LANDMARK WEST!

THE COMMITTEE TO PRESERVE THE UPPER WEST SIDE

Testimony of LANDMARK WEST!
Certificate of Appropriateness Committee
Before the Landmarks Preservation Commission
Proposed Amendments to the Commission's *Rules*
March 1, 2011

LANDMARK WEST! is a not-for-profit community organization committed to the preservation of the architectural heritage of the Upper West Side.

The Certificate of Appropriateness Committee wishes to comment on proposed amendments to existing and the adoption of new rules relating to HVAC, new window openings on secondary facades, rear yard additions, temporary permits, rooftop additions, bracket signs and storefront signage, expedited certificates of no effect, new sash and frames in historic district buildings, and revocation of approvals.

The Commission's website provides the following history *en bref*:

> The Landmarks Law was enacted **in response to New Yorkers' growing concern that important physical elements of the City's history were being lost** despite the fact that these buildings could be reused. Events like the demolition of the architecturally distinguished Pennsylvania Station in 1963 increased public awareness of the need to protect the city's architectural, historical, and cultural heritage.

The Landmarks Law, and, thus, the Landmarks Preservation Commission and its *Rules*, were born from the public's commitment to protecting the City's significant historic resources. The buildings and sites that comprise our city's history are of public value and interest, and as such the process by which they are safeguarded provides the public with a voice in landmark stewardship. The landmark review process serves the public—it should not acknowledge the perspective and interests of owners alone. In their current iteration, however, the proposed amendments to the *Rules* threaten to do just that, further obscuring the stewardship process from the public and moving deeper into "closed-door review" territory.

Public review should never be considered a hindrance to the efficient process of landmark stewardship. Just the opposite—the public has an understanding and familiarity of a neighborhood's resources beyond that of a Commission staff person assigned to an application. Architectural critic Paul Goldberger observed the necessity of the public's participation in the review process, and their unmatched knowledge of their communities:

> [Members of the community] understand the nitty-gritty of the neighborhood in a way that you can't expect a city-wide agency, like the Landmarks Preservation Commission … to do. [We're] on the ground, and [we] understand the pulse of this neighborhood. And that's critical; you need that.

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A limited-access site visit is not enough to understand the full impact of proposed modifications, and thus the Commission must rely on the active involvement of the public in the review process. Without that, the Commission positions applicants as clients to be served.

While it may not be practical or even recommended that all applications be subjected to the current system of public review—there are simply too many projects and, unfortunately, too small resources for the Commission staff to work in that way—the alternative is not to expedite the landmark review process and omit public review entirely. The relationship between the Commission and the public is mutually supportive: the public relies on the expert staff and Commissioners to oversee the effective stewardship of our landmarks, and the Commission relies on the invaluable "on the ground" knowledge of the public, providing context and impact information, to further inform their determinations of appropriateness.

This connection has not been for nothing! As General Counsel Mark Silberman remarked at a public forum to discuss the proposed *Rules* amendments, hosted by the Historic Districts Council on February 14, 2011, "what happens at the hearings is the Commissioners, over time, often times **reacting to testimony that [the public is] giving over time,** [their actions] sort of start evolving." As we understand it, then, the proposed *Rules* amendments reflect changing attitudes towards preservation on the part of the Commissioners based in part on the persuasive arguments and necessary information provided by members of the public at public hearings. With this in mind, excluding the public further from the review process would be counterproductive and irresponsible.

In considering the possibility of increased staff purview, we quickly realized that the existing staff review process is largely a mystery to the public. Once an application is submitted to the Commission and assigned to a staff person, at what point, if any, is there oversight from senior members of Preservation Department staff? Is the review process regularized to ensure that each and every application is reviewed by a senior staff person prior to issuing a permit? What is the system of checks and balances inherent in the review process? This need not—should not—be an unknown practice. As we wrote in our statement submitted to the Commission one month ago, on February 1st, the approval process for work to landmark buildings should be predictable and consistent. If dozens of individual staff members are authorized to independently apply the *Rules* to a highly varying array of projects, there must be a regularized and predictable overarching method for monitoring individual decisions.

