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# The New York Environmental Lawyer

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of the New York State Bar Association

## Message from the Chair

Greetings from Albany as we approach summer! I hope that this message conveys the gratitude that I feel toward the many people in the Section who helped to achieve what can only be termed as an extremely successful Section year.

Joan Leary Matthews

### 2008-09 Section Accomplishments

If you will allow me to toot the Section's horn for a moment, here is a list of the many accomplishments that together we achieved:

- ✔ established a blog;
- ✔ established the Classroom Project;
- ✔ began a Section webinar series;
- ✔ partnered with the International Section to present additional webinars;
- ✔ revamped the Section *Journal*, which will debut in 2009-10;
- ✔ instituted a "Track B" program for newer attorneys at the 2009 Fall Meeting;
- ✔ created guidelines for written materials for Section programs—which reduces paper and promotes sustainability;
- ✔ hosted renown physicist Dr. James Hansen to speak at Annual Meeting Climate Change program;
- ✔ co-sponsored the NYSBA Task Force on Global Warming and provided significant support for the Task Force's work in Albany;
- ✔ engaged in significant outreach for new members;
- ✔ offered law students Section benefits, including free membership and registration at programs;
- ✔ commented on key legislation—Bottle Bill and SEQRA Standing;

*(continued on p. 4)*

## Inside

# From the Editor

Kevin Anthony Reilly

The present issue features Historic Preservation, an area that too often seems marginal to environmental law and is underappreciated as an important component of public policy. I am sufficiently old-school to be convinced of the centrality of the humanities, generally, and especially history, to our cohesion as a society. Even if historical themes and lessons remain relatively unarticulated in our modern media culture, I deeply believe it to be a fact that the web of historical associations provides the filaments that hold us together, providing an underlying strength and—if carefully examined—an orderly way of understanding and explaining ourselves.

Certainly, history as a discipline incorporates more tensions that it did a half century ago. Scholars reach for more subtle explanations of events and social issues, people and groups are being analyzed who in the past fell beneath the proverbial radar screen of traditional narrative history, and the net of causation and explanations gathers information and data that generate new and even controversial ways of looking at people and events. If the field of history is more contentious, though, it also is that much richer. It follows that Historic Preservation, sometimes defined as preservation of the built environment, should also take on newer and deeper meaning. Its importance lies not in cultural fetishes nor only as a means to enshrine staid exhibits, but as a means to bring into the immediacy of the present the ideas, sensations, thoughts and dreams that animated prior generations, and which welded together diverse peoples and cultures and built a unique polity. History, and its motivating ideas and experiences, can be better appreciated when its artifacts and cultural reference points can be looked at, felt, and pondered.

However, just as historical studies sometimes get relegated within academia to the ideological margins, and within our culture historical persons and events survive too often as caricature, so, too, Historic Preservation is being drained of its richer possibilities. When the planning for historical structures, monuments and locations is considered, it seems that the choice comes down to Disneyfying our past or, alternatively, bulldozing it to make way for the glittering baubles proudly displayed by America's truly impressive commercial dynamo. As Henry Adams presciently observed a little more than a century ago, that dynamo inevitably consumes our past and with it our deeper sense of a national identity that, in its better expression, is linked to formative ideas and experiences. Historic Preservation, then, also has value when it draws our attention to those ideas and experiences, some uniquely American, but many of older vintage and with wider cultural resonances. When we sacrifice that which we can see, feel and physically experience, we risk losing sight of the less tangible components of who we are which, in the forward rush of everyday life, may become as spectral as yesterday's myths.

I would like to thank Chris Rizzo, of Carter Ledyard & Millburn, who gathered the articles in this issue that address Historic Preservation. Chris authored an article that provides a primer on Historic Preservation Law in New York. The article starts with an overview of the relevant federal law, then digs into an excellent exposition of New York State preservation law and New York City's Landmarks Law. Chris's article not only interweaves the several statutory structures but also discusses illustrative case law, before finally marching the reader forward into history with projections of where preservation efforts seem to be heading. As always in life, tax credits may prompt behavior where other efforts fail, and Chris discusses the tax ramifications of some preservation endeavors.

Susan Stern, an architect who is also a newly minted lawyer, focuses her article on the New York City Landmarks Law. Susan examines two recent cases that turned on procedural considerations which, as employed by the Landmarks Preservation Commission, seemed to undermine the protection of New York City's cultural and historical resources. John Weiss, Deputy General Counsel of the Landmarks Preservation Commission, explains the LPC permitting process, then addresses his article to the sustainability aspects of preservation, notably where preservation efforts intersect with energy conservation. Finally, Amy Facca, Preservation Planner at New York State's Office of Parks, Recreation and Historic Preservation, concludes by analyzing *Historic Preservation at a Crossroads*, the 2009-2013 New York State Historic Preservation Plan. Amy's discussion, and the underlying document, both broaden and deepen how we view preservation as an ideal, and she analyzes how preservation should be implemented operationally in a far more comprehensive manner. The article provides guidance as we grapple with how to understand and preserve the past, in the future.

It is sad, but strangely coincidental, that my preliminary discussions with Chris about this issue of this journal occurred in the wake of Dorothy Miner's passing. Dorothy, from her perch in the New York City Landmarks Preservation Commission, and at Columbia University, was an early voice—some suggest she was a force of nature—for Historic Preservation, which she pursued over the years with an ethos and a zeal that can best be described as an intellectual crusade, in the best sense. Her voice strengthened as the public's appreciation for

the monuments of its past ripened during the 1960s and 1970s, and she provided backbone for preservation efforts as political leaders championed real estate development in later decades. In recent years, Dorothy was affiliated with Nick Robinson's bailiwick in Pace University's Environmental Law program. A memorial service was held recently at Columbia University which was well attended by many people involved with preservation efforts, professionally as well as locally, and several Section members. The service was followed by a reception at the nearby Cathedral of St. John the Divine. The *New York Times* wrote an obituary which is re-published in this issue. Among Dorothy's "landmark" achievements, so to speak, was the preservation of Grand Central Station, which resulted in the "landmark" (I know—but the term actually matters!) *Penn Central* decision that became the template for modern Historic Preservation Law. Phil Weinberg, whose involvement with the case arose from his position with the New York State Attorney General, writes a fond remembrance, as does Leonard Koerner, presently Appeals Chief at the New York City Law Department, who worked with Dorothy in that monumental (another figure of speech that can't be helped) litigation.

Historic Preservation aside, Section members have been contributing to the again-growing chorus of specialists and citizens alike who are becoming re-engaged on matters of climate preservation. As I noted in my last column, it is like a breath of fresh air when political leaders, industry spokesmen, concerned citizens, and so many others are talking to one another rather than past one another—or, worse, ignoring one another—on the intertwined themes of global climate change and national security, both of which will benefit by the development of alternative energy sources. Finally, there is an intelligent and thoughtful national conversation on how to address climate change—mitigating it where possible, understanding its realistic ramifications, and preparing for the anticipated and unanticipated social, economic and even geographic disruptions. Michael Gerrard's exciting career change was noted in my last column. Kevin Healy recently moderated a well-attended program at the Association of the Bar of the City of New York, chaired by Peter Garam of Con Edison, that examined the actions being taken by federal, state and local officials. The discussion included additional inquiries into what measures are actually achievable politically, the strategies being employed to wring the best outcome from pending bills in Congress, and enterprising measures by New York State and New York City to both generate and conserve energy, many of which still face structural and logistical challenges. Roger Martella, former General Counsel of EPA, William Bumpers of Baker Botts, who was knowledgeable about bills currently passing through Congressional committees, Paul DeCotis, New York State Deputy Secretary for Energy, and James Gallagher, senior vice president for Energy Policy at New York City's Economic Development Corporation, also participated.

The Peter A. Berle Environmental Integrity Award was recently established by the Century Foundation in New York City, in cooperation with the National Audubon Society, the Natural Resources Defense Council, the Environmental Defense Fund, our Environmental Law Section, and friends of Peter Berle. Lou Alexander was the Section's representative on the Award Selection Committee. Steve Kass, Peter Berle's former partner, was centrally involved in creating the award and in developing the selection process. The inaugural award was jointly presented on May 3 to the eminent climate scientist James E. Hansen, director of the NASA Goddard Institute for Space Studies, and David Foster, executive director of the Blue Green Alliance. The recipients' remarks underscored not only the need for an enhanced attention to climate issues, but also the strategic importance of including industry actors—especially labor in a decidedly constricted employment market—in solving our several environmental problems.

Walter Mugdan, the Director of Emergency and Remedial Response in EPA Region 2, but also well known to our readers, adds to his lengthy list of contributions to this *Journal* over the years with an article on Green Remediation. While one may reasonably assume that remediation is innately green, that assumption is premised on *what* is being cleaned up—contamination—and misses *how* the cleanup is conducted. The contemporary concern for energy frugality insists that, as with so many other processes, we conduct remediation in more energy-efficient manners. Walter's article analyzes how energy is usually consumed in cleanups, and he suggests several alternatives that, in the aggregate, can significantly reduce remediation's carbon footprint. The article offers sage and especially timely advice from a leading expert in the field of remediation.

Nadya Kramerova, the Student Editor, submits case summaries from members of the Environmental Law Society at St. John's Law School. Phil Weinberg assumed overall supervisory responsibility for student submissions for many years. Phil essentially initiated environmental law studies at St. John's Law School and served as the faculty advisor for the Environmental Law Society, which he was instrumental in creating. It is no small irony that I am leaving my responsibilities as *Journal* editor as Phil, who originally offered this opportunity to me, is retiring from St. John's. I anticipate that after a bit of travel, Phil will be starting a third career.

The Environmental Law Section lost another friend and prominent member lately with the passing of Bill Fahey. Bill was an early Section Chair, and, with Phil Weinberg, co-chaired the Section's Transportation Committee for many years. Actually, Phil and Bill basically were the Transportation Committee. Bill will be remembered, fondly, for his sunny personality and an ever-present smile, a quick and gentle wit, and as an engaging conversationalist. I usually sat with Bill, because I enjoyed his

personality so much, at the luncheon following the Section's Legislative Forum each year. There will always be an empty seat, figuratively speaking, at future luncheons, and I know that many of Bill's old friends, who created and developed the Environmental Law Section with him, will miss him.

I do not want to end this column, and my tenure as editor, on a sad note. So, I will part by mentioning how much enjoyment I've had putting together this publication for more years than I care to remember. During my time as editor, the *Journal* has been a means by which I could stay in touch with the many people I would see at Section meetings and elsewhere, many of whom I could politely (I hope) prod into contributing articles, and whose company I came to enjoy so much over the years at meetings and weekend retreats. The *Journal* also served to keep me in touch with developments in New York Environmental Law. It is not undue flattery to observe that the Environmental Law Section has benefited from the membership and contributions of New York's leading environmental lawyers, and the *Journal* similarly benefited. It proved to be an excellent linkage to what I consider to be one of the most fascinating areas of law, developed by some of law's most interesting people. I welcome Miriam Villani to the editorship, and hope that she will be the recipient of as much generosity as was I over the years, and will enjoy the task in equal measure. I also congratulate Alan Knauf, our incoming Chair, and Joan Leary Matthews, who is cheerfully awaiting emeritus status.

**Kevin Anthony Reilly**

## Message from the Chair

*(continued from p. 1)*

- ✔ ensured that the Section's programs featured a diverse set of speakers.

### Legislative Forum

The Legislative Forum held in Albany on May 6 was also highly successful. This year's program was entitled "New Possibilities: Environmental Legislative Initiatives for 2009." I know that later events have clouded whatever hopes existed to break the legislative stalemate of prior years and advance meaningful environmental legislation. Nonetheless, we appreciated the fine work of the Legislation Committee—Terresa Bakner, Michael Lesser, and Jeff Brown—to put together an informative program, which featured Sen. Antoine Thompson, Stephen Liss, Esq. from Assemblyman Robert Sweeney's office, David Gahl from Environmental Advocates, Ken Pokalsky from The Business Council of NYS, and Anne Reynolds from the NYS DEC.

After the Forum, many participants stayed for the annual luncheon, attended by a number of government attorneys from a variety of State agencies. We thank Kimberly Harriman, Esq. from the Department of Public Service for her entertaining and informative presentation on the energy provisions of the American Recovery and Reinvestment Act (ARRA), which President Obama signed into law in February 2009.

### Diversity of Ideas

The Section adopted a Diversity Plan a number of years ago. Not only were we intending to change the demographics of the Section—based on age, geography, gender, race, ethnicity, etc.—we were also hoping to add diversity of ideas. With that diversity, attorneys who would not ordinarily see themselves as NYSBA or Section members might just be intrigued by the variety and breadth of work that we accomplish in the Section. Our intent is to be all inclusive—please let us know how we are doing, and how we can improve.

### A New Year

Please join me in wishing the new Section Chair, Alan Knauf, and the Section Cabinet a very successful 2009-10. Alan, his Program Co-chairs, and our colleagues in the Municipal Law Section have been planning an informative, fun-filled Fall Meeting in Canandaigua, in the Finger Lakes Region. We hope to see you there!

Thank you for your interest, enthusiasm, and support for the Section's activities this past year! It was truly my pleasure to serve as Section Chair.

**Joan Leary Matthews**

# Historic Preservation Law 101 for New York Lawyers

By Christopher Rizzo

## A. Introduction

Preservation law is one of the least-known but most important components of environmental law, governing and protecting the built environment that millions of New Yorkers enjoy each day. Preserved and restored main streets, historic districts and landmark sites generate millions of dollars in tourism revenue each year in places like Cooperstown, Saratoga Springs, Cold Spring and Greenwich Village in New York City.

The nation's principal preservation laws also *predate* most other environmental laws. Congress enacted major protections for historic resources in 1966 and New York City passed its Landmarks Law in 1965, a full decade before many other major federal environmental laws. This special edition of the New York State Bar Association's *New York Environmental Lawyer* therefore aims to reconnect attorneys with this critical component our environmental legal system. This article provides a very brief overview of major preservation laws, constitutional issues and hot topics in the field.

## B. Federal Historic Preservation Law

The three most significant federal historic preservation laws are the National Historic Preservation Act of 1966 (NHPA), Section 4(f) of the Department of Transportation Act of 1966 ("Section 4(f)") and the National Environmental Policy Act (NEPA). There are numerous other federal preservation laws, but they apply in much more limited circumstances (e.g., Native American sites or shipwrecks).[1]

### 1. National Historic Preservation Act of 1966

NHPA is the most significant federal historic preservation law because it applies to all federal agencies and most actions that impact historic resources. The law has several key components.

First, NHPA expands the U.S. Department of Interior's role in maintaining a "national register of historic places" that includes properties that are significant in American history, architecture, engineering or culture.[2] Eligible properties must be associated with important events, persons, architectural styles or historic periods and be more than 50 years old.[3] Buildings or sites on or eligible for the register are the focus of reviews under NHPA, NEPA and Section 4(f).

Second, NHPA encourages states to designate a "state historic preservation officer" to implement NHPA, prepare statewide historic preservation plans and otherwise coordinate with federal agencies.[4] Amy Facca of the New York State Historic Preservation Office discusses New York's latest plan in her article.

Third, NHPA requires federal agencies to protect historic properties that are within their ownership or control (often referred to as Section 110 of NHPA).[5]

*"Preservation law is one of the least-known but most important components of environmental law, governing and protecting the built environment that millions of New Yorkers enjoy each day."*

Fourth, NHPA creates a federal agency, the Advisory Council on Historic Preservation (ACHP)—arguably the least-known federal agency—to oversee the law's implementation.[6] The ACHP has created an extremely useful guide to NHPA and court decisions interpreting the law, *An Overview of Federal Historic Preservation Case Law, 1966-1996* and *Federal Historic Preservation Case Law Update, 1996-2000*.[7]

The most important component of NHPA is, however, its creation of the "Section 106" consultation process. Federal agencies must consider the effect of their undertakings on historic properties that are listed on, or eligible for, the National Register of Historic Places.[8] This evaluation process is generally coordinated with environmental impact review under NEPA, but each federal agency tends to have a different style for its consultation. Section 106 applies broadly to all direct federal actions, such as road construction, wetlands permits and funding by the Department of Housing and Urban Development.

The first step in the Section 106 process is the federal agency's determination of whether the undertaking has the potential to have effects on historic resources, which include both National Register-listed and eligible properties. If there is no potential for effects, the federal agency's duties are complete.[9] If there is a potential for effects, federal agencies must consult with the local State Historic Preservation Officer, impacted municipalities, any impacted Native American groups and project applicants to identify historic properties[10] and assess the effects. When there are potential adverse effects, federal agencies usually work with the consulting parties to eliminate or ameliorate them through a "memorandum of agreement" or "programmatic agreement."[11] But Section 106, like NEPA,

dictates procedures rather than results. Federal agencies can therefore choose to terminate consultation and proceed with an undertaking even if it has adverse effects.[12] In practice, this result is unusual and disfavored.

