
REFORM NEEDED AT THE LANDMARKS PRESERVATION COMMISSION OF NYC

A White Paper for Discussion

Lynn Ellsworth

www.humanscale.nyc

lynnellsworth0@gmail.com

Disturbing Trends Erode Confidence

Over the past twenty years the public has witnessed a growing number of disturbing trends at the Landmarks Preservation Commission (LPC). Collectively, these suggest we face a situation of regulatory capture – when a regulatory body serves the interests of the industry that is supposed to regulate instead of the wider public good (Hempling 2014; Bó 2006) . In this case, the industry that needs regulation is real estate, as clearly stated in the Landmarks Law statement of policy intent. In the face of these trends, public confidence in the LPC has eroded. The president of the City Club of New York pointed out in a 2018 journal article: “Looking at a series of recent decisions, we have to question whether the Commission as currently functioning considers historic preservation, at least preservation as understood by New Yorkers, to be in the public interest” (Kroessler 2018). The implication is that the Commission may no longer be serving the Landmarks Law.

The nine most important trends causing alarm are listed below.

1. Accrual of excessive discretionary power to the Chair of the LPC via manipulation of internal procedures, to the detriment of the exercise of powers of the full body of 11 Commissioners.

- a. **Example 1:** At public hearings, the appointed Commissioners have motions pre-written by the staff that are presented to them as "staff recommendations." Yet these are not the professional staff's recommendations but instead reflect what the administration (Chair) wants the commissioners to approve. The staff recommendations and the prepared motion used to be the consensus of the professional preservation staff; occasionally if there wasn't consensus two different views or motions would be offered. This suppression of staff recommendations emerged during the Chair of Jennifer Raab. The upshot is that the views of the professional staff are being deliberately misrepresented to the commissioners. As a result, the commissioners, who are mostly lay people when it comes to historic preservation, are not getting professional advice or guidance.¹
- b. **Example 2:** The LPC eliminated the small committee of Commissioners that used to meet monthly to conduct a kind of informal "triage" sorting procedure on newly arrived Requests for Evaluation (known as "RFEs"). RFEs are the first step into the pipeline for potential landmark or historic district designation. The Chair has consolidated this process and now conducts the triage procedure alone without the other appointed Commissioners aware of incoming Requests for Evaluation. Legal counsel to the Commission defends this abuse of power to the courts, claiming the Chair and Chair alone has "complete" and "unfettered"

¹ This information comes from multiple sources that have asked not to be named, all former staff and Commissioners.

regulatory discretion to make these decisions without external scrutiny, without accepted criteria, without consulting the other appointed Commissioners, nor with the obligation to record the meetings with legal counsel in which such triage decisions now get made. Yet it was clearly the intent of the law that the appointed members of the Commission as a body have the power in question, not the Chair acting as Monarch or with collusion with the legal counsel (see LPC Counsel's brief in the Tribeca Trust lawsuit and Article 16 of the City Charter).

2. Unwillingness to designate where there is substantial unbuilt airspace (FAR) of interest to the real estate industry. The result is widespread under-designation, refusal to designate landmarks, and unmerited "shrinking" of the boundaries of historic districts. Notable examples include excessive carveouts on the Upper West Side historic districts (Pezenik 2015), carveouts from the Tribeca Historic Districts (New York Law School lots and lots owned by Ponte Equities), and not least, the refusal to designate historic properties around Pennsylvania Station because one of the country's largest real estate investment trusts, Vornado, wants to demolish the buildings and replace them with office towers.
3. Modification of internal rules, procedures, and definitions that facilitate the demolition of low-rise historic properties. Examples are the abuse of the terms "no-style," "non-contributing," and "period of significance" in designation reports to excuse subsequent demolition (Gough 2017).
4. Transactional agreements to allow the designation of a district or landmark or to accept a violation of the regulatory rules in exchange for a "deal", sometimes unrelated to non-landmark urban planning concerns. Examples of transactional deals include the LPC's approval of a tower in Fort Green in an apparent deal for an expanded music school

(Duggan 2020) and the approval of a tower in the Seaport Historic District that violated the district height rules in exchange for financial benefits to the Seaport Museum.

