

**ENFORCEMENT
AND THE NEW YORK CITY LANDMARKS LAW:
PAST, PRESENT, AND FUTURE**

Benjamin Baccash

**Submitted in partial fulfillment of the requirement for the degree
Master of Science in Historic Preservation**

Graduate School of Architecture, Planning and Preservation

Columbia University

May, 2010

**ENFORCEMENT
AND THE NEW YORK CITY LANDMARKS LAW:
PAST, PRESENT, AND FUTURE**

Benjamin Baccash
Advisor: Anthony C. Wood

This thesis hopes to improve the enforcement procedures of the New York City Landmarks Preservation Commission (LPC) and further the protection of the historic resources under its regulation. Using the evolution of enforcement at the LPC for context, this thesis will examine how enforcement functions today. This examination will be complemented by a selection of case studies to further an understanding of the system. This thesis will then look to the enforcement methods of a selection of federal environmental laws and local preservation ordinances to inform recommendations to the historic preservation community which hope to improve enforcement of the New York City Landmarks Law.

ACKNOWLEDGEMENTS

This thesis would not have been possible without the cooperation, help and generosity of the many people I corresponded with and interviewed over the seven months it took to research and write it. Anthony C. Wood, my advisor, provided me with invaluable guidance, introductions and criticisms. Without him, this thesis would not be nearly as coherent or comprehensive. Kate Wood of Landmark West! and John Weiss of the New York City Landmarks Preservation Commission were members of my thesis jury and I thank them for taking the time to meet with me, respond to my many e-mails and read and critique my work product in addition to providing me with insider knowledge and information which without, this thesis would not have been as informed or worthwhile.

Interviews comprise the majority of the research conducted for this thesis and I appreciate the time taken by each of my interviewees to speak with me. Thank you to David Alpert from Greater Greater Washington, Simeon Bankoff, Executive Director of Historic District Council, Michael Beidler, Senior Preservation Specialist for the D.C. Historic Preservation Office, Carol Clark, Deputy Commissioner of the New York City Department of Housing Preservation & Development, Andrew Dolkart, Director of the Historic Preservation Program at Columbia University, Franny Eberhart, Board Member of Friends of the Upper East Side Historic District, Lily Fan, Director of Enforcement at the New York City Landmarks Preservation Commission, Frank Gilbert of the National Trust for Historic Preservation, Brian Goeken, Director of the Chicago Landmarks Commission, Amy Guthrie, Preservation Officer for the City of Aspen, Martha Hirst, Commissioner of the New York City Department of Citywide Administrative Services, Nancy Metzger of the Capitol Hill Restoration Society, Jim Peters, Executive Director of Landmarks Illinois, longtime preservationist Otis Pearsall, Stephen Raphael of Raphael & Marks LLP, Kathleen Rice, an Enforcement Officer with the Landmarks Preservation Commission, former New York City Landmarks Preservation Commission staff member Ron Roth, Tomas Reynolds, a Manager at the Museum of the City of New York, Elizabeth Sappenfield, Director of Urban Issues for Preservation North Carolina, Mark Silberman, General Counsel to the New York City Landmarks Preservation Commission, Nadhezda Williams of the Historic Districts Council, Drane Wilkinson, Director of the National Association of Preservation Commissions, and Pepper Watkins, Special Projects Manager for the National Trust for Historic Preservation. You all provided useful information, only some I was able to incorporate but all of which influenced my perspective and final product.

Lastly, I thank my brother Matthew Baccash, my mother Elaine Gay, and my friends Ben Muessig and Katie Chao for all of their proofreading efforts and advice. Lastly, I thank my dear friend Allison Lyons with whom I had a conversation that spurred the idea that became this thesis and subsequent discussions which made it all the better.

Ben Baccash
M.S. Historic Preservation, 2010
Columbia University Graduate School of Architecture, Planning and Preservation

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. A HISTORY OF ENFORCEMENT AT THE LPC.....	6
A Law in its Infancy (1965-1978).....	6
A System is Grown (1978-1994).....	11
Formalizing Enforcement (1994-1998).....	23
Functioning and Maturing (1998-Present).....	30
III. ENFORCEMENT TODAY.....	42
How the Landmarks Law is Enforced.....	42
Enforcement in Action.....	56
<i>Lenox Hill Brownstones</i>	57
<i>16-18 Charles Street</i>	63
<i>Sushi Samba 7</i>	68
<i>The Windermere</i>	71
IV. LEARNING FROM OTHERS.....	76
Enforcing Federal Environmental Law.....	76
<i>The Clean Air Act: Standards and Enforcement</i>	77
<i>The Clean Water Act: Standards and Enforcement</i>	80
<i>The Resource Conservation & Recovery Act: Standards and Enforcement</i>	82
<i>The Comprehensive Environmental Response, Compensation & Liability Act</i>	87
Enforcing Local Preservation Ordinances.....	94
<i>Aspen, Colorado</i>	94
<i>Washington, D.C.</i>	101
V. IMPROVING ENFORCEMENT OF THE LANDMARKS LAW.....	112
VI. CONCLUSION.....	139
APPENDIX.....	143

I. INTRODUCTION

The New York City Landmarks Law is touted as the premier stronghold of local historic preservation legislation.¹ However, preservation advocates argue that landmarks designated under the Landmarks Law -- scenic open spaces, significant architectures, cultural treasures and archaeological deposits, among other historic resources -- exist in a partially defenseless state resulting from deficiencies in how the law is enforced by the Landmarks Preservation Commission (LPC). Enforcement is the fulcrum of the Landmarks Law. Without the strongest possible enforcement system in place at the LPC, the Landmarks Law is incapable of providing the degree of protection which its reputation commands and necessitates.

Enforcement of the Landmarks Law is where historic preservation is tested in the real world as a regulatory cause and where the LPC is challenged to uphold the landmark standard. The Landmarks Law states the benefits of landmark designation as “aesthetic, cultural and historic values” that are in the “interest of the health, prosperity, safety and welfare of the people”.² It was enacted to “stabilize and improve property values;...foster civic pride in the beauty and noble accomplishments of the past;...protect and enhance the city’s attractions to tourists and visitor and the support and stimulus to the city;...and promote the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.”³ With these benefits in mind, is it possible that the Landmarks Law is not enforced sufficiently?

According to some, the answer is a loud-and-clear “Yes”. Preservation advocates contend that because it is not adequately enforced, the Landmarks Law is reduced to mere words on paper and consequently the protection that designation commands and the benefits it intends to

¹For a copy of the Landmarks Law, see the Appendix.

²New York City Administrative Code Section 25-301

³Ibid.

confer as a “public necessity” are compromised.⁴ Designation means much less, if anything at all, as a result of what they postulate a defective enforcement system, leaving supposedly protected landmarks vulnerable to unapproved alteration or even malignant neglect, thereby obstructing the ability of the city and its inhabitants to reap the full benefits of the Landmarks Law.

Preservation advocates claim that the LPC is too lenient and unnecessarily averse to disciplinary action in enforcing the Landmarks Law, leading to an epidemic of non-compliance. They are not alone in this worry. At the Republican Candidate’s Breakfast held by Landmark West!, a preservation advocacy organization, then mayoral candidate Michael Bloomberg stated, “All of the rules and regulations that everybody talks about always leaves me cold when I then go 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.”⁵ Said another way, according to Bloomberg, while its power to designate and its general regulations are focused upon, the Landmarks Law suffers by not being actively enforced. The fact that the issue was raised in a New York City Mayoral campaign, let alone by a mayor that some preservation advocates would posit is not overly kind to their cause, demonstrates a growing concern for landmarks enforcement by preservationists and non-preservationists alike.

Enforcement of the New York City Landmarks Law should be the supreme priority of the historic preservation community. This thesis will examine enforcement, defined as how the Landmarks Preservation Commission responds to non-compliance with its statute.⁶ Both minor and severe violations of the Landmarks Law, the different challenges encountered in each circumstance and the modes of enforcement available to the LPC will be discussed. Three

⁴New York City Administrative Code Section 25-301

⁵Bloomberg, M. (2001, August 8). Republican Candidate’s Breakfast: Michael Bloomberg. (Landmarks West!)

⁶This thesis will not include an examination of the general regulations of the Landmarks Law and the permit-review process.

instruments comprise the LPC's enforcement system as evolved to date: legal action in criminal and civil court and administrative action. However, while a trident by design, preservation advocates argue that the LPC's enforcement system is a pitchfork in practice.

As the Landmarks Law turns forty-five years old, a formal study and assessment of how the Landmarks Law is enforced is needed. First, this thesis will attempt to derive a historical record of enforcement at the LPC to contextualize our subsequent discussion of the system as practiced today. This is the first attempt to write a history of enforcement of the Landmarks Law.⁷ To delineate this history, interviews were conducted with formal advocates and amateurs of the preservation community in addition to LPC staff members from different eras of the agency's evolution.⁸ The accounts offered herein are individual oral histories and while materials from periodicals supporting or negating what was claimed were sought, all are not corroborated by the written record. Based on the history it will establish, this thesis hopes to deduce how the enforcement system of the LPC has evolved since the Landmarks Law was enacted in 1965. Have events like the Penn Central decision and the ebb and flow of different administrations, both at the Commission and on a citywide scale, affected this evolution? This thesis will attempt to determine if there are lessons which can be learned from the history of enforcement at the LPC and if so, how they can be applied to improving current enforcement of the Landmarks Law. In attempting to answer these questions, this thesis will weave an accurate history of enforcement at the LPC, considering the limitations of oral histories as a method of researching the recent past.⁹

With a cultural context established, this thesis will examine how the Landmarks Law is currently enforced. First, it was necessary to identify who at the LPC is involved in enforcement

⁷This is singularly the history of enforcement at the Landmarks Preservation Commission. It is the history of one thread of many in the history of the LPC.

⁸All interviews conducted as part of the research of this thesis were done according to the method outlined by James A. Holstein and Jaber F. Gubrium's The Active Interview, published by the Sage University Press, Thousand Oaks, California, 1995.

⁹For an account of the LPC's general history, see Marjorie Pearson's *New York City Landmarks Preservation Commission (1962-1999): Paradigm for Changing Attitudes Towards Historic Preservation* published by the James Marston Fitch Charitable Foundation.

of the Landmarks Law and in what capacity. Current LPC staff members were interviewed and the New York City Charter and the Administrative Code of the City of New York were examined as part of this effort. Specific cases of enforcement of the Landmarks Law were researched and serve to exemplify how the Landmarks Law was and is enforced. Interviews with individuals from the LPC and the community involved with these case studies were conducted in addition to review of both LPC files and written accounts in local newspapers and newsletters of preservation advocacy organizations.

Understanding the evolution of enforcement of the Landmarks Law and its function today, this thesis will identify alternate methods that could be adopted for historic preservation enforcement purposes in New York City. While different in their context and scale, federal environmental laws might provide enforcement strategies that could be conceptually adopted for enforcing the Landmarks Law. To test this hypothesis, environmental statutes and environmental law textbooks were reviewed.

Similarly, other locales enforce their preservation ordinances differently. Are there methods utilized in the enforcement of preservation ordinances from other local jurisdictions which might be effective in enforcing the New York City Landmarks Law? Following a survey of enforcement practices nationwide, Washington, D.C. and Aspen, Colorado were examined in depth as demonstrative of innovative approaches to historic preservation enforcement that diverge from the methods employed by the LPC and other locales nationwide. Members of the respective historic preservation government agencies and local advocacy groups were interviewed and the individual statutes examined in addition to reviewing local periodicals.

With an historical record of enforcement at the Landmarks Preservation Commission established, an understanding of its current function and the enforcement methods of other laws examined, this thesis will make recommendations to the New York City historic preservation community on how enforcement of the Landmarks Law may be improved for the future.

Members of the preservation advocacy community were interviewed and recent reports and

studies on the Landmarks Preservation Commission were studied to inform this discussion.

These recommendations serve to enhance the protection of designated landmarks in New York City.

As each month passes, the Landmarks Preservation Commission continues to designate historic districts and individual landmarks.¹⁰ If subject to the current enforcement system, some posit that future designations would be undermined and their fullest protection jeopardized as a result of the persistence of an insufficient and inconsequential enforcement system incommensurate with the Landmarks Law's reputation. This thesis hopes to bring the importance of enforcement of the Landmarks Law and the possible improvement therein to the forefront of civic discourse.¹¹ So read, consider, but most importantly, discuss – this is the past, present and future of enforcement and the New York City Landmarks Law.

¹⁰The following data was compiled from the Mayor's Management Report, published by the Office of the Mayor of the City of New York. In 2005, the Commission designated 15 individual buildings and 1 historic district. A total of 46 buildings were added to the Commission's regulatory portfolio that year. In 2006, the Commission designated 17 individual landmarks and 3 historic districts, a 333 building increase. In 2007, the Commission designated 24 individual landmarks and 3 historic districts, raising the "number of buildings designated in a single year to its highest level since Fiscal 1990." The Commission went from regulating "1,128 individual landmarks and more than 22,000 properties in 83 historic districts and 11 extensions to existing historic districts" in 2005 to regulating "1,199 individual landmarks and more than 25,000 properties in 91 historic districts and 13 extensions to existing historic districts" in 2008. In 2009, 5 historic districts, 33 individual landmarks, 1 scenic landmark and 1 interior landmark were added to the substantial regulatory responsibility of the LPC.

¹¹This thesis does not attempt to include the perspective of individual property owners and their interaction with the Landmarks Preservation Commission. This thesis recommends further study of the relationship between the property owner and the Landmarks Preservation Commission.

II. HISTORY OF ENFORCEMENT AT THE LPC

In April of 1965, the New York City Landmarks Law was signed by Mayor Wagner, giving the Landmarks Preservation Commission the power to protect and regulate local historic resources deemed significant. 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. To understand how the current enforcement system at the Landmarks Preservation Commission can be improved, it is necessary to understand its genesis and development since the inception of the Landmarks Law forty-five years ago. This thesis will examine four distinct periods in the LPC's history defining the evolution of enforcement.¹

A Law in its Infancy (1965-1978)

In its early years, the Landmarks Preservation Commission practiced very little official enforcement. In part, this was due to the Landmarks Law's sole mechanism of enforcement: criminal prosecution.² This meant that to compel owners to respond to issued violations, the Landmarks Preservation Commission had to prosecute them in criminal court alongside those accused of assault, robbery and murder. Otis Pearsall, one of New York City's early preservation advocates, decided to work within what the law provided. He states, "Given the fact that there was no other alternative, [I thought] maybe we could get the local precinct to take some action...So I prepared a desk book, which had the Landmarks Law in it, which I took down to the 84th [police] precinct and gave it to the desk sergeant," in the hopes that the police would enforce the law.³ Not knowing what exactly to do with Pearsall's desk book, the sergeant called the LPC and Frank Gilbert, Secretary the time, told the police sergeant to simply throw it away. In other

¹For a diagrammatic representation of this evolution, see the appendix.

²This mode of enforcement will be discussed more fully later in this thesis.

³Pearsall, O. (2010, February 18). Interview with Otis Pearsall. (B. Baccash, Interviewer)

words, according to Pearsall, there was no intention to enforce the Landmarks Law criminally and his efforts were consequently thwarted.

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.⁴ While Notices of Violation could be issued without the involvement of counsel, their power was limited, some might even say non-existent. No matter how minor or egregious, to officially enforce the law formal legal action was necessary. This required the involvement of the New York City Corporation Counsel Office which, in the words of Pearsall, “had bigger fish to fry.”⁵ 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.⁶ Roth said, “Enforcement was not in the Commission’s vocabulary at the time. There simply was no push and no will to do it.”⁷ He continues, “If there were minor or moderate violations and they weren’t easy to resolve, we would let them be.”⁸ 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, even rarer, a Stop Work Order. 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 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

⁴Norman, L. (2008, October 15). New York Preservation Archive Project: Lenore Norman Interview with Maria Drakos. (M. Drakos, Interviewer)

⁵Pearsall, O. (2010, February 18). Interview with Otis Pearsall. (B. Baccash, Interviewer)

⁶According to Roth, his resignation from the LPC was the result of a work environment which was jeopardizing his health. At the time, he says, a senior female LPC official threatened him with castration if he continued to openly criticize the Commission.

⁷Roth, R. (2010, February 9). Telephone Interview with Ron Roth. (B. Baccash, Interviewer)

⁸Ibid.

LPC violations. While this was a strategic road block that afforded the LPC some 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, absolutely forced a violation to be cured.

At this time, the Commission was very small, with only five staff members for most of the 1970s.⁹ The number of historic resources it regulated was much fewer than today, with a total of 5,576 designated landmarks in 1970 and 9,767 in 1976.¹⁰ Roth explained that even though enforcement action was not often taken, he did keep a watchful eye. 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”.¹¹ The areas which they walked were determined by the number and degree of complaints they would receive. 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.¹² Otis Pearsall referred to these efforts as inefficient “jawboning, plain and simple.”¹³ However, Roth insisted that these measures were useful in maintaining compliance with the Landmarks Law.¹⁴

⁹Wood, A. C. (1987, Winter). Is Landmark Designation Finished? *Village Views* , p. 43.

¹⁰Ibid, p.40.

¹¹Roth, R. (2010, February 9). Telephone Interview with Ron Roth. (B. Baccash, Interviewer)

¹²Ibid.

¹³Pearsall, O. (2010, February 18). Interview with Otis Pearsall. (B. Baccash, Interviewer)

¹⁴Roth, R. (2010, February 9). Telephone Interview with Ron Roth. (B. Baccash, Interviewer)

Journalist Roberta Gratz described the LPC of this period as demonstrating a “purposeful inadequacy” and exhibiting a “timid attitude”.¹⁵ 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.”¹⁶ 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.”¹⁷ During this period even “preservation advocates were lulled into complacency.”¹⁸ In other words, those who are 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.

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 which read “This Law Raises Grave Constitutional Questions.”¹⁹ Gilbert explained that there was a general awareness amongst the LPC staff that the Landmarks Law would be tested; it was inevitable. The LPC was conducting itself largely according to a purpose which had not yet been declared constitutional, but knew that in the near future the Landmarks Law would be challenged but 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 Landmarks Preservation Commission was swimming in largely uncharted waters. While written and enacted as law, historic preservation, as a type of

¹⁵Gratz, R. B. (2010). *The Battle for Gotham: New York in the Shadow of Robert Moses and Jane Jacobs*. New York: Nation Books. p.45

¹⁶Ibid, p.39.

¹⁷Ibid, p.46.

¹⁸Ibid, p.47.

¹⁹Gilbert, F. (2010, April 22). Interview with Frank Gilbert. (B. Baccash, Interviewer)

regulation, had not withstood constitutional challenge yet.²⁰ Beverly Moss Spatt, a Chair of the LPC during this time period, said “We had to move cautiously – we were new and untested.”²¹ Geoffrey Platt, the LPC’s first Chairman, described his primary objective as “to preserve the Landmarks Preservation Commission.”²² Otis Pearsall said, “The [LPC] didn’t know if they were going to be there tomorrow.”²³ In other words, the continued existence of the LPC was not guaranteed and because of this, as preservation historian Anthony C. Wood notes, “[c]onservatism and caution became the commission’s mantra.”²⁴ 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.²⁵ This seems to include the attitude and effort applied to enforcement of the Landmarks Law in the Commission’s early years.²⁶ When compounded with its only method of 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. The inevitable constitutional challenge that Frank Gilbert expected was underway. The Penn Central case

²⁰Even 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. City of New York* [1966], *Trustees of Sailors’ Snug Harbor v. Platt* [1968], and *Lutheran Church in America v. City of New York* [1974]. While questioned in both cases, the Landmarks Law was neither outright affirmed nor negated on the grounds of historic preservation as a legitimate regulatory basis.

²¹Goldberger, P. (1975, April 19). Landmarks Commission Survives A Decade, but Road Ahead Is Rocky. *The New York Times*, p. 68.

²²Wood, A. C. (2008). *Preserving New York*. New York: Routledge, p.377.

²³Pearsall, O. (2010, February 18). Interview with Otis Pearsall. (B. Baccash, Interviewer)

²⁴Wood, A. C. (2008). *Preserving New York*. New York: Routledge, p.377.

²⁵Related to this, Roth noted that the LPC was not respected by other, more established city agencies at the time.

²⁶The languishment of the Towers Nursing Home, which was designated an individual landmark on August 17th, 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 who was subsequently jailed, let it fall into disrepair. According to the Mosette Broderick, Director of the Urban Design and Architecture Studies Program at New York University, the “LPC did not enforce care of the interior, even to a plastic tarp.”

reached the New York State Supreme Court on January 21st, 1975.²⁷ By June 23, 1977 it had reached the highest court in New York State, the Court of Appeals. While the Landmarks Law was upheld in both instances, Penn Central Transportation Company seems to have been relentless in seeking a judgment in its favor and appealed, repeatedly.²⁸ It was clear -- 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 would constitutional or not?

A System is Grown (1978-1994)

It was not until *Penn Central Transportation Co. v. City of New York* [1978] that the Landmarks Preservation Commission's mission and purpose was upheld by the United States Supreme Court. Historic preservation was deemed a constitutional form of regulation. This victory, it seems, would prove esteem-building for the LPC in the coming years and would have a profound effect, seemingly indirectly, on the development of the enforcement system. In *Penn Central Transportation Co. v. City of New York*, the plaintiff brought action against New York City and the Landmarks Preservation Commission on the grounds that their denied attempts to construct a tower atop a designated landmark, Grand Central Terminal, constituted a taking of their private property. The United States Supreme Court found in favor of the city for a number of reasons.²⁹ In finding that the refusal of the LPC to issue a permit did not constitute a taking, the U.S. Supreme Court declared 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

²⁷Pearson, M. (2010). *New York City Landmarks Preservation Commission (1962-1999): Paradigm for Changing Attitudes Towards Historic Preservation*. New York City: The James Marston Fitch Charitable Foundation. p.59.

²⁸ Brown, G. (1987, Spring). Preservation, Private Property and the Law. *Village Views* , pp. 12-40.

²⁹This thesis 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 correlating to the development of an enforcement system.

general quality of life of New York City. Otis Pearsall, an historic preservation stalwart active in the enactment of the Landmarks Law, said “Before Penn Central, the Landmarks Commission didn’t know if what it was doing was constitutional. It was afraid of its own shadow.”³⁰

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?”³¹ The Landmarks Law proved able. This case had a huge effect on legislative preservation, which had previously been untested, ultimately affirming the LPC’s purposes.

The New York City Landmarks Law and the Landmarks Preservation Commission had been tested and their mission and principles upheld. No longer was the Landmarks Law a paper tiger. This decision seems to have enabled, indirectly and perhaps subconsciously, the LPC begin to enforce its statute. At the time, the LPC was headed by Kent Barwick who had been appointed to his position by Mayor Koch. Barwick was the 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.³² At the LPC, Barwick was responsible for a total of 582 individual landmarks, 31 historic districts, 12 interiors and 6 scenic landmarks.³³ It has been stated that “the legally mandated regulatory side of the Commission’s work was his immediate concern.”³⁴ “With the future of the Landmarks Law secured, Barwick and the Commission could pursue designation that previously seemed too problematic or too contentious.”³⁵ There was a conscious

³⁰Pearsall, O. (2010, February 18). Interview with Otis Pearsall. (B. Baccash, Interviewer)

³¹Wood, A. C. (2008). *Preserving New York*. New York: Routledge, p.377.

³²Pearson, M. (2010). *New York City Landmarks Preservation Commission (1962-1999): Paradigm for Changing Attitudes Towards Historic Preservation*. New York City: The James Marston Fitch Charitable Foundation, p.70.

³³Ibid, p.72.

³⁴Ibid, p.71.

³⁵Ibid, p.72.

change made to the way the commission would act. Apparently more confident as a result of its recent affirmation by the highest court of the land, the LPC began to pursue enforcement as well.

In 1981, three years after *Penn Central Transportation Co. v. City of New York* [1978] was decided, Tomas Reynolds, an architecture student who was contemplating going to law school, entered the Landmarks Preservation Commission and inquired about the possibility of an internship with the agency. After speaking with various staff people, Reynolds met Dorothy Miner, Special Counsel to the LPC at the time. Dorothy Miner played a critical role in the case.³⁶ Miner, who was described as “casual, almost frumpy [in] style – no makeup, loose dresses, hair in benign disarray”³⁷, was “intimately familiar with preservation law” and a “fierce, immovable stickler.”³⁸ She had a “fine legal mind” and was “intensely committed to her work and fiercely protective of the institution and its statutory birthright.”³⁹ Miner took Reynolds on 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 this point in time. Reynolds discovered countless violations that were resultant from the low priority of enforcement until his hiring. Subsequently, Miner directed him to extend his survey to Brooklyn Heights. Reynolds reached similar conclusions with regard to enforcement there as well.⁴⁰

³⁶The Penn Central Case was argued, in person, 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 8th, 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.”; Miner was hired in 1974 as assistant to Frank Gilbert. When Gilbert left the LPC 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.

³⁷Brolin, B. (1988). *The Battle of St. Bart's*. New York: William Morrow & Co. p.195.

³⁸Dunlap, D. (2008, October 3). Dorothy Miner, 72, Legal Innovator, Dies. *The New York Times* .

³⁹Ibid.

