PROTECTING LANDMARKS FROM DEMOLITION BY NEGLECT: NEW YORK CITY'S EXPERIENCE

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I. INTRODUCTION

In the aftermath of the tragic demolitions of Pennsylvania Station in 1963[1] and the Brokaw Mansion in 1965,[2] one of the initial priorities of the New York City Landmarks Preservation Commission was to identify and designate potential landmarks to prevent their demolition.[3] Over time, apprehension has lessened over undesignated buildings worthy of preservation being demolished. However, a new concern, one that could not have been imagined when the Commission was created in 1965,[4] has emerged as a priority for the Commission—protecting *designated* landmarks from demolition by neglect. This new focus reflects the maturation of the preservation movement in New York City and is a natural consequence of the designation of thousands[5] of buildings. This article explores the lessons learned from a decade of efforts to save dozens of landmarks at risk due to their extreme disrepair and provides guidance on practical issues that may arise during demolition by neglect cases.

The Commission has become much more assertive in bringing demolition by neglect lawsuits. During the Commission's first thirty-five years of existence, it brought only one demolition by neglect lawsuit.[6] During the next eight years (2000 through 2007) the Commission brought three lawsuits, and from 2008 to the present six additional demolition by neglect lawsuits have been filed.[7] This increased experience has resulted in the Commission

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1. Editorial, *Farewell to Penn Station*, N.Y. TIMES, Oct. 30, 1963, at 38.

2. Editorial, *Rape of the Brokaw Mansion*, N.Y. TIMES, Feb. 8, 1965, at 24.

3. *Cf.* Kim A. O'Connell, *Lead Us Not Into Penn Station*, NAT'L TRUST FOR HISTORIC PRES. (Apr. 1, 2008), http://www.preservationnation.org/magazine/2008/books/.

4. For more information about the Commission, see *About LPC*, N.Y.C. LANDMARKS PRES. COMM'N, http://www.nyc.gov/html/lpc/html/about/about.shtml (last visited Feb. 18, 2012).

5. Press Release, N.Y.C. Landmarks Pres. Comm'n, Five New Landmarks Named in The Bronx, Queens and Manhattan (Dec. 20, 2011), *available at* http://www.nyc.gov/html/lpc/downloads/pdf/11-14_five_landmarks.pdf (Noting that the LPC "has granted landmark status to more than 29,000 buildings and sites, including 1,301 individual landmarks, 113 interior landmarks, 10 scenic landmarks, 106 historic districts and 16 historic district extensions in all five boroughs.").

6. City of New York v. Goding, No. 48530/1996 (N.Y. Sup. Ct. Feb. 6, 1998).

7. City of New York v. Wilkins, No. 400729/2011 (N.Y. Sup. Ct. Aug. 2, 2011), *available at* http://decisions.courts.state.ny.us/fcas/fcas_docs/2011AUG/3004007292011001

developing a regularized process to address demolition by neglect situations. When the Commission learns of a landmark in extreme disrepair, it first tries to have repairs voluntarily made by the owner or person in charge of the landmark. If that effort fails, the Commission commences legal action seeking issuance by the New York State Supreme Court of a court order compelling the owners to make immediate repairs, keep the building in good repair, and pay monetary fines. Although increasing demand on Commission resources, bringing a lawsuit has shifted from being a rare occurrence to a mainstay of the Commission's enforcement tools.

The filing of a demolition by neglect lawsuit is similar to seeing only the tip of an iceberg—the vast majority of cases are resolved prior to initiation of legal action. Extensive efforts are undertaken by Commission staff to have owners voluntarily repair their landmarks prior to commencement of legal action. The Commission wants to have owners and other parties in charge of landmarks spend their time and funds substantively addressing the issues at hand rather than defending a lawsuit. It is important to provide notice of the need to make repairs, and an opportunity to do so, not only because it is the right thing to do, but also because the failure to make repairs after receiving notice is an important part of the legal case. Consequently, all contacts with the owners and parties in charge of the landmark are carefully documented and can become exhibits if the matter moves to a litigation posture. Unfortunately, owners often become responsive only after legal papers are drafted and the gravity of the situation becomes clear.