While NHPA encourages federal agencies to coordinate Section 106 review with NEPA review, discussed below, it is important to keep in mind that the standards for triggering further analyses under these laws are different. NEPA applies to "major federal actions,"[13] while NHPA applies to federal "undertakings."[14] Removal of a historic slate roof from a building, for example, may not trigger NEPA but could trigger NHPA. Further, under NEPA, federal agencies are required to prepare an environmental impact statement only if the action may have "significant adverse impacts."[15] Under NHPA, a federal agency must consult if there are any adverse effects, even if they are not significant from a NEPA perspective. As NHPA regulations state: a "finding of adverse effect on a historic property does not necessarily require an EIS under NEPA."[16]

#### 2. National Environmental Policy Act

As noted above, NEPA requires all federal agencies to consider the impacts of "major federal actions" on the environment. The law defines "impacts" to include impacts on historic resources,[17] including historic buildings, important view sheds, Native American sites and archeology.

NEPA review can proceed in one of three basic ways:

1. A federal agency may determine that an action is ministerial (i.e., no agency discretion), is subject to a specific regulatory exception or otherwise does not trigger NEPA. In these circumstances the agency has no further duties.

2. A federal agency may determine that, although NEPA applies, the action will not have any significant adverse impacts. In that circumstance, the agency prepares a short environmental assessment and issues a finding of no significant impact, commonly referred to as a "FONSI."

3. Finally, if a federal agency determines that the action may significantly affect the quality of the human environment,[18] it must prepare an environmental impact statement, which generally takes months to complete and requires substantial public participation. The process concludes with a final environmental impact statement and the agency's adoption of a record of decision that memorializes the significant impacts, addresses ways to minimize significant impacts, identifies alternatives to the action and selects the preferred alternative. Like NHPA review, this review process is procedural only and agencies can decide to proceed with a project that has significant impacts. But most practitioners credit the law with discouraging agencies from proceeding with many genuinely harmful actions.

#### 3. Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 303(b)

Although Section 4(f) applies only to actions of the U.S. Department of Transportation and its subsidiaries like the Federal Aviation Administration, its requirements are more substantive than those of NHPA and NEPA. The agency may approve a transportation project that requires use of publicly owned lands, parks, recreation areas, wildlife refuges or historic sites only if "there is no prudent and feasible alternative to using that land" and "the program or project includes all possible planning to minimize harm."[19] As under NHPA, in theory the Department of Transportation can proceed with a harmful action after complying with Section 4(f)'s procedural requirements and making agency findings about impacts and alternatives. But in practice the requirement to demonstrate that there are no viable alternatives to using protected open space or historic sites often makes it impossible to proceed with a harmful action.

The seminal case on point is *Citizens to Preserve Overton Park v. Volpe*, which involved the Department of Transportation's plans to construct a six-lane highway extension through a public park in Memphis.[20] In *Overton* the Department of Transportation argued to the U.S. Supreme Court that the agency could consider cost, efficiency of route, safety and other non-environmental matters in determining whether no feasible and prudent alternatives existed. Justice Thurgood Marshall dismissed this agency defense, holding that "if Congress intended all these factors to be on equal footing with preservation of parkland there would have been no need for the statutes."[21] The Court then held that, although routing the highway around the park would be more costly and less direct, it was potentially a prudent and feasible alternative. This reasoning applies equally to Section 4(f)'s protection on historic properties.

### C. New York State Historic Preservation Law

#### 1. State Historic Preservation Act

New York's State Historic Preservation Act, or SHPA, is similar to NHPA. It requires all state agencies to consider the impact of their actions on historic resources, which include properties listed as eligible for the State or National Registers of Historic Places. It also requires agencies to consult with staff of New York's SHPO.[22] The act states:

> As early in the planning process as may be practicable and prior to [final approval] the agency's preservation officer shall give notice, with sufficient documentation, to and consult with the [State Historic Presidential Officer] concerning the impact of the project if it appears that any aspect of the project may or will cause any change, beneficial or adverse, in the quality of any historic, architectural, archeological, or cultural property that is listed on the national register of historic places or property listed on the state register or is determined to be eligible for listing on the state register by the commissioner.
>
> Generally, adverse impacts occur under conditions which include but are not limited to (a) destruction or alteration of all or part of a property; (b) isolation or alteration of its surrounding environment; (c) introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting; or (d) neglect of property resulting in its deterioration or destruction.
>
> Every agency shall fully explore all feasible and prudent alternatives and give due consideration to feasible and prudent plans which avoid or mitigate adverse impacts on such property.[23]

SHPA does not apply to projects that are already subject to the more extensive consultation requirements of Section 106.[24] Nor does SHPA require the extensive or formal consultation that Section 106 requires.

Unlike Section 106, SHPA has been the subject of little litigation. This is probably due to the lack of third-party consultation, which often makes Section 106 quite contentious, and the fact that state agencies and the SHPO almost always try to reach an amicable resolution of impacts.

### 2. State Environmental Quality Review Act; the *Citineighbors* Case

In practice, evaluation of impacts under SHPA is folded into review under the State Environmental Quality Review Act (SEQRA). Like its federal counterpart, SEQRA requires all state agencies, counties and municipalities to consider the impacts of their "actions" on historic resources[25] and numerous other aspects of the environment (air, natural resources, traffic, etc.).[26] If the agency determines that the action may have a significant impact in any of these categories, SEQRA requires the agency to prepare an environmental impact statement.[27] The regulations state: "SEQRA requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an *environmental impact statement*."[28]

Like NEPA, SEQRA is a procedural statute only. But the public disclosure involved in environmental review tends to steer agencies away from patently harmful actions.

Notably, review and permitting decisions by local landmark agencies are not likely to be considered "actions" for SEQRA purposes. The regulations exclude at least two kinds of landmark actions from the law's purview. These include "designation of local landmarks or their inclusion within historic districts" and "official acts of a ministerial nature involving no exercise of discretion, including building permits and historic preservation permits where issuance is predicated solely on the applicant's compliance or noncompliance with the relevant local building or preservation code(s)."[29]

The second exception has been the source of some conflict in the preservation community. In *Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preservation Commission*,[30] the Appellate Division, First Department, held that the Commission's decisions are not subject to SEQRA. It reasoned that the Commission's review is circumscribed by a narrow set of criteria that allows consideration of only historic and aesthetic issues, which would make environmental review pointless. The court stated:

> Where, as here, an agency has some discretion, but that discretion is circumscribed by a narrow set of criteria which do not bear any relationship to the environmental concerns that may be raised in an EIS, its decisions will not be considered "actions" for purposes of SEQRA's EIS requirements. . . . The Commission's determination with respect to [an] application, limited to the appropriateness of the proposed building's exterior architectural features and narrowly circumscribed by the architectural, aesthetic, historical and other criteria specifically set forth in the Landmarks Preservation Law, was "ministerial" for SEQRA purposes.

The decision left some SEQRA lawyers uneasy, fearful that other agencies with limited jurisdictions might make the same argument.

### 3. Listing on the State and National Registers of Historic Places

The criteria for listing on the State Register of Historic Places are similar to those for the National Register.[31] Properties that are listed on the National Register are automatically included on the State Register. Properties can also be nominated to the State Register directly. The key difference between the two listings is that "[t]hose regulations which prohibit listing on the National Register when property owners object shall not apply to nominations for the State Register."[32] Additionally, the State Register contains a stronger *exception* to permit listing of properties that have attained significance with the past 50 years and are of "exceptional importance."[33] The most prominent example of a "young" State Register site is the World Trade Center, which the State Historic Preservation Officer determined to be eligible following the events of September 11, 2009.

## D. Local Historic Preservation Law

New York City created its Landmarks Law in 1965 and has since designated over 1,000 individual landmarks and 80 historic districts. The designation process has ebbed and flowed somewhat over the law's four-decade existence. Recently, the city has increased its attention to landmarks and districts outside of Manhattan. The law is examined here as a good of a local preservation law, although certainly not a "typical" one.

The Landmarks Law created the Commission, which consists of 11 members, including at least one architect, planner, realtor and representative of each borough.[34] The commissioners, besides the chair, are unsalaried. They oversee the designation process for new landmarks and review of applications to alter existing landmarks. They also less frequently address enforcement, penalty and hardship matters.

As Susan Stern discusses in her article for this journal, the designation process is largely undefined by city regulations.[35] The Commission can designate individual landmarks (whether publicly or privately owned), historic districts (which effectively imposes landmark status on all lots within the district), interior landmarks (rare and only when there is existing public access, like Grand Central Terminal) and scenic districts (governing city-owned properties, such as Central Park).[36]

Owners of landmarks can generally alter their properties without the Commission's approval if the change would not require a permit from the Department of Buildings, would not be visible from a public thoroughfare and would not impact a regulated feature of the landmark. But it is always wise to consult with the Commission's staff if there is any question about the necessary approvals. The Commission's staff can issue a "certificate of no effect" for work that requires a building permit but would otherwise not impact the regulated features of the landmark.[37] The staff can also issue a "minor work permit" for work that is not subject to a building permit and would have a negligible impact on the protected features of a landmark.[38]

Substantive work on landmarks, including buildings within historic districts, requires a "Certificate of Appropriateness." The Commission must consider:

> (a) the effect of the proposed work in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done, and (b) the relationship between the results of such work and the exterior architectural features of other, neighboring improvements in such district.[39]

The Commission's review is limited to the aesthetic qualities of the proposal, including "aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color."[40] The Commission is specifically barred from considering zoning issues such as height, rear yard requirements, open space, etc.[41]

The Landmarks Law and New York City Zoning Resolution provide owners of landmarks with several special forms of relief, which have probably helped the law withstand a number of legal challenges. The Commission itself can authorize two special forms of hardship relief for tax-exempt landmark sites and one for taxable landmark sites.[42] The City Planning Commission can grant a special permit to owners of landmark sites to alter use or bulk regulations (except floor area ratio) to further a preservation purpose.[43] Owners sometimes use this special permit to develop a for-profit use that generates funds for the restoration and maintenance of a landmark that shares the lot. The City Planning Commission can also grant a special permit to allow sale of development rights from a landmark site to adjacent lots or across the street, another way to generate revenue from a landmark site while preserving the landmark.[44]

## E. Constitutional Issues

Historic preservation laws are challenged on constitutional grounds from time to time, often based on an alleged *regulatory taking*, violation of *free speech*, interference with *religious freedom* or unconstitutional *vagueness*. These challenges usually take aim at local preservation laws, which are more likely than federal or state preservation laws to substantively regulate use of historic properties.

For the most part, local preservation laws fare relatively well in these challenges.

The seminal case on regulatory takings is *Penn Central Transportation Co. v. City of New York*, which involved an application by the owner of Grand Central Terminal to construct a 50-story high-rise above the landmark building.[45] The city's Landmark Preservation Commission denied the owner's application for a certificate of appropriateness, stating:

> [We have] no fixed rule against making additions to designated buildings—it all depends on how they are done. . . . But to balance a 55-story office tower above a flamboyant Beaux-Arts façade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass.[46]

The owner immediately challenged the denial in state courts, arguing that the permit denial was a regulatory taking in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution and a violation of due process protected by the Fourteenth Amendment. The New York Court of Appeals ultimately denied the challenges and the owner appealed to the U.S. Supreme Court.

The U.S. Supreme Court began its analysis by recognizing that its prior decisions have upheld the authority of states to regulate land uses to promote "health, safety, morals, or general welfare" even if such regulations adversely affect property values.[47] It then rejected Penn Central's contention that any diminishment in value because of land-use regulations should be compensable. Instead the Court held that, because the City's application of the Landmarks Law did not interfere with the primary expectation of use of the Terminal or deny the owner a reasonable economic return, Penn Central had not established a regulatory taking.[48] This ruling underscores the importance of having mechanisms in local laws to relieve genuine economic hardship imposed by landmark laws and zoning.

In 2004, a federal court turned down a major challenge—*Board of Managers of Soho International Arts Condominium v. City of New York*—to New York City's Landmark Law that was based on the First Amendment's protection of free speech.[49] The owner of a condominium building objected to the Landmark Preservation Commission's refusal to allow removal of a renowned modern art sculpture on the building's northern wall, commonly referred to as "The Wall." (The prior owner had consented to the artist's installation of the artwork.) The sculpture was installed after designation of the Soho Cast Iron Historic District in which the building is located and is distinctly modern, particularly in comparison with the 19th Century buildings that dominate the landmark district.

The court held that content-neutral landmark laws are subject to "intermediate scrutiny" with regard to their impact on speech and upheld the Landmarks Law under that analysis.[50] Moreover, the court found that the Landmarks Preservation Commission's requirement that artistic features of landmarks be preserved did not amount to "compelled speech," which the First Amendment also prohibits. The decision has major repercussions for all historic preservation laws because many landmark buildings include artistic features such as statues, gargoyles, murals or other artistic details. A decision that was adverse to the city potentially would have allowed thousands of buildings owners to sheer off artistic elements of their landmarks in the name of free speech.

Other challenges to landmark laws have been based on the First Amendment's protection of religious worship. Until 2000, the seminal case governing historic preservation laws and religion was the U.S. Supreme Court's decision in *Employment Division v. Smith*.[51] The case involved Oregon's dismissal of two employees for their use of peyote, a plant-derived drug that is used by some Native Americans in religious worship. The discharged employees challenged the state's anti-drug laws and argued that they should be subject to "strict scrutiny" analysis to the extent that the laws extended to religious-related drug use. The Court, in an opinion by Justice Scalia, vigorously disagreed and held that content-neutral laws of general applicability are subject only to the "rational basis" analysis. *Smith* set the standard for land-use and preservation laws and their impact on religious buildings.

Congress's enactment of the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000 dramatically changed the analysis. RLUIPA will, arguably, make it more difficult for preservation laws to regulate religious institutions, although there is still no consensus on this point.[52]

The law has three key provisions that relate to land use. First, RLUIPA subjects land-use laws that place a "substantial burden" on religious worship to strict scrutiny even if they are content-neutral. The law states:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly or institution (A) is in furtherance of a compelling governmental interest;

> and (B) is the least restrictive means of furthering that compelling governmental interest.[53]

This clause dramatically alters the playing field and the standard set forth in *Smith*.

Second, RLUIPA requires municipalities to treat religious uses equally to nonreligious uses.[54] Theoretically, this doesn't change the existing law, which should have required similarly situated religious and nonreligious uses to be treated equally. But it does provide a new avenue for challenges to land-use laws. For example, in 2008 the Third Church of Christ Scientist successfully argued in the U.S. District Court that New York City's Department of Buildings violated RLUIPA by refusing to permit a catering hall use within the church basement.[55] The church pointed out that the city permitted the Beekman Hotel, mere steps away from the church, to operate a similar restaurant and catering facility.

Third, RLUIPA prohibits municipalities from completely excluding houses of worship from a jurisdiction. The law states: "No government shall impose or implement a land use regulation that . . . totally excludes religious assemblies from a jurisdiction. . . ."[56] This provision has not been litigated extensively, probably because few municipalities entirely exclude houses of worship.

There continues to be a tremendous amount of interest in RLUIPA's impact on local laws. There have already been a number of unsuccessful facial challenges to RLUIPA by municipalities that claim that Congress usurped the states' police powers or violated the U.S. Constitution's Establishment Clause. These sorts of lawsuits are likely to continue until the Supreme Court finally addresses RLUIPA.

Finally, there have been some challenges to landmark laws based on state or federal constitutional "due process" guarantees. A recent decision from an Illinois appellate court has raised concerns in the preservation community because of the court's harsh treatment of Chicago's Landmark Ordinance based on state due process concerns. The plaintiffs in *Hanna v. City of Chicago* owned property that the Commission on Chicago Landmarks designated in 2006.[57] They objected to that designation and brought a facial challenge to the city's ordinance, alleging that the ordinance was void for vagueness and ambiguity under Illinois's constitutional due process clause. A law violates due process guarantees when "its terms are so incomplete, vague, indefinite and uncertain that men and women of ordinary intelligence must necessarily guess at their meaning and differ as to their application."[58] The court applied that standard to Chicago's ordinance, which directs the commission to consider a potential landmark's "value," "importance," "significance," "uniqueness," etc., and concluded that the plaintiffs had adequately alleged a violation of their due process rights, thereby reversing the trial court's dismissal of the case.[59] Chicago will almost certainly appeal the decision to Illinois's top court, but it has already led some municipalities around the nation to reconsider whether their own laws are clear enough under federal and state due process standards.

## F. The Future of Historic Preservation Law

### 1. Sustainable Buildings

The U.S. Green Building Council's voluntary standards for sustainable buildings, "Leadership in Energy and Environmental Design," or LEED, have become the widely accepted standard for sustainability in the construction industry.[60] There are now LEED guidelines for both new and renovated buildings. To deal with the perception that only new buildings can be sustainable, the U.S. Green Building Council recently reformulated its LEED certification for "operation and maintenance" of existing buildings, which may help owners of landmark properties achieve LEED certification even if they are not planning major "gut" renovations of their buildings.

LEED certification allows buildings to "earn" points in a variety of categories by choosing sustainable sites, improving water efficiency, improving energy efficiency and reducing air pollution, using sustainable materials and resources, improving indoor air quality and generally incorporating sustainability into the design process. One might expect these forms of construction to increase costs substantially, but early planning can minimize the price difference between sustainable buildings and their standard counterparts.

