HISTORIC PRESERVATION OPTIONS IN NEW YORK CITY

Similarities and Differences

Between

Landmarks Preservation Commission Regulation

And

Donation of a Preservation Easement

Prepared For
The Trust for Architectural Easements

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EXECUTIVE SUMMARY

Historic preservation in New York City – the protection offered to the city's historic properties – can be effected in various ways. Perhaps the best-known method is by the regulations imposed by New York City's Landmarks Preservation Commission ("LPC" or "Commission"), the city agency created in 1965 to identify, designate and regulate New York City's landmarks and historic districts. Less well known is the option of donating preservation easements to non-profit preservation organizations. Such easements are available only for properties that have been listed on the National Register of Historic Places ("National Register"), irrespective of whether those properties are also individually designated LPC landmarks or located within designated LPC historic districts. Regulation is provided by the non-profit organization to which the easement has been donated, a major such organization being the Trust for Architectural Easements ("the Trust"). The two systems of preservation operate independently of each other. A historic property can be protected by one or the other, or by both.

Although both LPC regulation and easement donations exist to promote the goals of historic preservation, they operate independently of each other, and have different policies, procedures and standards of review. As a result, certain kinds of work that might be approved by the Landmarks Commission might not be approved by the holder of a preservation easement, such as the Trust. The two forms of preservation are not interchangeable, and the results of regulation by LPC on the one hand and the Trust on the other can be strikingly different.

Part I of this Report provides an overview of the origin and composition of the LPC, preservation easements, and the Trust. Parts II through IV compare and contrast the workings of the two forms of historic preservation, explaining major policy and procedural differences. Parts V and VI of this Report illustrate how the differences between the LPC and the Trust – which are in fact substantial – lead to very different results that can have a significant impact on the development of the properties under regulation. Part VII discusses the different approaches of the LPC and the Trust to monitoring and enforcement and Part VIII reviews some fundamental differences between governmental regulation and preservation easements.

PART I: BACKGROUND AND HISTORY

A. New York City Landmarks Preservation Commission

Official municipal regulation of historic properties in New York City dates back to 1965, with the creation of the New York City Landmarks Preservation Commission.[1] The Commission is a municipal agency, like the Department of Buildings or the Planning Commission; its specific mission is the protection of New York City's historic landmarks.

The Commission operates under the "Landmarks Law," consisting of Section 3020 ("Establishment of the Landmarks Preservation Commission") and 3021 ("Hardship Appeals Panel") of the New York City Charter, and Title 25, Chapter 3 ("Landmarks Preservation and Historic Districts") of the Administrative Code.[2] The law sets forth the Commission's role and purposes:

> The purpose of this chapter [of the administrative code] is to (a) effect and accomplish the protection, enhancement and perpetuation of such improvements and landscape features and of districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history; (b) safeguard the city's historic, aesthetic and cultural heritage, as embodied and reflected in such improvements, landscape features and districts; (c) stabilize and improve property values in such districts; (d) foster civic pride in the beauty and noble accomplishments of the past; (e) protect and enhance the city's attractions to tourists and visitors and the support and stimulus to business and industry thereby provided; (f) strengthen the economy of the city; and (g) promote the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.[3]

Since its creation in 1965, the Commission has extended protection to approximately 24,000 buildings and sites, including 1184 individual landmarks, 110 interior landmarks, 9 scenic landmarks, and 90 historic districts.[4]

The LPC consists of both a Commission and a municipal agency staffed by civil servants. The eleven (11) Commissioners – a number specified in the Landmarks Law – are appointed by the Mayor and, with the exception of the Chairman, serve part-time and without pay. The Commissioners are supported by the civil-service staff – professional, legal and administrative. The number of staff varies, and has ranged over the past three decades from a low of approximately 45 to a high of approximately 90; currently the number is approximately 60.[5]

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[1] The history of the preservation movement in New York City has been thoroughly documented in the recently published book, *Preserving New York: Winning the Right to Protect a City's Landmarks*, by Anthony C. Wood (Routledge, 2007).

[2] A copy of the Landmarks Law is appended to this report as Attachment No. 1.

[3] New York City Administrative Code, Title 25, Chapter 3, "Landmarks Preservation and Historic Districts," § 25-301, "Purpose and declaration of public policy," paragraph b.

[4] Figures – as of March 2008 – supplied by the Commission.

[5] In each of the Fiscal Years 2007, 2008 and 2009, the City Council provided a temporary funding increase to the Commission for the express purpose of increasing its survey and designation functions – the identification and

The Commissioners meet several times a month at public meetings and public hearings. Their role is to vote on certain Commission actions, based on work prepared by the staff. They vote mainly on two types of such actions: designation of new landmarks and historic districts (which includes voting on whether or not to calendar a designation hearing, and, following the hearing, voting on whether or not to designate a landmark or district), and approval of permits for certain kinds of work.

Professionally-staffed departments include Archeology, Enforcement, and Environmental Review Coordination, as well as an Historic Preservation Grant Program. The majority of the staff, however, is assigned to either the Research or the Preservation department.

The Research Department staff identifies potential new landmarks and historic districts, conducts research into their history and architecture, and prepares research reports ("designation reports") demonstrating that the properties in question qualify for landmark status.

The Preservation Department staff processes applications to make alterations to landmarks or buildings within historic districts. The Preservation Department staff's relationship to the Commissioners is somewhat different from that of the Research Department staff. While the Commissioners vote to designate new landmarks and historic districts based on Research Department staff work, only the Commissioners have the authority to designate. By contrast, the Preservation Department staff has the authority to review applications for work, and to issue or deny certain kinds of permits without a vote by the Commissioners.

On average, more than 90% of alteration applications are handled by staff, via Certificates of No Effect and Permits for Minor Work. The remaining applications require a Certificate of Appropriateness. In 2007, the Commission processed a record 9,363 applications for alterations to landmarks, and issued 307 Certificates of Appropriateness, 1355 Permits for Minor Work, 3551 Certificates of No Effect, and 905 expedited Certificates of No Effect.[6]

B. Preservation Easements and the Trust for Architectural Easements

In contrast to the designation and regulation of landmarks by the Landmarks Preservation Commission – a branch of municipal government – preservation easements are voluntarily donated by property owners to not-for-profit organizations devoted to promoting historic preservation; such easements are held in perpetuity.[7]

The preservation easement program came into being a decade later than New York's Landmarks Law. In 1976, the United States Congress created the Federal Historic Preservation Tax

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designation of city landmarks and historic districts. With the current financial downturn, the City has imposed a hiring freeze, and it is unclear what the future of the LPC's budget will be over the next few years.

[6] New York City's Mayor's Management Report, fiscal year 2007, section describing the Landmarks Preservation Commission, pp. 105 ff. The report ascribes the balance of actions taken to 275 "Authorizations to Proceed," 423 "Notices of Compliance," and "other."

[7] A sample residential easement currently in use by the Trust for Architectural Easements is appended to this report as Attachment No. 4.

Incentive Program. The legislation permitted owners of historic properties to donate the rights to their facades in perpetuity to a qualified non-profit organization pursuant to preservation easements in return for a tax deduction reflecting the value of their rights forfeited.

The National Park Service ("NPS") defines an easement as follows:

> An historic preservation easement is a voluntary legal agreement made between a property owner (donor) and a qualified easement holding organization (donee) to protect a significant historic property, landscape or archeological site by restricting future changes to and/or development on the site. Normally, a property owner will convey a portion of his or her rights on the property to a qualified organization, thereby allowing the organization the legal authority to enforce the terms of the easement.[8]

NPS defines an easement-holding organization as follows:

> A qualified organization is recognized by the IRS as one that is committed to protecting the historic preservation purposes of the donation. It is generally a governmental organization or a charitable organization (501(c)(3)), such as a community land trust or historic preservation organization. A preservation easement gives the organization that holds it (the "grantee") the legal authority to enforce the restrictions written in the easement document. The grantee organization monitors the property at least once a year, maintaining written records of the visit, and ensuring that the terms of the easement are being followed.[9]

According to Internal Revenue Code Section 170(h), the owner of qualified property is eligible to receive income tax deductions equivalent to the value of the rights given away to a qualified charitable or governmental organization.

The easement is recorded in the official land records of the county in which the property is located, and becomes part of the property's chain of title; its restrictions are binding not only on the owner who grants the easement but on all future owners as well.

Easements can be held by governmental organizations, but private non-profit organizations are considered by some to be a better choice. According to one analysis, governmental agencies may not "automatically have the necessary 'commitment to protect the conservation purposes'" of an easement:

> Organizations seeking public charity status as land trusts now are confronted by several additional questions in the application for IRC §501(c)(3) status. These questions are intended to determine whether an organization has the required "commitment to protect the conservation purposes." However, because public agencies are not required to comply with §501(c)(3) no such questions are posed to public agencies and this raises the

[8] National Park Service, *Historic Preservation Easements: A Directory of Historic Preservation Easements Holding Organizations* (2003), p.3.
[9] *Ibid.*

> question of whether all public agencies, simply by virtue of being a public agency, are qualified to hold deductible easements. For example, the author knows of at least one public agency that simply terminated a conservation easement that it held because the landowner whose property was subject to the easement requested the termination. This public [agency] did not appear to have the "commitment to protect the conservation purposes" required by the tax code. [10]

The Trust for Architectural Easements is a not-for-profit 501(c)(3) organization, founded in 2001. The Trust currently holds more than 800 easements in the Northeast and Mid-Atlantic areas of the country, including eastern Maryland, northern Virginia, eastern Massachusetts and Boston, and the New York City metropolitan area including areas in Connecticut and New Jersey.

The Trust's sole mission is to promote the preservation of historic architecture. It achieves its mission by accepting voluntary donations of historic preservation easements and enforcing the terms of such easements, educating the public on the architectural values of historic buildings and monuments, and funding grants to community organizations for preservation projects.[11]

Once an easement has been granted to the Trust, owners must request the Trust's approval for any change that could affect the property's exterior appearance, including materials. Applications to make an alteration are reviewed by the Trust's professional staff, who makes decisions based on the *Secretary's Standards for the Treatment of Historic Properties* ("*Secretary's Standards*"), published by the National Park Service, Department of the Interior.[12] The Trust's vice president then reviews those decisions, to ensure conformity with the *Secretary's Standards*, before a final determination is made.

To ensure compliance with the terms of the easement, the Trust monitors all of its properties annually. On each monitoring visit, Trust staff takes photos of the property and compares them to baseline photos taken at the time of the easement donation, to determine if any improper alterations have been made. During the visit, staff also notes any maintenance issues that need attention. If staff identifies any such issues, a follow-up letter is sent to the owner requesting the owner to make the necessary repairs.

In addition to accepting historic preservation easement donations, the Trust supports the efforts of area residents to obtain listing on the National Register for their neighborhoods and buildings. Listing on the National Register helps preserve these neighborhoods and buildings by highlighting their importance as national historic resources and providing owners with the opportunity to use federal incentives for historic preservation. Since 2003, the Trust has contributed funds or staff time to support the listing of eighteen individual properties and thirteen historic districts. The historic districts include such notable areas as Wall Street in Manhattan, Washington, DC's Capitol Hill, and one of Boston's oldest neighborhoods, Charlestown.

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[10] C. Timothy Lindstrom, Esq., *A Guide to the Tax Aspects of Conservation Easement Contributions* (Jackson, Wyoming: The Jackson Hole Land Trust, 2007), p. 6.
[11] As communicated in a telephone interview with Julie Epperly, General Counsel of the Trust.
[12] A copy of the *Secretary's Standards* is appended to this report as Attachment No. 3.

