APL-2017-00248

New York County Clerk's Index No. 101109/15

Court of Appeals

STATE OF NEW YORK

In the Matter of the Application of

SAVE AMERICA'S CLOCKS, INC., THE HISTORIC DISTRICTS COUNCIL, INC., TRIBECA TRUST, INC., MARVIN SCHNEIDER, FOREST MARKOWITZ, THOMAS BERNARDIN, CHRISTOPHER DESANTIS, JEREMY WOODOFF and ALANA HEISS,

Petitioners-Respondents,

For a Judgment Pursuant to Articles 63 and 78 of the Civil Practice Law and Rules

against

CITY OF NEW YORK, OFFICE OF THE DEPUTY MAYOR FOR HOUSING AND ECONOMIC DEVELOPMENT, NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, NEW YORK CITY DEPARTMENT OF BUILDINGS and CIVIC CENTER COMMUNITY GROUP BROADWAY LLC,

Respondents-Appellants.

BRIEF FOR AMICI CURIAE THE CITY CLUB OF NEW YORK, BROOKLYN HEIGHTS ASSOCIATION, FRIENDS OF THE UPPER EAST SIDE HISTORIC DISTRICTS, GREENWICH VILLAGE SOCIETY FOR HISTORIC PRESERVATION, HUMAN-SCALE NYC, LANDMARK WEST!, THE NEW YORK METROPOLITAN CHAPTER THE VICTORIAN SOCIETY IN AMERICA

MICHAEL S. GRUEN
Attorney for Amici Curiae The City Club of New York, Brooklyn Heights Association, Friends of the Upper East Side Historic Districts, Greenwich Village Society for Historic Preservation, Human-Scale NYC, Landmark West!, The New York Metropolitan Chapter the Victorian Society in America
249 West 34th Street, Suite 402
New York, New York 10001
212-643-7050
mgruen@michaelgruen.net

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INTRODUCTION

This appeal concerns a historic clock built for public time-telling. Although designated as an interior landmark, its fate is at the mercy of the courts as the Landmarks Preservation Commission, acting on what the courts below have deemed to be the incorrect advice of its general counsel, and in defiance of its own designation report, has reduced protection to a minimal level and acceded to the owner's refusal to continue public access to the clock. The Supreme Court and Appellate Division correctly ruled against the Commission and owner.

In this Court, Appellants have refocused their energies onto their contention that the Commission is not governed by a coherent statute setting forth legislative authorizations and guidelines (as its enabling law in fact does), but by an unwritten practice of negotiating deals. This threatens a rule of capriciousness, not of law.

The City Appellants describe the unguided negotiation mode in new-age business terms: the Commission is "practical," "pragmatic" and "holistic." It strikes deals, and in so doing gives away City heritage that the law obliges it to save.

So, its attorneys say, the Commission is satisfied with an unenforceable, largely unwritten, "deal" that the clock hands will circle on electric power, that the historic clockworks will be stashed away (R. 1076), available for

possible use in the future (but disconnected from the clock faces and non-functioning), and that the Commission will have access on a regular basis to inspect. (City Brief 49; see Certificate of Appropriateness ("COA"), 5/29/15, p. 2; R. 1082).[1] That is not how the Commissioners expressed themselves just before the vote; rather, almost all wished the clock could be fully salvaged and remain available for public enjoyment. Save America's Clocks, Inc. v. City of New York, 157 A.D.3d 133, 143-146 (1st Dep't 2017)

The Appellate Division found as a fact that enough Commissioners were influenced by the incorrect legal advice, and would not have voted for the COA had they been correctly advised, that the outcome was affected by an error of law. Clocks, 157 A.D.3d at 143, 144.

[1] An ACRIS search reveals that no such agreements were ever recorded. (https://a836-acris.nyc.gov/CP/CoverPage/MainMenu, enter Manhattan Block 170 Lot 6, visited 5-11-18 and searched backward through 1989). Whatever assurances there might be (see p. 14) may be better regarded as hole-istic.

ARGUMENT

POINT I

THE COMMISSION IS GOVERNED BY THE RULE OF LAW, NOT OF BAZAAR NEGOTIATION

The Landmarks Preservation Law, adopted in 1965, and amended in 1973 to add interior and scenic landmarks to its designation options, imposes a comprehensive set of duties on the Commission to use historic preservation as a means of promoting aesthetic appreciation, cultural awareness, knowledge of historic roots, tourism, sense of belonging to a community, civic pride, and other values. N.Y.C. Admin. Code § 25-301(b). To achieve these ends, the Council commands that the City cease "countenancing the destruction of [its built] cultural assets." Admin. Code § 25-301(a).