LEED-certified buildings still constitute only a fraction of overall construction in the United States. There were about 1,200 LEED-certified buildings by the end of 2008, mostly new rather than renovated buildings. But that number grows exponentially each year, with thousands of projects registered to achieve certification. As John Weiss of the New York City Landmarks Preservation Commission writes in his article for this journal, it should be possible to incorporate sustainable design into historic buildings without damaging their protected features.

### 2. Incentives

The most important federal incentive for restoration of historic properties is the rehabilitation tax credit, which has encouraged thousands of property owners to adaptively reuse historic structures. The tax credits include (a) 20 percent of the qualified rehabilitation expenditures with respect to any certified historic structure on the National Register of Historic Places or within a register district; and (b) 10 percent of the qualified rehabilitation

expenditures for other buildings "placed in service" before 1936.[61] This tax credit can help offset the costs of preserving historic building details or seeking LEED certification. The tax credit requires, however, compliance with the exacting restoration standards of the U.S. Department of Interior.[62]

Because of budgetary concerns, New York State has long resisted creation of a state counterpart to the federal tax credit, despite annual lobbying by a wide array of preservation organizations. In 2006 the legislature finally created a state rehabilitation tax credit for projects already receiving the federal credit. But it limits the state credit to 30% of the federal tax credit or $100,000, whichever is less.[63] In 2009, several legislators introduced a bill to increase the limit to $5 million. Eligible projects would be located in economically distressed areas and include costs incurred between 2010 and 2015.[64] The bill's prospects are uncertain.

The Internal Revenue Service also offers a tax deduction for donations of a qualified interest in property to a nonprofit corporation for conservation purposes.[65] This tax deduction is intended to foster conservation of open space and historic buildings through donations of title or easements. Prior to 2006 there was a substantial increase in the practice of donating "façade easements" that allowed the property owner to retain title while ceding the right to change the façade of a building, often a historic townhouse. This practice raised some concerns because many historic buildings are already protected by preservation laws, which makes the "donation" gratuitous. Moreover, some homeowners were exaggerating the value of the donated easement to increase the tax deduction, suggesting tax fraud in some cases. The practice was serious enough to prompt congressional investigations,[66] which resulted in a revision to the U.S. tax code that limits the practice to easements that genuinely protect an entire structure and involve a bona fide preservation organization as the holder of the easement.

The above are just some of the major economic incentives for preservation of historic properties. There are numerous others at the federal, state and local level, including some new loans and grants that states and municipalities may be able to offer because of the 2008 and 2009 economic stimulus laws.

### 3. Modern Architecture

One of the biggest issues for the preservation community will be how to incorporate and embrace modern architecture. As Susan Stern has written in her article for this journal, modern architecture can generate extraordinary controversy among preservationists. Ultimately, as Ms. Stern writes, courts are likely to be very deferential in their treatment of municipalities' decisions regarding designation of modern buildings, as one New York court did in *Landmark West! v. Tierney*, a decision that upheld the New York City Landmarks Preservation Commission's decision not to hold a public hearing on the designation of the controversial "Huntington Hartford" building in Columbus Circle, Manhattan.[67] The building's owner subsequently completely altered the façade (an improvement in some critics' perspectives). In this author's experience, there are also different viewpoints on modern architecture between some at New York's State Historic Preservation Office and at local landmark agencies; SHPO is more likely to disfavor modern construction within State and National Register Districts.

*"[O]ne of the best arguments in favor of protecting and expanding preservation efforts in all economic climates is preservation's positive economic impact on New York's economy, property values, tourism and overall character of the state's communities."*

### 4. Economics

Historic districts and landmarks are equally threatened in economic booms and busts. During the economic boom of the past decade, development sometimes sped past efforts to identify and protect historic structures in certain communities. Preservationists have felt outnumbered and outgunned by developers seeking to construct new glass and steel towers in historic districts or undertake substantial modifications to potential landmarks. The economic recession poses a different kind of threat, with preservation staff faced with cuts that may hamper new efforts to designate landmarks or enforce existing laws. Ultimately, however, one of the best arguments in favor of protecting and expanding preservation efforts in all economic climates is preservation's positive economic impact on New York's economy, property values, tourism and overall character of the state's communities.

## Endnotes

1. Other significant federal preservation laws include the following: Antiquities Act of 1906, 16 U.S.C. §§ 431–433 (permits the President to declare national landmarks and protects federally owned landmarks, ruins, etc.); Archeological and Historic Preservation Act, 16 U.S.C. § 469 (protecting archeological resources, particularly from dams) and Archeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa *et seq.* (protecting archeological resources on public lands); American Indian Religious Freedom Act, 42 U.S.C. § 1996 (directing federal agencies to protect important religious sites for American Indians); Abandoned Shipwreck Act of 1987, 42 U.S.C. §§ 2101–2106.
2. 16 U.S.C. § 470a.

3. 36 C.F.R. § 60.4.
4. 16 U.S.C. § 470a(b).
5. 16 U.S.C. § 470h(f).
6. 16 U.S.C. § 470i.
7. Both are available at the ACHP's Web site, www.achp.gov.
8. 16 U.S.C. § 470f.
9. 36 C.F.R. § 800.3(a)(1).
10. 36 C.F.R. § 800.3 sets forth the required consulting parties in the Section 106 process. Federal agencies can and often do allow other parties, such as preservation organizations, to participate as well. *See* 36 C.F.R. § 800.3(f)(3).
11. 36 C.F.R. §§ 800.6 (resolution of adverse effects) and 800.14.
12. 36 C.F.R. § 800.7.
13. *See generally* 42 U.S.C. §§ 4321–4347.
14. 36 C.F.R. § 800.1.
15. 42 U.S.C. § 4332.
16. 36 C.F.R. § 800.8(a)(1).
17. 40 C.F.R. § 1508.8.
18. 40 C.F.R. § 1508.13.
19. 49 U.S.C. § 303(c), (d). There is an exception for *de minimis* impacts.
20. 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed.2d 136 (1971).
21. 401 U.S. at 412, 91 S. Ct. at 821, 28 L. Ed.2d at 412 (1971).
22. New York's SHPO is the commissioner of the Office of Parks, Recreation and Historic Preservation. In practice, the term "SHPO" is often used to refer to the historic preservation staff that handles the actual implementation of NHPA and SHPA in New York.
23. N.Y. Parks, Rec. & Hist. Preserv. Law § 14.09.
24. *Id*.
25. 6 N.Y.C.R.R. § 617.7(c).
26. 6 N.Y.C.R.R. § 617.7(c).
27. 6 N.Y.C.R.R. § 617.7.
28. *Id*. (emphasis added).
29. 6 N.Y.C.R.R. § 617.5(c).
30. 306 A.D.2d 113, 762 N.Y.S.2d 59 (1st Dep't 2003) *aff'd on other grounds*, 2 N.Y.3d 727, 811 N.E.2d 2, 778 N.Y.S.2d 740 (2004) (plaintiffs' appeal was moot because they had not sought an injunction against the near-completed building.).
31. 9 N.Y.C.R.R. § 427.1.
32. 9 N.Y.C.R.R. § 427.1(b).
33. 9 N.Y.C.R.R. § 427.3.
34. New York City Charter § 3020.
35. N.Y.C. Admin. Code § 25-302 (A landmark is defined as "any improvement, any part of which is thirty years old or older, which has special character or special historic or aesthetic interest or value as party of the development, heritage or cultural characteristics of the city, state or nation. . . . ").
36. N.Y.C. Admin. Code § 25-303.
37. N.Y.C. Admin. Code § 25-306.
38. N.Y.C. Admin. Code § 25-310.
39. N.Y.C. Admin. Code § 25-307(b)(1).
40. N.Y.C. Admin. Code § 25-307(b)(2).
41. N.Y.C. Admin. Code § 25-307(b)(3).
42. N.Y.C. Charter § 3020(9) (Commission hardship panel for tax-exempt properties); N.Y.C. Admin. Code § 25-309 (request for certificate of appropriateness authorizing demolition, alterations or reconstruction on ground of insufficient return, which is available to both taxable and tax-exempt properties).
43. N.Y.C. Zoning Resolution § 74-711; *see also* § 74-712 (for certain types of manufacturing zones).
44. N.Y.C. Zoning Resolution § 74-79 (transfer of development from landmark sites).
45. 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed.2d 631 (1978).
46. 438 U.S. at 118, 98 S. Ct. at 2656, 57 L. Ed.2d at 644.
47. 438 U.S. at 125, 98 S. Ct. at 2659, 57 L. Ed.2d at 649.
48. 438 U.S. at 136, 98 S. Ct. at 2664, 57 L. Ed.2d at 656.
49. 2004 U.S. Dist. LEXIS 17807 (S.D.N.Y. 2004).
50. *Id*. at 36.
51. 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).
52. 42 U.S.C. § 2000cc.
53. 42 U.S.C. § 2000cc(a).
54. 42 U.S.C. § 2000cc(b).
55. *Third Church of Christ v. City of New York*, 2008 U.S. Dist. LEXIS 99822 (S.D.N.Y. 2008).
56. 42 U.S.C. § 2000cc(b).
57. 2009 Ill. App. LEXIS 98 (Ill. App. 1st 2009).
58. *Id*. at 9.
59. *Id*. at 14.
60. The U.S. Green Building Council (www.usgbc.com) is a nonprofit organization composed of builders, municipalities, individuals and others interested in sustainable construction.
61. 26 U.S.C. § 47(a).
62. 36 U.S.C. § 67.7.
63. N.Y.S. Tax Law § 606(oo). There is also a tax credit for homeowners, which is capped at 20% or $25,000, whichever is less.
64. New York State Assembly Bill A.06471-A; New York State Senate Bill S.2960-A.
65. 26 U.S.C. § 170(h)(1).
66. The House Ways and Means Committee's oversight subcommittee held a hearing in June 2005.
67. 9 Misc. 3d 1102A, 806 N.Y. 2. 2d 445 (Sup. Ct., N.Y. Co. 2005) (court refused to force the New York City Landmarks Preservation Commission to have the full commission consider the designation of a controversial modern building in Columbus Circle in Manhattan.).

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# Two Recent Cases Highlight Concerns About the New York City Landmarks Preservation Commission's Management of the Designation Process

By Susan M. Stern

New York City first enacted legislation to protect landmarks in 1965 when Mayor Robert Wagner signed a local law establishing the Landmarks Preservation Commission (LPC) as the public entity responsible for protecting the city's architectural heritage.[1] The destruction of Penn Station in 1963 had served as a catalyst to galvanize support to pass this legislation to preserve the city's built environment. Close to half a century later there is at least a perception that LPC has not adequately protected some resources, attributable to both to politics and holes in its enabling legislation.[2]

This article will evaluate the validity of this perception as reflected in a pair of court cases that have questioned the functioning of LPC and the Landmarks Law. The article will then consider several proposals to amend the New York City Administrative Code, which governs LPC's procedures. This article will conclude by proposing a synthesis of some reform proposals, along with some additional suggestions.

## The Cases

This evaluation will focus in particular on a pair of recent cases brought to challenge the LPC's failure to act on designation of properties as landmarks. These cases encapsulate the criticism from preservationists who have grown frustrated with the LPC's lack of action on certain designation proposals. In *Landmark West! v. Tierney,* the court upheld the LPC's actions, yet voiced criticism of its functioning in substantial *dicta*. In an unusual decision, the court in *Citizens Emergency v. Tierney* went much further, found the actions of LPC arbitrary and capricious, and directed the agency to remedy the situation by implementing designation procedures.

In *Landmark West!* the petitioner preservation group sought an order barring the Commission's Chair from participating in the designation consideration of 2 Columbus Circle and from blocking the full Commission from considering the designation.[3] The group had sought to obtain landmark status for this Edward Durrell Stone building, constructed in 1964 as the Huntington Hartford Gallery of Modern Art. The trapezoidal building sits just to the south of Columbus Circle, with the arc of the front façade echoing the circle's curve. While the building's massing is successful, its ornamentation has sparked disagreement about its aesthetic value. At the time of its opening, Ada Louise Huxtable's review stated that "the new museum resembles a die-cut Venetian palazzo on lollipops,"[4] and it has been familiarly known as the Lollipop Building ever since. The building was first considered for landmark designation in 1996. At that time, LPC staff and the LPC "Designation Committee" (described below) undertook a review and concluded the building was not worthy of designation. The LPC, in exercise of its discretion, therefore did not hold a public hearing.[5]

In May 2005 the petitioner submitted another request to the LPC to consider the building for landmark status. LPC staff determined there were no new circumstances that warranted calendaring the building for a public hearing.[6] This resulting lawsuit was brought to force the full commission to hold a public hearing on the designation. At issue were the LPC's allegedly secretive internal procedures for evaluating designation proposals and the Chair's role in deciding whether to bring a designation proposal to the full commission.

The court granted the respondent's motion to dismiss, finding that the petitioner's arguments were inadequate to support a cognizable claim that the LPC abused its discretion.[7] The court cited legal precedent holding that city law grants the LPC broad latitude to establish its own procedures for determining if landmark designation is warranted.[8] The court found that matters of aesthetics are not justiciable (i.e., whether to designate).[9] The court also held that LPC can properly set its own operating procedures.[10] Furthermore, the Landmarks Law does not spell out specific procedures for evaluation of potential landmarks.[11]

In *dicta*, however, the court raised concerns about issues it saw as being beyond its purview—the practices and procedures of the LPC. Specifically, the court expressed concerns about the lack of transparency in LPC's consideration of proposed landmarks, stating:

> the litigation and larger public debate raise serious questions about the wisdom of the Commission's internal, essentially private and effectively unreviewable decision [not to designate a property] . . . that exercise of discretion may have affected the Commission's reputation as a

> guardian and arbiter of New York City's architectural heritage and undermined public confidence in the process.[12]

The deference paid to the LPC by the court in *Landmark West!* is typical of a court faced with a challenge to the operations of an administrative body that functions based on specialized knowledge of agency personnel.[13]

In *Citizens Emergency v. Tierney*, the petitioner, Citizens Emergency Committee to Preserve Preservation (CEPP), alleged the LPC's process for designating landmarks was both statutorily and constitutionally flawed, and that the Chair had commandeered the power of the commission by controlling whether undesignated properties were brought before the full commission for consideration.[14] The petitioner further asserted faults in the designation process, including LPC's allegedly unreasonable delays in reviewing proposed designations and failure to consistently apply standards for determining which properties should be designated. Specific allegations focused on the lack of action on six requests for consideration that were pending for several years.[15] These requests ranged from a three-year-old request for the Art Deco "Fish Building" apartment house on the Grand Concourse in the Bronx (named for its entrance-way mosaics) to a request to consider an expansion of the Park Slope Historic District in Brooklyn, which had been pending for over six-and-a-half years. The general relief requested included an order to the LPC to implement procedures that are "more transparent and fair,"[16] including a request that all dispositions of proposed designations be made on the record, that there be clear public standards for designation, and that all properties for which an evaluation request is received be seen by the full commission.[17]

The legal analysis hinged on whether the LPC's duty to consider a designation is discretionary or ministerial.[18] Article 78 of the N.Y. CPLR permits challenges to an agency's failure to perform a statutory duty (a so-called ministerial action) and to an agency's improper exercise of its own discretion (so-called discretionary action). But court review of the latter category of actions is strictly limited. The petitioner argued that the relief sought implicated LPC's statutory and ministerial duties: timely disposition of all requests for designation, consideration by the full Commission on the record, and greater transparency.[19]

The court agreed with petitioner's assessment that compliance with petitioner's demand for processing of the designation proposals would not impinge on LPC's discretion and ordered the LPC to make changes regarding timing and transparency. The court cited the Court of Appeals, which has previously held that administrative agencies owe applicants a duty of fairness, including a hearing and prompt determination.[20] The court therefore found that delays in considering proposed designations ran counter to the purpose of commission, which was not adequately protecting the resources it was charged with responsibility for.[21] The court found the LPC's failure to consider designation of properties that its internal "request for evaluation" committee had determined were meritorious was arbitrary and capricious.[22] The court directed the LPC to promulgate procedures to review all Requests for Evaluation (RFE) within 120 days of the requests' submission and to report all recommendations of LPC's internal RFE Committee, positive or negative, to the full LPC (which would necessarily be in the public record).[23]

## The New York City Administrative Code

The courts' concerns about LPC's work can be attributed in part to the judicial deference usually paid to government agencies as well as the limitations of the New York City Administrative Code. In general, courts grant a broad degree of latitude to administrative agencies in establishing their internal operations. This deference discourages challenges to agency procedures. Moreover, *Landmark West!* typifies the substantial deference paid by courts to government agencies in defining their own procedures.

As will be laid out below, the bulk of the Administrative Code is focused on the regulation of landmarks post-designation, when the property is within the LPC's jurisdiction, and not on the process that leads up to that point. The concerns raised in the cases focused on the designation process and the LPC's actions leading up to the decision of whether to designate a property as a landmark, not about its handling of its trust of designated properties.