It is important to maintain perspective about this problem. At any given time, approximately sixty structures are identified as being in disrepair—less than one-fifth of 1% of the approximately 29,000 buildings currently regulated by the Commission. Even accounting for buildings in disrepair that have not yet been brought to the Commission's attention, it is clear that the vast majority of landmark owners maintain their buildings in good repair.[8]

SCIV.pdf (stipulation and order); City of New York v. Orellana, No. 10360/2010 (N.Y. Sup. Ct. Feb. 17, 2011); City of New York v. Quadrozzi Jr., No. 8442/2010 (N.Y. Sup. Ct. May 21, 2010) (stipulation addressing repair); City of New York v. Estate of Johnson, No. 23104/2008 (N.Y. Sup. Ct. Oct. 7, 2009) (stipulation adding a party and acknowledging other facts); City of New York v. Corn Exch., LLC, No. 401846/2008 (N.Y. Sup. Ct. Jan. 29, 2009), *available at* http://decisions.courts.state.ny.us/fcas/FCAS_docs/2009FEB/3004018462008001SCIV.pdf (order denying preliminary injunction); City of New York v. Toa Constr., Inc., No. 400584/2008 (N.Y. Sup. Ct. May 8, 2008) (stipulation and order entered into by both parties for, among other things, the repair and continued maintenance of the building at issue); City of New York v. Palmer, No. 620/2006 (N.Y. Sup. Ct., Jan. 9, 2006); City of New York v. Retrovest Assocs., Inc., No. 12844/2003 (N.Y. Sup. Ct. Apr. 7, 2004) (order denying motion to dismiss); City of New York v. 10-12 Cooper Square, Inc., 793 N.Y.S.2d 688 (N.Y. Sup. Ct. 2004).

8. The earlier the Commission learns of landmarks in disrepair, the quicker it can begin its efforts to save the building. Time is not on the side of the Commission in these matters. Consequently, the Commission is starting an enhanced effort to more quickly identify buildings at risk. This initiative involves increased outreach to community groups to alert their members to contact the Commission if they know of a vacant landmark, as well as using existing City databases to identify landmarks in disrepair.

II. THE LAW

In New York City, the legal basis for these lawsuits is the requirement in the Landmarks Law that landmarks be kept in a condition of "good repair."[9] Section 25-311 of the Administrative Code of the City of New York (part of what is commonly referred to as the Landmarks Law of New York City, along with the City Charter[10] and Title 63 of the Rules of the City of New York[11]) provides that:

> Maintenance and repair of improvements. a. Every person in charge of an improvement on a landmark site or in an historic district shall keep in good repair (1) all of the exterior portions of such improvement and (2) all interior portions thereof which, if not so maintained, may cause or tend to cause the exterior portions of such improvement to deteriorate, decay or become damaged or otherwise to fall into a state of disrepair.[12]

Maintaining a landmark in "good repair" does not mean that it needs to be pristine. The Commission has interpreted the broad language of Section 25-311 as requiring that a landmark be structurally sound, watertight, and that its significant architectural features are not at risk of loss.[13] It is important to note that there is no requirement that the failure to maintain a landmark in good repair be intentional.

Section 25-311 of the Administrative Code holds responsible any "person in charge" of a landmark,[14] not only an owner, to keep it in good repair. The term "person in charge" is defined in Section 25-302(t) of the Administrative Code as including an owner, mortgagee or vendee in possession, executor, agent or "any other person directly or indirectly in control of an improvement or improvement parcel."[15] This expansive definition is helpful and has allowed the Commission to name estates and a bank that had foreclosed on a property as defendants in our actions.[16] The Administrative Code also

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9. N.Y.C. ADMIN. CODE § 25-311 (2011).

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

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

12. N.Y.C. ADMIN. CODE § 25-311.

13. Plaintiffs' Memorandum in Support of Motion for a Preliminary Injunction at 3, City of New York v. Toa Constr., Inc., No. 400584/2008 (N.Y. Sup. Ct. Mar. 20, 2008) 2008 WL 8046373 (describing the standard of good repair).

14. N.Y.C. Admin. Code § 25-311. Although these cases almost always involve buildings, there is a historic cast iron fence in the Park Slope Historic District that was in extreme disrepair. The Commission considered a demolition by neglect action, but the owner responded to Commission outreach and retained a highly qualified architectural firm to oversee the restoration of the fence, thereby avoiding litigation. Nothing in the New York City Landmarks Law prevents a demolition by neglect case for serious disrepair of a non-building landmark such as an historic fence or street clock.

15. *Id.* § 25-302(t).

16. *See, e.g.*, Stipulation, City of New York v. Estate of Johnson, No. 23104/2008 (N.Y. Sup.Ct. Oct. 7, 2009); City of New York v. Corn Exch., LLC, No. 401846/2008 (N.Y.

explicitly provides for the New York City Law Department to bring a legal action to enforce the Landmarks Law.[17]

There is very little published New York state case law on demolition by neglect matters. In the only case that has gone to trial, *City of New York v. 10-12 Cooper Square, Inc.*,[18] the Commission prevailed after a bench trial.[19] The court deferred to the expertise of the Commission as the expert administrative agency,[20] cited progressive deterioration as documented by photographs taken over several years by Commission staff,[21] and ordered permanent repairs as identified in the existing conditions report prepared by the Commission's architect.[22]

A. Injunctive Relief

Injunctive relief is the crux of the demolition by neglect cases. The Commission seeks immediate access to the property in question, if not already provided, in order to better assess its condition. Usually an architect and attorney from the Commission staff will inspect the building along with a structural engineer from the Department of Buildings.