These are broad and core issues of an urban civilization. The Law confers a commensurately broad, but carefully defined, range of authority.

One may search high and low through the Landmarks Law. One will not find the words "practical," "pragmatic," or "holistic." Nor will one find other words the City's Brief ascribes to the statutory text in paraphrasing it. For example, the City says that, in considering a request for a certificate of appropriateness, the Commission "must conclude that the work is, on balance,

consistent with the law's preservation goals." City Brief 45. "On balance," however, is not in the statutory text, nor is any similar expression. The City's free-wheeling embrace of non-statutory language does not help the Court in the task before it: statutory construction.

A. The Landmarks Law Requires That the Commission Rule on Proposed Alterations According to Fixed Preservation Standards.

The drafters of the Law, including the amendment adding interior landmarks, were obviously keenly sensitive to the basic requirement of administrative law that agency decision-making must follow legislative guidelines sufficient to ensure that the agency does not encroach on legislative functions.[2] See, e.g., Levine v. Whalen, 39 N.Y.2d 510 (1976); Flynn v. State Ethics Comm'n, Dep't of State, State of N.Y., 87 N.Y.2d 199 (1995); New York State Superfund Coal., Inc. v. New York State Dep't of Envt'l Conservation, 18 N.Y.3d 289 (2011).

Hence, the City Council prefaced the Law with a detailed statement of legislative intent, explaining with vigor and heartfelt care what has happened and what must be done:

- The accelerating loss of major architecturally outstanding structures (most notably at that time Penn Station), must stop.

[2] The undersigned attorney for Amici was an active member of the team that formulated the amendment.

- The lost structures represent "irreplaceable loss to the people of the city of the *aesthetic, cultural and historic values*"
- "The standing of this city as a world wide tourist center and world capital of business, culture and government cannot be maintained or enhanced by disregarding the historical and architectural heritage of the city and by countenancing the destruction of such cultural assets."
- "It is hereby declared as a matter of public policy that the *protection, enhancement, perpetuation and use* of improvements and landscape features of *special character or special historical or aesthetic interest or value* is a public necessity."
- Such efforts will promote the economic welfare of the City.
- The Council seeks to "foster civic pride in the beauty and noble accomplishments of the past;" and to
- "Promote the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city."

Admin. Code § 25-301.

The message is clear: Protect our historical heritage. Just don't violate constitutional rights to do it.

We have italicized some of the language in the above quotations in order to illustrate that, contrary to the contention of Appellants, the statement of intent and the operative provisions of the Law are intimately related and often use identical language. Thus, to grant any COA (i.e., permit for alteration), the Commission must affirmatively determine that the "proposed work would be *appropriate for and consistent with the effectuation of the purposes of this chapter*." In particular, as to an interior landmark, "the commission shall consider the effects of the proposed work upon the *protection, enhancement, perpetuation and use* of the interior architectural features of such interior landmark which cause it to possess a *special character or special historical or aesthetic interest or value*." Admin. Code §§ 25-307(a) and (e) (emphasis added). The underlined phrases precisely duplicate portions of the statement of legislative intent stated in Admin. Code § 25-301. The Council did not have to add, "as specified in Section 25-301" after these underlined phrases to make clear that it is referring back to Section 25-301; the relationship is obvious.

The first, last and most important question in any effort to construe a statute is: What did the legislature intend? Avella v. City of New York, 29 N.Y.3d 425, 434 (2017). The best, but not necessarily only, source for an answer

is the legislature's own statement of its intent. See, e.g., Hotel Dorset Co. v. Trust for Cultural Res. of City of New York, 46 N.Y.2d 358, 368 (1978). Case law mandates that, even if the Law were not as specific as it is in describing the Commission's duties, this Court would have to look beyond its "plain language" to the statute's overall purpose as the basis for ruling on the validity of agency actions. See Long v. Adirondack Park Agency, 76 N.Y.2d 416, 420-422 (1990); Surace v. Dana, 248 N.Y. 18, 21 (1928).

That principle has often been applied to the Law. Teachers Ins. & Annuity Ass'n of Am. v. City of New York, 82 N.Y.2d 35, 44 (1993), cites Section 25-301(b) (statement of legislative intent) for the proposition that the Commission has authority to designate the Four Seasons Restaurant in the Seagram Building as an interior landmark, it "having been provided *for the enjoyment of New York City's residents and visitors* since it opened more than three decades ago." (Emphasis added). The italicized words do not appear in Section 25-302(m) which defines the qualities an interior landmark must have. The Court was satisfied to rest purely on the statement of legislative purpose.

