Losing Its Way: the Landmarks Preservation Commission in Eclipse

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Editor’s Note: This Viewpoint article will be published in two parts. In Part 1, the author discusses issues related to the designation process for landmarks in New York City. Part 2, which will be published in the September 2018 issue, will address matters related to how New York City landmarks are regulated once they have been designated. Part 2 will also discuss issues related to the membership of the Landmarks Preservation Commission as well as the Commission’s role in regulatory decision-making.

The City Club of New York has serious concerns about how the Landmarks Preservation Commission (Commission or LPC) interprets and carries out its mission. Looking at a series of recent decisions, we have to question whether the Commission as currently functioning considers historic preservation, at least preservation as understood by New Yorkers, to be in the public interest.

We begin with a fundamental question: who, or what, is the client of the Commission? The owner of a designated property? The landmark itself? The public?

First and foremost, the principal client of the LPC must be the landmark itself. Is this building, site, or district worthy of designation? If so, how best shall it be protected? The Commission must act on behalf of the historic city.

SECONDARILY, the LPC’s clients are the citizens of New York. Designation is a public trust. It serves a public purpose and benefits the public. And the Commission is operating on behalf of the public.

We fully appreciate that the preservation of a historic building requires the support of the owner (enthusiastic or otherwise).
Regardless, owner consent is neither required for designation nor necessary for regulation. Of course, it is always to be preferred that the process of designation not be adversarial, but characterized by cooperation between agency and owner. Usually, that is the case, and the Commission is to be commended for always seeking that end.

In so many cases in recent years, the Commission has backed away from what we understand as the preservation ethic, embracing instead efficiency for its own sake, expediency without a consideration of the effects, and most seriously, a disregard of precedent. This has been the predictable result of putting the preferences of the owner of a historic site ahead of the preservation of the landmark in and of itself for the people of New York. Sadly, the Landmarks Preservation Commission seems embarrassed by its middle name.

Our critique falls into three areas:

- Designation
- Regulation and Process
- Commissioners

The first area is discussed in Part 1 of this article; the second and third will be discussed in Part 2 in the September 2018 issue.

I. Designation

Issues with designation include:

- What gets heard
- Changes negotiated pre-designation
- Hearing buildings as they become eligible
- Designation solely on the merits

What Qualifies as a Landmark

New Yorkers are not shy about nominating favorite buildings for designation. The Commission receives several Requests for Evaluation (RFEs) every week. Some nominations are half-baked; other sites are ineligible. But it has become routine to dismiss almost all RFEs with a determination that the site “does not rise to the level of a landmark at this time,” even those which are obviously worthy of designation.

Of course, Old Saint James Church in Elmhurst—built before the American Revolution and restored under a Sacred Sites grant from the New York Landmarks Conservancy—should qualify as a landmark. Shockingly, a nomination submitted by State Senator Tony Avella a few years ago received that “does not rise” letter. The LPC questioned just how much of the original 1735 structure remained. In 2004, the New York Landmarks Conservancy funded the restoration of the church to its 1880 appearance, and supplied ample documentation of its historic integrity. The LPC backtracked in this case, and Old Saint James was designated in September 2017. But why did the preservation community have to jump through so many hoops, providing research that the Commission already had? And how possibly could such a historic survivor not have been calendared in the first instance?

Old Saint James is not an isolated case. RFEs commonly must be submitted repeatedly before the LPC acts. Many times, however, the Commission simply digs in its heels and refuses.

Case in point: Richard Upjohn’s 1848 St. Saviour’s Church in Maspeth. Sitting on a wooded site that had been virtually undisturbed since the 18th century, the church was an obvious candidate for designation. The LPC had already designated Upjohn’s Trinity Church at Wall Street (1846), Church of the Holy Communion (1846), Grace Church in Brooklyn Heights (1847), Christ Church in the Bronx (1866), and the Green-Wood Cemetery Gates (1861). If there was a quota for Upjohn churches, it was met before the only Upjohn in Queens could be designated. True, St. Saviour’s did suffer damage from a fire in 1970 and was repaired in an inexpensive and expedient way. But the structure retained its integrity and was certainly not beyond restoration. The LPC would not be moved. In the end, the church was. St. Saviour’s was dismantled and placed in storage in 2008, pending reassembly in All Faith’s (formerly Lutheran) Cemetery in Middle Village. Ten years later it remains in pieces, awaiting funds for its reconstruction.

The most celebrated case of the Commission digging in its heels was 2 Columbus Circle. Designed by Edward Durell Stone and completed in 1964, Huntington Hartford’s Gallery of Modern Art was never exactly embraced by the architectural community, and it never overcame the verdict of Ada Louise Huxtable, architecture critic of the Times. She dismissed it as a “die-cut Venetian palazzo on lollipops.” While architects and historians could certainly argue about the merits of the design, no one could deny that it was a significant building. And the LPC is charged with protecting our architectural heritage, not ratifying taste.

Maddeningly, the LPC refused all pleas for a public hearing, and those entreaties came from established preservation groups—Municipal Art Society, Landmark West!, Historic Districts Council, Docomomo—and prominent architects, among them Robert A.M. Stern, then Dean of the Architecture School at Yale, and Robert Venturi. The World Monuments Fund put 2

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2 Ada Louise Huxtable, Architecture: Huntington Hartford’s Palatial Midtown Museum, N.Y. TIMES, Feb. 25, 1964, at 33, https://nyti.ms/2HqQ9wN. In that review, Huxtable also wrote that “its plan is an accomplished demonstration of one of the basic principles of architectural design—the expert manipulation of space by an expert hand” and that “[t]he theme is dignity and formality, rather than the exhilarating spatial fireworks. This interior planning is the building’s conspicuous success, an achievement to command considerable admiration.”
Columbus on its watch list. The Times published a scathing two-part op-ed by Tom Wolfe (who can imagine the Times publishing such a thing today?), and Herbert Muschamp, the paper’s unpredictable architectural critic, called out the LPC for “a shocking dereliction of public duty.”

The new owner, the Museum of Art and Design, objected to designation. They intended to strip Edward Durell Stone’s marble skin and apply a new façade designed by Brad Cloepfil. Representing the museum was Laurie Beckelman, former chair of the Landmarks Preservation Commission. Through a freedom of information request, Landmark West! obtained email exchanges between Beckelman and LPC Chair Robert Tierney in which they discussed how to keep advocates of designation at bay. No hearing was ever held.

Inwood, Richmond Hill, East Harlem, Tin Pan Alley—their neighborhoods and more have been the subjects of petitions to the LPC for designation as historic districts. In each case they have been rebuffed.

