

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

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In the Matter of an Article 78 Proceeding

CITIZENS EMERGENCY COMMITTEE  
TO PRESERVE PRESERVATION,

Index No. 103373-08

Petitioner,

-against-

ROBERT B. TIERNEY, Chair of the New York City  
Landmarks Preservation Commission, and  
KATE DALY, Executive Director of the New York City  
Landmarks Preservation Commission,

Respondents.

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**PETITIONERS' MEMORANDUM OF LAW**  
**IN SUPPORT OF PETITION FOR MANDAMUS AND PROHIBITION**

**PRELIMINARY STATEMENT**

This Memorandum is submitted in support of Petitioner's Verified Petition dated  
March 4, 2008.

**WHY PETITION SHOULD BE GRANTED**

This Petition is based on three grounds for relief:

1. The Chairman of the NYC Landmark Preservation Commission has usurped  
the power of the full Commission as envisaged by the original NYC Landmark  
Preservation Act. The participation of the full Commission in the proposal,  
consideration, application of criteria, discussion of criteria and determination of

designation is the legal obligation of the full Commission under law. Therefore the Chairman acting as sole advancer of properties as candidates for landmark designation is a minister “proceeding, and about to proceed without or in excess of his jurisdiction,” and is therefore subject to an Article 78 in the nature of Prohibition.

2. The Respondents have unreasonably delayed the submission of landmark designation proposals to the full Commission for its consideration.

3. The NYC Landmark Preservation Commission has failed to establish, enunciate, publish, and consistently apply landmark designation criteria and standards that are clear, comprehensive and fairly applied in a transparent and public fashion. Under the police power exercised by a landmark preservation commission and case law guiding this power, an administrative agency may not participate in a process that gives the appearance that certain properties are marked for special treatment in designation with no consideration for like treatment of properties with similar characteristics. A fairly applied designation process, based on clear and comprehensive standards is constitutional. A designation process where there is no clear and comprehensive standards published, applied and supported by a consistent and fair rationale, is not. Landmark designation standards must be clear, comprehensive and fairly applied. As currently constituted and executed, the standards and procedures of the Landmarks Preservation Commission fail this test and have “failed to perform a duty enjoined upon them by law.” Therefore the Chairman and Executive Director of the NYC Landmark Preservation Commission are subject to an Article 78 in the nature of Mandamus to Compel them to perform their duty to insure that the Landmarks Preservation Commission applies landmark designation standards that are clear, comprehensive and

fairly applied in a transparent and public fashion consistent with law, including the Constitutions of the state of New York and of the United States.

## ARGUMENT

### POINT I

#### **PETITIONERS HAVE STANDING TO PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION TO COMPEL RESPONDENTS TO PERFORM THEIR MINISTERIAL DUTIES AND TO COMPLY WITH CONSTITUTIONAL DUE PROCESS**

Petitioner has proper standing to bring this Petition on behalf of its members as taxpayers and members of the public.

There is no requirement that a citizen must prove injury in order to obtain a writ of mandamus to require public officials to perform their statutory duties.

Winter v. Board of Assessors of Nassau County, 311 N.Y.S.2d 684, 689 (S.Ct. Nassau County, 1969):

Any citizen may present his petition for the enforcement of mandatory duties imposed upon officials, Carmody-Wait 2<sup>nd</sup> 50 § 145.255; CHOB Associates Inc. v. Board of Assessors, 45 Misc.2d 184, 257 N.Y.S.2d 31, aff'd 22 A.D.2d 1015, 256 N.Y.S.2d 550, aff'd 16 N.Y.2d 779, 262 N.Y.S.2d 501, 209 N.E.2d 820.

See also Kelly v. Van Wyck, Mayor, decided by the Supreme Court, Kings County, in 1901 (35 Misc. 210, 71 N.Y.Supp. 814):

The right of the petitioner as an elector of the city to a writ of mandamus to require the official duty of appointment to be performed is also beyond dispute. People v. Daley, 37 Hun. 461; People v. Halsey, 37 N.Y. 344; People v. Common Council of City of Brooklyn, 77 N.Y. 503, 33 Am.Rep. 659; People v. Palmer, 154 N.Y. 133, 47 N.E. 1084; People v. Cummings, 72 N.Y. 433. The electors have the right to have these offices filled as required by law.

