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### ZONING AND LAND USE PLANNING

# Landmark Preservation Commission's Power Upheld

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In late November 2017, a divided Appellate Division, First Department, decided that New York City's Landmarks Preservation and Historic Districts Law (Administrative Code of City of N.Y. §25-301 *et seq.*) (the Landmarks Preservation Law) permitted the Landmarks Preservation Commission (LPC) to require the private owner of property purchased subject to a prior interior landmark designation to preserve the historic character and operation of the interior landmark and to continue to permit at least minimal public access to it.

This ruling came down even though the LPC previously had determined that it did not want to impose such a requirement in the case, involving the historic New York Life Insurance Company building and, in particular, its clock tower at 346 Broadway in lower Manhattan. *Matter of Save America's Clocks, Inc. v. City of New*

*York*, 157 A.D.3d 133 (1st Dept. 2017). The First Department's decision, as I pointed out in a 2018 Zoning and Land Use Planning column about that decision, seemed destined to itself become a landmark ruling. Anthony S. Guardino, "Landmarks Preservation Law Given Broad Reading by Divided Court," *NYLJ* Jan. 23, 2018.

Now, a divided New York Court of Appeals has taken what appears to be an even broader view of the LPC's authority. In doing so, however, the court reversed the First Department, which allowed the current owner of the New York Life building to complete the modifications that the LPC had previously approved—and to do so without any obligation to preserve the historic character and operation of the clock or public access to it. *Matter of Save America's Clocks, Inc. v. City of New York*, No. 17 (N.Y. March 28, 2019).

### The Case

In 1968, the city acquired the building, which had been designed by the architectural firm McKim, Mead

& White and completed in the late 1890s. In 1987, the LPC designated the building and parts of its interior as landmarks. In doing so, the LPC noted several of the building's unique features, including its clock tower, which housed a "No. 4 Striking Tower Clock"—a mechanical clock driven "by a thousand pound weight" that "strikes the hours" with a hammer and a "5,000 pound bell." The clock had been manufactured by the E. Howard Watch & Clock Company and "was specially equipped with a double three-legged gravity escapement"—a feature shared by (and perhaps shared only by) one other tower clock: the clock housed by Elizabeth Tower (also home to the bell known as Big Ben) in London.

In December 2013, the city sold the building to Civic Center Community Group Broadway LLC, a private developer. (At the time of the transfer, the deed expressly stated that the purchase was subject to a "notice of landmark designation.") After purchasing the building, the developer sought approval from the New York

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City Department of Buildings (DOB) to convert the building into private residences. The developer's plan was approved by the DOB in June 2014.

Before it could begin work on the landmarked building or the clock tower, the developer sought authorization from the LPC in the form of a certificate of appropriateness (COA), as required by the Landmarks Preservation Law.

The developer proposed to make the clock tower part of a private residence, eliminating public access, and to convert the clock to run on electricity. During a hearing on the proposal, the LPC's general counsel stated "there's no power under the Landmarks Law to require interior-designated spaces to remain public." Counsel also opined that the LPC was powerless to require that the clock mechanism remain "operable."

The LPC approved the proposal by a vote of 7-1. The dissenting commissioner voted against the proposal because she could "not approve the changes to the [clock] mechanism itself and to the interior of the clock tower gallery, as well as [the] mechanical room."

Various entities and individuals went to court to challenge the LPC's decisions to limit public access to the clock tower and to allow it to run electrically. The Supreme Court, New York County, granted the petition and annulled the COA. *Save America's Clocks, Inc. v. City of New York*, 52 Misc.3d 282 (Sup. Ct. N.Y. Co. 2016). The court concluded that the decision to "eliminate public access to the clock tower" was "irrational and

arbitrary." It found that there was a rational basis for the conversion of the clock from mechanical to electrical operation but determined that the decision to electrify the clock was affected by an error of law because the LPC counsel's advice that the LPC could not regulate the functioning of the clock was incorrect. Similarly, the court ruled, the LPC counsel's advice on public access was wrong because "the general provisions of the Landmarks Law vest the [LPC] with the power to regulate an interior landmark."

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The court's deference to the Landmarks Preservation Commission's authority to make decisions regarding landmarked city properties makes it clear that the power over these landmarks rests with the LPC.

