

## SPEECH: NEW YORK CITY'S LANDMARKS LAW

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Welcome back to the Fitch Forum. Our next panel is going to focus our conversation from the national level and then right back in on New York City. This is a celebration of New York City's Landmarks Law,<sup>1</sup> and we're going to take some hard looks at it and ask some questions. What are some things we might want to do to improve our Landmarks Law? What are some of the problems that we're confronted with as preservation advocates?

Before we get to sort of tear down the Landmarks Law and take that vicious look, we're going to take a couple of minutes to talk about the Landmarks Law. One of the things that we've heard this morning, that we hear all the time, is people don't really know too much about their landmarks law, in New York, in other jurisdictions and municipalities that have ordinances that are modeled on New York's. So I'm going to set myself a timer because I'm going to be really strict about the time, and we're going to take a look at the city's Landmarks Law.

Before we can ascribe a normative criteria to the Landmarks Law, it's probably important to look at some of the jurisprudential and philosophical underpinnings that brought us to having such a robust and celebrated landmarks law. I'm really not going to duplicate, to the extent possible, the things that Jerold spoke about this morning during the keynote address for a couple of reasons. The first is that you've already heard it; the second is there's no way I could do it nearly as well and I don't want to embarrass myself. So where you see me start to be duplicative, I will retreat and hope you understand.

The jurisprudential and philosophical underpinnings of the Landmarks Law are important. The notion that the government can regulate private property for purposes of health and safety, for purposes of the general welfare, it's something that we in this room all sort of hold as sacred and obvious. But actually, it's not obvious. Not to echo the calls of the property rights movement—with whom I disagree on many things—it is a spectacular thing that we have a landmarks law that does allow us to regulate private property for this purpose. It is not an unreasonable thing, it is not something that we should question as preservationists, but it's something that we should really appreciate. It didn't just sort of happen; it evolved.

It evolved because the national legal landscape, starting in the early twentieth

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1. Law of Apr. 19, 1965, No. 46, 1965 N.Y. Local Laws 261 (codified as amended at N.Y.C. ADMIN. CODE §§ 25-301 to 25-321 (West, Westlaw through Local Law 29 of 2011)).

century, was shifting to adopt what is sort of the modern understanding of the regulation of private property. In 1916, it's put on by the impact of skyscrapers on light and air, and it's put on by the real estate industry and also because of the impact of an encroachment of factories on fashionable residential neighborhoods in New York City. New York City passed what is arguably the nation's first zoning ordinances; that's in 1916.<sup>2</sup> There's a footnote there: L.A. beat us to the punch here too. In 1909 there was a zoning ordinance in Los Angeles.<sup>3</sup> It wasn't as comprehensive as New York's zoning ordinance, but at least they deserve some recognition for getting us there, getting there first, as they did with their landmarks law.

Again in 1916, we have the City's zoning ordinance. Then, in 1921, Secretary of Commerce Herbert Hoover convened the committee to consider the question of zoning.<sup>4</sup> That group eventually promulgated what's known as the Standard Zoning Enabling Act.<sup>5</sup> Out of nothing, sort of after the twentieth century, we start to see, stemming in part from the City Beautiful Movement and in part because of the modernization and urbanization of our cities, we see zoning has sort of come to be. Then in 1926, in a case called *Village of Euclid v. Ambler Realty*,<sup>6</sup> the Supreme Court sustained the constitutionality of zoning and made clear that the government can regulate private property, notwithstanding the fact that the regulation might diminish the value of that property.<sup>7</sup> You could do it without violating the Due Process or Equal Protection Clauses of the United States Constitution, and this is really important.