How is it decided whether a building or district is or is not worthy of consideration? Do the commissioners vote on whether to hold a hearing on this item or that? If so, is it the entire body, or only a committee, and if a committee, is that meeting subject to the Open Meetings Law? There is an arrogant absence of transparency in the designation process.

Mike Holmgren, former coach of the Green Bay Packers, originated the “50 guys in a bar” standard, as in, “If 50 guys in a bar say it’s a fumble, it’s a fumble.” Likewise: if 50 prominent architects, historians, preservationists, and elected officials say it’s a landmark, it’s a landmark. Or more exactly, it deserves a public hearing.

The Landmarks Preservation Commission needs to make the process for determining what merits a public hearing more transparent, and needs to take into account informed voices earlier in that process.

Designation Should Not Mean Demolition

A disturbing pattern is emerging at the Commission. In some instances, the LPC has approved drastic alterations to a new landmark immediately after designation, while in others the designation report excluded certain features. In such cases, the architecture is drastically altered, or even lost.

The 1954 Manufacturers Trust Company Building at 510 Fifth Avenue, designed by Gordon Bunshaft and Charles Evans Hughes III of Skidmore, Owings & Merrill, is the first sordid example. The LPC designated the exterior of this International Style gem in 1997. Fourteen years later, the Commission designated the interior, including the sculptural elements by Italian-American designer Harry Bertoia. The LPC then promptly issued a permit for the entire space to be gutted—which it was—down to the steel girders. Representing the owner, Vornado Realty Trust, was Meredith Kane, a former LPC commissioner. Preservationists could not but suspect that the owner had negotiated an approval for their proposed changes prior to designation.

The Citizens Emergency Committee to Preserve Preservation sued—and won a negotiated settlement (remarkably, the court recognized that this self-selected group of preservationists had standing). The Bertoia screen and ceiling sculpture were reinstalled on the second floor. Predictably, Joe Fresh, the client for whom the landmarked interior was demolished, occupied the building for only a couple of years.

Recently the LPC designated two other modernist landmarks, the Citicorp Tower (Hugh Stubbins and Associates, 1978) and the Ambassador Grill (Kevin Roche John Dinkeloo and Associates, 1976 and 1983). With Citicorp, the Commission simply abdicated its responsibility.

The Citicorp site features a sunken plaza at Lexington Avenue and 53rd Street, the work of Stuart Dawson, principal in the landscape architecture firm of Hideo Sasaki. It featured a cascading fountain beside the angled stairway, providing a sound buffer from the street above and a cooling respite in summer. That significant feature was called out in the designation report in 2016, but at the same time the LPC disowned it in a curious and shameful bit of bureaucratic reasoning. The report stated that the LPC recognizes that the sunken plaza and other architectural elements, public benefits and amenities and subsequent alterations to them were designed with the approval of the City Planning Commission in connection with the granting of floor area bonuses, and that future changes to these public spaces will remain under the City Planning Commission’s jurisdiction.

The LPC withdrew without firing a shot.

To say that only the square footage matters—and not aesthetics—for legally mandated public spaces diminishes the landmarks law and insults the public it is intended to serve. Architectural features can be—and in this case ought to have been—preserved, regardless of City Planning’s role in approving the shape of the public space when the building was conceived. City Planning does not

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5 See N.Y. PUB. OFF. LAW §§ 100–111.


govern aesthetics; Landmarks does. This decision sets a dangerous precedent for the fate of other privately owned public spaces (POPS) that will come under LPC purview.

The Commission’s justification for not asserting jurisdiction also runs counter to law and precedent. In 2013, the LPC designated the 1967 Marine Midland Building at 140 Broadway, designed by Gordon Bunshaft of Skidmore, Owings & Merrill. The 51-story skyscraper sits in the middle of the block, surrounded by a public plaza regulated by City Planning as a POPS. Here, the LPC designated the plaza fully aware of City Planning’s authority over the space, and here the LPC does indeed have authority over changes to scale and materials, street furniture, paving, and lighting. By excluding the Sasaki Fountain in the designation of the Citicorp Building, the LPC disregarded its own recently established precedent.

But there was more to it. Justifying the exclusion of the plaza, Chair Meenakshi Srinivasan said at the public hearing: “The Citicorp Building has a long history of changes . . . . We recognize that these spaces will continue to change.” First, the Sasaki plaza had not been altered in any fundamental way, and second, the changes she so blithely referenced predated designation, and the Commission designated anyway. With designation comes the mandate to protect, not to facilitate changes that obliterate key features.

Frankly, the preservation community was surprised when the Commission voted to designate the Ambassador Grill as an interior landmark, but then was dismayed to realize that the designation cut out a significant portion of the whole. Architect Wesley Kavanagh, a principal with Kevin Roche John Dinkeloo and Associates, testified that the spaces connecting the lobby and the Grill, as well as the sitting area attached to the lobby ought to have been included in the designation. “This is one architectural space and should be designated as such,” he argued. Again, preservationists wonder: did the LPC make a quiet arrangement with the owners prior to designation to obtain their quiescence? The Commission is obliged to designate a site in its entirety. The owner can come forward with proposed alterations and present them at a hearing. That is the public process.

If demolition of the landmark is the price of designation, then why bother with the charade at all?

Prior to designation, the LPC should not negotiate with owners as to what changes will be approved afterwards.

Future Landmarks

With its distinctive Chippendale top, the 1984 AT&T Building by Philip Johnson and John Burgee was the first post-modern addition to the city’s skyline. It is as emblematic of its time as the Woolworth Building (Cass Gilbert, 1913) and the Chrysler Building (William Van Alen, 1930). The AT&T Building became eligible for designation in 2014, 30 years after its completion. But the LPC did not act and was caught flat-footed when a new owner, Chelsfield America, announced major changes to the façade and the lobby, changes that would render Johnson and Burgee’s design unrecognizable. Such cosmetic surgery was as unbecoming as it was unnecessary.

To its credit, in November 2017 the LPC calendared the building for a public hearing soon after the news broke that new owners were proposing drastic changes to the façade. To the dismay of architects and preservationists, however, the Commission declined to include the lobby. This is inexplicable. There are certainly precedents for designating both façade and lobby. In 1978, the Commission designated the Chrysler Building, both the exterior and the glorious Art Deco lobby. In 1983, the Woolworth Building was designated—again, both the exterior and the richly appointed Gothic lobby.

The Commission informed the owner that the lobby would not be designated (and twisted itself into a remarkable yoga pose to justify that pronouncement), and the scaffolding went up immediately after. How was it that the lobby was not included in the proposed designation? We have to ask: did the owner agree to delay work on the exterior pending designation in return for the LPC’s refusal to include the lobby? That the architect representing Chelsfield is Sherida Paulsen, former chair of the LPC, gives one pause.