⁴⁰Reynolds, T. (2010, February 9). Interview with Tomas Reynolds. (B. Baccash, Interviewer)

In the process of conducting these studies and interacting with LPC staff people, 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 person 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 part of the LPC's duties and Reynolds was hired as a full time staff person.⁴¹

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 low on the priorities of the LPC and complaints, when received, were handled in an ad hoc fashion, amounting to their recordation in a poorly organized binder which was stowed in a drawer and rarely consulted for the purposes of curing the violation.⁴² Reynolds and Miner seem to have taken enforcement of the Landmarks Law to the next level. Reynolds states, "We were creating the system out of thin air."⁴³ Together, Reynolds and Miner developed an investigatory procedure which, today, remains in place at the LPC. Reynolds would check if any permits had been issued for the property at hand 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 compare the state of the

⁴¹Reynolds, T. (2010, February 9). Interview with Tomas Reynolds. (B. Baccash, Interviewer)

⁴²Ibid.

⁴³Ibid.

landmark with photographs taken at the time of designation.⁴⁴ Based on these efforts, which altogether served to create a baseline of judgment, Reynolds would attempt to determine whether or not an unpermitted alteration, constituting a violation of the Landmarks Law, had occurred.

Reynolds saw his position as Enforcement Officer as about “service delivery” to those who filed complaints.⁴⁵ 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, who founded 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 [kept] their eyes peeled for alterations that [were] not approved by the Landmarks Preservation Commission”.⁴⁶ 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 notified, an investigation followed and a consequent Stop Work Order was issued.⁴⁷ Seeing the potential effectiveness of the efforts of community groups in enforcing the Landmarks Law, the Municipal Art Society, in conjunction with the Landmarks Preservation Commission, held an event in which the formation of similar groups was encouraged.⁴⁸

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

⁴⁴It 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.

⁴⁵Reynolds, T. (2010, February 9). Interview with Tomas Reynolds. (B. Baccash, Interviewer)

⁴⁶It must be noted that just after the Landmarks Law was enacted, Otis Pearsall and the Brooklyn Heights Historic District had a similar blockwatchers program which dissolved due to logistical issues.

⁴⁷‘I Spy’ on 73d Blockwatchers Stop Alteration. (1987, May 31). *The New York Times*, p. R1.

⁴⁸Reynolds, T. (2010, February 9). Interview with Tomas Reynolds. (B. Baccash, Interviewer)

Reynolds “the Sherriff”.⁴⁹ While this sobriquet conveys a level of visible authority, Reynolds noted that his investigations were conducted in as discrete a manner as possible.⁵⁰ 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 and others were contentious responses to Notices of Violation, which were innumerable and the fact that the LPC was “wildly understaffed” did not help.⁵¹ While en route to a particular address about which he had received a complaint, Reynolds would visually inspect buildings 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.⁵²

In speaking of his experiences issuing violations, Reynolds stressed the need to be practical. He stated, “If I saw something which I figured out was a violation because there were no permits on file but I considered it to be appropriate, I just left it. There was no point [to issue a violation]. The Preservation Staff couldn’t handle it, I would have flooded them with applications” necessary in rectifying the violations.⁵³ Reynolds described his most effective tools in enforcing the Landmarks Law as the telephone and the ability to withhold permits until violations were cured, what some would later call the ‘hostage policy’.⁵⁴ He states, “I would scream at people on the telephone” sometimes 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

⁴⁹Reynolds, T. (2010, February 9). Interview with Tomas Reynolds. (B. Baccash, Interviewer)

⁵⁰Ibid.

⁵¹Ibid.

⁵²Ibid.

⁵³Ibid.

⁵⁴Bankoff, S. (2009, November 9). Interview with Simeon Bankoff. (B. Baccash, Interviewer); Silberman, M. (2010, April 16). Interview with Mark Silberman. (B. Baccash, Interviewer)

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.”⁵⁵ 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 evaluates appropriateness in a holistic way. If there was an outstanding violation, we wouldn't issue a permit until holistically the building was compliant. So DOB couldn't issue permits without our permits. This had a huge impact on our ability to enforce” the Landmarks Law.⁵⁶ 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, effective tool that [the LPC] had.”⁵⁷

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 stated 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.⁵⁸ 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 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.⁵⁹ In the case that a Notice of Violation was issued, it was composite, including multiple conditions in violation. If the circumstance called for a more immediate action, a Stop Work Order was issued and was delivered in person, sometimes accompanied by a

⁵⁵Reynolds, T. (2010, February 9). Interview with Tomas Reynolds. (B. Baccash, Interviewer)

⁵⁶Ibid.

⁵⁷Ibid.

⁵⁸Ibid.

⁵⁹Early designation reports did not contain as much photographic documentation as is expected today. It should be noted that a similar problem, which will be addressed later in this thesis, still persists.

member of the New York City Police Department. In the mid 1980s, the NYPD stopped cooperating and refused to accompany the LPC any longer on such deliveries for fear that corruption and bribery might occur.⁶⁰

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 Landmarks Preservation Commission.⁶¹ 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.”⁶² He continues, the Cooper Committee was “not seen as a preservation friendly committee.”⁶³ In 1986, the Cooper Committee mailed its report to Mayor Koch. Among its recommendations to improving the function of the LPC, the Cooper Committee suggested “establishing a cadre of four or five Buildings Department Inspectors who would be specially trained to monitor landmarks and buildings in historic districts for violations.”⁶⁴ The Committee also recommended “giving the Environmental Control Board (ECB) the power to hear violations and impose penalties.”⁶⁵ In 1988, the Mayor formed an initiative to amend the Landmarks Law and promulgated the recommendations of the Cooper Committee. The Mayor proposed that the Department of Buildings should be the major enforcer

⁶⁰Reynolds, T. (2010, February 9). Interview with Tomas Reynolds. (B. Baccash, Interviewer); 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.

⁶¹Rangel, J. (1985, February 26). City Procedures on Landmarks to be Reviewed. *The New York Times*, p. B4.

⁶²Wood, Anthony C. “Re: Pearson’s Paper” Message to Ben Baccash. 7 April 2010. E-mail.

⁶³Ibid.

⁶⁴Dunlap, D. (1988, May 11). Landmarks May Get New Rules. *The New York Times*, p. B1.

⁶⁵Ibid.; The Environmental Control Board is an administrative venue which hears violations issued by New York City government agencies which relate to quality of life issues.

of the Landmarks Law and landmarks violations be heard at the ECB.⁶⁶ Preservation advocates were vehemently opposed to these changes.⁶⁷

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.⁶⁸ 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 Landmarks Preservation Commission. 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 grant permits which were necessitated by Department of Buildings permits and to amend the Certificate of Occupancy in order to force owners to rectify outstanding violations – the hostage policy. In terms of problems, The Historic City Committee identified the enforcement staff as inadequate, although mentioned that Tom Reynolds was “energetically pursuing compliance with the law” having issued eight hundred Notices of Violation the previous year, sixteen of which were accompanied by a Stop Work Order, spurred by twelve hundred complaints resultant in subsequent investigations.⁶⁹ 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. The Committee also noted that fines which accompanied landmarks

⁶⁶Village Views. (1988, Spring-Summer). The Mayor's "initiatives". *Village Views* , p. 47.

⁶⁷Ibid, p.59.; 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 preservation community. At this time, there seems to have been a veritable tug of war and the winner would control the future of the LPC.

⁶⁸Wood, Anthony C. “Re: Pearson's Paper” Message to Ben Baccash. 7 April 2010. E-mail.; At 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.

⁶⁹Historic City Committee. (1989). *New York The Historic City*. New York: Municipal Art Society. p. 30.

violations were “widely perceived as inadequate deterrents”.⁷⁰ 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 first,

“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.”⁷¹

Otis Pearsall was responsible for the latter recommendation, what he calls the “private attorney general” ability.⁷² If the law were amended to allow such actions, community groups which met a certain standing, based on membership and time established, could initiate legal action against property owners in violation. According to Pearsall, LPC counsel Dorothy Miner severely opposed this idea and believed that the absolute power to prosecute must be left in the hands of the Commission.⁷³ Accordingly, this and the other two recommendations were not realized and substantial changes to the enforcement system of the Landmarks Preservation Commission would not come for nearly a decade. Because 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.

⁷⁰Historic City Committee. (1989). *New York The Historic City*. New York: Municipal Art Society. p. 30.

⁷¹Ibid, p. iii.

⁷²Pearsall, O. (2010, February 18). Interview with Otis Pearsall. (B. Baccash, Interviewer

⁷³Ibid.; A related anecdote was recounted by former LPC Commissioner Stephen M. Raphael. As the first LPC commissioner that was 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 this to be the case and from this point forward, Miner and Raphael maintained an amicable relationship.

In January of 1992, three years after The Historic City Committee study was released, the Landmarks Preservation Commission took what would seem to be its first step in proactively enforcing the Landmarks Law in court.⁷⁴ Under Chair Laurie Beckelman, the Landmarks Preservation Commission, 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. These efforts were part of a citywide cleanup policy adopted by Mayor Giuliani and his administration.⁷⁵ 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 Landmarks Preservation Commission but also with the Manhattan District Attorney's Office.⁷⁶ As part of the SoHo-Cast Iron Historic District, these eighteen properties were subject to the Landmarks Law and, accordingly, all work being done need be accompanied by a permit from the LPC. However, these property owners ignored such requirements and unlawfully installed signage and awnings and altered their storefronts as, at the time, "landmarks compliance...ha[d] often been considered irrelevant."⁷⁷ As a result of these unpermitted alterations and accretions, neighborhood residents described the area as having taken on a "flea market" atmosphere.⁷⁸ The lawsuits filed by 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."⁷⁹

⁷⁴Gray, C. (1994, June 30). On a Garish Thoroughfare, Oh-So-Slow Compliance. *The New York Times* , p. R7.

⁷⁵Ibid.

⁷⁶Ibid.

⁷⁷Ibid.

⁷⁸Blau, E. (1992, January 31). Panel Sues Landlords To Protect SoHo Sites. *The New York Times* , p. B3.

⁷⁹Gray, C. (1994, June 30). On a Garish Thoroughfare, Oh-So-Slow Compliance. *The New York Times* , p. R7.

Accordingly, the City sought \$5,000 for each violation and \$1,000 per day until each was resolved. 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.⁸⁰ Leonard Hecht, who owned 373 Canal Street next door, a property which was also in violation of the Landmarks Law and was 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.”⁸¹ In 1994, two years after the suit was filed, only three of the eighteen buildings had cured their violations and only one penalty totaling \$1,350 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, “These actions are very labor-intensive.”⁸² George Caleraro, then Spokesman for the Landmarks Preservation Commission, continued in this sentiment, saying, “It’s a can of worms... It’s not how we want owners to comply.”⁸³ LPC Enforcement Officer at the time Tomas Reynolds described the process as “a logistical nightmare. 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 we were 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” on the citywide perception of the LPC as an enforcement agency.⁸⁴

From 1978 to early 1994, the Landmarks Preservation Commission developed an enforcement system and demonstrated the power of the Landmarks Law in court by proactively

⁸⁰Gray, C. (1994, June 30). On a Garish Thoroughfare, Oh-So-Slow Compliance. *The New York Times* , p. R7.

⁸¹Blau, E. (1992, January 31). Panel Sues Landlords To Protect SoHo Sites. *The New York Times* , p. B3.

⁸²Gray, C. (1994, June 30). On a Garish Thoroughfare, Oh-So-Slow Compliance. *The New York Times* , p. R7.

⁸³Ibid.

⁸⁴Reynolds, T. (2010, February 9). Interview with Tomas Reynolds. (B. Baccash, Interviewer)

prosecuting a group of property owners in violation. The historical record suggests that in demonstrating its legal ability, the Landmarks Preservation Commission 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 of an increased confidence in historic preservation as a constitutional form of regulation as confirmed by *Penn Central Transportation Co. v. City of New York* [1978]. 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, however, some would argue, at a serious cost.

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 to the Landmarks Preservation Commission by Mayor Rudolph Giuliani, succeeding Laurie Beckelman.⁸⁵ 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 Harvard Law School.⁸⁶ 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.⁸⁷ While highly educated, she had little experience with historic preservation and was effectively an outsider to the field and its

⁸⁵Dunlap, D. (1997, July 20). Enlarging the Preservation Band. *The New York Times*, p. Section 9; Page 1; Column 5.; Slatin, P. (1995, May 7). At Landmarks, a Businesslike Balancing Act. *The New York Times*, p. R7.

⁸⁶Arenson, K. W. (2001, January 30). Mayor's Choice Picked to Run Hunter College. *The New York Times*, p. B3.

⁸⁷Slatin, P. (1995, May 7). At Landmarks, a Businesslike Balancing Act. *The New York Times*, p. R7.

community. Raab's disposition as such would seem to serve as both a strength and weakness at the Landmarks Preservation Commission.

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.⁸⁸ Raab brought a perspective to the Commission which 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."⁸⁹ 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.⁹⁰

Soon after being appointed, Raab requested that the Commission's tried, tested and 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 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 and Miner continued on at the LPC until Raab's appointment, when

⁸⁸Dunlap, D. (1997, July 20). Enlarging the Preservation Band. *The New York Times*, p. Section 9; Page 1; Column 5.

⁸⁹Pearson, M. (2010). *New York City Landmarks Preservation Commission (1962-1999): Paradigm for Changing Attitudes Towards Historic Preservation*. New York City: The James Marston Fitch Charitable Foundation. p.125.

⁹⁰According to Anthony C. Wood's Preserving New York, until this point the Chairs, Commissioners and, many "ranks of the Landmarks Commission were heavily populated with prominent civic leaders with strong ties to preservation-minded civic and professional organizations." But, as Otis Pearsall stated, "Raab is a lovely lady and has a lot of natural capability but she was not a preservationist." Beginning in the 1990s, as Wood posits, "the number of Landmarks Commissioners with strong personal and professional ties to preservation-minded organizations began to decrease." This unofficial policy extended to the staff of the LPC as well.

she was asked to resign.⁹¹ Tom Reynolds, Miner's Enforcement Officer, also left the Commission at this time.⁹² 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 Transportation Co. v. City of New York* [1978] among other noteworthy cases.⁹³ Valerie Campbell was hired as the new General Counsel to the LPC to further the regulatory needs of the Commission, a task which, according to Raab, Miner was incapable of achieving.⁹⁴ 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 Law".⁹⁵

Preservation advocates saw Raab's firing of Miner and other changes to the regulatory system⁹⁶ as diluting the authority of the LPC and 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-

⁹¹Wood, A. C. (2010, January 22). Thesis Advisor Meeting. (B. Baccash, Interviewer); Raphael, S. M. (2010, March 2). Interview with Stephen M. Raphael. (B. Baccash, Interviewer)

⁹²Reynolds, T. (2010, February 9). Interview with Tomas Reynolds. (B. Baccash, Interviewer)

⁹³A 'Fresh Eye' Wanted, Counsel Leaving Landmarks Panel. (1994, October 16). *The New York Times*, p. R1.

⁹⁴It must be noted that while it may seem that Miner was not open to the possibility of the Landmarks Law changing, both Otis Pearsall and Stephen M. Raphael, who knew her, say this was not the case.

⁹⁵Pearson, M. (2010). *New York City Landmarks Preservation Commission (1962-1999): Paradigm for Changing Attitudes Towards Historic Preservation*. New York City: The James Marston Fitch Charitable Foundation. p.120.

⁹⁶In 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 "We are not precluded from finding a less burdensome approach which is 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." Preservation advocates contested 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 their right to be heard at the Commission's hearings.; Dunlap, D. (1997, July 20) Enlarging the Preservation Band. *The New York Times*, Section 9; Page 1; Column 5.

autonomous deliberative body that [could], if necessary, stand up to City Hall.”⁹⁷ 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, or the Commission, the regulating.⁹⁸ In saying this, Wood suggests that sometimes people are simply not happy with the laws which govern 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 which today, some say, has yet to be healed.⁹⁹ 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.¹⁰⁰

⁹⁷Dunlap, D. (1997, July 20) Enlarging the Preservation Band. *The New York Times*, Section 9; Page 1; Column 5.

⁹⁸Ibid.

⁹⁹Eberhart, F. (2010, January 13). Interview with Franny Eberhart. (B. Baccash, Interviewer)

¹⁰⁰It 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 foregoing 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

While Raab was Chair of the Landmarks Preservation Commission, City Councilman Kenneth Fisher was the head of the Sub-Committee on Landmarks, Public Siting and Maritime Uses of the Land Use Committee of the City Council.¹⁰¹ Fisher's Sub-Committee 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 which would prove to be beneficial to the preservation community in the coming years.¹⁰²

Raab sought to resolve an issue which 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, remembers the enforcement system of the time, stating, "You used to have to bring violations to criminal court and a criminal judge doesn't give a hoot. The case beforehand, the guy [may have] raped his mother."¹⁰³ In other words, "the judge will think you are a jerk."¹⁰⁴ 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

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.

¹⁰¹Fisher, 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 Effects of Historic Districts on Residential Property Values* and was released on September 9th, 2003.

¹⁰²Fisher, K. (2010, January 29). Interview with Kenneth Fisher. (B. Baccash, Interviewer)

¹⁰³Bankoff, S. (2009, November 9). Interview with Simeon Bankoff. (B. Baccash, Interviewer)

¹⁰⁴Silberman, M. (2010, April 16). Interview with Mark Silberman. (B. Baccash, Interviewer)

enforcement system might be possible. Eberhart said, “When we sat down for breakfast, this was an issue [Raab] had not heard about and it seemed completely crazy to her that the only remedy for violations was criminal penalties and that it needed to be a civil process.”¹⁰⁵ It would seem that to effectuate this change was in keeping with the Giuliani administration which “was very against having violations sit on the books without a way for them to be fixed.”¹⁰⁶ It has been stated that “perhaps because of her background as a litigator, Raab was able to persuade the administration that the Commission needed to address enforcement issue, long a matter of concern for the preservation community.”¹⁰⁷ As part of this effort, the “agency budget was increased to allow her to hire a [D]irector of [E]nforcement”.¹⁰⁸

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.¹⁰⁹ 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. 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.¹¹⁰ Silberman explained that the LPC could not be perceived as nickel-and-diming the public. This sentiment would be evident in the administrative system as enacted.

¹⁰⁵Eberhart, F. (2010, January 13). Interview with Franny Eberhart. (B. Baccash, Interviewer)

¹⁰⁶Bankoff, S. (2009, November 9). Interview with Simeon Bankoff. (B. Baccash, Interviewer)

¹⁰⁷Pearson, M. (2010). *New York City Landmarks Preservation Commission (1962-1999): Paradigm for Changing Attitudes Towards Historic Preservation*. New York City: The James Marston Fitch Charitable Foundation. p.125.

¹⁰⁸ Ibid.

¹⁰⁹Silberman, Mark. (2010, April 16). Interview with Mark Silberman. (B. Baccash, Interviewer)

¹¹⁰Ibid.

Raab asked Silberman, her Deputy Counsel, to draft an amendment to the legislation to consciously create a “forgiving system” and with it completed, she approached Councilman Fisher.¹¹¹ On December 9th, 1997 the amendment to the Landmarks Law was proposed by the Landmarks, Public Siting and Maritime Uses Sub-Committee and subsequently approved by the Land Use Committee.¹¹² Eight days later, the amendment to the Landmarks Law passed the City Council and was signed into law by Mayor Giuliani on January 6th, 1998.¹¹³

According to preservation advocates and staff members of the Landmarks Preservation Commission, the 1998 amendment substantially improved the enforcement of the Landmarks Law. It should be noted that the amendment did not revoke the ability of the Landmarks Preservation Commission to withhold LPC permits should an open violation remain outstanding or the ability to pursue a violator in court.¹¹⁴ 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. 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. 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, including a new Warning Letter phase which did not

¹¹¹Silberman, Mark. (2010, April 16). Interview with Mark Silberman. (B. Baccash, Interviewer)

¹¹²City of New York. (n.d.). *Legislation Research Page: File # Int 1008-1997-A*. Retrieved February 10, 2010, from The New York City Council: <http://legistar.council.nyc.gov/Legislation.aspx>; It must be noted that the transcript for these hearing is neither online nor available with the City Clerk.

¹¹³Ibid.

¹¹⁴Fan, L. (2010, January 21). Interview with Lily Fan. (B. Baccash, Interviewer)

include a fine whereas previously a fine was immediately levied. Fines, the stick as Fisher describes them, would eventually be levied should the property owner in violation not rectify the condition in a timely manner or appropriate fashion.

While many saw this change in the legislation as an improvement, not all preservationists agreed. Otis Pearsall states, “It’s a lugubrious process and really isn’t a bludgeon. The statute on its face bends over backwards to scream that this is not a weapon that is going to make a whole lot of difference.”¹¹⁵ 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.¹¹⁶

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, Tomas 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.

Functioning and Maturing (1998-Present)

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. The owner was not maintaining her row house thereby putting the structure in danger

¹¹⁵Pearsall, O. (2010, February 18). Interview with Otis Pearsall. (B. Baccash, Interviewer)

¹¹⁶Ibid.

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.¹¹⁷ 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.¹¹⁸ 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 are 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.¹¹⁹

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 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."¹²⁰ It would seem that, according to Bloomberg, the Landmarks Law was not being actively enforced as it should be. He continues, "We have to give Landmarks a budget that will give them some enforcement capability."¹²¹ As the historical record will suggest, the coming years would yield an increase in active and effective enforcement of the Landmarks Law.¹²²

¹¹⁷Weiss, J. (2009, Summer). Pursuing an Owner for Demolition-by-Neglect: A Tortuous Legal Path. *District Lines*, pp. 2-3.

¹¹⁸Weiss, John. "Demolition by Neglect Cases" Message to Ben Baccash. 5 February 2010. E-mail.

¹¹⁹Weiss, J. (2009, Summer). Pursuing an Owner for Demolition-by-Neglect: A Tortuous Legal Path. *District Lines*, pp. 2-3.

¹²⁰Bloomberg, M. (2001, August 8). Republican Candidate's Breakfast: Michael Bloomberg. (Landmarks West!)

¹²¹Ibid.

¹²²This thesis was unable to determine how the resources dedicated to specifically enforcing the Landmarks Law fared during Bloomberg's administration.

In 2002, the Landmarks Preservation Commission filed suit against 10-12 Cooper Square Inc., Allan Goodman et. al for demolition-by-neglect.¹²³ 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 their building would collapse, the defendant strategically stopped maintaining their 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 it collapsed, they would be able to construct a larger and more profitable building on the site. However, the increasingly aggressive legal department of the Landmarks Preservation Commission was keen to this method of subterfuge and accordingly filed a lawsuit. On December 29th, 2004, two years after the suit was initiated, the court ruled in favor of the Landmarks Preservation Commission and the defendant was ordered to restore the Skidmore House to a state of good repair.¹²⁴

On September 15th, 2003, the LPC filed another demolition-by-neglect suit against Retrovest Associates, Inc. et al., the owners of New Brighton Village Hall.¹²⁵ New Brighton Village Hall, a three story brick building with a steep mansard roof, was designated an individual landmark on September 21st, 1965 as “an interesting example of French Second Empire Style of architecture in an American rural setting”.¹²⁶ Following what would seem to have been relentless neglect, the Department of Buildings ordered that the structure be demolished. Unlike the Skidmore House case, the LPC agreed to settle out of court with the owners of New Brighton

¹²³*City of NY and the NYC Landmarks Preservation Comm. V. 10-12 Cooper Square Inc., Allan Goldman et al.*[2002]

¹²⁴For further information on this case, please see the appendix.

¹²⁵*Landmarks Preservation Commission v. Retrovest Associates, Inc. et al.* Index 12844/03, Richmond County

¹²⁶Landmarks Preservation Commission. (1965). *New Brighton Village Hall Designation Report*. New York: Landmarks Preservation Commission.

Village Hall on May 20th, 2005.¹²⁷ The settlement required the owners of New Brighton Village Hall pay \$50,000 to the General Fund of the City of New York.¹²⁸ In addition to the cash settlement, the property was given to the City, effectively increasing the value of the settlement to \$1,000,000.¹²⁹ The land is now used as subsidized senior housing.¹³⁰ 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.¹³¹

While seemingly more aggressive in terms of legal pursuit of violators, the LPC was still regarded by some preservation advocates as not fulfilling their 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. 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.”¹³²

With an ever increasing regulatory purview, a second Enforcement Officer was hired under Chair Robert Tierney in 2004.¹³³ 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

¹²⁷Weiss, John. “Demolition by Neglect Cases” Message to Ben Baccash. 5 February 2010. E-mail.

¹²⁸Weiss, J. (2010, March 26). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

¹²⁹Weiss, J. (2010, April 16). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

¹³⁰Ibid.

¹³¹Weiss, J. (2010, March 26). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

¹³²Women's City Club of New York. (2004). *Problems Experienced By Community Groups Working With the Landmarks Preservation Commission*. New York: Women's City Club of New York.

¹³³Weiss, J. (2009, December 1). Interview with John Weiss. (B. Baccash, Interviewer)

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.¹³⁴

Also in 2004, the Landmarks Preservation Commission 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.¹³⁵ 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 years later, this case was settled, resulting in a penalty of \$500,000 paid by Sushi Samba 7 to the City of New York.¹³⁶

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, specifically the Warning Letter phase, as only 7% of violations that year were cured at this stage.¹³⁷ As part of the administrative enforcement system created as a result of the 1998 amendment to the Landmarks Law, Warning Letters 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

¹³⁴Women's City Club of New York. (2004). *Problems Experienced By Community Groups Working With the Landmarks Preservation Commission*. New York: Women's City Club of New York.