The inspection is carefully documented with photographs and often a written report, which can be used to establish the poor condition of the building and any future progress, or lack thereof, in returning the building to good repair.[23]

Injunctive relief is also sought in the form of an order directing that repairs be made to the landmark pursuant to a clearly delineated timetable.[24] As described later, the repairs ordered should be quite detailed and explicit. Finally, the Commission also asks the court to order that the landmark continue to be maintained in good repair.

B. Financial Penalties

Section 25-317.1 of the Administrative Code empowers the Commission to seek daily fines of $5000 per day from violators of the Landmarks Law.[25]

Sup. Ct. Jan. 29, 2009) (order denying preliminary injunction); City of New York v. Palmer, No. 620/2006 (N.Y. Sup. Ct., Jan. 9, 2006); *Cf.* Letter from John Weiss, Deputy Counsel, N.Y.C. Landmarks Pres. Comm'n, to Simeon Bankoff, Exec. Dir., Historic Dists. Council (Feb. 4, 2009), *available at* http://eastharlempreservation.org/docs/landmaks020409.pdf (discussing the Bedell House).

17. N.Y.C. ADMIN. CODE § 25-317.2(d).

18. 793 N.Y.S.2d 688 (N.Y. Sup. Ct. 2004).

19. *Id.* at 690.

20. *Id.* at 692.

21. *Id.*

22. *Id.* at 693.

23. *See generally id.*

24. *See* City of New York v. Wilkins, No. 400729/2011 (N.Y. Sup. Ct. Aug. 2, 2011), *available at* http://decisions.courts.state.ny.us/fcas/fcas_docs/2011AUG/3004007292011001SCIV.pdf (stipulation and order).

25. N.Y.C. ADMIN. CODE § 25-317.1(a)(3)-(4) (2011).

The ability to seek substantial daily fines is key to the prosecution of these cases and encouraging owners to be responsive. In one case, the Commission obtained a $1.1 million financial penalty for the egregious deterioration of an individual landmark.[26]

There are, of course, multiple factors that the Commission considers in deciding how large a fine to seek. An elderly homeowner of a small row house in disrepair does not merit the same penalty as a corporate owner of a large landmark who, despite extensive financial and professional resources, neglects its landmark. One important factor considered is how quickly the owner responds to the Commission. An owner substantially mitigates his potential financial penalty if he agrees to make repairs immediately after a suit is filed, as opposed to after discovery is underway, with documents being produced and depositions occurring. Another consideration is how long the owner has held title to the landmark. A recent purchaser of a building already in substantial disrepair is treated differently than a long-term owner who has neglected his property for many years, or even decades.[27]

In the extreme case, when a landmark has been substantially or completely demolished, the Landmarks Law provides for a penalty as high as the fair market value of a property, either with the landmark structure or without it, whichever amount is higher.[28] Unfortunately, we have had two cases where, during the course of our litigation, the Department of Buildings determined that the buildings were in such bad condition that they had to be immediately demolished because of the threat to public safety. In both cases, the Commission sought the fair market value of the property without the

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26. City of New York v. Toa Constr., Inc., No. 400584/2008 (N.Y. Sup. Ct. May 20, 2009) (stipulation & order settling all claims and awarding the Commission $1.1 Million); *See also* Press Release, N.Y.C. Law Dep't, Office of the Corp. Counsel, City Receives Record $1.1 Million Settlement Payment Over Owners' Failure to Maintain the Landmarked Windemere Apartment Complex on Manhattan's Upper West Side (May 21, 2009), *available at* http://www.nyc.gov/html/law/downloads/pdf/2326471_1.pdf.

27. The Corn Exchange Bank Building at 125th St. & Park Avenue is an example of the change in tone a new owner may suffer when improvements are not undertaken within a reasonable time. *Compare* David W. Dunlap, *At Burnt-Out Bank at 125th and Park; $9 Million Plan for Rebuilding A Landmark*, N.Y. TIMES (Dec. 1, 2002), http://www.nytimes.com/2002/12/01/realestate/postings-burnt-bank-125th-park-9-million-plan-for-rebuilding-landmark.html?src=pm, *with* Mike Reicher, *Harlem Landmark May Lose Two Floors*, N.Y. TIMES (Oct. 5, 2009 10:30 AM), http://cityroom.blogs.nytimes.com/2009/10/05/harlem-landmark-may-lose-two-floors/, *and* City of New York v. Corn Exch., LLC, No. 401846/2008 (N.Y. Sup. Ct. Jan. 29, 2009), *available at* http://decisions.courts.state.ny.us/fcas/FCAS_docs/2009FEB/3004018462008001SCIV.pdf (order denying preliminary injunction), *and* N.Y.C. Econ. Dev. Corp. v. Corn Exch., LLC, No. 405031/2007 (N.Y. App. Div. June 16, 2011), *available at* http://law.justia.com/cases/new-york/appellate-division-first-department/2011/2011-05184.html, *with* David W. Dunlap, *For a Harlem Landmark, Last Legs or First Steps?*, N.Y. TIMES (Feb. 16, 2012 11:34 AM), http://cityroom.blogs.nytimes.com/2012/02/16/for-a-harlem-landmark-last-legs-or-first-steps. *See also* City of New York v. Retrovest Assocs., Inc., No. 12844/2003 (N.Y. Sup. Ct. Apr. 7, 2004) (order denying motion to dismiss).