5. Behind the scenes, the LPC co-operates blatantly with high-powered applicant property owners and their lobbyists but fails to do so with other concerned parties. The most egregious example is the LPC's convening of a secret "practice" hearing with real industry representatives and their lobbyists to rehearse for the "real" public hearing for 50 Water Street in the Seaport Historic District (Glassman 2022). Another example was the extreme reticence to designate south of Chambers Street where the real estate industry had envisaged "Wall Street North" (Dunlap 1989).
6. Acquiescence, both active and passive, to the desire of applicant property owners to demolish buildings that are landmarked or inside historic districts, including those owned by the city (ex: PS 31 in the Bronx). This includes ignoring cases where demolition by neglect was taking place and refusal to regulate or act when demolition was imminent (Dietrich 2014) and not necessary (see the many examples cited in Village Preservation 2022).
7. Resistance to protecting interior landmarks, designating interiors, or regulating scenic landmarks once designated. Examples include the neglect of the Vale of Cashmere in Prospect Park and LPC's opposition to protecting the interior landmarked area of the famed Clocktower building at 346 Broadway. Other examples include the LPC's "anything goes" approach to the interior of the McGraw-Hill Building, the ATT building interior at 550 Madison, and that of 60 Wall Street (Kroessler 2018).
8. Active approval of in-fill developments inside historic districts that are aggressively out of character or scale with the surrounding district, using a rhetoric that refers to "a

tyranny of the context” and celebrates the “architecture of rupture” rather than respect for the wider asset of the historic district (Ellsworth 2018) and (Semes 2009). Examples among many include 325 West Broadway, 50 Hudson Street, 14 White Street, and 187 Franklin Street. The “tyranny” of Modernist philosophy in a regulatory agency with a mission for preservation needs to be explicitly addressed.

9. Conflicts of interest have accumulated among appointed Commissioners. These conflicts can no longer be managed by mere recusal of the affected person. Recusal is often not even respected. Commissioners publicly note on their business websites that they serve on the LPC and can help clients navigate requests before the LPC.

These trends make it evident that “regulatory capture” has taken place. The result has been erosion of the historic character of neighborhoods and the excessive loss of the architectural and urban patrimony of the people of New York.

Is Reform Possible?

Preservationists concerned about these trends worry: would efforts to initiate reform merely kick open the door for the real estate lobby (in the form of the Real Estate Board of New York (REBNY) and its allies to hijack a reform process?

The anxiety is indeed legitimate - but could the situation get any worse than it is now? The public now has the disturbing documentation from the Seaport case that the real estate industry is already openly calling the shots at the Commission. Moreover, the accrual of power to the Chair via internal procedural changes, to the detriment of the full Commission, has rendered the Commission vulnerable, even amenable, to real estate industry capture and an anti-preservation ideology.

The Law's Intent

The Landmarks Law does not state that the LPC is to serve as a moderating, conciliatory force between the real estate industry's desire for perpetual densification (both upwards and outward) and urban residents who support the preservation of our historic assets and the upholding of the Landmarks Law. The Commission has also used the peculiar term "managing change" to define its mission, something found nowhere in the law. This is disturbing. In its statement of purpose and public policy, the City Council issued a crystal-clear call to serve the public, including future generations, and to protect historic assets that have no market price. I cite that paragraph in its entirety below:

§ 25-301 Purpose and declaration of public policy.

a. The Council finds that many improvements, as herein defined, and landscape features, as herein defined, having a special character or a special historical or aesthetic interest or value and many improvements representing the finest architectural products of distinct periods in the history of the city, have been uprooted, notwithstanding the feasibility of preserving and continuing the use of such improvements and landscape features, and without adequate consideration of the irreplaceable loss to the people of the city of the aesthetic, cultural and historic values represented by such improvements and landscape features. In addition, distinct areas may be similarly uprooted or may have their distinctiveness destroyed, although the preservation thereof may be both feasible and desirable. It is the sense of the council that the standing of this city as a worldwide tourist center and world capital of business, culture and government cannot be

maintained or enhanced by disregarding the historical and architectural heritage of the city and by countenancing the destruction of such cultural assets.

b. It is hereby declared as a matter of public policy that the protection, enhancement, perpetuation and use of improvements and landscape features of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety, and welfare of the people (New York City n.d.)

The Landmarks Law text specifies a few organizational rules to set up the Landmarks Preservation Commission, some of which are clearly outdated. It tells of 11 commissioners that the Mayor appoints, of which three must be architects. It tells us that one Commissioner must be from the real estate industry, but it ironically does not specify that there must be someone with a professional degree in historic preservation.² There is a requirement that there be a Commissioner from each Borough, and that one Commissioner must be a historian.