As Jerold pointed out earlier, the Court wasn't part of some grand movement; the Court was doing this, in part, to protect private ownership. This was to protect the value of your property; the government could step in and regulate the way your neighbors use their own property. This is not new; this stems from nuisance and a long line of cases that we won't get into, but it's significant. It's significant for our purposes because it came on the heels of another Supreme Court decision that has implications for our own Landmarks Law, and particularly *Penn Central*.<sup>8</sup> That is *Pennsylvania Coal v. Mahon*.<sup>9</sup> This is the famous pronouncement by the Court that the business of the government can't happen—a government can't regulate property without having to pay for

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2. N.Y.C. Bd. Of Estimate & Apportionment, Bldg. Zone Res. (July 25, 1916), available at [http://www.nyc.gov/html/dcp/pdf/history\\_project/1916\\_zoning\\_resolution.pdf](http://www.nyc.gov/html/dcp/pdf/history_project/1916_zoning_resolution.pdf).

3. *Ex parte Quong Wo*, 118 P. 714, 715 (Cal. 1911) (describing original ordinance passed in December of 1909 and establishing seven segregated "industrial districts").

4. Richard H. Chused, *Euclid's Historical Imagery*, 51 *CASE W. RES. L. REV.* 597, 598-99 (2001).

5. *Id.* at 599. See also Eric R. Claeys, *Euclid Lives? The Uneasy Legacy of Progressivism in Zoning* 73 *FORDHAM L. REV.* 731, 739-40 (2004).

6. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

7. *Id.* at 395-97.

8. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

9. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

everything it does.<sup>10</sup>

So recognizing the need to regulate property, the Court went on to say that while property can be regulated, if regulation goes too far it's going to be recognized as a taking, and that's impermissible. That's the big question that's subsequently answered, at least answered in part, by *Penn Central*. That's the void that a lot of our preservation jurisprudence is struggling with now—when does a regulation go too far? We can synthesize these cases, and what we see is that temporally by this point we know that the government is not considered to be acting unconstitutionally when it regulates private property in the interest of health and safety. What's great is that health and safety is pretty broad and inclusive, and it's a short jump from health and safety to public welfare. Public welfare, as we all know, is a pretty broad and encompassing statement as well.

We see in a subsequent Supreme Court decision,<sup>11</sup> which was also alluded to this morning, the concept of public welfare as broad and inclusive.<sup>12</sup> This was in the context of a condemnation, but the issue here was absolutely on point for preservation purposes. We want to have a public welfare that encompasses the spiritual as well as the physical and the aesthetic as well as the monetary. Community should be beautiful as well as healthy, spacious as well as clean, and well balanced as well as carefully patrolled. The highest Court in the land has now pretty much said that the government is in the business of regulating for the public welfare, and public welfare includes aesthetics.<sup>13</sup> That is sort of the background to our Landmarks Law.

The Landmarks Law didn't just sort of happen after 1954, of course. There had been people advocating for such a law in New York for many years. But, it's unsurprising that with this sort of nationally evolving jurisprudence and the City Beautiful Movement and the sort of transformation of the city's art societies into what were essentially urban planning think-tanks early on, that we'd find a landmarks law that came out of this philosophy. That's precisely what happened. Our Landmarks Law was passed in 1965, shortly after *Berman v. Parker*, and it mirrored something called the Bard Act.<sup>14</sup> It's interesting though that the Bard Act was sort of drafted in 1913 when some of these ideas about zoning were just being floated around. So the idea of aesthetic protection and the protection of historic resources has really been a passenger in the vehicle the whole time. It only surfaced, though, with the

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10. Mahon, 260 at 416 (“We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”).

11. *Berman v. Parker*, 348 U.S. 26 (1954).

12. The case mentioned earlier was *Kelo v. City of New London*, 545 U.S. 469 (2005). *Kelo* quotes *Berman*'s statement regarding broad powers. *Id.* at 481. (quoting *Berman*, 348 U.S. at 33).

13. *Berman*, 348 U.S. at 33 (“The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary.”).

14. ANTHONY C. WOOD, *Preserving New York: Winning the Right to Protect A City's Landmarks* 10 (2008); See Carol Clark, *Albert S. Bard and the Origin of Historic Preservation in New York State*, 18 *WIDENER L. REV.* 323 (2012).

passage of New York City's law.