Decades earlier, the First Department filled a gap in the Law's provisions for hardship relief. In Trustees of Sailors' Snug Harbor in City of New York v. Platt, 29 A.D.2d 376, 378 (1st Dep't 1968), the Court recognized that the Council clearly intended that there should be a provision for relief if enforcement

of the Law became oppressive in a particular case, but overlooked that the earning capacity test that it enacted would not serve satisfactorily in a case concerning a not-for-profit entity. So, the Court devised an alternative test which looked to whether rigid enforcement would preclude the charity from fulfilling its charitable mission. Other cases filling in such gaps include Lutheran Church in America v. City of New York, 35 N.Y.2d 121 (1974) (confirming the Sailors' Snug Harbor test); Society for Ethical Culture Church in the City of New York v. Spatt, 51 N.Y.2d 449 (1980) (declining to extend Lutheran Church holding to non-religious activities of church); and 1025 Fifth Ave, Inc. v. Marymount School of New York, 173 Misc.2d 756 (Sup. Ct. N.Y. Co. 1983) (reading into text that a school in an historic district, not separately designated as a landmark, may rely on hardship provision for making a structural addition, because that is what the Legislature evidently intended despite absence of wording to that effect).

The Law follows a standard structure and requires a standard process by the Commission. The structure sets forth a task: "to determine whether proposed work is appropriate for and consistent with the *effectuation of the purposes of this chapter*." Admin. Code § 25-307(a). It then continues in the next four sub-paragraphs to provide guidelines and processes for each type of site– historic district, exterior landmark, interior landmark, or scenic landmark. In each

case, the over-riding purpose is always "effectuation of the purposes of this chapter," as stated in the statement of intent.

Contrary to the City's contention, Section 25-307 does not invite the Commission to make such determinations "on balance," for example by ignoring some damage that the work would cause to protected features because Commissioners think they are getting a tolerable result as to other features. The statute clearly requires consideration of the impact on each and every protected feature.

The end result of this process is a mandatory yes or no choice: "If the commission's determination is in the affirmative on such question [effectuation of the purposes of this chapter], it shall grant a certificate of appropriateness, and if the commission's determination is in the negative, it shall deny the applicant's request."

"Yes" or "no," those are the options. No haggling.

This point was applied with great clarity in Allison v. New York City Landmarks Pres. Comm'n, 35 Misc. 3d 500 (Sup. Ct. N.Y. Co. 2011) (Billings, J.). The case concerned the famous "glass house" bank at Fifth Avenue and 43rd Street, designed for Manufacturers Trust Company by Skidmore, Owings & Merrill. The case challenged the Commission's consent to the request of Vornado, as recent purchaser, to make extensive interior changes in order to accommodate re-use for

retail stores. The Court rejected the notion that "adaptive re-use"[3] is automatically available upon demand and allows whatever the owner desires. Adaptive re-use *may* be appropriate, the Court acknowledged,

> Yet the pieces of the record currently presented do not address such fundamental questions as:
>
> why the remodeling was necessary to accommodate a retail clothing business as a tenant;
>
> why two tenants were necessary, in turn necessitating a division of the unified space and additional entrances, breaking up the uninterrupted facade, a significant feature supporting the landmark status;
>
> why no other or single tenant, equally lucrative but requiring less remodeling, was interested in the first two floors at this highly desirable location; or
>
> why the freestanding escalators running parallel to 5th Avenue must be moved, for the prospective tenant or any other tenant, their location representing another significant design component unifying the first and second floors.

Id. at 520-21.

The Allison court highlighted exactly the issue of this case: that even for an application concerning adaptive re-use, the Commission is not free to toss away the standards of the Law and allow whatever the owner wants, as modified by some negotiation. The Commission must at a minimum ascertain first whether

[3] The term refers to modifications necessitated by the needs of a different use from that at the time of designation.

the requested changes conform to the Law. Second, if those changes are not appropriate by that standard, the Commission may allow divergence (in an adaptive re-use case) but only to the least extent necessary.

In allowing that a particular adaptive re-use might be, but is not necessarily, appropriate, Allison duly recognizes that one objective of the Law is to promote use of designated properties. Nowhere, however, does the Law suggest that wholesale capitulation to whatever the owner wants, or abandonment of the Law's specified process for determining applications by ascertaining the relevant facts and applying the Law to them, is permissible. Allison confirms just that, and denies Appellants' proposition that the Commission's function is to wheel and deal.

B. Appellants' Arguments for a Regime of Negotiation Are Not Pragmatic and Violate the Law.

The City rejects the orderly process discussed above and instead seeks judicial endorsement of what is claimed to be the Commission's practice of negotiating rather than "determining" as Section 25-307(a) prescribes. It vaguely describes the so-called "practical, pragmatic, holistic" approach, not as a codified process, but as an ad hoc imprecise management style reminiscent of mercantile negotiation. Yet it asks that this style be treated by this Court as if it were law. City Brief 35.

