

2010

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### Recommended Citation

Rebecca Birmingham, *Smash or Save: The New York City Landmarks Preservation Act and New Challenges to Historic Preservation*, 19 J. L. & Pol'y (2010).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol19/iss1/11>

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# SMASH OR SAVE: THE NEW YORK CITY LANDMARKS PRESERVATION ACT AND NEW CHALLENGES TO HISTORIC PRESERVATION

*Rebecca Birmingham\**

*“[W]e will probably be judged not by the monuments we  
build but by those we have destroyed.*

*Ada Louise Huxtable, Farewell to Penn Station”<sup>1</sup>*

## INTRODUCTION

A demolition crew lops a meticulously maintained cornice off an architecturally unique building.<sup>2</sup> A church begs for permission to erect a soaring office tower next to a turn-of-the-century chapel.<sup>3</sup> A pop star wields her considerable clout to finagle a dispensation to install historically inappropriate windows in her Brooklyn brownstone.<sup>4</sup>

These are just a few examples of the most recent challenges

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<sup>1</sup> Ada Louise Huxtable, Editorial, *Farewell to Penn Station*, N.Y. TIMES, Oct. 30, 1963, at 38.

<sup>2</sup> Robin Pogrebin, *Preservationists See Bulldozers Charging Through a Loophole*, N.Y. TIMES, Nov. 29, 2008, at C1 [hereinafter *Bulldozers*].

<sup>3</sup> Alan C. Weinstein, *The Myth of Ministry vs. Mortar: A Legal and Policy Analysis of Landmark Designation of Religious Institutions*, 65 TEMP. L. REV. 91, 92 (1992).

<sup>4</sup> Rich Calder, *Neighbors Bash Norah’s Window-In-Brick Trick*, N.Y. POST, Nov. 16, 2009, at 6.

facing the New York City Landmarks Preservation Commission (the “Commission”), whose mandate is to save some of the Big Apple’s most iconic buildings.<sup>5</sup> The Broadway theatre district,<sup>6</sup> Radio City Music Hall,<sup>7</sup> and the Apollo Theatre<sup>8</sup> are examples of “important and irreplaceable”<sup>9</sup> architecture that the Commission has salvaged for the foreseeable future. Since the Commission’s formation in 1965<sup>10</sup> with the enactment of the Landmarks Preservation Act,<sup>11</sup> the courts have given the Commission great deference to carry out its administrative mission of maintaining New York City’s historic neighborhoods and priceless structures.<sup>12</sup> However, the Commission’s freedom to protect historic neighborhoods and structures presents new challenges—the Commission must make changes to the designation process and increase communication and transparency between the applicable city agencies and not merely wait for courts to become involved or buildings to be destroyed.

This Note addresses the Commission’s historical track record, current structure, and policies, and proposes solutions to the most recent concerns the Commission faces. It argues that the Commission must undergo administrative restructuring, that it must increase its level of transparency, and that it must be more responsive to the realities of the real estate market in order to meet the stated goals of the Landmarks Preservation Act. Part I of this Note provides an overview of the legislative history of the Landmarks Preservation Act and the Commission, delineates the

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<sup>5</sup> *About the Landmarks Preservation Commission*, THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, <http://www.nyc.gov/html/lpc/html/about/about.shtml> (last visited Sept. 16, 2010).

<sup>6</sup> *Shubert Org., Inc. v. Landmarks Pres. Comm’n of N.Y.*, 570 N.Y.S.2d 504, 505 (N.Y. App. Div. 1991).

<sup>7</sup> NORVAL WHITE & ELLIOT WILLENSKY, *AIA GUIDE TO NEW YORK CITY* 287 (4th ed. 2000).

<sup>8</sup> *Shubert*, 570 N.Y.S.2d at 507. “[T]he Harlem showplace for black entertainers.” WHITE & WILLENSKY, *supra* note 7, at 503.

<sup>9</sup> *Penn Cent. Transp. Co. v. City of New York*, 377 N.Y.S.2d 20, 23 (N.Y. App. Div. 1975).

<sup>10</sup> *About the Landmarks Preservation Commission*, *supra* note 5.

<sup>11</sup> N.Y.C. ADMIN. CODE § 25–301 (West 2009).

<sup>12</sup> *See infra* Part II.

process required to landmark an architecturally significant structure in New York City and outlines the Commission's ability to provide economic assistance for struggling owners of landmarks. Part II explores the various legal challenges that traditional landowners and religious and charitable groups have brought against the Landmarks Commission. Part III describes the most recent conflicts that face the Commission and threaten the architecture of the City of New York. Finally, Part IV provides suggestions for alleviating these difficulties while fulfilling the Commission's legislative goal to simultaneously preserve New York's landmarks and accommodate the concerns of landowners.

## I. HISTORICAL AND PROCEDURAL FRAMEWORK OF THE LANDMARKS LAWS

### A. History

By the mid-sixties, attitudes throughout the country<sup>13</sup> as well as within New York City<sup>14</sup> were in the process of changing to recognize the value of "preserving irreplaceable buildings and sites which have historical, aesthetic or cultural significance."<sup>15</sup> On the federal level, this resulted in the enactment of the National Historic

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<sup>13</sup> See *Berman v. Parker*, 348 U.S. 26, 33 (1954) ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled . . . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."). See also Weinstein, *supra* note 3, at 96 n.25 ("[P]reservation efforts can be traced as far back as the end of the Roman Empire, when the Emperor Majorian attempted to halt the common practice of using monumental public buildings as a ready source of building materials.").

<sup>14</sup> "New York's rich history is reflective of the great deal of time, money and talent invested in building its own architectural heritage." *Penn Cent.*, 377 N.Y.S. at 23.

<sup>15</sup> *Id.* at 23. As early as 1894, the government began to appropriate former Civil War battlefields for preservation purposes. *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896). "Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country . . . must be valid." *Id.* at 681.

Preservation Act in 1966.<sup>16</sup> In its statement of purpose, this statute affirmed “that the historical and cultural foundations of our Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people.”<sup>17</sup>

On a local level, New York recognized the need for predictive city planning long before the enactment of the Landmarks Preservation Act.<sup>18</sup> The tradition of historic preservation arose out of “a keen interest in civic education as well as the realization that a common past would further the idea of a national community.”<sup>19</sup> A fledging preservationist movement<sup>20</sup> had pushed for the enactment of city landmarking legislation after the original Pennsylvania Station structure was razed<sup>21</sup> in what the New York

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<sup>16</sup> National Historic Preservation Act, 16 U.S.C.A. § 470 (West 2010). The historical basis for this legislation can be traced to 1888, and the enactment of 25 Stat. 357, “[a]n [a]ct [t]o authorize condemnation of land for sites of public buildings and for other purposes.” Act of Dec. 5, 1887, ch. 728, 25 Stat. 357 (West 2010). However, the “first preservation activity” in this country is often traced back to the conservation of Independence Hall in Philadelphia, Pennsylvania. Daniel T. Cavarello, Comment, *From Penn Central to United Artists’ I & II: The Rise to Immunity of Historic Preservation Designation from Successful Takings Challenges*, 22 B.C. ENVTL. AFF. L. REV. 593, 597 (1995).

<sup>17</sup> 16 U.S.C.A. § 470.

<sup>18</sup> “Chalcedon was called the city of the blind, because its founders rejected the nobler site of Byzantium lying at their feet. The need for vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness.” *Hesse v. Rath*, 164 N.E. 342, 342 (N.Y. 1928) (in approving a statute to allow construction of airports).

<sup>19</sup> Cavarello, *supra* note 16, at 596.

<sup>20</sup> Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 481–82 (1981). For a judicial statement on the value of preservation as a proper aspect of the public welfare, see *Keystone Assoc. v. Moerdler*, 224 N.E.2d 700, 704 (N.Y. 1966) (Desmond, C.J., dissenting).

<sup>21</sup> David M. Stewart, *Constitutional Standards for Hardship Relief Eligibility for Nonprofit Landowners Under New York City’s Historic Preservation Law*, 21 COLUM. J.L. & SOC. PROBS. 163, 164 (1987–1988). “[H]istoric preservation was largely arcane and unpopular until the demolition of Pennsylvania Station in 1963–65.” *Id.* See also John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 575 (1972) (“The demise of so many cherished buildings is a

Times characterized as a “monumental act of vandalism.”<sup>22</sup> As the Landmarks Preservation Commission states, “[e]vents like the demolition of the architecturally distinguished Pennsylvania Station in 1963 increased public awareness of the need to protect the city’s architectural, historical, and cultural heritage.”<sup>23</sup> Local organizations such as the New York Community Trust and the Municipal Art Society were formed to spearhead this movement.<sup>24</sup>

The city responded with the Landmarks Preservation Act, introduced as a measure to combat the loss of important and notable improvements and landscape features.<sup>25</sup> With the Act, New York City Mayor Robert Wagner established the Landmarks Preservation Commission<sup>26</sup> as a response to mounting concerns that valuable works of city architecture were being demolished in favor of more traditionally profitable edifices.<sup>27</sup> In codifying this idea, the Act asserts that one of its goals is to “foster civic pride in the beauty and noble accomplishments of the past.”<sup>28</sup> As the New

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peculiarly American phenomenon.”).

<sup>22</sup> Huxtable, *supra* note 1. On the national level, it has been said that previous to the enactment of the National Historic Preservation Act, “many historic structures had been destroyed through natural calamities, metropolitan growth, and simple changing of tastes.” Cavarello, *supra* note 16, at 597 n.23. See *The End of Penn Station*, N.Y. DAILY NEWS, Oct. 14, 2009, at 25 (reporting that commission director James Van Derpool said “[i]n the years to come . . . we will be consumed with regret for allowing this supreme example of the architecture of the period to be destroyed.”).

<sup>23</sup> *About the Landmarks Preservation Commission*, *supra* note 5.

<sup>24</sup> Cindy Moy, Note, *Reformulating the New York City Landmarks Preservation Law’s Financial Hardship Provision: Preserving the Big Apple*, 14 CARDOZO ARTS & ENT. L.J. 447, 448 (1996).

<sup>25</sup> N.Y.C. ADMIN. CODE § 25–301 (West 2009). See also *Penn Cent. Transp. Co. v. City of New York*, 377 N.Y.S.2d 20, 23 (N.Y. App. Div. 1975) (reaffirming the validity of the Landmarks Law, Judge Murphy wrote that “Stripped of its remaining historically unique structures, New York City would be indistinguishable from any other large metropolis.”).