¹³⁵This case will be examined in depth later in this thesis.

¹³⁶New York City Law Department. (2007). *LANDMARKS PRESERVATION COMMISSION AND NEW YORK CITY LAW DEPARTMENT ANNOUNCE SETTLEMENT OVER ILLEGAL ROOFTOP TENT ON GREENWICH VILLAGE RESTAURANT*. New York: Corporation Counsel Office.

¹³⁷Subcommittee on Landmarks, Public Siting and Maritime Uses. *Hearing*. New York City Council. 10 October 2004. p. 44.

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.¹³⁸

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 and why...before buildings are altered.”¹³⁹ The pilot program was facilitated by a grant of approximately \$5,000 from the New York State Certified Local Government Program.¹⁴⁰ 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 aforesaid areas.¹⁴¹ Unfortunately, according to Weiss, its effects were minimal. He stated, “The number of applications [and complaints] didn’t really change. It was depressing. Maybe it’s something we have to do every year to really get it into the public consciousness.”¹⁴²

In 2005, with what would seem to be an increasingly aggressive enforcement mentality growing at the Landmarks Preservation Commission 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

¹³⁸Subcommittee on Landmarks, Public Siting and Maritime Uses. *Hearing*. New York City Council. 10 October 2004. p. 44.

¹³⁹Ibid, p.32.; Tierney also noted that this type of action should have been taken a long time ago.

¹⁴⁰Weiss, J. (2010, April 16). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

¹⁴¹For a copy of the Pilot Program materials, see the appendix.

¹⁴²Weiss, J. (2010, April 16). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

consideration, supported the idea.¹⁴³ 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 which had been neglected in addition to the neglect of character-defining architectural features.¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶ One speaker called the proposed maintenance standard, good repair, “a standardless, flawed concept.”¹⁴⁷ Others expressed concern that the LPC would run wild with the proposed abilities.¹⁴⁸ 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.”¹⁴⁹ On January 13th, 2005, the City Council heard the bill, now definitive of what good repair meant. At this hearing, every preservation advocacy group supported the amendment to

¹⁴³Weiss, J. (2010, March 26). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

¹⁴⁴Subcommittee on Landmarks, Public Siting and Maritime Uses. *Hearing*. New York City Council. 30 November 2004 p. 3.

¹⁴⁵While not expressly written into the law before 2005, this interpretation was never challenged.

¹⁴⁶Subcommittee on Landmarks, Public Siting and Maritime Uses. *Hearing*. New York City Council. 30 November 2004 p.35.

¹⁴⁷Ibid. p.40.

¹⁴⁸Ibid. p.55.

¹⁴⁹Ibid, p.11.

the Landmarks Law.¹⁵⁰ The Demolition-by-Neglect Bill was signed into law on February 15th, 2005 by Mayor Michael Bloomberg.¹⁵¹

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 et al., the owner of 135 Joralemon Street in the Brooklyn Heights Historic District, after issuing several failure to maintain violations.¹⁵² Preservation pioneer Otis Pearsall noted that he had been complaining to the Commission for over twenty years about this particular property.¹⁵³ The City settled out of court with the owner in 2006.¹⁵⁴ 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 *The City of New York and the New York Landmarks Preservation Commission v. Toa Construction, Inc. Yuk Nam Kim, Rikuo Yamagata, et al.* [2008], where the individually landmarked Windermere Apartment Complex on West 57th Street and Ninth Avenue was being neglected¹⁵⁵, *City of NY and LPC v. Corn Exchange LLC, Ethel Bates, et al* [2008], where the individually landmarked Corn Exchange Bank on Park Avenue and 125th Street was being neglected, and *The City of New York and the New York Landmarks Preservation Commission v. the Estate of Roundo Johnson, Estate of William McGougan, EMC Mortgage Corp et al.* [2008], 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,

¹⁵⁰City Council. *Hearing*. New York City Council. 13 January 2005 p.12.

¹⁵¹City of New York. (n.d.). *Legislation Research Page: File # Int 1008-1997-A*. Retrieved February 10, 2010, from The New York City Council: <http://legistar.council.nyc.gov/Legislation.aspx>

¹⁵²*The City of New York and the Landmarks Preservation Commission v. Alfred Palmer et al.* Index No. 620/06, Kings County

¹⁵³Pearsall, O. (2010, February 18). Interview with Otis Pearsall. (B. Baccash, Interviewer)

¹⁵⁴Weiss, John. "Demolition by Neglect Cases" Message to Ben Baccash. 5 February 2010. E-mail.

¹⁵⁵This thesis will examine The Windermere case in depth in a subsequent section.

while the Corn Exchange case remains unresolved, the building now nearly entirely collapsed¹⁵⁶, and 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 the Deputy Counsel John Weiss, the “new owner [of 217 MacDonough Street] is obligated to make repairs after negotiation among the LPC, Law Department., buyer and defendant seller.”¹⁵⁷

On April 5th, 2010, the Landmarks Preservation Commission 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 which have fallen into a state of severe disrepair.¹⁵⁸ The “walls of the 1852 brownstone are badly cracked and there are holes in the adjacent stable's roof.”¹⁵⁹ The property owner blamed the LPC for the condition of the building, saying it was a result of the LPC’s “unwieldy city bureaucracy”.¹⁶⁰ This case has not yet been heard by the courts.

As of April 26th, 2010, the LPC expected to file a demolition-by-neglect suit concerning 348 Clermont Avenue, a row house in the Fort Greene Historic District now in a state of severe deterioration. Deputy Counsel John Weiss indicated that this suit is innovative in that it will be filed against both the current property owner and a past property owner for failure to maintain the designated landmark.¹⁶¹ This is the first time the LPC will file a suit like this.

¹⁵⁶Gray, C. (2010, March 21). A Once Proud Bank, Brought Low. *The New York Times* , RE8.

¹⁵⁷Weiss, John. “Demolition by Neglect Cases” Message to Ben Baccash. 5 February 2010. E-mail.

¹⁵⁸Weiss, J. (2010, April 8). Meeting with John Weiss. (B. Baccash, Interviewer); LPC v. John Quadrozzi et al. Index No. 8442/10

¹⁵⁹McLaughlin, M. (2010, April 22). City Sues Homeowner over Crumbling Historic Building in Cobble Hill. *The Daily News*.

¹⁶⁰Ibid.

¹⁶¹Weiss, John. “New Demo by Neglect Case” Message to Ben Baccash. 26 April 2010. E-mail.

The Landmarks Preservation Commission seems more aggressive in terms of enforcement, although some preservation advocates would argue still not aggressive enough.¹⁶² 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 Landmarks Preservation Commissioner Stephen M. Raphael criticized the Landmarks Preservation Commission 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.¹⁶³ Otis Pearsall voiced similar concern, explaining that small violations can lead to the “erosion of historic districts.”¹⁶⁴ However, as LPC Deputy Counsel John Weiss noted, litigation is avoided at almost all costs and only initiated once negotiations have reached an impasse.¹⁶⁵

Since the Landmarks Law was amended in 1998 until the present day, the Landmarks Preservation Commission has brought eight cases of demolition-by-neglect and issued thousands of Warning Letters and hundreds of Stop Work Orders and Notices of Violation.¹⁶⁶ 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 than it was, preservation advocates would argue that the enforcement of the Landmarks Law can be further improved.

¹⁶² 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 Preservation v. Tierney*, Index No. 103373/08 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. Judge Shafer ruled in favor of the plaintiff.

¹⁶³ Raphael, S. M. (2010, March 2). Interview with Stephen M. Raphael. (B. Baccash, Interviewer)

¹⁶⁴ Pearsall, O. (2010, February 18). Interview with Otis Pearsall. (B. Baccash, Interviewer)

¹⁶⁵ Weiss, J. (2009, December 1). Interview with John Weiss. (B. Baccash, Interviewer)

¹⁶⁶ See chart at appendix for breakdown of enforcement action and its performance over the years and a list of all demolition-by-neglect cases filed to date.

The enforcement system of the Landmarks Preservation Commission 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 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 was crafted under Raab’s administration which, as some would contest, was overly considerate of property owners. Because the administrative system remains, it would seem to come with remnant of an undermining culture. In other words, the administrative enforcement system is representative of the 1990s enforcement culture of the LPC – an apologetic culture. Twelve 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 remnant 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, as surely different courses of action are suitable in different circumstances. 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 as they believe the LPC remains mired under the influence of the mentality of preservation, past and that this gets in the way of the success of its regulatory perception, pursuit and potential.¹⁶⁷

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 began to demonstrate an increased comfort enforcing the Landmarks Law. But while the system has been improved, it is not as strong as it has the potential to be. In fact, the New York City Landmarks Preservation Commission is not on the cutting edge of preservation enforcement as confirmed by an examination of other local preservation enforcement methods conducted as part of this thesis. This is worrisome when one considers that New York City has more designated landmarks than any other municipality in the United States. Before looking at how other environmental laws and preservation ordinances are enforced and could inform future improvements to the enforcement system at the LPC, it is important to understand how the current enforcement system, as evolved to date, functions in the real world.

¹⁶⁷This thesis will examine these criticisms in depth later in this thesis.

III. ENFORCEMENT OF THE NEW YORK LANDMARKS LAW TODAY

With an understanding of how it evolved, this thesis will examine the enforcement system as it functions today. Following this examination, this section will offer four case studies to illustrate some of the system's strengths and weaknesses as observed in real world situations.

How the Landmarks Law is Enforced

The New York City Landmarks Law is enforced by the Landmarks Preservation Commission's Department of Enforcement. The department is one of several at the Landmarks Preservation Commission.¹ The Department of Enforcement is headed by Lily Fan, a lawyer, who oversees two Enforcement Officers and one legal secretary. 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 issued administratively are heard. The ECB is "an administrative tribunal that hears cases involving violations of New York City's quality-of-life laws. These laws serve all New Yorkers by protecting healthy, clean and safe environmental conditions throughout our City."² 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 enforcement department is organized within the greater Landmarks Preservation Commission, this thesis will now examine the administrative enforcement process, from when a complaint is filed to when a condition in violation of the Landmarks Law is resolved.

The Landmarks Preservation Commission does not have the resources to support a staff which can actively survey the more than 27,000 historic resources under its purview. LPC Deputy Counsel John Weiss stated, "We don't have the staff to do sweeps, for instance, of entire

¹See chart on organization of LPC at the Appendix.

²Department of Buildings. (n.d.). Department of Buildings Building Information System. New York, New York, USA.: <http://www.nyc.gov/html/dob/html/bis/bis.shtml>

neighborhoods. But we investigate every single complaint that comes in.”³ Lily Fan, the Director of Enforcement, indicated that small scale surveys were done only when a trend of offenses is occurring in a specific location.⁴ 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 “It’s reactionary with all city agencies. Any city agency that has an inspection system responds to permit applications. This is true for buildings, this is true for everybody. No city agency has the capacity to go around and inspect work that is ongoing is being done according to the permit. They wait for someone to report a problem, or for a reason to believe otherwise.”⁵ Because of a lack of resources, the onus of 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.⁶

If one suspects a violation of the Landmarks Law, there are a few ways it can be reported. Complaints concerning suspected violation of the Landmarks Law can be made using the Dial 311 System. The Dial 311 System, created under Mayor Bloomberg, 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.⁷ There are other methods of complaint filing, including directly calling or e-mailing an Enforcement Officer. In 2008, Dial

³Weiss, J. (2009, December 1). Interview with John Weiss. (B. Baccash, Interviewer)

⁴Fan, L. (2010, January 21). Interview with Lily Fan. (B. Baccash, Interviewer)

⁵Bankoff, S. (2009, November 9). Interview with Simeon Bankoff. (B. Baccash, Interviewer)

⁶Weiss, J. (2009, December 1). Interview with John Weiss. (B. Baccash, Interviewer)

⁷Rice, Kathleen. “RE: Enforcement Question” Message to Ben Baccash. 24 March 2010. E-mail.

311 received 1,539 Landmarks Preservation Commission-related inquiries, of which 63 were complaints of suspected unpermitted alteration of a landmark.⁸ These 63 complaints accounted for a small fraction of the total 1,430 complaints received from all routes of filing, all of which were subsequently investigated that year by the LPC's Department of Enforcement.⁹ In 2009, Dial 311 received 38 complaints concerning unpermitted work on landmarked buildings out of a total of 1,215 complaints received and investigations completed by the Department of Enforcement.¹⁰ 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.¹¹ The Landmarks Preservation Commission 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. With these unadvertised options available to file complaints, the LPC asks that the public download a form from their website, fill it out and mail it to their office.¹² 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.¹³

Filling out the complaint form is the only method of complaint reporting indicated by the Landmarks Preservation Commission's website.¹⁴ The form asks for the date, the location of the suspected violation, a description of the enforcement action being taken, an optional field for the

⁸Office of the Mayor. (2008). *Mayor's Management Report*. New York: City of New York.

⁹Ibid.

¹⁰Office of the Mayor. (2009). *Mayor's Management Report*. New York: City of New York.

¹¹Ibid.

¹²For a copy of this form, please see the Appendix

¹³Rice, K. (2010, January 21). Interview with Kathleen Rice. (B. Baccash, Interviewer)

¹⁴The LPC is spending \$5 million developing 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 has been created and will soon be listed on the LPC's website for complaint submission.

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 Landmarks Preservation Commission 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 groups¹⁵ and community boards have created their own forms which are mailed to the LPC.¹⁶

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 is a series of questions that the Enforcement Officer must ask in determining how to proceed.¹⁷ 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.¹⁸ Complaints regarding issues which are not regulated by the LPC are immediately closed. Were the complaint filed by a community group or community board with its own complaint form, included with the complaint is a response form which the LPC will fill out and mail back to complainant 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.¹⁹

If the complaint is regarding something which 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

¹⁵For example, Friends of the Upper East Side Historic District has its own form and pioneered this practice during Reynolds' enforcement tenure.

¹⁶Fan, Lily. "RE: Enforcement Thesis Question" Message to Ben Baccash. 24 March 2010. E-mail.

¹⁷See Flow Chart of Enforcement Process at Appendix

¹⁸Weiss, J. (2009, December 1). Interview with John Weiss. (B. Baccash, Interviewer)

¹⁹Fan, Lily. "RE: Enforcement Thesis Question" Message to Ben Baccash. 24 March 2010. E-mail.

and, or if less accessible by mass transit, by a New York City-owned automobile. This automobile is shared by LPC Preservation Staff and the Department of Enforcement.²⁰ 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 façade of the building and when they return to the office, compare these photographs to photographs at the time of designation as well as any other photographs of the property on file and 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 resource aside from the primary facade.²¹ 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.²² However, the complaint form does not provide indication of the need of photographs.

Assuming the suspected condition in violation is visible from the street, the Enforcement Officer will photograph the entire street façade with particular attention to the specific element of the landmark about which the complaint was filed. For example, in the case that 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 façade; the Enforcement Officer conducts a full assessment of the primary façade of the landmark. Upon returning to the office, the Enforcement Officer will upload their digital photographs to the Department of Enforcement's computer system.²³ This system is also accessible by the Director of Enforcement

²⁰Weiss, J. (2010, April 16). Interview with John Weiss. (B. Baccash, Interviewer)

²¹Rice, Kathleen. "RE: Enforcement Thesis Follow-Up" Message to Ben Baccash. 1 February 2010. E-mail.

²²Ibid.

²³Each department at the LPC has its own segregated computer system.

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.²⁴ As noted above, the complainant is only notified of this were they to provide the LPC with a form to do so when filing the complaint.²⁵

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.²⁶ For instance, unpermitted work to the windows would be the subject of one Warning Letter while the unpermitted painting of the cornice would be the subject of another Warning Letter. Each Warning Letter is accompanied by a brochure which outlines 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.²⁷ The LPC never issues violations to tenants directly, but considers them in issuing a Warning Letter for each condition in violation to property owners. This is done to enable property owners to more easily correct conditions in violations 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 20

²⁴Weiss, J. (2009, December 1). Interview with John Weiss. (B. Baccash, Interviewer)

²⁵Fan, Lily. "RE: Enforcement Thesis Question" Message to Ben Baccash. 24 March 2010. E-mail.

²⁶While this thesis noted that the City Council asked that Warning Letters be mailed with return receipt, John Weiss of the LPC explains 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 the Post Office and sign for the Warning Letter.

²⁷See Appendix for a sample Warning Letter Package

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, stating “NOTE: All work at or on this premises must stop immediately!” Lily Fan, the Director of Enforcement, stated, “The reason we decided through the legislation to issue the Warning Letter 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 correct the condition. Where possible, unlike the Buildings Department, we send a Warning Letter first, along with instruction to file a permit.”²⁸ If the property owner responds to the Warning Letter and applies for a permit within the 20 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 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.²⁹

Following the 20 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 by the Process Server.³⁰ Notices of Violation 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

²⁸Fan, L. (2010, January 21). Interview with Lily Fan. (B. Baccash, Interviewer)

²⁹Weiss, J. (2009, December 1). Interview with John Weiss. (B. Baccash, Interviewer)

³⁰For a sample NOV, see the appendix.

interior landmarks, the elimination of green space, and failure to submit period inspection reports.³¹ Type C violations are defined as “less serious infractions, such as painting a facade a new color, replacing a single window, or installing a light, sign, flagpole or banner.”³² Type B violations are issued for failure to maintain landmarked property in a state of good repair.³³ It should be noted that with the exception of Type B violations which are issued by the Deputy Counsel of the LPC, all violations are issued by the Director of Enforcement. The Notice of Violation is delivered to the perpetrator.

Once the Notice of Violation is issued, the property is indicated as being in violation of the Landmarks Law on the Department of Buildings Building Information System (BIS).³⁴ 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.³⁵ Initially, the Notice of Violation is unaccompanied by a fine and is the second grace period. If the Notice of Violation 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 Notice of Violation 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

³¹Landmarks Preservation Commission. (n.d.). Enforcement: Frequently Asked Questions. New York, New York, USA.

³²Ibid.

³³Administrative Code of the City of New York, Title 25, Section 311

³⁴Weiss, J. (2009, December 1). Interview with John Weiss. (B. Baccash, Interviewer)

³⁵Department of Buildings. (n.d.). Department of Buildings Building Information System. New York, New York, USA.: <http://www.nyc.gov/html/dob/html/bis/bis.shtml>

which the perpetrator is in violation in addition to a hearing date at the Environmental Control Board (ECB).³⁶ Formal legal counsel is not required to represent perpetrators at the ECB.³⁷ Due to their relative small number, all of the Landmarks Preservation Commission's violations are heard at the Manhattan division of the Environmental Control Board.³⁸

If the perpetrator of the Landmarks Law 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 98% of NOV's were upheld at the ECB³⁹, the violation is dismissed. However, if the Administrative Law Judge rules that the perpetrator was in violation of the Landmarks Law, a fine will be assessed.⁴⁰

If the property owner cited to appear at the ECB fails to appear on the indicated date, the ECB will assess a default penalty. Both the default and civil penalties will 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.⁴¹ The LPC does not have control over the process of lien imposition.

An ECB hearing can be avoided. The first Notice of Violation 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

³⁶Weiss, J. (2009, December 1). Interview with John Weiss. (B. Baccash, Interviewer)

³⁷Department of Buildings. (n.d.). Department of Buildings Building Information System. New York, New York, USA.: <http://www.nyc.gov/html/dob/html/bis/bis.shtml>

³⁸Fan, L. (2010, January 21). Interview with Lily Fan. (B. Baccash, Interviewer)

³⁹Mayor's Office of Operations. (n.d.). *Landmarks Preservation Commission: Agency Performance Report*. Retrieved February 3, 2010, from CPR: Agency Performance Reporting: <http://www.nyc.gov/html/ops/cpr/html/home/home.shtml>

⁴⁰Department of Buildings. (n.d.). Department of Buildings Building Information System. New York, New York, USA.: <http://www.nyc.gov/html/dob/html/bis/bis.shtml>

⁴¹Fan, L. (2010, January 21). Interview with Lily Fan. (B. Baccash, Interviewer)

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 Landmarks Preservation Commission 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 Landmarks Preservation Commission 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 Landmarks Preservation Commission. 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.⁴²

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 Notice of Violation is issued. A second Notice of Violation 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 25 days of having been found guilty at the ECB adjudication.⁴³

Unlike the first Notice of Violation which served as the final grace period, the second Notice of Violation is accompanied by a fine. According to the Landmarks Law, Type A violations can be accompanied by fines of up to \$5,000 per day. A Notice of Violation - Type C can be accompanied by a fine of up to \$500. If the perpetrator does not correct the condition

⁴²Weiss, J. (2009, December 1). Interview with John Weiss. (B. Baccash, Interviewer)

⁴³Landmarks Preservation Commission. (n.d.). Enforcement: Frequently Asked Questions. New York, New York, USA.

following this Notice of Violation- Type C, a fine of \$50 per day can be imposed.⁴⁴ 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 loss of life of either the occupants or health and fire personnel who respond to emergency calls.”⁴⁵ However, Fan continues, “We have asked for daily fines at the Supreme Court level, and have been granted such.”⁴⁶ 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 Notice of Violation – Type B, 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, as is often claimed by the defendant, with issuing an administrative citation and then pursuing the violator in court. The defendant, Weiss said, sometimes argues 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.⁴⁷ Other times, when the LPC does not anticipate pursuing the property owner

⁴⁴Landmarks Preservation Commission. (n.d.). Enforcement: Frequently Asked Questions. New York, New York, USA.

⁴⁵Fan, Lily. “RE: Enforcement Thesis Question” Message to Ben Baccash. 24 March 2010. E-mail.

⁴⁶Ibid.

⁴⁷Weiss, J. (2010, March 26). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

in court, he explained, administratively issuing NOVs for failure to maintain is effective and accordingly is done.⁴⁸

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. In other words, a fine can be paid and if the condition is not cured, a violation will remain. Once cannot buy a cure to their violation. Moneys collected as a result of violation of the New York City Landmarks Law do not fund the Landmarks Preservation Commission. All money collected goes into the General Fund of the City of New York and the source of these funds is not formally tracked.⁴⁹ The Landmarks Preservation Commission is not involved in collecting fines, nor does it know whether or not the fines associated with its violations have been collected. The Landmarks Preservation Commission does not formally know the amount of money collected as a result of their 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, if they choose, sell it. Landmarked buildings can be bought and sold with open violations.⁵⁰ The violations are associated with the properties themselves and not with the property owners. If the violations 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.⁵¹ 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.

⁴⁸Weiss, J. (2010, March 26). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

⁴⁹Weiss, J. (2009, December 1). Interview with John Weiss. (B. Baccash, Interviewer)

⁵⁰Ibid.

⁵¹Fan, L. (2010, January 21). Interview with Lily Fan. (B. Baccash, Interviewer)

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 in violation 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.⁵² 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.⁵³ 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 Landmarks Preservation Commission 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.⁵⁴ Demolition-by-neglect lawsuits, described as a situation in which “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.⁵⁵ 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.

⁵²Fan, L. (2010, January 21). Interview with Lily Fan. (B. Baccash, Interviewer)

⁵³Weiss, J. (2009, December 1). Interview with John Weiss. (B. Baccash, Interviewer)

⁵⁴Administrative Code of the City of New York Section 25.317.1(1)

⁵⁵Weiss, J. (2009, Summer). Pursuing an Owner for Demolition-by-Neglect: A Tortuous Legal Path. *District Lines* , pp. 2-3.

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.⁵⁶ In situations of demolition-by-neglect, property owners may have received numerous Notices of Violation – Type B 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 of a reluctance to perform maintenance, due their financial inability to do so or a nefarious motive. In the latter case, this action or inaction is 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 “any given time the LPC has forty-five buildings in various stages of the demolition-by-neglect process.”⁵⁷ Weiss also notes that, “Although 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.”⁵⁸ From 1965, when the Landmarks Law was enacted, to 1998, the Landmarks Preservation Commission did not file any demolition-by-neglect lawsuit. As of April of 2010, the Landmarks Preservation Commission 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 so far. Weiss stated that lawsuits, even when not filed, have proved effective as 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

⁵⁶Weiss, J. (2010, March 26). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

⁵⁷Weiss, J. (2009, Summer). Pursuing an Owner for Demolition-by-Neglect: A Tortuous Legal Path. *District Lines*, pp. 2-3.

⁵⁸Ibid.

from the Corporation Counsel Office work in tandem with Landmarks Preservation Commission counsel to prosecute the property owner.

In addition to demolition-by-neglect litigation, the Landmarks Preservation Commission can prosecute a property owner who intentionally demolishes a landmarked property criminally. If a property owner is threatening to demolish their landmarked property, the LPC can bring them to criminal court and seek a Temporary Restraining Order. 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 less they want to be held accountable in criminal court.⁵⁹ This tool is not used as the circumstance in which it would be appropriately applied is rare and the alternative, the issuance of civil fines and violations, is timelier and less resource intensive.

With an understanding of who comprises the Department of Enforcement, how it functions in the context of the Landmarks Preservation Commission and in the greater government of New York City, and the various tools available to the Commission in enforcing its law, this thesis can now 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 will exemplify the strengths and weaknesses of the system in the hopes of identifying opportunities for improvement.

Enforcement in Action

With a firm grip on how the enforcement system evolved since the passage of the Landmarks Law in 1965 and how the system is practiced by the Landmarks Preservation Commission today, an examination of four real world examples, all from the past ten years, will further this understanding. While the examples include both residential and commercial

⁵⁹Fan, L. (2010, January 21). Interview with Lily Fan. (B. Baccash, Interviewer)

properties, the properties herein examined are not a representative sample of all landmarks in 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.