Individually recognized properties include a wide variety of buildings, ranging from a grand banking hall to a utilitarian warehouse.

The Trust also provides financial assistance in the form of grants to local museums and community groups, supporting their efforts to restore historic sites in their neighborhoods and educate the public about architecture and history. The Trust provided key support for educational programs, including the *Cityscapes Revealed* exhibit at the National Building Museum, the Third Thursdays Lecture Series organized by the Alliance for Downtown New York, and two neighborhood and architectural guides developed by the Brooklyn Historical Society. Neighborhood improvement projects funded by the Trust include the restoration of cobblestone on NoHo's Crosby Street, emergency repairs to the parish house of the Mt. Morris Ascension Presbyterian Church in Harlem, and the renovation of Hiscock Park in Boston's South End neighborhood. The Trust also contributes staff time to restoration, having sent a team to New Orleans to help rebuild a double-shotgun house that was damaged by hurricanes Katrina and Rita in the Saint Roch neighborhood.

Finally, the Trust works to cultivate an appreciation for America's historic architecture and historic preservation by educating broad audiences. The Trust partnered with openhouse**newyork** to teach a series of workshops to second-grade students in Brooklyn and the Bronx. Each class planned an imaginary "box city" on its classroom floor, considering the location of streets, parks, houses, schools, and other necessities. The workshops were so successful that they were brought to classrooms in Washington, D.C., during the 2008-2009 school year. The Trust's staff has also given presentations on historic architecture and preservation at professional and academic conferences, including the Land Trust Rally and Salve Regina Annual Conference on Cultural and Historic Preservation. Most recently, the Trust has been invited to give a presentation on its educational programs at an AIA Virginia conference in Richmond in the fall of 2009.

PART II: DIFFERENCES BETWEEN LANDMARKS COMMISSION DESIGNATIONS AND NATIONAL REGISTER LISTING

While both LPC regulation and easement donation share similar goals, they operate differently, in several key respects. When it comes to identifying historic resources, the Commission relies on its own determination, while the Trust's easements are available only to properties listed on the National Register.

The Commission's list of historic properties differs to some extent from the National Register listings in New York City. There are many individual properties listed on the National Register which are not LPC-designated, and there are many New York City landmarks which are not listed on the National Register. The reason for these differences in the respective listings of historic properties is simply that the Landmarks Law and the National Register, created at different times for different purposes, have different definitions for historic properties (e.g., an LPC property must be at least 30 years old – no exceptions – whereas a National Register property must be at least 50 years old, unless it is found to be of exceptional significance, in which case there is no age limit at all).

Similarly, there are a number of historic districts designated by the Landmarks Commission that are not currently listed on the National Register, and a number of districts on the Register not designated by the Commission.

National Register historic districts that are not currently LPC historic districts include:

Manhattan:

- Buildings at 322-344 East 69th Street
- Fulton-Nassau historic district
- Lower East Side historic district
- Manhattan Avenue–West 120th-123rd Street historic district
- St. Nicholas historic district
- Sutton Place historic district
- Two Bridges historic district
- Wall Street historic district
- West 147th-149th Streets historic district

The Bronx:

- Grand Concourse historic district

Brooklyn:

- Clinton Hill South historic district
- Floyd Bennett Field historic district

- Pratt Institute historic district
- Prospect Heights historic district
- Rockwood Chocolate Factory historic district
- Senator Street historic district
- Sunset Park historic district
- Willoughby-Suydam historic district

Queens:

- 68th Avenue-64th Place historic district
- 75th Avenue-61st Street historic district
- Broadway-Flushing historic district
- Central Avenue historic district
- Central Ridgewood historic district
- Cooper Avenue Row historic district
- Cornelia-Putnam historic district
- Cypress Avenue East historic district
- Cypress Avenue West historic district
- Forest-Norman historic district
- Fort Tilden historic district
- Fresh Pond-Traffic historic district
- Grove-Linden-St. John's historic district
- Jacob Riis Park historic district
- Madison-Putnam-60th Place historic district
- Seneca Avenue East historic district
- Seneca-Onderdonk-Woodward historic district
- Stockholm-DeKalb-Hart historic district
- Summerfield Street Row historic district
- Woodbine-Palmetto-Gates historic district

Staten Island:

- Miller Army Air Field historic district

Even in the case of historic districts that are both designated by the LPC and listed on the National Register – generally with the same name – the two versions may have different boundaries.

The boundaries of LPC and National Register historic districts are identical in those cases in which existing LPC districts have been formally "certified" for the National Register, as per "Certified Local Government" regulations. This is a method by which LPC historic districts can be listed on the Register without going through a formal nomination process – and by definition, this leads to National Register districts with identical boundaries to LPC districts. Many early LPC historic districts were nominated directly to the National Register, and so also share

boundaries with their National Register equivalents. In those cases in which historic district nominations have been pursued separately, however, National Register boundaries are often significantly different from LPC boundaries, and generally larger. In addition, in a number of cases, National Register districts which were initially identical in size to LPC districts have since been significantly enlarged, while their LPC equivalents have not.

For example:

- The National Register Murray Hill historic district (Manhattan) is larger than LPC's Murray Hill historic district even though LPC recently expanded its district's boundaries. Moreover, the National Register version includes a "multiple resources" component that permits expedited eligibility determination followed by National Register listing for many adjacent individual properties and potential historic districts in the wider Murray Hill area.

- The National Register Mount Morris Park historic district (Manhattan), while originally identical to the LPC district, was doubled in size in 1996; the LPC boundaries have not changed.

- The National Register Sugar Hill historic district (Manhattan) is larger than the combined LPC Hamilton Heights and Sugar Hill historic districts, even though the LPC Sugar Hill district has been expanded.

- The National Register Fort Greene historic district (Brooklyn), while originally identical to the LPC district, was significantly expanded in 1984; the LPC boundaries have not changed.

- The National Register Upper East Side historic district (Manhattan) was significantly expanded in 2006. The LPC version of the district has not been expanded.

PART III: LANDMARKS COMMISSION PRESERVATION POLICIES VS. TRUST FOR ARCHITECTURAL EASEMENT POLICIES

A. Difference between the Designation of a Landmark and the Donation of an Easement

A major difference between the workings of the Landmarks Commission and the Trust has to do with how a property becomes restricted. LPC has authority to designate landmarks and historic districts without obtaining the consent of the property owners. Once a property is designated, the owner must conform to the LPC's determinations. By contrast, though the owner of a property with a preservation easement must also conform to determinations, in this case by the Trust, the owner voluntarily restricted the property through a charitable donation of an easement.

B. LPC's Regulatory Policies

The regulatory procedures of the Landmarks Commission and the review process of the Trust for Architectural Easements have similar goals, but function differently, because they are governed by different regulations and guidelines.

The regulatory processes of the Landmarks Commission are set out in the Landmarks Law. The Commission issues three major types of permits: Certificate of No Effect, Permit for Minor Work, and Certificate of Appropriateness. Certificates of No Effect and Permits for Minor Work are issued by staff without Commissioner input; a Certificate of Appropriateness requires a vote by the Commissioners.

Certificates of No Effect are issued for work on a designated landmark or building in an historic district, for alterations which will not:

> …change, destroy or affect any exterior architectural feature of the improvement on a landmark site or in a historic district or any interior architectural feature of the interior landmarks upon which said work is to be done….[13]

They are also issued in the case of construction of a new improvement, if staff determines that such construction would either not affect or otherwise be in harmony with the external appearance of other, neighboring improvements on such site or in such district.[14]

While Certificates of No Effect are generally issued for proposed work on portions of a landmark that do not fall within the Commission's purview (e.g., interior partitions in a building that is not also an interior landmark) they are also used more widely. Certificates of No Effect can be

[13]New York City Administrative Code, Title 25, Chapter 3, § 25-306, "Determination of request for certificate of no effect on protected architectural features."
[14]New York City Administrative Code, Title 25, Chapter 3, § 25-306, "Determination of request for certificate of no effect on protected architectural features."

issued for work on an area of the landmark that *is* under the Commission's purview, if the Commission staff determines that the work will not have a negative impact on the landmark's historic or architectural qualities.[15] They can also be issued for proposed alterations that, in the opinion of the Commission staff, conform to a "Master Plan" that has previously been approved by the Commission (see below).

Permits for Minor Work are issued for "minor work," which is defined in the Landmarks Law as

> Any change [to a landmark] … where such change, addition or removal *does not constitute ordinary repairs and maintenance* and is of such nature that it may be lawfully effected without a permit from the department of buildings.[16] (Italics added.)

No permits are required for "ordinary repairs and maintenance," defined in the Landmarks Law as

> work done [or] … replacement of any part [of a landmark, for which] … a permit issued by the department of buildings is not required by law [and whose] … purpose and effect…is to correct any deterioration of decay of or damage to [the landmark] … and to restore same, as nearly as may be practicable, to its condition prior to the occurrence of such deterioration, decay or damage.[17]

Certificates of Appropriateness are issued for any alterations that cannot be approved at the staff level via a Certificate of No Effect or Permit for Minor Work. Proposals for such alterations must be presented to the Commissioners at a public hearing, and then be approved by a vote of the Commissioners. If approved, the Certificate will set forth the Commissioners' "findings"– including the reasoning behind the decision. Because the Commission uses a single application form for all alteration requests, the Preservation Department staff reviews all applications. If the alteration meets the requirements for a Permit for Minor Work or a Certificate of No Effect, the staff will issue the relevant permit. If not, the staff will advise the owner of the landmark that a public hearing is required, and that the permit to be issued, should the Commissioners vote in favor, will be a Certificate of Appropriateness.

Many types of changes that would otherwise be handled via a Certificate of Appropriateness may in fact be processed by the staff as Certificates of No Effect or Permits for Minor Work if those changes conform to guidelines, rules or master plans that have been the subject of a public hearing and approved by a vote of the Commissioners. Master plans have been adopted for

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[15] New York City Administrative Code, Title 25, Chapter 3, § 25–306, "Determination of request for certificate of no effect on protected architectural features."
[16] New York City Administrative Code, Title 25, Chapter 3, § 25-302, "Definitions," paragraph q, "Minor work."
[17] New York City Administrative Code, Title 25, Chapter 3, §25-302, "Definitions," paragraph r, "Ordinary repairs and maintenance." The Commission's web site, under "Frequently Asked Questions about Making Changes to a Landmarked Building," clearly spells out this policy: "You do not need a permit from the Landmarks Commission to perform ordinary repairs or maintenance chores. For example, you do not need a permit to replace broken window glass, repaint a building exterior to match the existing color, or caulk around windows and doors." "FAQS: Frequently Asked questions about Making Changes to a Landmarked Building," http://www.nyc.gov/html/lpc/html/faqs/faq_permit.shtml

certain classes of buildings within historic districts (e.g., the master plan for storefronts in the Jackson Heights historic district) and for individual buildings (e.g., the master plan for storefronts at the Empire State Building). Any proposed alteration in these cases can be approved at the staff level so long as the alteration conforms to the master plan. Guidelines and rules exist for several classes of alterations. There are guidelines for window changes and for rooftop additions; and there are rules for certain historic districts, e.g. Douglaston, as well as guidelines about restoration work in general. The LPC's extensive compilation of rules and guidelines is published as *Title 63 of the Rules of the City of New York* ("Title 63"), which lays out these rules and guidelines in great detail .[18]

C. Policy Differences Between the Commission and the Trust: Title 63 vs. the *Secretary's Standards*

Unlike LPC, which relies for guidance on the Landmarks Law and the rules and guidelines published in *Title 63*, the Trust makes its determinations about proposed work based on the *Secretary's Standards*.[19] The LPC's guidelines and the *Secretary's Standards* share similar goals, but often differ on questions of preservation practice. Notable policy differences include:

1. Treatment of historic fabric

Item	Secretary's Standards	Title 63
Masonry cleaning	Recommended: "Cleaning masonry surfaces with the gentlest method possible, such as low pressure water and detergents …" (p. 68). A National Park Service Preservation Brief recommends using water pressure washes no higher than 400 pounds per square inch (psi).[20]	LPC permits the use of water pressure washes up to 500 psi (specified regularly in LPC permits).
HVAC	Not recommended: "Cutting through features such as masonry walls in order to install air conditioning units" (p. 101).	LPC staff may approve the installation of through-wall a/c equipment through a certificate of no effect or a permit for minor work when certain conditions are met according to the LPC rules. (Chapter 2, Subchapter B, §2-11)

[18] New York: City of New York, November 1998, March 2000, Updated: July 2003. A copy of Title 63 is appended to this report as Attachment No. 2.