<sup>26</sup> *About the Landmarks Preservation Commission*, *supra* note 5.

<sup>27</sup> § 25–301; John Nivala, *The Future for our Past: Preserving Landmark Preservation*, 5 N.Y.U. ENVTL. L.J. 83, 93 (1996). This made New York the first major city in the United States to enact legislation preserving historic landmarks and historic districts. Cavarello, *supra* note 16, at 601; Weinstein, *supra* note 3, at 98.

<sup>28</sup> § 25–301(b). Nearly one hundred years earlier, in approving the

York Appellate Division stated in the landmark case involving Grand Central Terminal, “[u]rban landmarks merit recognition as an imperiled species alongside the ocelot and the snow leopard.”<sup>29</sup>

Yet, maintaining an aesthetically beautiful city—one of the Act’s stated purposes—is not the only goal the Act cites.<sup>30</sup> It is also noted that a balance must be kept between conservation and economic feasibility when choosing the buildings, districts, “sceneries,”<sup>31</sup> and interiors eligible and suitable for landmark status.<sup>32</sup> In order to address this administrative challenge, the Landmark Preservation Commission was formed as a conduit between property owners, preservationists, and the New York City Department of Buildings.<sup>33</sup> The Commission, appointed by the Mayor,<sup>34</sup> is made up of experts spanning the architectural, development, and real estate communities, including residents of

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preservation of historic battlefields, the Supreme Court stated that “[t]he institutions of our country . . . ought to and will be regarded with proportionate affection.” *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 682 (1896).

<sup>29</sup> *Penn Cent.*, 377 N.Y.S. at 23 (citing John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 574 (1972)).

<sup>30</sup> § 25–301. “It is hereby declared that as a matter of public policy that the protection, enhancement, perpetuation and use of improvements and landscape features of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people.” *Id.* But see *Keystone Assoc. v. Moerdler*, 224 N.E.2d 700, 702 (N.Y. 1966), reflecting on a predecessor to the Landmarks Law applied to the Old Metropolitan Opera House, “[t]he statute was clearly not intended to protect the public health, safety, and welfare, as those terms are understood.”

<sup>31</sup> *E.g.*, *Central Park London v. Art Comm’n of New York*, 593 N.Y.S.2d 233 (N.Y. App. Div. 1993).

<sup>32</sup> § 25–301.

<sup>33</sup> *Id.* “Just as city officials fight crime, they also fight for the physical appearance of neighborhoods . . . these officials and architects, who take personally everything that gets built in the city under their watch, work with designers, developers and builders to ensure that New York is architecturally pleasing.” Jason Sheftell, *An Architectural Word (and Free Exhibition) Make New York a Better Place to Live*, N.Y. DAILY NEWS, Nov. 13, 2009, at 1.

<sup>34</sup> Members of the Landmarks Preservation Commission, THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, [http://www.nyc.gov/html/lpc/html/about/about\\_commissioners.shtml](http://www.nyc.gov/html/lpc/html/about/about_commissioners.shtml) (last visited Sept. 16, 2010).

all corners of the city.<sup>35</sup>

Among the duties of the Commission are to protect architecturally harmonic areas of the city, that have a unique character all their own.<sup>36</sup> In order to maintain the overarching look of a neighborhood, the Commission can designate entire districts as landmarked.<sup>37</sup> In 1973, notable interiors<sup>38</sup> “customarily open and accessible to the public” were added as preservable under the statute.<sup>39</sup> Since the enactment of the law, more than 27,000 buildings have been designated landmarks or reside within a designated historic district.<sup>40</sup>

To its credit, the Commission has saved Grand Central Terminal<sup>41</sup> from the addition of a hulking apartment tower,<sup>42</sup>

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<sup>35</sup> “[T]he Commission . . . must include at least three architects, one historian, one city planner or landscape architect, one realtor, and at least one resident of each of the city’s five boroughs.” Church of St. Paul & St. Andrew v. Barwick, 496 N.E.2d 183, 186 (N.Y. 1986) (citing N.Y.C. CHARTER § 3020 (West 2009)). “The agency consists of eleven Commissioners and a full-time staff.” *About the Landmarks Preservation Commission*, *supra* note 5.

<sup>36</sup> § 25–303(4).

<sup>37</sup> In the past 13 years alone, 33 historic districts have been landmarked by the Commission. Robin Pogrebin, *Fighting On To Preserve Morningside Heights*, N.Y. TIMES, Mar. 2, 2009, at C1. But see *Shubert Org. v. Landmarks Pres. Comm’n of New York*, 570 N.Y.S.2d 504, 505 (N.Y. App. Div. 1991) for a characterization of this policy as “an improper exercise in spot zoning.”

<sup>38</sup> *E.g.*, the Beacon Theater. *Committee to Save the Beacon Theater v. City of New York*, 541 N.Y.S.2d 364, 364 (N.Y. App. Div. 1989).

<sup>39</sup> *Teachers Ins. & Annuity Ass’n v. City of New York*, 82 N.Y.2d 35, 40 (N.Y. 1993). It is also worth noting that “the potential that the interior space, open to the public, might be adapted to private use in the future does not preclude landmarking under the Landmarks Law.” 81 NY JUR 2D, *Parks, Recreation, and Historic Preservation* § 17 (2009). *But see* N.Y.C. ADMIN CODE § 25–303(2) (West 2009); Weinstein, *supra* note 3, at 114 (stating that interiors used for religious worship cannot be designated as interior landmarks).

<sup>40</sup> *Landmarks Preservation Commission—Home*, THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, <http://www.nyc.gov/html/lpc/html/home/home.shtml> (last visited Sept. 16, 2010).

<sup>41</sup> Grand Central Terminal is located at E. 42nd St. at Park Ave., and described as “an imposing Beaux Arts Classical structure” with “a fine symmetrical composition of triumphal arches . . . .” WHITE & WILLENSKY, *supra* note 7, at 274.

<sup>42</sup> *Penn Cent. Transp. Co. v. City of New York*, 377 N.Y.S.2d 20 (N.Y. App. Div. 1975).

preserved Art Deco masterworks such as the Chrysler Building,<sup>43</sup> and prevented unattractive new development from infringing on the continuity of historic districts.<sup>44</sup> Most recently, the Commission has effected landmark designation for the Ocean on the Park district in Brooklyn,<sup>45</sup> the Ridgewood North Historic District in Queens,<sup>46</sup> and four rows of townhouses in the Tompkinsville section of Staten Island.<sup>47</sup> It recently expanded the Greenwich Village Historic District to include 235 additional buildings that “illustrate over two centuries of urban development.”<sup>48</sup> Overall, the Commission has successfully maneuvered the difficulties of balancing the practical necessities of a major metropolitan city with the vitally important task of preserving precious works of architecture. At its best, the Commission preserves stunning structures and neighborhoods while addressing the disquiet from real estate owners in order to achieve increased property values and civic pride.<sup>49</sup> As an added

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<sup>43</sup> The Chrysler Building, located at 405 Lexington Ave., is “an Art Deco confection” that “glows in the skyline.” WHITE & WILLENSKY, *supra* note 7, at 276.

<sup>44</sup> “A bad building violates the sense of enjoyment one feels when walking a city . . . [a]ny calm is immediately shattered by distasteful structures [sic] . . . .” Jason Sheftell, *An Architectural Word (and Free Exhibition) make New York a Better Place to Live*, N.Y. DAILY NEWS, Nov. 13, 2009, at 1.

<sup>45</sup> Marianne S. Percival, *Ocean on the Park Historic District Designation Report*, NYC LANDMARKS PRESERVATION COMMISSION (Oct. 27, 2009), [http://www.nyc.gov/html/lpc/downloads/pdf/reports/Ocean\\_ParkHD\\_desigrep.pdf](http://www.nyc.gov/html/lpc/downloads/pdf/reports/Ocean_ParkHD_desigrep.pdf).

<sup>46</sup> See generally Tara Harrison, *Ridgewood North Historic District Designation Report*, NYC LANDMARKS PRESERVATION COMMISSION (Sept. 15, 2009), <http://www.nyc.gov/html/lpc/downloads/pdf/reports/rnhd.pdf>.

<sup>47</sup> See generally Cynthia Danza, *411 Westervelt Avenue House, Horton’s Row Designation Report*, NYC LANDMARKS PRESERVATION COMMISSION (Sept. 15, 2009), <http://www.nyc.gov/html/lpc/downloads/pdf/reports/411horton.pdf>.

<sup>48</sup> Olivia Klose, *Greenwich Village Historic District Extension II Designation Report*, NYC LANDMARKS PRESERVATION COMMISSION 23 (June 22, 2010), [http://www.nyc.gov/html/lpc/downloads/pdf/reports/GVHDExtII\\_Report.pdf](http://www.nyc.gov/html/lpc/downloads/pdf/reports/GVHDExtII_Report.pdf).

<sup>49</sup> See Robin Pogrebin, *Preservation and Development, Engaged in a Delicate Dance*, N.Y. TIMES, Dec. 2, 2008, at C1 [hereinafter *Delicate Dance*]. “[The Commission] must strike a balance between protecting architecture and accepting economic realities, between a responsibility to history and a

bonus, landmark designation serves to boost struggling neighborhoods, instilling a sense of respect and self-preservation among community members.<sup>50</sup> However, contemporary challenges threaten historic preservation in unique ways and these challenges often arise from loopholes within the Landmarks Law itself.

### *B. Procedure*

The procedure for declaring a site a landmark in New York City is daunting, involving a balancing act between artistic worth, municipal practicality, and the opinions of multiple city agencies.<sup>51</sup> The Commission or private citizens initiate the (sometimes lengthy) process<sup>52</sup> by recommending noteworthy structures, landscapes, or districts.<sup>53</sup> After the Commission weighs historical, architectural, and economic factors, it holds a public hearing before taking any further action.<sup>54</sup> The designation is then taken to a vote, first by the Commission (which requires a simple majority), then the City Council.<sup>55</sup> At this stage, there is no requirement for the Commission's requests to comply with zoning or environmental limitations, as its recommendation for landmark status is purely "ministerial" in nature.<sup>56</sup> However, the

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knowledge that the city must evolve." *Id.*

<sup>50</sup> Moy, *supra* note 24, at 449 n.10 (1996). See also David M. Stewart, *Constitutional Standards for Hardship Relief Eligibility for Nonprofit Landowners Under New York City's Historic Preservation Law*, 21 COLUM. J.L. & SOC. PROBS. 163, 176 (1987–1988) ("Preservation laws have been justified as educational tools, as stimuli for revitalization of deteriorating urban areas, as sources for tourism revenues and as spurs for architectural creativity."). See also *infra* notes 86–93 and accompanying text.

