

## NEW YORK CITY'S LANDMARKS LAW AND THE RESCISSION PROCESS

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“No one is questioning the need for the university’s law school to expand, but surely it can be worked out in a way that does not destroy yet another piece of this fast-vanishing area. It is hard for me to believe that a great institution like N.Y.U., which had the foresight and good taste to expel me many years ago, would be insensitive to this situation.”

—Woody Allen<sup>1</sup>

### INTRODUCTION

Decisions over whether to accord a New York City building or site landmark status are frequently controversial.<sup>2</sup> Such decisions implicate divergent and often diametrically opposed views of the role the city’s government should play in economic development and in protecting cultural sites, as well as the role the democratic process should play in these decisions. Different views on the aesthetic or historical value of proposed sites often lead to protracted and often highly visible disputes waged in the press, in the political arena, and in the courts.

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1. Woody Allen, Letter to the Editor, N.Y. TIMES, July 27, 2000, <http://www.nytimes.com/2000/07/27/opinion/1-a-city-so-lovely-through-woody-allen-s-lens-389765.html> (regarding proposed construction of Furman Hall at New York University School of Law).

2. See, e.g., Nicolai Ouroussoff, *New York City, Tear Down These Walls*, N.Y. TIMES, Sept. 28, 2008, <http://www.nytimes.com/2008/09/28/arts/design/28ouro.html> (describing controversy over 2 Columbus Circle); Nicolai Ouroussoff, *In Village, a Proposal That Erases History*, N.Y. TIMES, Apr. 1, 2008, <http://www.nytimes.com/2008/04/01/arts/design/01pres.html> (discussing proposal to demolish O’Toole building); Witold Rybczynski, *Goodbye, 2 Columbus Circle*, SLATE, Jan. 14, 2009, <http://www.slate.com/id/2208529> (criticizing architectural changes to 2 Columbus Circle); Julia Vitullo-Martin, Op-Ed, *Has Landmarking in New York Gone Too Far?*, N.Y. POST, Apr. 25, 2010, [http://www.nypost.com/p/news/opinion/opedcolumnists/has\\_landmarking\\_in\\_new\\_york\\_gone\\_SzbdqcXFtBsoZx2F7IHSLN/3](http://www.nypost.com/p/news/opinion/opedcolumnists/has_landmarking_in_new_york_gone_SzbdqcXFtBsoZx2F7IHSLN/3) (discussing downside of landmarking).

New York City's Landmarks Preservation and Historic Districts Law (the Landmarks Law) was enacted in 1965.<sup>3</sup> As of 2008, New York City's Landmark Preservation Commission (LPC) had designated more than 1400 landmarks, including 1194 exterior landmarks<sup>4</sup> and 106 historic districts,<sup>5</sup> which include around 25,000 buildings.<sup>6</sup> In 2009, the LPC designated 40 landmarks and historic districts, twice the LPC's targeted number.<sup>7</sup> The sheer number of landmarks and the staggering amount of money at stake<sup>8</sup> in landmark disputes raise the question of how best to revisit landmark designations.

The Landmarks Law requires that designated sites be at least thirty years old.<sup>9</sup> This was meant to ensure that there had been time for a consensus to emerge that designated sites had sufficient historical or aesthetic merit.<sup>10</sup> Today, the Landmarks Law is over forty

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3. N.Y.C. ADMIN. CODE § 25-301 (1992); see also Cindy Moy, Note, *Reformulating the New York City Landmarks Preservation Law's Financial Hardship Provision: Preserving the Big Apple*, 14 CARDOZO ARTS & ENT. L.J. 447, 479 (1996); James Baron, *Celebrating 45 Years of Preserving New York*, N.Y. TIMES CITY ROOM BLOG (Apr. 19, 2010, 6:15 PM), <http://cityroom.blogs.nytimes.com/2010/04/19/celebrating-45-years-of-preserving-new-york/>.

4. An exterior landmark is a building or object designated as a landmark. An interior landmark is an interior space, which must be commonly accessible to the public. A scenic landmark is a landscape or group of features, such as Central Park, while a historic district is an area representative of a style of architecture prevalent in a particular historical period. N.Y.C. ADMIN. § 25-302.

5. FURMAN CENTER FOR REAL ESTATE AND PUBLIC POLICY, STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS 26 (2008), available at [http://furmancenter.org/files/sotc/State\\_of\\_the\\_City\\_2008.pdf](http://furmancenter.org/files/sotc/State_of_the_City_2008.pdf) [hereinafter FURMAN CENTER REPORT]. The exact breakdown was 1194 exterior landmarks, 112 interior landmarks, 10 scenic landmarks, and 106 historic districts. *Id.*

6. Edward L. Glaeser, *Preservation Follies: Excessive Landmarking Threatens to Make Manhattan a Refuge for the Rich*, CITY JOURNAL, Spring 2010, available at <http://www.city-journal.org/printable.php?id=6091>.

7. CITY OF NEW YORK, MAYOR'S MANAGEMENT REPORT 108 (Sept. 2009), available at [http://www.nyc.gov/html/ops/downloads/pdf/2009\\_mmr/0909\\_mmr.pdf](http://www.nyc.gov/html/ops/downloads/pdf/2009_mmr/0909_mmr.pdf) [hereinafter 2009 MAYOR'S REPORT].

8. See, e.g., Elias Wolfberg, *Ninth Avenue Noir*, N.Y. TIMES, Jan. 20, 2002, <http://www.nytimes.com/2002/01/20/nyregion/ninth-avenue-noir.html> (stating that buyer willing to spend between forty-five and fifty-five million dollars would be needed to refurbish The Windermere); see also Janet Lorin, *New York University Challenged on 40% Expansion Plan*, BLOOMBERG BUSINESSWEEK, Apr. 14, 2010, <http://www.businessweek.com/news/2010-04-14/new-york-university-challenged-on-four-fronts-of-40-expansion.html>.

9. ADMIN. § 25-302(m)-(n).

10. See Thomas W. Ennis, *Landmarks Bill Signed by Mayor: Wagner Approves It Despite Protests of Realty Men*, N.Y. TIMES, Apr. 20, 1965, at 28. The thirty-year provision was not in the original law but was added during the City Council debates on

five years old.<sup>11</sup> Decisions made in 1967 may no longer reflect the current consensus among historians or cultural critics, or circumstances surrounding the landmark may have changed so dramatically as to make the landmark designation deleterious to the City at large. Yet short of near-total takings under the regulatory takings doctrine, it is virtually impossible to de-designate a building's landmark status. This Note will argue that it should be easier for owners to obtain de-designation of their property when it becomes an "albatross landmark,"<sup>12</sup> a landmark whose value to the City is significantly outweighed by the potential uses of the site.

While there is a process for rescission of a landmark designation,<sup>13</sup> it is seldom used.<sup>14</sup> Owners of landmarked property can also apply for certificates of appropriateness,<sup>15</sup> certificates of no-effect,<sup>16</sup> and certificates of insufficient return.<sup>17</sup> But these provisions either offer only limited relief for property owners or require the LPC to analyze claims based on concerns well outside of their administrative competence.<sup>18</sup> In response to this, two judicially created doctrines have evolved: the "hardship exception" for nonprofit organizations and the "regulatory takings doctrine" for commercial operations.<sup>19</sup> But these doctrines create their own problems. Both provide incentives for owners of landmarked properties to take sub-optimal care of the properties or their businesses.<sup>20</sup> Because of the lack of any real possibility of rescission under the current regime, disputes center on the regulatory takings doctrine, which is not well suited to address whether maintaining a landmark designation is

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the legislation. Thomas W. Ennis, *Landmarks Bill Goes to Council: Protective Zone Is Cut but Architectural Rules Stay*, N.Y. TIMES, Mar. 24, 1965, at 50.

11. Barron, *supra* note 3.

12. This phrase is used here to refer to any landmark that creates a significant encumbrance or burden to the city. See OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining "albatross" as a "source or mark of misfortune, guilt, etc., from which one cannot (easily) be free; a burden or encumbrance."). The point of this Note is not to make substantive judgments about any existing landmarks, but instead to articulate standards by which the LPC could judge landmarks in the future.

13. ADMIN. § 25-303(h)(1). This provision applies to all decisions of the LPC and is more commonly used to rescind orders permitting alterations to landmarks.

14. *Infra* Part I.E.

15. ADMIN. § 25-307.

16. *Id.* § 25-306.

17. *Id.* § 25-309.

18. *Infra* Part II.D.

19. *Infra* Parts II.B–C. The regulatory takings doctrine does not, strictly speaking, apply only to commercial owners, but this is the relevant distinction for the purposes of this Note.

20. *Infra* Part II.D.

desirable. The better question is whether the landmark status of a building should be maintained based on a balancing of historical worth against costs associated with the landmark, and the current process for rescission does not substantively engage this question.

Decisions to rescind are rare. In addition, few claims are made under the reasonable returns standard, the regulatory takings doctrine, and either the statutory or judicial hardship exceptions. Given the history of New York City's preservationist efforts,<sup>21</sup> this may be desirable. But in cases where landmark status no longer serves the needs or interests of New York City, the status quo creates significant problems: it allows demolition by neglect, creates incentive structures that may cause needless loss, and leads to heavily adversarial disputes between developers and preservationists.

This Note will argue that the Landmarks Law's existing rescission provision should be modified and used more frequently. The current statutory provision is inadequate because it fails to provide clear standards to be used by the LPC in evaluating whether rescission is merited. In addition, the mechanisms used in lieu of rescission do not address the proper issues. The Landmarks Law should be changed to allow for rescission when the party seeking rescission can demonstrate that there has been a change in the circumstances relevant to the landmark, the particular landmark itself no longer adds significant value to the general landmark scheme, or the costs of maintaining the landmark status are unjustifiably high compared to the benefits that the City receives from the landmark. The burden of demonstrating both that there has been a relevant change and that the circumstances justify rescission should be placed on property owners. To balance against concerns of re-litigation and abuse by developers, procedural constraints such as timing provisions should also be added.

Part I addresses the nature of landmarks as public goods, the impact of historic preservation on development, and the institution of the LPC. It then argues that landmark status should not be perpetual. Part II examines the current mechanisms within the Landmarks Law for removal of landmark designations and argues that they are inadequate and create distortions. Part III proposes that the Landmarks Law should be changed to include provisions allowing for rescission under certain circumstances.

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21. *Infra* Part I.C.

I.  
LANDMARKING IN NEW YORK CITY

A. *Landmarks and Local Government Law*

This Note will proceed from two assumptions regarding landmarks. The first is that landmarks have some value, both intrinsic<sup>22</sup> and extrinsic,<sup>23</sup> to New York City.<sup>24</sup> The second assumption is that landmarks are a form of public good,<sup>25</sup> albeit of a somewhat atypical variety. It is necessary, therefore, to define “public good” and demonstrate how landmarks fit into the category. A public (or collective consumption) good is classically defined as a resource that is both non-rival and non-excludable.<sup>26</sup> A good is non-rival if one person’s use of the good does not conflict with another’s use of it,<sup>27</sup> and it is non-excludable if no one can be prevented from using

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22. See generally, e.g., Elizabeth C. Gutman, Note, *Landmarks as Cultural Property: An Appreciation of New York City*, 44 RUTGERS L. REV. 427 (1992). The claim that cultural preservation has intrinsic value is not uncontroversial. See, e.g., James W. Nickel, *Intrinsic Value and Cultural Preservation*, 31 ARIZ. ST. L.J. 355 (1999) (responding to Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291 (1999)). That particular debate is beyond the scope of this Note. Additionally, the question of what constitutes the correct rationale for historic preservation in general has never been entirely settled. David F. Tipson, *Putting the History Back in Historic Preservation*, 36 URB. LAW. 289, 289 (2004). This Note does not attempt to reconcile the different rationales, beyond assuming that the widespread use of historic preservation and the ferocity with which these controversies are normally contested is sufficient to demonstrate some intrinsic value.

23. These benefits could include anything from increased tourism to a larger tax base because of increased property values. *Infra* Part I.B. It also may be possible to speak of these benefits as being divided into “direct” benefits, such as the preservation of architecture itself, and “indirect” benefits, such as increases in tourism or property values. Tipson, *supra* note 22, at 294. For these purposes, the precise nomenclature is unimportant.

24. The two categories of value are not mutually exclusive. Some of the “intrinsic” value of a landmark may be that it promotes some non-quantifiable social good, which in turn produces “extrinsic” benefits to the city. See generally Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473 (1981).

25. Randall Mason, *Economics and Historic Preservation: A Guide and Review of the Literature*, THE BROOKINGS INSTITUTION 3 (2005), [http://www.brookings.edu/~media/Files/rc/reports/2005/09metropolitanpolicy\\_mason/20050926\\_preservation.pdf](http://www.brookings.edu/~media/Files/rc/reports/2005/09metropolitanpolicy_mason/20050926_preservation.pdf) (proceeding from the assumption that “historic preservation is a legitimate public good”).

26. Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 387 (1954).

27. N. GREGORY MANKIW, PRINCIPLES OF MICROECONOMICS 224 (4th ed. 2007).

it.<sup>28</sup> Examples of public goods include roads, national defense, and tornado sirens.<sup>29</sup>

Landmarks, or at the very least the historic or aesthetic features that landmark status is designed to protect, fit this definition.<sup>30</sup> Landmarks are goods in the sense that they provide cultural or aesthetic benefits to the city at large,<sup>31</sup> and their presence is both non-rival and non-excludable. They are non-rival in the sense that one person's enjoyment of a landmark does not affect another's ability to enjoy it, and non-excludable insofar as the aesthetic value of preserving a piece of architecture, or the historical value of maintaining the exteriors of a neighborhood, cannot be easily taken away from any one person.<sup>32</sup>

Because landmarks, as public goods,<sup>33</sup> benefit everyone, no one person has an incentive to provide the optimal level of care for

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28. *Id.*

29. *Id.* The literature surrounding public goods often makes a distinction between "pure" and "impure" public goods. *See, e.g.*, James M. Buchanan, *An Economic Theory of Clubs*, 32 *ECONOMICA* 1 (1965). Each of the examples given here could be considered an impure public good, at least insofar as it is potentially possible for each of them to become rival in the event of scarcity. This distinction is somewhat irrelevant for the purposes of this Note, as there are very few public goods for which the possibility of rivalry is completely non-existent. *See also* Mason, *supra* note 25, at 11 (discussing how historic preservation is both public and private).

30. *See, e.g.*, Per-Olof Bjuggren & Henrik af Donner, *Ownership of a Cultural Landmark: The Case of Gotha Canal*, 21 *INT'L REV. L. & ECON.* 499, 504-05 (terming the canal an "impure public good").

31. *See* Mason, *supra* note 25, at 3. Local government theorists and economists often make a distinction between "public goods" and "local public goods." *See, e.g.*, Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. & ECON.* 416, 418 (1956). Since this Note deals entirely with local government landmarks, the distinction is largely irrelevant for these purposes, except insofar as some of the criticisms of national-level distribution of public goods are not as salient when directed at local government expenditures, and insofar as the benefits of landmarking may have differing consequences for residents of different parts of the city.

32. There are some elements of landmark protections that are excludable. If a neighborhood gentrifies as a result of a historic district designation, then some may not receive the full benefits of the designation. Interior landmarks are also potentially excludable and could be subject to entrance fees; however, the Landmarks Law itself defines interior landmarks as places commonly available to the public, N.Y.C. ADMIN. CODE § 25-302(m) (1992), and interior landmarks are a relatively small portion of the total number of landmarks in the city. *See* FURMAN CENTER REPORT, *supra* note 5, at 26.