Kelly v. Van Wyck, Mayor, Supreme Court, Kings County, 1901 (35 Misc. 210, 71 N.Y.Supp. 814)

Petitioner's members are residents and taxpayers of the State and City of New York and are public beneficiaries under the Landmark Preservation Act. Respondents' failure to consistently apply clear and comprehensive criteria and standards for the designation of landmarks, and failure to provide rational basis therefore, has violated Petitioners' constitutional rights of access, free speech and due process under the New York State Constitution (Article I, Section 1: "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land,..."; Sec. 8: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press..."; Sec 9.1. "No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof;..."; Sec. 11. "No person shall be denied the equal protection of the laws of this state or any subdivision thereof...") Respondents' conduct has also violated the public's rights of access under the Federal Constitution (First, Fifth and Fourteenth Amendments).

## **POINT II**

### **THE AUTHORIZING STATUTE FOR THE LANDMARK PRESERVATION COMMISSION CONTAINS NO AUTHORITY ALLOWING THE FULL COMMISSION TO DELEGATE DECISIONS ON LANDMARK DESIGNATION TO STAFF, TO A SUBCOMMITTEE, OR TO THE COMMISSION CHAIR**

The full Commission has the sole lawful decision-making authority. The New York City Charter provision establishing the LPC states:

**§ 3020. Landmarks preservation commission.**

1. There shall be a landmarks preservation commission consisting of eleven members. The membership of such commission shall include at least three architects, one historian qualified in the field, one city planner or landscape architect, and one realtor. The membership shall include at least one resident of each of the five boroughs.

(New York City Charter, Ch. 74)

The New York Administrative Code describes the power of the LPC in relation to the designation of individual landmarks as follows:

**§ 25-303 Establishment of landmarks, landmark sites, interior landmarks, scenic landmarks and historic districts.**

a. For the purpose of effecting and furthering the protection, preservation, enhancement, perpetuation and use of landmarks, interior landmarks, scenic landmarks and historic districts, the commission shall have power, after a public hearing:

(1) to designate \*\*\* a list of landmarks which are identified by a description setting forth the general characteristics and location thereof;\*\*\*

The New York City Administrative Code defines the term “Commission” as meaning the full commission, not a subcommittee or single member or staff thereof:

**§ 25-302 Definitions.** As used in this chapter, the following terms shall mean and include:\*\*\*

e. “Commission.” The landmarks preservation commission.

The Code does authorize the LPC to delegate to a single member, or to fewer than the full 11-member Commission, the function of conducting public hearings or conferences, but no such authorization is provided to delegate the Commission’s core landmark designation voting responsibilities, which require action by the full Commission.

§ 25-313 **Public hearings; conferences.**\*\*\*

c. The commission may delegate to any member or members thereof the power to conduct any such public hearing and to hold any conference required to be held under the provisions of sections 25-306 and 25-310 of this chapter.

While the Commission may adopt regulations relating to the Commission's procedures, this does not include relieving the Commission of its statutory responsibilities.

§ 25-319 **Regulations.** The commission may from time to time promulgate, amend and rescind such regulations as it may deem necessary to effectuate the purposes of this chapter, including, but not limited to, regulations:\*\*\*  
(c) relating to the procedures of the commission in carrying out its functions, powers and duties under this chapter, including procedures for the giving of notice by the commission by mail or otherwise, where notice is required by this chapter;\*\*\*

(Emphasis added.)

The logic of restricting designation decisions to the full Commission is self-evident from the make-up of the Commission. Its members represent a range of professional disciplines and geographical interests. The landmark designation function is a matter of public policy at the heart of the Landmarks Preservation Act and also directly affects individual property rights. The independence and full participation of the Commission is crucial to insure fairness, balance and a commitment to the preservation purposes of the law.

Delegation to the Chairman, to a single Commissioner, to staff, or to a subcommittee would narrow the broad perspective built into the Commission's statutory make-up and would also make the delegated personnel vulnerable to outside pressures,

particularly from developers, destroying the whole idea behind having a broad-based body to represent the public interest in preserving the City's heritage.

The reasons for creating a strong independent landmark preservation agency -- one not subject to pressure from the Mayor, wealthy contributors, real estate interests or paid lobbyists -- are well stated in the First Department's discussion of the need for fair and effective landmark preservation laws in the much heralded Grand Central case (Penn Central v. City of New York, 50 A.D.2d 265 at 266-7 (1<sup>st</sup> Dept., 1975)):

Though "fraught with trouble" (*Lutheran Church in Amer. v. City of New York*, 35 NY2d 121, 131, *supra*) the preservation of landmarks in urban areas is of special importance. Great cities have always been havens for educational and cultural activities. New York's rich history is reflective of the great deal of time, money and talent invested in building its own architectural heritage. Structures such as the Brooklyn Bridge, the Metropolitan Museum of Art, the New York Public Library and Grand Central Terminal are important and irreplaceable components of the special uniqueness of New York City. We have already witnessed the demise of the old Metropolitan Opera House (see *Matter of Keystone Assoc. v. Moerdler*, 19 NY2d 78) and the original Pennsylvania Station. Stripped of its remaining historically unique structures, New York City would be indistinguishable from any other large metropolis.