<sup>51</sup> See *FAQS: The Designation Process*, NYC LANDMARKS PRESERVATION COMMISSION, [http://www.nyc.gov/html/lpc/html/faqs/faq\\_designation.shtml](http://www.nyc.gov/html/lpc/html/faqs/faq_designation.shtml) (last visited Sept. 16, 2010).

<sup>52</sup> Moy, *supra* note 24, at 449.

<sup>53</sup> The law requires that landmarks be at least thirty years old and have a "special character or special historical or aesthetic interest or value." N.Y.C. ADMIN. CODE § 25–302 (West 2009).

<sup>54</sup> *FAQS: The Designation Process*, *supra* note 51.

<sup>55</sup> *Id.*

<sup>56</sup> *Citineighbors Coal. of Historic Carnegie Hill v. New York City Landmarks Pres. Comm'n*, 762 N.Y.S.2d 59, 60 (N.Y. App. Div. 2003).

Commission may recommend an environmental or archaeological review of the property.<sup>57</sup>

Once a building is officially designated a landmark, significant limitations apply to construction projects undertaken at the building's site.<sup>58</sup> Most alterations, especially those that affect the remarkable architectural aspects of a building, must be submitted to and approved by the Landmarks Commission.<sup>59</sup> However, minor exterior work and maintenance does not require the Commission's approval.<sup>60</sup> There are three methods of requesting alteration of a landmarked site.<sup>61</sup> First, if the owner desires a minor alteration that will not substantively affect the quality of the building, he or she may request a "certificate of no effect on protected architectural features."<sup>62</sup> Secondly, a construction project that will not offend the intent of the Landmarks Law may be granted a certificate of "appropriateness."<sup>63</sup> Lastly, if a property owner shows that a landmark, when used for its intended purpose, cannot make a "reasonable return,"<sup>64</sup> and cannot be altered to accomplish this, the Commission may permit demolition of the structure.<sup>65</sup>

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<sup>57</sup> See *FAQs: Environmental Review*, NYC LANDMARKS PRESERVATION COMMISSION, [http://www.nyc.gov/html/lpc/html/faqs/faq\\_ereview.shtml](http://www.nyc.gov/html/lpc/html/faqs/faq_ereview.shtml) (last visited Sept. 16, 2010).

<sup>58</sup> § 25–305.

<sup>59</sup> *Id.* Proposed work must not "change, destroy or affect any architectural feature" and new construction must "be in harmony" with the exterior of the landmark. § 25–306.

<sup>60</sup> *FAQs: What Does Landmark Designation Mean to Property Owners*, THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, [http://www.nyc.gov/html/lpc/html/faqs/faq\\_meaning.shtml](http://www.nyc.gov/html/lpc/html/faqs/faq_meaning.shtml) (last visited Sept. 16, 2010).

<sup>61</sup> *Church of St. Paul & St. Andrew v. Barwick*, 496 N.E.2d 183, 186 (N.Y. 1986).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 186–87.

<sup>64</sup> "A net annual return of six per centum of the valuation of an improvement parcel." § 25–302. See also Moy, *supra* note 24, at 466 ("[A]n owner is not constitutionally entitled to the most beneficial use of his property."). For a more general application of this concept, see *Adamo v. Town of Babylon*, 272 N.E. 338, 339 (N.Y. 1971) ("A 'zoning ordinance is not unconstitutional as applied merely because it prohibits a use which may be the highest and best use for the land' . . .").

<sup>65</sup> See *Church of St. Paul*, 67 N.Y.2d at 516; *Manhattan Club v. Landmarks*

In addition, owners of landmarks are expected to maintain a state of “good repair” and prevent deterioration in their designated buildings.<sup>66</sup> They must at minimum preserve the state the building was in at the date of designation.<sup>67</sup> The Commission cannot require a landowner to go above and beyond this level of maintenance.<sup>68</sup> If a violation is found, the Enforcement Department of the Commission will first send a warning letter, and if the violation is not cured, issue a Notice of Violation.<sup>69</sup> This leads to a hearing that may result in fines<sup>70</sup> or a suspension of issuance of any Department of Buildings permits on the property.<sup>71</sup> If a landmark is demolished without permission, the Commission may go outside the administrative structure and bring an action in civil court.<sup>72</sup>

Since the enactment of the Landmarks Law,<sup>73</sup> the City of New

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Pres. Comm’n of the City of N.Y., 273 N.Y.S.2d 848, 851 (N.Y. Sup. Ct. 1966).

<sup>66</sup> § 25–311. This section of the statute was enacted in order to prevent “demolition by neglect.” See also *FAQs: What does Landmark Designation Mean*, *supra* note 60.

<sup>67</sup> See generally *Forms and Publications*, THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, [http://www.nyc.gov/html/lpc/html/forms/forms\\_pub.shtml](http://www.nyc.gov/html/lpc/html/forms/forms_pub.shtml) (last visited Sept. 16, 2010). This level of maintenance is determined by the Designation Report issued at the time of designation. *Id.* These reports “are based on research, photographs, and field visits . . .” and may factor in the “date of construction, neighborhood history, building use, architect and builder, style and design, past and current owners, and photographs of the historic district or individual landmark.” *Id.*

<sup>68</sup> See *FAQs: What does Landmark Designation Mean*, *supra* note 60 (“[T]he Commission regulates proposed changes to a building. It cannot make you do work on your building.”).

<sup>69</sup> *About: Enforcement Departments*, THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, <http://www.nyc.gov/html/lpc/html/about/enforce.shtml> (last visited Sept. 16, 2010).

<sup>70</sup> The Commission has had the power to use civil fines as an enforcement method since July 1998. *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *FAQs: The Enforcement Process*, THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, [http://www.nyc.gov/html/lpc/html/faqs/faq\\_enforce.shtml](http://www.nyc.gov/html/lpc/html/faqs/faq_enforce.shtml) (last visited Sept. 16, 2010).

<sup>73</sup> For a sense of the general attitude of the courts before the law was passed, see *Keystone Assoc. v. Moerdler*, 224 N.E.2d 700, 701–02 (N.Y. 1966), in which the New York Court of Appeals allowed the demolition of the Old Metropolitan Opera House (“[T]he owners may continue to use the building for

York and the courts have both given the Commission the final say on aesthetic, architectural, and historical judgments when making landmark-related decisions.<sup>74</sup> Indeed, courts have ceded to the Commission's opinion unless a serious legal conflict exists,<sup>75</sup> especially when dealing with issues within the Commission's proficiency.<sup>76</sup> When approaching landmarks cases, the courts have developed dual standards of statutory review—bowing to the Commission on issues of architectural or historical merit and reserving their judgment for the solely legal aspects of a complaint.<sup>77</sup> This deference is attributed to the “long-established presumption of regularity” that administrative agencies act within

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the purpose desired by the Legislature or they can let the building stand idle and suffer the loss.”).

<sup>74</sup> “[T]he court may not substitute its judgment for that of the administrative agency . . .” *Manhattan Club v. Landmarks Pres. Comm’n of New York*, 273 N.Y.S.2d 848, 851 (N.Y. Sup. Ct. 1966) (citing *Kilgus v. Bd. of Estimate of New York*, 308 N.Y. 620, 626 (N.Y. 1955); *Wiener v. Gabel*, 18 A.D.2d 1025, 1025–26 (2d Dept., 1963)). See also N.Y.C. ADMIN. CODE § 25–303 (West 2009); *City of New York v. Shakespeare*, 608 N.Y.S.2d 460, 460 (N.Y. App. Div. 1994); *Teachers Ins. & Annuity Ass’n v. City of New York*, 623 N.E.2d 526, 528–29 (N.Y. 1993). See also *Berman v. Parker*, 348 U.S. 26, 33 (1954) for an illustration of this concept on a national level (“Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear.”).

<sup>75</sup> “A landmark designation is an administrative determination . . . that must be upheld if it has support in the record, a reasonable basis in law, and is not arbitrary or capricious.” *Lutheran Church in America v. City of New York*, 316 N.E.2d 305, 310 (N.Y. 1974). See also *67 Vestry Tenants Ass’n v. Raab*, 658 N.Y.S.2d 804, 807 (N.Y. Sup. Ct. 1997) (“The [Landmarks Preservation Commission] is a body of historical and architectural experts to whom deference should be given by the court.”) (citing *Teachers Ins. and Annuity Ass’n of American v. City of New York*, 82 N.Y.2d 35, 41 (1993); *Gilbert v. Bd. of Estimate*, 575 N.Y.S.2d 840, 841 (1st Dept. 1991); *Committee to Save the Beacon Theater v. City of New York*, 541 N.Y.S.2d 364, 369 (N.Y. App. Div. 1989); N.Y. CITY CHARTER § 534 (West 2009)).

<sup>76</sup> See, e.g., *Comm. to Save the Beacon Theater v. City of New York*, 541 N.Y.S.2d 364, 369 (N.Y. App. Div. 1989).

<sup>77</sup> “The distinction between these standards is perhaps best understood by reference to the statutory term ‘special historical or aesthetic interest’—as to which courts should defer to the expertise of the Commission—and . . . matter[s] of pure legal interpretation as to which no deference is required.” *Teachers Ins.*, 623 N.E.2d at 529.

their legislatively determined duties.<sup>78</sup>

Despite this rule, when a disputed landmark designation ends up in court, the property owner often disagrees with the asserted merit of the property.<sup>79</sup> In the oft-cited *Penn Central* case, the Commission labeled the proposed alteration of Grand Central Terminal, including a 55-story office tower, as an “aesthetic joke”<sup>80</sup> reducing the gorgeous Beaux-Arts building “to the status of a curiosity.”<sup>81</sup> Further downtown, a former gallery that had minimal architectural value but a rich cultural and historical importance as the headquarters of Matthew Brady<sup>82</sup> was affirmed a landmark over the objections of its owner.<sup>83</sup> Similarly, a building known for being one of a set of “twin” buildings was designated a landmark, even though the Commission chose not to landmark the adjacent “twin.”<sup>84</sup> In another case, the City of New York itself asserted that a bandshell located within Central Park had become a haven for “vandalism, drug dealing, and other illicit activity” and should be torn down.<sup>85</sup> In that case, the Appellate Division ruled that even the judgment of the City could not trump the valuation of the Landmarks Commission, which was permitted to approve or deny the demolition.<sup>86</sup>

Economically, there is a wealth of evidence suggesting that landmark designation does much to increase property values and attractiveness to potential buyers and developers.<sup>87</sup> TriBeCa, for

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<sup>78</sup> *City of New York v. 10–12 Cooper Square, Inc.*, 793 N.Y.S.2d 688, 690 (N.Y. Sup. Ct. 2004).