28. *See* N.Y.C. ADMIN. CODE § 25-317.1(a)(1).

landmark structure.[29] The goal of financial penalties is to deter the extreme neglect of properties by depriving owners of all financial gain. In one case, the owner paid a $50,000 fine, the demolition costs, substantial unpaid taxes, and gave the property (valued at almost $1,000,000) to the City.[30] The City then transferred the property to a nonprofit organization that built housing for low-income senior citizens on the site.[31]

III. WHEN LITIGATION IS APPROPRIATE

Because of the extensive amount of time—usually years—and staff resources spent on a demolition by neglect lawsuit, and because not all landmarks in disrepair require litigation to remedy the situation, it is important to determine if cases can be addressed using alternative legal tools.[32] If the disrepair is serious, but localized, such as significant damage limited to a cornice, the Commission will use its administrative enforcement procedures to address the problem. The Commission will first issue a warning letter for failure to maintain a landmark, which does not impose a fine or require a court appearance.[33] If there is no satisfactory response to the warning letter, a Notice of Violation (i.e., a summons) is issued for failure to maintain the landmark.[34] The Notice of Violation is returnable to an administrative judge, and a fine can then be imposed. In cases of extensive deterioration of multiple building elements, or severe damage that threatens a landmark's structural stability (e.g., a partially collapsed roof), the Commission will usually bring a demolition by neglect lawsuit.[35]

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29. City of New York v. Orellana, No. 10360/2010 (N.Y. Sup. Ct. Feb. 17, 2011); City of New York v. Corn Exch., LLC, No. 401846/2008 (N.Y. Sup. Ct. Jan. 29, 2009), *available at* http://decisions.courts.state.ny.us/fcas/FCAS_docs/2009FEB/30040184620080001SCIV.pdf (order denying preliminary injunction).

30. City of New York v. Retrovest Assocs., Inc., No. 12844/2003 (N.Y. Sup. Ct. Apr. 7, 2004); LANDMARKS PRES. COMM'N., LP-0028 A, LANDMARK SITE OF FORMER NEW BRIGHTON VILLAGE HALL (2006), *available at* http://home2.nyc.gov/html/records/pdf/govpub/2782nbvillagehallrecis.pdf [hereinafter NEW BRIGHTON VILLAGE HALL] (noting "[t]he site was appraised as being worth $985,000. The owner also paid $50,000 in a financial penalty, and paid the demolition costs and various other expenses resulting in a settlement package worth approximately $1.1 million dollars.").

31. The City donated the property to the Sisters of Charity so that organization could build fifty-nine subsidized low-income homes for the elderly. *See* NEW BRIGHTON VILLAGE HALL, *supra* note 30.

32. In fact courts cite a lack of administrative formality (i.e. not exhausting alternative administrative tools) before rendering a decision in such cases. *See* Church of St. Paul and St. Andrew v. Barwick, 505 N.Y.S.2d 24, 30 (N.Y. App. Div. 1986).

33. *See Enforcement Department*, N.Y.C. LANDMARKS PRES. COMM'N, http://www.nyc.gov/html/lpc/html/about/enforce.shtml (last visited Mar. 10, 2012) [hereinafter *Enforcement*]; *see Frequently Asked Questions About The Enforcement Process*, N.Y.C. LANDMARKS PRES. COMM'N, http://www.nyc.gov/html/lpc/html/faqs/faq_enforce.shtml (last visited Mar. 10, 2012) [hereinafter *Frequently Asked Questions*].

34. *See Enforcement*, *supra* note 33; *see Frequently Asked Questions*, *supra* note 33.

35. *See Frequently Asked Questions*, *supra* note 33; *see also Barwick*, 505 N.Y.S.2d at 30.