So, how can we do this? How can the Commission evolve without compromising the role of its most important ally, the public? LANDMARK WEST! proposes that a system be put into place by which the public is given notice that an application has been deemed qualified to receive staff-level approval (be it CNE, PMW or other). The public might then have a set period of time (30 days) during which they can review the application materials and have the opportunity to express the need for a public hearing. We've provided an initial draft of how such a system might function and provided it to the Commissioners today as a handout. This may run counter to the perceived desire to move landmark review ever faster and faster, but we would argue that that is not a bad thing. The review process is intended to slow things down to ensure that we do

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not lose irreplaceable historic resources to hasty decisions. Streamlining the process for the benefit of the property owner-as-client is not the Commission's primary responsibility. The public and its cultural heritage are the "clients" to whom the Commission and its staff owe their primary loyalty—not merely by subjective desire, but by statute. The *Rules* and procedures adopted by the Commission and implemented by the staff should reflect that loyalty.

Regarding the specific language of the proposed amendments, LANDMARK WEST! does have some concerns. In large part, these are focused on the "new" standards proposed to certain sections of the *Rules* that would, according to the February 14th public forum, allow the staff to more clearly track previous decisions made by the Commission with regard to rear yard additions, roof top additions and windows. A more thorough discussion of these concerns is attached.

LANDMARK WEST! is grateful to have an opportunity to address the Commission on this matter. We look forward to working with the Commission to create more opportunities for meaningful and productive public involvement in every aspect of the landmark review process.

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Idea for New Public Notification/Review System

At a public forum to discuss the proposed Rules amendments, hosted by the Historic Districts Council on February 14, 2011, LPC General Counsel stated that at present, approximately 95% of applications for work to landmark buildings and sites are processed and qualify for staff-level approval. It is important to assure that the benefits that flow from public input—including, but not limited to, real-time facts and community context information—are available to the staff. Equally, it is imperative that the public is able to participate in this process that currently occurs "behind closed doors" between the staff and applicant.

LANDMARK WEST! has begun to brainstorm possible ways by which the LPC might continue to provide for public input on items determined to satisfy requirements for staff-level approval. This system capitalizes on the informational database that the Commission has slated for launch later this year. Below is our initial thinking of how such a system might operate:

1. An application is filed with the Commission.
    a. If the scope of work includes a rooftop or rear yard addition, or both, (as these all add additional bulk to historic properties), the property owner must notify contiguous property owners. Verification of this notification must be submitted to the Commission.
2. If a community group (ie: LANDMARK WEST!, a block association, etc.) is active in a neighborhood and requests notification, the Commission will send regular alerts as to pending applications (ie: within 10 days of filing). The Commission's Public Information Officer already does this in advance of Public Hearings, so the same notification process can be expanded.
3. A Commission staff member is assigned to a project and begins review to determine if the project meets the amended *Rules* standards.
4. If the Commission staff member determines that a staff-level approval can be issued, the public is provided with a window of time to review an application (30 days) via the new public information database.
    a. If members of the public find an application, while permissible at staff level, to have possible negative implications to the landmark structure or site in question, or to contiguous sites, the public may request a public hearing.

Expanding on the statement in our testimony that the public is largely unaware of the existing protocol for staff-level approval, if it does not already exist as such, we recommend that:

- Following the completion of application review by the individual Commission staff person assigned to a project, a designated senior staff person (ie: Deputy Director) must perform a review of the application's file and sign off on the decision to issue the permit. This senior, more experienced, member of staff provides for checks-and-balances and ensure consistent application of the Commission's *Rules*.

Previously submitted to the Landmarks Preservation Commission on February 1, 2011

Specific commentary on proposed Rules amendments

LANDMARK WEST! submits for review the following comments regarding the proposed amendments to the Landmarks Preservation Commission's *Rules*. These comments are not exhaustive.