33. One other possible definitional problem is that it is possible to consider parts of the current landmark scheme, especially the historic districts, as part of an exclusionary zoning system. That discussion, while occasionally relevant, is largely beyond the scope of this Note. For a discussion of exclusionary zoning in the context of cities and neighborhoods as public goods, see generally Lee Anne Fennell,

them.<sup>34</sup> Further, local residents may be unwilling to express their actual level of preference for having landmarks, hoping others will subsidize the costs.<sup>35</sup> While some landmarks may be amenable to exclusion mechanisms,<sup>36</sup> most are not.<sup>37</sup> As such, without some form of government intervention, one would expect there to be fewer landmarks.<sup>38</sup> But government intervention is also problematic: as landmarks create externalities, governments may not be able to accurately measure the public preference for landmarks; and unlike with other public goods, control over a landmark is typically in private hands.

The first problem with government intervention to preserve landmarks is that landmark decisions create significant externalities, both positive and negative.<sup>39</sup> In general, the property owner will bear a disproportionate share of the negative externalities and fail to recoup his or her entire investment. If landowners were able to capture the value of the positive externalities, then perhaps they would have an incentive to preserve buildings themselves. Instead, the burdens fall onto owners of landmarked property, while the benefits, such as increased land values in the surrounding area<sup>40</sup> and the historic value of the site itself, largely benefit the public.

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*Exclusion's Attraction: Land Use Controls in the Tieboutian Perspective*, in THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES 163, 175 (William A. Fischel ed., 2006).

34. See, e.g., Jide O. Nzeli, *Interest Groups, Power Politics, and the Risks of WTO Mission Creep*, 28 HARV. J.L. & PUB. POL'Y 89, 94 n.19 (2004) (citing MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965)).

35. Ariel Porat, *Private Production of Public Goods: Liability for Unrequested Benefits*, 108 MICH. L. REV. 189, 205 (2009) (proposing system for restitution in certain other contexts); see also LYNN A. BAKER & CLAYTON P. GILLETTE, *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 33–35 (3d ed. 2004).

36. See, e.g., Bjuggren & Donner, *supra* note 30, at 505.

37. As noted above, of the four categories of Landmarks in New York City, interior landmarks are the only form for which it is plausible that this could work.

38. Porat, *supra* note 35, at 205–06; cf. John P. Conley & Christopher S. Yoo, *Nonrivalry and Price Discrimination in Copyright Economics*, 157 U. PA. L. REV. 1801, 1802 (2009) (explaining that “a core policy implication of public goods theory is that markets tend to produce too few public goods and underutilize those that are produced,” and arguing for different conception of public goods in context of copyright law). This appears to be borne out by the history of landmarks in New York City as well. See *infra* notes 71–73.

39. See *infra* Part I.B.

40. This is somewhat different in the context of historic districts, rather than exterior landmarks, where the owners of the property are far more able to see the benefits of the designation themselves. These owners also tend to be families holding their own homes rather than large commercial or nonprofit entities, which may also alter the theoretical framework.

Thus, property owners have a significant incentive to fight landmark designations in the first instance.

The second problem is that the government may not be able to accurately account for the public's preferences for landmarks. The costs and benefits may be hard to quantify,<sup>41</sup> and voting patterns may reveal very little about preferences for landmarking.<sup>42</sup> Worse yet, there is reason to believe that landmarking in particular may cause politicians to be particularly responsive to "repeat players" such as preservationists and developers.<sup>43</sup>

The third problem is that, unlike more archetypal public goods such as roads or national defense, property being considered for landmark status is typically in private hands.<sup>44</sup> In this sense, the designation of a building as a landmark is an expropriation: the public benefits of protecting a landmark come at the expense of the private property owner's rights to exploit the property.<sup>45</sup> While courts have addressed the constitutionality of landmark regimes as regulatory takings,<sup>46</sup> the tests that they have created are by no means clear, reflecting significant tension between the existing law and the redistributive consequences of landmark decisions. In addition, while courts have referred to "average reciprocity of advantage,"<sup>47</sup> or the idea that restrictions that might otherwise be a taking are permitted if their application generally benefits all property owners,<sup>48</sup> there does not appear to be data to support the claim that this phenomenon actually occurs. Furthermore, the ferocity

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41. Mason, *supra* note 25, at 11–18 (comparing different econometric techniques for valuation of benefits from landmarks); *see also* Paolo Rosato et al., *Redeveloping Derelict and Underused Historic City Areas: Evidence from a Survey of Real Estate Developers*, 53 J. ENVTL. PLAN. & MGMT. 257, 261–63 (2010).

42. *Infra* Part I.D.

43. *Infra* Part I.D.

44. Some of the burdens of other public goods may occasionally fall on private parties. For example, cities may mandate that property owners shovel snow from in front of their properties in order to maintain the safety of roads. N.Y.C. ADMIN. CODE § 16-123 (1992). But these examples tend to be either *de minimis*, as in the snow-shoveling example, or related to exceptional circumstances, such as the need to quarter troops in times of war. *See* U.S. CONST. amend. III. Examples in which the burden of consistently maintaining an expensive public good is permissibly placed almost entirely on a private party are extremely rare.

45. Rose, *supra* note 24, at 497.

46. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (discussed *infra* Part II.C.1.).

47. *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 324 n.19 (2002) (discussing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017–18 (1992)).

48. Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455, 478–79 (2009).

with which owners sometimes fight these designations provides at least indirect evidence that owners do not agree with the claim that they receive sufficient benefits from the landmarking scheme.<sup>49</sup>

### B. Landmarks and Development

Landmark decisions also have distributional consequences and impact the general economic development of the city.<sup>50</sup> The aggregate impact is hard to determine, and the question of who benefits and who loses in that equation is similarly murky. On one hand, a landmark district can accelerate the process of gentrification.<sup>51</sup> Similarly, property values surrounding historic landmarks tend to increase,<sup>52</sup> and advocates of preservation argue that economic indicators like retail sales in stores in historic districts tend to in-

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49. For reasons that are largely political, the LPC prefers to landmark buildings by consent. For a discussion of an example that includes the political factors involved in landmarking, the consent policy, and a successful fight against landmarking, see Eliot Brown, *After Push by Extell, Landmarks Backs Down Over West 57th Street Building*, N.Y. OBSERVER, Nov. 10, 2009, <http://www.observer.com/2009/real-estate/after-push-extell-landmarks-backs-down-57th-st>. The tendency towards consent seems somewhat illusory, as there is very little the owner of a property that the LPC wants to designate can offer in a negotiation. For another example of the intensity of the negative reaction to a proposed designation, see Eliot Brown, *Oh, God, No*, N.Y. OBSERVER, Feb. 16, 2010, <http://www.observer.com/2010/real-estate/oh-god-no>.

50. Robin M. Leichenko, N. Edward Coulson & David Listokin, *Historic Preservation and Residential Property Values: An Analysis of Texas Cities*, 38 URB. STUD. 1973, 1984 (2001); David M. Stewart, Note, *Constitutional Standards for Hardship Relief Eligibility for Nonprofit Landowners Under New York City's Historic Preservation Act*, 21 COLUM. J.L. & SOC. PROBS. 163, 167–68 (1988); see also Glaeser, *supra* note 6 (asserting that large historic districts “are associated with a reduction in housing supply, higher prices, and increasingly elite residents”).

51. Loretta Lees, *Super Gentrification: The Case of Brooklyn Heights, New York City*, 40 URB. STUD. 2487, 2494 (2003). While the question of whether gentrification itself is net positive or net negative for the city as a whole is thankfully beyond the scope of this Note, it is fair to say that gentrification generally increases the city's tax base. Jacob L. Vigdor, *Does Gentrification Harm the Poor?*, BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS 133, 133 (2002).

52. Leichenko et al., *supra* note 50, at 1976. The authors compared the previous empirical studies of the impact of designation on property values. Of the fourteen prior studies, seven suggested a positive impact, while four found the impact to be neutral. Two showed a negative impact, and one showed a mixed impact. Leichenko, Coulson, and Listokin concluded that landmark designations tend to have a positive impact on property value but “may displace less affluent residents of historic areas.” *Id.* at 1984; see also N.Y.C. INDEP. BUDGET OFFICE, *THE IMPACT OF HISTORIC DISTRICTS ON RESIDENTIAL PROPERTY VALUES* 8 (Sept. 2003), available at [http://www.dlnhs.org/IBO\\_HistoricDistricts03.pdf](http://www.dlnhs.org/IBO_HistoricDistricts03.pdf) (concluding that while property values tended to be higher within historic districts, there was insufficient causal evidence).

crease.<sup>53</sup> On the other hand, landmark status can slow the development of an area<sup>54</sup> by maintaining potentially sub-optimal<sup>55</sup> use of the land.<sup>56</sup> Because potential investors cannot realistically expect further development of the site itself, landmark status also discourages increased investment in the surrounding neighborhood. While the area around the landmark should benefit from increased tourism both from visitors and city residents,<sup>57</sup> it is not clear that these benefits outweigh the drop-off in investment.<sup>58</sup> While precise numbers are often hard to find and separate from other factors, “heritage tourism” is a large industry.<sup>59</sup> Advocates of preservation have produced studies suggesting that heritage tourism can bring in millions of dollars in a given year.<sup>60</sup> It is important to note that landmarking is often used in ways that are not among the intended purposes of the Landmarks Law. For example, landmark status can be used as an explicitly ideological, anti-development tool<sup>61</sup> or as a political tool for purposes other than historic preservation.<sup>62</sup>

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53. See, e.g., NAT’L HISTORIC TRUST FOR PRES., ECONOMIC IMPACT OF HISTORIC DISTRICT DESIGNATION: LOWER DOWNTOWN DENVER, COLORADO 7–8 (1990).

54. Glaeser, *supra* note 6 (arguing that historic districts face slowed rates of new construction). While this should be unsurprising (after all, part of the reason to designate something as a historic district is to slow new construction), Glaeser argues that this drives up prices artificially, creating a significant obstacle to affordable housing in historic districts. See *id.*

55. Here “sub-optimal” is used purely to describe economic efficiency. MANKIW, *supra* note 27, at 148.

56. Stewart, *supra* note 50, at 166–67.

57. DONOVAN D. RYPKEMA, VIRGINIA’S ECONOMY AND HISTORIC PRESERVATION 4–5 (1995).

58. Mason, *supra* note 25, at 21 (“Historic preservation . . . produces certain economic benefits for both private actors and the public at large . . . . [P]reservation policies do make sound fiscal sense. However, the economic impacts and measures of historic preservation activities are too situational to be able to extrapolate widely.”).

59. ADVISORY COUNCIL ON HISTORIC PRESERVATION, HERITAGE TOURISM AND THE FEDERAL GOVERNMENT 6–7 (2002), available at [http://www.achp.gov/heritage\\_tourismsummit.pdf](http://www.achp.gov/heritage_tourismsummit.pdf).

60. RYPKEMA, *supra* note 57, at 4.

61. See, e.g., Norman Oder, *Census of Places that Matter, art opening, and the (upcoming) “vanished site” of Freddy’s*, ATLANTIC YARDS REPORT (Mar. 8, 2010, 2:21 PM), <http://atlanticyardsreport.blogspot.com/2010/03/census-of-places-that-matter-and-art.html> (rejecting suggestion that landmark status would be obtainable for Freddie’s Back Room, in blog post on site generally opposed to Brooklyn Atlantic Yards Project).

62. David B. Fein, Note, *Historic Districts: Preserving City Neighborhoods for the Privileged*, 60 N.Y.U. L. REV. 64, 90 (1985); see also Editorial, *Ground Zero Tolerance: Future New York Mosque a fitting symbol of American Values*, HOUSTON CHRONICLE, Aug. 12, 2010, <http://www.chron.com/disp/story.mpl/editorial/7151485.html> (discussing LPC’s refusal to landmark site proposed for “Ground Zero Mosque”);

There are also other benefits to historic preservation, both quantifiable and qualitative.<sup>63</sup> Historic preservation can help inculcate a sense of community,<sup>64</sup> which can produce other benefits as a result, including strengthened social ties<sup>65</sup> and greater stability in neighborhood populations.<sup>66</sup> Historic preservation could create unintended beneficial results, such as increasing the “pull” factors of cities and neighborhoods.<sup>67</sup>

*C. The Landmarks Preservation Commission’s Composition,  
Legal Mandate, and Processes*

Landmarking decisions in New York City are made by the Landmarks Preservation Commission. The LPC was established by New York City’s Landmarks Preservation and Historic District Law of 1965.<sup>68</sup> The Landmarks Law is a local law passed under the New

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Tom Topousis, *Jane Hotel Cite to Behold*, N.Y. POST, Oct. 7, 2009, [http://www.nypost.com/p/news/local/manhattan/item\\_RYCpYEUgwKkSnPvfKJRjiO](http://www.nypost.com/p/news/local/manhattan/item_RYCpYEUgwKkSnPvfKJRjiO) (describing use of landmark law violations in response to neighborhood complaints about bar at Jane Hotel). The use of landmark status as an ideological or anti-development tool has been a longstanding problem with the Landmarks Law. See David W. Dunlap, *Change on the Horizon for Landmarks*, N.Y. TIMES, Apr. 29, 1990, at 32.

63. While precise numbers are not necessarily relevant to this point, it is worth noting that economists have attempted to account for some of the harder to quantify or strictly qualitative benefits. For a summary of some of these methods, see Mason, *supra* note 25, at 16–18.

64. Rose, *supra* note 24, at 497.

65. See John Costonis, *Law and Aesthetics: A Critique and Reformulation of the Dilemmas*, 80 MICH. L. REV. 355, 392–94 (1982). See generally Rose, *supra* note 24. Both sources are cited in ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 496 (3d ed. 2005).

66. *But see* Leichenko et al., *supra* note 50, at 1984 (mentioning potential displacement of residents).

67. There is a significant debate over which level of government is most appropriate for the redistribution of public goods, but this debate is beyond the scope of this Note. For a discussion of the strengths and weaknesses of centralized and decentralized regimes of government in the context of public good distribution, compare Roderick M. Hills, Jr., *Compared to What? Tiebout and the Comparative Merits of Congress and the States in Constitutional Federalism*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES* 239 (William A. Fischel ed., 2006), with Clayton P. Gillette, *The Tendency to Exceed Optimal Jurisdictional Boundaries*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES* 264 (William A. Fischel ed. 2006) (commenting on Hills). While both of these essays focus on the distinction between the federal and state levels of governance, the arguments are applicable in the context of state and local governance as well.

68. Barron, *supra* note 3.

York State Municipal Laws Enabling Act.<sup>69</sup> The purpose of the law was to protect “landscape features, as herein defined, having a special character or a special historical or aesthetic interest or value . . . .”<sup>70</sup>

The conventional narrative is that the creation of the LPC was largely driven by concerns that emerged from the demolition of Penn Station in October of 1963.<sup>71</sup> In reality, landmarking had been a significant and controversial area of city politics for quite some time before the destruction of Penn Station.<sup>72</sup> In 1941, Robert Moses’ attempted destruction of Castle Garden<sup>73</sup> prompted a resolution at an angry meeting of the New-York Historical Society and the American Scenic and Historic Preservation Society,<sup>74</sup> and in 1961, Mayor Robert Wagner created the Committee for the Preservation of Structures of Historic and Esthetic Importance.<sup>75</sup> Regardless of the historical reasons underlying its creation, the LPC has been the primary force for preservation in New York City since 1965.

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69. N.Y. GEN. MUN. LAW § 96-a (2006) (“[T]he governing board or local legislative body of any . . . city . . . is empowered to provide by regulations, special conditions and restrictions for the protection, enhancement, perpetuation and use of places, districts, sites, buildings, structures, works of art, and other objects having a special character or special historical or aesthetic interest or value.”).

