COMMENTS FOR THE CHARTER COMMISSION ON THE BOROUGH PRESIDENCY

Submitted by Ruth Messinger, Former Manhattan Borough President

March 25, 2019

I appreciate the invitation to speak to this Commission. I am not presenting a lengthy treatise either orally or in writing, but am simply speaking to the importance of continuing to have elected Borough Presidents with clear authority to work on borough wide issues and with sufficient office budgets to make it possible for them to do this work.

The Borough President position draws its strength precisely from being less narrowly focused/ less parochial than individual council representatives. It offers a very large and very diverse city a level of government intermediate between local districts [Council and also State Senate and Assembly] and the city-wide government. There are many issues that ought to be brought to city government on behalf of the council members and, sometimes, on behalf of the council members and the community board chairs together. A Borough President should regularly convene these two groups and urge the members to determine additional and specific budget and land use issues that are important to the borough and then hammer out a borough position, rather than letting the Mayor and/or Commissioner make proposals that set one council district/member against another. Similarly, the Mayor and/or Commissioners should bring issues to the Borough President and ask for a coordinated borough position on the matter. And note that some of this happens already, but I am advocating for it to happen much more consistently.

Some powerful examples can be taken from the headlines at any point in time: a borough should be thinking together with its Borough President about where to locate and how to design a borough jail. A borough should be considering with the executive branch the best ways to achieve improved school integration. The parameters of which sites to offer for additional affordable housing, of where to sacrifice open space, could benefit from borough-based discussion and borough-based or borough board negotiations handled by the Borough President and the Mayor/Commissioners. The challenge for protecting small businesses—an area where the current Manhattan Borough President has been very involved—is but one more example of work that benefits from being studied throughout a borough, leading—hopefully—to recommendations for action being brought to the Executive branch or the Council or both

A strength of my Borough President tenure was the development of a very sophisticated and knowledgeable land use unit which was able to review and comment on land use proposals that were going before the Council. We were able to influence the Council's consideration because we could bring expertise that was much more difficult for an individual Council Member or community board to develop. We could provide data and analyses that the involved Council Member could then use in negotiation with the developer or in advancing her or his position to the rest of the Council.

Similarly, that land use unit was available to and used by several Community Boards in developing what the Charter refers to as 197a plans. Communities were engaged in plotting out some aspects of their own future development, indicating where they wanted to see growth, where they wanted to see open space, how they envisioned changes in traffic patterns, what zoning they would recommend. This

provided a framework to which not only the broader city government but future developers could respond.

The existence of Borough Presidents does, also, provide the public with people they can consider for city wide offices based on how those individuals have performed in their boroughs; that is a more logical step forward than imagining which individual district city and state office holders could best handle the challenges of city-wide positions.

One additional point. When I was in government we required the city to prepare and publish a tax expenditure budget. I believe this provision still exists but I know that on several occasions during my tenure the report was not published until we asked for it. Given the recent articles about tax forgiveness negotiations around Amazon and Hudson Yards it would be of interest for this Commission to investigate the status of this requirement, ensure that it is mandated and that the document is released with the proposed Executive budget.

Good Evening, my name is Allen Cappelli.

Let me begin by thanking the Charter Revision Commission 2019 for inviting me to join with you this evening on the topic of examining the Office of Borough President as defined by the New York City Charter Let me specifically acknowledge the honor to be here with the distinguished former Borough Presidents of Manhattan, the honorable Ruth Messinger and Virgina Field, both of whom served this City and their borough extraordinarily well.

I am a native New Yorker and have been in public service for almost forty years, starting with my service as the Land Use Chairman for CB 1 Staten Island. During my six year tenure, I worked with local residents, community based organizations and elected officials with a goal of having as much information available and communicating it so that neighborhoods could have their voices heard. I was a Member of the Charter Commission for Staten Island , which was tasked with analyzing the feasibility of creating a separate City.

I began my professional career in government 40 years ago, working in the Manhattan Borough President's office. I worked throughout Governor Mario Cuomo's twelve year tenure, in several positions, and was appointed the Chairman of the Unemployment Insurance Appeal Board at the end of his administration. I served on that board until I joined the staff of former Bronx Borough President, Fernando Ferrer, whom I served with for four years as one of his chief assistants until he left office in 2002.

More recently, I spent eight years as a board member of the Metropolitan Transit Authority (MTA), and almost two years at the New York City Civil Service Commission. I currently serve as a Member of the New York City Planning Commission.

I went into the private practice of law where I have spent the past seventeen years doing primarily criminal defense work, with a significant part of my practice devoted to indigent defendants.

The consistent thread between all of my endeavors has been a commitment to social justice and reform, and a desire to make government work for all of the residents of our City and our State. My tenure in government has been defined by

my independent spirit, obliged to seek ways for the government to work in a transparent way for all New Yorkers, so that everybody can share in the opportunities available, particularly in education, housing, transportation and employment. Again, I thank you for your invitation to participate and I welcome your questions.

Testimony of John Mollenkopf
Distinguished Professor of Political Science and Sociology
Director, Center for Urban Research
The Graduate Center of the City University of New York

to the
New York City Charter Revision Commission
Public Forum on Governance
March 25, 2019

Good evening Chairperson Benjamin and distinguished members of the New York City Charter Revision Commission. My name is John Mollenkopf and I teach and do research on urban politics and urban policy issues at the Graduate Center of the City University, which houses our system's doctoral programs and many of its research centers, including the Center for Urban Research. It is a pleasure to be here tonight between my distinguished colleagues Eric Lane and Ester Fuchs.

Previous to joining the Graduate Center, I was the division director for economic development in the New York City Department of City planning in 1980 and 1981, where it was my good fortune to work with Chairman Herb Sturz. My subsequent teaching and research have focused on the political dynamics of urban inequality, often using New York City as a laboratory, with a specific focus on how demographic and economic change influence patterns of voting and civic engagement and the evolution of city policies. Examples of our applied policy analysis include evaluations of the HomeBase homeless services program and the Build It Back program at the Mayor's Office of Housing Recovery Operations and a recent survey on civic engagement for New York City Service.

It was also an honor to be consultant to the 1988 and 1989 Charter Revision Commissions led by Richard Ravitch and Fritz Schwartz and to learn from their distinguished staff, Eric Lane, who just spoke, and Frank Mauro. My role was to advise on how much to increase the size of the City Council in order to ensure fair representation of previously under-represented communities in New York City. I have also worked with the three Districting Commissions that have redrawn council boundaries after the 1990, 2000, and 2010 Censuses. Our Center for Urban Research works on many related issues, for example with the Campaign Finance Board on patterns of contributions and with many full count efforts in advance of the 2020 Census.

In my short time, let me address three points raised in Commission documents and suggest one brand new idea for you that was mentioned briefly in the submission from the Citizens Budget Commission.

As my CUNY colleague Doug Muzzio testified last week, and as Professor Lane just said, your deliberation essentially amount to an assessment of how well the 1989 Charter revision has fared over the three decades since its enactment. It is a chance to affirm what worked from that pivotal effort and correct what did not. Its basic aim was to supplant the Board of Estimate, reallocate its powers to the Council and Mayor, thereby substantially reducing the powers of the borough presidents, and strengthen those of the Council

In the main, the 1989 charter reform has worked quite well. Perhaps the most important implementation challenge was empowering the City Council to be an effective, representative, and democratic body. As Henry Stern told many of us at the time, the previous council was worse than a rubber stamp because it did not even leave an impression. Today, we can declare that the City Council is full of able members who represent their highly diverse constituencies very well.

A second aim of the 1989 charter reform was to continue the long march that began with the 1936 charter to empower the mayor and reduce the policy influence of partial and special interests that had initially been lodged with the borough presidents and exercised through the Board of Estimate. The new charter succeeded in this aim as well, giving us a series of iconic mayors who, whether we liked them all or not, had the power to respond to the crises of their times.

The 1989 charter revision commission made a half-way compromise on the position of Public Advocate. To me, sentiment within the 1989 commission and among the staff leaned significantly toward abolishing this position. The primary reason they did not do so was a fear that the incumbent City Council President, Andrew Stein, would spend a lot of his own money to defeat charter reform.

In the past 30 years, the primary function of the Public Advocate position has been to provide a platform for aspiring candidates for higher office could win a city-wide election and achieve greater political visibility, generally to the detriment of city council leaders who also sought to be mayor. While there is some merit in the argument that having this position deepens the pool of potential candidates at fairly low cost, if we are candid with ourselves, it seems doubtful that the Public Advocate can act either to remedy individual problems, as an Ombudsperson (that is better done through Council members) or that it raises many under-appreciated issues except in ways that serve the political interests of the Public Advocate.

The success of the 1989 charter revision commission's other experiment, the Independent Budget Office, also diminishes the need for a Public Advocate. IBO has done an excellent job. This leaves me to conclude that the case for strengthening the office of Public Advocate is weak, while giving the IBO both a reasonable budget and assuring its access to information for entities like HHC and NYCHA, as others who have appeared before you have recommended, makes sense.

Along the lines of not seeking to fix what is not broken about the 1989 charter, it strikes me as a disastrously bad idea to subject key mayor appointments to Council review and approval. That would dilute and undermine the accountability of the mayor. It would force mayors to make side deals with special interests to secure appointments, which goes against the tenor of previous successful charter reforms. And it would deter the most capable people from accepting high positions in city government. It is already hard enough to get the most experienced and capable people to do these jobs.