[19] The brief statements on the Trust's web site about types of work that require review are intended only to indicate to donors the kinds of alterations for which donors need to request Trust permission – they are not meant to indicate detailed regulatory policy. As specified in the Trust's easements, the Trust's regulatory policies depend on the *Standards*, which are both extensive and quite specific.

[20] National Park Service, Technical Preservation Services, *Preservation Brief 1: The Cleaning and Waterproof Coating of Masonry Buildings*, by Robert C. Mack, FAIA, and Anne Grimmer; p.5.

2. Changes to historic windows on secondary facades

Item	**Secretary's Standards**	**Title 63**
Windows	Not recommended: "Changing the number, location, size or glazing pattern of windows, through cutting new openings, blocking-in windows, and installing replacement sash that do not fit the historic window opening" (p. 81). Recommended with alterations for a new use: "Designing and installing additional windows on rear or other non-character-defining elevations if required by the new use," provided certain conditions are met. (p. 83).	LPC staff may approve the enlargement, combination, or cutting of new windows on secondary, non-visible facades through a certificate of no effect when certain conditions are met according to the LPC rules. (Chapter 2, Subchapter B, §2-15)

3. Approving work in the absence of documentary evidence of historic conditions

Item	**Secretary's Standards**	**Title 63**
Replacement of missing historic features	Not recommended: "Creating a false historical appearance" by installing a replacement feature that is "based on insufficient historical, pictorial, and physical documentation" (p. 70 ff).	According to Title 63, LPC staff will issue a Certificate of No Effect or Permit for Minor Work for work restoring portions of a building to their "original or historic condition" if there is "a) photographic evidence," "b) physical evidence," or "c) original or historic drawings or documents." If those sources are lacking, however, staff can also issue a Certificate of No Effect or Permit for Minor Work based on "matching buildings," or, lacking even that, "the design may be based on that found in buildings of similar age and style that contain stylistic elements that follow a set pattern or type," as long as the work does not cause "the removal of significant historic fabric…that may have been added over time and that are evidence of the history and development of a building, structure, or site." (Chapter 2, Subchapter B, §2-17).

4. Additions at the rear of buildings in historic districts

Item	**Secretary's Standards**	**Title 63**
Additions	New additions "should be avoided if possible, and considered *only* after it is determined that those needs cannot be met by altering secondary, i.e. non character-defining interior spaces" (p. 65). Recommended: "Placing functions and services required for the new use in non-character-defining interior spaces rather than constructing a new addition" (p. 112). Not recommended: "Expanding the size of the historic building by constructing a new addition when the new use could be met by altering non-character defining interior spaces" (p. 112).	LPC staff may approve rear additions that alter the building's footprint and extend into the rear yard though a certificate of no effect when certain conditions are met according to the LPC rules (Chapter 2, Subchapter B, §2-16).

There are many more such differences regarding the details of restoration and renovation of historic structures that result from the differences between the policies detailed in Title 63 and the *Secretary's Standards*. Examples of the results are examined below in Part V.

The single most significant difference in policy between the Commission and the Trust, however, is the discretion of the LPC Commissioners in issuing Certificates of Appropriateness, as explained in the following section.

PART IV: THE LANDMARKS COMMISSIONERS' DISCRETIONARY AUTHORITY

A. The Major Difference Between the Trust and the Landmarks Commission

The major inherent difference between the regulation of properties encumbered by Trust easements and the regulation of properties subject to Commission rules is the discretion reserved for the LPC's Commissioners. That discretion can and does result in major differences between Commission and Trust decisions, and can have a significant impact on how a property may be developed.

The staff at the Commission and the staff at the Trust base their determinations on different regulations – Title 63 for the Commission, and the *Secretary's Standards* for the Trust. In addition, in the case of the Trust, all staff determinations are reviewed at a senior level, by the Trust's vice president, before being finalized, but that senior executive, like the staff, is also guided by the *Secretary's Standards*. At the Commission, by contrast, if property owners are dissatisfied with a staff determination, they have the option of requesting a public hearing before the Commissioners. And the Commissioners, unlike the staff, are not bound by the rules and guidelines of Title 63. Instead, they are explicitly empowered by the Landmarks Law to use their own discretion as to the "appropriateness" of any proposal. Neither the *Secretary's Standards* nor the policies of the Trust offer any equivalent to this discretion. The resulting difference in outcomes is often major.

This difference stems from the origins of the policies of the two organizations. LPC created the rules and guidelines in Title 63, and the Commissioners can choose to override them if they find a proposed alteration to be "appropriate." By contrast, the Trust has adopted a set of standards – the *Secretary's Standards* – created not by the Trust but by the National Park Service, and has defined those standards as binding in their easements; no one at the Trust has discretionary authority to ignore the *Secretary's Standards*. Property owners unhappy with determinations by LPC staff can appeal to the Commissioners; there is no such body governing the Trust to which the easement donors can appeal.

The Commission's rules and guidelines, as outlined in Title 63, guide the staff in their processing of applications only because they were specifically adopted – following a public hearing – by a vote of the Commissioners. Those rules and guidelines exist to help staff expedite permit applications. Those rules and guidelines are *not*, however, the final authority in approving or denying applications. Staff does not have final say on applications – that is reserved, by law, for the eleven (11) LPC commissioners.

Throughout Title 63, in each rule or guideline, there is a final sentence stressing the possibility of action by the Commissioners, as in this sentence from "rear yard additions":

> If all the above standards are met, a Certificate of No Effect may be issued; otherwise, consult with the Director of Preservation. Calendaring for a Certificate of Appropriateness public hearing may be required.

Or from the rooftop guidelines:

> (h) Application Procedure…. 2) When the application is complete, a staff member will review the application for conformance with these rules. Upon determination that the criteria of the rules have been met, a Certificate of No Effect will be issued.
> (3) *If the criteria for a Certificate of No Effect have not been met, the applicant will be given the opportunity to pursue a Certificate of Appropriateness* and may request a meeting with the Director of Preservation to discuss the interpretation of the rules. The applicant may also request a meeting and review by the Chair of the Commission.
> (4) *The decision of whether to approve an application for a Certificate of Appropriateness is made by an affirmative vote of at least six commissioners following a public hearing.* (Italics added.)

In other words, in all these cases, if the proposed work meets the Title 63 guidelines, staff may issue a permit – because, having already adopted the given rules, the Commissioners have effectively already approved the work. If the proposed work does *not* meet Title 63 rules and guidelines, it is still possible that the work may receive a permit. Property owners may go forward to a public hearing for a Certificate of Appropriateness – in other words, the Commissioners have the authority to grant permits for work that is not in accordance with the rules and guidelines.

The basis for this procedure is found in the Landmarks Law itself:

> a. In any case where an applicant for a permit to construct, reconstruct, alter or demolish any improvement on a landmark site, or in a historic district or containing an interior landmark, files such application with the commission together with a request for a certificate of appropriateness, and *in any case where a certificate of no effect on protected architectural features is denied* and the applicant thereafter, pursuant to the provisions of section 25-306 of this chapter, files a request for a certificate of appropriateness, *the commission shall determine whether the proposed work would be appropriate* for and consistent with the effectuation of the purposes of this chapter. If the commission's determination is in the affirmative on such question, it shall grant a certificate of appropriateness, and if the commission's determination is in the negative, it shall deny the applicant's request….[21] (Italics added.)

In holding a public hearing for a Certificate of Appropriateness, and considering whether or not to issue such a permit, the Commissioners are not bound by Title 63. Instead, the Commissioners use their discretion to determine whether or not the proposed work is "appropriate," as specified in the law:

> In making such determination with respect to any such application for a permit to construct, reconstruct, alter or demolish an improvement in a historic district, the

[21] New York City Administrative Code, Title 25, Chapter 3, § 25-307, "Factors governing issuance of certificate of appropriateness."

> commission shall consider
>
> > a) the effect of the proposed work in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done, and
> >
> > b) the relationship between the results of such work and the exterior architectural features of other, neighboring improvements in such districts.
>
> In appraising such effects and relationship, the commission shall consider, in addition to any other pertinent matters, the factors of aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color. [22]

In regards to an individual landmark:

> In making the determination…the commission shall consider the effects of the proposed work upon the protection, enhancement, perpetuation and use of the exterior architectural features of such landmark which cause it to possess a special character or special historical or aesthetic interest or value. [23]

The Commissioners, in other words, must keep in mind the purpose of the Landmarks Law, and the protection of the special qualities of the site in question, but they exercise their discretion in making the final determination of "appropriateness."

A particular difference between the Commissioners' discretion and the *Secretary's Standards* is spelled out in the law. In determining the "appropriateness" of a proposed alteration on a building within an historic district, the Commissioners consider not only its impact on the building itself, but also its impact on "the exterior architectural features of other, neighboring improvements in" the district. That consideration is not available under the *Secretary's Standards* – since it could lead to what the *Secretary's Standards* call a "false historical appearance" – and is not available to the Trust staff in assessing proposed alterations. [24]

Because the Commissioners' determination in these cases by definition does not fall into any of the LPC's rules or guidelines, their determination and its reasoning are spelled out in each Certificate of Appropriateness.

The law explicitly defers to the commissioners' discretion – which supersedes rules, guidelines, and staff recommendations. There is no equivalent to this discretion in the case of the Trust's preservation easements.

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[22] New York City Administrative Code, Title 25, Chapter 3, § 25-307, "Factors governing issuance of certificate of appropriateness," paragraph b, subparagraphs 1, 2 and 3.
[23] New York City Administrative Code, Title 25, Chapter 3, § 25-307, "Factors governing issuance of certificate of appropriateness," paragraph d.
[24] See table above, Part III C 3, "Replacement of missing historic features."

B. Example: Rooftop Additions

A good example of how the Commissioners' discretion overrules Commission guidelines and staff recommendations is the treatment of applications for rooftop additions. If Trust staff determines that an application conforms to the *Secretary's Standards* version of these rules, permission is granted; otherwise, it is denied. According to LPC guidelines, rooftop additions can be approved at the staff level if (quoting the guidelines):

- "they do not result in damage to, or demolition of, a significant architectural feature of the roof of the structure on which such rooftop addition is to be constructed"
- or, if in a historic district, they do not "adversely affect significant architectural features of adjacent improvements"
- and they are either "not visible" or, in certain cases, "only minimally visible" from "a public thoroughfare."