70. N.Y.C. ADMIN. CODE § 25-301 (1992).

71. See, e.g., FURMAN CENTER REPORT, *supra* note 5, at 26; Barron, *supra* note 3. But see ANTHONY C. WOOD, PRESERVING NEW YORK: WINNING THE RIGHT TO PROTECT A CITY’S LANDMARKS 9 (2008) (referring to narrative as “myth”).

72. Rose, *supra* note 24, at 481–91 contains an overview of some of the thematic developments in the justifications for landmark preservation. WOOD, *supra* note 71, is a comprehensive treatment of the history of New York City’s landmark scheme.

73. ROBERT A. CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK 639–87 (1975) contains a lengthy treatment of this dispute. Caro’s work, despite its relative age, remains the definitive study of the life and work of Robert Moses. Castle Garden was initially saved from destruction through the personal intervention of Eleanor Roosevelt, *id.* at 672, and was designated a national landmark in 1946. *Id.* at 686. It was ultimately placed on the National Register of Historic Places in 1966 under the National Historic Preservation Act. 16 U.S.C. § 470 (2006). While the site was not protected by local law, the dispute demonstrates that, prior to the enactment of the landmarks law, there were still preservationist mechanisms. The problem was not that historic buildings were never preserved but rather that there was no singular process for determining which ones ought to be preserved. For a review of the historical significance of Castle Garden, see generally BARRY MORENO, CASTLE GARDEN AND BATTERY PARK (2007).

74. WOOD, *supra* note 71, at 13–14.

75. *Id.* at 9.

The LPC is composed of eleven commissioners,<sup>76</sup> which must include “at least one resident of each of the five boroughs,”<sup>77</sup> three architects,<sup>78</sup> one “historian qualified in the field,”<sup>79</sup> a city planner or landscape architect,<sup>80</sup> and a realtor.<sup>81</sup> None of these terms is defined,<sup>82</sup> but the mayor is permitted to consult with “the fine arts federation of New York and any other similar organization” when appointing architects, historians, or city planners.<sup>83</sup> The commissioners are appointed by the mayor<sup>84</sup> and serve three-year, staggered terms.<sup>85</sup> The mayor also designates a chair and vice-chair for the commission.<sup>86</sup> With the exception of the chair, the commissioners are not paid for their work on the commission, but they do receive reimbursement for necessary expenses.<sup>87</sup> There is also a panel “independent of the commission” with five members “appointed by the mayor with advice and consent of the council” who hear appeals from denials of a variety of exemptions from LPC decisions.<sup>88</sup>

The LPC has the legal authority to declare sites as individual (or exterior) landmarks, interior landmarks, scenic landmarks, and historic landmarks.<sup>89</sup> The commission can act on its own recommendation<sup>90</sup> or in response to a public petition.<sup>91</sup> The commission can also amend designations<sup>92</sup> and approve or disapprove proposed modifications or alterations to existing landmarks.<sup>93</sup> Within 120 days of the designation of a historic site, the city council can “modify or disapprove” the designation by majority vote.<sup>94</sup> The mayor

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76. N.Y.C. CHARTER § 3020(1) (1989).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *See* N.Y.C. ADMIN. CODE §§ 1-112, 25-302 (1992); N.Y.C. CHARTER § 3020 (1989).

83. N.Y.C. CHARTER § 3020(2)(b).

84. *Id.* § 3020(2)(a).

85. *Id.*

86. *Id.* § 3020(4).

87. *Id.* § 3020(3).

88. *Id.* § 3020(10)(a).

89. N.Y.C. ADMIN. CODE § 25-303(a) (1992); *see supra* note 4.

90. ADMIN. § 25-303.

91. *Id.*

92. *Id.* § 25-303(c).

93. *Id.* § 25-303(d). The power to control construction and alterations of landmarks is more fully addressed in § 25-305.

94. N.Y.C. Charter § 3020(9) (1989).

can veto council resolutions relating to LPC decisions, subject to override by a two-thirds vote of the council.<sup>95</sup>

Once a site has been designated a landmark, its owner loses the right to modify or use the property in certain ways.<sup>96</sup> While a variety of waivers and exemptions exist,<sup>97</sup> the loss of rights in the property and the concomitant obligations to maintain the landmark<sup>98</sup> have been described as onerous<sup>99</sup> and are enforced by both civil penalties<sup>100</sup> and criminal sanctions, including imprisonment and fines.<sup>101</sup> Under certain conditions, the LPC is even authorized to condemn and seize landmarked property in order to protect it<sup>102</sup> and, in extraordinary cases, may file lawsuits against property owners to force repairs or levy further fines.<sup>103</sup>

The “rescission” provision<sup>104</sup> states that “[t]he commission shall have the power, after a public hearing, to adopt a resolution proposing rescission, in whole or in part, of any designation or

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95. *Id.*

96. ADMIN. § 25-305.

97. *See, e.g., id.* § 25-306 (discussing “certification of no effect on protected architectural features”); *infra* Part II.A.

98. ADMIN. § 25-311.

99. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 139 (1978) (Rehnquist, J., dissenting).

100. ADMIN. § 25-317.1.

101. *Id.* § 25-317. In 2009, approximately seven hundred enforcement actions and more than one thousand warning letters were issued. *See* 2009 MAYOR’S REPORT, *supra* note 7, at 108. As a practical matter, courts sometimes stay the enforcement of these violations in order to allow violators to “cure” the problem. *See, e.g.,* 259 West 12th, LLC v. Grossberg, 836 N.Y.S.2d 504 (City Civ. Ct. 2007) (allowing defendant found to be in violation of her lease because of failure to comply with LPC regulations a ten-day stay in order to obtain approval for changes made to her apartment). *But see* Craig Karmin, *City: Take Off Top Floor of Townhouse*, WALL ST. J., May 4, 2010, <http://online.wsj.com/article/SB10001424052748704342604575222053129473006.html>.

102. ADMIN. §25-309(g) (describing procedures in conjunction with certificate of appropriateness); *see also* Stewart, *supra* note 50, at 170.

103. *See, e.g.,* Mike McLaughlin, *City Sues Homeowner Over Crumbling Historic Buildings in Cobble Hill*, N.Y. DAILY NEWS, Apr. 22, 2010, [http://articles.nydailynews.com/2010-04-22/local/27062355\\_1\\_vacant-buildings-historically-significant-buildings-buildings-department](http://articles.nydailynews.com/2010-04-22/local/27062355_1_vacant-buildings-historically-significant-buildings-buildings-department). Even leaving aside enforcement powers, the LPC’s statutory authorization is quite broad, because the power to approve or disapprove alterations within the historic district gives the LPC effective control over a variety of decisions that are probably better suited to the zoning board. *See, e.g.,* Glaeser, *supra* note 6 (discussing how LPC limited height of building proposed on corner of 91st Street and Madison Avenue, despite the explicit statutory limitation on LPC’s authority to regulate height of buildings).

104. ADMIN. § 25-303(h).

amendment or modification . . . .”<sup>105</sup> The provision describes the procedure for rescission, which includes a report from the city planning commission<sup>106</sup> and allows for city council and mayoral veto.<sup>107</sup> While this process closely mirrors the designation process, it is infrequently used.<sup>108</sup> There is no specific requirement that there be an additional public hearing, and there are no additional procedural requirements for acting upon a petition. When the rescission provision is used, the LPC typically issues a brief and largely conclusory decision with virtually no explanation of its reasoning.<sup>109</sup> Also missing is any rule governing how much time must elapse between designation and rescission or amendment of the designation.<sup>110</sup> Finally, application for rescission does not prevent an owner from later seeking another avenue for removal of the landmark status.<sup>111</sup>

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105. *Id.* §25-303(h)(1).

106. *Id.* §25-303(h)(2).

107. *Id.* §25-303(h)(3). The city council and mayor can each approve through silence. *Id.*

108. *See infra* note 145.

109. *See, e.g.*, N.Y.C. LANDMARK PRESERVATION COMMISSION, *Landmark Site of Former New Brighton Village Hall*, Dec. 12, 2006, at <http://nyc.gov/html/records/pdf/govpub/2782nbvillagehallrecis.pdf>. The entirety of the “findings,” which are part of a scant six-page document, states that:

On the basis of a careful consideration of the history, the architecture, and other features of this Landmark and Landmark Site, the Landmarks Preservation Commission finds that the site of the former New Brighton Village Hall no longer possess special character or special historic or aesthetic interest or value as part of the development, heritage, and cultural characteristics of New York City.

The Commission further finds that the New Brighton Village Hall has been demolished, and that the site has been cleared of all structures. Accordingly, pursuant to the provisions of Chapter 74, Section 3020 of the Charter of the City of New York and Chapter 3 of Title 25 of the Administrative Code of the City of New York, the Landmarks Preservation Commission rescinds the designation of the Landmark of the New Brighton Village Hall and Landmark Site, which consists of Borough of Staten Island Tax Map Block 71, Lot 117.

This may be an exceptional case as the building was itself demolished, so there may have been little that the LPC could have said about it. Since rescission decisions are infrequent, an examination of some recent designation reports may be instructive. For example, while there is a lengthy recitation of historical facts, the “findings” in a report on the Brill Building are less than one page long. N.Y.C. LANDMARKS PRESERVATION COMMISSION, *The Brill Building*, Designation List 427, LP 2387 (Mar. 23, 2010), available at <http://www.nyc.gov/html/lpc/downloads/pdf/reports/brill.pdf>.

110. *See ADMIN.* §25-303(h)(1).

111. *See, e.g.*, N.Y.C. LANDMARKS PRESERVATION COMMISSION, *DISPOSITION OF HARDSHIP APPLICATIONS 3* (2008) (discussing application and re-application by

D. *Institutional Concerns About the Landmarks  
Preservation Commission*

The Landmarks Preservation Commission is not democratically accountable: the commissioners are appointed, not elected, and serve staggered terms,<sup>112</sup> so a mayor only has a chance to appoint the full commission by the final year of his or her first term of office. Even if the mayor had the power to appoint a full commission, there is little reason to believe that the voting public would care enough about landmarks to make this its single voting issue.<sup>113</sup> Additionally, with the exception of the chair, the commissioners do not draw a salary,<sup>114</sup> so even the threat of removing them from their position is weaker than it would be for ordinary city officers.<sup>115</sup>

Further, the LPC is vulnerable to “capture”<sup>116</sup> by stakeholders in the process. An agency is typically thought to be vulnerable to capture if there is an interest group, or a small number of interest groups, with a disproportionate stake in the work of the agency relative to the general public.<sup>117</sup> The two most likely participants in the landmark process are developers and preservationist associa-

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owners of 74-86 Greene Avenue, Brooklyn) (internal document acquired through records request to LPC) [hereinafter “LPC HARDSHIP DISPOSITIONS”].

112. N.Y.C. CHARTER § 3020(2)(a) (1989).

113. A search of *New York Times* articles for the phrase “landmarks preservation commission” in the six months preceding the 2005 mayoral election reveals sixty-one articles, while the same search for the six months before that reveals forty-one. A search of the same six-month period for 2004 revealed thirty-eight articles. Most of the discrepancy between the results can be explained by one landmark controversy in particular, the “Lollipop” building at 2 Columbus Circle. *But see* Gutman, *supra* note 22, at 432 n.29 (“The destruction of historic landmarks became an issue during the 1961 mayoral election campaign.”).

114. N.Y.C. CHARTER § 3020(3).

115. Of course, there may be reputational constraints on commissioners’ behavior, but insofar as commissioners are likely to come from preservationist backgrounds, those constraints would likely lead to more, not less, preservation. *But see* Robin Pogrebin, *An Opaque and Lengthy Road to Landmark Status*, N.Y. TIMES, Nov. 25, 2008, <http://www.nytimes.com/2008/11/26/arts/design/26landmarks.html> (quoting preservationists as stating that chair of LPC is not committed to preservation and wields too much power over LPC’s agenda).

116. “Regulatory capture is generally understood to refer to the undue influence of a regulated party over the regulator.” Shi-Ling Hsu, *A Two-Dimensional Framework for Analyzing Property Rights Regimes*, 36 U.C. DAVIS L. REV. 813, 858 n.171 (2003) (citing, *inter alia*, IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* ch. 3 (1992) (stating that scope of agency capture in general is not entirely clear)).

117. *See* Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 185 (1990) (discussing vulnerability to capture in terms of “slack” given to regulators by combination of high monitoring costs and impacted special interest groups).

tions, both of whom can be characterized as repeat players or special interest groups. Because landmarks operate as a public good in private hands, both participants have incentives, whether monetary or ideological, to try to win disputes in front of the LPC rather than attempt to reach negotiated solutions with one another. If a developer successfully fights off an attempt to landmark his property, he can maintain the unrestricted use without having to provide a public benefit from which he will be unable to capture the full return. On the other hand, a preservationist group seeking to save a building will not have to pay to maintain the site once it is declared a landmark.

Despite these concerns, there are reasons to believe that the LPC is not a captured agency. The first is that the composition of the commission is designed to balance competing interests.<sup>118</sup> As noted above, six of the eleven seats on the commission have professional requirements and are split between architects, historians, city planners, and developers.<sup>119</sup> On the other hand, the LPC uses a simple majority requirement for most matters, so the fact that six seats are split between different professions may be insufficient to prevent any one subset from gaining undue influence over the process.

Another reason why there may not be capture of the LPC is that, even if the landmarking process is structurally vulnerable to capture, as suggested above, the parties involved may have more to gain from negotiation than from capture of the commission. While high-profile landmark disputes, such as the recent fight over St. Vincent's Hospital, tend to create extremely bitter feelings on both sides,<sup>120</sup> most landmark decisions involve much lower stakes. This produces an incentive on both sides to reach an accommodation. Voluntary associations have often been involved in preservation efforts outside of the formal landmark process but in consultation with the LPC. There are also examples of partnerships in which both preservationists and private developers have worked in concert to preserve buildings while developing the area.<sup>121</sup> Still, the

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118. See N.Y.C. CHARTER § 3020(1) (1989).

119. *Id.*

120. See Glenn Collins, *Landmarks Panel Approves St. Vincent's Tower*, N.Y. TIMES CITY ROOM BLOG (Mar. 10, 2009, 5:30 PM), <http://cityroom.blogs.nytimes.com/2009/03/10/landmarks-panel-approves-new-tower-for-st-vincent/> (describing "yearlong battle" over O'Toole Building); John Del Signore, *Preservationists Sue to Save St. Vincent's O'Toole Building*, GOTHAMIST (Mar. 9, 2009, 3:27 PM), [http://gothamist.com/2009/03/09/preservationists\\_file\\_lawsuit\\_to\\_sa.php](http://gothamist.com/2009/03/09/preservationists_file_lawsuit_to_sa.php).

121. See, e.g., David Gonzalez, *A Neglected Bronx Landmark Gets a New Life*, N.Y. TIMES CITY ROOM BLOG (Aug. 25, 2008, 10:50 AM), <http://cityroom.blogs.nytimes.com/2008/08/25/a-neglected-bronx-landmark-gets-a-new-life/>.

fact that exterior landmarks remain the most common form of landmark in New York City creates a situation in which “negotiated regulation” is possible, as preservationists work with developers to find ways to adapt interiors to new uses while preserving landmarked exteriors.<sup>122</sup>

Finally, the two primary groups that would be interested in capturing the LPC, developers and preservationists, may simply balance each other out. This is possible but seems unlikely because developers may suffer from a collective action problem.<sup>123</sup> For any given landmark, there will tend to be one interested developer, whereas preservationists can seek to fight every major decision.<sup>124</sup>

Another potential institutional issue that may impact the LPC’s behavior is the internal dynamic between the eleven commissioners. Both commissioners and private citizens can initiate the designation process.<sup>125</sup> But each of the commissioners may come to the process with a personal agenda.<sup>126</sup> Presumably, a historian is likely

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com/2008/08/25/a-neglected-bronx-landmark-gets-a-new-life/; Press Release, National Trust for Historic Pres., *Drugstores: A Success Story in Westfield* (Sept. 12, 2002), available at <http://www.preservationnation.org/resources/case-studies/chain-drugstores/drugstores-westfield.html>.