In some cases, however, the Commission decides not to bring a demolition by neglect lawsuit but instead uses another strategy to achieve the same goal. In several cases, there have been other legal proceedings already underway and, depending on the facts, the Commission can appear in the litigation as an interested party rather than as a named party.[36] Our experience has been that judges take recognition of the Commission's interest in the matter and will order inspections and repairs in light of the building's landmark status.[37]

In one case, an individual landmark was the subject of litigation due to its owner's failure to pay taxes.[38] The building was in extreme disrepair with collapsed floors and decades of neglect. The former owner had brought a legal action to stop a tax proceeding, which was being handled by a private financial institution. Because the former owner had no resources to make repairs, and the potential new owner did not yet have title, it would have been difficult to compel a responsible party to make repairs in response to a demolition by neglect action. Consequently, members of the Commission's legal staff appeared at every court hearing and the judge incorporated the Commission's concerns in his rulings and orders.[39] The litigation was eventually resolved—the building was sold to a new owner and extensive repairs are underway—all without the Commission filing suit.

One concern the Commission has had is that an owner will respond to the Commission's efforts to compel repairs by filing a hardship application for demolition of the landmark, which is allowed if certain strict criteria are met.[40] While hardship applications are extremely rare (only nineteen

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36. *See* NYCTL 1998-2 Trust v. Republican Club Realty Co. of Richmond Hill, No. 18366/1999 (N.Y. Sup. Ct. Mar. 11, 2003), *available at* http://decisions.courts.state.ny.us/fcas/FCAS_docs/2004JAN/40001836619991005CIV.pdf (motion for an order to show cause)

37. For an example of such deference *see* City of New York v. 10-12 Cooper Square, Inc., 793 N.Y.S.2d 688, 692 (N.Y. Sup. Ct. 2004) (stating that the evaluation of "good repair," the determinative issue in the case, was "a matter to be determined by the [Landmarks Preservation] Commission. Courts will defer to a determination of an administrative agency when that decision falls under the purview of the Agency's expertise" (citations omitted)).

38. *See* NYCTL 1998-2 Trust v. Republican Club Realty Co. of Richmond Hill, No. 18366/1999 (N.Y. Sup. Ct. Mar. 11, 2003), *available at* http://decisions.courts.state.ny.us/fcas/FCAS_docs/2004JAN/40001836619991005CIV.pdf (motion for an order to show cause); *see also* N.Y.C. LANDMARKS PRES. COMM'N, LP-2126, DESIGNATION LIST 343 (2002).

39. Letter from John Weiss, Deputy Counsel, N.Y.C. Landmarks Pres. Comm'n, to Simeon Bankoff, Exec. Dir., Historic Dists. Council (Feb. 4, 2009), *available at* http://eastharlempreservation.org/docs/landmaks020409.pdf (discussing the Richmond Hill Republican Club).

40. *See* N.Y.C. CHARTER ch. 74, § 3021, *available at* http://www.nyc.gov/html/dycd/downloads/pdf/citycharter2004.pdf (detailing hardship appeal panel). Hardship appeals also implicate the Administrative Code. N.Y.C. ADMIN. CODE § 25-309 (2011) (a hardship for a private owner arises only when a "reasonable return" cannot be maintained on the property). Certain religious and charitable institutions have been judged using a standard different than "reasonable return." Trs. of Sailors' Snug Harbor v. Platt, 288 N.Y.S.2d 314, 316 (N.Y. Sup. Ct. 1968) (announcing charitable purpose test); Lutheran Church In America v. City of New York, 316 N.E.2d 305 (N.Y. 1974) (using the same charitable purpose test); St. Bartholomew's Church v. City of New York, 914 F.2d 348, 358-60 (2d Cir. 1990) (approving of the substantial interference test). The Historic Preservation Grant Program is an alternative to the hardship

applications have been filed in the Commission's forty-seven years of existence), the Commission is concerned that an owner who has recently purchased a landmark in extremely poor condition may file a hardship application seeking demolition. To date, however, this has not occurred.

It is a commonly held belief that owners intentionally neglect their buildings in order to justify their demolition, thereby removing landmark regulation over their properties (at least in the case of individual landmarks). While it appears that there has been at least one possible case of an owner in New York City neglecting a landmark with the intent of having it collapse or be demolished as unsafe,[41] the Commission's typical experience is that the neglect is due to benign causes—elderly or ill property owners, estate disputes, foreclosure, dysfunctional or unrealistic owners—and other problems that result in a complex road to repair that often takes years of sustained effort.

The owner's circumstances and the condition of the building will determine when and if a lawsuit is brought. If a corporation with ample resources owns a landmark in very bad condition, such as one with a collapsed roof, litigation will begin quickly if the owner is not promptly responsive. Alternatively, if an owner is elderly and has limited resources, and based upon an engineer's inspection there is no danger of a near term collapse or other significant damage to the building, more time is given to allow for a solution.