If the Commission staff determines that an application conforms to these rules, a Certificate of No Effect is issued. If not, then the proposal goes to a public hearing in front of the Commissioners.

In other words, rooftop additions that meet the guidelines in Title 63 are always approved, by staff, but those that do not meet the guidelines may still be considered for review by the Chairman and/or approval by the Commissioners.

The rooftop addition regulations have sometimes been construed by outside observers to mean that LPC will not permit a rooftop addition that is "visible from a public thoroughfare," but in fact the regulations mean only that such additions *cannot be approved at the staff level*. Many such additions – in some cases extending to towers of 36 and 57 stories, erected above buildings no taller than five or six stories – have indeed been approved by a vote of the Commissioners, whose only criteria is "appropriateness." There is no equivalent with a Trust easement.

This discretion applies to all work proposed for landmarks or buildings within historic districts: rear additions, storefronts, and restoration work of all kinds. It even extends, potentially, to demolition.

A number of examples illustrating the Commissioners' discretion at work in actual Certificates of Appropriateness, including rooftop additions, which they have approved, are provided in Part V below.

PART V: DIFFERENCES IN OUTCOMES

There are many differences in outcomes of the regulatory policies of the Commission and the Trust – some stemming from the differences between Title 63 and the *Secretary's Standards*, and others stemming from the LPC Commissioners' discretion in approving Certificates of Appropriateness.

A. Differences in outcome deriving from the differences between Title 63 (for LPC Certificates of No Effect and Permits for Minor Work) and the *Secretary's Standards*

In a number of instances, because of differences between Title 63 and the *Secretary's Standards*, although the Commission issued a permit for a proposed alteration, the Trust declined to permit that alteration. There are not many such examples yet, simply because the Trust program is relatively new. Here are two:

1. House in the Greenwich Village Historic District

This is one of a group of Greek Revival houses in the Greenwich Village historic district. As described in the Greenwich Village designation report:

> Of this row, a superb picture is created at [this house] by the interesting ironwork which, including the balcony, provides a complete enframement at eye level. These four fine Greek Revival town houses were built in the early Eighteen-forties with stoops, handsome doorways and the usual low attic windows beneath dentilled cornices. [This house] illustrates how the group must have appeared originally. Here a pilastered doorway, with capitals similar to those at [a neighboring house], carries a dentilled cornice. The inner wood doorway displays a four-paneled door with side lights, and transom of glass. Enframing the door are two pilasters of linear Greek design with small capitals, and half-pilasters are beyond the sidelights. The transom bar has dentils, Greek fret motifs above the sidelights, and wreaths above the pilasters, the whole surmounted by a low pediment with acroteria and a foliate design within. This and [a nearby house] are among those houses having their original Greek Revival wrought ironwork both at the stoop and enclosing the area. The iron balcony railing at the floor-length windows of the first floor at [this house] consists entirely of castings and, although it might be considered Greek in theme, is possibly of a later date. This house has its original sash although cornices have been added to the stone window lintels…. These four houses have such similarity that they form a row, though built between 1842 and 1845 for different owners…. [This house] dating from 1844… [was] built for the same Isaacs family which had built the oldest house now extant in The Village.[25]

[25] New York City Landmarks Preservation Commission, *Greenwich Village Historic District Designation Report* (New York: City of New York, 1969), pp. 44-45.

Existing condition

Proposed condition

On July 21, 2005, the LPC granted permission to the owner of this building to replace the existing six-over-nine first floor windows with double-leaf, multi-light French doors and surmounting divided-light transoms. This was done via a Certificate of No Effect, which explained that the "work will have no effect on significant protected features of the building."[26] That owner did not undertake the work, but a subsequent owner decided to do so, in 2008. Since the Trust holds an easement on the property, the new owner – despite having the LPC's permit – had to request permission from the Trust as well. Trust staff – following Trust procedures and the *Secretary's Standards* – consulted historic photographs from the 1920s and 1930s, from which they confirmed that the existing six-over-nine double-hung windows were most likely the building's original sash (confirming the Commission's own assertion, cited above, that the house "has its original sash"). Consequently, in accordance with the *Secretary's Standards*, and despite the existing LPC permit, the Trust did not permit the owner to replace the six-over-nine sash with French doors and transoms.

[26] Landmarks Preservation Commission, Certificate of No Effect, CNE 05-8210.

2. Row house in the Upper West Side/Central Park West Historic District

As described in the Upper West Side/Central Park West Historic District designation report, this five-story-tall, Chateauesque row house was built in 1898, as part of a row, to designs by Norman & Barber. “American basement” in type, it has a façade of white Roman brick, stone, terra cotta, copper, and ironwork, with double-hung wood windows and a pitched slate roof with dormers.

On March 9, 2007, the Commission issued a Warning Letter to the owner for the “replacement of front entrance door without permit(s).” On April 5th, the owner submitted an application to legalize the alteration. On April 10th, the Commission issued a Permit for Minor Work to legalize the installation of the door, but specified it should be painted glossy black, noting that the “proposed paint color is appropriate for a building of this age, style, and type; that the paint color will match the alteration to the existing historic frame; and the door installation has not caused the loss of any significant architectural features.”

Removed door

Unauthorized door

In addition to not having applied for an LPC permit for the new door, the owner had not sought the Trust’s permission either. On March 12th, however, the Trust monitored the property and discovered the entrance replacement to which the Trust had not consented. Staff research found that the door that had been removed was similar in configuration and materials to the door in the related row house next door. Consultant architectural historians in New York confirmed that the original door would most likely have been symmetrical in design, unlike the replacement door which was modern in style, asymmetrically designed and with a prominent use of glass. The Trust, guided by the *Secretary’s Standards*, declined to approve the replacement. Instead, the Trust required the owner to replace the unpainted, asymmetrical door with a black custom-milled double-leaf door compatible in appearance and design to the entry door that was removed without the Trust’s consent.

These examples demonstrate the Trust's adherence to the *Secretary's Standards*, and illustrate how that adherence can lead to determinations different from the Commission's.

B. Differences in outcome deriving from the LPC Commissioners' Discretion with Certificates of Appropriateness

The discretion reserved for the LPC's Commissioners is the major regulatory difference between the Commission and the Trust. That discretion makes possible major differences between Commission and Trust decisions, with a significant impact on how a property may be developed.

The following are alterations that LPC staff could not have approved under Title 63, but that the Commissioners, exercising their discretion, approved via a Certificate of Appropriateness.

1. Facade Alterations

Row house in the Upper East Side Historic District

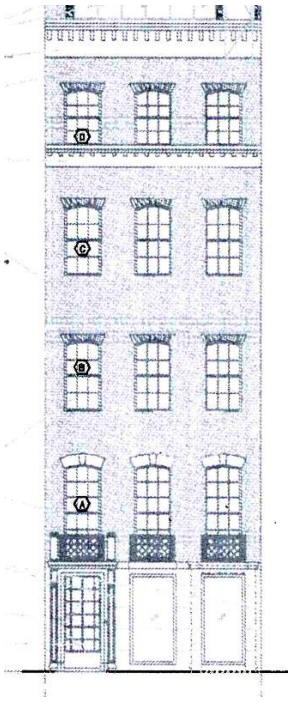
This five-story brick house, according to the Upper East Side designation report, was built in 1882-83 by R.H. Robertson, and given a new, neo-Federal façade designed by Sterner & Wolfe in 1919. The building's "ground floor has been altered for commercial use." [27] It once belonged to industrialist Robert M. Littlejohn. Its transformation with a new façade was typical of the block's history. As explained in the designation report:

> In the last years of the 19th century and first decades of the 20th century the streets between Fifth and Madison Avenues changed dramatically as wealthy individuals moved to the area and built larger, more stylish houses or redesigned the front facades of existing structures. [The street on which this house is located] saw a total transformation; none of the houses retain details from the 1870s and 1880s. The new designs were commissioned from New York's finest architects…. Among those who were attracted to the street were banker Henri P. Wertheim…railroad president Benjamin F. Yoakum…Robert Fulton Cutting…known as the "first citizen of New York"; lawyers Samuel H. Valentine…Chauncey Traux…and William Fawcett…; theatrical entrepreneur Martin Beck…and industrialists Ferdinand Sulzberger…and Robert M. Littlejohn…. The street still retains its low-rise, residential character….[28]

On March 23, 2007, LPC issued a Certificate of Appropriateness for several alterations, including the installation of a new cast-stone cornice, and the relocation of the main entrance door with its surround from the easternmost bay of the façade to the westernmost bay.

[27] New York City Landmarks Preservation Commission, *Upper East Side Historic District Designation Report* (New York: City of New York, 1981), p. 340.
[28] *Ibid.*, p. 312.

Existing condition



Proposed condition

According to the permit:

> …the proposed cornice will relate to cornices found on adjacent buildings that have had their height increased by the addition of extra stories [and]…the relocation of the main entry door and surround will not result in the loss of any historic fabric.[29]

This work began without notification of or consent from the Trust. When the Trust learned of the ongoing work, it required the owner to stop work pending a staff review of the plans. The review included consultation of historic photographs, which confirmed that the entrance was located on the east c.1930, following the construction of the new façade in 1919 but prior to the creation of the commercial storefront c.1933, and that historically there was no cornice above the fifth floor. Though the Commission could take into consideration the relationship of the proposed cornice to those on "adjacent buildings," that option was not available to the Trust, which is bound by the *Secretary's Standards*. The Trust determined that relocating the entrance would alter the building's relationship to the sidewalk and, rather than recreating an historic condition, actually would be an ahistorical alteration; and that the proposed installation of a new cast-stone cornice would directly contradict the *Secretary's Standards*, which require that such an installation be based on historic documentation, and avoid a "false historical" appearance. The Trust denied the owner's request to move the door and add the cornice.

[29] Landmarks Preservation Commission, Certificate of Appropriateness 07-7043, 3/23/2007.

2. Rooftop Additions

The results of LPC's policies on rooftop additions, described in the preceding section, offer some of the most dramatic examples of the results of the Commissioners' discretion. Rooftop additions that do not meet LPC's guidelines – and certainly do not meet the *Secretary's Standards* – but have nevertheless been approved by the LPC's Commissioners, range from two-story additions to towers of 36 and 57 stories. If any of these properties had also been subject to an easement held by the Trust, these alterations could not have been approved.

a. *Hearst International Building*

The six-story, Art Deco style Hearst International Building at 951-969 Eighth Avenue, one of the very few surviving New York City works of Viennese architect Joseph Urban, was designated a landmark in 1988. In 2001, the LPC approved the construction of an additional 36 story-tower to the six-story-tall original, thereby creating a 42-story skyscraper.

Such a tower could not possibly have met the criteria of Title 63's rooftop addition guidelines. Instead, the Commissioners based their approval on the fact that there had been an early plan – never carried out – to extend the Hearst Building into a taller tower. As explained in the Certificate of Appropriateness:[30]

> With regard to this proposal, the Commission found that the building was originally designed and conceived to be larger than its current six stories; that physical evidence at the building clearly indicates provisions for its future as a base for a larger tower, including structural support for the addition of several stories…; that construction in two stages was a familiar pattern in New York in general and to Hearst in particular….