Concerns regarding decreased transparency with increase of "closed door" (staff) reviews
The proposed amendments transfer an enormous amount of discretion from the Commissioners to the staff, with public input provided for only when and if the staff determines it is necessary. Allowing staff determinations to be made *in camera* on purportedly minor alterations to historic structures shuts out the public. Staff reviews do not allow and, most importantly, do not provide for any input for the community. If staff review of these applications is to continue as a part of the Commission's process, public notice and participation should be allowed. Provision for public notice and participation while the application is being considered by the staff should be regularized and required as part of the application process.

Staff determinations that do not include public involvement risk becoming owner-focused rather than building-focused. As a result, even the most conservative staff member will or could become identified with the plans and desires of the owner/applicants, and as a result lose their objectivity and make decisions that do not take into account the impact of these alterations on the neighborhood or district.

Commission issuance of Certificates of No Effect (CNE)
The *Rules* allow that the Commission staff *shall* issue CNEs if certain criteria are met. However there is no provision for public input into these CNE decisions. An example of such a provision deals with roof top additions. The language from the current section 2-19 follows:

> *(c) Rooftop additions to be constructed on a structure which is an individual landmark.*
> *(1) The Landmarks Preservation Commission shall issue a CNE for any rooftop addition to be constructed on a structure which is an individual landmark of six stories or less in height which:*
> *(i) consists solely of mechanical equipment; and*
> *(ii) does not result in damage to, or demolition of, a significant architectural feature of the roof of the structure on which such rooftop addition is to be constructed; and*
> *(iii) is not visible from a public thoroughfare.*

The failure to provide for any meaningful public comment gives owners of landmarked buildings an ability to make representations that may not stand up to public scrutiny. It is assumed that the Commission staff makes the determination that the criteria set forth in this section are satisfactorily fulfilled and recommends that the Commission issue a CNE. With all due respect to the staff of the Commission, the input of the public would be of great assistance in assessing compliance as well as impact on other structures, as well as visibility. Further, limiting the scope of the issue of visibility to "not visible from a public thoroughfare" fails to appreciate the importance of the skyline impact of certain rooftop additions, as well as aesthetic appropriateness and harmony in regards to rear yard additions.

Changes to 2-11 The propose criteria (e) addresses ductless air systems, which we believe to be a positive addition. However, the proposed text states that a "PMW or CNE *shall may* be ..." Word choice is incredibly important in this matter, and we ask that the Commission correct and clarify this section.

Changes to 2-15 Proposed amendments to (a) are inappropriately broad. To be specific, new text would permit staff to approve new window sash in secondary façades that match the configuration and finish of windows sash on a building's front façade, should there be no existing secondary façade sash to look to for guidance. Street façades are often very different in character from secondary facades and, therefore, provide an inappropriate reference point. The proposed *Rules* change would result in unnecessary upgrades for secondary façade windows.

Changes to 2-16 Criterion (d) currently reads: *Other rear yard incursions exist within the block (in the case of buildings in Historic Districts).* This would appear a tightening up of the standard; however, whether or not other buildings have such incursions should not be determinative of whether a new incursion should be approved. Further, it should be stated that those other encroachments which provide a level of "appropriateness" to a new application for a rear yard addition should at a minimum be "legal".

Criterion (c) reads: *Proposed addition is <u>not visible</u> from a public thoroughfare or right of way.* The amendments propose to move this issue to new item (g) and add "minimally visible" as part of the new standard. The standard should remain <u>not visible</u>. The current definition of "minimally visible" contained in the *Rules* at 2-19(a) is too subject to argument. Further, as with other discussions of "visibility" in these *Rules,* visibility from a public thoroughfare or right of way fails to appreciate the impact of such rear yard additions or extensions on neighboring properties.