<sup>79</sup> *See Manhattan Club*, 273 N.Y.S.2d at 850.

<sup>80</sup> Cavarello, *supra* note 16, at 604.

<sup>81</sup> Moy, *supra* note 24, at 461.

<sup>82</sup> Brady was a noted daguerrotype artist of the time, photographing Abraham Lincoln at the 359 Broadway gallery after Lincoln’s lauded speech at Cooper Union. WHITE & WILLENSKY, *supra* note 7, at 75.

<sup>83</sup> *Russo v. Beckelman*, 611 N.Y.S.2d 869, 870 (N.Y. App. Div. 1994).

<sup>84</sup> *Doro’s Rest., Inc. v. City of New York*, 578 N.Y.S.2d 163, 164 (N.Y. App. Div. 1992). In this case, the fact that the adjacent building was in a bad state of disrepair contributed to the Commission’s decision to refrain from landmarking it.

<sup>85</sup> *London v. Art Comm’n of New York*, 593 N.Y.S.2d 233, 234 (N.Y. App. Div. 1993).

<sup>86</sup> *Id.* at 234–35.

<sup>87</sup> *See generally* JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN*

example, formerly seen as a “decrepit” fringe neighborhood,<sup>88</sup> has experienced an explosion of development since the area’s historic district designation more than fifteen years ago.<sup>89</sup> It has been suggested that a lack of landmarking constraints led to the downfall of the Times Square area of New York, and may have contributed to its current high-rent, upscale status.<sup>90</sup> Courts have also pointed out that the common developer’s fear that landmark designation will decrease a property’s value is relatively unfounded.<sup>91</sup> In sum, “[l]andmark designation may increase property value as it confers prestige, protects the neighborhood from urban renewal projects, and attracts businesses.”<sup>92</sup> For example, when Carnegie Hall, which is surrounded by a swath of small businesses, was at risk of demolition, the area property owners were the ones to raise heated objection.<sup>93</sup> Additionally, the Commission can place no bar on the owner’s right to sell or transfer his or her property, making increased property values an attractive and potentially lucrative prospect.<sup>94</sup>

The Commission is permitted to take several ameliorating measures to assist financially struggling owners.<sup>95</sup> The requirement that aggrieved parties must first exhaust all possible administrative solutions before resorting to litigation serves to keep property owners apprised of the entire breadth of their options.<sup>96</sup> One of

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CITIES (1st ed. 1961); *Delicate Dance*, *supra* note 49.

<sup>88</sup> Edward Lewine, *Is Downtown Dead?*, N.Y. TIMES, May 25, 1997, at 1.

<sup>89</sup> *Delicate Dance*, *supra* note 49, at C1.

<sup>90</sup> Moy, *supra* note 24, at 483.

<sup>91</sup> *Doro’s Rest., Inc. v. City of New York*, 578 N.Y.S.2d 163, 165 (N.Y. App. Div. 1992) (“There is no credible evidence that 319 Broadway, if designated, would lack economic value.”).

<sup>92</sup> Moy, *supra* note 24, at 482.

<sup>93</sup> *Id.* at 448, 490 n.9. “World-famous more for its acoustics than its architectural envelope, . . .” many virtuoso musicians also joined the rally to save the building. WHITE & WILLENSKY, *supra* note 7, at 268.

<sup>94</sup> *FAQs: What does Landmark Designation Mean*, *supra* note 60.

<sup>95</sup> See, e.g., *About: Historic Preservation Grant Program*, THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, <http://www.nyc.gov/html/lpc/html/about/hpgp.shtml> (last visited Sept. 16, 2010).

<sup>96</sup> *Church of St. Paul & St. Andrew v. Barwick*, 496 N.E.2d 183, 189 (N.Y. 1986). “[T]he controversy cannot be ripe if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available

these administrative processes activates when a real estate owner requests a Certificate of Appropriateness for a renovation project.<sup>97</sup> The Commission, along with financial planners, will then assist the property owner in devising a fiscal plan for the building's future.<sup>98</sup> Next, economic hardship may be relieved via a tax rebate.<sup>99</sup> This particular provision, involving both tax credits and exemptions, are usually applied toward landmarks in significantly decrepit shape.<sup>100</sup> The Commission also sponsors a Historic Preservation Grant Program that provides funds of up to \$25,000 to landowners looking to repair damaged facades.<sup>101</sup>

## II. TYPICAL OBJECTIONS: THE LANDMARKS LAW GOES TO COURT

To a real estate holder with cost-effectiveness always in mind, a landmarks designation can seem like a dubious honor. Due to the Landmark Preservation Act's strict regulations on renovation and demolition, the Commission has acquired a fearful reputation among property owners who worry that they may not be able to exploit their assets to the highest possible net gain.<sup>102</sup> To comport with the Landmarks Laws, the exterior of landmarks must remain

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to the complaining party.”

<sup>97</sup> Moy, *supra* note 24, at 454.

<sup>98</sup> *Id.*

<sup>99</sup> N.Y.C. ADMIN. CODE § 25–309 (West 2009). *See also* Lutheran Church in Am. v. City of New York, 316 N.E.2d 305, 307 (N.Y. 1974).

<sup>100</sup> Moy, *supra* note 24, at 453. However, religious organizations cannot avail themselves of these provisions. *See Lutheran Church*, 316 N.E.2d at 307.

<sup>101</sup> *About: Historic Preservation Grant Program*, *supra* note 95. The Commission gives preference to those who supplement the grant with their own money in order to repair the building, adding incentive for caring for a landmark. *Id.*

<sup>102</sup> Robin Pogrebin, *A Historic District is Proposed, and Buildings Are Soon Altered*, N.Y. TIMES, May 12, 2009, at C1 [hereinafter *Historic District*]. This apprehension is so ingrained in the battle between developers and preservationists that community members have on occasion used landmarking as a threat to undesired development projects. *See* Brendan Brosh, *Outraged Over Plan for New Jiggle Joint in Long Island City*, N.Y. DAILY NEWS, Oct. 14, 2009, at 4 (reporting that an assemblywoman planned to contact the Commission to attempt to halt construction of a proposed strip club).

intact and maintained to the condition at the date of its landmarking.<sup>103</sup> This sometimes requires a significant financial commitment.<sup>104</sup> Any construction that normally requires a permit from the Department of Buildings first needs to be approved by the Commission to ensure the important architectural features are maintained and respected.<sup>105</sup> In addition, owners of landmarked buildings are statutorily required to maintain their properties in a state of “good repair.”<sup>106</sup> Finally, though consent from the owner is gaining in importance to the Commission,<sup>107</sup> it is not required for designation, and buildings may be landmarked over the protestations of the owner.<sup>108</sup> In response to these regulations, many titleholders of newly designated buildings have brought lawsuits claiming various constitutional barriers to the Commission’s actions.<sup>109</sup>

A common argument raised against the Landmarks Commission is that designation is an unconstitutional deprivation

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<sup>103</sup> N.Y.C. ADMIN. CODE § 25–306 (2008); *see also* *Rudey v. Landmarks Pres. Comm’n of the City of N.Y.*, 587 N.Y.S.2d 623, 624 (N.Y. App. Div. 1992) (Commission ordered the restoration of a set of new windows in a landmarked building).

<sup>104</sup> *See St. Bartholomew’s Church v. City of New York*, 914 F.2d 348, 358–59 (2d Cir. 1990).

<sup>105</sup> § 25–306. Certainly, the Commission will not allow the owner “the unbridled right to develop its property as it sees fit.” *Soc’y for Ethical Culture in the City of N.Y. v. Spatt*, 416 N.Y.S.2d 246, 253 (N.Y. App. Div. 1989).

<sup>106</sup> § 25–311.

<sup>107</sup> Though it has been suggested that requiring owner consent might enable an owner to sell or transfer their property prior to designation, the true effect on aesthetically invaluable architecture is much more serious and destructive. *See infra* notes 180–89 and accompanying text. *See also* *Moy, supra* note 24, at 489 n.228 (conceding that requiring landowner consent “may effectively eviscerate landmark protection . . .”).

<sup>108</sup> *Teachers Ins. & Annuity Assoc. v. City of New York*, 623 N.E.2d 526, 528–29 (N.Y. 1993). *But see Historic District, supra* note 102 (according to preservationist Anthony Wood, “the landmarks law is applied based on owner consent . . . [n]ot legally but operationally.”) *See also FAQs: The Designation Process, supra* note 51 (explaining that part of the designation process involves meeting with the owner to discuss “potential regulatory issues.”).

<sup>109</sup> *Historic District, supra* note 102 (according to developers, preservation is “intruding on ownership rights.”).

of property without due process<sup>110</sup> or alternatively, a taking of private property without compensation.<sup>111</sup> To start, the court generally must decide whether an assertion that the Landmarks Preservation Act is unconstitutional is “ripe for judicial determination.”<sup>112</sup> This two-part test involves first determining whether the case is appropriate for the court to decide.<sup>113</sup> First, the court looks to the definitiveness of the Commission’s decision; in other words, “whether the administrative action is final.”<sup>114</sup> Second, the court evaluates the possible hardship inflicted on either party should judicial review be granted.<sup>115</sup> Once the first two parts of the test are satisfied, the court may move on to determine whether a taking has occurred.<sup>116</sup>

The test for an unconstitutional taking<sup>117</sup> is whether the action towards a property “affects its free use and enjoyment or the power of disposition at the will of the owner.”<sup>118</sup> In determining this, the courts consider “the importance of the regulation to the public good, the reasonableness of the regulation in achieving such end and the effect of the regulation on the economic viability of the

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<sup>110</sup> “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. “. . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

<sup>111</sup> See *Manhattan Club v. Landmarks Pres. Comm’n of the City of N.Y.*, 273 N.Y.S.2d 848, 850 (N.Y. Sup. Ct. 1966); *Penn Cent. Transp. Co. v. City of New York*, 377 N.Y.S.2d 20, 22 (N.Y. App. Div. 1975).