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



***The Lenox Hill Brownstones: Today the facades are obscured by safety barricades.
Photograph from Friends of the Upper East Side Historic District's Spring '09 Newsletter***

Avenue and Lexington Avenue in Manhattan.⁶⁰ 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

⁶⁰Landmarks Preservation Commission. (1981). *Upper East Side Designation Report*. New York: Landmarks Preservation Commission. p.134-139

row houses were removed.⁶¹ 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 Hospital⁶², a local private hospital which has been functioning on the Upper East Side since it moved there in 1868.⁶³ Thirteen years after the Hospital accrued all six row houses, it proposed, sought and gained approval from the Landmarks Preservation Commission for their alteration to create a sports medicine facility designed by James Polshek.⁶⁴ However, this plan was never executed.⁶⁵ On November 21st, 1995, having received complaints from the local historic preservation advocacy group Friends of the Upper East Side Historic District, the Landmarks Preservation Commission's enforcement staff investigated the unpermitted installation of lighting at the façades of 110, 112 and 114 East 76th Street.⁶⁶ 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 Notice of Violation for each infraction, described as "installation of a

⁶¹Landmarks Preservation Commission. (1981). *Upper East Side Designation Report*. New York: Landmarks Preservation Commission. p.134-139

⁶²New York Landmarks Conservancy. (n.d.). *Endangered Buildings Initiative*. Retrieved February 25, 2010, from New York Landmarks Conservancy: http://www.nylandmarks.org/programs_services/endangered_buildings_initiative/110_120_east_76th_st/

⁶³Lenox Hill Hospital. (n.d.). *About*. Retrieved March 5, 2010, from Lenox Hill Hospital: <http://www.lenoxhillhospital.org/about.aspx?id=102>

⁶⁴New York Landmarks Conservancy. (n.d.). *Endangered Buildings Initiative*. Retrieved February 25, 2010, from New York Landmarks Conservancy: http://www.nylandmarks.org/programs_services/endangered_buildings_initiative/110_120_east_76th_st/

⁶⁵Ibid.

⁶⁶Friends of the Upper East Side Historic District, Violation Report: 110 -120 East 76th Street, 21 November 1995

light fixture on façade without permit(s)” was issued to Lenox Hill Hospital on December 8th, 1995.⁶⁷

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.”⁶⁸ 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.⁶⁹ The Lenox Hill Brownstones were amongst 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, legal action was not initiated by the LPC. John Weiss, Deputy Counsel for the LPC, noted that while he did perform site visits to inspect the Lenox Brownstones, this inspection was initially only carried out from the street, rendering only the primary façade visible. Weiss noted that not entering the buildings at this point in time was a “key failure on our part”, and as the historical record shows, his statement proved true.⁷⁰

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 they should, as “windows [were] left open and holes [had become] present in the

⁶⁷Landmarks Preservation Commission, NOV 96/0235, 96/0236, 96/0237, 8 December 1995

⁶⁸Friends of the Upper East Side. (2009, Spring). Neighborhood Watch: Lenox Hill Brownstones. *News From Friends*, p. 4.

⁶⁹Eberhart, F. (2010, January 13). Interview with Franny Eberhart. (B. Baccash, Interviewer)

⁷⁰Weiss, J. (2010, March 26). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

roofs.”⁷¹ At this time, the LPC contacted the new owner and notified them of the outstanding violations on the building from 1995 in addition to voicing concern over the deteriorating physical condition of the row houses.⁷² John Weiss stated, “We told them ‘You have to do something because, if you don’t, we will sue you.’”⁷³ 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 upon entering 114 East 76th Street; the floors had fully collapsed.⁷⁴ Subsequently, the city “spray painted many bright squares 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.⁷⁵

While in 2009 it was well within the abilities of the Landmarks Preservation Commission to pursue the Chetrit Group for failure to maintain their 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, “Because Chetrit was responsive, we did not sue them. They were cooperating, hiring an architect and engineer.”⁷⁶ 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.”⁷⁷

⁷¹Friends of the Upper East Side. (2009, Winter). Lenox Hill Brownstones Update. *News From Friends*, p. 5.

⁷²Weiss, J. (2010, March 26). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

⁷³Ibid.

⁷⁴Ibid.

⁷⁵Friends of the Upper East Side. (2009, Spring). Neighborhood Watch: Lenox Hill Brownstones. *News From Friends*, p. 4.

⁷⁶Weiss, J. (2010, April 16). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

⁷⁷Weiss, J. (2010, March 26). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

In January of 2010, the owner applied for a Certificate of Appropriateness to construct a rooftop addition to the buildings and alter the facades.⁷⁸ In the process of seeking such approval, The Chetrit Group argued that their proposal would improve the condition of the Lenox Hill Brownstones, using the buildings' neglected condition as a bargaining tool what preservation advocates would contest is 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 solution to this terrible problem is to stabilize, rebuild, and restore the facades to their present configuration or their historic one.”⁷⁹

While the proposed Certificate of Appropriateness was not issued, had the LPC issued NOV's 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.⁸⁰ 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. Deputy Counsel for the LPC John Weiss agreed, stating, “In retrospect, we should have been in discussion with [Lenox Hill] Hospital.”⁸¹ He continues, “Today, it would be handled differently.”⁸²

⁷⁸Landmarks Preservation Commission, Docket Number: 104437, 5 January 2010

⁷⁹Historic Districts Council. (2010, January 5). *LPC Docket Number: 104437*. Retrieved February 15, 2010, from Historic District Council: <http://www.hdc.org/hdc@lpc/?p=181>

⁸⁰Friends of the Upper East Side. (2009, Winter). Lenox Hill Brownstones Update. *News From Friends*, p. 5.

⁸¹Weiss, J. (2010, March 26). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

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 Landmarks Preservation Commission 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's 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 historical 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 indirectly. While in some instances the enforcement system of the Landmarks Preservation Commission functions as it should, in others, it does not. However, John Weiss of the Landmarks Preservation Commission indicated, while the manner in which enforcement in the case of the Lenox Hill Brownstones, the LPC learned from its mistakes and modified some of its investigatory practices accordingly.⁸³ Weiss also indicated that the Lenox Brownstones were not a failure as a restoration was recently approved by the LPC.⁸⁴

⁸²Weiss, J. (2010, March 26). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

⁸³Ibid.

⁸⁴Weiss, J. (2010, April 17). Telephone Interview with John Weiss. (B. Baccash, Interviewer); See the appendix for a rendering of the restoration plans.

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.⁸⁵ Today, six of these dwelling survive stripped of some of their original



16 - 18 Charles Street

architectural detail. Two have been combined and comprise 16-18 Charles Street today.⁸⁶ 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 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.

⁸⁵Landmarks Preservation Commission. (1969). *Greenwich Village Historic District Designation Report*. New York: Landmarks Preservation Commission.

⁸⁶Ibid.

As this thesis has explained, the enforcement process is initiated by a complaint filed by a member of the public. Following three complaints of unsanctioned work, two filed anonymously on January 16th and 26th of 2004 and one filed by Andrew Menschel on February 4th, 2004, Landmarks Preservation Commission Enforcement Officer Bernadette Artus went to 16-18 Charles Street to see if a violation of the Landmarks Law existed.⁸⁷ At this time, the LPC had all of the abilities previously described by this thesis, 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 24th, 2004 issued three Warning Letters accordingly; WL 04-513 for “[a]lteration and replacement of windows at front façade without permit(s)”⁸⁸; WL 04-514 for “[p]ainting lintels, sills and cornice gray without permit(s)”⁸⁹; and WL 04-515 for “[i]nstallation of keyboxes and intercoms at entrance without permit(s)”⁹⁰. 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.⁹¹ 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 7th of that same year.⁹²

On April 23, 2004, Cynthia Danza of the Landmarks Preservation Commission 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

⁸⁷Landmarks Preservation Commission, Violation Report Log #6452

⁸⁸Landmarks Preservation Commission, Warning Letter 04-513, 24 February 2004

⁸⁹Landmarks Preservation Commission, Warning Letter 04-514, 24 February 2004

⁹⁰Landmarks Preservation Commission, Warning Letter 04-515, 24 February 2004

⁹¹One of the owners, Esti Brahver, was anecdotally identified as a real estate investor who did not care about city-issued violations, specifically landmarks violations.

⁹²Landmarks Preservation Commission, NOV #070001216K, NOV #070001217M, NOV #070001218Y 07 June 2004

the building's outstanding violations were resolved.⁹³ One month later, the owner was granted a Certificate of No Effect 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.⁹⁴

The LPC neither received a response to the Warning Letters, which were mailed in February, nor the Notices of Violation, which were subsequently mailed. At a hearing held on June 7th, 2004 by the Environmental Control Board, Process Server Art Mondsheim testified that he attempted to deliver the second three Notices of Violation on May 10th, 2004 but the LLC owner was not reachable. The only person present at the address was Mrs. Rosenchein, who "lives there and says that she has nothing to do with this company."⁹⁵ 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 to cure one of the outstanding violations.⁹⁶ As explained by this thesis, 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 fixing 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 façade brick wall" among other small re-pointing work and the legalization of a lock

⁹³Landmarks Preservation Commission, Letter to 16-18 Charles Street LLC, 23 April 2004

⁹⁴Landmarks Preservation Commission, CNE #04-7301, 24 May 2004

⁹⁵Environmental Control Board, Affidavit of Non-Service, NOV #070001216K, NOV #070001217M, NOV #070001218Y, 7 June 2004

⁹⁶Landmarks Preservation Commission, PMW 04-7619, 10 June 2004

box. The PMW noted that while the permit intended to cure two of the other violations, Violation 04-514 would remain outstanding. Likewise, it read “Note that this permit contains a compliance date of September 8th, 2004”.⁹⁷ The LPC expected that the curative, permitted work be completed by that date.

On June 14th, 2004, the Landmarks Preservation Commission issued a Certificate of No Effect, which outlined work including a number of interior alterations and the work necessary to correct Violations 04-513 and 04-515, in response to an application filed by the property owner.⁹⁸ 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 will aid in the long term preservation of the building”.⁹⁹ On July 14th, 2005 the LPC granted 16-18 Charles Street LLC a Permit for Minor Work, extending the purview of the previously granted CNE.¹⁰⁰

On November 3rd, 2005, following a complaint filed by Christabel Gough of the Society of the Architecture of the City¹⁰¹, the Landmarks Preservation Commission issued a Warning Letter for the “[r]emoval of canopy, installation of planter and installation of door and sidelights without permit(s)”.¹⁰² The historic canopy was added to 16-18 Charles Street during the 1920s when the row houses were rebranded by a savvy real estate entrepreneur.¹⁰³ While not original, the canopy of 16-18 Charles Street was extant at the time of its designation and is significant architecturally. According to LPC Enforcement Officer Kathleen Rice, the historic iron canopy is

⁹⁷Landmarks Preservation Commission, PMW 04-7619, 10 June 2004

⁹⁸Landmarks Preservation Commission, CNE 04-7716, 14 June 2004

⁹⁹Landmarks Preservation Commission, Letter to Aharon Vaknin, 27 April 2005

¹⁰⁰Landmarks Preservation Commission, PMW 06-0288, 14 July 2005

¹⁰¹Dolkart, Andrew. “Re: Program Feedback” Message to Ben Baccash. 10 February 2010. E-mail.

¹⁰²Rice, Kathleen. “RE: Complaint Inquiry” Message to Ben Baccash. 11 February 2010. E-mail.

¹⁰³Dolkart, A. S. (2009). *The Row House Reborn*. New York: The Johns Hopkins University Press. p. 153.

in the basement of 16-18 Charles Street¹⁰⁴ but this could not be confirmed. Receiving no response to the Warning Letter, the LPC issued NOVs for Violation 06-230, which addressed the missing canopy, and Violation 06-229¹⁰⁵, the nature of which is not clear as it is not noted on the Building Information System.¹⁰⁶

After a member of the LPC Preservation Staff followed up on a Permit for Minor Work granted previously, on October 10th, 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 on July 14, 2005”.¹⁰⁷ No response was received from the owner and an NOV was issued accordingly. 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.¹⁰⁸ On July 27th, 2007, 16-18 Charles Street was sold to Daniel Elias with several outstanding violations.¹⁰⁹

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 violations to properties owned by LLCs in that often they are unreachable. It also suggests that an owner can manipulate the permit process to feign compliance while furthering its own purpose of making inappropriate improvements designed to enhance the profitability of their property. Likewise, it

¹⁰⁴Rice, Kathleen. “RE: Complaint Inquiry” Message to Ben Baccash. 11 February 2010. E-mail.

¹⁰⁵Ibid.

¹⁰⁶Department of Buildings. (n.d.). Department of Buildings Building Information System. New York, New York, USA.: <http://www.nyc.gov/html/dob/html/bis/bis.shtml>

¹⁰⁷Landmarks Preservation Commission, Warning Letter 07-0136, 10 October 2006

¹⁰⁸Landmarks Preservation Commission, NOV# 070001898R, 10 October 2006

¹⁰⁹City Register. (n.d.). *ACRIS*. Retrieved March 1, 2010, from Department of Finance: <http://www.nyc.gov/html/dof/html/jump/acris.shtml>, block 00611, lot 49

demonstrates that properties can be transferred even with outstanding violations. It further depicts that by issuing permits for work including corrective action, the resolution of violations is not guaranteed. Due to the lack of what some have called ‘teeth’ of 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.

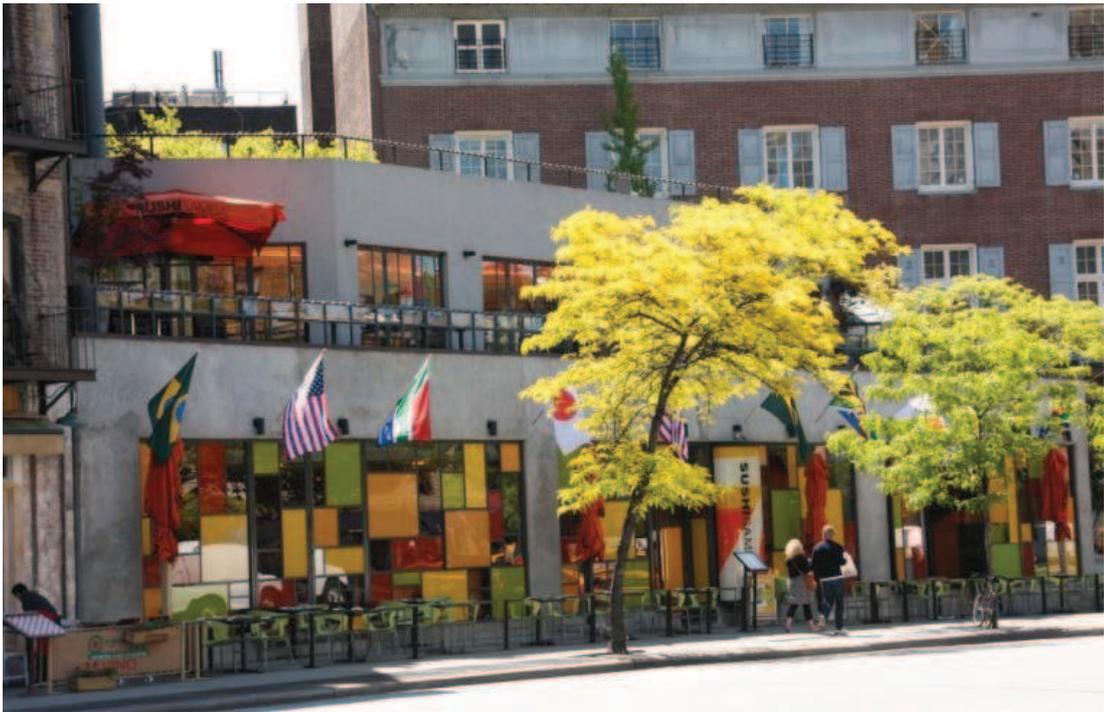
Sushi Samba 7

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 Landmarks Preservation Commission to construct an unenclosed wood trellis atop their one-story tax-payer building on the corner of Barrow Street and 7th Avenue South.¹¹⁰ The Greenwich Village Historic District Designation Report describes the building, which was built in 1923, as “undistinguished” but with the proper care could be improved so as to complement the historic district.¹¹¹ 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 went as far as to try to conceal this fact by covering the unapproved structure in canvas. Notices of Violation were issued accordingly and 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 denial to legalize the rooftop trellis was upheld.¹¹²

¹¹⁰Amateau, A. (2007, February 14-20). Sushi Samba ends rooftop fishy business and is fined. *The Villager*.

¹¹¹Landmarks Preservation Commission. (1969). *Greenwich Village Historic District Designation Report*. New York: Landmarks Preservation Commission. p.130

¹¹²Amateau, A. (2007, February 14-20). Sushi Samba ends rooftop fishy business and is fined. *The Villager*.



Sushi Samba 7

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, an aspect 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 said, “These people received a permit. 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.”¹¹³ 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

¹¹³Andeson, L. (2004, November 17-22). Landmarks bento out of shape over Sushi Samba rooftop tent. *The Villager* .

ordered that the restaurant do so immediately. Sushi Samba 7 did not comply and appealed the ruling.¹¹⁴

In February of 2007, a settlement was reached between Sushi Samba 7 and the Landmarks Preservation Commission. The owners of Sushi Samba 7 signed an agreement with the LPC to build an approved rooftop addition in place of their illegal trellis addition and pay 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 \$8.5 million dollars in fines, or \$5,000 per day for the duration of the violation but sought a lesser amount.¹¹⁵ As noted previously by this thesis, 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 2007.¹¹⁶

In a press release issued by the Landmarks Preservation Commission, Virginia Waters of the Corporation Counsel Office said, “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 7 has agreed to comply with the Landmarks Law in the future.”¹¹⁷ 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 7 underscores that commitment, and should serve as a deterrent

¹¹⁴New York City Law Department. (2007). *LANDMARKS PRESERVATION COMMISSION AND NEW YORK CITY LAW DEPARTMENT ANNOUNCE SETTLEMENT OVER ILLEGAL ROOFTOP TENT ON GREENWICH VILLAGE RESTAURANT*. New York: Corporation Counsel Office.

¹¹⁵Amateau, A. (2007, February 14-20). Sushi Samba ends rooftop fishy business and is fined. *The Villager*.

¹¹⁶Center for New York City Law. (2007, APRIL/MAY). RESTAURANT TO PAY \$ 500,000 PENALTY. *CITYLAW*, p. 2.

¹¹⁷New York City Law Department. (2007). *LANDMARKS PRESERVATION COMMISSION AND NEW YORK CITY LAW DEPARTMENT ANNOUNCE SETTLEMENT OVER ILLEGAL ROOFTOP TENT ON GREENWICH VILLAGE RESTAURANT*. New York: Corporation Counsel Office.

to those who would knowingly and intentionally violate the Landmarks Law.”¹¹⁸ 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 Landmarks Preservation Commission’s pursuit of legal action, if taken, can be a very effective course of enforcement.

The Windermere

The Windermere is an apartment complex located at 400-406 West 57th Street, at Ninth Avenue in Manhattan. In 2005, the Landmarks Preservation Commission 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.¹¹⁹ 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 28th, 2005, the Landmarks Preservation Commission designated The Windermere as an individual landmark¹²⁰, well aware of the complex’s deteriorated physical condition.¹²¹ Designed by Theophilus G. Smith and completed in 1881, the Windermere is “significant as the oldest-known large apartment complex remaining

¹¹⁸New York City Law Department. (2007). *LANDMARKS PRESERVATION COMMISSION AND NEW YORK CITY LAW DEPARTMENT ANNOUNCE SETTLEMENT OVER ILLEGAL ROOFTOP TENT ON GREENWICH VILLAGE RESTAURANT*. New York: Corporation Counsel Office.

¹¹⁹Center for New York City Law. (2008, May/June). City sues to save landmark apartments. *CITYLAW*, p. 1.

¹²⁰Landmarks Preservation Commission. (2005). *The Windermere Designation Report*. New York: Landmarks Preservation Commission.

¹²¹Weiss, J. (2010, March 26). Telephone Interview with John Weiss. (B. Baccash, Interviewer)



*The Windermere: Today the building is obscured by scaffolding and safety netting.
Photograph from the Windermere Designation Report*

in an area that was one of Manhattan's first apartment-house districts."¹²² The Windermere is also significant as an early apartment building which provided "housing options for single, self-supporting women [in a time when such units] were relatively limited."¹²³ 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."¹²⁴ In September of 2007, the LPC surveyed the façade of The Windermere and found that because maintenance was not being performed, the building's

¹²²Landmarks Preservation Commission. (2005). *The Windermere Designation Report*. New York: Landmarks Preservation Commission.

¹²³Ibid.

¹²⁴Administrative Code of the City of New York, Title 25, Section 311

structural and historical integrity were severely at risk.¹²⁵ 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.

On March 19th, 2008 the City of New York, including the New York City Landmarks Preservation Commission, 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.¹²⁶ LPC Deputy Counsel John Weiss noted that legal action was taken as the LPC expected, based on the owner’s opposition to designation, that they would not to cooperate were the LPC to issue administrative citations for failure to maintain.¹²⁷ In addition to compliance with the law, the City sought penalties of \$5,000 per day until The Windermere was repaired accordingly.¹²⁸

Senior Counsel at the Corporation Counsel Office Virginia Waters said, “The City has made every effort to work with The Windermere’s owners...We felt we had no choice but to bring this legal action to save this important New York City landmark.”¹²⁹ On May 9th, 2008 Justice 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. Justice 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

¹²⁵Center for New York City Law. (2008, May/June). City sues to save landmark apartments. *CITYLAW*, p. 1.

¹²⁶*New York City v. Toa Construction Co.*, Index No. 400584/08 [N.Y. Cty.Sup.Ct. March 19, 2008]

¹²⁷ Weiss, J. (2010, March 26). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

¹²⁸New York Law Department. (2008). *CITY'S LAW DEPARTMENT AND LANDMARKS COMMISSION ANNOUNCE LAWSUIT TO SAVE HISTORIC LANDMARKED APARTMENT BUILDING - THE WINDERMERE - LOCATED AT GATEWAY TO UPPER WEST SIDE*. New York City: Corporation Counsel Office.

¹²⁹*Ibid.*

Toa Construction Company.¹³⁰ After receiving the report, Toa Construction Company was ordered by the Court to apply for all necessary permits within 30 days and, after receiving the permits, to complete the necessary repairs within 120 days.¹³¹

On May 21st, 2009 after subsequent court orders were issued to the defendant to repair The Windermere, the Landmarks Preservation Commission 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.¹³² The \$1.1 million settlement was to be paid to the General Fund of the City of New York. John Weiss, Deputy Counsel for the LPC, said “I would have loved to have that money [for the LPC], but we didn’t see any of it.”¹³³

Following the settlement, Toa Construction Company sold their building to a new owner, Windermere Properties LLC. The LPC reached an agreement with Windermere Properties LLC requiring them to repair and maintain The Windermere. Windermere Properties LLC agreed to comply with the orders previously issued by Justice Smith which mandated the complex be shored and braced by September 30th, 2009 and all other repairs be made in a timely fashion.¹³⁴ Windermere Properties LLC has performed some of the reparative work but continues to miss

¹³⁰New York City Law Department. (2008). *STATE SUPREME COURT JUSTICE ORDERS REPAIRS TO LANDMARKED WINDERMERE APARTMENT COMPLEX IN WEST MIDTOWN MANHATTAN*. New York: Corporation Counsel Office.

¹³¹Center for New York City Law. (2008, July/August). Court intervenes to save landmark. *CITYLAW*, p. 1.

¹³²New York City Law Department. (2008). *CITY RECEIVES RECORD \$1.1 MILLION SETTLEMENT PAYMENT OVER OWNERS' FAILURE TO MAINTAIN THE WINDERMERE APARTMENT COMPLEX ON MANHATTAN'S UPPER WEST SIDE*. New York: Corporation Counsel Office.

¹³³Weiss, J. (2009, December 1). Interview with John Weiss. (B. Baccash, Interviewer)

¹³⁴New York City Law Department. (2008). *CITY RECEIVES RECORD \$1.1 MILLION SETTLEMENT PAYMENT OVER OWNERS' FAILURE TO MAINTAIN THE WINDERMERE APARTMENT COMPLEX ON MANHATTAN'S UPPER WEST SIDE*. New York: Corporation Counsel Office.

specified deadlines and, as a result, litigation continues. Deputy Counsel for the LPC John Weiss indicated that daily fines would be sought if the property owner continues to act in this manner.¹³⁵

In this case, the preservation community regards the Legal Department of the Landmarks Preservation Commission as victorious. This action does not reflect an “apologetic agency” as some posit characterizes the LPC’s enforcement record. The New York City Landmarks Preservation Commission’s Legal Department and the ability to uphold the law through the courts seem to be its greatest assets 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,¹³⁶ legal suits are effective. In *New York City v. Toa Construction Company* [2008], 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.¹³⁷

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 Landmarks Preservation Commission’s enforcement system. Next, this thesis will examine how a selection of federal environmental laws and local preservation ordinances are enforced in the hopes that concepts therein can be applied to improving the enforcement system of the New York Landmarks Law.¹³⁸

¹³⁵Weiss, J. (2010, April 17). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

¹³⁶Weiss, J. (2009, Summer). Pursuing an Owner for Demolition-by-Neglect: A Tortuous Legal Path. *District Lines* , pp. 2-3.