This same importance applies equally to lesser landmark structures that reflect and incorporate the City's neighborhood and architectural diversity, cultural richness, and political history. Each decision whether to preserve or to allow destruction of a proposed landmark requires the thoughtful participation of all Commissioners charged by law with that responsibility. Significantly, the United States Supreme Court expressly relied on the fact that the New York Preservation Act is implemented through action of the entire Commission in its leading decision in Penn Central Transportation v. New York:

The operation of the law can be briefly summarized. The primary responsibility for administering the law is vested in the Landmarks Preservation Commission (Commission), a broad-based 11-member agency[FN8] assisted by a technical staff.

The Commission first performs the function, critical to any landmark preservation effort, of identifying properties and areas that have

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.

§ 2071.0(n); *see* § 207-1.0(h). If the Commission determines, after giving all interested parties an opportunity to be heard, that a building or area satisfies the ordinance's criteria, it will designate a building to be a "landmark," § 207-1.0(n), situated on a particular "landmark site," § 207-1.0(o), or will designate an area to be a "historic district," § 207-1.0(h). After the Commission makes a designation, New York City's Board of Estimate, after considering the relationship of the designated property "to the master plan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved," § 207-2.0(g)(1), may modify or disapprove the designation, and the owner may seek judicial review of the final designation decision. Thus far, 31 historic districts and over 400 individual landmarks have been finally designated, and the process is a continuing one.

Penn Central Transportation Co. v. New York City,  
438 U.S. 104, 110-111 (1978)

Through Respondent's actions inconsistent with the Constitution and the enabling landmark legislation, the operation of the Commission has been radically altered and is now violative of due process by failing to apply clear standards in a consistent fashion and by ceding authority to a single member of the Commission – never envisaged by the legislation, and never recognized by the High Court.

The U.S. Supreme Court noted in footnote 8 to the Penn Central decision that the broad expertise built into the law was an essential aspect of its constitutionality:

The ordinance creating the Commission requires that it include at least three architects, one historian qualified in the field, one city planner or landscape architect, one realtor, and at least one resident of each of the city's five boroughs. N.Y.C. Charter § 534 (1976). In addition to the ordinance's requirements

concerning the composition of the Commission, there is, according to a former chairman, a "prudent tradition" that the Commission include one or two lawyers, preferably with experience in municipal government, and several laymen with no specialized qualifications other than concern for the good of the city. Goldstone, *Aesthetics in Historic Districts*, 36 *Law & Contemp.Prob.* 379, 384-385 (1971).

(Id. FN8 at 110)

The need for full Commission participation in the decision whether to designate a landmark building applies equally to the decision not to designate a building as a landmark. How else can the statutory requirement that a landmark have "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" (NYAC § 25-302n) be consistently maintained? If staff members or a subcommittee, or the Chair alone, can reject proposed landmarks with no input from the full Commission, who will protect the public interest against political pressures, lobbying, bias or just plain ignorance?

### **POINT III**

#### **RESPONDENT TIERNEY'S EXERCISE OF POWER TO BLOCK COMMISSION CONSIDERATION OF LANDMARK DESIGNATION EXCEEDS HIS JURISDICTION AND AUTHORITY AND VIOLATES THE CONSTITUTIONAL RIGHTS OF LANDMARK PROPONENTS AND CITY TAXPAYERS AND CITIZENS**

The present practice of the LPC vests total authority and control in the Commission Chair alone to decide whether the Commission will be permitted to consider a proposed landmark. As noted in the Petition, this absolute power is candidly stated in the LPC's description of its operating procedure on its official internet website, [www.nyc.gov/html/lpc](http://www.nyc.gov/html/lpc) :

Ultimately the decision whether to bring the property forward to the full commission for review is made by the Chair.

(Emphasis added.) (Exhibit F)

Placing absolute control over which buildings will or will not be considered by the Commission in the hands of a single Commissioner violates the wording, spirit and purpose of the Landmark Preservation statute and is unconstitutional on First, Fifth and Fourteenth Amendment grounds, as well as equivalent provisions of the New York State Constitution.

The RFE procedure for requesting commission consideration of a proposed landmark building or district is described on the FAQs page of the LPC website:

What is the LPC's procedure for considering and designating potential landmarks?