The Commission offered its reasons. None was convincing. Some were untrue. “In our evaluation the lobby does not hold the same level of broad significance,” explained Kate Lemos McHale, Director of Research at the LPC, and with “the removal of ‘Golden Boy,’ alterations within the lobby itself, and its diminished relationship to the overall design of the base, we have determined that it does not rise to the level of an interior landmark.”

To be clear: the lobby was just as designed by Johnson and Burgee. When the building opened, the lobby featured as its centerpiece “Spirit of Communication,” better known as “Golden Boy.” The 24-foot statue had stood atop the company’s old headquarters downtown at 195 Broadway. In 1992, AT&T sold the building to Sony and removed the statue to its new suburban campus in New Jersey. “Golden Boy” graced the lobby for only eight years.

Other alterations were cosmetic. The Commission has routinely approved much more destructive alterations to designated landmarks.

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8 Jason Sayer, Sasaki Fountain at Citicorp Center May Be Demolished, ARCH. NEWSPAPER (Mar. 21, 2017), https://archpaper.com/2017/03/citicorp-plaza-fountain/
10 To be fair, there are also examples where the LPC did not designate a lobby—the Chanin Building and the Socony-Mobil Building, for example.
By the time the designation hearing was held in June 2018, however, the lobby had been jackhammered into dust. Imagine what we would have lost had the Commission designated only the exterior of the Chrysler Building.

This situation was avoidable. Had the LPC actively researched the architecture of recent decades, they would have been poised to consider the AT&T building as soon as it was 30 years old and thus eligible for designation. Many preservation organizations have compiled such lists.

Richard Meier’s Bronx Development Center opened in 1976; the AIA Guide called it “a consummate work of architecture” and said it was “sure to be ranked among the great buildings of its time.”\(^{11}\) In the late 1990s, this “elegant summation of modern technology” was sold, and the new owners stripped the “tightly stretched skin of natural anodized aluminum panels” and installed a banal and inoffensive façade. In the wake of that loss, the Municipal Art Society (MAS) issued “30 Under 30: The Watch List of Future Landmarks.”\(^{12}\)

MAS was not alone. Robert A.M. Stern compiled a list of 25 modernist landmarks in 1996, an undertaking highlighted in the New York Times (unimaginable today, surely).\(^{13}\) In 2001, Friends of the Upper East Side Historic Districts produced an exhibit and catalog titled “Modern Architecture on the Upper East Side: Landmarks of the Future.”

Such efforts offer a natural starting point for the LPC.

The Landmarks Preservation Commission must compile a list of buildings crossing the 30-year eligibility line, and proactively designate important sites as they become eligible.

East Midtown: Preemptive Rejection

The fate of East Midtown illustrates a final troubling question about the designation process. Under Mayor Bloomberg, City Planning proposed to upzone Midtown between Madison and Third Avenues, 41st to 59th Streets. In response, the Historic Districts Council, the Municipal Art Society, and the New York Landmarks Conservancy each produced a list of potential landmarks. There was some overlap, but the lists included many different sites. Because of these discrepancies, the Real Estate Board of New York and the anti-preservation press ridiculed the effort. If even preservationists don’t agree, well then.

In actuality, the differences only demonstrated the depth and breadth of preservation advocates. Taken together, the lists showed that there was no shortage of historic architecture in East Midtown, ranging in style from the Beaux Arts to Postmodernism. How did the LPC respond? The Commission designated only 12 buildings.

Astonishingly, after designating the 12 landmarks, Chair Srinivasan announced that there would be no more designations in East Midtown, providing a green light to the upzoning (now with Mayor de Blasio driving the process) and rejecting in advance any and all Requests for Evaluation. What this meant was that every building, no matter how big, no matter how historic or how beloved a part of the fabric of New York, was now a development site. Such a betrayal of the public trust was unprecedented. Every site suggested for designation deserves to be considered on the merits, not presumptively rejected in deference to owner opposition or its economic potential.

The rezoning was accomplished in the fall of 2017.\(^{13}\) We all knew it was only a matter of time before the first tower fell, and in February 2018 it did: JPMorgan Chase announced that they would demolish their 52-story building at 270 Park Avenue, between 47th and 48th Streets, and build a 70-story tower in its place, adding a million square feet of office space. Originally the Union Carbide Building, it was designed by Natalie de Blois and Gordon Bunshaft of Skidmore, Owings & Merrill and completed in 1960. The AIA Guide described the building as “articulated with bright stainless steel mullions against a background of gray glass and black matte-finished steel panels.”\(^{14}\) (see Figure 1, below). The skyscraper was on several lists of potential landmarks, and not unknown to the LPC. More than one Request for Evaluation had been submitted. Did anyone expect that only buildings of lesser quality would be targets of redevelopment?

\(^{11}\) ELLIOT WILLENSKY & NORVAL WHITE, AIA GUIDE TO NEW YORK CITY 544 (3d ed. 1988).


\(^{13}\) For a critique, see John West & Michael Gruen, A Better Path for East Midtown, CITYLAND (June 19, 2017), http://www.citylandnyc.org/better-path-east-midtown/.

\(^{14}\) WILLENSKY & WHITE, supra note 11, at 245–46.
In a letter to the Historic Districts Council, Chair Srinivasan explained that the Union Carbide Building “is not a priority due to the lack of broader stakeholder support.” In fact, the only stakeholder who matters is JPMorgan Chase, and they oppose designation. The chair went on to explain that the Commission had already designated 12 sites in East Midtown. Furthermore, six buildings by Skidmore, Owings & Merrill have been designated across Manhattan, as well as other examples of mid-century modernism. And that is more than enough. “We considered existing designated landmarks and how well they represent each various eras [sic] of development and whether additional historic resources could enhance the reading, understanding and
preservation of the area’s development history. Thus, the Commission declared its work complete.

By stating in advance that the LPC would consider no additional structures in East Midtown, Chair Srinivasan eliminated all public participation in the process. But there is simply too much money at stake in East Midtown to trifle with such matters as preservation or the public interest. In return for being allowed this development bonus, JPMorgan Chase has pledged $40 million in public improvements. Actually, it is required to do so in order to take advantage of the new zoning. The City thus has a financial interest in approving all such upzonings, without regard to their planning purpose or impact on the quality of life. And make no mistake: our historic streetscape contributes to our quality of life.