Criterion (g) addresses height of a proposed addition or enlargement and reads as follows: *In buildings with rear cornices, corbeled brickwork on the parapet, or other distinctive roof silhouettes, the rear addition does not rise to the full height of the building.* The Commission proposes to change the language by relocating the discussion of rear cornices, corbelled brick work on the parapet or other distinctive roof silhouettes to new criterion (a) and add the following language at the end of the new (g): "and is not taller than the predominant height of existing additions or enlargements to the block." What exactly does the Commission consider to be "predominant height"? Variations in grade could impact this determination. So, from what

baseline is this measurement made? Will Commission staff first check to ensure all existing additions conform to the plans approved by the Commission?

New Criterion (i), on the surface, seems a beneficial addition to the *Rules*. By requiring a public hearing for any rear yard addition to a building where a rooftop addition has already been built, the question of "how much is too much?" must be answered by the Commissioners, not the staff. Further, the public has the opportunity to weigh in on the possible over-development of their landmark neighborhood. Who, we ask, will be charged with the task of making sure a building does not have any of these approved or grandfathered additions? Will this fall to the staff, or does the Commission propose to accept the representations of the applicant? The latter would raise red flags for us.

Changes to 2-18 Current language provides for staff determinations regarding "temporary installations". As discussed elsewhere in this statement, staff determinations exclude an important resource for the staff and an important stake holder in these decisions: the public. Any amendment to this *Rule* should include provision for public input.

Criterion (a) currently reads: "*'Temporary Installation' is defined as an installation for sixty (60) days or less for signs and banners or one (1) calendar year or less for other temporary installations. The duration of any temporary installation authorized under this rule shall be specified in the CNE and shall be for a single period not to exceed sixty days for signs and banners or one year for other temporary installations*." The current language only allows a CNE to be issued for a single period. The Commission proposes to add language that allows for renewals of two additional periods. On its face, this may seem an innocuous change; however, with staff review it falls short of protecting landmarks from "temporary installation" creep.

Changes to 2-19 The proposed amendment adds green technology items to the *Rules* definitions. Recognizing the increasing use of these kinds of mechanicals in preservation work is an important step.

Criteria (d) and (e) appear problematic, as the language in the sections contains "shall". *Shall* is a mandatory word, that is, no wiggle room for staff who might concur that a full-Commission review is, in fact, advantageous in a particular situation.

Criteria 2-19 (h)(3) provides: "*If the criteria for a CNE have not been met, the applicant will be given the opportunity to pursue a Certificate of Appropriateness and may request a meeting with the Director of Preservation to discuss the interpretation of the Rules. The applicant may also request a meeting and review by the Chair of the Commission.*" While ample opportunity is laid out for the applicant to work with the Commission, the public, on the other hand, has no ability to challenge the issuance of a CNE.

Changes to 2-20 LANDMARK WEST! believes that, regarding signage, the Commission staff is vested with significant power over signage approval, without the benefit of public input.

Changes to 2-32 Regrettably, these amendments do not deal with a key issue of concern in this section: that is, the ability of an engineer and/or owner to simply provide for example "(i) a statement signed and sealed by the architect or engineer" stating in sum that the criteria set out in 2-32 has been fulfilled. Self-certification of compliance is always a hazard. The Commission should never rely solely on the statements of an owner, architect and/or an engineer alone for any reason. However, false or negligently made incorrect statements made by an architect, owner or engineer on any form filed with the Commission should be punished. There should be no discretion left in the hands of the Chair on this point.

Introduction of 7-06 "Revocation of Approvals" Criterion (1) states that "whenever an approval has been issued in error and conditions are such that approval should not have been issued." Linking these two conditions is problematic. Substituting "or" for the underlined "and" corrects this inappropriate connection while also maintaining a certain amount of discretion on the part of the Commission to revoke erroneously issued permits.

Criterion (2) can be strengthened and made more meaningful by adding language to make it clear that any work done under these conditions will be ordered removed. It should also be made clear that an approval can be revoked even if the project is or has been completed.