The Code lays out the rationale for protecting certain properties, citing the public policy interest in protecting buildings found of worthy of designation for their "special character or historical or aesthetic interest or value"[24] or representation of the best architecture from different historical eras. But the Code mostly focuses on LPC's powers and duties after a property has been designated as a landmark,[25] including procedures governing any changes to properties under its jurisdiction.[26] Post-designation LPC must hold public hearings on applications to alter a landmark and give reasons behind any determination granting or denying permission to do work on a designated building.[27]

While the Code provides structure to the post-designation process, the pre-designation process is largely undefined. Administration Code § 25-319 provides that the commission "may promulgate, amend and rescind such regulations as it may deem necessary to effectuate pur-

poses of this chapter."[28] But the LPC has not laid out any regulations for this designation process and the Code doesn't provide them.

Instead, the LPC Web site lays out the procedure leading to designation: interested parties can request consideration for properties they think worthy of designation by submitting a Request for Evaluation (RFE) to the LPC. The RFE is reviewed by the internal RFE Designation Committee composed of the Chairman, the Executive Director, the Chief of Staff, the Director of Research, and other agency staff to determine if the property meets designation criteria. The Director of Research then informs the party requesting designation if the committee's determination is yes or no. If the Committee determines that a proposed property merits further consideration, information is forwarded to individual commissioners for comment. The decision of whether to bring the property to the full Commission for review is ultimately made by the Chair. If he or she determines that a property warrants consideration, the full Commission reviews it at a public meeting. This hearing is the first time that the designation process unfolds publicly. The concerns expressed in the above cases have centered on this internal process, which occurs without public oversight.[29]

## Reform Proposals

Due to some of these alleged shortcomings, the New York City Council has considered a number of proposed reforms to the Landmarks Law. The primary concerns about LPC's delays are tied to its jurisdiction, which vests in the LPC only upon designation of a landmark. Up until designation, property owners retain the ability to demolish their buildings or remove architectural details regardless of historical value. Thus, problems arising out of delays in designation process are deemed particularly critical, and a number of proposals have aimed at addressing the protection of vulnerable buildings that do not yet have the status of landmarks.

There have been several proposals to force LPC's hand in considering designations. They include proposals to allow the City Council to direct LPC to hold a public hearing on proposed designations;[30] to allow the Council to publish bi-annual lists of properties it deems worthy of consideration, upon which LPC must act within a set time frame;[31] and to force LPC to add staff responsible for conducting regular assessments and recommendations for properties worthy of designation to Commissioners.[32]

Other proposals focus on the relationship between LPC and the Department of Buildings (DOB). Proposed amendments to the Administrative Code would (1) require LPC to inform DOB when a property is being considered for designation; (2) require reciprocal notification by the DOB to LPC upon receipt of a permit application for a property under consideration (and furthermore revoke previously issued DOB permits on these properties);[33] (3) require LPC to consider all buildings over a certain age for designation when their owners apply for building permits;[34] and (4) require the city to create a centralized database with all publicly available information related to real property.[35]

While there is value in a number of these proposed reforms, the reform measures have been piecemeal in nature. A more holistic approach may be more effective. The overall aim should be to make the pre-designation process as comprehensive as the post-designation processes, with procedures for time frames and communication spelled out. Such reform should maintain LPC's discretion on designations, but give the Commission a better framework to operate within.

In addition to instituting timelines and communication requirements, it is important to improve designation criteria, which are now somewhat vague and subject to political pressure. While it is impossible to remove politics entirely from decisions, it is important to minimize this aspect of the decision-making process and restore public confidence in this institution. In general, greater transparency in operations will go a long way toward achieving this goal.

## Endnotes

1. The New York City Landmarks Preservation Commission—FAQs—About the Landmarks Preservation Commission, http://www.nyc.gov/html/lpc/html/about/about.shtml.
2. Robin Pogrebin, *An Opaque and Lengthy Road to Landmark Status*, N.Y. Times, Nov. 26, 2008. Ms. Pogrebin's article gives an overview of the concerns of the LPC's functioning, and provided inspiration for this article.
3. *Landmark West! v. Robert B. Tierney*, 2005 N.Y. Slip Op. 5134U, 1 (Sup. Ct., N.Y. Co. 2005). This proceeding was the fifth brought by Landmark West! in its attempts to prevent the sale of the 2 Columbus Circle building to the Museum of Art and Design and to have the building designated as a landmark. Previous challenges included action brought against the NYC City Planning Commission (*Matter of Landmark West!, et al. v. Burden,* 3 Misc. 3d 1102(A), 2004 N.Y. Slip Op. 50331(U) (Sup. Ct., N.Y. Co.), *aff'd* 15 A.D.3d 308, 790 N.Y.S.2d 107 (1st Dep't 2005) (challenging the City's environmental review); *Landmark West!, et al. v. Manhattan Borough Board* (Sup. Ct., N.Y. Co. Feb. 15, 2005), Beeler, J., Index No. 116913/2004 (challenging Borough Board's approval of proposed sale); *Landmark West! v. City of New York, et al.* (Sup. Ct., N.Y. Co. March 29, 2005), Stallman, J., Index No. 117996/2004 (challenging the response to Freedom of Information Law request); *Landmark West!, et al. v. City of New York and NYC Economic Dev. Corp. (* Sup. Ct., N.Y. Co.), Stallman, J., Index No. 103689/2005 (challenging the building sale under public trust doctrine); *Landmark West! v. Tierney, et al. (*Sup. Ct., N.Y. Co.), Stallman, J., Index No. 107387/2005 (proceeding to disqualify Landmarks Commissioner and bar communication with museum principals; the instant proceeding). All actions have been dismissed.

4. Ada Louise Huxtable, *Architecture: Huntington Hartford's Palatial Midtown Museum*, N.Y. Times, Feb. 25, 1964, 33.
5. *Landmark West!* at 1.
6. *Id*.
7. *Id*. at 5.
8. *Id*. at 2.
9. The LPC has substantial discretion to determine whether to designate a property based on the following definition: "Landmark: Any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation, and which has been designated as a landmark pursuant to the provisions of this chapter." N.Y.C. Admin. Code § 25-302.
10. *Landmark West!* at 4.
11. *Id*. at 2.
12. *Id*. at 3.
13. *Id*. at 5.
14. *Citizens Emergency v. Robert B. Tierney*, Index No. 103373/2008 (Sup. Ct., N.Y. Co. filed Nov. 21, 2008) 3. While the concerns regarding control of the designation process in the two cases are similar, the action brought by Landmark West! was narrowly tailored, addressing concerns about a particular building. The action brought by CEPP was much broader, addressing concerns about long-standing lack of action in protecting eligible buildings. It is perhaps this much broader view that led to this court taking action, while the previous court felt constrained to voice its concern about LPC functioning in *dicta*.
15. *Id*. at 4.
16. *Id*.
17. *Id*.
18. *Id*. at 6.
19. *Id*. at 8.
20. *Id*. at 9.
21. *Id*.
22. *Id*., *citing Klostermann v. Cuomo*, 61 NY2d 525 (1981) (compelling timely action on non-discretionary duties).
23. *Id*. at 10. *Landmark West!* appeal has been denied; *Citizens Emergency* is on appeal.
24. N.Y.C. Admin. Code § 25-301.
25. N.Y.C. Admin. Code § 25-305.
26. *Id*.
27. N.Y.C. Admin. Code § 25-315.
28. N.Y.C. Admin. Code § 25-319.
29. The New York City Landmarks Preservation Commission—FAQs, *available at* http://www.nyc.gov/html/lpc/html/faqs/faq_designation.shtml.
30. Int. 0705-2005, http://www.nyccouncil.info/html/legislation/legislation.cfm. The City Council refers to bills as "introductions," using the abbreviation "Int."
31. Int. 0393-2006.
32. Int. 0400-2006.
33. Int. 0542-2007. Proposal allows for the permit to be reinstated upon showing that the holder has undertaken substantial expenditures.
34. Int. 0317-2004; Int. 99513-A -2004.
35. Int. 0869-2007. This database would include information from the Department of Buildings, the Department of Finance, the Fire Department, Department of Housing Preservation and Development, LPC and the Rent Guidelines Board.

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# Landmarks and Sustainability

By John Weiss

## Introduction

Energy efficient buildings that minimize their carbon footprint are often thought of as new structures designed to be energy efficient and built with materials characterized as "green," such as bamboo flooring. Retrofitted historic buildings, however, can also be energy efficient and have the added bonus of not using the significant amount of energy expended in the construction of a new building. Can one achieve the goal of retrofitting a landmark building to increase its energy efficiency within the regulatory overlay created when a building is designated an official landmark? The answer to this question is a resounding yes, as demonstrated by the extent of such work already under way on landmark buildings in New York City.

This article examines the regulation of designated landmarks in New York City and how actions to conserve energy or generate alternative energy can be consistent with landmark status. Regulatory approvals for work on landmarks to conserve energy or generate energy from alternative sources include measures that require no regulatory action, some that only need easily obtained staff-level permits, and to others necessitating a more complex public review process.

## Landmark Regulation in New York City

Landmarks in New York City are identified and designated by the Landmarks Preservation Commission, a city agency created in 1965. The Commission designates four types of landmarks: individual landmarks such as the Empire State Building; historic districts like the SoHo-Cast Iron Historic District; interior landmarks such as the interior of the Gage & Tollner restaurant in Brooklyn, and scenic landmarks like Central Park. The Commission has designated over 25,000 properties in all five boroughs of New York City and annually issues approximately 10,000 permits for alterations to landmarks. It has 11 Commissioners and approximately 65 staff members.

Pursuant to the Landmarks Law,[1] the Commission designates improvements on landmark sites, which are usually co-extensive with the underlying tax lots. Once designated, the Commission regulates alterations to the improvements or the landmark site. Improvements—broadly defined as a "building, structure, place, work of art or other object constituting a physical betterment of real property"[2]—can include buildings, bridges, sidewalk clocks, fences and sidewalks. Consequently, the Commission regulates changes to the entire landmark site, including the front, side and rear façades of any structure on the site and any improvements to the front, side or rear yards. Construction, reconstruction, alteration and demolition on landmark sites require Commission permits before work begins or a Department of Buildings (DOB) permit is obtained.[3] In a nutshell, almost all alterations to landmarks other than ordinary maintenance need a permit.

*"Can one achieve the goal of retrofitting a landmark building to increase its energy efficiency within the regulatory overlay created when a building is designated an official landmark? The answer to this question is a resounding yes . . ."*

## Landmarks Preservation Commission Permits

The Administrative Code provides for three types of LPC permits, two of which are issued after an LPC staff-level review and one after a Commission-level review.[4] Approximately 95% of permits issued by the Commission are staff-level permits. Once the staff person has all information necessary to issue a permit, staff permits are issued quicker than Commission-level reviews because no public hearing process is required. Landmarks Commission Rules (Title 63 of the Rules of the City of New York) set forth explicit standards for work that qualifies for staff-level permits so an applicant can often determine in advance what type of permit is needed for proposed work.

The first type of staff-level permit is a Certificate of No Effect (CNE), which is issued when a permit is required from the DOB and there is no effect on the landmark's protected architectural features. Examples of work qualifying for a CNE include minimally visible rooftop additions for mechanical equipment, small rear-yard additions and interior work that requires a DOB permit. Commission staff reviews such work to ensure it does not affect protected features of a landmark or detract from the special character of a historic district. There also is an Expedited CNE (XCNE) for purely interior work above the second floor of a landmark.

The second type of staff-level permit is a Permit for Minor Work (PMW), which is issued when proposed work does not require a DOB permit but will affect significant protected architectural features, e.g., window replacement or masonry repairs.

If the proposed work does not meet the requirements for a staff-level permit, the applicant can seek a Commission-level permit called a Certificate of Appropriateness (CofA), which is required for work that on its face has an effect on architectural features and does not qualify for a staff-level permit. Examples of CofA work include demolition of a landmark, construction of a new building in a historic district, visible additions, modern storefronts and replacement of special windows. When reviewing a CofA application the Commission considers the effect of the proposed work on the significant features of the landmark and whether the proposed changes are compatible with the landmark's appearance and character. In a historic district, the Commission also considers the effect of the proposed work on neighboring buildings and the character of the district.[5]

## Landmark Review of Energy Conservation Measures

Most steps to decrease energy consumption in a landmark do not need a permit from the Commission or, if a permit is required, require only a staff-level permit. One of the easiest ways to decrease a building's heating and cooling load is to install insulation or augment existing insulation. Insulation installation, whether the more traditional fiberglass batting or advanced open or closed cell foams, is interior work that does not require a DOB permit and therefore no LPC permit. Similarly, installation of more energy efficient appliances does not require an LPC permit unless the installation of equipment requires a DOB permit. Even if a DOB permit is required, in many cases the applicant will need only an XCNE from Commission staff. If a new duct or vent is required that perforates an exterior wall, e.g., a range exhaust, then a non-expedited staff permit is required.

If historic windows are drafty, interior storm windows can be installed without an LPC permit if simple criteria set forth in the Landmarks Rules are met. If the interior storm window criteria are not met, or a property owner wants to install exterior storm windows, only a staff-level permit is needed. Similarly, skylights that provide natural light and reduce electrical usage are regularly approved at the staff level if the skylights do not damage significant architectural features and are either not visible, or minimally visible, from a public thoroughfare.

In many cases new windows with energy efficient features, such as double glazing with inert gases between the glass, can be installed pursuant to LPC staff-level permits if the existing windows are beyond repair, the replacements match the historic windows and certain other criteria are met (such as the operation, profile, configuration, finish and other aspects of the replacement window). Staff permits can be obtained even for replacement windows in a substitute material, such as wood windows being replaced by aluminum windows, but such applications are limited to certain types of buildings and window types. Even if a staff permit is not feasible, a Commission-level Certificate of Appropriateness permit may be issued if the replacement windows are found to be appropriate.

Historically, many buildings had window awnings. Awnings are a low-tech way to reduce a building's cooling load. If there is historic precedence for awnings on the type of building for which an application to install awnings is submitted and the awning design is historically appropriate, the awnings can be installed pursuant to a staff permit.

Green roofs—roofs covered with growing media and vegetation—which reduce storm water run-off and have insulating qualities, have been approved in New York City historic districts by staff-level permits for non-visible, flat roofs.

## Landmark Review of Alternative Energy Generation Measures

As is the case with energy conservation measures, some alternative energy steps only require staff-level permits. For instance, installation of a geothermal heating and cooling system (a system that uses the earth's nearly constant temperature of approximately 56 degrees to efficiently heat and cool a building and provide hot water) is almost always exclusively interior and below-grade work, and will therefore only require a staff-level permit. Similarly, installation of a co-generation unit should have minimal impact on the exterior of a landmark and should also require only a staff-level permit.

Installation of geothermal heating and cooling units should be encouraged by preservationists because such units eliminate the need for unsightly rooftop condensers and cooling towers.

The LPC has approved over 20 applications to install solar panels on buildings in historic districts that are not individual landmarks and at least one midtown skyscraper that is an individual landmark, which installed a large solar panel array. These applications are usually more complex because of visibility issues. A mock-up of where the solar panels will be placed, which shows the extent to which the proposed solar panels are visible from a public thoroughfare, is required. The vast majority of these installations are installed pursuant to staff-level CNEs.

To obtain a staff-level permit for photovoltaic installations, several findings must be made, including findings that the rooftop addition consists solely of mechanical equipment, that the installation will not damage any significant architectural feature of the roof, that the mechani-

cal equipment is either not visible, or minimally visible, from a public thoroughfare, and that the equipment will not adversely affect significant architectural features of adjacent buildings. From a historic preservation perspective, one benefit of photovoltaic arrays is that the work is usually easily reversible.

One important, yet often ignored, method of designing an energy efficient building is to "right size" the design. Instead of having a 12-foot floor-to-ceiling height in a penthouse addition, a more modest 9-foot height not only saves material, but also requires less energy to heat and cool while still being of a generous proportion. Reducing the height of a rooftop addition often helps decrease or eliminates visibility of the addition from a public thoroughfare, which is frequently a landmark issue. Consequently, modestly refining the size of an addition can meet not only energy efficiency goals, but also landmark goals.

## Summary

Installation of energy conservation measures and alternative energy sources need not conflict with the goals of historic preservation and can, in certain situations such as installation of geothermal energy systems, be an improvement over traditional systems in terms of eliminating unattractive visible alterations to landmarks. The regulatory requirements from the Landmarks Preservation Commission range from nonexistent to substantial depending on the work proposed. Consequently, it is always advisable to contact Commission staff or, at a minimum, review its Web site for guidance before embarking on alterations to a designated landmark. In furtherance of the movement to retrofit historic buildings, the Commission has formed a staff "green team" to work on these issues.

The Commission embraces environmentally responsive alterations to landmarks that are appropriate to the historic architectural features. With thoughtful planning and an awareness of what changes can be approved by the Commission, approval can be easily obtained for decreasing the environmental impact of a landmark building.

## Endnotes

1. *See* § 3020 of the City Charter, § 25-307 of the N.Y.C. Administrative Code and Title 63 of the Rules of the City of New York, collectively known as the "Landmarks Law."
2. N.Y.C. Admin. Code §25-302(i).
3. N.Y.C. Admin. code §§ 25-305, 25-310.
4. N.Y.C. Admin. Code §§ 25-306 *et seq*.
5. N.Y.C. Admin. Code §§ 25-307(b)(1) and (2).