Without question, the Union Carbide Building is worthy of designation. It is up to the Landmarks Preservation Commission to make that determination, not JP Morgan Chase. There is a public process. Hold a hearing. Designate (or not). The City Council must then ratify (or reject) the LPC’s decision. At the City Council the decision is political. At the Landmarks Preservation Commission, the decision has to be made on the merits.

The Landmarks Preservation Commission has the obligation to consider each and every request for designation on the merits, not on the basis of a site’s development potential.

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LEGAL DEVELOPMENTS

ASBESTOS

Second Circuit Reversed Dismissal of Asbestos Personal Injury Action, Clarified Judicial Estoppel Doctrine

The Second Circuit Court of Appeals reversed the dismissal on judicial estoppel grounds of an asbestos personal injury action, finding that “to hold on the facts of this case that . . . claims are barred by an equitable doctrine would be to deprive the concept of equity of any meaning.” The case involved claims by a man, now deceased, who was diagnosed with mesothelioma just before he and his wife made their final payment to creditors in a Chapter 13 bankruptcy proceeding. The man and his wife informed their bankruptcy attorney of the diagnosis, but the diagnosis was never disclosed to the bankruptcy court. The district court concluded that both “prerequisite elements” of the judicial estoppel doctrine were present: (1) “the party against whom the estoppel is asserted took an inconsistent position in a prior proceeding,” and (2) “that position was adopted by the first tribunal . . . , such as by rendering a favorable judgment.” As a threshold matter, the Second Circuit held that “a district court’s invocation of judicial estoppel is reviewed only for abuse of discretion” (a point about which there had been some confusion). The Second Circuit concluded, however, that the district court in this case had abused its discretion by applying judicial estoppel as a “mechanical rule” requiring only that the doctrine’s two elements be present. The Second Circuit held that these elements were “necessary conditions” for judicial estoppel, but not “sufficient ones.” In addition, the Second Circuit said, a court “must inquire into whether the particular factual circumstances of a case ‘tip the balance of equities in favor’ of” estopping a party, including by asking whether the party to be estopped gained an “unfair advantage.” In this case, the defendant conceded it was not prejudiced by the plaintiffs’ failure to disclose the personal injury to the bankruptcy court, and the Second Circuit said it was not appropriate to overlook the “unfair advantage” requirement in the “usual” circumstances of this case, where the debtor’s nondisclosure had “at most a de minimis effect” on the bankruptcy proceeding. Clark v. AII Acquisition, LLC, 886 F.3d 261 (2d Cir. 2018).

CLIMATE CHANGE

Appellate Division Upheld Order Requiring Attorney General to Pay Competitive Enterprise Institute’s Attorney Fees in Freedom of Information Suit

The Appellate Division, Third Department, affirmed an order awarding costs and attorney fees to the Competitive Enterprise Institute (CEI) in CEI’s lawsuit against the New York attorney general under New York’s Freedom of Information Law (FOIL). CEI brought the lawsuit after the attorney general’s office denied a request for any climate change “common interest agreements” entered into by the New York and other state attorneys general concerning the sharing of information and other matters related to ongoing and potential climate change investigations. The attorney general unsuccessfully sought to dismiss the lawsuit as moot based on the public release of a common interest agreement by another party to the agreement. The Supreme Court, Albany County, denied the motion, required the attorney general to provide further explanation, and eventually ordered payment of $20,377.50 in attorney fees as well as costs. The Third Department agreed that an award of fees was warranted, concluding that CEI had substantially prevailed even though the common interest agreement—the only document responsive to CEI’s request—had already been in the public domain. The Third Department also said there was not a reasonable basis for

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15 Letter from LPC Chair Meenakshi Srinivasan to the Historic Districts Council (Mar. 9, 2018).
Viewpoint
Jeffrey A. Kroessler

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Editor’s Note: This Viewpoint article has been published in two parts. In Part 1, published in the August issue, the author discussed issues related to the designation process for landmarks in New York City. Part 2 addresses matters related to how New York City landmarks are regulated once they have been designated. Part 2 also discusses issues related to the membership of the Landmarks Preservation Commission as well as the Commission’s role in regulatory decision-making.

II. Regulation and Process

Designation of new landmarks may be where the glamour lies, but most of the Landmarks Preservation Commission’s (LPC’s or Commission’s) work is in the realm of regulation. Each year thousands of applications are filed with the Commission for work ranging from a window replacement to a rooftop addition, from demolition to new construction. Each year the number of applications increases, placing greater burdens on the agency’s small staff.

Over its first half century the LPC has built a sizeable body of precedent. We are now concerned that in some cases these precedents are being ignored. And at the opposite extreme, the Commission is adopting rigid rules to apply to all landmarks, regardless of the specific context. This is the contradiction between too loose and too strict application of standards.

Issues with regulation include:

- Accommodating needs of the moment over historic integrity
- Public access to interior landmarks
- Regulating cultural landmarks
- Scenic landmarks
- Arbitrary categories and standards
- Public comment throughout the process
- Staff-level regulation versus decisions by commissioners.

* This article is adapted from a report issued in March 2018 by The City Club of New York. The City Club’s mission is to promote thoughtful urban land use policy that responds to the needs of all New Yorkers, to provide a forum for public discussion of development issues affecting the urban environment, and to advocate vigorously for solutions that best serve the greater good.
Regulating for Use, Not for Preservation

Increasingly, the LPC has approached regulation from the perspective of use, with historic features or context a decidedly secondary consideration. What else can explain the Certificate of Appropriateness awarded to 510 Fifth Avenue to demolish the entire designated interior, move the entrance from 43rd Street to Fifth Avenue, and reposition the escalators?

In 2017, the Commission made a similar decision regarding the 1898 Jamaica Savings Bank. Rather than insist that the historic façade be respected, the Commission accepted the applicant’s argument that the historic façade impeded commercial use and allowed new windows to be cut into the stone. Representing the owner, former Landmarks Chair Sherida Paulsen offered two arguments by way of justification. First, such an incursion into the original fabric was “reversible” (which suggests, of course, that the proposal might have been unwise to begin with). Secondly, she pointed out that this was, after all, only Jamaica Avenue, not Madison Avenue.

Where to begin. Should the Commission set a lower standard for regulating Beaux Arts buildings in Queens than for regulating buildings in Manhattan? Or perhaps we should consider that the New Yorkers strolling on Madison Avenue have a more refined sensibility compared to those on Jamaica Avenue? Or is it that Jamaica just doesn’t rise to the level of importance of the Upper East Side? The LPC approved the alterations.