The 1989 charter commission also extensively debated the role of borough presidents, with my friend and colleague Doug Muzzio, along with my late colleague Ed Rogowsky, making a strong plea for the necessity of having an office that was in between the city-wide perspective of the mayor and the neighborhood perspective of the council member. After all, before 1898, three of the five counties were outside of New York City and they continue to have their own cultures and sense of identity. So you should not eliminate borough presidents, but you should not increase their powers, either.

In closing, let me suggest one new innovation to structure of New York City that you should consider and adopt: mandating a periodic survey of New Yorkers' interactions with government that would provide evidence on how utilizing city services affects the life trajectories of New Yorkers. This would take the movement for open government and big data to a new level. Such a survey should have a large enough sample that it would provide statistically reliable at the Council District level (about 20,000 participants). It should be a panel study that tracks experiences and results over time so that we can understand much better how and why New York City neighborhoods are changing. Currently available data, such as the American Community Survey or even our own Housing and Vacancy Survey, do not give us this information. We may know, for example, that a neighborhood has gained white residents but lost black residents, but we do not know why this happens or what happens to those who move out or what might have enabled them to stay if they wished to do so. This would be expensive, as surveys go, but it would be a rounding error in the overall city budget, probably about one-tenth of one percent of the total. Given that city policy now often drives down dark roads with no headlights, it makes lots of sense to spend the money to help New York City government to see more clearly where it is going and what it is doing. And it would be a signal innovation in the movement to improve and increase the amount of data we have to understand the complexities of governing. Evaluating Thrive New York is just one example of where such knowledge would help us make good policy.

Thank you for the opportunity to share these thoughts and I would be happy to expand on any of these comments or answer any questions you might have, either now, or later with staff.

Testimony Before 2019 New York City Charter Revision Commission
Expert Forum – Governance
March 25, 2019

Ester R. Fuchs, Professor of International and Public Affairs and Political Science, Columbia University
Director of the Urban Policy Program, School of International and Public Affairs
Chair 2005 New York City Charter Revision Commission

Good evening Commission Chair Benjamin, honorable members of the NYC Charter Revision Commission, and fellow citizens who have chosen to attend these proceedings as an unheralded, but significant form of participation in our local democracy. Thank you for the opportunity to testify before you this evening.

I want to begin by commending Borough President Brewer, former Public Advocate and current Attorney General Leticia James and the City Council for recognizing the importance of the city's charter revision process and the need to engage in a comprehensive review of the City Charter. It is, as all of you know by now, a daunting task.

This charter revision commission comes at a very important time, as the public's confidence in national institutions of government is at an all-time low. It is reflected in public opinion polls about congress and the president and in the voter turnout rates for every elective office. According to a 2018 Marist poll, only 8 percent of the public reported having a great deal of confidence in Congress, while 19 percent reported a great deal of confidence in the presidency. According to the Pew Research Center, public trust in government is at historic lows. Only 18 percent of Americans today say they can trust the government in Washington to do what is right "just about always" (3%) or "most of the time" (15%)." Voter turnout in the last mayoral election in New York City was 21 percent of eligible voters.

I am convinced that the strength of our democracy will ultimately depend on how well our institutions of local government work. In NYC, that will be determined by whether the public thinks that city government is fair, accountable, and responsive to its needs.

Before I present my specific proposals, I would like to address two very important questions. First, where does charter revision fit in as a process to our democratic form of governance; and second, where does the charter itself fit into this governance structure and ultimately the success of our democracy?

In a system of democratic governance that intentionally depends on institutions of representation for its legitimacy, this process of charter revision is the closest we come to engaging in direct democracy—where the public actually makes policy. A proposition will be placed on the ballot during the next general election for direct approval by the voters. There will be no legislative debate by a small group of representatives. So, when the charter revision process is initiated, the most important thing that the commission must do is to engage the public. You must ensure that the public has been given every opportunity to participate. And finally, you must make the

propositions clear and easy to understand, in language that does not obscure the meaning or "game" the outcome. And that, as we all know, is a difficult task. It is also important not to elevate these forms of direct democracy, which are becoming increasingly popular, as "better" or more "authentic" forms of democracy. We are fundamentally a representative democracy. Through elections, we delegate our authority to make and implement policy to legislators and executives. Whatever the outcome of this charter revision process, I would suggest that all charter commissions have a responsibility to first do no harm to the democratic process. Maintaining a publicly accountable government is the responsibility of both the executive and legislative branches of government. We rely on the legislature to channel the inevitable conflicts that emerge in a democratic society by engaging in robust debate, executive oversight and a fair and open legislative process, but it is ultimately the executive that implements policy through the provision of fair, effective, and efficient services. How we define the balance of power between the legislature and executive must ultimately consider both policymaking and implementation.

What about the charter itself? We all like to think about NYC's Charter as its constitution—it is a considerably more expansive document and the level of arcane detail about the most obscure government agencies gives one pause. The sheer size of NYC's Charter is a clue that it was intended for a different purpose than our federal constitution. The original U.S. Constitution was written on four pages of parchment. They were long pages, true, but there were only four! You can purchase a standard pocket Constitution and you will find about 17 pages for the Constitution and another 17 pages for the Amendments. Yes, that is only 34 pages. NYC's current Charter currently weighs in at 300-plus pages.

Yes, there is reason to continue describing NYC's Charter as our constitution. Let us be clear. The NYC Charter is NOT a document exclusively or primarily of general principles like our federal constitution. Rather, it is an effort to balance the functioning of our local democracy with the need to manage a complex 21st century city government in a diverse, multi-cultural city, as I alluded to earlier in my remarks. The charter goes beyond identifying the City's basic legal governance structure, including the responsibilities of our elected officials and agencies.

First, the charter is a legal framework for the functioning of our local democracy (participation, dissent, accountability). It identifies the formal-legal institutions of democratic governance. The powers and authority of the executive and legislative branches are designed to mirror those institutions in our national government (within the constraints of federalism). The balance of power between the executive and legislative branches of government is certainly important. Equally important is the ability for the public to engage politically in the period between elections. Let us be clear, NYC's charter provides for one of the most robust democratic governance structures of any city in the world. We have an elected mayor, district-based representation for our city council, regularly scheduled elections, an elected fiscal officer (comptroller). We even have an elected public advocate and borough presidents. The charter identifies the legal responsibilities of all our elected officials. Yes, we must strive to improve the public accountability of our elected officials, but we start with a strong institutional framework for democratic governance.

Second, the charter identifies, often in excruciating detail the structure of city agencies, sometimes even requiring agencies to have a deputy commissioner. It also determines our land

use process, procurement/contracting process, and the City's budget process. These institutions and processes that the charter mandates are designed to manage a complex 21st century city government in a diverse, multi-cultural city.

The charter is ultimately balancing the institutions of democratic governance with the needs of managing a complex 21st century city service delivery network. This is challenging, to say the very least, and any proposed revisions to the charter should be thought about in the context of this balance. Having served as chair of the 2005 Charter Revision Commission, I understand the difficulty of ensuring this balance is maintained. While all Charter Revision Commissions are mandated to review the entire charter, some have narrowed their focus from the beginning of the process. This commission has assumed from the start a more expansive role. That, of course, comes with high risk, but also the possibility of proposing changes of great significance.

In the spirit of maintaining this balance, I would like to make five proposals for the Commission to considers:

1) The Public Advocate. Every commission since 1989 struggled with how to improve or eliminate the position of public advocate. Clearly, no one is satisfied with exactly how the position has evolved since then. I do not think there is the political will to eliminate the public advocate position. And guaranteeing its budget is not sound fiscal policy. The council can ensure an appropriate budget for the public advocate and so can the mayor during the current budget process. I also do not support putting the 311 system in the public advocate's office. The only way to ensure agency accountability for 311 complaints is to have it in the Mayor's Office. I propose a citizen survey administered and managed by the pubic advocate that would be conducted every year. There is a template for this survey. In 2008, Public Advocate Betsy Gotbaum conducted a survey of 130,000 randomly selected NYC households to determine their opinions about the quality of city services, as well as their policy and budget preferences. This would place the public advocate at the center of all city policy discussions, as well as increase his/her ability to hold city agencies accountable for quality service delivery. It would also improve our democracy by giving everyone the same opportunity for their voice to be heard in our budget and policy process. The data should also be made available directly to the public and community organizations, as well as community boards. This would improve our understanding of community problems, highlight variations in service delivery by neighborhood and make advocacy more effective with high quality data.

2) Community Boards. The 59 Community Boards are another governance structure designed to improve our democracy by bringing government closer to individuals in their neighborhoods. Community boards were designed to be co-terminus with service delivery districts created by departments like police, sanitation, and parks. This was meant to give agencies a direct link the people they serve at the neighborhood level. At the same time, neighborhood residents were meant to use community boards as a way of directly connecting to city agencies for the improvements of local services. Community boards were also meant to have a serious role in land use and capital planning. Members serve on a volunteer basis and community board budgets are ridiculously inadequate to these tasks. And as the issues get even more complicated and the need for technical

expertise grows, the community boards will be become even less relevant to the important issues of governing our city. It is clear that community boards are not serving their Charter purpose. Agencies have not made their service delivery districts consistently co-terminus with community boards. I propose that community boards be made co-terminus with city council districts. This way council members can get input from members of the community boards and the public will at least have a direct line of accountability to an elected official.