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# Historic Preservation at a Crossroads: The 2009–2013 New York State Historic Preservation Plan

By Amy E. Facca

The New York State Office of Parks, Recreation and Historic Preservation (OPRHP) will soon publish *Historic Preservation at a Crossroads*, the 2009-2013 New York State Historic Preservation Plan.[1] Like plans recently prepared by other state historic preservation offices, it reflects a movement away from a more inwardly focused operational and organization-based document to a more strategic plan that provides informed direction and guidance for preservation efforts throughout the state.[2] *Historic Preservation at a Crossroads* is therefore not a plan for the New York State Historic Preservation Office alone; it establishes a strong foundation for enhanced preservation leadership, collaboration, coordination, advocacy, planning, and education throughout the Empire State.[3]

## Plan Preparation Process

Although the plan has been prepared mainly by the New York State Historic Preservation Office and will guide much of the agency's work over the next five years, it was developed with extensive public input,[4] including more than 75 individual interviews, 12 public meetings in locations across the state, and six professional conference and meeting presentations (draft materials were also made available for public comment). In addition, the New York State Board for Historic Preservation, a statewide plan advisory committee, and numerous preservation partner organizations helped guide and inform preparation of the plan and contributed diverse perspectives about historic preservation.[5]

## A Time of Evaluation and Change

The plan's title, *Historic Preservation at a Crossroads*, emphasizes that it was prepared and will be implemented at a critical moment in New York State's history. The extensive planning process was conducted within a rapidly changing state and national climate of political change, wildly fluctuating but generally increasing energy prices, and a sustained economic recession the depth of which is approaching levels not experienced since the Great Depression.

In the field of historic preservation, as in most business sectors, these trends will likely continue to present challenges such as budget cuts, hiring freezes and layoffs, reductions in hours and services, program modifications, and other changes. At the same time, however, there will undoubtedly be new opportunities. For example, new job training programs offering much needed preservation skills training and energy conservation techniques that can be incorporated into building rehabilitation projects would fit in well with emerging green employment programs, producing not only jobs but also significant economic benefits in participating communities and regions.

The planning process benefited from and took place at approximately the same time as a number of other important events and planning initiatives, including:

- An aggressive statewide OPRHP capital program to rehabilitate New York's aging parks and historic sites;
- Publication of the seminal *Preserving New York: Winning the Right to Protect a City's Landmarks* and two related conferences convened by the New York City-based New York Preservation Archives Project;[6]
- Preservation Vision NYC, a year-long collaborative analysis and report on historic preservation in New York City;[7]
- The New York State Council on the Arts' statewide Cultural Blueprints meetings (modeled and building upon statewide meetings conducted earlier in the year by the Empire State Development Corporation);[8] and,
- Completion of the Erie Canalway National Heritage Corridor's management plan and heritage tourism economic impact survey.[9]

The planning process made it clear that 43 years after the enactment of the National Historic Preservation Act and almost 30 years after the adoption of the New York State Historic Preservation Act,[10] there are many successes and accomplishments to celebrate. New York has a robust State Historic Preservation Office complemented by a strong not-for-profit statewide historic preservation organization. A network of active, professionally staffed regional and local not-for-profit historic preservation organizations has grown from approximately 10 in the 1960s to more than 30 in 2009 and is augmented by numerous partners from a wide range of related professional and volunteer membership organizations.

Thousands of buildings, districts, structures, landscapes, objects, and sites have been formally documented,

evaluated, and listed in the National and State Registers of Historic Places or determined eligible for registers' listing. Innumerable vacant, abandoned, and dilapidated buildings have been rehabilitated and returned to productive use. Intensified interest in the protection of community character has led to the adoption of an increasing number of local historic district ordinances and related land use strategies as well as growing participation in the Certified Local Government program.[11]

At the same time, however, many challenges remain. Historic preservation efforts are often fragmented between numerous involved groups and individuals. Economic incentives and certain public policies continue to favor new construction and development over building, neighborhood, and community revitalization. Few people, from elected officials to local residents, recognize or understand the economic, social, and environmental benefits of historic preservation. Many historic sites, museums, libraries, and arts and cultural organizations are threatened with closure because of lack of funding, decreased visitation, increased operational challenges, and competition from an ever-expanding range of educational and entertainment choices. The number of new not-for-profit preservation (and related) organizations continues to grow in spite of ongoing capacity building issues among existing not-for-profits and the consolidation and merging of other organizations, such as the recent consolidation of the Landmark Society of the Niagara Frontier and Preservation Coalition of Erie County to form the new Preservation Buffalo Niagara. The popularity of do-it-yourself home improvement enterprises such as Home Depot and Lowe's, combined with the predominance of new construction, means that fewer people in the construction trades have preservation skills, knowledge, or experience. Many of New York's most accomplished and knowledgeable preservation practitioners have been lost through retirement or death, including Dorothy M. Miner, Esq., to whom this edition of the *New York Environmental Lawyer* is dedicated. Efforts to protect historic and cultural resources of the recent past and similar emerging issues are taking preservation in new directions.

*Historic Preservation at a Crossroads* responds directly to the key themes and threats[12] heard throughout its planning process and is based on the premise that historic preservation is in the best interest of the people of New York State. It offers powerful, proven, but as yet underutilized community, economic development, and environmental stewardship strategies that should be more effectively incorporated into New York State's revitalization, smart growth, and sustainability efforts. Historic preservation strategies help communities manage change and make history, culture, and heritage strong building blocks for revitalization, improvement, and growth. They are critically important because although many of New York State's communities have suffered economic decline, population losses, and disinvestment for decades, their rich history, heritage, and highly desirable quality of life assets are largely intact. Preservation strategies are also important because individuals, small businesses, and corporations are increasingly making decisions about where to live, attend college, raise a family, retire, travel, invest, or establish headquarters based on community character and quality of life. They evaluate communities on their authentic character, unique sense of place, safe and friendly neighborhoods, connection to public transportation, schools, health and human services, history, arts, culture, entertainment, recreation, and overall vibrancy.

*Historic Preservation at a Crossroads* is designed to improve New York State's ability to achieve the economic, social, and environmental benefits related to the identification, protection, enhancement, and promotion of its historic and cultural resources. Its vision, goals, and implementing actions establish a dynamic framework that has been purposefully designed to broaden engagement in, understanding of, and support for historic preservation. It provides context and direction as well as substantial background information and supporting resources for anyone involved in, interested in becoming involved in, or wanting to learn more about historic preservation. With its intentionally broad focus, successful implementation of the plan will clearly depend on considerable initiative and strategic collaboration among many new and existing preservation partners, including practitioners of environmental, historic preservation, land use, real estate, and related areas of law.

## Vision for the Future

The goals and implementing actions outlined in *Historic Preservation at a Crossroads* revolve around this ambitious vision:[13]

> Historic preservation will be understood as a rational approach for protecting irreplaceable historic and cultural resources and managing change, offering proven, fiscally conservative, cost-effective community improvement strategies. Historic preservation will be a significant catalyst for, and contributor to, New York State's economic recovery, sustainability, and smart growth efforts. Historic and cultural resources, including National Historic Landmarks, historic sites, historic districts, archeological resources, and heritage areas, will be protected and recognized as foundations of community pride, authenticity, and local character—

as important economic and educational assets, tourism destinations, and community anchors that strongly complement and support New York State's extensive arts, culture, education, recreation, entertainment, and natural resources. New York State will strengthen policies, laws, and incentive programs that protect and revitalize cities, villages, neighborhoods, and rural hamlets as centers of investment, infrastructure, education, culture, creativity, and entrepreneurial and social interaction.

## Goals and Implementing Actions

Seven goals and 35 implementing actions[14] provide the strategic framework that will guide statewide efforts to achieve this vision:

1. Catalyze New York's state and local economies using historic preservation, heritage development, and tourism.
2. Expand incentives, technical assistance programs, and policies to stimulate rehabilitation and reuse in older and historic residential and commercial areas and to encourage the preservation and interpretation of archeological sites.
3. Integrate historic preservation into smart growth policies, local and regional planning, and decision making to enhance economic competitiveness, community sustainability, and quality of life.
4. Strengthen collaboration and partnerships among preservation and related organizations.
5. Expand and strengthen education, outreach, and capacity building efforts.
6. Integrate historic and cultural resource preservation into New York's sustainability and green building efforts.
7. Increase awareness, identification, interpretation, preservation, protection, and stewardship of both prehistoric and historic sites and artifacts located on private and state-owned lands.

Through collective achievement of the vision, goals, and implementing actions, OPRHP seeks to increase public understanding and use of historic preservation strategies and to fully incorporate historic preservation into New York State's planning, smart growth, and sustainability efforts. It is anticipated that implementation of *Historic Preservation at a Crossroads* will improve statewide historic preservation efforts and result in:

- Expansion of services to communities, reinvigoration of the state historic site system, and better integration of historic preservation into OPRHP's overall mission and operations.
- Improved stewardship of historic and cultural resources at the local, county, regional, and state levels through historic preservation planning and preparation (and updating) of cultural resource surveys.
- Greater emphasis on and engagement in historic preservation education and training at all levels, including encouragement of preservation skills training for the construction trades.
- Collaboration, coordination, and formation of strategic partnerships with existing and new preservation partners from the public, private, and not-for-profit sectors, with particular emphasis on agency preservation officers, local and regional planning organizations, and municipal and county governments.
- Adoption of new historic preservation and other incentive programs to place building rehabilitation and community revitalization on equal footing with new development and construction.
- Improved data collection, analysis, and reporting about the economic, social, and environmental benefits of historic preservation.
- Improved management of and greater accessibility to information about New York State's historic, cultural, and archeological resources through improved use of the Internet and computer technologies, including increased deployment of geographic information systems.[15]

With its proven ability to stimulate community pride and attract investment in neglected areas, historic preservation will likely grow in importance as a tool for sustainability, smart growth, and economic development. Revitalizing existing town centers is at the heart of the smart growth movement in the United States and such efforts will be complemented and strengthened through incorporation of preservation strategies. *Historic Preservation at a Crossroads* will improve New Yorkers' understanding of preservation and help them achieve the numerous economic, social, and environmental benefits associated with preservation.

## Endnotes

1. The new plan will also be available on the N.Y.S. OPRHP Web site (http://www.nysparks.state.ny.us/shpo/). The N.Y.S. OPRHP Field Services Bureau (also known as the New York State Historic

Preservation Office, or NYSHPO) prepares a comprehensive state historic preservation plan approximately every five years as part of its responsibilities under the National Historic Preservation Act of 1966, as amended; Public Law 89-665, 16 U.S.C. 470, § 101(b)(3)(C)—State Historic Preservation Programs (an electronic copy can be downloaded at http://www.achp.gov/nhpa.html). Other responsibilities include: directing and conducting a comprehensive statewide survey of historic properties and maintaining inventories of such properties in cooperation with other federal and state agencies, private organizations, and individuals; identifying and nominating eligible properties to the National Register of Historic Places and otherwise administering applications for listing properties on the National Register; administering the state program of federal assistance for historic preservation within the state; advising and assisting, as appropriate, federal and state agencies and local governments in carrying out their historic preservation responsibilities; cooperating with the Secretary of Interior, the Advisory Council on Historic Preservation, and other federal and state agencies, local governments, and organizations and individuals to ensure that historic properties are taken into consideration at all levels of planning and development; providing public information, education and training, and technical assistance in historic preservation; cooperating with local governments in the development of local historic preservation programs and assisting local governments in becoming Certified Local Governments; consulting with the appropriate federal agencies on federal undertakings that may affect historic properties, and the content and sufficiency of any plans developed to protect, manage, or to reduce or mitigate harm to such properties; and advising and assisting in the evaluation of proposals for rehabilitation projects that may qualify for federal assistance.

2. Preparation of state historic preservation plans is overseen by the National Park Service (see National Park Service—Historic Preservation Planning at http://www.nps.gov/history/hps/pad/). All state historic preservation plans must also be formally approved by the National Park Service.

3. The plan preparation process provides a basis for information sharing, discussion, and thought regarding needs, issues, and opportunities, resulting in blueprint for action. Required elements of the plan include public input, an overview of New York State's historic and cultural resources, an analysis of historic preservation activities within the state, and an action plan. The plan also includes information about what historic preservation is, why it is important to New York State, the various organizations and professions involved in preservation, and an overview of New York State's historic and cultural resources.

4. More than 1,000 people participated in the preservation planning process through meeting participation, review of related memoranda and plan draft materials, and submission of written comments, including mayors, town supervisors, state legislators, other municipal elected officials and staff, state agency staff, news media, preservation students, realtors, K-12 teachers and college professors, representatives of historic houses and other museums, heritage areas and scenic byways, archeologists, preservation organizations, municipal historians, arts organization staff, developers, architects, planners, community and economic development professionals, lawyers, interested individuals, and many others.

5. The public participation process is briefly described in the plan; a more detailed description can be found in State Historic Preservation Plan Memorandum #1. The extensive and wide-ranging comments from the public participation process were grouped into a series of key themes and threats. A detailed discussion of the key themes and threats is provided in State Historic Preservation Plan Memorandum #2. Extensive background and supporting information is presented in State Historic Preservation Plan Memoranda #3. These memoranda are *available at* http://www.nysparks.state.ny.us/shpo/planning/involved.htm or upon request.

6. See Anthony C. Wood, *Preserving New York: Winning the Right to Protect a City's Landmarks* (New York: Taylor & Francis, Inc.) 2007 and New York [City] Preservation Archives Project at http://www.nypap.org/ (last viewed April 7, 2009).

7. See Preservation Vision NYC at http://www.preservationvision-nyc.org/ (last viewed April 7, 2009).

8. See New York State Council on the Arts, Cultural Blueprints program, at http://www.culturalblueprints.co.cc/ (last viewed April 7, 2009).

9. See Erie Canalway National Heritage Corridor's *Preservation and Management Plan*, which can be downloaded at http://www.eriecanalway.org/about-us_preserve-manage.htm (last viewed April 7, 2009).

10. New York State Historic Preservation Act of 1980 (Parks, Recreation and Historic Preservation Law Article 14; General Municipal Law Article 5-K; Public Buildings Law § 60). Additional state and federal laws relating to cultural resource management and protection include: the New York State Environmental Quality Review Act (SEQRA); New York State Education Law, Section 233 (1958); and the Indian Cemetery or Burial Grounds Law; the Antiquities Act of 1906; the National Historic Sites Act of 1935; the Reservoir Salvage Act of 1960; Department of Transportation Act of 1966; the National Environmental Policy Act of 1969; the Historic and Archaeological Data Preservation Act of 1974; American Indian Religious Freedom Act; Archaeological Resources Protection Act; Abandoned Shipwreck Act; Native American Graves Protection and Repatriation Act; Executive Order 11593: Protection and Enhancement of the Cultural Environment (1971); Executive Order 13006: Locating Federal Facilities on Historic Properties in Our Nation's Central Cities (1996); and Executive Order 13287: Preserve America (2003).

11. See http://www.nysparks.state.ny.us/shpo/certified/certified_local.htm and http://www.nps.gov/history/hps/clg/ (last viewed April 7, 2009). Established by a 1980 amendment to the National Historic Preservation Act of 1966, the CLG program is a nationwide initiative that directly links a community's preservation goals to state and federal preservation programs. Any city, village, town, or county can be a CLG, once the New York State Historic Preservation Office (N.Y.S. OPRHP Field Services Bureau) determines that it meets state and federal standards for the administration of local historic preservation programs.

12. Key themes included the need for improved leadership and advocacy, coordination and collaboration, education and training at all levels and among various preservation partners and constituencies, historic resource identification and protection, historic preservation planning, funding and incentives, outreach and awareness, development of a state version of the National Trust for Historic Preservation's "Main Street" program, proactive development of guidelines and standards, green building and sustainability, and capacity building and support.

13. The vision statement has been abbreviated slightly for this article but can be read in its entirety in the plan.

14. The 35 implementing actions are described in detail in the plan.

15. Federal Transportation Enhancement Program funds have been awarded to N.Y.S. OPRHP for this purpose.

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# Dorothy Miner Defended Our Architectual Heritage

By Philip Weinberg

Dorothy Miner, whose passing is a great loss to environmental law in New York, embodied the voice of historic preservation for the past three decades and more. As general counsel to New York City's Landmarks Preservation Commission, she ably and imaginatively defended our architectural heritage from a series of challenges, and her impassioned defense of Grand Central Terminal directly led to the U.S. Supreme Court's decision—itself a landmark—in *Penn Central Transp. Co. v. City of New York*, protecting preservation laws from constitutional challenge and eloquently justifying their importance.

*"[Dorothy] ably and imaginatively defended our architectural heritage from a series of challenges, and her impassioned defense of Grand Central Terminal directly led to the U.S. Supreme Court's decision—itself a landmark—in* Penn Central Transp. Co. v. City of New York . . ."

I first met Dorothy in the course of the Grand Central litigation. I was writing an amicus brief for New York State while the suit brought by the terminal's owner was in the New York Court of Appeals. The railroad company claimed the city's denial of a permit to construct a 55-story office building atop the historic station amounted to an unconstitutional taking of its property. Dorothy assembled a phalanx of skilled lawyers in private practice, including the legendary Ralph Menapace, to help defend the city's law and its determination.

