y. TIMES, Jan. 30, 1994, at R7.

90. See *id.*

91. See Dan Barry, *The Giuliani Years: The Overview; A Man Who Became More Than a Mayor*, N.Y. TIMES, Dec. 31, 2001, at A1, available at <http://www.nytimes.com/2001/12/31/nyregion/the-giuliani-years-the-overview-a-man-who-became-more-than-a-mayor.html>.

92. See Gray, *supra* note 89.

93. *Id.*

94. Eleanor Blau, *Panel Sues Landlords to Protect SoHo Sites*, N.Y. TIMES, Jan. 31, 1992, at B3.



the LPC intended to force the property owners in violation to “remove illegal signs, restore demolished details and generally make their century-plus-old structures presentable.”<sup>95</sup>

Accordingly, the City sought \$5000 for each violation and \$1000 per day until each was resolved.<sup>96</sup> The most egregious of the properties in violation was 375 Canal Street, which had fifteen violations, the most of any landmark building in New York City at the time.<sup>97</sup> Leonard Hecht, who owned 373 Canal Street, a property that was also in violation of the Landmarks Law and subject to prosecution, said that he knew about landmark violations, but that the lawsuit was unfair because he just “‘did the same thing as everyone else.’”<sup>98</sup> In 1994, two years after the suit was filed, only three of the eighteen buildings had cured their violations and only one penalty totaling \$1350 had been levied, demonstrating the Commission’s initially firm but subsequently soft follow-through in enforcing the law at the time. Describing the course of legal action, Abby Fiorella of the Corporation Counsel Office said, “[t]hese actions are very labor-intensive.”<sup>99</sup> George Calderaro, then-Spokesman for the LPC, continued in this sentiment, saying, “[i]t’s a can of worms . . . . It’s not how we want to have building owners comply.”<sup>100</sup> An LPC Enforcement Officer at the time, Tom Reynolds, called the process “a logistical nightmare.”<sup>101</sup> To get the building histories into the briefs, plus the delays of the court system, it was the first time in any comprehensive way that the LPC was legally enforcing the law, but it was so protracted because the system wasn’t designed to do this. It was hugely inefficient. There was no real bounce out of it and it didn’t have much of an effect.

From 1978 to early 1994, the LPC developed an enforcement system and demonstrated the power of the Landmarks Law in court by proactively prosecuting a group of property owners in violation. The historical record suggests that in demonstrating its legal ability, the LPC was exhibiting an increased level of comfort in its identity as an enforcement agency. While a direct link between the two was never found, this growth and maturation seems to be, at least in part, resultant from an increased confidence in historic preservation as a constitutional form of regulation as confirmed by *Penn Central*. Even so, according to preservation advocates, enforcement of the law still needed to be improved. In the coming years, this system would become increasingly streamlined, though, some would argue, at a serious cost.

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95. Gray, *supra* note 89.

96. See *id.*

97. *Id.*

98. Blau, *supra* note 94.

99. Gray, *supra* note 89.

100. *Id.*

101. Interview with Tom Reynolds, *supra* note 45.

## III. FORMALIZING ENFORCEMENT (1994-1998)

In 1994, New York City preservationists were introduced to a figure that would prove a polarizing new addition to their community. In July of that year, Jennifer J. Raab was appointed as Chair of the LPC by Mayor Rudolph Giuliani, succeeding Laurie Beckelman.<sup>102</sup> Raab grew up in the Washington Heights section of Manhattan, attended Hunter College High School followed by Cornell University, Princeton University's Woodrow Wilson School of Public and International Affairs and, lastly, Harvard Law School.<sup>103</sup> Before her appointment, Raab was the Director of Public Affairs for the New York City Department of City Planning, acted as Issues Director on Giuliani's failed 1989 mayoral campaign, and worked as a litigator for Paul, Weiss, Rifkind, Wharton & Garrison.<sup>104</sup> While highly educated, she had little experience with historic preservation and was effectively an outsider to the field and its community. Raab's disposition as such would seem to serve as both her strength and weakness at the LPC.

As Chair of the LPC, Raab found herself with a newly assumed responsibility of 20,000 landmarked buildings, approximately 2.5% of all of the properties in New York, which generated thousands of LPC applications a year.<sup>105</sup> Raab brought a perspective to the Commission that had previously been exhibited by the Koch administration but had not been effectively implemented. "Raab was committed to seeking more cooperation from property owners, before, during and after designation."<sup>106</sup> According to periodicals of the time, Raab believed that preservationists and real estate developers were members of the same community, instead of the common belief that they were diametrically opposed constituencies. Accordingly, Raab sought to change the way the Commission functioned.<sup>107</sup>

Soon after being appointed, Raab requested that the Commission's tried, tested, and ever-victorious Legal Counsel, Dorothy Miner, resign. As an asset to the preservation community, Miner was seen as a clear opponent of the real estate community. According to anecdotal evidence, when he was appointed chair of the LPC in the early 1980s, Kent Barwick received a telephone call

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102. David W. Dunlap, *Enlarging the Preservation Band*, N.Y. TIMES, July 20, 1997, at § 9; Peter Slatin, *At Landmarks, a Businesslike Balancing Act*, N.Y. TIMES, May 7, 1995, at R7.

103. Karen W. Arenson, *Mayor's Choice Picked to Run Hunter College*, N.Y. TIMES, Jan. 30, 2001, at B3.

104. Slatin, *supra* note 102.

105. Dunlap, *supra* note 102.

106. PEARSON, *supra* note 30, at 125.

107. Interview with Otis Pearsall, *supra* note 1. According to Wood's *Preserving New York*, until this point the "ranks of landmarks commissioners were heavily populated with prominent civic leaders with strong ties to preservation-minded civic and professional organizations." WOOD, *supra* note 24 at 389. But, as Otis Pearsall stated, "[Raab] is a very bright lady and had a lot of natural capability, . . . but she was not a preservationist." Interview with Otis Pearsall, *supra* note 1. Beginning in the 1990s, as Wood posited, "the number of landmark commissioners with strong personal and professional ties to preservation-minded organizations began to decrease." WOOD, *supra* note 24 at 389. This unofficial policy extended to the staff of the LPC as well. See generally *id.*

from an acquaintance involved in real estate in New York who told him a way to establish a good working relationship with the New York City real estate community would be to fire Miner. Barwick did not. Miner continued on at the LPC until Raab's appointment, when she was asked to resign.<sup>108</sup> Tom Reynolds, Miner's Enforcement Officer, also left the Commission at this time.<sup>109</sup> In an interview reported in *The New York Times*, Raab indicated that it was not an easy decision to ask Miner to resign, as Miner was an undeniable asset to the LPC and the preservation community, having guided the Commission through Penn Central, among other noteworthy cases.<sup>110</sup> Valerie Campbell was hired as the new General Counsel to the LPC to further the regulatory needs of the Commission, a task that, according to Raab, Miner was incapable of achieving.<sup>111</sup> Some contend that the preservation community was "immediately antagonized when Raab decided to replace Dorothy Miner, the long-time agency counsel and staunch defender of the Landmarks [L]aw."<sup>112</sup>

Preservation advocates saw Raab's firing of Miner, and other changes to the regulatory system,<sup>113</sup> as diluting the authority of the LPC. Advocates feared that in making it more user-friendly for the real estate industry, the LPC was becoming an "instrument of city policy rather than a semi-autonomous deliberative body that [could], if necessary, stand up to City Hall."<sup>114</sup> Anthony C. Wood, a longtime preservationist, stated "at some point, if you're playing a regulatory role, somebody's not going to be happy," referring to property owners, the regulated, and/or the Commission.<sup>115</sup> In saying this, Wood suggests that sometimes people are simply not happy with the laws that govern

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108. Interview with Anthony Wood (Jan. 22, 2010) (on file with author); Interview with Stephen Raphael, *supra* note 88.

109. Interview with Tom Reynolds, *supra* note 45.

110. A 'Fresh Eye' Wanted, Counsel Leaving Landmarks Panel, *N.Y. TIMES*, Oct. 16, 1994, at § 9.

111. Interview with Stephen Raphael, *supra* note 88. It must be noted that while it may seem that Miner was not open to the possibility of the Landmarks Law changing, Otis Pearsall and Stephen M. Raphael, both of whom knew Miner, say this was not the case. *Id.*; Interview with Otis Pearsall, *supra* note 1.

112. PEARSON, *supra* note 30, at 120.

113. Dunlap, *supra* note 102. In line with propagating a more pro-real estate sentiment, as is suggested by the historical record, Raab reversed the policy that the Commission was not allowed to consider costs in their regulatory decisions, stating "[w]e are not precluded from finding a less burdensome approach appropriate. If you give someone the opportunity to present an argument as to why a new material will work as well as the replacement of old material in kind, we can all learn together." *Id.* Preservation advocates asserted that by adopting this new policy Raab was decreasing the standard to which protected historic resources were held. Raab also extended powers previously reserved for the Commissioners to LPC staff. The LPC staff was now allowed to approve inexact replications, an approval previously only to be made by the Commissioners. In allowing an increase in staff level responsibility, preservation advocates argued that they and the public-at-large were further disenfranchised from the landmark regulation process, specifically its right to be heard at the Commission's hearings. *Id.*

114. *Id.*

115. *Id.*

them, but this does not preclude them from their subjection. Clearly, Wood's perspective and that of Raab, who it would seem was striving to be more user-friendly at the cost of the preservation standard, as preservationists would contest, were at odds.

As a result of these regulatory changes, the preservation community felt as if the LPC was acting under the influence of a Mayor who was more concerned with the needs of the real estate community than with the principles of historic preservation and the thoughts of the preservation community, the same community which fought for the establishment of the Commission and grew the law until this point. As a result, Franny Eberhart, former Executive Director of the Historic Districts Council, and preservationists at large felt that Raab fractured the partnership between preservationists and the LPC, an injury that today, some say, has yet to be healed.<sup>116</sup> However, while this may have been true of other aspects of the LPC's conduct at the time, it was not in terms of enforcement of the Landmarks Law. Ironically, as the historical record will suggest, enforcement of the Landmarks Law seems to have been substantially improved under Raab's tenure.<sup>117</sup>

While Raab was Chair of the LPC, City Councilman Kenneth Fisher was the head of the Subcommittee on Landmarks, Public Siting and Maritime Uses of the Land Use Committee of the City Council.<sup>118</sup> Fisher's Subcommittee approved designations made by Raab's LPC in addition to overseeing its budget. Raab and Fisher, as he explains it, grew a close working relationship as a result of their interactions, a relationship that would prove to be beneficial to the preservation community in the coming years.<sup>119</sup>

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116. Interview with Franny Eberhart, Bd. of Dirs., Historic Dist. Council (Jan. 13, 2010) (on file with the Widener Law Review).

117. It must be noted that Raab had positive effects on the LPC. Until Raab's appointment, it was not uncommon for Commission hearings to last into the early hours of the following morning. Raab changed that, keeping to an enumerated schedule. However, Anthony C. Wood noted that while this may seem to be an administrative improvement, it was achieved at the expense of thoughtful comments from the Commissioners. According to the written record, Raab also thought that it was important that the LPC maintain itself as its own agency. Soon after her appointment, Raab resisted the merging of the Landmarks Preservation Commission and the City Planning Commission. Likewise, she fought to protect the LPC's budget over the course of her tenure, attributed by Wood to her good working relationship with Mayor Giuliani.

118. Fisher, whose district included Brooklyn Heights, Cobble Hill, Greenpoint, Fulton Ferry, DUMBO, Vinegar Hill, and parts of Park Slope, was engaged in preservation as the result of the interests of his constituencies. Besides his legislative contribution to bolstering enforcement of the Landmarks Law, Kenneth Fisher also proposed the creation of a High School for Preservation Arts and, along with Councilman Andrew Eristoff, requested that City of New York Independent Budget Office examine the effects of historic preservation in New York City on residential property values. This report is entitled *The Impact of Historic Districts on Residential Property Values* and was released on September 9, 2003. Interview with Kenneth Fisher, Former Chair, Land Use Subcomm. on Landmarks, Public Siting and Mar. Uses (Jan. 29, 2010) (on file with the Widener Law Review).

119. *Id.*

Raab sought to resolve an issue that had been frustrating the preservation community and the Commission for years. At the time, the Landmarks Law was enforceable only by going to criminal court. Simeon Bankoff, Executive Director of the Historic Districts Council, recalled that, “no criminal court judge in the world [would give a] hoot. [In the case beforehand, the guy may have] raped his mother.”<sup>120</sup> In other words, the judge had more important things to do.<sup>121</sup> To rephrase these fusillades, hearing landmark violations in a criminal court was, according to some preservation advocates, unreasonable and inappropriate. Soon after her appointment, Raab sat down to breakfast with Franny Eberhart and Eric Allison, then Executive Director and President of the Historic Districts Council, respectively. Eberhart and Allison raised the issue of enforcement to Raab with the belief that under the legally-minded Giuliani administration, change to the LPC’s enforcement system might be possible.<sup>122</sup> Eberhart said, “[W]hen we sat down for breakfast, this was an issue that [Raab] hadn’t heard about but it seemed completely crazy to her that the only remedy for [violations] were criminal penalties and that indeed it need[ed] to be a civil process.”<sup>123</sup> It would seem that effectuating this change was in keeping with the Giuliani administration, which was against having violations sit on the books without a way for them to be fixed.<sup>124</sup> It has been stated that “[p]erhaps because of her background as a litigator, Raab was able to persuade the administration that the Commission needed to address enforcement issues, long a matter of concern for the preservation community.”<sup>125</sup> As part of this effort, “[t]he agency budget was increased to allow her to hire a [D]irector of [E]nforcement.”<sup>126</sup>

Decided that the law needed to be amended, Raab and Fisher sat down with Mark Silberman, who had been hired under Raab as the Director of Enforcement but functioned as Deputy Counsel under Valeria Campbell at the time.<sup>127</sup> Before arriving at the LPC, Silberman was an environmental lobbyist in Washington, D.C. and had worked with Paul, Weiss, Rifkind, Wharton & Garrison, the firm at which Raab previously worked. Raab was referred to Silberman by a mutual friend as a tactile amender of the Landmarks Law. Together, Raab, Fisher, and Silberman decided that if they were going to fix the “dysfunctional system” currently in place, comprised of the hostage policy and criminal prosecution, that for political reasons the new system could not be seen as typical in its enforcement demeanor.<sup>128</sup> Silberman explained that the LPC could not be perceived as nickel-and-diming the public.<sup>129</sup> This sentiment would be evident in the administrative system as enacted.

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120. Interview with Simeon Bankoff, *supra* note 65.

121. *Id.*

122. Interview with Franny Eberhart, *supra* note 116.

123. *Id.*

124. Interview with Simeon Bankoff, *supra* note 65.

125. PEARSON, *supra* note 30, at 125.

126. *Id.*

127. Interview with Mark Silberman, *supra* note 65.

128. *Id.*

129. *Id.*

Raab asked Silberman, her Deputy Counsel, to draft an amendment to the legislation that consciously created a “forgiving system” and, when it was completed, she approached Councilman Fisher.<sup>130</sup> On December 9, 1997 the amendment to the Landmarks Law was proposed by the Landmarks, Public Siting and Maritime Uses Subcommittee and subsequently approved by the Land Use Committee.<sup>131</sup> Eight days later, the amendment to the Landmarks Law passed the City Council and was signed into law by Mayor Giuliani on January 6, 1998.<sup>132</sup>

According to preservation advocates and staff members of the LPC, the 1998 amendment substantially improved the enforcement of the Landmarks Law. It is noteworthy that the amendment did not revoke either the ability of the LPC to withhold permits should an open violation remain outstanding or the LPC’s ability to pursue a violator in court.<sup>133</sup> Rather, the amendment made the Landmarks Law more readily enforceable by expanding the abilities of the LPC, enabling it to pursue property owners in violation outside of criminal court, either in civil court or at the Environmental Control Board.<sup>134</sup> In being able to pursue property owners in violation at the Environmental Control Board, a recommendation made by The Cooper Committee and The Historic City Committee nearly a decade earlier, fewer resources needed to be dedicated to resolving each enforcement action thus making the law easier to enforce. Former Councilman Kenneth Fisher described the amended enforcement system as providing both a carrot and a stick to the Commission’s enforcement toolbox, both of which could be used to compel compliance of the property owner.<sup>135</sup> According to Fisher, it gave property owners the benefit of the doubt, with multiple grace periods for them to rectify the violation, the so-called carrot. The amendment also included a new Warning Letter phase that did not include a fine whereas previously a fine was immediately levied.<sup>136</sup> Fines, the stick as Fisher described them, would eventually be levied should the property owner in violation not rectify the condition in a timely manner or appropriate fashion.<sup>137</sup>

While many saw this change in the legislation as an improvement, not all preservationists agreed. Otis Pearsall stated the law involves a lugubrious process and is not intended as a bludgeon. “[T]he statute on its face bends over backwards to scream that this is really not a weapon that’s going to make

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130. Interview with Mark Silberman, *supra* note 65.

131. NEW YORK CITY COUNCIL LEGIS. RES. CENTER, FILE # INT 1008-1997-A, <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=430183&GUID=F5937E52D56A4eC3-85B0-A9C4DAB37C63&Options=IDText&Search=1008-1997> (last visited Apr. 15, 2012). [hereinafter NEW YORK CITY COUNCIL LEGIS. RES. CENTER]. It must be noted that the transcript for these hearing is neither online nor available with the City Clerk. Meeting minutes, on the other hand, are available, in certain instances, online.

132. *Id.*

133. Interview with Lily Fan & Kathleen Rice (Jan. 21, 2010) (on file with the Widener Law Review).

134. NEW YORK CITY COUNCIL LEGIS. RES. CENTER, *supra* note 131.

135. Interview with Kenneth Fisher, *supra* note 118.

136. *Id.*

137. *Id.*

a whole lot of difference.”<sup>138</sup> The 1998 amendment seems to have been written to enable and facilitate compliance as opposed to outright penalizing violators of the Landmarks Law, reflecting, as some preservation advocates would suggest, the pro-real estate and preservation-light mentality of its strongest proponent, Raab. Some preservationists would argue that a more punitive approach would send a message that would compel future compliance whereas the civil system, according to Pearsall, does everything in its power not to punish the property owner.<sup>139</sup>

While regarded by some as an adversary to historic preservation, it seems Jennifer Raab improved the enforcement of the Landmarks Law. Raab formalized a system developed under Dorothy Miner and practiced by the LPC’s enforcement vanguard, Tom Reynolds, with support from local community groups. As a legally-minded manager and administrator, it seems that Raab’s professional experience enabled her to achieve this improvement.

#### IV. FUNCTIONING AND MATURING (1998-2010)

The 1998 amendment to the Landmarks Law created administrative enforcement. Legal enforcement of the law was also expanded by this amendment. Civil litigation would prove to be the LPC’s most effective enforcement asset in the coming years. In the late 1990s, the LPC brought suit against the owner of 305 State Street in the Boerum Hill Historic District in Brooklyn.<sup>140</sup> The owner was not maintaining her row house, thereby putting the structure in danger of collapse. After being sued, the owner, who lived in Hawaii and was very difficult to track down, put a voodoo curse on the LPC’s General Counsel, Mark Silberman.<sup>141</sup> After many attempts at negotiation and the pressure of legal action looming, the owner died and the property was sold by her estate to a new owner who subsequently restored it.<sup>142</sup> This was the first case in the history of the LPC of demolition by neglect litigation in which owners that endanger landmarks by failing to maintain them were prosecuted by the LPC. Such action, according to the LPC’s Deputy Counsel John Weiss, would become a staple of the enforcement system in the years to come.<sup>143</sup>

At this time, a general concern for the enforcement of the Landmarks Law was growing. In 2001, a preservation advocacy organization held an event for then mayoral candidate Michael Bloomberg to interact with the preservationist constituency. At this breakfast, Bloomberg stated, “All of the rules and regulations that everybody talks about always leaves me cold when I then go

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138. Interview with Otis Pearsall, *supra* note 1.

139. *Id.*

140. John Weiss, Pursuing an Owner for Demolition-by-Neglect: A Tortuous Legal Path, DISTRICT LINES, Spring 2009, at 2, available at [http://www.eastharlempreservation.org/docs/corn\\_DLspring09.pdf](http://www.eastharlempreservation.org/docs/corn_DLspring09.pdf).

141. Weiss, *supra* note 140, at 2.

142. E-mail from John Weiss to Benjamin Baccash (Feb. 5, 2010) (on file with author).

143. Weiss, *supra* note 140, at 2.

out to the streets and see that it is totally meaningless. It is just a bunch of people talking about solving a problem without ever actually doing it.”<sup>144</sup> It would seem that, according to Bloomberg, the Landmarks Law was not being actively enforced as it should be. He insisted, “We have to give Landmarks a budget that will give them some enforcement capability.”<sup>145</sup> As the historical record will suggest, the coming years would yield an increase in active and effective enforcement of the Landmarks Law.

In 2002, the LPC filed suit against 10-12 Cooper Square, Inc., for demolition by neglect.<sup>146</sup> The defendant owned the Skidmore House, an individual landmark which, built in the mid-nineteenth century, was a Greek Revival row house on East 4th Street in Manhattan, now freestanding as a result of the demolition of its neighboring buildings over the years. Apparently in the hopes that its building would collapse, the defendant strategically stopped maintaining the structure. The defendant owned an adjacent, large parcel of land to the east for which development was imminent. In neglecting the Skidmore House, it appears the defendant hoped that if the building collapsed, it would be able to construct a larger and more profitable building on the site. However, the increasingly aggressive legal department of the LPC was keen to this method of subterfuge and accordingly filed a lawsuit. On December 29, 2004, two years after the suit was initiated, the court ruled in favor of the LPC and the defendant was ordered to restore the Skidmore House to a state of good repair.<sup>147</sup>

On September 15, 2003, the LPC filed another demolition by neglect suit against Retrovest Associates, Inc., the owners of New Brighton Village Hall.<sup>148</sup> New Brighton Village Hall, a “three-story brick building with a steep mansard roof,” was designated an individual landmark on September 21, 1965 as “an interesting example of the French Second Empire Style of architecture in an American rural setting.”<sup>149</sup> The Department of Buildings ordered that the structure be demolished, following what would seem to have been relentless neglect. Unlike the Skidmore House case, the LPC agreed to settle out of court with the owners of New Brighton Village Hall on May 20, 2005.<sup>150</sup> The settlement required the owners of New Brighton Village Hall to pay \$50,000 to the General Fund of the City of New York.<sup>151</sup> In addition to the cash

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144. Michael Bloomberg, Address at the Republican Candidate’s Breakfast (Aug. 8, 2001).

145. *Id.*

146. *City of New York v. 10-12 Cooper Square, Inc.*, 793 N.Y.S.2d 688, 691 (N.Y. Sup. Ct. 2004).

147. *Id.* at 693.

148. *City of New York v. Retrovest Assocs., Inc.*, No. 12844/2003 (N.Y. Sup. Ct. Apr. 7, 2004) (order denying motion to dismiss).

149. N.Y.C. LANDMARKS PRES. COMM’N, LP-0028, NEW BRIGHTON VILLAGE HALL (2006) (original designation report issued on October 14, 1965).

150. E-mail from John Weiss to Benjamin Baccash, *supra* note 142.

151. N.Y.C. LANDMARKS PRES. COMM’N, LP-0028 A, LANDMARK SITE OF FORMER NEW BRIGHTON VILLAGE HALL (2006), available at <http://home2.nyc.gov/html/records/pdf/govpub/2782nbvillagehallrecis.pdf> [hereinafter LP-0028 A] (addendum to the original



settlement, the property was given to the City, effectively increasing the value of the settlement to approximately \$1,000,000.<sup>152</sup> The land is now used as subsidized senior housing.<sup>153</sup> Following this settlement, the LPC requested the \$50,000 from the City and was granted such, subsequently using the funds to digitize its collections of historic photographs.<sup>154</sup>

While seemingly more aggressive in terms of legal pursuit of violators, the LPC was still regarded by some preservation advocates as not fulfilling its responsibilities to fully enforce the Landmarks Law. In a report entitled “Problems Experienced By Community Groups Working With the Landmarks Preservation Commission,” the Women’s City Club of New York identified what they believed were deficiencies in the enforcement of the Landmarks Law.<sup>155</sup> The report stated, “Property owners and other members of the general public perceive the LPC’s enforcement of the Landmarks Law as inconsistent and erratic. Work done without permits is often undetected and uncorrected, in part due to shortage of enforcement staff.”<sup>156</sup>

With an ever-increasing regulatory purview, a second Enforcement Officer was hired under Chair Robert Tierney in 2004.<sup>157</sup> This would seem to confirm that enforcement of the Landmarks Law was becoming a higher priority of the LPC, a possible result of being on the mind of the City’s Mayor and its growing presence in the conscience of preservationists in general. Now, instead of one Enforcement Officer responsible for approximately 23,000 protected properties, the duties of enforcement were able to be distributed among two Enforcement Officers, each responsible for approximately 11,500 designated landmarks. While certainly an improvement, preservation advocates contended that this responsibility was still unwieldy.<sup>158</sup>

Also in 2004, the LPC filed a lawsuit against Sushi Samba 7, a Brazilian-Japanese fusion restaurant located on the corner of Barrow Street and Seventh Avenue South in the Greenwich Village Historic District. Sushi Samba 7 built a rooftop addition in discordance with a permit issued by the LPC. This resulted in numerous violations that Sushi Samba 7 refused to rectify. Three

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designation report); Telephone Interview with John Weiss, Deputy Counsel, N.Y.C. Landmarks Pres. Comm’n (Mar. 26, 2010) (on file with the Widener Law Review).

152. LP-0028 A, *supra* note 151 (Noting “[t]he site was appraised as being worth \$985,000. The owner also paid \$50,000 in a financial penalty, and paid the demolition costs and various other expenses resulting in a settlement package worth approximately \$1.1 million dollars.”); Telephone Interview with John Weiss (Apr. 16, 2010) (on file with the Widener Law Review).

153. LP-0028 A, *supra* note 151.

154. Telephone Interview with John Weiss, *supra* note 151.

155. See generally THE ARTS AND LANDMARKS COMM. OF THE WOMEN’S CITY CLUB OF N.Y., REPORT: PROBLEMS EXPERIENCED BY COMMUNITY GROUPS WORKING WITH THE LANDMARKS PRESERVATION COMMISSION, (Nov. 17, 2004) [hereinafter WOMEN’S CITY CLUB OF N.Y.] (discussing nine problems associated with working with the LPC).

156. *Id.* at 13.

157. Interview with John Weiss (Dec. 1, 2009) (on file with the Widener Law Review).

158. WOMEN’S CITY CLUB OF N.Y., *supra* note 155, at 2, 14.

years later, this case was settled, resulting in a penalty of \$500,000 paid by Sushi Samba 7 to the City of New York.<sup>159</sup>

While legal enforcement of the Landmarks Law proved effective, administrative enforcement continued to meet criticism. In 2005, at a Landmarks, Public Siting and Maritime Uses Subcommittee hearing, members of the City Council questioned the usefulness of parts of the administrative enforcement process. Members specifically challenged the Warning Letter phase, as only seven percent of violations were cured at this stage.<sup>160</sup> Warning letters, a part of the administrative enforcement system created as a result of the 1998 amendment to the Landmarks Law, were mailed to property owners prior to issuing violations and intended to provide a grace period to correct the condition in violation. Noting what would seem to be a low cure-rate, the Subcommittee asked that future Warning Letters be mailed certified with return receipt to ensure that they were received by property owners in violation of the Landmarks Law.<sup>161</sup>

Concurrently, Deputy Counsel for the LPC John Weiss had an idea on how to raise awareness of the responsibility of owners of landmarked properties. Weiss believed that the source of non-compliance, property owners, needed to be educated to curb violation of the Landmarks Law. Chair Robert Tierney described this effort as “a pilot project . . . that will send targeted mailings to the residents of three Brooklyn historic districts, [as a] public education effort designed to inform the residents and property owners of the Park Slope, Boerum [Hill] and Fort[] Greene historic districts of the need to obtain permits . . . before buildings are altered.”<sup>162</sup> The pilot program was facilitated by a grant of approximately \$5000 from the New York State Certified Local Government Program.<sup>163</sup> Weiss and Tierney had high hopes for this program. A special cover letter and brochure were drafted and mailed to every property owner in the aforementioned areas.<sup>164</sup> Unfortunately, according to Weiss, its effects were minimal. He stated that the number of applications and complaints did not really change. Weiss described this result as depressing and thought that maybe it was something that had to be done every year to get into the public consciousness.<sup>165</sup>

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159. Press Release, N.Y.C. Law Dep’t, Office of the Corp. Counsel, Landmarks Preservation Comm’n and N.Y.C. Law Dep’t Announce Settlement Over Illegal Rooftop Tent on Greenwich Village Restaurant (Feb. 1, 2007) [hereinafter Press Release, Settlement Over Illegal Rooftop Tent].

160. Hearing on Intro. No. 403-A Citywide 20055033 LLY Before the Subcomm. on Landmarks, Siting and Mar. Uses, 2004-2005 Sess. 38 (N.Y.C. 2004) [hereinafter Hearing on Intro.] (statement of Simcha Felder, Chairperson, Subcomm. on Landmarks, Siting and Mar. Uses).

161. *Id.* at 44.

162. Hearing on Intro., *supra* note 160, at 31 (statement of Robert Tierney, Chairman, N.Y.C. Landmarks Pres. Comm’n). Tierney also noted that this type of action should have been taken a long time ago. *Id.*

163. Telephone Interview with John Weiss, *supra* note 152.

164. See Benjamin Baccash, Enforcement and the New York City Landmarks Law: Past, Present and Future app. at § IV (May 2010) [hereinafter Appendix] (unpublished M.S. dissertation, Columbia University) (on file with the Widener Law Review).

165. Interview with John Weiss, *supra* note 157.

In 2005, with what would seem to be an increasingly aggressive enforcement mentality growing at the LPC in terms of legal action and anticipating future demolition by neglect cases, Councilmember Tony Avella proposed a way to further aid the enforcement process. The Demolition by Neglect Bill was introduced by Councilmember Avella in June of 2004. He brought the proposal to the Commission which, after careful consideration, supported the idea.<sup>166</sup> The bill sought to create a new type of administrative citation specifically for failure to maintain designated landmark properties in a state of good repair. This citation would be used to protect both entire buildings that had been neglected in addition to the neglect of character-defining architectural features.<sup>167</sup> Previously, administrative landmarks violations were issued for work done without a permit or in discordance with a permit. As it was proposed, the Commission would have the ability to cite property owners for neglecting to maintain their properties, an enforcement action which until this point was only pursuable in court as a matter of interpretation of the law.<sup>168</sup> Now, such legal action would be indisputable. At a City Council Subcommittee hearing, some members of the public, particularly not-for-profit organizations and religious institutions, expressed concern that they might be targeted as a result of their limited financial abilities to maintain their properties.<sup>169</sup> One speaker called the proposed maintenance standard, good repair, “a standardless, flawed concept.”<sup>170</sup> Others expressed concern that the LPC would run wild with the proposed abilities.<sup>171</sup> LPC General Counsel Mark Silberman reassured the dissenters that administrative demolition by neglect enforcement action would only be taken after “extensive outreach by the Commission to the owners of these buildings.”<sup>172</sup> On January 13, 2005, the City Council heard the bill, now definitive of what good repair means. At this hearing, every preservation advocacy group supported the amendment to the Landmarks Law.<sup>173</sup> The Demolition by Neglect Bill was signed into law on February 15, 2005 by Mayor Michael Bloomberg.<sup>174</sup>

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166. Telephone Interview with John Weiss, *supra* note 151.

167. Hearing on Intro., *supra* note 160, at 3-5 (statement of Mark Silberman, Gen. Counsel, N.Y.C. Landmarks Pres. Comm’n).

168. *Id.* While not expressly written into the law before 2005, this interpretation was never challenged.

169. *Id.* at 17-19 (statement of Reverend N.J. Liteureux, Jr., Exec. Dir., Queens Fed’n of Churches).

170. *Id.* at 38.

171. *Id.* at 21-22 (statement of George J. McCormack, General Counsel, Catholic Archdiocese of N.Y.).

172. *Id.* at 11 (statement of Mark Silberman, Gen. Counsel, N.Y.C. Landmarks Pres. Comm’n).

173. Hearing on Intro. No. 403-B Citywide 20055033 LLY Section 25-311 Before the Comm. on Land Use, 2004-2005 Sess. 12 (N.Y.C. 2005) (statement of Tony Avella, Council Member, Comm. On Land Use).

174. NEW YORK CITY COUNCIL LEGIS. RES. CENTER, FILE # INT 0403-2004-B, <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=442606&GUID=5601A68655064DFFD-8F0D-821B87D48BF1&Search=&Options=> (last visited Apr. 15, 2012).

In 2006, approximately a year after the Landmarks Law was amended to include demolition by neglect as an enumerated course of enforcement, the LPC filed suit against Alfred Palmer, the owner of 135 Joralemon Street in the Brooklyn Heights Historic District, after issuing several Failure to Maintain violations.<sup>175</sup> Preservation pioneer Otis Pearsall noted that he had been complaining to the Commission for over twenty years about this particular property.<sup>176</sup> The City settled out of court with the owner in 2006.<sup>177</sup> Two years later, the LPC filed suit against three more property owners for failure to maintain their landmarked properties in a state of good repair in City of New York v. Toa Construction, Inc.,<sup>178</sup> where the individually landmarked Windermere Apartment Complex on West 57th Street and Ninth Avenue was being neglected; City of New York v. Corn Exchange, LLC,<sup>179</sup> where the individually landmarked Corn Exchange Bank on Park Avenue and 125th Street was being neglected; and, City of New York v. Estate of Johnson,<sup>180</sup> where a row house on MacDonough Street in the Stuyvesant Heights Historic District was being neglected. The Windermere case was settled out of court, including \$1.1 million paid to the City, while the Corn Exchange case remains unresolved. The building is currently almost entirely collapsed,<sup>181</sup> and the case has been further complicated by the defendant filing for bankruptcy. A default order was issued in September of 2008 in the MacDonough case when the property was transferred. According to John Weiss, the new owner of 217 MacDonough Street is obligated to make repairs due to negotiations amongst the LPC, Law Department, buyer, and defendant seller.<sup>182</sup>

On April 5, 2010, the LPC filed suit against John Quadrozzi, Jr., the owner of 346 Henry Street and 129 Congress Street, a four-story row house and two-story carriage house in the Cobble Hill Historic District in Brooklyn that had fallen into a state of severe disrepair.<sup>183</sup> The suit alleged that the “walls of the 1852 brownstone [were] badly cracked and there [were] holes in the adjacent

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175. City of New York v. Palmer, No. 620/2006 (N.Y. Sup. Ct., Jan. 9, 2006) (order to Show Cause).

176. Interview with Otis Pearsall, *supra* note 1.

177. E-mail from John Weiss to Benjamin Baccash, *supra* note 142.

178. City of New York v. Toa Constr., Inc., No. 400584/2008 (N.Y. Sup. Ct. May 8, 2008) (stipulation and order).

179. City of New York v. Corn Exch., LLC, No. 401846/2008 (N.Y. Sup. Ct. Jan. 29, 2009), available at [http://decisions.courts.state.ny.us/fcas/FCAS\\_docs/2009FEB/3004018462008001SCIV.pdf](http://decisions.courts.state.ny.us/fcas/FCAS_docs/2009FEB/3004018462008001SCIV.pdf) (order denying preliminary injunction).

180. City of New York v. Estate of Johnson, No. 23104/2008 (N.Y. Sup. Ct. Oct. 7, 2009) (stipulation).

181. Christopher Gray, A Once Proud Bank, Brought Low, N.Y. TIMES, Mar. 21, 2010, at RE 8.

182. E-mail from John Weiss to Benjamin Baccash, *supra* note 142.

183. Interview with John Weiss (Apr. 8, 2010) (on file with the Widener Law Review); see City of New York v. Quadrozzi Jr., No. 8442/2010 (N.Y. Sup. Ct. May 21, 2010) (Stipulation addressing repair).

stable's roof.”<sup>184</sup> The property owner blamed the LPC for the condition of the building, saying it was a result of the LPC’s “unwieldy city bureaucracy.”<sup>185</sup>

As of May 11, 2010, demolition had begun on 348 Clermont Avenue, a row house in the Fort Greene Historic District which was in a state of severe deterioration. Deputy Counsel John Weiss indicated that the demolition by neglect suit concerning this property was innovative in that it was against both the current property owner and a past property owner for failure to maintain the designated landmark.<sup>186</sup> This was the first time the LPC filed a suit of this nature.

Today, the LPC seems more aggressive in terms of enforcement than it once was, although some preservation advocates would argue still not aggressive enough.<sup>187</sup> While some preservation advocates see the efforts to prosecute in situations of demolition by neglect as victories, others question the manner in which they are handled. Former LPC Commissioner Stephen M. Raphael criticized the LPC for not aggressively enforcing the law early enough, suggesting that by allowing minor conditions to go unresolved, a result of what would seem to be an ineffective administrative enforcement system, more severe situations of neglect were enabled.<sup>188</sup> Otis Pearsall voiced similar concern, explaining that small violations can lead to the erosion of historic districts.<sup>189</sup> However, as LPC Deputy Counsel John Weiss noted, litigation is avoided at almost all costs and only initiated once negotiations have reached an impasse.<sup>190</sup>

Since the Landmarks Law was amended in 1998 through the present day, the LPC has brought eight cases of demolition by neglect and issued thousands of Warning Letters and hundreds of Stop Work Orders and Notices of Violation.<sup>191</sup> However, the degree to which the administrative enforcement efforts have been effective is inconclusive as consistent and adequate performance indicators are not tracked. Although certainly better

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184. Mike McLaughlin, *City Sues Homeowner Over Crumbling Historic Buildings in Cobble Hill*, N.Y. DAILY NEWS (Apr. 22, 2010), [http://articles.nydailynews.com/2010-04-22/local/27062355\\_1\\_vacant-buildings-historically-significant-buildings-buildings-department](http://articles.nydailynews.com/2010-04-22/local/27062355_1_vacant-buildings-historically-significant-buildings-buildings-department).

185. *Id.*

186. E-mail from John Weiss, Deputy Counsel, N.Y.C. Landmarks Pres. Comm’n, to Benjamin Baccash (Apr. 26, 2010) (on file with author).

187. Aside from the eight suits initiated by the LPC since 1998, the Commission also responded to many lawsuits, some from property owners who contested the legitimacy of the designation of their properties and others from advocates, including *Citizens Emergency Committee to Preserve Pres. v. Tierney*, filed in New York County Supreme Court and presided over by Judge Shafer, calling attention to the LPC’s complacency, its lack of action to designate, and its need for operational transparency. *In re Citizens Emergency Comm. to Preserve Pres. v. Tierney*, No. 103373/08, 2008 N.Y. Misc. LEXIS 8105, at \*4-\*11 (N.Y. Sup. Ct. Nov. 14, 2008), *rev’d on other grounds*, 896 N.Y.S. 2d 41 (App. Div. 2010). Judge Shafer ruled in favor of the plaintiff. *Id.* at \*11.

188. Interview with Stephen Raphael, *supra* note 88.

189. Interview with Otis Pearsall, *supra* note 1.

190. Interview with John Weiss, *supra* note 157.

191. Appendix, *supra* note 164, at § V.

than it was, preservation advocates would argue that enforcement of the Landmarks Law can be further improved.

The enforcement system of the LPC has certainly come a long way since 1965. Initially, it was an unwieldy spear, as the Landmarks Law was only enforceable in criminal court. Coupled with this cumbersome mode of enforcement, the young LPC was hesitant and timid and thus enforcement action was rarely taken. Soon after the Penn Central decision in 1978, which seems to have infused the LPC with a greater sense of confidence, enforcement was developed in an ad hoc fashion but remained difficult as criminal prosecution was still the only method of enforcing the law. Then, in 1998, the Landmarks Law was amended and the enforcement system was improved, becoming enforceable in civil court and administratively at the Environmental Control Board in addition to in criminal court. This transformed what was an unwieldy spear into a usable trident. In the years following the amendment of the Landmarks Law, legal action became a staple of enforcement and proved extremely effective.

However, while a trident by design, preservation advocates argue that the enforcement system is a dull pitchfork in practice. This is the result of deficiencies in the administrative enforcement system—the mode of enforcement most frequently employed. The administrative enforcement system crafted under Raab's administration was overly considerate of property owners. Because the administrative system remains, it would seem to come with remnants of an undermining culture. In other words, the administrative enforcement system is representative of the 1990s enforcement culture of the LPC—an apologetic culture. Fourteen years after the administrative enforcement system was created, the LPC is decreasingly apologetic in enforcing its law as demonstrated by the more frequent subjection of property owners in severe violation of the Landmarks Law to legal action. But the same cannot necessarily be said for less severe violations.

Perhaps because the administrative remnants of 1990s culture persists, the LPC remains focused on compliance and the curing of violations as opposed to penalizing property owners for non-compliance with the Landmarks Law. In other words, the unabashedly disciplinary nature or legal action taken by the LPC is predominately supported by the preservation community while it would seem that the administrative enforcement system could be toughened to reflect a comparable sentiment. This is not to suggest that severe and minor violations of the law should be treated in the same fashion. However, it would seem that the administrative enforcement system could be updated to reflect the sentiment of preservationists of today as opposed to that of the 1990s. Accordingly, the LPC's current administrative enforcement system is heavily criticized by the historic preservation community. The community believes that the LPC remains mired under the influence of a preservationist mentality and that this influence interferes with the success of its regulatory perception, pursuit, and potential.

It would seem that, as it has evolved, the LPC has started to move beyond self-awareness, as demonstrated by the numerous cases of litigation to uphold

the Landmarks Law, and has begun to demonstrate an increased comfort enforcing the Landmarks Law. While there will always be room for improvement, the Landmarks Law's evolved strength is attributable largely to its relatively steadfast enforcement as considered from the perspective of its genesis.

#### V. HOW THE LANDMARKS LAW IS ENFORCED TODAY

The New York City Landmarks Law is enforced by the LPC's Department of Enforcement. The department is one of several at the LPC. The Department of Enforcement is headed by Lily Fan, the Director of Enforcement. In addition to her supervisory capacity, the Director of Enforcement represents the LPC at the Environmental Control Board (ECB), where violations of the Landmarks Law are heard. The ECB is an administrative tribunal that "hears cases on violations of City laws that protect health, safety and a clean environment."<sup>192</sup> General Counsel of the LPC Mark Silberman and Deputy Counsel John Weiss coordinate with the Director of Enforcement, pursuing owners that are in more serious violation of the Landmarks Law in civil or criminal court. With an understanding of how the Department of Enforcement is organized within the greater LPC, this article will now examine the administrative enforcement process—the time from when a complaint is filed to when a condition in violation of the Landmarks Law is resolved.

The LPC does not have the resources to support a staff that can actively survey the more than 27,000 historic resources under its purview. LPC Deputy Counsel John Weiss believes that the LPC does not have sufficient staff to do sweeps of entire neighborhoods. Nonetheless, Weiss stated: we investigate "every single complaint that comes in."<sup>193</sup> Lily Fan, the Director of Enforcement, indicated that small-scale surveys were done only when a trend of offenses was occurring in a specific location.<sup>194</sup> For example, if the owner of a property regulated by the LPC installed a fence without first applying for a permit and other neighbors followed suit, the LPC, having been made aware of this by a complaint, would go to the area and conduct an area-based investigation. It should be no surprise that the LPC does not do full scale surveys. Simeon Bankoff, the Executive Director of the Historic Districts Council, stated that inspections are reactionary with all city agencies. Bankoff believes that any city agency that has an inspection system responds to permit applications but that "no city agency . . . has the . . . capacity to go around and inspect"<sup>195</sup> work that is ongoing to be sure it is being done according to the permit. The agencies instead wait for someone to report a problem, or for a reason to believe otherwise. Because of a lack of resources, the onus of

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192. About the ECB, N.Y.C. ENVTL. CONTROL BD., <http://www.nyc.gov/html/ecb/html/about/about.shtml> (last visited Apr. 15, 2012).

193. Interview with John Weiss, *supra* note 157.

194. Interview with Lily Fan & Kathleen Rice, *supra* note 133.

195. Interview with Simeon Bankoff, *supra* note 65.

enforcement initiation falls on the public, including city residents, community boards, and advocacy groups. LPC staff members in other departments also file complaints. The percentage breakdown of the origin of complaints is not tracked by the LPC.<sup>196</sup>

Complaints concerning suspected violation of the Landmarks Law can be made using the Dial 311 System.<sup>197</sup> Created under Mayor Bloomberg, Dial 311 is New York City's hotline for miscellaneous questions and reports of problems of all sorts. Upon calling 311, the complainant's call is either routed to the LPC Enforcement Officer's telephone line or transcribed and e-mailed to the Enforcement Officer's official LPC e-mail address.<sup>198</sup> There are other methods of complaint filing, including directly calling or e-mailing an Enforcement Officer. In 2008, Dial 311 received 1539 LPC-related inquiries, of which sixty-three were complaints of suspected unpermitted alteration of a landmark.<sup>199</sup> These sixty-three complaints accounted for a small fraction of the total 1430 complaints received from all methods of filing, all of which were subsequently investigated that year by the LPC's Department of Enforcement.<sup>200</sup> In 2009, Dial 311 received thirty-eight complaints concerning unpermitted work on landmarked buildings out of a total of 1215 complaints received and investigations completed by the Department of Enforcement.<sup>201</sup> The Mayor's Management Report notes that the decline in investigations completed between 2008 and 2009 is a result in the decline of complaints made, demonstrating the system's reliance on public vigilance.<sup>202</sup> The LPC does not publish the Dial 311 method of complaint reporting to the public on its website or its printed literature. Likewise, the telephone numbers and e-mail addresses of its Enforcement Officers are not published. The LPC requests that the public download the forms from its website, fill it out, and mail it to their office.<sup>203</sup> Kathleen Rice, an Enforcement Officer at the Commission, indicated that the majority of complaints were received via direct telephone calls to her unpublicized line and not using the complaint form.<sup>204</sup>

Filling out the complaint form is the only method of complaint reporting indicated by the LPC's website.<sup>205</sup> The form asks for the date, the location of the suspected violation, a description of the enforcement action being taken,

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196. Interview with John Weiss, *supra* note 157.

197. E-mail from Kathleen Rice, N.Y.C. Landmarks Pres. Comm'n, to Benjamin Baccash (Mar. 24, 2010) (on file with author).

198. *Id.*

199. CITY OF NEW YORK, THE MAYOR'S MGMT. REPORT: FISCAL 2008 116 (Sept. 2008), available at [http://home2nyc.gov/html/ops/downloads/pdf/mmr/0908\\_mmr.pdf](http://home2nyc.gov/html/ops/downloads/pdf/mmr/0908_mmr.pdf).

200. *Id.*

201. CITY OF NEW YORK, THE MAYOR'S MGMT. REPORT: FISCAL 2009 108 (Sept. 2009), available at [http://home2nyc.gov/html/ops/downloads/pdf/mmr/0909\\_mmr.pdf](http://home2nyc.gov/html/ops/downloads/pdf/mmr/0909_mmr.pdf).

202. *Id.* at 107.

203. Appendix, *supra* note 164, at § 7.

204. Interview with Lily Fan & Kathleen Rice, *supra* note 133.

205. The LPC has budgeted \$5 million to develop a web-based complaint submission and tracking system comparable to the DOB's Building Information System (BIS). While the system is being developed, as a result of this thesis an e-mail address will soon be listed on the LPC's website for complaint submission.



an optional field for the complainant to identify themselves, and a portion for staff use that will later receive a complaint number, a description of the enforcement action taken, and additional comments, if applicable. At the bottom of the form, the footer provides a telephone number where an Enforcement Officer can be reached. Once the form is completed, it is to be mailed to the LPC to the attention of the Violations Unit, also known as the Department of Enforcement. In lieu of using the LPC's official form, some preservation advocacy groups<sup>206</sup> and community boards have created their own forms, which are mailed to the LPC.<sup>207</sup>

Once the LPC receives a complaint, an investigation is triggered. Complaints are triaged, the most time-sensitive and serious being processed sooner. In processing a complaint, there are a series of questions that the Enforcement Officer must ask in determining how to proceed.<sup>208</sup> First, the Enforcement Officer must determine if the complaint affects something governed by the LPC. For example, LPC Deputy Counsel Weiss noted that many complaints are about sidewalk sheds and scaffolding and these are not regulated by the LPC.<sup>209</sup> Complaints regarding issues that are not regulated by the LPC are immediately closed. Included with the complaint form is a response form, which the LPC will fill out and mail back to the complaining individual or group. In all other instances, the complainant is invited to call the LPC to inquire about the status of their complaint but is not proactively contacted by the LPC.<sup>210</sup>

If the complaint is regarding something that the LPC governs, the process continues. The Enforcement Officer will check to see if there are currently any permits issued for the property at hand. The Enforcement Officer will visit the property in question, sometimes by train, or, if less accessible by mass transit, by a city-owned automobile. This automobile is shared by LPC Preservation Staff and the Department of Enforcement.<sup>211</sup> If there are permits issued for the property, while on site the Enforcement Officer will check to see if the actual work matches the work approved by the permit. The Enforcement Officer will photograph the entire street facade of the building and when they return to the office, compare these photographs to photographs at the time of designation as well as with any other photographs of the property on file and with tax photographs available at the Municipal Archives. Landmarks are inspected from public thoroughfares only, as designation reports, a part of the metric by which conditions are assessed and determined to be a violation or not, do not include photographs of the historic

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206. For example, Friends of the Upper East Side Historic District has its own specific form. This organization pioneered this practice during Reynolds's enforcement tenure.

207. E-mail from Lily Fan, N.Y.C. Landmarks Pres. Comm'n, to Benjamin Baccash (Mar. 24, 2010) (on file with author).

208. Appendix, *supra* note 164, at § 8.

209. Interview with John Weiss, *supra* note 157.

210. E-mail from Lily Fan, *supra* note 207.

211. Telephone Interview with John Weiss, *supra* note 152.

resource aside from the primary facade.<sup>212</sup> Complaints with regard to secondary facades or any part of the building not visible from the street can result in violations only if they are accompanied by photographs provided by the complainant.<sup>213</sup> However, the complaint form does not provide any indication of the need for photographs.

Assuming the suspected condition in violation is visible from the street, the Enforcement Officer will photograph the entire street facade with particular attention to the specific element of the landmark about which the complaint was filed. For example, in the case where a complaint was filed concerning the unpermitted alteration of windows, while at the property the Enforcement Officer would review the windows in addition to other elements of the facade; the Enforcement Officer conducts a full assessment of the primary facade of the landmark. Upon returning to the office, the Enforcement Officer will upload their digital photographs to the Department of Enforcement's computer system.<sup>214</sup> This system is also accessible by the Director of Enforcement and the Deputy Counsel. The Enforcement Officer then reviews all permits associated with the property to determine what work, if any, was approved by the LPC in the past. The combination of the photographs and the permits on file (if any) tell an evolutionary story of the landmark and provide a baseline from which the work being done and state of the landmark can be evaluated. If the work being done or done previously was approved by the LPC, is or was permitted, and is or was done according to the permit, the complaint investigation is closed as the Landmarks Law has not been broken.<sup>215</sup> As noted above, complainants are only notified of this if they provide the LPC with a form to do so when filing the complaint.<sup>216</sup>

If there is no permit on file or the work being done is not in compliance with the permit issued, further action is necessary. In the case that work being done has not been permitted, the Enforcement Officer will issue a Warning Letter, sent by first class mail, to the property owner for each violation.<sup>217</sup> For instance, unpermitted work to the windows would be the subject of one Warning Letter while the unpermitted painting of a cornice would be the subject of another Warning Letter. Each Warning Letter is accompanied by a brochure outlining what it means to be the owner of a designated New York City landmark, instructions for filing a permit with the LPC, and a permit application. The LPC never issues violations to tenants directly, but considers them in issuing a Warning Letter for each condition in violation to property

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212. E-mail from Kathleen Rice, N.Y.C. Landmarks Pres. Comm'n to Benjamin Baccash (Feb. 1, 2010) (on file with author).