122. See J. Peter Byrne, *Regulatory Takings Challenges to Historic Preservation Laws After Penn Central*, 15 FORDHAM ENVTL. L. REV. 313, 330–31 (2004) (arguing that “historic preservation law is well suited for this kind of negotiated regulation,” and using rezoning of SOHO lofts in the 1970s as primary example).

123. The collective action problem is that general lobbying requires everyone to get involved, but most developers only care to the extent their building is affected. Trade associations may be somewhat able to overcome this issue, especially in terms of systemic reform and lobbying. Ultimately, each individual designation is extremely valuable to the individual property owner, and of limited importance to the profession in general.

124. While both sides have cost concerns, those costs should be roughly the same for each, so for the purposes of discussing the relative strengths and weaknesses of each side, cost is something of a non-issue. In addition, some (although certainly not all) of the preservationist groups in New York City are extremely well funded. It is also worth mentioning that several developers have made significant donations to preservationist groups, such as the Municipal Art Society. See, e.g., MUNICIPAL ART SOCIETY, ANNUAL REPORT 2008–2009 11, 34, available at [http://mas.org/images/media/original/MAS\\_AnnRep\\_2009\\_jul13\\_final.pdf](http://mas.org/images/media/original/MAS_AnnRep_2009_jul13_final.pdf). While further evidence would be needed, this suggests that it may be the case that developers feel it is easier to work with preservationists than lobby the LPC.

125. A private citizen can begin the process by filing a “Request for Evaluation” with the LPC. See N.Y.C. LANDMARKS PRESERVATION COMMISSION, <http://www.nyc.gov/html/lpc/html/propose/landmark.shtml>.

126. Though it is beyond the scope of this Note, there is a lurking question as to whom the LPC will favor. Though the LPC was created, in part, to avoid the unseemly influence peddling that dominated landmark decisions prior to its enactment, it might still reflect the power dynamic of city politics writ large, thus impli-

to be sympathetic to claims of historic value, while an architect is likely to seek out aesthetic monuments for preservation. Whenever a commissioner wants a particular building landmarked, the incentive structure suggests that the rational strategic choice for another commissioner would be to approve that landmark. Because the costs of the decisionmaking process (i.e. the hearings, reports, and other statutory requirements) are the same regardless of whether the commission chooses to designate a site, these costs can be considered neutral. Once the site is landmarked, there are enforcement costs, but these tend to be relatively low.<sup>127</sup> If any individual commissioner wants a site designated, other commissioners are likely to approve that choice in order to maintain goodwill and have their own preferences respected.

While the LPC does not keep searchable databases of votes, a look at some of the voting agendas posted on their website bears this out.<sup>128</sup> The agenda for December 8, 2009, contains twenty-three items, seventeen of which were brought to a vote.<sup>129</sup> In these

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cating questions of race and class. Also troubling, the commission may perpetuate the biases of those people who tend to sit on the city's artistic boards, which are not even vaguely representative of the city's population. These issues can affect both judgments about the impact of a landmark decision on the neighborhood as a whole, and decisions about what to landmark, in the sense that the history of a particular group may be undervalued. *See, e.g.*, Rose, *supra* note 24, at 478 (“[P]oor black families might be displaced as middle class whites moved into spruced-up ‘historic’ neighborhoods . . . and . . . it wasn’t black history that the preservationists had in mind.”) (citing Michael deHaven Newsom, *Blacks and Historic Preservation*, 36 LAW & CONTEMP. PROBS. 423, 423–24 (1971)); Tipson, *supra* note 22, at 309 (“It is only recently that working-class neighborhoods have been appreciated as historic districts.”). There is some evidence that this tendency is changing. *See, e.g.*, N.Y.C. LANDMARK PRESERVATION COMMISSION, RIDGEWOOD NORTH HISTORIC DISTRICT DESIGNATION REPORT 1–2 (2009) (describing the significance of model tenements built in the early 20th century), available at <http://www.nyc.gov/html/lpc/downloads/pdf/reports/rnhd.pdf>.

127. Of the LPC’s total budget of a little under five million dollars in 2009, less than one million dollars was spent on all actions besides “personal services.” The category of “personal services” includes the entire hearing process and general work of the commission, while “other expenditures” include all other work. THE CITY OF NEW YORK, EXPENSE REVENUE CONTRACT 146E (2010), available at [http://www.nyc.gov/html/omb/downloads/pdf/erc6\\_09.pdf](http://www.nyc.gov/html/omb/downloads/pdf/erc6_09.pdf).

128. The archive of LPC calendars can be found at WORKING WITH LANDMARKS: CALENDAR ARCHIVE, [http://www.nyc.gov/html/lpc/html/working\\_with/calendar\\_archive.shtml](http://www.nyc.gov/html/lpc/html/working_with/calendar_archive.shtml). A few recent agendas were chosen more or less at random for this purpose.

129. *Public Hearing of the Landmark Preservation Commission* (Dec. 8, 2009), available at [http://www.nyc.gov/html/lpc/downloads/pdf/calendar/12\\_08\\_09.pdf](http://www.nyc.gov/html/lpc/downloads/pdf/calendar/12_08_09.pdf).

votes, there was one dissent and one abstention.<sup>130</sup> The April 13, 2010 agenda contains eleven items, all of which reached a vote.<sup>131</sup> There were zero votes in opposition and zero abstentions.<sup>132</sup> While there are occasional contested votes, such as the approval of St. Vincent's Hardship Application,<sup>133</sup> the posted agendas contain mostly unanimous or nearly unanimous votes.

To explain the general lack of dissent within the LPC, a look at some of the scholarly work done on collegial courts may be instructive.<sup>134</sup> The phenomenon of "dissent aversion,"<sup>135</sup> in which judges engaged in a cooperative structure will actively avoid leaving a majority opinion,<sup>136</sup> may explain why votes on the LPC tend not to produce 6–5 decisions. This is especially true because, like appellate judges but unlike university faculties or lower civil servants, the commissioners are not chosen by "a stable, uniform management layer."<sup>137</sup> Rather, they are appointed by a democratically elected mayor, which would tend to create a greater likelihood of dissent aversion between commissioners.<sup>138</sup>

Furthermore, the LPC may be vulnerable to informational cascading.<sup>139</sup> Insofar as commissioners are willing to defer to the opinions of other commissioners on matters concerning home boroughs, or in areas of individual commissioner's expertise, there

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130. *Id.*

131. *Public Meeting of the Landmark Preservation Commission* (Apr. 13, 2009), available at [http://www.nyc.gov/html/lpc/downloads/pdf/calendar/04\\_13\\_10.pdf](http://www.nyc.gov/html/lpc/downloads/pdf/calendar/04_13_10.pdf).

132. *Id.*

133. *Public Meeting of the Landmark Preservation Commission* (May 12, 2009), available at [http://www.nyc.gov/html/lpc/downloads/pdf/calendar/05\\_12\\_09.pdf](http://www.nyc.gov/html/lpc/downloads/pdf/calendar/05_12_09.pdf); see also LANDMARKS PRESERVATION COMMISSION, DETERMINATION OF THE APPLICATION FOR A CERTIFICATE OF APPROPRIATENESS OR NOTICE TO PROCEED TO DEMOLISH A DESIGNATED BUILDING PURSUANT TO SECTION 25-309 OF THE LANDMARKS LAW (May 12, 2009), available at [http://www.gvshp.org/\\_gvshp/preservation/st\\_vincent/doc/notice-to-proceed05-12-09.pdf](http://www.gvshp.org/_gvshp/preservation/st_vincent/doc/notice-to-proceed05-12-09.pdf) [hereinafter "St. Vincent's Hardship Approval"].

134. RICHARD A. POSNER, *HOW JUDGES THINK* 32 n.30 (2008), contains a brief review of literature discussing the impact of dissenting opinions on collegiality in the appellate courts.

135. *Id.*

136. *Id.*

137. *Id.* at 33.

138. See *id.*; see also CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 166–68 (2003) (discussing tendencies of three-judge panels based on political affiliation of the appointing president).

139. *Id.* at 55 ("In an informational cascade, people cease relying, at a certain point, on their private information or opinions. They decide instead on the basis of the signals conveyed by others.").

is already some evidence that cascades are occurring.<sup>140</sup> Even more to the point, the commissioners are not full-time government workers, so they are likely to be even more vulnerable to social pressure from other members of the commission.<sup>141</sup> And because commissioners tend to be preservationists, there is a further risk of group polarization towards a more extreme position.<sup>142</sup>

There is at least one plausible alternative explanation for the paucity of dissenting votes on the LPC agenda: it could be the case that there is frequently disagreement among the commissioners, but they negotiate among themselves to reach a consensus before calendaring the vote. This possibility, however, does not limit the problems seen above. If anything, it simply exacerbates them by making the process entirely opaque, which is contrary to the spirit of holding public meetings on the subject.

*E. Landmark Status Should Not Necessarily Be Perpetual*

It is sometimes clear that landmark status is no longer appropriate or efficient. The cultural importance of a given site may seem much stronger at some point in the past than it does in the present or future. The Landmarks Preservation Commission might make a mistake in assigning the initial designation, either by protecting a building that lacks aesthetic or historical merit, or by protecting exemplars of an historical trend that has been reevaluated. Alternatively, a landmark designation may impede the development of an area so significantly that the costs of maintaining the landmark designation significantly outweigh any cultural benefit. Additionally, the circumstances of the area surrounding the landmark may have changed since the designation was issued, either in terms of an areas development needs or cultural needs. Finally, the value of the landmark relative to other landmarks may change over time. In each of these circumstances, rescission of the landmark designation might be potentially appropriate, yet the current law merely provides that any order of the LPC can be rescinded without providing further guidance or addressing these possibilities.

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140. Informal conversations with members of the LPC's legal staff have confirmed this, but unfortunately neither hard data nor public statements are readily available.

141. SUNSTEIN, *supra* note 138, at 79–80.

142. *Id.* at 112. No hard data is available for this proposition, both for questions of what and how to measure, but this is supported by informal conversations with involved parties and the tendency, discussed throughout this Note, for the LPC to approve landmarking decisions and oppose rescissions.

While owners of landmarked property can seek permission to modify the property,<sup>143</sup> removing the designation altogether is extremely difficult. There is a process for the rescission of a landmark designation,<sup>144</sup> but it is infrequently used.<sup>145</sup> The LPC last rescinded landmark status in 2006, and that case was somewhat unusual in that the site itself had been destroyed.<sup>146</sup> Some of this is probably explained by the composition of the LPC; many of the commissioners are likely to have an interest in preservation,<sup>147</sup> and there are reasons why owners might hesitate to seek rescission, including concerns about negative publicity. This does not suggest that there are no circumstances in which rescission would be desirable, nor that rescission should be as difficult as it currently stands. Rather, this implies that, even if there were a more robust mechanism for rescission, fears of an under-supply of landmarks are unfounded.

The next section will address the existing mechanisms within the Landmarks Law for modifications to landmarked property and show why they are inadequate to address the problem of landmark designations that have outlived their usefulness.

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143. *Infra* Part II.B. Critics of the current Landmarks Law have also criticized the difficulties of making some of these modifications. *See, e.g.*, Barron, *supra* note 3 (quoting critic and professor of architecture Paul Goldberger as stating that

“[preservation fundamentalism] is particularly egregious in New York, where the insistence that everything be exactly as it was, and that historic districts cannot continue to evolve, that they cannot contain modern buildings within them and that the only way to show proper care for an individual landmark building is to make sure its appearance never changes—these attitudes seem altogether inconsistent with our nature and identity as a city. Respecting and preserving landmarks does not have to mean treating them like hothouse orchids.”)

The consequences of ignoring these regulations can also be severe; in at least one case, the LPC ordered a homeowner to tear down the addition of an entire floor. *See* Karmin, *supra* note 101.

144. N.Y.C. ADMIN. CODE § 25-303(h) (1992).

145. The LPC does not aggregate its records, so it is virtually impossible to find hard data on the actual frequency of its use, but some analysis of the LPC's agendas indicates that it is rare. There are a few cases in which buildings in historic districts were granted permits for demolition, but these are slightly different types of cases in that they usually involve non-historic buildings in generally protected areas and are typically handled by “certificates of no effect.” *See infra* Part II.A.

146. N.Y.C. LANDMARK PRESERVATION COMMISSION, *supra* note 109.

147. *Supra* Part I.D.

II.  
CURRENT MECHANISMS FOR DE-DESIGNATION:  
REASONABLE RETURN AND THE  
HARDSHIP EXCEPTION

Though outright rescission is rare, the Landmarks Law contains other provisions that allow owners to modify their properties in certain ways. This section will briefly review the existing provisions that allow for modification of properties and will then address the reasonable return standard and both the statutory and judicial hardship exceptions, which allow for more drastic changes, including demolition of the landmarked property.

In addition to rescission, there are other potential avenues for owners of landmarked property to pursue. There are three potential certificates that the owner of the property can petition for in order to modify a landmarked property: a “certificate of no effect,”<sup>148</sup> a “certificate of appropriateness,”<sup>149</sup> and a “certificate of insufficient return.”<sup>150</sup>

A. *Certificates of No Effect and the Certificate of Appropriateness*

A certificate of no effect allows a property owner the opportunity to demonstrate that a proposed modification to the landmarked property would not “change, destroy or affect” the protected elements,<sup>151</sup> or in the case of a historic district, that the proposed modification would be “in harmony with the external appearance” of the district.<sup>152</sup> This is by far the most common certificate issued by the Landmarks Preservation Commission,<sup>153</sup> although this likely does not demonstrate the ease with which one can obtain relief from landmark status, but instead reflects the expansive regulatory power of the LPC: even the most minor altera-

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148. ADMIN. § 25-306.

149. *Id.* § 25-307.

150. *Id.* §25-309(a)(1). Technically, this is also a “certificate of appropriateness,” wherein the owner petitions for a certificate of appropriateness, asking for permission to demolish, alter, or renovate on the specific grounds of “insufficient return.” In this Note, it is referred to as a certificate of insufficient return or a claim under the reasonable return standard, for the sake of clarity.

151. *Id.* § 25-306(a)(1).

152. *Id.*

153. In 2009, the LPC issued 3466 such certificates and 848 expedited petitions, after receiving 8929 applications. 2009 MAYOR’S REPORT, *supra* note 7, at 107–08.

tions to landmarked exteriors or buildings in historic districts require approval.<sup>154</sup>

The second certificate an owner might seek is a certificate of appropriateness.<sup>155</sup> Unlike a certificate of no effect, in which a property owner asserts that the protected elements will remain unchanged, a certificate of appropriateness<sup>156</sup> covers situations in which the owner concedes that some element will be modified but argues that those modifications do not undermine the purposes of the Landmarks Law.<sup>157</sup> This certificate is mostly used for additions or renovations that are set back from the street in some way or are otherwise inconspicuous. Unlike the standards for rescission proposed in this Note<sup>158</sup> this certificate is used for a narrow class of renovations in which the owner is able to preserve the historic values of the site, despite making some changes.