Determination was indeed the key word for Dorothy. Together with the New York City Corporation Counsel's gifted lawyers—Kevin Sheridan and now Chief Assistant Corporation Counsel Leonard Koerner—and the *amici* she helped orchestrate, she planned and executed a brilliant, multi-layered defense that led to Justice Brennan's time-tested Supreme Court decision.

*"Determination was indeed the key word for Dorothy. . . . [Her] untimely passing is a loss to all who care about historic preservation."*

Following *Penn Central*, Dorothy advised the Commission and strategized with the Corporation Counsel's lawyers to successfully defend St. Bartholomew's magnificent Park Avenue church, Staten Island's Greek-revival Sailors' Snug Harbor, and numerous other architectural and historic gems. After leaving the Commission, she worked tirelessly—always with zeal tempered by humor—advising the Municipal Art Society and teaching at Columbia and Pace on preservation issues.

Dorothy's untimely passing is a loss to all who care about historic preservation. As with Christopher Wren, designer of London's St. Paul's Cathedral, if you seek her monuments you need but to look around you.



# Dorothy Miner Award

By Leonard Koerner

Dorothy Miner represented the noble public servant in her capacity as counsel to the New York City Landmarks Preservation Commission from December 1975 to 1994. During her tenure, Ms. Miner was instrumental in shaping the zoning laws as they were being applied to landmarks designation. I hope some of the vignettes described below will demonstrate Dorothy's abilities as a counsel, her tenacity and her character.

As with Professor Phil Weinberg, who has also written a note in praise of Ms. Miner in this *Journal*, I met Ms. Miner in connection with the Grand Central Terminal case. In December 1975, the Appellate Division in a 3-2 decision had upheld the designation of Grand Central Terminal as a landmark. Dorothy had collaborated with the New York City Law Department appellate attorney, Nina Gershon, and her supervisor, L. Kevin Sheridan. Dorothy was an active participant in the preparation of the brief. After the decision in the Appellate Division, Nina Gershon left the Appeals Division, and I inherited the case. Dorothy was like no other counsel to an agency with whom I had contact. She was extremely helpful in the preparation of the brief to the New York State Court of Appeals and in anticipating questions that might be asked during oral argument. Indeed, after the oral argument Dorothy continued on the bus ride from Albany to New York, to explain all the arguments we could have made if we had been given 2½ hours instead of approximately 40 minutes.

In December 1977, the Supreme Court accepted the Grand Central Terminal case. In January 1978, Ed Koch became Mayor and selected Alan Schwartz as Corporation Counsel of the City of New York. Soon after Mr. Schwartz was appointed, a delegation of lawyers from large firms in New York City met with Mr. Schwartz to request that the city's position in the Supreme Court be briefed and argued by members of one of the firms. The case had attracted a great deal of attention, and it would have been understandable if Dorothy had expressed a preference for the handling of the matter by the private firm. Instead, Dorothy aggressively supported my handling of the case, and Alan Schwartz concurred.

We then began the arduous task of preparing the brief. This included the review of a final draft for over eight hours in a print shop. Dorothy's tenacity had now been well-established and would be repeated over the years in which she dealt with our cases.

The oral argument was on April 17, 1978. Dorothy was not able to sit at the counsel table because there were only three chairs, which were occupied by Alan Schwartz, L. Kevin Sheridan and me. Dorothy placed herself about two rows back. During the argument, one of the Justices mentioned a section of the Landmarks Law. Dorothy, taking her cue, walked up to the lectern to provide me with a copy of the Administrative Code which contained the applicable section. The court officer immediately escorted Dorothy back to her seat and informed her that, if this happened again, she would be evicted from the building.

*"Dorothy Miner represented the noble public servant in her capacity as counsel to the New York City Landmarks Preservation Commission from December 1975 to 1994. . . . [She] was instrumental in shaping the zoning laws as they were being applied to landmarks designation."*

After the Supreme Court ruled in the Grand Central Terminal case and established the propriety of the designation of individual buildings, the Law Department handled many significant landmark cases. These included the Meeting House of the Society of Ethical Culture of the City of New York (1980), Church of St. Paul and St. Andrew (1986), the Community House at St. Bartholomew (1990), 22 Broadway theaters (1991) and the Four Seasons Restaurant (1993). In each case, Dorothy was actively involved in formulating the arguments at the trial and appellate levels.

The Law Department of the City of New York gives an award each December for outstanding service as a counsel to a City agency. The first recipient was Dorothy Miner. The award is now called the Dorothy Miner award. This says it all about Dorothy's service to the City of New York and her immense contribution to the development of the landmarks law.

**Leonard Koerner is Chief Assistant and Division Chief of the Appeals Division, New York City Law Department.**

# *In Memoriam: Dorothy Miner*

## Dorothy Miner, 72, Legal Innovator, Dies

By David W. Dunlap

Dorothy Marie Miner, who developed legal protection for historic landmarks nationwide in her longtime role as counsel to the New York City Landmarks Preservation Commission, died on Tuesday in Manhattan. She was 72 and lived in Morningside Heights.

The cause was complications of lung disease, said her brother Dr. Robert Dwight Miner.

She played an important role in the critical 1978 case of *Penn Central Transportation Company v. New York City*, which upheld the landmark status of Grand Central Terminal and set national precedents.

Intimately familiar with preservation law, Ms. Miner was meticulous when making her case—another way to put it was that she was a fierce, immovable stickler—and could infuriate allies as well as adversaries with her insistence on principle and procedure.

"We spent eight hours arguing over every sentence," Leonard Koerner, the chief assistant corporation counsel of New York City, said in recalling what it was like to work with Ms. Miner at the print shop on the legal briefs in the Penn Central case.

Eventually, the United States Supreme Court upheld the landmark designation of the terminal against a challenge by Penn Central, which owned the building and asserted that landmark status effectively amounted to an unconstitutional taking of property by the government.

Because of the New York commission's victory, its "innovations became standard practice for landmarks commissions all around the country," said Nicholas A. Robinson, a professor at the Pace University School of Law, with whom Ms. Miner taught.

Ms. Miner was born on Aug. 14, 1936, in Manhattan. Her father, Dwight C. Miner, was a professor of history at Columbia University. She received a bachelor's degree from Smith College in 1958, a law degree from Columbia in 1961 and a degree in urban planning from Columbia in 1972.

She married James Edward O'Driscoll in 1970. He died in 1993. She is survived by Dr. Miner, of Montvale, N.J., and another brother, Richard Thomas Miner, of Sparta, N.J.

Ms. Miner was named counsel to the landmarks commission in 1975 and helped devise the legal framework under which it designated the 17th-century street plan of Lower Manhattan as a landmark in 1983. That stopped developers from further eradicating the neighborhood's characteristically irregular blocks.

When the commission voted in 1983 to permit the demolition of the former Mount Neboh Synagogue at 130 West 79th Street because it created a financial hardship for its owner, Ms. Miner wanted it understood that the synagogue had not been stripped of its landmark status.

"There was no finding today or at any other time that this wasn't a significant building," she said. "It will be, until the end, a designated landmark.

She helped defend the designation of St. Bartholomew's Church on Park Avenue against a challenge by the parish, which argued that landmark status unconstitutionally interfered with its freedom of religion and its property rights. The city won in the federal Court of Appeals in 1990.

After 19 years with the commission, Ms. Miner was asked for her resignation in 1994 by Jennifer J. Raab, who was then chairwoman. Ms. Raab said the commission's regulatory and enforcement work "would benefit from a fresh eye."

But preservationists took a darker view. Professor Robinson said he invited Ms. Miner to join him at Pace after Mayor Rudolph W. Giuliani "decided he would accede to the real estate industry and press to remove her as counsel." Ms. Miner also became an adjunct associate professor in the Graduate School of Architecture, Planning and Preservation at Columbia.

Although she had been in the hospital since early summer, Ms. Miner continued to collaborate on a preservation law class with Professor Robinson until a month ago, even planning an annual expedition that begins at Grand Central Terminal.

"I'll be doing the field trip this Saturday," he said, "with her tape-recorded voice."

# Clean and Green: Remediating Contaminated Sites More Sustainably

By Walter Mugdan[1]

In recent years there has been growing interest in a variety of "green" design and construction practices and techniques. The goal of these is to reduce the overall environmental footprint—with a special focus on the carbon footprint—of the built environment.[2] "Green remediation" has the same objectives with respect to the cleanup and reuse of contaminated sites.

Hazardous site remediation is, of course, fundamentally an effort to improve the environment by eliminating toxic wastes and/or cutting off the pathways through which humans and other organisms may be exposed to dangerous levels of those wastes. Nevertheless, the work itself has its own environmental footprint. Collateral environmental impacts from remedies include energy use, air emissions, water discharges, generation and management of waste materials including redeposit of hazardous substances, topographical and hydrological changes in land, and short- and long-term changes in land use. Many of these can be mitigated by considering alternative approaches. Some alternatives have been discovered through the search for green construction approaches and now have established track records which have proven to be competitive with traditional options. In fact, best management practices (BMPs) for green remediation have begun to emerge. However, these results are not widely known, and awareness needs to be raised to advance consideration of these alternatives

EPA's Office of Solid Waste and Emergency Response is working with a variety of public and private partners to identify, develop and foster the use of BMPs for green remediation. The agency has prepared an online "toolbox" that remedial project managers (RPMs) and others involved in environmental remediation can consult for ideas on how to minimize the environmental impact of the cleanup project.[3]

The following is a survey of a number of areas where opportunities exist to reduce significantly the environmental footprint of cleanups:

> **Energy use:** Like almost any other human endeavor, remediation work requires energy. Much of it is electric—from running the lights in the construction management trailer to running large pumps for decades in a major pump-and-treat cleanup. Construction and transportation equipment also requires energy, typically fossil fuels—earth moving equipment, excavators, dredges, trucks, railway locomotives, and barges all use energy. And all energy use is associated with air pollution emissions, including in particular greenhouse gas (GHG) emissions.

The basic choice of remedial technology may have the biggest impact on energy use in a cleanup project. Many types of remedial action are inherently energy-intensive. For example, if ground water remediation is effectuated through a traditional pump-and-treat system, a substantial amount of electricity will be required to run the pumps and the treatment plant, typically for years or even decades. Similarly, remediation that involves extensive soil excavation followed by treatment or transportation for disposal also demands large amounts of energy in the form of fuel for excavation and transportation equipment.

**Less Energy-Intensive Remedies:** There may be suitable remediation techniques that use dramatically less electricity or fuel. Examples are bio-remediation and phyto-remediation. Bio-remediation relies on micro-organisms, fungi or other biota to remove contaminants from the environment and/or convert them through metabolic processes into harmless or less harmful constituents.[4] Phyto-remediation is a special subclass of bio-remediation, in which certain kinds of green plants (including various types of grasses, shrubs and trees) are used to extract contaminants from soil or water.[5] In some cases the plants concentrate the contaminants and are then harvested for proper disposal. In other cases the plants render the contaminants less hazardous, or move them out of the ground and into the atmosphere through transpiration.

**Energy-Efficient Equipment**: While bio- and phyto-remediation are less energy-intensive techniques, the range of circumstances in which they are suitable is still somewhat limited.[6] Where a traditional pump-and-treat remedy continues to be the best remediation tool, there are nevertheless a range of options for reducing its impact. For example, high-efficiency, variable speed pumps can be used for groundwater extraction and treatment plant operations.

**Buying and/or Making Renewable Energy:** In most states the purchaser of power from the grid can opt to buy electricity made from renewable sources, thus nearly eliminating the project's electricity-related carbon footprint.[7] There is often a choice of electricity generated entirely by wind, or generated from a mix of renewable sources including small-scale (and thus environmentally

more friendly) hydro. The cost differential is generally small, in the range of a penny or two per kilowatt hour.

In some situations electricity can be generated on-site using wind, solar or geothermal energy. For example, at the former St. Croix Alumina site in the U.S. Virgin Islands, electricity generated on-site by several windmills and solar arrays is used to drive pumps.[8] Similarly, at the BP Petroleum site in Paulsboro, N.J., a 275-KV solar field powers six recovery well pumps, aerators and blowers.[9] In appropriate settings fans for vapor intrusion mitigation systems can be powered by roof-top solar panels or wind-driven vacuum systems, as at the former Ferdula Landfill in Frankfort, N.Y.[10] At closed landfills, landfill gas (methane) can be captured and used for energy production, as at the Operating Industries Landfill in Monterey Park, CA.[11]

**Green Concrete and Other More Sustainable Materials**: Even the choice of materials for a remedial project can have a profound impact on the project's overall carbon footprint. For a project that requires a significant amount of concrete (e.g., for the construction of an on-site treatment plant), "green concrete" can be selected instead of ordinary concrete. Concrete is typically made by mixing sand and/or gravel with water and Portland cement, which hardens and binds it together. Manufacturing Portland cement is energy-intensive: making a ton of the material results in the emission of nearly a ton of carbon dioxide. Indeed, the concrete industry accounts for 5% or more of the world's greenhouse gas emissions.[12]

As it happens, coal combustion products—that is, coal ash—from coal-fired power plants and other coal-burning installations can be used to replace a significant portion of the Portland cement that would normally be needed for use in concrete. The ash has many of the same pozzolanic, or binding, properties as cement, and in fact actually performs better than cement in some respects. The coal ash would otherwise have to be disposed of in a landfill.[13] Every ton of coal ash used in concrete offsets about one ton of Portland cement and thus reduces GHG emissions by nearly a ton. Moreover, concrete made with coal ash is actually less permeable, more durable and stronger than concrete made with Portland cement alone.[14]

And of course, any on-site facilities can also use better insulation against hot or cold weather, and energy efficient lighting and electronics.

**Air Emissions**: Construction equipment used on-site will typically emit air pollutants. Most heavy equipment—excavators, trucks, locomotives, drilling rigs, generators, etc.—are powered by diesel engines. While the very newest diesel engines are subject to recently established, stringent emission-control requirements, the vast majority of existing diesel engines continue to be the source of significant quantities of pollutants. Chief among these are very small particulates (known as PM2.5, which stands for particulate matter smaller than 2.5 microns in size[15]). These are the soot particles that make up the familiar black puff of smoke that is associated with diesel engines.

Because diesel engines are designed and built to be very durable, they tend to remain in service for a very long time—much longer than automobile engines. Consequently, the benefits of EPA's new, stringent emission control requirements will take decades to be fully realized. With a concentration of diesel equipment working all day long, a major remedial project site can therefore be a significant source of dangerous air pollutants, creating legitimate concerns for neighboring communities (as well as the workers themselves). Because a disproportionate number of contaminated sites are located in or near densely populated areas and/or low-income or minority communities, whose citizens are already exposed to high levels of air emissions, the added burden of diesel emissions from a long-term remedial project in such a community is a matter of particular concern.

EPA's "Clean Construction USA" program promotes voluntary reductions of air pollution emissions from construction equipment through a variety of strategies, ranging from the easy and inexpensive to the somewhat more costly.

**Proper Maintenance and Less Idling**: First, and most obvious, operators can and should properly maintain their equipment. Second, operators and site managers can limit idling time. This should be equally obvious, and yet it is customary for diesel engines to be left running for extended time periods even when not required. Both of these strategies will save money by reducing fuel use and extending engine life.

**Cleaner Fuels:** Next, operators can choose to use cleaner fuels. Historically, diesel fuel contained significant quantities of sulfur, which is emitted as fine particulates and sulfur oxides (another troublesome air pollutant). EPA has recently required ultra-low sulfur diesel fuel (ULSD) to be widely available for use in on-road vehicles, and by 2010 it will also be required for use in non-road engines. In the meantime, however, operators who are not yet legally required to use ULSD can easily do so for only a modest additional cost—typically 10 to 20 cents per gallon, which will

yield a reduction of 5% to 9% in particulate emissions. Biodiesel—diesel fuel made entirely from renewable, organic materials such as soybeans or even used cooking oils—can also be used, and burns significantly cleaner than conventional diesel, with a 20% biodiesel blend (known as "B-20") yielding reductions of up to 12% in particulate emissions. Use of biodiesel also results in reduced GHG emissions.[16]

**Repowering:** Owners of diesel construction equipment can elect an accelerated replacement cycle, thus bringing newer (and cleaner) equipment onto a major job site. Or, owners can "repower" their equipment—i.e., replace just the engine with a newer, cleaner one.

**Retrofit:** Finally, owners can retrofit diesel engines with pollution control equipment. There are two major types of retrofit equipment, diesel oxidation catalysts (DOCs) and diesel particulate filters (DPFs). DOCs for non-road equipment are relatively inexpensive—ranging from $500 to $2,000 depending on engine size and configuration—and remove about 30% of particulate emissions. DPFs are somewhat more expensive—ranging from $3,000 to $10,000 depending on engine size and configuration—but remove 90% or more of particulates. DOCs or DPFs for larger and unusual engines will be in the higher ranges (although the cost will always be small by comparison with the cost of the piece of construction equipment on which it is being installed).