The standard ought to be what best suits the landmark, not what appeases the owner. In the early 1980s, Burger King applied to demolish a historic storefront on Montague Street in Brooklyn Heights. The old building just didn’t look like a Burger King, they argued. The Commission rejected their plans and compelled them to fit their business with the existing façade. Within a few years Burger King had vacated the site, leaving intact the historic streetscape, as seen in Figure 2, below. Would that the LPC maintained that approach today.

Figure 2: The building on Montague Street in the Brooklyn Heights Historic District where a Burger King opened in the early 1980s (author’s photo).
Witness the fate of the oldest house in Chelsea. Sold in 2015 for a reported $6.5 million, 404 West 20th Street was a Federal-style row house; a small plaque affixed to the façade read: 404, Oldest Dwelling in Chelsea, Frame House with Brick Front, Built in 1830. The plaque disappeared soon after the building was sold. And then the owner filed an application to make the building disappear. They would preserve the front façade but demolish the rest, and fill in the side alley where the original clapboard siding was visible. The result would be a much grander, entirely new structure. The LPC approved the application in July 2016, with only Commissioner Michael Devonshire voting against “obliterating” the house. Representing the applicant was Valerie Campbell of Kramer Levin, formerly the general counsel of the LPC. The decision evoked cries of disapproval, to no avail. One citizen commented online, “If the Landmarks Preservation Commission cannot see fit to reject this proposal to raze the oldest house in Chelsea, it should disband and cease its façade of preserving landmarks.”

By accommodating the temporary needs of applicants, the LPC compromises the integrity of the historic site.

Interior Landmarks and Public Access

In 1973, the landmarks law was amended to permit the designation of interior spaces “customarily open or accessible to the public, or [a place] to which the public is customarily invited.” Since then the Commission has made 117 such designations, among them the Rainbow Room, the former Four Seasons Restaurant, the Rose Main Reading Room in the New York Public Library, the Dime Savings Bank in Brooklyn, and the Waldorf Astoria Hotel.

The issue of public access to interior landmarks has recently come to the forefront in the case of the former New York Life Insurance Building interior in lower Manhattan. Designed by the firm of McKim, Mead & White for the New York Life Insurance Company and built between 1894 and 1899, 346 Broadway covers an entire block. The City acquired the property in 1968, and the building, including several interior spaces, was designated in 1987. The designation report specifically called out the four-sided clock in the tower and its mechanism, calling it “a rarity” and “one of the few remaining in New York which has not been electrified.” It had to be wound by hand once a week.

The City sold the building in 2013, and the new owner proposed to convert the building into residences. In 2014, the owner applied for a Certificate of Appropriateness, which included plans to disconnect the mechanism and electrify the clock, privatizing space that had been open to the public. This was the first time a proposal to convert an interior landmark into private space had come before the Commission.

How did the Commission respond? The Certificate of Appropriateness was granted. LPC Counsel Mark Silberman informed the commissioners that they had “no power under the Landmarks Law to require interior-designated spaces to remain public,” nor could they “require that [the original clock] mechanism remain operable.” But the same C of A that denied the Commission’s authority to maintain public access to the clock room also required the applicant to maintain public access to the main banking floor. Although a majority of the commissioners wanted to protect the clock and its historic mechanism, they voted to approve the application, based on counsel’s interpretation of the law.

How did the preservation community respond? They filed an Article 78 petition, contending that the LPC had granted the permit in error. In March 2016, Supreme Court Justice Lynn R. Kotler ruled in favor of Save America’s Clocks and annulled the Certificate of Appropriateness. Rather than accept the court’s ratification of the Commission’s authority, the City appealed, demanding that the courts accept its reasoning that it lacked such regulatory power. (Is there another instance when a City agency has vehemently argued for less authority?)

In November 2017, the Appellate Division affirmed the lower court. Associate Justice Ellen Gesmer wrote that the LPC’s determination was both “irrational and affected by an error of law.” She said the LPC Counsel’s interpretation was simply wrong. Furthermore, the LPC acted contrary to its purpose under the law. “We are not required to defer to the LPC’s misunderstanding of its authority under the Landmarks Law,” she wrote, “and we should not do so when that misunderstanding was so clearly contrary to what the Commissioners viewed as the course most in keeping with their expert consideration of the historical and aesthetic importance of the clock and its mechanism.”

What is particularly alarming is that there was already legal precedent for the regulation of interior landmarks. In 1993, the Court of Appeals affirmed the Commission’s power to designate interior spaces, in this case the Four Seasons Restaurant. In her brief opinion, Chief Judge Judith Kaye noted that “any structure, even a railroad station, can be converted to private use in the future; that potential cannot preclude the landmarking of appropriate interiors.” And, one presumes, the regulation thereof.

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2 N.Y.C. ADMIN. CODE § 25-302(m).
When the clocktower case arose, why did the LPC not stand upon this firm, decades-old legal precedent? In 1993, the City went to court to assert the right to designate interior landmarks. In 2016, the City went to court to ratify the LPC’s denial of legal authority. And not taking no for an answer, the City has pressed on to the Court of Appeals. A victory for the City there would seriously undermine the landmarks law, and would mark the first time the law has been circumscribed by the courts.

The Commission’s erroneous interpretation of its power to regulate interior landmarks has had implications for designation, also. The LPC declined to designate the Edgar J. Kaufmann Conference Center, designed by Finnish architect Alvar Aalto, because, LPC Counsel Silberman claimed, it was not ordinarily open to the public. Funny. The Historic Districts Council has held events there, and my wife and I had our wedding reception there, with a member of the Landmarks Commission as the minister.

The Landmarks Commission must define what public access means according to the law in designating and regulating interior landmarks, and not defer to owner interests.

Cultural Landmarks

The landmarks law authorizes the Commission to designate places of architectural, historical, or cultural significance. Over its first 50 years, the LPC has done itself proud in the recognition of architecture and history, but it has been less successful in designating cultural landmarks. The supposed stumbling block is: How can we regulate?

In 1990, the LPC designated 327 East 27th Street, the row house where Antonín Dvořák lived during his American sojourn (September 1892 to April 1895). It is where he composed his famed Ninth Symphony, *From the New World*, and his Cello Concerto. Beth Israel Medical Center owned the building. They lobbied to have the designation overturned and then demolished the house for something not much bigger. The *Times* crowed in an editorial, “Dvořák Doesn’t Live Here Anymore.” To which Brendan Gill penned an outraged rejoinder:

> Dvořák doesn’t live here anymore! Mozart doesn’t live in Salzburg anymore: should the house in which he lived be torn down? Should we tear down the Jumel Mansion in Flushing was designated for its connection with the African American inventor, not its architecture. That house, too, had been moved, and “at the time of designation, the building’s original clapboards were concealed by asbestos shingles.” The idea is not that designation honors a pristine site, but that designation would spur restoration.