### B. *Reasonable Return and the Statutory Hardship Exception*

Finally, a certificate of insufficient return allows commercial property owners to demonstrate that the landmark designation of their property prevents them from obtaining a “reasonable return” on their property because of the landmark status.<sup>159</sup> Reasonable return is defined as “six percent of the valuation of an improvement parcel.”<sup>160</sup> A similar provision, the statutory hardship exception, exists for nonprofit owners of landmarked property.<sup>161</sup> The Landmarks Preservation Commission can modify the landmark designation in order to assist with a sale or long-term lease of the property if the nonprofit owner can demonstrate that the landmark status makes the site unusable for its current purpose and for which it was used when the nonprofit acquired the property, and demonstrate that, were the owner a commercial enterprise, it would be unable to obtain a reasonable return.<sup>162</sup> Neither provision is frequently used by the LPC, nor is the hardship provision often sought.<sup>163</sup> Since 1967, there have been sixteen applications for

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154. There are provisions for extremely minor work, but the general rule is that any work that would require a Department of Buildings Permit would also require LPC approval.

155. ADMIN. § 25-307.

156. *Id.*

157. *Id.* § 25-307(a).

158. *Infra* Part III.C.

159. ADMIN. § 25-309(a)(1).

160. *Id.* § 25-302(v)(1).

161. *Id.* § 25-309.

162. *Id.* § 25-309(a)(2).

163. LPC HARDSHIP DISPOSITIONS, *supra* note 111.

hardship dispositions.<sup>164</sup> Of these applications, fifteen asked for the right to demolish the structure in whole or in part.<sup>165</sup> Eight of the fifteen were granted outright, and three were denied.<sup>166</sup> In the remaining cases, either the request was withdrawn, or the LPC helped the applicant find a buyer.<sup>167</sup> In sum, landmark status is rarely rescinded either by a rescission decision made by the LPC or through one of the exceptions.

*C. The Regulatory Takings Doctrine and the  
Judicial Hardship Exception*

The remaining ways in which an owner can remove landmark status are through a challenge under the regulatory takings doctrine or, in the case of nonprofit owners, the judicial hardship exception.

If the Landmarks Preservation Commission denies an owner's application for a certificate of insufficient return, the owner can bring a claim in New York State Supreme Court with an Article 78 petition.<sup>168</sup> The burden of proving a lack of reasonable return falls to the owner of the property,<sup>169</sup> and judicial scrutiny of these decisions is based on case-by-case analysis<sup>170</sup> under a deferential standard of review.<sup>171</sup> Owners who lose the Article 78 proceeding can still challenge the designation of the property as a taking or argue that the decision to landmark was arbitrary and capricious and therefore violated due process.<sup>172</sup> Nonprofit owners can claim that

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164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. N.Y. C.P.L.R. § 7801 (McKinney 2010). Article 78 is the primary mechanism for challenging administrative decisions in New York State. Generally speaking, it encompasses the common law writs of mandamus, prohibition, and certiorari. The LPC can also apply the "judicial" hardship exception, despite its lack of statutory authorization.

169. *See* 400 East 64/65th Street Block Ass'n v. City of New York, 583 N.Y.S.2d 452, 454-55 (App. Div. 1992).

170. *Soho Alliance v. N.Y.C. Bd. of Standards & Appeals*, 703 N.Y.S.2d 150, 158 (App. Div. 2000).

171. *Shubert Org., Inc. v. Landmarks Pres. Comm'n of City of New York*, 570 N.Y.S.2d 504, 507 (App. Div. 1991) (applying "arbitrary and capricious" standard of review).

172. *See, e.g., Rudey v. Landmarks Pres. Comm'n of New York*, 627 N.E.2d 508 (N.Y. 1993). As a procedural matter, an owner must seek a certificate of appropriateness before seeking either no-return or hardship relief, and must exhaust these options before challenging them in court. *See* N.Y.C. ADMIN. CODE §§ 25-307, 25-309 (1992); C.P.L.R. § 7801.

they qualify for the judicial hardship exception, created by New York State Appellate Division in *Trustees of Sailor's Snug Harbor in the City of New York v. Platt*,<sup>173</sup> while commercial owners typically proceed under the regulatory takings standard.<sup>174</sup> This section discusses each standard and then argues that neither is appropriate nor adequate for the problem of albatross landmarks.

### 1. Regulatory Takings

Governments are permitted to make decisions for aesthetic reasons.<sup>175</sup> In *Penn Central Transportation Co. v. New York City*,<sup>176</sup> the United States Supreme Court held that a government designation of a site as a landmark does not constitute a taking.<sup>177</sup> Penn Central, the same railroad company that had destroyed Penn Station, also owned Grand Central Terminal.<sup>178</sup> The station, built in 1913, was and is a prized example of Beaux-Arts architecture.<sup>179</sup> The Terminal had been declared a landmark in 1967.<sup>180</sup> Penn Central wanted to build a fifty-three-story office building atop the Terminal and applied for permission to do so from the Landmark Preservation Commission, submitting two separate plans.<sup>181</sup> The LPC denied the applications, and Penn Central filed suit in New York State court, alleging violations of the Fifth and Fourteenth Amendments to the Constitution.<sup>182</sup> Specifically, it asserted that the application of the Landmarks Law to Grand Central Station was a taking of its property without just compensation<sup>183</sup> and that the landmark status

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173. 288 N.Y.S.2d 314 (App. Div. 1968). While this obviously pre-dates the decision in *Penn Central*, any discussion of the judicial response to the concerns in *Penn Central* must begin with *Snug Harbor*.

174. While the two tests have been discussed separately in this Note, one open question is the extent to which the regulatory takings standard and the hardship variance standard are co-extensive. In other words, if the judicial hardship exception is read as stating that the denial of the hardship variance would cause taking, then is the nonprofit entitled to the variance? However, whether the *Snug Harbor* test governs or the regulatory takings doctrine controls, the criticisms made in this Note as to the inappropriateness of these tests for certain decisions still hold.

175. *Berman v. Parker*, 348 U.S. 26, 32–33 (1959).

176. 438 U.S. 104 (1978).

177. *Id.* at 138.

178. *Id.* at 115.

179. *Id.*

180. *Id.* at 115–16.

181. *Id.* at 116–17.

182. *Id.* at 117, 119.

183. *Id.*

“arbitrarily deprived them of their property without due process of law.”<sup>184</sup>

The New York State Supreme Court granted an injunction to Penn Central, but the Appellate Division reversed,<sup>185</sup> and the New York Court of Appeals affirmed the Appellate Division.<sup>186</sup> The New York Court of Appeals cursorily rejected the Fifth Amendment takings argument because the City had merely restricted certain uses of the property, rather than transferring ownership.<sup>187</sup> After more extensive discussion, the court also rejected Penn Central’s claim that its substantive due process rights had been violated, because the landmark designation, *inter alia*, still allowed a “reasonable return” on its investment interest in the property.<sup>188</sup>

The United States Supreme Court affirmed the judgment of the New York Court.<sup>189</sup> Rather than address the substantive due process argument, the Court certified the question for appeal as whether there had been a taking under the Fifth Amendment and, if so, whether the transferable development rights that had been granted to Penn Central were sufficient as “just compensation.”<sup>190</sup> Because it found no taking, the Court never addressed the second question.<sup>191</sup> Although the Court explicitly rejected the idea that a taking required the transfer of physical control of the property,<sup>192</sup> it ruled that the Landmarks Law “[had] not effected a ‘taking’ of [Penn Central’s] property.”<sup>193</sup>

The Court’s ruling made a number of points that are important for the purposes of contemporary landmark determinations. It rejected the argument that landmark decisions are fundamentally arbitrary because they rely on the subjective judgment of institutions like the LPC.<sup>194</sup> While the Court did not adopt a rule requir-

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184. *Id.*

185. Penn Cent. Transp. Co. v. City of New York, 377 N.Y.S.2d 20, 30 (App. Div. 1965).

186. Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271, 1279 (N.Y. 1977).

187. Penn Cent. Transp. Co. v. New York City, 438 U.S. at 120–21.

188. *Id.* at 121.

189. *Id.* at 138.

190. *Id.* at 122. The New York Court of Appeals had granted leave to Penn Central to present further evidence that they could not make a reasonable return on their property, and thus could still have a viable Fourteenth Amendment claim, but as the company decided not to pursue that in lieu of appeal to the Supreme Court, the Court did not address that claim. *Id.*

191. *See id.*

192. *Id.* at 123 n.25.

193. *Id.* at 1–38.

194. *Id.* at 132.

ing a physical transfer of ownership or intrusion for a finding of a regulatory taking,<sup>195</sup> neither did it apply a rule requiring compensation whenever there is a diminution of value caused by government action.<sup>196</sup> Finally, the Court re-affirmed the test for regulatory takings<sup>197</sup> established in *Pennsylvania Coal Co. v. Mahon*<sup>198</sup> and explicitly applied it to the landmark context.<sup>199</sup>

Justice Rehnquist, joined by Chief Justice Burger and Justice Stevens, dissented.<sup>200</sup> Justice Rehnquist explicitly justified his dissent with the language of public goods discourse<sup>201</sup> and identified two important aspects of landmarking that distinguish it from other zoning actions. Unlike zoning, which might limit land uses for all owners in an area, a landmark designation only restricts the owners of a particular site.<sup>202</sup> In addition, the landmark designation creates “an affirmative duty to *preserve* his property *as a landmark* at his own expense.”<sup>203</sup> According to the dissent, the individual and affirmative nature of the burdens created by a landmark designation were sufficient to create a claim under the Fifth Amendment.<sup>204</sup>

Despite these concerns, the majority’s ruling in *Penn Central* remains intact.<sup>205</sup> Yet the recognition by the Court that the concerns of the dissenters should inform the use of an ad hoc test has had consequences for litigation surrounding landmarks.

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195. *Id.* at 123 n.25. That actions other than a transfer of title can amount to a takings has been established since at least the nineteenth century. Gary Lawson, Katharine Ferguson & Guillermo A. Montero, “*Oh Lord, Please Don’t Let Me Be Misunderstood!*”: *Rediscovering the Mathews v. Eldridge and Penn Central Frameworks*, 81 NOTRE DAME L. REV. 1, 25 (2005).

196. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. at 131.

197. For a brief yet helpful summary of the evolution of the regulatory takings doctrine up to *Penn Central*, see Lawson, Ferguson & Montero, *supra* note 195, at 24–30.

198. 260 U.S. 393 (1922).

199. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. at 136 (“We now must consider whether the interference with the appellants’ property is of such a magnitude that ‘there must be an exercise of eminent domain and compensation to sustain [it].’”) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413).

200. *Id.* at 138.

201. *Id.* at 139 (Rehnquist, J., dissenting) (“The question in this case is whether the cost associated with the city of New York’s desire to preserve a limited number of ‘landmarks’ within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individuals properties.”).

202. *Id.* at 139–40.

203. *Id.* at 140 (emphasis in original).

204. *Id.*

205. *See, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 616–17 (2001).

## 2. The Judicial Hardship Exception

In *Trustees of Sailor's Snug Harbor in the City of New York v. Platt*,<sup>206</sup> a sailors' home on Staten Island challenged the designation of four of their dormitories as landmarks.<sup>207</sup> While the Landmarks Law includes an exception for nonprofits that is somewhat similar to the reasonable return status,<sup>208</sup> it only applies when the nonprofit intends to sell or lease the property in question and the sale is to a commercial enterprise.<sup>209</sup> The plaintiffs in *Snug Harbor* only wanted to modify their property.<sup>210</sup> In *Snug Harbor*, the Appellate Division reversed the decision for the plaintiffs in the lower court and remanded for reconsideration in light of the rule it announced.<sup>211</sup> The *Snug Harbor* test states that nonprofit owners can successfully challenge the refusal to grant a variance as a taking when "maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose."<sup>212</sup>

Despite the announcement of a major new constitutional rule in *Penn Central*, which, as a takings clause case addressing New York's Landmarks Law, might have superseded the New York State cases, the basic framework for hardship variance applications for nonprofits in New York retains the *Snug Harbor* test. In *Lutheran Church in America v. City of New York*,<sup>213</sup> the New York Court of Appeals explicitly applied the *Snug Harbor* test<sup>214</sup> in order to declare a

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206. 288 N.Y.S.2d 314 (App. Div. 1968).

207. *Id.* at 315.

208. *Supra* at Part II.B.

209. N.Y.C. ADMIN. CODE § 25-309(a)(2) (1992).

210. *See Snug Harbor*, 288 N.Y.S.2d 314, 316 (App. Div. 1968).

211. *Id.* at 317.

212. *Id.* at 316. It is worth noting, in light of later arguments in this section, that *Snug Harbor* was essentially a case on physical hardship, not financial hardship. *See Stewart, supra* note 50, at 180.

213. 316 N.E.2d 305 (N.Y. 1974). Cases involving religious institutions, which are frequently organized as nonprofit organizations, also introduce a First Amendment dimension to the jurisprudence. *See, e.g.*, *Church of St. Paul & St. Andrew v. Barwick*, 496 N.E.2d 183, 185–86 (N.Y. 1986) (dismissed on ripeness grounds). While this problem is beyond the scope of this Note, a general treatment of the issue can be found in Catherine Maxson, Note, "Their Preservation is Our Sacred Trust"—Judicially Mandated Free Exercise Exemptions to Historic Preservation Ordinances Under *Employment Division v. Smith*, 45 B.C. L. REV. 205 (2003). *See also* Steven P. Eakman, Note, *Fire and Brownstone: Historic Preservation of Religious Properties and the First Amendment*, 33 B.C. L. REV. 93 (1991) (written before Supreme Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (2000)).

214. *Lutheran Church*, 316 N.E.2d at 311 (citing *Snug Harbor*, 288 N.Y.S.2d 314).

landmark designation “confiscatory.”<sup>215</sup> In *Society for Ethical Culture v. Spatt*,<sup>216</sup> the first hardship exception case decided after *Penn Central*, the Appellate Division applied *Snug Harbor*<sup>217</sup> to uphold the designation of a building with an estimated sale price of four million dollars.<sup>218</sup> In that case, the court was careful to articulate that the hardship exception is evaluated with reference to the present uses of the property, not the potential financial gains that could be made by other uses of the site.<sup>219</sup>

Later cases have re-affirmed the use of the *Snug Harbor* test and given a great deal of discretion to the Landmark Preservation Commission in applying the test. In *1025 Fifth Avenue, Inc. v. Marymount School of New York*,<sup>220</sup> neighbors of a school challenged the issuance of a certificate of appropriateness to renovate a rooftop gymnasium located within the Metropolitan Museum Historic District.<sup>221</sup> Despite a finding that the modification was inappropriate,<sup>222</sup> the LPC had granted the certificate because Marymount had demonstrated insufficient returns on the property, given their charitable mission.<sup>223</sup> The court, in upholding that decision, held that the LPC was correct to apply the *Snug Harbor* test, and thus the court could only reverse if the decision of the LPC was arbitrary or capricious.<sup>224</sup>

In the wake of *Board of Estimate v. Morris*,<sup>225</sup> the City Charter Revision Commission considered and rejected several changes to the way in which the Landmarks Law deals with nonprofit organizations.<sup>226</sup> While several changes, such as the creation of an appeals

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215. *Id.* at 310–12. This was also a physical, not financial, hardship case. Stewart, *supra* note 50, at 181.

216. 416 N.Y.S.2d 246 (App. Div. 1979).

217. *Id.* at 251.

218. *Id.* at 248. This case was somewhat unusual, as the nonprofit owner challenged the designation under the hardship exception immediately after the designation. The court ruled that the challenge was not premature but still ruled against the owners. *Id.* at 253.

219. *Id.* at 252; see Stewart, *supra* note 50, at 184.

220. 475 N.Y.S.2d 182 (Sup. Ct. 1983).

221. *Id.* at 183–84. An additional issue in this case was that the Marymount building itself was not landmarked but fell within a historic district. The petitioners claimed that this meant that the issuance of the certificate was therefore ultra vires, but the court found that under *Snug Harbor*, it was entitled to create common law rules for “situations not foreseen in the statute.” *Id.* at 185.

