

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. *Id.*

7. *Id.*

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

At this time, the Commission was very small, with only five staff members during most of the 1970s.⁸ The number of historic resources it regulated was much fewer than today, with a total of 5576 designated landmarks in 1970 and 9767 in 1976.⁹ Roth explained that even though enforcement action was not often taken, he did keep a watchful eye.¹⁰ Roth attributed the maintenance of a street presence, albeit minimal, to discouraging non-compliance. While not an official policy, Roth and other staff members in the early years of the LPC, as he recalls, regularly walked historic districts to stymie “the tide of [potential] violations”.¹¹ The areas that they walked were determined by the number and degree of complaints they would receive.¹² While walking the preservation beat, LPC staff would not always issue violations in an official capacity but they interacted with property owners and tenants, explaining what the law required, what was allowed under it and what was not.¹³ Otis Pearsall referred to these efforts as inefficient “jaw boning pure and simple.”¹⁴ However, Roth insisted that these measures were useful in maintaining compliance with the Landmarks Law.¹⁵

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

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

9. *Id.* at 40.

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

11. *Id.*

12. *Id.*

13. *See Id.*

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

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

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

17. *Id.* at 35.

18. *Id.* at 46.

19. *Id.* at 47.

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

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

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

21. *Id.*

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

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

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

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

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

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

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

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

Then, the LPC was sued by the Penn Central Transportation Company.²⁹ The inevitable constitutional challenge that Frank Gilbert expected was underway. The Penn Central case saw the New York State Supreme Court issue an opinion on January 21, 1975.³⁰ Then, on June 23, 1977 the highest court in New York State, the Court of Appeals, issued its own opinion.³¹ While the Landmarks Law was upheld in both instances, Penn Central Transportation Company was relentless in seeking a judgment in its favor and appealed repeatedly.³² It was clear that the Commission's fate would be determined. As Penn Central's case climbed the ladder of the court system, the LPC anxiously awaited the decision. Was the New York City Landmarks Law constitutional or not?

II. A SYSTEM IS GROWN (1978-1994)

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

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

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

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

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

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

34. *Id.* at 138.

35. *Id.* at 107.

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

37. *Id.* at 132.

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

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

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

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

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

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

41. *Id.* at 70.

42. *Id.* at 72.

43. *Id.* at 71.

44. *Id.* at 72.

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

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

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

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

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

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

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

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

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

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

51. *Id.*

52. *Id.*

53. *Id.*

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

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

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

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

55. *Id.*

56. *Id.*

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

58. ‘I Spy’, *supra* note 57.

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

60. *Id.*

61. *Id.*

62. *Id.*

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

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

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

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

64. *Id.*

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

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

67. *Id.*

68. *Id.*

69. *Id.*

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

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

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

71. *Id.*

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

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

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

75. *Id.*

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

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

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

79. *Id.* at 40.

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

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

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

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

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

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

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

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

84. *Id.* at 30.

85. *Id.*

86. *Id.* at iii.

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

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

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

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

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

90. See *id.*

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

92. See Gray, *supra* note 89.

93. *Id.*

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

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

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

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

95. Gray, *supra* note 89.

96. See *id.*

97. *Id.*

98. Blau, *supra* note 94.

99. Gray, *supra* note 89.

100. *Id.*

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

III. FORMALIZING ENFORCEMENT (1994-1998)

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

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

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

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

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

104. Slatin, *supra* note 102.

105. Dunlap, *supra* note 102.

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

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

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

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

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

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

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

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

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

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

114. *Id.*

115. *Id.*

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

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

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

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

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

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

119. *Id.*

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

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

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

121. *Id.*

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

123. *Id.*

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

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

126. *Id.*

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

128. *Id.*

129. *Id.*

Raab asked Silberman, her Deputy Counsel, to draft an amendment to the legislation that consciously created a “forgiving system” and, when it was completed, she approached Councilman Fisher.¹³⁰ On December 9, 1997 the amendment to the Landmarks Law was proposed by the Landmarks, Public Siting and Maritime Uses Subcommittee and subsequently approved by the Land Use Committee.¹³¹ Eight days later, the amendment to the Landmarks Law passed the City Council and was signed into law by Mayor Giuliani on January 6, 1998.¹³²

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

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

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

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

132. *Id.*

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

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

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

136. *Id.*

137. *Id.*

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

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

IV. FUNCTIONING AND MATURING (1998-2010)

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

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

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

139. *Id.*

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

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

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

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

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

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

On September 15, 2003, the LPC filed another demolition by neglect suit against Retrovest Associates, Inc., the owners of New Brighton Village Hall.¹⁴⁸ New Brighton Village Hall, a “three-story brick building with a steep mansard roof,” was designated an individual landmark on September 21, 1965 as “an interesting example of the French Second Empire Style of architecture in an American rural setting.”¹⁴⁹ The Department of Buildings ordered that the structure be demolished, following what would seem to have been relentless neglect. Unlike the Skidmore House case, the LPC agreed to settle out of court with the owners of New Brighton Village Hall on May 20, 2005.¹⁵⁰ The settlement required the owners of New Brighton Village Hall to pay \$50,000 to the General Fund of the City of New York.¹⁵¹ In addition to the cash

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

145. *Id.*

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

147. *Id.* at 693.