213. *Id.*

214. Each department at the LPC has its own segregated computer system.

215. Interview with John Weiss, *supra* note 157.

216. E-mail from Lily Fan, *supra* note 207.

217. Interview with John Weiss, *supra* note 157. While the City Council asked that Warning Letters be mailed with return receipt, John Weiss of the LPC explained that to do so would be too expensive and would require too much staff time. He also explained that it might hinder compliance as a result of the recipient's reluctance to go to a post office and sign for the Warning Letter. *Id.*

owners. This is done to enable property owners to more easily correct conditions in violation and, in the case that they were caused by different tenants, assign each tenant the particular condition for which they are responsible. The Warning Letter indicates why the property owner is in violation of the Landmarks Law and explains that the property owner must apply for a permit within twenty working days to avoid subsequent enforcement action. There is no fine attached to the Warning Letter and accordingly it serves as a grace period. The Warning Letter also provides the property owner in violation with the telephone number of the Enforcement Officer assigned to their case. The letter concludes: “NOTE: All work at or on this premises must stop immediately!”<sup>218</sup> Lily Fan, the Director of Enforcement, explained:

[T]he reason we decided through the legislation to issue a [W]arning [L]etter first is [that] we want to have owners work with us[. We’re not in this to collect fines [or be punitive.] We want to . . . have people actually correct the condition. So where possible, unlike the [Buildings Department] . . . [w]e send a Warning Letter first, [along with instruction to file a permit.]<sup>219</sup>

If the property owner responds to the Warning Letter and applies for a permit within the twenty working days time period, no violation or fine is issued against the property.

Once a permit is filed, the Preservation Department takes control of the application. At the Preservation Staff level, the condition in violation can be legalized or legalized with modification. If the staff believes the work done without a permit should not be legalized or believes that greater oversight is necessary, the action is scheduled for a hearing with the eleven-member Commission. The Commission can then rule on the issue, approving in totality, approving with modification, or denying in totality, in which case the unpermitted work must be undone.<sup>220</sup>

Following the twenty day Warning Letter grace period, the Director of Enforcement will revisit the file of the property in violation to check if a permit to legalize the condition has been filed with the Preservation Department. If a permit has not been applied for, the property owner is personally served with a Notice of Violation (NOV) by the Process Server. NOV’s are either Type A, Type B, or Type C. Type A violations are defined as “serious alterations to important architectural elements, such as cornices, stoops, windows, and storefronts; additionally, construction of rooftop or backyard additions may fit into this category” as well as alterations to interior landmarks, the elimination of green space, and failure to submit period inspection reports.<sup>221</sup> Type B violations are defined as “less serious

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218. Interview with Lily Fan & Kathleen Rice, *supra* note 133.

219. *Id.*

220. Interview with John Weiss, *supra* note 157.

221. Frequently Asked Questions About the Enforcement Process, N.Y.C. LANDMARKS PRES. COMM’N, [http://www.nyc.gov/html/lpc/html/faqs/faq\\_enforce.shtml](http://www.nyc.gov/html/lpc/html/faqs/faq_enforce.shtml) (last visited Apr. 15, 2012) [hereinafter Enforcement Process FAQs].

infractions, such as painting a facade a new color, replacing a single window, or installing a light, sign, flagpole or banner.”<sup>222</sup> Type B violations are issued for failure to maintain landmarked property in a state of good repair.<sup>223</sup> It should be noted that with the exception of Type B violations that are issued by the Deputy Counsel of the LPC, all violations are issued by the Director of Enforcement. The NOV is delivered to the perpetrator.

Once the NOV is issued, the property is indicated as being in violation of the Landmarks Law on the Department of Buildings Building Information System (BIS).<sup>224</sup> The BIS is a database of all properties within New York City and has information relating to application processing, accounting, inspections, complaint tracking, violation tracking, periodic safety reports, equipment tracking, trade licensing, and contractor tracking.<sup>225</sup> Initially, the NOV is unaccompanied by a fine and is the second grace period. If the NOV is issued while unsanctioned work is ongoing, it will be accompanied by a Stop Work Order. Stop Work Orders can be issued by the Department of Enforcement without consulting the legal department. In cases of egregious violations, the Enforcement Officer will hand deliver Stop Work Orders.

If the unpermitted work has already been completed, the NOV will not be accompanied by a Stop Work Order. The NOV indicates the address of the property in violation, the nature of the violation, and cites the section of the New York City Administrative Code of which the perpetrator is in violation in addition to a hearing date at the Environmental Control Board (ECB).<sup>226</sup> Formal legal counsel is not required to represent perpetrators at the ECB.<sup>227</sup> Due to their relative small number, all of the LPC’s violations are heard at the Manhattan division of the Environmental Control Board.<sup>228</sup>

If the perpetrator wishes to contest their violation, they are expected to appear at the ECB in person on the assigned hearing date. If they argue their case and the Administrative Law Judge rules that they are not in violation of the law, which is rare as last year ninety-eight percent of NOV’s were upheld at the ECB, then there is no penalty.<sup>229</sup> However, if the Administrative Law Judge rules that the perpetrator was in violation of the Landmarks Law, a fine will be assessed.<sup>230</sup>

If the property owner cited fails to appear at the ECB on the indicated date, the ECB will assess a default penalty. Both the default and civil penalties will

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222. Enforcement Process FAQs, *supra* note 221.

223. See *id.*; See also N.Y.C. ADMIN. CODE § 25-311 (2011).

224. Interview with John Weiss, *supra* note 157.

225. BIS FAQs, DEPT. OF BLDGS., <http://www.nyc.gov/html/dob/html/bis/faq.shtml> (last visited Mar. 30, 2012).

226. Interview with John Weiss, *supra* note 157.

227. Safety & Enforcement: ECB Hearings & Penalties, DEP’T OF BLDGS., [http://www.nyc.gov/html/dob/html/safety/ecb\\_hearings\\_penalties.shtml](http://www.nyc.gov/html/dob/html/safety/ecb_hearings_penalties.shtml) (last visited Apr. 15, 2012) [hereinafter ECB Hearings & Penalties].

228. Interview with Lily Fan & Kathleen Rice, *supra* note 133.

229. Agency Performance Report: Landmarks Preservation Commission, N.Y. MAYOR’S OFFICE OF OPERATIONS, <http://www.nyc.gov/html/ops/cpr/html/home/home.shtml> (last visited Apr. 15, 2012).

230. ECB Hearings and Penalties, *supra* note 227.

be followed with notices to pay. After a certain amount of time, a collections agency will be assigned the debt and have the fine docketed into a judgment that will become a lien against the real property.<sup>231</sup> The LPC does not have control over the process of lien imposition.

An ECB hearing can be avoided. The first NOV is accompanied by a Certificate of Correction, a signed agreement which facilitates rectifying the violation administratively. If the property owner in violation elects to concede to having violated the Landmarks Law and indicates so on the Certificate of Correction, an ECB hearing would not be held as a fine would not be levied. In pleading guilty, the property owner agrees to fix the condition in violation within a specified time frame and the LPC agrees to not issue fines unless the promised work is not done in a timely manner. In filling out a Certificate of Correction, the perpetrator is required to apply for a permit to correct the previously unpermitted work. This Certificate of Correction, which is a signed agreement, and a permit application are returned to the LPC and subsequently monitored by Preservation Staff and Enforcement Staff in tandem. Once the perpetrator is granted a permit and corrects the condition in violation, they photograph the work and mail these photographs to the LPC. Preservation Staff will then go to the property, verify that the photographs sent to them are accurate, and, if the violation condition has been corrected, issue a Notice of Compliance to the property owner. The Notice of Compliance officially states that the property is no longer in violation of the Landmarks Law.<sup>232</sup>

If the property owner in violation does not elect to plead guilty on the Certificate of Correction, does not appear for their assigned hearing date to contest the violation, or generally does not respond to the first NOV, a subsequent NOV is issued. A second NOV will also be served if the property owner in violation pleads guilty on the Certificate of Correction and does not rectify the problem in a timely fashion or does not rectify the problem within twenty-five days of having been found guilty at the ECB adjudication.<sup>233</sup>

Unlike the first NOV, which serves as the final grace period, the second NOV is accompanied by a fine. According to the Landmarks Law, Type A violations can be accompanied by fines of up to \$5000. A Type B NOV can be accompanied by a fine of up to \$500.<sup>234</sup> If the perpetrator does not correct the condition following this Type B NOV, a fine of \$50 per day can be imposed.<sup>235</sup> According to Lily Fan, Director of Enforcement at the LPC:

Daily fines are in the statute; however, they are not currently in the ECB penalty schedule. When we requested daily fines for certain infractions, the ECB Board turned us down as they stated that they only assess daily fines on hazardous conditions (e.g., illegal partitioning of living quarters) which may result in the

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231. Interview with Lily Fan & Kathleen Rice, *supra* note 133.

232. Interview with John Weiss, *supra* note 157.

233. Enforcement Process FAQs, *supra* note 221.

234. *Id.*

235. *Id.*

loss of life of either the occupants or health and fire personnel who respond to emergency calls.<sup>236</sup>

However, Fan continues, "We have asked for daily fines at the Supreme Court level, and have been granted such."<sup>237</sup> In other words, daily fines have been assigned in legal enforcement proceedings but are not a part of the administrative enforcement system as applied at the ECB.

A Type B NOV, for failure to maintain, is accompanied by a \$3500 summons. LPC Deputy Counsel John Weiss noted that it can be beneficial to only issue Warning Letters for failure to maintain if the LPC anticipates the property owner's non-compliance and expects to have to pursue them formally in court. Weiss explained that some believe there are *res judicata* issues with issuing an administrative citation and then pursuing the violator in court. The defendants, Weiss explained, sometimes argue that because they were administratively penalized, further penalization in court would effectively subject them to double jeopardy. While Weiss does not agree with the legal basis of this claim, to be safe, the LPC will sometimes only issue Warning Letters for failure to maintain which will not be followed by NOVs.<sup>238</sup> Other times, when the LPC does not anticipate pursuing the property owner in court, he explained, administratively issuing NOVs for failure to maintain is effective and accordingly is done.<sup>239</sup>

Fines tied to violations are collected by the New York City Department of Finance. Fines can be paid via mail, in person, or online. Whether the fine is paid or not has no bearing on the resolution of the landmarks violation. One cannot buy a cure to their violation. In other words, a fine can be paid and if the condition is not cured, a violation will remain. Moneys collected as a result of violation of the New York City Landmarks Law do not fund the LPC. All money collected goes into the General Fund of the City of New York and the source of these funds is not formally tracked.<sup>240</sup> The LPC is not involved in collecting fines. It does not know whether or not the fines associated with its violations have been collected or the amount of money collected as a result of its assessed violations.

Currently, there is no mechanism to force payment of fines or to force rectification of LPC-issued violations. While a property owner cannot change the Certificate of Occupancy of their property or be granted Department of Buildings permits if the property is in violation of the Landmarks Law, he or she can still use their property and sell it. Landmarked buildings can be bought and sold with open violations.<sup>241</sup> The violations are associated with the properties themselves and not with the property owners. If the violations

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236. E-mail from Lily Fan, *supra* note 207.

237. *Id.*

238. Telephone Interview with John Weiss, *supra* note 151.

239. *Id.*

240. Interview with John Weiss, *supra* note 157.

241. *Id.*

are so numerous and outstanding, the ECB may turn the case over to a collections agency which will get the fines docketed and pursue a judgment against the property in the form of a lien.<sup>242</sup> A lien is a serious obstacle in selling or refinancing one's property as lending institutions and buyers alike expect a property to be lien free.

In this same vein, the LPC requires that a building be in good standing to grant permits to do work. Generally, new permits will only be granted to properties with violations in order to correct said violations or to protect the health and safety of the inhabitants or the public. The LPC will grant permits to properties in violation for actions outside of the scope of these two categories if the property owner signs an escrow agreement stating that they will fix the condition in a timely manner once the other permitted work is completed.<sup>243</sup> The escrow agreement requires that a specific amount of money, usually double the estimated cost of the work to be done, be deposited into the escrow account of an independent attorney to pay for the corrective work to be performed at a later date.<sup>244</sup> Once the Director of Enforcement verifies that the money has been deposited into the escrow account, a permit will be granted and work can begin.

In addition to the administrative violations system, the LPC can bring civil and criminal legal action against any property owner in violation of any part of the Landmarks Law. To date, the Landmarks Law has not been enforced in criminal court. However, civil litigation is an increasingly common mode of enforcement employed by the LPC. The LPC can sue a property owner for the market value of their property which is particularly valuable in demolition by neglect litigation.<sup>245</sup> Demolition by neglect lawsuits, situations in which there is "extensive deterioration of multiple building elements, or severe damage that threatens a landmark's structural stability," are the type of litigation most commonly initiated by the LPC.<sup>246</sup> In preparation for these cases, the Deputy Counsel conducts site visits with a preservation staff person to gauge the physical condition of the property at hand. Sometimes, independent consultants, like a structural engineer, are hired by the LPC to aid in its investigation but, for the most part, the Department of Buildings Forensic Engineering staff is utilized.<sup>247</sup>

In situations of demolition by neglect, property owners may have received numerous Type B NOV's for failure to maintain their property in a state of good repair and have chosen not to cooperate with the LPC and rectify the situation. Situations of demolition by neglect arise as a result of an owner mistreating their historic property or out of a reluctance to perform maintenance. The violations may be due to the owners' financial inability to do so or due to a nefarious motive. In the latter case, this action or inaction is

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242. Interview with Lily Fan & Kathleen Rice, *supra* note 133.

243. *Id.*

244. Interview with John Weiss, *supra* note 157.

245. N.Y.C. ADMIN. CODE § 25-317.1(a)(1) (2011).

246. Weiss, *supra* note 140, at 2.

247. Telephone Interview with John Weiss, *supra* note 151.

usually done in the hopes that the historic property at hand will collapse, allowing the owner to construct a newer, and presumably larger and more profitable, building in its place. If successful, demolition by neglect lawsuits ensure the continued existence of historic properties that are in a severe state of disrepair and are near collapse. Deputy Counsel for the LPC John Weiss notes that “[at] any given time the LPC has about [thirty] buildings in various stages of the demolition by neglect process.”<sup>248</sup> Weiss also notes that, “[a]lthough very time-consuming, bringing a lawsuit to compel repairs has shifted from being a rare occurrence to a mainstay of the Commission’s enforcement tools.”<sup>249</sup> From 1965, when the Landmarks Law was enacted, to 1998, the LPC did not file any demolition by neglect lawsuit. As of April of 2010, the LPC has filed demolition by neglect lawsuits against eight property owners in New York State Supreme Court; seven of these suits have been filed since 1998, four of which were filed before 2008, three were filed in 2008 and one in 2010. Weiss stated that lawsuits, even when not filed, have proven effective as a deterrent to non-compliance. All lawsuits are formally initiated by the Administrative Division of the Corporation Counsel Office of the City of New York. Lawyers from the Corporation Counsel Office work in tandem with LPC counsel to prosecute the property owner.

In addition to civil demolition by neglect litigation, the LPC can criminally prosecute a property owner who intentionally demolishes a landmarked property. If a property owner is threatening to demolish their landmarked property, the LPC can seek a Temporary Restraining Order in criminal court. The law maintains this ability, including the option to gain a Temporary Restraining Order. A Temporary Restraining Order is an injunction issued by a judge directing the owner to arrest all action on their property lest they want to be held accountable in criminal court.<sup>250</sup> The circumstance in which this tool would be appropriately applied is rare and the alternative, the issuance of civil fines and violations, is timelier and less resource intensive, thus, it is not often used.

## VI. CASE STUDIES

With an understanding of who comprises the Department of Enforcement, how it functions in the context of the LPC and in the greater government of New York City, and the various tools available to the Commission in enforcing its law, this article will next examine how enforcement functions in the real world. Four case studies in which enforcement has had varying degrees of success will be examined. These illustrative examples exemplify the strengths and weaknesses of the system and help to identify opportunities for improvement.

While the examples include both residential and commercial properties, the properties examined herein are not a representative sample of all landmarks in

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248. Weiss, *supra* note 140, at 2.

249. *Id.*

250. Interview with Lily Fan & Kathleen Rice, *supra* note 133.



New York City. By no means are these examples an exhaustive representation of the entire gamut of possible outcomes of the current enforcement system. Rather, these case studies were chosen to illustrate the range of possible outcomes under the current enforcement system and to demonstrate the various enforcement abilities of the LPC.

#### A. The Lenox Hill Brownstones

In 1883, John J. MacDonald hired architect Augustus Hatfield to design a row of thirteen houses as a speculative real estate venture on the south side of East 76th Street between Park Avenue and Lexington Avenue in Manhattan.<sup>251</sup> Today, six of these row houses remain, however in a rather decrepit condition. Designated as part of the Upper East Side Historic District Extension, 110-120 East 76th Street are neo-Grec in style. Each is four stories high and faced in brownstone that has been painted. Originally entered at their parlor levels, the stoops of these row houses were removed.<sup>252</sup> Nonetheless, they were included as part of the Upper East Side Historic District as they exhibited the historical integrity and significance to merit such protection.

Unfortunately, as preservation advocates would suggest, this protection did not play out as it should have. By 1976, the row of six row houses was owned by Lenox Hill Hospital,<sup>253</sup> a local private hospital which has been functioning on the Upper East Side since it moved there in 1868.<sup>254</sup> Thirteen years after the Hospital accrued all six row houses, it proposed, sought, and gained approval from the LPC to alter the buildings to create a sports medicine facility designed by James Polshek.<sup>255</sup> However, this plan was never executed.<sup>256</sup> On November 21, 1995, having received complaints from the local historic preservation advocacy group Friends of the Upper East Side Historic District, the LPC's enforcement staff investigated the unpermitted installation of lighting at the facades of 110, 112, and 114 East 76th Street.<sup>257</sup> As this was prior to the amendment to the Landmarks Law in 1998, NOV's were issued outright, did not carry a fine, and were not preceded by a Warning Letter. A NOV for each infraction, described as "installation of [a] light

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251. N.Y.C. LANDMARKS PRES. COMM'N, UPPER EAST SIDE HISTORIC DIST. DESIGNATION REPORT 823 (1981).

252. *Id.*

253. Endangered Bldgs. Initiative: 110-120 East 76th St., THE N.Y. LANDMARKS CONSERVANCY, [http://www.nylandmarks.org/programs\\_services/endangered\\_buildings\\_initiative/110\\_120\\_east\\_76th\\_st/](http://www.nylandmarks.org/programs_services/endangered_buildings_initiative/110_120_east_76th_st/) (last visited Apr. 15, 2012)[hereinafter Endangered Bldgs. Initiative].

254. Our History, LENOX HILL HOSPITAL, <http://www.lenoxhillhospital.org/about.aspx?id=102> (last visited Apr. 15, 2012).

255. Endangered Bldgs. Initiative, *supra* note 253.

256. *Id.*

257. N.Y.C. Landmarks Pres. Comm'n, Violation Report No. 820 (Nov. 21, 1995) (on file with the Widener Law Review).

fixture on facade without permit(s)" was issued to Lenox Hill Hospital on December 8, 1995.<sup>258</sup>

In the late 1990s, the six row houses began to deteriorate. Lenox Hill Hospital was not maintaining them well and the preservation community began to keep a more watchful eye. According to the Friends of the Upper East Side Historic District's Newsletter, "the buildings became vacant and increasingly neglected, even though neighbors complained about their worsening condition, including refuse and rat infested backyards."<sup>259</sup> In 2000, the Lenox Hill Brownstones were put on the New York Landmark Conservancy's Endangered Buildings List, a list compiled by the historic preservation non-profit which ranked over 20,000 landmarked properties and noted, out of these, which were most deteriorated.<sup>260</sup> The Lenox Hill Brownstones were among the worst of the lot. Even after the Landmarks Law was amended in 1998, when administratively a violation could have been issued, no subsequent violations were issued by the LPC. Likewise, no legal action was initiated by the LPC. John Weiss noted that while he did perform site visits to inspect the Lenox Brownstones, this inspection was initially carried out from the street, rendering only the primary facade visible. Weiss noted that not entering to inspect the buildings at this point in time was a "key failure on our [part]," and as the historical record shows, his statement proved true.<sup>261</sup>

In 2007, Lenox Hill Hospital sold the six brownstones to the Chetrit Group, a local real estate developer. Upper East Side residents noted that the new owner was not caring for the building as it should, as "windows [were] left open and holes [had become] present in the roofs."<sup>262</sup> At this time, the LPC contacted the new owner and notified it of the outstanding violations on the building from 1995 in addition to voicing concern over the deteriorating physical condition of the row houses.<sup>263</sup> John Weiss recalls indicating to the new owners that they "must [make] repairs or [be] sued for demolition by neglect."<sup>264</sup> At this point in time, the owner granted Deputy Counsel Weiss permission to enter the property and, upon doing so, Weiss, as he says, was "horrified" by what he saw once inside 114 East 76th Street—the floors had fully collapsed.<sup>265</sup> Subsequently, the city "spray painted many bright squares

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258. N.Y.C. Landmarks Pres. Comm'n, Notice of Violation No. 96/0235 (Dec. 8, 1995) (on file with the Widener Law Review); N.Y.C. Landmarks Pres. Comm'n, Notice of Violation No. 96/0236 (Dec. 8, 1995) (on file with the Widener Law Review); N.Y.C. Landmarks Pres. Comm'n, Notice of Violation No. 96/0237 (Dec. 8, 1995) (on file with the Widener Law Review).

259. FRIENDS OF THE UPPER EAST SIDE HISTORIC DIST., *Neighborhood Watch: Lenox Hill Brownstones*, NEWS FROM FRIENDS, Spring 2009, at 4 [hereinafter *Neighborhood Watch*].

260. Interview with Frany Eberhart, *supra* note 116.

261. Telephone Interview with John Weiss, *supra* note 151.

262. FRIENDS OF THE UPPER EAST SIDE HISTORIC DIST., *Lenox Hill Brownstones Update: Residences Planned for Historic Row of Brownstones*, NEWS FROM FRIENDS, Winter 2009/2010, at 5 [hereinafter *Lenox Hill Brownstones Update*].

263. Telephone Interview with John Weiss, *supra* note 151.

264. *Id.*

265. *Id.*

on the facades of these buildings, [which are] meant to alert emergency workers to use great caution when entering dangerously deteriorated structures” and indicate the buildings as vacant.<sup>266</sup>

While in 2009 it was well within the abilities of the LPC to pursue the Chetrit Group for failure to maintain its properties, both by issuing NOVs and taking legal action, the row of six houses further dilapidated until January of 2010. According to LPC Deputy Counsel John Weiss, legal action was not taken against the Chetrit Group as negotiations, initiated by the Commission once the buildings were transferred, were underway. Weiss stated, “[B]ecause Chetrit was responsive, we did not sue them. They were cooperating, hiring an architect and engineer.”<sup>267</sup> Weiss also noted that the Commission would prefer that the money the owner would have to spend on litigation be spent on saving the buildings.<sup>268</sup> In January of 2010, the owner applied for a Certificate of Appropriateness to construct a rooftop addition to the buildings and alter the facades.<sup>269</sup> In the process of seeking such approval, The Chetrit Group argued that its proposal would improve the condition of the Lenox Hill Brownstones. However, preservation advocates used the building’s neglected condition as a bargaining tool and contested that the condition was an inappropriate alteration. A representative of the Historic Districts Council testified:

Neglect should not be used as an argument for inappropriate renovations. The applicant should not be applauded for stabilizing these buildings and giving them new life, when the applicant has been part of their near death. Nor should the applicant be rewarded for this treatment with the approval of unsympathetic alterations. This row represents some of the best housing stock available, and there is no excuse for the condition they are in now. They were simply, willfully allowed to go to rack and ruin over the years, both by this owner and the previous one. The only acceptable solutions [sic] to this terrible problem is to stabilize, rebuild, and restore the facades to their present configuration or their historic one.<sup>270</sup>

While the proposed Certificate of Appropriateness was not issued, had the LPC issued NOVs over the prior years or taken action, the neglected state of the buildings could not have been used as a bargaining tool. At this time, the LPC granted approval for the demolition of the rear walls of 112 and 114 East 76th Street.<sup>271</sup> It would seem that had the LPC taken administrative or legal enforcement actions, the buildings’ condition could have been improved and the adverse effects suffered by buildings and the surrounding area diminished. John Weiss agreed, stating, “In retrospect, we should have been in discussion

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266. *Neighborhood Watch*, *supra* note 259, at 4.

267. Telephone Interview with John Weiss, *supra* note 152.

268. Telephone Interview with John Weiss, *supra* note 151.

269. Notice of Pub. Hearing LPC Docket Number: 104437, HISTORIC DISTRICT COUNCIL (Jan. 6, 2010), <http://hdc.org/hdclpc/january-5-2010>.

270. *Id.*

271. *Lenox Hill Brownstones Update*, *supra* note 262, at 5.

with [Lenox Hill] Hospital.”<sup>272</sup> He continued by saying that today, it would be “handled differently.”<sup>273</sup>

Even though they had been on the New York Landmarks Conservancy’s Endangered Buildings List since 2000 and neighbors and advocacy groups had been readily voicing their concerns, the LPC did not take any official enforcement action in protecting the Lenox Hill Brownstones. It is possible, as some preservationists might argue, that enforcement action was not taken against Lenox Hill Hospital when they owned the properties as the Commission did not want to penalize a hospital or take on a powerful non-profit, viewing the nature of the owner’s business as paramount to the LPC’s regulatory cause. It is also possible that the LPC did not act in this manner as it was unwillingly to deal with the bad publicity that may have followed. It’s possible that the LPC did not take enforcement action against the Chetrit Group as they felt that, as it seems, they were burdened by the inherited neglected condition. However, in both cases, the lack of action by the LPC directly led to the further deterioration and loss of historic material. In neglecting to take enforcement action, six row houses of the Upper East Side Historic District were directly and adversely affected, as were its neighbors. While in some instances the enforcement system of the LPC functions as it should, in others, it does not. However, John Weiss has indicated that, due to the manner in which enforcement in the case of the Lenox Hill Brownstones was handled, the LPC learned from its mistakes and modified some of its investigatory practices accordingly.<sup>274</sup> Weiss also indicated that the Lenox Brownstones were not a complete failure, as a restoration was recently approved by the LPC.<sup>275</sup>

#### B. 16-18 Charles Street

16-18 Charles Street, now one large multiple dwelling, was originally constructed as part of a speculative real estate development by financier Myndert Van Schaick and carpenter Patrick Cogan in 1846. The development totaled eleven Greek Revival row houses, each three stories high and faced in brick.<sup>276</sup> Today, six of these dwelling survive, albeit stripped of some of their original architectural detail. Two have been combined and comprise 16-18 Charles Street.<sup>277</sup> In 1969, the LPC designated the Greenwich Village Historic District and as a member of it, 16-18 Charles Street is protected under the New York City Landmarks Law. The violation history of 16-18 Charles Street, however, illuminates some of the weaknesses of the administrative system used to enforce the law.

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272. Telephone Interview with John Weiss, *supra* note 151.

273. *Id.*

274. *Id.*

275. Interview with John Weiss, *supra* note 157.

276. N.Y.C. LANDMARKS PRES. COMM’N, GREENWICH VILL. HISTORIC DIST. DESIGNATION REPORT 273-74 (vol. II 1969).

277. *Id.*

As previously discussed, the enforcement process is initiated by a complaint filed by a member of the public. Following three complaints of unsanctioned work, one filed anonymously on January 16 and two filed by Andrew Menschel on January 26 and February 4, 2004, LPC Enforcement Officer Bernadette Artus went to 16-18 Charles Street to see if a violation of the Landmarks Law existed.<sup>278</sup> At this time, the LPC had all of the abilities previously described by this article, with the exception of issuing administrative violations for failure to maintain a landmark in good repair. Artus discovered three conditions in violation and on February 24, 2004 issued three Warning Letters (WL) accordingly; WL 04-0513 for “[a]lteration and replacement of windows at front facade without permit(s)”;<sup>279</sup> WL 04-0514 for “[p]ainting lintels, sills and cornice gray without permit(s)”<sup>280</sup>; and WL 04-0515 for “[i]nstallation of key boxes and intercoms at entrance without permit(s).”<sup>281</sup> These Warning Letters, which are not accompanied by a fine and serve as the first of two grace periods, were mailed to 16-18 Charles Street Associates, the property owner. The owners of the property did not respond to these Warning Letters. Notices of Violation for each condition followed, indicating that the owner must appear at the Environmental Control Board on June 7 of that same year.<sup>282</sup>

On April 23, 2004, Cynthia Danza of the LPC mailed a letter to the owner of 16-18 Charles Street after receiving an application from them to renovate the property. The letter indicated that a permit for the proposed work would not be granted until the building’s outstanding violations were resolved.<sup>283</sup> One month later, the owner was granted a Certificate of No Effect (CNE) permit. In this case a permit was only granted for reasons of health and safety. The CNE permitted the owner to stabilize a collapsing foundation wall of the building. No work beyond the scope of stabilizing the building was to be allowed. The permit noted that the extant violations would remain outstanding until corrected.<sup>284</sup>

The LPC neither received a response to the Warning Letters, which were mailed in February, nor the NOV’s, which were subsequently mailed. Process

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278. N.Y.C. Landmarks Pres. Comm’n, Violation Report Form, Log #6452 (Feb. 24, 2004) (on file with the Widener Law Review).

279. N.Y.C. Landmarks Pres. Comm’n, Warning Letter, WL04-0513 (Feb. 24, 2004) (on file with the Widener Law Review).

280. N.Y.C. Landmarks Pres. Comm’n, Warning Letter, WL04-0514 (Feb. 24, 2004) (on file with the Widener Law Review).

281. N.Y.C. Landmarks Pres. Comm’n, Warning Letter, WL04-0515 (Feb. 24, 2004) (on file with the Widener Law Review).

282. Env’tl. Control Bd., Notice of Violation, NOV No. 070001216K (June 7, 2004) (on file with the Widener Law Review); Env’tl. Control Bd., Notice of Violation, NOV No. 070001217M (June 7, 2004) (on file with the Widener Law Review); Env’tl. Control Bd., Notice of Violation, NOV No. 070001218Y (June 7, 2004) (on file with the Widener Law Review).

283. Letter from Cynthia Danza, Landmarks Preservationist, N.Y.C. Landmarks Pres. Comm’n, to Aharon Vaknin, Owner of 16-18 Charles Street (Apr. 23, 2004) (on file with the Widener Law Review).

284. N.Y.C. Landmarks Pres. Comm’n, Certificate of No Effect, CNE 04-7301 (May 24, 2004) (on file with the Widener Law Review).

Server Art Mondschein later testified that he attempted to deliver the second three NOVs on May 10, 2004 but the LLC owner was not reachable. The only person present at the address was Mrs. Rosenschein, who “lives there and says that she has nothing to do with this company.”<sup>285</sup> At this hearing the ECB formally assigned a fine accordingly and issued the second set of NOVs.

Three days later, after receiving an application from the property owner, who presumably realized they had been found to be in violation of the law, the LPC issued a Permit for Minor Work (PMW) to cure one of the outstanding violations.<sup>286</sup> As explained by this article, permits are only granted to properties in violation of the Landmarks Law to cure said violations or for reasons of health and safety. Had the work not included actions necessary to fix the condition in violation, the permit would not have been granted. Because it included actions to cure one of the violations, the PMW was granted. The PMW entailed the owner’s “removal of two existing intercoms and the installation of one new surface mounted stainless steel intercom at the entrance on the return of the front facade brick wall” among other small re-pointing work and the legalization of a lock box.<sup>287</sup> The PMW noted that while the permit intended to cure one of the other violations, Violations 04-514 and 04-513 would remain outstanding.<sup>288</sup> Likewise, it read, “Note that this permit contains a compliance date of September 8, 2004.”<sup>289</sup> The LPC expected that the curative, permitted work be completed by that date.

On June 14, 2004, the LPC issued a Certificate of No Effect (CNE), which outlined work including a number of interior alterations and the work necessary to correct Violations 04-0513 and 04-0515, in response to an application filed by the property owner.<sup>290</sup> Nine months later, in April of 2005, the LPC received an application to amend the CNE granted in June of 2004, asking that additional exterior work be permitted, work which the LPC described as “restorative in nature and [which] will aid in the long-term preservation of the building.”<sup>291</sup> On July 14, 2005 the LPC granted 16-18 Charles Street LLC a Permit for Minor Work, extending the purview of the previously granted CNE.<sup>292</sup>

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285. Env’tl. Control Bd., Affidavit of Non Service, NOV Nos. 070001216K (June 7, 2004) (on file with the Widener Law Review); Env’tl. Control Bd., Affidavit of Non Service, NOV Nos. 070001217M (June 7, 2004) (on file with the Widener Law Review); Env’tl. Control Bd., Affidavit of Non Service, NOV Nos. 070001218Y (June 7, 2004) (on file with the Widener Law Review).

286. N.Y.C. Landmarks Pres. Comm’n, Permit for Minor Work, PMW 04-7619 (June 10, 2004) (on file with the Widener Law Review).

287. *Id.*

288. *Id.*

289. *Id.*

290. N.Y.C. Landmarks Pres. Comm’n, Certificate of No Effect, CNE 04-7716 (June 14, 2004) (on file with the Widener Law Review).

291. Letter from Cynthia Danza to Aharon Vaknin, Owner of property at 16-18 Charles St. (Apr. 27, 2005) (on file with the Widener Law Review).

292. N.Y.C. Landmarks Pres. Comm’n, Permit for Minor Work, PMW 06-0288 (July 14, 2005) (on file with the Widener Law Review).

On November 3, 2005, following a complaint filed by Christabel Gough, a member of the Society of the Architecture of the City,<sup>293</sup> the LPC issued a Warning Letter for the “[r]emoval of canopy, installation of planter and installation of door and sidelights without permit(s).”<sup>294</sup> The historic canopy was added to 16-18 Charles Street during the 1920s when a savvy real estate entrepreneur rebranded the row houses.<sup>295</sup> While not original, the canopy of 16-18 Charles Street was extant at the time of its designation and is architecturally significant. According to LPC Enforcement Officer Kathleen Rice, the historic iron canopy is in the basement of 16-18 Charles Street,<sup>296</sup> but this could not be confirmed. Receiving no response to the Warning Letter, the LPC issued NOVs for Violation 06-0230, which addressed the missing canopy, and Violation 06-0229.<sup>297</sup>

After a member of the LPC Preservation Staff followed up on a Permit for Minor Work granted previously, on October 10, 2006, the LPC mailed a Warning Letter to 16-18 Charles Street LLC for the “[i]nstallation of windows in noncompliance with Permit for Minor Work 06-0288 . . . issued July 14, 2005.”<sup>298</sup> No response was received from the owner and an NOV was issued accordingly.<sup>299</sup> Again, the process server was unable to locate the owner as a result of it being an LLC and the address on file with the New York State Attorney General, who regulates the formation of LLCs, was not the residence of the responsible party.<sup>300</sup> On July 27, 2007, 16-18 Charles Street was sold to Daniel Elias with several outstanding violations.<sup>301</sup>

None of the violations issued to 16-18 Charles Street have been resolved to date. The violation history of 16-18 Charles Street exemplifies what preservation advocates would identify as the weaknesses of the New York Landmarks Law’s administrative enforcement system. The enforcement history of 16-18 Charles Street also exhibits the problem with issuing

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293. E-mail from Andrew Dolkart to Benjamin Baccash (Feb. 10, 2010) (on file with author).

294. E-mail from Kathleen Rice to Benjamin Baccash (Feb. 11, 2010) (on file with author).

295. Andrew Dolkart, *The Row House Reborn: Architecture and Neighborhoods in New York City, 1908-1929* 153-54 (2009).

296. E-mail from Kathleen Rice to Benjamin Baccash (Feb. 10, 2010) (on file with author).

297. N.Y.C. DEP’T OF BUILDINGS, DOB VIOLATIONS, <http://a810-bisweb.nyc.gov/bisweb/ActionsByLocationServlet?requestid=1&allbin=1078134&allinquirytype=BXS4OCV3&stypeocv3=V> (last visited Apr. 15, 2012).

298. N.Y.C. Landmarks Pres. Comm’n, Warning Letter, WL 07-0136 (Oct. 10, 2006) (on file with the Widener Law Review).

299. Env’tl. Control Board, Notice of Violation, NOV No. 070001898R (Oct. 10, 2006) (on file with the Widener Law Review).

300. Env’tl. Control Bd., Affidavit of Non Service, NOV Nos. 070001216K (June 7, 2004) (on file with the Widener Law Review); Env’tl. Control Bd., Affidavit of Non Service, NOV Nos. 070001217M (June 7, 2004) (on file with the Widener Law Review); Env’tl. Control Bd., Affidavit of Non Service, NOV Nos. 070001218Y (June 7, 2004) (on file with the Widener Law Review).

301. Office of the City Register, N.Y.C. DEPT. OF FINANCE, (July 27, 2007), available at [http://a836-acris.nyc.gov/Scripts/DocSearch.dll/Detail?Doc\\_ID=2007072301393001](http://a836-acris.nyc.gov/Scripts/DocSearch.dll/Detail?Doc_ID=2007072301393001).

violations to properties owned by LLCs in that they are often unreachable. Furthermore, it also suggests that an owner can manipulate the permit process to feign compliance while furthering his own purpose of making unauthorized improvements designed to enhance the profitability of their property. Likewise, it demonstrates that properties can be transferred even with outstanding violations. It further illustrates that by issuing permits for work including corrective action, the resolution of violations is not guaranteed. Due to the lack of “teeth” in penalties for landmarks violations, 16-18 Charles Street continued to be degraded at little expense to the owner as the fines were not substantial enough to act as a deterrent while the surrounding historic district unfairly suffered the unfortunate cost of non-compliance with the requirements of the Landmarks Law.

### C. Sushi Samba 7

In September of 2000, Sushi Samba 7, a trendy Japanese-Brazilian fusion restaurant located at 81-87 Seventh Avenue in the Greenwich Village Historic District of Manhattan, applied for a permit from the LPC to construct an unenclosed wood trellis atop their one-story tax-payer building on the corner of Barrow Street and 7th Avenue South.<sup>302</sup> The Greenwich Village Historic District Designation Report describes the building, built in 1923, as “undistinguished” but noted that, with the proper care, it could be improved so as to complement the historic district.<sup>303</sup> The LPC approved Sushi Samba 7’s proposal to build a wood trellis and issued a permit accordingly. However, Sushi Samba 7 constructed a structure which differed substantially from what was approved by the LPC and even went as far as to try to conceal this violation by covering the unapproved structure in canvas. In response to the NOV’s that were issued, the restaurant attempted to have their as-built “trellis” legalized, but the Commission refused. Sushi Samba 7 sued the LPC in January of 2003 in the New York State Supreme Court, but was unsuccessful and the LPC’s decision was upheld.<sup>304</sup>

Unsuccessful in terms of administrative enforcement and further aggravated by being sued by Sushi Samba 7, the LPC filed charges against Sushi Samba 7 in civil court in February of 2004, seeking an injunction to obligate the restaurant to remove the canvas sheathing, which had never been approved in any way, shape, or form, in addition to seeking an award of the accrued fines. Mark Silberman, General Counsel for the LPC, indicated that the collection of fines was intended to offset the profits made as a result of the operation of additional, illegal commercial space. In an article in *The Villager*, a neighborhood newspaper, Silberman stated, “These people received a permit.

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302. Albert Amateau, *Sushi Samba Ends Rooftop Fishy Business and is Fined*, THE VILLAGER, [http://www.thevillager.com/villager\\_198/sushisambaends.html](http://www.thevillager.com/villager_198/sushisambaends.html) (last visited Apr. 15, 2012).

303. LANDMARKS PRES. COMM’N, GREENWICH VILL. HISTORIC DIST. DESIGNATION REPORT 130 (vol. I 1969).

304. Amateau, *supra* note 302.



They violated the permit. The judge has upheld our decision not to legalize the existing conditions. Meanwhile, they've dragged their feet and continued to operate in the illegal addition and reap substantial profits."<sup>305</sup> In September of 2004, the LPC approved plans submitted by Sushi Samba 7 to build an enclosed second story that was to be completed by January of 2007 in place of their unapproved trellis. In June of 2006, Sushi Samba had not yet removed their extant, illegal rooftop addition and the New York State Supreme Court ordered that the restaurant do so immediately. Sushi Samba 7 did not comply and appealed the ruling.<sup>306</sup>

In February of 2007, a settlement was reached between Sushi Samba 7 and the LPC. The owners of Sushi Samba 7 signed an agreement with the LPC, which included authorization to build an approved rooftop addition in place of their illegal trellis addition, while still paying a settlement of \$500,000. According to Virginia Waters of the Corporation Counsel Office of the City of New York, the LPC was entitled to a total of \$8.5 million in fines, or \$5000 per day for the duration of the violation, but sought a lesser amount.<sup>307</sup> As previously noted, daily fines cannot be levied at an administrative level but can be sought in court. The \$500,000 was to be paid to the City of New York by 2010, with initial payments totaling \$100,000 within the first three months. Sushi Samba 7 was allowed to build its approved enclosed second story by May of 2007.<sup>308</sup>

In a press release issued by the LPC, Virginia Waters stated: "The illegal structure did not fit the character of the Greenwich Village Historic District, and has finally been removed after five years of litigation. Sushi Samba has agreed to comply with the Landmarks Law in the future."<sup>309</sup> Chair Robert Tierney continued in this sentiment, stating, "In recent years, our aggressive enforcement of the law has enabled us to preserve the character of many of the City's buildings and neighborhoods. Our settlement with Sushi Samba underscores that commitment, and should serve as a deterrent to those who would knowingly and intentionally violate the Landmarks Law."<sup>310</sup> In this instance, legal action compensated for what some preservationists would argue is an ineffective administrative enforcement system, eventually resulting in a substantial monetary settlement in addition to compliance with the law. Albeit seemingly tedious, clearly the LPC's pursuit of legal action, if taken under the correct circumstances, can be a very effective course of enforcement.

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305. Lincoln Anderson, *Landmarks Bento Out of Shape Over Sushi Samba Rooftop Tent*, THE VILLAGER, [http://www.thevillager.com/villager\\_81/landmarksbentoutof.html](http://www.thevillager.com/villager_81/landmarksbentoutof.html) (last visited Apr. 15, 2012).

306. Press Release, *Settlement Over Illegal Rooftop Tent*, *supra* note 159.

307. Amateau, *supra* note 302.

308. Anderson, *supra* note 305.

309. Press Release, *Settlement Over Illegal Rooftop Tent*, *supra* note 159.

310. *Id.*

## D. The Windermere

The Windermere is an apartment complex located at 400-406 West 57th Street, at Ninth Avenue in Manhattan. In 2005, the LPC was considering designation of The Windermere as an individual landmark. At this time, the Japan-based property owner, Toa Construction Company, insisted that the building was not worthy of designation as a result of its poor physical condition.<sup>311</sup> Nonetheless, preservation groups advocated for The Windermere to be designated under New York's Landmarks Law as its condition was such that it could be restored. On June 28, 2005, the LPC designated The Windermere as an individual landmark,<sup>312</sup> well aware of the complex's deteriorated physical condition.<sup>313</sup> Designed by Theophilus G. Smith and completed in 1881, the Windermere is "significant as the oldest-known large apartment complex remaining in an area that was one of Manhattan's first apartment-house districts."<sup>314</sup> The Windermere is also significant as an early apartment building that provided "housing options for single, self-supporting women [in a time when such units] were relatively limited."<sup>315</sup> It is seven stories tall and is designed in the Queen Anne style.

As a designated landmark, The Windermere was required by law to be kept in a state of good repair, defined as a state in which, "if not so maintained, may cause or tend to cause the exterior portions of such improvement to deteriorate, decay or become damaged or otherwise to fall into a state of disrepair."<sup>316</sup> In September of 2007, the LPC surveyed the facade of The Windermere and found that because maintenance was not being performed, the building's structural and historical integrity were severely at risk.<sup>317</sup> Deputy Counsel for the LPC John Weiss noted, "We were aware from the 'get go'" of the condition of The Windermere and this, it seems, was integral in saving the landmark.<sup>318</sup>

On March 19, 2008 the City of New York, including the New York City LPC, filed suit in New York County Supreme Court to compel Toa Construction Company to make the repairs necessary in keeping their landmarked property in a state of good repair.<sup>319</sup> John Weiss noted that legal action was taken based on the owner's opposition to designation, that they

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311. Center for N.Y.C. Law, *City Sues to Save Landmark Apartments*, 14 CITYLAW 59, 59 (2008) [hereinafter Center for N.Y.C. Law].

312. N.Y.C. LANDMARKS PRES. COMM'N, LP-2171, THE WINDERMERE 1 (2005), available at <http://home2.nyc.gov/html/lpc/downloads/pdf/reports/windermere.pdf> [hereinafter WINDERMERE].

313. Telephone Interview with John Weiss, *supra* note 151.

314. WINDERMERE DESIGNATION REPORT, *supra* note 312, at 1.

315. *Id.*

316. N.Y.C. ADMIN. CODE § 25-311(a)(2) (2011).

317. Center for N.Y.C. Law, *supra* note 311, at 59.

318. Telephone Interview with John Weiss, *supra* note 151; Telephone Interview with John Weiss, *supra* note 152; Interview with John Weiss, *supra* note 157.

319. See Plaintiffs' Memorandum in Support of Motion for a Preliminary Injunction, *City of New York v. Toa Constr., Inc.*, No. 400584/2008, (N.Y. Sup. Ct. Mar. 20, 2008) 2008 WL 8046373.

would not cooperate if the LPC issued administrative citations for failure to maintain.<sup>320</sup> In addition to compliance with the law, the City sought penalties of \$5000 per day until the Windermere was repaired accordingly.<sup>321</sup>

Senior Counsel at the Corporation Counsel Office, Virginia Waters, stated: “[t]he City has made every effort to work with The Windermere’s owners [and] . . . felt we had no other choice but to bring this legal action to save this important New York City landmark.”<sup>322</sup> On May 9, 2008, Judge Karen Smith of the New York County Supreme Court issued a preliminary injunction compelling Toa Construction Company to remedy the continuing deterioration of The Windermere. Judge Smith also directed the LPC to produce a report outlining the actions necessary of Toa Construction Company to return the building to a state of good repair as well as identifying what permits would be necessary to do this work. This report was to be paid for by Toa Construction Company.<sup>323</sup> After receiving the report, Toa Construction Company was ordered by the Court to apply for all necessary permits within thirty days and, after receiving the permits, to complete the necessary repairs within 120 days.<sup>324</sup>

On May 21, 2009, after subsequent court orders were issued to the defendant to repair The Windermere, the LPC and Toa Construction Company reached a record settlement. Toa Construction Company and individual defendants were to pay the City of New York \$1.1 million in deferred civil fines for failure to maintain their property in good repair as is required by the New York Landmarks Law. This “settlement is the largest penalty ever recovered by the City [of New York] for a violation of the Landmarks Law.”<sup>325</sup> The \$1.1 million settlement was to be paid to the General Fund of the City of New York. John Weiss said, “I would [have] loved to have had that money [for the LPC,] but we didn’t see any of it.”<sup>326</sup>

Following the settlement, Toa Construction Company sold its building to a new owner, Windermere Properties LLC. The LPC reached an agreement

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320. Telephone Interview with John Weiss, *supra* note 151.

321. Press Release, N.Y.C. Law Dep’t, Office of the Corp. Counsel, City’s Law Department and Landmarks Commission Announce Lawsuit to Save Historic Landmarked Apartment Building – The Windermere – Located at Gateway to Manhattan’s Upper West Side (Mar. 20, 2008), available at [http://www.nyc.gov/html/lpc/downloads/pdf/press/09-07\\_windermere\\_record\\_settlement.pdf](http://www.nyc.gov/html/lpc/downloads/pdf/press/09-07_windermere_record_settlement.pdf).

322. *Id.*

323. Press Release, N.Y.C. Law Dep’t, Office of the Corp. Counsel, State Supreme Court Justice Orders Repairs to Landmarked Windermere Apartment Complex in West Midtown Manhattan (May 9, 2008), available at [http://www.nyc.gov/html/lpc/downloads/pdf/press/05\\_09\\_08.pdf](http://www.nyc.gov/html/lpc/downloads/pdf/press/05_09_08.pdf).

324. Center for N.Y.C. Law, Decisions of Interest: Court Intervenes to Save Landmark, 14 CITYLAW 83, 83 (2008).

325. Press Release, N.Y.C. Law Dep’t, Office of the Corp. Counsel, City Receives Record \$1.1 Million Settlement Payment Over Owners’ Failure to Maintain the Landmarked Windermere Apartment Complex on Manhattan’s Upper West Side (May 21, 2009), available at [http://www.nyc.gov/html/law/downloads/pdf/2326471\\_1.pdf](http://www.nyc.gov/html/law/downloads/pdf/2326471_1.pdf) [hereinafter Press Release, Record \$1.1 Million Settlement].

326. Interview with John Weiss, *supra* note 157.

with Windermere Properties LLC requiring it to repair and maintain The Windermere. Windermere Properties LLC agreed to comply with the orders previously issued by Judge Smith that mandated the complex be shored and braced by September 30, 2009 and all other repairs be made in a timely fashion.<sup>327</sup> Windermere Properties LLC has performed some of the reparative work but continues to miss specified deadlines and, as a result, litigation continues. Weiss indicated that daily fines would be sought if the property owner continues to act in this manner.<sup>328</sup>

In this case, the preservation community regards the Legal Department of the LPC as victorious. This action does not reflect an “apologetic agency” as some characterize the LPC’s enforcement record. The New York City LPC’s Legal Department and its ability to uphold the law through the courts seems to be its greatest asset and, recently, demolition by neglect litigation has proved itself to be the strongest enforcement implement of the New York Landmarks Law. While a time consuming course of action, in this case only made more arduous by the mandatory translation of all documents sent to Toa Construction Company into Japanese as required by the Hague Convention,<sup>329</sup> legal suits are effective. In *City of New York v. Toa Construction Co.*, the persistence and high standards of both the Commission’s Legal Department and the City’s Law Department resulted in the saving of an individual landmark and the collection of a substantial settlement for the City of New York.<sup>330</sup>

Whether it is an individual landmark or a member of a historic district, a commercial or residential property, as designated landmarks the properties examined in this section are regulated by the New York Landmarks Law as protected buildings. Each of these case studies exemplifies a different strength or weakness of the LPC’s enforcement system.

## VII. FURTHERING ENFORCEMENT OF THE LANDMARKS LAW (2010—THE FUTURE)

Now with an understanding of its enforcement protocols, both as they exist on paper and as applied to the real world, and having illuminated its strengths and exposed its weaknesses, this article will offer recommendations for the Landmarks Law’s future improvement. These recommendations will be presented beginning with the more philosophical and then proceeding on to the tactile and pragmatic.

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327. Press Release, Record \$1.1 Million Settlement, *supra* note 325.

328. Telephone Interview with John Weiss, *supra* note 152.

329. Weiss, *supra* note 140, at 3.

330. In a related lawsuit, the court held against Toa Construction Co., ordering that they pay over \$2,600,000 to the tenants forced out of their homes by The Windermere’s decrepit condition. The Department of Housing Preservation and Development was awarded money to cover the cost of relocating these tenants. Press Release, Record \$1.1 Million Settlement, *supra* note 325.

Overall, the LPC is criticized by preservation advocates as portraying itself as apologetic in its enforcement practices. Preservation advocates believe that the LPC could take a more hard-lined approach to enforcement of the Landmarks Law, acting in a more aggressive and punitive fashion. Before appraising the enforcement philosophy of the LPC, it is necessary to understand two models of regulation.