3) Open primaries and rank choice voting in the general election. There is no question that the current level of participation in NYC elections is unacceptable. As a private citizen I have been working hard on improving access to information about polling places and candidates through the creation of a non-partisan website, WhosontheBallot. This is not enough. There are structural changes that can be made that will make our elections more inclusive and increase turnout. Make all registered voters eligible to participate in an open primary for council seats and citywide offices. The top two vote-getters would face each other in a rank choice general election. The ballot could still identify a candidate's party affiliation, but voters would not have to register for a party to vote in the primaries. The current closed-party primary system is broken. More New Yorkers are choosing to register without any party affiliation. As a consequence, they cannot participate at all in the candidate selection process. And since 68 percent of registered voters in the city are Democrats, most of the real competition occurs in low-turnout Democratic primaries and not in the general election.

4) Rainy Day Fund. As all of you know, NYC has a strict balanced budget requirement, that goes back to the 1975 fiscal crisis and the Financial Emergency Act of 1975 (FEA) that was passed by the State legislature to avert bankruptcy and restore fiscal stability to the City. State law was made part of the NYC Charter in a 2005 proposal approved by the voters. Current legal requirements limit the City's ability to use savings from prior years to pay current year expenses. It also prohibits the City from having an explicit Rainy Day Fund. In the spirit of budget transparency and sound fiscal policy, this should be fixed. Ultimately, the State would have to pass legislation to make this change, but a Charter proposal would be a first step in ensuring that is taken up by the legislature and actually happens. It is too easy to wait for a crisis in order to make this kind of important change. This commission could help avert the crisis and make the change now.

5) The Department of Investigation (DOI). Make the removal of the Commissioner of Investigation subject to the approval of the Council. Currently, the Commissioner of Investigation is appointed by the Mayor with the advice and consent of the Council. The Commissioner can be removed only by the Mayor. While the Mayor must send a letter to the Commissioner stating the reasons for the removal which must also be filed with the Department of Citywide Administrative Services, the Charter provides no role for the Council in the removal of the Commissioner of Investigation. As we know from recent events, DOI commissioners must be able to investigate corruption in city agencies without fear of reprisal from the mayor. We now know how difficult that job really is. In this case, increasing the Council's role in oversite is not only warranted, but necessary.

There are some general principles I have chosen to follow in these proposals and I would suggest that the Commission's work hard to do the same in the proposals they put forward to the public. First, recognize that there will always be a tradeoff between more engagement and more oversight and efficient management. Finding that balance is paramount. Second, recognize that the City's fiscal condition is always precarious, even during periods of economic growth and budget expansion. So there needs to be maximum flexibility in the budget process. This means no agency or elected official should be guaranteed a level of expenditure in the charter (apart from the IBO). Third, the more you expand the number of people serving on commissions or boards and the more you dilute the appointment powers of the mayor, the more you will reduce accountability and the overall efficiency of agency operations. This does not mean that no changes should be made, but most often it is not the easy structural fix that you might be thinking. Many of the problems we have in governance come from the public not paying attention or being informed about what government does; inadequate spending on basic public services; and the failure to whole agencies or contractors accountable for the services they have promised. This unfortunately, cannot be fixed by a charter revision commission.

Thank you all for your time, consideration and indulgence. I look forward to the discussion.

TESTIMONY OF MARGERY PERLMUTTER
CHAIR, BOARD OF STANDARDS AND APPEALS
Charter Revision Commission
Land Use Forum
March 25, 2019

Good evening. My name is Margery Perlmutter.

I am an architect, land use attorney, former member of Community Board 8M, former commissioner on the Landmarks Preservation Commission and, currently, Chair of the New York City Board of Standards and Appeals.

Thank you for inviting me to participate in this panel discussion tonight.

The BSA was created in 1916 to protect the City from challenges that the Zoning Resolution unconstitutionally deprives persons of their private property rights without just compensation.

You will see in the packet that we provided to you a timeline of the composition of the Board since 1916. This shows that the Board has always been comprised of between 3 and 6 commissioners with requirements for architects and engineers. In 1975 an urban planner was added. BSA commissioners have been full-time since 1936. BSA is the sole City land use agency with an entirely full-time commission.

My fellow commissioners are a city planner and a structural engineer, both from Queens, a financial feasibility analyst from the Bronx, and an attorney from Staten Island. I am from Manhattan. Two of our commissioners served on their community boards. I feel very strongly that this representation by all five of these professional disciplines, combined with community awareness, is essential to the Board's ability to review and comment on the complex materials presented to it by applicants' professional consultants and to be responsive to challengers.

With a supportive staff of only 19, the Board hears applications for variances of the Zoning Resolution, 80 different special permits designated by the Zoning Resolution, renewals of these permits, interpretative appeals to resolve conflicts about the meaning of specific text in the Zoning Resolution, DOB or FDNY requests to revoke or modify certificates of occupancy, vested rights, requests to vary NYS laws governing unmapped streets and multiple dwellings, and others. Variances represent only 11% of BSA's total applications annually. The package includes a more detailed description of BSA's authority.

The BSA's prioritization of transparency is evident in its operations. Applications for variances and special permits are required, per the BSA's Rules, to be submitted to the applicable Community Board, City Council member, Borough President, the Departments of City Planning and Buildings at the same time as they are filed initially with the BSA. All applications, upon filing, are assigned to a planner, who ensures that materials are complete and undergoing CEQR review, prior to scheduling them for public hearing.

Commissioners then independently review all materials submitted on each application and discuss its merits at executive sessions and public hearings. At the public hearings, the Commissioners hear and discuss testimony from the applicant, community, interested agencies and elected officials. All of these sessions and hearings are posted to YouTube, a link to one of which is provided in your package.

Commissioners, not agency staff, lead the review, project modification and resolution of these applications. It is an extremely transparent and iterative process.

To ensure independence and transparency, BSA commissioners are prohibited from speaking to anyone outside of the agency about any pending applications. This long-standing policy will shortly be formalized by an amendment to our Rules with a public hearing under CAPA (the City Administrative Procedure Act) scheduled for April 11.

I firmly believe that an increase in the number of BSA commissioners, presumably all but the Chair being part-time as they are at other agencies, will reduce transparency, by forcing a much-increased staff to take on the iterative review process prior to hearing, and advising part-time commissioners on the merits of each application.

Pursuant to statute and to court directions over the decades, the Board's written final determinations must perforce describe the facts the Board considered in making its determination under a substantial evidence standard and to explain its rationale in detail. All Board decisions are appealable, and often are appealed, to the NY State Supreme Court in an Article 78 proceeding. A sample resolution is included in your package.

As to your question about the Board's consistency in its review, we have very specific application standards and review each case according to its particular facts and circumstances, so I would like the Commission to provide more information as to what it would like me to respond to.

I'd like to thank you again for inviting me to participate on this panel and I am happy to take any questions.

Testimony of
Margery Perlmutter
Chair, Board of Standards & Appeals

Charter Revision Commission
Land Use Forum
March 25, 2019

What does the BSA do?

Classic variance case

- **Created in 1916 simultaneous with NYC's first Building Zone Resolution to prevent unconstitutional "takings" of private property through land use regulation**
- **An independent quasi-judicial Board with the power to grant relief from zoning and other regulations that govern the development and maintenance of buildings**
- **Allows reasonable development to occur on properties that would otherwise not develop**
- **Empowered by the NYC Zoning Resolution to grant certain use and bulk waivers**

CREATED IN 1916, THE BSA HAS ALWAYS HAD AT LEAST 3 AND AT MOST 6 APPOINTED MEMBERS (COMMISSIONERS).

THE HISTORY OF

The New York City Board of Standards and Appeals

1916 — Board of Appeals

(Appeals)
7 Members:
6 appointed members
+1 FD Chief

COI Prohibition

1925 — BSA absorbs Board of Appeals:

5 Members:
4 appointed members
+ 1 FD Chief (no $)

2 members with 10 or more years' experience: (1) in structural work as civil engineer; (1) employing building contractor

1934 — Board of Standard & Appeals (BSA)

(Standards, special permits & variances)
9 Members:
6 appointed members
+ 2 FDNY (Commissioner & Chief of uniformed force)
+ 1 DOB Superintendent

10 or more year's experience as:
(1) architect; (1) structural engineer; (1) builder

1936 — BSA decreased to 3 commissioners

3 appointed members
+ 1 FD Chief (no $)

10 or more years' experience: (1) in structural work as civil engineer; (1) employing building contractor

1957 — Change in qualifications

2 members with 15 or more years' experience: (1) as engineer engaged in structural work; (1) as licensed architect

No other occupation, profession or employment for any BSA commissioner.

1969 — BSA increased to 5 commissioners

3 commissioners with 15 or more years' experience: (2) R.A.; (1) licensed P.E. with experience engaged in structural work

1975 — 5 commissioners

1991 — BSA increased to 6 commissioners

(2) R.A. with 10 or more years' experience
(1) licensed P.E. with 10 or more years' experience engaged in structural work
(1) licensed P.E. with 10 or more years' experience engaged in mechanical work
(1) planner with professional qualifications and 10 or more years' experience as a planner

2019 — BSA decreased to 5 commissioners

" for fiscal savings and operating efficiency"

1 R.A. with 10 or more years' experience
1 licensed P.E. with 10 or more years' experience
1 planner with professional qualifications and 10 or more years' experience as a planner

Geographic Diversity: no more than 2 commissioners may reside in each borough

5 commissioners

- R.A., Attorney, Manhattan
- P.E., Queens
- Planner, Queens
- Attorney, Staten Island
- Feasibility analyst, the Bronx

Commissioner Expertise

- 2 Comm'rs have always been required to have a minimum of 10 years experience in various trades (i.e. architecture, engineering, and building contracting).
- Qualification increased to 15 years+ in 1936.
- Reduced back to 10 years+ in 1975.
- City planner added as professional qualification in 1975.
- Today, Comm'rs must include city planner, engineer and architect with at least 10 years experience.

