2011 FITCH FORUM: PART FOUR

NEW YORK CITY'S LANDMARK LAW AT FORTY-FIVE: PERPETUALLY YOUNG OR SHOWING ITS AGE?

Moderator: Mr. Anthony Wood

Panelists: Mr. Al Butzel, Mr. Otis Pearsall, Ms. Margery Perlmutter, Mr. David Schnakenberg, & Mr. Mark Silberman

MR. WOOD: There will be a test on David's presentation. So I hope you all took notes on that. Today we've assembled a distinguished panel of lawyers with different backgrounds and different perspectives on preservation law in New York City. It spans generations and it spans a wide range of viewpoints. Their longer resumes, as we've said, float virtually on our website, so I'm going to be very brief on the introductions; but something is indeed required.

Al Butzel is the principal of Albert K. Butzel Law Offices. He practices law and has led advocacy campaigns in New York City since 1965. As an attorney, Mr. Butzel has handled many important matters, including the Storm King Mountain power plant case, his legendary successful litigation against Westway, and more current legal efforts such as those on behalf of Albert Ledner's National Maritime Union headquarters, also known as the O'Toole Building to some of us in the Greenwich Village Historic District. He's represented St. Vincent de Paul in an effort to secure landmark designation for that historic French church blessed by the presence of Edith Piaf, and he worked for the groups that were trying to downsize the Atlantic Yards project. So, Al has become the go-to lawyer for those unsatisfied with planning and the preservation status quo.

Otis Pearsall is truly a legendary person in the history of preservation in New York City. As a young lawyer, not to suggest he isn't a young lawyer still, new to Brooklyn Heights in the late 1950s, he was part of and came to lead the effort to secure landmark protection for Brooklyn Heights. In that process, he actually drafted a landmarks ordinance prior to the drafting of the city ordinance, and then worked on getting the city ordinance secured. 102 historic districts ago, Brooklyn Heights became the first district designated after the passage of the law, and Otis has been active ever since.

Margery Perlmutter is a partner in the law firm of Bryan Cave LLP, specializing in zoning and land use, building code, and related environmental issues. She represents private developers, public institutions, and non-profit groups before the New York City Planning Commission, the Board of Standards and Appeals, the Department of Buildings, community boards, Borough Presidents' Offices, and the New York City Council in obtaining administrative approvals and consideration of special cases. She counsels her clients on development enhancement strategies and related transactional issues, and serves as code, construction, and zoning litigation counsel in Board

of Standards and Appeals and Article 78 proceedings. Margery is a member of the New York City Landmarks Preservation Commission, and, until 2006, she was a member of Manhattan Community Board 8. Perhaps most importantly, this semester she's teaching here in the Preservation program at Columbia.

David Schnakenberg, from whom we have just heard, is an attorney and a former Menapace Fellow in Urban Land Use Law at the Municipal Art Society. While in that position, he was involved with a variety of preservation and legal issues including the St. Vincent Hospital hardship hearing. He's also a guest lecturer in the Columbia Graduate School of Architecture, Planning and Preservation and the coordinator of today's event.

Mark Silberman is the General Counsel for the New York City Landmarks Preservation Commission. Prior to working for the Commission, he was a litigation associate at Paul, Weiss, Rifkind, Wharton & Garrison, where he specialized in environmental and general commercial litigation. In the 1980s, he was a lobbyist, organizer, writer, and editor in Washington, D.C. for various environmental and public interest groups.

So, the overriding question that our high-octane panel is going to address is New York City's Landmarks Law at age forty-five: Perpetually young or showing its age? Based on years of observation, I think one can say that most, if not all, of the rest of the country is envious of New York's Landmarks Law. New York is indeed blessed to have such a robust law. However, New Yorkers are not known for just sitting back and counting their blessings. They're always striving for more and better. Frankly, I think a few were in shock over lunch to realize that everybody thought our Law was so terrific.

The recent conversations over charter reform, a variety of disappointments over the years, including losing a number of buildings, and the failure of some legal challenges to achieve change, have caused some to wonder if it's time to devote some serious thinking to the notion of tweaking or amending our Landmarks Law. The Preservation Vision Project, which involved close to 500 preservationists thinking about the future of preservation, came up with a list of ten things that we needed to focus on to secure preservation in New York in the future; the fifth on that list, in order of priority, would be to strengthen the Landmarks Law.

Our Law is almost fifty years old; the world is now a different place. Arguably, the Law has only been substantially amended once in 1973. So, the Law has remained basically unchanged for thirty-eight years. Is it perpetually young? Were we successful in creating a document that could evolve over time and successfully meet every changing need? Or is it showing its age? If it is showing its age, in what ways? If it is, is the prescription a little botox, is the prescription a facelift, or is the prescription just to learn to live with it and love the wrinkles that it has? This panel will explore these and other questions.

I'm going to start by guiding our panel through a much briefer series of questions than I planned, because I want to open this up to the audience to explore three areas of interest. First, we're going to look at what's transpired

since the passage of the Law; talk a little bit about how we got here. Then, we're going to look at some of the current challenges and opportunities that the Law faces. Then, we're going to be looking at the future.

We're going to do this probably for about fifteen minutes. We're then going to open it up for Q&A. I'm going to direct the question at a particular panelist just to start it, and then invite the other to comment. Everybody doesn't have to chime in on every question, unless they want. I'm going to try and move us along, and I'm going to do this in a kind of a Charlie Rose style.

Trying to get an overview of the last forty-five years of the application of the Law, the record is clear that in the early years the Commission proceeded very gingerly; preserving the Landmarks Law was its greatest concern. Frank Gilbert, the Executive Secretary of the Commission has a sign on his desk that reads, "This Law Raises Grave Constitutional Questions." The first and second chairs of the Landmarks Committee maintained that, indeed, preserving the Law was their top priority. Some suggest that after *Penn Central*, the Commission was more aggressive in the application of the Law, leading to a period of creativity and activism, but also of conflict and controversy. Since 1994, some have observed that the Commission has become restrained in its application of the Law. Is that a fair characterization of the last forty-five years? If not, in broad terms, how would you describe how the Law's application has evolved in that period?

Otis, I'm going to ask you to start because you've been through the whole thing.

MR. OTIS PEARSALL: Maybe I'm the only one in the room who's been here through the whole thing. It's been a great honor to be here through the whole thing. I have to say that I think if I have to vote between perpetually young and showing its age, I think it's perpetually young. This is the most remarkable success story that I can imagine. We were envisioning a landmarks law starting in 1958 and it took us seven years to get the Landmarks Law, and to get Brooklyn Heights designated the first historic district. Nobody had in mind the 110 historic districts we have now. We thought of maybe three or four.

In our discussion with Platt and Goldstone,[1] it was always Brooklyn Heights, Greenwich Village, Gramercy, and maybe two or three others. But no one had the foresight to envision the flexibility of the Law and its utility not only to preserve buildings and districts, but entire neighborhoods. The neighborhood preservation idea came into vogue with Beverly Spatt. She was

1. Geoffrey Platt was the first chairman of the New York City Landmarks Preservation Commission and Harmon Goldstone was his successor. *Geoffrey Platt*, THE NEW YORK PRES. ARCHIVE PROJECT, http://www.nypap.org/content/geoffrey-platt (last visited Jan. 16, 2012); *Harmon Goldstone*, THE NEW YORK PRES. ARCHIVE PROJECT, http://www.nypap.org/content/harmon-goldstone (last visited Jan. 16, 2012).

the one who first saw the potential to use it as a planning tool, which gets us a little bit over to one of the issues this morning.

With 110 going on 250 historic districts, one has to step back a little bit and wonder just what exactly it is we are trying to achieve, and what we are doing. Are we cheapening the brand or is this the correct thing to be doing? Until there is a mechanism here in the city to preserve neighborhoods, other than the Landmarks Law, the Landmarks Law is the name of the game, and we're going to have to go charging ahead with the preservation of valuable neighborhoods through the historic districting mechanism.

Your question is a little broad. I think that some of the subtleties of, "Were we going fast at one point, or were we going slow at another point?" I find very confusing. Everything has drifted into the mist of time in terms of the actual energy levels of the different commissions. Anyway, I certainly have my own pet thoughts as to what can be done to improve the Landmarks Law. I'm not going to give them. I'm not going to share them with anybody; I'm just telling you I have them.

But I want to be optimistic when I think about the New York Landmarks Law, when I consider what has been achieved. I mean we can carp and we can pick, but the fact of the matter is, it has been a remarkable success. That's not to say it can't be improved both in the Law and in its administration. This audience is filled with people who can go and particularize item by item what needs to be done to improve it. But the fact of the matter is, it's not a bad instrument as it is right now.

MR. WOOD: We will move to the carping and picking later. Other thoughts on whether that is a fair way of looking at the scope of the Commission's work over time?

MR. AL BUTZEL: Unlike Otis—you've been in it for fifty years—I've been in it for three years, so I have to look at it in a significantly different way. I didn't realize you were that old actually.

MR. PEARSALL: We started in 1958.

MR. BUTZEL: Well, so it's been sixty years, I'm sorry, please forgive me. I agree though, looking at it as an outsider to begin with, and now more as an insider, that it's a remarkable Law and it's achieved remarkable things, and has undoubtedly achieved things well beyond what anyone would have anticipated at that time. The Law though, and Otis has already referred to this, depends a lot on the Commission that's enforcing it and interpreting it. As at the beginning of the process, the greatest concern was to maintain and uphold the Landmarks Law that came to be with the *Penn Central* decision, and then was carried forward with the *St. Bart's* decision, both of which are extraordinary cases, and extraordinary judicial law.

There are now issues that are arising, most recently in the *St. Vincent* case in which I was involved, where the Commission itself, in my judgment anyway, diverged from the *Penn Central* and the *St. Bart's* decisions, and concluded that it was appropriate not to address a building as a building, but rather to accumulate buildings on a campus, the so called "campus theory." The consequence of which could be that historic structures on a campus like Columbia, for example, might be subject to demolition, even though they are capable of being reused, even though they are capable of adaptive use. I think that we're never going to get a court decision on this because *St. Vincent's* conveniently went bankrupt, but it is one of the issues that people are going to have to grapple with. Whether there's a legislative solution or ultimately a legal decision, that issue will have to be addressed.

MR. WOOD: Lots of things have gone on the table. So I started looking at the history, other things that have been brought up. So go with it where you want.

MR. MARK SILBERMAN: Since I'm fifty-two, I think of this as perpetually young, the Law. I think that it's really useful for everyone in the audience to hear how important New York is to everybody, and how critical the Law is that we take for granted here every day. The other thing that I think is important to remember is all of the people coming from the other jurisdictions. They're talking about how the practical realities of actually administering a law is very complicated. One of the dangers is to think that preservation is a vehicle for handling lots of urban problems.