The Compliance Model of law enforcement intends to “secure conformity with the law by resorting to means that induce conformity or by taking actions to prevent law violations without the necessity of detecting, processing, and penalizing violators.”<sup>331</sup> The Deterrence Model of enforcement seeks to “secure conformity with the law by detecting violations of the law, determining who is responsible for the violations, and penalizing violators to inhibit future violations by those who are punished and to inhibit those who might be inclined to violate the law if violators were not penalized.”<sup>332</sup>

While it initially seems that the LPC systematically enforces the law in a deterrence-based fashion, in operation, the LPC is focused on compliance. John Weiss said, “The whole philosophy of our enforcement is to not penalize people . . . but to . . . get the buildings [fixed].”<sup>333</sup> But, as preservation advocates would argue, the fines and violations that are imposed and are intended to act as deterrents are not as effective as one would hope. Preservation advocates would further argue that since Jennifer Raab’s appointment as Chair in the mid-1990s, the LPC has pandered to property owners. Otis Pearsall noted that as it currently enforces the law, the Commission does everything in its power to avoid being a bludgeon, a result that he posited was caused by the LPC being led by non-preservationists.<sup>334</sup> The deterrent aspect of the enforcement of the Landmarks Law seems to be compromised by the multiple grace periods that skew it towards the Compliance Model. What results from this hybrid regulatory enforcement system is, at best, mildly punitive systematically and, at worst, compliance-driven operationally. This is not to say that the current system is altogether ineffective, as surely it is an improvement from the pre-1998 system. Rather, the administrative enforcement system, as it now functions, seems to be confused in its mission and application.

Preservation historian Anthony C. Wood describes how the Commission functions as “a public nicety” as opposed to the “public necessity” that the law mandates.<sup>335</sup> While it is important to remain focused on compliance, a more punitive attitude and approach would benefit the LPC by improving enforcement of the Landmarks Law and the protection of the historic

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331. Albert J. Reiss, Jr., *Consequences of Compliance and Deterrence Models of Law Enforcement for the Exercise of Police Discretion*, LAW & CONTEMP. PROBS., Autumn 1984, at 83, 91.

332. *Id.*

333. Interview with John Weiss, *supra* note 157.

334. Interview with Otis Pearsall, *supra* note 1. It should be noted that the historical record, as established by this article, suggests that as Chairs of the LPC, non-preservationists were as effective, if not more effective, than preservationists in terms of the development of an enforcement system.

335. WOOD, *supra* note 24, at 376.

resources designated by it. The following recommendations seek to promote and nurture the nascent proactive enforcement philosophy present at the LPC.

#### A. Adopt Proactive Practices

Some claim that there is a general lack of awareness on the part of property owners of the specific requirements of the Landmarks Law and the permits required in performing work on designated properties. Kenneth Fisher, who was involved with the amendment of the Landmarks Law in the late 1990s to establish the administrative enforcement system, said, "If you ask[ed] the average property owner . . . they wouldn't know" what is required of them by law.<sup>336</sup> He continued, "[I]f you ask the typical single family homeowner in a historic district, who knows they're in a historic district, if they know that they need the Landmarks Commission to replace their windows, I would guess they don't know."<sup>337</sup> This would seem almost unbelievable, as street signs in historic districts declare the area as such and the title report of one's property indicates it as a landmark. While some ignorance of the Landmarks Law may be present, this does not account for the majority of non-compliance.

Violation of the Landmarks Law is most likely the product of a general reluctance to comply. Kate Wood of Landmark West!, a preservation advocacy group, contested that property owners who were aware of the requirements of the Landmarks Law forewent the pursuance of permits in a bold faced manner, knowing that the LPC would unlikely discover their non-compliance.<sup>338</sup> It would seem that required permits for minor alterations are often foregone by property owners as they are regarded as unnecessary or overly burdensome. The avoidance of the permit process for minor alterations seems to result in numerous, albeit minor, violations of the law. Longtime preservationist Otis Pearsall said that these minor violations can lead to major consequences, what he called the erosion of historic districts.<sup>339</sup> Stephen M. Raphael, a former LPC Commissioner, reiterated this point saying that in effectively allowing unpermitted work to go unpunished, a result of the weaknesses of the current enforcement system, small conditions of violation can become severely detrimental and historically damaging.<sup>340</sup>

Non-compliance, as some preservation advocates contend, is also the result of property owners believing, rightly so, that the LPC does not actively monitor designated landmarks. The Executive Director of Landmark West!, Kate Wood, argued that designated landmarks are not nearly as protected as their designation commands and requires because the LPC does not proactively monitor the historic resources under its regulation. She stated, "If the landmark commission isn't coming out to make routine inspections, then I

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336. Interview with Kenneth Fisher, *supra* note 118.

337. *Id.*

338. Interview with Kate Wood (Nov. 5, 2009) (on file with the Widener Law Review).

339. Interview with Otis Pearsall, *supra* note 1.

340. Interview with Stephen Raphael, *supra* note 88.

can only imagine that it would be a free for all.”<sup>341</sup> Currently, as the historical record suggests and as preservation advocates would argue, the LPC seems selective in terms of enforcement. This is a product of enforcement being initiated by complaints filed by the public. Some communities are much more active and dedicated to reporting suspected violations than others. Thus, property owners found to be in violation feel individually targeted by the LPC, as complaints are not produced in a fashion necessarily representative of the distribution of conditions in violation. For example, during the prosecution of a group of Canal Street property owners in violation of the Landmarks Law in the early 1990s, Leonard Hecht, who owned 373 Canal Street, said that he knew about landmark violations, but that the suit was unfair because he just “did the same thing as everyone else.”<sup>342</sup> In an interview with a property owner in Park Slope, Brooklyn who received a Warning Letter for the unpermitted installation of a sign for his medical office, he said “Why did they pick me? Someone must have reported me, a neighbor maybe.”<sup>343</sup> The owner explained his frustration as feeling singled out by the LPC. If the LPC evenly monitored all of the resources under its regulation, this sentiment would not exist as non-compliance would be uniformly detected.

Kate Wood continued, “[savvy] property owners know they can get away with violations,” and, as it is now, “nobody is minding the store.”<sup>344</sup> 16-18 Charles Street exemplifies this deficiency, where an historic iron canopy, an architecturally defining feature of the nineteenth century structure, was removed and the LPC was not aware of this until a complaint was filed by a member of the public.<sup>345</sup> Since the LPC does not actively monitor the historic resources under its purview, preservation advocates argue that compliance with the Landmarks Law is rendered voluntary and, consequently, as Kate Wood insinuated, the streets of historic districts have become the “Wild West” of regulatory historic preservation.<sup>346</sup>

As the historical record shows, the past ten years have yielded an increase in resources dedicated to enforcement of the Landmarks Law. It would seem beneficial to continue this trend and grow the LPC’s presence as an enforcement agency. The LPC would benefit from the development of a proactive monitoring program, thus establishing itself as an enforcement agency in the street, a watchful eye of the designated historic resources that it regulates. Non-compliance would be more readily detected and the public would begin to perceive the LPC as a visible enforcement entity.

In Washington, D.C., for example, Enforcement Officers actively monitor designated historic resources. This is done by automobile, bicycle, or on

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341. Interview with Kate Wood, *supra* note 338.

342. Blau, *supra* note 94.

343. Interview with Anonymous Property Owner (Nov. 26, 2009) (on file with author).

344. Interview with Kate Wood, *supra* note 338.

345. E-mail from Kathleen Rice to Benjamin Baccash (Feb. 11, 2010) (on file with author).

346. Interview with Kate Wood, *supra* note 338.

foot.<sup>347</sup> While complaints are also filed by the public, the D.C. Historic Preservation Office's monitoring efforts seem to be effective in dissuading non-compliance. From the success which preservation enforcement in Washington, D.C. has had, it would seem that by maintaining a visual presence in the field, the LPC could compel compliance by raising awareness of itself as an enforcement authority. Likewise, the LPC would be more likely to discover conditions in violation. Thus, designated landmarks and, subsequently, the LPC would benefit from the establishment of a proactive monitoring program.

Proactive monitoring is not altogether absent from New York City's regulatory repertoire. For example, the NYC Street Condition Observation Unit (also known as the NYC\*Scout Program) is dedicated to detecting unsafe street conditions throughout the five boroughs. To achieve this, a manned scooter proactively drives the streets seeking potholes and detecting Department of Buildings conditions of violation, in addition to other issues.<sup>348</sup>

This article recommends that the LPC develop and implement a proactive monitoring program. The LPC could hire Enforcement Officers who solely patrol historic districts and individual landmarks as mobile monitors. Alternatively, the LPC could establish branch offices in each borough where additional Enforcement Officers could be stationed and more easily monitor the protected historic resources of their respective jurisdictions.<sup>349</sup> LPC staff members and preservation advocates agree that the LPC would benefit from routinely patrolling historic districts and individual landmarks to ensure compliance with the Landmarks Law. In doing so, the LPC would build its presence in the field as an enforcement agency. This would aid the LPC not only in detecting non-compliance with its statute, but also by piquing the public's perception of it as an enforcement agency.

#### B. Raise Awareness of The LPC as an Enforcement Entity

The perception of the LPC as an enforcement agency can be built in other ways as well. The enforcement of the Landmarks Law would benefit if Enforcement Officers wear official badges, raising awareness of the LPC as an enforcer of the law. Currently, LPC Enforcement Officers conduct their investigations in the background and generally go unnoticed. When identifying themselves, which is not necessary in conducting their investigations, Enforcement Officers show their New York City-issued identification cards.

In Washington, D.C., shields have been extremely effective in solidifying the D.C. Historic Preservation Office's reputation as a serious enforcement

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347. Telephone Interview with Michael Beidler, D.C. Enforcement Officer (Jan. 26, 2010) (on file with the Widener Law Review).

348. Street Conditions Observation Unit, N.Y.C. MAYOR'S OFFICE OF OPERATIONS, <http://home2.nyc.gov/html/ops/html/home/home.shtml> (last visited Apr. 15, 2012).

349. *Id.* As a secondary benefit, these offices could be used by other LPC staff for meetings regarding applications in the respective borough, thereby making the interaction of the property owner with the LPC more convenient.



agency by exhibiting a higher level of officiality.<sup>350</sup> Other agencies that regulate the built environment in New York City, like the Department of Housing Preservation and Development and the Department of Buildings (DOB), utilize shields in enforcing the law. Timothy Lynch, a forensic structural engineer for the Department of Buildings, explained that DOB inspectors wear uniforms reminiscent of the police department and exhibit their shields in the same vein because the design community was not giving them the necessary respect when they appeared no differently than civilians.<sup>351</sup> In presenting itself in a more authoritative fashion, the DOB began to build its presence as an enforcement agency. Behavioral psychologists have proven that “clothing . . . elicits associations of authority and thereby serves as a cue for obedience.”<sup>352</sup> Moreover, “[s]ymbols can override the lack of other information, which leads people to comply with requests made by an individual wearing a [badge] when they know nothing else about this individual.”<sup>353</sup>

As it has been effective in increasing compliance with Washington, D.C.’s preservation ordinance and also at the New York City Department of Buildings, it seems that the LPC would build its reputation as an enforcement entity were its Enforcement Officers to wear and display shields. The cost of this requirement would be minimal and it is within the abilities of the LPC to amend their rules and regulations to do so, as demonstrated by the adoption of similar methods by similar regulatory agencies in New York City. General Counsel to the LPC Mark Silberman supported this idea.<sup>354</sup> As an improvement of minimal cost, the adoption of a policy that staff of the LPC’s Legal Department and the Department of Enforcement have badges and utilize them in enforcing the Landmarks Law would benefit the LPC. This article recommends the adoption of such a policy and posits that to do so would curb non-compliance by raising the public’s awareness of the LPC as an enforcement agency.

As another means of raising awareness of the LPC as an enforcement authority, the Department of Enforcement could post Stop Work Orders in visible areas as a deterrent, thereby compelling compliance. Currently, if Stop Work Orders are issued by LPC Enforcement Officers, they are mailed and only sometimes hand delivered. However, posting Stop Work Orders so as to be seen by the general public has been effective in enforcing the historic preservation ordinance in Washington, D.C. As explained by D.C. Enforcement Officer Beidler, this practice embarrasses the property owner.<sup>355</sup> Nancy Metzger of the Capitol Hill Restoration Society, a neighborhood preservation advocacy organization in Washington, D.C., echoed this notion

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350. Telephone Interview with Michael Beidler, *supra* note 347.

351. Interview with Tim Lynch, N.Y. Dep’t of Bldgs. (Mar. 8, 2010) (on file with the Widener Law Review).

352. Anat Rafaeli, Yeal Sagy & Rellie Derfler-Rozin, *Logos and Initial Compliance: A Strong Case of Mindless Trust*, 19 *ORG. SCI.* 845, 846 (2008).

353. *Id.*

354. Interview with Mark Silberman, *supra* note 65.

355. Telephone Interview with Michael Beidler, *supra* note 347.

and indicated that the posting of Stop Work Orders has helped the D.C. Historic Preservation Office build its reputation as a serious enforcement agency.<sup>356</sup>

As a practice, “the sanction of adverse publicity as a means of controlling the behavior of individuals” is an effective method of enforcing the law.<sup>357</sup> The New York City Department of Health and Mental Hygiene acts in accordance with this notion, posting the letter grade received by restaurants as inspected in their front windows, in plain view of the general public.<sup>358</sup> Likewise, if a person does not follow the street cleaning schedule and neglects to move his automobile, the New York City Department of Sanitation is “authorized to affix a sticker on the operator’s side back seat window of the vehicle informing the operator of said violation and interference, and this is in addition to any penalty imposed.”<sup>359</sup> For anyone who has experienced this inconvenience, it is certainly a deterrent to non-compliance.

The LPC would benefit from posting Stop Work Orders in a highly visible location on a portion of the designated property in question that would not be sensitive to its adherence (for example, on a front window). As demonstrated by enforcement preservation practices in D.C., methods of enforcing sanitation regulations in New York City, and psychological studies, owners of properties regulated by the Landmarks Law would be deterred from violating the law should the possibility of the posting of a Stop Work Order on their property exist. Posting Stop Works Orders would cost little and is within the abilities of the LPC. In doing so, as suggested by the evidence offered, the public would seem to be more likely to comply as a result of the LPC’s visible role as an enforcement authority. This article recommends that the LPC begin to post Stop Work Orders in highly visible locations as a deterrent to non-compliance with its statute, thereby building the perception of the LPC as a serious enforcement agency and subsequently curbing non-compliance.

### C. Hold All Parties Accountable and Equally Responsible

As it currently functions, the LPC only pursues the owner of the property exhibiting a condition in violation. But there is another party that could be held responsible and to pursue them would strengthen the administrative enforcement system. Licensed New York State contractors are responsible to notify their clients of all permits necessary to perform the desired work. By neglecting to do so, contractors can leave property owners unaware that they are violating the law. LPC Director of Enforcement Lily Fan said that she sometimes notifies property owners of their right to sue their contractor if this

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356. Benjamin Baccash, *Enforcement Methods for Local Historic Preservation Ordinances*, FORUM J., Winter 2011, at 10, 11.

357. Francis E. Rourke, *Law Enforcement Through Publicity*, 24 U. CHI. L. REV. 225, 226 (1957).

358. Tim Zagat, *Op-Ed, Kitchen Confidential No More*, N.Y. TIMES, Mar. 24, 2010, at A27.

359. N.Y.C. DEP’T OF SANITATION, A SUMMARY OF SANITATION RULES AND REGULATIONS 11 (2009).

happens.<sup>360</sup> Fan also indicated that while the LPC could take the contractor to court, seeking judgments against corporations is made difficult by their propensity to fold and reincorporate under a different name.<sup>361</sup> It would be beneficial to protect the property owner by decreasing the likelihood that the owner suffers the penalty resulting from the contractors foregoing the necessary permits under the Landmarks Law. As a deterrent, holding contractors liable for their misconduct would increase compliance with the Landmarks Law by decreasing the likelihood that contractors would forego applying for necessary permits.

There is another approach that could achieve a similar result. In Aspen, Colorado, the Historic Preservation Review Board requires all contractors and architects to be licensed in historic preservation in order to perform work on designated properties. The City of Aspen tests for this license.<sup>362</sup> When asked about the logistical possibility of developing a similar licensing program in New York City, former City Councilmember Kenneth Fisher said, “I don’t think it’s scalable here.”<sup>363</sup> Preservation advocate Kate Wood supported the idea of a historic preservation licensing program in New York City.<sup>364</sup> One could see the benefits of such a program. As the multilayered nature of environmental laws suggests, fail-safes seem integral to achieving a law unlikely to be violated. This article recommends further study on the possibility of developing a historic preservation licensing program in New York City.

Another way that contractors could be held responsible for violating the Landmarks Law is by explaining to the property owner their right to legal recourse. While Fan noted that sometimes she does this, it is not a regular practice of the LPC.<sup>365</sup> The LPC could mail with its Warning Letters and Notices of Violation a supplement explaining the responsibility of the contractor to the property owner and their right to sue for negligence accordingly. In doing so, it is likely that at least some property owners would pursue the contractors and, subsequently, it is possible that some contractors would be held responsible for their misconduct. It seems that this would increase the deterrent nature of Notices of Violation and increase the effectiveness of the administrative enforcement system. This article recommends that the LPC begin to pursue parties other than the property owner involved in violation of the Landmarks Law.

#### D. Enable the Private Right of Action

In grave instances of violation of the Landmarks Law, the LPC is able to pursue legal action against the violator. As the historical record suggests, as in the cases of Sushi Samba 7, the Skidmore House, and The Windermere, legal

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360. Interview with Lily Fan & Kathleen Rice, *supra* note 133.

361. *Id.*

362. *Id.*

363. Interview with Kenneth Fisher, *supra* note 118.

364. Interview with Kate Wood, *supra* note 338.

365. Interview with Lily Fan & Kathleen Rice, *supra* note 133.

action, when taken, is an extremely effective method of enforcing the Landmarks Law. John Weiss indicated that legal action is reserved for the most serious instances of violation and while it sometimes may seem to the public that legal action would be the best course of action, Weiss indicated that negotiation and the mere threat of legal action can be an effective deterrent.<sup>366</sup> A recommendation offered by the Historic City Committee in 1989 seems promising to resolve the discrepancy in opinion and to complement the limited resources of the legal department.

Following a study of the LPC, the Historic City Committee proposed "exploring the possibility of amending the Landmarks Law to permit private right of action suits to be brought against violators by bona fide groups with a recognized preservation interest."<sup>367</sup> A private right of action suit is a lawsuit initiated by the Private Attorney General. "The '[P]rivate [A]ttorney [G]eneral' is someone who is understood to be suing on behalf of the public, but doing so on his own initiative, with no accountability to the government or the electorate."<sup>368</sup> Environmental laws are enforceable by the Private Attorney General and this method of enforcement has proven to be a "powerful engine of public policy" in that realm.<sup>369</sup> Potentially, the Landmarks Law could be amended to be enforced by the Private Attorney General.

As the Private Attorneys General, citizens would be empowered to enforce the law themselves should the LPC elect not to do so. However, this possibility concerns the LPC for a number of reasons. General Counsel to the LPC Mark Silberman indicated that the power to prosecute must be left in the hands of the regulatory body in order to protect the Landmarks Law and avoid its utilization for nefarious purposes.<sup>370</sup> General Counsel Silberman and Deputy Counsel to the LPC John Weiss both expressed worry over the possibility that if the Landmarks Law were to be enforced by the Private Attorney General, the abilities of the Landmarks Law to enforce the law might be hindered, should the citizen-initiated suit result in an adverse precedent.<sup>371</sup> Deputy Counsel Weiss also voiced concern that the LPC might encounter resistance to the designation of future landmarks were the Landmarks Law enforceable by the Private Attorney General.<sup>372</sup> In other words, property owners would be averse to the idea of being sued by their neighbor for a minor violation of the Landmarks Law. With these concerns in mind, it would seem that by limiting it, the Private Attorney General option could be molded into a worthwhile enforcement mechanism.

In order to manage the suits that would be contemplated under the proposed Private Attorney General provision of the law, this article proposes

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366. Telephone Interview with John Weiss, *supra* note 151.

367. HISTORIC CITY COMM., *supra* note 82, at iii.

368. Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, LAW & CONTEMP. PROBS., Winter & Spring 1998, at 179, 179.

369. Rabkin, *supra* note 368. In addition to environmental laws, antitrust laws have been enforced by the Private Attorney General with extreme effectiveness.

370. Interview with Mark Silberman, *supra* note 65.

371. *Id.*; see also Telephone Interview with John Weiss, *supra* note 152.

372. Telephone Interview with John Weiss, *supra* note 152.

that a set of qualifiers would need to be established. For example, only citizens living within a certain proximity of the property at issue or community groups that reach a particular membership and age threshold would be able to sue. To ensure that malicious suits are not filed, mandatory consultation with the LPC would be necessary. Consultation would give the LPC an advisory role, thereby allowing them to influence and oversee lawsuits initiated by the Private Attorney General as a means of supporting qualitative cases and avoiding adverse precedents. The type of suit that could be brought by the Private Attorney General should also be limited. If the Private Attorney General was able to bring a suit for any violation of the Landmarks Law, property owners would be fearful that they would be subject to such a suit if they unlawfully made minor alterations to their landmarked property, no matter how unlikely a suit like this would be, and this could hinder the LPC's future ability to designate historic resources as landmarks. Thus, in addition to a proximity and age threshold and mandatory consultation with the LPC, enforcement by a Private Attorney General would need to be limited to cases of demolition by neglect. In this way, the Private Attorney General could supplement the capabilities of the LPC without endangering the Landmarks Law.

To enable the Landmarks Law to be enforced by the Private Attorney General, an amendment would need to be proposed by a City Councilmember and subsequently pass a vote and be signed into law by the Mayor. The Private Attorney General amendment would enable a drastic increase in the Landmarks Law's enforcement without an increase in resources, as the resources used to enforce the law by the Private Attorney General would be those of the private citizen electing to enforce the Landmarks Law of their own accord. The Private Attorney General provision would enable the citizen to be ultimately empowered, thus reaping the full benefits of the Landmarks Law and the public's vigilance. This article recommends that the Landmarks Law be amended so that it can be enforced by the Private Attorney General under the aforementioned terms.

#### VIII. CONCLUSION

In describing the history of New York City's preservation ordinance, Anthony C. Wood stated, "The story of the Landmarks Law is a story of vigilance—its price and its reward."<sup>373</sup> Increased vigilance is the fulcrum of the Landmarks Law. The future protection of New York City's designated historic resources relies on the LPC's enforcement system.

At first, the enforcement system employed by the LPC may seem primitive. However, once one understands its evolution and the climate of the times in which the system was developed and changed, one sees that enforcement of the Landmarks Law has come a long way. As a combination of criminal and civil suits and administrative action, the enforcement system is a trident by

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373. WOOD, *supra* note 24, at 391.

design. However, preservation advocates contend that it is a dull pitchfork in practice. While their opinions of the system differ, the LPC and preservation advocates alike agree that enforcement of the Landmarks Law is of paramount concern. Thus it is incumbent on the preservation community to continue discussing enforcement and consider how it could be improved.

Preservation enforcement will be increasingly relevant. Each month, the regulatory purview of the LPC grows as the number of buildings designated by the LPC increases. While designation will always be one of its main responsibilities, the LPC should become increasingly focused on enforcement of the Landmarks Law. Current and future landmark designations mean much less, some might say nothing at all, if not accompanied by a strong, failsafe, consistent, and appropriate enforcement system. Because the Landmarks Law is rendered less meaningful if it is not actively upheld, the LPC must reorient itself and reassess its priorities.

Forty-five years after the Landmarks Law was enacted, the time has come to consider how the enforcement system of the LPC could be improved. Designation of landmarks is only the beginning of a long road to protection. Detours from this road are not to be taken. Unapproved alterations, amputations, and additions are not to be performed. If a steadfast and impenetrable enforcement system were in place, this road would be without end or detour; designated New York City landmarks would exist in protected perpetuity. However, under the current enforcement system, this is not the case and historical fabric is lost as a result of frequent non-compliance.

Legitimized by the highest court in the land as a regulatory cause, developed as a profession, and established as a fixture to be reckoned with in the civic discourse, historic preservation has come into its own. It is imperative to improve enforcement of the Landmarks Law to foster the protection of all of the historic resources designated under it. This article has engineered improvements that together embolden a deterrent-oriented enforcement culture, an antidote to non-compliance. The time has come for the Landmarks Law to be unabashedly upheld. Those who fought for the Landmarks Law forty-five years ago envisioned a mode of protection which was innovative for the time and ultimately achievable. The historic preservation community of today should take a cue from their perspicacious predecessors and make it their mission to further safeguard New York City's designated landmarks by improving how the Landmarks Law is enforced.

## 2011 FITCH FORUM: PART THREE

### A TALE OF THREE CITIES: PRESERVATION ISSUES AROUND THE NATION

#### INTRODUCTION

Speakers: Mr. David Schnakenberg & Mr. Tom Mayes

MR. SCHNAKENBERG: So, one of the things that we heard from the first group is that we need opportunities to see what's happening around the country, on the ground, in different jurisdictions, and what's happening with different landmark ordinances. New York is in so many ways proud to be the leader, but we're certainly not the only place where preservation happens. We had a great opportunity to bring in some experts from around the country to talk about their local preservation ordinances and what issues they are confronted with routinely. They'll be introduced to you by the moderator I have the pleasure of introducing to you now.

Tom Mayes is the Deputy General Counsel for the National Trust for Historic Preservation. He has specialized in both corporate and preservation law since joining the Trust in 1986. He is the Trust's principal lawyer for legal matters relating to their twenty-nine historic sites and for historic properties and real estate transactions. Tom has expertise in architectural and technical preservation issues, preservation easements, the Americans with Disabilities Act, and historic shipwrecks; and he's written extensively on many of those topics. In addition to his work for the Trust, he has taught at the University of Maryland graduate program in Historic Preservation. He received his B.A. with honors in History and his J.D. from the University of North Carolina at Chapel Hill. He also has a Master of the Arts in Writing from Johns Hopkins University. He's going to introduce his panelists to you and we're very excited to welcome what we're calling "A Tale of Three Cities: A Look at Historic Preservation around the Country." Thank you, Tom, and welcome everyone.

MR. TOM MAYES: Thank you, David. I'm very honored to be asked to speak and I thank you all for being here today. I'm a little intimidated to follow that fantastic panel with Jerold and Tersh and Anne and Paul but we'll see what we can do. This is "A Tale of Three Cities" and we've got two cities that have faced, or are facing, legal challenges to their ordinances, this vagueness issue that Jerold and others referred to. Then we have a city, Los Angeles, which is in the process of contemplating changing and strengthening its ordinance, another topic that Jerold touched on. I'm looking forward very much to hearing what our panelists have to say about that. I'm going to introduce the three panelists, and then they're each going to do a brief presentation for about ten to fifteen minutes with a few slides. You're all visual learners, so you get to see some visuals, and then we'll come back and have some questions and answers, beginning, I hope, with some questions from the audience.

Linda Dishman will be our first speaker. Linda is the Executive Director of the Los Angeles Conservancy. She's been in that role since 1992. She's been on the Board of Advisors for the National Trust for many years. She is also on the Board of the California Preservation Foundation and is a nationally recognized leader in preservation. Brian Goeken is lead staff to the Commission on Chicago Landmarks. He has been in that position for ten years and has been with Chicago for even longer than that. He is a past-Chair and Board member of the National Alliance of Preservation Commissions, an organization that we haven't touched on this morning, but it is one of the important national organizations that gives advice and counsel to preservation commissions. Karen Gordon is the City of Seattle's Historic Preservation Officer and has been in that role since 1984. She's also on the Board of the Washington Trust for Historic Preservation and the Board of the Advisors of the National Alliance of Preservation Commissions. That is the briefest of introductions about these individuals, but let me say all three of them are considered national leaders in the field of local preservation law because, even though they're not lawyers, they're at the forefront of this. They are interfaced with the public and the legal system regarding legal challenges to the ordinances in their cities, and how that plays out between what preservationists do, as a legal content, what the law actually says, and how its applied in the courts. They have, all three, worked very closely with the National Trust and with the National Alliance of Preservation Commissions in helping to defend these ordinances from legal challenges, and they've worked very closely with our Legal Defense Fund at the National Trust. I'm thrilled that we're going to be able to hear from them this morning. I'm excited to get their perspectives about local preservation ordinances, how they're interpreted, and how they can be defended and strengthened from legal challenges. With that, I'm going to turn it over to Linda.

#### LOS ANGELES

Speaker: Ms. Linda Dishman<sup>1</sup>

Great, thank you Tom. I know that I'm in New York, but I'm going to tell you we do have historic resources in Los Angeles, so bear with me. I just want to get that out there. We do actually spend a lot of our time with old buildings, but most of our work has to do with more modern resources, which I'll get into.

We were founded in 1978 to save the Central Library, which was going to be torn down; hard to be believe, but that was the first of our win-win solutions. It's very important that we use preservation law to craft our win-win solutions, but the law is just one component of what we do to save these

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1. All photographs courtesy of the Los Angeles Conservancy.



buildings. When the conservancy was founded, we always had education. We always had advocacy—partly because not everybody in L.A. believes we have historic resources; so we have to get people out and experience these things. This is just a broad example of the type of historic resources that we have. Most of the conservancy's work—we do work within the entire county of Los Angeles—is within the in the city of L.A.

Interestingly, something I had not noticed until I'd been invited by Tony to come here, is that the L.A. city ordinance is actually older than New York's; I bet none of you would've gotten that question right on the test. Our ordinance was enacted in 1962. It has never been challenged legally, which is interesting, particularly when you find out how vague it is. We have worked with individual landmarks; we have over 1000. We also have twenty-seven historic preservation districts, which we call HPOZs,<sup>2</sup> which protect another 22,000 buildings. We actually have a fair number of buildings under protection, but this is under the context that there are 880,000 parcels in the city of Los Angeles, so we are just beginning our odyssey in terms of designation and protection.

One of the things that I think makes the Los Angeles ordinance interesting is that it does not specify whether there is interior review, but it always has been interpreted that there is interior review. It's sort of like, this is our pattern of practice, but it's not specified. This is one of the concerns that we actually thought was vulnerable. We also have many fabulous interiors. So this interior issue is very important but we've never had any problems. The only problem we had with our interiors had to do with Bullocks Wilshire which had all these great interior light fixtures. When Macy's was going bankrupt, the light fixtures were removed and dispersed to department stores throughout the city and state. The City Attorney said that because it required a permit to remove the light fixtures, they didn't have the authority to get the light fixtures back. That was our one test of the ordinance in terms of interiors. We did get the light fixtures back by sending thousands and thousands of postcards to the CEO of Macy's who decided, "Okay, fine, I'll give them back," but that's been the one test on the interiors.

We've started to review the ordinance, and it turned out to be much more elaborate, because we wanted to do consensus building. I've decided that consensus building is not the way. But anyway, we went through three whole processes in trying to figure out how we can do this, and one of the things that happened to us is we got out-organized by the monument owners. There were a couple of people that hired paid lobbyists, hired an organizer, and brought in pretty strong opposition to the existing monument owners. Now, would you ask them if you had a problem? Well, no, but it was feeding into what was referred to earlier as the property rights agenda. So, we went through all these different processes, working with the Chamber of Commerce and others; we

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2. At time of publication, the city of Los Angeles had twenty-nine designated HPOZs, with many more under consideration. See Historic Preservation Overlay Zones (HPOZs), OFFICE OF HISTORIC RES., CITY OF L.A., <http://www.preservation.lacity.org/hpoz> (last visited Jan. 16, 2012).

thought we had an agreement and then we didn't, and a lot of this would keep coming back to the interiors issue. We had been following preservation laws across the country which said that interiors typically would be designated as publicly accessible buildings. We found out that in the neighborhoods of Los Angeles, local groups were using this interior review to stop big bungalows from being turned into student housing, particularly near the University of Southern California. They were doing land use *de facto* with these designations, so they did not want to agree to this change of review in terms of public versus private.

The other thing that we worked on with the business community that I actually think, as a preservationist, is a good change, is not every alteration has to meet the Secretary of Interior Standards<sup>3</sup> as we're looking at overall eligibility. There were some projects we had some difficulty with in terms of one small element that didn't meet the standard. Of course 1962 pre-dates the standards—it doesn't even reference the standards in our ordinance—once again, another area of vulnerability: What are you using to make these decisions? I mentioned that we are the whole county. There are eighty-eight cities in the county of Los Angeles, and so the Conservancy has been working very hard to get ordinances in these cities. Seven of eighty-eight got an "A" on the report card; and that means they have an ordinance with some teeth. They have a Mills Act<sup>4</sup> contract, which is a property tax incentive we have in California, and they have a survey. Only thirty-six cities, 40%, have any kind of ordinance. Less than half of our cities have any kind of ordinance, and of those, only 15% have an ordinance that has some protection for historic resources; and they get a "B." What's interesting about this report card is the people in Beverly Hills are pretty damn proud that they have a "D," and they'll mention that in every conversation I have with them: "Well you know we have a 'D?'" "Yes, I'm aware of that," and we sort of work through. Then, we have an example of a community called Huntington Park, 98% Latino, which had one person on the City Council that didn't like that "D," and he worked tirelessly. We worked very closely with him, and they now have a "B+." The next time we do the report card, they're going to have an "A," because they'll have a Mills Act contract by then. So, this grading has its pluses and minuses. I would say mostly pluses.

This is important work that we're doing with the ordinances, but in essence, it really comes down to CEQA.<sup>5</sup> I had somebody say to me, "Who is this

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3. See The Secretary of Interior's Standards and Guidelines, OFFICE OF HISTORIC RESOURCES, CITY OF L.A., <http://preservation.lacity.org/secretary-guidelines> (last visited Jan. 16, 2012).

4. See generally OFFICE OF HISTORIC PRES., DEP'T OF PARKS AND RECREATION, MILLS ACT PROPERTY TAX ABATEMENT PROGRAM 1 (1999), available at <http://ohp.parks.ca.gov/pages/1054/files/ts12ca.pdf>.

5. See generally OFFICE OF HISTORIC PRES., DEP'T OF PARKS AND RECREATION, CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) AND HISTORICAL RESOURCES 6-7 (2001), available at <http://www.parks.ca.gov/pages/1054/files/ts01ca.pdf>.

Native American you keep referring to, CEQA?” It made me realize we talk in alphabets, but it’s the California Environmental Quality Act. In California, we have a tool that many other people don’t have, and that is our state environmental review process. What’s important about that is that you don’t have to be designated, you just have to be eligible. I think that’s really important, particularly because so little of Los Angeles has been surveyed. We’re currently doing a \$5 million survey right now, but the vast majority is undesignated. So CEQA will pick up if something is eligible or not, and if you are eligible then you have to look at a preservation alternative. Tersh gave his example of Brutalist architecture. We have LA Brutalism and, once again, not a building people hug. The Columbia Savings building was threatened with a multi-family housing development. We did a California Register nomination on this because, politically, in our city, if a City Council member doesn’t want something to be designated in their district, it won’t be. We went through the process and we really were pushing within the CEQA to have the building determined eligible, and what we had is a battle of experts. CEQA doesn’t save buildings it just provides a process to look at whether it’s historic and if there are preservation alternatives, and those alternatives are really important. It doesn’t, at the end of the day, save buildings but it does provide a process. We’re now getting into a process on the Moore House.<sup>6</sup>



Above is a Lloyd Wright, son of Frank, building and one of the things in looking at the Environment Impact Report (EIR), is you have projects with objectives. The property owner wants to tear it down and build a big old mansion, but it will be Mediterranean, so it will fit into the neighborhood. One of the issues we’re dealing with is that we’re actually preparing for a lawsuit when the final EIR comes out. When you have project alternatives, you need a

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6. Preservation Issues & Alerts: Moore House, L.A. CONSERVANCY, [http://www.laconservancy.org/issues/issues\\_moore.php4](http://www.laconservancy.org/issues/issues_moore.php4) (last visited Jan. 16, 2012).

house that fits in with the neighborhood, that isn't really a fair objective. That is something that we are really working on: what is the designation of CEQA?

I'm going to talk just briefly about Saint Vibiana Cathedral built in 1876. Designated one of our very early landmarks, the Archdiocese wanted to tear it down and build a new cathedral, and we wanted to work with them. They started to demolish the building without a permit because they got a Notice to Obey. We got a temporary restraining order on a Saturday morning, which no one thought we could do, and they were banking on that. We were able to stop the demolition after just a little top piece was taken off. Actually, that day had several lawsuits, and the lawsuits really had to do with the fact that the city didn't have the right to have this building demolished without going through environmental review. Then, the city tried to de-designate the building, and once again, we came back and filed a lawsuit and said, no, that's a discretionary action, you need to have environmental review.



Then, we had it where the Archdiocese, which was very powerful before all the scandal, went to Sacramento and tried to get the whole area of downtown taken out of the California Environmental Quality Act. However, CEQA ultimately saved us. Because the process was so long, the Archdiocese threatened to go to the valley, so it was given another piece of property downtown. The Cathedral was saved, and has now been turned into event space. This is something we worked on and brought a lot of money to the table, at both the state and federal level, but it really is sort of all the different tools in the tool box. That would be my message on advocacy today and using the law outside of the process: it is about the messaging, it is about having really good friends who are lawyers that will come do pro bono work for you, it's about marshalling people, but it really is about ultimately saving the building, and making sure it's going to be there for the next generation. Thank you.

## CHICAGO

Speaker: Mr. Brian Goeken<sup>7</sup>

Good morning. It's been said that during the competition between New York and Chicago to host the 1893 World Columbian exposition, a New York Sun editor derisively referred to Chicago as "that windy city," and popularized the city's sobriquet, not because of the city's weather, but because of the long winded talk and the civic boosterism of its businessmen. I'm going to err on the side of brevity this morning.

As an introduction, I thought I'd start with a little background. Like New York City and elsewhere, the preservation movement in Chicago grew out of a reaction to urban renewal, interstate highway construction, and the loss of major historic buildings. Incidentally, this photo, below, is of architectural photographer and early preservationist advocate, Richard Nickel, taken around 1960.<sup>8</sup>



The poster that he's holding up says, "Do we dare squander Chicago's great architectural heritage?" Chicago had a Landmarks Commission as early as 1957, a precursor to our current Commission, but it only had the authority to recommend buildings for an honorary designation and a plaque, and not to actually protect them from demolition. As you can imagine, important buildings continued to be lost and threatened, including such universally recognized masterpieces as Robie House, which Frank Lloyd Wright himself

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7. Unless otherwise indicated, all photographs courtesy of the Commission on Chicago Landmarks.

8. Photograph courtesy of the Chicago Sun-Times.

visited in Chicago in support of preservation. It wasn't until 1963, that the state of Illinois passed the enabling legislation, several years before Chicago adopted its current landmarks ordinance in 1968. In its forty-three year history, we have 296 individual properties, fifty-three districts, and seven district extensions encompassing over 10,000 buildings. About two-thirds of those have been designated under the term of the last mayor, Mayor Richard M. Daley, so about two-thirds within the last twenty years of the forty-three-year history of the Commission. The landmarks ordinance had major amendments in the 1980s and in 1997, including a change to require consent only for houses of worship. Chicago also has a citywide survey of historic resources<sup>9</sup> and a Demolition-Delay Ordinance<sup>10</sup> for the survey's two highest significance categories.

Originally the Commission was a freestanding agency. In the early 1990s Mayor Daley merged the Commission with the Planning and Economic Development departments with the goal of better coordination on planning, development, and preservation issues. The preservation community, as you can expect, had misgivings about this change. However, the result, I believe, was a stronger program, both in terms of greater collaboration and fewer inter-agency conflicts, but most significantly, greater access to financial tools and assistance for the redevelopment of historic buildings. This remains a major component of our program and has benefitted several dozen buildings in just the last few years. Some examples are: the use of taxing and financing to reconstruct the missing cornice to restore the elaborate cast-iron storefronts of Louis Sullivan's Carson Pirie Scott and Company department store, county property tax incentives in support of the rehabilitation of such buildings as the Art Deco Chicago Board of Trade Building, as well as the use of CDBG and housing funds, tax credits, facade rebate, and other development tools and incentives.

Finally, one comment regarding the Hanna<sup>11</sup> case which has been alluded to and mentioned by others and I'm sure it will continue to be. As the case is still being litigated, and as a named defendant—my mother is very proud—I am not at liberty to talk about it specifically except to say the Chicago landmarks ordinance was not invalidated and the city continues to designate new landmarks.

Let me state up front that the New York City landmarks ordinance remains the leading model nationally in most respects. As we look forward, I've been asked to talk about some of the issues we're currently facing, as well as offer

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9. See Chicago Landmarks: Historic Resources Survey, CITY OF CHICAGO, <http://webapps.cityofchicago.org/landmarkswb/web/historicsurvey.htm> (last visited Jan. 16, 2012).

10. See generally Historic Preservation: Demolition Delay, CITY OF CHICAGO, [http://www.cityofchicago.org/city/en/depts/dcd/supp\\_info/demolition\\_delay.html](http://www.cityofchicago.org/city/en/depts/dcd/supp_info/demolition_delay.html) (last visited Jan. 16, 2012).

11. See generally *Hanna v. City of Chicago*, 887 N.E.2d 856 (Ill. App. Ct. 2008).

my observations on the future. I decided to approach this from the perspective of someone administering a local preservation program. In the interest of time, this is by no means comprehensive but hopefully a starting point for an engaging discussion today.

Thinking about current trends regarding city budget and staffing levels, the trends are obvious and show no signs of changing soon. There are competing priorities and demands on local government facing reduced revenues, rising costs, and lower staffing levels. We are in competition for limited funds with basic city services and other equally worthy programs. It's therefore an absolute necessity that we continue to do more with less, prioritize what we do, and streamline how we do it. This may require changes to our ordinances, and almost definitely to our rules and regulations. If I had to tell you what the most important function of the Commission is, it would not be designation, but the review of permits and certificates of appropriateness. This is why: landmarks review has a reputation of being time-consuming, burdensome, anti-developmental, and expensive. Now, we know this is not necessarily the case, but it is the first issue raised by property owners when discussing landmark designation and the issue you'll most likely hear from officials as complaints from constituents. We need to do a better job confronting both the myths as well as the truths in this area. In times like these especially, preservation should be seen as contribution to economic development, as the creation of jobs and enhanced property values. For all these, there is considerable supporting data on effective and active designation programs depending on how well the certificate of appropriateness program functions.

Along these same lines, we should be concerned about how long it takes to review a permit, as well as, specifically, the number of projects reviewed at the commission level, especially for large cities with professional staff. The commission itself should only review a very small percentage of projects. It unnecessarily delays the applicant, and it's a waste of staff resources and the time of the commission. I think there's an unfounded fear incommensurate with the amount of time and energy consumed by not streamlining the review process as much as possible for projects that could just as appropriately be handled at the staff level. Additionally, we should constantly be evaluating the acceptability of new projects and materials, how we apply our criteria, and we should be mindful of the big picture.

That is the point of all this after all, to save historic buildings. We need to be open to new ideas and thinking creatively, to balance the continuing investment in these buildings, while ensuring that the character-defining aspects are preserved. One example, Chicago's Bungalow Initiative,<sup>12</sup> which isn't regulatory, nor is it a program of the Commission, but it's been extremely successful in promoting the preservation of 80,000 bungalows. We need to also think about how to retake the lead on the discussion of sustainability, of which we are a much more significant part, in terms of potential impacts and benefits if we're serious about making major strides in this area. We need to

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12. See HISTORIC CHICAGO BUNGALOW ASSOC., <http://www.chicagobungalow.org/> (last visited Jan. 16, 2012).



think more about how and what we designate. Early on, we focused on high-style buildings and the works of the masters; and we've moved on to culturally significant properties, the "recent past," roadside architecture, the vernacular and, most recently, cultural landscapes. I'm a big fan of using local thematic landmark designations for properties that may be significant for historical reasons. By developing a historic context combined with designation survey work, it's easier to comparatively evaluate and identify the most significant properties. It can also streamline the designation process.

Below, a group of three architecturally modest buildings but part of the Black Metropolis, the city-within-the-city created by and for African Americans in Chicago's South Side in the years following the Great Migration of Blacks from the rural south to the city.<sup>13</sup>



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13. The second of three photographs courtesy of the Davis Group.





Also below, examples of some recently designated buildings associated with the Chicago Black Literary Renaissance of the 1930s, '40s and '50s; here, the homes of writer Richard Wright (top) and poet Gwendolyn Brooks (bottom). Thematic designations also allow for a much more compelling and detailed story in explaining the significance of these buildings; and for designations, you can nominate a larger group of buildings using thematic designations from across the city, in one single process. I know also that local support for designations varies greatly from community to community, in terms of depth, interest and organization. New York City, for example, has many more

advocacy groups involved in preservation than Chicago, and I have no doubt that has an effect on our respective programs.





With this in mind, what might work well in one city, might be less or more effective in another. Just like the historic properties themselves, preservation programs are specific to their cities and their own histories. But I want to conclude with some hopefully universal questions on some of the things we're going to be discussing in the years to come. They're not new questions for us, but timely ones. First, how do you establish priorities for our designation and permit review programs given limited time and resources? Is every historic building equally important? Are all past changes to a building important? For example, for changes that are at least fifty years in age must they, therefore, be preserved? If the building is significant for its cultural or historical significance, does it need to meet the same standards of integrity as buildings with architectural significance? How do you protect the integrity of buildings with cultural significance if it derives from the ephemeral use or occupancy of the building? And is landmark preservation the right tool to do so? I'm not sure. Can buildings of lesser significance continue to convey their importance while allowing greater changes; for example, properties with national or citywide significance versus neighborhood significance? What are the implications of treating some properties differently in terms of administration and fairness? Should all historic properties be held to the same standards of authenticity? And for some properties, particularly modernist ones, what's more important to preserve: original materials or the design intent? What if the design intent,

as essential to the significance of the property, could not be achieved at the time due to technical issues or the budget? Lastly, should all buildings that meet landmark criteria necessarily be landmarks and, therefore, required to be preserved as a matter of public policy? I thank you for the opportunity to speak today, and congratulate New York on its 45th anniversary.

#### SEATTLE

Speaker: Ms. Karen Gordon<sup>14</sup>

Thank you very much. I was going to show a few slides of Seattle for those of you who haven't been there. I feel like I'm coming from this hamlet after presentations about New York and Chicago and Los Angeles and we're, of course, the biggest city in Washington and probably a couple of states, so I'm humbled. The city of Seattle also owes a debt of gratitude to New York City. Our ordinance, too, is modeled after New York's, and our first landmark ordinance was passed in 1973. But before that, we actually had several historic districts that were designated. Perhaps the most iconic are the Pike Place Market, below, which is a historic district and Pioneer Square, right, which was the first historic district designated in 1970 by the citizens initiative. Like Chicago, our Pioneer Square District was the product of redevelopment after a fire.



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14. Unless otherwise indicated, all photographs courtesy of the City of Seattle Historic Preservation Program.



Then, some of our more modern resources are the iconic Space Needle, the monorail at Seattle Center, and some of our historic districts. We also have modern resources. For example a mural by northwestern artist Paul Horiuchi at the Seattle Center, which is celebrating its 50th anniversary next year. We also have vessels that have been designated as historic buildings, industrial buildings, a former Coca-Cola Bottling Plant, and schools. I'm sure many of you have had challenges working with school districts, as have we.

We have come to an accommodation where we designate buildings, and at the beginning of each designation presentation, they tell us they don't think we have the authority to do it but then we just make nice and go through with it. Also, filling stations, like the restored Hat 'n Boots, which is now a Seattle park, fire stations, and churches.





This is actually a success story church, a building that has been converted to condominiums. Many of you who are involved with preservation law might be most familiar with the former First United Methodist Church<sup>15</sup> involved in the case where the Washington State Supreme Court, almost twenty years ago, ruled that our ordinance was unconstitutional as it related to the designation of religious properties.<sup>16</sup> Fortunately, it's always good to have a preservation angel and Kevin Daniels, who's now a National Trust Preservation Trustee and a developer in town, he actually purchased the building from the church, which had a dwindling congregation that was looking to use the profits from the sale of their building to fund their mission. We've been basically having discussions in and out of the courts about this church for probably twenty-five years. The building was purchased about two years ago and the area between that and the high-rise to the south will become a high-rise building. Just for all of you to put this in perspective, especially the students, preservation solutions do not come quickly. This was an issue when I started my job in 1984.

The case I wanted to talk to you about today just very briefly, is the Satterlee House,<sup>17</sup> which is an individually designated landmark in West Seattle. It is separated from Seattle by a bridge and is sometimes considered its own city, but it is very much part of the city of Seattle, and this is a property that was designated by the Landmarks Board in 1981.

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15. Photograph Courtesy of Nan Krafft.

16. *First United Methodist Church of Seattle v. Seattle Landmarks Pres. Bd.*, 916 P.2d 374 (Wash. 1996) (en banc).

17. *Conner v. City of Seattle*, 223 P.3d 1201 (Wash. Ct. App. 2009). See also John Nivala, *Tout Ensemble: Preserving Seattle's Satterlee House*, 18 WIDENER L. REV. 247 (2012).



Our landmarks ordinance passed in 1973. The owner of the property at the time actually contacted the office and asked for his property to be considered for landmark designation, because he wanted to avail himself of the benefits available to owners of historic properties. It was designated as the Satterlee House, but the text of the designating ordinance also referred to the grounds as a historical landmark, which became an issue during the court case.<sup>18</sup> About ten years ago, a developer bought the property and planned to do a demonstration project of cottage housing by putting six cottages on the site in front of the Satterlee House. The developer donated a view easement to the nonprofit preservation organization in the city and not because of the Landmarks Board, but because the neighbors didn't want six houses in this area. They really, for the most part, threw up enough roadblocks. The developers said fine, I'm not going to do it, and the project time expired. Instead, they short plotted the yard to three lots. Basically, we went through about seven years of meetings between our Architectural Review Committee, Landmarks Board, and the Historic Landmarks Preservation Board. Ultimately, the owner was denied a certificate of approval for building the three houses and the Board was very specific about the reasons for which the project was denied. In its decision, the Board was very clear that three houses could be built there, but the houses that were being proposed were much larger than the landmark house and really would have destroyed the character of the landmark which included the site. We denied at the Landmarks Board level a certificate of approval for the three houses. Our Hearing Examiner upheld it. Then, the property owners went to King County Superior Court where the Hearing Examiner's decision was upheld, then went to the state Court of Appeals, which also upheld the decision of the previous decision makers. They also appealed to our State Supreme Court who refused to take the case, thereby upholding the Court of Appeals.

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18. Conner, 223 P.3d at 1207.

We are forever indebted to the National Trust for all their help on the vagueness cases. I get to talk about my cases because they aren't ongoing. I spent fifteen years not being able to talk about church cases so, Brian, I feel your pain. The court rejected the property owner's arguments that the ordinance was unconstitutionally vague as applied and that the landmark restrictions were an unlawful regulatory taking and deprived them of due process.<sup>19</sup> Not being a lawyer, I certainly understand due process, and there certainly was enough process in this case. We literally went on for six or seven years.

So, having said that, one thing that is applicable to what some of the previous speakers have said, is whether public support is growing or waning for preservation ordinances. What else is needed to supplement a community's preservation ordinance? Both Linda and Brian have spoken to that. I just want to emphasize some of the issues I see on a daily basis. One is really a strong constituency, both external and internal. I'm coming from a regulatory standpoint, working for the city but having a strong nonprofit partner. If you're in a smaller community or nonprofit historical societies, it is really critical. Those groups can do things I can't do, our board can't do, people on my staff can't do. I teach preservation planning and I always say that the strength of an ordinance or a program reflects the political will of the community, and I think that's really important to keep that in mind in doing the work. Having those relationships or at least lines of communication between city and nonprofit organizations at the local level and those constituencies is important. You might not have to agree all the time. I think Linda and Brian can both tell you that there are some people that we are sometimes stunned being in the same room with or side of the table with, but it happens and it's good to have that relationship. Brian also talked about money and budget. My other maxim is: budget is policy. If your program isn't funded, having an ordinance is not as meaningful as it is if you have the funding to do it and the ability to adapt to changing priorities and the economy.