<sup>112</sup> *Comm. to Save the Beacon Theater v. City of New York*, 541 N.Y.S.2d 364, 368 (N.Y. App. Div. 1989).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Lutheran Church in America v. City of New York*, 316 N.E.2d 305, 311–12 (N.Y. 1974); see also *Beacon Theater*, 541 N.Y.S.2d at 364.

<sup>117</sup> An alternate balancing test has been established with the following three factors: “1) the economic impact of the law on the claimant; 2) the extent to which the law has interfered with distinct investment-backed expectations; and 3) the character of the governmental action.” Cavarello, *supra* note 16, at 605.

<sup>118</sup> *Lutheran Church*, 35 N.Y.2d at 130 (citing *Forster v. Scott*, 136 N.Y. 577, 584 (1893)). Put another way, courts will “permit . . . regulation which does not interfere with activities being carried on in the structure.” 1025 Fifth Ave. v. Marymount School of N.Y., 475 N.Y.S.2d 182, 186 (N.Y. Sup. Ct. 1983).

parcel involved.”<sup>119</sup> The first prong—the importance of the regulation to the public—and the second prong—the reasonableness of the regulation—are satisfied by the statutory goals of the Landmarks Law.<sup>120</sup> Regarding to the effect the law has on the economic capability of the property, the use of the interior space is generally left up to the owner, as the bulk of the restrictions laid out in the Landmarks Preservation Act deal solely with exteriors.<sup>121</sup> The Landmarks Commission may not use its administrative role to confine trades to certain sites or geographical areas.<sup>122</sup> Due to the flexibility provided to the owner of a landmark, the appropriate question to ask when a landowner asserts an unconstitutional taking is: “have the plaintiffs demonstrated that the regulation in issue deprives them of all reasonable beneficial use of their property?”<sup>123</sup>

Property owners have also mounted legal challenges to specific restoration orders from the Commission<sup>124</sup> relating to the owner’s

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<sup>119</sup> Penn Cent. Transp. Co. v. City of New York, 377 N.Y.S.2d 20, 32 (N.Y. App. Div. 1975). It is also important to consider that “while every regulation is in some sense a prohibition, *the circumstances in a specific case* determine whether a given regulation treads over the line so as to act as a confiscatory taking.” David M. Stewart, *Constitutional Standards for Hardship Relief Eligibility for Nonprofit Landowners Under New York City’s Historic Preservation Law*, 21 COLUM. J.L. & SOC. PROBS. 163, 177 (1987–1988) (emphasis added).

<sup>120</sup> Penn Cent., 377 N.Y.S.2d at 32.

<sup>121</sup> Manhattan Club v. Landmarks Pres. Comm’n of the City of N.Y., 273 N.Y.S.2d 848, 850, 852 (N.Y. Sup. Ct. 1966). An exception to this rule exists where the landmark has an interior with a “special character” and has been separately designated. Teachers Ins. & Annuity Assoc. v. City of New York, 623 N.E.2d 526, 527–28 (N.Y. 1993). In Shubert Org. v. Landmarks Pres. Comm’n of the City of N.Y., 570 N.Y.S.2d 504, 506 (N.Y. App. Div. 1991), the owners of several Broadway theatres alleged that landmark designation “had detrimental effects on the owners’ ability to adapt theatres to changing productions and changing times.”

<sup>122</sup> N.Y.C. ADMIN. CODE § 25–304(a) (West 2009).

<sup>123</sup> Penn Cent., 377 N.Y.S.2d at 32. See also Cavarello, *supra* note 16, at 617 (“A historic designation is unlikely to deprive a private property owner of all reasonable uses of the property.”).

<sup>124</sup> See Rudey v. Landmarks Pres. Comm’n of the City of N.Y., 587 N.Y.S.2d 623, 624 (N.Y. App. Div. 1992) (indicating that Commission ordered the restoration of a set of new windows in a landmarked building). For a

duty to repair.<sup>125</sup> In these cases, where the court finds that the Commission has made an “arbitrary and capricious” determination,<sup>126</sup> the ordered repair may be estopped or delayed.<sup>127</sup> Courts often look to the effect on the property owner, the visual effect from the street with and without the repairs, and an order of estoppel would frustrate the Commission’s stated goals.<sup>128</sup>

In addition, parties have brought legal challenges based on the Act’s statutory assurance of a “reasonable return”<sup>129</sup> of profits resulting from the ownership of the building.<sup>130</sup> The precise legal question here is whether the building in its current, restored form is incapable of earning a reasonable return, not whether the owners are actually making a reasonable return.<sup>131</sup> Also, it is not sufficient that a real estate owner can show that less restriction would result in a greater return—a reasonable return must be actually unachievable.<sup>132</sup>

Religious leaders have been among the most vociferous

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variation on the same concept, see *Improved Dwelling Co. v. Flannery*, 519 N.Y.S.2d 309, 311 (N.Y. City Civ. Ct. 1987), where tenants objected to their landlord entering to repair rotting window frames in a landmarked building.

<sup>125</sup> See *supra* notes 66–72 and accompanying text.

<sup>126</sup> *Rudey*, 587 N.Y.S.2d at 624.

<sup>127</sup> *Id.* (finding that the Commission had held different owners in the same building to different standards, the Court allowed the owner in question to delay replacement of windows until the sale of their property).

<sup>128</sup> *Id.*

<sup>129</sup> “A net annual return of six per centum of the valuation of an improvement parcel.” N.Y.C. ADMIN. CODE § 25–302(v)(1) (West 2009). However, charitable organizations are not privy to this rule. See *St. Bartholomew’s Church v. City of New York*, 914 F.2d 348, 357 (2d Cir. 1990); *1025 Fifth Ave. v. Marymount School of N.Y.*, 475 N.Y.S.2d 182, 184 (N.Y. Sup. Ct. 1983) (“‘Insufficient return’ is almost by definition a commercial concept, and inapplicable to nonprofit institutions . . .”).

<sup>130</sup> *Lutheran Church in America v. City of New York*, 316 N.E.2d 305, 307 (N.Y. 1974); *Manhattan Club v. Landmarks Pres. Comm’n of the City of N.Y.*, 273 N.Y.S.2d 848, 852 (N.Y. Sup. Ct. 1966).

<sup>131</sup> *Penn Cent. Transp. Co. v. City of New York*, 377 N.Y.S.2d 20, 32 (N.Y. App. Div. 1975) (suggesting that owners of Grand Central Terminal could transform vacant space, transfer development rights, or renegotiate their leasing agreements to possibly earn a reasonable return).

<sup>132</sup> *Williams v. Town of Oyster Bay*, 295 N.E.2d 788, 790–91 (N.Y. 1973).

opponents to landmark designation.<sup>133</sup> More than 200 of New York City's designated landmarks are churches or other religious structures.<sup>134</sup> In addition, religious organizations make up some of the most significant real estate owners in the city.<sup>135</sup> The often ornate and aging buildings owned by religious institutions can be extremely costly to maintain.<sup>136</sup> It is no surprise, then, religious organizations have raised a number of claims against landmark designations, in which they assert an unconstitutional interference with the free exercise and establishment clauses.<sup>137</sup>

When a religious or charitable institution claims that the Commission has posed a burden on religion, it must prove that landmarking prevents the group from exercising its mission.<sup>138</sup> One method of proving this is to use the so-called "hardship exception" to the Landmarks Law, by which charitable organizations use evidence of their changing needs to show that a certain structure is no longer appropriate for their religious or charitable activities<sup>139</sup> or that the restriction on development bars

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<sup>133</sup> When St. Bartholomew's Church was fighting the designation of one of their properties, they went so far as to take out a full-page ad in the New York Times to gain public support. Weinstein, *supra* note 3, at 92.

<sup>134</sup> Moy, *supra* note 24, at 473 n.132 (1996). These include St. Patrick's Cathedral, Congregation Kol Israel, and the Lenox Avenue Unitarian Church. WHITE & WILLENSKY, *supra* note 7, at 497, 786.

<sup>135</sup> Weinstein, *supra* note 3, at 112.

<sup>136</sup> "[T]he Church of St. Paul and St. Andrew . . . spends more than seventy percent of its yearly budget on maintaining its nineteenth century building . . . ." Stewart, *supra* note 21, at 168.

<sup>137</sup> The First Amendment states, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. See also *St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 352 (2d Cir. 1990); *Church of St. Paul & St. Andrew v. Barwick*, 496 N.E.2d 183, 191-92 (N.Y. 1986); *Lutheran Church in America v. City of New York*, 316 N.E.2d 305, 308 n.1 (N.Y. 1974).

<sup>138</sup> The organization must show that the "improvement has ceased to be adequate, suitable or appropriate for use for carrying out both (1) the purposes of such owner to which it is devoted and (2) those purposes to which it had been devoted when acquired unless such owner is no longer engaged in pursuing such purposes." N.Y.C. ADMIN. CODE § 25-309(a)(2)(c) (West 2009). See also *St. Bartholomew's*, 914 F.2d at 351-52.

<sup>139</sup> See *St. Bartholomew's*, 914 F.2d at 352; *Sailors' Snug Harbor v. Platt*, 288 N.Y.S.2d 314, 315-16 (N.Y. App. Div. 1968) (claiming the buildings at a

or “directly impinge[s] on religious uses.”<sup>140</sup> However, if any insufficiency in the space can be alleviated through limited permitted construction, the hardship exception will not stand, and the courts will suggest the organization make the requisite changes instead.<sup>141</sup>

In addition, even if it is found that landmarking has “drastically restricted” a charitable organization’s revenue-raising ability, the restrictions on demolition may be upheld.<sup>142</sup> The only exception is when “maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose.”<sup>143</sup> Courts have taken a liberal approach to determining a religious institution’s charitable purpose, looking to all “eleemosynary activities within the landmark.”<sup>144</sup> Generally, the Commission and the courts have been unsympathetic to efforts by religious institutions to alter or demolish their landmarked properties for development purposes,<sup>145</sup> even where the proceeds from said development would further the institution’s charitable

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home for former seafarers were no longer suitable).