The Certificate of Appropriateness does not reference the height or design of the proposal of half-a-century earlier. Instead, the Commissioners found only that

> …the sculptural form and expressive quality of the [proposed new] tower's design relates well to the theatrical character of the historic six-story base of the building.

[30] Landmarks Preservation Commission, Certificate of Appropriateness 02-4598, 3/18/2002.

Hearst International Building

In other words, the LPC found that the addition of a contemporary tower of a type never imagined by the architect of the landmark was, nevertheless, an "appropriate" addition. Had the Trust held an easement on this building, that tower could not have been built.

b. *Coty-Rizzoli*

A 15-year-old precedent for the Hearst tower was an LPC Certificate of Appropriateness issued for a tower above two individual landmarks, the Coty and Rizzoli buildings. The Coty Building, at 714 Fifth Avenue, was a five-story commercial building in whose 1907 façade the French perfumer Francois Coty had installed what LPC describes as "the only extant architectural glasswork in New York City designed by the great French glassmaker Rene Lalique."[31] Next door stood No. 712 Fifth Avenue – home at the time to the Rizzoli bookstore – which LPC described as "designed in accordance with 18th-century French prototypes as a five-story limestone-fronted structure that would blend with the nearby houses and maintain the elegant character of the street."[32]

Unlike the Hearst building, which was intended from the beginning to have a tower of some kind (though not the one that LPC eventually approved) – thus providing some rationale for considering a proposal for a new tower – the Rizzoli building was specifically intended to blend in with neighboring five-story residential buildings. Nevertheless, the same year that LPC designated these two landmarks, the Commissioners also approved the addition of a 57-story apartment house rising above them.

In this case, the Commissioners' rationale for permitting the enormous new tower involved the concerns of a developer who – prior to designation – had planned to replace both buildings and a neighbor with a skyscraper.[33] Nevertheless, had preservation easements existed for these buildings, the tower would not have been possible.

[31] New York City Landmarks Preservation Commission, *Guide to New York City Landmarks*, third edition (Wiley and Sons, Inc., 2004), p. 111.
[32] *Ibid*.
[33] Paul Goldberger, "'Façadism' on the Rise: Preservation or Illusion?" *New York Times*, July 15, 1985, p. B1.

Coty-Rizzoli

As designated

With the LPC-approved tower

Looking up the tower

c. *72-76 East 79th Street*

The two towers just described were built above commercial buildings that were individually designated landmarks. But such towers are also possible with residential buildings within historic districts. The same year that LPC approved the Coty-Rizzoli tower, it also approved a highly visible 19-story apartment house built behind and above the facades of a group of five-story row houses located on a prominent cross-town artery, East 79th Street between Fifth and Madison avenues, within the Upper East Side Historic District. Unlike the Coty-Rizzoli project, in which the tower was set back 50 feet from the sidewalk to retain some illusion of a separate existence for the landmark buildings, the 79th Street tower was set back just 15 feet. As in the case of both Coty-Rizzoli and the Hearst Building, unusual conditions were cited as necessitating approval of this design. In this case, only the facades of the brownstones remained, standing as shells. Nevertheless, the proposal certainly did not meet the conditions for a rooftop addition that would have allowed LPC staff to approve the project – which is why the project required approval by the Commissioners.

Moreover, the LPC staff actively *opposed* the project. As reported by the *New York Times*:

> The staff of the Landmarks Preservation Commission yesterday urged the commissioners to reject a proposal for a 19-story residential tower above the facades of three Queen Anne-style brownstones on East 79th Street. … Before the vote, Frank Sanchis, the executive director of the commission, spoke on behalf of the commission's staff of preservationists and architects who study proposed alterations of designated buildings.
>
> … "Do not be seduced by the handsome design, which this is," Mr. Sanchis said of the building designed by William J. Conklin, an architect and a former vice chairman of the commission. "This will be a façade pasted on another building. There's no way this building will ever have integrity again."[34]

The Commissioners, however, voted to approve the tower. Their rationale was spelled out in the Certificate of Appropriateness:

> …the Commission found that…the proposed apartment building, by incorporating the facades of Nos. 72-74 and No. 76 East 79th Street, not only preserves significant architectural features of the district and integral parts of the streetscape on this block of the historic district but serves to upgrade these historic facades to a state closer to their original condition; that the design of the tower portion of the new building relates successfully in terms of scale and massing to the surrounding apartment buildings and to the character of the 79th Street edge of the Upper East Side Historic District; that the design of the tower portion…is compatible with other buildings of similar scale found within the historic district….[35]

[34] Jane Gross, "Landmarks Panel Staff Urges Rejection of East Side Tower," *New York Times*, October 9, 1985, p. B10.
[35] Landmarks Preservation Commission, Certificate of Appropriateness 86-0057, 11/22/1985.

72-76 East 79th Street

As designated ("Green book" photo[36])

With tower

In other words, although the 19-story tower was unquestionably visible from a public thoroughfare, and although the LPC's professional staff objected, the Commissioners – exercising their discretion as defined in the Landmarks Law – found the proposed tower to be "appropriate," in part because, though different in scale from the houses above which it would rise, it matched the scale of "surrounding apartment buildings" and was "compatible with other buildings of similar scale" in the district.

According to the *Times* account, the Commissioners who voted to approve the project argued that the circumstances in this case were unusual. Nevertheless, the Commission has continued to approve smaller additions to the roofs of buildings within historic districts – additions which the staff would not have been able to approve because they did not conform to the conditions set out in the LPC's rooftop guidelines, and which the Trust would not be able to approve because they do not meet the *Secretary's Standards*.

[36] "Green book" photos are photos taken by LPC staff at the time of designation.

d. *100-120 East 76th Street, Manhattan*

In 2002, the Commissioners voted to approve a two-story rooftop addition (not yet constructed) to a row of six neo-Grec style brownstone row houses at 110-120 East 76th Street within the Upper East Side Historic District.

The Commissioners found…

> …that the informal, accretive nature of the rooftop addition respects the separate integrity of the historic row houses, and is in keeping with the simple and asymmetrical nature of rooftop additions throughout the Upper East Side Historic District.…[37]

In other words, though the rooftop addition would be visible from a public thoroughfare, the Commissioners found its design to be similar to other such additions in the historic district – and they therefore considered it an "appropriate" addition.

e. *1217 Park Avenue, Manhattan*

In 2005, the Commissioners voted to approve a three-story addition above a one-story extension on the East 95th Street façade of 1217 Park Avenue, a Romanesque Revival/Queen Anne style row house in the Carnegie Hill Historic District.

The Commissioners found…

> …that the proposed addition is well scaled to the building and other buildings along East 95th Street; that the height and design of the addition relate to the extension constructed in 1921-22; that the construction of this addition on a corner row house will have no effect on the large central green area of the block; and that the cladding and setbacks of the addition are sensitive to the original structure and do not cause the addition to dominate the East 95th Street elevation.[38]

In other words, though the three-story addition is completely visible from the public thoroughfare, the Commissioners decided that its design was compatible with the design of the building and the appearance of the block, and therefore found it to be "appropriate."[39]

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[37] Landmarks Preservation Commission, Certificate of Appropriateness 02-3124, 1/30/2002.
[38] Landmarks Preservation Commission, Certificate of Appropriateness 05-6912, 4/11/2005.
[39] The Trust accepted an easement on 1217 Park Avenue only in 2006, and therefore had no authority over the addition approved by the Commission the year before; had an easement been in place at that time, the Trust would not have been able to approve the addition, as per the *Secretary's Standards*.

1217 Park Avenue, Manhattan

As designated ("Green book" photo)

With LPC-approved addition

All the proposed rooftop additions described in Sections (B)(2)(a) through (B)(2)(e) above – whether two stories tall or 57 stories tall – share two characteristics:

- Their approval depended entirely on the judgment and discretion of the LPC's Commissioners. Not one of these proposals could have been approved at the staff level – because not one of them met the requirements of the LPC's rooftop guidelines. But each of them could be – and was – approved by the Commissioners, who, exercising their discretion under the Landmarks Law, found them to be "appropriate" alterations.

- Not one of these proposals could have been constructed if the buildings in question, whether individual landmarks or contributing buildings within an historic district, had been the subject of full-building preservation easements held by the Trust, because not one of them would have met the *Secretary's Standards*.

3. Demolition of Buildings Within Historic Districts

As radical as 36- and 57-story additions may seem, LPC's Commissioners have stretched the boundaries of "appropriateness" still further – to the point of permitting the demolition of a building within an historic district. The Commissioners' finding of appropriateness was based strictly on their discretion about the proposed demolition.

11 Water Street

As described in the *New York Times* in 2006:

> On May 22, 1936, the photographer Berenice Abbott ambled along the Brooklyn waterfront, thrilling to river-wrapped vistas and old warehouses that glowered with imposing grandeur. Crossing the narrow streets on one of her celebrated sorties to shoot the surging metropolis for the federal Works Progress Administration, she turned her lens upon a sleek new structure rising at 11 Water Street, beneath the Brooklyn Bridge.
>
> Abutting the bridge's Brooklyn tower, the two-story Art Moderne warehouse was just a steel skeleton when Abbott photographed it. It would become the New York City Department of Purchase Storehouse, known as the Purchase Building, a low-slung work of brick and concrete ribbons. In 1977, when the building was declared part of the Fulton Ferry Historic District, preservation officials even noted its quirky boiler house, admiring its "boldly designed, tiered and faceted chimney-stack."
>
> Yet at a public hearing on Feb. 21, the New York City Landmarks Preservation Commission voted 7 to 2 in favor of demolishing the Purchase Building to make way for Brooklyn Bridge Park.[40]

LPC has several mechanisms for permitting the demolition of buildings in historic districts. In particular, buildings that are identified as "no style" in LPC designation reports can be demolished via a Certificate of No Effect, as long as LPC has approved a replacement. This would be roughly comparable to permitting the demolition of a "non-contributing" building in a National Register historic district. The Landmarks Law also has a "hardship provision" that permits demolition in certain cases of financial hardship (see below, Part VIII-B).

But the Purchase Building was a different case. It was not a "no style" building, so staff could not issue a Certificate of No Effect for its demolition. Nor was there a claim of financial hardship. The issue, instead, was that the New York City Parks Department believed the building to be an impediment to its plans for park development. As described in the *Times*:

> At the hearing, Adrian Benepe, the city's parks commissioner, deemed the Purchase Building "a substantial barrier" to the Brooklyn park, a 1.3-mile-long waterfront area that planners have already hailed as the city's third great open space, in league with Central Park and Prospect Park.

[40] "Amid the Facades, Furrowed Brows," *New York Times*, March 19, 2006, p. 14.

The Commissioners cited various rationales for permitting the demolition of the building, finding that:

> … this complex of buildings…is not of the period of primary significance of the historic district, and does not relate in its design or detail to the buildings which establish the special architectural and historic character for which the Fulton Ferry Historic District was designated; that the location of the complex obscures the base of the Brooklyn Bridge tower, and detracts from its special architectural and historic character; that the presence of the Purchase Building complex between the anchorage and the tower diminishes the openness and visual clarity of the bridge's eastern span; that removing these buildings will help establish a visual connection between the Tobacco Warehouse and Empire Stores to the north, and the Old Fulton Street corridor to the south, which are the two groupings of significant buildings within the historic district….[41]

The demolition, however, was approved by virtue of the Commissioners' discretion. It could not have been approved by staff under the LPC rules and guidelines. And its demolition would not have been possible had there been an easement on the building.