1. Requests for Evaluation.

The LPC receives a steady stream of suggestions for designation from interested citizens, property owners, community groups, public officials and others.

Landmarks Commissioners and staff also may identify potential buildings and areas of interest. The Commission asks members of the public who propose properties for potential designation to fill out a Request for Evaluation (RFE) form. This form requests the individual to provide as much information about the property as possible, including photographs and/or slides.

2. Evaluation.

Once the LPC receives a request, an RFE Committee, consisting of the Chairman, the Executive Director, the Chief of Staff, the Director of Research, and other agency staff members, review the materials submitted and discuss whether the property meets the criteria for designation. The Director of Research then sends a letter to the person who submitted the request, informing him or her of the committee's determination.

3. Calendaring and Commission Review.

If the RFE Committee determines that a proposed historic property merits further consideration a photograph, statement of significance and the committee's recommendation is sent to each individual commissioner for their comment.

Ultimately the decision whether to bring the property forward to the full Commission for review is made by the Chair.

The full Commission reviews such potential landmarks at public meetings. At these meetings the Commission can vote to schedule a public hearing on the properties they believe merit further review.

For structures being considered as individual landmarks, the LPC staff usually contacts the owner after the Chair decides to send the item to the full Commission to discuss the meaning of landmark designation and the designation process. One or more meetings and/or site visits are scheduled with the owner or owner's representative to discuss potential regulatory issues.

#### 4. Public Hearing.

The LPC holds a public hearing for each property that the full Commission has voted to consider for designation. Notice of the hearing is published in the city Record and sent to the property owner, the City Planning Commission, and the affected community boards and elected officials.

At the hearing a member of the Research Department makes a brief presentation about the property under consideration. The Chairman then asks whether the owner or a representative of the owner would like to speak. All other interested parties are then encouraged to present their opinions on the proposed designation. Interested parties can also submit written statements about the proposed designation at the hearing or after the hearing, up to the time that the Commission votes on the proposed designation.

#### 5. Discussion and Designation Report.

After the hearing is closed, the Commissioners discuss the proposed designation at one or more public hearings. While the Commissioners are considering the property, the Research Department writes a detailed designation report, describing the potential landmark's architectural, historical, and/or cultural significance. A draft copy is sent to the owner for review and discussion.

#### 6. Commission Vote.

The Commission then votes on the designation at a public meeting. Six votes are needed to approve or deny a designation. By law, landmark designation is effective upon the Commission's vote, and all rules and regulations of the Landmarks Law are applicable. Within ten days, the LPC files copies of the final designation report with the City Council, the City Planning Commission, and other city agencies. The LPC also sends a Notice of Designation to the property owner and registers the Notice at the City Register's or County Clerk's Office.\*\*\*

(Emphasis added.) (Exhibit F)

These procedures make clear that the Chair has usurped absolute control of the fundamental decision whether a proposed landmark building will ever be considered by the full Commission. This is in plain violation of the wording, intent and purpose of the landmark statute, along with citizens' constitutional rights, and the exercise of this power must be voided in this case and prohibited in future cases.

#### **POINT IV**

#### **RESPONDENTS' DICTATORIAL CONTROL OVER RFE AND LANDMARK PROPOSAL CONSIDERATION CONSTITUTES A DEPRIVATION OF PETITIONER'S CONSTITUTIONAL RIGHT TO HAVE ANY EXERCISE OF POLICE POWERS BASED ON A CONSISTENT RATIONAL BASIS**

#### **First and Fourteenth Amendment Right of Access to Government Agencies**

The United States Supreme Court has said that the First Amendment right to petition the government for redress of grievances is "among the most precious of the liberties safeguarded by the Bill of Rights." United Mine Workers v. Illinois State Bar Association, 389 U.S. 217, 222 (1967). See also Thomas v. Collins, 323 U.S. 516, 530 (1944):

It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peacefully to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, cf. DeJonge v. Oregon, 299 U.S. 353, 364, and therefore are united in the First Article's assurance. CF. 1 Annals of Congress 759-760.

The right of access to administrative agencies is equal to the right of access to the courts, and Respondents have no more right to decide which RFEs will be considered by the Landmarks Preservation Commission than a Clerk or Chief Judge has to decide which cases will or will not be considered by a Court.