For me, I felt at home with the panel at the beginning, talking about the need of trying to separate out our impulses to make preservation the paradigm through which all good urban new ideas should be funneled and refracted out, and I think that's a mistake. I also think that the commissions become more mature and have more and more power over the economic welfare of the cities in which they are operating. To hear Otis say, "No one ever imagined this," I think is both great and it's also a cautionary note. What was it when all this discretion was granted to the Commission in 1965? I mean if you think about the levels of discretion that happened in the Law, it's pretty remarkable.

You have great discretion being given to the Commission, but at the same time maybe the Commission had a narrower view of what they were engaging, what their area of discretion was. Then, you have the courts saying, "I don't want to weigh into this, I'm going to leave it up to you guys." Then, at the same time, you have the Law itself evolving as what counts as preservation gets broader and broader. So, it gets more and more attenuated as time goes by. As our power over larger areas of the city grows, I think the danger is to think that preservation should be this incredibly—I don't want to use the word rigid—sort of formulaic thing, when in fact it requires great degrees of discretion, which makes a lot of people uncomfortable.

My job as a Counsel of the Commission is to try to make sure that when the commissioners are debating something, that the discussion is taking place within the legal framework of the Law. But I do believe that the Commission has to be able to have discretion. It has to be able to deal with new situations in new ways. Al and I are litigants in this case on *St. Vincent's*, we can't talk about that case in more detail. But this case is, just to sort of remind everybody, the first time ever where the Commission had to deal with the question: we have a building, and it was decided that it could no longer function. The purpose for which the building was created was to be a hospital, but yet you couldn't use that building while you find a place for a new hospital. That's a situation the Commission had never had to deal with before.

What happens if you found that this is a problem? You recognize the need for a new hospital, but you can't just have them move and do something else. So I think the commissions, not just in New York, but all of them, are dealing with matters of first impression, real matters of how we regulate. I think discretion is going to be an important thing to keep in mind as we discuss how we want to change the law.

MS. MARGERY PERLMUTTER: I just want to pick up on some of the things that Mark was saying. All laws develop as people use them. When a law sits there and no one actually touches it, you don't see how it affects your world or anyone else's world. For instance, in economic development times, in boom times, you see how the law is being implemented and how people are trying to use it.

I haven't been involved in historic preservation for decades, for me it's more like a few, maybe ten years; but what I have seen, for an example as a member of a community board, is how community activists use historic preservation as a way to limit development. That's not what historic preservation is for. That's called zoning. What I'm seeing more and more, which I think is a very unfortunate trend in the historic preservation movement, and therefore an imposition on the Law, is that people will see that designating a historic district or designating a building can actually be a speedier way to eliminating a development possibility than convincing the City Planning Commission that it would be a wise planning move.

So I think that really needs to be looked at. I think one of the panelists from an earlier conversation was talking about, I think in Chicago, that the Planning Commission and Landmarks Commission now are somehow in the same agency. It's an interesting phenomenon because what I see from the perspective of my clients when I go to the City Planning Commission, is that they're often surprised by the disconnect between the agencies. So, you can actually be designing a building that the City Planning Commission is in favor of, and then it comes to the Landmarks Commission and it's killed. We've actually had some of those experiences on the Commission where there was a

total disconnect between the agencies, and that's something where I really think the Law needs work. The two agencies need to work closer together.

The Law itself needs to be blended because, in fact, historic preservation is planning. It's an urban planning process that needs to recognize the role of zoning, and zoning needs to recognize the role of historic preservation. The other aspect of it is, of course, we see many times people coming in to add very large additions to their little, tiny townhouses. Why can they do that? Because they're located in zoning districts that allow them to quadruple the size of their house. So, there's a total disconnect between the purpose of preservation and the zoning purpose, and those things really need to be coordinated.

MR. WOOD: David, I'm going to direct the next question to you, to get a first shot at it. We heard that our Landmarks Law was really the gold standard when it was passed; many wonderful imitations. But there have been now decades of law, decades of experience, we've heard about some other laws this morning. The question is, have you observed anything, or are there any aspects of other ordinances—have things evolved? If we were doing our Landmarks Law over again today, is there something that we could see from others that you would like to incorporate into it?

I would just add that if, indeed, I understood correctly from Tersh, I really like the idea that you don't have to go to the city council for designations to be approved. But that's just me. So David, you start with this question and others can jump in.

MR. SCHNAKENBERG: One of the things that's interesting is we talk about *Penn Central* all the time when we talk about our Landmarks Law, but *Penn Central* sort of fundamentally changed the way we think of the ability to regulate property. It set a standard for when a regulation goes too far; it arguably ratcheted up the government's ability to regulate property shy of a taking. We have a hardship variance built into our Landmarks Law for for-profit entities, as well as for certain non-profit entities, but not for non-profit entities who wish to demolish or alter in an inappropriate way their historic resources. This is sort of the underpinning of the St. Vincent's issue. One of the things that we've seen is, after the Landmarks Law was enacted, and when some of the case law that addresses the question of what we do in the absence of a statutory answer to the question of a non-profit owner who wants to demolish a building, we've seen that the takings law, the underpinnings of our Landmarks Law have been ratcheted up. The problem, I think, at St. Vincent's was that our own ordinance, arguably, should have some flexibility built in so that the Landmarks Commission would have been able to deal with what was a very difficult set of facts. But the law that underpins our Landmarks Law has sort of outgrown the Landmarks Law.

We have *Penn Central*, we have *St. Bart's*, but the case law and ordinances themselves didn't really do the work. I would say that one thing we could think about doing is taking a look at where we would like our statute to deviate from its underpinning law and actually co-define some of those things. Some of the things that have changed throughout case law, it might be legally true and we certainly have a federal floor of the Supreme Court says that it is so. But, we have some freedom to nuance the way our Landmarks Commission can deal with some of the law. I think to that extent, that's something that would be desirable.

A lot of landmarks laws that were passed subsequent to *St. Bart's*, for instance, have statutorily incorporated some of the holdings in the *St. Bart's* decision, which is really just a great attempt at bringing the for-profit *Penn Central* analysis into the non-profit world, and it's really difficult. I think it's hard to figure out when a regulation divests an owner of its monetary value. It's even harder to find out if a non-profit owner has been divested of his ability to further add value. This is tough stuff; it's heavy lifting. With all respect to all the Commission and the Commission staff, I think rather than let them figure it out on an ad hoc basis, we might want to codify some of the things that we think should be in there.

MR. BUTZEL: I'd sort of like to make a case. I think we were extremely fortunate to have the Landmarks Law amended in 1973. I think it's remarkable. While I agree that there are some aspects of it that might be legislatively improved—one is designation and maybe we'll talk about that a little later—the Landmarks Law was created, I suppose, mostly because people thought about Greenwich Village, and people thought about Grand Central and the likes. But the reality is, it has emerged as one of the preeminent ways of trying to protect neighborhoods; and a "neighborhood" is place, that's where people live. And so I have to dissent a little bit from what Margery had to say because why shouldn't it be the zoning? Maybe it should be zoning, but it isn't zoning in this political atmosphere. Zoning in this atmosphere—I shouldn't make an across the board condemnation because the City Planning Commission had down-zoned a lot of neighborhoods and is trying to protect neighborhoods. But the Landmarks Law is absolutely the best mechanism to protect neighborhoods in those areas that have been designated historic districts. If they had been, they presumably deserved to be, and I think we're fortunate to be able to take advantage of the Landmarks Law.

I think that Mark's comments are reflective of what often happens with agencies that are entrusted to carry out a particular mission. The mission of the Landmarks Law is to protect historic resources. When Mark talks about discretion, there's a lot of discretion in the Law. In terms of designation, the City Council had the opportunity to veto, and has done so in particular situations. In the case of hardship, there's a hardship panel that's never been invoked, and presumably the Council can change the situation if it wants. I

think the agency should be doing everything it can to implement the Landmarks Law and not to worry about the other considerations of policy; those are for the legislature to determine if they want to revisit the Law. The Landmarks Commission, which is distinct from the Planning Commission, ought to be upholding the Landmarks Law, and using it to the broadest possible extent now that it has been established as legal.

MR. PEARSALL: Let me just pan a thought on that. One of the things that's missing from Landmarks Law is a mechanism to reconcile conflicting city policy. The Landmarks Commission has taken this into account on various occasions. I'll give you one example, which is the demolition of the Purchase Building under the Brooklyn Bridge. There was the compelling desire of those interested in Brooklyn Bridge Park to open a piazza. It was a Parks and Recreation policy. That policy overwhelmed the public interest and preservation. One would think that a conflict in policy of that sort should be resolved by the City Council through a political process, instead of internally with the Landmarks Commission deciding whether it will defer to the policy of a different agency.

There had been other sites of example, and indeed St. Vincent's, in its own way, represents a conflict of policy in the city; obviously, a great desire to do good things for the hospital. At the same time we have the public interest in preservation. Interestingly, the Landmarks Law, on its face, does not provide any mechanism for reconciling, compromising, or otherwise dealing with conflicts of city policy. Now, when the Purchase Building came along, I made an argument that the Landmarks Commission has no business taking into account the public policy having to do with the park. If you go to look at the terms of the Landmarks Law and the definition of what could be considered on the issue of demolition, you don't find in there anywhere the idea that if another agency has a compelling policy need, you can defer to that. That's not one of the listed items that you take into account when you are deciding under the Landmarks Law whether demolition is appropriate. I just give that as an example.

I think the St. Vincent's thing involves another example. Another example that's going to come along is the conflict between preservation policy, on the one hand in connection with a landmark building, and the desire of a large number of people in the city to convert it into a theater. We're constantly being confronted by these kinds of policy choices and nowhere is there a specific political mechanism to resolve those kinds of things.

MR. WOOD: Mark, last few words on this one?

MR. SILBERMAN: Yes, there are a couple of things. With respect to the Purchase Building I think it's important that there are two things to know. One is, there is a provision in the Law that the drafters created to deal with

conflicts between the agencies, and that was originally that the Landmarks Commission was advisory. So, when we came up with city owned projects and city owned property, all we could do was issue an advisory report, on the theory that every city agency has its own mandate, new housing for the poor, parks, whatever it might be, and the Landmarks Commission would be part of that process. They would come to us, we would say our opinion out loud in the political world, and then it could be disregarded, unless the public then organized and defended it.

That's changed, I think, ironically. It changed inadvertently with the passage of the amendment to the Landmarks Law, so that now the Law is binding in certain respects. It's very complicated, streamlining things maybe doesn't work that well. But now we're in fact binding in some cases where we were never binding before. So, I think there was a very explicit political calculus in the original law, but you're correct it wasn't a face-to-face debate. It would happen sort of seriatim, and the agency that wanted to do something could sort of do it afterwards and after the hubbub died down, if it did.

I do want to go back briefly to the question of amending the Law, because we're all talking about this in preparation. Should we amend the Law, is it a good time, and Otis pointed out as someone who's been around for the longest, that there's no answer to that question; it all depends on circumstances. It will depend on where we are at a particular moment, with a particular council, and a particular issue, and where the public is at the particular moment. It's easy for me to say you can amend the Law, because that's why I was brought to the Landmarks Commission in 1995. I was brought specifically because I had a lobbying background to help the then chair, Jennifer Raab, amend the Law, which we did successfully, to get the Commission real enforcement power, which has had real impacts on the Landmarks Law in New York City. John Weiss is going to talk about it a little later.