There was no public awareness back in the 1960s when the law was passed of the reality that most architects were (and still are) dyed-in-the-wool Modernists, with sworn ideological fealty to the famous Commandment #70 of the modernist “Charter of Athens.” That commandment forbids use of pre-1920 styles of architecture in historic areas. Taking an authoritarian tone, it says:

The re-use of past styles of building for new structures in historic areas under the pretext of aesthetics has disastrous consequences. The continuance or the introduction of such habits in any form should not be tolerated (Jeanneret-Gris 1943).

² Granted, back in the 1960s there were no graduate programs in historic preservation, but such programs have proliferated since then.

Obviously, many architects who specialize in renovation of historic properties do not swear fealty to such a commandment, but the writers of the law did not make a distinction among architects loyal to Commandment #70 and those who were not. Most architects are only aware of the commandment as a general “rule” for their profession but do not know where it comes from. The rule profoundly affects non-architects and residents of historic cities as well as historic preservation agencies and is thus not an obscure problem.

Despite these drawbacks, the intent of the law is clear: there is to be a dedicated city agency to protect the city from excessive demolition of historic assets and protect the character of historic districts. The intent was not to arbitrate politically between the interests of real estate and that of the public good nor was it to “manage change”.

History of Big Real Estate Interference with the LPC

REBNY (the official lobby of the industry in NY) has made its open hostility to the Commission known from the beginning of the LPC’s existence. REBNY opposed the Landmarks Law during its formulation. When REBNY saw that its passage was inevitable, it kneecapped the law with three modifications (Wood 2008):

- a) REBNY forced the excision from the draft law a proposal that the surrounding buildings within 400-feet of an individual landmark be subject to LPC regulation to protect the context of the landmark. The goal was to avoid burying a landmark under massive buildings as is now frequently encountered throughout the city.³

³ To fix this, the problem might be better managed with a requirement that City Planning undertake contextual rezoning in these areas. If in the hands of LPC, this would have significant staffing and expertise implications. Also, depending on the administration, LPC regulation of these areas might be no more useful than their ineffectual regulation within historic districts.

- b) The Commission was limited to making designations to a three-month period every three years. It was only after years had passed and a series of articles by journalist Roberta Gratz in *the Daily News* raised enough of a scandal that the law was changed (Gratz 1973).
- c) Commissioners were given salaries, a fact that weakens the time and attention Commissioners can give and makes it vulnerable to conflicts of interest dramas among the architects on the Commissioners. The lack of a salary obliges them to keep pursuing seek real estate industry contracts.

REBNY's resistance to the Commission and the Landmarks Law did not stop there. Once the Commission became operational, the REBNY easily began to exert its influence through the Mayor and the appointed Deputy Mayors, mostly to ensure that whoever the Mayor named as Chair of the Commission would at least be cooperative with the industry. Their means of influence in the first instance was - and remains - large campaign contributions that buy direct access to government and the Mayor. REBNY is proud of its record on that matter. Mayors and their Deputies then casually make their views known to the Chair of the LPC via private discussions and phone calls, as interviews with past Chairs on the Preservation Archive website indicate. For example, former Chair Kent Barwick described meeting frequently with Deputy Mayor Robert Wagner Jr. and remarked in his oral history:

In those days it was clear that there was a prohibition against designation of landmarks south of Fulton street on the east side of, maybe Chambers. There was kind of a mental bat, this is— don't fuck around here (Barwick 2011).

Obviously, such a prohibition did not become known to Mr. Barwick via telepathy. Not all communication was so subtle. Long-serving former Commissioner Anthony Tung wrote in his book:

I was offered bribes. I received anonymous threatening phone calls, and I was coerced by the Mob. In later years I was frequently cautioned to be more flexible when evaluating those construction projects politically blessed by City Hall (Tung 2002, 7).

Tung did not say who cautioned him.

Informal control is of course normal in the rough and tumble politics of any city (and might explain the lack of designations in Staten Island and Queens), but it is not conducive to the operation of an impartial regulatory agency. Mayoral control is also a matter of degree. That control may have become excessive and need paring back.

In the face of Mayoral concern for the speculative interests of the real estate industry, the LPC self-regulated over many years. It was especially cautious during the years in which the Penn Central case was winding its way through the courts. That caution continued when they feared that the Board of Estimate or the City Council might overturn a designation. Some, like writer Tom Wolfe, pointed out that this self-regulatory tendency morphed over time into an excessive and unnecessary timidity (Wolfe 2006).