We talked a little bit about sustainability; I think sustainability is in many areas. Sometimes preservationists apologize too quickly for not being on the cutting edge of whatever the new trend is, but I think in terms of sustainability, we should really take credit for our having really been at the forefront long before anyone had a name for it, for energy efficiency, etcetera. There are other ways to achieve energy efficiency without taking out every window, and especially in the context of the sustainability discussion, in terms of sustainability overall and some of the tools we're using. You've heard about

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19. Conner, 223 P.3d at 1208-11, 1213-15.



some of them. Certainly federal law Section 106 and Section 4(f)<sup>20</sup> can be very complex, but they are understandable. I know a question was posed earlier about why they're difficult. The core of those laws is very clear, and I continue to be amazed after twenty-seven years in the city where I always have to raise my hand at meetings and say, "Well, that's fine but you may have a 4(f) problem or a 106 issue" and they say, "Oh, you're so smart you understand all that." Well, it's not intuitive. I've learned it over the years. Everyone can learn it and explain it. It's really obvious: if it's a federal undertaking, you have a 106 issue and you need to work pretty early on in the process to deal with it.

Other things I wanted to mention: ongoing education, again, that's internal and external. One of the issues that I really tried to be a leader on, is working with capital improvement departments in the City of Seattle. I work with them before any levy measures go to the voters, so that it's really clear that they understand that they're historic resources and that the ballot title includes the word rehabilitation, and not just modernize, because that opens you up to demolition. Having a good survey and inventory, which I know in the budget times can be difficult, but I think that's where having the connections with your other constituents can be helpful. Educating your elected officials—all of my colleagues on this panel live in cities that have districts, and you all do too, our district has city-wide council members, so it's very important that every single person there understands the value of preservation. There are some downsides that might not affect their neighborhood, but I think it's important to make it a universal issue and I think, finally, in going to the Conner decision, is really making sure your board members are educated and they can make a defensible decision. That's really about having a good relationship with your city attorney's office and making sure that the support is there, which I've really been blessed in having over twenty years.

When I do commission training when the board members are first appointed, the first thing I say to them is, "There are two words, 'feel' and 'like,' that should never come from your lips during a meeting" and the second is, "We tape our meetings and make them into transcripts so if you really don't want to hear it aloud in a court room, don't say it" and the third is, "If I invite you out for coffee or lunch, it's not a good thing usually because that means you haven't really listened to the first two things. So it's lovely seeing you but you probably don't want to see me again really quickly because it's probably not good." Thank you for being here and it's been a pleasure.

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20. The National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915 (codified as amended at 16 U.S.C. §§ 470-470x6 (2006)); The Department of Transportation Act of 1966, § 4(f) Pub. L. No. 89-574, 80 Stat. 771 (codified as amended at 23 U.S.C. § 138 (2006)). Each section has been amended and renamed, but are still commonly referred to as 106 and 4(f) by historic preservationists. Section 106 mandates consultative procedural requirements for determining a project's effect on historical resources and section 4(f) provides protection to certain types of historical sites. The two statutes are very similar and are often a source of confusion. Generally, section 106 process is the method by which a historical site's significance is determined for federal undertaking under section 4(f). See Section 4F, Md. Dept. Transp., [http://www.section4f.com/res\\_cult.htm](http://www.section4f.com/res_cult.htm) (last visited Jan. 16, 2012).

## PANEL DISCUSSION

Moderator: Mr. Tom Mayes

Panelists: Ms. Linda Dishman, Mr. Brian Goeken, & Ms. Karen Gordon

MR. MAYES: Well, first I would just like to thank our panelists for great presentations. It was fantastic to visit Los Angeles and Chicago and Seattle for a little bit; to see some green shrubbery and green lawns. Thank you, I really appreciate that. I wanted to start the questions and answers by posing one complicated question, and then open it up to the audience after I give the panelists an opportunity to respond. I wanted to pick up on a theme from this morning, and that is the theme of vagueness, which all of you touched upon to some degree. Linda, you said your ordinance was vague.

MS. LINDA DISHMAN: It's not a surprise to anybody.

MR. MAYES: Karen has survived a vagueness challenge and Brian is in the midst of a vagueness challenge. I wanted to back up away from the specifics of the law and think about it from a more rhetorical point of view, again a theme from this morning. Karen, I love the fact that you tell your Commission that they may not say "like" or "feel," and yet there is this fundamental issue that we have in preservation where people think it's still simply a subjective exercise of the taste police. We've had that all the way through the history of preservation for forty-five years, for seventy years, think back to Charleston. I wanted to ask the panelists how they respond to vagueness in their day-to-day work. What's your elevator speech about vagueness and subjectivity? How do you talk about it?

MS. KAREN GORDON: Well first of all, our ordinance differs from most in that for each designated property we indicate what features or what changes require approval by the board, what can go to staff, and what doesn't need approval. We're very specific with people at the beginning, and it really helps them understand the process more and feel more comfortable. They know that if the building interior isn't protected—and we do protect building interiors both public and nonpublic in Seattle—and they want to remodel their kitchen, they don't ever need to see us again. That's not a problem unless they're adding to the house someplace it's visible, but if they want to put on a third story to a house, they do need to see us again. So, we have some agreements here, very complicated and sometimes some of the elected officials, their head starts spinning when they see these come before them, but the property owners are happy. They might not be happy—I shouldn't say

that, they're less ticked off and they're not suing us; they're happier than they were when they walked in the door.

MR. BRIAN GOEKEN: I'm going to talk about, for obvious reasons, the permit review side and not the designation side, because I'm perfectly free to talk about the permit review side. I think along the same lines, this is a constant issue even with the Secretary of Interior Standards, all the guidelines that we promulgated, and the technical briefs of the National Park Service. There's a lot of information out there but it is never—and this is a constant refrain in talking with my staff—the same exact situation because, by definition, almost every situation with historic property is somewhat unique. Obviously, we have to treat like properties in like situations similarly but it's very rare in the more than twenty years that I've been doing this that I've ever seen the same situation with the same circumstances. There's always some little important fact or distinction. It drives my staff crazy because we'll be sitting in a staff meeting and they'll say, "Well, this is just like what we did in this other case," and I'll be like, "Well, did you think about this? Are you sure about that?" And we should always be doing that internally and making sure. It helps us solidify our thinking.

I think Tom asked us this when we had the conference call to set this up; we don't require consent with our ordinance except for houses of worship. We do actively try to get consent and we have a very long consent period, forty-five days, with possibly another 120. In fact, by mutual agreement, we can extend it past that if we're in active negotiations with the idea of reaching some kind of consensus. Ideally, we'd much rather go to a council, as a matter of principle, with the consent of the property owner. In addition to identifying significant features, we do sometimes incorporate specific design guidelines in our ordinance. New York City has policies, I think, for banks and, I know, for theater interiors and we've looked at them frequently when we had some weird circumstances. I had the fortune, or the misfortune I guess, to be the lead on negotiating with the Chicago Cubs on the only Major League Ballpark that's a designated landmark, if you want to imagine what that process was like. I think I looked the other day and I had more than thirty-five drafts of the design guidelines that we developed. I don't take somebody else's stuff, so if we agree on changes I redraft and I redistribute, because I want to make sure there weren't any changes made that I'm not aware of. We went through all those things to try to win the consent of the Tribune Company who was the owner of the ballpark at the time, and at the end of the day they did not consent. We decided to go forward with the guidelines that we negotiated with them even though we arguably gave some things away in exchange for other things, but we felt that it was the right thing to do. That's basically the philosophy in Chicago. We do really try to work hard with the property owners to be fair and predictable and address some of these concerns. A lot of times it's things that are very obvious that you look at and say, "Well, that's never going to be a concern," but to the property owner, they don't understand that. So

sometimes you're putting things in an ordinance that actually have no material effect in how you administer it, but it makes them feel better and there's something to be said for that.

MR. MAYES: Do you have an example of that?

MS. GORDON: I can give you one. We have a private club, the Rainier Club, across the street from the Methodist Church and there was a designation for years. They wanted a decrease in their taxes because they could be a landmark but they didn't want to be a landmark. So, that had been going on for like six years before I got there and I said, "Hmm, walks like a duck, talks like a duck, you're going to be a duck," and they actually are, and we have interiors but they were saying what about when we plant annuals in the spring and the fall. I mean that's the kind of thing we get and we're thinking, "Oh, we can do gardening, go out there and help them plant their annuals but no we're not going to get into that." In the designating ordinance, we talk about what landscape features are included and what are not and they were happy with that. They're fine. They actually go to other downtown property owners now and tell them about how this process really works. They're my ambassadors with other nonprofits.

MS. DISHMAN: I have two points; one is in terms of the vagueness. I think, while our overall ordinance is vague, the really specific issue is that at least half of the 1,000 nominations that we have designated have maybe four or five sentences. So in the Bullocks Wilshire case, there were three sentences. None of them mention these light fixtures. We just don't have a lot of information, so one of the proposed changes to the ordinance is to have an inventory of character defining features, that will be, as Karen said, upfront. Everyone knows what the game is, and I think that's where we've had some problems. Although, we've had this group of monument owners organizing against the ordinance revisions; none of them have a specific example of a problem and I thought that was really compelling but they were really buying into this property rights thing: "I can't tell you that I've had a problem, but overall I just think this is wrong." And they've been monuments for over twenty-five, thirty years; so I think that is something we need to be dealing with in a more formal way. And we're fortunate that we have a tax incentive for designating properties in California called the Mills Act which makes it more attractive for people.

The other thing I wanted to sort of pick up on is the issue of subjectivity. We found with our Cultural Heritage Commission we had a building that was built before the 1960s and the Commission didn't get it. They thought, "Not really an important architect, not really attractive" and there was a land use attorney, "Well it's been altered." And if you don't like it and it's been altered,

there's a high chance it's not going to be designated. After that hearing it became clear that if the Cultural Heritage Commission didn't understand the 1960s, clearly the vast majority of people didn't understand the '60s. So, the Conservancy launched in 2010, "The '60s Turn 50." Fifty years is what people understand; we went to the level that people could understand. Fifty years old, that should be considered historic. So guess what, the '60s are going to be considered historic. We did a year-long series of events to get people thinking about the '60s. One of the reasons that it's so important, particularly for us in Los Angeles, is that three-quarters of our growth occurred after World War II, and we have some amazing examples. Most people agree on the amazing examples. It's the slightly below amazing that we seem to have a lot of disconnect with. Probably fifteen years ago, I was at a Trust conference and somebody made a comment that basically said that surveys were so important because if we don't know what we have then we will only save what's left. Don't we need to get out there and figure out what were the best buildings of the '60s? When we saved the Century Plaza Hotel in 1966 we really found that that was the one that resonated, but people didn't necessarily understand why it resonated. So, part of our job was to explain that, and I think looking at subjectivity, education is so important; not only education of the commissioners and of the staff, but also of a broad audience so people don't go "What?" because that's not the right response. I think that working hand in hand there really is an effort. What was funny to me was, during our kickoff of the "'60s turn 50," we invited the Cultural Heritage Commission, of course. The Chair of the Commission came up to us afterwards and said, "You did that for us didn't you?"

MR. MAYES: Right, I have a follow up before I ask Brian and Karen to respond on the modernism piece. It seems to me that there were a lot of comments this morning about the core of historic preservation. I do think there's an issue of modern buildings being outside of our core for some reason and yet, we should go back and look at the past of our own movement. I was already working at a time when preservation didn't recognize Victorian buildings and didn't recognize Art Deco buildings. Now, both of those are well within what is considered core preservation value. So, I just wanted to get two responses on modernism and then we'll open it up to the audience.

MR. GOEKEN: I explained we had a precursor commission in 1957, and at that time they didn't think there was such a thing as districts. They thought there was a finite number of buildings that would be important; you'd designate them and you'd be done. So, they came up with a list with thirty-nine buildings on it; I think they finally adopted the list in 1961 or 1962. It has the Inland Steel Building on it. The Inland Steel Building was built in 1956, so the building is less than five years old at the time that they were considering it. The

list had several buildings from the 1940s, there was one other building from the '50s, as well.

You have to remember that, at least in Chicago, the preservation movement comes from architects and they're modernists. They wanted to make the connection between modern architecture and the Second Chicago School, the First Chicago School being Louis Sullivan and Frank Lloyd Wright, and the Prairie School, uniquely American architecture, not that classical stuff that New York is doing, but the unique Chicago stuff. So, that was always kind of a bias. When the public library was threatened with demolition, though not on anybody's radar screen in the professional preservation category, the public gets upset about it. The Chicago Theatre demolition permit gets pulled for our namesake theater, which is not designated. The public is in uproar. The city refuses to issue the demolition permit. It then goes to court and the judge says "You've got two options: issue the permit, or buy it," and the city ended up having to buy it, because there was no way we could live with losing the Chicago Theatre. So, it was always kind of interesting stuff. We didn't look at the Classical Revival stuff in Chicago, the stuff that in other parts of the country would rank highly.

Where we are now is a group of sixteen neighborhood banks. They were all from the early 1900s with the exception of this little gem of a building. It was by a major firm, really cool inside: floating mezzanine, luminescent ceiling. There's an elevator core with a staircase that goes around it, and the core had little gold tiles that were supposed to look like stacked coins, really "neato bandito." Only one that was post-1930, and it was a horrible experience.

MR. MAYES: Maybe because the standard was "neato bandito," a little bit hard to explain.

MS. DISHMAN: It's in your ordinance.

MR. GOEKEN: "Neato bandito" is not "feel" and it's not "like," it's a standard. And what was interesting was that the Commission was lukewarm about it, but they did start the process on it; the property owner was adamantly against it. It didn't have a lot of support from the neighborhood or the preservation community. And the architects, the problem that they had with it was that it wasn't pure International style. Those folks have their opinions about what was the best architecture. They're still alive. They still think about these things. And that was the biggest thing, because I had architects showing up at my hearing saying, "It's not pure International style because the columns aren't pulled out, or they're not in the right location." It was really kind of crazy. And at the council level—we're by ward, and so the individual alderman had a great say on what happens in land use decisions in their wards—and the alderman who was the Vice Chair of the Council Committee on Historical Landmark

Preservation said “I just don’t get it. I like buildings with brick and stone, those look old, those look important to me. I don’t get why this one is important,” and we had to withdraw it because we have the “Second Bite Clause” in our ordinance. That is to say you get one bite at the apple. So, if I lose that vote at City Council, I don’t get to take it up again later, so we withdrew the designation for that one building in the hopes that we might prevail another day.

MR. MAYES: Right, thank you.

MS. GORDON: I agree. I think a lot of it is the education. I mean, I think in many ways, the preservation movement hasn’t been too successful in the image of the brownstone in New York, or Pioneer Square, or whatever. That is the peoples’ image of a historic property. I deliberately chose images of the Space Needle and the mural and the monorail; some of the places that really define Seattle. But, the general public, and even the decision makers, don’t understand that it really is the heart and soul of the city, and a way of life that they are preserving. I think it really is about education, and I think that we’re beginning to have that discussion. I think we’ve done such a good job convincing people that the historic districts, many of which we have on the east coast, and even other parts of the country, are what historic property should look like.

#### AUDIENCE QUESTION & ANSWER

MR. MAYES: Sure. Thank you all, and now let’s open up to the audience. This gentleman down here.

AUDIENCE MEMBER: Brian, the owner consent you mentioned, is that written into the law or is that an informal process and does that forty-five days begin after the proposal’s public hearing and end at the designation?

MR. GOEKEN: I looked at the ordinance and it’s in the original 1968 ordinance, so it’s always been the process. It’s very long; there’s several steps in it. So we have a preliminary recommendation which kicks it off, and the third step is requesting formal consent. It’s in the ordinance, forty-five days, and then they can request an additional 120.

AUDIENCE MEMBER: Forty-five days from when?

MR. GOEKEN: It’s tied to the third step in the process. When the Commission receives a report from the Planning Department that is consistent with the city’s planning goals and objectives. It’s forty-five days from when we send the letter out, and then 120 beyond that. If we do not get consent, then there’s a clock ticking, which is one of the changes in the ordinance, that we have to

have a public hearing, and make a final decision within a year from when they started the process.

MR. MAYES: Just to be clear, you can designate over an owner objection. If the owner doesn't consent, you still can designate.

MR. GOEKEN: Correct, except for houses of worship.

MR. MAYES: Good, other questions?

AUDIENCE MEMBER: The New York law, which we're going to talk about later, allows you to designate interiors if they're publicly accessible and not used for religious purposes. Linda mentioned, casually, about interiors of houses; and Karen mentioned in absolute passing, that the Rainier Club has interiors. When I was in Pasadena about a year ago, people were talking about how they regulate the interiors of privately owned Greene & Greene houses. So I'm interested in what the conditions are in your three locations with designating private interiors that are not customarily open to the public, and whether, if you have that ability, there have been challenges to that.

MS. DISHMAN: I'll go first, and I actually know the Pasadena ordinance because I worked for the City of Pasadena during that-

MR. GOEKEN: Me too.

MS. GORDON: And they called me a lot.

MS. DISHMAN: That's how Karen and I got to be friends. Let me just address Los Angeles first, and we'll get to Pasadena. It vaguely says interiors, but it doesn't say "not interiors," so that is the power that's in there now. Under the new process, which hopefully will be adopted before our 50th anniversary, it'll be the character-defining features. So, it'll actually be listed in the ordinance what parts of the property or the structure are identified. What came out of the Planning Commission, once again, is that we had several architects on the Planning Commission, and one of the justifications for needing to have interior review, particularly in residential areas, was for our modern houses. You can stand on the street, and if the curtains are open, you can see in the house. So there was an argument that there was a public benefit to being able to look in this house.

MS. GORDON: I won't say what the benefit is.



MS. DISHMAN: The curtain people are going to make a fortune once this ordinance goes through, but that actually came up in discussion with the inside-outside debate, which was very important. It will all go back to this list of character-defining features in the ordinance in terms of how that's regulated. In terms of Pasadena, what happened there are thirty-three Greene & Greene houses in Pasadena, and one night, in the middle of the night, a Texan came with a truck and took all the fixtures that were designed by Greene & Greene out of the Blacker House.

Now, Pasadena is in some ways a conservative community, but when a Texan comes in the middle of the night and takes the light fixtures, that is something to get mad about. So there was a lot of uproar, and at that point we needed to stop this, and the problem was that each individual light fixture was worth more than the house. This was when they were going for \$500,000, so the city said we need to do something. One of my bosses said while we're doing it, let's just change the ordinance, we'll have a perfect ordinance. We struggled for a year, and ultimately we got the ordinance. It was solidified at my wedding. That was my wedding gift from the Mayor, and so Brian got to administer this. But, I will tell you that it was not seen as controversial, partly because you only have thirty-three people that could be mad; and in terms of education, Pasadena is so identified with Greene & Greene, it was really seen as one of the treasures. Now we will silently talk amongst ourselves that the Texan had bought the house from an elderly widow who had unfortunately invested in a game show that was not successful, so she had a hardship. Had she tried to sell a couple of light fixtures to buy her cat food, she would've been fine. Nobody would've come out, but because it was this assault on the city, that was how we had the momentum to do that. So I'm a big believer in when something bad happens, to really try to capitalize on it.

MR. MAYES: I'll only drop a footnote that this Texan issue was the first time the Trust had a claim of defamation against it. So, we're not really permitted to talk about the Texan very much.

MR. GOEKEN: Just along these lines, our ordinance says that we can designate a building all, or in part. In the beginning of time, the first designations designated buildings in their entirety, and then over the years we've administered permits where we've kind of decided what are the parts of that. Over the last twenty years in the designation ordinance we've specifically said this is what's designated. In general, the ones that were designated in their entirety we're really cautious about what we are reviewing on the inside of these buildings, especially if they're houses.

While we have the consent requirement for churches, we actually have probably designated more churches in the last several years than we did before there was the consent requirement. We've had a lot of churches that we've worked with, and we include the interiors. On the South Side of Chicago where you had Martin Luther King, Jr. or other individuals in there, you really

need the auditorium interiors to tell part of the story. For private houses now, if I'm going on the inside, I would really want to have consent, because I think that's what will bolster me if there are any other future challenges. Otherwise, if they're publicly accessible I think I'm probably fine. The big problem with these interiors, though, is what requires a permit. You can have the stuff designated in there, but if it doesn't require a permit, it's kind of hard. The problem with the Greene & Greene stuff is that you don't necessarily know what's inside the houses. When they were designated it was blanket. It wasn't like there was a survey or inventory. I can remember the countless number of times where we had to have the discussion, "Is this a fixture or is this furniture," because that makes a difference under the law as to whether we can regulate it or not.

MS. GORDON: And in our ordinance, at the time of designation we talk about the features and characteristics of the landmark—it's nomination and then designation. We can't designate any more than we've nominated so the board tends to cast its widest net at the time of nomination, and often includes interior features that ultimately are not designated. At the staff level, we spend a lot of time calming people down and assuring them that the bathroom won't be designated, and to just chill for the forty-five to sixty days. We're really specific, and I think there is the distinction between the privately owned properties and the lobbies of commercial buildings. Often with the privately owned properties, it's the owner coming to us wanting to have those features protected, because in some cases, it's a building that's been in the family for three generations and they're selling it. The enforcement is really the huge issue, because if there's this fabulous tile bathroom or kitchen that really is quite special and is part of the landmark feature, well, they don't need a permit to take that tile out. As Brian says, I may never know about it, but I'm still a little concerned about interior designations of private homes because of the enforcement issue and the whole issue of public benefit. I know that there are interiors included and my staff doesn't want me to hear about it if I haven't been to the meeting. We have another opportunity at what we call the "Controls and Incentives" stage, where we negotiate what's going to have a certificate of approval or not. For the most part, on more recent designations, I put some of those interior features under an administrative review so we have an opportunity to look at them at the staff level. And then if they have to go to the board, we make a decision there.

MS. DISHMAN: It's better with interiors, easements are a better tool.

MR. MAYES: Well there are issues about enforcement of interiors for easements as well, the same problem. I'm afraid we're out of time for questions.

AUDIENCE MEMBER: Oh quick question, did Pasadena ever get the light fixtures back and if so, how?

MS. DISHMAN: Some of the light fixtures did come back to the Blacker House. Some of the people, who shall remain nameless, did feel some guilt and actually sold them back to the family that bought the Blacker House. They have replicated the rest of the light fixtures, so when you go into the Blacker House, you experience it as it was when Greene & Greene completed the house.

MR. MAYES: I'd like to just thank the panel again, wonderful presentation.

MR. SCHNAKENBERG: Thanks Tom, Linda, Brian, and Karen.

# TOUT ENSEMBLE: PRESERVING SEATTLE'S SATTERLEE HOUSE

JOHN NIVALA\*

## I. INTRODUCTION

I love my neighborhood, though it really is nothing special. It has no historical or architectural significance. The houses are all built from the same pattern with the same materials. There are minor variations in construction (garage attached or not) and in exterior appearance (painted or not). The topography calls for some differences in siting (on a rise or not).

But for me, it is a pleasant enclave. The streets are not laid out on a grid; they bend and curve, gently rising or descending. There is foliage. The trees are mature and plentiful; the plantings are established and varied. When I turn on to my lane, I am home.

My neighborhood has a character which affords me a “sense of place and identity,” a sense produced by my interaction with my surroundings, a sense which makes “a home and a series of houses a neighborhood.”<sup>1</sup> A community’s “sense of place, its character,” can be created by a collection of structures or by a single structure.<sup>2</sup> But, in the end, it just makes us feel good, feel at home.<sup>3</sup>

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1. Katherine Ghilain, *Improving Community Character Analysis in the SEQRA Environmental Impact Review Process: A Cultural Landscape Approach to Defining the Elusive “Community Character,”* 17 N.Y.U. ENVTL. L.J. 1194, 1194 (2009) [hereinafter *Improving Community Character*]. The author continued:

It is a community’s perception of itself and is “shaped by time, experience, and action within the social, economic, historic, environmental, and cultural contexts of a specific place. As a composition of these various elements, community character is an intangible manifestation of a community’s relationship with the landscape—its cultural landscape.”

Id. (quoting Katie Ghilain, *Cultural Landscape Preservation in the Hudson Valley: St. Lawrence Cement’s Place in the Evolving Legal Protection of “Place”* 7 (May 5, 2006) (unpublished B.A. thesis, Vassar College) (on file with the N.Y.U. Environmental Law Journal)); see also Justin Martin, *Jewels of Olmsted’s Unspoiled Midwest*, N.Y. TIMES, Sept. 4, 2011, at TR11 (commenting on Olmsted’s design for the community of Riverside, Illinois: “It’s a triumph of subtle social engineering, full of thoughtful design touches meant to foster a sense of community; any well-thought-out modern suburb owes a debt to Riverside.”).

2. *Improving Community Character*, supra note 1, at 1216; see also Shalia Dewan, *Seeking a Tribute to the Ordinary in a Water Tower*, N.Y. TIMES, Feb. 6, 2009, at A12 (“[T]here is nothing preventing a workaday water tower from winning historic recognition. There is a growing awareness of the importance of what we call the vernacular, the ordinary, things that represent ordinary people and workers.”) (quoting historian James Gabbert of the National Register of Historic Places).

3. See Nancy Perkins Spyke, *The Instrumental Value of Beauty in the Pursuit Justice*, 40 U.S.F.L. REV. 451, 469 (2006) (“The feel good argument simply recognizes . . . that our visual environment impacts us in direct and significant ways. Aesthetically pleasing surroundings

Threats to that character or ambiance make us apprehensive. Threats carried out upset us. Loss of visual harmony or prospect and loss of identifying structures disorient us. There is a loss of concordance, of things—structures, landscape, visual cues—that made us feel good. We seek to protect and preserve the combinations, the ensemble, which gives us a sense of place.<sup>4</sup>

That is what this essay will discuss.

Part I will discuss and illustrate environs, a term used to describe a historic property's "associated surroundings and the elements or conditions that serve to characterize a specific place, neighborhood, district or area."<sup>5</sup> These characteristics spark a desire "to retain and preserve the distinctive character of historic properties' environs."<sup>6</sup>

Part II will review Louisiana's desire to preserve the character, the environ, of the French Quarter in New Orleans. Using the term "tout ensemble" shows that the Quarter is not just a collection of individual structures, but an entity in itself that collectively has a spirit, an ambiance and character that merits preservation.

Part III will then discuss whether an individual structure, the Satterlee House in West Seattle, has a character, an environ, described not just by the structure but also by its setting, a tout ensemble for an individual structure rather than a collective.

## II. ENVIRONS

Environs, that combination of "associated surroundings and the elements or conditions that serve to characterize a specific place, neighborhood, district or area," seem to have universal importance.<sup>7</sup> Amman, Jordan has a master development plan—"A livable city is an organized city, with a soul"—that seeks to "restore, rather than reinvent" the city, "preserving the skyline and a

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enhance our well-being by positively impacting our personality and sense of happiness."); see also Mark Bobrowski, *Scenic Landscape Protection Under the Police Power*, 22 B.C. ENVTL. AFF. L. REV. 697, 745 (1995).

4. See *Improving Community Character*, supra note 1, at 1195; see also John Nivala, *Saving the Spirit of Our Places: A View on Our Built Environment*, 15 UCLA J. ENVTL. L. & POL'Y 1, 18-23 (1997). We find ourselves in good company here, as Justice Breyer was recently appointed to the panel that awards the Pritzker Prize, the architecture equivalent of the Nobel Prize (at least for literature). See Robin Pogrebin, *Breyer Invited to Make a Case for Architecture*, N.Y. TIMES, Oct. 6, 2011, at A1 ("My home architecturally?" he said: 'It's where I live with my family. I like it. It's attractive. It's an old house in Cambridge. It's very nice. I love living there. It's very comfortable.'") (quoting Justice Stephen G. Breyer).

5. Francois Quintard-Morenas, *Preservation of Historic Properties' Environs: American and French Approaches*, 36 URB. LAW. 137, 167 (2004).

6. Quintard-Morenas, supra note 5, at 167; see also Spyke, supra note 3, at 470 (noting that "aesthetic regulation is not really about beauty at all, but rather serves to reassure us that our communities will remain stable and resistant to environmental change").

7. Quintard-Morenas, supra note 5, at 167.

sense of community.”<sup>8</sup> Simple things—sidewalks and benches—and major things—relocating sites of proposed tall tower construction which would have blocked the residents’ traditional view of their surroundings—helped “a city bereft of an identity develop a sense of place and ownership.”<sup>9</sup>

That sense, once developed, is strongly held. People appreciate it, identify with it, and seek to protect it once established. It can be big things—development of neighborhood green space<sup>10</sup>—or little things—neighbors cutting down established trees.<sup>11</sup> It can be construction that seems discordant with neighborhood character.<sup>12</sup> It can be proposals that threaten to interfere with neighborhood vistas.<sup>13</sup>

This really is not about beauty, but about reassurance that we can maintain stability in our environs, that concordance can be sustained. An example: *Sprint PCS Assets, L.L.C. v. City of Palos Verde Estates*.<sup>14</sup> “The City is a planned community, about a quarter of which consists of public rights-of-way that were designed not only to serve the City’s transportation needs, but also to contribute to its aesthetic appeal.”<sup>15</sup> Sprint wanted to place wireless facilities on those rights-of-way; eight applications were approved and two denied.<sup>16</sup>

One of the proposals denied involved Via Azalea, a narrow residential street, and the other involved Via Valmonte, a main entrance to the city.<sup>17</sup> A city ordinance permitted denial of an application for “adverse aesthetic impacts arising from the proposed time, place, and manner of use of the public property.”<sup>18</sup> The city council decided that the Via Azalea application “would disrupt the residential ambiance of the neighborhood;” the Via

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8. Michael Slackman, *Sidewalks, and an Identity, Sprout in Jordan’s Capital*, N.Y. TIMES, Feb. 24, 2010, at A8; see also Anna Louie Sussman, *In Amman, Unwinding From the City’s Snarl*, N.Y. TIMES, Sept. 4, 2011, at TR9.

9. Slackman, *supra* note 8.

10. See Ian Urbina, *Club’s Plan to Sell Land Shatters a Baltimore Neighborhood’s Serenity*, N.Y. TIMES, Aug. 20, 2008, at A13.

11. See Corey Kilgannon, *When Trees Fall Next Door, Neighbors Make the Noise*, N.Y. TIMES, Nov. 29, 2009, at MB1.

12. See Inga Saffron, *Poor Economy Prompts a Poor Design Decision*, PHILA. INQUIRER, Mar. 27, 2009, at D1.

13. See Sabrina Tavernise, *In the Capital, Rethinking Old Limits on Buildings*, N.Y. TIMES, Nov. 4, 2010, at A17; see also Martin Fackler, *Taking on Skyscrapers to Protect View of an ‘Old Friend’*, N.Y. TIMES, Oct. 12, 2009, at A6 (discussing a proposed Tokyo development which could block a neighborhood’s view of Mount Fuji); Christine Haughney, *Wondering if a New School in Brooklyn is Worth Blocking a View of the Bridge*, N.Y. TIMES, Jan. 21, 2009, at A25. Even rock stars are not shielded from these concerns. See Ian Lovett, *U2 Guitarist’s House Plan Rejected by California Board*, N.Y. TIMES, June 18, 2011, at A14 (discussing David “The Edge” Evans’ plan to build several homes that would mar his neighbors’ view of the Malibu cliffs).

14. 583 F.3d 716 (9th Cir. 2009).

15. *City of Palos Verde Estates*, 583 F.3d at 719.

16. *Id.*

17. *Id.* at 719-20.

18. *Id.* at 720 (citation omitted).

Valmonte application, if granted, “would detract from the natural beauty that was valued at that main entrance to the City.”<sup>19</sup>

Sprint appealed and the district court granted it summary judgment. The city then appealed to the Ninth Circuit, which reversed. California statutes permitted companies such as Sprint to construct the proposed facilities “in such manner and at such points as not to incommode the public use of the road or highway.”<sup>20</sup> “To ‘incommode’ the public use is to ‘subject [it] to inconvenience or discomfort; to trouble, annoy, molest, embarrass, inconvenience’ or ‘[t]o affect with inconvenience, to hinder, impede, obstruct (an action, etc.).’”<sup>21</sup>

The court said an “experience of traveling along a picturesque street is different from the experience of traveling through the shadows of [the proposed facility].”<sup>22</sup> The city could reasonably determine “that the former is less discomforting, less troubling, less annoying, and less distressing than the latter.”<sup>23</sup> The city’s “streets may be employed to serve important social, expressive, and aesthetic functions.”<sup>24</sup> It noted that “the public rights-of-way are the visual fabric from which neighborhoods are made.”<sup>25</sup>

That visual fabric is indeed important to our feel-good sense about our neighborhood or other ambient surroundings. Discordant elements introduced into that fabric are, in a sense, pollution, interfering with one’s enjoyment and interaction with his environs.<sup>26</sup> A stable environ protects “the emotional and symbolic meanings of our visual environment.”<sup>27</sup> We should work “to preserve neighborhood integrity and pride in identifiable, ambient qualities,” pride in our environs.<sup>28</sup>

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19. City of Palos Verde Estates, 583 F.3d at 720.

20. Id. at 723 (citing CAL. PUB. UTIL. § 7901 (West 1994)).

21. Id. at 723 (quoting THE OXFORD ENGLISH DICTIONARY 806 (2d ed. 1989)) (alterations in original).

22. Id. at 723.

23. Id.

24. Id.

25. City of Palos Verde Estates, 583 F.3d at 724.

26. See John Copeland Nagle, Cell Phone Towers as Visual Pollution, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 537, 539 (2009) writing that:

[O]ffensive sights are polluting agents because their appearance is found objectionable. A polluting agent is placed into the environment by a sign, a tower, a building, or a disorganized pile of materials. . . . Aesthetic concerns have also been linked to human health and blamed for depriving landowners of the cultural identity of their neighborhood.

Id.; See also Improving Community Character, *supra* note 1, at 1199; David F. Tipson, Putting the History Back in Historic Preservation, 36 URB. LAW. 289, 314 (2004).

27. Spyke, *supra* note 3, at 470-71.

28. Donna Jalbert Patalano, Police Power and the Public Trust: Prescriptive Zoning Through the Conflation of Two Ancient Doctrines, 28 B.C. ENVTL. AFF. L. REV. 683, 696 (2001); see also James P. Karp, The Evolving Meaning of Aesthetics in Land-Use Regulation, 15 COLUM. J. ENVTL. L. 307, 307-08

### III. THE FRENCH QUARTER: TOUT ENSEMBLE

Talk about being out front on historic preservation. In 1936, Louisiana amended its constitution, authorizing New Orleans to establish the Vieux Carre Commission to “have for its purpose the preservation of such buildings in the Vieux Carre section . . . deemed to have architectural and historical value . . . which . . . should be preserved for the benefit of the people. . . .”<sup>29</sup> The commission, acting

‘for the public welfare and in order that the quaint and distinctive character of the Vieux Carre section of the City of New Orleans may not be injuriously affected, and in order that the value to the community of those buildings having architectural and historical worth may not be impaired, and in order that a reasonable degree of control may be exercised over the architecture of private and semi-public buildings erected on or abutting the public streets of said Vieux Carre section’

was empowered to review any permit application that could affect the Quarter.<sup>30</sup>

Shortly after the commission was established and then promulgated rules regarding signage in the Vieux Carre, Marcus Pergament displayed a sign at his gas station for which he did not seek a permit and which exceeded limitations imposed by the commission’s rules. He argued, in part, that “his place of business, being a modern structure, having no architectural or historical worth” was not subject to the constitutional amendment or the commission’s rules.<sup>31</sup>

The Louisiana Supreme Court found “nothing arbitrary or discriminating in forbidding the proprietor of a modern building, as well as the proprietor of one of the ancient land marks . . . to display an unusually large sign upon his premises.”<sup>32</sup> The ordinance had a purpose “not only to preserve the old buildings themselves, but to preserve the antiquity of the whole French and Spanish quarter, the tout ensemble, so to speak, by defending this relic against iconoclasm or vandalism.”<sup>33</sup>

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(1990) (“[T]he aesthetic basis for contemporary land use regulation must be explained as incorporating humankind’s growing desire to achieve harmony between the natural and human environments, to balance human needs with the role of humankind as a part of the natural ecosystem.”).

29. *City of New Orleans v. Pergament*, 5 So. 2d 129, 130 (La. 1941) (referencing the stated purpose of the Louisiana constitutional amendment).

30. *Id.*

31. *Id.* at 130.

32. *Id.* at 131.

33. *Id.*; see also *City of New Orleans v. Levy*, 64 So. 2d 798, 801 (La. 1953); Hunter S. Edwards, *The Guide for Future Preservation in Historic Districts Using a Creative Approach*: Charleston,



Tout ensemble describes an “associational harmony,” which places a focus “on shared human values and the community’s need for cultural stability.”<sup>34</sup> After years of litigation, Morris Maher and his successors got that message. He owned two properties in the Vieux Carre and wanted to demolish one building on his property to build an addition to the other. Beginning in 1963, he sought permission to carry out his plan.<sup>35</sup>

The Vieux Carre Commission voted to recommend that Maher be given permission, but the city council, which had the final say, declined to adopt it. Maher said the council did not have the authority to reject the commission’s recommendation. Eventually, the Louisiana Supreme Court said the council had that authority and did not abuse its discretion in rejecting the Commission’s recommendation. A review of the record established to the court’s satisfaction that “the Maher cottage composed part of the elusive ‘tout ensemble’ of the Vieux Carre . . . and that it does have architectural value.”<sup>36</sup>

Maher and his successors were not done. He filed suit in federal district court challenging the ordinance’s constitutionality and claiming the city could only act through eminent domain.<sup>37</sup> The district court was dismissive: “The courts have repeatedly sustained the validity of architectural control ordinances as police power regulation, especially when historic or touristic districts like the Vieux Carr[e] are concerned.”<sup>38</sup>

The court, referencing *Pergament*, noted that the “protection of the ‘quaint and distinctive character of the Vieux Carre’ depends on more than the preservation of those buildings agreed to have great individual artistic or historical worth.”<sup>39</sup> Equally important was “the preservation and protection of the setting or scene in which those comparatively few gems are situated.”<sup>40</sup> In other words, consider everything; consider the overall effect made up of contributing parts. The “mandate to preserve the character of the Vieux

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South Carolina’s Contextual Approach to Historic Preservation, 20 U. FLA. J.L. & PUB. POL’Y 221, 225-26 (2009):

Historic preservation also contributes social and psychological benefits by recognizing that historic buildings, landmarks, and districts provide a constant memory of place to people in the face of change and development pressures. The attempts by historic preservationists to retain a familiar public scene help individuals feel more comfortable in their private lives.

See also Rose Maura Lorre, *Charleston’s (Now) Great Hall*, N.Y. Times, Sept. 4, 2011, at TR5.

34. Karp, *supra* note 28, at 309.

35. *Maher v. City of New Orleans*, 235 So. 2d 402, 403 (La. 1970).

36. *Id.* at 406; see also Bobrowski, *supra* note 3, at 718.

37. *Maher v. City of New Orleans*, 371 F. Supp. 653, 661 (E.D. La. 1974).

38. *Id.*

39. *Id.* at 663.

40. *Id.*

Carr[e] 'takes clear meaning from the observable character of the district to which it applies.'"<sup>41</sup>

But wait, there is a last chapter of the Maher saga to write. Morris Maher's successor, Paula-Beth Lashley Maher, appealed to the Fifth Circuit, raising both due process and taking issues.<sup>42</sup>

The Fifth Circuit said a due process analysis had to determine that "the state purpose to be served is legitimate," which "may encompass not only the goal of abating undesirable conditions, but of fostering ends the community deems worthy."<sup>43</sup> Due process values need not "be solely economic or directed at health and safety in their narrowest senses" but are indeed "more generous, comprehending more subtle and ephemeral societal interests."<sup>44</sup> The court noted its own precedent that "zoning ordinances may be sustained under the police power where motivated by a desire to 'enhanc[e] the aesthetic appeal of a community'" which can include maintaining "'the value of scenic surroundings'" and preserving "'the quality of our environment.'"<sup>45</sup>

As to the Vieux Carre, the court deferred to legislative judgment that it was "in the public interest to preserve [its] status quo . . . and to scrutinize closely any proposed change in the ambiance by private owners."<sup>46</sup> The ordinance "further[s] the object of preserving the character of the district in a meaningful fashion."<sup>47</sup> The court concluded that the "Vieux Carre Ordinance was enacted to pursue the legitimate state goal of preserving the 'tout ensemble' of the historic French Quarter."<sup>48</sup>

That is tout ensemble: the coming together of elements, not necessarily identical, but when combined, produces an effect which has character, an ambiance that pleases us and gives us a sense of place, and reminds us of antecedents and continuity. That is why we protect it. It is not shrink wrapped.<sup>49</sup> The Vieux Carre is alive with commerce, with residents, with structures from the past being used in the present with a real prospect of being used in the future. It has character.

But can that idea of tout ensemble be applied to an individual structure and its siting? The recent litigation involving the Satterlee House in West Seattle

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41. Maher, 371 F. Supp. at 664 (citing *Town of Deering ex rel. Bittenbender*, 202 A.2d 232, 235 (N.H. 1964)); see also Edwards, *supra* note 33, at 226-27 (stating that "Charleston remains the strongest proponent of retaining a contextual approach to . . . preserving not only individual buildings, but also preserving the historical integrity of entire communities").

42. Maher v. City of New Orleans, 516 F.2d 1051, 1053, 1054 n.6 (5th Cir. 1975).

43. Id. at 1059-60.

44. Id. at 1060.

45. Id. (quoting *Stone v. City of Maitland*, 446 F.2d 83, 89 (5th Cir. 1971)) (alteration in original).

46. Id. 1061.

47. Id.

48. Maher, 516 F.2d at 1067.

49. For a slightly different perspective, see Sarah Williams Goldhagen, *Death by Nostalgia*, N.Y. TIMES, June 11, 2011, at A21.

shows that it can. We do not seek a snapshot of a house; we want to sense what made it a place that, in turn, gives us a sense of place.

#### IV. THE SATTERLEE HOUSE

In 1905, Carrie and Frank Baker built a residence in West Seattle to be used as a summer retreat and a place for Carrie to run a vacation Bible school. Facing west with a view of Puget Sound and the Olympic Mountains, the house was built in a classic, Seattle box style rising three stories.



The house alone is distinctive but what really distinguishes it is the siting. The lot gently slopes eighteen feet up from Beach Drive to a knoll at the rear; that knoll is where the house was built. The front of the lot—about two thirds of an acre—was not developed and today remains much as it was in 1905—a greensward providing a neighborhood space for play and other activities.

From 1905 to 1971, the house had only three owners. In 1971, David and Margita Satterlee became the fourth owners. They owned the property until 2000 when it was sold to William and Marilyn Conner.<sup>50</sup>

During the Satterlee's tenure, Mr. Satterlee, seeking to obtain preservation funding, inquired about having the property—house and land—designated as

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50. This preliminary discussion is supported by information supplied by Seattle's Log House Museum and by the Southwest Seattle Historical Society. See generally Paul Dorpat, *The Painted Lady*, SEATTLE TIMES; Kathy Mulady, *When Past and Present Come Into Conflict; For Sale: The Only Two Historic Landmark Houses in West Seattle*, SEATTLE POST-INTELLIGENCER, Jan. 31, 2007 at B1; Tim St. Clair, *'Painted Lady' Cottage Project Debated*, WEST SEATTLE HERALD, Mar. 5, 2001 at 1. All these materials are on file with the Widener Law Review. I am particularly appreciative of the work done by Enza Klotzbucher of Widener's Legal Information Center who really unearthed much of the material.

a historic site.<sup>51</sup> The Seattle Landmarks Preservation Board (SLPB) did so in 1981 and “recommended that the city council impose controls on the property such that approval would be required for significant changes or addition of new structures.”<sup>52</sup> The council adopted that recommendation in 1983.<sup>53</sup>

When this process was initiated by a nomination form, the form, describing both the structure and the site, noted that “[l]andscape elements and siting contribute to the period character and significance of the residence,”<sup>54</sup> and contrasted it to nearby properties which “‘congregate near [Beach Drive’s] edge with much less attention to complementary landscaping.’”<sup>55</sup>

When the SLPB approved the Satterlee House designation it relied in part on this criterion:

Because of its prominence of spatial location, contrasts of siting, age, or scale, [the landmark] is an easily identifiable visual feature of its neighborhood or the city and contributes to the distinctive quality or identity of such neighborhood or the city.<sup>56</sup>

The SLPB further noted the Satterlee House was “in significant contrast to the surrounding, rather crowded (albeit atmospheric) area, with its long ‘front yard’ extending back and up the slope, climaxed by location of the house near the top of the slope.”<sup>57</sup> The house and the site were as one, were tout ensemble.<sup>58</sup>

After purchasing the Satterlee House in 2000, William Conner sought to develop the lawn, dividing it into three lots and proposing to build three

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51. Conner v. City of Seattle, 223 P.3d 1201, 1204 (Wash. Ct. App. 2009).

52. *Id.*

53. *Id.*; see also Julie L. Wilchins, Note, A Sense of Time and Place: The Past, Present, and Future of the Seattle Landmarks Preservation Ordinance, 17 VA. ENVTL. L.J. 415, 446-48 (1998) (discussing the Seattle Landmarks Preservation ordinance’s role in protecting historic buildings).

54. Conner, 223 P.3d at 1205 (alteration in original).

55. *Id.*

56. *Id.* (alteration in original); see also Bobrowski, *supra* note 3, at 697-98 (“Protection of visual resources has been an acknowledged goal of environmental management for at least a generation. . . . [T]he visual landscape rightly has been called our ‘most maligned, ignored, [and] unappreciated natural resource.’”)(citation omitted); Quintard-Morenas, *supra* note 5, at 137-38 (“Economic growth and development pressure increasingly threaten the environmental settings of historic properties. . . . The sense of time, place, and community associated with a historic property may progressively be lost by incongruous or incompatible structures affecting the property’s historical setting or context.”).

57. Conner, 223 P.3d at 1206; see also Lee Anne Fennell, Common Interest Tragedies, 98 NW. U. L. REV. 907, 979 (2004) (noting that the “overall neighborhood ambiance can be understood as a common pool resource”).

58. See Quintard-Morenas, *supra* note 5, at 138-39 (“The notion that historic properties cannot be considered in isolation from their immediate environment is not new. . . . This rule, described by the French expression ‘tout ensemble doctrine,’ implies a consideration of both the individual building and its setting.”).

homes, each of which would be larger than the Satterlee House.<sup>59</sup> The SLPB rejected the proposal as inconsistent with the protected historic features, a rejection which was affirmed by a hearing examiner and the Superior Court.<sup>60</sup> He appealed to the Washington Court of Appeals claiming the preservation ordinance was unconstitutionally vague and, as applied, deprived him of property without due process or compensation.<sup>61</sup>

The Court of Appeals denied these claims and affirmed the Superior Court's decision. In doing so, the court said it must first "identify the property protected by the landmark designation," because Conner claimed only the house, not the site, had been designated.<sup>62</sup> However, after reviewing the entire record from proposed designation through the administrative hearing, the court concluded that the ordinance "clearly designates the entire site as a historic landmark."<sup>63</sup>

Conner then contended that the Landmarks Preservation Ordinance (LPO) "provides no objective criteria from which he [could] predict what development proposal" would be approved, thus leaving individual board members free "to rely on their own subjective opinions to determine whether his proposal complies with the LPO."<sup>64</sup> In response, the court noted:

Because each landmark has unique features and occupies a unique environment, it is impracticable for a single ordinance to set forth development criteria or standards that could apply to every landmark. Rather, because that which may be appropriate adjacent to the Red Hook Ale Brewery may not be suitable next to the Smith Tower, the LPO requires each landmark designation to provide for specific controls and incentives, thus requiring individual consideration of development proposals.<sup>65</sup>

The LPO protects the "prominence of spatial location, contrasts of siting, age, or scale."<sup>66</sup> These are features and characteristics "which make the Satterlee House 'an easily identifiable visual feature of its neighborhood or the city and contributes to the distinctive quality or identity of such neighborhood or the city.'"<sup>67</sup> These are, the court said, "objective criteria."<sup>68</sup> The court

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59. Conner, 223 P.3d at 1204.

60. *Id.*

61. *Id.*

62. *Id.* at 1206.

63. Conner, 223 P.3d at 1207; see also Quintard-Morenas, *supra* note 5, at 138 ("The environmental setting of historic properties is often an important contributor to their overall character, and the preservation of historic properties' environs is increasingly recognized as a means of protecting the historic properties themselves.").

64. Conner, 223 P.3d at 1208.

65. *Id.*

66. *Id.* at 1209 (quoting Clerk's Papers at 323-24).

67. *Id.*; see also Spyke, *supra* note 3, at 474 ("The preservation and protection of beautiful vistas and culturally significant structures is important, not merely because they are part of the environment, but because they enrich us, or because they might otherwise be lost

noted that the ordinance and attendant instructions “adequately convey that a proposal should not overpower the house in size or scale and should preserve a relationship between the house and its grounds that provides ‘prominence of spatial location.’”<sup>69</sup> The court summed up by saying the LPO “contains both contextual standards and a process for clarification and guidance” thus affording the landowner a constitutionally sufficient avenue to “ascertain what changes may be made.”<sup>70</sup> In conclusion, Conner’s proposal was properly “rejected in order to safeguard the public’s interest in the historic environmental features of a designated landmark.”<sup>71</sup>

In a sense, the Satterlee House case was simple. Conner bought the property knowing of its designation and knowing that the designation was an ensemble—structure and lawn. It was not designated for the house alone but for the accompanying siting and vista, appreciating the visual effect from Beach Drive to the house and from the house to Puget Sound.<sup>72</sup> Conner’s proposal threatened to compromise, even destroy, the integrity and harmony of Carrie and Frank Baker’s vision in 1905, a vision that subsequent owners preserved and a vision that became, over the years, talismanic. Conner’s proposal would have destroyed the ambiance, a quality significant to the well-being of residents who visit or live nearby.<sup>73</sup> The property—house and siting—is tout ensemble. It represents a part of our shared human values.<sup>74</sup>

## V. CONCLUSION

The authority to preserve seems beyond question; the exercise of that authority is always open to question. Did you follow the required procedures and apply the appropriate standards? Did you explain your decision based on the record made? This is not an application of some vague, perhaps

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forever.”); Stephen Christopher Unger, Note, *Ancient Lights in Wrigleyville: An Argument for the Unobstructed View of a National Pastime*, 38 IND. L. REV. 533, 555 (2005) (discussing “‘the sense of place’ that older structures lend to a community, giving individuals interest, orientation, and sense of familiarity in their surroundings”) (quoting Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 480 (1981)).

68. Conner, 223 P.3d at 1209.

69. *Id.*

70. *Id.* at 1211.

71. *Id.* at 1215.

72. See Unger, *supra* note 67, at 549 (“A view from a particular vantage point often enhances the value of that tract of land.”).

73. See Karp, *supra* note 28, at 324 (noting “that shared human values are what actually underlie many courts’ perception of aesthetic regulations.”).

74. See Tyler E. Chapman, Note, *To Save and Save Not: The Historic Preservation Implications of the Property Rights Movement*, 77 B.U.L. REV. 111, 143 (1997) (“The value of historic preservation goes beyond subjective judgments about which old buildings and neighborhoods are worth saving. Courts have long recognized that historic preservation is an essential tool for local governments to improve the quality of life for their citizens.”).

subjective, aesthetic standard.<sup>75</sup> It is a question of preserving ambiance: what does this structure, this setting, this district provide to our sense of place, our sense of community, our sense of continuity?<sup>76</sup> Does it instruct, inform, impart to such a degree that we preserve it not just for ourselves but also for future observers?<sup>77</sup> And, if so, what aspects of the environs are essential to preserving those values?

The North Carolina Supreme Court said preservation “provides a visual, educational medium by which an understanding of our country’s historic and cultural heritage may be imparted to present and future generations.”<sup>78</sup> The court also recognized that “preservation of the historic aspects of a district requires more than simply the preservation” of buildings, but also preservation of their setting and scene: “This ‘tout ensemble’ doctrine . . . is an integral and reasonable part of effective historic district preservation.”<sup>79</sup> And, as this essay has suggested, the same should apply to individual situations such as the Satterlee House.