¹³⁷In a related lawsuit, the Court held against Toa Construction Co., ordering they pay over \$2,600,000 to the tenants forced out of their homes by The Windermere’s decrepit condition. NYC’s Department of Housing Preservation and Development was awarded money to cover the cost of relocating these tenants.

IV. LEARNING FROM OTHERS

This section will examine the methods of enforcement utilized to uphold a selection of federal environmental laws and local preservation ordinances around the United States. This examination hopes to inform recommendations to be made by this thesis to the New York City historic preservation community on possible improvements in enforcement of the Landmarks Law.

Enforcing Federal Environmental Law

The environmental movement in the United States emerged in the 1960s, acknowledging the importance of the natural environment and its necessity to physical health, thereby justifying its protection.¹ The environment is a common possession and as such it is used by all people, some of whom act in a much more considerate manner than others. As the movement progressed, it became clear that the law was the tool to ensure the protection of the environment. In 1970, under President Nixon, the Environmental Protection Agency (EPA) was formed in order to administer, and in part enforce, the environmental laws to be enacted in the coming years.

While environmental laws regulate the natural environment, historic preservation ordinances regulate the man-made and designed environment. Having been legislatively realized at the federal level in the same era and regulating the two components which comprise the total environment, environmental laws and preservation ordinances can be considered comparable. The federal statutes which are examined by this thesis do not comprise an exhaustive list of environmental laws in the U.S. By no means does this thesis purport that the enforcement of federal environmental laws and local historic preservation ordinances are one in the same.

This selection of environmental laws was chosen based on the array of mechanisms, albeit on a greater scale and context, used in their enforcement. This examination is based on the

¹Ferrey, Steven (2001) *Environmental Law: Examples and Explanations*, New York: Aspen Publishers. p. 2.

written statutes. For the purposes of this thesis, these statutes will serve as conceptual bases upon which our recommendations to the historic preservation community to improve the enforcement of the New York Landmarks Law will be founded.

The Clean Air Act: Standards and Enforcement

The Clean Air Act was adopted in 1963 as a federal statute. Since its enactment, it has undergone various revisions and amendments. This thesis will examine how the Clean Air Act functions as amended through 1990 and as it applies to private entities and not to the states.

The purpose of the Clean Air Act is to protect one of the building blocks of human life, air. In order to do that, National Ambient Air Quality Standards and Criteria Pollutants were identified.² The standards are categorized as primary or secondary and refer to pollutants which directly affect public health and those which affect public welfare (or the public health of the future) respectively. The Criteria Pollutants are specific, quantitatively measurable toxics. These toxics are measured by specified geographical regions.

The Clean Air Act approaches air quality from two perspectives. First, New-Source Performance Standards require new emitters of pollutants to use the best available control technology (BAT).³ The BAT is determined by the EPA with its financial implication in mind. Best available control technology serves to set a standard to which one can easily comply. Each Criteria Pollutant is paired with a specific technology which ensures adequate protection of air quality.⁴ The other perspective from which the Clean Air Act approaches air quality is conservation. The Clean Air Act considers areas with high quality air and the need to prevent their deterioration. These areas, called Prevention of Significant Deterioration Attainment Areas,

²Ferrey, Steven (2001) *Environmental Law: Examples and Explanations*, New York: Aspen Publishers. p. 156.

³Ibid, p. 163

⁴Similar standards include the National Emission Standard for Hazardous Air Pollutants and the New Federal Motor Vehicle Emission Limitations.

are deemed either Class I as the highest standard, Class II, or Class III as the lowest standard.

Each class has specific, acceptable levels of criteria pollutants associated with it.⁵

The Environmental Protection Agency has three tools to enforce the Clean Air Act: civil actions, administrative actions, and field citations. Civil actions can have two forms. The first form is a monetary fine which cannot exceed \$25,000 per day for each violation. Section 113(a) of the Clean Air Act “imposes strict liability on a source in violation of the act, without consideration of whether or not the source was knowingly in violation.”⁶ However, the EPA will consider a number of factors in issuing a fine, including the violator’s compliance history and the seriousness of the violation. The EPA can impose monetary fines on an administrative basis without consulting the Department of Justice. However, this type of fine cannot exceed \$200,000 for any single violation. If this amount is not sufficient, a greater fine can be cosigned by the EPA administrator and the United States Attorney General. In the case of an EPA-issued fine, the violator is given written notice, thirty days from which the violator can request a hearing.⁷

The second form of civil action which can be brought by the EPA is an injunction. Injunctions are issued by the Department of Justice and can order a violator to comply by enjoining them from continuing to commit the violating act. The EPA’s third tool to enforce the Clean Air Act is the field citation. Field citations can be issued on site with a penalty of up to \$5,000 per day per violation. In the case a field citation is issued, accused violators have the ability to request an informal hearing.⁸

Beyond the EPA’s role in enforcing the Clean Air Act, citizens can bring civil law suits against either a violator or the EPA itself. In doing so, the citizen must give the defendant and the

⁵Ferrey, Steven (2001) *Environmental Law: Examples and Explanations*, New York: Aspen Publishers. p. 170.

⁶Ibid, p. 204

⁷Ibid.

⁸Ibid.

EPA sixty days notice before the suit is filed. These sixty days are considered a grace period in which the violator can rectify the noncompliance. Having been made aware of the violation, the EPA can decide to pursue the violator legally, rendering the citizen's suit redundant. If the EPA does not elect to take this course of action, the citizen can continue with their suit which will result in either a monetary fine to be paid to the government or a civil injunction, assuming the defendant is found guilty. A successful citizen plaintiff will be awarded attorney fees but cannot receive any other monetary reward.⁹ However, there is a reward system in place which allows Congress to pay \$10,000 to "any person who provides information of a Clean Air Act violation that leads to a criminal conviction or assessment of civil penalty."¹⁰ Violators are also ineligible to receive government contracts and can be removed from certified lists of government contractors should they be found guilty.¹¹

Criminal penalties are also possible under the Clean Air Act. If a violator is found to have knowingly violated the law, this is the appropriate course of action. Whether a violator was intending to violate the law or not is to be evaluated on a case-by-case basis. Indications of a knowing violator are the failure to pay permit fees or to install required monitoring equipment. The most "severe criminal penalties are possible where a source knowingly releases hazardous emissions creating imminent danger of death or serious bodily injury."¹² These penalties can include fines up to \$1,000,000 and imprisonment.¹³

If violations of The Clean Air Act are self-reported, the EPA will issue less costly fines. In this way, voluntary information is rewarded but does not lead to forgiveness. Criminal penalties are still possible. All information voluntarily disclosed to the EPA can be used in a

⁹Ferrey, Steven (2001) *Environmental Law: Examples and Explanations*, New York: Aspen Publishers. p. 206

¹⁰Ibid.

¹¹Ibid, p. 204.

¹²Ibid, p. 206

¹³Ibid.

court of law. Hence, self audits are less likely to be undertaken and if they are, tend to be purposefully vague and inconclusive.¹⁴

The Clean Water Act: Standards and Enforcement

The Federal Water Protection Control Act, commonly referred to as The Clean Water Act, was enacted in 1972. The act was passed to restore “the integrity of the Nation’s waters to fishable and swimmable quality by 1983, and [totally eliminate] pollutant discharges into U.S. navigable waters by 1985” as well as setting specific effluent discharge standards for the future.¹⁵ Since its enactment, the Clean Water Act has undergone a number of amendments. This thesis will examine the Clean Water Act as amended to date.

The Clean Water Act requires a permit for any point source discharge of a pollutant, even if the discharge does not adversely affect the receiving waters of the United States. Point sources of pollution include municipal sewage treatment plants and industrial discharge sources.¹⁶ United States waters are those that the federal government has authority over including waters used for interstate commerce as well as intrastate lakes, rivers, streams, wetlands, sloughs, wet meadows, natural ponds, small brooks or even prairie potholes. Both the point sources and the receiving waters are regulated in order to maintain a specified quality standard. The pollutants regulated are either toxic pollutants, conventional pollutants, or nontoxic nonconventional pollutants. Each category has a list of substances associated with it that is maintained by the EPA.¹⁷

These pollutants are held to health-based standards and technology-based standards. Health-based standards consider six factors: toxicity, persistence, degradability, the potential

¹⁴Ferrey, Steven (2001) *Environmental Law: Examples and Explanations*, New York: Aspen Publishers. p. 207

¹⁵Ibid, p. 224

¹⁶Ibid, p.225

¹⁷Ibid.

presence of organisms in the receiving waters, whether these organisms are important, and if and how the effluent will affect these organisms. Health-based standards do not consider costs. Health-based standards are regarded as largely impossible to evaluate as the effect of all known toxins and their effect on the environment is unknown. Technology-based standards sought to rectify the difficulty in measuring the health-based standards. These standards rely “on the ability of end-of-the-pipe equipment and process technology to reduce the amount of pollutants in industrial effluent.”¹⁸ Technology-based standards are separated into three categories: best practicable control technology (BPT), best available technology economically available (BAT), and best conventional pollutant control technology (BCT). The BPT standard is a lower requirement than the BAT, and the BCT standard is the most stringent of all the standards. The EPA determines which point sources require BPT standards, BAT standards or BCT standards based on the seriousness of the situation. New industrial sources are automatically held to BAT standards at a minimum.¹⁹

Title IV of The Clean Water Act establishes the National Pollutant Discharge Elimination System (NPDES) that sets forth a permit process. If point source polluters apply for permits and discharge only what is acknowledged on the permit at the indicated level, the point source is considered to be compliant. The NPDES also requires self-monitoring reports on discharge which are required to be submitted to both the state and the EPA.²⁰

The Clean Water Act is primarily enforced by the states as per federal standards.²¹ The EPA has been criticized for not establishing standards for many pollutants, some of which are routinely discharged into U.S. waters. Law suits brought by citizens more commonly catalyze the

¹⁸Ferrey, Steven (2001) *Environmental Law: Examples and Explanations*, New York: Aspen Publishers. p. 229

¹⁹Ibid, p. 235

²⁰Ibid, p. 237

²¹Ibid, p.225

enforcement of the Clean Water Act, as allowed by Section 505, as opposed to the state at hand or the EPA itself. Any citizen who has an interest that is adversely affected by the discharge of pollutants can bring suit against the polluter. States can also bring suit against the EPA if the inaction of the EPA results in harm to the state. Any state employee who initiates such a lawsuit is protected under Section 507 of The Clean Water Act.²²

Resource Conservation & Recovery Act: Standards and Enforcement

Hazardous and solid waste present grave environmental concern as they have the potential to contaminate soil and groundwater and consequently pose a significant risk to human health.²³ Because the risk presented by hazardous and solid waste is so serious, the systems in place to regulate them must be fail-safe. In 1976, The Resource Conservation & Recovery Act (RCRA) created a federally mandated system to regulate hazardous waste. The RCRA intends to increase the safety of land disposal, encourage alternatives to land disposal, promote the reduction of solid wastes, delegate solid waste permitting to the states and encourage recycling.²⁴

The Resource Conservation & Recovery Act defines solid waste as any byproduct of a “waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material including solid, liquid, semisolid or contained gaseous material resulting from industrial, commercial, mining and agricultural operations and from community activity.”²⁵ The RCRA defines hazardous waste according to its quantity, concentration and physical, chemical, or infectious characteristics which may cause adverse health effects which increase mortality

²²Ferrey, Steven (2001) *Environmental Law: Examples and Explanations*, New York: Aspen Publishers. p. 246

²³Ibid. p. 281

²⁴Ibid. p. 282

²⁵United States Resource Conservation and Recovery Act, Section 1003-27

through an increase in irreversible illness or incapacitating, reversible illness.²⁶ More broadly, hazardous waste is that which is potentially harmful to human health and the environment unless properly handled. The EPA has identified criteria for regulating hazardous waste. These criteria are ignitability, corrosiveness, chemical reactivity, exhibition of toxicity, instability, fatality to humans in small doses, containing toxic constituents or listed generically as hazardous. Each criterion has a specific degree at which the waste at hand is deemed hazardous. For example, if a waste is ignitable at less than 140 degrees, it is considered hazardous.²⁷

The Resource Conservation & Recovery Act has a three part permit process to ensure the protection of the public. Hazardous waste generators, transporters and treatment/storage/disposal facilities all require permits. Hazardous waste generators are those sites which produce hazardous waste. They are required to indicate the type of containment system they use, disclose the type of waste to be transported to and stored by them to the subsequent recipients, and submit records to the EPA about how much hazardous waste is generated and transported. Each hazardous waste generator has a unique EPA identification number. The RCRA also creates a manifest system which ensures that the chain of custody of hazardous waste is recorded in order to ensure its proper delivery. The manifest system is a paper trail. The manifest forms are standardized by the EPA and can be supplemented by the states. Copies of the manifest, which include the origin of the waste indicated by the EPA identification number, are kept by the generator, the transporter(s) and the treatment/storage/disposal facility. In the case that the generator does not receive notification that their waste arrived at the treatment/storage/disposal facility, the generator must notify the EPA. If the treatment/storage/disposal facility receives hazardous waste without a manifest or if the manifest does not reflect what is being transported,

²⁶Ferrey, Steven (2001) *Environmental Law: Examples and Explanations*, New York: Aspen Publishers. p. 285

²⁷Ibid, p. 286

they are also required to file a report with the EPA. If the EPA receives notice from either the generator or the treatment/storage/disposal facility, the EPA initiates an investigation.²⁸

The RCRA requires other actions from hazardous waste transporters in addition to their role in the manifest system. If the transporter has an accident, they are obligated to inform the EPA. The transporter is also responsible for the cleanup of any hazardous waste which enters the environment as a result of the accident in which they were involved.²⁹

Treatment/storage/disposal facilities are required to have an EPA permit in order to conduct business. Both owners and operators are required to be permitted. The treatment/storage/disposal facilities are required to notify the EPA whenever they treat, store or dispose of hazardous waste. They are also required to indicate where the waste is being stored and the manner in which it is stored. Treatment/storage/disposal facilities are categorized as either interim or permanent and are subject to different types of regulation. Interim status was given to all facilities which existed at the time the RCRA was enacted. Interim facilities were subject to administrative orders issued by the EPA. These orders require corrective action and were intended to introduce the facilities to the new system of regulation. For the interim facilities which did not become permanent facilities, the EPA requires that they submit closure and post-closure plans. This measure intends to mitigate and possibly remove all remaining on-site contamination in its entirety.³⁰

Today, almost all facilities are permanent. There are seven requirements to which the EPA holds permanent treatment/storage/disposal facilities: they must have unique identification numbers, they must submit written notice of waste acceptance, they must analyze samples of waste, they must prevent contact with waste, they must perform inspections and monitor waste

²⁸Ferrey, Steven (2001) *Environmental Law: Examples and Explanations*, New York: Aspen Publishers. p. 295

²⁹Ibid, p. 263

³⁰Ibid, p. 300

and have emergency equipment available, they must train their operations personnel and they must maintain the waste manifest. These requirements are considered minimal and the individual states may impose more stringent regulations. Permanent facilities are also subject to administrative orders issued by the EPA to ensure corrective action.³¹

The enforcement of the Resource Conservation & Recovery Act can be achieved through information gathering and inspection, monitoring and testing, and citizen suits. Section 3007 of the RCRA extends the purview of the EPA under the RCRA to include all people who were involved in handling the waste. This can include manual laborers who are not licensed by the EPA and testing facilities. These individuals can be subject to mandatory interview carried out by a representative of the EPA. These interviews are initiated in letter form and any data received in response is confidential. Section 3007 of the RCRA also allows the EPA to perform site inspections. These inspections, which can be done without a warrant, are held to two requirements. First, EPA officials must have probable cause that a violation is present, and second, that the inspection is not hostile. During these inspections, EPA representatives can obtain samples and investigate the procedures of the site at hand. All action carried out by the EPA must be accompanied by a receipt so that the operator of the site is aware of the specifics of the inspection. In the event that the person or site refuses to be interviewed or inspected, the EPA can threaten an administrative penalty and issue an administrative complaint accompanied by a fine.³²

Section 3013 of the RCRA gives the EPA the authority to order the facility at hand to perform monitoring, testing and analysis and to report the results of these actions. These actions are based on the EPA's demonstration that a substantial hazard to human health or the environment is present and is thus warranted. The purpose of a Section 3013 order is to

³¹Ferrey, Steven (2001) *Environmental Law: Examples and Explanations*, New York: Aspen Publishers. p. 302

³²Ibid, pp. 310 – 312

determine the extent and nature of a hazard. When the Section 3013 order is received, the recipient is directed to submit a plan to the EPA which outlines their monitoring, testing and analysis. If the facility at hand does not respond to the Section 3013 order, or responds but in an unsatisfactory manner, the EPA can initiate civil action accompanied by a penalty or perform the monitoring, testing and analysis itself. The EPA can also order the state or municipality in which the facility is located to perform the monitoring, testing and analysis for which they will be reimbursed by the non-complying site. In the case of noncompliance, the EPA can also revoke the site's permit to function as a testing/storage/disposal facility.³³

Section 7002 of the RCRA enables citizens and government agencies, in addition to the EPA to act as the enforcer. Civil suits can be brought against any other entity: individual, corporation or governmental. Sixty days notice must be given in the case that the suit is brought concerning the requirements of permitting and operation outlined by the RCRA, and ninety days notice for actions concerning imminent hazard. In the case that the plaintiff wins, they will be awarded attorney fees. No money is directly awardable to the plaintiff under the RCRA. The defendant can be ordered to pay civil penalties or ordered to act in a manner determined by the judge. Citizens cannot bring suits concerning the siting of a treatment/storage/disposal facility or the issuance of permits. Citizens are also unable to bring suits in situations where states have already taken action. This double-jeopardy measure prevents redundancy. Claims by citizens cannot solely be based on a record of past violations. Continued violation of the act, which can include the presence of dumped materials, is cause enough. Citizen suits can also be brought against persons involved in the handling of such waste. Citizen suits are concerned with abatement and enjoinder and not remedy or restitution.³⁴ In other words, citizen suits filed under the RCRA can only result in a facility ceasing to operate or the cleaning of the spill.

³³Ferrey, Steven (2001) *Environmental Law: Examples and Explanations*, New York: Aspen Publishers. p. 312-313

³⁴Ibid, p. 314

Section 7003 of the RCRA gives the EPA authority to sue any person who has “contributed to, or is contributing to, any solid or hazardous waste management practice that may present an imminent and substantial endangerment to health or the environment.”³⁵ This provision is based on the notion of imminent harm. Imminent harm need not be immediate and may occur in the distant future. Likewise, it does not need to have already happened, it can be anticipated. In these cases, the EPA must only demonstrate exposure and not actual damage caused. Exposure establishes a risk of harm.³⁶ Section 7003 suits can result in civil penalties and injunctive remedial action.

Criminal cases can also be brought against those in violation of the RCRA. Criminal cases are appropriate when the defendant knowingly violates the RCRA; when action covered under the RCRA requiring a permit is done without a permit; when RCRA-regulated waste is dumped into the ocean without the appropriate permit; when the defendant falsely represents their actions and waste; when the defendant neglects to keep adequate records; when the defendant does not act in compliance with the manifest system; or when the defendant exports hazardous waste to another country without their consent. In addition to jail time, to which specific employees of the prosecuted corporation can be subjected, criminal cases can be accompanied by monetary fines up to \$50,000 per day.³⁷

Comprehensive Environmental Response, Compensation & Liability Act

Whereas the Resource Conservation & Recovery Act deals with regulation of handling hazardous materials, the Comprehensive Environmental Response, Compensation & Liability Act, commonly called CERCLA, regulates hazardous materials once they are disposed. In other

³⁵Ferrey, Steven (2001) *Environmental Law: Examples and Explanations*, New York: Aspen Publishers. p. 317

³⁶Ibid, p. 318

³⁷Ibid, p. 323

words, RCRA is prospective while CERCLA is retrospective.³⁸ CERCLA regulates disused hazardous materials which have become problematic, for instance spilled, or have a substantial likelihood to become problematic. There is a considerable overlap between hazardous materials covered in CERCLA and those regulated under The Clean Air Act and The Clean Water Act. However, CERCLA is not primarily concerned with what type of hazardous material has spilled; it is concerned with remediating situations in which the environment has become contaminated. Here, the environment includes land, water and air.³⁹ While The Clean Air Act, The Clean Water Act, and RCRA primarily regulate persons, CERCLA regulates places.⁴⁰ Four components comprise CERCLA: information gathering and analysis (Sections 103 and 104), the authority of the federal government to respond to hazardous spills and clean them up accordingly (Sections 104 and 105), a fund to underwrite the governments clean up costs (Sections 111 and 112), and a schema by which liability is assigned to individuals (Sections 107). This thesis will focus on the latter three parts of the statute.

CERCLA enables the federal government to clean up hazardous substances that have been released, or are releasing, into the environment. To do this, the federal government can remove the waste on a short term basis as well as remediate the spill over the long term. To remediate the spill, the federal government must ensure that the state will conduct and monitor the remediation, that a hazardous waste disposal site of adequate size is available to receive the waste and that the state will assume some of the financial cost of the clean up. CERCLA-initiated clean ups must be in accordance with the National Contingency Plan (NCP), a guide to clean up activities. Part of the NCP, the National Hazardous Substance Response Plan (NHSRP) ensures that cost-effective clean-up methods are pursued. In conjunction with the NCP, which outlines

³⁸Ferrey, Steven (2001) *Environmental Law: Examples and Explanations*, New York: Aspen Publishers. p. 333

³⁹Ibid, p. 335

⁴⁰Ibid, p. 334

the degree to which substances should be cleaned up, CERCLA ensures both a cost-effective and thorough course of action to deal with the contamination at hand.⁴¹ In remediation, a site investigation and analysis of alternative clean up actions must be evaluated and the public must have an opportunity to comment.⁴² Sites which are eligible for remediation are identified and logged in CERCLA's information system, CERCLIS. These sites are ranked in terms of toxicity, the quantity of waste present and its concentration therein. Each rank is associated with a specific level of risk. The risk value takes into account the population being exposed to the hazardous situation, the possibility of it affecting natural ecosystems and drinking water, the degree of hazard associated with the substance at hand, the likelihood it could damage the human food chain and the likelihood of direct public interaction with the site. Sites with the highest risk values are put on the National Priorities List. Sites which are listed on the National Priorities List are entitled to more than \$2 million for remediation. Sites can only be put on the National Priorities List if they are not remediable under RCRA. By filing petitions, citizens are able to bring sites to the attention of the EPA if not already listed on CERCLIS. Citizens can also bring suit against any person in violation of CERCLA standards and regulations in federal district court. In doing so, it is required of the citizen that the government and the alleged offender be given sixty days notice. In this situation, the EPA is able to assume the case should they see such a course of action desirable.⁴³

In order to clean up the contamination situation at hand, CERCLA enables the federal government and the individual state to spend money. The state is responsible for 10% of the cost and the federal government is responsible for the remainder. In the case that the building is owned by a municipality within the state, the state is responsible for 50% of the cost. The federal

⁴¹Ferrey, Steven (2001) *Environmental Law: Examples and Explanations*, New York: Aspen Publishers. p. 341

⁴²Ibid, p. 342

⁴³Ibid, p. 344

government is reimbursed for its expenditure with money from the Hazardous Substance Response Trust Fund, commonly referred to as the Superfund.⁴⁴ In part, the Superfund contains tax revenue from corporations dealing in petroleum, raw chemicals, and chemical derivatives.⁴⁵ In addition, the Superfund contains money from those pursued as potentially responsible parties for the actions undertaken by the federal government including clean up, administration, removal, and resource restoration.⁴⁶

Under CERCLA, liability falls on potentially responsible parties (PRPs). Four categories of PRPs can be pursued to recoup cost of addressing situations of contamination. The first category of PRP includes all owners and operators of a facility which have or intend to release hazardous substances. The second category of PRP is anybody who owned or operated the facility during unauthorized disposal of hazardous substances. The third category of PRP is individuals involved in arranging for the disposal. The fourth category of PRP is anyone involved in transporting hazardous waste with the intent to dispose of it unlawfully and in the process selects a disposal site for it.⁴⁷ All four categories of perpetrators can be pursued legally to recuperate costs. The awarded moneys are deposited in the Superfund.

From this examination of federal environmental law, a number of lessons can be learned.

1. The Environmental Protection Agency has quantitatively measurable standards which have specific penalties associated with them. These are prescriptive and clear, and thereby make their reporting and measurement that much easier.

⁴⁴Ferrey, Steven (2001) *Environmental Law: Examples and Explanations*, New York: Aspen Publishers. p. 344

⁴⁵Ibid, p. 346; Tax revenues from these sources also supply the Historic Preservation Fund which provides grants to states, tribes and local governments for historic preservation purposes.

⁴⁶Ibid, p. 345

⁴⁷Ibid, p. 344.

2. Voluntary submission to inspection is rewarded thereby making compliance desirable.

3. The EPA can revoke permits and prevent one from carrying out business. Likewise, in maintaining a list of recommended contractors, entities/individuals found to be in violation can be taken off that list as a result of misconduct. In both of these instances, there is a clear cause and effect relationship between misconduct and the inability to conduct one's business.