While only a small percentage of landmarks are in extreme disrepair, the risk of losing a designated landmark is an inherent priority for the Commission and the local preservation community. These situations are also understandably very disturbing to neighbors not only due to the presence of a dilapidated structure but the problems often associated with a vacant building—litter, graffiti, rodents, etc. Consequently, these buildings often become priorities for neighborhoods who want the multiple problems expeditiously solved. While the Commission also wants quick action, it is a rare situation where demolition by neglect cases can be quickly resolved. The road to good repair is often long and winding—owners need to agree to make repairs that are frequently very extensive and expensive, funding must be obtained, an architect and engineer often need to be retained, plans must be prepared and approved by the Commission and the Department of Buildings, contractors must be hired, and finally work begins. Accordingly, it

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appeal. *See Historic Preservation Grant Program*, N.Y.C. LANDMARKS PRES. COMM'N, http://www.nyc.gov/html/lpc/html/about/hpgp.shtml (last visited Mar. 10, 2012).

41. *See* City of New York v. 10-12 Cooper Square, Inc., 793 N.Y.S.2d 688, 692 (N.Y. Sup. Ct. 2004) (stating "the evidence is clear that defendants have allowed the facade of the Skidmore House to deteriorate" and that photographs demonstrated "the deterioration that the facade of the Skidmore house has endured under the stewardship of the defendants."). The intent described here is one implied by the surrounding circumstances of the case.

is important to keep the local and preservation communities informed of progress so they do not think that nothing is happening.[42]

A. The Process

Once a building has been brought to the Commission's attention as being in disrepair, Commission staff gathers information about the building's condition from easily accessible resources. Such information includes the history of Landmark permits being issued (or a lack thereof), Landmark violations, Department of Building violations and complaints, Department of Finance records on the ownership of the building, and any available photographs of the building. A site visit is quickly made to assess, in person, the condition of the building. If possible, access to a neighbor's roof or rear yard is sought in order to obtain a fuller understanding of the building's condition.

If it is determined that the building is in disrepair, the next step is to identify and locate the owner and other persons in charge of the property. Sometimes, simply contacting the owner of a landmark in disrepair is a major hurdle. In one case, initial efforts to contact the owner were unsuccessful and subsequent efforts to locate him included obtaining his hospital discharge information to learn who had checked him out, contacting a contractor who had done work for him, having a private investigator visit his prior addresses and interview neighbors, and researching death certificates to determine if he had passed away. Eventually, the owner contacted the Commission after he received a letter that the Social Security Administration delivered on behalf of the Commission. It turned out that the owner was living in a homeless shelter a few miles away from the Commission offices. We need to locate the owners not only to try and have them make repairs voluntarily, but also so that we can serve them with the summons and complaint if litigation commences.

After identifying the owner and other potentially responsible parties, the Commission sends a letter identifying the nature of the building's disrepair, the legal obligations of the recipient to keep the building in good repair under the Landmarks Law, the need to obtain a permit from the Commission before starting work,[43] and requesting that the recipient quickly contact the Commission's legal counsel. If the Commission does not receive a response, it sends a more sternly worded letter by first-class mail and certified mail. The

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42. For an example, *see* Letter from John Weiss, Deputy Counsel, N.Y.C. Landmarks Pres. Comm'n, to Andrew Berman, Greenwich Village Soc'y for Historic Pres. (May. 15, 2009), *available at* http://www.gvshp.org/_gvshp/preservation/43_macdougal/doc/LPCresponse 5.15.09-demobyneglect.pdf.

43. For further information on the permit process, *see Frequently Asked Questions About Making Changes to a Landmarked Building*, N.Y.C. LANDMARKS PRES. COMM'N, http://home2.nyc.gov/html/lpc/html/faqs/faq_permit.shtml (last visited Mar. 10, 2012) [hereinafter *Making Changes*].

correspondence escalates until legal action is threatened unless certain steps are taken by a set deadline.[44]

Since the passage of time works against the Commission's efforts to save these landmarks, we have shortened the time we spend on outreach to the owners when necessary. We now spend three to six months trying to have repairs voluntarily made by reaching out to the owners and other responsible parties (e.g., a bank that has foreclosed on a landmark).[45]

Often during the outreach process, a Commission architect will prepare an existing conditions report documenting how the landmark is in disrepair. Often the architect has to base his report only on the condition of the street facade. Necessary repairs (based on the limited available information) are also clearly identified. The existing conditions report becomes a key exhibit if the matter is litigated, and is augmented once access to the building is obtained. Often a judge will order repairs as part of the injunctive relief based on what is described as being required in the existing conditions report.[46]

Towards the end of this voluntary compliance period, the Commission's Chair issues a Chair's Order which formally orders the parties in charge of the landmark to make repairs and subjects them to $5000 daily fines from the date of the Order if repairs are not forthcoming. The Order also clearly explains to the parties in charge that legal papers are being drafted by Commission lawyers and that the matter will be referred to the City of New York's Law Department for legal action if corrective steps are not taken by a date certain.[47]

Because of concerns that collateral estoppel[48] arguments will be made if we issue a standard notice of violation, sometimes we do not use our usual enforcement actions in demolition by neglect cases. Although confident that we would prevail, there is no need to muddy the waters with a summons that is returnable to an Administrative Law Judge when we are preparing an action for possible trial.