REBNY was also the originator of legislative proposals such as Intro 775 and operating rule changes during the de Blasio administration that favored real estate and made it harder for the Commission to take a second look at a property that had been put in the “maybe” or “not now” triage pile (Spinola 2012).

And of course, REBNY testifies regularly at public hearings against landmarking, typically mobilizing its close organizational allies to do so in concert. REBNY members shower

contracts on the Commissioners who are architects, limiting the ability of those architects to opine without an obvious conflict of interest. During the Bloomberg administration, REBNY published white papers attacking historic districts, accusing them (falsely) of occupying too much of the city’s land mass and hindering the growth of new construction (REBNY 2013a; 2013b). These white papers closely followed the reasoning and arguments made by economist Edward Glaeser and Deputy Mayor for Housing Vicki Been in a NBER paper that blithely and without a factual basis accused historic districts of “hindering growth” (Glaeser et al. 2014). That line of attack comes up frequently without a reality check. It was repeated for example by Matt Vigiano, a land use staffer for the Council in a paper criticizing historic district designation with the argument lifted entirely from the Been and Glaeser paper (New York City Council Land Use Committee 2016).⁴

Pathways to Reform via Rule Changes and Legislative Changes

The Commission is guided by its own 250-page book of internal rules, (available at the link below⁵), and by the Administrative Code of the City and the City Charter. Its internal rules can be self-modified without oversight after a perfunctory public hearing and following a codified set of steps. However, changes to the Administrative Code and the Charter require the legislative action of the City Council.

Both are legitimate pathways to reform.

⁴ Vigiano then ended up working for the lobbying firm of Kasirer, mostly for big real estate clients, including the Howard Hughes Corporation whose efforts to undermine the landmarks law have captured so much press attention (Glassman 2022).

⁵

https://www1.nyc.gov/assets/lpc/downloads/pdf/Rules/Rules%20of%20the%20NYC%20Landmarks%20Preservation%20Commission_01.22.2019.pdf

Those seeking modifications to either the internal rules or the Administrative Code or both might usefully pursue three goals to structure reform proposals:

Goal 1: Insulate the Commission from excessive Mayoral and City Planning Interference

Goal 2: Reduce Opportunities for Conflicts of Interest to Arise

Goal 3: Put discretionary power back in the hands of the full Commission and revise procedures that give the Chair and Chair alone “unfettered” power.

Let us examine each of these in turn.

Insulating the Commission from the vagaries of Mayoral dependence on the real estate industry as well as from REBNY lobbying efforts is a valid policy goal. It traditionally happens in a variety of ways.

- Redistribute nominating and appointment powers to a Commission among various bodies such as City Council, Mayor, Public Advocate, Borough Presidents, and even, as more than a few people have suggested, the Chair of the Conflicts of Interest Board.
- Elect the Chair from the body of appointed Commissioners or let the Mayor appoint from a list of nominees chosen by a consortium of professional preservation organizations.
- Create an “equal time” rule that is transparent when it comes to lobbying. For example, require that the Commission publish each week on their website all meetings with paid lobbyists to the Commission while also imposing a rule that community groups and preservation organizations be given equal access and time on the same issues that the lobbyists raise. This would be an attempt to level the playing field between the vast wealth of the real estate industry and the volunteer community groups working in preservation who do not have the means to hire professional lobbyists.

For the second goal on reducing conflicts of interest, a mix of internal rule and legislative changes might be possible. For example:

- Grant Commissioners a salary on the same scale as those appointed to the City Planning Commission.
- Impose a rule that working architects on the Commission may not enter into a financial contract with a member of REBNY while serving on the Commission. Or require that the architects on the Commission be retired from active practice or be architects that work solely in the domain of renovation and restoration of historic properties. The point is that mere recusal is ineffective. Stronger medicine is called for.
- Balance the requirement that a real estate professional be on the Commission with a requirement that a historic preservation professional also serve, one that has an advanced degree in preservation, preservation planning, or landscape architecture, but without a history of professional consulting or employment with the real estate industry.

The third goal might be accommodated with changes to the internal operating rules of the Commission. It would be a simple matter to write rules that allow staff to convey their own, unedited, unfiltered recommendations for the Commissioners - without the interference of the Chair or Legal Counsel - and to restore the old “triage” committee of Commissioners for handling RFEs.

