LANDMARK WEST!

THE COMMITTEE TO PRESERVE THE UPPER WEST SIDE

February 1, 2011

Robert Tierney, Chair
Landmarks Preservation Commission
1 Centre Street, 9th Floor
New York, NY 10001

RE: Proposed *Rules* amendments

Dear Chair Tierney:

Amending the Landmarks Preservation Commission's *Rules* is a major proposition, and a worthwhile one at that, requiring careful consideration, not haste. As proposed, these amendments will significantly alter the circumstances under which proposed modifications to landmarked buildings are reviewed, substituting public review before the Commission with "closed doors" approval at staff level. This is, therefore, the public's one and only opportunity to evaluate the impact of decisions affecting thousands of properties citywide. We still have more questions than answers.

Since first being notified about these proposed Rules changes on January 5th, LANDMARK WEST! has sought counsel from a host of preservation professionals—our own Certificate of Appropriateness Committee, preservation advocates, architects, contractors, lawyers, etc.—and members of the public directly impacted by the *Rules*. The consensus was clear: strengthening the policies already in place and clarifying the process of landmark stewardship in New York City is a welcome prospect. It is sincerely unfortunate, however, that the Commission chose to proceed in an expedited manner. To rub salt in the wound, proposed changes that affect landmark stewardship city-wide were not broadly communicated. Only through third-party notification did many of our colleagues (in Manhattan, in Queens, etc.) hear that such important regulatory change was afoot. This provoked cynicism from the public—the same public upon whose eyes the Commission relies to monitor the city's landmarks.

Upon notification, the prospect of amending the *Rules* left LANDMARK WEST! with a litany of questions. Thus, LANDMARK WEST! took action and requested a continuance in writing, which the Commission did then grant. Now, we turn our attention to the amendments:

Weak or Ambiguous Language

If the public—and the Commissioners—are to entrust in the staff enhanced regulatory powers, the staff must be equipped with clear and objective *Rules*. Forcing even the most seasoned Commission staff members to make value judgments based on ambiguous language will lead to inconsistent staff-level approvals. The subjective, qualitative language in the *Rules* leaves too much to interpretation. When evaluating the existing conditions of a rear yard doughnut and the extent of build out, for example, how does one determine if one addition is "comparable" to another? And is that even an appropriate standard? What does the Commission consider to be "minimally visible" (language that is clearly causing the Commission to pause and consider defining, as bracketed notes in the proposed text are evidence).

In reviewing an application for signage, how does the Commission proposed to define "proportional," as in "the height of a sign must be proportional to the storefront opening"? How would the Commission define a "substantial" reduction in transparency in terms of regulating window-mounted signage?

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Concretely defining some of this language (ie: proportional might mean a certain percentage of a business' overall street frontage) must be made a priority.

But not all of these comparisons are black and white. The meaning of "is not visible from the public way" is clear, but in a number of cases the regulations invite a discretionary staff judgment with the language "mostly not visible". These are judgment calls, and allowing them to be made *in camera* with no apparent opportunity for public review is like hearing a one-sided story. Such applications should be reviewed by the full Commission with testimony encouraged from the public.

Agency Resources
The fundamental question is whether the existing staff with its limited resources can handle the significant increase in proposals needing staff-level approval? Is the Commission staff sufficiently equipped to track its projects so that this case-by-case review by individual staff members does not lose sight of the larger context and overall integrity of a building, site or district? For example, the first section of the *Rules* proposed for amending, Section 2-11, addresses ductless split system HVAC equipment. As we understand the proposed text, individual residents of a building could, independent of one another, receive staff approval to install these HVAC systems. What will prevent dozens of split system pipes and wires from snaking from a building's roof, down its façade, and into innumerable openings?

Scope of Public Participation in Review Process
The approval process for work to landmark buildings should be predictable, consistent and, above all, transparent. While codifying pre-existing procedures via *Rules* amendments may empower the Commission's staff to authorize a greater range of approvals, it simultaneously shuts out an important component of the universe of parties interested in the preservation of landmark structures and districts. That is, the public. Staff reviews do not allow and, most importantly, do not provide for any input from the community in which these structures form an important part of the neighborhood.

LANDMARK WEST! believes that if the vast majority of work to landmark buildings is to be determined by staff review, 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. The objective is not to prevent any staff discretion but to hold the results up for review so that the Commission may consider refining its direction to the staff or reconsider (as we are in the process of doing right now) the scope of the judgments being made with "no effect".

This letter reflects LANDMARK WEST's "big picture" concerns about the proposed Rules amendments and the process in which we are currently operating. To address specific components of the Rules amendments, we have collaborated with a number of individuals to craft the enclosed commentary. It is intended as a tool by which the amendments, prior to their March 1, 2011, public hearing, might be further honed to the benefit of the city's irreplaceable architecture heritage.

Sincerely,

Arlene Simon
President

Kate Wood
Executive Director

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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, and we look forward to further opportunity to share our perspective on how these amendments may impact landmark stewardship at the scheduled March 1, 2011, Public Hearing of the Commission.

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.