Borough Representation

- No more than 2 Comm'rs may reside in the same borough.

BSA Acts on Applications Filed. Number depends on general economic conditions and zoning activity (i.e. amendments to the Zoning Resolution).

BSA Staff includes Executive Director, Compliance Officer, IT Professional, 6 Project Managers, CEQR Officer, 2 Admin. Assistants, 4 Records Specialists

Independent

- Comm'rs appointed to six-year terms.
- Prohibited from ex-parte communication

Full-Time Land Use Board

- Previously, only Chair was full-time
- All Comm'rs full-time since 1936.
- Unique among NYC land use agencies.

Revenue Generating, Constitutionally Mandated
BSA must exist no matter the number of applications filed annually.

Today, the BSA has 5 full-time Commissioners.

City Planner, Queens; Engineer, Queens; Architect/Attorney, Manhattan; Financial Analyst, Bronx; Attorney, Staten Island

Supported by a staff of 19, the Board decides on approximately 400 applications annually.

THE BOARD'S AUTHORITY

To Vary provisions of the Zoning Resolution of the City of New York based on certain findings

To Grant Special Permits as authorized by the Zoning Resolution based on certain findings

To Modify New York State Multiple Dwelling Law, General City Law 35 and 36 (mapped streets)

To Waive or Modify Fire Codes, Flood Regulations and Building Codes

To Decide the Meaning of Text in the Zoning Resolution (aka an "Interpretive Appeal")

To Vest Rights to continue construction following changes in the Zoning Resolution or Building Codes

To Revoke or Amend Certificates of Occupancy upon DOB or FDNY request

To Amend and Renew, Extend Terms and Extend Time to Complete Construction

All Board decisions are appealable to the New York State Supreme Court under Article 78 of the New York Civil Practice Laws and Rules (CPLR). Challengers argue that the Board's decision was arbitrary or capricious, or not supported by substantial evidence, or that environmental reviews failed to take a hard look at an area of environmental concern

THE BSA PRIORITIZES TRANSPARENCY.

Applications submitted upon filing to CB, BP, CC, DOB, DCP. Board defers to CB's 60 days of review.

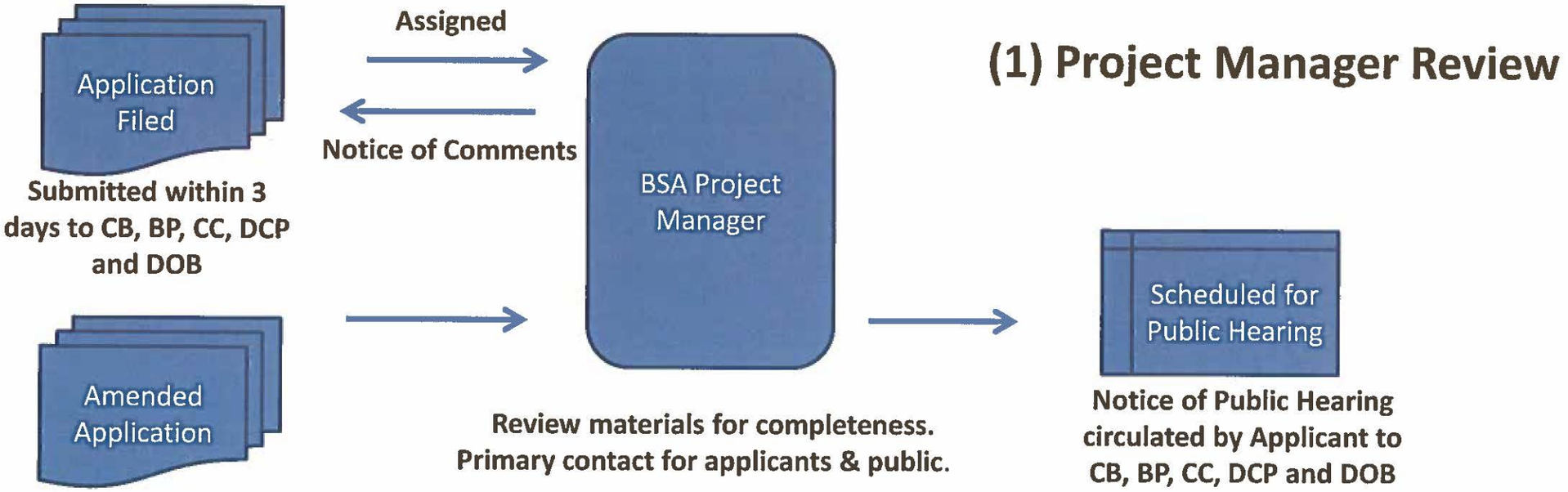
Project managers confirm that applications are complete and schedule them for hearing.

Review of applications is an iterative process conducted in public hearing.

Ex Parte Communications with Commissioners Are Prohibited (CAPA hearing 4/11/19).

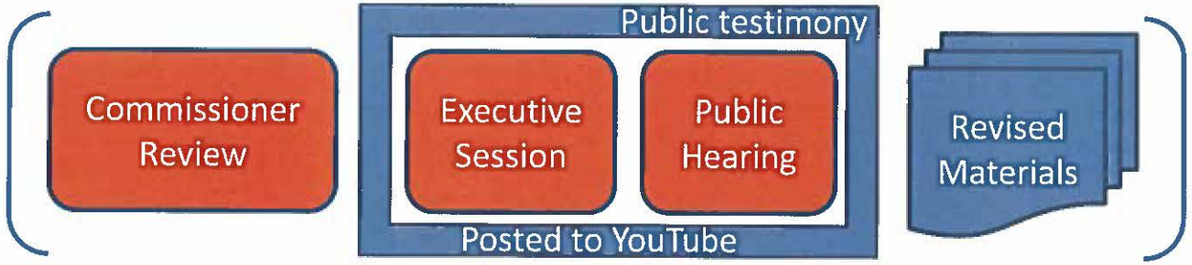
BSA and BOARD REVIEW TIMING depends on responsiveness of applicants to Staff and Commissioner comments.
Often applicants are not represented by experienced consultants and are small, very long term businesses.

(1) Project Manager Review

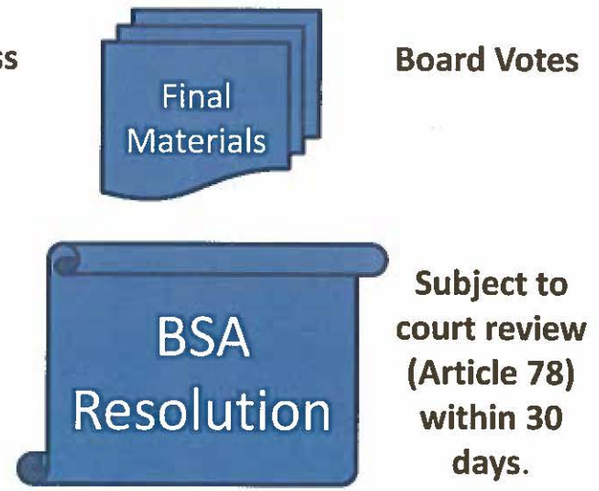


(2) BSA Commissioner Review

Iterative review process, duration of which depends on applicant responsiveness



Revised application materials are submitted by applicants in response to concerns identified and discussed at public hearing and in the executive session. Continued hearings are scheduled until all relevant issues have been addressed and the public record is complete. Applications subject to environmental review under CEQR.



APPLICATION STANDARDS SUPPORT CONSISTENCY OF REVIEW

Standardized Materials for Variance Applications

- **Reports for Uniqueness/Hardship:** subsurface condition reports (geotechnical, environmental contamination, soil boring test results); building conditions/structural engineering reports; topographic maps/surveys; documentation of costs relating to hardships, including construction cost estimates

- **Financial Feasibility Studies:** market-based acquisition costs; comparables for unit sales and rentals; hard and soft costs; total development costs; construction financing

- **Neighborhood Character Studies:** radius diagram/land use maps; photographs; yard diagrams; FAR diagrams; streetscape renderings; shadow studies; parking and traffic studies

- **Guidelines for Drawings**

BSA COMMISSIONERS LEAD THE REVIEW & RESOLUTION OF APPLICATIONS IN FULL VIEW OF THE PUBLIC

Iterative design process modifies proposals in response to concerns of BSA Commissioners, Community Boards, elected officials and neighbors.

Timeline for review varies based on particulars of applications and responsiveness of applicants.

Applications to the BSA are often an applicant's last administrative remedy before judicial intervention.

Public hearings (https://youtu.be/1LRfvjIJVpM?t=5096)

and executive sessions (https://youtu.be/enbk6WDOy6M?t=3809)

are on YouTube.

BSA COMMISSIONERS REVIEW COMPLEX DATA PREPARED BY EXPERTS.

Engineer: Geotechnical data, soil borings, support of excavation, foundation + super-structure drawings, scientific data, cost data, in field construction experience

Financial: land sale comparables, rental and unit sale comparables, underwriting methodologies, cost estimates, feasibility analysis, capitalization methodologies.

Planning: neighborhood character, height, lot coverage, floor area, shadow studies, traffic and parking impacts.

Architecture: full review of architectural drawing package, building and zoning laws as applied to project, in field construction experience.

Attorney: precedential BSA and common law caselaw, statutory construction, controlling statutes.