Contract specifications for projects that involve significant diesel emissions can require clean diesel fuel and equipment to be used by contractors. Doing so can be helpful in addressing the legitimate concerns of neighboring communities.[17]

Just over the horizon is one of the most promising developments in diesel technology, the hydraulic hybrid. Developed and patented by EPA scientists, but available to any and all manufacturers for free, it is expected to reduce diesel fuel use and associated emissions by 50%–70% when fully developed. Introduced in mid-2006, the technology has been in pilot use for over a year on a large United Parcel Service (UPS) truck. In September, 2007, a further pilot application was announced by EPA Administrator Stephen Johnson, this time on a pair of "yard hostlers, " diesel trucks that move freight containers around port facilities. In late 2008 UPS ordered seven additional trucks with hydraulic hybrid drive, and the technology is also being adapted for use in military Humvees.[18]

**Water Impacts.** Extensive pumping of ground water can deplete an aquifer and change local hydrology. Effluent from a treatment plant can affect the quality of the surface water body into which it is discharged. Large areas of impervious surface (used, e.g., for capping contaminated soils) can increase stormwater runoff and exacerbate urban combined sewer and storm sewer overflows. Differing approaches to remediation and management of contaminated sediments in wetlands, lakes, rivers, harbors and estuaries will have differing impacts on the human users and the flora and fauna.

There are many ways to reduce these impacts. Treated or grey water can be used to irrigate vegetative cover on site; biosolids from a treatment system can be used for soil amendment. Reinjection of treated groundwater can be explored.[19] Pervious pavement can be used in non-contaminated areas of the site. Sites can also be regraded to incorporate berms and swales to optimize management of stormwater. At the De Sale Reforestation Area in western Pennsylvania, acid mine drainage is being treated passively through a series of natural, gradient-driven engineering steps involving settling ponds, vertical flow ponds, and constructed wetlands.[20] Even a landfill cap itself can, in appropriate circumstances, be engineered to have different hydrologic characteristics. For example, at Fort Carson, a federal facility in semi-arid Colorado, a 15-acre landfill was capped with a four-foot thick monolithic evapotranspiration cover and revegetated with drought-resistant native prairie grasses. In addition to these ecological benefits, the approach also resulted in significant construction and O&M cost savings.[21]

**Site Reuse**. The post-remediation use for a site will also have an environmental impact, which can and should be considered in the remedial planning stage. Consideration can be given to maintaining a formerly contaminated site as open space. If so, the remedy can be designed to maximize the ecological productivity of the site—wetlands, surface water and other habitats can be restored, and native species can be replanted. For some sites, it may not be realistic to remediate them sufficiently so that unrestricted residential or even commercial use can be permitted. Allowing such sites to "return to nature" while maintaining use or access restrictions may be the only affordable remedial solution, but this approach can also confer very significant ecological benefits. One of the best known examples is the former Rocky Flats nuclear weapons plant site near Denver, Colorado, which in 2005 became a National Wildlife Refuge.[22] For capped landfills, which must be kept perpetually free of trees and other vegetation that could harm the cap, these sites may be able to

be reused as solar energy farms. Indeed, many remediated sites may be suitable for the generation of renewable wind or solar energy.[23] A number of proposals for solar farms on closed landfills have recently been floated, including several in New Jersey.[24] Finally, if a site is to be reused for commercial or residential purposes, the new development can itself be built using "green construction " techniques, with energy efficiency, water efficiency, material reuse, etc., in mind.[25]

## Legal Considerations

Many green remediation techniques and practices can yield savings in the cost of site remediation. Examples include the on-site generation of solar or wind energy, or the use of engineered wetlands to treat contaminants. Some green remediation elements will, however, add to the overall costs of remediation. Examples include purchasing electricity off the grid that has been generated through renewable means (which may cost a penny or two more per kilowatt) or requiring contractors to use clean diesel. Some techniques, like the use of "green concrete," may be cost-neutral or even generate savings, but finding a local supplier may present a challenge.

It is fair to ask whether EPA can use, or require the use of, such green remediation techniques even in instances where that use increases overall costs or imposes an unwanted administrative burden. The question applies both to instances where EPA pays for the site remediation work under the Superfund program and those instances where a potentially responsible party (PRP) pays for the work pursuant to an enforceable instrument like an administrative order or a consent decree.

The author submits that the answer, in both cases, is likely to be yes, at least with respect to the actual construction and operation of a remedial project, provided that there are demonstrable environmental benefits from the green remediation technique in question. The National Oil and Hazardous Substances Contingency Plan (NCP) is the EPA regulation that governs, *inter alia*, how Superfund remedial project alternatives are to be evaluated and selected.[26] The NCP sets out nine criteria for evaluation of such options.[27] Two of these are "threshold criteria" that each alternative must meet in order to be eligible for selection; five more are "primary balancing criteria" that are used to evaluate among alternatives that satisfy the threshold criteria; and the final two are "modifying criteria."[28]

Among the balancing criteria is "short-term effectiveness."[29] This criterion provides that the short-term impacts of alternatives shall be assessed considering, *inter alia*—

1. the "short-term risks that might be posed to the community during implementation of an alternative";
2. the potential impacts on workers during the remedial project; and
3. the "[p]otential environmental impacts of the remedial action and the effectiveness and reliability of mitigative measures during implementation."

Many of the green remediation techniques described above can easily be justified using these considerations. For example, use of clean diesel equipment clearly reduces short-term risks to nearby residents from diesel emissions and also protects workers from those same emissions, considerations No. 1 and No. 2. Use of green concrete, purchase of renewably generated electricity from the grid[30] or use of on-site renewable energy generation—all of which result in reduced GHG and other air emissions associated with a remedial construction project—self-evidently reduce the real environmental impacts of the remedial action, consideration No. 3.

Additionally, the ninth criterion, one of the two modifying criteria, is "community acceptance," which provides that support or opposition from interested members of the community should be considered in selecting a remedial alternative.[31] If properly presented with factual information about the short-term risks and impacts of different alternatives, it is likely that community members may indeed express strong views for or against certain alternatives. Again, a good example is the use of clean diesel. If residents near a remedial construction site are presented with information about the quantity of diesel emissions to which they will be exposed using conventional equipment compared with, say, equipment retrofitted with pollution controls and using ultra-low sulfur diesel fuel, it is hard to imagine that those residents would not have a very strong preference for the latter.

Of course, there are elements of green remediation that EPA presumably cannot require an unwilling PRP to implement or pay for. For example, the post-remediation use of a site is properly the concern of the site owner, subject to local zoning and land-use restrictions. If the owner of a closed landfill chooses to build a golf course, EPA cannot force that owner to instead build a solar farm. Nevertheless, the author contends that EPA can properly take steps during the remediation to ensure that the site, once cleaned, is suitable for appropriate forms of "green" reuse, thus preserving that future use option.

Several federal Executive Orders (EOs) also point EPA in the direction of requiring steps to green its remedial program. A leading example is EO 13423, "Strengthening Federal Environmental, Energy and Transportation Management" (January 24, 2007).[32] This EO establishes targets for energy use reduction by federal agencies, and directs the heads of federal agencies to, *inter alia*, establish "sustainable practices for . . . energy efficiency, greenhouse gas emissions avoidance or reduction, and petroleum products use reduction. . . ."[33]

## Endnotes

1. Any opinions expressed in this article are the author's own, and do not necessarily reflect the position of the U.S. Environmental Protection Agency.

2. *See*, *e.g.*, *Promoting Green Construction: EPA's Use of Voluntary Programs to Encourage More Sustainable Development*, Environmental Law, American Law Institute/American Bar Association (ALI-ABA), February 2008.

3. *See*: <http://www.clu-in.org/greenremediation/subtab_b1.cfm>.

4. *See*, *e.g.*: <http://www.clu-in.org/download/citizens/bioremediation.pdf>. Microbes have been particularly effective in addressing certain kinds of organic compound contamination in soil and groundwater. The efficacy of such an approach is a function of the specific contaminants in question and the specific characteristics of the matrix (soil, groundwater) in which they are found. Microbes may also be able to be used to remove organic contaminants like toluene, xylene and acetone in contaminated landfill gas. In that application, soil vapor extraction (SVE) is used to move the contaminated gas through biofilter unit. Naturally occurring bacteria populate a biofilm in a moisture layer coating the media filter. As contaminated vapors pass through the treatment vessel, the filter retains organic contaminants and allows them to diffuse through the biofilm formed around the solid filter material. The microbes in the biofilm obtain primary energy and carbon by consuming (oxidizing) the organic contaminants. The resultant end products are usually CO2 and water, plus mineral salts. The microorganisms regenerate themselves and ultimately die and are recycled. Small amounts of liquid waste would still require treatment. A biofiltration system is expected to work reliably with minimal maintenance for blowers, nozzles and biomass buildup, and would require significantly less energy than a traditional landfill gas treatment process.

5. *See*, *e.g.*, *Introduction to Phytoremediation*, EPA 600/R-99/107, February, 2000, <http://www.clu-in.org/download/citizens/citphyto.pdf>. Green plants have been used for centuries to mitigate naturally occurring soil contamination. The technique has proved most effective with certain heavy metals, such as lead, zinc and arsenic, but it can also be used for oil, pesticides and explosives. "Sites with widespread, low to medium level contamination within the root zone are the best candidates for phytoremediative processes." *Id.* at 6.

6. Since the fundamental purpose of remediation is to achieve desired environmental improvements at the site itself, the efficacy of the remedial technique is, of course, always the primary consideration in selecting a remedy. If it doesn't satisfy the remedial objectives, it doesn't matter that a technique may be less energy-intensive.

7. A U.S. Department of Energy Web site provides links that inform users how to purchase green energy across the country. *See* http://apps3.eere.energy.gov/greenpower/buying/buying_power.shtml.

8. *See* <http://www.clu-in.org/greenremediation/subtab_d7.cfm>.

9. *See* <http://www.clu-in.org/greenremediation/subtab_d2.cfm>.

10. *See* <http://www.clu-in.org/greenremediation/subtab_d21.cfm>.

11. *See* <http://www.clu-in.org/greenremediation/subtab_d10.cfm>. Six 70-KW microturbines generate 70% of the on-site power needs for the remediation systems and long-term O&M, saving up to $400,000 annually in grid-supplied electricity.

12. *Emission Reduction of Greenhouse Gases from the Cement Industry*, C.A. Hendricks *et al.*, IEA Greenhouse Gas R&D Programme, August, 2004, <http://www.csmonitor.com/2008/0312/p14s01-stgn.html>. Some commentators assert that the total is as high as 8% to 10% of the world's GHG emissions. *See*, *e.g.*, <http://www.worldchanging.com/archives/003151.html> and http://www.csmonitor.com/2008/0312/p14s01-stgn.html. The manufacture of Portland cement accounts for 80% or more of the greenhouse gas emissions associated with concrete. J.M. Flower & J. Sanjayan, *Greenhouse Gas Emissions Due to Concrete Manufacture,* The International Journal of Life Cycle Assessment, July, 2007, <http://www.springerlink.com/content/56266t21424h4854/>.

13. Storage of large volumes of coal ash at power plants, often situated near waterways, can itself cause environmental catastrophes if the ash containment fails, as happened in late 2008 at a Tennessee Valley Authority power plant when some 5.4 million cubic yards of ash fouled the Emory River, http://www.google.com/hostednews/ap/article/ALeqM5hG-hem1jWBFw32ZRkKpRX58dyENAD96BGL108.

14. Green concrete has been used in some very high-profile projects, including the reconstruction of the I-35 bridge in Minneapolis, as reported in the March 31, 2008 *New York Times*. *See* http://www.nytimes.com/2009/03/31/science/earth/31adirondacks.html?_r'1&ref'nyregion. Moreover, secondary materials other than coal ash can also be used in concrete. *See*, *e.g.*, <http://www.epa.gov/rcc/foundry/> for information about reuse of foundry sand.

15. By comparison, a human hair is about 70 microns in diameter. PM2.5 is particularly dangerous precisely because the particles are so small. Their tiny size allows them to be inhaled more deeply into the lungs, easily bypassing the body's natural defenses (such as cilia and mucous membranes). Exposure to PM2.5 is strongly linked to a host of respiratory and pulmonary illnesses and premature death.

16. Though not a remedial project site, it is instructive to note that Destiny USA, a planned "mega-mall " under construction in Syracuse, N.Y., has required all equipment on the job site to use 100% biodiesel. Over 100,000 gallons have been used to date. *See Destiny USA goes 100% biodiesel*, Syracuse Post Standard, June 19, 2007, http://blog.syracuse.com/news/2007/06/destiny_usa_goes_100_percent_b.html>. This is an especially impressive achievement because most diesel engine manufacturers had not warrantied the engines for use of biodiesel fuel beyond about 30%. Destiny engaged with the manufacturers and persuaded them to allow the warranties to cover engines using B-100 (100% biodiesel). Biodiesel is quickly becoming more widely available as new plants come on line. In 2007 a biodiesel plant with a capacity of a million gallons per year opened in northern New Jersey, http://www.elizabethnj.org/press_releases/05_04_07_fuel.pdf.

17. For example, the reconstruction of downtown Manhattan after the devastation of 9-11 involves a massive series of projects that will extend over more than a decade. The local community, which had suffered the effects of pollution from the collapse of the World Trade Center (WTC), was deeply concerned about being exposed to large amounts of extra diesel emissions from construction during such a long period. The various agencies involved—the New York Metropolitan Transportation Authority, the Port Authority of New York and New Jersey, and the developer Silverstein (who holds the long-term lease on the WTC)—all agreed to require of their construction contractors that any piece of diesel equipment larger than 50 horsepower used on site would have to be retrofitted with DPFs (if possible—otherwise DOCs). The community was very appreciative of this decision. The equipment operators and construction workers themselves have also been very pleased, since they are most directly affected by the pollution.

18. *See* <http://www.epa.gov/otaq/technology/#hydraulic> and <http://www.greencarcongress.com/2006/06/epa_and_partner.html> and http://blog.wired.com/cars/2008/10/ups-hydraulic-h.html.

19. For example, at the Rowe Industries Superfund site in Sag Harbor, New York, an on-site air stripper receives about 137 million gallons of PCE-contaminated water per year from eight groundwater recovery wells. The treated water is then discharged into two

recharge basins—one primary basin, and a secondary basin to catch the overflow (which has never been used)—from which it percolates back into the ground. The only maintenance required is to remove the leaves in the fall and/or scrape the surface when the basin begins to fill up. Interestingly, the remedy originally selected called for the treated water to be discharged to a bay of Long Island Sound. This met with strong public resistance, and the recharge option was subsequently adopted instead. Even at sites where the hydrogeology makes it impossible to reinject all the water, partial reinjection is an option. At the American Thermostat site, in the Town of Catskill, Greene County, N.Y., groundwater is processed at the on-site treatment plant at a rate of approximately 40 gallons per minute (gpm). About a third of the treated water—13 gpm—is reinjected into the bedrock aquifer through nine injection wells, at depths varying from 175 feet to 425 feet. The rest of the water is discharged into a surface creek. The low reinjection rate is related to the low capacity of the fractured bedrock aquifer.

20. *See* <http://www.clu-in.org/greenremediation/subtab_d20.cfm>.
21. *See* <http://www.clu-in.org/greenremediation/subtab_d8.cfm>.
22. *See* http://www.lm.doe.gov/land/sites/co/rocky_flats/rocky.htm.
23. EPA is encouraging the development of renewable energy by identifying currently and formerly contaminated lands and mining sites that present opportunities for renewable energy development. The agency has a Web site containing information and resources for developers, industry, and others interested in renewable energy development on formerly contaminated land and mining sites. <http://www.epa.gov/renewableenergyland/>.
24. *See*, *e.g.*, <http://www.northjersey.com/environment/environmentnews/32128079.html>, concerning an October, 2008 proposal for a 5-MW solar farm on the former Erie Landfill in North Arlington, N.J., and a similar proposal for the Maynard, N.J. landfill, <http://www.wickedlocal.com/maynard/archive/x776458827/Landfill-may-become-home-to-solar-panels>; and a 2-MW solar farm proposed for a closed landfill in Jeonju, South Korea, <http://investors.sunpowercorp.com/releasedetail.cfm?ReleaseID'266834>.
25. For a discussion of green construction techniques generally, see, *e.g.*, W. Mugdan, *Promoting Green Construction: EPA's Use of Voluntary Programs to Encourage More Sustainable Development*, Environmental Law in New York, Vol. 19., No. 8, August 2008.
26. 40 C.F.R. Part 300.
27. 40 C.F.R. § 300.430(e)(9)(iii).
28. 40 C.F.R. § 300.430(f)(1)(i)(A)–(C).
29. 40 C.F.R. § 300.430(e)(9)(iii)(E).
30. This is the type of "extra" expenditure that EPA has imposed on itself in recent years—virtually all EPA offices around the country buy electricity generated from renewable sources. Indeed, EPA was the first federal agency to purchase "green power "equal to 100% of its annual electricity use nationwide, http://www.epa.gov/greeningepa/greenpower/index.htm.
31. 40 C.F.R. § 300.430(e)(9)(iii)(I)
32. 72 Fed. Reg. 17, page 3919 *et seq. See* http://www.ofee.gov/eo/EO_13423.pdf.
33. *Id.* at Section 3(a), page 3920.