So, it can be done. But it was done in a way that is a very specific issue, is very narrowly drawn, and you had a very strong chair with very strong ties to the Mayor. You had a very strong head of the Landmarks Sub-Committee in the City Council. So, it was a way to be controlled. At no time during that process, having been a participant in it, was there any risk that it was going to spiral out of control. That said, guess what happened? We didn't get everything that we wanted. The religious organizations came in, and basically we got the message from the speaker's office: if you don't cut out the religious organizations, the whole bill is dead. So, guess what we did? We cut out the religious organizations. Later we got it back in, so we have demolition by neglect for non-profits, but we still had to do it.

I think that when you start talking about amending the hardship provision, I think it would be very, very difficult to control that debate and to control what's open at any given time. That would be my biggest concern. If you look at what the Real Estate Board of New York was proposing to the

Charter, they wanted lots of limits as to what the Landmark Commission can do, some having to do with hardships. It is exactly a vehicle to bring all those in. I think that the danger is, that to amend it, it has to be something very specific, very narrow, and hardship is not one of those issues.

AUDIENCE QUESTION & ANSWER

MR. WOOD: Okay, I'm going to reconvene the panel over a bottle of wine to have them answer the other ten questions I had. But we are going to turn to the audience.

I would want to just leave with a thought, kind of building on what Mark said. For years, no card-carrying preservationist could even raise the question of whether we would try and amend the Law to make it stronger without being voted off the island. So, I think that it's healthy that we're finally in a place where we could have a conversation about whether indeed there are ways to improve the Law, and whether it's politically wise to try and move on those. So, I think it's a wonderfully healthy conversation; people have extremely strong opinions on it. So, let's open it up for some questions from the audience to the panel on our large issue of perpetually young or looking for botox.

AUDIENCE MEMBER: Just picking up on what Brian had said earlier from learning lessons from other municipalities, the notion of thematic districts. Could you sort of discuss—I know what the upsides of it are—your feelings about that, what might be possible disadvantages, or why it would not work currently?

MR. WOOD: In the context of New York City?

AUDIENCE MEMBER: In the context of New York City, please. Thematic districts, where for example—and Brian can answer this better—you were to look at a series of African-American historical sites and kind of create a thematic district of that, as he did with neighborhood banks.

MR. WOOD: Before the panels answer that, I'm now going to go into the strict moderator mode, and I don't want every panelist to answer. So, if you really want to answer, signal, otherwise hold your fire for the question you really do want to answer, because everyone's not going to get to respond to every question. That being said, who would like to respond?

MR. SILBERMAN: I think that it's a good idea. I think we have to be careful about words though. It's not a "district" as we use the word district in New York. Brian, Lisa, and Margery, we're all talking about this afterwards. It's a way to create a milieu, a rationale, and a basis for designating lots of different

things, all of which would take too much time individually. Also, you might be able to throw into the mix things that on their face would be more difficult to get. So I think that that's a great idea. I mean the Commission, the closest we've done is this sort of federals, sort of looking at federals and trying to do more federal buildings. But it's not been done all at once, it's been done piece by piece. I think it's an interesting idea and one that certainly we're going to look at.

MR. WOOD: Okay, questions? I've got my list of twelve, I'm happy to go to them. Roberta Gratz here in front.

AUDIENCE MEMBER: I can't say I've been around as long as Otis, but I may be the second longest in the house. I'm not sure if this is an observation, challenge, question, or a comment. I'm always a little concerned about this need to separate the planning from the landmarks and zoning from landmarks, all of which, obviously, is clear in the Law, but let's remember that the Law was an outgrowth of urban renewal overkill. So, from day one there has been a blurring of what the use of the Landmarks Law was for: it was reactive. Yes, Margery, a lot of people do respond to threats in their neighborhood through landmarks. However, it's often that threat that prompts them to care about what is of preservation value.

I have not seen, in our history, any neighborhood using the Landmarks Law inappropriately. It may have been spurred by what you described, but its use was not inappropriate, in that they weren't fighting for something that had no historic value. So, I think we have to also remember that history has blended it from day one. As was said before and said over and over again, the Grand Central case didn't just change historic preservation; it changed land use, planning, and policy nationwide. But that's land use, that's not just historic preservation.

I also want to add, though that I think I totally agree with Mark on needing to keep any attempt to refine the Law to a narrow opportunity, there was a time where there was an attempt to change the Law, when they were ready to drive a Mack truck through it, and the whole thing was squelched just for that reason. That's very important to keep in mind.

MS. PERLMUTTER: I think that was a comment; I don't think there was a question in there. This was another thing that I think, again, was raised in the subject of Chicago. I mean, I don't know what the building count now is with all of the property—currently 27,000 within the historic districts. So, there's this Landmarks staff of sixty, and I don't know which percentage of them are the ones who actually review the applications. What is it, thirty review the application? Okay, so there are fifteen people who review the applications for potentially close to 30,000 buildings, and as we move ahead there will be more than 30,000 buildings.

So you have to ask then, what is it that we're doing here? You have a property owner who wants to change windows and they want to do it in a way that, let's just say, is staff level approval. Nevertheless, it's staff level approval, and the staff has thousands and thousands and thousands of applications. I guess the question is, when there was a move to expand the Upper West Side historic district to encompass another, I don't know how many thousands of buildings, are we really getting at historic preservation, or is it something like zoning, because what we're trying to do is retain something about the character? What's attracting us to the neighborhood has to do with scale, it has to do with materials, it has to do with much broader things than maybe that person's windows.

Maybe what's missing, either from the Landmarks Law, or from zoning mechanisms is a mechanism that's somewhere in there—it's a conversation I've had before that I call "landmarks lite." It's not the same kind of a regulation that we're currently imposing on every property owner. There needs to be much more arranged so that maybe another agency can manage it. Maybe it's something that's very clearly in a set of guidelines or a building code or something. But I'm imagining 30,000 buildings that fifteen staff need to approve.

MR. WOOD: I think a presentation in the next session may be floating some ideas around that.

MR. BUTZEL: I think that zoning doesn't affect character. I think that's one of the limits of zoning. I mean it can keep things smaller, it can keep things big, even contextually where you have existing neighborhoods, brownstones or whatever, that can help there. What distinguishes the Landmarks Law? The Landmarks Law takes the community, which is what people are really talking about, and tries to maintain the character of that community by preserving mainly the structures that exist. If we're in Europe no one would be thinking twice about this because that's the way Hamlets are, that's the way cities are, and the like. Well, I shouldn't say all of them but certainly the best of them.

I think with regard to the issue of how you enforce all this, there are lots of possibilities, including self-certification, including giving neighbors the rights of private action in order to enforce the regulations and the like. I don't think it's an endless process of bureaucracy that has to go on.

MR. PEARSALL: May I jump in on that note just for a moment? For twenty years I've been trying to make this point, I might as well.

MR. WOOD: The time is right.

MR. PEARSALL: Twenty years ago, I proposed, in something called the Historic City Committee Report,[2] the idea that we could solve our enforcement issues here. I should say, with nearly 30,000 buildings, I think we've got three active enforcement people for 110 historic districts and close to 30,000 buildings. So, the idea that we are closely monitoring what's going on in all of these historic districts, I think is pretty self evident. But, if we could, with a very simple change in a few words, adopt what the federal environmental laws adopt, what the federal securities laws include, what the federal anti-trust laws include: a private right of action, the private attorney general. Not everybody would be able to do this, but organizations that have been around for a while can spend a lot of time in trying to define exactly what the criteria is. But take it from me, it would be possible to identify criteria that would eliminate the cranks and the people who have grudge matches. You could open, to responsible organizations, the ability to assist in policing the enforcement of the Landmarks Law by creating a private right of action. You would only be entitled to get injunctive relief; this is not going to be for damages. Now, the Landmarks Commission has never liked this idea, which is why nothing has ever happened. Dorothy Miner hated this idea. She hated this idea; we had the most terrible fights about this and it's perfectly understandable. I know where Mark is going to come from, he doesn't even need to bother.

They want to keep control of the process, understandably. If they keep control of the process, they can determine what's going to be pursued, what isn't going to be pursued, all the subtleties and the litigation that pursues it. I agree that something would be lost. The Landmarks Commission could obviously always intervene in such proceedings, and make it felt through those means. I think there's an answer to all of the objections, and one should just step back and understand the incredible benefits that enforcement would achieve by having a private right of action.

MR. WOOD: Mark, would you like to expand on his statement of your position just a little?

MR. SILBERMAN: Well, it was stated. I want to move, take the conversation a little bit further on. I would say that everything that Otis had said is certainly the position of the Landmarks Commission. But in addition, I think it is very difficult to weed out the cranks. We deal with this every day. Again, it's one of those things where people who think about preservation sort of, from on high, need to come back down to the hearing once in a while. People come into hearings, they propose something, and it's routine for preservationists and neighborhoods to basically try to humiliate and demonize their neighbors. It is a very unpleasant forum. Somebody bought a house, they want to put on an

2. HISTORIC CITY COMM., NEW YORK: THE HISTORIC CITY (1989).

addition and they're told, "The house you have is a piece of crap. Even if it's a piece of crap, we think what you're proposing makes it worse. So you're a piece of crap." People cry at these things. Don't underestimate the sort of power neighbors use to get involved in their neighbor's lives in a non-productive way.

I also want to raise a different question: I think there's a lot of conversation that happens all the time in New York about preservation with what the public wants, and I think it all takes place with an incredible lack of information about what the public really thinks about, and values about what I and the rest of the people at the Commission do every day.

Sort of following a little bit on what Margery said—for instance, windows, materiality, one of the cornerstones of historic preservation as we now know it and certainly the way the Landmarks Law in New York City is created—how important is that for neighbors and these communities that want to preserve themselves? Maybe it is just a question of size. I think that we need real metrics. We need to go out and talk to people about what it is that they value and like about what they do, how well are we doing it and what they hate, and what it is that they don't value, and think is intrusive, so that there can be an actual discussion. What does preservation mean to New Yorkers?

This conversation happens up here, and I'm telling you, the rest of us are down here dealing with people who bought into the violation. There's a case that we're dealing with now, these people bought a house and guess what happened? Twenty years ago, because there was no private right of action according to Otis, someone changed the curved parlor floor windows on the brown stone. These people bought it, there's no violation on the property, there's nothing. We now find out about it, through whatever means, and guess what? What do we do? Do we say you now have to come up with $50,000—that's not a made up number—to change curve windows? That's what the Commission has to do every day. I think that's when we talk about preservation, when you say what is it people value in New York about what we do.

MR. WOOD: Frank, your next. But before you start to talk, raise hands again because I want to tee up the next few questions. And I just want to point out, for the record, I see no cranks in this audience.