The First Department agreed with the Supreme Court that the decision to discontinue public access to the clock tower was irrational because it was "inconsistent with the statutory definition" of interior landmark. The appellate court also found that the decision to electrify the clock was irrational. Moreover, it agreed with the Supreme Court that the LPC's counsel had given incorrect advice about the LPC's authority to require public access and to dictate how the clock functioned. That advice, the majority found, affected the LPC's vote on the COA. The dissent concluded that, based on the record, the LPC's decisions were rational, and

that no error of law had infected the proceedings because the LPC's counsel's advice was correct and the LPC vote would not have been affected even if the advice was incorrect.

The dispute reached the Court of Appeals.

### The Court's Decisions

In a decision by Judge Michael Garcia, in which Judges Leslie Stein, Eugene Fahey, and Paul Feinman concurred (with Chief Judge Janet DiFiore taking no part), the court explained that judicial review of the LPC's findings was limited to whether the determination was made "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." More specifically, the court said that courts could not "interfere" unless there was "no rational basis for the exercise of discretion" or the LPC's action was "without sound basis in reason... and taken without regard to the facts."

The court reasoned that the LPC had engaged in an "extensive deliberative process, including multiple public hearings" and had "afford[ed] a reasonable opportunity for the presentation of facts and the expression of views by those desiring to be heard." It added that, in an exercise of its discretion, the LPC had received "testimony of witnesses," along with various documentary submissions. Moreover, the court continued, the LPC staff had engaged in a dialogue with the developer concerning the project and staff members had visited

the building, along with certain LPC commissioners.

The court then rejected the petitioners' argument that the LPC's decision to close off the clock tower was inconsistent with the statutory definition of interior landmark and, therefore, was facially irrational. "At base," it ruled, the Landmarks Preservation Law made plain that the LPC's decision with respect to the clock tower "was well within the ambit of its discretion."

The court also determined that the LPC's decision to allow the clock to be electrified was "similarly rational" given that (as noted by the dissent in the Appellate Division), "the operation of the clock would be modernized by electrification, thereby assuring its continued maintenance for the foreseeable future, and the visibility of exterior clock faces to the public would be enhanced by LED or some other form of modernized lighting, while the clock faces would remain in their original, pristine condition."

Simply put, the court found that the LPC's determination to issue the COA after its "extensive and inclusive deliberative process," and to approve work to the clock tower and clock mechanism, constituted a "rational exercise of the LPC's discretion based on its unique expertise."

Interestingly, the court was not concerned about addressing the LPC's counsel's statements other than by declaring that the LPC's decisions had not been affected by an error of law. It explained that because the COA set forth the reasons for the LPC's action, there was no need to

"surmise or speculate as to how or why [the LPC] reached a particular conclusion."

The dissent, by Judge Jenny Rivera and concurred in by Judge Rowan Wilson, took a very different view of the LPC's powers. In the dissent's view, the LPC had exceeded its authority when it approved the proposal to "[t]ransform[] an interior landmark into a private residence" so that it was "completely closed off from the public."

The dissent also disagreed with the majority's conclusion that the LPC's decision to approve the proposed alterations to the clock was rational, declaring that the decision effectively rescinded the clock's landmark designation, which only could be accomplished by holding a public hearing, proposing rescission to the city's planning commission, and obtaining approval of the rescission from the city council and mayor.

The dissent also argued that the decision contravened the LPC's statutory mandate to permit only those alterations that effectuated the purposes of the Landmarks Preservation Law—alterations, the dissent said, that did "not include the conversion of a public treasure to a private apartment in a manner that irrevocably damages the unique and defining historic characteristic of the interior landmark."

The dissent concluded that the LPC's decision to allow the developer to deny public access to the clock and to disconnect the clock mechanism was in "direct contravention" of the Landmarks Preservation Law's statu-

tory purposes and public policy.

## Conclusion

There are 120 interior landmarks in New York City now, but the court's decision does not necessarily mean that they all will be altered in ways that disturb preservationists and historians. The court's deference to the LPC's authority to make decisions regarding these and other landmarked city properties makes it clear that the power over these landmarks rests with the LPC. Ultimately, New York City's mayor appoints the commissioners, so the buck, as it were, stops there.