As was noted at the beginning, the test is not aesthetic, a definitional task which is daunting (if even possible). What would preservation bring to our collective character? Is a structure or place memorable just for being? Is it a district or structure which instructs us about where and how we lived and that continues to radiate lessons for today? Or sometimes, does it just make us feel connected to a past, allowing us a glimpse of another time which stimulates thoughts about our present time and what future time might bring?

The Satterlee House is really not, by itself, that significant. Although big and beautifully appointed, it is just another Queen Anne, Seattle box style house. But ah, its location and its siting on that location; almost beachfront, perched on a knoll with an unobstructed westward view of the Sound and the mountains; unobstructed because the long, sloping greensward extends from Beach Street to the knoll. It is, together, an ensemble pleasing to the eye, evocative and instructive of time and place, a memory and presence which adds to our sense of place even today.<sup>80</sup>

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75. See Spyke, *supra* note 3, at 470 (“The psychological impacts of aesthetic regulation and its ability to stabilize communities offer firmer support for aesthetic regulation than do vague references to the public welfare and beauty.”).

76. See Joseph L. Sax, *Land Use Regulation: Time to Think About Fairness*, 50 NAT. RESOURCES J. 455, 459-60 (2010); Spyke, *supra* note 3, at 474.

77. See *Improving Community Character*, *supra* note 1, at 1211 (“The evaluation of a proposed project’s impacts on the cultural landscape of an area should include the consideration of impacts on the broader experience of a place felt by all those affected.”); see also Spyke, *supra* note 3, at 470.

78. *A-S-P Assocs. v. City of Raleigh*, 258 S.E.2d 444, 450 (N.C. 1979).

79. *Id.* at 451.

80. See ALAIN DE BOTTON, *THE ARCHITECTURE OF HAPPINESS* 219 (2006) (Buildings “should not only harmonise their parts but in addition cohere with their settings; that they should speak to us of the significant values and characteristics of their own locations and eras.”).

## SPEECH: NEW YORK CITY'S LANDMARKS LAW

DAVID SCHNAKENBERG\*

Welcome back to the Fitch Forum. Our next panel is going to focus our conversation from the national level and then right back in on New York City. This is a celebration of New York City's Landmarks Law,<sup>1</sup> and we're going to take some hard looks at it and ask some questions. What are some things we might want to do to improve our Landmarks Law? What are some of the problems that we're confronted with as preservation advocates?

Before we get to sort of tear down the Landmarks Law and take that vicious look, we're going to take a couple of minutes to talk about the Landmarks Law. One of the things that we've heard this morning, that we hear all the time, is people don't really know too much about their landmarks law, in New York, in other jurisdictions and municipalities that have ordinances that are modeled on New York's. So I'm going to set myself a timer because I'm going to be really strict about the time, and we're going to take a look at the city's Landmarks Law.

Before we can ascribe a normative criteria to the Landmarks Law, it's probably important to look at some of the jurisprudential and philosophical underpinnings that brought us to having such a robust and celebrated landmarks law. I'm really not going to duplicate, to the extent possible, the things that Jerold spoke about this morning during the keynote address for a couple of reasons. The first is that you've already heard it; the second is there's no way I could do it nearly as well and I don't want to embarrass myself. So where you see me start to be duplicative, I will retreat and hope you understand.

The jurisprudential and philosophical underpinnings of the Landmarks Law are important. The notion that the government can regulate private property for purposes of health and safety, for purposes of the general welfare, it's something that we in this room all sort of hold as sacred and obvious. But actually, it's not obvious. Not to echo the calls of the property rights movement—with whom I disagree on many things—it is a spectacular thing that we have a landmarks law that does allow us to regulate private property for this purpose. It is not an unreasonable thing, it is not something that we should question as preservationists, but it's something that we should really appreciate. It didn't just sort of happen; it evolved.

It evolved because the national legalscape, starting in the early twentieth

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1. Law of Apr. 19, 1965, No. 46, 1965 N.Y. Local Laws 261 (codified as amended at N.Y.C. ADMIN. CODE §§ 25-301 to 25-321 (West, Westlaw through Local Law 29 of 2011)).



century, was shifting to adopt what is sort of the modern understanding of the regulation of private property. In 1916, it's put on by the impact of skyscrapers on light and air, and it's put on by the real estate industry and also because of the impact of an encroachment of factories on fashionable residential neighborhoods in New York City. New York City passed what is arguably the nation's first zoning ordinances; that's in 1916.<sup>2</sup> There's a footnote there: L.A. beat us to the punch here too. In 1909 there was a zoning ordinance in Los Angeles.<sup>3</sup> It wasn't as comprehensive as New York's zoning ordinance, but at least they deserve some recognition for getting us there, getting there first, as they did with their landmarks law.

Again in 1916, we have the City's zoning ordinance. Then, in 1921, Secretary of Commerce Herbert Hoover convened the committee to consider the question of zoning.<sup>4</sup> That group eventually promulgated what's known as the Standard Zoning Enabling Act.<sup>5</sup> Out of nothing, sort of after the twentieth century, we start to see, stemming in part from the City Beautiful Movement and in part because of the modernization and urbanization of our cities, we see zoning has sort of come to be. Then in 1926, in a case called *Village of Euclid v. Ambler Realty*,<sup>6</sup> the Supreme Court sustained the constitutionality of zoning and made clear that the government can regulate private property, notwithstanding the fact that the regulation might diminish the value of that property.<sup>7</sup> You could do it without violating the Due Process or Equal Protection Clauses of the United States Constitution, and this is really important.

As Jerold pointed out earlier, the Court wasn't part of some grand movement; the Court was doing this, in part, to protect private ownership. This was to protect the value of your property; the government could step in and regulate the way your neighbors use their own property. This is not new; this stems from nuisance and a long line of cases that we won't get into, but it's significant. It's significant for our purposes because it came on the heels of another Supreme Court decision that has implications for our own Landmarks Law, and particularly *Penn Central*.<sup>8</sup> That is *Pennsylvania Coal v. Mahon*.<sup>9</sup> This is the famous pronouncement by the Court that the business of the government can't happen—a government can't regulate property without having to pay for

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2. N.Y.C. Bd. Of Estimate & Apportionment, Bldg. Zone Res. (July 25, 1916), available at [http://www.nyc.gov/html/dcp/pdf/history\\_project/1916\\_zoning\\_resolution.pdf](http://www.nyc.gov/html/dcp/pdf/history_project/1916_zoning_resolution.pdf).

3. *Ex parte Quong Wo*, 118 P. 714, 715 (Cal. 1911) (describing original ordinance passed in December of 1909 and establishing seven segregated "industrial districts").

4. Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597, 598-99 (2001).

5. *Id.* at 599. See also Eric R. Claeys, *Euclid Lives? The Uneasy Legacy of Progressivism in Zoning* 73 FORDHAM L. REV. 731, 739-40 (2004).

6. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

7. *Id.* at 395-97.

8. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

9. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

everything it does.<sup>10</sup>

So recognizing the need to regulate property, the Court went on to say that while property can be regulated, if regulation goes too far it's going to be recognized as a taking, and that's impermissible. That's the big question that's subsequently answered, at least answered in part, by *Penn Central*. That's the void that a lot of our preservation jurisprudence is struggling with now—when does a regulation go too far? We can synthesize these cases, and what we see is that temporally by this point we know that the government is not considered to be acting unconstitutionally when it regulates private property in the interest of health and safety. What's great is that health and safety is pretty broad and inclusive, and it's a short jump from health and safety to public welfare. Public welfare, as we all know, is a pretty broad and encompassing statement as well.

We see in a subsequent Supreme Court decision,<sup>11</sup> which was also alluded to this morning, the concept of public welfare as broad and inclusive.<sup>12</sup> This was in the context of a condemnation, but the issue here was absolutely on point for preservation purposes. We want to have a public welfare that encompasses the spiritual as well as the physical and the aesthetic as well as the monetary. Community should be beautiful as well as healthy, spacious as well as clean, and well balanced as well as carefully patrolled. The highest Court in the land has now pretty much said that the government is in the business of regulating for the public welfare, and public welfare includes aesthetics.<sup>13</sup> That is sort of the background to our Landmarks Law.

The Landmarks Law didn't just sort of happen after 1954, of course. There had been people advocating for such a law in New York for many years. But, it's unsurprising that with this sort of nationally evolving jurisprudence and the City Beautiful Movement and the sort of transformation of the city's art societies into what were essentially urban planning think-tanks early on, that we'd find a landmarks law that came out of this philosophy. That's precisely what happened. Our Landmarks Law was passed in 1965, shortly after *Berman v. Parker*, and it mirrored something called the Bard Act.<sup>14</sup> It's interesting though that the Bard Act was sort of drafted in 1913 when some of these ideas about zoning were just being floated around. So the idea of aesthetic protection and the protection of historic resources has really been a passenger in the vehicle the whole time. It only surfaced, though, with the

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10. Mahon, 260 at 416 ("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

11. *Berman v. Parker*, 348 U.S. 26 (1954).

12. The case mentioned earlier was *Kelo v. City of New London*, 545 U.S. 469 (2005). *Kelo* quotes *Berman's* statement regarding broad powers. *Id.* at 481. (quoting *Berman*, 348 U.S. at 33).

13. *Berman*, 348 U.S. at 33 ("The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary.").

14. ANTHONY C. WOOD, *Preserving New York: Winning the Right to Protect A City's Landmarks* 10 (2008); See Carol Clark, *Albert S. Bard and the Origin of Historic Preservation in New York State*, 18 *WIDENER L. REV.* 323 (2012).

passage of New York City's law.

But despite the fact that we have this underpinning, New York City is still losing buildings. It's important to remember that while we were talking about zoning and we were talking about early historic preservation and we were talking about protecting aesthetics, this was a city that was losing buildings. That's not surprising. In the absence of a robust preservation law, New York City will demolish its historic resources. This is a city that's characterized and defined by two things: forward momentum and finite space. This is a recipe for demolition, and this is why New York City still badly needed a landmarks law.

Some of the buildings that very well might have been protected—probably would have been protected—under the Landmarks Law include: the Astor Hotel, which was demolished in 1926; the Marble House, which was demolished in 1951; the Mark Twain house, which was also demolished right around *Berman v. Parker* in 1954; and, of course, the all too familiar Penn Station, which was demolished right before the passage of the Landmarks Law in 1963. The Brokaw was demolished just as the New York City Landmarks Law was passed.

So let's talk about the Landmarks Law that came out of this incredible need and this pressure to save our historic resources and the jurisprudential underpinnings that we've discussed. When we talk about the city Landmarks Law, we're not really just talking about one law, we're talking about the City Charter,<sup>15</sup> which governs the way we protect and preserve resources and the way our city commission works. We're talking about the City Administrative code,<sup>16</sup> which is to say when we talk about the Landmarks Law we're often talking just about the Administrative Code and the Rules of the City of New York,<sup>17</sup> which are rules promulgated by the agency.

Today, because of timeliness, we're not going to talk about the Rules of the City of New York; we're going to briefly talk about the City Charter and we are going to talk about the purpose and declaration of policy that's in the New York City Administrative Code. If we understand what we wanted out of the Landmarks Law, we might be able to sort of understand if we're getting that out of our Landmarks Law. I'm going to breeze through this.

The City Charter does speak to what our commission can do.<sup>18</sup> The first thing it does is say that there shall be a Landmarks Preservation Commission. It requires that the Commission consists of eleven members; many of you are familiar with this, some of you are not, so I'll go through it quickly. We have to have a minimum of three architects, one historian qualified in the field, a city planner or landscape architect, and a realtor; all must be on the

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15. N.Y.C. CHARTER ch. 74, §§ 3020-3021 (2004), available at <http://www.nyc.gov/html/dycd/downloads/pdf/citycharter2004.pdf>.

16. N.Y.C. ADMIN. CODE §§ 25-301 to 25-321 (West, Westlaw through Local Law 29 of 2011)).

17. RULES OF THE CITY OF N.Y. tit. 63, §§ 1-01 to 13-05 (2011), available at <http://72.0.151.116/nyc/>.

18. See generally N.Y.C. CHARTER ch. 74, §§ 3020-3021.

Commission. The Commission must have representation from each of the five boroughs. Members of the Commission are appointed by the mayor. The mayor is permitted, but not required, to consult with the Fine Arts Federation or similar organizations for appointing members. The mayor is required to designate a chair. The chair is the only commissioner who is paid; all of the other commissioners are volunteers. Members serve for a three-year term, and they do so very generously because they're working for free. There's also the staff; the Commission must appoint an executive director. There must be an annual report of these activities, and they're permitted to employ technical experts and employees as may be required to perform. Of course, agencies need to have their staff do a lot of work.

Several of the powers and duties are covered in the City Charter. First of all, it includes reference to the Administrative Code and says that the Commission shall have those powers and duties as are prescribed by law. There are a number of notice requirements that are included in our City Charter. There's also a democratic check on our Landmarks Commission, and I think that's important to highlight that this Commission has a check. So, while the Charter makes clear that landmark sites, interior landmarks, and historic districts are in full force and effect upon designation, some things can happen. The City Council can modify or disapprove by a majority vote any designation of the Landmarks Preservation Commission within 120 days of the filing of that designation with the Council. That's one safeguard: who overlooks the Commission. The Mayor can then disapprove of a City Council's decision within five days of the filing of its vote on the designation. Then if the City Council really doesn't like what the Mayor did, the City Council can override the Mayor's veto by a two-thirds majority vote so long as they do so within ten days of the finding of that decision. Those are the powers and duties of the Commission that are in the charter.

After the decision in *St. Bart's* in 1989,<sup>19</sup> the voters of the City of New York, by charter, elected to create a Hardship Appeals Panel.<sup>20</sup> This is a curious thing because this has never actually been convened, but the Hardship Appeals Panel is independent of the Commission. It consists of five members who are appointed by the Mayor with the advice and consent of the Council, and they review appeals from the terminations of the Landmarks Preservation Commission denying applications for hardship for non-profits.

Now let's go to the meat of the conversation: The New York City Administrative Code. This is what we talk about when we talk about the Landmarks Law; it does a number of things. It states the purposes and declaration of policy underlying the Law. It also speaks to the powers and duties of the Commission. It details the degree in which we can regulate property subject to the jurisdiction of the Commission, and this is that extraordinary power. The Landmarks Law has the authority to regulate privately on the property. It also established certain civil and criminal

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19. *St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958 (S.D.N.Y. 1989); see generally BRENT C. BROLIN, *THE BATTLE OF ST. BART'S* (1988).

20. See generally N.Y.C. CHARTER ch. 74, § 3021.

penalties for non-compliance. I'm not going to talk about those at all because we have an expert to talk about that later today.<sup>21</sup>

Let's look at the declaration of public policy. The council found that many improvements having a special character or special historic or aesthetic interest or value and many improvements representing the finest architectural products of distinct periods in history had been uprooted. So in some sense the Landmarks Law is very much in response to the phenomenon we were discussing, where the city's most important buildings were being demolished. The Brokaw, as I mentioned, is exactly what they're talking about. This is an architectural treasure that would have benefited the city, but was lost. This is happening notwithstanding the fact that these buildings can be protected and they can be used; they can continue in their use.

In the public policy, this is sort of a lament, right? We've been demolishing these incredible buildings without adequate consideration of the irreplaceable loss of the aesthetic, cultural, and historic values represented by such improvements and landscape features. This is something that Jerold brought up in his keynote—this is the sense of place that comes from these buildings. When we talk about treasures that we've lost, we do look to Pennsylvania Station and we do look to the sense of place. Anyone take the train in today and come through Penn Station? I'm pretty sure the former structure is better than what you walked through today. When we talk about an irreplaceable loss and we talk about a sense of place, we're talking about that feeling, that sense of pride that comes from our architectural treasures, and that's very much in the Landmarks Law. The Landmarks Law was very thoughtful in that regard.

Again, continuing with the declaration of public policy—this is cool—distinct areas are similarly operative. So we're not just going to protect buildings, but we are going to protect historic districts, and this is also in recognition of the sense of place that comes from the preservation of neighborhoods and neighborhood characters. We're going to look quickly through them—Brooklyn Heights and Greenwich Village are two of our most famous historic districts. Again, in the declaration of public policy, it's the sense of the Council that the standing of this city as a worldwide tourist center and world capital of business, culture, and government cannot be maintained without preservation. This is very, very passionate language for a run-of-the-mill ordinance, and it's important to remember that it's in there. When we as preservation advocates feel that we might be pushing too hard, let's remember that the purpose is in the Law, the declaration of policy is in the Law, and it's pretty bold and it's pretty ambitious—and that's sort of the “I love New York” part of the Law.

I'm going to stop there so we can get to the conversation. I'll quickly introduce Tony who will be moderating our next panel. Tony is known to just about everyone in the room because he either invited you or strong-armed you to be here. Tony is founder of the New York Preservation Archive Project,

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21. John M. Weiss, *Protecting Landmarks From Demolition by Neglect: New York City's Experience*, 18 WIDENER L. REV. 309 (2012).

he's a preservation activist, a writer, and a teacher here on the faculty. He's going to moderate the conversation and now he'll introduce everyone on the panel.

## 2011 FITCH FORUM: PART FOUR

### NEW YORK CITY'S LANDMARK LAW AT FORTY-FIVE: PERPETUALLY YOUNG OR SHOWING ITS AGE?

Moderator: Mr. Anthony Wood

Panelists: Mr. Al Butzel, Mr. Otis Pearsall, Ms. Margery Perlmutter, Mr. David  
Schnakenberg & Mr. Mark Silberman

MR. WOOD: There will be a test on David's presentation. So I hope you all took notes on that. Today we've assembled a distinguished panel of lawyers with different backgrounds and different perspectives on preservation law in New York City. It spans generations and it spans a wide range of viewpoints. Their longer resumes, as we've said, float virtually on our website, so I'm going to be very brief on the introductions; but something is indeed required.

Al Butzel is the principal of Albert K. Butzel Law Offices. He practices law and has led advocacy campaigns in New York City since 1965. As an attorney, Mr. Butzel has handled many important matters, including the Storm King Mountain power plant case, his legendary successful litigation against Westway, and more current legal efforts such as those on behalf of Albert Ledner's National Maritime Union headquarters, also known as the O'Toole Building to some of us in the Greenwich Village Historic District. He's represented St. Vincent de Paul in an effort to secure landmark designation for that historic French church blessed by the presence of Edith Piaf, and he worked for the groups that were trying to downsize the Atlantic Yards project. So, Al has become the go-to lawyer for those unsatisfied with planning and the preservation status quo.

Otis Pearsall is truly a legendary person in the history of preservation in New York City. As a young lawyer, not to suggest he isn't a young lawyer still, new to Brooklyn Heights in the late 1950s, he was part of and came to lead the effort to secure landmark protection for Brooklyn Heights. In that process, he actually drafted a landmarks ordinance prior to the drafting of the city ordinance, and then worked on getting the city ordinance secured. 102 historic districts ago, Brooklyn Heights became the first district designated after the passage of the law, and Otis has been active ever since.

Margery Perlmutter is a partner in the law firm of Bryan Cave LLP, specializing in zoning and land use, building code, and related environmental issues. She represents private developers, public institutions, and non-profit groups before the New York City Planning Commission, the Board of Standards and Appeals, the Department of Buildings, community boards, Borough Presidents' Offices, and the New York City Council in obtaining administrative approvals and consideration of special cases. She counsels her clients on development enhancement strategies and related transactional issues, and serves as code, construction, and zoning litigation counsel in Board

of Standards and Appeals and Article 78 proceedings. Margery is a member of the New York City Landmarks Preservation Commission, and, until 2006, she was a member of Manhattan Community Board 8. Perhaps most importantly, this semester she's teaching here in the Preservation program at Columbia.

David Schnakenberg, from whom we have just heard, is an attorney and a former Menapace Fellow in Urban Land Use Law at the Municipal Art Society. While in that position, he was involved with a variety of preservation and legal issues including the St. Vincent Hospital hardship hearing. He's also a guest lecturer in the Columbia Graduate School of Architecture, Planning and Preservation and the coordinator of today's event.

Mark Silberman is the General Counsel for the New York City Landmarks Preservation Commission. Prior to working for the Commission, he was a litigation associate at Paul, Weiss, Rifkind, Wharton & Garrison, where he specialized in environmental and general commercial litigation. In the 1980s, he was a lobbyist, organizer, writer, and editor in Washington, D.C. for various environmental and public interest groups.

So, the overriding question that our high-octane panel is going to address is New York City's Landmarks Law at age forty-five: Perpetually young or showing its age? Based on years of observation, I think one can say that most, if not all, of the rest of the country is envious of New York's Landmarks Law. New York is indeed blessed to have such a robust law. However, New Yorkers are not known for just sitting back and counting their blessings. They're always striving for more and better. Frankly, I think a few were in shock over lunch to realize that everybody thought our Law was so terrific.

The recent conversations over charter reform, a variety of disappointments over the years, including losing a number of buildings, and the failure of some legal challenges to achieve change, have caused some to wonder if it's time to devote some serious thinking to the notion of tweaking or amending our Landmarks Law. The Preservation Vision Project, which involved close to 500 preservationists thinking about the future of preservation, came up with a list of ten things that we needed to focus on to secure preservation in New York in the future; the fifth on that list, in order of priority, would be to strengthen the Landmarks Law.

Our Law is almost fifty years old; the world is now a different place. Arguably, the Law has only been substantially amended once in 1973. So, the Law has remained basically unchanged for thirty-eight years. Is it perpetually young? Were we successful in creating a document that could evolve over time and successfully meet every changing need? Or is it showing its age? If it is showing its age, in what ways? If it is, is the prescription a little botox, is the prescription a facelift, or is the prescription just to learn to live with it and love the wrinkles that it has? This panel will explore these and other questions.

I'm going to start by guiding our panel through a much briefer series of questions than I planned, because I want to open this up to the audience to explore three areas of interest. First, we're going to look at what's transpired



since the passage of the Law; talk a little bit about how we got here. Then, we're going to look at some of the current challenges and opportunities that the Law faces. Then, we're going to be looking at the future.

We're going to do this probably for about fifteen minutes. We're then going to open it up for Q&A. I'm going to direct the question at a particular panelist just to start it, and then invite the other to comment. Everybody doesn't have to chime in on every question, unless they want. I'm going to try and move us along, and I'm going to do this in a kind of a Charlie Rose style.

Trying to get an overview of the last forty-five years of the application of the Law, the record is clear that in the early years the Commission proceeded very gingerly; preserving the Landmarks Law was its greatest concern. Frank Gilbert, the Executive Secretary of the Commission has a sign on his desk that reads, "This Law Raises Grave Constitutional Questions." The first and second chairs of the Landmarks Committee maintained that, indeed, preserving the Law was their top priority. Some suggest that after Penn Central, the Commission was more aggressive in the application of the Law, leading to a period of creativity and activism, but also of conflict and controversy. Since 1994, some have observed that the Commission has become restrained in its application of the Law. Is that a fair characterization of the last forty-five years? If not, in broad terms, how would you describe how the Law's application has evolved in that period?

Otis, I'm going to ask you to start because you've been through the whole thing.

MR. OTIS PEARSALL: Maybe I'm the only one in the room who's been here through the whole thing. It's been a great honor to be here through the whole thing. I have to say that I think if I have to vote between perpetually young and showing its age, I think it's perpetually young. This is the most remarkable success story that I can imagine. We were envisioning a landmarks law starting in 1958 and it took us seven years to get the Landmarks Law, and to get Brooklyn Heights designated the first historic district. Nobody had in mind the 110 historic districts we have now. We thought of maybe three or four.

In our discussion with Platt and Goldstone,<sup>1</sup> it was always Brooklyn Heights, Greenwich Village, Gramercy, and maybe two or three others. But no one had the foresight to envision the flexibility of the Law and its utility not only to preserve buildings and districts, but entire neighborhoods. The neighborhood preservation idea came into vogue with Beverly Spatt. She was

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1. Geoffrey Platt was the first chairman of the New York City Landmarks Preservation Commission and Harmon Goldstone was his successor. Geoffrey Platt, THE NEW YORK PRES. ARCHIVE PROJECT, <http://www.nypap.org/content/geoffrey-platt> (last visited Jan. 16, 2012); Harmon Goldstone, THE NEW YORK PRES. ARCHIVE PROJECT, <http://www.nypap.org/content/harmon-goldstone> (last visited Jan. 16, 2012).

the one who first saw the potential to use it as a planning tool, which gets us a little bit over to one of the issues this morning.

With 110 going on 250 historic districts, one has to step back a little bit and wonder just what exactly it is we are trying to achieve, and what we are doing. Are we cheapening the brand or is this the correct thing to be doing? Until there is a mechanism here in the city to preserve neighborhoods, other than the Landmarks Law, the Landmarks Law is the name of the game, and we're going to have to go charging ahead with the preservation of valuable neighborhoods through the historic districting mechanism.

Your question is a little broad. I think that some of the subtleties of, "Were we going fast at one point, or were we going slow at another point?" I find very confusing. Everything has drifted into the mist of time in terms of the actual energy levels of the different commissions. Anyway, I certainly have my own pet thoughts as to what can be done to improve the Landmarks Law. I'm not going to give them. I'm not going to share them with anybody; I'm just telling you I have them.

But I want to be optimistic when I think about the New York Landmarks Law, when I consider what has been achieved. I mean we can carp and we can pick, but the fact of the matter is, it has been a remarkable success. That's not to say it can't be improved both in the Law and in its administration. This audience is filled with people who can go and particularize item by item what needs to be done to improve it. But the fact of the matter is, it's not a bad instrument as it is right now.

MR. WOOD: We will move to the carping and picking later. Other thoughts on whether that is a fair way of looking at the scope of the Commission's work over time?

MR. AL BUTZEL: Unlike Otis—you've been in it for fifty years—I've been in it for three years, so I have to look at it in a significantly different way. I didn't realize you were that old actually.

MR. PEARSALL: We started in 1958.

MR. BUTZEL: Well, so it's been sixty years, I'm sorry, please forgive me. I agree though, looking at it as an outsider to begin with, and now more as an insider, that it's a remarkable Law and it's achieved remarkable things, and has undoubtedly achieved things well beyond what anyone would have anticipated at that time. The Law though, and Otis has already referred to this, depends a lot on the Commission that's enforcing it and interpreting it. As at the beginning of the process, the greatest concern was to maintain and uphold the Landmarks Law that came to be with the Penn Central decision, and then was carried forward with the St. Bart's decision, both of which are extraordinary cases, and extraordinary judicial law.

There are now issues that are arising, most recently in the St. Vincent case in which I was involved, where the Commission itself, in my judgment anyway, diverged from the Penn Central and the St. Bart's decisions, and concluded that it was appropriate not to address a building as a building, but rather to accumulate buildings on a campus, the so called "campus theory." The consequence of which could be that historic structures on a campus like Columbia, for example, might be subject to demolition, even though they are capable of being reused, even though they are capable of adaptive use. I think that we're never going to get a court decision on this because St. Vincent's conveniently went bankrupt, but it is one of the issues that people are going to have to grapple with. Whether there's a legislative solution or ultimately a legal decision, that issue will have to be addressed.

MR. WOOD: Lots of things have gone on the table. So I started looking at the history, other things that have been brought up. So go with it where you want.

MR. MARK SILBERMAN: Since I'm fifty-two, I think of this as perpetually young, the Law. I think that it's really useful for everyone in the audience to hear how important New York is to everybody, and how critical the Law is that we take for granted here every day. The other thing that I think is important to remember is all of the people coming from the other jurisdictions. They're talking about how the practical realities of actually administering a law is very complicated. One of the dangers is to think that preservation is a vehicle for handling lots of urban problems.

For me, I felt at home with the panel at the beginning, talking about the need of trying to separate out our impulses to make preservation the paradigm through which all good urban new ideas should be funneled and refracted out, and I think that's a mistake. I also think that the commissions become more mature and have more and more power over the economic welfare of the cities in which they are operating. To hear Otis say, "No one ever imagined this," I think is both great and it's also a cautionary note. What was it when all this discretion was granted to the Commission in 1965? I mean if you think about the levels of discretion that happened in the Law, it's pretty remarkable.

You have great discretion being given to the Commission, but at the same time maybe the Commission had a narrower view of what they were engaging, what their area of discretion was. Then, you have the courts saying, "I don't want to weigh into this, I'm going to leave it up to you guys." Then, at the same time, you have the Law itself evolving as what counts as preservation gets broader and broader. So, it gets more and more attenuated as time goes by. As our power over larger areas of the city grows, I think the danger is to think that preservation should be this incredibly—I don't want to use the word rigid—sort of formulaic thing, when in fact it requires great degrees of discretion, which makes a lot of people uncomfortable.

My job as a Counsel of the Commission is to try to make sure that when the commissioners are debating something, that the discussion is taking place within the legal framework of the Law. But I do believe that the Commission has to be able to have discretion. It has to be able to deal with new situations in new ways. Al and I are litigants in this case on St. Vincent's, we can't talk about that case in more detail. But this case is, just to sort of remind everybody, the first time ever where the Commission had to deal with the question: we have a building, and it was decided that it could no longer function. The purpose for which the building was created was to be a hospital, but yet you couldn't use that building while you find a place for a new hospital. That's a situation the Commission had never had to deal with before.

What happens if you found that this is a problem? You recognize the need for a new hospital, but you can't just have them move and do something else. So I think the commissions, not just in New York, but all of them, are dealing with matters of first impression, real matters of how we regulate. I think discretion is going to be an important thing to keep in mind as we discuss how we want to change the law.

MS. MARGERY PERLMUTTER: I just want to pick up on some of the things that Mark was saying. All laws develop as people use them. When a law sits there and no one actually touches it, you don't see how it affects your world or anyone else's world. For instance, in economic development times, in boom times, you see how the law is being implemented and how people are trying to use it.

I haven't been involved in historic preservation for decades, for me it's more like a few, maybe ten years; but what I have seen, for an example as a member of a community board, is how community activists use historic preservation as a way to limit development. That's not what historic preservation is for. That's called zoning. What I'm seeing more and more, which I think is a very unfortunate trend in the historic preservation movement, and therefore an imposition on the Law, is that people will see that designating a historic district or designating a building can actually be a speedier way to eliminating a development possibility than convincing the City Planning Commission that it would be a wise planning move.

So I think that really needs to be looked at. I think one of the panelists from an earlier conversation was talking about, I think in Chicago, that the Planning Commission and Landmarks Commission now are somehow in the same agency. It's an interesting phenomenon because what I see from the perspective of my clients when I go to the City Planning Commission, is that they're often surprised by the disconnect between the agencies. So, you can actually be designing a building that the City Planning Commission is in favor of, and then it comes to the Landmarks Commission and it's killed. We've actually had some of those experiences on the Commission where there was a

total disconnect between the agencies, and that's something where I really think the Law needs work. The two agencies need to work closer together.

The Law itself needs to be blended because, in fact, historic preservation is planning. It's an urban planning process that needs to recognize the role of zoning, and zoning needs to recognize the role of historic preservation. The other aspect of it is, of course, we see many times people coming in to add very large additions to their little, tiny townhouses. Why can they do that? Because they're located in zoning districts that allow them to quadruple the size of their house. So, there's a total disconnect between the purpose of preservation and the zoning purpose, and those things really need to be coordinated.

MR. WOOD: David, I'm going to direct the next question to you, to get a first shot at it. We heard that our Landmarks Law was really the gold standard when it was passed; many wonderful imitations. But there have been now decades of law, decades of experience, we've heard about some other laws this morning. The question is, have you observed anything, or are there any aspects of other ordinances—have things evolved? If we were doing our Landmarks Law over again today, is there something that we could see from others that you would like to incorporate into it?

I would just add that if, indeed, I understood correctly from Tersh, I really like the idea that you don't have to go to the city council for designations to be approved. But that's just me. So David, you start with this question and others can jump in.

MR. SCHNAKENBERG: One of the things that's interesting is we talk about Penn Central all the time when we talk about our Landmarks Law, but Penn Central sort of fundamentally changed the way we think of the ability to regulate property. It set a standard for when a regulation goes too far; it arguably ratcheted up the government's ability to regulate property shy of a taking. We have a hardship variance built into our Landmarks Law for for-profit entities, as well as for certain non-profit entities, but not for non-profit entities who wish to demolish or alter in an inappropriate way their historic resources. This is sort of the underpinning of the St. Vincent's issue. One of the things that we've seen is, after the Landmarks Law was enacted, and when some of the case law that addresses the question of what we do in the absence of a statutory answer to the question of a non-profit owner who wants to demolish a building, we've seen that the takings law, the underpinnings of our Landmarks Law have been ratcheted up. The problem, I think, at St. Vincent's was that our own ordinance, arguably, should have some flexibility built in so that the Landmarks Commission would have been able to deal with what was a very difficult set of facts. But the law that underpins our Landmarks Law has sort of outgrown the Landmarks Law.

We have Penn Central, we have St. Bart's, but the case law and ordinances themselves didn't really do the work. I would say that one thing we could think about doing is taking a look at where we would like our statute to deviate from its underpinning law and actually co-define some of those things. Some of the things that have changed throughout case law, it might be legally true and we certainly have a federal floor of the Supreme Court says that it is so. But, we have some freedom to nuance the way our Landmarks Commission can deal with some of the law. I think to that extent, that's something that would be desirable.

A lot of landmarks laws that were passed subsequent to St. Bart's, for instance, have statutorily incorporated some of the holdings in the St. Bart's decision, which is really just a great attempt at bringing the for-profit Penn Central analysis into the non-profit world, and it's really difficult. I think it's hard to figure out when a regulation divests an owner of its monetary value. It's even harder to find out if a non-profit owner has been divested of his ability to further add value. This is tough stuff; it's heavy lifting. With all respect to all the Commission and the Commission staff, I think rather than let them figure it out on an ad hoc basis, we might want to codify some of the things that we think should be in there.

MR. BUTZEL: I'd sort of like to make a case. I think we were extremely fortunate to have the Landmarks Law amended in 1973. I think it's remarkable. While I agree that there are some aspects of it that might be legislatively improved—one is designation and maybe we'll talk about that a little later—the Landmarks Law was created, I suppose, mostly because people thought about Greenwich Village, and people thought about Grand Central and the likes. But the reality is, it has emerged as one of the preeminent ways of trying to protect neighborhoods; and a "neighborhood" is place, that's where people live. And so I have to dissent a little bit from what Margery had to say because why shouldn't it be the zoning? Maybe it should be zoning, but it isn't zoning in this political atmosphere. Zoning in this atmosphere—I shouldn't make an across the board condemnation because the City Planning Commission had down-zoned a lot of neighborhoods and is trying to protect neighborhoods. But the Landmarks Law is absolutely the best mechanism to protect neighborhoods in those areas that have been designated historic districts. If they had been, they presumably deserved to be, and I think we're fortunate to be able to take advantage of the Landmarks Law.

I think that Mark's comments are reflective of what often happens with agencies that are entrusted to carry out a particular mission. The mission of the Landmarks Law is to protect historic resources. When Mark talks about discretion, there's a lot of discretion in the Law. In terms of designation, the City Council had the opportunity to veto, and has done so in particular situations. In the case of hardship, there's a hardship panel that's never been invoked, and presumably the Council can change the situation if it wants. I

think the agency should be doing everything it can to implement the Landmarks Law and not to worry about the other considerations of policy; those are for the legislature to determine if they want to revisit the Law. The Landmarks Commission, which is distinct from the Planning Commission, ought to be upholding the Landmarks Law, and using it to the broadest possible extent now that it has been established as legal.

MR. PEARSALL: Let me just pan a thought on that. One of the things that's missing from Landmarks Law is a mechanism to reconcile conflicting city policy. The Landmarks Commission has taken this into account on various occasions. I'll give you one example, which is the demolition of the Purchase Building under the Brooklyn Bridge. There was the compelling desire of those interested in Brooklyn Bridge Park to open a piazza. It was a Parks and Recreation policy. That policy overwhelmed the public interest and preservation. One would think that a conflict in policy of that sort should be resolved by the City Council through a political process, instead of internally with the Landmarks Commission deciding whether it will defer to the policy of a different agency.

There had been other sites of example, and indeed St. Vincent's, in its own way, represents a conflict of policy in the city; obviously, a great desire to do good things for the hospital. At the same time we have the public interest in preservation. Interestingly, the Landmarks Law, on its face, does not provide any mechanism for reconciling, compromising, or otherwise dealing with conflicts of city policy. Now, when the Purchase Building came along, I made an argument that the Landmarks Commission has no business taking into account the public policy having to do with the park. If you go to look at the terms of the Landmarks Law and the definition of what could be considered on the issue of demolition, you don't find in there anywhere the idea that if another agency has a compelling policy need, you can defer to that. That's not one of the listed items that you take into account when you are deciding under the Landmarks Law whether demolition is appropriate. I just give that as an example.

I think the St. Vincent's thing involves another example. Another example that's going to come along is the conflict between preservation policy, on the one hand in connection with a landmark building, and the desire of a large number of people in the city to convert it into a theater. We're constantly being confronted by these kinds of policy choices and nowhere is there a specific political mechanism to resolve those kinds of things.

MR. WOOD: Mark, last few words on this one?

MR. SILBERMAN: Yes, there are a couple of things. With respect to the Purchase Building I think it's important that there are two things to know. One is, there is a provision in the Law that the drafters created to deal with

conflicts between the agencies, and that was originally that the Landmarks Commission was advisory. So, when we came up with city owned projects and city owned property, all we could do was issue an advisory report, on the theory that every city agency has its own mandate, new housing for the poor, parks, whatever it might be, and the Landmarks Commission would be part of that process. They would come to us, we would say our opinion out loud in the political world, and then it could be disregarded, unless the public then organized and defended it.

That's changed, I think, ironically. It changed inadvertently with the passage of the amendment to the Landmarks Law, so that now the Law is binding in certain respects. It's very complicated, streamlining things maybe doesn't work that well. But now we're in fact binding in some cases where we were never binding before. So, I think there was a very explicit political calculus in the original law, but you're correct it wasn't a face-to-face debate. It would happen sort of seriatim, and the agency that wanted to do something could sort of do it afterwards and after the hubbub died down, if it did.

I do want to go back briefly to the question of amending the Law, because we're all talking about this in preparation. Should we amend the Law, is it a good time, and Otis pointed out as someone who's been around for the longest, that there's no answer to that question; it all depends on circumstances. It will depend on where we are at a particular moment, with a particular council, and a particular issue, and where the public is at the particular moment. It's easy for me to say you can amend the Law, because that's why I was brought to the Landmarks Commission in 1995. I was brought specifically because I had a lobbying background to help the then chair, Jennifer Raab, amend the Law, which we did successfully, to get the Commission real enforcement power, which has had real impacts on the Landmarks Law in New York City. John Weiss is going to talk about it a little later.

So, it can be done. But it was done in a way that is a very specific issue, is very narrowly drawn, and you had a very strong chair with very strong ties to the Mayor. You had a very strong head of the Landmarks Sub-Committee in the City Council. So, it was a way to be controlled. At no time during that process, having been a participant in it, was there any risk that it was going to spiral out of control. That said, guess what happened? We didn't get everything that we wanted. The religious organizations came in, and basically we got the message from the speaker's office: if you don't cut out the religious organizations, the whole bill is dead. So, guess what we did? We cut out the religious organizations. Later we got it back in, so we have demolition by neglect for non-profits, but we still had to do it.

I think that when you start talking about amending the hardship provision, I think it would be very, very difficult to control that debate and to control what's open at any given time. That would be my biggest concern. If you look at what the Real Estate Board of New York was proposing to the



Charter, they wanted lots of limits as to what the Landmark Commission can do, some having to do with hardships. It is exactly a vehicle to bring all those in. I think that the danger is, that to amend it, it has to be something very specific, very narrow, and hardship is not one of those issues.

#### AUDIENCE QUESTION & ANSWER

MR. WOOD: Okay, I'm going to reconvene the panel over a bottle of wine to have them answer the other ten questions I had. But we are going to turn to the audience.

I would want to just leave with a thought, kind of building on what Mark said. For years, no card-carrying preservationist could even raise the question of whether we would try and amend the Law to make it stronger without being voted off the island. So, I think that it's healthy that we're finally in a place where we could have a conversation about whether indeed there are ways to improve the Law, and whether it's politically wise to try and move on those. So, I think it's a wonderfully healthy conversation; people have extremely strong opinions on it. So, let's open it up for some questions from the audience to the panel on our large issue of perpetually young or looking for botox.

AUDIENCE MEMBER: Just picking up on what Brian had said earlier from learning lessons from other municipalities, the notion of thematic districts. Could you sort of discuss—I know what the upsides of it are—your feelings about that, what might be possible disadvantages, or why it would not work currently?

MR. WOOD: In the context of New York City?

AUDIENCE MEMBER: In the context of New York City, please. Thematic districts, where for example—and Brian can answer this better—you were to look at a series of African-American historical sites and kind of create a thematic district of that, as he did with neighborhood banks.

MR. WOOD: Before the panels answer that, I'm now going to go into the strict moderator mode, and I don't want every panelist to answer. So, if you really want to answer, signal, otherwise hold your fire for the question you really do want to answer, because everyone's not going to get to respond to every question. That being said, who would like to respond?

MR. SILBERMAN: I think that it's a good idea. I think we have to be careful about words though. It's not a "district" as we use the word district in New York. Brian, Lisa, and Margery, we're all talking about this afterwards. It's a way to create a milieu, a rationale, and a basis for designating lots of different

things, all of which would take too much time individually. Also, you might be able to throw into the mix things that on their face would be more difficult to get. So I think that that's a great idea. I mean the Commission, the closest we've done is this sort of federals, sort of looking at federals and trying to do more federal buildings. But it's not been done all at once, it's been done piece by piece. I think it's an interesting idea and one that certainly we're going to look at.

MR. WOOD: Okay, questions? I've got my list of twelve, I'm happy to go to them. Roberta Gratz here in front.

AUDIENCE MEMBER: I can't say I've been around as long as Otis, but I may be the second longest in the house. I'm not sure if this is an observation, challenge, question, or a comment. I'm always a little concerned about this need to separate the planning from the landmarks and zoning from landmarks, all of which, obviously, is clear in the Law, but let's remember that the Law was an outgrowth of urban renewal overkill. So, from day one there has been a blurring of what the use of the Landmarks Law was for: it was reactive. Yes, Margery, a lot of people do respond to threats in their neighborhood through landmarks. However, it's often that threat that prompts them to care about what is of preservation value.

I have not seen, in our history, any neighborhood using the Landmarks Law inappropriately. It may have been spurred by what you described, but its use was not inappropriate, in that they weren't fighting for something that had no historic value. So, I think we have to also remember that history has blended it from day one. As was said before and said over and over again, the Grand Central case didn't just change historic preservation; it changed land use, planning, and policy nationwide. But that's land use, that's not just historic preservation.

I also want to add, though that I think I totally agree with Mark on needing to keep any attempt to refine the Law to a narrow opportunity, there was a time where there was an attempt to change the Law, when they were ready to drive a Mack truck through it, and the whole thing was squelched just for that reason. That's very important to keep in mind.

MS. PERLMUTTER: I think that was a comment; I don't think there was a question in there. This was another thing that I think, again, was raised in the subject of Chicago. I mean, I don't know what the building count now is with all of the property—currently 27,000 within the historic districts. So, there's this Landmarks staff of sixty, and I don't know which percentage of them are the ones who actually review the applications. What is it, thirty review the application? Okay, so there are fifteen people who review the applications for potentially close to 30,000 buildings, and as we move ahead there will be more than 30,000 buildings.

So you have to ask then, what is it that we're doing here? You have a property owner who wants to change windows and they want to do it in a way that, let's just say, is staff level approval. Nevertheless, it's staff level approval, and the staff has thousands and thousands and thousands of applications. I guess the question is, when there was a move to expand the Upper West Side historic district to encompass another, I don't know how many thousands of buildings, are we really getting at historic preservation, or is it something like zoning, because what we're trying to do is retain something about the character? What's attracting us to the neighborhood has to do with scale, it has to do with materials, it has to do with much broader things than maybe that person's windows.

Maybe what's missing, either from the Landmarks Law, or from zoning mechanisms is a mechanism that's somewhere in there—it's a conversation I've had before that I call "landmarks lite." It's not the same kind of a regulation that we're currently imposing on every property owner. There needs to be much more arranged so that maybe another agency can manage it. Maybe it's something that's very clearly in a set of guidelines or a building code or something. But I'm imagining 30,000 buildings that fifteen staff need to approve.

MR. WOOD: I think a presentation in the next session may be floating some ideas around that.

MR. BUTZEL: I think that zoning doesn't affect character. I think that's one of the limits of zoning. I mean it can keep things smaller, it can keep things big, even contextually where you have existing neighborhoods, brownstones or whatever, that can help there. What distinguishes the Landmarks Law? The Landmarks Law takes the community, which is what people are really talking about, and tries to maintain the character of that community by preserving mainly the structures that exist. If we're in Europe no one would be thinking twice about this because that's the way Hamlets are, that's the way cities are, and the like. Well, I shouldn't say all of them but certainly the best of them.

I think with regard to the issue of how you enforce all this, there are lots of possibilities, including self-certification, including giving neighbors the rights of private action in order to enforce the regulations and the like. I don't think it's an endless process of bureaucracy that has to go on.

MR. PEARSALL: May I jump in on that note just for a moment? For twenty years I've been trying to make this point, I might as well.

MR. WOOD: The time is right.

MR. PEARSALL: Twenty years ago, I proposed, in something called the Historic City Committee Report,<sup>2</sup> the idea that we could solve our enforcement issues here. I should say, with nearly 30,000 buildings, I think we've got three active enforcement people for 110 historic districts and close to 30,000 buildings. So, the idea that we are closely monitoring what's going on in all of these historic districts, I think is pretty self evident. But, if we could, with a very simple change in a few words, adopt what the federal environmental laws adopt, what the federal securities laws include, what the federal anti-trust laws include: a private right of action, the private attorney general. Not everybody would be able to do this, but organizations that have been around for a while can spend a lot of time in trying to define exactly what the criteria is. But take it from me, it would be possible to identify criteria that would eliminate the cranks and the people who have grudge matches. You could open, to responsible organizations, the ability to assist in policing the enforcement of the Landmarks Law by creating a private right of action. You would only be entitled to get injunctive relief; this is not going to be for damages. Now, the Landmarks Commission has never liked this idea, which is why nothing has ever happened. Dorothy Miner hated this idea. She hated this idea; we had the most terrible fights about this and it's perfectly understandable. I know where Mark is going to come from, he doesn't even need to bother.

They want to keep control of the process, understandably. If they keep control of the process, they can determine what's going to be pursued, what isn't going to be pursued, all the subtleties and the litigation that pursues it. I agree that something would be lost. The Landmarks Commission could obviously always intervene in such proceedings, and make it felt through those means. I think there's an answer to all of the objections, and one should just step back and understand the incredible benefits that enforcement would achieve by having a private right of action.

MR. WOOD: Mark, would you like to expand on his statement of your position just a little?

MR. SILBERMAN: Well, it was stated. I want to move, take the conversation a little bit further on. I would say that everything that Otis had said is certainly the position of the Landmarks Commission. But in addition, I think it is very difficult to weed out the cranks. We deal with this every day. Again, it's one of those things where people who think about preservation sort of, from on high, need to come back down to the hearing once in a while. People come into hearings, they propose something, and it's routine for preservationists and neighborhoods to basically try to humiliate and demonize their neighbors. It is a very unpleasant forum. Somebody bought a house, they want to put on an

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2. HISTORIC CITY COMM., NEW YORK: THE HISTORIC CITY (1989).

addition and they're told, "The house you have is a piece of crap. Even if it's a piece of crap, we think what you're proposing makes it worse. So you're a piece of crap." People cry at these things. Don't underestimate the sort of power neighbors use to get involved in their neighbor's lives in a non-productive way.

I also want to raise a different question: I think there's a lot of conversation that happens all the time in New York about preservation with what the public wants, and I think it all takes place with an incredible lack of information about what the public really thinks about, and values about what I and the rest of the people at the Commission do every day.

Sort of following a little bit on what Margery said—for instance, windows, materiality, one of the cornerstones of historic preservation as we now know it and certainly the way the Landmarks Law in New York City is created—how important is that for neighbors and these communities that want to preserve themselves? Maybe it is just a question of size. I think that we need real metrics. We need to go out and talk to people about what it is that they value and like about what they do, how well are we doing it and what they hate, and what it is that they don't value, and think is intrusive, so that there can be an actual discussion. What does preservation mean to New Yorkers?

This conversation happens up here, and I'm telling you, the rest of us are down here dealing with people who bought into the violation. There's a case that we're dealing with now, these people bought a house and guess what happened? Twenty years ago, because there was no private right of action according to Otis, someone changed the curved parlor floor windows on the brown stone. These people bought it, there's no violation on the property, there's nothing. We now find out about it, through whatever means, and guess what? What do we do? Do we say you now have to come up with \$50,000—that's not a made up number—to change curve windows? That's what the Commission has to do every day. I think that's when we talk about preservation, when you say what is it people value in New York about what we do.

MR. WOOD: Frank, your next. But before you start to talk, raise hands again because I want to tee up the next few questions. And I just want to point out, for the record, I see no cranks in this audience.

AUDIENCE MEMBER: My question is about making the landmarks process more easily understood by the public. Landmarks regulation through the Commission is about regulating private property. But Mark just talked about a change, where the Commission has now binding authority over properties owned by the city, which are governmentally owned public property. It's always been confusing to me, and I can't imagine that it isn't to others, that the Commission's decision about state and federally owned property in the city are also advisory. In fact, the Commission spends time considering proposed

alterations to some of our most important, physical public buildings, that the public would probably assume the Commission had authority over. Then, those agencies completely ignore the findings of the Landmarks Commission, and all the time that was invested in that is more or less down the tubes.

So, my question is, is there any way that you think the relationship between the findings of a municipal authority can have a more binding constraint upon a governmentally owned building?

MR. WOOD: Okay, a couple of people want to take that on, or nobody wants to take it on?

MR. PEARSALL: I have an opinion on everything. I say the legislature ought to decide, when you get to public properties, there's a public government. I agree with what Mark said, maybe the provision that restricts the Landmark Commission, so its decisions are obligatory rather than just advisory, is a mistake. When it's in the public realm, the political process basically, in my view, appropriately decides what should happen there.

MR. WOOD: Okay, we have a question here.

AUDIENCE MEMBER: Hi. I'm wondering, and the opinion probably of Mark and Al are more suitable in answering this, in your opinion, to what extent are not-for-profit organizations such as the St. Vincent's or a city agency like Parks, really delaying a building actually having a hearing or even ever getting a hearing or actually ever being calendared? With not-for-profit organizations, it can be something that will take years and years and years to ever see a hearing because it's owned by a not-for-profit. So I guess the threat of something being not-for-profit owned, the ramifications of actually having a property like that ever designated or being managed by historic preservation . . .

MR. WOOD: We get it, we get it.

MR. SILBERMAN: The issue you raised is not just about non-profits; it's about the designation process. The Landmarks Law, as I think it was referred to a couple of different times during the course of the day, there's been some litigation in New York about that process and the Commission has prevailed in all those cases, because the Landmarks Law itself is silent on how things are brought forward. Once a decision is made to consider something formally for a landmark, a lot of due process kicks in, and there are hearings and reports and things going on. The process before then is the process that takes place at the staff level, and David was talking about the importance of the staff.

The short answer to your question is, there's been some criticism about the lack of communication about what happened, where something is in the review process for potential landmarks. The Commission's work is—we keep

saying that it keeps getting delayed, but there is a big capital project to bring all the computer stuff together in the city soon. People will be able to look online at a property and see every permit, every violation, designation information, staff level permits, commission level permits, the whole thing. In addition, RFE, the Request For Evaluation, the status of those will be there on the website so you can actually see something has been submitted on this date and it's under consideration.