<sup>140</sup> *Barwick*, 496 N.E.2d at 191.

<sup>141</sup> *See St. Bartholomew’s*, 914 F.2d at 359 (explaining that a building where two floors could readily be added was not eligible for demolition).

<sup>142</sup> *Id.* at 355. *See also* 81 N.Y. JUR. 2D, *Parks, Recreation, and Historic Preservation* § 17 (West 2010). This determination is not made via the “reasonable return” method used for traditional landlords. “Reasonable return formulas are inappropriate for nonprofit-owned landmarks, because the concept of reasonable return is irrelevant to institutions not pursuing economic gain . . . .” Stewart, *supra* note 21, at 180.

<sup>143</sup> *Sailors’ Snug Harbor*, 288 N.Y.S.2d at 316. *See, e.g.*, 1025 Fifth Ave. Inc. v. Marymount Sch. of N.Y., 475 N.Y.S.2d 182, 186–87 (N.Y. Sup. Ct. 1983) (allowing a Catholic school to build a gymnasium, as barring it would interfere with their charitable purpose). *See also* Moy, *supra* note 24, at 460 n.63 (citing Andrew Oppenheimer Dean, *Inspired Partners*, HIST. PRESERVATION, May/June 1994, at 28 (stating that the charitable purpose of a church may be expanded from the pure exercise of religion to broader cultural and benevolent acts)).

<sup>144</sup> Moy, *supra* note 24, at 465 n.88.

<sup>145</sup> *See generally id.* “Because church and synagogue buildings are rarely more than a few stories in height and often occupy only a portion of the zoning lot, they face considerable pressure from developers.” Weinstein, *supra* note 3, at 116 n.144 (citing Stewart, *supra* note 142, at 166–67).

goals.<sup>146</sup> However, where there is convincing evidence that there is no alternative but to alter the building in order to carry out the charitable purpose, the Landmarks Commission may allow it.<sup>147</sup> Moreover, where the alteration does not constitute a material change to the building in question, the Commission has usually been accommodating in approving work permits for religious structures.<sup>148</sup>

The Landmarks Commission has also acted as the plaintiff in limited cases where a designated building has fallen into a state of dangerous disrepair that threatens the architectural soundness of the structure.<sup>149</sup> In a case where the roof of a mid-19th century “Greek revival” building had deteriorated to the point of collapse, the Commission compelled the owners to renovate the space to return it to the quality it was in at the time of landmarking.<sup>150</sup> The Commission described this incident as “demolition by neglect.”<sup>151</sup>

The Commission has never been seriously impinged by judicial appeals regarding its designation choices.<sup>152</sup> However, the cases that have been brought in New York City provide an instructive look at landowners’ common concerns, as these are the issues that have led to the current problems plaguing the administration of the

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<sup>146</sup> See, e.g., *Church of St. Paul & St. Andrew v. Barwick*, 496 N.E.2d 183, 187 (N.Y. 1986) (explaining that the Commission did not permit a church permitted to build a high-rise apartment building on their landmarked property). *But see* Stewart, *supra* note 21, at 165–66 (discussing a proposed bill to allow church leaders to reject landmark designation if any interference with religious activities would occur as a result).

<sup>147</sup> See *1025 Fifth Ave. v. Marymount School of N.Y.*, 475 N.Y.S.2d 182, 184 (N.Y. Sup. Ct. 1983) (permitting a Catholic school without recreational facilities to construct a gymnasium on the roof of a non-landmarked structure within a landmarked district).

<sup>148</sup> See Weinstein, *supra* note 3, at 112 (showing that statistically, most applications for work on churches are approved by the Commission, and within a relatively short time).

<sup>149</sup> See *City of New York v. 10–12 Cooper Square, Inc.*, 793 N.Y.S.2d 688, 689 (N.Y. Sup. Ct. 2004).

<sup>150</sup> *Id.* at 689–90.

<sup>151</sup> *Id.* at 691.

<sup>152</sup> New York’s history is unlike that of other jurisdictions (such as Seattle and Boston), where churches brought First Amendment complaints against city landmark laws and won. Weinstein, *supra* note 3, at 94.

Landmarks Law.

### III. CURRENT CHALLENGES TO THE COMMISSION

The additional responsibilities entailed in the ownership of a landmarked building have created a fear of designation in the current real estate market, which has weakened the Commission's efficacy.<sup>153</sup> Developers have discovered new, drastic methods of avoiding landmark status by cheaply destroying the architecturally unique facets of their property.<sup>154</sup> Less financially solvent institutions may destroy a building completely in order to stay afloat.<sup>155</sup> To compound the problem, the Commission has deemphasized the economic benefits of landmark status by increasingly ceding to demolition requests in historic districts.<sup>156</sup>

In the past few years, the Commission has not been overly strict in preserving districts, and has allowed new construction and renovation when it finds the historic area will not be compromised.<sup>157</sup> For example, the Commission has allowed many buildings in historic districts to be razed and repurposed over the protests of the community and preservationists, who, while they share the Landmarks Commission's vision, often disagree with it on the scope of their responsibility.<sup>158</sup>

If a landmark owner is willing to negotiate, in cases where the

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<sup>153</sup> See Moy, *supra* note 24, at 451 (alleging that the Landmarks Law “imposes unyielding financial burdens upon landmarked property owners and that legislative reform is needed to reflect the current economic environment.”).

<sup>154</sup> *Bulldozers*, *supra* note 2.

<sup>155</sup> Robin Pogrebin, *Preserving the City: Houses of Worship Choosing to Avoid Landmark Status*, N.Y. TIMES, Dec. 1, 2008, at C1 [hereinafter *Houses of Worship*]; *Bulldozers*, *supra* note 2.

<sup>156</sup> *Delicate Dance*, *supra* note 49.

<sup>157</sup> See *67 Vestry Tenants Ass'n. v. Raab*, 658 N.Y.S.2d 804, 806–07 (N.Y. Sup. Ct. 1997); *Delicate Dance*, *supra* note 49; Tom Topousis, *W. 57th 'Landmark' Nix*, N.Y. POST, Nov. 11, 2009, at 23.

<sup>158</sup> See *Delicate Dance*, *supra* note 49; *Raab*, 658 N.Y.S.2d at 807 (allowing construction of a hotel partially within the Tribeca North Historic District over “massive community opposition”); *Matter of Committee to Save the Beacon Theater v. City of New York*, 541 N.Y.S.2d 364, 400 (N.Y. App. Div. 1989) (allowing for temporary interior alterations to convert the theater to a discotheque).

Commission will not permit demolition, it may be beneficial for the developer to work openly with the Commission in implementing its suggestions for respectful architectural plans.<sup>159</sup> Also, when an owner has made clear efforts to prevent his or her designated buildings from deterioration, the Commission is more likely to grant Certificates of Appropriateness for further construction.<sup>160</sup>

One example of the Commission's allowance of demolition is a swath of structures on the west side of Manhattan, located within the Greenwich Village Historic District, that are scheduled to be demolished and rebuilt as condominiums and supplemental space for St. Vincent's Hospital's remaining facilities.<sup>161</sup> Though Robert B. Tierney, the chairman of the Commission, has claimed that the project "successfully meets the challenge of knitting together the old and the new," the Greenwich Village Society for Historic Preservation has criticized the decision as a dangerous precedent.<sup>162</sup> The justification for the Commission's allowance may be found in its statement that "new construction may occur when an owner of a vacant lot *or building of no significance in a historic district* wishes to construct a new building on the site."<sup>163</sup> However, that reasoning does not apply to another approved demolition project for a former Goodrich Tires building on West 57th Street.<sup>164</sup> That property's sister building was approved for landmark status, begging the question as to whether the Commission ceded to influence from another agency or the developers.<sup>165</sup>

The Goodrich example reflects a common complaint of

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<sup>159</sup> See *Raab*, 658 N.Y.S.2d at 806, 808.

<sup>160</sup> *Id.*

<sup>161</sup> *Delicate Dance*, *supra* note 49. But see Vivian Marino, *The 30-Minute Interview: William C. Rudin*, N.Y. TIMES, Jul. 12, 2009, at RE11 (suggesting this allowance by the Commission may have been influenced by "the fact that it's the only hospital in New York City in a historic district.").

<sup>162</sup> Glenn Collins, *Landmarks Panel Approves Luxury Condo Plan for St. Vincent's Site*, N.Y. TIMES, Jul. 8, 2009, at A21.

<sup>163</sup> *FAQs: What does Landmark Designation Mean*, *supra* note 60 (emphasis added).

<sup>164</sup> Topousis, *supra* note 157, at 23.

<sup>165</sup> *Id.*

preservationists, who have asserted that the Commission has recently yielded to pressure from the real estate community, the mayor, or other political agendas.<sup>166</sup> Indeed, there is a constant battle for favorable cachet between preservationists and developers among members of the City Council, who have the final say on any landmarks designation.<sup>167</sup> Some preservationist groups have even accused the Commission of abusing loopholes in the landmarking process to allow buildings to be demolished that it had “no intention of designating,” to give the appearance of a conservationist approach.<sup>168</sup> There have also been insinuations that the Commission deliberately ignores sites worthy of landmarking if a construction effort is endorsed by the mayor,<sup>169</sup> or is owned by a group with particular political clout.<sup>170</sup>

Preservationists have also claimed that the Commission has bowed to political pressure from religious groups.<sup>171</sup> The large number of lawsuits brought on freedom of religion claims has created a recent reluctance within the Commission to pressure religious institutions to landmark their buildings.<sup>172</sup> Although the Commission usually prevails in judicial decisions involving religious institutions,<sup>173</sup> it also seeks to avoid aggravating the fact

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<sup>166</sup> *Delicate Dance*, *supra* note 49. See also Calder, *supra* note 4 (suggesting that Norah Jones may have used her fame to skirt the approval process for construction on her 19th-century Greek Revival brownstone).

<sup>167</sup> *Delicate Dance*, *supra* note 49.

<sup>168</sup> *Bulldozers*, *supra* note 2 (accusing the Commission of dragging out the designation process for buildings that were slated for development, allowing the owners to destroy the architecture).

<sup>169</sup> Robin Pogrebin, *Renovation Provokes a Backlash*, N.Y. TIMES, Jun. 2, 2009, at C1.

<sup>170</sup> See, e.g., Robin Pogrebin, *Fighting On To Preserve Morningside Heights*, N.Y. TIMES, Mar. 2, 2009, at C1 (preservation advocates suggest that Columbia University may exert some influence over the Commission in their particular neighborhood).