222. *Id.*

223. *Id.* at 184.

224. *Id.* at 186–87.

225. 489 U.S. 688 (1989) (declaring structure of Board of Estimate unconstitutional).

226. Gutman, *supra* note 22, at 440–45.

board, would have made it easier for such groups to challenge LPC decisions,<sup>227</sup> other changes would simply have transferred authority that had previously been held by the Board of Estimate<sup>228</sup> to the city council.<sup>229</sup>

*D. The Regulatory Takings Doctrine and the Judicial Hardship Exception Do Not Address the Problem of Albatross Landmarks*

While the *Penn Central* decision and the ad hoc test it created have been the subject of significant criticism,<sup>230</sup> they have remained the dominant framework for regulatory takings analysis.<sup>231</sup> The *Penn Central* decision has also largely protected historic preservation statutes from constitutional attack on Fifth Amendment grounds.<sup>232</sup> Despite this, the takings doctrine and the related judicial hardship exception are at present the most viable means for landmark rescission. The problem is that these doctrines were not designed to deal with albatross landmarks, and when applied to them, the doctrines create distortions and inefficiencies.

Both the exceptions within the Landmarks Law and the judicially created hardship exception create perverse incentives for owners of landmarked property.<sup>233</sup> Landmark status can give own-

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227. *Id.* at 445.

228. The New York City Board of Estimate was a governing body composed of the mayor, comptroller, city council president, and the five borough presidents. The mayor, comptroller, and city council president each got two votes, while the borough presidents each had one vote. The structure was declared unconstitutional under the doctrine of "One Person, One Vote" in *Board of Estimate v. Morris*, 489 U.S. 688 (1989), and most of the Board's authority was given to the city council by the new city charter.

229. Gutman, *supra* note 22, at 446.

230. See, e.g., Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 DICK. L. REV. 571, 571 (2003); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 205 (2004). See generally Gideon Kanner, *Making Laws and Sausages: A Quarter Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL RTS. J. 679 (2005).

231. A long line of cases have reinterpreted or applied the *Penn Central* test. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015–19 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). The basic framework from *Penn Central* is still the standard in regulatory takings cases.

232. Byrne, *supra* note 122, at 316. In certain cases, constitutional attacks on designations have been made under the First Amendment. *Supra* note 213.

233. In general, landmark regimes may create perverse incentives for owners to build unremarkable buildings, although this may be mitigated through other incentives built into the landmark system. Rose, *supra* note 24, at 500–01.

ers a reason to take subpar care of their buildings.<sup>234</sup> While fines and other penalties can help prevent this, it is sometimes more costly to repair the landmark than to pay the fine. The ultimate recourse, condemning and seizing the property, is difficult and does not necessarily solve the problem.<sup>235</sup> Because rescission of a landmark is difficult, the easiest way to get a landmark designation removed entirely or modified may be to demolish the property through neglect<sup>236</sup> or, short of that, to demonstrate that the designation impedes one's ability to see a profit on the property.

This creates the possibility of strategic behavior on the part of owners of landmarks. Commercial owners may be incentivized to less than fully exploit the landmark site, in order to demonstrate that it is impossible to receive a reasonable return on the site. While there is some case law stating that this is not an acceptable way to obtain the exception,<sup>237</sup> such behavior may be difficult to detect. Similarly, nonprofit owners may be disincentivized from improving the services which they provide in order to demonstrate that the landmark status interferes with their charitable purposes.

Beyond these perverse incentives, the doctrines have a number of problems. First, the tests are relatively vague.<sup>238</sup> Although there is a nominally objective standard defining "reasonable return" as "a net annual return of six percent of the valuation of an improvement parcel,"<sup>239</sup> it is not clear what values should be used for calcu-

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234. Shawn G. Kennedy, *Landmarking's Double-edged Sword: Sometimes It Works Against Preservation*, N.Y. TIMES, Jan. 13, 1991, § 10 (Real Estate), at 1 (cited in ELLICKSON & BEEN, *supra* note 65, at 500 n.5).

235. See, e.g., Lisa Selin Davis, *Neglect, Lack of Funds Damage NYC Landmark*, WALL ST. J. REAL ESTATE JOURNAL (2004), available at <http://lisaselindavis.com/articles/Sea%20View%20Hospital.pdf> (describing how city agencies could not be forced to repair property through standard landmarks enforcement regime). While the LPC can fine owners who fail to maintain landmarked property, enforcement is sometimes lax both because of issues of funding and staff shortages and because of administrative incompetence. See HON. BILL PERKINS, COMMITTEE ON GOVERNMENTAL OPERATIONS, FORTY YEARS OF NEW YORK CITY LANDMARKS PRESERVATION: AN OPPORTUNITY TO REVIEW, REFLECT AND REFORM 4, 8 (2005) [hereinafter "COUNCIL REPORT"].

236. See, e.g., Lana Bortolot, *amNY's Endangered NYC special report: The city's crumbling past*, AMNY, Jan. 3, 2010, <http://amny.com/urbanite-1.812039/amny-s-endangered-nyc-special-report-the-city-s-crumbling-past-1.1682392>.

237. *Seawall Assocs. v. City of New York*, 534 N.Y.S.2d 958, 963–64 (App. Div. 1988).

238. Moy, *supra* note 3, at 458; Stewart, *supra* note 50, at 163 ("New York City's nonprofit landowners allege, however, that the current historic preservation system employs vague, arbitrary and overly strict eligibility criteria for hardship relief . . .").

239. N.Y.C. ADMIN. CODE § 25-302(v) (1992).

lating the six percent figure. Even with a defined standard of “six percent,” it is extremely difficult to properly account for the failure of the owner to realize a reasonable return. For example, the owner’s losses may be a result of mismanagement, rather than the landmark designation. Courts have stated that a reasonable return is not the present return compared to the most economically efficient use of the property,<sup>240</sup> but, especially when property has been landmarked after being acquired by the present owners, it is not clear why other potential uses of the property should not be considered.<sup>241</sup>

Furthermore, the Landmarks Preservation Commission may well be best-suited to decide the historical or aesthetic value of a particular site,<sup>242</sup> but may not be equally adept at evaluating the financial implications of maintaining a landmark designation. The problem essentially repeats itself in the context of nonprofit owners; the LPC is designed to assess architectural and historic merit, not evaluate the books of myriad nonprofit enterprises.<sup>243</sup> And if the conventional rationale for maintaining a deferential standard of review is administrative competence,<sup>244</sup> then that rationale is insufficient to maintain the current deference in landmark decisions.<sup>245</sup>

Another potential issue is that the constitutional standards governing the various exceptions are traceable to *Penn Central*, which dealt with an obviously important, especially valuable, highly visible, and centralized structure.<sup>246</sup> While early commentators on the *Penn*

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240. 400 East 64/65th Street Block Ass’n v. City of New York, 583 N.Y.S.2d 452, 454–55 (App. Div. 1992).

241. The *Penn Central* test includes analysis of the owner’s “investment-backed expectations.” *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). While this may have relevance to the constitutional issue of takings, insofar as a plaintiff cannot claim the government took something they never thought they had, as this Note argues, the question of future uses should be relevant to the question of maintaining a landmark designation. *Infra* Part III.C.

242. Stewart, *supra* note 50, at 172.

243. *Id.* at 171 (“The LPC’s essential task in [the hardship relief] context is to distinguish between landmark owners who truly need hardship relief and those who seek relief merely for easy gain.”).

244. See, e.g., *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

245. This is not to suggest that courts should, without authorization from the legislature, apply a higher level of scrutiny to landmarking decisions but rather that the New York State legislature would do well to revisit this particular scheme.

246. Richard A. Jaffe & Stephen Sherrill, Comment, *Grand Central Terminal and the New York Court of Appeals: “Pure” Due Process, Reasonable Return, and Betterment Recovery*, 78 COLUM. L. REV. 134, 152–53 (1978) (published in January 1978, before the Supreme Court granted a writ of certiorari in *Penn Central*).

*Central* decision argued that the decision might have little practical import<sup>247</sup> or that restrictions on less deserving sites would be harder to constitutionally maintain,<sup>248</sup> the decision has proven to be versatile and enduring. But many landmarks are nowhere near as important or obvious as Grand Central. It is possible that the decision, made after the very same company that had destroyed Penn Station had attempted to destroy Grand Central, should not have the same persuasive force when applied to other less significant sites. The ad hoc test of *Penn Central* allows courts to balance the importance of the government's interest in the designation against the magnitude of the imposition on private property owners, but the Supreme Court has interpreted that as a balance between the regulatory scheme in general (i.e. the government's interest in having any landmark scheme at all) and the imposition on an individual owner, rather than a balance between the government's interest in a particular landmark and the imposition on the owner.<sup>249</sup> In *Penn Central*, the Court explicitly stated that it approved of the government interest in maintaining landmarks.<sup>250</sup> By approving the use of landmark laws in order to balance the public interest in historic preservation in general against the burden on particular private property owners, the Court did not ask if there might be individual cases where the general scheme of landmarking would be too burdensome given the actual structure being preserved.

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247. *Id.* at 152.

248. *Id.* at 153.

249. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542–546 (2005); Christopher T. Goodin, *The Role and Content of the Character of the Governmental Action Factor in a Partial Regulatory Takings Analysis*, 29 U. HAW. L. REV. 437, 442 (2007); Michael B. Kent, Jr., *Construing The Canon: An Exegesis of Regulatory Takings Jurisprudence After Lingle v. Chevron*, 16 N.Y.U. ENVTL. L.J. 63, 93 (2008); see also *Yee v. City of Escondido*, 503 U.S. 519, 522–23 (1992) (interpreting *Penn Central* as stating that a regulatory taking occurs “only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole”). The Court never reached the regulatory takings argument in *Yee*, stating that it had not been properly certified for appeal. *Id.* at 537–38.

250. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 129 (1978) (“[A]ppellants do not contest that New York City’s objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal.”); see also *id.* at 134–35 (“Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York Citizens and all structures, both economically and by improving the quality of life in the city as a whole—which we are unwilling to do—we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law.”).

Finally, the Supreme Court has frequently referred to “investment-backed expectations” in the context of regulatory takings cases.<sup>251</sup> This makes perfect sense: an owner cannot reasonably claim that the government has taken property rights that no reasonable person would believe he or she possessed. But in the context of albatross landmarks, present and future uses that were not foreseen when the owner acquired the property might be persuasive reasons to eliminate the landmark designation. Requiring owners to show interference with their investment-backed expectations fails to address the possibility that a landmark designation that made sense at one point no longer provides the city with significant benefits. The next section of this Note proposes circumstances which would justify rescission of landmark designations.

### III. PROPOSALS FOR RESCISSION

To recount, the problem can be stated as this: without the Landmarks Preservation Commission, there would likely be an undersupply of landmarks. But the LPC itself is vulnerable to capture and is likely to over-preserve. Even were the supply of landmarks at an optimal level,<sup>252</sup> there is still the possibility of mistaken landmark designations and the possibility that changed circumstances obviate the utility of a given landmark designation. At present, landmark status is virtually perpetual, both because of the internal dynamics of the LPC and because of the external constraints on its behavior. When this is combined with the courts’ likely increased scrutiny<sup>253</sup> of decisions to rescind, there are powerful disincentives for the LPC to ever rescind landmark status.

The solution to the problem of albatross landmarks is to modify the statutory scheme for rescission. The scheme should explicitly delineate circumstances in which landmark status can be rescinded and establish the evidentiary burden that an owner must meet. In order to avoid the possibility of developers attempting to manipulate this system, it should also address the possibility of re-litigation.

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251. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 617–18 (2001); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992) (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 124); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

252. The question of the optimal level of supply of landmarks is an empirical and ideological question, which will exist regardless of the possibility of rescission. The point here is that the current system is likely to over-preserve and has no mechanisms in place to correct for this tendency.

253. *Infra* Part III.A.

*A. The Current Rescission Provision's Inadequacy*

One of the major problems with the rescission provision is that its own terms seem to undercut any significant possibility of rescission. The Landmarks Preservation Commission is charged with “safeguard[ing] the city’s historic, aesthetic and cultural heritage, as embodied and reflected in such improvements, landscape features and districts.”<sup>254</sup> The very fact of an earlier designation suggests that there is significant cultural or historic value in the landmark. If it were clear that a site has simply lost historic value, as happened when the New Brighton Village buildings were destroyed,<sup>255</sup> then perhaps rescission would be easy even in the absence of a clear standard or a set of factors to consider. Unfortunately, when rescission becomes appropriate, it is rarely as obvious.

Landmark disputes are generally controversial, and there is little reason to believe that rescission decisions would not be similarly hard-fought. This presents a disincentive for the LPC to rescind of its own accord. If the LPC reverses its own decision to protect a building, it risks increased scrutiny of that change.<sup>256</sup> Were the LPC to rescind a designation, it would likely face a lawsuit from a preservationist group. Since there are no provisions delineating the circumstances in which rescission can be used, these decisions are, contrary to most decisions by the LPC,<sup>257</sup> highly vulnerable to chal-

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254. N.Y.C. ADMIN. CODE § 25-301(b) (1992).

255. *See supra* note 109.

256. *See, e.g.*, *Idlewild 94-100 Clark, LLC v. City of New York*, 898 N.Y.S.2d 808, 817 (Sup. Ct. 2010) (quoting *Matter of 2084-2086 BPE Assocs. v. State of New York Div. of Housing and Community Renewal*, 15 A.D.3d 288 (N.Y. App. Div. 2005)).

257. The standard for judicial review of determinations by the LPC, like other agencies, is whether the administrative determination is “warranted on the record and has a rational basis in the law.” *Mattone v. N.Y.C. Landmarks Pres. Comm’n*, No. 117604.03, 2004 WL 2567127 (N.Y. Sup. Ct. Sept. 24, 2004); *see also* *Teachers Ins. & Annuity Ass’n of America v. City of New York*, 623 N.E.2d 526, 528 (N.Y. 1993) (“A landmark designation is an administrative determination, ordinarily reviewable under article 78, that must be upheld if it has support in the record, a reasonable basis in law, and is not arbitrary or capricious.”) (citing *Lutheran Church v. City of New York*, 316 N.E.2d 305, 309 n.2 (N.Y. 1974)); *Shubert Org., Inc. v. Landmarks Pres. Comm’n*, 570 N.Y.S.2d 504, 507 (App. Div. 1991) (also applying “reasonable basis” and arbitrary and capricious standard of review). This is an extremely low requirement for the LPC to meet. One of the few examples of the LPC losing under this standard was a case in which the Commission set two different timetables for compliance with identical enforcement orders given to two residents of the same building, *Rudey v. Landmarks Pres. Comm’n*, 627 N.E.2d 508 (N.Y. 1993). Another court rejected an LPC determination, used by the City Planning Commission, that an increase of 4900 pedestrians “in a vicinity populated

lenge in an Article 78 proceeding. While judicial review of LPC decisions is rare,<sup>258</sup> insofar as it is possible to extrapolate from a relatively small data set, courts seem generally unwilling to find the LPC's actions arbitrary or capricious.<sup>259</sup> Moreover, the opacity of many LPC decisions makes it extremely difficult to demonstrate that they did not use improper factors.<sup>260</sup> Owners seeking rescission of a landmark designation face significant additional obstacles.<sup>261</sup>

The most likely result of this is that the Landmarks Preservation Commission will simply maintain landmarks, which appears to be what is happening under the status quo.<sup>262</sup> The LPC also has a variety of procedural mechanisms which can allow it to dispatch certain petitions without substantive rulings,<sup>263</sup> and the LPC is not subject to particularly stringent procedural requirements in the first

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daily by some 700,000 workers" would be a significant impact. 383 Madison Assocs. v. City of New York, 598 N.Y.S.2d 180, 182 (App. Div. 1993).