AUDIENCE MEMBER: My question is about making the landmarks process more easily understood by the public. Landmarks regulation through the Commission is about regulating private property. But Mark just talked about a change, where the Commission has now binding authority over properties owned by the city, which are governmentally owned public property. It's always been confusing to me, and I can't imagine that it isn't to others, that the Commission's decision about state and federally owned property in the city are also advisory. In fact, the Commission spends time considering proposed

alterations to some of our most important, physical public buildings, that the public would probably assume the Commission had authority over. Then, those agencies completely ignore the findings of the Landmarks Commission, and all the time that was invested in that is more or less down the tubes.

So, my question is, is there any way that you think the relationship between the findings of a municipal authority can have a more binding constraint upon a governmentally owned building?

MR. WOOD: Okay, a couple of people want to take that on, or nobody wants to take it on?

MR. PEARSALL: I have an opinion on everything. I say the legislature ought to decide, when you get to public properties, there's a public government. I agree with what Mark said, maybe the provision that restricts the Landmark Commission, so its decisions are obligatory rather than just advisory, is a mistake. When it's in the public realm, the political process basically, in my view, appropriately decides what should happen there.

MR. WOOD: Okay, we have a question here.

AUDIENCE MEMBER: Hi. I'm wondering, and the opinion probably of Mark and Al are more suitable in answering this, in your opinion, to what extent are not-for-profit organizations such as the St. Vincent's or a city agency like Parks, really delaying a building actually having a hearing or even ever getting a hearing or actually ever being calendared? With not-for-profit organizations, it can be something that will take years and years and years to ever see a hearing because it's owned by a not-for-profit. So I guess the threat of something being not-for-profit owned, the ramifications of actually having a property like that ever designated or being managed by historic preservation . . .

MR. WOOD: We get it, we get it.

MR. SILBERMAN: The issue you raised is not just about non-profits; it's about the designation process. The Landmarks Law, as I think it was referred to a couple of different times during the course of the day, there's been some litigation in New York about that process and the Commission has prevailed in all those cases, because the Landmarks Law itself is silent on how things are brought forward. Once a decision is made to consider something formally for a landmark, a lot of due process kicks in, and there are hearings and reports and things going on. The process before then is the process that takes place at the staff level, and David was talking about the importance of the staff.

The short answer to your question is, there's been some criticism about the lack of communication about what happened, where something is in the review process for potential landmarks. The Commission's work is—we keep

saying that it keeps getting delayed, but there is a big capital project to bring all the computer stuff together in the city soon. People will be able to look online at a property and see every permit, every violation, designation information, staff level permits, commission level permits, the whole thing. In addition, RFE, the Request For Evaluation, the status of those will be there on the website so you can actually see something has been submitted on this date and it's under consideration.

That internal process, I think is very important. It's not an answer that preservationists like to hear. But, there's a lot of priority setting and decision making that happens at the level of the chair and the staff to deal with the fact that we get 200 requests for evaluations every year. A request is for one individual building or for a huge district. We have to deal with priority issues, sort of budget issues. There are a lot of decisions that go on in terms of whether something should go forward or not. That decision-making, I think, is appropriately currently residing with the chair and sort of that internal process, because I think it's inevitable.

For example, the current chair, Bob Tierney, giving designations to the outer boroughs was something he has talked a lot about since he was first appointed in 2003. Guess what? He's doubled all of the designations in Queens now. He's increased designations in Brooklyn by 15%. That's a priority. Now, should he be able to say that takes priority over everything else? There is a process that the commissioners, not that he sets every single thing, but those kinds of priorities are important because we have limited resources. Working on one thing means we're not working on another.

So in that sense, I think that's the process. It's a practical process given a volunteer commission that meets three times a month; 15% of Margery's professional life is donated to the City of New York, 15%. We can't take up more of their time; the staff has to make these decisions.

MR. BUTZEL: I represent a group called Save St. Vincent de Paul, which is a not-for-profit trying to save—actually, the first integrated church in New York by more than seventy years, it's called St. Vincent de Paul. It's on 23rd Street, between 6th and 7th Avenue. It's a French speaking church. It's been found eligible by the State Historic Preservation Office and it's actually a very attractive little church. Edith Piaf was married in it; I mean she's only been married seventeen times. There are not that many places where you have this. It fits every possible criteria of a structure that ought to be considered for designation in EAF or EAS, or whatever they're called; and we were denied on the grounds that it doesn't meet the criteria. The usual three-line letter that tells you it doesn't meet the criteria.

I brought a lawsuit saying that the Landmarks Law said that the Commission is supposed to designate or determine, and that implies the Commission should determine what is heard, or not heard, rather than just the chairman. We lost that. We think that there needs to be—if there's any

amendment to the Landmarks Law that's ever proposed given this climate, that's one that ought to be made. In Boston, citizens can nominate instructions for designations or districts for designation, and we're suggesting a proposal which will allow that to happen.

But, if a citizen does it, in order to get rid of the cranks that Mark's talking about, they have to bring with them a report from a qualified historic preservation expert laying out what the reasons are for designation. Then, the full commission hears that only in a preliminary way. If they decide it needs to go on, then it goes on. If they decide it doesn't need to go on, it stops. So, that way you avoid increasing the workload dramatically, but you provide a process for the public or important people in the public to make. Whether that happens or not, I don't know.

MR. WOOD: Okay, back there?

AUDIENCE MEMBER: Just wondering whether the LPC of the greatest city in the world should be at this point, with the workload, composed of full-time commissioners. Why is it that just the Chair is full-time? Of course there are budget problems and so on, but we're at the point where we could do so much more if we have the full attention of X number of commissioners. Is that outrageous?

MR. WOOD: We still have 85% of Margery's time to take advantage of.

MR. BUTZEL: It's the Board of Standards and Appeals. It's not as important as the Landmarks Commission.

MR. SILBERMAN: One could imagine there is a philosophy that is still adhered to by—I don't really know, like I said we have no metric—some percentage of the preservation world that believes that volunteer commissions are very important, that you need to have people that are not doing the job of Landmark Commission as a paid job, that you'll get better people if it's not paid. I think it's problematic because I think there are structural issues that follow from having a non-paid commission, and I think it's probably something that should be looked at.

MS. PERLMUTTER: I just want to speak to that. The City Planning Commissioners are paid, but they're also working full-time in their other jobs. They're paid because their time spent is recognized. I don't believe that them being paid has an impact on their decision-making, it just recognizes their time. I think it's very important, personally, that the commissioners in all of these agencies be professionals, that they're full-time government employees. For instance, I'm working everyday on the days that I'm not on the Commission representing property owners who are confronted with the

various regulatory processes. So, as a result, I can be empathetic to that property owner who owns a house that's got a window that was replaced twenty years ago, and how do we address the realities of it not being a historically correct replacement, but at the same time it's a person with limited income, and so on.

I can be sympathetic also because I understand as a professional—I'm also an architect—how it is to modify a building, what's entailed. I can read plans. It is important that the other architects in the Commission do that, and the person who's in the real estate business understands the kinds of impact on real estate. It's very important that you have active working professionals who listen to working professionals make the presentations, and can kind of weigh reality checks.

MR. WOOD: We're down to the final round of Jeopardy here. We have about seven minutes left. So anyone who is dying to ask a question, please demonstrate vociferously so we give you a chance to do so. I see a hand at the back?

AUDIENCE MEMBER: To go back to Frank Sanchis' question; the City of Los Angeles uses the California Environmental Quality Act as a tool to enhance landmark review. We could have in New York, under state and federal law and city law, a memorandum of understanding as how to use to the Environmental Impact Assessment Procedures so that state and federal agencies would have to listen to the Landmark Commission's advice as a matter of expertise, not as a matter of a mandatory decision. I've always wondered why the city doesn't choose to engage—the city adopted an environmental impact assessment law before any other entity after Congress, before the State of New York. We copied the California law when we adopted our law in 1978.

You could integrate each of these environmental impact assessment reviews through a memorandum of understanding, and it will just take a little inter-agency negotiation. You might get to Otis's point that you could have some judicial review of that, if the citizens thought the reviews were inadequate, because there's a large body of case law on that. That's a soft question for Al Butzel.

MR. BUTZEL: I believe—and Mark has to talk to this—that the LPC does not regard itself as subject to the environmental impact and environmental EIS laws, and therefore, maybe it would be difficult for them to integrate any one into the present process.

MR. SILBERMAN: Yes, the Commission has taken the position legally. It had been adopted that the Commission is not subject to environmental quality review acts because, as Professor Kayden mentioned earlier, we view our

decision making on very narrow grounds. It's set forth in the statutes, it's about architecture, it's about the things that make a particular designation significant, and that has been upheld. So, we are deemed to be ministerial in our review.

MR. BUTZEL: Which is just making my case when he starts talking about outside considerations like equity and that sort of thing, it must be illegal, right?

MR. SILBERMAN: I don't believe I've used equity today.

MR. BUTZEL: I used the word equity to give you credit.

AUDIENCE MEMBER: In this discussion, if you are taking the position, or if the position is that it is not subject to this, is it worth taking time of the Commission and Commissioners in talking about federal and state buildings if, in the end, nothing comes to?

MR. SILBERMAN: Absolutely it is because I think that the process, just as it was with the original Landmarks Law where we were advisory on city owned projects, politics matters. These are meaningful interactions. That doesn't mean they agree with everything that we say or we do, which is fine. But, I think that when we deal with the federal, the Parks Department or the Park Service, or when we deal with sort of larger state authorities and stuff, they do listen, and they do sometimes adopt; not every time, and sometimes it's a problem. But, I think dragging them before the Landmarks Commission and having them sort of explain what they want, hearing the questions and the criticisms can have a salutary impact on some of these things.

I mean I think the TWA Terminal example was I think—again, is it the outcome everyone wanted? No. But I think the fact that they have to come to the Landmarks Commission and defend their view and explain it mattered and the project that resulted was better for it.

MR. WOOD: I think on that note we should all thank this panel, it's been really terrific, even the commentary.

LOOKING AHEAD: CHALLENGES AND OPPORTUNITIES FOR NEW YORK CITY AND BEYOND

Introduction: Mr. David Schnakenberg & Ms. Kate Wood

MR. SCHNAKENBERG: We're going to move on to our last panel presentation. This one is called "Looking Ahead: Challenges and Opportunities." We're going to look at some of the things that are both challenges and opportunities

for preservation as we move forward. I have the pleasure of introducing to you our moderator for this final series of presentations, Kate Wood. Kate has a joint degree in Historic Preservation and Urban Planning from Columbia University. She is the Executive Director of Landmark West!. She is also an adjunct Associate Professor at the historic preservation program here at the Graduate School of Architecture, Planning and Preservation. Kate's full bio is on the website and in some of your course materials. She is the recent recipient of the Grassroots Preservation Award from the Historic Districts Council and Kate is right here, so Kate is going to introduce her panelists to you now as they come on up and get started.