<sup>171</sup> See *supra* notes 133–48 and accompanying text.

<sup>172</sup> See *Houses of Worship*, *supra* note 155 (“[T]he commission has been especially loath to take on churches or synagogues that don’t want to be designated.”).

<sup>173</sup> See *supra* notes 145–46 and accompanying text. But see Weinstein, *supra* note 3, at 94 (citing examples of victorious First Amendment claims by churches against landmark preservation laws in other cities). For an example of

that “[s]tatutory protection of landmarks . . . often results in increased administrative burdens, decreased flexibility, and adverse financial consequences for the religious institutions involved.”<sup>174</sup> The Commission has admitted the difficulty to “balance the need to preserve historical treasures with the economic straits of religious institutions.”<sup>175</sup> For instance, congregations struggling to stay afloat<sup>176</sup> often gain a windfall when selling churches to developers, since they “tend to be low-rise buildings in choice residential locations.”<sup>177</sup> However, some institutions have been able to openly negotiate with the Commission in order to achieve that balance without demolishing the building outright.<sup>178</sup>

A particularly distressing result of the Landmark Laws has been the new trend of avoiding landmarking by destroying notable aspects of a building apt to be designated.<sup>179</sup> When the Commission debates inclusion of a particular building, it announces the proposal to the public and property owners often

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the prevailing attitude in several other jurisdictions, see *Society of Jesus v. Boston Landmarks Comm’n*, 564 N.E.2d 571, 574 (Mass. 1990) (“[U]nder our hierarchy of constitutional values we must accept the possible loss of historically significant elements of the interior of this church as the price of safeguarding the right of religious freedom.”).

<sup>174</sup> Russell S. Bonds, Comment, *First Covenant Church v. City of Seattle: The Washington Supreme Court Fortifies the Free Exercise Rights of Religious Landmarks Against Historic Preservation Restrictions*, 27 GA. L. REV. 589, 589 (1993).

<sup>175</sup> *Id.* “The conflict between the desirable interests of free exercise of religion and preservation of sacred architecture is difficult to resolve.” *Id.* at 617.

<sup>176</sup> *Houses of Worship*, *supra* note 155 (“Now we have the chance to be a real Christian church and not have to worry about fixing the roof all the time.”).

<sup>177</sup> *Id.*

<sup>178</sup> See, e.g., Weinstein, *supra* note 3, at 155 (pointing out that churches that cannot sell their property for development are still privy to other financial exemptions); *Houses of Worship*, *supra* note 155 (explaining that the Cathedral of St. John the Divine set aside a small percentage of their property for development purposes). This type of negotiation may also result in an adaptive reuse of the property in question. See *infra* notes 224–27 and accompanying text.

<sup>179</sup> See *Bulldozers*, *supra* note 2.

take notice.<sup>180</sup> Fearing that his or her development prospects will be quashed by the designation,<sup>181</sup> “[t]he owner then rushes to obtain a demolition or stripping permit from the city’s Department of Buildings so that notable qualities can be removed.”<sup>182</sup> This cheap method of partial demolition serves to effectively eliminate the building from further consideration by the Commission by removing its architectural interest, leaving the owner the option of destroying the structure completely at a later date.<sup>183</sup> The problem occurs on an even larger scale in areas that are candidates for historic district designation, where entire neighborhoods are being altered in anticipation of the eventual landmark limitations.<sup>184</sup> Building owners often justify these actions by claiming that the structures are neither interesting nor historically valuable and therefore not worthy of landmark status.<sup>185</sup>

However, the forty-four years since the enactment of the Landmarks Law seem to show that, in practice, fears of decreased economic value have been relatively unfounded. As one scholar noted, “[t]he vast majority of historic designations are not going to destroy property value, but rather, may in fact either increase the value of a particular piece of property or may merely prevent a

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<sup>180</sup> FAQs: The Designation Process, *supra* note 51. *See also Historic District*, *supra* note 102 (“Preservationists argue that the commission’s process gives owners too much time to pre-empt landmark protection of their properties.”).

<sup>181</sup> John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 582 (1972) (“The gap between the income potential of these parcels as presently developed and as improved to their most profitable use is such that few owners . . . warmly embrace designation.”).

<sup>182</sup> *Bulldozers*, *supra* note 2.

<sup>183</sup> *See id.* (reporting that the owners of the Dakota Stables used this method to clear the way for a luxury residential building now under construction, and the mosaic ceiling of 711 Third Avenue was ripped out to prevent interior landmark status). *But see id.* (conceding that two apartments on the Upper East Side were designated landmarks even after being refaced in stucco).

<sup>184</sup> *Historic District*, *supra* note 102.

<sup>185</sup> *Id.* (reporting that the owner of 178 Bleecker Street gutted the interior in anticipation of the Landmarks Commission landmarking the surrounding district, claiming “the structure was not architecturally significant . . .”).

dramatic increase in its value.”<sup>186</sup> The plain fact of a landmark designation does not block most development that leaves the exterior undisturbed;<sup>187</sup> for example, a fast-food restaurant recently opened in a 125-year-old landmarked building in Brooklyn’s Fulton Mall.<sup>188</sup> The drastic and underhanded demolitions that some landowners have resorted to seem to constitute a violent overreaction in a desperate economic climate. As a result, scores of architecturally and historically significant buildings have been lost forever.<sup>189</sup>

#### IV. PRACTICAL SUGGESTIONS

It is important for the City of New York to uphold the Landmarks Preservation Commission’s legislative goals in order to maintain New York’s reputation as an aesthetically stunning, diverse, and captivating metropolis.<sup>190</sup> Without the Landmarks Law’s power, the city would likely lose its most culturally valuable architecture at the hands of indiscreet developers.<sup>191</sup>

The new trend in undertaking minor demolition to prevent landmark designation is a result of a lag between the notification of the building owner that the structure is being considered and the

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<sup>186</sup> Cavarello, *supra* note 16, at 617.

<sup>187</sup> Michael Ware, *New Wine, Old Bottle*, RETAIL TRAFFIC, [http://retailtrafficmag.com/mag/retail\\_new\\_wine\\_old/](http://retailtrafficmag.com/mag/retail_new_wine_old/) (last visited Sep. 17, 2010).

<sup>188</sup> Mike McLaughlin, *Arby’s Steaks Claim to Historic Home of Gage and Tollner*, N.Y. DAILY NEWS, Nov. 6, 2009, at 56.

<sup>189</sup> See *Historic District*, *supra* note 102 (providing the example of the Provincetown Playhouse, also known as “the birthplace of modern American theater,” which was partially razed by New York University to create a building for its law school).

<sup>190</sup> “[B]y preserving those same streets and forbidding buildings that don’t fit in, officials, community activists and architects allow citizens to understand their place here.” Jason Sheftell, *An Architectural Word (and Free Exhibition) Make New York a Better Place to Live*, N.Y. DAILY NEWS, Nov. 13, 2009, at 1.

<sup>191</sup> “The artistic community has already witnessed the demolition of the Old Metropolitan Opera House, the Helen Hayes Theater, and the Morosco Theater, entities that were once regarded as prominent members of the performance arts.” Moy, *supra* note 24, at 482–83.

scheduling of a public hearing on the matter.<sup>192</sup> After owners discover that their demolition rights may be limited, they usually have ample time to apply for the necessary permits to alter their buildings.<sup>193</sup> This delay was seen as advantageous in the past, in order for the Commission to have time to evaluate a potential landmarked location or district and make an informed, well-reasoned decision.<sup>194</sup> However, the effect of a delay between proposal and designation has now proved to be detrimental to the goals of the Commission and the City.<sup>195</sup>

One way to prevent the issuance of permits to developers bent on avoiding designation would be to develop an improved interaction between the Commission and the Department of Buildings. The current procedure behind landmarking has been called “overly burdensome, costly, and biased.”<sup>196</sup> Oftentimes the buildings department is unaware of a structure’s potential landmark status, and issues a demolition permit without first consulting with the Commission.<sup>197</sup> Probably the most flagrant result of this administrative fumbling occurred when the Willkie Memorial Building was partially razed, contrary to the wishes of the Commission.<sup>198</sup>

One possible solution to the situation would be the implementation of a process by which the Commission could issue a preliminary injunction or stay against any property under

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<sup>192</sup> “[O]nce a landmark hearing has been scheduled, building owners may not obtain demolition or alteration permits. But if such a permit is secured before a hearing is scheduled, . . . the work may proceed without penalty.” *Bulldozers*, *supra* note 2, at C1.

<sup>193</sup> *Historic District*, *supra* note 102 (“[T]he commission notifies owners well in advance of putting a property on its hearings calendar.”).

<sup>194</sup> In 1988, Mayor Edward I. Koch suggested this initiative as part of the Cooper Committee evaluation of the Landmarks Commission. Moy, *supra* note 24, at 486–87. Under his plan, a geographic swath would be studied for one year prior to the landmarking designation. *Id.* at 487.

<sup>195</sup> See *supra* notes 179–89 and accompanying text.

<sup>196</sup> Moy, *supra* note 24, at 486.

<sup>197</sup> *Bulldozers*, *supra* note 2.

<sup>198</sup> The Buildings Department refrained from informing the Commission about the work permit issued in this case. Moy, *supra* note 24, at 486 n.216. This demolition led to the creation of the Cooper Committee. See *supra* note 191.

consideration for landmarking. This would, for the evaluation period, block the owner from obtaining the necessary work permits from the buildings department that would in essence thwart the designation process. Once the decision is handed down from the Commission, the injunction would be lifted and applications for construction would again be accepted (privity to the new landmark limitations, if applicable). This simple fix would close a significant loophole and allow the Commission to effectuate its legislative goals.

The conflict between the Landmarks Commission and the City Council has had destructive consequences as well.<sup>199</sup> When the Commission declined to confer landmark status on the B. F. Goodrich building near 57th Street, Chairman Robert B. Tierney made it clear that the Commission was operating under pressure from the City Council,<sup>200</sup> who has the final say on all landmark designations.<sup>201</sup> Members of the Commission have come forward to publicly plea for a mechanism to be created to bring greater transparency in dealings with the City Council.<sup>202</sup>

Miscommunication between the Commission and another city agency—the Department of Buildings, has also aggravated the landmarking process. This uncertainty is clearly illustrated in situations where the Commission has incorrectly filed the paperwork for landmarking. This heavily weakens any case the Commission may have should it attempt to take action, and increases confusion between the Commission and the Department of Buildings.<sup>203</sup> The efforts of local legislators to streamline the

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<sup>199</sup> See, e.g., Robin Pogrebin, *City Council Influences Landmarks Decision*, N.Y. TIMES, Nov. 19, 2009, at C3 [hereinafter *City Council Influences*].