Commissioners discuss submissions with the Applicant's consultants: attorneys (both land use and litigation), architects, structural, geo-technical, environmental engineers, financial consultants, planners and preservationists.

Community Boards

- BSA defers to CB's 60 days to hear and submit recommendations
- Have best information on site conditions.
- Reveal issues that would not otherwise come to light and help BSA understand potential impacts.

BSA Application Approval Rate the result of both the iterative review process, which leads to proposals revised to meet findings, and pre-application meetings.

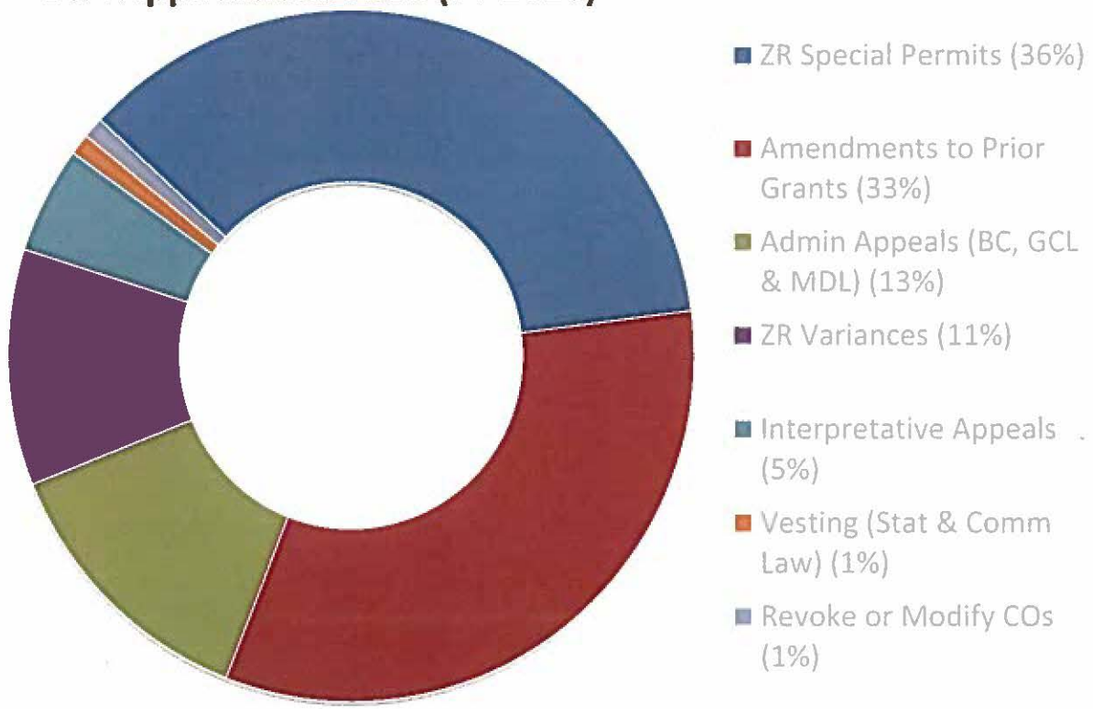
Currently, only review timeline mandated in the Charter is w/r/t applications challenging DOB revocation of permits, which are considered urgent.

2017 City Council Leg.
Includes biannual report on applications filed & decided; decisions on NYC Open Data; materials must be submitted to BSA; submissions certified under penalty of perjury; sworn testimony.

Variances Filed (FY 2018)

	Granted	Denied	Withdrawn	Dismissed	Active	Total
For Profit	3	0	1	0	8	12
Non - Profit	3	0	0	0	7	10
1-3 Family	3	0	0	0	8	11
Totals	9	0	1	0	23	33

BSA Applications Filed (FY 2018)



95 N.Y.2d 437, 741 N.E.2d 106,
718 N.Y.S.2d 261, 31 Envtl. L. Rep.
20,306, 2000 N.Y. Slip Op. 10389

In the Matter of SoHo
Alliance et al., Appellants,
v.
New York City Board of Standards
and Appeals et al., Respondents.

Court of Appeals of New York
124
Argued October 11, 2000;
Decided November 28, 2000

CITE TITLE AS: Matter of SoHo Alliance
v New York City Bd. of Stds. & Appeals

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered February 24, 2000, which, with two Justices dissenting, (1) reversed, on the law, a judgment of the Supreme Court (Ira Gammerman, J.), entered in New York County in a proceeding pursuant to CPLR article 78, granting a petition to annul two resolutions of respondent New York City Board of Standards and Appeals that approved applications for zoning variances, (2) denied the petition, and (3) reinstated the resolutions.

Matter of SoHo Alliance v New York City Bd. of Stds. & Appeals, 264 AD2d 59, affirmed.

HEADNOTES

Municipal Corporations
Zoning
Variance--Construction of Apartment Buildings in SoHo Historic District

() Respondent New York City Board of Standards and Appeals (BSA) acted rationally in granting variances permitting the development of two apartment buildings, previously approved by the Landmarks Preservation Commission (LPC), on two neighboring properties located within a light manufacturing zoning district along the boundary of the SoHo Cast-Iron Historic District. The BSA's determination was made after eight months of proceedings, including four days of public hearings, and review of an abundance of documentary exhibits and materials, including the City Planning Commission's (CPC) initial review. The BSA was entitled to rely on the CPC's study, which found the existence of unique physical conditions resulting in practical difficulties or unnecessary hardship. Expert testimony submitted by the property owners based upon significant documentation demonstrated that the unique physical configurations of the properties would preclude a reasonable rate of return from conforming uses, and it was not erroneous as a matter of law for the BSA to have considered comparable properties from outside the zoning district in determining the feasability of the properties' potential uses. Moreover, it was not irrational for the BSA to conclude that the development, which would bring only an additional 185 residents into the neighborhood and conforms with LPC's requirements that buildings be designed in a manner consistent with the special architectural features of the SoHo district, would have only an insignificant effect on the general character of the mixed use neighborhood.

Environmental Conservation
Environmental Impact Statement
Necessity of Environmental Impact Statement in Determining Application for Variance

() In a proceeding to determine applications for variances permitting the development of two apartment buildings on two neighboring properties locatedwithin *438 a light manufacturing zoning district along the boundary of the SoHo Cast-Iron Historic District, respondent New York City Board of Standards and Appeals (BSA) acted rationally in determining that there were no foreseeable significant environmental impacts which would require the preparation of an environmental impact statement. The BSA took

a hard look at the potential environmental effects of the proposed development, sought input from several interested agencies, including the City's Department of Environmental Protection and the Landmarks Preservation Commission, and required archaeological studies and soil and groundwater testing.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Zoning and Planning, §§ 838-840, 847, 850, 852, 944.

Carmody-Wait 2d, Proceeding Against a Body or Officer § 145:1267.

NY Jur 2d, Buildings, Zoning, and Land Controls, §§ 320, 326, 327, 341, 342.

NY Real Prop Serv, §§ 44:5-44:7, 44:56, 44:64.

ANNOTATION REFERENCES

See ALR Index under Variances; Zoning.

POINTS OF COUNSEL

Jack L. Lester, New York City, for appellants.
I. The Board of Standards and Appeals' (BSA) decision approving the variances was not supported by substantial evidence. (*Toys "R" Us v Silva*, 89 NY2d 411; *Matter of Bella Vista Apt. Co. v Bennett*, 89 NY2d 465; *Consolidated Edison Co. v Hoffman*, 43 NY2d 598; *Matter of Village Bd. of Village of Fayetteville v Jarrold*, 53 NY2d 254; *Matter of Fuhst v Foley*, 45 NY2d 441; *Conley v Town of Brookhaven Bd. of Appeals*, 40 NY2d 309; *Matter of Cowan v Kern*, 41 NY2d 591; *Matter of Kingsley v Bennett*, 185 AD2d 814; *Matter of Ryan v Miller*, 164 AD2d 968.) II. The BSA erred in failing to direct preparation of an environmental impact statement. (*Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359; *Matter of Farrington Close Condominium Bd. of Mgrs. v Incorporated Vil. of Southampton*, 205 AD2d 623; *Onondaga Landfill Sys. v Flacke*, 81 AD2d 1022; *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400; *H.O.M.E.S. v New York State Urban Dev. Corp.*, 69 AD2d 222.)

Michael D. Hess, Corporation Counsel of New York City (*Linda H. Young, Elizabeth S. Natrella* and *Deborah Rand* of ***439** counsel), for New York City Board of Standards and Appeals, respondent.
I. The Court below properly held that the resolutions of the BSA granting the variances were supported by substantial evidence and were not arbitrary or capricious. (*Matter of Khan v Zoning Bd. of Appeals*, 87 NY2d 344; *Matter of Cowan v Kern*, 41 NY2d 591; *Matter of Consolidated Edison Co. v Hoffman*, 43 NY2d 598; *Matter of WEOK Broadcasting Corp. v Planning Bd.*, 79 NY2d 373; *Matter of Fuhst v Foley*, 45 NY2d 441; *Conley v Town of Brookhaven Zoning Bd. of Appeals*, 40 NY2d 309; *Matter of Bella Vista Apt. Co. v Bennett*, 89 NY2d 465; *Matter of Douglaston Civic Assn. v Klein*, 51 NY2d 963; *Matter of Jayne Estates v Raynor*, 22 NY2d 417; *Matter of Fiore v Zoning Bd. of Appeals*, 21 NY2d 393.) II. The Court below properly upheld the BSA's determination that no environmental impact statement was required. (*Matter of WEOK Broadcasting Corp. v Planning Bd.*, 79 NY2d 373; *Akpan v Koch*, 75 NY2d 561; *Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 539; *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400; *Coalition Against Lincoln W. v City of New York*, 94 AD2d 483, 60 NY2d 805; *Matter of Neville v Koch*, 79 NY2d 416; *Coalition for Responsible Planning v Koch*, 148 AD2d 230, 75 NY2d 704; *Matter of People for Westpride v Board of Estimate*, 165 AD2d 555; *Matter of Merson v McNally*, 90 NY2d 742; *Matter of Cathedral Church of St. John the Divine v Dormitory Auth.*, 224 AD2d 95.)