4. Any parties involved, however tangential the link may be, can be held accountable for misconduct. Parties are required to report any misconduct that they are aware of and if they do not, can be held in violation. Plausible deniability carries no weight and this makes enforcement all the more likely.

5. The EPA conducts inspections, which need not be announced and, in the process, can issue field citations. This practice would seem to promote the agency's presence and the notion that they are serious in enforcing their law.

6. Whether knowingly or unknowingly in violation of the law, monetary fines are issued and do not require the involvement of an extra-agency entity.

7. Lawsuits would seem to be one of the EPAs strongest tools. These suits can originate from citizens and be subsumed by the EPA itself. Likewise, these suits can target any party involved in the violating act. Knowing violators of the law are pursued in criminal suits. This is a further deterrent and, one assumes, compels compliance.

8. In grave situations, the EPA takes initiative and performs restorative work necessitated by non-compliance. This work is underwritten by the government and is paid for with moneys deposited in a reserved fund.

9. The EPA tracks compliance history in order to gauge appropriate punishments and assess, as a matter of risk, which sites are more likely to present threats to the environment.

10. The EPA's enforcement system is multilayered and contains fail-safes to ensure the protection of the environment.

11. The EPA regulates both the source of violations and the subject of violations.

These lessons serve to inform recommendations to the New York City historic preservation community on how the enforcement of the Landmarks Law might be improved.

Environmental law enforcement is carried out in order to prevent or remediate physical harm caused by contamination or degradation of the natural environment which is the result of human action. While contamination or degradation is quantitatively measurable, the effects are not. However, there are possible adverse implications to physical health which are associated with these measurable actions. In order to mitigate the possibility of these adverse effects, environmental laws outline specific, measurable standards and procedures to which operators are held. If these standards are not met or if these procedures are disregarded, enforcement is achieved through a combination of both government-initiated action and citizen-initiated action. The citizen can initiate civil suits which can serve to call government attention to a specific situation or to seek remedy. The federal and state governments carry out administrative procedures which can compel compliance and penalize the violator as well as initiate legal action, both civil and criminal. Moreover, the federal government can proactively restore the site to an

uncontaminated state. Environmental laws are regulated and enforced through a combination of proactive and preventative measures, reactive and penalizing measures and remedial measures which together serve to protect the current and future health of the environment and the people.

The environmental laws examined by this thesis are all federal statutes. They function with much greater resources and apply to an entire country. However, this is not to say that local historic preservation ordinances cannot be influenced by the mechanisms by which the federal government protects the environment. While it deals with admittedly less grave situations, historic preservation directly impacts our environment and our experiences therein. Historic buildings ameliorate our neighborhoods and our daily experiences by providing a historical context from which we can glean history and associate ourselves with a greater society.⁴⁸ On its most basic level, historic preservation legislation ensures the continued pleasure of experiencing history physically and aesthetically as it is manifested and has evolved in the built environment. The measures by which the federal government regulates and restores the environment demonstrate the variety of possibilities by which the New York Landmarks Law could be enforced.

Surely there are some measures in place already, like permitting, fines and litigation, which the Landmarks Preservation Commission uses to enforce its law. However, there are other measures that are not implemented to enforce the Landmarks Law but which have been modified and adopted for historic preservation purposes in other locales around the U.S. For example, in Aspen, Colorado, licensing is used to curb non-compliance. In Washington, D.C., a superfund-like mechanism exists to supplement enforcement efforts. Next, this thesis will examine how Aspen, Colorado and Washington, D.C. enforce their respective historic preservation ordinances.

⁴⁸For an in depth exploration on the benefits of historic preservation on mental health, please refer to Dr. Mindy Fullilove's *Root Shock: How Tearing Up City Neighborhoods Hurts America and What We Can Do About It*.

Enforcing Local Preservation Ordinances

Nationwide, local historic preservation enforcement is administered in a largely similar fashion. Changes to designated historic properties require permits and forgoing the pursuance of these permits typically results in violations, fines and sometimes, although more rarely, legal action.⁴⁹ This section will focus on two preservation enforcement systems which elaborate on the norm. These two locales were chosen after a broad survey of innovative enforcement methods and ideologies. These two local jurisdictions were chosen as their respective preservation ordinances are enforced in deviceful ways. This thesis does not claim to offer an exhaustive survey of the effective methods of enforcing local preservation laws. In examining the enforcement practices of Aspen, Colorado and Washington, D.C., effective methods of upholding historic local preservation legislation will serve as a basis, both ideological and operational, for recommendations to be made by this thesis to the historic preservation community on how the enforcement of the New York City Landmarks Law can be improved.

Aspen, Colorado

Aspen, Colorado may seem like an unlikely locale from which New York City's historic preservation enforcement system can learn. However, Aspen's preservation enforcement system is quite innovative. In the early 1970s, the City of Aspen passed an historic preservation ordinance to protect its built heritage. This heritage is a product of Aspen's history as the first town fully electrified in Colorado, a signifier of its roots in the mining industry, and its role as the first city in the U.S. to host the FIS World Alpine Championship in 1950, which catalyzed the City's development as a destination for winter sports.⁵⁰ Aspen's built heritage includes Victorian

⁴⁹For a more detailed survey of enforcement practices nationwide, please see the National Alliance of Preservation Commission's *The Alliance Review* published in November/December of 2004. Please note that portions of this study relating to NYC's enforcement system as of 2004 were found to be inaccurate.

⁵⁰Historic Preservation Task Force. (2008). *State of the Aspen Area*. Aspen: Historic Preservation Task Force.

structures, log cabins, ski lodges and, perhaps most unexpectedly, post-World War II modernist single family homes. Aspen's historic preservation ordinance is quite developed and the historic resources designated under it seem well protected. Before examining the historic preservation enforcement methods there, it is important to generally understand Aspen's historic preservation legislation.⁵¹

Aspen's historic preservation legislation is administered by the City Community Development Department (CDD) of which the Historic Preservation Commission (HPC), a voluntary review board, is a part. The purpose of Aspen's historic preservation legislation is "to promote the public health, safety and welfare through the protection, enhancement and preservation of those properties, areas and sites, which represent the distinctive elements of Aspen's cultural, educational, social, economic, political and architectural history" in order to ensure the continued usage of Aspen's built heritage, its appreciation, its continued character as a mining town and ski destination, and support tourism and the local economy through the attractive reuse of its historic buildings.⁵² The main responsibilities of the HPC, whose staff is comprised of two employees in total⁵³, is to designate Aspen's historic resources and to review alteration applications submitted by property owners for which they can grant or refuse the issuance of permits.⁵⁴ The types of permits in Aspen are comparable to New York City in their nature but not in the number which are reviewed.

Historic resources in Aspen are reviewed for designation by a voluntary board, the HPC, and are deemed significant based on their age of at least one hundred years and demonstration of adequate integrity or a property or district which is thirty years old and is associated with an

⁵¹For a copy of Aspen's ordinance, see the appendix.

⁵²Historic Preservation Task Force. (2008). *State of the Aspen Area*. Aspen: Historic Preservation Task Force.

⁵³Guthrie, Amy. "Contractor Test" Message to Ben Baccash. 19 January 2010.

⁵⁴City of Aspen Municipal Code, Section 26.415.010

event, pattern or trend that made a significant contribution to local, state or regional history or its association with a person who made a contribution of significance therein, or a structure which exhibits distinctive characteristics of a type, period or method of construction. A structure of less than thirty years old can be designated as a landmark should its owner nominate it voluntarily or if it is part of a district and the majority of the buildings comprising its context are thirty years old.⁵⁵ As of 2008, 280 structures were listed on Aspen's historic resources inventory list, including both individual buildings and districts.⁵⁶

Aspen's historic preservation legislation also includes a detailed section concerning demolition-by-neglect which outlines the building condition that must be maintained by designated properties.⁵⁷ With an understanding of its legislation in general, this thesis can now examine how historic preservation in Aspen is enforced.

Enforcement of Aspen's historic preservation ordinance is initiated by the public. In Aspen, the public is as relied upon as in New York City. Following the filing of complaints, inspections are required within fourteen days. The inspectors are employees from the Department of Buildings, the construction management staff of the City, and the two staff people from the CDD itself. Informal monitoring of the City's protected historic resources is also done by these three separate governmental bodies.⁵⁸ If a condition in violation is found to be present, violations are issued and are subsequently heard at administrative court.⁵⁹ A violation requires an owner to restore their property to the condition prior to violation. While monetary fines do not accompany these violations, the CDD has reached monetary settlements with property owners in violation as

⁵⁵City of Aspen Municipal Code, Section 26.415.030b

⁵⁶Historic Preservation Task Force. (2008). *State of the Aspen Area*. Aspen: Historic Preservation Task Force.

⁵⁷City of Aspen Municipal Code, Section 26.415.100a

⁵⁸Guthrie, Amy. "Contractor Test" Message to Ben Baccash. 19 January 2010. E-mail.

⁵⁹City of Aspen Municipal Code, Section 26.415.100b

a result of legal action.⁶⁰ Up until this point, enforcement of Aspen’s preservation legislation resembles New York City’s practices in concept and procedure. Beyond these similarities, Aspen has four newfangled methods of enforcing its law.

Aspen’s Historic Preservation Commission is the only historic preservation regulatory body in the nation to require a license for work being done on an individual landmark or on a property within a historic district. In 2000, the licensing program was adopted as a policy as opposed to being incorporated into the law. A contractor or superintendent on any historic preservation projects in Aspen is required to have a specialty license. The historic preservation license is earned by passing a test which is administered by the HPC. Multiple-choice questions covering topics from repairing decorative stonework to wood conservation comprise the licensing exam.⁶¹ According to Amy Guthrie, a Historic Preservation Officer with the Aspen Community Development Department, “The test isn’t too hard. In fact, I don’t think anyone has failed.”⁶² Even so, Guthrie noted that the historic preservation licensing program has made a “major difference in enforcement.”⁶³ It has provided for an increase in communication between HPC staff and contractors and subsequently improved their understanding of the permitting process. From the regulatory perspective, licensing is beneficial as contractors cannot claim ignorance of what is required of them by the law. Guthrie stated, “We can revoke the specialty license and their general contractor’s license which is a big disincentive for them to do something wrong.”⁶⁴ The licensing program seems to be effective in its revocation ability, precluding contractors who are found to be in contravention from further violating the Aspen historic preservation ordinance.

⁶⁰Guthrie, Amy. “Contractor Test” Message to Ben Baccash. 19 January 2010. E-mail.

⁶¹For a page from the Aspen Historic Preservation Licensing Exam, please see the Appendix.

⁶²Guthrie, Amy. “Contractor Test” Message to Ben Baccash. 19 January 2010.

⁶³Ibid.

⁶⁴Ibid.

If a property is found to be in violation of the preservation ordinance, Aspen's Community Development Department is able to unabashedly penalize the property owner. The law states, "Following notice and public hearing, the HPC shall prohibit the owner, successor or assigns from obtaining a building permit for the subject property for a period of up to ten (10) years from the date of the violation. The City shall initiate proceedings to place a deed restriction on the property to ensure enforcement of this penalty. The property owner shall be required to maintain the property during that period of time in conformance with the Standards for reasonable care and upkeep."⁶⁵ Guthrie indicated that this provision is "meant to be a big disincentive" to non-compliance.⁶⁶ It would seem to be a punitive measure effectively disallowing or severely decreasing the ability of the property owner to reap a desired profit from their property should they disregard the law. Guthrie continued, "There is a downside in that it might not be good for a neighborhood to have an unfinished site for that long."⁶⁷ Even so, it would seem that the mere presence of a provision like this in the historic preservation ordinance dissuades the potential violator from being non-compliant. Perhaps this explains why this part of the law has yet to be implemented in Aspen.⁶⁸ Its disuse is preferable to its use. By having the ability to so harshly penalize a property owner in violation, property owners are deterred from violating the law. While it is unlikely that this provision will be used, it is still possible. The New York City Landmarks Law does not provide this punitive ability.

Aspen's Community Development Department and Historic Preservation Commission also has the ability to revoke previously granted benefits for which only designated historic properties are eligible. The law states that "Any variances or historic preservation benefits previously granted to the property may be subject to revocation," if the property is found to be in

⁶⁵City of Aspen Municipal Code, Section 26.415.140A2

⁶⁶Guthrie, Amy. "RE: Enforcement Thesis Follow-up" Message to Ben Baccash. 04 March 2010. E-mail.

⁶⁷Ibid.

⁶⁸Ibid.

violation of the historic preservation ordinance.⁶⁹ These benefits include the ability to subdivide one's property, thereby exempting property owners of historic properties from the City of Aspen's Subdivision and Growth Management Quota System, as well as dimensional variances which may allow owners of historic properties to develop their sites more fully than would be otherwise allowed by then general zoning code. They are also eligible for a reduction in parking requirements and the allowance of conditional uses. In addition, they can be allowed five-hundred square feet of potential additional development in floor-area and the waiver of fees whereby the waiver assists in the property's preservation.⁷⁰ In addition to attracting property owners to designation, by providing special benefits to property owners of historic properties the HPC is empowered through the possibility of the revocation of these benefits. As New York City has legislated benefits to designated properties, no such possibility of revocation exists.

The Aspen HPC can go even further in enforcing its law and proactively perform necessary work on a designated building which a property owner neglects to do. This is part of the demolition-by-neglect regulations of the historic preservation ordinance. The law states that after providing for adequate due process and multiple opportunities for the deficient condition to be corrected, "If the owner fails to make the necessary repairs within the identified time frame, the City may undertake the work to correct the deficiencies that create any hazardous and unsafe conditions to life, health and property. The expense of this work will be recorded as a lien on the property."⁷¹ According to Guthrie, this provision has not yet been used as the HPC has been able to negotiate with owners and persuade them to perform the work themselves.⁷² Nonetheless, it is important for the HPC to have the ability to do work when a property owner refuses to do so. It demonstrates that the regulatory historic preservation body is willing to expend its own funds to

⁶⁹City of Aspen Municipal Code, Section 26.415.140A3

⁷⁰Ibid, Section 26.415.110A – G

⁷¹Ibid, Section 26.415.100b6

⁷²Guthrie, Amy. "RE: Enforcement Thesis Follow-up" Message to Ben Baccash. 04 March 2010. E-mail.

uphold its mission, subsequently protecting an historic resource. It sends a message that non-compliance will not be tolerated and that the HPC will proactively restore the building to their standard of acceptable maintenance if need be. While the New York City Landmarks Preservation Commission has comparable demolition-by-neglect standards of maintenance, as well as the ability to have a lien put against a property and the ability to hire consultants to assess a building's condition, the NYC Department of Housing Preservation and Development (HPD) has the ability to stabilize a building should it be near collapse and subsequently have a lien docketed against the property. Aspen's legislation provides the regulatory preservation agency with the composite ability to perform the necessary work and effectively bill the owner. While in New York City the same outcome can be achieved, it requires interagency coordination and the HPD contractors often do a poor quality job.⁷³

For such a small and obscure locale, Aspen's historic preservation legislation is remarkably developed. While traditional in terms of designation and permit review, Aspen's historic preservation ordinance diverges from the norm of regulatory historic preservation in the methods and mechanisms used to enforce the law. While drastically different in terms of the built heritage which is protected, the context in which these resources are protected, and the scale of this protection, Aspen's four innovative historic preservation enforcement methods (licensing requirement, permit freeze, benefit revocation, and the ability to do work and bill the owner without interagency coordination) are noteworthy and will inform the recommendations offered by this thesis to the New York City historic preservation community on how it might improve enforcement of the Landmarks Law.⁷⁴

⁷³Weiss, J. (2010, April 16). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

⁷⁴Before any specific enforcement practices are adopted from Aspen, it is necessary to contact preservation advocates there to hear their opinion on the enforcement system. As part of the research for this thesis, advocates in Aspen were contacted but a response speaking to the effectiveness of their enforcement practices was not received. This is a point of further research which merits exploration.

Washington, D.C.

Washington, D.C. is one of the few locales around the United States that is enforcing its historic preservation ordinance innovatively. In the Nation's capital, local historic preservation appears to be taken seriously as reflected by the vigor with which the law is upheld. Before examining their cutting-edge enforcement methods, it is important to have a general understanding of Washington D.C.'s historic preservation legislation.⁷⁵

Washington, D.C.'s historic preservation ordinance was enacted as The Historic Landmark and Historic District Act of 1978 for the purpose of "the protection, enhancement and perpetuation of properties of historical, cultural and aesthetic merit [that] are in the interests of the health, prosperity and welfare of the people of the District of Columbia."⁷⁶ The act sought to protect the city's heritage, foster civic pride, enhance the city's attraction to visitors and the financial benefits that flow there from, promote the use of landmarks and historic districts for educational purposes, and generally enhance the quality of life in Washington, D.C.⁷⁷ Historic resources must satisfy the National Register Criteria for Designation to qualify for designation in D.C. The Historic Landmark and Historic District Act of 1978 is administered by the Historic Preservation Office (HPO) which is part of the D.C. Office of Planning (OP). The Historic Preservation Review Board (HPRB), one component of the HPO, acts in a discretionary review capacity. Day to day operations are carried out by HPO staff. In its basic structure, D.C.'s local preservation legislation is similar to New York City, with an administrative agency deferring to a discretionary body for further oversight and review. In these ways, the purpose and function of preservation in D.C. and New York City are quite similar.

In terms of their respective preservation legislative frameworks, however, Washington, D.C. and New York City differ. While D.C.'s HPO is similar to the Landmarks Preservation

⁷⁵For a copy of D.C. historic preservation ordinance, see the appendix.

⁷⁶Historic Landmark and Historic District Protection Act of 1978 of the District of Columbia, Section 2

⁷⁷Ibid.

Commission in terms of its administrative duties, it must be noted that the HPO is part of a larger regulatory body, the D.C. Office of Planning, whereas the LPC is not. While the LPC has the power to issue its own permits, in D.C. permits are issued by the Department of Consumer and Regulatory Affairs (DCRA), which is its own autonomous agency.⁷⁸ While the granting or refusal of them is reliant on comments from the HPO or the HPRB, permits are administered by DCRA. In 2008, DCRA issued 4,527 permits as reviewed by the HPO, 94% of which were reviewed by HPO staff and 6% by the HPRB.⁷⁹ The DCRA is also the official employer of the three HPO Enforcement Officers who solely enforce The Historic Landmarks and Historic District Act of 1978.⁸⁰ Perhaps the most significant difference between the two agencies, the LPC is solely responsible for the designated historic resources within New York City while the HPO has this responsibility in addition to acting as the State Historic Preservation Office for D.C. While this does not geographically increase the size of its purview, it does add to its duties. For instance, in 2008 the HPO was responsible for reviewing \$89.5 million of rehabilitation tax credit projects⁸¹ while the LPC is not directly involved in this type of review.

While the organization of duties and certain aspects of the review process may seem substantially different from those of New York City, the underlying concepts are the same: properties are designated and subsequent changes to these designated properties require approval and permits and if these obligations are not met, enforcement action is taken accordingly. There are other substantive rationales for comparing the historic preservation enforcement systems of New York City and Washington, D.C. While it should be noted that D.C. and New York City are disparate in population and in geographical area, both are the economic engines of their respective metropolitan regions which developed contemporaneously as cities. Moreover, the

⁷⁸Beidler, M. (2010, January 26). Telephone Interview with Michael Beidler. (B. Baccash, Interviewer)

⁷⁹Fenty, A. M. (2008). *2008 Annual Report*. Washington, D.C.: Office of Planning. p. 2.

⁸⁰Beidler, M. (2010, January 26). Telephone Interview with Michael Beidler. (B. Baccash, Interviewer)

⁸¹Fenty, A. M. (2008). *2008 Annual Report*. Washington, D.C.: Office of Planning. p. 2.

historic resources which are protected by D.C.'s preservation legislation, approximately 25,000, nearly equal New York City's total number of protected sites, approximately 27,000.⁸² The enforcement system of the New York City Landmarks Preservation Commission and D.C.'s Historic Preservation Office's enforcement practices are somewhat similar.

In terms of enforcement specifically, the D.C. HPO has three dedicated inspectors responsible for protecting all of the designated historic resources, a combination of historic districts and individual landmarks. While these Enforcement Officers work for the DCRA, they only enforce D.C.'s preservation legislation. The three HPO Enforcement Officers are shielded, making them officers of the law. Their responsibilities includes checking for permits, ensuring that permits are being accurately followed, and monitoring designated landmarks to verify they are kept in a condition commensurate with the maintenance standard established in the D.C. legislation, what in New York City is called 'good repair'.⁸³ These Enforcement Officers can issue Stop Work Orders and violations which are subsequently adjudicated by an extra-agency venue, the Office of Administrative Hearings (OAH). These hearings can result in civil penalties. In 2008, the Enforcement Officers conducted 946 inspections, posted 107 Stop Work Orders and issued 96 Notices of Violation and 40 Notices of Infraction.⁸⁴ The law is also enforceable criminally.⁸⁵ HPO's enforcement philosophy, however, is to not punish the property owner but to correct the violation.

As much of D.C.'s historic preservation enforcement system is similar to NYC, a detailed examination limited to its major differences and innovative mechanisms will be most useful and informative for the purposes of this thesis. These include the practice of proactively monitoring

⁸²Beidler, M. (2010, January 26). Telephone Interview with Michael Beidler. (B. Baccash, Interviewer)

⁸³Historic Landmark and Historic District Protection Act of 1978 of the District of Columbia, Section 10b(a), 10b(b) and 10(c)

⁸⁴Fenty, A. M. (2008). *2008 Annual Report*. Washington, D.C.: Office of Planning.

⁸⁵Historic Landmark and Historic District Protection Act of 1978 of the District of Columbia,, Section 11(a)

designated landmarks, the ability to issue Stop Work Orders in the field, the effective use of a badge in enforcing the law, the ability to fine contractors in violation of the law, the ability to perform work to prevent further physical damage caused by neglect, and the establishment of a dedicated fund to finance enforcement measures generally. This thesis will look at how these aspects of D.C.'s enforcement system function to inform recommendations on improving the enforcement of the Landmarks Law.

Active monitoring of designated landmarks would seem to be an important aspect of their continued protection. While in New York City no such action takes place, monitoring is an integral part of the D.C. preservation enforcement repertoire. Each of the three Enforcement Officers is assigned the responsibility of particular historic districts. For example, Toni Cherry, who was appointed D.C.'s first historic preservation Enforcement Officer in 1999⁸⁶, is responsible for Cleveland Park, Downtown, Fifteenth Street, Foggy Bottom, Georgetown, Mount Pleasant, Takoma Park and Woodley Park.⁸⁷ According to HPO Enforcement Officer Michael Beidler, Enforcement Officers walk or bicycle through their assigned districts on a regular basis. In the instance where the area to be monitored is farther away, a car from D.C.'s municipal fleet is used.⁸⁸ Toni Cherry "cruises the streets of historic Washington in a city-issued Dodge with a big red light on the dashboard."⁸⁹ By having a siren in the car, preservation enforcement in D.C. consciously maintains a visual presence. As Cherry drives through her assigned areas, she will stop if she sees someone breaking the law⁹⁰, in addition to checking permits on a weekly or

⁸⁶Deane, D. (2001, September 1). History Cop. *The Washington Post*, p. H.01.

⁸⁷Office of Planning. (n.d.). *Reporting Illegal Work*. Retrieved February 10, 2010, from Washington, D.C. Office of Planning: <http://www.planning.dc.gov/>

⁸⁸Beidler, M. (2010, January 26). Telephone Interview with Michael Beidler. (B. Baccash, Interviewer)

⁸⁹Deane, D. (2001, September 1). History Cop. *The Washington Post*, p. H.01.

⁹⁰Ibid.

bimonthly basis to make sure that all continuing work is in adherence.⁹¹ Cherry's actions are typical of the three preservation Enforcement Officers in Washington, D.C. In addition to actively monitoring their historic districts, D.C. preservation enforcement officers respond to complaints, the majority of which are received by telephone.⁹² The public is relied upon, however not as much as in New York City, complementing their monitoring practice. Maintaining a street presence through monitoring would seem a key part of D.C.'s preservation enforcement system.

If, while in the field, a D.C. HPO Enforcement Officer encounters someone altering a designated building without a permit, he/she can issue a Stop Work Order on the spot. Stop Work Orders can be issued verbally in addition to being posted on the building itself. A posted SWO is a bright orange sticker and is accompanied by a \$2,000 fine which doubles if the sticker is removed and increases incrementally if the condition in violation is not corrected lawfully in an allotted amount of time. If a Stop Work Order is issued, an Enforcement Officer returns daily to ensure work has not resumed and that the sticker is still posted. Enforcement Officer Beidler noted that "there is a level of embarrassment to it, we want people to see [the Stop Work Order]," in explaining that calling the attention of the public to a landmark violation can be quite effective in resolving the condition at hand. While initially this may seem inappropriate, Beidler explained that, in the end, this is about protecting the buildings and to do that, conditions in violation need to be resolved as soon as possible.⁹³ In other words, the end justifies the means. D.C.'s Stop Work Order-posting policy differs drastically from the New York City LPC procedure of mailing SWOs, sometimes hand delivering them, and never posting them. While the goal of D.C. and New York City to protect their respective designated historic resources is the same, the attitude to achieve this goal appears to differ.

⁹¹Beidler, M. (2010, January 26). Telephone Interview with Michael Telephone. (B. Baccash, Interviewer)

⁹²Deane, D. (2001, September 1). History Cop. *The Washington Post*, p. H.01.