The application in this instance for a certificate of appropriateness was, the City says, "extremely complicated...with many tradeoffs." However, it adds, this application is typical: "Give-and-take like this between an owner and the Commission is a common way to balance competing interests:" Id.

This "pragmatic" approach seems to render legal standards secondary–even nugatory. "[T]he real issue put to the Commission" in dealing with this exterior and interior landmark, "was not," the City says, "an abstract legal question about the outer limits of its powers, but rather the practical question whether to approve an expansive restoration project for a landmark in sore need of attention." City Brief 44.

The City claims that the "pragmatic" negotiatory approach gives the Commission an option: trading survival of some protected architectural features in exchange for jettisoning others. City Brief 45-47. Give us, the City in effect says, a reconstructed marble anteroom removed from the fourth floor to the first floor, and we'll drop our objections to whatever you want to do with the clock. Section 25-307(e), however, does not allow that; it requires that all protected features be assessed under the same process. "Appropriateness," the City argues, should be measured not on the basis of whether each feature identified in the Designation Report as central to the designation, and whether each feature otherwise worthy of preservation meets the standards prescribed by the Law, but on the Commission's

sense of whether a negotiated outcome will be good for the cause of preservation as a whole, i.e. "on balance." City Brief 46-47 (arguing that, in the negotiation process, "preservation [should be] balanced with the need to afford owners 'maximum latitude' to use and adapt their properties").

This approach disregards the Commission's clearly stated intention at the time of designation to preserve the whole clock. See Designation Report 1-2, 16-17. In this instance, the negotiations resulted, among other things, in approval of renovation of some major rooms and stairs (but removed to different locations);[4] and assurance that the public will be allowed to enter certain rooms on lower floors (but not all). However, the public would not be able to visit the Clocktower Suite;[5] and the clock's original mechanism would be disconnected and replaced with electric power, all subject to the Owner's unenforceable assurances that it will continue to operate the electrified clock, that it will retain all of the disconnected mechanism, and that it will allow the Commission to inspect the remains of that mechanism.

A negotiated deal of the complexity of this one generally has some common characteristics. One would expect, for example, that important details such as the storage of the disconnected clock equipment, and the LPC's right to

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[4] See City Brief pp. 13-14, 17.

[5] "Clocktower Suite" refers to the entire sector housing the clock.

inspect from time to time, would be the subject of detailed specifications. One would expect that these specifications would be reduced to writing and signed by the parties. And one would expect that the resulting agreement would be recorded to ensure enforceability against future owners. But no such actual action is evidenced by any references in the City's Brief or in ACRIS records. See supra p.2, n.1 (ACRIS citation). Some of these items are sketchily addressed as a condition of the COA (at p. 4 thereof), but a vague promise does not stand in for a detailed guarantee.

Designating a landmark is a solemn act that the Commission undertakes with great care. The Commission cannot later conscientiously or credibly treat the landmark that it previously designated as not worthy of preservation because the old-fashioned clock mechanism must be wound periodically. City Brief 9-10. This intensity of commitment is mandatory. Admin. Code § 25-301.

The City's ultimate point is a real stunner. Laying bare the Commission's entire negotiating strategy, it asserts that the Law so strongly endorses horse trading over enforcement under guidelines that it offers landmark owners the option of applying not just to alter or reconstruct, but to demolish. And the City invites owners to take the hard line. As it declares to all who may find

themselves across the table from the Commission's negotiators, the statute does not

> tell the Commission to be puritanical about preservation, either when considering the project as a whole or parts of it. Just the opposite: the reason the certificate of appropriateness framework exists is to make reasonable space for owners to 'alter,' even 'demolish,' architectural features with the Commission's approval. Id. § 25-307(a), (e). The process *presumes* change, sometimes dramatic change. *** This is a pragmatic approach to preservation, rooted in an understanding that the perfect should not be the enemy of the good.

City Brief pp. 46-47.

Total or partial demolition may be an option available in special circumstances where the subject improvement is itself inappropriate,[6] where application of the Law leads to extreme financial hardship (as defined by the Law), or where necessary to achieve limited essential adaptive re-use. But that is not the City's argument. Rather, its stated purpose is to undermine the Commission's own mandate by making demolition available at the owner's option. That transforms demolition from being a necessity to being just another bargaining chip that the owner can trade for a benefit.

It is no insult to hardworking individual Commissioners to suggest that such a public statement invites snickers from applicants and refusal to yield.

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[6] E.g. the Designation Report p. 13 identifies certain fluorescent lighting and sprinklers as "intrusive"; "every effort should be made to remove them at some future date."