Once the matter is referred to the Law Department, the assigned Assistant Corporation Counsel sends a letter, on Law Department letterhead, to the parties in charge, explaining that the matter is now at the Law Department and another deadline is given as a last chance to avoid the cost of litigation and potentially significant fines.

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44. *Cf.* Letter from John Weiss, Deputy Counsel, N.Y.C. Landmarks Pres. Comm'n, to Andrew Berman, Greenwich Village Soc'y for Historic Pres. (May. 15, 2009), *available at* http://www.gvshp.org/_gvshp/preservation/43_macdougal/doc/LPCresponse5.15.09-demobyneglect.pdf.

45. *See* Letter from John Weiss, Deputy Counsel, N.Y.C. Landmarks Pres. Comm'n, to Simeon Bankoff, Exec. Dir., Historic Dists. Council (Feb. 4, 2009), *available at* http://eastharlempreservation.org/docs/landmaks020409.pdf.

46. *See 10-12 Cooper Square*, 793 N.Y.S.2d at 692.

47. *See, e.g.*, City of New York v. Palmer, No. 620/2006 (N.Y. Sup. Ct., Jan. 9, 2006) (Order to Show Cause).

48. Collateral estoppel acts as an issue-specific procedural bar whereby a claim can be prevented from being heard by a trial court judge if an administrative judge has already heard and ruled upon the same issue. This requires (1) that the issue being argued is the same and (2) that the party opposing its application have had a "full and fair opportunity" to contest the issue in the prior proceeding. 73A N.Y. JUR. 2D *Judgments* § 470 (2011).

Often an owner will decide to sell the landmark as a way of addressing the building's disrepair. This outcome occurs particularly with elderly owners who no longer live in the building at issue due to its disrepair and in light of their often not having easy access to financial resources or the ability to undertake a large repair project. If the landmark is sold once litigation has commenced, we usually substitute the purchaser as a party or require the purchaser to sign a stipulation or other agreement that binds him to repairing the landmark in an expeditious manner.

B. Litigation Commences

We bring our action by "orders to show cause" which allows the Commission to appear before a judge in an expedited manner. The justification for the orders to show cause is that the landmark is deteriorating with every passing day, particularly when there is bad weather. The action seeks access to the interior of the building, a court order directing the parties in charge to expeditiously make repairs, and imposition of $5000 daily fines if repairs are not forthcoming.

Usually the responsible parties are responsive once they are before a judge. Often there is almost no issue of fact. Designation reports and other documentation unequivocally establish that the building in question is either in a historic district or is an individual landmark. Photographs showing the disrepair are usually uncontested and very convincing to a judge.[49] Consequently, we often enter into a detailed stipulation fairly early on in these cases requiring, among other things: 1) access to the interior and rear of the landmark so that a thorough inspection by Commission staff and Department of Buildings engineers can be made; 2) monitoring, often by a structural engineer retained by the owner, which results in regular reports on the condition of the building; 3) a detailed schedule for the owner to submit applications to the Commission and other appropriate regulatory bodies; and 4) a timeline for when different types of work must be completed to avoid imposition of a daily fine.[50] Regular site visits are also required in order to monitor the building's condition and any work that may be underway.

The language in the stipulation is key. Because we want to set realistic deadlines, we consult with architects and engineers to obtain an accurate sense of how long each task should take. We also require that complete applications be submitted to the regulatory agencies that need to issue permits. We list the information needed for an application to be considered complete (e.g., dimensioned front elevation drawings showing the distance between windows and door and window dimensions with legible notes, a section of the proposed replacement cornice, information on operation, configuration, finish, material,

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49. *See generally* City of New York v. 10-12 Cooper Square, Inc., 793 N.Y.S.2d 688, 692 (N.Y. Sup. Ct. 2004).

50. *See, e.g.*, City of New York v. Wilkins, No. 400729/2011 (N.Y. Sup. Ct. Aug. 2, 2011), *available at* http://decisions.courts.state.ny.us/fcas/fcas_docs/2011AUG/3004007292011001SCIV.pdf (stipulation and order).

and profile of proposed replacement windows, etc.). In one case, an owner submitted just our one page application form and a two-page report from his engineer (that we already had) as his application. We then spent the next seven weeks trying to get the materials necessary to process the application from the owner. In court, the owner complained that the Commission, and not him, was responsible for the delay.[51] Ambiguity often works against efforts to have repairs made in a timely manner.