⁹³Beidler, M. (2010, January 26). Telephone Interview with Michael Beidler. (B. Baccash, Interviewer)

While issuing the Stop Work Order, the Enforcement Officer will alert the workmen that they must leave the premises. A Washington Post article recounting a typical day of HPO Enforcement Officer Cherry explains one such situation. Cherry responded to a complaint made by a neighbor concerning a suspected illegal addition to a property in the Georgetown Historic District. This investigation resulted in her issuing a Stop Work Order. Initially, Cherry entered the property and said “Hi. I’m Toni Cherry. I’m an inspector for the city. I need to see the building plans for the addition you’ve got going in the back,” and simultaneously showed the workmen her shield. Once he verified that the badge was in fact D.C. issued, the foreman was lawfully obliged to comply with Cherry’s requests and showed her the plans which she subsequently scrutinized and deduced that what was being built was not adherent to the permit and thus had not been approved by the HPO or HPRB. Cherry issued a SWO and cleared the site.⁹⁴ Enforcement Officer Beidler explained that the badge provides the D.C. Enforcement Officer with both legal protection as well as a level of authority and intimidation. Beidler further indicated that the issuance of shields helped D.C.’s Enforcement Officers solidify their reputation as being effective and active enforcers of the law. Beidler indicated that workmen were far more responsive to the badge than to a city-issued identification card.⁹⁵ He stated, “When [workers] see Toni [Cherry], hammers drop,” or, in other words, all work stops. In the case of Washington, D.C. the Enforcement Officer’s badge seems to be a very effective tool in enforcing their historic preservation legislation.

If a condition in violation is discovered whilst investigating a complaint, a Notice of Violation (NOV), which is a citation without a fine, or a Notice of Infraction, which is accompanied by a fine no less than \$2,000, is issued by the D.C. Enforcement Officer. Neither an NOV nor an NOI is purely a warning and both are citations against the building. It is at the discretion of the Enforcement Officer whether to issue an NOV or an NOI. NOIs can impose

⁹⁴Deane, D. (2001, September 1). History Cop. *The Washington Post*, p. H.01.

⁹⁵Beidler, M. (2010, January 26). Telephone Interview with Michael Beidler. (B. Baccash, Interviewer)

finer on the property owner or the contractor in violation, or both.⁹⁶ In having the option to issue NOIs to contractors, property owners are not the sole bearers of the burden of the requirements of local legislative preservation. In New York City, only the property owner is fined while the contractor is very rarely pursued.

In grave situations of neglect, D.C.'s Historic Preservation Office is able to commission work to be done on the designated properties and subsequently bill the respective owner. Section 10(c) of The Historic Landmark and Historic District Act of 1978 as amended through March 2nd, 2007, states, "If the Mayor determines that an historic landmark or a contributing building or structure within a historic district is threatened by demolition by neglect, upon obtaining an order from the Superior Court of the District of Columbia, the Mayor may (1) Require the owner to repair all conditions contributing to demolition by neglect; or (2) If the owner does not make the required repairs within a reasonable period of time, enter the property and make the repairs necessary to prevent demolition by neglect."⁹⁷ If the D.C. HPO is forced to repair the structure in lieu of an owner doing so, all cost of that repair will be charged to the owner in the form of a lien against their real property.⁹⁸ According to HPO Enforcement Officer Michael Beidler, this rarely happens due to the likelihood that an owner will respond to the court order to repair their property.⁹⁹ Nonetheless, this would seem to be a very important provision of D.C. preservation legislation which, after adequate due process and negotiation, allows the Historic Preservation Office to take action in the name of saving a designated landmark whereas in New York City, the Landmarks Preservation Commission must coordinate this action with the Department of Housing Preservation and Development.

⁹⁶Sale, W. (2007). *Plenty of Bark, Not Much Bite: Putting Teeth Back into Historic Preservation Enforcement in D.C.* Georgetown: Georgetown University Law Center. p.14.

⁹⁷Historic Landmark and Historic District Protection Act of 1978 of the District of Columbia, Section 10c(a)

⁹⁸Ibid. Section 10c(b)

⁹⁹Beidler, M. (2010, January 26). Telephone Interview with Michael Beidler. (B. Baccash, Interviewer)

Perhaps the most innovative part of D.C.'s preservation enforcement system is the Historic Landmark-District Protection Fund (HLDP Fund), established on August 18th, 2006,¹⁰⁰ which funds the aforesated repair work. Section 11(a) of the The Historic Landmark and Historic District Act of 1978 as amended through March 2nd, 2007 defines this fund as “a non-lapsing, revolving fund; the funds of which shall not revert to the General Fund at the end of any fiscal year but shall remain available...for the purpose of paying the costs of repair work necessary to prevent demolition by neglect as described in Section 10(c) or for the costs of carrying out any other historic preservation program consistent with the purposes of and pursuant to this act.”¹⁰¹ The HLDP Fund is supposed to contain amounts appropriated to it, donations (or the money resultant of the sale of donated real property), interest earned on its balance, and fines collected as a result of HPO-issued NOIs.¹⁰² The Mayor of D.C. is required to appropriate funds annually necessary for its capitalization.¹⁰³ As of May 2007, only permit fees were being directed to the HLDP Fund even though the law states otherwise.¹⁰⁴ In 2008, the HLDP Fund grew from \$47,123.00 to \$73,795.41. In that year, \$8,366.59 was spent on broadcasting Historic Preservation Review Board meetings and \$35,039.00 was deposited from permit fees.¹⁰⁵ As a non-lapsing fund dedicated to supporting the purposes of D.C.'s local preservation legislation, specifically its ability to perform necessary repair work in cases of grave neglect, the HLDP Fund, in concept, permits the Historic Preservation Office to be decreasingly reliant on their

¹⁰⁰District of Columbia Register, 18 August 2006, Section 6.1110.01

¹⁰¹Historic Landmark and Historic District Protection Act of 1978 of the District of Columbia, Section 11a(a)

¹⁰²Ibid. Section 11a(b)(1),(2),(3),(4),(5),(6)

¹⁰³Ibid. Section 11a(c)

¹⁰⁴Sale, W. (2007). *Plenty of Bark, Not Much Bite: Putting Teeth Back into Historic Preservation Enforcement in D.C.* Georgetown: Georgetown University Law Center. p.30.

¹⁰⁵Fenty, A. M. (2008). *2008 Annual Report.* Washington, D.C.: Office of Planning.

appropriated budget and increasingly able to act at their discretion.¹⁰⁶ In New York City, the Landmarks Preservation Commission neither has the ability to perform work on neglected buildings nor a specified mechanism to fund such work.

According to local advocates, preservation enforcement in D.C. is generally effective. David Alpert, who created the blog “A Greater, Greater Washington” indicated that there was a general awareness of preservation enforcement in D.C. He explained that the enforcement efforts are commensurate with the “very strong (even too strong) historic controls.”¹⁰⁷ Alpert indicated that historic preservation was “effectively enforced” by the HPO inspectors and that while they do proactively monitor, there is still a reliance on local groups.¹⁰⁸ Nancy Metzger of the Capitol Hill Restoration Society, a local preservation advocacy organization, said that while the HPO monitors, complaints from the public supplement these efforts.¹⁰⁹ She further indicated that the monitoring could be more frequent but that it was better than no monitoring at all, as is the case in New York City.¹¹⁰ Even so, Metzger said that there is a definite awareness of preservation enforcement in Washington, D.C. She attributes this, at least in part, to the badge utilized in enforcing D.C.’s preservation ordinance. She explained that the badge makes the Enforcement Officer a “visible policing authority”.¹¹¹ She stated, “People believe they will get in trouble if they don’t get the right permits” and that if they forego this responsibility and are found in violation, they are “very distraught over it” as a result of its “highly embarrassing” nature.¹¹² Metzger indicated that no matter how good their enforcement system was, non-compliance would

¹⁰⁶The D.C. SHPO was repeatedly contacted with regards to how this fund was managed and whether or not it was a useful tool. Unfortunately, a response to these questions was never received.

¹⁰⁷Alpert, David. “Re: Preservation Enforcement Thesis” Message to Ben Baccash. 18 April 2010. E-mail

¹⁰⁸Ibid.

¹⁰⁹Metzger, N. (2010 April 18) Telephone Interview with Nancy Metzger. (B. Baccash, Interviewer)

¹¹⁰Ibid.

¹¹¹Ibid.

¹¹²Ibid.

never be completely eradicated.¹¹³ Based on the opinions of these two D.C. advocates, it would seem that D.C.'s enforcement system is effective.

Washington, D.C. is a leader of local historic preservation enforcement. While D.C.'s enforcement philosophy as compliance-driven may resemble New York City's, there is a distinction that must be made. In D.C. aggressive enforcement fosters compliance through deterrents. Holistically, D.C.'s enforcement system is unrivaled by any other locale in the country. The strengths of Washington D.C.'s enforcement system must be thoughtfully considered when making recommendations to improve the enforcement system of the New York Landmarks Law.

Washington, D.C. and Aspen, Colorado enforce their respective historic preservation legislations inventively. It is clear that no location is identical to New York City in terms of the number of resources regulated, the geographic distribution of these resources and the political and financial climates in which this regulation takes place. Some of the cutting-edge measures examined herein are much more in tune with the culture of the New York City Landmarks Preservation Commission while others would seem to be in total discord. Some of the measures examined could be implemented on an administrative basis while others would require a legislative change. As no place is exactly like New York, it would be unfair to simply take measures from other locations and blindly stamp them on the New York City's regulatory preservation system. Because of this, this thesis will use these measures as conceptual bases from which recommendations will be adapted to New York City and its context. In adapting the concepts gleaned from the respective locales and their preservation enforcement systems, the New York City Landmarks Preservation Commission enforcement system may be strengthened by the carefully considered recommendations, to be discussed next, which have been tailor-made to the setting of New York City.

¹¹³Metzger, N. (2010 April 18) Telephone Interview with Nancy Metzger. (B. Baccash, Interviewer)

Having examined federal environmental laws, local historic preservation ordinances and their respective methods of enforcement, this thesis can now critique the enforcement of the New York Landmarks Law and begin to form recommendations to the historic preservation community on how it might be improved. An explanation of these goal-based recommendations will be examined in the following section.

V. IMPROVING ENFORCEMENT OF THE LANDMARKS LAW

Enforcement of the New York City Landmarks Law has come a long way. Nevertheless, further improvement is possible. The following critique of the enforcement system in place at the New York City Landmarks Preservation Commission will be informed by the preceding sections on its history and evolution, how it functions and the case studies of enforcement in action offered therein. This critique is concerned with the enforcement of the Landmarks Law, systematically and operationally. Considering the methods employed in enforcing federal environmental laws and preservation ordinances from two other local jurisdictions, this thesis will make recommendations to the historic preservation community concerning the improvement of the enforcement of the New York City Landmarks Law. There are two obstacles which stand in the way of improving enforcement: the resources available to the Landmarks Preservation Commission and the culture that underlies its function. Each obstacle will be addressed separately and paired with goals which seek to address them. Each goal is accompanied by a discussion of possible operational improvements which could effectuate its achievement.

Obstacle: Resources and the Landmarks Preservation Commission

Historically, the Landmarks Preservation Commission has not been given the funding that many members of the historic preservation community believe it deserved. While its budget and resources have increased over the years, it seems that the LPC is still under-resourced today and this limits its ability to uphold the law.

The LPC has two Enforcement Officers responsible for responding to complaints concerning the approximately 27,000 designated landmarks under its regulation. Preservation advocates contest that this is an unwieldy responsibility.¹ LPC Deputy Counsel John Weiss indicated that as the Commission continues to designate, it will undoubtedly have to ask for more resources, i.e. another Enforcement Officer, and intends to do so once the current financial

¹Bankoff, S. (2009, November 9). Interview with Simeon Bankoff. (B. Baccash, Interviewer)

climate improves.² Preservation advocates and the Landmarks Preservation Commission agree that enforcement of the Landmarks Law would benefit from an increase in resources for the LPC's Department of Enforcement.

Likewise, preservationists would argue that the protection of designated landmarks would benefit from legal action being taken more frequently and, it seems, the Deputy Counsel of the LPC would agree.³ However, as "chronically underfunded"⁴, the Landmarks Preservation Commission is not able to take additional legal action. General Counsel to the LPC Mark Silberman noted that enforcement of the Landmarks Law would benefit from the hiring of an additional lawyer.⁵ Deputy Counsel John Weiss stated that having either an engineer on retainer or on the staff of the LPC would also be extremely helpful.⁶ In having more staff to aid in the investigation and legal pursuit of demolition-by-neglect cases in particular, the Landmarks Preservation Commission would be increasingly equipped to enforce the Landmarks Law.

Goal: To supplement the resources of the Landmarks Preservation Commission and improve its capacity to enforce the Landmarks Law.

The LPC's current under-resourced state adversely affects its ability to enforce the law. If the LPC's budget was increased enough to allow for the hiring of additional staff for administrative and legal enforcement purposes, it would seem that the protection offered by the Landmarks Law would be more easily, frequently and qualitatively provided.

In Washington, D.C, the Historic Preservation Office's budget is able to be supplemented by the Historic-District Landmark Protection Fund. The HLDP Fund contains amounts

²Weiss, J. (2009, December 1). Interview with John Weiss. (B. Baccash, Interviewer)

³Ibid.

⁴Weiss, J. (2010, March 26). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

⁵Silberman, Mark. (2010, April 16). Interview with Mark Silberman. (B. Baccash, Interviewer)

⁶Weiss, J. (2010, March 26). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

appropriated to it, donations (or the money resultant from the sale of donated real property), interest earned on its balance, and fines collected as a result of HPO-issued Notices of Infraction, equivalent to New York City's Notices of Violation.⁷ As a non-lapsing fund dedicated to supporting the purposes of D.C.'s local preservation legislation, the HLDP Fund, in concept, permits the Historic Preservation Office to be decreasingly reliant on their appropriated budget and increasingly able to act in the name of their purpose.⁸ This fund is reminiscent of CERCLA's Superfund utilized by the EPA to fund cleanup projects.⁹ A fund like this could be established supplement the budget of the LPC.

In New York City, similar funds exist. The Per Cent For Art Fund contains a mandatory earmarked portion of the City's annual budget used for the retention and display of art citywide. The Department of Citywide Administrative Services (DCAS) has The Historic Preservation Fund which is separate from the City's General Fund and contains money donated to it by the entertainment industry, which uses city buildings for filming television shows and motion pictures. These funds are used to perform maintenance work on New York City's historic real estate holdings.¹⁰ According to Martha Hirst, the Commissioner of the Department of Citywide Administrative Services, this fund has been very effective and has allowed DCAS to perform a lot of work which, otherwise, would have fallen by the wayside.¹¹ Based on the success of these other funds and the LPC's need for an increase in resources, it would seem that the LPC would benefit from the establishment of a fund which could receive donations from the preservation community in addition to deposits resultant from its enforcement actions.

⁷Historic Landmark and Historic District Protection Act of 1978 of the District of Columbia, Section 11a(b)(1),(2),(3),(4),(5),(6)

⁸The D.C. SHPO was repeatedly contacted with regards to how this fund was managed and whether or not it was a useful tool. Unfortunately, a response to these questions was never received.

⁹Ferrey, Steven (2001) *Environmental Law: Examples and Explanations*, New York: Aspen Publishers. p. 344.

¹⁰Hirst, Martha. "RE: Ben Baccash" Message to Ben Baccash. 26 January 2010. E-mail.

¹¹Ibid.

Deputy Counsel to the LPC John Weiss expressed concern about this, believing that if the money collected from fines which accompany NOV's were used to fund the LPC, the LPC would be criticized for enforcing the Landmarks Law as a means of generating revenue for itself.¹² To avoid this potential criticism, it would seem beneficial for the historic preservation community to pursue the possibility of having the money that is currently deposited into the General Fund of the City of New York as a result of lawsuits initiated by the Landmarks Preservation Commission directed to a fund solely for enforcement purposes.

The Landmarks Preservation Foundation (LPF), a not-for-profit which supports the LPC's mission, could function as the repository of the proposed fund. The additional funds received by the LPF could potentially supplement the respective budgets of the Department of Enforcement and the Legal Department and help to hire additional Enforcement Officers and professional legal support staff, thereby equipping the LPC to more adequately enforce the Landmarks Law. In fact, the Legal Department has most recently supplemented its resources by utilizing funds from the Landmarks Preservation Foundation to hire a law student as a summer intern who will focus on enforcement issues.¹³

This thesis proposes that the historic preservation community should pursue the possibility of utilizing the Landmarks Preservation Foundation as a conduit of resources to supplement the enforcement capacity of the Landmarks Preservation Commission. The protection of the designated landmarks would be improved by increasing the Landmarks Preservation Commission's capability to enforce the Landmarks Law. While an increase in resources will certainly help to improve enforcement of the Landmarks Law, it is not its panacea. There is another obstacle that is perhaps even more difficult to surmount which must be addressed.

¹²Weiss, J. (2010, April 16). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

¹³Weiss, J. (2010, March 26). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

Obstacle: The Culture of the Landmarks Preservation Commission

The Landmarks Preservation Commission 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.”¹⁴ 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 are not penalized.”¹⁵

While it initially seems that the Landmarks Preservation Commission enforces the law in a deterrent fashion systematically, in operation the LPC is focused on compliance. John Weiss, Deputy Counsel for the LPC, said “The philosophy of enforcement [at the LPC] is to not penalize people, but to get the buildings fixed.”¹⁶ 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 Landmarks Preservation Commission has pandered to property owners. Otis Pearsall noted that as it currently enforces the law, the Commission does everything

¹⁴Reiss, A. J. (Autumn, 1984). Consequences of Compliance and Deterrence Models of Law Enforcement for the Exercise of Police Discretion. *Law and Contemporary Problems* , 83-122.

¹⁵Ibid.

¹⁶Weiss, J. (2009, December 1). Interview with John Weiss. (B. Baccash, Interviewer)

in its power to avoid being a bludgeon, a result that he posited was caused by the LPC being led by non-preservationists.¹⁷ The deterrent aspect of the enforcement of the Landmarks Law seems to be compromised by the multiple grace periods which skew it towards the Compliance Model. What results from this is a hybrid regulatory enforcement system which 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 which the law mandates.¹⁸ While it is important to remain focused on compliance, a more punitive attitude and approach would benefit the Landmarks Preservation Commission both in terms of its effectiveness and perception as a regulatory body, thereby improving enforcement of the Landmarks Law and the protection of the historic resources designated by it. The following three goals seek to implant this new culture at the LPC to improve enforcement of the Landmarks Law.

Goal: To build the Landmarks Preservation Commission’s field presence and raise awareness of it as an enforcement agency.

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 necessitated 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 asked the

¹⁷Pearsall, O. (2010, February 18). Interview with Otis Pearsall. (B. Baccash, Interviewer); It should be noted that the historical record, as established by this thesis, 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.

¹⁸Wood, A. C. (2008). *Preserving New York*. New York: Routledge. p.376.

average property owner, they wouldn't know what is required of them by law."¹⁹ He continues, "If you asked the typical, single family homeowner in an historic district who knows they are in an historic district if they know that they need the Landmarks Commission's permission to replace their windows, I would guess that most people don't know."²⁰ 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. Evan Mason of Landmark West!, a preservation advocacy group, contested that properties 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.²¹ 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".²² Stephen M. Raphael, a former Landmarks Preservation 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.²³

¹⁹Fisher, K. (2010, January 29). Interview with Kenneth Fisher. (B. Baccash, Interviewer)

²⁰Ibid.

²¹Mason, E. (2009, November 5). Interview with Kate Wood. (B. Baccash, Interviewer)

²²Pearsall, O. (2010, February 18). Interview with Otis Pearsall. (B. Baccash, Interviewer)

²³Raphael, S. M. (2010, March 2). Interview with Stephen M. Raphael. (B. Baccash, Interviewer)

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. Executive Director of Landmark West! Kate Wood argued that because the LPC does not proactively monitor the historic resources under its regulation, designated landmarks are not nearly as protected as their designation commands and requires. She stated, “If the Landmarks Commission isn’t making routine inspections, it’s going to be a free for all.”²⁴ Currently, as the historical record suggests and as preservation advocates would argue, the Landmarks Preservation Commission 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. Because of this, property owners found to be in violation feel individually targeted by the Landmarks Preservation Commission, 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.”²⁵ 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”, explaining his frustration as feeling singled out by the LPC.²⁶ If the LPC evenly monitored all of the resources under its regulation, this sentiment would not exist as non-compliance would be uniformly detected.

²⁴Wood, K. (2009, November 5). Interview with Kate Wood. (B. Baccash, Interviewer)

²⁵Blau, E. (1992, January 31). Panel Sues Landlords To Protect SoHo Sites. *The New York Times*, p. B3.

²⁶Baccash, E. (2009, November 26). Interview with Emil Baccash. (B. Baccash, Interviewer)

Preservation advocate Kate Wood continues, “Savvy property owners know they can get away with violations... As it is now, no body is minding the store.”²⁷ 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.²⁸ As the Landmarks Preservation Commission 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 founder of Landmark West! Arlene Simons insinuated, the streets of historic districts become the Wild West of regulatory historic preservation.²⁹

As the historical record shows, the past ten years have yielded an increase in resources dedicated to enforcement of the Landmarks Law and a heightening of it as a greater priority of the Commission. It would seem beneficial to continue this trend and grow the Landmarks Preservation Commission’s presence as an enforcement agency. The Landmarks Preservation Commission would benefit from the development of a proactive monitoring program, thus establishing itself as an enforcement agency in the street, watchful 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., Enforcement Officers’ actively monitor designated historic resources. This is done by automobile, bicycle, or on foot.³⁰ 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

²⁷Wood, K. (2009, November 5). Interview with Kate Wood. (B. Baccash, Interviewer)

²⁸Rice, Kathleen. “RE: Complaint Inquiry” Message to Ben Baccash. 11 February 2010. E-mail.

²⁹Simons, A. (2009, November 5). Interview with Kate Wood. (B. Baccash, Interviewer)

³⁰Beidler, M. (2010, January 26). Telephone Interview with Michael Beidler. (B. Baccash, Interviewer)

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*Scout Program (which stands for Street Condition Observation Unit) is dedicated to detecting unsafe street conditions throughout the five boroughs. To achieve this, a manned scooter proactively drives the streets seeking potholes and also detecting Department of Buildings conditions of violation, in addition to other issues.³¹

This thesis recommends that the Landmarks Preservation Commission 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.³² LPC staff members and preservation advocates agree that the Landmarks Preservation Commission 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.

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 were shielded with official badges, raising awareness of the Landmarks Preservation Commission as an enforcer

³¹Mayor's Office of Operatoins. (2010). *Street Conditions Observation Unit (SCOUT)*. Retrieved March 23, 2010, from Mayor's Office of Operatoins: <http://www.nyc.gov/html/ops/html/scout/about.shtml>

³²As 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.

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 agency by exhibiting a higher level of officiality.³³ Other agencies which regulate the built environment in New York City, like the Department of Housing Preservation and Development and the Department of Buildings, utilize shields in enforcing the law.³⁴ 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.³⁵ 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."³⁶ Moreover, "symbols can override the lack of other information, which leads people to comply with requests made by individuals [wearing a badge] if they know nothing else about this individual."³⁷

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

³³Beidler, M. (2010, January 26). Telephone Interview with Michael Beidler. (B. Baccash, Interviewer)

³⁴This thesis has noted that other New York City agencies unabashedly take a deterrent-oriented approach to enforcement of the law. Further research to compare the specific cultures of these agencies with that of the LPC is recommended.

³⁵Lynch, T. (2010, March 8). Interview with Tim Lynch. (B. Baccash, Interviewer)

³⁶Rafaeli, A. (November-December 2008). Logos and Initial Compliance. *Organization Science*, 845-858.

³⁷Ibid.

Landmarks Preservation Commission to amend their rules and regulations to do so, as demonstrated by the adoption of similar methods by like regulatory agencies in New York City. General Counsel to the Landmarks Preservation Commission Mark Silberman supported this idea.³⁸ 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 thesis 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.

The Department of Enforcement could post Stop Work Orders in visible areas as a deterrent as another means of raising awareness of the LPC as an enforcement authority, 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.³⁹ Nancy Metzger of the Capitol Hill Restoration Society, a neighborhood preservation advocacy organization in Washington, D.C., echoed this notion 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.⁴⁰

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.⁴¹ The New York City Department of Health and Mental Hygiene acts in accordance with this notion, posting the letter grade received

³⁸Silberman, Mark. (2010, April 16). Interview with Mark Silberman. (B. Baccash, Interviewer)

³⁹Beidler, M. (2010, January 26). Telephone Interview with Michael Beidler. (B. Baccash, Interviewer)

⁴⁰Metzger, N. (2010 April 18) Telephone Interview with Nancy Metzger. (B. Baccash, Interviewer)

⁴¹Rourke, F. E. (Winter, 1957). Law Enforcement Through Publicity. *The University of Chicago Law Review*, 225-255.

by restaurants as inspected in their front windows, in plain view of the general public.⁴²

Likewise, if a person does not follow the street cleaning schedule and neglects to move their 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.”⁴³ For anyone who has experienced this inconvenience, it is certainly a deterrent to non-compliance.

The Landmarks Preservation Commission 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 Landmarks Preservation Commission. 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 thesis recommends that the Landmarks Preservation Commission 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.