But despite the fact that we have this underpinning, New York City is still losing buildings. It's important to remember that while we were talking about zoning and we were talking about early historic preservation and we were talking about protecting aesthetics, this was a city that was losing buildings. That's not surprising. In the absence of a robust preservation law, New York City will demolish its historic resources. This is a city that's characterized and defined by two things: forward momentum and finite space. This is a recipe for demolition, and this is why New York City still badly needed a landmarks law.

Some of the buildings that very well might have been protected—probably would have been protected—under the Landmarks Law include: the Astor Hotel, which was demolished in 1926; the Marble House, which was demolished in 1951; the Mark Twain house, which was also demolished right around *Berman v. Parker* in 1954; and, of course, the all too familiar Penn Station, which was demolished right before the passage of the Landmarks Law in 1963. The Brokaw was demolished just as the New York City Landmarks Law was passed.

So let's talk about the Landmarks Law that came out of this incredible need and this pressure to save our historic resources and the jurisprudential underpinnings that we've discussed. When we talk about the city Landmarks Law, we're not really just talking about one law, we're talking about the City Charter,<sup>15</sup> which governs the way we protect and preserve resources and the way our city commission works. We're talking about the City Administrative code,<sup>16</sup> which is to say when we talk about the Landmarks Law we're often talking just about the Administrative Code and the Rules of the City of New York,<sup>17</sup> which are rules promulgated by the agency.

Today, because of timeliness, we're not going to talk about the Rules of the City of New York; we're going to briefly talk about the City Charter and we are going to talk about the purpose and declaration of policy that's in the New York City Administrative Code. If we understand what we wanted out of the Landmarks Law, we might be able to sort of understand if we're getting that out of our Landmarks Law. I'm going to breeze through this.

The City Charter does speak to what our commission can do.<sup>18</sup> The first thing it does is say that there shall be a Landmarks Preservation Commission. It requires that the Commission consists of eleven members; many of you are familiar with this, some of you are not, so I'll go through it quickly. We have to have a minimum of three architects, one historian qualified in the field, a city planner or landscape architect, and a realtor; all must be on the

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15. N.Y.C. CHARTER ch. 74, §§ 3020-3021 (2004), available at <http://www.nyc.gov/html/dycd/downloads/pdf/citycharter2004.pdf>.

16. N.Y.C. ADMIN. CODE §§ 25-301 to 25-321 (West, Westlaw through Local Law 29 of 2011).

17. RULES OF THE CITY OF N.Y. tit. 63, §§ 1-01 to 13-05 (2011), available at <http://72.0.151.116/nyc/>.

18. See generally N.Y.C. CHARTER ch. 74, §§ 3020-3021.

Commission. The Commission must have representation from each of the five boroughs. Members of the Commission are appointed by the mayor. The mayor is permitted, but not required, to consult with the Fine Arts Federation or similar organizations for appointing members. The mayor is required to designate a chair. The chair is the only commissioner who is paid; all of the other commissioners are volunteers. Members serve for a three-year term, and they do so very generously because they're working for free. There's also the staff; the Commission must appoint an executive director. There must be an annual report of these activities, and they're permitted to employ technical experts and employees as may be required to perform. Of course, agencies need to have their staff do a lot of work.

Several of the powers and duties are covered in the City Charter. First of all, it includes reference to the Administrative Code and says that the Commission shall have those powers and duties as are prescribed by law. There are a number of notice requirements that are included in our City Charter. There's also a democratic check on our Landmarks Commission, and I think that's important to highlight that this Commission has a check. So, while the Charter makes clear that landmark sites, interior landmarks, and historic districts are in full force and effect upon designation, some things can happen. The City Council can modify or disapprove by a majority vote any designation of the Landmarks Preservation Commission within 120 days of the filing of that designation with the Council. That's one safeguard: who overlooks the Commission. The Mayor can then disapprove of a City Council's decision within five days of the filing of its vote on the designation. Then if the City Council really doesn't like what the Mayor did, the City Council can override the Mayor's veto by a two-thirds majority vote so long as they do so within ten days of the finding of that decision. Those are the powers and duties of the Commission that are in the charter.