Incorporating into this section the sanctions included in Section 2-34 (relating to false statements made in an application for expedited review by an architect and owner) would add greater meaning to this section. Further, we recommend incorporating the following presumptions:

a. The owner is presumed to know the landmark statutes of their property. Claimed ignorance of the landmark status of the property, or the historic district in which the property is sited, shall not be a defense to a revocation or any other enforcement action.

b. Any architect or engineer who has been engaged to represent the owner and/or who files or causes to be filed plans or other forms with the Commission shall be presumed to know the landmark status of the building and/or the historic district status of the area in which the building is sited. Ignorance of the status shall be no defense to revocation or any other enforcement action including but not limited to being barred from "self-certification" of any plans or other forms that are filed with the Commission.

This section should contain a clear warning that review by a Commission staff member of any forms, plans or other papers filed or caused to be filed by the owner and/or the architect or engineer will not relieve the owner, architect or engineer of their obligations under this or any other section of these *Rules* to provide correct and non-misleading information in all plans or forms filed with the Commission, and will be no defense to any sanction that may be lodged by the Commission or its Chair for any violation of the *Rules*.

The proposed introduction of text addressing revocation of approvals has encouraged us to review the present practice of enforcement, as explained in Chapter 11. This chapter provides for "enforcement" of the Commission's *Rules* by the issuance of warning letters, notices of

violation, and stop work orders. It provides the owners of landmarked properties with a procedure by which they can correct the violations and or have the violation "legalized". It does not, however, provide any vehicle for public comment or involvement. In fact, the entire process—except for the legalization hearings—proceeds entirely out of the view of the public, even when the public is the source of the information that discloses or uncovers the violation. This deficiency should be remedied.

Further, legalization "as-is" of a violation should be a *rare* result of an enforcement action; any decision to legalize a violation should be based on, among other things, the extent of the violation and the reasons that the violation occurred. The construction of an entire floor on the top of a landmarked building without Commission permits because of the failure (either negligently or fraudulently) of the architect and/or the owner to properly disclose the status of the building and or the district should never be legalized. Chapter 11 should include a warning that failure to comply with the *Rules*, regardless of the reason, may result in an order to remove the violation regardless of cost and regardless of the status in terms of size or completeness of the construction realized in violation of Commission *Rules*.

Chapter 11 should incorporate the following presumptions as recommended above regarding revocation of approvals. That is:

a. The owner is presumed to know the landmark statutes of their property. Claimed ignorance of the landmark status of the property, or the historic district in which the property is sited, shall not be a defense to a revocation or any other enforcement action.

b. Any architect or engineer who has been engaged to represent the owner and or who files or causes to be filed plans or other forms with the Commission shall be presumed to know the landmark status of the building and/or the historic district status of the area in which the building is sited. Ignorance of the status shall be no defense to revocation or any other enforcement action including but not limited to being barred from "self-certification" of any plans or other forms that are filed with the Commission.

Testimony of LANDMARK WEST!
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Proposed Fees Amendments
March 1, 2011

LANDMARK WEST! is a not-for-profit community organization committed to the preservation of the architectural heritage of the Upper West Side.

The Certificate of Appropriateness Committee wishes to comment on the proposal to amendment the *Rules* to increase certain fees for work approved as Certificates of Appropriateness and Certificates of No Effect.

LANDMARK WEST first testified on the proposed increased in fees at the Public Hearing of January 18, 2011. At the time, we stated that we fully support an increase in the budget of the Landmarks Preservation Commission; however, there is no guarantee that increased fees will translate into more (and much needed) revenue for the Commission. An increased budget could translate into additional staff and greater compensation for staff, thus increasing the ability to recruit and retain highly-educated individuals as the front-line defenders of our city's architectural resources. Further, it could allow for upgrades of technology and tools for staff. Nowhere in the proposed amendments, however, is this monetary connection—increased fees equal increased Commission budget—made.

If applicants will be burdened by paying increased fees to maintain their landmark property, they should in turn receive improved services. LANDMARK WEST! cannot support increasing the City's General Fund at the expense of both landmark property owners and Commission staff.