<sup>200</sup> *Id.* The Commission denied status “in light of opposition to this designation from the City Council and certain members of the City Council and the likelihood that that body will overturn any designation.” *Id.*

<sup>201</sup> *Id.* In 2005, the City Council vetoed the landmark designations of two major projects, including a warehouse designed by Cass Gilbert that is now slated for luxury apartments. *Id.*

<sup>202</sup> *Id.* “The friction between the commission and its role and the City Council and its role needs to be exposed.” *Id.* (quoting Commission member Christopher Moore).

<sup>203</sup> See *Rudey v. Landmarks Pres. Comm’n of the City of N.Y.*, 587 N.Y.S.2d 623, 625 (N.Y. App. Div. 1992) (“[P]etitioners’ architects searched the New York City Department of Buildings records, and obtained work permits

communication process between the City Council, the Department of Buildings, and the Commission<sup>204</sup> should be continued and effected. As one of the city's smallest agencies,<sup>205</sup> the Commission could use assistance on this front.

The Commission has acted in response to the challenges it faces. For example, it has publicized its attempt to improve communications with property owners to keep them more informed about the benefits of landmarking.<sup>206</sup> This is an important step toward removing the stigma that surrounds the stamp of a landmark. The Commission is also concerned about the effect of leaving owners out of the landmarking process completely, which increases the likelihood of litigation.<sup>207</sup> It is apparent that landmark owners are not adequately informed about their options for assistance, as only eleven applications for hardship relief were filed in the first two decades after the Landmarks Law's enactment.<sup>208</sup> Though the Commission has a prerogative to "distinguish between landmark owners who truly need hardship relief and those who seek relief merely for easy gain,"<sup>209</sup> the fact that the relief exists as an option at all is not adequately communicated to landlords. It is vital to the preservation movement that landowners, especially those in the nonprofit sector, are aware of the relief available to them. If an insolvent nonprofit landowner were to sell to a commercial entity, the new owners of the building might then be able to show the lack of a reasonable return,<sup>210</sup> paving the way for a demolition certificate.<sup>211</sup>

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from that agency, without finding a[n] Historic District designation on file. . . .").

<sup>204</sup> See *Bulldozers*, *supra* note 2 (reporting that Tony Avella and Rosie Mendez, members of the City Council, have introduced two bills to change the stop-work policies at the buildings department once a landmark hearing is scheduled and improve interdepartmental communications, respectively).

<sup>205</sup> *About: Mission of the Landmarks Preservation Commission*, THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, <http://www.nyc.gov/html/lpc/html/about/mission.shtml> (last visited Aug. 31, 2010).

<sup>206</sup> See *Bulldozers*, *supra* note 2 (stating that the Commission meets with owners "in the hope of enlisting cooperation or even support.").

<sup>207</sup> *Historic District*, *supra* note 102.

<sup>208</sup> Stewart, *supra* note 21, at 169.

<sup>209</sup> *Id.* at 171.

<sup>210</sup> Nonprofits do not use the reasonable return test in demonstrating

Additionally, the Commission has an obligation as part of its administrative capacity to be sensitive to “the pro-development social and economic pressure facing so many . . . landowners.”<sup>212</sup> Most urban development decisions are made by private property owners, whose choices are shaped by the state of the current real estate market.<sup>213</sup> Since the codification of the Landmarks Laws, the real estate market in New York City has undergone many drastic changes,<sup>214</sup> and as an agency with a direct effect on that market, the Commission should be more responsive to economic considerations. Though the Commission has claimed that it does not oppose new construction,<sup>215</sup> in the opinion of some landowners, the Commission has not demonstrated flexibility regarding designated properties.<sup>216</sup>

One way to be more responsive to the realities of the real estate market would be to alter the current required ratio of fields of expertise of the commissioners. As it stands, only one commissioner need be a realtor or developer, while five members are required to have a background in history or aesthetics.<sup>217</sup> Though the Commission’s vote will always skew toward preservation, the addition of members who have experience in creative repurposing might help guide landowners looking to

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financial hardship, though commercial entities may. *See supra* note 142.

<sup>211</sup> *See* Stewart, *supra* note 21, at 173 (explaining the risk of resale to a commercial entity by a religious or nonprofit organization).

<sup>212</sup> *Id.*

<sup>213</sup> John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 575 (1972).

<sup>214</sup> In 1976, for example, only one office building was constructed in all of Manhattan. Stewart, *supra* note 21, at 166 n.17.

<sup>215</sup> “LPC is a proponent of new buildings in old settings, even when contrasting approaches using modern materials and unusual shapes are applied . . . ‘this commission is not an automaton that says building something exactly like what’s next door,’ says LPC Chairman Robert Tierney.” Sheftell, *supra* note 33, at 1.

<sup>216</sup> “Some property owners want their buildings to be landmarked, and some don’t.” Richard Sandomir, *Landmark in Hearts and Minds, Not in Fact*, N.Y. TIMES, Sept. 20, 2008, at SP9.

<sup>217</sup> Church of St. Paul & St. Andrew, 67 N.Y.2d at 515 (citing N.Y.C. CHARTER § 534 (West 2009)).

generate more revenue for their landmarked property.<sup>218</sup>

There are several ways the Commission can demonstrate that it has property owners' interests in mind. In the winter of 2009, Mayor Bloomberg and the City Council offered a Penalty Relief program for business and homeowners who owed fines on minor Environmental Control Board violations.<sup>219</sup> Under this plan, the City waived additional penalties, late fees, and interest on the violations if the original fine had been paid and the violating condition was corrected.<sup>220</sup> A similar waiver program for landmarks violations would demonstrate the Commission's concern for property owners and show its willingness to compromise with them on minor issues in a time of economic difficulty. It would also behoove the City to consider setting aside funds to pay the commissioners a salary.<sup>221</sup> The Commission would then be financially able to devote more time and energy to making the most appropriate decisions for both struggling landowners and the aesthetic and historical health of New York City.

It has been suggested by some scholars that the necessary "reasonable rate of return" as applied to for-profit landowners should be increased in order to improve relations with developers and allow more landmark owners to alter or demolish their property.<sup>222</sup> Though this might slightly reduce the number of would-be landmarks being defaced, it would also allow more buildings already designated as landmarks to be completely razed and replaced with new development. This disruption of the flow of historic districts would be the antithesis of the stated legislative goals of the Commission.<sup>223</sup>

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<sup>218</sup> *But see City Council Influences*, *supra* note 199, at C3 ("The landmarks commission is not supposed to be considering the development potential of the site . . .").

<sup>219</sup> *NYC Penalty Relief Program FAQs*, NYC GOV, [http://www.nyc.gov/html/dof/html/pdf/ecb/ecb\\_faq.pdf](http://www.nyc.gov/html/dof/html/pdf/ecb/ecb_faq.pdf) (last visited Sept. 16, 2010).

<sup>220</sup> *Id.*

<sup>221</sup> "[T]he commissioners . . . with the exception of the chair are unpaid . . ." Stewart, *supra* note 21, at 172.

<sup>222</sup> Moy, *supra* note 24, at 479 (1996).

<sup>223</sup> The Commission has described historic districts as "areas of the city that possess architectural and historical significance and a distinct 'sense of place,' . . ."

Since the interiors of landmarked buildings are almost always left unfettered by a designation, the Landmarks Commission has encouraged landowners to “adaptively reuse”<sup>224</sup> their properties—a strategy that has long informed New York City’s architectural personality. Some critics have postulated that religious properties are far less well-suited for this approach and thus a designation is even more burdensome for the property owner.<sup>225</sup> However, there exist several fine examples of adaptive reuses of churches in New York that can serve as a model to religious institutions looking to sell their landmarked property to developers.<sup>226</sup> The Commission works closely with architects on a regular basis,<sup>227</sup> and could use this network in the future to relay available options for development prospects to nonprofit entities. This would not only foster communication between landlords and the Commission, but would ensure that these structures are efficiently utilized in a city with a premium on space.

## CONCLUSION

In general, the Landmarks Preservation Commission has performed admirably given the resources it has been allocated and its unpopularity among many landowners in New York City. The

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. . .” *Working With Landmarks*, THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, [http://www.nyc.gov/html/lpc/html/working\\_with/recommend.shtml](http://www.nyc.gov/html/lpc/html/working_with/recommend.shtml) (last visited Sept. 16, 2010). *See also* N.Y.C. ADMIN. CODE § 25–301(b) (West 2009).

<sup>224</sup> Weinstein, *supra* note 3, at 110.

<sup>225</sup> *Id.*

<sup>226</sup> For example, the Limelight Nightclub was created out of the structure of the deconsecrated and resold Episcopal Church of the Holy Communion in the Chelsea neighborhood of Manhattan. It has now been renovated into an upscale marketplace. *The Limelight is Going Retail*, N.Y. POST, July 17, 2009, at 6. Also, the Washington Square Methodist Church was recently reimaged as a luxury apartment building. *New Developments*, CORCORAN.COM, [http://www.nycexclusives.com/property/nd/detail\\_fr\\_overview.asp?ndevid=197](http://www.nycexclusives.com/property/nd/detail_fr_overview.asp?ndevid=197) (last visited Sept. 16, 2010).

<sup>227</sup> *About the Landmarks Preservation Commission*, *supra* note 5; *FAQs: Making Changes to a Landmarked Building*, THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, [http://www.nyc.gov/html/lpc/html/faqs/faq\\_permit.shtml](http://www.nyc.gov/html/lpc/html/faqs/faq_permit.shtml) (last visited Sept. 16, 2010).

amount of invaluable, historic, and inspiring architecture that has been saved by the Commission's efforts speaks to the overall success of the Landmarks Preservation Act. However, with administrative restructuring, increased agency transparency, and greater responsiveness to the realities of the real estate market—including the pressures facing landlords—the Commission will be able to perform its civic duties with more efficiency and sensitivity. These changes are necessary for the Commission to continue as a valued and necessary asset to the city infrastructure for years to come.