### **Deprivation of Citizen Rights Without Due Process of Law**

One of the burdens of living in the City of New York is direct and indirect liability for local sales, property and income taxes. The level and burden of such taxes on Petitioners' members and other city residents and taxpayers is determined in part by tax revenues received from non-residents visiting the city as tourists. In his 2008 "State of the City" message to the City Council, New York City Mayor Bloomberg acknowledged that tourist tax revenues are derived in part from the City's landmarks:

Last year, NYC & Company ramped up its global reach by launching the 'This is New York City' campaign and opening offices in places like Sweden, Russia, China, and Brazil. In 2008, we'll add new locations in India and Australia to keep us moving closer to our goal of attracting 50 million annual visitors by 2015.

There is no doubt what draws so many tourists to our city: arts and culture. No matter what your pleasure – from MOMA to Mamma Mia, from Landmarks to sculpture parks, you can find it here. This is New York City – the most diverse arts and entertainment community in the world.

(Emphasis added.)

By allowing potential city landmarks to be destroyed through delay, refusal and failure to submit proposed landmark designations to the full Commission as required by law, Respondents have deprived and are depriving City taxpayers of their property interest in reduced taxes without due process of law.

### **Express Rational Basis Required**

The United States Supreme Court has held that a local landmark preservation law is a proper exercise of state police power under the Necessary and Proper clause of the U.S. Constitution. But exercise of this power requires, and must meet, a rational basis

test. Landmark preservation laws pass this test because the stated purpose has met the constitutional reasoning requirement that preservation benefits the public weal.

However, where state police power is exercised under law, including power exercised by a landmark preservation commission to designate or not designate a property for preservation, an administrative agency may not engage in a process that gives the appearance that certain properties are marked for special treatment with no consideration for like treatment of properties with similar characteristics such as age, use and location. A fairly applied designation process, based on clear and comprehensive standards is constitutional and compliant with a rational basis requirement. A designation process where no clear and comprehensive criteria and standards are published, applied and supported by rationale is not. Landmark designation standards must be clear, comprehensive and fairly applied. As currently executed, the standards and procedures of the Landmarks Preservation Commission fail this test, and Respondents have therefore “failed to perform a duty enjoined upon them by law.” The present designation criteria are entirely subjective and subject to the whim of the staff members and the Chair. Respondents are properly subject to an Article 78 Mandamus to compel the Commission to apply landmark designation standards that are clear, comprehensive and fairly applied in a transparent and public fashion consistent with law, including the Constitutions of the State of New York and of the United States.

The Landmark Preservation Commission has failed to apply a designation process using clear and comprehensive standards. Instead, the Landmark Preservation Commission has allowed the Chair and staff to use a designation process in which no clear and comprehensive standards are published, applied or supported by rationale. In

the exercise of state police powers for public benefit, the absence of a coherent rationale applying to each and every property brought before the Commission is a violation of constitutional due process. See Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926)

Landmark designation standards must be clear, comprehensive and fairly applied. The Court should therefore order injunctive relief to prevent such unconstitutional and rationally-unsupported determinations.

### **CONCLUSION**

WHEREFORE, Petitioner requests the Court to issue a Writ of Mandamus and Prohibition:

(a) ordering ROBERT B. TIERNEY and KATE DALY, to cease the usurpation of powers granted by the Landmark Preservation Act to the full Landmark Preservation Commission;

(b) ordering Respondents to enunciate, publish, and consistently apply landmark designation criteria and standards that are clear, comprehensive and fairly applied in a transparent and public fashion consistent with the Landmark Preservation Act, The Constitution of the State of New York, and the Federal Constitution.

(c) ordering Respondents to comply with constitutional provisions of due process, including not only by administering the landmark law in a transparent process complying with the clear, comprehensive and fairly applied legal standards for landmark designation, but to apply the rational basis standard required for the constitutional exercise of state police powers under landmark preservation legislation for all properties properly submitted to the Commission's consideration, including not only properties that

are designated, but also those that are properly submitted to the Commission for consideration and are not designated;

(d) ordering and directing Respondents to present the properties listed in the Petition to the full Commission for its consideration without further delay;

(e) ordering and directing Respondents and their successors in office in the future to promptly present to the full Commission for consideration any property proposed for landmark designation for which a completed RFE has been received, and in no event to do so later than ninety days after receipt of the completed RFE;

(f) ordering and directing Respondents to make public the Commission's "criteria for designation," referred to on its website;

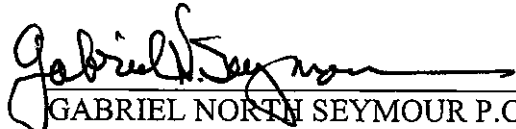
(g) awarding to Petitioners their costs and attorneys fees; and

(h) granting such other and further relief as the Court may deem appropriate.

Respectfully submitted,



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