Accordingly, we try to spell out very clearly exactly what is needed for the Commission staff to issue a permit and will often provide the owner with a sample of a complete application containing all the necessary information.[52] If an owner is in violation of the stipulation, copies of all the materials provided to him and his team become exhibits to establish the good faith effort of the various City agencies to have permits issued in a timely manner and demonstrate to the court that noncompliance with the stipulation deadlines is due to the owner's fault.

It is useful to have an interagency meeting with all municipal regulatory agencies that must authorize repairs (often the Department of Buildings and the Commission), and the owner's architect, engineers, and other professionals, in order to ensure that all parties understand what material needs to be submitted for issuance of a permit and the permit issuance process as a whole. Poor coordination among City agencies can undermine an otherwise successful demolition by neglect action.

Even after a lawsuit is filed, absentee ownership often creates problems. In one case, because the owner was a Japanese corporation, service issues arose when we wanted to file a motion that may have required personal service upon the owner in Tokyo and the translation of lengthy legal documents into Japanese.[53] Another case involved a landmark controlled by an estate that was foreclosed on, resulting in two defendants—one being the estate and the other being a Texas-based financial institution.[54]

It is of paramount importance to gain access to the interior of the building at issue as soon as possible. Often a building's front facade may appear to be in a somewhat poor condition, but not requiring immediate action. However, the interior of a building may tell a whole different story with floors partially collapsed, extensive water damage from a skylight that has been leaking for decades, or unexpected problematic load conditions. Once we gain access, the scope of required repairs often changes.

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51. City of New York v. Quadrozzi Jr., No. 8442/2010 (N.Y. Sup. Ct. May 21, 2010) (stipulation addressing repair).

52. *See Making Changes*, *supra* note 43; *see Forms and Publications*, N.Y.C. LANDMARKS PRES. COMM'N, http://www.nyc.gov/html/lpc/html/forms/forms.shtml (last visited Mar. 10, 2012).

53. *See* Plaintiffs' Memorandum in Support of Motion for a Preliminary Injunction at 3, City of New York v. Toa Constr., Inc., No. 400584/2008 (N.Y. Sup. Ct. Mar. 20, 2008) 2008 WL 8046373.

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

Sometimes psychological issues are problematic—some owners have filled their building with possessions creating classic examples of the Collyer Brothers Hoarding Syndrome.[55] On occasion, I have had to physically climb over boxes and furniture piled everywhere in a landmark, even on staircases, in order to inspect the building's condition. Some owners can take months to empty the tons of material that can be causing structural load issues. If there were an intentional component to the standard, a substantial hurdle would exist in bringing these actions.

During each site visit, I extensively photograph the interiors and exteriors of landmarks subject to demolition by neglect litigation. While the lawyers for both sides can disagree about a condition at the landmark, a series of clear photographs can quickly persuade the court of the Commission's position if a dispute arises over whether work is complete and, if so, when it was completed.

Demolition by neglect matters often have unusual developments prior to and during litigation. Once, an owner filed for bankruptcy while litigation was pending.[56] In another case when a derelict landmark was about to be sold, a prior owner commenced their own legal action to halt the sale and, therefore, the necessary repairs. Eventually, the property was sold; the new owner has undertaken the extensive repairs to restore the structure to a state of good repair and preserve the landmark for future generations.[57]

IV. CONCLUSION

Addressing landmarks in serious disrepair can seem like a Sisyphean task. As buildings are repaired and taken off the Commission's endangered list, new historic districts with more buildings in disrepair are designated or new buildings are identified in old historic districts, resulting in what sometimes seems to be a never-ending stream of buildings that need attention. Additionally, there have been cases where an owner takes substantial steps to address problems, but then after a year or two of progress, work stops with the building still in a compromised condition, resulting in a resumption of legal efforts.

Often times, owners of decaying landmarks in New York City have their own, frequently poignant, tales of struggle that led them to the point of not being able or willing to maintain their landmark buildings. These buildings

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55. For more information on this syndrome, *see* Franz Lidz, *The Paper Chase*, N.Y. TIMES, Oct. 26, 2003, at CY1, *available at* http://www.nytimes.com/2003/10/26/nyregion/the-paper-chase.html.

56. Letter from John Weiss, Deputy Counsel, N.Y.C. Landmarks Pres. Comm'n, to Simeon Bankoff, Exec. Dir., Historic Dists. Council (Feb. 4, 2009), *available at* http://eastharlempreservation.org/docs/landmaks020409.pdf (describing the Corn Exchange Bank Building).

57. John Weiss, *Pursuing an Owner for Demolition-by-Neglect: A Tortuous Legal Path*, DISTRICT LINES, Spring 2009, at 2, 3, *available at* http://www.eastharlempreservation.org/docs/corn_DLspring09.pdf.

require extraordinary time and effort by the staff of the Commission and other agencies, but saving our landmarks is unquestionably worth the effort.