MS. KATE WOOD: Thank you all. So, welcome back to today's mind-blowing crash course in preservation law, theory, and politics. Andrew Dolkart, I hope you're listening because I think all the Columbia students here today should just collect their Master's degree on their way out the door. There are a few sadistic people who have suggested to me in the past that I go to law school given my various laps around the courtroom working for Landmark West! in the past ten years, and I hope I can collect a few credits on my way out too.

So, good afternoon. Again, my name is Kate Wood and I am the wanna-be lawyer asked to moderate the last set of panelists today. The purpose here is to begin pooling some of the ideas we heard today and look ahead towards the future and see what a strong, comprehensive preservation tool kit might look like. We've got some great acts to follow but if there is anyone who deserves an honorary J.D. it is the wonderful Carol Clark. Carol's first semester preservation planning course in Columbia's Historic Preservation Program is the moment that I can distinctly pinpoint I knew I was in exactly the right field. I had the luxury of listening to her illuminating explanations of landmark designation, zoning, and other planning tools for an entire semester and in a few minutes you'll have the pleasure of hearing about her latest research on new ways to protect historic neighborhoods.

Richard Roddewig is a lawyer and one of this country's foremost experts on land use, real estate, and landmarks—a formidable combination if there ever was one. It says in his bio he has valued more than 500 historic properties. So given the fact that there are nearly 27,000 designated landmarks in New York City I think we're going to have to clone you. Preservation easements will be the focus of Richard's presentation today. He is also the author of a very soon to be released text book on preservation easements and also, wearing a different hat, responsible for the fact that this whole session is being filmed and will be turned into a film that we can all enjoy for many years to come.

Finally, John Weiss has the shortest written bio in the program that I saw but I think that's a testament to his quiet, cool-headed presence and persistence as Deputy Counsel of the New York City Landmarks Preservation Commission. Since John came on board, he obviously has strongly increased its activism to defend landmarks from demolition by neglect, something that

he'll tell us more about in his presentation. So this is in many ways the dream panel and not only because you're all so awesome but because here's where we get to contemplate not only what is, but what could be. So you each have fifteen minutes. I am going to be in the role of rigorous task master when it comes to the time, so enforcement is the word of the day. Then we'll have plenty of time for what I'm sure will be a very lively Q&A with the audience. So thank you all very much. Carol?

Speaker: Ms. Carol Clark[3]

Thanks, Kate, for that lovely introduction. It's a privilege to discuss approaches to conserving neighborhood character with you, but first my thanks to the National Trust John E. Streb Preservation Fund for New York and the New York State Council on the Arts for their support of my research. Also, a special thank you to Ben Baccash, whose skillful assistance with today's presentation is greatly appreciated by me.

In New York City, a wide variety of older residential neighborhoods are suffering stunning losses of distinctive character. Whether through demolition and replacement of perfectly decent housing with McMansions or from unsympathetic alterations that compromise completely the original appearance of a building with bad siding, unfortunate windows or front yards paved over with parking, these changes undermine the character of neighborhoods. The problem is evident throughout New York City and it's a national issue. *The New York Times* decried the tear down epidemic, asserting that it is a rapidly growing hazard.[4] There is also an economic factor to consider. People prefer to reside in places that possess cohesiveness and feel comfortable to them. Add too many jarring juxtapositions, and we risk creating utterly unappealing environments. This could yield negative economic impacts.

Today, New York is a thriving city with a growing population located in a wide variety of housing, but the most common residential building type in New York City is the single family house. The majority of New Yorkers live in low density, suburban style settings. Understanding how they contribute to the city's vibrancy and bringing preservation tools to these neighborhoods is critical. Consider the difference between typical historic districts and another tool used to protect neighborhoods, conservation districts. Julia Miller, the Trust's expert on this subject, has written "[n]eighborhood conservation districts are areas located in residential neighborhoods with a distinct physical character that have preservation or conservation as the primary goal. Although these neighborhoods tend not to merit designation as a historic district, they

3. Photograph courtesy of Ben Baccash.

4. Editorial, *Hold Back the Wrecking Ball*, N.Y. TIMES, July 1, 2008, at A20, *available at* http://www.nytimes.com/2008/07/01/opinion/01tue3.html.

warrant special land use attention due to their distinctive character and importance as viable, contributing areas to the community at large."[5]

There are neighborhood conservation district ordinances in about 100 cities around the country. These can be tailored to a variety of local conditions not traditionally considered suitable for historic district designation. They seek to conserve the historic development patterns of the neighborhood, including its green spaces and predominately low density lot coverage. In New York City, concern about community appearance is not a new topic. A 1957 study was conducted by leading professional organizations.[6] The report stated that beautiful communities can be created and maintained only through a deliberate search for beauty on the part of community leadership backed by a lively appreciation of a visual world by the public. The chapter on evolving legal concepts written by the venerable Albert S. Bard discusses the public's interest in community appearances and concludes that appearance is value.[7] The next chapter, "Excerpts and Abstracts From Existing Legislation and Court Decisions," provides a road map to extending the administration of aesthetic regulation to the broadest possible context. The report asserts that a new, more positive approach to planning for community appearance is needed. Remember, this is 1957. The authors note that the publication of this report is not intended to signify that the subject has been exhausted. Instead, after four years of meetings, these professionals concluded that "we are now making available the material and our thinking on the subject so that a larger number of persons may join the effort."[8] Here we are.

While landmarks laws in the ensuing decades have been effective in protecting historic buildings, it's apparent that planning initiatives that involve aesthetics, community appearance, and neighborhood conservation have not advanced adequately, at least not in New York City. When considering aesthetic regulation of the built environment here, we think, of course, first of the Landmarks Preservation Commission. Their impact is significant. As you've heard, approximately 27,000 properties are under its jurisdiction but there are about 900,000 tax lots in the five boroughs. The landmark parcels, in total, represent only about 3% of the property citywide. There are many neighborhoods with distinctive character that are quite unlikely to be found worthy of designation. The *Times* reported on the construction of McMansions in Forest Hills by new residents whose houses, with paved over front lawns and high fences, are viewed by some as colliding in an appalling way with

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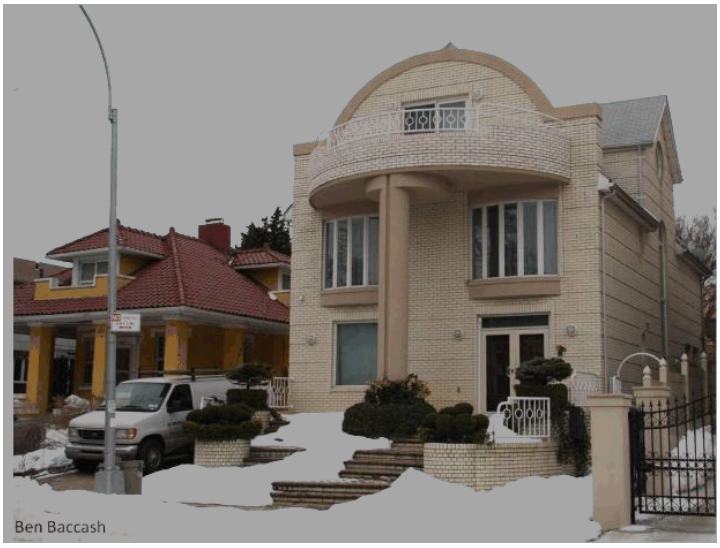
5. Rebecca Lubens & Julia Miller, *Protecting Older Niehborhoods Through Conservation District Programs*, 21 PRESERVATION LAW REPORTER, 1001, 1005 (2002).

6. AIA-AIP NEW YORK AREA JOINT COMMITTEE ON DESIGN CONTROL, PLANNING AND COMMUNITY APPEARANCE (Henry Fagin & Robert C. Weinberg eds., 1958).

7. Fagin & Weinberg, *supra* note 6, at 83.

8. Fagin & Weinberg, *supra* note 6, at viii.

neighborhood character.[9] The newcomers see them as signs of welcomed prosperity and success. Many of the older neighborhoods in Queens were built with a cohesive community design which was enforced originally by covenants or easements. In recent years, these privately regulated mechanisms have often either lapsed or have been overlooked. Douglaston is a case in point. Developed by the Richert-Finlay Realty Company, it is characterized by fine houses that dominate its sometimes narrow winding streets. Note that their construction is ongoing. In Kew Gardens, the original character, sedate and charming, is being transformed by houses like this one.



With an abundance of detached houses, what is happening with their replacements is this. There's a pressing need to think in a comprehensive way about neighborhood preservation. Myra Morris describes conservation districts as a regulatory overlay used to protect an area from inappropriate development. In practice, a conservation district is a malleable legal tool that is shaped differently in each city and neighborhood where it applies. Some neighborhood conservation districts apply rigorous design reviews while others simply apply guidance for new construction and act as a vehicle for neighborhood level urban planning.

Commentators tend to split conservation districts into two types: the architectural or historic preservation model, and the neighborhood-planning model. Preservation model neighborhood conservation district ordinances (NCDs) are more focused on preventing tear downs than on preserving architectural details. In contrast with the preservation model, the planning

9. Kirk Semple, *Questions of Size and Taste for Queens Houses*, N.Y. TIMES, July 5, 2008, at B1, *available at* http://www.nytimes.com/2008/07/05/nyregion/05forest.html?pagewanted=all.

style NCDs do not include design review, but rely solely on standard zoning regulations like lot size, building orientation, and scale to maintain the neighborhood's built form. Let's look at a few examples. In 1983, Cambridge, Massachusetts adopted legislation establishing neighborhood conservation districts, and with it, groups of vernacular buildings. Vernacular buildings and their settings with particular design qualities, are protected and maintained. One of the goals stated explicitly is to enhance the pedestrian's visual enjoyment of the neighborhood's buildings, landscapes, and structures. The ordinance supplements the traditional landmarks law in Cambridge.

To establish a conservation district in Dallas, Texas, a feasibility study is conducted and the city's director of planning determines eligibility. As a Dallas planning official notes, Dallas uses conservation districts to help neighborhoods determine what is important and writes guidelines based on what the neighborhood considers to be defining characteristics. An interesting example is the M Street conservation district which requires that all new homes be built in the Tudor revival style of architecture, characteristic of the original buildings. The neighborhood conservation district requires the use of standard sized bricks, as opposed to the king size type often used in the building of newer homes. It forbids metal roofs and window air conditioning units and requires that porches be constructed with transparent glass. Even though requiring replacement homes to be neo-Tudor revival seems anti-preservationist in its strictest sense, this approach is entirely consistent with what the residents agree they wanted, and it satisfies local government officials.

In Nashville, neighborhood conservation zoning districts are implemented using zoning overlays; each district has its own design guidelines which have been developed by the local government in close consultation with neighborhood residents. The districts promote new development that's compatible with the neighborhood's existing character. Another example is the Hillsboro-West End District. The result is a building that relates successfully to the existing residential character.

In Roanoke, Virginia, neighborhood design districts provide design guidelines for a variety of residential structures.