After the decision in *St. Bart's* in 1989,<sup>19</sup> the voter's of the City of New York, by charter, elected to create a Hardship Appeals Panel.<sup>20</sup> This is a curious thing because this has never actually been convened, but the Hardship Appeals Panel is independent of the Commission. It consists of five members who are appointed by the Mayor with the advice and consent of the Council, and they review appeals from the terminations of the Landmarks Preservation Commission denying applications for hardship for non-profits.

Now let's go to the meat of the conversation: The New York City Administrative Code. This is what we talk about when we talk about the Landmarks Law; it does a number of things. It states the purposes and declaration of policy underlying the Law. It also speaks to the powers and duties of the Commission. It details the degree in which we can regulate property subject to the jurisdiction of the Commission, and this is that extraordinary power. The Landmarks Law has the authority to regulate privately on the property. It also established certain civil and criminal

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19. *St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958 (S.D.N.Y. 1989); see generally BRENT C. BROLIN, *THE BATTLE OF ST. BART'S* (1988).

20. See generally N.Y.C. CHARTER ch. 74, § 3021.

penalties for non-compliance. I'm not going to talk about those at all because we have an expert to talk about that later today.<sup>21</sup>

Let's look at the declaration of public policy. The council found that many improvements having a special character or special historic or aesthetic interest or value and many improvements representing the finest architectural products of distinct periods in history had been uprooted. So in some sense the Landmarks Law is very much in response to the phenomenon we were discussing, where the city's most important buildings were being demolished. The Brokaw, as I mentioned, is exactly what they're talking about. This is an architectural treasure that would have benefited the city, but was lost. This is happening notwithstanding the fact that these buildings can be protected and they can be used; they can continue in their use.

In the public policy, this is sort of a lament, right? We've been demolishing these incredible buildings without adequate consideration of the irreplaceable loss of the aesthetic, cultural, and historic values represented by such improvements and landscape features. This is something that Jerold brought up in his keynote—this is the sense of place that comes from these buildings. When we talk about treasures that we've lost, we do look to Pennsylvania Station and we do look to the sense of place. Anyone take the train in today and come through Penn Station? I'm pretty sure the former structure is better than what you walked through today. When we talk about an irreplaceable loss and we talk about a sense of place, we're talking about that feeling, that sense of pride that comes from our architectural treasures, and that's very much in the Landmarks Law. The Landmarks Law was very thoughtful in that regard.

Again, continuing with the declaration of public policy—this is cool—distinct areas are similarly operative. So we're not just going to protect buildings, but we are going to protect historic districts, and this is also in recognition of the sense of place that comes from the preservation of neighborhoods and neighborhood characters. We're going to look quickly through them—Brooklyn Heights and Greenwich Village are two of our most famous historic districts. Again, in the declaration of public policy, it's the sense of the Council that the standing of this city as a worldwide tourist center and world capital of business, culture, and government cannot be maintained without preservation. This is very, very passionate language for a run-of-the-mill ordinance, and it's important to remember that it's in there. When we as preservation advocates feel that we might be pushing too hard, let's remember that the purpose is in the Law, the declaration of policy is in the Law, and it's pretty bold and it's pretty ambitious—and that's sort of the “I love New York” part of the Law.

I'm going to stop there so we can get to the conversation. I'll quickly introduce Tony who will be moderating our next panel. Tony is known to just about everyone in the room because he either invited you or strong-armed you to be here. Tony is founder of the New York Preservation Archive Project,

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21. John M. Weiss, *Protecting Landmarks From Demolition by Neglect: New York City's Experience*, 18 WIDENER L. REV. 309 (2012).

he's a preservation activist, a writer, and a teacher here on the faculty. He's going to moderate the conversation and now he'll introduce everyone on the panel.