258. A search on Westlaw for "Landmarks Preservation Commission" for cases from either New York courts or federal courts sitting in New York reveals only 132 decisions, many of which are from different procedural phases of the same cases, and some of which pre-date the *Penn Central* decision. The absence of cases could also indicate that the threat of litigation constrains the behavior of the LPC. See Byrne, *supra* note 122, at 330.

259. See, e.g., Rudey v. Landmarks Pres. Comm'n, 627 N.E.2d 508 (N.Y. 1993).

260. See, e.g., Mattone v. N.Y.C. Landmarks Pres. Comm'n, No. 117604.03, 2004 WL 2567127 (N.Y. Sup. Ct. Sept. 24, 2004) (upholding LPC determination where petitioner failed to show that LPC had relied on one plan improperly).

261. The cases cited in this section contain several different kinds of obstacles, including challenges from third parties, which create their own dilemmas. For example, owners can challenge designations of their own property or the failure to grant a certificate, while third parties can challenge both designations and the failure to designate or the granting of the various certificates. One issue that sometimes occurs in cases is timing, as it is difficult to obtain a preliminary injunction compelling the LPC to either hold a hearing or stay a determination, see, e.g., Deane v. City of New York Dep't of Bldgs., 677 N.Y.S.2d 416 (Sup. Ct. 1998), but delaying litigation can allow a property owner to quickly make approved changes, which would lead to dismissal of a case against the LPC's decision as moot. See, e.g., Citineighbors Coal. of Historic Carnegie Hill *ex rel* Kazickas v. N.Y.C. Landmarks Pres. Comm'n, 811 N.E.2d 2, 4 (N.Y. 2004). Standing and timing are much bigger issues for third parties seeking to overturn decisions allowing demolition or modification of landmarks than for owners of property seeking relief.

262. Whether this is a direct result of the difficulty of obtaining rescission and the unavailability of judicial review or an indirect result of owners not seeking rescission because of these two factors is an empirical question.

263. See, e.g., Landmark West! v. Tierney, 807 N.Y.S.2d 342, 343 (App. Div. 2006) (holding that collateral estoppel prevented petitioner from raising challenge to LPC's procedures on appeal). The LPC had simply refused to calendar a hearing for the petition, which the petitioner had challenged below. The original decision is Landmark West! v. Tierney, No. 107387/05, 2005 WL 2108005 (N.Y. Sup. Ct. Sept. 1, 2005).

instance. For example, there is no requirement of any particular procedure to determine whether to conduct a hearing on a proposal brought to its attention.<sup>264</sup>

Many of the aforementioned problems are not unique to the LPC. Courts typically only examine agency decisions under arbitrary and capricious review.<sup>265</sup> But the confluence of several factors makes this inappropriate for landmark decisions. The LPC is vulnerable to capture.<sup>266</sup> When the agency decides to designate a landmark, the costs associated with that decision are relatively low.<sup>267</sup> The only viable legal option for owners besides judicial review of the decision is a challenge under the regulatory takings doctrine, which is an extremely difficult standard to win under.<sup>268</sup> Because of these factors, the owner of a landmark is more or less stuck with the designation. The problem is compounded by the lack of statutory language delineating when a designation should be rescinded. It is almost impossible to think of an example where the LPC would not meet the rationality standard when a prior group of commissioners had approved the landmark. If it is true that landmark status sometimes becomes inappropriate over time, or was simply sometimes mistaken when made, then there ought to be a way to re-visit the decision. As it is unlikely that the rules of judicial review for administrative decisions will change, the most practical way to alter the review of landmark designations is to add a statutory standard for rescission. This would improve the procedural route to rescission and create fixed parameters for the LPC's decision, providing courts with a standard against which to judge LPC determinations.<sup>269</sup>

#### B. Using "Change-Mistake" to Create a Framework for Rescission

At least one jurisdiction, Maryland, has created a doctrine to address areas of land use policy that have some common features with the problem of albatross landmarks. Under Maryland's

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264. Robin Pogrebin, *New York Landmarks Agency Is Upheld on Appeal*, N.Y. TIMES, Mar. 4, 2010, [http://www.nytimes.com/2010/03/05/arts/design/05arts-NEWYORKLANDM\\_BRF.html](http://www.nytimes.com/2010/03/05/arts/design/05arts-NEWYORKLANDM_BRF.html).

265. *Rudey v. Landmarks Pres. Comm'n of City of New York*, 627 N.E.2d 508 (N.Y. 1993).

266. *See supra* Part I.D.

267. *See supra* Part I.D.

268. *See supra* Part II.C.1.

269. Decisions under this standard would still be subject to a great deal of deference, but adding statutory factors would create additional questions of law, to which less deference is owed to the agency's interpretation. *See, e.g.,* *Belance v. Manhattan Beer Distribs.*, 861 N.Y.S.2d 797, 798 (App. Div. 2008).

“change–mistake” doctrine,<sup>270</sup> in the context of “spot” zoning—where individual parcels within a comprehensive zoning plan are re-zoned—courts require the zoning board (or whoever is responsible for the decision) to justify the change under a higher standard than would ordinarily attach to an administrative decision. The rule is stated as follows: “[w]here property is rezoned, it must appear that either there was some mistake in the original zoning, or that the character of the neighborhood has changed to such an extent that such action ought to be taken.”<sup>271</sup> The rule is meant to create a presumption in favor of the initial zoning determinations,<sup>272</sup> because, unlike the comprehensive zoning plan, in a spot zoning decision, courts “probably suspect that regulations that favor (or disfavor) a particular tract serve private interests, not public purpose, and are therefore arbitrary and illegal.”<sup>273</sup>

This should be the basic framework for rescission in New York City. Landmark decisions, especially exterior designations, are effectively spot zoning decisions. In historic districts, the decision to rescind a landmark is also comparable. Courts should treat the initial landmark designation as presumptive evidence of historical or aesthetic merit. When an owner wants the designation rescinded,<sup>274</sup> he or she should be allowed to overcome the presumption by presenting evidence to the Landmarks Preservation Commission based on factors suggested in the next section. The owner would have to demonstrate that some factor either not considered or not in existence at the time of designation now exists and that rescission is justified by reference to one of the enumerated standards. In essence, this should be a two-step process for owners: First, they should have to demonstrate that there has been a change in circumstances or a new potential use which justifies re-evaluating the decision based on a factor that was not considered during the initial

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270. *Kracke v. Weinberg*, 79 A.2d 387, 391 (Md. 1951). See generally Barlow Burke, Jr., *The Change-Mistake Rule and Zoning in Maryland*, 25 AM. U. L. REV. 631 (1976).

271. *Kracke*, 79 A.2d at 391.

272. Philip J. Tierney, *Bold Promises But Baby Steps: Maryland's Growth Policy to the Year 2020*, 23 U. BALT. L. REV. 461, 483 n.154 (1994) (surveying cases on change-mistake rule and stating that, while rule has been successful, Maryland State Legislature should enable zoning boards to make changes in other circumstances).

273. John Mixon & Kathleen McGlynn, *A New Zoning and Planning Metaphor: Chaos and Complexity Theory*, 42 HOUS. L. REV. 1221, 1231 (2006).

274. In the somewhat unlikely event that the LPC decides to revoke landmark status on its own and there is a legal challenge, the current level of administrative deference is justifiable, as there are already safeguards against arbitrary action in place, and this is the kind of decision that is delegated to the LPC.

designation. Second, if they can do so, they should also have to demonstrate that the change is significant enough that landmark status is no longer appropriate.<sup>275</sup> This would both provide the LPC with a way to avoid frivolous claims and allow owners a second chance to challenge the rulings of the LPC in court, thus increasing the transparency of LPC decisions by forcing them to present arguments to neutral arbiters. Permitting this kind of claim would add clarity to the current landmarks regime and further the goal of balancing historic preservation against the present needs of the city. Furthermore, it would provide standards against which a court could evaluate the LPC's decisions without modifying the existing standard of agency deference.

### C. *Circumstances Justifying Rescission*

There are at least three circumstances in which rescission should be warranted.<sup>276</sup> First, when there has been a significant change in the economic circumstances surrounding the landmark, owners should be entitled to present evidence that the initial designation as a landmark no longer makes sense. The kinds of changes for which this would be appropriate would primarily be economic.

Changes that should be considered include significant increases or decreases in the area's population<sup>277</sup> and significant shifts in the economic activities of the neighborhood. Both of these situations would alter the economic impact of the landmark so significantly that a new look at the designation is justified. This provision would be especially useful in situations where the present use of the landmark is no longer useful to the area and the landmark designation impedes any other practical uses.

Landmark designations are justified, in part, by economic considerations.<sup>278</sup> Therefore, it is incongruous to consider only the economic impact at the time of designation and not at the time of

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275. The kinds of changes that would justify this should vary with the type of claim made. Changes that would qualify are addressed for each of the circumstances that would justify rescission.

276. One further circumstance, simple mistake in the original designation, has not been discussed, because it is uncomplicated, appears to be extremely rare, and is adequately covered by the existing provision. This Note should not be read as foreclosing the possibility that other circumstances could also justify rescission.

277. To be clear, this should not apply to shifts in the demographics of a neighborhood, including gentrification. Part of the reason for historic preservation is to maintain vestiges of the past; therefore, changes in demographics are insufficient to justify rescission.

278. N.Y.C. ADMIN. CODE § 25-301 (1992) (declaration of public policy, stating that purposes of law include, *inter alia*, "stabiliz[ing] and improv[ing] property

application for rescission. Allowing rescission in changed economic circumstances would strike a balance between the Landmarks Law's competing aims of preservation and development. The approach taken by courts in other types of land use disputes is instructive here. For example, Pennsylvania courts have refused to bar claims contesting denials of variances on the basis of *res judicata* when "there has been a subsequent substantial change in conditions incident to the land itself."<sup>279</sup> Placing the burden on owners to show that such a change exists would limit the dangers of re-litigation and would still allow for reconsideration when appropriate.

Second, rescission should be granted when the landmark is one of the least valuable examples of a style of architecture that is over-protected in the city. The question should be: "How valuable is maintaining the landmark, given the existence of other protected exemplars of the same architectural style?" As architectural trends reach designation-eligible age, and as different commissioners identify particular architectural trends as being worthy of preservation, the Landmarks Preservation Commission can designate several exemplars of this style. For example, in 2009, the LPC committed to preserving more Modernist buildings and designated four examples in that fiscal year alone.<sup>280</sup>

While programmatic planning by the LPC may be desirable, there is also the possibility that, given the costs both to the owner and to the public of preserving a landmark, there may not be a need for every component of the scheme. Under the current system, landmarks are designated without reference to the broader program of protection, even when the LPC has targeted a particular style for protection.<sup>281</sup> This is the worst of both worlds: by programmatically identifying and then protecting sites in the first

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values in [historic] districts . . . protect[ing] and enhanc[ing] the city's attractions to tourists and visitors . . . [and] . . . strengthen[ing] the economy of the city").

279. *City of Pittsburgh v. Zoning Bd. of Adjustment*, 559 A.2d 896, 901 (Pa. 1989). While that case rejected a variance on the basis of "mere economic hardship," the circumstances included "self-inflicted economic harm." *Id.* at 903-04. The point made in this Note is primarily procedural; thus, the Pennsylvania court's refusal to credit the economic harm is somewhat irrelevant. *Cf. Fisher v. City of Dover*, 412 A.2d 1024, 1027-28 (N.H. 1980) (reversing lower court's affirmation of zoning board's granting of variance because zoning board had not demonstrated change in circumstances).

280. 2009 MAYOR'S REPORT, *supra* note 7, at 107.

281. *See, e.g.*, N.Y.C. LANDMARK PRESERVATION COMMISSION, *Spring Mills Building*, Designation List 428, LP-2385 10 (Apr. 13, 2010), available at <http://www.nyc.gov/html/lpc/downloads/pdf/reports/SpringsMills.pdf> (describing site as "a particularly well-preserved example of a mid-20th century glass curtain wall skyscraper" without reference to any other extant examples).

instance without a way to later evaluate the landmark in the context of the scheme in its entirety later, there is a danger of both over-protection and of arbitrariness. If an owner can demonstrate that the significance of the structure within the overall preservation program was not considered when the landmark was designated, or that subsequent designations have significantly weakened the importance of preserving their building, or that there has been a major reevaluation of the importance of the protected attributes, then he or she should be able to apply for rescission.

Owners of landmarks should be granted rescission if they demonstrate that their property is protected primarily as an exemplar of certain kind of architecture and that that style of architecture is already adequately protected relative to its importance to the history of the city or the history of architecture.<sup>282</sup> The scarcity of buildings exhibiting a particular style of architecture is a valuable consideration, because it allows the city to find a balance between the public benefits of having historical buildings against the economic needs of the city. For example, if the Trylon Theater had been the last Art Deco movie house left in the city, then perhaps it would have been more crucial to save it.<sup>283</sup> There are likely to be cases where it makes very little difference to the public which particular examples are preserved or where those exemplars are located, but the actual location of a particular landmark is crucial to a development plan or other advantageous use.

There are a number of ways in which the owner could demonstrate that the site is protected merely as an exemplar. The initial designation report would be useful for this, as it typically explains, at least briefly, the reasons why a site has been deemed to be important, and it often states that the building is typical of a particular style.<sup>284</sup> If rescission on these grounds were allowed, however, the

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282. There are other reasons, in addition to architectural style, for granting landmark status. The logic of this Note applies in these situations. For example, some sites are protected because of the historical importance of the period in which they were built, rather than because of the actual aesthetic merit of the buildings. When the argument for rescission centers on schematic concerns, it will likely be based on architectural style; therefore, I have referred solely to those circumstances for the purposes of clarity.

283. For a contemporary account of the dispute over the Trylon, see Jeff Vandam, *For an Art Moderne Theater, A Struggle Over Act II*, N.Y. TIMES, Sept. 18, 2005, § 14, at 8, available at <http://query.nytimes.com/gst/fullpage.html?res=9D0CE7D61E31F93BA2575AC0A9639C8B63>. The theater has since been destroyed.

284. For an example of one of the more comprehensive designation reports found while researching this Note, see LANDMARKS PRESERVATION COMMISSION, *130 West 57th Street Building*, Designation List 310, LP-2042 (Oct. 19, 1999), available at <http://www.nyc.gov/html/lpc/downloads/pdf/reports/130w57.pdf>.

LPC might simply add more reasons to the initial report in order to protect the designation from later challenge. Still, this would be preferable to the status quo. Forcing the LPC to provide more detailed justifications for landmark designations may limit the supply of landmarks and would create a written evidentiary trail, which would reduce the risk of arbitrary decisions.

One way to determine whether a landmark deserves continuing protection would be a ranking system. At least one state, Oregon, requires the state historic preservation office to survey all historic resources in a community prior to designation.<sup>285</sup> While preservationists have taken issue with ranking systems because the rankings may make less significant structures seem “dispensable,” they have also praised their objectivity and responsiveness to community needs.<sup>286</sup> As this Note has proposed, the less significant structures may in fact be dispensable, given the burdens on owners and the impediments to development. Furthermore, the Oregon system already uses rarity as one of its considerations even before designation.<sup>287</sup> Similar ranking systems exist in San Francisco,<sup>288</sup> Chicago,<sup>289</sup> Boston,<sup>290</sup> and England.<sup>291</sup> Using a ranking system, par-

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285. See OR. REV. STAT. § 358.595 (2009); OR. STATE HISTORIC PRESERVATION OFFICE, 2005 OREGON HISTORIC PRESERVATION PLAN 7 (2005).