In addition to ordinances, Austin, Texas relies on residential design and compatibility standards. This is also known as Austin's "McMansion Ordinance." It outlines acceptable set back lines, building lines, and heights. The standards also mandate the articulation of side walls to encourage smaller scale and segmented appearance in construction to make it more compatible with its surroundings.

In Boston, architectural conservation districts are used to recognize areas of local significance. The architectural conservation districts have dedicated commissions and design guidelines that most observers believe are more flexible than those traditional historic districts. Here, the rhythm of the row house facades are echoed in the design of this new building erected by Boston

University. The architectural conservation districts work well and supplement the traditional historic districts in protecting the city's neighborhood character. These examples are but the tip of the iceberg.

There are numerous approaches to plan and safeguard community appearance. The future integrity of our neighborhoods requires us to learn from and adapt to these approaches. The ongoing erosion of neighborhood character is a planning problem, not a landmarks preservation issue. Many practitioners agree that in New York City, we have been treating zoning as planning. Zoning is not planning. One case in point: to respond to the proliferation of McMansions in Queens, city planning created a new zoning district which now applies to some lots in Bayside. This limits the heights of the houses and governs the building placement on the lot. The line-up provision of the R2A zoning resulted in a better outcome than what might have happened without it, but shouldn't we be thinking bigger than this? With a solid grasp of the multitude of planning and preservation challenges citywide, we need to consider creativity and a fresh outlook how best to respond to them.

Our overarching goal in compiling a plan for both addition and development in every neighborhood is what is necessary to be before us. In New York City this plan has to balance the competing realities of a growing and changing population with conserving built fabric, while also enabling, even reinforcing, the very dynamism that is the city's core. Other cities from Miami to Boston, from San Francisco to Portland, Oregon, are applying a variety of approaches to assess community character, inventory resources, articulate goals, and set priorities. Shouldn't New York City aspire to be a leader, bringing the best practices from elsewhere into focus and adapting them to our needs? The bottom line is that New York needs to grow and thrive with enlightened leadership, a design community that embraces change and respects the past, along with an informed, engaged constituency that shows it cares about planning and community appearance. The stakes are high. Right now the overall quality of the city's built environment is truly endangered. Together we need to rethink how we will proceed and to reinvent our approach. What better time to tackle this challenge than now, as we approach the 50th anniversary of New York City's Landmarks Law in 2015. Thank you.

Speaker: Mr. Richard Roddewig

Thank you very much. It's appropriate to be talking about easements here in New York City because really the origins of the modern perseveration easement movement in this country come out of New York City's process and landmarks code in the 1960s and 1970s. The interesting transferable development rights and how they're valued led to a lot of creative discussion by John J. Costonis, an attorney, and by real estate analysts in Chicago to come up with methods for valuing preservation easements. In the late 1970s and

early 1980s, the focus of this easement movement was on either large historic easements that were threatened by a subdivision, or smaller downtown income producing historic buildings in high-density zones such as New York, San Francisco, or Chicago. In the mid to late 1980s, the number of easements grew dramatically as real estate syndicators using the investment tax credit, and the rehab of historic income buildings, included preservation easements as another way of boosting the tax returns.

The number of historic preservation easements increased dramatically from the early 1980s to mid-1980s. I'll talk in a bit about recent IRS review of easements. This isn't the first time that they had zero value in easement donations. They did it, too, in the early to mid 1980s. The Atlanta office of the IRS was particularly focused on zero evaluations. It led to a summit conference with preservation organizations in 1985 and the IRS agreed to back off on their zero evaluation position and go to a case-by-case review and analysis of the easement values. The recession of 1987 and 1988 combined with new depreciation rules really put a temporary, almost virtual halt, to the donation of historic perseveration easements in the United States. Since there wasn't as much real estate syndication going on involving tax projects, there weren't as many easements being donated as a result.

In the early 1990s, there was little IRS focus on the easement area because there weren't very many easements being donated. In the late 1990s, the numbers started to come back, as interest in rehabbing historic properties also came back. Since 2000, however, there has been a dramatic surge in the number of preservation easements donated, especially for the first time, on single-family homes in urban markets, not a type of easement that was a focus on the first wave of easement donations in the 1970s and 1980s.

There's also been a big surge in conservation easement donations since 2000 as well. Active promotion of preservation easements has been underway by a number of preservation organizations around the county, including the Trust for Architectural Easements, once known as the National Architectural Trust. Since 2000, there's been a dramatic increase in the number of preservation easements. The statistics show that by 2005 there were 842 Part I Certifications for easement donations, nationally.[10] Most of the increase since 2000 has been in three major cities: Washington DC, here in New York, and in Chicago; there were approximately 500 easement donations between 2003 and 2008.

The title of this presentation is "Preservation Easements Under Assault," and I think in a way the assault is not only by the IRS in reaction to what has been going on, but also in a way, some of these preservation organizations that are promoting assessments have been assaulting the traditional concept of

10. The process by which a historic preservation easement is obtained begins with the Historic Preservation Certificate Application Part I, whereby the property is evaluated for its historical significance. PRESERVATION EASEMENT TRUST, FREQUENTLY ASKED QUESTIONS, http://www.preservationeasement.org/conservation/faq.asp (last visited July 10, 2011).

what a preservation easement should be, and the types of properties that it should be on. The assault from the point of view of publicity about what was going on began in 2002 with some *Philadelphia Inquirer* newspaper stories about conservation easements.[11] The stories alleged that these were benefits that were only helping very rich people. There were conflicts of interest among board members on the conservation groups that were accepting the easements.

The *Philadelphia Inquirer* article alleged that the easements enhanced, rather than decreased property values, and that they were being supported by inflated appraisals. The IRS in June of 2009 began to address what it perceived as abuses. A press release issued in June 2009 said that there were numerous instances where tax benefits of conservation and preservation easement donations have been twisted for inappropriate individual benefit; and it warned that taxpayers who game the system, and the charities that assist them, will be held accountable.

The *Washington Post* series of articles is really the one that most people are aware of in terms of what it meant for the IRS' new relationship with the easement area. The *Washington Post* series focused on preservation easement donations, and argued that donors of preservations were agreeing to change something they could not change anyway.[12] Owners were reaping a windfall. The easements were bogus gifts that were supplying home owners with free money, and the promoters were promising tax deductions, but quietly telling the donors that there would be no effect on their property values. The series even alleged that members of Congress were taking advantage of what was called in some of the articles, a loophole.

The IRS, in February of 2005, included easements on their list of the "Dirty Dozen Tax Scams," and in a statement later in the year said in many cases local historic preservation laws already prohibit alterations of the homes' facade, making contributed easements superfluous. This led to Senate Finance

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11. The Philadelphia Inquirer series was a four-part investigative report on the use and misuse of preservation easements. Craig R. McCoy & Linda K. Harris, *Saving Treasures That Benefit Few*, PHILA. INQUIRER, Feb. 24, 2002, at A1, *available at* http://articles.philly.com/2002-02-24/news/25333700_1_federal-tax-tax-deduction-tax-revenue; Craig R. McCoy & Linda K. Harris, *A Limit to Development But Not to His Creativity*, PHILA. INQUIRER, Feb. 25, 2002, at A1, *available at* http://articles.philly.com/2002-02-25/news/25332959_1_preservation-easements-deed-restriction-limit-development; Craig R. McCoy & Linda K. Harris, *Estates to Sell?*, PHILA. INQUIRER, Feb. 26, 2002, at A1, *available at* http://articles.philly.com/2002-02-26/news/25334732_1_deed-restrictions-transactions-real-estate; Craig R. McCoy & Linda K. Harris, *A Preservation Group Hangs On, Looks Ahead*, PHILA. INQUIRER, Feb. 27, 2002, at A1, *available at* http://articles.philly.com/2002-02-27/news/25334301_1_historic-buildings-preservation-groups-preservation-activists.

12. The Washington Post series was a two-part investigative report. Joe Stephens, *Loophole Pays Off on Upscale Building*, WASH. POST, Dec. 12, 2004, at A01, *available at* http://www.washingtonpost.com/wp-dyn/articles/A57445-2004Dec11.html; Joe Stephens, *Tax Break Turns Into Big Business*, WASH. POST, Dec. 13, 2004, at A01, *available at* http://www.washingtonpost.com/wp-dyn/articles/A59835-2004Dec12.html.

Committee hearings, an investigation by the Senate Finance staff, House Ways and Means Committee hearings, which led, in turn, to the Pension Protection Act of 2006 Preservation Easement Amendments. The IRS, in ratcheting up its review of this whole area, created a special issue management team. It also, as part of its assault on the easement area, made changes to its audit manual. It conducted market studies in New York, Chicago, and Washington D.C., and it got behind the Pension Protection Act of 2006 changes, adopted new regulations, and went into court to argue that easements have zero value, and to challenge other aspects of easement donations.

I want to talk about each of these briefly. The IRS audit manual was something that was being picked up on by appraisers who were being recommended by the more aggressive groups promoting assessments. The audit manual said that in Philadelphia, in a study done by the IRS, easements typically reduce value by 10 to 15%. Many appraisers began to simply rely on that percentage, apply it to the before easement value, and give to the taxpayer the amount of the donation. The IRS as part of its review of the program, removed the article from the audit manual and issued a Chief Counsel advice memo that said there was never an automatic fixed percentage that easement donors were entitled to.

The market studies that the IRS conducted here in New York City were a comprehensive study of single-family townhome easements. It calculated the number of easements that were donated, and did some market studies and comparative analysis of sales prices for easement single-family row houses and non-easement properties. The conclusion in the New York City market study was that preservation easements result in no discernible diminution in a fair market value of a brownstone property. It went further to say that easements simply duplicate the protection already provided by New York City's Landmark Law. The study was not written by attorneys however, but by real estate analysts. In Washington D.C., a similar kind of study was conducted, leading to similar conclusions.

In Chicago where we were retained by the IRS to do the market study, we found slightly different results. We did find some impacts from preservation easements on single-family homes. We found 4-6% impacts on prices in two neighborhoods, no impact on prices in one, same to slightly higher values in one neighborhood, and one sales data was inconclusive in the fifth neighborhood that we studied for the IRS.

The Pension Protection Act of 2006 has a number of provisions related to appraisers and what they must do now to be more rigorous in their analysis. New over-evaluation penalties were put in place. There are also some new requirements for easement organizations. These new requirements include a filing fee every time they accept an easement for a charitable deduction, a new reporting requirement for them, and also the requirement that preservation easements must protect all four sides and the roof in order to qualify as a conservation contribution. IRS transitional guidance and proposed regulations

went further, and reiterated some of the things in the Pension Protection Act, especially as it related to real estate appraisers and how they must perform their duties.

The issue management team, as of March of 2006, announced that it had about 500 easement donations under review including about seventy-five easements nationally. Conservation easements in Colorado were particularly subject to review. A *Denver Post* story in November 2007 said there were about 290 conservation easements in Colorado under review by the IRS. The precise number of easements the IRS is reviewing is not really clear. There are probably now hundreds of them, including dozens here in New York City that are under review.