For example, a rule might state that a “Request for Evaluation” committee of five appointed Commissioners, without the Chair, meet monthly to sort the evaluation requests into three piles: “yes” - meaning the request may go forward with additional research to the full

Commission for its consideration; “maybe”, meaning the request requires additional information and once obtained, may be considered again by the triage committee without time limit, and no, meaning the present Commissioners have no interest. These meetings need not be “open meeting law” meetings. They should be closed to the public, allowing Commissioners essential moments of informal analysis and professional discussion. Nonetheless, the meeting should have brief minutes for the benefit of the Commissioners not present at triage. Moreover, the selection of a “no” decision needs an explanation according to clear published guidelines so that it is not widely interpreted as arbitrary and capricious nor a bow to real estate interests. The legal counsel of the Commission should specifically be excluded. This is to ensure the Commissioners are weighing applications based on the architectural and historical merits of the case and not on FAR considerations. Note that the need for legal counsel at such meetings was long ago rendered moot back when the Supreme Court ruled in favor of the City in the Penn Central case. Anxiety over a possible “takings” situation is deeply misguided at this point in history.

Conclusion

The evidence that real estate interests have come to dominate the Landmarks Preservation Commission is substantial. Regulatory capture is a real phenomenon. Therefore, the time has come to consider changes to the rules of the Landmarks Preservation Commission in New York City, else we permanently lose the visual character and history of our city. As the law states, such change “is required in the interest of the health, prosperity, safety, and welfare of the people.”

Citations

- Barwick, Kent. 2011. "Reminiscences of Kent Barwick." New York Preservation Archive.
- Dietrich, Gregory. 2014. "Analysis of Pre-Designation Activities in NYC during the Bloomberg Administration." New York: Village Preservation.
- Ellsworth, Lynn. 2018. "We Got What We Wished for, Now What?" *Broadsheet*, April 20, 2018. <https://www.ebroadsheet.com/opinion-analysis-got-wished-now/>.
- Glaeser, Edward, Ingrid Gould Ellen, Michael Gedal, Vicki Been, and Brian J. McCabe. 2014. "Preserving History or Hindering Growth? The Heterogeneous Effects of Historic Districts on Local Housing Markets in New York City." Working Paper 20446. National Bureau of Economic Research. <http://www.nber.org/papers/w20446>.
- Glassman, Carl. 2022. "Judge Sides With Seaport Tower Foes, Orders Temporary Construction Halt | Tribeca Trib Online." *Tribeca Trib*, October 11, 2022. <http://www.tribecatrib.com/content/judge-sides-seaport-tower-foes-orders-temporary-construction-halt>.
- Gough, Christabel. 2017. "Undoing Historic Districts." New York: Society for the Architecture of the City.
- Gratz, Roberta. 1973. "Landmarks Law a Threat to City's Heritage." *New York Post*, January 8, 1973.
- Kroessler, Jeffrey. 2018. "Losing Its Way: The Landmarks Preservation Commission in Eclipse." *Environmental Law in New York*, August. https://academicworks.cuny.edu/jj_pubs/245.
- New York City. n.d. "Chapter 3: Landmarks Preservation and Historic Districts." American Legal Publishing. Accessed February 15, 2023. <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAadmin/0-0-0-133896>.
- New York City Council Land Use Committee. 2016. "Landmarks for the Future: Learning from 50 Years of Preservation." New York. <http://nyccouncillabs.wpengine.com/press/wp-content/uploads/sites/56/2016/06/landmarks.pdf>.
- REBNY. 2013a. "An Analysis of Landmarked Properties in Manhattan." New York.
- . 2013b. "Landmarking Curtails Affordable Housing Development in Manhattan, REBNY Study Reveals." REBNY. www.rebny.com.
- Spinola, Steven. 2012. "REBNY: Improve the City's Landmarks Designation Process." *CityLand* (blog). September 7, 2012. <https://www.citylandnyc.org/rebny-improve-the-citys-landmarks-designation-process/>.
- Village Preservation, dir. 2022. *Press Conference Demanding an End to Rash of Demolitions of NYC Landmarks, December 15, 2022*. <https://www.youtube.com/watch?v=VsIMGyBDDNA>.
- Wood, Anthony C. 2008. *Preserving New York: Winning the Right to Protect a City's Landmarks*. New York: Routledge.