4. The Commission's rationale vs. the Trust's rationale

The thinking behind the Commission's approvals of such alterations and demolitions described above has been articulated publicly by various LPC Chairmen and staff.

Former LPC Chair Jennifer Raab was quoted in the *New York Times* about a very visible addition to a commercial loft building in one of the Tribeca historic districts, one that did not conform to Title 63, but was permitted by the Commissioners' exercising their discretion:

> It's a visible addition but we felt it was appropriate. *You can be architecturally creative and we will be receptive to reviewing and considering it*. [Italics added.][42]

Former LPC Chairman Gene Norman, in a letter to the *New York Times*, wrote:

> The law is not a "no change" law; far from its being "impossible to alter" a designated building, the Landmarks Preservation Commission issues over a thousand permits a year for appropriate alterations to designated buildings. The changes range from new doors to additional stories on existing buildings to major rebuilding… The commission has also found partial demolition appropriate….[43]

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[41] Landmarks Preservation Commission, "Binding Report," CRB 08-8554, for 11 Water Street, Fulton Ferry Historic District.
[42] "In TriBeCa, They're Raising the Roofs," *New York Times*, July 12, 1998, p. RE1.
[43] "A Landmarks Law Mindful of Owner Interests," letter to the editor from Gene Norman, Chairman, Landmarks Preservation Commission, *New York Times*, September 10, 1983, p.22.

Sarah Carroll, currently the LPC's Director of Preservation, has explained that,

> [w]hile we regulate work, we do not prevent change. We review change.[44]

And current LPC Chairman Bob Tierney has told the *New York Times*:

> There are historic districts where we've allowed pretty modern interventions…. We don't freeze districts in aspic….[45]

The Trust, however, has clearly adopted a different approach. The Trust's easement provides:

> It is the intent of the parties hereto that the Protected Façades *remain essentially unchanged* and, wherever visible from a public way, in full public view. [Italics added.]

According to the Trust, it views the easement language above to be consistent with its charitable mission and with the current tax laws governing easement donations, which require easements to prohibit "any change in the exterior of the building which is inconsistent with the historical character of such exterior."[46]

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[44] "News: Press Reports on Sunnyside Meeting," *Queens Chronicle*, January 25, 2007, as reprinted on the web site of the Historic Districts Council (http://hdcvoice.blogspot.com/2007/01/news-chronicle-reports-on-sunnyside.html).
[45] "Distinguishing the Remarkable From the Merely Old," *New York Times*, January 26, 2007, p. B2.
[46] I.R.C. Sec. 170(h)(4)(B).

PART VI: MAINTENANCE – LANDMARKS COMMISSION VS. THE TRUST

Both the Commission and the Trust are concerned that the historic properties under their care be properly maintained, but unlike the Commission, the Trust actively monitors maintenance issues and enforces compliance.

A. Commission Policies vs. Trust Policies.

The Trust's easement includes very specific language about the property owner's obligations regarding maintenance:

> **Maintenance**. Grantor agrees to maintain in good order the Protected Façades and the foundations and overall structural integrity of the Building, in each case, in the condition and appearance that existed on the Effective Date (as set forth in the Baseline Documentation).[47]

The Landmarks Law stipulates:

> Every person in charge of an improvement on a landmark site or in a historic district shall keep in good repair (1) all of the exterior portions of such improvement and (2) all interior portions thereof which, if not so maintained, may cause or tend to cause the exterior portions of such improvement to deteriorate, decay or become damaged or otherwise to fall into a state of disrepair.[48]

The Trust has an excellent record of enforcing the maintenance obligation provided in its easement. Because the Trust visits each property annually to inspect conditions, the Trust's staff can address maintenance issues before they escalate into crises. If a maintenance issue is identified, the Trust will request the appropriate action from the property owner in its post-monitoring letter (the letter received by owners after each monitoring inspection). Such actions have included everything from painting a peeling cornice, window trim and gutters, and cutting back overgrown ivy, to stabilizing brickwork and repairing mortar, broken window sash, cornices and rusted ironwork. The Trust has prepared a summary of maintenance requests made to property owners since 2004; it is included in the attachments at the end of this Report.[49]

The Commission's *Title 63* provides no additional guidance on the subject, referencing "maintenance" only to the extent of describing which types of maintenance require LPC permits. Since the Commission – unlike the Trust– has no regular inspection regimen, it is impossible to characterize the extent to which the 24,000 building under its jurisdiction are properly maintained.

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[47] Standard language quoted from a current easement. The maintenance requirement contained in earlier versions of the Trust's easement provided "Grantor agrees to maintain in good order the roof, Protected Façades, foundations and overall structural integrity of the Building."
[48] New York City Administrative Code, Title 25, Chapter 3, §25-311, "Maintenance and repair of improvements."
[49] See attachment No. 6.

B. Demolition by Neglect

According to Commission Counsel Mark Silberman, the LPC is concerned with maintenance issues only when they result in a landmark's no longer being water tight or structurally sound, or in the deterioration of a character-defining architectural element.[50]

Unfortunately, there have been a number of instances of "demolition by neglect" of LPC-regulated properties.

In 1997, a brownstone at 42 Schermerhorn Street in the Brooklyn Heights Historic District was demolished because it had fallen into disrepair. According to the *New York Times*:

> "It was basically a danger to the public," Ted Birkhahn, a spokesman for the Buildings Department, said of the brownstone. "Despite the fact that it was a landmark building, the most important aspect of the situation is the safety of the public." Normally, the city's Landmarks Preservation Commission would have to give approval for the demolition of a historic building. But in an emergency, Mr. Birkhahn said, the city can bypass the commission….. [W]hen Robert D'Alessio, deputy chief inspector for the Buildings Department, looked at 42 Schermerhorn from the rooftop next door on Oct. 28, he signed an emergency order to have what had not already fallen in torn down.[51]

In 1999, a building in a Staten Island historic district was similarly demolished:

> A landmark building that had stood for 90 years on the grounds of the Farm Colony-Seaview Hospital Historic District was reduced to rubble last month at the request of City Councilman James S. Oddo, without the consent of the city's preservationists. Mr. Oddo wrote to Deputy Mayor Joseph J. Lhota requesting that the city declare an emergency and demolish the building immediately, because it was unstable… The director of the Mayor's Office of Emergency Management, Jerome M. Hauer, said the Buildings Department and his agency had inspected the building and found it to be a safety hazard.[52]

A second building in Staten Island met the same fate in 2004:

> Dynamite and wrecking balls aren't the only things that destroy buildings. Some buildings, even historic landmarks, are demolished by neglect. Such is the case with New Brighton Village Hall…. Although the structure was declared a landmark in 1965 and is one of only three village halls left in the city, it has been vacant and in decline since 1968. Now the Department of Buildings has determined that the hall is unsafe and must be torn down.[53]

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[50] Information provided by Mark Silberman, Commission Counsel.
[51] "With Historic Brownstone Gone, Is Development at Hand?" *New York Times*, November 9, 1997, p. CY10.
[52] *New York Times*, September 5, 1999, p. CY9.
[53] "Look What They Have Done to the Old Village Hall," *New York Times*, January 25, 2004, p. 14.

The right of the City to demolish a landmark in an emergency situation is spelled out in the Landmarks Law:

> In any case where the department of buildings, the fire department or the department of health and mental hygiene, or any officer or agency thereof, or any court on application or at the instance of any such department, officer or agency, shall order or direct the construction, reconstruction, alteration or demolition of any improvement on a landmark site or in an historic district or containing an interior landmark, or the performance of any minor work upon such improvement, for the purpose of remedying conditions determined to be dangerous to life, health or property, nothing contained in this chapter shall be construed as making it unlawful for any person, without prior issuance of a certificate of no effect on protected architectural features or certificates of appropriateness or permit for minor work pursuant to this chapter, to comply with such order or direction.[54]

The Commission can bring suit to keep landmarks from deteriorating to the point of demolition by neglect. As described in a 2004 *New York Times* article:

> The Landmarks Preservation Commission…has sued owners when their neglect of a landmark has led to "severe structural instability." But Mark A. Silberman, the commission's general counsel, said such lawsuits were lengthy and costly.[55]

Meanwhile, other landmarks have deteriorated. A recent article in *AM New York* (July 18, 2008, pp. 4) chronicled "Crumbling History: Ten city landmarks or buildings in historic districts that have fallen into disrepair," including 43 MacDougal Street, Manhattan; 614 Courtlandt Avenue, the Bronx; 100 Clark Street, Brooklyn; the Empire Stores at 53-83 Water Street, Brooklyn; the Windemere, 400-06 West 57th Street, Manhattan; the RKO Keith's Theater, 135-29 Northern Boulevard, Queens; the Bedell House, 7484 Amboy Road, Staten Island; the John Rohr Houses, 502-506 Canal Street, Manhattan; 67 Greenwich Street, Manhattan; and the Corn Exchange Bank Building, 81-85 East 125th Street, Manhattan.[56] In the words of the article:

> While landmark designation is intended to protect historic or architecturally significant structures for future generations, dozens of neglected city landmarks or buildings in historic districts are in danger of being lost forever….
>
> Owners often allow landmarks to fall into disrepair because they want to profit from redevelopment at the site, lack the financial means to maintain the buildings to city standards or are elderly and find the repair process too daunting, preservationists and city officials said. In some cases, buildings were already decaying before being designated as landmarks…..

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[54] New York City Administrative Code, Title 25, Chapter 3, § 25–312, "Remedying of dangerous conditions."
[55] "Owners of Neglected Landmarks Would Face Fines Under Bill," *New York Times*, September 8, 2004, p. B3.
[56] Ryan Chatelain, "Shells of their former selves: Landmarks endangered by neglect," *AM New York*, July 18-20, 2008, p. 4. See Attachment No. 5 at the end of this report.

> In recent years, neglect has claimed landmarks such as… New Brighton Village Hall on Staten Island….. "It is a problem," [LPC deputy counsel John] Weiss said of neglected properties. "But it has to be kept in context that we have over 25,000 buildings that are in historic districts or are individual landmarks and…only a handful are candidates for demolition-by-neglect litigation."

By contrast, among properties that have easements monitored by the Trust, there have been to date no instances of anything approaching "demolition by neglect."

PART VII: MONITORING AND ENFORCEMENT

A. Commission Monitoring vs. Trust monitoring

Monitoring historic properties for compliance with regulations is an important tool for enforcement.

The Commission has a full-time enforcement staff of two, responsible for the approximately 24,000 properties under the Commission's jurisdiction. That staff responds to public complaints about apparent violations, but cannot regularly monitor all designated properties to check for violations of the Landmarks Law. Instead, community preservation advocacy groups encourage residents to report potential violations.