The IRS has filed more than thirty-five conservation easement cases since 2005 in tax court and other courts. The issues raised in these court cases typically involve four things: challenges to the appraisals that are not meeting the qualified appraisal rules, challenges to the appraised values, challenges to the conservation purpose having been met or not met by the donation, and issues related to the subordination of mortgages.

Now these are the six most significant cases.[13] I'm going to talk about a couple of them, and then maybe we can talk more about them when the panel convenes. In one case,[14] the appraiser simply multiplied 4% or 5% by the four sides of the building, and got a 20% easement deduction. The IRS' position was that not only was that improper, but there were other things wrong with the appraisal as well. That meant that the taxpayer had not substantially complied with the requirements for a qualified appraisal and for a charitable donation. The district court agreed, said there's no substantial compliance in this case, and said that the acknowledgment by the Landmarks Preservation Council of Illinois was deficient. LPCI acknowledged the cash contribution, but did not acknowledge the easement itself as required by the tax court.

There's interesting dicta by the District Court in the decision of the case involving the arbitrary percentage. The court concluded by saying it appears to call for careful scrutiny by someone who recognizes when an emperor has no clothes on, the fact that there was an automatic percentage that the appraiser applied. The District Court also called into question the fact that Landmarks Preservation Council based its cash contribution on 10% of the appraised value of the easement. That raises interesting issues about whether or not they were recommending friendly appraisers in order to boost the amount of the charitable gift deduction and boost the amount of their cash contribution.

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13. Bruzewicz v. United States, 604 F. Supp. 2d 1197 (N.D. Ill. 2009); Simmons v. Comm'r, 98 T.C.M. (CCH) 211 (2009); Scheidelman v. Comm'r, 100 T.C.M. (CCH) 24 (2010); Herman v. Comm'r, 98 T.C.M. (CCH) 107 (2009); Kaufman v. Comm'r, 134 T.C. 182 (2010); Whitehouse Hotel Ltd. P'ship v. Comm'r, 131 T.C. 112 (2008), *rev'd and remanded*, 615 F. 3d 321 (5th Cir. 2010).

14. Bruzewicz v. United States, 604 F. Supp. 2d 1197 (N.D. Ill. 2009).

In *Simmons*[15] in Washington, D.C., the claimed easement value was at 11% and 13% on two row houses. The IRS zero valued this, said there was no value to the easement because both easements duplicated the protection already provided by D.C. preservation laws, and that the appraisers were not qualified appraisers. The IRS also said there was no conservation purpose here because the L'Enfant Trust can consent to changes in the facade after review, and has the right not to exercise any of its obligations if it doesn't want to. The IRS also argued that the mortgage subordination and acknowledgment was not paramount to subordination, and that meant the easement failed to meet the perpetuity requirements.

The Tax Court disagreed with the IRS on virtually every single one of these points, and pointed out that the preservation easements imposed a higher level of enforcement by the then District of Columbia preservation laws, and said a zero value appraisal is not credible.

So let's go to the lessons of the IRS court challenges. As a result of these cases, here's what the lessons are. First, courts are not sympathetic to IRS claims that preservation easements do not impact value. They have been rejecting the IRS claims that there's no impact on value. The courts unanimously agree that preservation easements impose more legal restrictions than local preservation laws. Strict compliance with qualified appraisal rules is essential, at least for taxpayers, and that's part of the *Whitehouse Hotel*[16] case. It's improper to base value on fixed percentage value. Mortgage subordination issues remain open. Deduction of cash contribution issues remain open, but there are some inconsistencies between tax court decisions.

There are many appraisal issues left to be resolved. The appraisal profession has responded with two courses on appraising conservation easements and on appraising historic conservation assessments. They also responded with a book that I authored that will be out in about a week and a half. The National Trust is joined with the Land Trust Alliance in these educational efforts, and has filed amicus briefs in a number of these cases.

The IRS had an advisory council take a look at its' own easement practices. The advisory council said that what was happening as a result of the IRS review of easements was that donees were believing that IRS policies have had a chilling effect, and that owners were fearing to make any more donations because they were afraid they would be fined and audited. They were absolutely right about the chilling effect. The number of easement donations has gone down dramatically. In 2009, the National Park Service certification only had seventy-two compared to 842 just four years earlier.

So where are we today, and what still needs to be done? The IRS needs to adopt the recommendations of its advisory council. Recommendation number one, is that you should be allowed to amend technically deficient appraisals

15. Simmons v. Comm'r, 98 T.C.M. (CCH) 211 (2009).

16. Whitehouse Hotel Ltd. P'ship v. Comm'r, 131 T.C. 112 (2008), *rev'd and remanded*, 615 F. 3d 321 (5th Cir. 2010).

during the audit process. The IRS needs to affirm that a non-zero market value is possible. This is an odd way of putting it, but an effective way of telling the IRS that they shouldn't be zero valuing all easements. There should be a safe harbor rule where easements that are less than 10%, the IRS should make use of outside appraisers.

So we're at a point where the IRS is continuing to review easements, and so is the Justice Department, but the focus will eventually wane, given the decreased number of easement donations. The preservation movement needs to get back to the basics. Let's get back to the kinds of buildings that we were focused on early on. Easements should not be mass-marketed. They should be focused on buildings threatened by high-density subdivision and development, and the amount of cash contribution should not be related to the value of the easement. It will continue to be an important tool. I think the book that's coming out,[17] the documents, the whole history of this, the court cases, as well as evaluation techniques, will help a whole lot. You can order it from the Appraisal Institute. Thank you.

Speaker: Mr. John M. Weiss[18]

Most of our enforcement action in New York concerns property owners who make changes either without a permit from the LPC, or one that's not in compliance. There are, however, a small number of property owners who have failed to maintain their buildings and these are "demolition by neglect" cases. Some of these buildings are in pretty horrific condition at the start of the process.

The basis for our demolition by neglect cases is a Landmarks Law requirement that landmarks must be kept in the condition of good repair, which is very broadly defined in the Law. We interpret that to mean that a landmark must be structurally sound, it must be water tight, and the significant architectural features must be kept intact. As Kate alluded, we've become much more aggressive with bringing these demolition by neglect lawsuits in the past eight or nine years. In the first thirty-seven years, we had one case filed where we prevailed, and we had eight more cases in eight or nine years with another case we're about to file in maybe three weeks or so.

What's important to note, is the majority of demolition by neglect buildings get resolved prior to Landmarks filing a law suit. This is really the tip of the iceberg. Right now we have about thirty-five or forty buildings which are in the pipeline where we're working with the owner to try to make repairs before we have to file a lawsuit. Most of those efforts will be successful; if not, we file a lawsuit.

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17. RICHARD J. RODDEWIG, APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS (2011).

18. All photographs courtesy of the New York City Landmarks Preservation Commission.

This is my first case study.[19]

It's an individual landmark in lower Manhattan. In 2002, we received a report that the roof had collapsed. In general, the building was in disrepair. The property owner had another number of properties in Manhattan that were very well financed. They were very well off, they had deep pockets, and there was no excuse for letting this landmark fall to this level of disrepair. We got access to the roof fairly quickly, but this building continued to get in worse and worse shape. We filed our demolition by neglect lawsuit in August of 2002 and we actually had a trial on this case. I was fairly confident we were going to prevail in the trial because the owner called me as their only defense witness. So we went to trial and what happened is we realized there were many more structural problems with the Skidmore House than just the roof collapsing; most of the floors had to be replaced. In fact, during the course of this litigation, there were two more interior collapses of the floors; luckily no one was hurt. Once the building was stabilized, the front facade had to be reattached to the side walls because it was pulling away. All the restorative work is not quite done. The roof needs to be put back which will be done this Spring.

This is our demolition by neglect process. We document the condition of the building at issue. We've had a lot of help from the preservation groups, neighbors, elected officials, and other agencies, bringing to our attention

19. Samuel Treadwell Skidmore House, 1845 Greek Revival Row House at 37 East 4th St. (May, 2002).

buildings that are at risk of demolition by neglect. It's very hard sometimes to contact the owner. I'll talk about that a little bit more. We try to have voluntary repairs made. We have our hard working preservation staff prepare an existing conditions report. So they go out, do a site visit, they document the poor condition of the building and that is technically the basis of our lawsuit. The Chair, Bob Tierney, then issues the order directing the owner to make repairs. It outlines how the building is in disrepair and it cites the provision of the Landmarks Law that allows us to impose a $5000 per day fine for failure to maintain the building. Our staff then drafts the legal documents and refers the matter to the New York City law department for prosecution. The cases we bring are by order-to-show-cause so we can get in front of a judge very quickly. We often get before a judge in three or four weeks as opposed to waiting five or six months. In court we are seeking a court order from a judge, ordering the parties responsible to bring the building up to good repair and then in perpetuity to keep it in that condition.

Sometimes there are cases where we decide not to bring a lawsuit. One of our concerns is that this is still a new area of law in New York. We don't have a lot of case law so we are concerned about having a bad decision against us. Also, there is a concern that a home owner might want to file for hardship. If they're not getting a 6% return, we might be opening a can of worms by bringing a demolition by neglect lawsuit when the owner turns around and files a demolition based on hardship. Also sometimes there are alternative solutions to the problem and sometimes we're just trying to do the right thing. That is what happened in one building where the owner was actually born in the building in Brooklyn in the 1920s. Her parents had bought it in 1922. When we reached out to her, she was in poor health and didn't have the financial resources to address the buildings condition. The rear wall had partially collapsed actually. When her parents bought it, there was no record of the transaction, there was no title, there was no deed that anyone could locate. So technically the person that was born there and lived there her entire life, did not own it. So, a pro bono attorney brought an adverse possession case and I'm sure that the lawyers here will appreciate that. That's where you openly and notoriously live in a location for ten years in New York, you can then bring a proceeding to take title to that property. So I was very involved in that proceeding. The judge ruled in her favor, she got title, she sold it and the new owner understood it was a landmark and had to be repaired. He came to us and got permits, did that work, and rebuilt the rear facade as well.

We find that there's no specific type of building or owner that falls into the demolition by neglect category. We have seen here wood frame buildings, we have individual homeowners, we brought actions against corporations, including one based in Tokyo, another one was based in Vermont. We have large buildings as well as single-family buildings and this is a case actually, where we did not file a lawsuit.

The owner, after we met with him, realized his obligations. He decided to sell the building which happens fairly regularly with these buildings, and the new owner started to do repairs. The second picture is what it looks like now.

It still needs to be painted correctly, but obviously it's in much better condition.

There are some really simple problems we run into on these cases. For instance, once we actually get permission to go inside a building, I'll show up with the engineer from the Department of Buildings, someone from our hard working preservation staff. We put the key in the door, try to open the door, and it only opens about eight or nine inches. Then we see the building can be filled with possessions or debris. So, we had three or four cases where it seems like it's a syndrome involved. It's important to clean out the buildings because, not only do we want to get in to do an inspection and make repairs, but that's a lot of weight on a building's floors, and often these buildings have water damage; it's getting in and causing structural issues. So in a number of these cases we've had the owners spend literally months filling dumpster after dumpster after dumpster to clean out their possessions.