So it comes as no surprise when the owner's architect is asked, as he was here, at a public hearing, whether it would be possible to provide public access to the Clocktower, and he replies quite simply that it is possible, but the owner does not intend to do so. Clocks, 157 A.D.3d at 139-40, 142. The very idea of negotiation implies what the City calls some "give and take." Inevitably, announcing that the Commission's business is negotiation, not enforcement, weakens the Commission and results in inability to negotiate credibly.

As this case demonstrates, the result is less preservation, because a sophisticated owner will always know that if he does not want to cave, he will not have to. The Commission, fearing that the Owner would back away from the entire project of rehabilitating this derelict building if it pushed too hard, sacrificed the clocktower to a luxury condo. Subsequent events have shown that this concession was unnecessary: the Owner was, in fact, content to proceed with construction with or without a clocktower luxury condominium. This is evidenced by the agreement it entered into with the Petitioners, under which it is proceeding with construction, but will do nothing to the clocktower unless and until permitted to do so by the court. (R.436).

Moral: the Commission's expertise in architecture, planning and history gives it great credibility when making determinations on the basis of

evidence, but serves it poorly when engaging in the rough and tumble art of the deal.

The City attempts in vain to ground its negotiatory approach in the law of CPLR Article 78, suggesting that since this case is brought under Article 78, any rational procedure is legal. City Brief 23-25. According to the City, if the Commission barters rather than determines,

> [a]s a practical matter, when the Commission finds that the work is "appropriate," there is no justicially administrable test to second-guess its assessment of the particulars. So long as the reviewing court is satisfied the Commission has brought its expert judgment to bear, that should usually be the end of the matter.

City Br. 47. In other words, negotiation enables the Commission to avoid standards; without standards, a reviewing court loses its basis for review. Two goals achieved, with one arrow.

For support of its bartering approach, the City relies on Friends of P.S. 163, Inc. v. Jewish Home Lifecare, 30 N.Y.3rd 416, 430 (2017), because it says, according to the City, that agencies "weigh the desirability of any actions [and] choose among alternatives." That decision, however, concerned the adequacy of an environmental impact statement under SEQRA, which expressly requires evaluation of environmental impacts and of alternative actions, including no action. ECL § 8-0109. The Landmarks Law does not allow the same latitude.

The other case the City relies on, City of New York v. State of New York Commission on Cable Television, 47 N.Y.2d 89, 92-93 (1979), is no more helpful to its argument. The Court there ruled only that even though no provision of the enabling act addressed combining such actions, the Cable Television Commission could act on several different franchises in one decision. The Court understandably saw no reason why such a petty detail would require specific legislation. That decision did not mention the Landmarks Law.

The City cites no authority to support its contention that Article 78 supersedes the Commission's governing statute—the Landmarks Law. City Brief 23-25.

The City's argument that the Landmarks Law itself allows for bartering fares no better. The City claims that the U.S. Supreme Court promulgated the "practical, pragmatic, holistic" approach in Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 109-112 (1978). City Brief 4; see also Owner Brief 38. City Appellants point to two quotations from the Opinion, but neither helps them. First:

> [The Law's] primary method of achieving its goals is not by acquisition of historic properties, but rather by involving public entities in land-use decisions affecting these properties, and providing services, standards, controls and incentives that will encourage preservation by private owners and users.

That sentence does not remotely suggest a bartering system. It describes the general philosophy behind the Landmarks Law–to shift the primary function of historic preservation from the public to private owners. The public sector does not bow out: it provides "services" (in the form of advice), and "incentives" (prospective higher real estate values due to designation, and transfer of development rights via Zoning Resolution § 74-79), and possible solutions where strict application of the Law would result in excessive hardship (see Admin. Code § 25-309). And it provides "standards" and "controls," not permission to wheedle or barter. The Law has teeth.

The second quotation is of only two words, "maximum latitude," whose meaning the City mangles by cutting them from their context. The City's argument is that according to Penn Central the Law is a grand bargain in which the City imposes a duty of preservation on private parties and, in exchange, assures the private parties a reasonable return and "'maximum latitude' to use and adapt their properties." City Brief 46-47 (purporting to paraphrase Penn Central, 438 U.S. at 110). The actual text from Penn Central severely limits "maximum latitude" with a qualifying phrase that the City neglects to quote: the most owners get is "maximum latitude to use their parcels *for purposes not inconsistent with the preservation goals*." Id. (emphasis added to highlight the phrase omitted by the

City). The "preservation goals" are obviously those set by the Commission within the broad framework of Admin. Code § 25-301.