Paul, Weiss, Rifkind, Wharton & Garrison, New York City (*Gerard E. Harper* and *Debo P. Adegbile* of counsel), for Broadway HS Corp. and others, respondents.
I. The Court below correctly held that the BSA's findings and conclusions were reasonable and based on substantial evidence. (*Matter of Fuhst v Foley*, 45 NY2d 441; *Conley v Town of Brookhaven Zoning Bd. of Appeals*, 40 NY2d 309; *Matter of Tarantino v Zoning Bd. of Appeals*, 228 AD2d 511; *Matter of Sasso v Osgood*, 86 NY2d 374; *300 Gramatan Ave. Assocs. v State Div. of Human Rights*, 45 NY2d 176; *Matter of Supkis v Town of Sand Lake Zoning Bd.*

of Appeals, 227 AD2d 779; *Matter of Toys "R" Us v Silva*, 89 NY2d 411; *Matter of Stork Rest. v Boland*, 282 NY 256; *Matter of Consolidated Edison Co. v New York State Div. of Human Rights*, 77 NY2d 411; *Matter of Jennings v New York State Off. of Mental Health*, 90 NY2d 227.) II. The Court below correctly upheld the BSA's determination that an environmental impact statement was not required to issue the variances. (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400.) *440

OPINION OF THE COURT

Levine, J.

At issue here is the validity of a determination made by the New York City Board of Standards and Appeals (BSA) to grant use variances permitting development of two neighboring properties and issuing a Type I Negative Declaration rather than requiring an Environmental Impact Statement (EIS). The properties at issue in this matter are located on West Houston Street within and along the northernmost boundary of the SoHo Cast-Iron Historic District. In addition, these sites fall within an M1-5A zoning district, designated as a light manufacturing district.

The BSA's determination was made after proceedings spanning eight months, and included four days of public hearings and review of an abundance of documentary materials and exhibits. Additionally, the BSA had the benefit of an initial review conducted by the City Planning Commission (CPC). Moreover, because the sites were located within an historic district, the owners sought and ultimately obtained the necessary approval of the Landmarks Preservation Commission (*see*, Administrative Code of City of NY §§ 25-306, 25-307).

In order to issue the variances here, the BSA was required to find that the proposed development met five specific requirements: that (a) because of "unique physical conditions" of the property, conforming uses would impose "practical difficulties or unnecessary hardship;" (b) also due to the unique physical conditions, conforming uses would not "enable the owner to realize a reasonable return" from the zoned property; (c) the proposed variances would "not alter the essential character of the neighborhood or district;" (d) the owner did not create the practical difficulties or unnecessary hardship; and (e) only the "minimum variance necessary to afford relief" is sought (NY City Zoning Resolution § 72-21; *see, Matter of Bella Vista Apt. Co. v Bennett*, 89 NY2d 465, 469).

This Court's review of the BSA's determination to grant the variances sought is limited by the well-established principle that a municipal zoning board has wide discretion in considering applications for variances. A "board determination may not be set aside in the absence of illegality, arbitrariness or abuse of discretion," and "will be sustained if it has a rational basis and is supported by substantial evidence" (*Matter of Consolidated Edison Co. v Hoffman*, 43 NY2d 598, 608).

As to the existence of unique physical conditions resulting in practical difficulties or unnecessary hardship, the BSA was *441 entitled to rely on the study completed by the CPC. The CPC found that the "properties have idiosyncratic lot configurations that are generally not duplicated in other parts of the M1-5A district" in that the properties extended along a lengthy stretch of West Houston Street, a major thoroughfare, and were L-shaped, measuring only approximately 25 feet deep in places. In addition, the CPC study noted that "[t]he properties have been unable to be significantly improved since the widening of [West] Houston Street in 1963" which caused the irregular and unique shape of the lots.

Likewise, the BSA could reasonably rely upon expert testimony submitted by the owners based upon significant documentation, including detailed economic analysis, which undeniably provided "dollars and cents" evidence (*Matter of Village Bd. of Vil. of Fayetteville v Jarrold*, 53 NY2d 254, 256) that the unique physical configurations of the properties would preclude a reasonable rate of return from conforming uses. The owners' expert demonstrated that a reasonable rate of return on the properties at issue would be 9.9%. Moreover, the submitted financial data and economic analysis also supported the conclusion that, not only would conforming uses fail to provide the 9.9% rate of

return, but also no lesser non-conforming uses could yield that rate of return.

Appellants do not seriously dispute that there was submitted the kind of detailed economic analysis necessary to provide "dollars and cents proof" to support the BSA's findings that conforming uses would yield an insufficient rate of return. Rather, their main objection is that, in part, the exposition of the owners' expert was based upon comparable properties from outside the zoning district. In actuality, more than half of the properties examined were within the district, and virtually all of the remaining properties within the survey were located in areas adjoining the district. No inflexible rule exists which requires, as a matter of law, that an economic analysis to support a use variance must be restricted exclusively to data on properties within a particular zoning district. Indeed, the New York City Zoning Ordinance's requirement that any proposed development "not alter the essential character of the *neighborhood or district*" (§ 72-21 [c] [emphasis supplied]) demonstrably contemplates the possibility of consideration of properties that might fall outside the actual boundaries of the pertinent district. As the Appellate Division aptly observed, the value of the property--and thus the feasibility of potential uses--was due as much to its geographical location as to the zoning ***442** district of which it was a part. Under these circumstances it cannot be said that it was irrational or erroneous as a matter of law for the BSA to have considered comparables from outside the zoning district.

Furthermore, appellants' assertion that the current use of the properties as parking lots yielded a reasonable rate of return was raised for the first time on appeal and, thus, is not properly before us.

As to the BSA's finding that the proposed development plans would not change the essential character of the neighborhood, the agency could reasonably rely upon the changes to the plans of the development made to reflect the Landmarks Preservation Commission's detailed construction requirements, which appellants do not challenge, that the two proposed buildings should have very different outward appearances and yet each would be designed in a manner consistent with the special architectural features of the SoHo district. Furthermore, it was not irrational for the BSA to conclude that the development--which would bring only an additional 185 residents to the already existent population of 10,000 residents in the neighborhood and immediately surrounding areas--would have only an insignificant effect on the general character of the mixed use neighborhood.

() For all of the foregoing reasons, it cannot be said that there was an absence of substantial evidence to support the Board's findings as to each of the five requirements necessary to issue the proposed use variances here.

() Moreover, the BSA's determination that no EIS was necessary was also neither irrational nor illegal. The BSA took a "hard look" at the potential environmental effects of the proposed development, and sought input from several interested agencies, including the City's Department of Environmental Protection and the Landmarks Preservation Commission. The BSA also required archaeological studies and soil and groundwater testing. Thus, there was a rational basis for the BSA's determination that there were "no foreseeable significant environmental impacts that would require the preparation of an Environmental Impact Statement."

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Kaye and Judges Smith, Ciparick, Wesley and Rosenblatt concur.
Order affirmed, with costs. ***443**

End of Document

2016-4138-BZ
CEQR #16-BSA-092M
APPLICANT – Kramer Levin Naftalis & Frankel LLP, for 323 Sixth LLC, owner; IFC Center, lessee.
SUBJECT – Application March 16, 2016 – Variance (§72-21) for an enlargement of an existing motion picture theater (*IFC Center*) contrary to both use and bulk requirements. C1-5/R7-2 & R6 zoning district.
PREMISES AFFECTED – 323-27 Avenue of the Americas, Block 589, Lot(s) 19, 30, 31, Borough of Manhattan.
COMMUNITY BOARD #2M
ACTION OF THE BOARD – Application granted on condition.
THE VOTE TO GRANT –
Affirmative: Chair Perlmutter, Vice-Chair Chanda, Commissioner Ottley-Brown, Commissioner Sheta and Commissioner Scibetta.....5
Negative: 0
THE RESOLUTION –

WHEREAS, the decision on behalf of the Borough Commissioner, dated December 11, 2017, acting on Department of Buildings Application No. 122507769 reads in pertinent part:

1. ZR 32-31: Proposed use group [8] (Theater) exceeds the 500 seats permitted by special permit in C1-5 zoning district;
2. ZR 32-421: Proposed use group 8 (theater) is limited to two stories in C1-5 zoning district;
3. ZR 33-431: Proposed use group 8 (theater) is limited to a height of 30 feet or two stories, whichever is less, in C1-5 zoning district;
4. ZR 33-283: Proposed enlargement encroaches in required rear yard equivalent of through lot portion of zoning lot;
5. ZR 32-421: Commercial use is not permitted above level of the first story ceiling in buildings occupied by Residential Use;
6. ZR 3[3]-121: Proposed commercial floor area exceeds 2.0 FAR Maximum in permitted C1-5 zoning district;
7. ZR 33-26: (C1 District) A rear yard with a depth of not less than 20 feet shall be provided at every rear lot line;
8. ZR 22-10: Propose use group 8 (theater) not permitted in R6 zoning district;
9. ZR 23-153: The proposed building exceeds the maximum floor area ratio permitted in the R6 district;
10. ZR 77-22: The proposed building exceeds the adjusted maximum floor area ratio permitted in the R6 district;
11. ZR 23-532: The proposed building encroaches in the required rear yard equivalent of the through lot portion of the zoning lot;
12. ZR 33-662: The proposed building exceeds the maximum base height and maximum building height for Quality Housing option buildings on narrow streets in R6 zoning district; and