As an example, the Greenwich Village Society for Historic Preservation (GVSHP) operates a "Preservation Watch" program:

> GVSHP "Preservation Watch" program – a way to help ensure that serious landmarks violations are reported and the landmarks law enforced, and to preserve our neighborhood's historic integrity.
>
> GVSHP wants to ensure that landmarks violations are reported and acted upon as swiftly and thoroughly as possible. That is why we want you to know how you can report a landmarks violation to the City, and how you can report it to GVSHP to help advocate for its solution.
>
> If you see something which you believe may be a landmarks violation (destruction/inappropriate alteration of or unpermitted work upon a landmark structure or structure in a historic district), here's what you can do….[57]

Other community groups encourage similar involvement by residents. LPC Counsel Silberman confirms that LPC staff does not regularly monitor the c.24,000 properties under its jurisdiction.[58] He explains that the Commission looks to citizens or preservation advocacy groups to bring violations to its attention. Sometimes the LPC learns of violations through the processing of Buildings Department violations, sometimes LPC staff becomes aware of violations in the course of their work.[59]

By contrast, staff from the Trust makes annual visits to each property on which the Trust holds an easement, and compares current conditions with baseline photographs taken at the time of the easement donation, to ensure that no unapproved alterations have taken place and that the

[57] Greenwich Village Society for Historic Preservation web site: http://www.gvshp.org/violations.htm
[58] Information provided by Mark Silberman, Commission Counsel.
[59] Information provided by Mark Silberman, Commission Counsel.

property is being maintained in good repair. The law stipulates that the easement include this ability for the donee, as explained in Treasury Regulations 170A-14(g)(5)(ii):

> (ii) *Donee's right to inspection and legal remedies.* In the case of any donation referred to in paragraph (g)(5)(i) of this section, the donor must agree to notify the donee, in writing, before exercising any reserved right, *e.g.* the right to extract certain minerals which may have an adverse impact on the conservation interests associated with the qualified real property interest. The terms of the donation must provide a right of the donee to enter the property at reasonable times for the purpose of inspecting the property to determine if there is compliance with the terms of the donation. Additionally, the terms of the donation must provide a right of the donee to enforce the conservation restrictions by appropriate legal proceedings, including but not limited to, the right to require the restoration of the property to its condition at the time of the donation.

New York State law has a similar provision in Environmental Conservation Law § 49-0305(6):

> The holder of a conservation easement, its agents, employees, or other representatives may enter and inspect the property burdened by a conservation easement in a reasonable manner and at reasonable times to assure compliance with the restriction.

Consistent with these legal requirements, the Trust easement states in section 6a:

> **6.** **Remedies**. Grantee, in order to ensure the effective enforcement of this Easement, shall have, and Grantor hereby grants it, the following rights and remedies:
>
> a) At reasonable times and upon reasonable notice, the right to enter upon and inspect the Protected Façades and any improvements thereon. Grantor acknowledges that in order for Grantee to obtain proper access to inspect the Protected Façades, Grantee may require access through the interior of the Building.

The result is that the Trust is always aware of any enforcement issues regarding the properties on which it holds easements.

B. Commission Enforcement vs. Trust Enforcement

1. Commission

The Commission's enforcement capabilities are outlined in the Landmarks Law, which prescribes potential civil fines (from $25 to $1000, depending on the violation, for each day the violation is not cured) and/or imprisonment (no more than one year).[60] The law also permits the Commission to take violators to court, and to obtain temporary or permanent injunctions or

[60] New York City Administrative Code, Title 25, Chapter 3, §25-317 "Penalties for violations; enforcement."

restraining orders. If the alteration in question was also done without the proper Buildings Department permit, that agency will also take action.

The Landmarks Law originally provided for the possibility of criminal fines and imprisonment, but those proved impractical as an enforcement tool. According to a *New York Times* article of 1997:

> Preservationists have complained for years that the city's 30-year-old landmarks law was practically useless because it comprised only criminal penalties that have been virtually unenforced. Given the many more serious crimes they must contend with, police officers and prosecutors have been loath to pursue such crimes as a chiseled cornice or a jackhammered sidewalk.[61]

To correct that situation, in late 1997 the City Council passed legislation creating the current system of civil fines for violations of the Landmarks law.

> The creation of civil fines would allow the city's Landmarks Preservation Commission to issue a summons that would be referred to an administrative tribunal, which would be much more likely to issue a fine than a criminal court would. City officials also said that the bill would help reduce the backlog of outstanding landmarks violations from its current high of more than 4,000.[62]

The point of the fines was to encourage property owners to comply with the law.

> Jennifer J. Raab, the chairwoman of the Landmarks Preservation Commission, said she believed the civil fines would be an extremely useful tool in deterring and correcting violations. "This legislation sends a message that we're serious about compliance," she said. "We're here to work with you, but you can't just paint a historic building bright pink or put up flashing lights in the middle of Brooklyn Heights."[63]

The various preservation advocates who promoted the new law understood that its purpose was to promote preservation, rather than to raise money:

> Peg Breen, president of the New York Landmarks Conservancy, another strong advocate for the bill, stressed that it included grace periods for compliance and was not intended to be punitive.[64]

The Commission's counsel, Mark Silberman, confirms that the LPC's fines are meant to encourage compliance, rather than to be punitive; owners are given two grace periods in which to avoid a fine.[65]

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[61] "Accord on Shoring Up Landmark Law," *New York Times*, December 10, 1997, p. B.3.
[62] *Ibid.*
[63] *Ibid.*
[64] *Ibid.*
[65] Information provided by Mark Silberman, Commission counsel.

While the criminal fines remained in effect, and in fact the highest criminal fine was raised from $1,000 to $10,000, nevertheless,

> … Ms. Raab said the criminal fines would probably remain infrequently enforced.

According to Mr. Silberman, imprisonment, though still present as a possibility, has never been imposed for a Landmarks Law violation.[66]

2. The Trust

The Trust does not have a system for imposing financial penalties, and, not being a government agency, does not have the authority to impose criminal penalties such as imprisonment. Like the Commission, the Trust can and does issue "Stop Work Orders," if it discovers construction underway that has not been approved by the Trust. Instead of financial penalties, the deed of easement between the Trust and the donor gives the Trust certain rights vis-à-vis the owner, including the right to enter and inspect the property. As specified in the deed of easement, if the inspection identifies a violation, the owner typically has a period of fifty business days during which to propose a cure acceptable to the Trust in its sole discretion. If the Trust and the owner cannot agree upon a cure during that period, the Trust has the right to pursue legal remedies in court or arbitration to require the restoration of the property to its prior condition. If the violation is still not cured to the Trust's satisfaction, in accordance with the order of the court or the arbitrator, the Trust has the right to enter the property, restore the property to its former condition, and hold the owner responsible for the cost of all work performed, and any expenses incurred by the Trust. If the owner refuses to pay those costs and expenses, the Trust may obtain a judgment against the owner for those cost and expenses, and record the judgment in the official record of the county in which the property is located. The judgment, once properly recorded, operates as a lien on the property, and will be effective as of the date that the final judgment was recorded in the county's records.[67]

3. Trust vs. Landmarks Commission Enforcement

Both the Trust and the Commission share the same enforcement goal: to work with property owners to remedy violations. They have different tools with which to effect the remedies:

- The Commission has civil and criminal fines, and the potential for imprisonment
- The Trust has the right to pursue litigation or arbitration

Each organization's enforcement tools seem to be effective in achieving the goal of enforcement. Each organization acts independently to enforce its preservation restrictions.

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[66] Information provided by Mark Silberman, Commission Counsel.

[67] This description of the Trust's and the donor's obligations is based on information provided by the Trust. See section 6 in the sample easement attached to this report.

One distinction between the two organizations is that the Trust has the ability to monitor each property, and therefore can catch violations regularly and act to remedy them. The Commission, by contrast, has to rely on others to report violations, and some violations may well go undetected.

From 2004 to 2008, each year between 95% and 100% of the New York City properties monitored by the Trust have been in compliance with the preservation requirements of their easements.[68]

[68] Figures provided by the Trust.

PART VIII: GENERAL ADVANTAGES OF EASEMENTS OVER LPC REGULATION

Strong and well-established as it is, the LPC – like municipal preservation agencies around the country – suffers from a number of weaknesses. These weaknesses become especially apparent in a period when New York City is experiencing a massive construction boom. New York's preservation movement is struggling to keep up. By contrast, National Register listing combined with the granting of easements offers a clear path to preservation.

The chief weaknesses affecting the Commission are a chronic lack of resources, various political hurdles, and threats to its continuing existence.

A. Limited LPC Resources

Many potential landmarks wait years for consideration by the Commission which, given its limited budget and staffing, must set strict priorities for pursuing designations in any given year. As described in the Mayor's Management Report for Fiscal Year 2004, the Commission's annual goals were quite modest, especially compared with the number of public requests received for consideration of potential landmarks:

> *Performance Report: Optimize and preserve the City's architectural, historical, cultural and archeological assets.* Identify and designate eligible individual landmarks, scenic landmarks and historic districts. LPC received 233 requests from individuals and organizations for evaluation of potential landmark status during the reporting period. The volume of requests received is consistent with previous years and all applications were reviewed by LPC's research staff. A total of 15 sites were granted landmark status this fiscal year, just below the target of 16. The 12 individual landmarks and three historic districts designated consisted of 220 buildings…."[69]

By contrast, National Register listings and preservation easements can happen as soon as a property owner expresses interest. That is because unlike the Commission, which designates new landmarks and historic districts according to its own schedule and priorities, the State Historic Preservation Office that processes National Register nominations will consider any meritorious nomination presented to it. The owners of many historic properties not yet protected by LPC designation have supported the nomination of their properties to the National Register, and donated preservation easements that are now protecting those properties.

Limited resources also result in the Commission staff's inability to mount a regular program of monitoring landmarks for maintenance and violations (see above, Part VII A).

[69] New York City's Mayor's Management Report, fiscal year 2004, section describing the Landmarks Preservation Commission.

B. The Hardship Provision

New York City's Landmarks Law includes a provision that permits demolition in cases of demonstrated economic hardship. If the Commission finds that the owner of a landmark, who had applied to carry out an inappropriate alteration or a demolition, faces a financial hardship, the Commission can try to find a buyer or tenant for the property that will remedy the hardship. Otherwise, the Commission will grant permission to alter or demolish the property as required to mitigate the hardship.

Under the terms of the provision:

> If, within the one hundred eighty day period following the commission's preliminary determination...the commission shall not have succeeded in obtaining a purchaser or tenant of the improvement parcel…the commission…may transmit to the mayor a written recommendation that the city acquire a specified appropriate protective interest in the improvement parcel…. If, within ninety days after transmission of such recommendation…the city does not…enter into a contract with the owner…to acquire such interest…the commission shall promptly grant, issue and forward to the owner, in lieu of the certificate of appropriateness requested by the applicant, a notice to proceed [with the originally proposed alteration or demolition].[70]

From its creation in 1965 through 2007, the Commission considered 17 hardship applications.[71] Nine (9) landmarks have been demolished following a successful hardship application: the Manhattan Club (former Jerome Mansion) at Madison Avenue and East 26th Street, Manhattan (1967); 51 Eighth Avenue, Manhattan (1972); 74-84 Greene Street, Brooklyn (1979); the Marymount School, Manhattan (1982); the former Mt. Neboh Synagogue at 130 West 79th Street, Manhattan (1982)[72]; the Knickerbocker Field Club, Brooklyn (1988), and three houses at 351, 352 and 353 Central Park West (1989).[73] The Commission found hardship and granted permission to demolish three other properties, but those have survived: 38-40 Hicks Street, Brooklyn (1970); the Assumption School, Brooklyn Heights (1973); and the Poppenhusen Institute in College Point, Queens (1979).[74] Most recently, in October 2008, the Commission found hardship for St. Vincent's Hospital in the Greenwich Village historic district.