286. See, e.g. Bradford J. White & Richard J. Roddewig, *Elements of a Good Preservation Plan*, HISTORIC PRESERVATION LAW, SJ053 ALI-ABA 379, 386 (2004) (reprinted from American Planning Association, 1993).

287. See, e.g. CLACKAMAS COUNTY ZONING AND DEVELOPMENT ORDINANCE § 707.02(B)(5) (2008) (adopted in conformity with statewide standards for preservation).

288. San Francisco does not explicitly address the question of rarity, but it does divide buildings within the central city into five categories, assigning different limitations to each. See S.F., Cal., Planning Code, art. 11, §§ 1102, 1109–17.

289. Chicago has conducted at least one historical site surveys and ranks buildings in order of priority. See COMMISSION ON CHICAGO LANDMARKS, *Chicago Historic Resources Survey*, <http://webapps.cityofchicago.org/LandmarksWeb/chrs.do>. However, the ordinance establishing the Commission on Chicago Landmarks was recently struck down as unconstitutionally vague. *Hanna v. City of Chicago*, 907 N.E.2d 390 (Ill. App. Ct. 2009), *appeal denied*, 910 N.E.2d 1127 (Ill. 2009).

290. White & Roddewig, *supra* note 286, at 387; see also, e.g., THE DRUKER COMPANY, PROJECT NOTIFICATION FORUM: 350 BOYLSTON STREET 3-21 (2007), *available at* [http://www.bostonredevelopmentauthority.org/DevelopmentProjects/PipeDocs/350%20Boylston%20Street/PNF/350%20Boylston%20Street\\_PNF.pdf](http://www.bostonredevelopmentauthority.org/DevelopmentProjects/PipeDocs/350%20Boylston%20Street/PNF/350%20Boylston%20Street_PNF.pdf) (proposing development that would affect historic sites, and discussing applications of Boston ranking system).

291. Under the Planning Act of 1990, the English Secretary of State for Culture, Media, and Sport is required to list buildings for conservation status and categorize them according to three grades. Planning (Listed Buildings and Conservation Areas) Act, 1990 c. 9, *available at* <http://www.legislation.gov.uk/ukpga/1990/9/contents>.

ticularly for the rarity of what is being preserved, would have other benefits. For example, it would force the LPC to make explicit statements about their reasons for preserving a structure. This would, at the very least, give owners an administrative record to use if they sought to challenge a refusal to rescind as arbitrary. Another possible benefit would be greater flexibility for the LPC itself. Although designating a landmark as an exemplar will not necessarily create any great harm at the time of designation, the fact that landmark status is virtually permanent means that there is no opportunity to reevaluate the scheme in its entirety. If it becomes easier to rescind landmark designation, the LPC would be able to preserve a greater number of borderline landmarks while retaining the ability to reevaluate those decisions later.

One possible problem with instituting a ranking system is that it might encourage a race among owners to get their buildings de-designated. Even assuming that an owner has no plans to demolish or modify his or her landmarked property and no significant upkeep costs resulting from the landmark designation, the value of having the freedom to make changes without the approval of the LPC may suffice to motivate the owner to seek de-designation. That said, there are two reasons why this is not a significant problem. First, when a landmark is part of an over-protected architectural movement, it may be good to encourage owners to seek rescission. Second, this would alert the LPC to owners who wish to be rid of their landmarks, giving it an opportunity to try to find other owners for the site. This would help ease some of the LPC's enforcement costs.<sup>292</sup>

The third situation in which an owner of landmarked property should be able to seek rescission would be when the costs of maintaining the landmark significantly outweigh the benefits that accrue to the city. While there would be some overlap between this provision and either changed circumstances or value of the landmark within the overall landmark scheme, there are circumstances which would fit neither of those two provisions but would nonetheless justify the rescission of a landmark designation. Examples of this would include situations where a potential use of the property that could be instituted without the landmark designation. One example of a change that could justify this type of rescission application would be a proposed use of the property that was not possible at the time of designation or a significant shift in the value of the site for some other potential use.

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292. See COUNCIL REPORT, *supra* note 235, at 4–6.

There are also some similarities between this proposal and the current hardship relief and reasonable return standards. Under those standards, however, potential uses of the site are not considered when evaluating the impact of the landmark designation,<sup>293</sup> the result of which may be that it impedes a future use of the land without significant benefit to the city. Permitting owners to present evidence of such a situation will allow the LPC to more fully address the question of costs and benefits of a particular designation.

The recent dispute over the O'Toole Building at St. Vincent's Hospital illustrates the need for this kind of provision.<sup>294</sup> In that instance, the LPC ultimately permitted the demolition of the O'Toole Building.<sup>295</sup> A Certificate of Appropriateness was granted on the basis of a hardship application.<sup>296</sup> To reach this result, the LPC stated that demolition of the site was "inappropriate"<sup>297</sup> but presented reasons why demolition was nevertheless desirable.<sup>298</sup> But these arguments focused on two aspects of the proposed demolition: whether the site interfered with St. Vincent's charitable mission,<sup>299</sup> and whether the judicial hardship exception applied.<sup>300</sup> Although there is no doubt that these were the proper questions for the LPC to ask under existing law, neither of them get to the question that the LPC seemed to be trying to answer, which was

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293. See *supra* Part II.D.

294. For a summary of the landmark dispute, see Matt Chaban, *The Hardest Choice*, THE ARCHITECT'S NEWSPAPER, Oct. 28, 2008, [http://www.archpaper.com/e-board\\_rev.asp?News\\_ID=2916](http://www.archpaper.com/e-board_rev.asp?News_ID=2916). For an account of the eventual closure of St. Vincent's Hospital, see Suzanne Sataline, *St. Vincent's Hospital to Close*, WALL ST. J., Apr. 8, 2010, <http://online.wsj.com/article/SB10001424052702303411604575168631569560638.html>.

295. St. Vincent's Hardship Approval, *supra* note 133, at 9.

296. *Id.* at 4–7.

297. *Id.* at 4.

298. *Id.* at 5–7. In order to prove this argument, the LPC recounted a variety of "standards" for hospital designs that the O'Toole building failed to meet.

299. *Id.* at 4–5.

300. *Id.* Because St. Vincent's did not seek to alienate the property, the statutory provision was unavailable, but the judicial hardship test only seemed to apply if the entirety of the "campus" of St. Vincent's was considered. As at least two future litigants would point out, the idea of a "campus exception" to the hardship test was an invention of the LPC. See, e.g., Brief Amici Curiae of The Municipal Art Society of New York City, as Amici Curiae Supporting Petitioners, at 39, *Protect the Village Historic District v. N.Y.C. Landmarks Pres. Comm'n* No. 102744/2009 (N.Y. Sup. Ct. 2009), available at [http://www.gvshp.org/\\_gvshp/preservation/st\\_vincents/doc/amicus-curiae-11-04-09.pdf](http://www.gvshp.org/_gvshp/preservation/st_vincents/doc/amicus-curiae-11-04-09.pdf). For a summary of this brief, see Letter from David Schnakenberg, The Municipal Art Society of New York, to Participating Amici (Nov. 4 2009), available at [http://www.gvshp.org/\\_gvshp/preservation/st\\_vincents/doc/amicus-summary-11-04-09.pdf](http://www.gvshp.org/_gvshp/preservation/st_vincents/doc/amicus-summary-11-04-09.pdf).

whether the aesthetic or historical value of the building outweighed the cost to the City of preventing St. Vincent's from expanding. Based on this example, it seems as though the LPC is effectively engaging in the kind of cost-benefit analysis proposed in this Note, at least in the more extreme cases. Rather than issue a ruling to that effect, the LPC is forced to contort the existing law in ways that distort the incentives for owners to properly preserve property and manage their commercial or charitable missions properly. It would be better if they could state what they are in fact doing and allow owners to apply for rescission based on the substantive question as to whether maintaining the designation makes sense. Because the City Council can overturn decisions of the LPC,<sup>301</sup> a democratic check exists on the process, which would allow for more direct expression of voter preferences in these kinds of rescissions.

Cost-benefit analysis is never easy, especially when many of the benefits resist quantification.<sup>302</sup> However, almost all of the other land use regulatory schemes in New York City demand some form of cost-benefit analysis or environmental impact review, often with community involvement.<sup>303</sup> There is no principled reason why this form of analysis should be limited to the initial designation, where at least a rudimentary form of cost-benefit analysis is used. Just as the circumstances surrounding the landmark may change, the potential uses of the site may change, and the needs of the city may evolve. Allowing property owners to present evidence that the restrictions on their property are inefficient would allow the LPC to create a better balance between preservation and other concerns.

The major concern with allowing owners to claim that there is simply a better use for the land than as a landmark is that an important goal of a landmarks law is to insulate historic sites from pressure from developers. Penn Station, which may have provided part of the impetus for the Landmarks Law, is an example. In that case, an unprotected historic site was destroyed by a coalition of developers, politicians, and construction unions.<sup>304</sup> Were cost-benefit analysis grounds for rescission, there would be a concern that developers could more easily destroy historic sites. The point of a landmarks regime should be to find a balance between the desira-

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301. N.Y.C. ADMIN. CODE § 25-303(g)(2) (1992).

302. See Mason, *supra* note 25, at 21.

303. See, e.g., N.Y. CITY CHARTER § 197-c (2004). See generally N.Y.C. CHARTER REVISION COMM'N, *Summary of Expert Testimony*, in FINAL REPORT OF THE 2010 N.Y.C. CHARTER REVISION COMM'N B-12 (2010), available at [http://www.nyc.gov/html/charter/downloads/pdf/final\\_report\\_2010\\_charte\\_revision\\_9-1-10.pdf](http://www.nyc.gov/html/charter/downloads/pdf/final_report_2010_charte_revision_9-1-10.pdf).

304. Wood, *supra* note 71, at 301.

bility of preservation and the economic and social needs of the city. These concerns can be mitigated in a number of ways. As discussed, placing the burden of demonstrating that some change has occurred on the owners of the property would limit their ability to rescind; the LPC is likely to be unsympathetic to claims that there is a better use for the property. Preservationists would still be able to challenge rescissions in court, so an additional level of oversight would remain. As discussed in greater depth below, limiting the number of such claims, would give owners a reason to only make claims that they are likely to win. Additionally, there are external constraints on the owners of landmarked property, which would limit the use of this provision to extreme cases. Furthermore, bringing such a claim would alert the LPC to the fact that the owner wished to be free of the designation; the LPC is uniquely positioned to bring together owners of landmarked property who wish to get rid of the designation and potential owners who would maintain it, and so this may provide an additional mechanism for collaboration.

#### IV. CONCLUSION

These proposals do not mean that rescission is a panacea to the public goods dilemma of landmarks. Without the Landmarks Preservation Commission, there is likely to be an undersupply of landmarks, yet the current system both oversupplies the good and places significant burdens on private actors. More aggressive use of rescission, in conjunction with the standards outlined above, can mitigate these two problems. Mechanisms exist within the current landmarks regime to address situations where landmark status may no longer be appropriate, but, as shown above, they are inadequate to the problem of oversupply, and they place a very high burden on individual owners.

Rescission is preferable to the status quo for a number of reasons. First, using rescission would allow the LPC to focus more closely on questions within its field of competence. Rather than have the LPC evaluate financial returns or potential for greater charitable uses, the LPC would be able to focus on the general programmatic goals of the landmarking regime. It would also force the LPC to justify its decisions in more scrupulous and transparent ways, because the initial determination that a site should be a landmark would likely create a strong presumption in favor of continued preservation in the eyes of reviewing judges. This would help ferret out developer interest and would expose the process to greater scrutiny and oversight.

The second reason to prefer rescission is that it can lead to greater accommodation between preservationists and developers.<sup>305</sup> There would be less of a reason to fight landmark designations if they were not perpetual. Rescission claims would also alert the LPC and the preservationist community to the desires of the property owners prior to the developers having to formally submit a plan under the current certificate of appropriateness scheme. Because the current system requires a significant showing of a plan to modify or develop, of hardship, or no reasonable return, the proposed option could function as an early warning sign, allowing the LPC and preservationists to attempt to find buyers who would be willing to preserve the site. The LPC is uniquely positioned to bring together preservationists and developers and could potentially be useful in reducing transaction costs associated with efforts to move properties from the hands of those who wish to demolish into those who wish to preserve.<sup>306</sup> This would have the added benefit of reflecting expressed preferences for landmarks, at least insofar as preservationists could raise money for their cause.<sup>307</sup>

While this system may encourage a certain amount of re-litigation, the problem can be mitigated in a couple of ways. In order to guard against re-litigation by owners of landmarks, a timing provision should be included, stating that rescission cannot occur until a fixed number of years have passed since the designation and permitting applications for rescission only once during a fixed period of years.<sup>308</sup> This would have two benefits: it would limit the power of repeat players or wealthy owners of landmarked property to continually re-litigate their claims, and it would allow the LPC to make regular comparisons between properties over time, which could make cost-benefit analysis increasingly easy. Even if more of these claims are brought, the fact that this sort of litigation (bringing a

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305. If owners of a landmarked property subject to demolition by decay or otherwise sub-optimal use are encouraged to alert the LPC that they no longer wish their property to be subject to the landmark designation, the LPC may be able to step in and assist them. *See supra* Part II.B.

306. For an example of the type of landmark dispute that this could help mitigate, see Noah Rosenberg, *Seek "Sensitive" Theater Buyer: Landmark Ridgewood Theater Not Protected Inside*, THE QUEENS COURIER, Apr. 14, 2010, available at [http://www.queenscourier.com/articles/2010/04/14/news/top\\_stories/doc4bc608af57448981604477.txt](http://www.queenscourier.com/articles/2010/04/14/news/top_stories/doc4bc608af57448981604477.txt).

307. Obviously, those unable to afford to participate in these deals would still be at risk of being underserved by landmarks, but this is the same under the present system.

308. The ideal length of this term is largely an empirical question, and should be determined in consultation with the relevant actors.

petition to the LPC) is likely to remain far cheaper than full-scale lawsuits under Article 78 may be cheaper in the aggregate for owners to come before the LPC and wait out the timing provision if they lose rather than challenge the decision in court. The attempt at rescission should also be tied to the property rather than to the owner, thus making it impossible to avoid this provision by conveying the property which would, over time, produce data on how valuable the possibility of rescission is to owners.

Forcing owners to demonstrate a change would lead to an increase in scrutiny by the courts. This would not require a revision of the current standard for administrative review, but rather a recognition that, were the LPC to rescind a designation, the record would need to demonstrate why the previous designation is no longer appropriate, which may require a more exhaustive evaluation than is currently used. This new process would therefore serve to mitigate some of the concerns surrounding the lack of transparency of the LPC.

Historic preservation has always been controversial in New York City. The rate at which the city evolves and the scarcity of space, particularly in Manhattan, and the rate at which the city evolves create significant tensions between the desire to preserve the past and the need to serve the present. The current landmarks regime is prone to oversupply landmarks, and, by failing to provide adequate mechanisms for rescission, does not create an ideal balance between these two goals. Given some of the past failures to preserve the city's landmarks, the urge to freeze aspects of the city is understandable but is not a sufficient reason to retain the status quo. There are circumstances in which maintaining landmark designations simply does not make sense, and the Landmarks Law should be changed to reflect that. The goal is not to return to the old days of Robert Moses, nor to suggest that the LPC should be less vigilant in protecting the City's cultural legacy. Rather, the City's Administrative Code should be amended to include a more realistic standard and procedure for the rescission of landmarks so that owners of landmarked property, as well as the public at large, can help strike the proper balance between the goals of development and preservation.

1000 NYU ANNUAL SURVEY OF AMERICAN LAW [Vol. 66:951