WHEREAS, this is an application under ZR § 72-21 to permit, on a site located partially within an R6 zoning district and partially within a R7-2 (C1-5) zoning district and in the Greenwich Village Historic District Extension II, the enlargement of an existing motion picture theater contrary to use and bulk requirements set forth in ZR §§ 32-31, 32-421. 33-431, 33-283, 32-421, 33-121, 33-26, 22-10, 23-153, 77-22, 23-532 and 33-662: and

WHEREAS, this application is filed on behalf of IFC Theatres, LLC ("IFC" or the "Applicant"), the lessee of the premises; and

WHEREAS, a public hearing was held on this application on November 1, 2016, after due notice by publication in *The City Record*, with continued hearings on February 28, 2017, September 12, 2017, December 12, 2017, March 27, 2018, and May 15, 2018, and then to decision on July 17, 2018; and

WHEREAS, Chair Perlmutter, Vice-Chair Chanda, Commissioner Ottley-Brown, former Vice-Chair Hinkson and former Commissioner Montanez performed inspections of the site and surrounding area; and

WHEREAS, the subject site is bound by Cornelia Street to the north and Avenue of the Americas to the south, partially within an R7-2 (C1-5) zoning district and partially within an R6 zoning district, in the Greenwich Village Historic District Extension II, in Manhattan; and

WHEREAS, the site is comprised of three interior tax lots, Lots 30 and 31, having approximately 75 feet of contiguous frontage along Avenue of the Americas and wholly located within an R7-2 (C1-5) zoning district, and Lot 19, having approximately 26 feet of frontage along Cornelia Street and partially located within an R7-2 (C1-5) zoning district and partially within an R6 zoning district; and

WHEREAS, the site has approximately 9,146 square feet of lot area; Lots 30 and 31 are occupied by a two-story plus cellar theater operated as the IFC Center and Lot 19 is currently vacant and utilized for accessory theater uses, including storage and parking; and

WHEREAS, the Board has exercised jurisdiction over this site since March 17, 2009, when, under BSA Cal. No. 319-08-BZ, the Board granted a special permit, pursuant to ZR § 73-201, to permit a 95-seat expansion of the existing Use Group 8 theater on condition that a 480 square foot waiting area be provided in the lobby area of the ground floor,

residual patron space be maintained at the cellar level, all applicable fire safety measures be complied with and all egress be as approved by Department of Buildings; and

WHEREAS, with this application, the Applicant initially proposed to enlarge the existing building from a five screen theater with 480 seats located solely on Lots 30 and 31, wholly located within an R7-2 (C1-5) zoning district, to an 11 screen theater with 948 seats, including an expansion of the use into a three-story plus cellar addition rising 60 feet to the top of the parapet on the portion of the zoning lot fronting Cornelia Street and located partially within an R7-2 (C1-5) zoning district and partially within an R6 zoning district; and

WHEREAS, by resolution dated July 26, 2016, Community Board 2, Manhattan, recommends denial of this application unless the submission is revised to reflect and respect the neighborhood context finding and does not seek to building a commercial building on a residential street; the final plan incorporates an interior staircase above the second floor of the main building; that the minimum variance be evaluated with respect the land without factoring a specific use preferred by the leaseholder; and

WHEREAS, Community Board 2 sent additional letters to the Board reiterating its preference for a residential development, rather than the enlargement of the existing theater, on the Cornelia Street frontage; and

WHEREAS, the Board received numerous letters and form objections from individuals, many of them residents of Cornelia Street, as well as organizations—including the Greenwich Village Society for Historic Preservation, the Central Village Block Association—in opposition to the proposal, citing concerns regarding the proposed addition of a commercial building on Lot 19 fronting Cornelia Street, a street they characterize as comprised of small independent businesses limited to the ground floor only with residential units above, and that, upon IFC Center vacating the site, the commercial landlord will redevelop the site with an offensive commercial use; and

WHEREAS, the Board was also in receipt of several form letters and hundreds of emails in support of the proposed expansion of the IFC Center at the subject site; and

WHEREAS, the Friends of Cornelia Street Coalition was represented by counsel that appeared with written submissions and in public hearings in opposition to the subject application to ensure that any expansion at the subject site is justified by ZR § 72-21, particularly with regards to the minimum variance; and

WHEREAS, in the course of hearings, and in response to comments and direction by the Board, the Applicant revised the proposal to enlarge the existing building to a four-story plus cellar 10 screen Use Group 8 theater with 941 seats as well as construct a four-story, four-unit residential building fronting Cornelia Street within a rear yard equivalent required for the through lot portion of the site; and

WHEREAS, the revised proposal includes 23,805 square feet of commercial floor area (21,191 square feet of commercial floor area within the portion of the site located in an R7-2 (C1-5) zoning district and 2,614 square feet of commercial floor area within the portion of the site located in an R6 zoning district); 3,881 square feet of residential floor area (410 square feet of residential floor area within the portion of the site located in an R7-2 (C1-5) zoning district and 3,471 square feet of residential floor area in the portion of the site located in an R6 zoning district); a total of 21,601 square feet of floor area within the portion of the site located in an R7-2 (C1-5) zoning district and 6,085 square feet of floor area within the portion of the site located in an R6 zoning district; no rear yard or rear yard equivalent, a base height and building height of 60 feet, without setback, at the Cornelia Street façade, which is located in an R6 zoning district, and a street wall height of 60 feet at the Avenue of the Americas façade, which is located in an R7-2 (C1-5) zoning district; and

WHEREAS, Use Group 8 theaters are prohibited within the portion of the site located in an R6 zoning district pursuant to ZR § 22-10; a maximum of 3,181 square feet of residential floor area is permitted within the portion of the site located in an R6 zoning district pursuant to ZR § 23-153 and a maximum of 4,691 square feet of total floor area is permitted on that same portion of the site pursuant to ZR § 77-22; Use Group 8 theaters are limited to 500 seats permitted by special permit within the portion of the site located in an R7-2 (C1-5) zoning district pursuant to ZR § 32-31; the maximum permitted floor area ratio ("FAR") for the portion of the site located within a R7-2 (C1-5) zoning district is 2.0 FAR (15,400 square feet) pursuant to ZR § 33-121, theaters are limited to a height of 30 feet or two stories, whichever is less, in the portion of the site located in an R7-2 (C1-5) zoning district pursuant to ZR §§ 32-421 and 33-431; commercial uses in Use Group 8, among others, are not permitted above the level of the first story ceiling in any building or portion of a building occupied on one or more of its upper stories by residential use pursuant to ZR § 32-42; a rear yard equivalent of 40 feet is required on the through lot portion of the site located in an R7-2 (C1-5) zoning district pursuant to ZR § 33-283; a rear yard equivalent of 60 feet is required on the through lot portion of the site located in an R6 zoning district pursuant to ZR § 23-532; a rear yard of at least 20 feet is required in the portion of the site located within an R7-2 (C1-5) zoning district pursuant to ZR § 33-26; and a maximum base height of 45 feet, an initial setback of 20 feet and a maximum building height of 55 feet are mandated

by ZR § 23-662; and

WHEREAS, the Applicant seeks to construct the subject proposal in order to provide additional theaters and screens and lobby space sufficient to accommodate patrons, who currently congregate outside at the theater's Avenue of the Americas frontage, waiting to be seated in theaters; and

WHEREAS, the Applicant states that, pursuant to ZR § 72-21(a), the irregular shape of the lot, its split by a zoning district boundary line and the history of the development of the site create practical difficulties and unnecessary hardship in developing the site in conformance with the zoning regulations applicable in the underlying zoning districts; and

WHEREAS, in particular, the applicant notes, in particular, that the site is split between zoning districts in which different use regulations are applicable and although 84 percent of the lot area of the subject site is located within an R7-2 (C1-5) zoning district and only 16 percent of the lot area of the subject site is located in an R6 zoning district, the location of the zoning district boundary line 37'-3" from the street line at the southern end of the site is greater than the 25 feet maximum set forth in ZR § 77-11 that would permit, as-of-right, the application of use regulations applicable in an R7-2 (C1-5) zoning district to the entirety of the zoning lot; and

WHEREAS, the site was originally developed with a two-story house of worship for the West Reformed Dutch Church and has been occupied, at least in part, by commercial uses since approximately 1893; in 1937 the building was converted into a motion picture theater, in 1961 the theater use became non-conforming, and in 2005, the theater was renovated to accommodate the IFC Center; and

WHEREAS, the Applicant asserts that the existing building is functionally obsolete as a movie theater, the purpose for which it was converted in 1937, in that its footprint and building are too small to accommodate the wide range of film content now available, sought out by theatergoers and provided, in large part, by IFC's competitors, independent theaters located in Manhattan that have between 800 and 1200 theater seats; as a result, the Applicant seeks the proposed enlargement in the rear of the site to facilitate an increase in the number of screens available at the subject site, improve theater layout and patron circulation and enable the site to realize a reasonable return; and