The Supreme Court found no taking, applying a relevant-factors test that replaced the "too far" test of Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922). The Penn Central test prevails to this day. Among the many factors the Court considered was that the Commission had rejected COA applications for approval of different towers to be built over the Terminal (53 to 55 additional stories). Interestingly, the Penn Central opinion indicates that the Commission's COA proceedings closely followed the Law by rejecting the applications as made, while noting that the applicants were welcome to submit alternative applications; i.e., the Commission assessed the proposals, applied the Law, and denied them–it did not negotiate.

Our critique of the bazaar approach is not intended to preclude a change of use of an interior landmark. Rather, we criticize a regulatory philosophy that says that the property owner's desires govern the result, and that the Commission is limited to negotiating for the best it can get. That sets up a regulatory regime without standards–one that is bound to fail both in terms of its effectiveness and its legality. A far sounder approach is expressed by the well-reasoned Allison case discussed at pages 9-11 above.

We would like to believe that this is simply an ill-considered litigation position and does not reflect the true thinking of the Commission. Regardless, we submit that the City's position deserves emphatic rejection.

POINT II

THE COMMISSION HAS THE AUTHORITY TO DISCHARGE ALL DUTIES AT ISSUE HERE; IT HAS FAILED TO DO SO

A. The Commission's Failure to Require Continued Public Access to The Clocktower Suite Is Arbitrary, Capricious and Contrary to Law.

The Courts below correctly held that the public has a continuing right of access, conferred by the definition of "interior landmark" at Section 25-302(m): "An interior, or part thereof, ...which is customarily open or accessible to the public, or to which the public is customarily invited, ... and which has been designated as an interior landmark" by the Commission.

Appellants disagree. They rest on what they think is a grammatical mandate: the statute requires that the site "*is* customarily open" to the public. That, according to Appellants, fulfills a jurisdictional requirement, so that, after

designation, it *was* open but need not continue to be. Owner Brief 30-33; City Brief 28-29.[7]

That reading falls short for three reasons. First, the sentence as written does not readily sustain that construction. It starts with the requirement that the site "*is* customarily open" using a verb that is statutorily defined as including the future as well as the present. Gen. Const'n L. § 48. The definition continues, "and which *has been* designated as an interior landmark." Thus, the definition is speaking as of any time after the past event of designation, including right now. If the intention were that the openness to the public served only as a jurisdictional test at the moment of designation, and no other purpose, the definition would read, "An interior, or part thereof ...which *was* ... customarily open or accessible to the public, or to which the public *was* ... customarily invited *at the time of designation"* and has been designated.

Second, the broad use of "is" fulfills the clear legislative intent. Section 25-301 clearly indicates that the Council intended that all landmarks of every kind be visible to the public on a continuing basis. If landmarks are not visibly accessible to the public, it would be difficult to impossible for them to "(d) foster civic pride in the beauty and noble accomplishments of the past; (e) protect

[7] The Council might have used "was at the time of designation, has continued to be since then, and is now" open to the public, or some equally cumbersome phrase. But statutory construction is not a tool for punishing the legislature (and thereby the public) for grammatical negligence.

and enhance the city's attractions to tourists and visitors . . . and (g) promote the use of...interior...scenic landmarks for the education, pleasure and welfare of the people of the city." Admin. Code § 25-301(b). In the case of interior landmarks, lack of physical access typically precludes effective enjoyment of substantially *all* elements of the interior landmark. To construe this Law as Appellants propose, contrary to the legislature's express intent, would imply incompetence, perversity, or worse on the part of the legislature. That is not permissible in statutory interpretation. See pp. 6-8 supra.

Third, the Law, in fact does explicitly empower the Commission to provide for continued public "use" of (read, "access to") interior landmarks. The Council did that by giving the Commission authority to "apply or impose, with respect to the...use of such improvement...regulations, limitations, determinations or conditions which are more restrictive than those prescribed or made by or pursuant to other provisions of law applicable to such...use." Admin. Code § 25-304(b).[8] See, e.g., Allison, 35 Misc. 3d at 520-21 (questioning whether the Commission was required to permit change of use that would lead to destruction of important features of landmarked property). As in Allison, the Commission here could restrict the landmark (i.e., exterior, and designated interior portions,

[8] The Owner misconstrues this as a meaningless concession allowing the Commission nothing more than to permit uses already permitted by a statute other than the Law. Owner Brief 27 n.7. That interpretation is not compatible with the very clear statutory wording quoted in the text above.

including the Clocktower) to uses compatible with public access to the interior landmark spaces even though the Zoning Resolution may permit other uses.[9]

Despite the architect's opinion that public access is feasible (see pp. 19-20 supra), the Owner argues that there is no accessway within the interior landmark all the way from the street to the Clocktower. Owner Brief 7-8. This observation is somewhat exaggerated. Although the Owner implies that the interior landmark has no connectivity above the fourth floor, the interior landmark when designated included all stairs and passages from the Leonard Street main entrance to the thirteenth floor, and over designated exterior landmark space from the stairs to the Clocktower. See R 30 and depiction of entire interior landmark in Designation Report 16-17; and maps at id. pp. 29-31. Access, as the architect said, was feasible. The Commission arbitrarily refused to require it.