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[70] New York City Administrative Code, Title 25, Chapter 3, § 25-309, "Request for certificate of appropriateness authorizing demolition, alterations or reconstruction on ground of insufficient return," paragraph "i" (4) "a" and "b."
[71] "Testimony of the Municipal Art Society Before the New York Landmarks Preservation Commission," by Melissa Baldock, Kress/RFR Fellow for Historic Preservation and Public Policy; St. Vincent's Hardship Application - Greenwich Village Historic District June 3, 2008.
[72] "Landmark Hardship Plea Backed," *New York Times*, July 24, 1982, p. 27.
[73] "Developer Wins a Point in Fight on Landmarks," *New York Times*, December 19, 1988, p. B3, and "A Neighborhood Assists Central Park West Project," *New York Times*, January 4, 1991, p. B4.
[74] Information on hardship applications and demolitions provided by Mark Silberman, Commission Counsel.

C. Political Hurdles Facing the LPC

All Commission designations require approval by the City Council (formerly by the Board of Estimate, a political body which no longer exists). Many designations have been overturned, for purely political reasons, including two entire historic districts – Steinway and Lalance-Grosjean.

The *New York Times* chronicled one of the most egregious examples:

> Preservationists cheered last year when the [Landmarks Preservation] commission designated the Jamaica Savings Bank on Jamaica Avenue, 17 years after the Board of Estimate rejected the commission's first attempt to designate it. Their hopes collapsed in September, however, when the City Council overturned the designation. The Council, including the entire Queens delegation, rejected the designation of the four-story Beaux-Arts building built in 1897 after the councilman who represents Jamaica, Archie Spigner, lobbied against it. … "That was a tough loss," [Jeffrey A. Kroessler, president of the Queensborough Preservation League] said. "We ran into political horse-trading of the highest caliber. If this sets a precedent, it's going to be a problem not only here in Queens, but all over the city."[75]

The Jamaica Savings Bank still stands, and was recently designated for a *third* time. But other landmarks whose designations were overturned have been demolished, including the "Dvorak House" at 327 East 17th Street – the house in which the composer lived while composing his internationally renowned *New World Symphony*.[76]

By contrast, since preservation easements are voluntary donations, they do not involve local politics.

D. Threats to the Commission's Continuing Existence

Political opponents of landmarks commissions in various parts of the country have attempted, in some instances successfully, to circumvent the commissions' authority by changing their role within the local governmental structure, or by defunding them altogether. During the fiscal crisis of the late '70s and again in the late '80s and early '90s, proposals surfaced at New York City's Board of Estimate and the City Council to disband the Commission as a cost-saving measure. As described in various *New York Times* articles:

> **1979**
>
> Mayor Koch is expected to tell the Landmarks Preservation Commission that it must come up with private financing to support its activities or virtually go out of existence, City Hall aides confirmed yesterday. The action is part of a continuing effort on the part of the Mayor to close the city's budget gap…. Although the Landmarks Commission's budget is minuscule by New York City standards…it is one of a number of small

[75] "Historic Preservation Comes of Age in Queens," *New York Times*, February 3, 1993, p. B1.

[76] *New York Times*, December 5, 1993, p. CY8.

agencies where the Mayor believes savings must be made before he can begin layoffs or drastic cuts in more essential services.[77]

1980

A group of New York City's small municipal agencies are reportedly among those that Mayor Koch is seeking to eliminate as part of his effort to close budget gaps over the next two years…. Mayor Koch is reportedly considering eliminating…the Landmarks Preservation Commission….[78]

1988

Several hundred preservation-minded New Yorkers, opposed to a Koch administration plan to overhaul the process by which landmarks are designated, staged a rally yesterday outside Pennsylvania Station. The razing of the original station in 1963 was a catalyst in a drive that led to the adoption of the current landmarks preservation laws…. "This proposed set of revisions would eviscerate the landmarks law," City Comptroller Harrison J. Goldin said. "It would cause carnage to the physical heritage of New York." "It is a not-too-clever scheme to disembowel the landmarks commission with a whole series of proposals that seem innocuous but are calculated to paralyze the process," said James Marston Fitch, a member of the commission in the 1970's.[79]

1992

Zero dollars. Zero employees. Preservationists and planners in and out of New York City government were startled last week when City Hall presented those figures for the Landmarks Preservation Commission for the next fiscal year. They had already warily greeted a proposal in January to shift some administrative tasks from the landmarks commission to the City Planning Department. That economy measure was developed without consulting either Laurie Beckelman, the chairwoman of the landmarks commission, or Planning Director Richard L. Schaffer. And when the zeros appeared in the Mayor's Management Report last week, with the landmarks budget folded into the Planning Department's, suspicion grew that a more fundamental consolidation might be under way.

…"I don't want landmarks to be subsumed or their mission to be diluted," said Councilwoman June M. Eisland, a Bronx Democrat who heads the Council's Land Use Committee. …By Friday afternoon, Deputy Mayor Barbara J. Fife said the idea of merging the agencies' budgets "is no longer contemplated" and that the two commissions would "keep their independent units of appropriation."

[77] "Landmark Unit Facing a Cutoff of City's Funds," *New York Times*, January 4, 1979, p. B3.
[78] "Koch May Eliminate Some City Agencies," *New York Times*, January 10, 1980, p. B12.
[79] "Rally Protests Proposal to Alter Landmark Law," *New York Times*, June 30, 1988, p. B1.

> "I was worried that there was a total loss of independent landmark personnel," said Borough President Ruth W. Messinger of Manhattan. Councilman Stephen DiBrienza, a Brooklyn Democrat who heads the Council's landmarks subcommittee, said it appeared to be "a wholesale movement of the landmarks commission into city planning." When told that city officials had dropped the idea, Ms. Messinger still expressed concern. "I think they're being put under the umbrella of an agency that has a different function," she said, "one that's sometimes at odds with the function of landmarks."[80]

> **1994**

> Opening negotiations with Mayor Rudolph W. Giuliani over his plan to close a $1.1 billion budget gap with deep spending cuts, the City Council revealed a wish list of alternatives yesterday, including...the consolidation of nearly a dozen of New York City's agencies. … The Council proposed merging several agencies: ....and the Landmarks Commission with the Department of City Planning.[81]

The Commission will likely survive as an independent agency well into the foreseeable future – but that could change. Should that happen, LPC regulation could be altered, or disappear altogether.

By contrast, easements – by definition – continue in perpetuity. Easements do not include a means for being extinguished. According to New York State Consolidated Laws §1951:

> §1951. Extinguishment of non-substantial restrictions on the use of land.

> 2. When relief against such a restriction [as an easement] is sought in an action to quiet title or to obtain a declaration with respect to enforceability of the restriction or to determine an adverse claim arising from the restriction, or is sought by way of defense or counterclaim in an action to enforce the restriction or to obtain a declaration with respect to its enforceability, if the court shall find that the restriction is of no actual and substantial benefit to the persons seeking its enforcement or seeking a declaration or determination of its enforceability, either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment, or for any other reason, it may adjudge that the restriction is not enforceable by injunction or as provided in subdivision 2 of section 1953 and that it shall be completely extinguished upon payment, to the person or persons who would otherwise be entitled to enforce it in the event of a breach at the time of the action, of such damages, if any, as such person or persons will sustain from the extinguishment of the restriction.

In other words, to extinguish a Trust easement under New York law, a court would have to find that the easement had no actual and substantial benefit to the Trust, either because its purpose

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[80] *New York Times*, "Budget Shift Stirs Fears for Landmarks Panel," 2/16/1992, p.41.
[81] *New York Times*, "City Council Offers Plans on Budget," 11/16/1994, p.B3.

had been accomplished, or because it was not capable of being accomplished. Absent such a finding, the easement remains in place in perpetuity.

Should the Trust itself go out of existence, it would be obliged to transfer the easements it holds to a similar non-profit organization with a similar purpose. As described in Treasury Regulations Section 1.170A-14(c)(2):

> (2) *Transfers by donee.* A deduction shall be allowed for a contribution under this section only if in the instrument of conveyance the donor prohibits the donee from subsequently transferring the easement (or, in the case of a remainder interest or the reservation of a qualified mineral interest, the property), whether or not for consideration, unless the donee organization, as a condition of the subsequent transfer, requires that the conservation purposes which the contribution was originally intended to advance continue to be carried out. Moreover, subsequent transfers must be restricted to organizations qualifying, at the time of the subsequent transfer, as an eligible donee under paragraph (c)(1) of this section. When a later unexpected change in the conditions surrounding the property that is the subject of a donation under paragraph (b)(1), (2), or (3) of this section makes impossible or impractical the continued use of the property for conservation purposes, the requirement of this paragraph will be met if the property is sold or exchanged and any proceeds are used by the donee organization in a manner consistent with the conservation purposes of the original contribution. In the case of a donation under paragraph (b)(3) of this section to which the preceding sentence applies, see also paragraph (g)(5)(ii) of this section.

In other words, not only are easements perpetual, but according to the law the easement will always be held by an organization having the requisite commitment to preserve the property.

CONCLUSION

As demonstrated in this Report, the protections offered by LPC regulation and the restrictions resulting from the donation of preservation easements to the Trust differ significantly. While both work to protect New York City's historic properties, they work differently, and those differences can and do lead to significantly different outcomes.

AUTHOR'S QUALIFICATIONS

Anthony W. Robins, vice-president of Thompson & Columbus, Inc., is an architectural historian and historic preservation consultant, specializing in New York City, with more than 30 years' experience in the field.

For 19 years (1979-1998), Mr. Robins served on the staff of the New York City Landmarks Preservation Commission. As Deputy Director of Research and then Director of Survey, he supervised, researched, wrote and edited hundreds of reports on landmarks and historic districts, while advising the Chairman on preservation policy and representing the Chairman and the Commission to government agencies and task forces involved with landmarks issues.

At Thompson & Columbus, Inc., Mr. Robins has worked closely with the New York State Historic Preservation Office on the preparation of dozens of nominations to the State and National Registers of Historic Places. He has also provided consultant services to various preservation organizations throughout New York City.

Mr. Robins is the author of several books on New York City architecture and history, including *The World Trade Center* (Pineapple Press, 1987) and *Subway Style* (Stewart, Tabori & Chang, 2004). He has published articles on New York City architecture and history in, among others, *The New York Times, Progressive Architecture, Metropolis, Architectural Record, Preservation*, and the *Encyclopedia of New York City*. His articles on historic preservation include "Historic Preservation and Planning: The Limits of Prediction," in the *Journal of the American Planning Association* (Vol. 61, No. 1, Winter 1995), and "Coping with History: Cultural Landmarks," *National Trust for Historic Preservation: Preservation Forum* (May-June 1994).

Mr. Robins has lectured nationally and internationally on New York City architecture and preservation. He is also the author of the "Heritage Trails Sitemarkers" (New York's equivalent of Boston's Liberty Trail), a series of 40 sitemarkers at historic and architectural sites in Lower Manhattan.

Since 1995, Mr. Robins has been an adjunct professor at New York University's School of Continuing and Professional Education. He has also taught at Pratt Institute's Graduate Center for Planning and Environment, and Williams College.

Mr. Robins has won several awards, including the "New York City Book Award" from the New York Society Library for *Subway Style* (2004), and the "Samuel H. Kress Foundation Fellowship in Historic Preservation and Conservation" (the "Rome Prize," 1997) from the American Academy in Rome.

ATTACHMENTS

The following documents are attached to this report:

1. The New York City Landmarks Law
2. Title 63 of the Rules of the City of New York – the Landmarks Commission's rules and guidelines
3. The Secretary of the Interior's Standards for the Treatment of Historic Properties
4. A sample residential easement currently in use by the Trust for Architectural Easements
5. Article from *AM New York* on maintenance issues for New York City landmarks
6. A summary of maintenance corrections for properties subject to Trust easements.