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

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

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

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

settlement, the property was given to the City, effectively increasing the value of the settlement to approximately \$1,000,000.¹⁵² The land is now used as subsidized senior housing.¹⁵³ Following this settlement, the LPC requested the \$50,000 from the City and was granted such, subsequently using the funds to digitize its collections of historic photographs.¹⁵⁴

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

With an ever-increasing regulatory purview, a second Enforcement Officer was hired under Chair Robert Tierney in 2004.¹⁵⁷ This would seem to confirm that enforcement of the Landmarks Law was becoming a higher priority of the LPC, a possible result of being on the mind of the City’s Mayor and its growing presence in the conscience of preservationists in general. Now, instead of one Enforcement Officer responsible for approximately 23,000 protected properties, the duties of enforcement were able to be distributed among two Enforcement Officers, each responsible for approximately 11,500 designated landmarks. While certainly an improvement, preservation advocates contended that this responsibility was still unwieldy.¹⁵⁸

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

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

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

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

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

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

156. *Id.* at 13.

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

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

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

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

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

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

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

161. *Id.* at 44.

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

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

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

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

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

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

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

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

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

170. *Id.* at 38.

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

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

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

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

In 2006, approximately a year after the Landmarks Law was amended to include demolition by neglect as an enumerated course of enforcement, the LPC filed suit against Alfred Palmer, the owner of 135 Joralemon Street in the Brooklyn Heights Historic District, after issuing several Failure to Maintain violations.¹⁷⁵ Preservation pioneer Otis Pearsall noted that he had been complaining to the Commission for over twenty years about this particular property.¹⁷⁶ The City settled out of court with the owner in 2006.¹⁷⁷ Two years later, the LPC filed suit against three more property owners for failure to maintain their landmarked properties in a state of good repair in *City of New York v. Toa Construction, Inc.*,¹⁷⁸ where the individually landmarked Windermere Apartment Complex on West 57th Street and Ninth Avenue was being neglected; *City of New York v. Corn Exchange, LLC*,¹⁷⁹ where the individually landmarked Corn Exchange Bank on Park Avenue and 125th Street was being neglected; and, *City of New York v. Estate of Johnson*,¹⁸⁰ where a row house on MacDonough Street in the Stuyvesant Heights Historic District was being neglected. The Windermere case was settled out of court, including \$1.1 million paid to the City, while the Corn Exchange case remains unresolved. The building is currently almost entirely collapsed,¹⁸¹ and the case has been further complicated by the defendant filing for bankruptcy. A default order was issued in September of 2008 in the MacDonough case when the property was transferred. According to John Weiss, the new owner of 217 MacDonough Street is obligated to make repairs due to negotiations amongst the LPC, Law Department, buyer, and defendant seller.¹⁸²

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

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

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

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

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

179. *City of New York v. Corn Exch., LLC*, No. 401846/2008 (N.Y. Sup. Ct. Jan. 29, 2009), available at http://decisions.courts.state.ny.us/fcas/FCAS_docs/2009FEB/300401846200801SCIV.pdf (order denying preliminary injunction).

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

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

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

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

stable's roof."¹⁸⁴ The property owner blamed the LPC for the condition of the building, saying it was a result of the LPC's "unwieldy city bureaucracy."¹⁸⁵

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

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

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

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

185. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

V. HOW THE LANDMARKS LAW IS ENFORCED TODAY

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

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

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

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

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

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

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

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

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

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

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

198. *Id.*

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

200. *Id.*

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

202. *Id.* at 107.

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

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

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

an optional field for the complainant to identify themselves, and a portion for staff use that will later receive a complaint number, a description of the enforcement action taken, and additional comments, if applicable. At the bottom of the form, the footer provides a telephone number where an Enforcement Officer can be reached. Once the form is completed, it is to be mailed to the LPC to the attention of the Violations Unit, also known as the Department of Enforcement. In lieu of using the LPC's official form, some preservation advocacy groups²⁰⁶ and community boards have created their own forms, which are mailed to the LPC.²⁰⁷

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

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

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

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

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

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

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

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

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

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

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

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

213. *Id.*

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

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

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

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

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

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

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

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

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

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

219. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Unlike the first NOV, which serves as the final grace period, the second NOV is accompanied by a fine. According to the Landmarks Law, Type A violations can be accompanied by fines of up to \$5000. A Type B NOV can be accompanied by a fine of up to \$500.²³⁴ If the perpetrator does not correct the condition following this Type B NOV, a fine of \$50 per day can be imposed.²³⁵ According to Lily Fan, Director of Enforcement at the LPC:

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

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

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

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

234. *Id.*

235. *Id.*

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

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

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

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

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

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

237. *Id.*

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

239. *Id.*

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

241. *Id.*

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

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

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

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

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

243. *Id.*

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

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

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

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

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

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

VI. CASE STUDIES

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

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

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

249. *Id.*

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

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

A. The Lenox Hill Brownstones

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

Unfortunately, as preservation advocates would suggest, this protection did not play out as it should have. By 1976, the row of six row houses was owned by Lenox Hill Hospital,²⁵³ a local private hospital which has been functioning on the Upper East Side since it moved there in 1868.²⁵⁴ Thirteen years after the Hospital accrued all six row houses, it proposed, sought, and gained approval from the LPC to alter the buildings to create a sports medicine facility designed by James Polshek.²⁵⁵ However, this plan was never executed.²⁵⁶ On November 21, 1995, having received complaints from the local historic preservation advocacy group Friends of the Upper East Side Historic District, the LPC's enforcement staff investigated the unpermitted installation of lighting at the facades of 110, 112, and 114 East 76th Street.²⁵⁷ As this was prior to the amendment to the Landmarks Law in 1998, NOV's were issued outright, did not carry a fine, and were not preceded by a Warning Letter. A NOV for each infraction, described as "installation of [a] light

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

252. *Id.*

253. Endangered Bldgs. Initiative: 110-120 East 76th St., THE N.Y. LANDMARKS CONSERVANCY, http://www.nylandmarks.org/programs_services/endangered_buildings_initiative/110_120_east_76th_st/ (last visited Apr. 15, 2012)[hereinafter Endangered Bldgs. Initiative].

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

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

256. *Id.*

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

fixture on facade without permit(s)” was issued to Lenox Hill Hospital on December 8, 1995.²⁵⁸

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

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

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

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

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

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

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

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

264. *Id.*

265. *Id.*

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

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

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

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

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

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

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

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

270. *Id.*

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

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

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

B. 16-18 Charles Street

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

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

273. *Id.*

274. *Id.*

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

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

277. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

287. *Id.*

288. *Id.*

289. *Id.*

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

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

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

On November 3, 2005, following a complaint filed by Christabel Gough, a member of the Society of the Architecture of the City,²⁹³ the LPC issued a Warning Letter for the “[r]emoval of canopy, installation of planter and installation of door and sidelights without permit(s).”²⁹⁴ The historic canopy was added to 16-18 Charles Street during the 1920s when a savvy real estate entrepreneur rebranded the row houses.²⁹⁵ While not original, the canopy of 16-18 Charles Street was extant at the time of its designation and is architecturally significant. According to LPC Enforcement Officer Kathleen Rice, the historic iron canopy is in the basement of 16-18 Charles Street,²⁹⁶ but this could not be confirmed. Receiving no response to the Warning Letter, the LPC issued NOVs for Violation 06-0230, which addressed the missing canopy, and Violation 06-0229.²⁹⁷

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

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

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

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

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

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

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

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

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

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

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

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

C. Sushi Samba 7

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

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

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

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

304. Amateau, *supra* note 302.

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

In February of 2007, a settlement was reached between Sushi Samba 7 and the LPC. The owners of Sushi Samba 7 signed an agreement with the LPC, which included authorization to build an approved rooftop addition in place of their illegal trellis addition, while still paying a settlement of \$500,000. According to Virginia Waters of the Corporation Counsel Office of the City of New York, the LPC was entitled to a total of \$8.5 million in fines, or \$5000 per day for the duration of the violation, but sought a lesser amount.³⁰⁷ As previously noted, daily fines cannot be levied at an administrative level but can be sought in court. The \$500,000 was to be paid to the City of New York by 2010, with initial payments totaling \$100,000 within the first three months. Sushi Samba 7 was allowed to build its approved enclosed second story by May of 2007.³⁰⁸

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

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

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

307. Amateau, *supra* note 302.

308. Anderson, *supra* note 305.

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

310. *Id.*

D. The Windermere

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

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

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

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

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

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

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

315. *Id.*

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

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

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

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

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

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

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

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

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

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

322. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

332. *Id.*

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

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

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

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

A. Adopt Proactive Practices

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

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

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

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

337. *Id.*

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

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

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

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

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

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

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

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

342. Blau, *supra* note 94.

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

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

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

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

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

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

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

B. Raise Awareness of The LPC as an Enforcement Entity

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

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

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

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

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

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

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

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

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

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

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

353. *Id.*

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

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

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

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

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

C. Hold All Parties Accountable and Equally Responsible

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

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

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

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

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

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

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

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

D. Enable the Private Right of Action

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

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

361. *Id.*

362. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VIII. CONCLUSION

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

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

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

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

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

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

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