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***Citizens' Environmental Coalition Inc. v. New York State Department of Environmental Conservation***, 57 A.D.3d 1279 (2008)

## Facts

In 2003, the legislature passed the Brownfield Cleanup Program Act which was meant to encourage the cleanup and redevelopment of Brownfield or hazardous waste sites.[1] Under this act, developers receive substantial tax credits and a release from future liability in exchange for cleaning up Brownfield sites. The Department of Environmental Conservation (DEC) is vested with the authority to implement the statute, as well as the authority to promulgate regulations. In 2006, the DEC adopted final regulations under authorization from this Act and the Citizens' Environmental Coalition Inc. commenced this Article 78 proceeding seeking review of these regulations and challenging subpart 375-3 and 375-6.[2] Subpart 375-3 governs cleanup eligibility and site-specific remedial programs and subpart 375-6 establishes generic tables of contaminant-specific soil cleanup objectives (SCOs).

The Supreme Court granted the petition to the extent of vacating 6 N.Y.C.R.R. 375-3.8(e)(4)(iii), which allowed exposed surface soils to remain at background levels in certain instances. As to the remaining causes of action, the court dismissed the petition. The Citizens' Environmental Coalition Inc. appealed.

## Issues

ECL § 27-1415(6)(b) provides that SCOs "shall be protective of public health and the environment pursuant to subdivision one of this section."[3] ECL § 27-1415(1) states that "all remedial programs shall be protective of public health and the environment including but not limited to groundwater . . . , drinking water, surface water and air (including indoor air) . . . and ecological resources, including fish and wildlife."[4] The first issue addressed here was whether DEC regulations 6 N.Y.C.R.R. 375-3 and 375-6 violate ECL § 27-1415(6) by setting up general SCOs that do not expressly account for impacts on soil contaminants on surface water, aquatic resources or effects of soil vapor intrusion on indoor air in buildings.

The second issue was whether 6 N.Y.C.R.R. 375-3.3(a)(2), which specifies that the DEC "shall consider only contamination from on-site sources," contravenes ECL § 27-1415 because it excludes properties contaminated by off-site contamination. The Citizens' Environmental Coalition claimed that because the legislature did not include an express exclusion for off-site contaminated properties in ECL § 27-1415 and because ECL § 27-1415 broadly defines a Brownfield site as "any real property," the exclusion of these off-site contaminated properties from 6 N.Y.C.R.R. 375-3.3(a)(2) violates ECL § 27-1415.[5]

## Reasoning

The court noted that when the question presented is one of strict legal interpretation, the practical construction of the statute by the agency charged with implementing it, if not unreasonable, is entitled to deference by the courts.[6] The Citizens' Environmental Coalition Inc.'s interpretation of the statute is too narrow. The legislature endowed the DEC with the power to prescribe rules and regulations consistent with the enabling legislation and the DEC rationally determined, consistent with the statute's mandate, that site specific programs in conjunction with SCOs ensure protections of public health and environment and that the development of generic SCOs for surface water, aquatic resources and indoor air would have been impractical and ineffective to achieve the protection of public health.

Sites that do possess surface waters and aquatic resources display a wide range of characteristics affecting the degree to which soil contamination may impact these resources, such that generic SCOs would be inappropriate and insufficiently protective at many sites. Additionally, contamination of surface water, aquatic resources and indoor air is extensively addressed in regulations governing site-specific remedial programs, which require mitigation of impacts on these resources as an element of the cleanup at any site.

The court held that the DEC, in its area of expertise, set up these rules and the Citizens' Environmental Coalition Inc. failed to establish that they were required to develop SCOs to account for soil contamination impacts on surface water, aquatic resources or indoor air or that the challenged regulations do not adequately protect the public health and environment, including the resources at issue. The court rejected the argument that the DEC did not comply with ECL § 27-1415(6)(b)(v) because it failed to identify and account for more stringent cleanup levels that may

have been achieved in prior remediations. The law requires that in developing SCOs, the DEC must consider "the feasibility of achieving more stringent remedial action objectives, based on experience under the existing state remedial programs, particularly where toxicological, exposure or other pertinent data are inadequate or nonexistent for a specific contaminant."[7] Nothing in that statute requires the DEC to perform a comprehensive analysis of all historically achieved cleanup levels. Rather, the statute requires only that the DEC consider the feasibility of achieving more stringent SCOs in light of past experiences.

The court examined the record, which revealed that the DEC complied with the statutory requirement that it must consider the feasibility of setting more stringent SCOs in light of the adequacy of available data and standards developed based on its experience. The court concluded that DEC used its expertise to develop SCOs for the protection of human health and ecological resources and did not act arbitrarily or capriciously and agreed with the Supreme Court that 6 N.Y.C.R.R. 275-3.3(a)(2) does not contravene ECL § 27-1415.

The court rejected the Citizens' Environmental Coalition claim that 6 N.Y.C.R.R. 375-3.3(a)(2), which requires the DEC to "consider only contamination from on-site sources" in determining which sites are eligible for the program, contravenes the statute.[8] Because of the lack of language in the statute directly addressing the issue, the statutory focus on removal of the source of contamination through remediation programs and separate enforcement mechanisms where contamination has been caused by off-site sources constitutes a rational determination that the goals of the statute are best served by addressing contamination at its source.

## Conclusion

Since the DEC complied with ECL § 27-1415 in promulgating the generic SCOs and the regulatory exclusion of properties contaminated by off-site sources, the court rejected the contention that the regulations at issue were irrational and, thus, the partial dismissal of the petition was affirmed.

**Christopher J. Palmese, 2009**

## Endnotes

1. *See* Brownfield Cleanup Program Act.
2. *See* 6 N.Y.C.R.R. 375.
3. *See* ECL § 27-1415(6)(b).
4. *See* ECL § 27-1415(1).
5. *See* ECL § 27-1415.
6. *In re Village of Scarsdale v. Jorling*, 91 N.Y.2d 507, 516 (1998).
7. *See* ECL § 27-1415(6)(b)(v).
8. *See* 6 N.Y.C.R.R. 375-3.3(a)(2).

* * *

## ***Coalition of Watershed Towns v. United States Environmental Protection Agency***, Docket Nos. 07-2449-ag (L), 07-3912-ag (Con) (2008)

### Facts

Petitioners are a confederation of towns ("Towns") in the Catskill and Delaware watershed region of New York. They have actively negotiated and litigated against New York City, New York State and the United States Environmental Protection Agency (EPA) for many years. The Towns sought review of two actions regarding the implementation of the Safe Drinking Water Act of 1974 (SDWA) by U.S. EPA: (1) an April 25, 2007 letter from the EPA highlighting the state's non-compliance with certain EPA regulations regarding administrative penalties and temporarily postponing the previously scheduled transfer to the state of primary enforcement responsibility ("primacy") over the Catskill and Delaware watersheds until the state complies with the relevant regulations; and (2) a July 30, 2007 Filtration Avoidance Determination (FAD), which required the city to spend additional monies on land acquisition in the Catskill and Delaware watershed regions.

### Issue

The issue addressed was whether the petitioners had standing to sue under Article III of the Constitution.[1] *Lujan v. Defenders of Wildlife* established standing under Article III has three elements: (1) an "injury in fact," i.e., an invasion of a legally protected interest that is "concrete and particularized . . . and [ ] actual or imminent, not conjectural or hypothetical," that is (2) causally related ("fairly traceable") to the challenged action and (3) likely to be redressed by a favorable court decision.[2] The question addressed was whether, even if the petitioners had suffered an injury-in-fact, redress from a favorable court decision was likely?

### Reasoning

The EPA argued that under the "case-or-controversy" requirement of Article III of the Constitution, the Towns lack standing to bring this petition because they have not suffered any "injury-in-fact." In response, the Towns have proposed four injuries that, in their opinion, confer Article III standing: (1) breach of a Memorandum of Agreement signed by the parties in 1997 (the MOA), which scheduled the transfer of primacy for May 15, 2007 and capped the city's acquisition of land and easements in the Catskill and Delaware watershed regions of New York at $300 million; (2) loss of an opportunity to have the state conduct a cost-benefit analysis that would weigh the city's land acquisition against the preservation of local "community character," pursuant to the New York State Environmental Quality Review Act;[3] (3) an injury to the Towns' "legal right to determine the future economic and planning goals for their communities"; and (4) a shared interest in the city's water supply.

Despite each side's argument, the court raised, *nostra sponte*, a related question about standing. The court, assuming that harms suffered as alleged were cognizable as injuries-in-fact, examined whether they were likely to be redressed by a favorable court decision. "Redressability is the non-speculative likelihood that the injury can be remedied by the requested relief."[4] "[I]t also must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[5] "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court."[6]

The court ruled that despite injury suffered by the Towns, any relief that the court could provide is speculative. Even assuming that the EPA was required by the MOA to transfer primacy to the state in May 2007, as opposed to September 2007 when it was actually transferred, the court found no basis for the conclusion that the Towns would more likely than not be in any different position than they are now.

Furthermore, the court asserted that while the state might have been required by state regulations and laws to perform a cost-benefit review of the substance of the July 2007 FAD, the Towns did not point to any evidence suggesting that the state's analysis would have substantially differed from the EPA's, or would remedy any injury alleged by petitioners. The court found that the state's intervention in this case on the side of the EPA and in support of the June 2007 FAD led to the conclusion that the state would have promulgated substantially the same determination.

## Conclusion

The court denied the Towns' petition for review and entered judgment for the EPA. In making its decision, the court took no position on whether the Towns met its injury-in-fact requirement. The court focused solely on whether a favorable court decision would have redressed the Towns' injury in a non-speculative manner. It was held that a favorable court decision would not have redressed the Towns' injury in a non-speculative remedy. Therefore, the U.S. Court of Appeals for the Second Circuit concluded that it could not address the merits of the petition because the Towns lacked standing to sue under Article III of the Constitution.

**Scott Ross, 2009**

## Endnotes

1. U.S. Const. Art. III.
2. 504 U.S. 555, 560 (1992).
3. 6 N.Y. Comp. Codes R. & Regs. §§ 617 *et seq.*
4. *W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche L/P.*, __ F.3d __, No. 06-1664-cf, 2008 WL 5076825, at *4 (2d Cir. Dec. 3, 2008).
5. *Lujan*, 504 U.S. at 561.
6. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

* * *

## ***HLP Properties LLC v. NYC Dept. of Environmental Conservation,*** 21 Misc. 3d 658, 864 N.Y.S.2d 285

### Facts

In this Article 78 application petitioners challenge respondent's determination denying petitioners' application to participate in the Brownfield Cleanup Program under Environmental Conservation Law.[1] Petitioners seek a declaration that the Site at issue is a "brownfield site" within the meaning of the Brownfield Cleanup Program Act[2] and that respondent's decision was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious and/or was an abuse of discretion. Furthermore, petitioners seek an order annulling and vacating respondent's decision and obliging respondent to accept their application to the Brownfield Cleanup Program. Finally, petitioners seek an award of costs and disbursements associated with this proceeding.

The site at issue, a 1.75-acre parcel of property located in the West Chelsea part of Manhattan, is owner by petitioner HLP Properties (HLP) and is currently an at-grade level parking lot. Petitioners seek to develop this parcel into two residential and commercial high-rise towers. The parcel was occupied by a gas production facility for over sixty years, which resulted in the accumulation of significant quantities of environmental contaminants in the surrounding land. Such contaminants include coal tar, volatile organic compounds (VOCs), semi-volatile organic compounds (SVOCs) and heavy metals.

In 1994, the Department of Environmental Conservation (DEC) initiated an administratively created Voluntary Cleanup Program (VCP), issuing Voluntary Cleanup Agreements (VCAs), which allowed parties to investigate and clean up abandoned contaminated sites and to return those sites to productive use. In return for their cleanup efforts, the volunteers received protection against future liability arising out of the redevelopment of those sites.

In 2003, the New York State Legislature enacted the Brownfield Cleanup Program Act (BCPA) to encourage the voluntary cleanup of hazardous waste sites and to restore those sites to productive use.[3] Applicants who successfully complete the remediation requirements would receive a Certification of Completion, providing additional liability limitations under the statute[4] and enabling applicants to benefit from significant tax credits.[5] Because the BCPA codified many of the existing VCP provisions, the DEC allowed parties to transfer properties subject to VCP agreements into BCPA, to terminate their VCP agreements and to apply for BCP or to continue to operate under existing VCP agreements.

In 2002, nonparty Con Edison received a VCP agreement for the site at issue, requiring the nonparty to investigate and clean up the site. Con Edison did not move to transfer the VCP agreement into the BCP program. Nevertheless, HLP submitted its own BCP application in 2004

for the site and Con Edison objected to this application, alleging that the property could not qualify as a BCP site while Con Edison's 2002 VCP agreement for the same site remained in effect. No further action was taken on the 2004 application.

In 2007, both nonparty Con Edison and HLP submitted separate BCP applications for the site, but both applications were denied. The DEC explained that it is not a brownfield site because the site is not in an economically distressed area, is not unattractive for redevelopment or reuse due to the presence of contamination, and such redevelopment or reuse is not complicated by the presence of contamination.

## Issues

Whether the challenged determination was rationally based, or whether it was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, or an abuse of discretion.

## Reasoning

The Court analyzed the legal interpretation of the statute,[6] focusing on the purpose, objectives, and intent of the legislation. Agency determinations running counter to the clear wording of statutory provisions are afforded little weight.[7] Petitioners contended that the DEC's decision was not made based on a demonstrated ineligibility under the statute, but rather, an illegibility based on respondent's interpretation of the statute. Respondent alleged that its use of agency-created guidance documents was reasonable to determine that petitioner was ineligible.

The Court held that the legislative intent behind the Brownfield Act[8] was not ambiguous and was expressly created to encourage the voluntary remediation of brownfield sites for reuse and redevelopment.[9] The Act defines a brownfield site as being "any real property, the development or reuse of which may be complicated by the presence or potential presence of a contaminant."[10] The Court rejected respondent's argument that the word "any" is not all-encompassing and, thus, is not to be extended to all properties and that the phrase "may be complicated by a contaminant" allows the DEC to administratively create economic guidance factors in determining BCP eligibility.

The Court ruled that that the word "any" has been deemed "as inclusive as is any other word in the English language" and it does not create ambiguity.[11] Statutes should be interpreted so as to further legislative intent through clear and unambiguous statutory language interpretation, giving the words used their plain meaning.[12] Furthermore, an agency, by law, is not allowed to "legislate" by adding "guidance requirements" not expressly authorized by statute.[13] Thus, the DEC's use of its own administratively created and much more limiting guidelines to determine petitioners' ineligibility is unsupported by the express language of the statute and has been the subject of criticism from multiple entities in this State, including the New York State Bar Association Environmental Law Section.[14]

Most importantly, not only has the Legislature declined to adopt the DEC's guidance factors in the ECL, the guidance factors are conspicuously missing from the DEC's own regulations with regard to the BCP.[15] Thus, the court held that DEC's use of guidance factors constitutes an impermissible attempt to legislate and is inconsistent with the Legislature's intent to encourage remediation. The court reversed the denial of petitioners' BCP application and directed respondent to accept petitioners' property into the BCP program. The court denied petitioner's request for award of cost and disbursements associated with this proceeding because they were unsupported by a statutory basis.

## Conclusion

The court also addressed the unique question as to whether a property owner is entitled to reap the benefits associated with BCP where a third party has already voluntarily agreed to undertake all responsibility for the investigation and removal of environmental hazards from the affected site. It concluded that by statute, tax credits earned as a result of the voluntary cleanup are inexplicably linked to the amount of money spent by the parties responsible for the cleanup and, thus, any credits petitioners might be awarded in the future would be based on their share of the actual remediation of the site.

**Nadya Kramerova, 2009**

## Endnotes

1. *See* §§ 27-1401 *et seq*.
2. ECL §§ 27-1401–27-1431.
3. *Id*.
4. *See* ECL § 27-1421(1).
5. *See* New York Tax Law §§ 21–23.
6. ECL §§ 27-1401–27-1431.
7. *Raritan Development Corp. v. Silva*, 91 N.Y.2d 98, 103 (1997).
8. ECL §§ 27-1401–27-1431.
9. ECL § 27-1403.
10. ECL § 27-1405(2)
11. *New Amsterdam Casualty Co. v. Stecker*, 3 N.Y.2d 1, 6 (1957).
12. *Patrolmen's Benevolent Ass'n v. City of New York*, 42 N.Y.2d 205, 208 (1976); *Doctor's Council v. New York City Employees' Retirement System*, 71 N.Y.2d 669, 674-675 (1988); *Raritan Development Corp.*, 91 N.Y.2d 98, 106-107 (1997).
13. *See In re The Medical Society of the State of New York v. Serio*, 100 N.Y.2d 854 (2003); *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987); *Destiny USA Development, LLC v. New York State Department of Conservation*, 2008 WL 2368085, 2008 Slip Op. 51161 (U) (Sup. Ct., Onondaga Co. 2008).
14. *See Destiny USA Development*, 2008 WL 2368085, 2008 Slip Op. 51161 (U) at 16-17.
15. *See* 6 N.Y.C.R.R. Pt. 375.

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