That internal process, I think is very important. It's not an answer that preservationists like to hear. But, there's a lot of priority setting and decision making that happens at the level of the chair and the staff to deal with the fact that we get 200 requests for evaluations every year. A request is for one individual building or for a huge district. We have to deal with priority issues, sort of budget issues. There are a lot of decisions that go on in terms of whether something should go forward or not. That decision-making, I think, is appropriately currently residing with the chair and sort of that internal process, because I think it's inevitable.

For example, the current chair, Bob Tierney, giving designations to the outer boroughs was something he has talked a lot about since he was first appointed in 2003. Guess what? He's doubled all of the designations in Queens now. He's increased designations in Brooklyn by 15%. That's a priority. Now, should he be able to say that takes priority over everything else? There is a process that the commissioners, not that he sets every single thing, but those kinds of priorities are important because we have limited resources. Working on one thing means we're not working on another.

So in that sense, I think that's the process. It's a practical process given a volunteer commission that meets three times a month; 15% of Margery's professional life is donated to the City of New York, 15%. We can't take up more of their time; the staff has to make these decisions.

MR. BUTZEL: I represent a group called Save St. Vincent de Paul, which is a not-for-profit trying to save—actually, the first integrated church in New York by more than seventy years, it's called St. Vincent de Paul. It's on 23rd Street, between 6th and 7th Avenue. It's a French speaking church. It's been found eligible by the State Historic Preservation Office and it's actually a very attractive little church. Edith Piaf was married in it; I mean she's only been married seventeen times. There are not that many places where you have this. It fits every possible criteria of a structure that ought to be considered for designation in EAF or EAS, or whatever they're called; and we were denied on the grounds that it doesn't meet the criteria. The usual three-line letter that tells you it doesn't meet the criteria.

I brought a lawsuit saying that the Landmarks Law said that the Commission is supposed to designate or determine, and that implies the Commission should determine what is heard, or not heard, rather than just the chairman. We lost that. We think that there needs to be—if there's any

amendment to the Landmarks Law that's ever proposed given this climate, that's one that ought to be made. In Boston, citizens can nominate instructions for designations or districts for designation, and we're suggesting a proposal which will allow that to happen.

But, if a citizen does it, in order to get rid of the cranks that Mark's talking about, they have to bring with them a report from a qualified historic preservation expert laying out what the reasons are for designation. Then, the full commission hears that only in a preliminary way. If they decide it needs to go on, then it goes on. If they decide it doesn't need to go on, it stops. So, that way you avoid increasing the workload dramatically, but you provide a process for the public or important people in the public to make. Whether that happens or not, I don't know.

MR. WOOD: Okay, back there?

AUDIENCE MEMBER: Just wondering whether the LPC of the greatest city in the world should be at this point, with the workload, composed of full-time commissioners. Why is it that just the Chair is full-time? Of course there are budget problems and so on, but we're at the point where we could do so much more if we have the full attention of X number of commissioners. Is that outrageous?

MR. WOOD: We still have 85% of Margery's time to take advantage of.

MR. BUTZEL: It's the Board of Standards and Appeals. It's not as important as the Landmarks Commission.

MR. SILBERMAN: One could imagine there is a philosophy that is still adhered to by—I don't really know, like I said we have no metric—some percentage of the preservation world that believes that volunteer commissions are very important, that you need to have people that are not doing the job of Landmark Commission as a paid job, that you'll get better people if it's not paid. I think it's problematic because I think there are structural issues that follow from having a non-paid commission, and I think it's probably something that should be looked at.

MS. PERLMUTTER: I just want to speak to that. The City Planning Commissioners are paid, but they're also working full-time in their other jobs. They're paid because their time spent is recognized. I don't believe that them being paid has an impact on their decision-making, it just recognizes their time. I think it's very important, personally, that the commissioners in all of these agencies be professionals, that they're full-time government employees. For instance, I'm working everyday on the days that I'm not on the Commission representing property owners who are confronted with the



various regulatory processes. So, as a result, I can be empathetic to that property owner who owns a house that's got a window that was replaced twenty years ago, and how do we address the realities of it not being a historically correct replacement, but at the same time it's a person with limited income, and so on.

I can be sympathetic also because I understand as a professional—I'm also an architect—how it is to modify a building, what's entailed. I can read plans. It is important that the other architects in the Commission do that, and the person who's in the real estate business understands the kinds of impact on real estate. It's very important that you have active working professionals who listen to working professionals make the presentations, and can kind of weigh reality checks.

MR. WOOD: We're down to the final round of Jeopardy here. We have about seven minutes left. So anyone who is dying to ask a question, please demonstrate vociferously so we give you a chance to do so. I see a hand at the back?

AUDIENCE MEMBER: To go back to Frank Sanchis' question; the City of Los Angeles uses the California Environmental Quality Act as a tool to enhance landmark review. We could have in New York, under state and federal law and city law, a memorandum of understanding as how to use to the Environmental Impact Assessment Procedures so that state and federal agencies would have to listen to the Landmark Commission's advice as a matter of expertise, not as a matter of a mandatory decision. I've always wondered why the city doesn't choose to engage—the city adopted an environmental impact assessment law before any other entity after Congress, before the State of New York. We copied the California law when we adopted our law in 1978.

You could integrate each of these environmental impact assessment reviews through a memorandum of understanding, and it will just take a little inter-agency negotiation. You might get to Otis's point that you could have some judicial review of that, if the citizens thought the reviews were inadequate, because there's a large body of case law on that. That's a soft question for Al Butzel.

MR. BUTZEL: I believe—and Mark has to talk to this—that the LPC does not regard itself as subject to the environmental impact and environmental EIS laws, and therefore, maybe it would be difficult for them to integrate any one into the present process.

MR. SILBERMAN: Yes, the Commission has taken the position legally. It had been adopted that the Commission is not subject to environmental quality review acts because, as Professor Kayden mentioned earlier, we view our

decision making on very narrow grounds. It's set forth in the statutes, it's about architecture, it's about the things that make a particular designation significant, and that has been upheld. So, we are deemed to be ministerial in our review.

MR. BUTZEL: Which is just making my case when he starts talking about outside considerations like equity and that sort of thing, it must be illegal, right?

MR. SILBERMAN: I don't believe I've used equity today.

MR. BUTZEL: I used the word equity to give you credit.

AUDIENCE MEMBER: In this discussion, if you are taking the position, or if the position is that it is not subject to this, is it worth taking time of the Commission and Commissioners in talking about federal and state buildings if, in the end, nothing comes to?

MR. SILBERMAN: Absolutely it is because I think that the process, just as it was with the original Landmarks Law where we were advisory on city owned projects, politics matters. These are meaningful interactions. That doesn't mean they agree with everything that we say or we do, which is fine. But, I think that when we deal with the federal, the Parks Department or the Park Service, or when we deal with sort of larger state authorities and stuff, they do listen, and they do sometimes adopt; not every time, and sometimes it's a problem. But, I think dragging them before the Landmarks Commission and having them sort of explain what they want, hearing the questions and the criticisms can have a salutary impact on some of these things.

I mean I think the TWA Terminal example was I think—again, is it the outcome everyone wanted? No. But I think the fact that they have to come to the Landmarks Commission and defend their view and explain it mattered and the project that resulted was better for it.

MR. WOOD: I think on that note we should all thank this panel, it's been really terrific, even the commentary.

#### LOOKING AHEAD: CHALLENGES AND OPPORTUNITIES FOR NEW YORK CITY AND BEYOND

Introduction: Mr. David Schnakenberg & Ms. Kate Wood

MR. SCHNAKENBERG: We're going to move on to our last panel presentation. This one is called "Looking Ahead: Challenges and Opportunities." We're going to look at some of the things that are both challenges and opportunities

for preservation as we move forward. I have the pleasure of introducing to you our moderator for this final series of presentations, Kate Wood. Kate has a joint degree in Historic Preservation and Urban Planning from Columbia University. She is the Executive Director of Landmark West!. She is also an adjunct Associate Professor at the historic preservation program here at the Graduate School of Architecture, Planning and Preservation. Kate's full bio is on the website and in some of your course materials. She is the recent recipient of the Grassroots Preservation Award from the Historic Districts Council and Kate is right here, so Kate is going to introduce her panelists to you now as they come on up and get started.

MS. KATE WOOD: Thank you all. So, welcome back to today's mind-blowing crash course in preservation law, theory, and politics. Andrew Dolkart, I hope you're listening because I think all the Columbia students here today should just collect their Master's degree on their way out the door. There are a few sadistic people who have suggested to me in the past that I go to law school given my various laps around the courtroom working for Landmark West! in the past ten years, and I hope I can collect a few credits on my way out too.

So, good afternoon. Again, my name is Kate Wood and I am the wanna-be lawyer asked to moderate the last set of panelists today. The purpose here is to begin pooling some of the ideas we heard today and look ahead towards the future and see what a strong, comprehensive preservation tool kit might look like. We've got some great acts to follow but if there is anyone who deserves an honorary J.D. it is the wonderful Carol Clark. Carol's first semester preservation planning course in Columbia's Historic Preservation Program is the moment that I can distinctly pinpoint I knew I was in exactly the right field. I had the luxury of listening to her illuminating explanations of landmark designation, zoning, and other planning tools for an entire semester and in a few minutes you'll have the pleasure of hearing about her latest research on new ways to protect historic neighborhoods.

Richard Roddewig is a lawyer and one of this country's foremost experts on land use, real estate, and landmarks—a formidable combination if there ever was one. It says in his bio he has valued more than 500 historic properties. So given the fact that there are nearly 27,000 designated landmarks in New York City I think we're going to have to clone you. Preservation easements will be the focus of Richard's presentation today. He is also the author of a very soon to be released text book on preservation easements and also, wearing a different hat, responsible for the fact that this whole session is being filmed and will be turned into a film that we can all enjoy for many years to come.

Finally, John Weiss has the shortest written bio in the program that I saw but I think that's a testament to his quiet, cool-headed presence and persistence as Deputy Counsel of the New York City Landmarks Preservation Commission. Since John came on board, he obviously has strongly increased its activism to defend landmarks from demolition by neglect, something that

he'll tell us more about in his presentation. So this is in many ways the dream panel and not only because you're all so awesome but because here's where we get to contemplate not only what is, but what could be. So you each have fifteen minutes. I am going to be in the role of rigorous task master when it comes to the time, so enforcement is the word of the day. Then we'll have plenty of time for what I'm sure will be a very lively Q&A with the audience. So thank you all very much. Carol?

Speaker: Ms. Carol Clark<sup>3</sup>

Thanks, Kate, for that lovely introduction. It's a privilege to discuss approaches to conserving neighborhood character with you, but first my thanks to the National Trust John E. Streb Preservation Fund for New York and the New York State Council on the Arts for their support of my research. Also, a special thank you to Ben Baccash, whose skillful assistance with today's presentation is greatly appreciated by me.

In New York City, a wide variety of older residential neighborhoods are suffering stunning losses of distinctive character. Whether through demolition and replacement of perfectly decent housing with McMansions or from unsympathetic alterations that compromise completely the original appearance of a building with bad siding, unfortunate windows or front yards paved over with parking, these changes undermine the character of neighborhoods. The problem is evident throughout New York City and it's a national issue. The New York Times decried the tear down epidemic, asserting that it is a rapidly growing hazard.<sup>4</sup> There is also an economic factor to consider. People prefer to reside in places that possess cohesiveness and feel comfortable to them. Add too many jarring juxtapositions, and we risk creating utterly unappealing environments. This could yield negative economic impacts.

Today, New York is a thriving city with a growing population located in a wide variety of housing, but the most common residential building type in New York City is the single family house. The majority of New Yorkers live in low density, suburban style settings. Understanding how they contribute to the city's vibrancy and bringing preservation tools to these neighborhoods is critical. Consider the difference between typical historic districts and another tool used to protect neighborhoods, conservation districts. Julia Miller, the Trust's expert on this subject, has written "[n]eighborhood conservation districts are areas located in residential neighborhoods with a distinct physical character that have preservation or conservation as the primary goal. Although these neighborhoods tend not to merit designation as a historic district, they

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3. Photograph courtesy of Ben Baccash.

4. Editorial, *Hold Back the Wrecking Ball*, N.Y. TIMES, July 1, 2008, at A20, available at <http://www.nytimes.com/2008/07/01/opinion/01tue3.html>.

warrant special land use attention due to their distinctive character and importance as viable, contributing areas to the community at large.”<sup>5</sup>

There are neighborhood conservation district ordinances in about 100 cities around the country. These can be tailored to a variety of local conditions not traditionally considered suitable for historic district designation. They seek to conserve the historic development patterns of the neighborhood, including its green spaces and predominately low density lot coverage. In New York City, concern about community appearance is not a new topic. A 1957 study was conducted by leading professional organizations.<sup>6</sup> The report stated that beautiful communities can be created and maintained only through a deliberate search for beauty on the part of community leadership backed by a lively appreciation of a visual world by the public. The chapter on evolving legal concepts written by the venerable Albert S. Bard discusses the public’s interest in community appearances and concludes that appearance is value.<sup>7</sup> The next chapter, “Excerpts and Abstracts From Existing Legislation and Court Decisions,” provides a road map to extending the administration of aesthetic regulation to the broadest possible context. The report asserts that a new, more positive approach to planning for community appearance is needed. Remember, this is 1957. The authors note that the publication of this report is not intended to signify that the subject has been exhausted. Instead, after four years of meetings, these professionals concluded that “we are now making available the material and our thinking on the subject so that a larger number of persons may join the effort.”<sup>8</sup> Here we are.

While landmarks laws in the ensuing decades have been effective in protecting historic buildings, it’s apparent that planning initiatives that involve aesthetics, community appearance, and neighborhood conservation have not advanced adequately, at least not in New York City. When considering aesthetic regulation of the built environment here, we think, of course, first of the Landmarks Preservation Commission. Their impact is significant. As you’ve heard, approximately 27,000 properties are under its jurisdiction but there are about 900,000 tax lots in the five boroughs. The landmark parcels, in total, represent only about 3% of the property citywide. There are many neighborhoods with distinctive character that are quite unlikely to be found worthy of designation. The Times reported on the construction of McMansions in Forest Hills by new residents whose houses, with paved over front lawns and high fences, are viewed by some as colliding in an appalling way with

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5. Rebecca Lubens & Julia Miller, *Protecting Older Neighborhoods Through Conservation District Programs*, 21 PRESERVATION LAW REPORTER, 1001, 1005 (2002).

6. AIA-AIP NEW YORK AREA JOINT COMMITTEE ON DESIGN CONTROL, PLANNING AND COMMUNITY APPEARANCE (Henry Fagin & Robert C. Weinberg eds., 1958).

7. Fagin & Weinberg, *supra* note 6, at 83.

8. Fagin & Weinberg, *supra* note 6, at viii.

neighborhood character.<sup>9</sup> The newcomers see them as signs of welcomed prosperity and success. Many of the older neighborhoods in Queens were built with a cohesive community design which was enforced originally by covenants or easements. In recent years, these privately regulated mechanisms have often either lapsed or have been overlooked. Douglaston is a case in point. Developed by the Richert-Finlay Realty Company, it is characterized by fine houses that dominate its sometimes narrow winding streets. Note that their construction is ongoing. In Kew Gardens, the original character, sedate and charming, is being transformed by houses like this one.



With an abundance of detached houses, what is happening with their replacements is this. There's a pressing need to think in a comprehensive way about neighborhood preservation. Myra Morris describes conservation districts as a regulatory overlay used to protect an area from inappropriate development. In practice, a conservation district is a malleable legal tool that is shaped differently in each city and neighborhood where it applies. Some neighborhood conservation districts apply rigorous design reviews while others simply apply guidance for new construction and act as a vehicle for neighborhood level urban planning.

Commentators tend to split conservation districts into two types: the architectural or historic preservation model, and the neighborhood-planning model. Preservation model neighborhood conservation district ordinances (NCDs) are more focused on preventing tear downs than on preserving architectural details. In contrast with the preservation model, the planning

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9. Kirk Semple, Questions of Size and Taste for Queens Houses, N.Y. TIMES, July 5, 2008, at B1, available at <http://www.nytimes.com/2008/07/05/nyregion/05forest.html?pagewanted=all>.

style NCDs do not include design review, but rely solely on standard zoning regulations like lot size, building orientation, and scale to maintain the neighborhood's built form. Let's look at a few examples. In 1983, Cambridge, Massachusetts adopted legislation establishing neighborhood conservation districts, and with it, groups of vernacular buildings. Vernacular buildings and their settings with particular design qualities, are protected and maintained. One of the goals stated explicitly is to enhance the pedestrian's visual enjoyment of the neighborhood's buildings, landscapes, and structures. The ordinance supplements the traditional landmarks law in Cambridge.

To establish a conservation district in Dallas, Texas, a feasibility study is conducted and the city's director of planning determines eligibility. As a Dallas planning official notes, Dallas uses conservation districts to help neighborhoods determine what is important and writes guidelines based on what the neighborhood considers to be defining characteristics. An interesting example is the M Street conservation district which requires that all new homes be built in the Tudor revival style of architecture, characteristic of the original buildings. The neighborhood conservation district requires the use of standard sized bricks, as opposed to the king size type often used in the building of newer homes. It forbids metal roofs and window air conditioning units and requires that porches be constructed with transparent glass. Even though requiring replacement homes to be neo-Tudor revival seems anti-preservationist in its strictest sense, this approach is entirely consistent with what the residents agree they wanted, and it satisfies local government officials.

In Nashville, neighborhood conservation zoning districts are implemented using zoning overlays; each district has its own design guidelines which have been developed by the local government in close consultation with neighborhood residents. The districts promote new development that's compatible with the neighborhood's existing character. Another example is the Hillsboro-West End District. The result is a building that relates successfully to the existing residential character.

In Roanoke, Virginia, neighborhood design districts provide design guidelines for a variety of residential structures.

In addition to ordinances, Austin, Texas relies on residential design and compatibility standards. This is also known as Austin's "McMansion Ordinance." It outlines acceptable set back lines, building lines, and heights. The standards also mandate the articulation of side walls to encourage smaller scale and segmented appearance in construction to make it more compatible with its surroundings.

In Boston, architectural conservation districts are used to recognize areas of local significance. The architectural conservation districts have dedicated commissions and design guidelines that most observers believe are more flexible than those traditional historic districts. Here, the rhythm of the row house facades are echoed in the design of this new building erected by Boston

University. The architectural conservation districts work well and supplement the traditional historic districts in protecting the city's neighborhood character. These examples are but the tip of the iceberg.

There are numerous approaches to plan and safeguard community appearance. The future integrity of our neighborhoods requires us to learn from and adapt to these approaches. The ongoing erosion of neighborhood character is a planning problem, not a landmarks preservation issue. Many practitioners agree that in New York City, we have been treating zoning as planning. Zoning is not planning. One case in point: to respond to the proliferation of McMansions in Queens, city planning created a new zoning district which now applies to some lots in Bayside. This limits the heights of the houses and governs the building placement on the lot. The line-up provision of the R2A zoning resulted in a better outcome than what might have happened without it, but shouldn't we be thinking bigger than this? With a solid grasp of the multitude of planning and preservation challenges citywide, we need to consider creativity and a fresh outlook how best to respond to them.

Our overarching goal in compiling a plan for both addition and development in every neighborhood is what is necessary to be before us. In New York City this plan has to balance the competing realities of a growing and changing population with conserving built fabric, while also enabling, even reinforcing, the very dynamism that is the city's core. Other cities from Miami to Boston, from San Francisco to Portland, Oregon, are applying a variety of approaches to assess community character, inventory resources, articulate goals, and set priorities. Shouldn't New York City aspire to be a leader, bringing the best practices from elsewhere into focus and adapting them to our needs? The bottom line is that New York needs to grow and thrive with enlightened leadership, a design community that embraces change and respects the past, along with an informed, engaged constituency that shows it cares about planning and community appearance. The stakes are high. Right now the overall quality of the city's built environment is truly endangered. Together we need to rethink how we will proceed and to reinvent our approach. What better time to tackle this challenge than now, as we approach the 50th anniversary of New York City's Landmarks Law in 2015. Thank you.

Speaker: Mr. Richard Roddewig

Thank you very much. It's appropriate to be talking about easements here in New York City because really the origins of the modern preservation easement movement in this country come out of New York City's process and landmarks code in the 1960s and 1970s. The interesting transferable development rights and how they're valued led to a lot of creative discussion by John J. Costonis, an attorney, and by real estate analysts in Chicago to come up with methods for valuing preservation easements. In the late 1970s and



early 1980s, the focus of this easement movement was on either large historic easements that were threatened by a subdivision, or smaller downtown income producing historic buildings in high-density zones such as New York, San Francisco, or Chicago. In the mid to late 1980s, the number of easements grew dramatically as real estate syndicators using the investment tax credit, and the rehab of historic income buildings, included preservation easements as another way of boosting the tax returns.

The number of historic preservation easements increased dramatically from the early 1980s to mid-1980s. I'll talk in a bit about recent IRS review of easements. This isn't the first time that they had zero value in easement donations. They did it, too, in the early to mid 1980s. The Atlanta office of the IRS was particularly focused on zero evaluations. It led to a summit conference with preservation organizations in 1985 and the IRS agreed to back off on their zero evaluation position and go to a case-by-case review and analysis of the easement values. The recession of 1987 and 1988 combined with new depreciation rules really put a temporary, almost virtual halt, to the donation of historic preservation easements in the United States. Since there wasn't as much real estate syndication going on involving tax projects, there weren't as many easements being donated as a result.

In the early 1990s, there was little IRS focus on the easement area because there weren't very many easements being donated. In the late 1990s, the numbers started to come back, as interest in rehabbing historic properties also came back. Since 2000, however, there has been a dramatic surge in the number of preservation easements donated, especially for the first time, on single-family homes in urban markets, not a type of easement that was a focus on the first wave of easement donations in the 1970s and 1980s.

There's also been a big surge in conservation easement donations since 2000 as well. Active promotion of preservation easements has been underway by a number of preservation organizations around the country, including the Trust for Architectural Easements, once known as the National Architectural Trust. Since 2000, there's been a dramatic increase in the number of preservation easements. The statistics show that by 2005 there were 842 Part I Certifications for easement donations, nationally.<sup>10</sup> Most of the increase since 2000 has been in three major cities: Washington DC, here in New York, and in Chicago; there were approximately 500 easement donations between 2003 and 2008.

The title of this presentation is "Preservation Easements Under Assault," and I think in a way the assault is not only by the IRS in reaction to what has been going on, but also in a way, some of these preservation organizations that are promoting assessments have been assaulting the traditional concept of

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10. The process by which a historic preservation easement is obtained begins with the Historic Preservation Certificate Application Part I, whereby the property is evaluated for its historical significance. PRESERVATION EASEMENT TRUST, FREQUENTLY ASKED QUESTIONS, <http://www.preservationeasement.org/conservation/faq.asp> (last visited July 10, 2011).

what a preservation easement should be, and the types of properties that it should be on. The assault from the point of view of publicity about what was going on began in 2002 with some Philadelphia Inquirer newspaper stories about conservation easements.<sup>11</sup> The stories alleged that these were benefits that were only helping very rich people. There were conflicts of interest among board members on the conservation groups that were accepting the easements.

The Philadelphia Inquirer article alleged that the easements enhanced, rather than decreased property values, and that they were being supported by inflated appraisals. The IRS in June of 2009 began to address what it perceived as abuses. A press release issued in June 2009 said that there were numerous instances where tax benefits of conservation and preservation easement donations have been twisted for inappropriate individual benefit; and it warned that taxpayers who game the system, and the charities that assist them, will be held accountable.

The Washington Post series of articles is really the one that most people are aware of in terms of what it meant for the IRS' new relationship with the easement area. The Washington Post series focused on preservation easement donations, and argued that donors of preservations were agreeing to change something they could not change anyway.<sup>12</sup> Owners were reaping a windfall. The easements were bogus gifts that were supplying home owners with free money, and the promoters were promising tax deductions, but quietly telling the donors that there would be no effect on their property values. The series even alleged that members of Congress were taking advantage of what was called in some of the articles, a loophole.

The IRS, in February of 2005, included easements on their list of the "Dirty Dozen Tax Scams," and in a statement later in the year said in many cases local historic preservation laws already prohibit alterations of the homes' facade, making contributed easements superfluous. This led to Senate Finance

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11. The Philadelphia Inquirer series was a four-part investigative report on the use and misuse of preservation easements. Craig R. McCoy & Linda K. Harris, *Saving Treasures That Benefit Few*, PHILA. INQUIRER, Feb. 24, 2002, at A1, available at [http://articles.philly.com/2002-02-24/news/25333700\\_1\\_federal-tax-tax-deduction-tax-revenue](http://articles.philly.com/2002-02-24/news/25333700_1_federal-tax-tax-deduction-tax-revenue); Craig R. McCoy & Linda K. Harris, *A Limit to Development But Not to His Creativity*, PHILA. INQUIRER, Feb. 25, 2002, at A1, available at [http://articles.philly.com/2002-02-25/news/25332959\\_1\\_preservation-easements-deed-restriction-limit-development](http://articles.philly.com/2002-02-25/news/25332959_1_preservation-easements-deed-restriction-limit-development); Craig R. McCoy & Linda K. Harris, *Estates to Sell?*, PHILA. INQUIRER, Feb. 26, 2002, at A1, available at [http://articles.philly.com/2002-02-26/news/25334732\\_1\\_deed-restrictions-transactions-real-estate](http://articles.philly.com/2002-02-26/news/25334732_1_deed-restrictions-transactions-real-estate); Craig R. McCoy & Linda K. Harris, *A Preservation Group Hangs On, Looks Ahead*, PHILA. INQUIRER, Feb. 27, 2002, at A1, available at [http://articles.philly.com/2002-02-27/news/25334301\\_1\\_historic-buildings-preservation-groups-preservation-activists](http://articles.philly.com/2002-02-27/news/25334301_1_historic-buildings-preservation-groups-preservation-activists).

12. The Washington Post series was a two-part investigative report. Joe Stephens, *Loophole Pays Off on Upscale Building*, WASH. POST, Dec. 12, 2004, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A57445-2004Dec11.html>; Joe Stephens, *Tax Break Turns Into Big Business*, WASH. POST, Dec. 13, 2004, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A59835-2004Dec12.html>.

Committee hearings, an investigation by the Senate Finance staff, House Ways and Means Committee hearings, which led, in turn, to the Pension Protection Act of 2006 Preservation Easement Amendments. The IRS, in ratcheting up its review of this whole area, created a special issue management team. It also, as part of its assault on the easement area, made changes to its audit manual. It conducted market studies in New York, Chicago, and Washington D.C., and it got behind the Pension Protection Act of 2006 changes, adopted new regulations, and went into court to argue that easements have zero value, and to challenge other aspects of easement donations.

I want to talk about each of these briefly. The IRS audit manual was something that was being picked up on by appraisers who were being recommended by the more aggressive groups promoting assessments. The audit manual said that in Philadelphia, in a study done by the IRS, easements typically reduce value by 10 to 15%. Many appraisers began to simply rely on that percentage, apply it to the before easement value, and give to the taxpayer the amount of the donation. The IRS as part of its review of the program, removed the article from the audit manual and issued a Chief Counsel advice memo that said there was never an automatic fixed percentage that easement donors were entitled to.

The market studies that the IRS conducted here in New York City were a comprehensive study of single-family townhome easements. It calculated the number of easements that were donated, and did some market studies and comparative analysis of sales prices for easement single-family row houses and non-easement properties. The conclusion in the New York City market study was that preservation easements result in no discernible diminution in a fair market value of a brownstone property. It went further to say that easements simply duplicate the protection already provided by New York City's Landmark Law. The study was not written by attorneys however, but by real estate analysts. In Washington D.C., a similar kind of study was conducted, leading to similar conclusions.

In Chicago where we were retained by the IRS to do the market study, we found slightly different results. We did find some impacts from preservation easements on single-family homes. We found 4-6% impacts on prices in two neighborhoods, no impact on prices in one, same to slightly higher values in one neighborhood, and one sales data was inconclusive in the fifth neighborhood that we studied for the IRS.

The Pension Protection Act of 2006 has a number of provisions related to appraisers and what they must do now to be more rigorous in their analysis. New over-evaluation penalties were put in place. There are also some new requirements for easement organizations. These new requirements include a filing fee every time they accept an easement for a charitable deduction, a new reporting requirement for them, and also the requirement that preservation easements must protect all four sides and the roof in order to qualify as a conservation contribution. IRS transitional guidance and proposed regulations

went further, and reiterated some of the things in the Pension Protection Act, especially as it related to real estate appraisers and how they must perform their duties.

The issue management team, as of March of 2006, announced that it had about 500 easement donations under review including about seventy-five easements nationally. Conservation easements in Colorado were particularly subject to review. A *Denver Post* story in November 2007 said there were about 290 conservation easements in Colorado under review by the IRS. The precise number of easements the IRS is reviewing is not really clear. There are probably now hundreds of them, including dozens here in New York City that are under review.

The IRS has filed more than thirty-five conservation easement cases since 2005 in tax court and other courts. The issues raised in these court cases typically involve four things: challenges to the appraisals that are not meeting the qualified appraisal rules, challenges to the appraised values, challenges to the conservation purpose having been met or not met by the donation, and issues related to the subordination of mortgages.

Now these are the six most significant cases.<sup>13</sup> I'm going to talk about a couple of them, and then maybe we can talk more about them when the panel convenes. In one case,<sup>14</sup> the appraiser simply multiplied 4% or 5% by the four sides of the building, and got a 20% easement deduction. The IRS' position was that not only was that improper, but there were other things wrong with the appraisal as well. That meant that the taxpayer had not substantially complied with the requirements for a qualified appraisal and for a charitable donation. The district court agreed, said there's no substantial compliance in this case, and said that the acknowledgment by the Landmarks Preservation Council of Illinois was deficient. LPCI acknowledged the cash contribution, but did not acknowledge the easement itself as required by the tax court.

There's interesting dicta by the District Court in the decision of the case involving the arbitrary percentage. The court concluded by saying it appears to call for careful scrutiny by someone who recognizes when an emperor has no clothes on, the fact that there was an automatic percentage that the appraiser applied. The District Court also called into question the fact that Landmarks Preservation Council based its cash contribution on 10% of the appraised value of the easement. That raises interesting issues about whether or not they were recommending friendly appraisers in order to boost the amount of the charitable gift deduction and boost the amount of their cash contribution.

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13. *Bruzewicz v. United States*, 604 F. Supp. 2d 1197 (N.D. Ill. 2009); *Simmons v. Comm'r*, 98 T.C.M. (CCH) 211 (2009); *Scheidelman v. Comm'r*, 100 T.C.M. (CCH) 24 (2010); *Herman v. Comm'r*, 98 T.C.M. (CCH) 107 (2009); *Kaufman v. Comm'r*, 134 T.C. 182 (2010); *Whitehouse Hotel Ltd. P'ship v. Comm'r*, 131 T.C. 112 (2008), rev'd and remanded, 615 F. 3d 321 (5th Cir. 2010).

14. *Bruzewicz v. United States*, 604 F. Supp. 2d 1197 (N.D. Ill. 2009).

In *Simmons*<sup>15</sup> in Washington, D.C., the claimed easement value was at 11% and 13% on two row houses. The IRS zero valued this, said there was no value to the easement because both easements duplicated the protection already provided by D.C. preservation laws, and that the appraisers were not qualified appraisers. The IRS also said there was no conservation purpose here because the L'Enfant Trust can consent to changes in the facade after review, and has the right not to exercise any of its obligations if it doesn't want to. The IRS also argued that the mortgage subordination and acknowledgment was not paramount to subordination, and that meant the easement failed to meet the perpetuity requirements.

The Tax Court disagreed with the IRS on virtually every single one of these points, and pointed out that the preservation easements imposed a higher level of enforcement by the then District of Columbia preservation laws, and said a zero value appraisal is not credible.

So let's go to the lessons of the IRS court challenges. As a result of these cases, here's what the lessons are. First, courts are not sympathetic to IRS claims that preservation easements do not impact value. They have been rejecting the IRS claims that there's no impact on value. The courts unanimously agree that preservation easements impose more legal restrictions than local preservation laws. Strict compliance with qualified appraisal rules is essential, at least for taxpayers, and that's part of the *Whitehouse Hotel*<sup>16</sup> case. It's improper to base value on fixed percentage value. Mortgage subordination issues remain open. Deduction of cash contribution issues remain open, but there are some inconsistencies between tax court decisions.

There are many appraisal issues left to be resolved. The appraisal profession has responded with two courses on appraising conservation easements and on appraising historic conservation assessments. They also responded with a book that I authored that will be out in about a week and a half. The National Trust is joined with the Land Trust Alliance in these educational efforts, and has filed amicus briefs in a number of these cases.

The IRS had an advisory council take a look at its' own easement practices. The advisory council said that what was happening as a result of the IRS review of easements was that donees were believing that IRS policies have had a chilling effect, and that owners were fearing to make any more donations because they were afraid they would be fined and audited. They were absolutely right about the chilling effect. The number of easement donations has gone down dramatically. In 2009, the National Park Service certification only had seventy-two compared to 842 just four years earlier.

So where are we today, and what still needs to be done? The IRS needs to adopt the recommendations of its advisory council. Recommendation number one, is that you should be allowed to amend technically deficient appraisals

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15. *Simmons v. Comm'r*, 98 T.C.M. (CCH) 211 (2009).

16. *Whitehouse Hotel Ltd. P'ship v. Comm'r*, 131 T.C. 112 (2008), rev'd and remanded, 615 F. 3d 321 (5th Cir. 2010).

during the audit process. The IRS needs to affirm that a non-zero market value is possible. This is an odd way of putting it, but an effective way of telling the IRS that they shouldn't be zero valuing all easements. There should be a safe harbor rule where easements that are less than 10%, the IRS should make use of outside appraisers.

So we're at a point where the IRS is continuing to review easements, and so is the Justice Department, but the focus will eventually wane, given the decreased number of easement donations. The preservation movement needs to get back to the basics. Let's get back to the kinds of buildings that we were focused on early on. Easements should not be mass-marketed. They should be focused on buildings threatened by high-density subdivision and development, and the amount of cash contribution should not be related to the value of the easement. It will continue to be an important tool. I think the book that's coming out,<sup>17</sup> the documents, the whole history of this, the court cases, as well as evaluation techniques, will help a whole lot. You can order it from the Appraisal Institute. Thank you.

Speaker: Mr. John M. Weiss<sup>18</sup>

Most of our enforcement action in New York concerns property owners who make changes either without a permit from the LPC, or one that's not in compliance. There are, however, a small number of property owners who have failed to maintain their buildings and these are "demolition by neglect" cases. Some of these buildings are in pretty horrific condition at the start of the process.

The basis for our demolition by neglect cases is a Landmarks Law requirement that landmarks must be kept in the condition of good repair, which is very broadly defined in the Law. We interpret that to mean that a landmark must be structurally sound, it must be water tight, and the significant architectural features must be kept intact. As Kate alluded, we've become much more aggressive with bringing these demolition by neglect lawsuits in the past eight or nine years. In the first thirty-seven years, we had one case filed where we prevailed, and we had eight more cases in eight or nine years with another case we're about to file in maybe three weeks or so.

What's important to note, is the majority of demolition by neglect buildings get resolved prior to Landmarks filing a law suit. This is really the tip of the iceberg. Right now we have about thirty-five or forty buildings which are in the pipeline where we're working with the owner to try to make repairs before we have to file a lawsuit. Most of those efforts will be successful; if not, we file a lawsuit.

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17. RICHARD J. RODDEWIG, APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS (2011).

18. All photographs courtesy of the New York City Landmarks Preservation Commission.

This is my first case study.<sup>19</sup>



It's an individual landmark in lower Manhattan. In 2002, we received a report that the roof had collapsed. In general, the building was in disrepair. The property owner had another number of properties in Manhattan that were very well financed. They were very well off, they had deep pockets, and there was no excuse for letting this landmark fall to this level of disrepair. We got access to the roof fairly quickly, but this building continued to get in worse and worse shape. We filed our demolition by neglect lawsuit in August of 2002 and we actually had a trial on this case. I was fairly confident we were going to prevail in the trial because the owner called me as their only defense witness. So we went to trial and what happened is we realized there were many more structural problems with the Skidmore House than just the roof collapsing; most of the floors had to be replaced. In fact, during the course of this litigation, there were two more interior collapses of the floors; luckily no one was hurt. Once the building was stabilized, the front facade had to be reattached to the side walls because it was pulling away. All the restorative work is not quite done. The roof needs to be put back which will be done this Spring.

This is our demolition by neglect process. We document the condition of the building at issue. We've had a lot of help from the preservation groups, neighbors, elected officials, and other agencies, bringing to our attention

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19. Samuel Treadwell Skidmore House, 1845 Greek Revival Row House at 37 East 4th St. (May, 2002).

buildings that are at risk of demolition by neglect. It's very hard sometimes to contact the owner. I'll talk about that a little bit more. We try to have voluntary repairs made. We have our hard working preservation staff prepare an existing conditions report. So they go out, do a site visit, they document the poor condition of the building and that is technically the basis of our lawsuit. The Chair, Bob Tierney, then issues the order directing the owner to make repairs. It outlines how the building is in disrepair and it cites the provision of the Landmarks Law that allows us to impose a \$5000 per day fine for failure to maintain the building. Our staff then drafts the legal documents and refers the matter to the New York City law department for prosecution. The cases we bring are by order-to-show-cause so we can get in front of a judge very quickly. We often get before a judge in three or four weeks as opposed to waiting five or six months. In court we are seeking a court order from a judge, ordering the parties responsible to bring the building up to good repair and then in perpetuity to keep it in that condition.

Sometimes there are cases where we decide not to bring a lawsuit. One of our concerns is that this is still a new area of law in New York. We don't have a lot of case law so we are concerned about having a bad decision against us. Also, there is a concern that a home owner might want to file for hardship. If they're not getting a 6% return, we might be opening a can of worms by bringing a demolition by neglect lawsuit when the owner turns around and files a demolition based on hardship. Also sometimes there are alternative solutions to the problem and sometimes we're just trying to do the right thing. That is what happened in one building where the owner was actually born in the building in Brooklyn in the 1920s. Her parents had bought it in 1922. When we reached out to her, she was in poor health and didn't have the financial resources to address the buildings condition. The rear wall had partially collapsed actually. When her parents bought it, there was no record of the transaction, there was no title, there was no deed that anyone could locate. So technically the person that was born there and lived there her entire life, did not own it. So, a pro bono attorney brought an adverse possession case and I'm sure that the lawyers here will appreciate that. That's where you openly and notoriously live in a location for ten years in New York, you can then bring a proceeding to take title to that property. So I was very involved in that proceeding. The judge ruled in her favor, she got title, she sold it and the new owner understood it was a landmark and had to be repaired. He came to us and got permits, did that work, and rebuilt the rear facade as well.

We find that there's no specific type of building or owner that falls into the demolition by neglect category. We have seen here wood frame buildings, we have individual homeowners, we brought actions against corporations, including one based in Tokyo, another one was based in Vermont. We have large buildings as well as single-family buildings and this is a case actually, where we did not file a lawsuit.





The owner, after we met with him, realized his obligations. He decided to sell the building which happens fairly regularly with these buildings, and the new owner started to do repairs. The second picture is what it looks like now.

It still needs to be painted correctly, but obviously it's in much better condition.

There are some really simple problems we run into on these cases. For instance, once we actually get permission to go inside a building, I'll show up with the engineer from the Department of Buildings, someone from our hard working preservation staff. We put the key in the door, try to open the door, and it only opens about eight or nine inches. Then we see the building can be filled with possessions or debris. So, we had three or four cases where it seems like it's a syndrome involved. It's important to clean out the buildings because, not only do we want to get in to do an inspection and make repairs, but that's a lot of weight on a building's floors, and often these buildings have water damage; it's getting in and causing structural issues. So in a number of these cases we've had the owners spend literally months filling dumpster after dumpster after dumpster to clean out their possessions.

Now, making initial contact with the owners can also be challenging. I was just going to go through a list of actions we took in one case to finally reach an owner but then I realized the story behind the image here of the house filled with debris is more interesting in terms of how we got in touch with the responsible parties.



We were about to bring a lawsuit against the responsible parties, then it turns out the two brothers that owned this building both died and the family

members were completely unresponsive to letters, phone calls, and efforts to get them into a dialogue to take some action on their building. I searched the finance records in New York for any other properties owned by this family and came up with some other properties. There had been a recent transaction on one of them and it was a lawyer's name in the records from four or five years earlier. So I call up the lawyer, and he agreed the family was very secretive and was not very responsive, but he said one of the brothers who died had a business partner who he knew and I should contact her to get me into the building and start the discussion with the surviving family members. However, he didn't have a phone number or an address. He just said her name is Bertha and she runs and owns a liquor store on Houston Street near Avenue B. So I went there and sure enough there is a liquor store and it has its Plexiglas sheets coming down to the counter and there's this eighty-five-year-old woman behind the counter, and it's Bertha. I slid my card in where the cash goes and we had a lovely conversation explaining why we had to talk to the family of her deceased partner. Sure enough, the next week the owner's relatives did get in touch with me, and they started making repairs to the building.

We brought a lawsuit against a building where the estate, two owners, both died unfortunately. They were not related and the bank that had one of the mortgages foreclosed, so in the lawsuit we actually named not only the estate but the bank in Texas that had the mortgage and it got worked out. Some of the work is non-compliant, I think some of the windows and cornice need some corrective action.

We also sometimes piggy-back onto existing litigations. The Republican Club is a landmark in Queens. There was a lawsuit between a private owner and a current owner. I started showing up at the court conferences and the judge took judicial notice of the fact that this was a landmark. He ordered inspection by Landmarks, the Fire Department, and the Department of Buildings. We went in and the judge was very cognitive of the landmark issues. So while we did not actually bring our own demolition neglect lawsuit we used the existing litigation to achieve the objective. The building was sold and now it's being repaired.

One issue I've discovered is that a lot of work goes on behind the scenes. You might be working with an owner of a building but the neighbors and other interested parties are unaware of anything going on because the facade is not changing. Yet, during that time we're negotiating with the owner, the architect or engineer is drawing up plans, they're filing with us, we're issuing permits, the Department of Buildings is issuing permits, there's shoring and bracing going on inside the building in anticipation of exterior repairs proceeding. So sometimes a lot of work is going on but it's all behind the scenes. I should mention Tim Lynch, he's the head of the Forensic Engineering Unit of the Department of Buildings. We work with him and his

engineers on almost a daily basis with making site visits or conservations of these buildings, so the sister agencies are a tremendous help to landmarks.

My last case study is the Windermere. It was designated in 2005. It had been owned by the Toa Corporation, based in Tokyo, for twenty years. It was in pretty horrific condition at the time of designation and that was the argument of why they said it should not even be designated. Nevertheless, the Commission designated it and we filed the lawsuit. We had a terrific judge, Justice Smith, who ruled in our favor. A \$1.1 million fine was paid by the owner; Landmarks did not get the money by the way. The new owner signed the extensive agreement to make repairs over the next year or so and he had inspections on a regular basis by engineers and Landmarks. So we thought this is perfect. A lot of work has been done to stabilize the Windermere but we spent the past year still working with the new owner and their team on working out the additional work that has to get done, when it's going to be done, and how it's going to be done. So even though we might prevail in court, the work does not end with the victory. They're about half way done with the exterior facade work and will resume in the spring.

So just to sum up, these cases are complex. They involve a lot of human stories with owners who are elderly, sometimes they don't have the financial wherewithal, and they might be ill. We have the estates that we have to deal with. We have corporations that are overseas or out of New York City, which cause problems, but nonetheless the Commission is dedicated to continuing to take these demolition by neglect actions, and we are steadily moving forward. So just to go back to the analogy that came up this morning about landmarks being middle-aged: I think when you're middle aged you need to exercise, to flex your muscles to stay in shape. So I think the demolition by neglect actions and the work on issuing of permits and other post designation aspects of historic preservation is becoming more and more important as landmarks in New York age and as we almost hit our 50th anniversary. Thank you.

#### AUDIENCE QUESTION & ANSWER

Moderator: Ms. Kate Wood

Panelists: Ms. Carol Clark, Mr. Richard Roddewig & Mr. John M. Weiss

MS. WOOD: Thank you. So while our presenters come up to the panel I want to open this immediately to the audience, just because I want to have as much time as possible for questions. While they're gathering, I just want to evoke one of my favorite "Tony Woodisms," which is: when all you have is a hammer, everything looks like a nail. Maybe that's one of the questions that weaves together these three presentations, the question is about using the right tools in the right situation, how do you determine when a strong application of

the Landmarks Law is the right approach, and in what cases may other approaches be more effective. So with that kind of question, I just want to open it up to questions from the audience. Way in the back there.

AUDIENCE MEMBER: Carol, what do you think it would take to get a neighborhood conservation ordinance?

MS. CAROL CLARK: It would take legislation by the City Council. I think it's not necessarily essential to have legislation to achieve the results that a neighborhood conservation ordinance might be able to achieve here; but I think if you had the appropriate political will at the top, and enough of us spoke about how we felt it was important that we had this additional kind of aesthetic—not regulation because I know Margery doesn't want any more regulation—but certainly guidelines and tools, and ways of providing members of neighborhoods to get better guidance about what they could do. We could probably achieve this without legislation and politically that might be a more sensible way to attempt to do it.

AUDIENCE MEMBER: John, firstly, would it be helpful if the Commission had the power to get access to the interior of buildings more frequently to know what they had to do? Secondly would it also be helpful for your enforcement staff to have a structural engineer? And, thirdly, in solving a troublesome problem like demolishing the building, would it be helpful to work out a protocol between the Landmarks Commission and Buildings that would eliminate the possibility of oversight?

MR. JOHN M. WEISS: Yes, yes and yes. In terms of the structural engineer, yes, it would be terrific for us to have a structural engineer on staff; however we use the engineers at the Department of Buildings all the time, and they've been incredibly accommodating. Tim Lynch, as I mentioned, has twenty-five years of experience as a structural engineer. I've known Mark Silberman for a couple of years. I talk to him or email him at least three or four times a day, so we've managed to leverage the existing city resources to meet our needs.

In terms of getting access, yes, that would be terrific. We need to get permission from the owners and sometimes that can be time consuming, as the Law does not allow us to enter without the permission of the owner.

Finally, in terms of the issue of when a sister agency might take some action that might be harmful to a landmark, there have been cases as you well know, I think over the last few years, where our communication has gotten much better and at this point we know who to contact at the Department of Buildings. They know who to contact at Landmarks. There's a lot more communication back and forth between the agencies, so hopefully we will avoid any unfortunate incidents.

AUDIENCE MEMBER: Easements have been a really great mechanism for doing two things. One is in areas where they're not in historic districts already, obviously it's the owner being willing or a predecessor being willing to restrict future changes to the building. So, it's kind of opting for landmarking and in the situation where it is historic property within a historic district, provided that the not-for-profit that is monitoring the easement holds to its mandate which is to monitor and enforce its own regulation, you've got another entity who is functioning, sitting in the role of Landmarks Commission. We did have some experience where the entity was stricter than the Commission was about certain changes that were made. So, you had made a comment that you thought there should be fewer of those easements and that they should be directed at a particular type of building where they had been before, but I don't see how that helps us.

MR. RICHARD RODDEWIG: You're absolutely right, that easements, when they're enforced properly, are much stronger than preservation ordinances. I disagree completely with the IRS position on that, and the new book that's coming out disagrees completely with the IRS position on that. The point that I'm making about the single-family homes is that when you go in and you appraise easements of the property before and after, most of the time on these single-family homes, you don't find any significant impacts. As a result, what we really should be focused on are those properties where we know there would be a significant value to the easement. We should be encouraging the easement to be donated on those properties, rather than encouraging single-family homeowners to donate easements in situations when all that they really might be doing is buying themselves a bunch of trouble with the IRS, because the appraisals won't stand up.

AUDIENCE MEMBER: But if an easement is going to have a significant value on a property, isn't that going to lead to higher real estate taxes? And also, doesn't landmark protection apply only to the visible portions of a building or property from a public street? And so, the easement therefore offers protection on all four sides, whereas the landmark protection doesn't.

MR. RODDEWIG: If I understand the New York City Landmarks Law, you can protect all parts of the building including the interior.

AUDIENCE MEMBER: And the building which is not even visible from the street as well?

MR. WEISS: Yes. The Landmarks Law in New York designates the landmark site, and so it will include, in most cases, the entire tax lot. It's not only the front facade, it's a side facade, a rear facade, and even the back yard sometimes.

AUDIENCE MEMBER: Quick question for John, were there at least one or two people still living in the Windermere?

MR. WEISS: Yes.

AUDIENCE MEMBER: What happened to them?

MR. WEISS: They were actually vacated by the Fire Department. I think there were six or seven tenants. The Windermere hadn't been SRO for many years. Before the Toa Corporation in Japan had bought it, the prior owners had harassed out many tenants. So there was a felony conviction for the former property owner for clearing out the Windermere except for the six or seven tenants. The conditions were so bad that the Fire Department did evacuate the building and I'm not sure where they are but there was a settlement made to them.

MS. WOOD: We just have time for one more question. Does anybody have a question about the neighborhood conservation districts?

AUDIENCE MEMBER: Yes, I had one on that.

MS. WOOD: Alright, go ahead.

AUDIENCE MEMBER: I'm very impressed by the presentation Carol, because you pointed out a lot of things that I really think are so on the mark, and it seems to pull in that gray area between the Landmarks Commission and the Planning Commission. Some of the images that you showed seem to be either just outside or on the edge of already some historic districts, and I wondered if that were true. Is there not something now that, short of designating historic districts everywhere—although I know people who would love that—could be done now either between the Planning Commission or Landmarks? Is historic designation the only alternative to those conservation areas? Because you're focused on scale and materials, which are also part of the consideration in the historic district, or on the planning right?

MS. CLARK: Right, my primary point is that there are so many areas of the city that do have quality architecture that is being eaten away at now, and the City Planning Department's response to it, and the Planning Commission's response has been to adopt certain zoning districts like the R2A, that applies in certain areas in Queens and in Bayside. It also applies to forty foot lots. There's another piece of zoning that applies in Forest Hills to sixty foot lots. But my point is that it's a very incremental, and I think an inadequate approach, and that we need a much broader approach. Of course we get into

that larger question of planning and zoning, and we don't unfortunately have zoning police. I think that we would really need, the political will and all of us voicing our concern about community character and planning, and community appearance throughout the five boroughs of Manhattan.

MS. WOOD: Unfortunately, I'm being told we have to cut off this panel, but we're going to shift gears and continue the conversation in a slightly different format, but thank you all so much.



# PROTECTING LANDMARKS FROM DEMOLITION BY NEGLECT: NEW YORK CITY'S EXPERIENCE

JOHN M. WEISS\*

## I. INTRODUCTION

In the aftermath of the tragic demolitions of Pennsylvania Station in 1963<sup>1</sup> and the Brokaw Mansion in 1965,<sup>2</sup> one of the initial priorities of the New York City Landmarks Preservation Commission was to identify and designate potential landmarks to prevent their demolition.<sup>3</sup> Over time, apprehension has lessened over undesigned buildings worthy of preservation being demolished. However, a new concern, one that could not have been imagined when the Commission was created in 1965,<sup>4</sup> has emerged as a priority for the Commission—protecting designated landmarks from demolition by neglect. This new focus reflects the maturation of the preservation movement in New York City and is a natural consequence of the designation of thousands<sup>5</sup> of buildings. This article explores the lessons learned from a decade of efforts to save dozens of landmarks at risk due to their extreme disrepair and provides guidance on practical issues that may arise during demolition by neglect cases.

The Commission has become much more assertive in bringing demolition by neglect lawsuits. During the Commission's first thirty-five years of existence, it brought only one demolition by neglect lawsuit.<sup>6</sup> During the next eight years (2000 through 2007) the Commission brought three lawsuits, and from 2008 to the present six additional demolition by neglect lawsuits have been filed.<sup>7</sup> This increased experience has resulted in the Commission

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\* Deputy Counsel, New York City Landmarks Preservation Commission since 2001 and a graduate of Columbia University School of Law. This article is meant to be an overview of the general practices of the Commission in addressing demolition by neglect cases. The author has been personally involved in all the matters discussed except for the cases that were prior to 2001.