Now, making initial contact with the owners can also be challenging. I was just going to go through a list of actions we took in one case to finally reach an owner but then I realized the story behind the image here of the house filled with debris is more interesting in terms of how we got in touch with the responsible parties.

We were about to bring a lawsuit against the responsible parties, then it turns out the two brothers that owned this building both died and the family

members were completely unresponsive to letters, phone calls, and efforts to get them into a dialogue to take some action on their building. I searched the finance records in New York for any other properties owned by this family and came up with some other properties. There had been a recent transaction on one of them and it was a lawyer's name in the records from four or five years earlier. So I call up the lawyer, and he agreed the family was very secretive and was not very responsive, but he said one of the brothers who died had a business partner who he knew and I should contact her to get me into the building and start the discussion with the surviving family members. However, he didn't have a phone number or an address. He just said her name is Bertha and she runs and owns a liquor store on Houston Street near Avenue B. So I went there and sure enough there is a liquor store and it has its Plexiglas sheets coming down to the counter and there's this eighty-five-year-old woman behind the counter, and it's Bertha. I slid my card in where the cash goes and we had a lovely conversation explaining why we had to talk to the family of her deceased partner. Sure enough, the next week the owner's relatives did get in touch with me, and they started making repairs to the building.

We brought a lawsuit against a building where the estate, two owners, both died unfortunately. They were not related and the bank that had one of the mortgages foreclosed, so in the lawsuit we actually named not only the estate but the bank in Texas that had the mortgage and it got worked out. Some of the work is non-compliant, I think some of the windows and cornice need some corrective action.

We also sometimes piggy-back onto existing litigations. The Republican Club is a landmark in Queens. There was a lawsuit between a private owner and a current owner. I started showing up at the court conferences and the judge took judicial notice of the fact that this was a landmark. He ordered inspection by Landmarks, the Fire Department, and the Department of Buildings. We went in and the judge was very cognitive of the landmark issues. So while we did not actually bring our own demolition neglect lawsuit we used the existing litigation to achieve the objective. The building was sold and now it's being repaired.

One issue I've discovered is that a lot of work goes on behind the scenes. You might be working with an owner of a building but the neighbors and other interested parties are unaware of anything going on because the facade is not changing. Yet, during that time we're negotiating with the owner, the architect or engineer is drawing up plans, they're filing with us, we're issuing permits, the Department of Buildings is issuing permits, there's shoring and bracing going on inside the building in anticipation of exterior repairs proceeding. So sometimes a lot of work is going on but it's all behind the scenes. I should mention Tim Lynch, he's the head of the Forensic Engineering Unit of the Department of Buildings. We work with him and his

engineers on almost a daily basis with making site visits or conservations of these buildings, so the sister agencies are a tremendous help to landmarks.

My last case study is the Windermere. It was designated in 2005. It had been owned by the Toa Corporation, based in Tokyo, for twenty years. It was in pretty horrific condition at the time of designation and that was the argument of why they said it should not even be designated. Nevertheless, the Commission designated it and we filed the lawsuit. We had a terrific judge, Justice Smith, who ruled in our favor. A $1.1 million fine was paid by the owner; Landmarks did not get the money by the way. The new owner signed the extensive agreement to make repairs over the next year or so and he had inspections on a regular basis by engineers and Landmarks. So we thought this is perfect. A lot of work has been done to stabilize the Windermere but we spent the past year still working with the new owner and their team on working out the additional work that has to get done, when it's going to be done, and how it's going to be done. So even though we might prevail in court, the work does not end with the victory. They're about half way done with the exterior facade work and will resume in the spring.

So just to sum up, these cases are complex. They involve a lot of human stories with owners who are elderly, sometimes they don't have the financial wherewithal, and they might be ill. We have the estates that we have to deal with. We have corporations that are overseas or out of New York City, which cause problems, but nonetheless the Commission is dedicated to continuing to take these demolition by neglect actions, and we are steadily moving forward. So just to go back to the analogy that came up this morning about landmarks being middle-aged: I think when you're middle aged you need to exercise, to flex your muscles to stay in shape. So I think the demolition by neglect actions and the work on issuing of permits and other post designation aspects of historic preservation is becoming more and more important as landmarks in New York age and as we almost hit our 50th anniversary. Thank you.

AUDIENCE QUESTION & ANSWER

Moderator: Ms. Kate Wood

Panelists: Ms. Carol Clark, Mr. Richard Roddewig, & Mr. John M. Weiss

MS. WOOD: Thank you. So while our presenters come up to the panel I want to open this immediately to the audience, just because I want to have as much time as possible for questions. While they're gathering, I just want to evoke one of my favorite "Tony Woodisms," which is: when all you have is a hammer, everything looks like a nail. Maybe that's one of the questions that weaves together these three presentations, the question is about using the right tools in the right situation, how do you determine when a strong application of

the Landmarks Law is the right approach, and in what cases may other approaches be more effective. So with that kind of question, I just want to open it up to questions from the audience. Way in the back there.

AUDIENCE MEMBER: Carol, what do you think it would take to get a neighborhood conservation ordinance?

MS. CAROL CLARK: It would take legislation by the City Council. I think it's not necessarily essential to have legislation to achieve the results that a neighborhood conservation ordinance might be able to achieve here; but I think if you had the appropriate political will at the top, and enough of us spoke about how we felt it was important that we had this additional kind of aesthetic—not regulation because I know Margery doesn't want any more regulation—but certainly guidelines and tools, and ways of providing members of neighborhoods to get better guidance about what they could do. We could probably achieve this without legislation and politically that might be a more sensible way to attempt to do it.

AUDIENCE MEMBER: John, firstly, would it be helpful if the Commission had the power to get access to the interior of buildings more frequently to know what they had to do? Secondly would it also be helpful for your enforcement staff to have a structural engineer? And, thirdly, in solving a troublesome problem like demolishing the building, would it be helpful to work out a protocol between the Landmarks Commission and Buildings that would eliminate the possibility of oversight?

MR. JOHN M. WEISS: Yes, yes and yes. In terms of the structural engineer, yes, it would be terrific for us to have a structural engineer on staff; however we use the engineers at the Department of Buildings all the time, and they've been incredibly accommodating. Tim Lynch, as I mentioned, has twenty-five years of experience as a structural engineer. I've known Mark Silberman for a couple of years. I talk to him or email him at least three or four times a day, so we've managed to leverage the existing city resources to meet our needs.

In terms of getting access, yes, that would be terrific. We need to get permission from the owners and sometimes that can be time consuming, as the Law does not allow us to enter without the permission of the owner.

Finally, in terms of the issue of when a sister agency might take some action that might be harmful to a landmark, there have been cases as you well know, I think over the last few years, where our communication has gotten much better and at this point we know who to contact at the Department of Buildings. They know who to contact at Landmarks. There's a lot more communication back and forth between the agencies, so hopefully we will avoid any unfortunate incidents.

AUDIENCE MEMBER: Easements have been a really great mechanism for doing two things. One is in areas where they're not in historic districts already, obviously it's the owner being willing or a predecessor being willing to restrict future changes to the building. So, it's kind of opting for landmarking and in the situation where it is historic property within a historic district, provided that the not-for-profit that is monitoring the easement holds to its mandate which is to monitor and enforce its own regulation, you've got another entity who is functioning, sitting in the role of Landmarks Commission. We did have some experience where the entity was stricter than the Commission was about certain changes that were made. So, you had made a comment that you thought there should be fewer of those easements and that they should be directed at a particular type of building where they had been before, but I don't see how that helps us.

MR. RICHARD RODDEWIG: You're absolutely right, that easements, when they're enforced properly, are much stronger than preservation ordinances. I disagree completely with the IRS position on that, and the new book that's coming out disagrees completely with the IRS position on that. The point that I'm making about the single-family homes is that when you go in and you appraise easements of the property before and after, most of the time on these single-family homes, you don't find any significant impacts. As a result, what we really should be focused on are those properties where we know there would be a significant value to the easement. We should be encouraging the easement to be donated on those properties, rather than encouraging single-family homeowners to donate easements in situations when all that they really might be doing is buying themselves a bunch of trouble with the IRS, because the appraisals won't stand up.

AUDIENCE MEMBER: But if an easement is going to have a significant value on a property, isn't that going to lead to higher real estate taxes? And also, doesn't landmark protection apply only to the visible portions of a building or property from a public street? And so, the easement therefore offers protection on all four sides, whereas the landmark protection doesn't.

MR. RODDEWIG: If I understand the New York City Landmarks Law, you can protect all parts of the building including the interior.

AUDIENCE MEMBER: And the building which is not even visible from the street as well?

MR. WEISS: Yes. The Landmarks Law in New York designates the landmark site, and so it will include, in most cases, the entire tax lot. It's not only the front facade, it's a side facade, a rear facade, and even the back yard sometimes.

AUDIENCE MEMBER: Quick question for John, were there at least one or two people still living in the Windermere?

MR. WEISS: Yes.

AUDIENCE MEMBER: What happened to them?

MR. WEISS: They were actually vacated by the Fire Department. I think there were six or seven tenants. The Windermere hadn't been SRO for many years. Before the Toa Corporation in Japan had bought it, the prior owners had harassed out many tenants. So there was a felony conviction for the former property owner for clearing out the Windermere except for the six or seven tenants. The conditions were so bad that the Fire Department did evacuate the building and I'm not sure where they are but there was a settlement made to them.

MS. WOOD: We just have time for one more question. Does anybody have a question about the neighborhood conservation districts?

AUDIENCE MEMBER: Yes, I had one on that.

MS. WOOD: Alright, go ahead.

AUDIENCE MEMBER: I'm very impressed by the presentation Carol, because you pointed out a lot of things that I really think are so on the mark, and it seems to pull in that gray area between the Landmarks Commission and the Planning Commission. Some of the images that you showed seem to be either just outside or on the edge of already some historic districts, and I wondered if that were true. Is there not something now that, short of designating historic districts everywhere—although I know people who would love that—could be done now either between the Planning Commission or Landmarks? Is historic designation the only alternative to those conservation areas? Because you're focused on scale and materials, which are also part of the consideration in the historic district, or on the planning right?

MS. CLARK: Right, my primary point is that there are so many areas of the city that do have quality architecture that is being eaten away at now, and the City Planning Department's response to it, and the Planning Commission's response has been to adopt certain zoning districts like the R2A, that applies in certain areas in Queens and in Bayside. It also applies to forty foot lots. There's another piece of zoning that applies in Forest Hills to sixty foot lots. But my point is that it's a very incremental, and I think an inadequate approach, and that we need a much broader approach. Of course we get into

that larger question of planning and zoning, and we don't unfortunately have zoning police. I think that we would really need, the political will and all of us voicing our concern about community character and planning, and community appearance throughout the five boroughs of Manhattan.

MS. WOOD: Unfortunately, I'm being told we have to cut off this panel, but we're going to shift gears and continue the conversation in a slightly different format, but thank you all so much.