> Not infrequently, in approving an alteration to a designated landmark the LPC will justify the decision by saying the work is “reversible.” If that standard is appropriate for work on an existing landmark, a site the Commission is specifically charged with protecting, then surely the unfortunate changes to the Walt Whitman House can be seen as likewise “reversible.” Under the guiding hand of the Commission, the building could be brought back to its Whitmanesque glory. What is not in doubt is that this building is only a Department of Buildings filing away from being lost.

> Tin Pan Alley is another cultural landmark-in-waiting. It may be hard to believe, but Tin Pan Alley still exists in a row just as it does with all other landmarks. And it would have accommodated new uses required by the hospital within the historic envelope.

This is the question now confronting the LPC regarding the Walt Whitman House. America’s greatest poet (all right, there is some room for debate there) was a Brooklynite. He lived at 99 Ryerson in Wallabout, and that house still stands. In fact, it is the only home he lived in that survives in the five boroughs. Would any New Yorker question whether that structure was of cultural significance? Yet the LPC refuses to hold a public hearing, or rather the staff has sent out a letter stating that it “does not rise to the level of a landmark” (noting by way of explanation that there is a Walt Whitman House in Camden, New Jersey!). In this case, the LPC contends that the house has been altered over time; that it is covered in siding; that Whitman would not recognize it.

In the first place, Walt Whitman would certainly recognize it, as the door and window openings are original. Clearly, the Walt Whitman House was nominated for designation on the basis of its cultural significance, not its architectural merits. As such, the specific architectural details should be of secondary importance in the consideration of whether it qualifies as a landmark. Still, the Commission objects that the building is too changed to qualify, but at the same time questions how it could be regulated. As a starting point, bring it back to what Whitman might recognize.

> By rejecting 99 Ryerson Street, the Commission is turning its back on its own precedents. Hamilton Grange was designated despite the house having been moved and remodeled. Yes, but it was Alexander Hamilton’s home! The Lewis H. Latimer House in Flushing was designated for its connection with the African American inventor, not its architecture. That house, too, had been moved, and “at the time of designation, the building’s original clapboards were concealed by asbestos shingles.” The idea is not that designation honors a pristine site, but that designation would spur restoration.

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of buildings on West 28th Street, just east of Sixth Avenue, as seen below in Figure 3. Not the musical entrepreneurs, of course, as the music industry moved on decades ago, but many of the original buildings remain more or less as they were at the turn of the twentieth century. Given the magnificent creation known as the Great American Songbook, the place where it was created is certainly of historical and cultural significance. Questions about regulation here are but smoke. Oddly enough, the owner of these buildings has sold the air rights, so the row is not even a development site.

Figure 3: Tin Pan Alley, West 28th Street near Sixth Avenue (author’s photo).
But the LPC has refused to consider Tin Pan Alley. Rather, a staff person has refused to consider Tin Pan Alley. They claim that while these surviving buildings were part of what constituted Tin Pan Alley, they were not the most important buildings, and the best songs were written in other, now-vanished buildings. We might quibble over which songwriters were more important, but we cannot deny that the remaining blocks are in peril.

Finally, designating cultural landmarks is a way for the City to recognize the diversity of its history, its people, and its cultures. In 1996, the Municipal Art Society issued a report on cultural landmarks, “History Happened Here,” highlighting controversies such as the Dvorak House and arguing for a more aggressive approach to designating places of cultural significance.\(^{14}\) Two decades later the preservation community is confronting the same questions.

\textit{The Landmarks Commission must more aggressively designate cultural landmarks and not stumble over questions about regulation.}

\section*{Scenic Landmarks}

Scenic landmarks occupy a peculiar position in the LPC’s portfolio. To begin with, only publicly owned spaces can be designated, which in practice means public parks. The Commission’s decisions were always merely advisory, as the City is exempt from its own landmarks law. Nonetheless, the LPC spoke with authority. Landmarks took its responsibility to consider proposed changes to Central Park and Prospect Park seriously.

The most wonderful example goes back to a 1985 proposal to rebuild the Wisteria Pergola, located above the bandshell in Central Park. The Parks Department proposed a rebuilding of the pergola and approached the LPC for a permit. The staff could not issue a permit for minor work for such a project, and so the application was sent to the full Commission for a public hearing. By that time, however, 11 of the 20 ancient vines had already been cut, information the assistant parks commissioner neglected to share with the Commission. At the hearing, Chair Gene Norman asked why the commissioners had not been informed the vines had been cut, when the commissioners specifically requested that the 120-year-old vines not be disturbed. They were “twisted,” came the reply. At that point Commissioner Elliot Willensky inquired as to whether she had developed a “new, Mies van der Rohe wisteria which grows straight.”\(^{25}\)

The Parks Department applied for a permit, and Landmarks rigorously scrutinized that proposal. Discussion among the commissioners at the hearing was vigorous. Parks did not gain approval for what it originally wanted and modified its proposal accordingly.

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\textit{\textbf{NEED KAUFMAN, MUN. ART SOC’Y, HIST. HAPPENED HERE: A PLAN FOR SAVING NEW YORK CITY’S HISTORICALLY AND CULTURALLY SIGNIFICANT SITES} (1996). In 1998, Kaufman and others founded Place Matters to put the report’s ideas into practice.}
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\textit{\textbf{Cutting Down the Old Wisteria, VILLAGE VIEWS, Winter 1986, at 5–11.}}
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\textit{\textbf{N.Y.C. CHARTER § 3020(1).}}
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so many changes over time—to materials (wood to concrete being the most egregious) and even to the level of the beach below—that the LPC could not regulate with any energy or authority. This was not the kind of preservation those who long advocated for the Boardwalk’s designation expected from the Landmarks Preservation Commission.

The Landmarks Preservation Commission must protect the historic landscaping of our scenic landmarks, preserve the layering of design elements, and push back against efforts to redesign spaces for convenience or commercialization. Furthermore, it must reassert its authority to regulate all features of scenic landmarks, especially the landscaping.

**Period of Significance; Contributing/Non-Contributing: “Style: None”—Nowhere in the Law**

In *Undoing Historic Districts,* a deeply critical analysis of the procedures of the Landmarks Commission, Christabel Gough explains how the Commission is relying more and more on concepts that appear nowhere in the landmarks law: period of significance; “style: none”; and contributing/non-contributing. Over the years, designation reports have incorporated these concepts. Under LPC Chair Meenakshi Srinivasan, who stepped down on June 1, 2018, however, this soft and vague descriptive terminology was reinterpreted as a hard definition with strict standards for regulation. Such an interpretation places many structures that give historic districts their character—their “sense of place”—at risk.