1. Editorial, Farewell to Penn Station, N.Y. TIMES, Oct. 30, 1963, at 38.

2. Editorial, Rape of the Brokaw Mansion, N.Y. TIMES, Feb. 8, 1965, at 24.

3. Cf. Kim A. O'Connell, Lead Us Not Into Penn Station, NAT'L TRUST FOR HISTORIC PRES. (Apr. 1, 2008), <http://www.preservationnation.org/magazine/2008/books/>.

4. For more information about the Commission, see About LPC, N.Y.C. LANDMARKS PRES. COMM'N, <http://www.nyc.gov/html/lpc/html/about/about.shtml> (last visited Feb. 18, 2012).

5. Press Release, N.Y.C. Landmarks Pres. Comm'n, Five New Landmarks Named in The Bronx, Queens and Manhattan (Dec. 20, 2011), available at [http://www.nyc.gov/html/lpc/downloads/pdf/11-14\\_five\\_landmarks.pdf](http://www.nyc.gov/html/lpc/downloads/pdf/11-14_five_landmarks.pdf) (Noting that the LPC "has granted landmark status to more than 29,000 buildings and sites, including 1,301 individual landmarks, 113 interior landmarks, 10 scenic landmarks, 106 historic districts and 16 historic district extensions in all five boroughs.").

6. City of New York v. Goding, No. 48530/1996 (N.Y. Sup. Ct. Feb. 6, 1998).

7. City of New York v. Wilkins, No. 400729/2011 (N.Y. Sup. Ct. Aug. 2, 2011), available at [http://decisions.courts.state.ny.us/fcas/fcas\\_docs/2011AUG/3004007292011001](http://decisions.courts.state.ny.us/fcas/fcas_docs/2011AUG/3004007292011001)

developing a regularized process to address demolition by neglect situations. When the Commission learns of a landmark in extreme disrepair, it first tries to have repairs voluntarily made by the owner or person in charge of the landmark. If that effort fails, the Commission commences legal action seeking issuance by the New York State Supreme Court of a court order compelling the owners to make immediate repairs, keep the building in good repair, and pay monetary fines. Although increasing demand on Commission resources, bringing a lawsuit has shifted from being a rare occurrence to a mainstay of the Commission's enforcement tools.

The filing of a demolition by neglect lawsuit is similar to seeing only the tip of an iceberg—the vast majority of cases are resolved prior to initiation of legal action. Extensive efforts are undertaken by Commission staff to have owners voluntarily repair their landmarks prior to commencement of legal action. The Commission wants to have owners and other parties in charge of landmarks spend their time and funds substantively addressing the issues at hand rather than defending a lawsuit. It is important to provide notice of the need to make repairs, and an opportunity to do so, not only because it is the right thing to do, but also because the failure to make repairs after receiving notice is an important part of the legal case. Consequently, all contacts with the owners and parties in charge of the landmark are carefully documented and can become exhibits if the matter moves to a litigation posture. Unfortunately, owners often become responsive only after legal papers are drafted and the gravity of the situation becomes clear.

It is important to maintain perspective about this problem. At any given time, approximately sixty structures are identified as being in disrepair—less than one-fifth of 1% of the approximately 29,000 buildings currently regulated by the Commission. Even accounting for buildings in disrepair that have not yet been brought to the Commission's attention, it is clear that the vast majority of landmark owners maintain their buildings in good repair.<sup>8</sup>

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SCIV.pdf (stipulation and order); *City of New York v. Orellana*, No. 10360/2010 (N.Y. Sup. Ct. Feb. 17, 2011); *City of New York v. Quadrozzi Jr.*, No. 8442/2010 (N.Y. Sup. Ct. May 21, 2010) (stipulation addressing repair); *City of New York v. Estate of Johnson*, No. 23104/2008 (N.Y. Sup. Ct. Oct. 7, 2009) (stipulation adding a party and acknowledging other facts); *City of New York v. Corn Exch., LLC*, No. 401846/2008 (N.Y. Sup. Ct. Jan. 29, 2009), available at [http://decisions.courts.state.ny.us/fcas/FCAS\\_docs/2009FEB/3004018462008001SCIV.pdf](http://decisions.courts.state.ny.us/fcas/FCAS_docs/2009FEB/3004018462008001SCIV.pdf) (order denying preliminary injunction); *City of New York v. Toa Constr., Inc.*, No. 400584/2008 (N.Y. Sup. Ct. May 8, 2008) (stipulation and order entered into by both parties for, among other things, the repair and continued maintenance of the building at issue); *City of New York v. Palmer*, No. 620/2006 (N.Y. Sup. Ct., Jan. 9, 2006); *City of New York v. Retrovest Assocs., Inc.*, No. 12844/2003 (N.Y. Sup. Ct. Apr. 7, 2004) (order denying motion to dismiss); *City of New York v. 10-12 Cooper Square, Inc.*, 793 N.Y.S.2d 688 (N.Y. Sup. Ct. 2004).

8. The earlier the Commission learns of landmarks in disrepair, the quicker it can begin its efforts to save the building. Time is not on the side of the Commission in these matters. Consequently, the Commission is starting an enhanced effort to more quickly identify buildings at risk. This initiative involves increased outreach to community groups to alert their members to contact the Commission if they know of a vacant landmark, as well as using existing City databases to identify landmarks in disrepair.

## II. THE LAW

In New York City, the legal basis for these lawsuits is the requirement in the Landmarks Law that landmarks be kept in a condition of “good repair.”<sup>9</sup> Section 25-311 of the Administrative Code of the City of New York (part of what is commonly referred to as the Landmarks Law of New York City, along with the City Charter<sup>10</sup> and Title 63 of the Rules of the City of New York<sup>11</sup>) provides that:

Maintenance and repair of improvements. a. Every person in charge of an improvement on a landmark site or in an historic district shall keep in good repair (1) all of the exterior portions of such improvement and (2) all interior portions thereof which, if not so maintained, may cause or tend to cause the exterior portions of such improvement to deteriorate, decay or become damaged or otherwise to fall into a state of disrepair.<sup>12</sup>

Maintaining a landmark in “good repair” does not mean that it needs to be pristine. The Commission has interpreted the broad language of Section 25-311 as requiring that a landmark be structurally sound, watertight, and that its significant architectural features are not at risk of loss.<sup>13</sup> It is important to note that there is no requirement that the failure to maintain a landmark in good repair be intentional.

Section 25-311 of the Administrative Code holds responsible any “person in charge” of a landmark,<sup>14</sup> not only an owner, to keep it in good repair. The term “person in charge” is defined in Section 25-302(t) of the Administrative Code as including an owner, mortgagee or vendee in possession, executor, agent or “any other person directly or indirectly in control of an improvement or improvement parcel.”<sup>15</sup> This expansive definition is helpful and has allowed the Commission to name estates and a bank that had foreclosed on a property as defendants in our actions.<sup>16</sup> The Administrative Code also

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9. N.Y.C. ADMIN. CODE § 25-311 (2011).

10. N.Y.C. CHARTER ch. 74, §§ 3020-3021 (2004), available at <http://www.nyc.gov/html/dycd/downloads/pdf/citycharter2004.pdf>.

11. RULES OF THE CITY OF N.Y. tit. 63, §§ 1-01 to 13-05 (2011), available at <http://72.0.151.116/nyc/>.

12. N.Y.C. ADMIN. CODE § 25-311.

13. Plaintiffs’ Memorandum in Support of Motion for a Preliminary Injunction at 3, *City of New York v. Toa Constr., Inc.*, No. 400584/2008 (N.Y. Sup. Ct. Mar. 20, 2008) 2008 WL 8046373 (describing the standard of good repair).

14. N.Y.C. Admin. Code § 25-311. Although these cases almost always involve buildings, there is a historic cast iron fence in the Park Slope Historic District that was in extreme disrepair. The Commission considered a demolition by neglect action, but the owner responded to Commission outreach and retained a highly qualified architectural firm to oversee the restoration of the fence, thereby avoiding litigation. Nothing in the New York City Landmarks Law prevents a demolition by neglect case for serious disrepair of a non-building landmark such as an historic fence or street clock.

15. *Id.* § 25-302(t).

16. See, e.g., Stipulation, *City of New York v. Estate of Johnson*, No. 23104/2008 (N.Y. Sup.Ct. Oct. 7, 2009); *City of New York v. Corn Exch., LLC*, No. 401846/2008 (N.Y.

explicitly provides for the New York City Law Department to bring a legal action to enforce the Landmarks Law.<sup>17</sup>

There is very little published New York state case law on demolition by neglect matters. In the only case that has gone to trial, *City of New York v. 10-12 Cooper Square, Inc.*,<sup>18</sup> the Commission prevailed after a bench trial.<sup>19</sup> The court deferred to the expertise of the Commission as the expert administrative agency,<sup>20</sup> cited progressive deterioration as documented by photographs taken over several years by Commission staff,<sup>21</sup> and ordered permanent repairs as identified in the existing conditions report prepared by the Commission's architect.<sup>22</sup>

#### A. Injunctive Relief

Injunctive relief is the crux of the demolition by neglect cases. The Commission seeks immediate access to the property in question, if not already provided, in order to better assess its condition. Usually an architect and attorney from the Commission staff will inspect the building along with a structural engineer from the Department of Buildings.

The inspection is carefully documented with photographs and often a written report, which can be used to establish the poor condition of the building and any future progress, or lack thereof, in returning the building to good repair.<sup>23</sup>

Injunctive relief is also sought in the form of an order directing that repairs be made to the landmark pursuant to a clearly delineated timetable.<sup>24</sup> As described later, the repairs ordered should be quite detailed and explicit. Finally, the Commission also asks the court to order that the landmark continue to be maintained in good repair.

#### B. Financial Penalties

Section 25-317.1 of the Administrative Code empowers the Commission to seek daily fines of \$5000 per day from violators of the Landmarks Law.<sup>25</sup>

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Sup. Ct. Jan. 29, 2009) (order denying preliminary injunction); *City of New York v. Palmer*, No. 620/2006 (N.Y. Sup. Ct., Jan. 9, 2006); Cf. Letter from John Weiss, Deputy Counsel, N.Y.C. Landmarks Pres. Comm'n, to Simeon Bankoff, Exec. Dir., Historic Dists. Council (Feb. 4, 2009), available at <http://eastharlempreservation.org/docs/landmaks020409.pdf> (discussing the Bedell House).

17. N.Y.C. ADMIN. CODE § 25-317.2(d).

18. 793 N.Y.S.2d 688 (N.Y. Sup. Ct. 2004).

19. *Id.* at 690.

20. *Id.* at 692.

21. *Id.*

22. *Id.* at 693.

23. See generally *id.*

24. See *City of New York v. Wilkins*, No. 400729/2011 (N.Y. Sup. Ct. Aug. 2, 2011), available at [http://decisions.courts.state.ny.us/fcas/fcas\\_docs/2011AUG/3004007292011001SCIV.pdf](http://decisions.courts.state.ny.us/fcas/fcas_docs/2011AUG/3004007292011001SCIV.pdf) (stipulation and order).

25. N.Y.C. ADMIN. CODE § 25-317.1(a)(3)-(4) (2011).

The ability to seek substantial daily fines is key to the prosecution of these cases and encouraging owners to be responsive. In one case, the Commission obtained a \$1.1 million financial penalty for the egregious deterioration of an individual landmark.<sup>26</sup>

There are, of course, multiple factors that the Commission considers in deciding how large a fine to seek. An elderly homeowner of a small row house in disrepair does not merit the same penalty as a corporate owner of a large landmark who, despite extensive financial and professional resources, neglects its landmark. One important factor considered is how quickly the owner responds to the Commission. An owner substantially mitigates his potential financial penalty if he agrees to make repairs immediately after a suit is filed, as opposed to after discovery is underway, with documents being produced and depositions occurring. Another consideration is how long the owner has held title to the landmark. A recent purchaser of a building already in substantial disrepair is treated differently than a long-term owner who has neglected his property for many years, or even decades.<sup>27</sup>

In the extreme case, when a landmark has been substantially or completely demolished, the Landmarks Law provides for a penalty as high as the fair market value of a property, either with the landmark structure or without it, whichever amount is higher.<sup>28</sup> Unfortunately, we have had two cases where, during the course of our litigation, the Department of Buildings determined that the buildings were in such bad condition that they had to be immediately demolished because of the threat to public safety. In both cases, the Commission sought the fair market value of the property without the

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26. *City of New York v. Toa Constr., Inc.*, No. 400584/2008 (N.Y. Sup. Ct. May 20, 2009) (stipulation & order settling all claims and awarding the Commission \$1.1 Million); See also Press Release, N.Y.C. Law Dep't, Office of the Corp. Counsel, City Receives Record \$1.1 Million Settlement Payment Over Owners' Failure to Maintain the Landmarked Windemere Apartment Complex on Manhattan's Upper West Side (May 21, 2009), available at [http://www.nyc.gov/html/law/downloads/pdf/2326471\\_1.pdf](http://www.nyc.gov/html/law/downloads/pdf/2326471_1.pdf).

27. The Corn Exchange Bank Building at 125th St. & Park Avenue is an example of the change in tone a new owner may suffer when improvements are not undertaken within a reasonable time. Compare David W. Dunlap, *At Burnt-Out Bank at 125th and Park; \$9 Million Plan for Rebuilding A Landmark*, N.Y. TIMES (Dec. 1, 2002), <http://www.nytimes.com/2002/12/01/realestate/postings-burnt-bank-125th-park-9-million-plan-for-rebuilding-landmark.html?src=pm>, with Mike Reicher, *Harlem Landmark May Lose Two Floors*, N.Y. TIMES (Oct. 5, 2009 10:30 AM), <http://cityroom.blogs.nytimes.com/2009/10/05/harlem-landmark-may-lose-two-floors/>, and *City of New York v. Corn Exch., LLC*, No. 401846/2008 (N.Y. Sup. Ct. Jan. 29, 2009), available at [http://decisions.courts.state.ny.us/fcas/FCAS\\_docs/2009FEB/3004018462008001SCIV.pdf](http://decisions.courts.state.ny.us/fcas/FCAS_docs/2009FEB/3004018462008001SCIV.pdf) (order denying preliminary injunction), and *N.Y.C. Econ. Dev. Corp. v. Corn Exch., LLC*, No. 405031/2007 (N.Y. App. Div. June 16, 2011), available at <http://law.justia.com/cases/new-york/appellate-division-first-department/2011/2011-05184.html>, with David W. Dunlap, *For a Harlem Landmark, Last Legs or First Steps?*, N.Y. TIMES (Feb. 16, 2012 11:34 AM), <http://cityroom.blogs.nytimes.com/2012/02/16/for-a-harlem-landmark-last-legs-or-first-steps>. See also *City of New York v. Retrovest Assocs., Inc.*, No. 12844/2003 (N.Y. Sup. Ct. Apr. 7, 2004) (order denying motion to dismiss).

28. See N.Y.C. ADMIN. CODE § 25-317.1(a)(1).

landmark structure.<sup>29</sup> The goal of financial penalties is to deter the extreme neglect of properties by depriving owners of all financial gain. In one case, the owner paid a \$50,000 fine, the demolition costs, substantial unpaid taxes, and gave the property (valued at almost \$1,000,000) to the City.<sup>30</sup> The City then transferred the property to a nonprofit organization that built housing for low-income senior citizens on the site.<sup>31</sup>

### III. WHEN LITIGATION IS APPROPRIATE

Because of the extensive amount of time—usually years—and staff resources spent on a demolition by neglect lawsuit, and because not all landmarks in disrepair require litigation to remedy the situation, it is important to determine if cases can be addressed using alternative legal tools.<sup>32</sup> If the disrepair is serious, but localized, such as significant damage limited to a cornice, the Commission will use its administrative enforcement procedures to address the problem. The Commission will first issue a warning letter for failure to maintain a landmark, which does not impose a fine or require a court appearance.<sup>33</sup> If there is no satisfactory response to the warning letter, a Notice of Violation (i.e., a summons) is issued for failure to maintain the landmark.<sup>34</sup> The Notice of Violation is returnable to an administrative judge, and a fine can then be imposed. In cases of extensive deterioration of multiple building elements, or severe damage that threatens a landmark's structural stability (e.g., a partially collapsed roof), the Commission will usually bring a demolition by neglect lawsuit.<sup>35</sup>

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29. *City of New York v. Orellana*, No. 10360/2010 (N.Y. Sup. Ct. Feb. 17, 2011); *City of New York v. Corn Exch., LLC*, No. 401846/2008 (N.Y. Sup. Ct. Jan. 29, 2009), available at [http://decisions.courts.state.ny.us/fcas/FCAS\\_docs/2009FEB/3004018462008001SCIV.pdf](http://decisions.courts.state.ny.us/fcas/FCAS_docs/2009FEB/3004018462008001SCIV.pdf) (order denying preliminary injunction).

30. *City of New York v. Retrovest Assocs., Inc.*, No. 12844/2003 (N.Y. Sup. Ct. Apr. 7, 2004); LANDMARKS PRES. COMM'N., LP-0028 A, LANDMARK SITE OF FORMER NEW BRIGHTON VILLAGE HALL (2006), available at <http://home2.nyc.gov/html/records/pdf/govpub/2782nbvillagehallrecis.pdf> [hereinafter NEW BRIGHTON VILLAGE HALL] (noting "[t]he site was appraised as being worth \$985,000. The owner also paid \$50,000 in a financial penalty, and paid the demolition costs and various other expenses resulting in a settlement package worth approximately \$1.1 million dollars.").

31. The City donated the property to the Sisters of Charity so that organization could build fifty-nine subsidized low-income homes for the elderly. See NEW BRIGHTON VILLAGE HALL, *supra* note 30.

32. In fact courts cite a lack of administrative formality (i.e. not exhausting alternative administrative tools) before rendering a decision in such cases. See *Church of St. Paul and St. Andrew v. Barwick*, 505 N.Y.S.2d 24, 30 (N.Y. App. Div. 1986).

33. See Enforcement Department, N.Y.C. LANDMARKS PRES. COMM'N, <http://www.nyc.gov/html/lpc/html/about/enforce.shtml> (last visited Mar. 10, 2012) [hereinafter Enforcement]; see Frequently Asked Questions About The Enforcement Process, N.Y.C. LANDMARKS PRES. COMM'N, [http://www.nyc.gov/html/lpc/html/faqs/faq\\_enforce.shtml](http://www.nyc.gov/html/lpc/html/faqs/faq_enforce.shtml) (last visited Mar. 10, 2012) [hereinafter Frequently Asked Questions].

34. See Enforcement, *supra* note 33; see Frequently Asked Questions, *supra* note 33.

35. See Frequently Asked Questions, *supra* note 33; see also *Barwick*, 505 N.Y.S.2d at 30.

In some cases, however, the Commission decides not to bring a demolition by neglect lawsuit but instead uses another strategy to achieve the same goal. In several cases, there have been other legal proceedings already underway and, depending on the facts, the Commission can appear in the litigation as an interested party rather than as a named party.<sup>36</sup> Our experience has been that judges take recognition of the Commission's interest in the matter and will order inspections and repairs in light of the building's landmark status.<sup>37</sup>

In one case, an individual landmark was the subject of litigation due to its owner's failure to pay taxes.<sup>38</sup> The building was in extreme disrepair with collapsed floors and decades of neglect. The former owner had brought a legal action to stop a tax proceeding, which was being handled by a private financial institution. Because the former owner had no resources to make repairs, and the potential new owner did not yet have title, it would have been difficult to compel a responsible party to make repairs in response to a demolition by neglect action. Consequently, members of the Commission's legal staff appeared at every court hearing and the judge incorporated the Commission's concerns in his rulings and orders.<sup>39</sup> The litigation was eventually resolved—the building was sold to a new owner and extensive repairs are underway—all without the Commission filing suit.

One concern the Commission has had is that an owner will respond to the Commission's efforts to compel repairs by filing a hardship application for demolition of the landmark, which is allowed if certain strict criteria are met.<sup>40</sup> While hardship applications are extremely rare (only nineteen

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36. See NYCTL 1998-2 Trust v. Republican Club Realty Co. of Richmond Hill, No. 18366/1999 (N.Y. Sup. Ct. Mar. 11, 2003), available at [http://decisions.courts.state.ny.us/fcas/FCAS\\_docs/2004JAN/4000183661999100SCIV.pdf](http://decisions.courts.state.ny.us/fcas/FCAS_docs/2004JAN/4000183661999100SCIV.pdf) (motion for an order to show cause)

37. For an example of such deference see *City of New York v. 10-12 Cooper Square, Inc.*, 793 N.Y.S.2d 688, 692 (N.Y. Sup. Ct. 2004) (stating that the evaluation of "good repair," the determinative issue in the case, was "a matter to be determined by the [Landmarks Preservation] Commission. Courts will defer to a determination of an administrative agency when that decision falls under the purview of the Agency's expertise" (citations omitted)).

38. See NYCTL 1998-2 Trust v. Republican Club Realty Co. of Richmond Hill, No. 18366/1999 (N.Y. Sup. Ct. Mar. 11, 2003), available at [http://decisions.courts.state.ny.us/fcas/FCAS\\_docs/2004JAN/4000183661999100SCIV.pdf](http://decisions.courts.state.ny.us/fcas/FCAS_docs/2004JAN/4000183661999100SCIV.pdf) (motion for an order to show cause); see also N.Y.C. LANDMARKS PRES. COMM'N, LP-2126, DESIGNATION LIST 343 (2002).

39. Letter from John Weiss, Deputy Counsel, N.Y.C. Landmarks Pres. Comm'n, to Simeon Bankoff, Exec. Dir., Historic Dists. Council (Feb. 4, 2009), available at <http://eastharlempreservation.org/docs/landmarks020409.pdf> (discussing the Richmond Hill Republican Club).

40. See N.Y.C. CHARTER ch. 74, § 3021, available at <http://www.nyc.gov/html/dycd/downloads/pdf/citycharter2004.pdf> (detailing hardship appeal panel). Hardship appeals also implicate the Administrative Code. N.Y.C. ADMIN. CODE § 25-309 (2011) (a hardship for a private owner arises only when a "reasonable return" cannot be maintained on the property). Certain religious and charitable institutions have been judged using a standard different than "reasonable return." *Trs. of Sailors' Snug Harbor v. Platt*, 288 N.Y.S.2d 314, 316 (N.Y. Sup. Ct. 1968) (announcing charitable purpose test); *Lutheran Church In America v. City of New York*, 316 N.E.2d 305 (N.Y. 1974) (using the same charitable purpose test); *St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 358-60 (2d Cir. 1990) (approving of the substantial interference test). The Historic Preservation Grant Program is an alternative to the hardship

applications have been filed in the Commission's forty-seven years of existence), the Commission is concerned that an owner who has recently purchased a landmark in extremely poor condition may file a hardship application seeking demolition. To date, however, this has not occurred.

It is a commonly held belief that owners intentionally neglect their buildings in order to justify their demolition, thereby removing landmark regulation over their properties (at least in the case of individual landmarks). While it appears that there has been at least one possible case of an owner in New York City neglecting a landmark with the intent of having it collapse or be demolished as unsafe,<sup>41</sup> the Commission's typical experience is that the neglect is due to benign causes—elderly or ill property owners, estate disputes, foreclosure, dysfunctional or unrealistic owners—and other problems that result in a complex road to repair that often takes years of sustained effort.

The owner's circumstances and the condition of the building will determine when and if a lawsuit is brought. If a corporation with ample resources owns a landmark in very bad condition, such as one with a collapsed roof, litigation will begin quickly if the owner is not promptly responsive. Alternatively, if an owner is elderly and has limited resources, and based upon an engineer's inspection there is no danger of a near term collapse or other significant damage to the building, more time is given to allow for a solution.

While only a small percentage of landmarks are in extreme disrepair, the risk of losing a designated landmark is an inherent priority for the Commission and the local preservation community. These situations are also understandably very disturbing to neighbors not only due to the presence of a dilapidated structure but the problems often associated with a vacant building—litter, graffiti, rodents, etc. Consequently, these buildings often become priorities for neighborhoods who want the multiple problems expeditiously solved. While the Commission also wants quick action, it is a rare situation where demolition by neglect cases can be quickly resolved. The road to good repair is often long and winding—owners need to agree to make repairs that are frequently very extensive and expensive, funding must be obtained, an architect and engineer often need to be retained, plans must be prepared and approved by the Commission and the Department of Buildings, contractors must be hired, and finally work begins. Accordingly, it

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appeal. See Historic Preservation Grant Program, N.Y.C. LANDMARKS PRES. COMM'N, <http://www.nyc.gov/html/lpc/html/about/hpgp.shtml> (last visited Mar. 10, 2012).

41. See *City of New York v. 10-12 Cooper Square, Inc.*, 793 N.Y.S.2d 688, 692 (N.Y. Sup. Ct. 2004) (stating "the evidence is clear that defendants have allowed the facade of the Skidmore House to deteriorate" and that photographs demonstrated "the deterioration that the facade of the Skidmore house has endured under the stewardship of the defendants."). The intent described here is one implied by the surrounding circumstances of the case.



is important to keep the local and preservation communities informed of progress so they do not think that nothing is happening.<sup>42</sup>

#### A. The Process

Once a building has been brought to the Commission's attention as being in disrepair, Commission staff gathers information about the building's condition from easily accessible resources. Such information includes the history of Landmark permits being issued (or a lack thereof), Landmark violations, Department of Building violations and complaints, Department of Finance records on the ownership of the building, and any available photographs of the building. A site visit is quickly made to assess, in person, the condition of the building. If possible, access to a neighbor's roof or rear yard is sought in order to obtain a fuller understanding of the building's condition.

If it is determined that the building is in disrepair, the next step is to identify and locate the owner and other persons in charge of the property. Sometimes, simply contacting the owner of a landmark in disrepair is a major hurdle. In one case, initial efforts to contact the owner were unsuccessful and subsequent efforts to locate him included obtaining his hospital discharge information to learn who had checked him out, contacting a contractor who had done work for him, having a private investigator visit his prior addresses and interview neighbors, and researching death certificates to determine if he had passed away. Eventually, the owner contacted the Commission after he received a letter that the Social Security Administration delivered on behalf of the Commission. It turned out that the owner was living in a homeless shelter a few miles away from the Commission offices. We need to locate the owners not only to try and have them make repairs voluntarily, but also so that we can serve them with the summons and complaint if litigation commences.

After identifying the owner and other potentially responsible parties, the Commission sends a letter identifying the nature of the building's disrepair, the legal obligations of the recipient to keep the building in good repair under the Landmarks Law, the need to obtain a permit from the Commission before starting work,<sup>43</sup> and requesting that the recipient quickly contact the Commission's legal counsel. If the Commission does not receive a response, it sends a more sternly worded letter by first-class mail and certified mail. The

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42. For an example, see Letter from John Weiss, Deputy Counsel, N.Y.C. Landmarks Pres. Comm'n, to Andrew Berman, Greenwich Village Soc'y for Historic Pres. (May. 15, 2009), available at [http://www.gvshp.org/\\_gvshp/preservation/43\\_macdougall/doc/LPCresponse5.15.09-demobyneglect.pdf](http://www.gvshp.org/_gvshp/preservation/43_macdougall/doc/LPCresponse5.15.09-demobyneglect.pdf).

43. For further information on the permit process, see Frequently Asked Questions About Making Changes to a Landmarked Building N.Y.C. LANDMARKS PRES. COMM'N, [http://home2.nyc.gov/html/lpc/html/faqs/faq\\_permit.shtml](http://home2.nyc.gov/html/lpc/html/faqs/faq_permit.shtml) (last visited Mar. 10, 2012) [hereinafter Making Changes].

correspondence escalates until legal action is threatened unless certain steps are taken by a set deadline.<sup>44</sup>

Since the passage of time works against the Commission's efforts to save these landmarks, we have shortened the time we spend on outreach to the owners when necessary. We now spend three to six months trying to have repairs voluntarily made by reaching out to the owners and other responsible parties (e.g., a bank that has foreclosed on a landmark).<sup>45</sup>

Often during the outreach process, a Commission architect will prepare an existing conditions report documenting how the landmark is in disrepair. Often the architect has to base his report only on the condition of the street facade. Necessary repairs (based on the limited available information) are also clearly identified. The existing conditions report becomes a key exhibit if the matter is litigated, and is augmented once access to the building is obtained. Often a judge will order repairs as part of the injunctive relief based on what is described as being required in the existing conditions report.<sup>46</sup>

Towards the end of this voluntary compliance period, the Commission's Chair issues a Chair's Order which formally orders the parties in charge of the landmark to make repairs and subjects them to \$5000 daily fines from the date of the Order if repairs are not forthcoming. The Order also clearly explains to the parties in charge that legal papers are being drafted by Commission lawyers and that the matter will be referred to the City of New York's Law Department for legal action if corrective steps are not taken by a date certain.<sup>47</sup>

Because of concerns that collateral estoppel<sup>48</sup> arguments will be made if we issue a standard notice of violation, sometimes we do not use our usual enforcement actions in demolition by neglect cases. Although confident that we would prevail, there is no need to muddy the waters with a summons that is returnable to an Administrative Law Judge when we are preparing an action for possible trial.

Once the matter is referred to the Law Department, the assigned Assistant Corporation Counsel sends a letter, on Law Department letterhead, to the parties in charge, explaining that the matter is now at the Law Department and another deadline is given as a last chance to avoid the cost of litigation and potentially significant fines.

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44. Cf. Letter from John Weiss, Deputy Counsel, N.Y.C. Landmarks Pres. Comm'n, to Andrew Berman, Greenwich Village Soc'y for Historic Pres. (May. 15, 2009), available at [http://www.gvshp.org/\\_gvshp/preservation/43\\_macdougall/doc/LPCresponse5.15.09-demoby neglect.pdf](http://www.gvshp.org/_gvshp/preservation/43_macdougall/doc/LPCresponse5.15.09-demoby neglect.pdf).

45. See Letter from John Weiss, Deputy Counsel, N.Y.C. Landmarks Pres. Comm'n, to Simeon Bankoff, Exec. Dir., Historic Dists. Council (Feb. 4, 2009), available at <http://eastharlempreservation.org/docs/landmarks020409.pdf>.

46. See 10-12 Cooper Square, 793 N.Y.S.2d at 692.

47. See, e.g., *City of New York v. Palmer*, No. 620/2006 (N.Y. Sup. Ct., Jan. 9, 2006) (Order to Show Cause).

48. Collateral estoppel acts as an issue-specific procedural bar whereby a claim can be prevented from being heard by a trial court judge if an administrative judge has already heard and ruled upon the same issue. This requires (1) that the issue being argued is the same and (2) that the party opposing its application have had a "full and fair opportunity" to contest the issue in the prior proceeding. 73A N.Y. JUR. 2D Judgments § 470 (2011).

Often an owner will decide to sell the landmark as a way of addressing the building's disrepair. This outcome occurs particularly with elderly owners who no longer live in the building at issue due to its disrepair and in light of their often not having easy access to financial resources or the ability to undertake a large repair project. If the landmark is sold once litigation has commenced, we usually substitute the purchaser as a party or require the purchaser to sign a stipulation or other agreement that binds him to repairing the landmark in an expeditious manner.

### B. Litigation Commences

We bring our action by "orders to show cause" which allows the Commission to appear before a judge in an expedited manner. The justification for the orders to show cause is that the landmark is deteriorating with every passing day, particularly when there is bad weather. The action seeks access to the interior of the building, a court order directing the parties in charge to expeditiously make repairs, and imposition of \$5000 daily fines if repairs are not forthcoming.

Usually the responsible parties are responsive once they are before a judge. Often there is almost no issue of fact. Designation reports and other documentation unequivocally establish that the building in question is either in a historic district or is an individual landmark. Photographs showing the disrepair are usually uncontested and very convincing to a judge.<sup>49</sup> Consequently, we often enter into a detailed stipulation fairly early on in these cases requiring, among other things: 1) access to the interior and rear of the landmark so that a thorough inspection by Commission staff and Department of Buildings engineers can be made; 2) monitoring, often by a structural engineer retained by the owner, which results in regular reports on the condition of the building; 3) a detailed schedule for the owner to submit applications to the Commission and other appropriate regulatory bodies; and 4) a timeline for when different types of work must be completed to avoid imposition of a daily fine.<sup>50</sup> Regular site visits are also required in order to monitor the building's condition and any work that may be underway.

The language in the stipulation is key. Because we want to set realistic deadlines, we consult with architects and engineers to obtain an accurate sense of how long each task should take. We also require that complete applications be submitted to the regulatory agencies that need to issue permits. We list the information needed for an application to be considered complete (e.g., dimensioned front elevation drawings showing the distance between windows and door and window dimensions with legible notes, a section of the proposed replacement cornice, information on operation, configuration, finish, material,

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49. See generally *City of New York v. 10-12 Cooper Square, Inc.*, 793 N.Y.S.2d 688, 692 (N.Y. Sup. Ct. 2004).

50. See, e.g., *City of New York v. Wilkins*, No. 400729/2011 (N.Y. Sup. Ct. Aug. 2, 2011), available at [http://decisions.courts.state.ny.us/fcas/fcas\\_docs/2011AUG/3004007292011001SCIV.pdf](http://decisions.courts.state.ny.us/fcas/fcas_docs/2011AUG/3004007292011001SCIV.pdf) (stipulation and order).

and profile of proposed replacement windows, etc.). In one case, an owner submitted just our one page application form and a two-page report from his engineer (that we already had) as his application. We then spent the next seven weeks trying to get the materials necessary to process the application from the owner. In court, the owner complained that the Commission, and not him, was responsible for the delay.<sup>51</sup> Ambiguity often works against efforts to have repairs made in a timely manner.

Accordingly, we try to spell out very clearly exactly what is needed for the Commission staff to issue a permit and will often provide the owner with a sample of a complete application containing all the necessary information.<sup>52</sup> If an owner is in violation of the stipulation, copies of all the materials provided to him and his team become exhibits to establish the good faith effort of the various City agencies to have permits issued in a timely manner and demonstrate to the court that noncompliance with the stipulation deadlines is due to the owner's fault.

It is useful to have an interagency meeting with all municipal regulatory agencies that must authorize repairs (often the Department of Buildings and the Commission), and the owner's architect, engineers, and other professionals, in order to ensure that all parties understand what material needs to be submitted for issuance of a permit and the permit issuance process as a whole. Poor coordination among City agencies can undermine an otherwise successful demolition by neglect action.

Even after a lawsuit is filed, absentee ownership often creates problems. In one case, because the owner was a Japanese corporation, service issues arose when we wanted to file a motion that may have required personal service upon the owner in Tokyo and the translation of lengthy legal documents into Japanese.<sup>53</sup> Another case involved a landmark controlled by an estate that was foreclosed on, resulting in two defendants—one being the estate and the other being a Texas-based financial institution.<sup>54</sup>

It is of paramount importance to gain access to the interior of the building at issue as soon as possible. Often a building's front facade may appear to be in a somewhat poor condition, but not requiring immediate action. However, the interior of a building may tell a whole different story with floors partially collapsed, extensive water damage from a skylight that has been leaking for decades, or unexpected problematic load conditions. Once we gain access, the scope of required repairs often changes.

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51. *City of New York v. Quadrozzi Jr.*, No. 8442/2010 (N.Y. Sup. Ct. May 21, 2010) (stipulation addressing repair).

52. See *Making Changes*, *supra* note 43; see Forms and Publications, N.Y.C. LANDMARKS PRES. COMM'N, <http://www.nyc.gov/html/lpc/html/forms/forms.shtml> (last visited Mar. 10, 2012).

53. See Plaintiffs' Memorandum in Support of Motion for a Preliminary Injunction at 3, *City of New York v. Toa Constr., Inc.*, No. 400584/2008 (N.Y. Sup. Ct. Mar. 20, 2008) 2008 WL 8046373.

54. *City of New York v. Estate of Johnson*, No. 23104/2008 (N.Y. Sup. Ct. Oct. 7, 2009).

Sometimes psychological issues are problematic—some owners have filled their building with possessions creating classic examples of the Collyer Brothers Hoarding Syndrome.<sup>55</sup> On occasion, I have had to physically climb over boxes and furniture piled everywhere in a landmark, even on staircases, in order to inspect the building's condition. Some owners can take months to empty the tons of material that can be causing structural load issues. If there were an intentional component to the standard, a substantial hurdle would exist in bringing these actions.

During each site visit, I extensively photograph the interiors and exteriors of landmarks subject to demolition by neglect litigation. While the lawyers for both sides can disagree about a condition at the landmark, a series of clear photographs can quickly persuade the court of the Commission's position if a dispute arises over whether work is complete and, if so, when it was completed.

Demolition by neglect matters often have unusual developments prior to and during litigation. Once, an owner filed for bankruptcy while litigation was pending.<sup>56</sup> In another case when a derelict landmark was about to be sold, a prior owner commenced their own legal action to halt the sale and, therefore, the necessary repairs. Eventually, the property was sold; the new owner has undertaken the extensive repairs to restore the structure to a state of good repair and preserve the landmark for future generations.<sup>57</sup>

#### IV. CONCLUSION

Addressing landmarks in serious disrepair can seem like a Sisyphean task. As buildings are repaired and taken off the Commission's endangered list, new historic districts with more buildings in disrepair are designated or new buildings are identified in old historic districts, resulting in what sometimes seems to be a never-ending stream of buildings that need attention. Additionally, there have been cases where an owner takes substantial steps to address problems, but then after a year or two of progress, work stops with the building still in a compromised condition, resulting in a resumption of legal efforts.

Often times, owners of decaying landmarks in New York City have their own, frequently poignant, tales of struggle that led them to the point of not being able or willing to maintain their landmark buildings. These buildings

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55. For more information on this syndrome, see Franz Lidz, *The Paper Chase*, N.Y. TIMES, Oct. 26, 2003, at CY1, available at <http://www.nytimes.com/2003/10/26/nyregion/the-paper-chase.html>.

56. Letter from John Weiss, Deputy Counsel, N.Y.C. Landmarks Pres. Comm'n, to Simeon Bankoff, Exec. Dir., Historic Dists. Council (Feb. 4, 2009), available at <http://eastharlempreservation.org/docs/landmaks020409.pdf> (describing the Corn Exchange Bank Building).

57. John Weiss, *Pursuing an Owner for Demolition-by-Neglect: A Tortuous Legal Path*, DISTRICT LINES, Spring 2009, at 2, 3, available at [http://www.eastharlempreservation.org/docs/corn\\_DLspring09.pdf](http://www.eastharlempreservation.org/docs/corn_DLspring09.pdf).

require extraordinary time and effort by the staff of the Commission and other agencies, but saving our landmarks is unquestionably worth the effort.

## ALBERT S. BARD AND THE ORIGIN OF HISTORIC PRESERVATION IN NEW YORK STATE

CAROL CLARK\*

Advocates of New York State's enabling legislation specific to historic preservation, passed by the legislature and signed by Governor W. Averell Harriman in April 1956,<sup>1</sup> focused on neighborhood preservation and "planning for community appearance."<sup>2</sup> The criteria in the law is broadly worded, the deliberate result of the thorough grasp that the bill's principal drafter, attorney Albert S. Bard, had of the development of aesthetic regulation in American jurisprudence. It can be argued that although New York City adopted its heralded Landmarks Law in 1965,<sup>3</sup> the reach of what the framers envisioned in the 1950s has never been realized to a significant degree. In fact, the unfinished business of those who formulated and promoted what came to be known as the Bard Law includes creating a more effective means to address the protection of neighborhood character in jurisdictions like New York City.

By the fall of 1954, a Joint Committee on Design Control of the American Institute of Architects New York Chapter and the local organization of the American Institute of Planning held regular meetings.<sup>4</sup> Participants included architects, planners, and civic-minded individuals who were keenly aware of the pressing need for the establishment of tools to protect public and private property from unsympathetic change.<sup>5</sup> The stated objective of the Committee was "[t]o collect, analyze and evaluate existing laws, ordinances and regulations . . . having to do with the appearance of individual buildings . . . and open

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1. N.Y. GEN. MUN. LAW. § 96-a (McKinney, Westlaw through L.2011, ch. 1-54 & 57-495). In 1968 the relevant provision of the original enabling legislation, New York Historic Preservation Enabling Act of 1956, Law of Apr. 2, 1956, ch. 216, 1956 N.Y. Laws 908, was repealed and reenacted at § 96-a without substantive changes. Mary Spearing, Note, *Landmark Preservation: The Problem of the Tax Exempt Owner*, 3 FORDHAM URB. L.J. 123, 123 n.2 (1974). The Governor had vetoed the same legislation a year before in 1955. It was reintroduced and passed in 1956, defeating the previous veto. Bard Act, N.Y. PRESERVATION ARCHIVE PROJECT, <http://www.nypap.org/content/bard-act> (last visited Jan. 28, 2012) [hereinafter Bard Act].

2. AIA-AIP N. Y. AREA JOINT COMM. ON DESIGN CONTROL PLANNING AND CMTY. APPEARANCE vii (Henry Fagin & Robert C. Weinberg eds., 1958).

3. Law of Apr. 19, 1965, No. 46, 1965 N.Y. Local Laws 261 (codified as amended at N.Y.C ADMIN. CODE §§ 25-301 to 25-321 (West, Westlaw through Local Law 29 of 2011)).

4. AIA-AIP JOINT COMM. ON DESIGN CONTROL, Meeting Minutes (Dec. 7, 1954), in *Albert S. Bard Papers 1893-1962* (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

5. *Id.*

spaces . . . and of any other aspects of the urban scene where design regulation might be desirable and practicable.”<sup>6</sup>

An additional objective was “[t]o suggest new and better regulations and other procedures, if practicable . . . and to investigate related questions of the advantages and disadvantages, aesthetically and politically, of such regulations . . . to the practicing architect, the property owner and the [private] citizen.”<sup>7</sup> Committee members held expansive ideas about the scope of the topic at hand. The meeting minutes read: “[t]he city’s responsibility is to the design of the whole scene as taken in by the eye at any one point as well as to the design of any one individual building.”<sup>8</sup>

At the November 18, 1954 meeting of the Joint Committee on Design Control, members agreed that “[o]ur job is to formulate regulations applicable to our region which would stand the test of legal action.”<sup>9</sup> Attorney Albert S. Bard explained to his fellow Committee members that unless wording was “added to the State Law relating to powers of cities, as a form of enabling legislation, the more specific regulation we might recommend for New York City itself, for other communities, would probably not hold water.”<sup>10</sup> A remarkable one-page document is appended to these meeting minutes. It contains the earliest known version of the language adopted into New York State law a year and a half later, drafted by Mr. Bard. The wording is striking for its breadth:

To provide, for places, buildings, structures, works of art, and other objects having a special character or special historical or aesthetic interest or value, special conditions or regulations for their protection, enhancement, perpetuation or use, including appropriate control of the use or appearance of neighboring private property within public view, or both . . . .<sup>11</sup>

Bard’s prescience in crafting such far reaching criteria no doubt grew from his lifelong, careful study of “aesthetics as a basis for the exercise of the police power,” as he described it late in his career in correspondence with a Harvard Law School student.<sup>12</sup> New York City’s Landmarks Law, when it was enacted

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6. Meeting Minutes (Dec. 7, 1954), *supra* note 4.

7. *Id.*

8. AIA-AIP JOINT COMM. ON DESIGN CONTROL, Meeting Minutes (Dec. 16, 1954), in Albert S. Bard Papers 1893-1962 (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

9. AIA-AIP JOINT COMM. ON DESIGN CONTROL, Meeting Minutes (Nov. 18, 1954), in Albert S. Bard Papers 1893-1962 (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

10. *Id.*

11. *Id.*

12. Letter from Albert S. Bard, Attorney, to Calhoun Dickinson, Harvard Law Student (Dec. 15, 1959) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review). Calhoun Dickinson was a third year law student taking a Land-Use Planning course at Harvard Law and was put in touch with Bard by Calhoun’s professor, Charles Haar. Letter from Calhoun Dickson, Harvard Law Student, to Albert S. Bard Attorney (Dec. 12, 1959) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives



in 1965, contained this same sweeping language.<sup>13</sup> In 1954, however, the members of the Joint Committee thought that an amendment to the New York City Zoning Resolution, based on the principles to be established “[i]n the State Enabling Act by Mr. Bard’s proposed amendment would be the next step so far as New York City is concerned.”<sup>14</sup> They were not alone in conceptualizing the implementation of historic preservation goals through the mechanism of zoning. As zoning reform became a municipal priority in the latter half of the 1950s, culminating in revisions to New York City’s Zoning Resolution in 1961, advocates of historic preservation focused repeatedly on zoning as an avenue for protection.<sup>15</sup>

When New York City’s major zoning changes were complete, they were conspicuously lacking any acknowledgement of historic preservation needs or goals. This was due to a shrewd calculation by James Felt, Chairman of the Planning Commission, who was in charge of the zoning reform. His concern was that adding the subject of historic preservation to an already politically charged proposed new zoning could keep him from achieving his primary goal.<sup>16</sup> “Aesthetic zoning was only one of a number of reforms that would be left behind on the road to the resolutions approval.”<sup>17</sup> As part of the compromise that Felt reached with leading preservationists, Mayor Robert F. Wagner, Sr. established a “Committee for the Preservation of Structures of Historic and Esthetic Importance.”<sup>18</sup> At its third meeting on September 12, 1961, minutes reveal that a question was raised as to whether or not the master list of New York City landmarks “should be made part of the Zoning Resolution. It was felt that this could best be resolved in conference with the City Planning Commission.”<sup>19</sup> It is unclear whether or not the Mayor’s

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Division & the Widener Law Review). It is possible that Albert Bard may have influenced Dickinson, as Dickinson’s obituary recounts him as an advocate of aesthetic regulation law. See Sharon Pian Chan, Obituary: Calhoun Dickinson, 77, Attorney and Parks Advocate, *SEATTLE TIMES* (Oct. 13, 2008, 12:00 AM), [http://seattletimes.nwsources.com/html/localnews/2008259783\\_dickinsonobit13m.html](http://seattletimes.nwsources.com/html/localnews/2008259783_dickinsonobit13m.html).

13. Law of Apr. 19, 1965, No. 46, 1965 N.Y. Local Laws 261 (codified as amended at N.Y.C. ADMIN. CODE §§ 25-301 to 25-321 (West, Westlaw through Local Law 29 of 2011)). For a discussion of the specific amendments made to the Landmarks Law that changed the language originally drafted by Bard see Bard Act, *supra* note 1.

14. AIA-AIP JOINT COMM. ON DESIGN CONTROL, Meeting Minutes (Nov. 18, 1954), in Albert S. Bard Papers 1893-1962 (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

15. See, e.g., Anthony C. Wood, An Interview with the First Chairman of the Landmarks Preservation Commission, The Late Geoffrey Platt, *VILLAGE VIEWS*, Winter 1987, at 7, 7-9, 17, 28, 38 [hereinafter An Interview with Geoffrey Platt]; Anthony C. Wood, An Interview with Harmon Goldstone, *VILLAGE VIEWS*, Summer 1987, at 17, 24-25, 35-36 [hereinafter An Interview with Harmon Goldstone].

16. ANTHONY C. WOOD, *PRESERVING NEW YORK: WINNING THE RIGHT TO PROTECT A CITY’S LANDMARKS* 244-46 (2008) [hereinafter *PRESERVING NEW YORK*].

17. *PRESERVING NEW YORK*, *supra* note 16, at 246.

18. An Interview with Geoffrey Platt, *supra* note 15, at 8-9; See also An Interview with Harmon Goldstone, *supra* note 15, at 38-39.

19. COMM. FOR THE PRES. OF STRUCTURES OF HISTORIC AND ESTHETIC IMPORTANCE, Meeting Minutes (Sept. 12, 1961), in Whitney North Seymour Papers, 1930-1983 (on file with

Committee conferred with urban planners and their Commissioners on this point. What did happen is that preservation advocates sought and achieved the adoption of New York City's local landmarks ordinance,<sup>20</sup> a distinctly different approach to realizing their goals. But that the powers associated with zoning were understood throughout much of the 1950s and into the early 1960s as being sufficient and valid in support of historic preservation objectives is noteworthy.<sup>21</sup> It suggests that today's ongoing erosion of neighborhood character throughout New York City can be addressed with planning and zoning tools, and it offers valuable guidance on how this important contemporary challenge might be confronted.

In a notable 1955 article in *The American City*, Albert S. Bard wrote:

Not until Courts recognize community beauty as a ground for the exercise of police power by the state or community upon the same basis and as fully as they recognize health, safety, morality, and good order as grounds for such exercise, and as an equal partner with those factors in the term "community welfare," will planning and the law of planning come full circle.<sup>22</sup>

Bard noted that while this had not yet taken place, "the law is on its way and the recent case of *Berman v. Parker* . . . decided by the United States Supreme Court on November 22, 1954, helps close that gap."<sup>23</sup> *Berman* was a seminal case in the development of urban renewal, involving a challenge to the District of Columbia's Redevelopment Act of 1945, which provided for the clearance of blighted areas and their redevelopment with the new construction fulfilling optimal planning standards.<sup>24</sup> The plaintiff, an owner of a thriving business in a redevelopment project area, sought an injunction against the application of the statute to him and against the condemnation of his property.<sup>25</sup> According to Bard, the Supreme Court held that "a project for the replanning and redevelopment of a large section of the city is entirely constitutional and that all property within the area is subject to condemnation in order to compel its participation in and contribution to the new development . . . ."<sup>26</sup> Key to the decision was the Court's view that the redevelopment plan itself served a public purpose.

The Committee on City Development of the Fine Arts Federation issued a report for its annual meeting on April 28, 1955 that mirrored Bard's above referenced article in *The American City*. Commenting on *Berman v. Parker*, the authors noted:

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The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

20. *PRESERVING NEW YORK*, *supra* note 16, at 137-38.

21. Ross D. Netherton, *The Due Process Issue in Zoning for Historic Preservation*, 19 *URB. LAW.* 77, 77-78 (1987).

22. Albert S. Bard, *Esthetics and the Police Power: U.S. Supreme Court Holds District of Columbia Redevelopment Act Constitutionally Valid*, 70 *AM. CITY* 179, 179 (1955).

23. *Id.* at 202 (internal citation omitted).

24. *Berman v. Parker*, 348 U.S. 26, 28-29 (1954).

25. *Id.* at 28, 31.

26. Bard, *supra* note 22, at 202.

The decision itself does not expressly state that esthetic considerations alone—the making of a pleasanter and more sightly city—will support such legislation, nor that esthetic considerations by themselves will support the regulation of land uses, but the language of the opinion by Mr. Justice Douglas may be claimed to go so far as to support such a case.<sup>27</sup>

Bard and the architect, Geoffrey Platt, who later played a significant role as a leader in New York City's preservation community, were the two signatories on the report.<sup>28</sup> The report underscores the fact that the decision of Justice Douglas constitutes the 'opinion of the court,' and no dissent was filed.<sup>29</sup> The Report stated: "His language is broad enough to support legislation which replans a city area upon new standards of appearance and beauty."<sup>30</sup>

The *Berman v. Parker* case was argued before the Supreme Court on October 19, 1954.<sup>31</sup> A week later, Bard introduced a resolution that was passed by the Board of Directors of the Municipal Art Society of New York, a prominent civic organization.<sup>32</sup> It deplored "the absence of adequate consideration of the factor of appearance in the planning and zoning of the city."<sup>33</sup> It is telling that many close observers of the preservation and planning professional scene in New York City today, over half a century later, believe that the same situation exists. What is also fascinating is that Bard had prepared the draft of enabling legislation prior to reading the *Berman v. Parker* decision.