In addition, the Commission is not limited to an access route entirely within interior-landmarked property. The Commission did in fact approve a new entrance on Broadway with new adjacent stairs and elevators going to the Clocktower. Pet-Resp Br. 7. It just failed to require that the path be open to guide-supervised visitors to the Clocktower. The Commission's obligation was to

[9] The zoning is C6-4A. (www1.nyc.gov/assets/planning/download/pdf/zoning/zoning-maps/map12a.pdf), which allows both residential and commercial use. ZR §§ 32-00, 32-15, 32-17, 32-18, 32-19 and 32-21. Notably, ZR §32-15 specifically allows commercial gallery use, an actual use of part of the Clocktower before sale to the present owner.

explore all possible means of preserving access to the Clocktower, not to capitulate.[10] Allison, 35 Misc. 3d at 507 (discussed supra pp. 9-11).

B. The Commission's Failure to Protect the Historical Mechanical Integrity of the Clock Is Arbitrary, Capricious and Contrary to Law.

The Designation Report landmarks the space in which all aspects of the clock reside including "the clock machinery." "Clock" in the Report's usage, refers to all parts of the clock including its "faces," its "bell," the bell's "hammer," "weights" that power all moving parts, and the "pendulum." The designation covers the Clocktower rooms and "fixtures and interior components of these spaces, including but not limited to...doors, stair railings, light fixtures, clock machinery, and attached decorative elements." Designation Report 13 and 16.

A future with weights hanging, lifeless, as from a gallows, hardly communicates the image and sound of slow measured percussive descent of weights, "Ta-ki-ta-TAT'ing"[11] with cardiac precision, giving impulse to the pendulum, and driving the mechanism to move the hands.

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[10] Under Section 25-307(c), the Commission has authority to address any work on the "landmark site" in order to ensure that such work does not adversely affect a portion of the site designated as a landmark. In this instance, the entire lot is the "landmark site." Designation Report 17.

[11] David Dunlap at https://www.nytimes.com/2014/11/13/nyregion/a-landmark-tower-clock-will-stay-but-its-ticktock-could-be-silenced.html.

Surely, these organs and sinews must tick and throb if their presence is, as mandated by Section 25-301(b), effectively to "(g) promote ... the education, pleasure and welfare of the people." The Council clearly intended an extremely broad definition of what marvels should be preserved. And, when the Commission designated the entirety of the historic clock, neither the Commission, nor the Council, nor the Mayor (the latter two having approval and veto power, Section 25-303(g) and (h)), intended that it be reduced to nothing more than faces kept nominally alive by an electric pacemaker. Such mistreatment would directly violate the Commission's statutory obligation under Section 25-307(e) to protect the "special character or special historical or aesthetic interest or value" of landmark features, not to amputate alive and healthy essential organs that are merely inconvenient to their owner.

Appellants rest on triviality in asserting that, even though the clock and its clockworks are designated and featured components of the landmark (Designation Report 16), they can only be protected by a totally ineffective charade because they are not "architectural features" (Owner Brief 45), and the Law focuses on "style,...not the features' operation" (City Brief 36). That requires an extraordinarily narrow reading of the extraordinarily broad definition of "interior architectural features," being "The architectural style, design, general arrangement and *components of an interior*, *including, but not limited to*, the kind, color and

texture of the building material and the type and style of all windows, doors, lights, signs and *other fixtures appurtenant to such interior*." Admin. Code § 25-302(l), emphasis added). The clock, in its entirety, being a feature specifically identified in the Designation Report, must be deemed a "fixture appurtenant to" and a "component of" the clocktower.

The artificiality of Appellants' distinction between "style" and "operation" is well illustrated by several of the Commission's other almost exclusively mechanically-oriented designations. These include such engineering feats as the Cyclone roller coaster,[12] the Wonder Wheel,[13] and the Parachute Jump,[14] all at Coney Island, and the Carroll Street Bridge spanning the Gowanus Canal.[15] All have critical moving parts, and even consist primarily of moving parts. All are built to work. None bear significant amounts of surface decoration. Yet, unquestionably, the Commission has deemed them "architecture" with movable protectable architectural features. The Commission may talk of a narrow

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[12] http://s-media.nyc.gov/agencies/lpc/lp/1636.pdf

[13] http://s-media.nyc.gov/agencies/lpc/lp/1708.pdf

[14] http://s-media.nyc.gov/agencies/lpc/lp/1638.pdf. The designation report notes that, in the late 19th century, "Coney Island developed into 'America's first and probably still most symbolic commitment to mechanized leisure.'" Id. p. 2. That one or more of the Coney Island rides may not currently operate does not detract from the fact that they were designated precisely because of their operation. Granted, the Commission may, for good reason, allow termination of the mechanical use, but it is not, as Appellants claim, legally barred from addressing the issue of preserving the essence of what it so thoughtfully designated.