Another deterrent-oriented, adverse publicity practice could be adopted by the LPC to build its image as an enforcement agency. A list of notorious violators could be published on the LPC’s website. The Department of Buildings publishes a list entitled “Top Ten Elevator Offenders” on their website as, it would seem, a deterrent of public shame to compel compliance

⁴²Zagat, T. (2010, March 24). Kitchen Confidential No More. *The New York Times* , A27.

⁴³Department of Sanitation. (2009). *A Summary of Sanitation Rules and Regulations*. New York: City of New York.

with its elevator inspection requirements.⁴⁴ This measure is within the abilities of the Landmarks Preservation Commission and would not be prohibitively expensive.

This thesis posits that it is imperative that the Landmarks Preservation Commission continue to build its reputation as an enforcement agency. Non-compliance with the Landmarks Law would be less frequent were the public to believe that their disregard would result in enforcement action. Proactive monitoring, the utilization of badges, the posting of Stop Work Orders and the publishing of a list of notorious violators are all methods to achieve this increase in awareness and establishment of its enforcement reputation. This thesis recommends that these courses of action be pursued as a means of fostering a more deterrent-oriented enforcement culture.

Goal: To empower the general public and reap the maximum benefit from their role in the enforcement process.

The Landmarks Preservation Commission relies on the public to file complaints of violation of the Landmarks Law. Lily Fan, the Director of Enforcement at the Landmarks Preservation Commission, indicated that 5% to 7% of complaints are filed by LPC staff members who notice conditions in violation while in the field for other reasons, and the remaining percentage of complaints is filed by community boards, elected officials, advocacy groups and members of the public combined.⁴⁵ Advocacy groups account for a large portion of the remaining percentage; such groups do proactively monitor and file complaints or aid in filing complaints reported to them by members of the general public.

Executive Director of Landmark West! Kate Wood said “In a neighborhood where there is no Landmarks West!, I don’t know how your average citizen would know how to report a

⁴⁴Department of Buildings. (2010). *Violations: Top Ten Elevator Offenders*. Retrieved March 24, 2010, from Department of Buildings: http://www.nyc.gov/html/dob/html/violations/top10_elev_offenders.shtml

⁴⁵The distribution of complaints is not formally tracked by the Landmarks Preservation Commission.

violation.”⁴⁶ John Weiss, Deputy Counsel for the LPC, indicated that while every complaint that the LPC receives is investigated, these complaints are not necessarily representative of the distribution of conditions in violation. For instance, “no one complains in Park Slope but in the Village [the LPC] get[s] complaints all of the time. The Upper West Side, a lot of complaints. If people are complaining, [the LPC] follow[s] up.”⁴⁷ Because the public is relied upon to initiate enforcement, preservation advocate Arlene Simons argued that the hand by which enforcement is triggered is uneven and countless violations go unreported accordingly.⁴⁸

Improvement of the complaint-filing process would benefit enforcement of the Landmarks Law. Preservation advocates contest that the complaint-filing process is unclear. Right now, a member of the public must go to the Landmarks Preservation Commission’s website, locate and print out their complaint form, fill it out, put it in an envelope, stick a stamp to it and mail it. While this is the only method of complaint-filing advertised by the Landmarks Preservation Commission, complaints can also be filed via the Dial 311 system or by contacting an LPC Enforcement Officer directly, either by telephone or e-mail. However, these other methods of complaint filing are not indicated on the LPC’s website. While the enforcement of the Landmarks Law is reliant upon them, operationally the public is restrained as a result of all of the methods of complaint-filing not being advertised. The protection of designated landmarks would benefit from a complaint-filing system which is more readily utilized by the public.

Considering that historically the telephone has been an extremely effective means of receiving complaints from the public, as noted by Enforcement Officer Tomas Reynolds⁴⁹, it would seem that by publishing the telephone numbers of the Enforcement Officers on the LPC’s website would benefit the protection of designated landmarks. In addition to this, to ensure that

⁴⁶Wood, K. (2009, November 5). Interview with Kate Wood. (B. Baccash, Interviewer)

⁴⁷Weiss, J. (2009, December 1). Interview with John Weiss. (B. Baccash, Interviewer)

⁴⁸Simons, A. (2009, November 5). Interview with Kate Wood. (B. Baccash, Interviewer)

⁴⁹Reynolds, T. (2010, February 9). Interview with Tomas Reynolds. (B. Baccash, Interviewer)

all potential complaints are filed by the public, the LPC could publish the e-mail addresses of its Enforcement Officers there as well.⁵⁰ In Washington, D.C. and in Aspen, Colorado, this information is provided on the respective regulatory body's website.⁵¹ In New York City, the Department of Buildings also does this.⁵² In publishing all of the possible methods of complaint-filing, the Landmarks Preservation Commission would increase the effectiveness of what would seem to be its greatest resource, the public, as their eyes and ears on the street. The citizen would be further empowered and it would seem likely that the number of complaints received by the LPC would increase. This thesis recommends improving the complaint filing process. This is within the abilities of the Landmarks Preservation Commission and would not necessitate the expenditure of any funds.

The complaint-filing process could be made more efficient with the development of an internet-based complaint filing system.⁵³ Other New York City agencies allow complaints to be filed online. The NYC 311 Online website, the internet counterpart to the Dial 311 System, enables e-filing of complaints.⁵⁴ Here, complaints regarding unpermitted work, adverse environmental conditions and issues concerning the Department of Buildings are able to be filed but Landmarks Preservation Commission-related complaints are not. The Landmarks Preservation Commission would seemingly benefit from the addition of their complaint type to the NYC 311 Online website.

⁵⁰As a result of this thesis, John Weiss of the LPC indicated that the LPC is creating an e-mail address that will be listed on its website for the purposes of complaint filing.

⁵¹Office of Planning. (n.d.). *Reporting Illegal Work*. Retrieved March 10, 2010, from Historic Preservation Office: <http://planning.dc.gov/planning/cwp/view,A,1284,Q,634413.asp>; Community Development Department, (n.d.). *Historic Preservation*. Retrieved March 17, 2010, from Community Development Department: <http://www.aspenpitkin.com/Departments/Community-Development/Historic-Preservation/>

⁵²Department of Buildings. (n.d.) *Contact the Department of Buildings*. Retrieved March 10, 2010. From Department of Buildings: <http://www.aspenpitkin.com/Departments/Community-Development/Historic-Preservation/>

⁵³Fan, Lily. "RE: Enforcement Thesis Question" Message to Ben Baccash. 25 March 2010. E-mail

⁵⁴City of New York. (2010). *Department of Buildings Complaint* Retrieved March 25, 2010, from NYC 311 Online: <http://www.nyc.gov/>

Currently, the Landmarks Preservation Commission is spending \$5 million on a new computer system called PILLAR which will enable the citizen to file complaints online and track their progress. By improving complaint-filing and tracking, the advocate and homeowner will be provided with information regarding landmarked properties, thereby increasing the transparency of the LPC and improving the ability of the public to act in its role to enforce the Landmarks Law and for the non-compliant property owner to rectify their violation more easily. However, this system has not yet been implemented.⁵⁵ E-filing significantly increases efficiency by streamlining the mode of communication between citizens and regulatory bodies.⁵⁶ By developing an e-filing complaint system, one can suppose that the number of complaints received by the LPC would increase as the method by which they are filed is made easier. The public would be more fully utilized as the LPC's greatest enforcement asset. As it has been criticized in the past as lacking transparency and for its poor communication skills, the LPC must ensure that its new computer system is paired with adequate funding and advertising so as to be made widely known to the public. This thesis recommends that the LPC continue to develop and mass market its new computer system as a means of easing the complaint-filing and tracking process.

Beyond what is currently underway, it would seem beneficial for the LPC to develop a smartphone application to aid the filing of complaints electronically.⁵⁷ SeeClickFix is an online complaint-filing service intended to empower the citizen to see non-emergency issues in their neighborhoods and input the issue into the SeeClickFix online database, which subsequently records the nature of the complaint, its location, and its status as resolved or not.⁵⁸ SeeClickFix works with local governments to facilitate the filing, tracking and resolving of quality of life-

⁵⁵Weiss, J. (2010, April 16). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

⁵⁶Wood, L. (July August 2009). Implementing Public Utility Commission Web Sites. *Public Administration Review*, 753-763.

⁵⁷A smartphone is a cellular telephone which also has internet and GPS capabilities. The BlackBerry and iPhone are considered smartphones.

⁵⁸SeeClickFix. (2009). *About Us*. Retrieved January 2010, from SeeClickFix: <http://www.seeclickfix.com>

related issues and develops custom smartphone applications for this purpose. In an article entitled “Phone + GPS + Camera = Revolution”, Stephen Goldsmith, Director of the Innovations in American Government Program at the Harvard Kennedy School, explains the great potential of smartphones to help governments serve citizens. Goldsmith describes Boston which “deployed a free iPhone app that allows citizens to use their phone's built-in camera and GPS system to take a photo of urban blights such as potholes, graffiti and trash, and report them directly to City Hall.”⁵⁹ In explaining how it has the potential to increase the efficiency of complaint-filing, Goldsmith stated, “Instead of inching its way through City Hall, critical information heads straight [from the citizen with a smartphone] to a public works crew.”⁶⁰ Goldsmith continues, “The free app, called Citizens Connect, means Boston instantly has more eyes to spot and report problems.”⁶¹

Applying a smartphone program like this to historic preservation enforcement in New York City, a mindful citizen could take a photograph with their mobile device and send it to the Landmarks Preservation Commission, the location of the condition suspected in violation of the Landmarks Law having been geo-tagged by the GPS capability of the smartphone and subsequently sent directly to the LPC Enforcement Officer. It would seem that number of complaints being filed would increase, triggering an increase in the number of investigations conducted and, subsequently, enforcement actions would be taken more frequently. The implementation of a smartphone application is an innovative idea which is promising and merits further research and consideration. Whether by telephone, e-mail, electronically or by handheld device, to aid the public in filing complaints is the most efficient utilization of resources herein proposed. As omnipresent eyes on the street, the public is a resource that the LPC, as a result of its current complaint filing system, has largely neglected to utilize its full potential.

⁵⁹Goldsmith, S. (2010, March 17). Phone + GPS + Camera = Revolution. *Governing Magazine*.

⁶⁰Ibid.

⁶¹Ibid.

The public can be further utilized in the enforcement process. 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 action, when taken, is an extremely effective method of enforcing the Landmarks Law. John Weiss, Deputy Counsel for the LPC, 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.⁶² 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.”⁶³ A private right of action suit is a lawsuit initiated by the Private Attorney General. The Private Attorney General 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.”⁶⁴ 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.⁶⁵ Potentially, the Landmarks Law could be amended to be enforced by the Private Attorney General.

As the Private Attorney Generals, 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

⁶²Weiss, J. (2010, March 26). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

⁶³Historic City Committee. (1989). *New York The Historic City*. New York: Municipal Arts Society. p. iii.

⁶⁴Rabkin, J. A. (1998). The Secret Life of the Private Attorney General. *Law and Contemporary Problems*, 179-203.

⁶⁵Ibid.; In addition to environmental laws, antitrust laws, according to Otis Pearsall, have been extremely effectively enforced by the Private Attorney General.

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.⁶⁶ 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.⁶⁷ 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.⁶⁸ 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 which would be sought under the proposed Private Attorney General provision of the law, this thesis proposes 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 Landmarks Preservation Commission would be necessary. Consultation would give the Landmarks Preservation Commission 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 which 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

⁶⁶Silberman, Mark. (2010, April 16). Interview with Mark Silberman. (B. Baccash, Interviewer)

⁶⁷Ibid; Weiss, J. (2010, April 16). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

⁶⁸Weiss, J. (2010, April 16). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

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 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. This thesis recommends that the Landmarks Law be amended so that it can be enforced by the Private Attorney General under the aforesaid terms.

Goal: To strengthen the administrative enforcement system.

The administrative system is the most common mode of enforcement utilized by the LPC. However, it is criticized for a number of reasons. This thesis proposes that to rectify the deficiencies in the administrative enforcement system would improve the enforcement system over all and benefit the protection of New York City's designated landmarks. It is first necessary to identify each deficiency in order to develop a mode of improving it.

Preservation advocates would argue that the Landmarks Preservation Commission does not adequately track the performance of its Department of Enforcement. In neglecting to do so, it would seem that the LPC has rendered itself virtually unable to anticipate likely sources of violations of the Landmarks Law. According to Andrew Farmer's Handbook of Environmental

Protection and Enforcement, “risk based regulation is necessary wherever environmental enforcement authorities have resource constraints.”⁶⁹ It would seem, then, that the LPC, as underfunded, is a prime candidate for risk-based, proactive investigatory practices. By tracking the distribution of LPC-issued violations by owner and address, the LPC could develop a risk-based assessment of areas, properties and owners with a higher likelihood of non-compliance. It seems that this would allow the LPC to anticipate properties at higher risk of being found in violation of the law. In doing so, the LPC Department of Enforcement could subsequently monitor these properties more closely. This thesis recommends the implementation of a risk-based assessment practice to aid the LPC in anticipating violations of the Landmarks Law.

The administrative enforcement process could be further improved by modifying the investigation so as to be comprehensive. As part of the administrative enforcement process, the LPC Enforcement Officer conducts inspections of the landmark about which they receive complaint. Inspections are only made from nearby public thoroughfares⁷⁰ even though the Landmarks Law regulates the entire site, much of which is oftentimes not visible from public thoroughfares. Inspection is only conducted from public thoroughfares because when properties are designated, they are only documented from public thoroughfares. Thus, according to Deputy Counsel John Weiss, for the LPC to regulate a part of a building for which they have no documentary record or baseline of judgment is impossible.⁷¹

This seems to present a problem which is illustrated by the Lenox Hill Brownstones case study. As the LPC conducted its site visits in response to complaints made by members of the Upper East Side community, LPC Enforcement Officers did not attempt to enter the Lenox Hill Brownstones. Weiss noted that by neglecting to enter the properties, the Enforcement Officers

⁶⁹Farmer, A. (2007). *Handbook of Environmental Protection & Enforcement*. London: Earthscan. p. 18.

⁷⁰Rice, Kathleen. “RE: Enforcement Thesis Follow-Up” Message to Ben Baccash. 1 February 2010. E-mail.

⁷¹Weiss, J. (2010, April 16). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

were only able to inspect the exterior which “was hiding significant issues at the interior,” that eventually led to the severe degradation of two of the row houses.⁷² While the Deputy Counsel of the LPC will conduct site visits and ask the owner for permission to enter and investigate the property more fully, having learned from the mistakes made at the Lenox Brownstones, LPC Enforcement Officers only investigate primary facades, leaving the rear facades of buildings effectively unregulated.⁷³ However, as described by Deputy Counsel John Weiss, this effort is “absolutely key.”⁷⁴ Former LPC Enforcement Officer Tom Reynolds noted that if he received a complaint regarding an element of a designated landmark which was not visible from the street, he would arrange with a neighbor or the complainant to gain access to their property to gain a vantage on the subject of the complaint.⁷⁵ It would seem that to enter the property, if granted permission by the owner, and to inspect the building envelope would improve the protection of designated landmarks.

In entering the property, it is not suggested that the LPC Enforcement Officer would inspect the interior of the building for the purpose of its regulation, as this is beyond their mandated power. However, by gaining entry the Enforcement Officer would be able to inspect conditions, like structural integrity, which can have a grave affect on the structure as a whole, as demonstrated by the Lenox Hill Brownstones case study, as well as to access private areas which would provide a vantage on the other façade(s) of the building in question, thereby enabling a more complete investigation. This thesis proposes that comprehensive inspections of regulated properties be conducted as part of the complaint-initiated inspection process. Likewise, to ensure a sound baseline of judgment, this thesis proposes that all future designation reports include

⁷²Weiss, J. (2010, March 26). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

⁷³In situations of Demolition-by-Neglect, the Deputy Counsel will attempt to enter the premises with the owner’s permission.

⁷⁴Weiss, J. (2010, March 26). Telephone Interview with John Weiss. (B. Baccash, Interviewer)

⁷⁵Reynolds, T. (2010, February 9). Interview with Tomas Reynolds. (B. Baccash, Interviewer)

photographs of the entire exterior of the structure to be landmarked. This would allow for the Enforcement Officer to conduct a complete and accurate inspection of the property at hand. To conduct a more complete investigation would benefit the administrative enforcement process and lead to the detection of non-compliance which today is often precluded as a result of the limited, cursory investigation.

Following the discovery of a condition in violation, the property owner in question is given two grace periods: the Warning Letter and the initial Notice of Violation. Preservation advocates would argue that, in part, due to the issuance of the Warning Letter as a grace period, the Landmarks Preservation Commission is sending an undermining message that compliance is voluntary as opposed to compulsory. It should also be noted that other New York City agencies, like the Department of Buildings, do not issue warnings. The Warning Letter has not proven itself to be an effective enforcement practice. On October 20th, 2004, Mark Silberman, General Counsel for the LPC, indicated that only 7% of Warning Letters issued that year resulted in the curing of a condition in violation.⁷⁶ It would seem, as preservation advocates would insist, that to eliminate the Warning Letter grace period would benefit the protection of designated landmarks in both expediting compliance and propagating what they believe is a more appropriate enforcement philosophy, as opposed to the current apologetic sentiment exhibited by the administrative system. This thesis proposes the removal of the Warning Letter phase to strengthen the administrative enforcement process.

Following the issuance of a Warning Letter and assuming the condition has not been cured, a Notice of Violation is issued. However, as the example of 16-18 Charles Street suggests, where multiple violations remained outstanding at the expense of the designated landmark and its historical integrity, NOVs do not seem to be as effective as they are intended. To increase the effectiveness of NOVs would benefit and strengthen the administrative enforcement process.

⁷⁶Subcommittee on Landmarks, Public Siting and Maritime Uses. *Hearing*. New York City Council. 20 October 2004 p.34.

There is a means of achieving this goal already written into the Landmarks Law which is not uniformly utilized.

The Landmarks Law enables the LPC to issue daily fines. But, as Director of Enforcement Lily Fan noted, “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.”⁷⁷ Fan continued, “We have asked for daily fines at the Supreme Court level, and have been granted such.”⁷⁸ However, as indicated by Deputy Counsel for the LPC John Weiss, legal action is extremely resource intensive.⁷⁹ It would seem that to levy daily fines administratively would compel compliance as fines against a property would accrue quickly. Thus, what some contest are inadequate fines would become substantial monetary deterrents. This thesis recommends that the historic preservation community lobby the City Council in the hopes of changing the ECB’s policy and enabling the imposition of daily fines at the administrative enforcement level. This thesis posits that the imposition of daily fines would substantially increase the effectiveness of the administrative enforcement system.

There is another deficiency in the administrative enforcement system that must be addressed. As it currently functions, the Landmarks Preservation Commission 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

⁷⁷Fan, Lily. “RE: Enforcement Thesis Question” Message to Ben Baccash. 24 March 2010. E-mail.

⁷⁸Ibid.

⁷⁹Weiss, J. (2009, December 1). Interview with John Weiss. (B. Baccash, Interviewer)

she sometimes notifies property owners of their right to sue their contractor if this happens.⁸⁰ Fan also indicated that while the LPC could take the contractor to court, seeking judgments against corporations and their propensity to fold and reincorporate under a different name makes this recourse untenable.⁸¹ In this situation, it would seem beneficial to further protect the property owner by decreasing the likelihood that they suffer the penalty resultant from their contractor's foregoing of the permits necessary in performing work as required by 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. According to Amy Guthrie, a Historic Preservation Officer with the Aspen Community Development Department, because it can be revoked should non-compliance occur, the "historic preservation licensing program has made a major difference in enforcement."⁸² 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."⁸³ Preservation advocate Kate Wood supported the idea of a historic preservation licensing program in New York City.⁸⁴ 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.

⁸⁰Fan, L. (2010, January 21). Interview with Lily Fan. (B. Baccash, Interviewer)

⁸¹Ibid.

⁸²Ibid.

⁸³Fisher, K. (2010, January 29). Interview with Kenneth Fisher. (B. Baccash, Interviewer)

⁸⁴Wood, K. (2009, November 5). Interview with Kate Wood. (B. Baccash, Interviewer)

This thesis 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 Landmarks Preservation Commission.⁸⁵ The Landmarks Preservation Commission 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 accordingly increase the effectiveness of the administrative enforcement system. This thesis recommends that the Landmarks Preservation Commission begin to pursue parties other than the property owner involved in violation of the Landmarks Law. A supplement to the NOV would be an easily implemented way to start to do this.

Together, these recommendations seek to build the presence of the Landmarks Preservation Commission as an enforcement agency and raise awareness of it as such, to empower the general public and reap the maximum benefit from their role in the enforcement process, and to strengthen the administrative enforcement system. Holistically, the recommendations offered to achieve each goal attempt to impregnate the Landmarks Preservation Commission with a deterrent-oriented culture which, as this thesis has posited, will increase compliance with the Landmarks Law and thus benefit the protection of designated New York City landmarks. It is the responsibility of the historic preservation community to pursue the ideas offered by this thesis to their fullest, discussing them at neighborhood events, approaching the Landmarks Preservation Commission with them and lobbying the City Council and individual political figures to gain support therein.

⁸⁵Fan, L. (2010, January 21). Interview with Lily Fan. (B. Baccash, Interviewer)

VI. CONCLUSION

In describing the history of New York City's preservation ordinance, Anthony C. Wood states, "The story of the Landmarks Law is a story of vigilance – its price and its reward."¹ Increased vigilance is the fulcrum of the Landmarks Law. The future protection of New York City's designated historic resources relies on the Landmarks Preservation Commission's enforcement system.

At first, the enforcement system employed by the Landmarks Preservation Commission 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 design. However, preservation advocates contend that it is a dull pitchfork in practice. While their opinions of the system differ, the Landmarks Preservation Commission and preservationist 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.

Having traced the evolution of enforcement of the Landmarks Law and examined the system as it functions today, with knowledge of how federal environmental laws and two other local historic preservation ordinances are enforced, this thesis makes recommendations to the historic preservation community about how enforcement of the Landmarks Law could be improved. This thesis posits that the protection of designated landmarks in New York City would benefit from an increase in the resources of the Landmarks Preservation Commission, specifically its Department of Enforcement and Legal Department. This thesis recommends that settlements and awards resultant from the LPC enforcing the Landmarks Law in court should be deposited in a dedicated enforcement fund held by the Landmarks Preservation Foundation, an associated non-profit. An increase in resources would grow the LPC's enforcement capacity, subsequently

¹Wood, A. C. (2008). *Preserving New York*. New York: Routledge. p. 391

improving the protection of designated landmarks. However, the LPC faces a complex obstacle of culture that is more difficult to address.

This thesis opines that the Landmarks Preservation Commission would benefit from shifting its enforcement philosophy from compliance-driven to deterrent-oriented, subsequently curbing non-compliance. To effectuate this shift in philosophy, this thesis sets forth a number of goals. First, to build the presence of the Landmarks Preservation Commission in the field and raise the public's awareness of it as an enforcement agency, this thesis recommends that the agency:

1. Develop a proactive monitoring program.
2. Wear and utilize badges while enforcing the law.
3. Post Stop Work Orders in highly visible locations.

Also to foster a deterrent-oriented culture, this thesis recommends that the LPC empower the public in order to reap the maximum benefit from their role in the enforcement process. To achieve this, this thesis recommends that:

1. The Landmarks Preservation Commission publish all modes of complaint filing on its website.
2. The public be able to file landmarks complaints via the Dial 311 Online system.
3. The Landmarks Preservation Commission continue developing its electronic complaint filing and tracking system and appropriately market it.
4. The historic preservation community conduct further research on the development and implementation of a smartphone application used to file landmarks complaints.
5. The Landmarks Law be amended to allow for enforcement by the Private Attorney General in circumstances of demolition-by-neglect and only after consultation with the Landmarks Preservation Commission.

This thesis posits that the administrative enforcement system can be strengthened to further cultivate a more effective enforcement philosophy. This can be accomplished by:

1. Developing risk-based assessment to anticipate violation of the Landmarks Law.
2. Changing the Landmarks Preservation Commission's protocol to conduct a complete investigation of the landmark about which the agency receives a complaint, including areas not visible from public thoroughfares.
3. Removing the Warning Letter phase.
4. Lobbying for a change in the Environmental Control Board policy to allow for daily fines to be imposed in instances of violation of the Landmarks Law
5. Empowering the Landmarks Preservation Commission to pursue parties involved in violation of the Landmarks Law besides the property owner, such as contractors.

Taken cumulatively, these recommendations seek to develop a deterrent-oriented culture at the Landmarks Preservation Commission, in the process eradicating what preservation advocates would call a timid culture that lingers from the LPC's early years and continues to undermine it as an enforcement agency today. It is the responsibility of the historic preservation community to pursue improvements to the enforcement of the Landmarks Law. The ideas offered herein serve as fuel to a nascent discussion to improve the protection of designated landmarks in New York City.

Preservation enforcement will be increasingly relevant. Each month the regulatory purview of the Landmarks Preservation Commission grows as the number of buildings designated by the LPC increases. While designation will always be one of the main responsibilities of it, 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 Landmarks Preservation Commission 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 Landmarks Preservation Commission could be improved.

Designation of landmarks is only the beginning of a long road of protection. One hopes that detours from this road are not taken and unapproved alterations, amputations and additions are not performed and that the end of this road, when a building is demolished, is never reached. 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; 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 and subsequently the protection of all of the historic resources designated under it. This thesis has engineered improvements which 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.