Following the issuance of the decision, Bard corresponded with the key players who were involved in it. For example, in a December 27, 1954 letter to Simon E. Sobeloff, the U.S. Solicitor General who argued the case in support of the District of Columbia Redevelopment Act, Bard wrote:

For more than 40 years I have been interested in the legal question to what extent aesthetic considerations may constitutionally be made the basis of the regulation of private property. The development of planning in late years and the decisions on the subject indicate a marked trend in judicial decisions in support of aesthetics as the basis of the exercise of the police power.<sup>34</sup>

In a reply written the following day, the Solicitor General responded: "I think that Justice Douglas' opinion, not only because of its authority, but because of its sweep, will be as great a landmark in the law as the old *Eudid v. Ambler*

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27. THE FINE ARTS FED'N OF N.Y., REPORT OF THE COMMITTEE ON CITY DEVELOPMENT 8 (1955).

28. *Id.* at 10.

29. See *Berman*, 348 U.S. at 28.

30. THE FINE ARTS FED'N OF N.Y., *supra* note 27, at 8.

31. *Berman*, 348 U.S. at 26.

32. See PRESERVING NEW YORK, *supra* note 16, at 137-38.

33. *Id.* at 137.

34. Letter from Albert S. Bard, Attorney, to Simon E. Sobeloff, U.S. Solicitor Gen. (Dec. 27, 1954) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

Realty Company case.”<sup>35</sup> There is no question that the Solicitor General’s prediction was accurate; how astute of him to make the observation so close to the date of the decision.

This series of correspondence also includes a back and forth with an attorney representing the other side of the case. On January 17, 1955, in a reply to Joseph H. Schneider, Esq., who represented the adverse party in the dispute, Bard wrote:

For a long time planning has had to deal with aesthetics in order to be planning at all, and the inclusion of aesthetic factors among other factors supporting an exercise of the police power goes back a long time. It began in New York many years ago by a mild decision that the inclusion of aesthetic factors did no harm. Since then the law of planning has undergone great development, and the effect of aesthetic considerations upon values, both financial and social, has become generally recognized.<sup>36</sup>

Without question, Bard was viewed by his peers as an expert on the subject. He was invited to be among “outstanding authorities” who contributed an essay to *The American Journal of Economics and Sociology* published in April 1956.<sup>37</sup> His article, *Aesthetics and the Police Power*, includes an instructive annotated list of court cases relative to the subject at hand.<sup>38</sup> The Journal granted permission the following year for the reprinting of the article by the Citizens Union Research Foundation.<sup>39</sup> Between the two publications, it is apparent that Bard’s thinking would have been shared widely among those with similar interests in professional and civic circles of the day. Felix Frankfurter, a Justice of the Supreme Court of the United States, penned a handwritten note to “Dear Albert,” complimenting Bard: “you did well collecting those aesthetical juristic utterances together.”<sup>40</sup> Bard was an attorney of great distinction and he applied his lawyerly skills with the same persistence and brilliance as he approached his preservation advocacy efforts.

Henry Hope Reed, the venerable New Yorker who launched the architectural walking tour as a fundamental element in the preservationist’s

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35. Letter from Simon E. Sobeloff, U.S. Solicitor Gen., to Albert S. Bard, Attorney (Dec. 28, 1954) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

36. Letter from Albert S. Bard, Attorney, to Joseph H. Schneider, Attorney (Jan. 17, 1955) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

37. See Letter from Mabel Walker, Executive Director, Tax Inst., Inc., to Albert S. Bard, Attorney (undated) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

38. Albert S. Bard, *Aesthetics and the Police Power*, 15 AM. J. ECON. & SOC. 265, 268-70 (1956).

39. Letter from V.G. Peterson, Sec’y-Treasurer, Am. J. Econ. & Soc., to Albert S. Bard, Attorney. (Oct. 2, 1957) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

40. Letter from Felix Frankfurter, Justice of the U.S. Supreme Court, to Albert S. Bard, Attorney (undated) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

toolkit, recognized immediately the importance of Bard's advocacy. Writing enthusiastically to Bard in May 1956, he stated:

Your article, "Aesthetics and the Police Power," is one of the most encouraging statements for the future . . . [I]t is interesting that the concept of community beauty has expanded so fast within recent years. As you say, [it] is a "revolution that has taken place in fifty years with respect to the legal power of the community to deal with the individual landowner . . . ." <sup>41</sup>

Bard wrote a summary of the provisions of the enabling law in June 1956; in it, he refers to the "fresh power" it contained.<sup>42</sup> During that same spring season following the enactment of the enabling legislation, Bard drafted a different summary of the bill, this time entitled "New Planning Power to Deal with Landmarks and Unique Situations."<sup>43</sup> It was sent to J. Owen Grundy of the weekly newspaper *The Villager*, and on May 29th, the newspaperman responded to Bard's letter of May 28th inquiring about the piece. He assured Bard: "I think that the new law should receive the widest publication. This, so that local governing bodies and zoning officials throughout the State will know about its provisions and be in a position to apply them before it is too late."<sup>44</sup> Always ready to promulgate information that he deemed essential to practitioners and perhaps even to the uninitiated, Bard sent a letter to the editors of *The American City* in September 1956. Printed under the heading *Municipal Regulation of Esthetics Advanced*, he asserted: "The law, which might serve as a model mandate for esthetic regulations in cities and towns throughout the country, gives the New York cities the power" to enact and administer laws and regulations concerning historic properties.<sup>45</sup>

The Joint Committee on Design Control met regularly from 1953 to 1957 to "review methods by which communities in various parts of this country and abroad are attempting to prevent ugliness and to achieve harmony and beauty in their appearance."<sup>46</sup> The Committee believed that "[t]he professional designers of buildings and of neighborhoods shared a common feeling. Certain current esthetic regulations might be effective, others might be doing more harm than good. A new, more positive approach to planning for

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41. Letter from Henry H. Reed, Jr. to Albert S. Bard, Attorney (May 28, 1956) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

42. Albert S. Bard, *New Power to New York Cities to Deal with Particular Projects*, June 1956 (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

43. Letter from Albert S. Bard, Attorney, to J. Owen Grundy, Assoc. Editor, *The Villager* (April 23, 1956) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

44. Letter from J. Owen Grundy, Assoc. Editor, *The Villager*, to Albert S. Bard, Attorney (May 29, 1956) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

45. Albert S. Bard, *Municipal Regulations of Esthetics Advanced*, *AM. CITY*, Sept. 1956.

46. Fagin & Weinberg, *supra* note 2, at vii.

community appearance is needed.”<sup>47</sup> Robert C. Weinberg, the architect and planner who served as co-chairman of the Committee and co-editor of its report, was a younger colleague of Bard who shared many of his affiliations and interests.<sup>48</sup> When the Committee embarked upon its work and began to grapple with questions concerning the constitutional underpinnings of the topic at hand, Bard counseled them to “[p]roceed on the assumption that esthetic control of private property in the interest of the community is a legal exercise of the police power.”<sup>49</sup> Bard was confident that the courts would catch up to public sentiment which he believed, increasingly, was moving to embrace aesthetic regulation. As a young lawyer, toiling on the battle to reign in the overwhelming number of billboards in New York City, Bard was steeped in the intricacies of how advertising could be regulated on the grounds of public beauty. Over the course of a long professional career, Bard battled the obstacles faced by those who sought control over the look of the public realm. He pressed consistently for a legislative or other legal solution, lobbying unsuccessfully in 1938 for a state constitutional amendment.<sup>50</sup> His combination of a rigorous intellect, unflagging determination, and prodigious scholarship finally yielded the sought after result with the adoption of the Bard Law in 1956. To shape the debate about the future integrity of the City’s neighborhoods, today’s concerned citizens and advocates need to borrow a page or two from Bard’s playbook. The lesson here is that the message must be clear, the pursuit resolute, and the energy unwavering. To change the current trends in neighborhood conservation, both the public and their elected representatives need to be engaged. The time has come to raise the volume on the discussion about the quality of places New Yorkers call home, and to produce a viable strategy that will ensure their preservation.

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47. Fagin & Weinberg, *supra* note 2, at vii.

48. PRESERVING NEW YORK, *supra* note 16, at 135, 137.

49. *Id.* at 137 (quoting Fagin & Weinberg, *supra* note 2, at 8).

50. *Id.* at 31-32.

## 2011 FITCH FORUM: PART FIVE

### MODERATORS ROUND TABLE: WHAT'S NEXT FOR HISTORIC PRESERVATION

Moderator: Ms. Kate Wood

Panelists: Mr. Tom Mayes, Ms. Anne Van Ingen, & Mr. Anthony Wood

MS. WOOD: So I'm being joined up here by, again, Tom Mayes, Anne Van Ingen, and Tony Wood. This is an opportunity to get the moderators from the various panels of the day together for a few more minutes to gather our thoughts, to gather thoughts from you after this full day of contemplation, and really ask ourselves, okay, what have we really learned?

I just want to set the stage for a minute because I believe there are a lot of different reasons we're having this conversation today and one of them is because of the calendar; it is the 45th anniversary of New York's Landmarks Law. That is an important milestone to recognize, but I also want to say that we shouldn't minimize that there is a real sense of crisis in this city, that no one in this room believes that everything is going just terrific, we succeeded, and it's time to close up shop and dedicate ourselves to other worthy missions. There's a lot left to do, and it's that sense that triggers this conversation.

There are some specific issues that have come up, or maybe not come up yet, that I just want to get out there in New York City, where there has been a strong sense that the process is not working, and needs reflection and fine tuning. Two Columbus Circle, a classic failure of due process. The Cathedral Saint John Divine and the BF Goodrich building are cases where there was a clear development agenda influencing the designation process. Saint Vincent's Hospital came up and the alarming interpretation of hardship in that case, the Mayor's perennial failure to reappoint or appoint Landmarks Commissioners in a timely way or at all, and the influence that has on the process. Nominations for designation languish for years without action and the loss of buildings could have and should have been saved.

An issue that led at least one New York State Supreme Court Justice to hold the Landmarks Commission's hand in its failure to carry out the Law was a case that was litigated by the priceless Whitney North Seymour, Jr. and is now being carried on by Mike Seymour, Al Seymour, and others, using the Landmarks Commission's minuscule budget. There was a rounding error in the city's overall budget. If there are 3% of the properties in New York City designated as landmarks, 27,000 buildings, an astounding number, what does it say that .0000-something percent of the city's budget is actually dedicated to regulating and preserving them? So, with those thoughts on the table and many others that I'm sure are bouncing around in peoples' heads, I just want to bring it back to the question that was the core of the keynote speech: Is the glass half full, is it half empty, is it broken, and really, why should we care? What's at stake here? Aren't most of the buildings, the landmarks in New

York City, preserved most of the time? Why are these cases where it goes wrong so important and why are we having this conversation?

MR. MAYES: Wow. Well, may I jump in with something? It's funny that you began by saying that, because I was actually going to begin my remarks by saying, "Okay let's take a deep breath." We're all in the trenches with these issues every day, all the time, and that was an amazing list of issues and problems that are out there, but I think we also have to acknowledge that New York, Los Angeles, Chicago, Seattle, and 2600 other communities throughout the country are more livable, more stable, more pleasant, more meaningful places because of New York's Landmarks Laws and other laws around the country. So I think we have to acknowledge that at the outset and say there is a success story here, too. That doesn't mean we have to stop. So, I wanted to say that first.

MS. WOOD: So that's a glass half full.

MR. MAYES: Half full.

MR. WOOD: It's important to do a victory lap but I think perhaps we've taken a victory lap too long and have become complacent. Maybe that's more about the movement than it is about the Law. I mean it strikes me that today was the beginning of a very necessary conversation and one that really needs to go on and be seriously joined. There really does seem to be a tension and at the moment we're told that we've got a very strong, national Law and we do. It's had a great impact here. It's had a huge impact, but at the same time and not surprisingly, most of our lawyers tell us to be cautious about using this great Law. We got it and it's terrific, but if we really use it aggressively, we could be getting ourselves into trouble. So there's kind of this "let's hold back on this wonderful Law."

As Kate points out, we're still losing buildings, which is a great frustration among the core community of preservationists, who I think are actually beginning to wonder if it's all still worthwhile. Maybe the Law is good. It does what it can do. We just have to suck it up or take up another hobby, because we're just not going to be able to save Two Columbus Circle. I mean, who cares about a building like that? We are losing buildings that the Landmarks Law was basically passed to allow us to have a process to save. It's an interesting tension we're in and the political climate is not exactly a great one. We have people like Ed Glaeser out there who, for the first time I can remember, is not only questioning whether we should have more historic districts but questioning if we should undo the 102 districts we presently have. The politics aren't great, so there's a lot to be thankful for, but those of us who've been kind of serious and been in the trenches we need to figure out our way out of this moment. There's a phrase in the Landmarks Law



somewhere that says preservation is a necessity; and maybe now it's just being perceived as a nicety. When it gets tough and you have to go up against the churches, and it's tough when you've got to go up against the Mayor, okay it's a nicety, and we'll do what we can do. We're doing more designation. The designation numbers are great, but are we designating stuff that's really threatened?

So there are tough questions, but I think you're absolutely right, we should all leave this room realizing what this Law has accomplished, and what it continues to accomplish, is phenomenal, but this isn't a room of underachievers. This is a room of people who are here because they want to have the patrimony of this wonderful city. So I think it is incumbent on us to answer the question: can we do better? And there have been some ideas today in which we might improve the Law. But then there's another question of discussion which is can we do better politically, because everybody has stressed the context and the Law happens in context. So we may end up, if it's at the end of a very thoughtful conversation, saying yeah, there's some ways we can make our Law better, but we cannot pull it off in this political climate, so we've got to continue to basically love the wrinkles on the face of the Landmarks Law and hope for a better day when we can do plastic surgery. I think we haven't had yet, as a community, that conversation and now's the time to have that conversation.

MS. VAN INGEN: I'm going to assume Kate and Tony, for the purposes of this discussion, that you're being flip to a certain extent. We care, of course we care. Preservation is not a fixed activity. It's not a job you do and walk away from; it's not like baking a cake. You don't bake it, eat it, it's done, who has the plate, go away. It is a constant process. It is a constant process of making the places we care about better places, and it's not only about patrimony and about protecting the physical place, it's about protecting the places people care about.

I think Jerold Kayden said it incredibly well, and I won't dare to try to paraphrase, but I think that's what it's about. It's about creating places that people want to live in, where their families are, where they create spaces, where they're comfortable, where they raise their kids, where they have jobs. They live and work in the same place and that's what it's about. Preservation is part of a bigger issue and we can talk all we want. We can talk ourselves blue in the face. We can talk about law, about tweaking. Certainly one of the takeaways I learned today and certainly agree with, is that if we're going to tackle our Law, let's take it off in a small piece. I think we are in danger. The climate is difficult. We're in a very difficult political and economic time. We don't have the political clout, we don't have the economic clout for wholesale change, and I think that should be a starting point for any discussion. But the bigger issue, and I've been harping about this for years, is that this is a movement, this is a profession that hasn't clearly defined itself. We don't speak with enough passion to the people that we need to speak to.

We are extraordinary, we're very bright, but every one of us has a Facebook page, every one of us twitters—well, maybe not everyone. I don't, but many of you tweet. We have the availability and the tools through new media, through communication technology, to finally get the message out. Think of all the crazy things that we hear every day on the radio that we know are patently not true, but they get traction because somebody's figured out how to use social media. We need to be able to do that. Those of you that are in the back row that are going to be getting degrees from Columbia, bless your hearts, your minds work differently than ours do. You communicate differently and you communicate differently every day. I'll bet every one of you who are current students have been sitting there multi-tasking all day and texting with your friends. Put that to use for this field. You must have passion or you wouldn't be paying the tuition. Think about it. It's not for the salaries, trust me. Put that passion to good use, convert the people who continue to make stupid comments about this field, the bone-headed wrong thinking about what preservation is and what it means. We operate in the bigger context. Let's move the game plan forward. Finally we have the new technology to do it, and a new generation of people who understand how to use it. That's your job.

MR. MAYES: Well I'll agree with that without any question, but I want to tie back to something Jerold raised also, which is this idea about whether preservation is a universal human right. That's the way I begin the discussion for my preservation law class in Maryland every year, and this year, we had this long expansive discussion about rights: property rights, religious rights, environmental rights, right to clean air, right to clean water. There are preservation students, not one of the eighteen students in my class, who thought they could define these cultural rights and preservation related rights as a universal human right, even in the context of things like the Bamiyan sculptures. Even something as universally recognized as that, they said, yes, we think this is an important interest but they didn't really define it as a right. I think one of the things that we have not done as a movement is the hard work of looking at the underlying public policy rationales for historic preservation. There are a lot of them. There are about twelve in the list that I keep on my computer; fundamental reasons for why historic preservation is important for public policy. But we don't continually talk about them, articulate them, and continue to do research on them.

MR. WOOD: I want to build on that. I think one of the things that Jerold Kayden said was terrific, really talking about the importance of preservation, the psychic preservation through change and the like. For years, preservation has been trying to wear the camouflage of the economic issue; we're about economic development. Well, I don't think that's why most of us are here.

MR. MAYES: That's one of the twelve.

MR. WOOD: Yeah, it's one of the twelve, but one, I don't think we've been as good at trying to develop language around the point that Jerold raised. I mean that could reach a different audience. We don't have the language perfected on that, but I think we need to spend some energy, because that's really why many of us do preservation. It's this larger value to society, and it's great that we're trying to put our own two cents in it. But I think also society is reaching a point where dollars and cents is one conversation, but I think particularly, in the new generation, and how people are looking at liberty and what's important in life, that's where we can win, if we actually tell people that's why we do this.

MS. VAN INGEN: Messaging again, the endless conversation we have that comes up between the Green Movement and preservation. Why are they discussed as two separate issues? We need to work on the language. I'm not going to beat this one but that's a really silly one. You know, Jim Fitch wrote articles in the 1930s that were all about Green design, all about sustainability. Martica Sawin just edited his collective writings.<sup>1</sup> I recommend it to anyone who hasn't read it. He was an extraordinarily forward thinker. This is not new stuff, but the Green Movement has been hijacked by products basically. So you have this complete disconnect. We didn't get ahead of that story. We need to be doing that. The best, most sustainable thing you could do is save the building, it's obvious to us.

MS. WOOD: Can I ask to what extent is it different today than it was forty-five years ago? I mean is this a conversation that's just been ongoing for the past four decades, or are there things that are really new and different about today that inspired these questions and new questions?

MR. WOOD: Do we really look like we were involved forty-five years ago? Thanks a lot. Based on historical research, some things, I think, have changed quite interestingly within New York. I do remember in the early 1980s that you could never get any public popular support for a historic district in what were then called the outer boroughs—now our sister boroughs or whatever we call them to be politically correct. Today what's interesting is you get political support in places like Staten Island, Brooklyn, and Queens, because those neighborhoods have realized that instead of preservation taking away their ability to take control of their lives, preservation has allowed them to have a say in their neighborhood. So all of a sudden there's this constituency that wasn't there in the 1980s that's realizing they have something important, and this is a tool that can help them with that. So that's a very interesting political change.

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1. JAMES MARSTON FITCH (Martica Sawin, ed., 2007).

MR. MAYES: I think that's interesting because there's a larger headcount of people who care about preservation in New York City and in other parts of the country than there has ever been—people who think of it as important to their daily lives, whether they're trying to achieve historic designation, or trying to stop their neighbor from doing something that would undermine the character of the neighborhood or anything else. Does that suggest that the messaging has worked?

MS. VAN INGEN: I think most of them wouldn't call that historic preservation. I think there's a disconnect in what people want in their communities, what they say they want and what we say we're doing.

MS. WOOD: But does it matter what you call it?

MS. VAN INGEN: All those people you're talking about should be members of all the nonprofit organizations across the city and I'm not sure they are because they don't understand that we're all working for the same thing.

MR. MAYES: I'm not sure it matters what we call it. The phrase that I keep hearing that makes a lot of sense to me, is that preservation is a widely held ethic, but it is not a deeply held ethic for most people. Most people assume that preservation tools that we have are in place. In fact, most people assume they are stronger than they are. Most people assume if something is listed on the national registry, it can't be torn down. It sure can. It's not a very deeply held belief, so when it bumps up against property rights or this fundamental ordinance, or our own incapacity to articulate what our standards are, then it doesn't fare very well and that's a fundamental problem we have to work on. That was cheerful.

#### AUDIENCE QUESTION & ANSWER

MS. WOOD: Well, I'm sure there are lots of questions in the audience that will bring out more, so I just want to open it up to you all, so if people want to raise their hands, we can cue up the mics, maybe start right there and then go over to Lisa.

AUDIENCE MEMBER: So first of all, for the record, in my application for admission to Columbia in 1984, I wrote something about sustainability, although I didn't call it that then because I didn't know what it was, but I'm totally on board with the first theme. Earlier, I think it was Margery, who mentioned something about there is no master plan in the city of New York. I'm really curious about that because I came across the whole State Zoning and Enabling Act business from the 1920s, that came out of the Department of Commerce, and one of the key elements was that you must or should have

a master plan and most of us out there in the rest of the country deal with these problems every ten, twenty years even revising our master plans. It's a painful process and at one point, we had one of our preservationists saying we should get all of our surveyed historic properties designated in this round of our master plan revision, because after all, they're surveyed historic and so they should be designated and the rest of us went, "That should never happen." But anyway, long way of asking, should that be one of the things you all do to improve these issues that you're talking about with the disconnect between agencies, and would a master plan make it all better or not?

MR. WOOD: Carol can join the family.

MS. WOOD: I think Carol can handle that one.

MS. CLARK: No, New York City does not have a master plan, and I don't think it contemplated ever having one. It has a zoning resolution and some very good planning does take place. But as I was presenting today—it's probably inadequate for those of us that are concerned with the built fabric throughout the city that is unlikely to reach the designation.

MR. MAYES: The reality is that planning an effort like that would take many years. It would not be a doable accomplishment within a four-year administration.

MS. VAN INGEN: The question does raise another point that I think is important: that preservation law is only one of the tools we use and there are planning tools, zoning tools, tax incentives, and preservation easements. There are also tools that we don't necessarily think of as preservation tools, and one of the things Jerold just mentioned very briefly was we need to make sure that the people who are applying those other tools have preservation built in. It's a value there and we need to do the hard work to make sure that message is carried through. I don't think we can emphasize that enough, because it really takes a whole quiver of arrows to make a project work.

MR. WOOD: And I think that's really an important particular observation especially for New York City. Because of our love affair with our Law, because of how long it took us to get the Law, because of the sacrifices made when we got the Law, it became the name of the game for doing preservation in New York City. Other cities that didn't have laws had to develop other arrows in their quiver. They didn't have the big arrow. Maybe they had darts, but we've always played with the big arrow and I think we need to deliver. We need to look at other cities that had to develop a variety of other techniques, so that we can employ all of them. I think back to Kate's earlier hammer and nail reference, and we do tend to see every preservation problem in New York as being solved by the Law because that's what we have to work with. I mean that's how we initially think, and we've got to break out of that. No matter

what we feel about the Law and its condition today, alone the Law cannot accomplish all that we as preservationists would like to achieve for our city, and so we need those other tools.

MS. WOOD: Lisa, you had a question?

AUDIENCE MEMBER: Yeah, a Green building issue. There was a conference here a couple of months ago, where Emily Wadhams, as a keynote speaker for the National Trust, said that she actually believes there's a great crisis in terms of the preservation community, and really the sort of general lack of engagement in sustainability and Green issues. I think that people like Jim Fitch really laid out why keeping a building is Green. I do think the landscape, largely because of the recession, has changed, and there's a much greater focus on improving efficiency of buildings and developing of metrics. I don't think the preservation community is nearly as engaged in those conversations. Things are moving quickly and I think if more people are involved, we are at risk. I guess that's more of a comment than a question but if anybody would like to respond.

MS. WOOD: I know the Municipal Art Society has a strong interest in sustainability and its intersection with other planning and preservation issues and it would be great to see that kind of leadership on that specific issue filter down into the neighborhoods. With real collaboration with the organizations that are doing preservation work in all five boroughs we could really get up to speed on those issues.

MR. MAYES: I'll just respond and say this, in addition to the work Emily has been doing, trying to do additional research on all of these topics and continue to look for more information that should be forthcoming, it is a big issue and I want to second something that Anne said. So much of the current Green movement, and LEED certification in particular, is built around selling products, and one of the things that's interesting about preservation is that it's, to some degree, anti-consumerist. I don't really want to be quoted saying that but-

MR. WOOD: Speak into the mic.

MR. MAYES: Preservation doesn't necessarily-

MS. VAN INGEN: It's labor intensive so that's good.

MR. MAYES: Right, the money goes to a different place. It stays locally, because the labor and all of that, but it's fundamentally not about product.

MS. WOOD: I see Simeon has a question back there.

AUDIENCE MEMBER: One thing that has been touched on throughout a lot of the presentation discussions today but actually hasn't been elaborated on is the role of community activists within this. Obviously we're talking about underlying law and that was the focus. It was a terrific focus, but the interaction between the actual residents and citizens; can somewhat talk to in implementing the Law? I mean a law is great, but it creates a bureaucracy that, in many times, doesn't actually serve the constituents that brought it there.

MR. MAYES: Well, I'll jump in because I think Karen on the panel or perhaps Linda, did mention it briefly, and just said it's critically important for there to be an active engagement. The preservation activist community has to go to those hearings and present evidence, so the Landmarks Commission can have some other body that presents evidence for them, other than the property owner. It's important for them to be able to develop the record. It's important for them to be able to do things that the commissions can't necessarily do. So I don't think I can overemphasize the importance of the nonprofit community.

MR. WOOD: No, I think that underscores the history of the Law. We have the Law because the neighborhood didn't give up, and kept fighting. So, the role of the community advocates is essential. I think one thing that has to be done as we look at the 50th anniversary, is really have our advocacy community take a look at itself. We probably never have had more preservation groups in New York City on the ground in our history. There are probably more perseverance groups in New York City than combined in other parts of the country. I think it is fair to ask whether we've got that community as well organized, as well networked, as well in sync, as it needs to be to take on the challenges in the future. Some of our organizations have evolved and changed over the years. The Landmarks Law may be middle-aged, but some of our long-standing preservation groups are well beyond middle-aged. So I think it's time to get more conversations going there. The Landmarks Law is at a point in preservation where it looks like it's something that is being administered so the Commission is run more as motivated by the administration. The early leaders of the Landmarks Commission were preservationists. Recently, we've had good managers that have been running it. I think we can look at the preservation community itself. We need leadership, we need passion, and we've got terrific people. We've got terrific energy. I question whether we've got it all aligned as elegantly as it needs to be to take on the challenges in the future.

AUDIENCE MEMBER: Just parroting off that, there was talk about how the political and economic capital is just not there right now to do what we want to do, any thoughts on changing that? I would just like to say that I don't think it's a foregone conclusion, just because the political will isn't there. I mean

that's what democracies are for. Let's change it. Let's get pissed and change it, right? Let's vote new people in and you know, push for exactly what we want, and during a recession, is ideally when there's less building. Wouldn't this be the time to mobilize and say, "Alright, when the developers start knocking down the door we've got people that are going to support the people's agenda about this?"

MS. VAN INGEN: I agree with you, and I think one thing that can happen, speaking of the nonprofit sector, is that this is a moment I think for every organization, every nonprofit that cares about these issues, to really start building membership, because foundation money is dropping off. Foundation money is moving to other more, what they would consider perhaps more, vital causes. So the sort of larger grant systems for the nonprofit infrastructure in the historic preservation movement in the city is shrinking. Membership though, is where you can build dollars, so I think that speaks again to broadening our outreach, and getting people engaged in this very, very important sector of movement which is that nonprofit sector. I think what we're having to do at this moment is build membership.

MR. WOOD: And I agree with your sentiment but I'd tweak it a different way. I think membership is a phenomenon of my generation. It is not a phenomenon of the Millennials. If you look at what's going on in terms of membership with groups, I think it's perhaps less about traditional membership, and more about engagement, engaging as many people as possible and then accessing funds from those people in new and creative ways that we're beginning to see around particular causes. So if you look at what people are writing about, social networking, and use of the Internet, books like Clay Shirky's *Organizing Without Organizations*. The way social change is beginning to happen is by mastering those tools and engaging large numbers of people, which is what we would have to do to have the political clout we need in the city. That's a generational challenge. I'd be the last one that should be planning that, but I know it's needed, and I think there is great hope and a reason for optimism. You know, in the old days, how could you find likeminded people who cared about wanting to save Brooklyn Heights? Otis corralled neighbors and they met in church basements. And that still happens today, but you go on the internet and you're going to have a 1000 people all of a sudden responding if you start reaching out and you start articulating what we care about and offer people an opportunity to get engaged in a way that meets them where they are in their lives.

MS. VAN INGEN: As long as we make sure that each of those people gives five dollars.



MR. WOOD: Absolutely, tweet five dollars to Anne Van Ingen. What's your number Anne?

MS. VAN INGEN: We still need to pay the rent, still need to pay staff, a professional preservation community is still an incredibly important piece of this conversation.

MR. WOOD: But all for money.

MR. MAYES: And don't forget that the National Trust is a membership organization.

MS. WOOD: There was an article in *The New Yorker* recently about how social networking, social media, has changed or not changed the face of advocacy and how it's a tool that can be used effectively, especially, he was arguing, in cases where you're trying to reach a large number of people and ask them not to do very much. There's certain things that can be solved very effectively by that. All you need is the numbers. Petition signing is sort of the traditional mechanism, but if you can reach people and ask them for five dollars, or their name on a petition, or something else, to like you on Facebook, that can send a strong message. It doesn't work for every problem, but I think it's an interesting thing. I think going back to the question about all of these problems and how do you handle them and the word was brought up earlier about priorities. What our priorities are is a conversation that we need to have as a community, not just the advocates, but our colleagues in government and other non-profits, to figure out how all this works together. What is the low hanging fruit that we might be able to accomplish this year, given the political and economic realities, and what are the things that we need to start working on now, knowing that things will change in five to ten years? Steve, right here in the front row?

AUDIENCE MEMBER: A lot of battle metaphors have come up about mobilization and connecting, and I think that's natural for a relatively small community of likeminded people that are trying to organize something, but Jerold referred to this notion of popular understanding that really is what you have to have in front of you in this field. So I'm wondering how one enlarges, or changes, that popular understanding, and gets more diversity in our community?

MR. MAYES: May I? I just want to respond to some degree to say that's a fundamental issue. One of the themes throughout today has been that first, we're a professional community, we have professional standards. We apply these relatively complicated laws. We make decisions in a contextual manner where we're applying standards, where part of the procedural due process protection there is that the boards have certain types of qualifications. Well, what's missing there is that popular understanding of what preservation is and

I think one of the great opportunities of the new social media changes that are happening, whether we want them to happen or not, is that dynamic is going to change regardless. I think the opportunity that's there is to figure out, what does the public want? What is this widely held belief of perseverance? And let us hear and let us listen to what that is. I'm not sure what the mechanism for that is. The Trust has some ideas that we're working on because that's the core of our mission. But I think that's a fundamental thing facing us and something we need to have on the list of key things to work on.

MS. WOOD: Laurie, right there in the back.

AUDIENCE MEMBER: A number of the people who have spoken today about how other cities have been talking about tax incentives that were available to the owners of historic properties. They didn't go into detail, but I know that's something in New York City. Aside from the Tax Act Project, which is not really available to most private people, we've never really had those kinds of fundamental incentives for historic property owners. I think politically, and probably economically, it would probably not be the right moment in New York City. However, that seems to me something that would be extraordinarily attractive and might sway those who are not so excited about being historic preservation owners to our side. Is there any thought about that?

MS. VAN INGEN: Well the Preservation League of New York State has struggled for years to get a state level tax credit, exactly what you're discussing, and in fact, one was enacted a year and a half ago, the Historic Homeowners Tax Credit. It only applies in certain census tracks, so it's not a perfect tool, but it does apply to certain areas of New York City, within the five boroughs. Certainly, I agree with you Laurie, what makes people do the right thing in this town is money, it's real simple. It's all about the real estate. It's all about the tax incentives, and I think we are heading in the right direction. We've taken a big step forward in that New York state law and I think the Preservation League deserves a lot of credit for sticking with that one for about the eight years that it took to get it, it's not perfect, but it's better, and there's room to expand its applicability.

MR. WOOD: Laurie I think that's a perfect example of tools in the preservation toolbox here. Those tools do take years to happen, but now is exactly the right time to be thinking of those things: designing them and beginning to build the constituency. Three, four, five years down the road, we'll have them, but not if we don't start on them today.

MS. VAN INGEN: I know we're done with questions and we're just about to wrap up. I just wanted to say that this has been an extraordinary day. I think

Jim Fitch would've been thrilled. I think this is a Fitch Forum worthy of the name and I thank all of you for coming very much.

#### CLOSING REMARKS

Introduction: Mr. Vin Cipolla

Speaker: Mr. Tony Hiss

MR. SCHNAKENBERG: Thank you Kate, thank you Tom, and thank you, of course, Tony. We're going to wrap up now. To introduce Tony Hiss, we've asked Vin Cipolla to have that honor, and I'm very pleased to introduce Vin to all of you.

Vin is the President of the Municipal Art Society, and began his tenure as President during my fellowship as the Ralph Menapace Legal Fellow at MAS. That was a terrible thorn in Vin's side. As he started his first week at MAS, I walked into his office and said, "Hey, there's a really, really difficult and complicated preservation fight that's going to be largely unpopular and no one is going to be happy with our answer," and that was my first conversation with Vin. So thank you for tolerating that. Vin, before joining MAS, was the President and CEO of the National Park Foundation. He continues to serve on its board as the Citizen Chairman. Before that, he was Vice President of the National Trust for Historic Preservation. Vin has done many other things that are on the website and in the printed material. Here's Vin to introduce Tony.

MR. VIN CIPOLLA: You know I love you David Schnakenberg, and we miss you at MAS. David was a tremendous asset to MAS, as I know he's been a tremendous asset to this conference, so thank you David for everything that you're doing, and to all the sponsors, a tremendous work. I haven't been able to be here all day, but the portion that I've been in has been absolutely fabulous.

To Andrew Dolkart, thank you for your leadership, and always here in New York, and Tony Wood. I mean, life without Tony Wood, that is a miserable, unspeakable horror. Thank God for Tony Wood. Also, it's really nice to see Paul and Tom. The brilliant Tom Mayes and Paul Edmonson who continue to work so tirelessly around the country. And, Anne Van Ingen, for your extraordinary leadership over so many years, and your voice, your powerful, passionate voice, and congratulations on recent developments. And it's nice to see Al Butzel and Otis Pearsall in the room among others who worked so closely with MAS.

Kate Wood for her leadership, and all you do, Kate, with Landmarks West! for all of us in New York. I saw Peg Breen earlier; Judith Saltzman who chairs our Preservation Committee. Frank Sanchis and Lisa Kersavage, who do more than carry the preservation flag at the Municipal Art Society.

MAS, as everybody knows, has been synonymous with legendary preservation battles in New York. Today, MAS works to maintain the fabric in

New York's sense of place and community in this period of rapid change that we've all been talking about and finding the right balance between preserving important structures, and building our future. It isn't an easy task, as our last panel was debating, but it isn't impossible either. A highlight of our recent work, as Lisa had underscored, and was brilliantly executed by Lisa Kersavage, was MAS's conference on preservation and climate change last fall. With the support of many of you, and with the National Trust, that conference really worked at bringing together, as Kate mentioned, the importance of preservation and sustainability. Preservation and sustainability are two aspects of building our city that haven't always gone hand-in-hand, but actually have a tremendous amount in common which was pointed out by Anne.

Those familiar with MAS know that we are actively involved in the Garment District, an area of Manhattan where there's rich cultural history and an uncertain future. Andrew Dolkart has also been keeping an understanding and knowledge of the Garment District and its importance in architectural history alive. The district is a unique area of New York, where planning, preservation, entrepreneurship, urban design, livability, economic development, and aesthetic issues converge. The Garment District is in many ways the story of New York and an excellent example of a multilayer character in the city. MAS is conducting research and presenting forums for robust debate about the future of the neighborhood, which has helped to make New York City a global fashion capital, truly one of our most treasured places, and a hot spot for all kinds of entrepreneurship, both social and commercial—[www.MAS.org](http://www.MAS.org) is a very splendid website, with information on so many things. So the Columbia students in the room, if you're not a member of MAS, complementary membership is on me, first year only; you can use social media to get to me or you can give me your email address on the way out if you'd like to be a member of MAS. If not, we'd love to have you.

I'm about to do one of my favorite things ever. I got to do it twice so far in the last couple of months, and that is to introduce the very special wrap-up speaker for this tremendous meeting. Someone who has written extensively on the experience of place and urban environments, Tony Hiss. He is an acclaimed author who explores the way we think about and interact with cities. Tony was a writer at *The New Yorker* for more than thirty years and has also written for *The New York Times*, *Newsweek*, and *Travel and Leisure*. He has lectured around the world, and is currently a visiting scholar at New York University's Robert F. Wagner Graduate School of Public Service. The National Recreation and Park Association's National Literary Award praised Tony for a lifetime of spellbinding and poignant writing about how our environments, modes of travel, and other aspects of the American landscape affect our lives. His 13th and most recent book, *In Motion*,<sup>2</sup> looks at our daily travels in some of the most public spaces and how simple changes in our

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2. TONY HISS, *IN MOTION: THE EXPERIENCE OF TRAVEL* (2010).

viewpoints can bring about a heightened experience and a deeper connection during these journeys. Tony's sense of travel became something useful, not lost time that we strive to recover. Please join me in welcoming the champion of urban places, a wonderful friend of MAS, a dear friend of mine, and I know to many of you, Tony Hiss.

MR. TONY HISS: Thank you. What a treat and a privilege it is to try to digest some of this extraordinary day. The first thing I noticed was that it was built on several deliberate oddities cutting across so many different grains. Not too many people usually turn out for a 45th birthday, and yet here we all are. People who love to walk the city have spent an entire nine-and-a-half hour day in a dim, dark, basement room. Talk about Plato's cave.

Another oddity: 100 brilliant minds in the same room for nine and a half hours, all thinking about the same subject. Another oddity coming up over and over again: so many passionate remarks about not being passionate enough. And finally a conference that actually began with a remarkable keynote that really set the tone for the entire day and helped to advance and focus the discussion.

Let's review a little bit, and then I'll pull some things together. Adele began by telling us that the Romans chopped off the hands of those that destroyed historic buildings; whereas in the U.S, we didn't get started until the Antiquities Act of 1906, which drew the first line in the sand; and as she said we've barely begun.

Jerold began his speech by saying preservation is middle-aged and drew a distinction between zoning and historic preservation. He said zoning is basically preventing harm from new development. Historic preservation is a separate and distinct legal and regulatory regime that rejected zoning thinking and asked the question how do we think about existing buildings? He called it a revolutionary and radical approach to the legal regulation of land use. We went through some of the great moments. *Penn Central v. New York City*, can enough be said about it? He said no, should we designate this decision? It validated and disseminated New York's Landmark Law by declaring that diminution of value is not necessarily a taking. Though if regulation goes too far, it is a taking. But he reminded us that what also lives is the dissent from that decision, which could be summed up in two words, "It's unfair." When do we know a taking has occurred? He said no one can authoritatively answer that question and ambiguity is inherent. He promised to be the 2056 conference keynote. I'm sure Tony will hold him to that. He talked about broadening the histrionic understanding of preservation because, he said, landmarks guarantee emotional stability in a world faced by frightening change. Then he posed the intriguing question, is historic preservation a universal right? We then got into a wonderful discussion in which Paul Edmonson talked about how landmark planning laws now recognize the importance of landmarking, but he too talked about a surge of rhetoric within the framework of property rights that has blocked designation.

The issue of owner consent has come up. Historic preservation, he said, stands on firm judicial ground, but on vulnerable ground rhetorically. He talked about cutbacks in funding and about how the laws are only as strong as the administrative structure that administer them.

Tersh began by saying, "Oh, to be middle aged again." He acknowledged there are very few in the District of Columbia who understand what landmarking is all about; a very esoteric field. He said, "Universal rights scare me, I like operating under the radar." He said we have problems with educating people, and with handling nonsense, but not with the law. Jerry came back to say that viewshed protection has been a standard for years for natural views and Ken Livingston, the former mayor of London, extended the principle to London management protection of river views and landscape views.

We talked about the political outcry that shocked people over the eminent domain decision of the Court a few years ago. A question from the audience: "Why can't the law be easier to explain? It takes about five lectures to explain." Jerry said it's crucial that it be very technical. On the other hand a universal right is a tether, an anchor to something physical. The built environment is part of who we are as human beings. We may not have loved the World Trade Center towers but boy, do we miss them.

We got the wonderful contributions from the wonderful people around the country, Linda, Brian and Karen. Linda pointed out that the L.A. ordinance is older than New York City's ordinance. More power to them, and their law has never been challenged locally. They now administer jurisdiction over about 27,000 in about 180,000 buildings. "We are just beginning our odyssey," she said. They also protect interiors just because no one ever told them they couldn't. They have jurisdiction within L.A. County. When they did a survey, seven of the eighty-eight cities got a "B," fifteen got an "A." Beverly Hills was very proud of its "B." On the other hand Huntington Park, a 98% Latino community, was furious that it only got a "B," and has worked its way up to an "A." Her message, she said: "Use all the tools, and have really good friends. Ultimately, it's about saving buildings, and making sure they'll be there for the next generation."

Brian showed us a picture of the great perseveration martyr, Richard Nickel, who was destroyed in one of the demolitions in Chicago, carrying a sign saying "Do we dare squander Chicago's great architectural heritage?" They now have fifty-three historic districts to 10,000 buildings, two thirds in the last twenty years. Their department merged with the Planning Department in the '90s, which he said is a good thing for them.

Yes, there's competition for limited money. Yes, we have to streamline how we give permits, but preservation contributes to the economic well being of the city. He brought up the intriguing idea of local thematic designation, where buildings are connected not physically, but by their use, purpose, meaning, and intent. This includes the Black Metropolis on the South Side of Chicago, the

Black Literary Renaissance, and some wonderful South Side churches united by the fact that Martin Luther King had preached in them and some local banks. He said, "This thematic unity gives us a much more compelling story and argument."

He asked a lot of timely questions: How do you establish priorities? Must all fifty-year-old changes actually be retained? Should we think of historical and cultural standards as lower than architectural standards? Can you allow greater changes to buildings of only neighborhood importance? Should all fifty-year-old properties actually be designated?

Karen said, in Seattle, the law is modeled on New York, which came about in 1973, but they don't just designate places like Pioneer Square. They designated the Space Needle, the Monorail, historic vessels, filling stations, and fire stations, a church battle that took twenty-five years. It was an issue when she got there in '84, and it has only just been resolved. Asked the question, she said she doesn't know if there was due process, but she said there certainly was enough process. Is public support growing or waning; she wanted to know. She thinks historic preservationists have been too quick to abandon sustainability as an issue. Embracing sustainability would gather a following for them, one that preservationists should take credit for.

Tom, as the moderator, asked a question about vagueness, pointing out that people still think that preservation is a subjective exercise in personal taste, which came up in Chicago with the banks. They included a modern bank among some beautiful neo-classical banks, and it was a horrible experience, according to Brian, because a councilman said, "I like brick and stone, that looks old to me." Tom said the perception that modernisms are outside our range is only beginning to crumble, if you can remember when preservationists didn't even recognize Victorians as historic buildings. They were just Charles Addams monstrosities, and then it took a long time to accept Art Deco as historically worthwhile of preservation.

Linda talked about the depredations in Pasadena. A Texas truck driver drove up in the middle of the night to steal the lights from one of the thirty-three Greene & Greene houses. Each one of the light fixtures was worth more than the entire house. Some lights came back through guilt, others were replicated.

In the halls and at lunch, I overheard a number of conversations. A New Jersey consultant said, "My state is the state of home rule." Maybe 200 of the 500 towns have ordinances but no one really thinks beyond their own town, even though environmentalists do. There's no sense of regional collaboration within the states, let alone across the Hudson. She found she misses the specific information she used to get in the *Preservation Law Reporter* that helped her on how to apply various review standards.

Someone else said, "I see a push-back, a wave of enthusiasm has led to acceptance and then ascendance, by preservation, then bureaucratization and a push-back. Former enthusiasts now feel burdened and restricted." He thinks arbitrary and capricious is inevitable, because the field is so economical.

Economists are responding to a different aspect of the whole, the famous Central Asian story of the blind man and the elephant.

Is support eroding? That question kept coming back, and then after lunch, we had another series of wonderful presentations. Otis called the local Law the most remarkable success story that you can imagine. When we started in 1958, he said, he thought maybe there would be three or four historic districts, and now there are 110. Until there's a mechanism to preserve, the Landmarks Commission is the name of the game. Al Butzel asked, "Can we depend on the Commission administering and interpreting the Law even though the Law itself is brilliant?"

Mark said that we have to separate out the impulse to think of other issues needing to be handled by landmarking. There was a certain amount of dispute about that. Roberta asked the question, reminding us that the Law was a reaction itself to the overkill of urban renewal, and it's often a threat that gets people thinking. She's never seen a neighborhood law used inappropriately. All the places they put forward for designation are places that have historical value. Tony Wood said, for the record, he saw no cranks in the audience.

Then, we had some remarkable talks about new tools, how the value of preservation easements was temporarily diminished by some bad apples overselling the product, leading to an overreaction by the IRS.

We talked about demolition by neglect. Leading to more, again, ambiguous questions, because some people neglect it because they don't know any better, or can't afford to do anything. Others neglect it because they are uncaring. Then, Carol talked about the whole question of Conservation Districts as a way of extending protections to perhaps fifty neighborhoods, that may never meet the standards of the Landmarks Commission itself.

At the end of the questions, the moderators got together. Tony asked, has landmarking become a nicety rather than a necessity? What the law has accomplished has been phenomenal, but can we do better? Or do we need to be content with the wrinkles, rather than try for a facelift and take on smaller issues?

So some of the themes that I heard there: middle-aged, revolutionary and radical approach, when is it a taking, vagueness versus fairness, rhetorical renewal, explaining purposes better. Someone said, "We won the Law but now we have no friends." Can we capture the high ground on sustainability? Is there anything like a universal right to historic preservation?

I thought there was a lot of talking about takings, but to me historic preservation is as much a taking as it's a giving. It's something we extend to ourselves. Jim Fitch, I think, would've been right in the middle. He would've asked every question. So he is present with us today.

Perhaps it was in some ways, as Roberta was alluding to, easier to be a preservationist in New York forty-five years ago. The city stayed the same the first time from 1929 to 1946 basically, and then faced a huge explosion of change in the 1950s, which then led to power and outrage. We also now meet



in a different context. On the one hand, we have post-9/11 lessons. We've learned from our sorrow that the physical is inherently fragile and temporary, although the spiritual isn't. We now meet in the context of the goals put forward by the PlaNYC people. We have to think about protecting what we have within the context of adding at least another 600,000 New Yorkers by 2030.

At the same time, what endures and what fades, even with the Landmarks Commission, seems arbitrary and capricious. We're getting ready, in a month, to celebrate, if celebrate is the right word, the Triangle Shirtwaist Fire. That building stands and is in robust health as a chemical classroom building at NYU on Washington Place. While we read in the paper just the other day, at least nine of the eleven buildings on Admiral's Row in the Brooklyn Navy Yard seem doomed.

What is it that we're carrying forward? To me, landmarking is entirely a future-oriented passion. What is it that we love, that we're going to give as a present to our children and grandchildren? Perhaps "historic preservation" is a misleading name because it's really about continuity. We have an intergenerational bucket brigade so that people who come after us can refresh by the same waters that sustain and delight us, nourished by the same experiences and richness. Solve this question and New York can become the model mega city of the 21st century, as it was an emblematic city of the 20th century.

Now, thanks to Columbia, and many other institutions, we have for the first time a professional generation trained in preservation management: citizens with skills, citizens with a university degree. At the last meeting that Tony Wood organized a few years ago, Ken Jackson said, "New York is about change." Let's not think too much about landmarking, but instead think landmarking is about changing the way change comes, so that it comes at several different paces, so that everyone has an anchor. Why do people stay put, why do they move on? Landmarks help us stay in touch with ourselves. We're just learning about "interior preservation" as it might be called. What goes on within our own minds? My book, that Vin was kind enough to hold up, talks about a neglected form to awareness that I called Deep Travel, that's built into everyone, that is just now getting rescued and appreciated. Much of our connection to the places that mean most to us comes through this awareness, both with evoking our own memories and with re-establishing the sense we get from places that are older than we are, of rejoining a long story that began generations ago and is far from finished. These places hold onto a larger sense of the here that we are part of, and the longer now that we are part of.

Jim Fitch often talked about buildings being people's "third skin"—our own skin being our first skin and clothing being our second skin. Landmarks, in this sense, are part of our third skin. They are the context of experiences and connectedness that a community can provide and evoke the mental and feeling context that helps us keep our wits about us and fuels the energy and creativity of a great city. Buildings are not just embodied energy. They are

embodied skills, thoughts, and perceptions. Some of them odd, some playful, some profound, some dead wrong. They are the embodied craftsmanship of a generation. They are messages from their creators that are now ours to absorb and to pass on.

Preservation is as much about a conversation with our surroundings as it is the conservation of our surroundings. They are, in a sense, older brothers. They are things we can count on. Landmarking is like packing for the future. What is it we want to have with us when we get there? They give us a different sense of permanence.

PlaNYC not only tells us to expect 600,000 more New Yorkers, but it tells us to expect summers like Atlanta, to expect sea level rise. It's also about a different sense of temporariness. Can we, as a species, among millions of species, make it intact through the 21st century? We've been handed, without having asked for it, a multi-generational task. We're in the middle of a long emergency. We're all on an ark with five decks and already as a species, occupy two and a half of those five decks. We're on our way to occupying three of them with the two by two animals pushed onto the rest of the ark. It's going to be a long white-water ride before the ark is safe.

E. O. Wilson, the great biologist, calls the next century the "great bottleneck," but I think part of the reason that the whole preservation conversation seems slippery or vague or ambiguous, perhaps, is because it's a left-brain, right-brain kind of split. So much of what preservation does, yokes on together the very practical and the very specific with the ineffable. Yet, as David reminded us in his review of the history of the Law, it was the enabling laws and the court decision that countrified, as the law of the land, as the law of the city, what previously had been considered ineffable. The Supreme Court ruling that extended constitutional rights to the ineffable, said that public welfare rights are spiritual as well as physical, aesthetic as well as monetary; that communities have a right to be beautiful, spacious, and well-balanced.

The New York City Landmarks Law of 1965 said that when buildings with a special character have been uprooted, their absence is an irreplaceable loss to the city. Larger areas have had their areas of distinctiveness destroyed. This has diminished New York as a world center. So, perhaps the reason we feel this uneasiness is that we dwell between in this unexpected realm within the brain. There's something called the corpus callosum, which is the only piece of brain tissue that connects the left-brain to the right brain. Maybe that's where we find ourselves embodied. Yet we have within us, every one of us, a talent not only to exclude the world when we daydream or when we focus our attention on a specific task, but also to welcome the world back in through this wider awareness. In a place like New York, this awareness is instantly enriched.

Perhaps the emblem for preservationists is the longest-living natural thing, the oldest creature within the city, the Queens Giant, a tree in Alley Pond Park, is over 113 feet tall, and is probably 450 years old. It was here before

Verrazano, certainly here before Henry Hudson, certainly here before Nieuw Amsterdam became a reality, certainly here before New York became a reality, and yet it has endured all this time, just as we're trying to endure through yet another century.

I have to thank Tony Wood for his remarkable leadership in his field, and Carol Clark for wanting us to delve more deeply into these questions of immense importance to us as human beings and as citizens of a great city. Thank you for your attention this afternoon.

MR. SCHNAKENBERG: So that's the end of what I think was a pretty good day. Thank you everyone for joining us. I want to thank our funders and sponsors and our partners. I want to thank the Fitch Forum Planning Committee. Thank you Jerold Kayden and Tony Hiss. I want to thank, particularly, Janet Foster, who runs this building. Really this conference would not have happened without her. Thank all of you for being here, and really thank you Tony and Carol again, for putting the Fitch Forum together, envisioning it a year ago and really forcing it into being. So thanks to all of them as well. Thank you guys.