The concept of designating a historic district according to a tightly defined “period of significance” flies in the face of not only preservation theory but also the history of the city. Best practice in preservation today encompasses layers of architecture, history, and culture, especially in historic districts. It is this palimpsest, this juxtaposition of buildings from different eras and with different characteristics, which enlivens our city.

In a very few cases, the idea of a period of significance makes sense. All of the Sunnyside Gardens Historic District, for example, was built between 1924 and 1935. That history provides a very clear direction for regulation. But what is the period of significance for Greenwich Village? The buildings date from the early 1800s to the 1960s, and styles range from the Federal Period to the 19th century to the Great Depression, when most of the development within the district occurred.20 It goes on to define “[t]he buildings from this period that contribute to the streetscape.”21 Such a statement is clearly intended to exclude all other structures. Never before has a designation report, the legal document voted on by the City Council to ratify a designation, denoted certain structures as being outside the sphere of protection. Furthermore, the report specifically calls out “immigrant history” as the characteristic giving the district its sense of place. Historians and architects would certainly counter that there is more than one layer of history in any city block.

Had this been merely a description of a key aspect of the historic district, there would be no issue. But what the Commission has done here is to use that very limited historical description as the basis of regulation:

Buildings that were developed after this period do not convey the history of immigration in this district, as expressed through the earlier residential, institutional, and commercial architecture of the historic district. Therefore, the buildings that were constructed, reconstructed, or heavily altered after the 1930s, and vacant lots and lots on which new buildings are being constructed are non-contributing to the historic district. In some cases, these buildings have been given a style in the designation report; however, the style field does not attribute significance to the building within the historic district.

One need only stroll through the district to understand just how many buildings fall outside of the Commission’s exclusionary “period of significance.”

Whew. By limiting protection to “contributing” buildings only, the LPC, for the first time, has declared that some buildings

That concept originated in the Vieux Carre in New Orleans and has been repeatedly ratified in the courts. As far back as 1941, the Louisiana Supreme Court ruled against a property owner who wanted to erect a large sign on his building. “The purpose of the [preservation] ordinance is not only to preserve the old buildings themselves,” the court declared, “but to preserve the whole French and Spanish quarter, the tout ensemble, so to speak, by defending this relic against iconoclasm and vandalism.”

Federal and state courts have held that the legitimate state goal of preserving the ‘‘tout ensemble’’ of the historic French Quarter. ‘‘The Vieux Carre Ordinance was enacted to pursue the legitimate state goal of preserving the ‘‘tout ensemble’’ of the historic French Quarter.”

What the LPC has done in the Sullivan-Thompson designation report is to violate the long-established precedent of regulating with an eye toward protecting the ‘‘tout ensemble,’’ not individual buildings. Certain one may find a dominant architectural style in any historic district. And one can likewise see many buildings that do not conform to that style. Over the years, the authors of designation reports have attributed a particular style to each building in a historic district. When architectural details have been stripped over time, or a structure has no clear defining characteristic, the authors have relied upon “style: none.” But that is merely a shorthand description, and was never intended to suggest that the building should then be regulated to a lower standard. Now, unfortunately, the LPC is doing just that. Because a designated building is denoted as “style: none,” the Commission has decided it merits no protection whatsoever.

In January 2018, the LPC published proposed changes to some of its regulations that govern the process for obtaining approval on work at designated properties. The proposed rules, for the first time, intend to regulate buildings in historic districts to a less rigorous standard than what is applied to individual landmarks. Again, this is nowhere in the law and contradicts generations of preservation practice.

The LPC must not regulate on the basis of contributing and non-contributing; nor should buildings in historic districts be regulated according to looser standards than individual landmarks. Work on all landmarks must be to the highest standards of restoration.

Gaming the Process

Despite all efforts to have most decisions made at staff level, some applications still must go before the 11 appointed commissioners for a public hearing. In recent years, applicants with especially controversial projects have learned to game the system, with the cooperation of the Commission itself. They appear at the hearing with their proposal, and the public testifies. The commissioners neither approve nor reject, and the applicant is instructed to work with staff and return with a modified proposal. The rub is that when the proposal does return, the public is prevented from commenting on what is in many ways a new proposal, the outcome of negotiations between staff and applicant.

In such instances, when considering what in essence is a new proposal, the LPC must reopen the hearing to accept new testimony. Alas, that would only slow down the approval process.

When applicants return to the LPC with a modified proposal, the public must be granted an opportunity to comment in a public hearing.

New Rules Trust Staff to Enforce the Landmarks Law, Not the Commissioners

The LPC has proposed new rules governing the process of regulation. The Commission has published a detailed and comprehensive proposal intended to streamline the application process. As LPC Counsel Mark Silberman has often said, “We regulate work.” With each additional designation comes increased regulatory demands. Applications take weeks and months to wend their way through the approval process, not necessarily because of inefficiency but due to the sheer number of applications.

The new rules, however, do not serve a clear preservation purpose. The proposed changes are intended to speed approvals of a Permit for Minor Work or a Certificate of Appropriateness; the goal is to make the process smoother for the applicant. The quality of work proposed on the landmark itself is a secondary consideration. Moreover, one can imagine a future scenario in which a member of the preservation staff will be evaluated on the basis of the number of applications approved in a given period, as opposed to the quality of the work approved or the reasons for rejecting an application.

The new rules can be taken apart and criticized in detail. They suggest that rooftop additions and rear yard additions might be minimally visible. Well, how much can be built and still be considered minimal? But that misses the big problem.
The intent of the rules is to improve efficiency, and the way to do this is by having more and more decisions taken out of the public process and handled at staff level. If so much will be decided at staff level, what will be left for the commissioners to do?

That is not a rhetorical question. The 11 appointed commissioners are charged with enforcing the landmarks law. The proposed new rules would give much of this authority to the staff. Will the commissioners even know what is being decided in their name?

With the bulk of the regulatory decisions made at staff level, often the result of negotiation with the applicant, the public is cut out of the process. When efficiency is prized over preservation, preservation cannot but suffer. If staff members are evaluated on the basis of their efficiency, will they not have an interest in granting swift approvals regardless of their impact?

In recent years there has been significant turnover among the Commission’s staff. Much institutional memory has been lost, and new staff members are often charged with overseeing dozens of projects. They are not necessarily familiar with precedents set over decades of regulation. To prize efficiency over precedent compromises the integrity of the process and diminishes public respect for the agency’s decisions.