[15] http://s-media.nyc.gov/agencies/lpc/lp/1553.pdf

definition of "architecture," especially if it suits particular litigation aims, but its practice is consistent with the highest standards of dictionary definition: Architecture is, quite simply, "1. The art or science of building or constructing edifices of any kind for human use." O.E.D. 1933.

The Commission has often designated operating elements as part of interior landmarks. For example, the designated elements of the interior of the Manufacturers Trust Company "glass house" building at Fifth Avenue and 43rd Street in Manhattan include the two side-by-side escalators paralleling Fifth Avenue and visible from Fifth Avenue. The designation report lauds the escalators: "Rising on a diagonal in open space, without any apparent means of support, passing pedestrians could easily observe the constant...flow of customers, while inside, riders could enjoy changing views of the interiors."[16] The motion is part of the designation.

The central element of the Rainbow Room in Rockefeller Center is the rotating dance floor with its wooden parquet floor. It gives dancers constantly changing views across the three to five minute stretch of each full rotation. It entertains onlookers with a vision of the social whirl of upper crust New York society.[17] Again, the motion is part of the designation.

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[16] http://s-media.nyc.gov/agencies/lpc/lp/2467.pdf, p. 6.
[17] http://s-media.nyc.gov/agencies/lpc/lp/2505.pdf

For the Gage & Tollner Restaurant in downtown Brooklyn, the Commission's designation report explicitly states just how important continuation of the use of gas as part of the lighting is to the preservation effort and effect. It finds that "the handsome interior...successfully maintains its original 'Gay Nineties' atmosphere, ... that by night it is still lighted by gas as well as by electricity, and that here a carefully preserved past contributes to the full enjoyment of the present, maintaining the traditions which have enhanced the life of Brooklyn and New York City at this location since 1889."[18]

Perhaps most important from a legal point of view is that any newly minted definition that denies that the clock is a fully protected architectural feature flies in the face of its designation, in 1989, with all its elements, as an architectural feature worthy of preservation in its entirety. Designation Report 13, 16. That action is binding precedent. The Commission cannot later reconstrue the meaning of terms to deny that protection without a reasoned explanation for doing so. Charles A. Field Delivery Service, Inc., 66 N.Y.2d 516 (1985). A bald assertion of illegality is not a reasoned explanation, and the Commission has provided no other, reasoned or not.

The blanket contention that the operative provisions of the Law do not allow consideration of mechanical issues (Owner Brief 44-56) defies logic as well

[18] http://s-media.nyc.gov/agencies/lpc/lp/0885.pdf, p. 3

as precedent. Since the structure is legally designated as a landmark, the Commission has the power and duty to require its maintenance and repair and to ensure that any proposed alterations are "appropriate for and consistent with the effectuation of the purposes of" the Law. Admin. Code §§ 25-311, 25-307(a). And, if the designation includes mechanical elements that are features of the designated structure, then the Commission has like powers to protect the integrity of those special features.

The Owner obfuscates the issue by pointing to the alleged past disinterest of the Commission in how some particular (but unidentified) doors or windows operate. Owner Brief 50. Perhaps the operation of some doors and windows is legitimately a matter of indifference. But that is not this case. Here the designation report expressed keen interest in the workings of this clock. The Commission has a continuing obligation to preserve this landmark in all the mechanical glory that inspired its designation.

CONCLUSION

The courts below correctly ruled that the Commission erred by failing to protect the clock's operation and access of the public to the clocktower.

The issue of incorrect legal advice goes beyond the right of Commissioners to be properly advised and not to be misled to vote against their will. The ones who truly suffer from the wrong advice are absent from this case. They are the public. It is the public that the Law seeks to protect.

The City's "pragmatic" rejection of the rule of law is a danger to the public interest and strongly deserves this Court's categorical rejection.

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Respectfully submitted,

Michael S. Gruen

Attorney for Amici
249 West 34th Street, #402
New York, NY 10001
(212) 643-7050
mgruen@michaelgruen.net

Of counsel:

John R. Low-Beer

WORD COUNT STATEMENT

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Michael S. Gruen