Ultimate authority for enforcing the landmarks law lies with the appointed commissioners, and relegating so much work to staff (no matter how well-trained and dedicated) betrays the intent of the law.

III. The Commissioners

Issues with Commissioners

- Commitment to preservation
- Exclusion from staff-level decisions
- Expired terms

Landmarks Preservation Commissioners

Unsympathetic to Preservation

Perhaps this is viewing the past through a rose-tinted lens, but it seems that in decades past the Landmarks Preservation Commission consisted of individuals who were actually preservationists, or at least were sympathetic to preservation, or at bottom, understood what it meant. In recent years, it has seemed that an embrace of the preservation ethic immediately disqualifies a candidate.

Such an attitude actively diminishes the role of historic preservation and undermines its contributions to a livable city. Furthermore, sidelining informed preservationists greatly enhances the influence of voices antagonistic to preservation, particularly voices from the real estate industry. This is not to say that preservationists are anti-development; rather, they are for the historic city, a city that respects layers of history as opposed to clear-cutting the past to make way for the future. The recent rezoning of East Midtown, discussed in Part 1 of this article,27 certainly was a defeat for preservation and a victory for untrammeled development.

Unless the mayor appoints committed preservationists to the LPC, respect for the agency and its decisions will diminish and preservation will be increasingly marginalized in matters of public concern.

The mayor must appoint as chair a committed preservationist, someone who will advocate on behalf of the agency and its mission, and commissioners must have demonstrated experience in or appreciation for historic preservation.

The Regulatory Process Marginalizes Appointed Commissioners

Hearings at the Landmarks Preservation Commission once offered intense debate, controversy, and animated discussion. They were at times exciting, as the commissioners actively participated in the process of regulation. No more. LPC hearings today are orchestrated affairs, and more often than not the resolution has been completely written before public testimony has been heard.

In addition, more and more applications for Certificates of Appropriateness are being decided at staff level, meaning that the commissioners are not at all involved, even though they are legally responsible for the decisions. One could argue that once a precedent has been established it is redundant and inefficient for the Commission to hear a presentation on every such item. But this runs the risk of an arbitrary and bureaucratic application of the rules as opposed to a thoughtful evaluation of the particulars of each application. The proposed new rules will further distance appointed commissioners from regulatory decisions.

Commissioners must be involved in the process of regulation to assure it is open and public; an over-reliance on staff-level decisions obscures the decision-making process.

Commissioners Serving Beyond Their Terms

Too many sitting commissioners are serving with expired terms. The mayor appoints them for three years, and then forgets about them. This presents several problems. First, because commissioners can be dismissed at any time, with or without a replacement, they may be hesitant to contradict the chair, or to support a preservation matter opposed by the administration. Second, the absence of timely reappointments eliminates the public role in the appointment process. Confirmation hearings are an opportunity to support or object to a nominee.

In December 2006, the Citizens Emergency Committee to Preserve Preservation sued to compel the mayor to make timely reappointments of commissioners.\textsuperscript{28} Remarkably, the administration soon nominated five commissioners and pledged to fill two or three additional spots by June 2007.\textsuperscript{29} For a brief moment no commissioner was serving with an expired term. But since then, nothing. And now most members of the Commission sit with expired terms. That legal victory proved to be a singular event, not a portent of change.

The mayor has an obligation to maintain commissioners with current terms, and to appoint commissioners in a timely fashion. The LPC Chair must insist on this to assure the independence of the agency.

Conclusion

The LPC has played a vital role in fostering the livable city. Today, it has ceased being an advocate for the historic city and instead strives to accommodate the owners of designated properties. Furthermore, the Commission has backed away from proactively designating landmarks and in too many instances preemptively rejects Requests for Evaluation.

The public has the right to expect that the Landmarks Preservation Commission will embrace the idea of historic preservation and protect our historic, architectural, and cultural landmarks.

It has come to this: a Landmarks Preservation Commission actively rejecting the idea of preservation.

It was not always thus. And that must not be the inescapable future.

Jeffrey A. Kroessler is the chair of the Preservation Committee of the City Club of New York. He is an Associate Professor in the Lloyd Sealy Library at John Jay College of Criminal Justice, CUNY.

LEGAL DEVELOPMENTS

AIR QUALITY

Second Circuit Issued Opinion with Rationale for Vacating Rule That Delayed Penalty Increases for Violations of CAFE Standards

The Second Circuit Court of Appeals issued an opinion explaining the rationale for its April 2018 order vacating a National Highway Traffic Safety Administration (NHTSA) rule that indefinitely delayed a previously published rule that increased civil penalties for noncompliance with Corporate Average Fuel Economy (CAFE) standards. The Second Circuit found that the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015 did not give NHTSA authority to indefinitely delay adjustments to civil penalties and that NHTSA did not otherwise have authority to suspend the penalty increase rule. The Second Circuit also held that NHTSA violated the Administrative Procedure Act by failing to follow notice-and-comment rulemaking procedures when it adopted the delay rule. As a threshold matter, the Second Circuit also concluded that both the state petitioners (including New York) and the environmental petitioners had standing. The Second Circuit also rejected the argument that the proceedings were untimely, finding that under the applicable Energy Policy and Conservation Act judicial review provision, the time for filing petitions for review was triggered by publication in the Federal Register, not by NHTSA’s delivery of the agency action to the Office of the Federal Register.


Second Circuit Upheld EPA’s Denial of Petitions Challenging “Common Control” Determination for Waste-to-Energy Facility

In a summary order, the Second Circuit Court of Appeals rejected a challenge to the U.S. Environmental Protection Agency’s (EPA’s) denial of a petition to reopen or object to an air permit issued by the New York State Department of Environmental Conservation (DEC) for a facility in Ontario County that burned gas from a nearby landfill. DEC determined that the facility and the landfill were not under “common control” for purposes of the “major source” analysis for renewal and modification of the waste-to-energy facility’s Title V permit. This case concerned a 2015 “Source Determination,” which DEC issued after EPA granted the petitioner’s first petition to object to DEC’s 2012 analysis on the ground that DEC had not adequately addressed concerns regarding common control. After DEC issued the Source Determination, the petitioner filed a new request, styled as a “request to reopen,” again raising arguments about DEC’s common control analysis and asserting that DEC’s Source Determination did not respond to EPA’s 2015 directions. The Second Circuit ruled that EPA had not acted arbitrarily or capriciously in denying the petition to reopen because the petitioner had not even mentioned the relevant legal framework for reopening a case. The Second Circuit also found that the petitioner had not responded to or engaged with DEC’s 2015 Source Determination and that any petition to object was therefore plainly inadequate. The Second Circuit said that DEC’s Source