WHEREAS, the Applicant represents that an as-of-right horizontal expansion of the building is limited by the irregular shape of the site and angle at which the zoning district boundary line traverses the site, rendering a Use Group 8 theater as-of-right on one site and prohibited on the other, and that a vertical expansion would require the installation of an additional platform within the building to support the additional floors or, in the alternative, the construction of a new building; and

WHEREAS, based on the foregoing, the Board finds that the aforementioned unique physical conditions create unnecessary hardship and practical difficulties in developing the site in conformance with applicable zoning regulations; and

WHEREAS, with regards to ZR § 72-21(b), the applicant submits that there is no reasonable possibility that a conforming development at the subject site will bring a reasonable return and, in support that assertion, submitted financial analyses of the following development scenarios from the perspective of the property owner (rather than that of the applicant, a lessee): (1) an as-of-right five-story plus cellar residential building with four studio apartments and 2,128 square feet of rentable residential floor area and maintenance of the existing building ("Scheme A"); (2) and as-of-right five-story plus cellar residential building with 2,128 square feet of rentable residential floor area and conversion of the existing building to retail with 11,473 square feet of rentable floor area ("Scheme 2A"); (3) a five-story plus cellar residential building with five dwelling units and 5,120 square feet of rentable residential floor area and conversion of the exiting building with retail with 11,473 square feet of rentable floor area requiring waivers of ZR §§ 23-153, 23-532, 33-283, 23-662 and 23-71 ("Scheme 2B"); (4) a five-story plus cellar residential building with five dwelling units and 5,120 square feet of rentable residential floor area and conversion of the existing building to retail with 13,980 square feet of rentable floor area requiring waivers of ZR §§ 33-26, 33-283, 23-153, 23-532, 33-283, 23-662 and 23-71 ("Scheme 3A"); (5) a five-story plus cellar residential building with five dwelling units and 5,120 square feet of rentable residential floor area and conversion of the existing building to retail with 14,396 square feet of rentable floor area requiring waivers of ZR §§ 22-10, 33-26, 33-283, 23-153, 23-532, 33-283, 23-662 and 23-71 ("Scheme 3B"); (6) a five-story plus cellar residential building with five dwelling units and 5,120 square feet of rentable floor area and enlargement of the existing theater to 23,677 gross square feet, 9 theaters and 643 seats requiring waivers of ZR §§ 32-31, 32-421, 33-431, 33-26, 33-283, 23-153, 23-532, 33-283, 23-662 and 23-71 ("Scheme 4A"); (7) a five-story plus cellar residential building with five dwelling units and 5,120 square feet of rentable floor area and enlargement of the existing theater to 24,560 gross square feet, 9 theaters and 689 seats requiring waivers of ZR §§ 22-10, 32-31, 32-421, 33-431, 33-26, 33-283, 23-153, 23-532, 33-283, 23-662 and 23-71 ("Scheme 4B"); (8) a five-story plus cellar residential building with five dwelling units and 5,120 square feet of rentable floor

area and enlargement of the existing theater to 33,950 gross square feet, 8 theaters and 840 seats requiring waivers of ZR §§ 32-31, 32-421, 33-431, 33-26, 33-283, 23-153, 23-532, 33-283, 23-662 and 23-71 ("Scheme 4C"); (9) a five-story plus cellar residential building with four two-bedroom dwelling units and 4,720 square feet of rentable floor area and enlargement of the existing theater to 32,148 gross square feet, 13 theaters and 838 seats requiring waivers of ZR §§ 22-10, 32-31, 32-421, 33-431, 33-26, 33-283, 23-153, 23-532, 33-283, 23-662 and 23-71 ("Scheme 5"); (10) enlargement of the existing theater to 30,052 gross square feet, 11 theaters and 927 seats requiring waivers of ZR §§ 22-10, 32-31, 32-421, 33-121, 33-431, 33-26 and 33-283 ("Scheme 6"); (11) a lesser variance residential building with 4,480 square feet of rentable residential floor area and an enlarged theater with 30,262 gross square feet, 10 theaters and 876 seats requiring waivers of ZR §§ 32-31, 32-421, 33-431, 33-283, 22-10, 23-153, 23-532, 23-662 and 77-22 ("Revised Scheme 4C"); (12) a lesser variance residential building with 1,638 square feet of rentable residential floor area and an enlarged theater with 33,799 gross square feet, 11 theaters and 947 seats requiring waivers of ZR §§ 32-31, 32-421, 33-431, 33-283, 32-421, 22-10, 23-153, 77-22, 23-532 and 23-662 ("Revised Scheme 5" or "Scheme 4D"); (13) enlargement of the existing theater to 32,124 gross square feet, 11 theaters and 948 seats requiring waivers of ZR §§ 22-10, 32-31, 32-421, 33-121, 33-431 and 33-283 ("Revised Scheme 6"); (14) a lesser variance residential building with 4 dwelling units and an enlargement of the existing theater building to 30,197 gross square feet, 10 theaters and 898 seats requiring waivers of ZR §§ 32-31, 32-421, 33-431, 33-283, 22-10, 23-153, 23-532, 23-662 and 77-22 ("Scheme 4C.1"); (15) a lesser variance residential building with four dwelling units and an enlargement of the existing theater building to 33,339 gross square feet, 10 theaters and 941 seats ("Scheme 4D.1" or the "Subject Revised Proposal")

WHEREAS, the analyses demonstrated that only Revised Scheme 6 and Scheme 4D.1 would provide a reasonable return; and

WHEREAS, based on the record, the Board finds that due to the site's unique physical conditions, there is no reasonable possibility that a development in strict conformance with applicable zoning requirements will provide a reasonable return; and

WHEREAS, the applicant represents that the Subject Revised Proposal will not alter the character of the neighborhood, will not substantially impair the appropriate use or development of adjacent property and will not be detrimental to the public welfare in accordance with ZR § 72-21(c) because the residential building proposed to front Cornelia Street is compatible with that street's mixed residential with commercial at the first floor character; and

WHEREAS, at hearing and in written testimony, members of the public, including neighbors of the subject site, expressed a preference for Scheme 4C.1 because of the larger residential units provided therein, but the Board notes both that that development scenario was deemed financially infeasible and that the comparatively smaller residential units in Scheme 4D.1 are typical of existing tenement and front-rear row houses commonly found in the area; and

WHEREAS, the Board finds that though Revised Scheme 6 also provides a reasonable return, Scheme 4D.1, with its provision of residential frontage on Cornelia Street while allowing for improved interior patron circulation in the portion of the development dedicated to theater use, is more consistent with the existing character of the neighborhood, and with Cornelia Street specifically, than Revised Scheme 6, which would provide for a commercial lobby and lounge in that location of the development; the Board further notes that, in this way Scheme 4D.1 is responsive to many of the community's concerns regarding the development of the subject site; and

WHEREAS, accordingly, the Board finds that the requested relief will not alter the essential character of the neighborhood nor impair the use or development of adjacent properties, nor will it be detrimental to the public welfare; and

WHEREAS, the Board finds that the hardship claimed as grounds for the variance was not created by the owner or a predecessor in title in accordance with ZR § 72-21(d); and

WHEREAS, the applicant represents, and the Board finds, that the subject proposal is the minimum variance necessary to afford relief because it is the only scenario that would provide a reasonable return; and

WHEREAS, the Board has determined that the evidence in the record supports all of the findings required to be made under ZR § 72-21; and

WHEREAS, the project is classified as a Type I action pursuant to 6 NYCRR, Part 617.4(b)(9); and

WHEREAS, the Board has conducted an environmental review of the proposed action and has documented relevant information about the project in the Final Environmental Assessment Statement ("EAS") CEQR No. 16BSA092M, dated July 10, 2018; and

WHEREAS, the EAS documents that the project, as proposed, would not have significant adverse impacts on Land Use, Zoning and Public Policy; Socioeconomic Conditions; Community Facilities; Open Space; Shadows; Historic and Cultural Resources; Urban Design and Visual Resources; Natural Resources; Hazardous Materials; Water and Sewer Infrastructure; Solid Waste and Sanitation Services; Energy; Transportation; Air Quality;

Greenhouse Gas Emissions; Noise; Public Health; Neighborhood Character; or Construction; and

WHEREAS, with regards to hazardous materials, by letter dated March 16, 2018, the New York City Department of Environmental Preservation ("DEP") states that, upon completion of the clean fill/top soil investigation activities at the site, the Applicant's consultant should submit a detailed clean soil report to DEP—including, at a minimum, an executive summary, narrative of the field activities, laboratory data, and comparison of soil analytical results (i.e., NYSDEC 6 NYCRR Part 375 Environmental Remediation Programs)—for review and approval prior to importation and placement on-site; and

WHEREAS, DEP additionally states that it finds the February 2018 Revised Remedial Action Plan ("RAP") acceptable and requests that, at the completion of the project, a Professional Engineer certified Remedial Closure Report be submitted to DEP for review and approval indicating that all remedial requirements have been properly implemented (i.e., installation of vapor barrier; proper transportation/disposal manifests and certificates from impacted soils removed and properly disposed of in accordance with all NYSDEC regulations; and one foot of DEP approved certified clean fill/top soil capping requirement in any landscaped/grass covered areas not capped with concrete/asphalt, etc.); and

WHEREAS, by correspondence dated April 5, 2017 the New York City Department of Transportation ("DOT") reviewed the draft EAS and detailed pedestrian analyses and determined that a detailed traffic analyses is not warranted; and

WHEREAS, subsequent to the DOT review the project parameters were modified to include less seats and a small residential component, not affecting DOT's original determination; and;

WHEREAS, by correspondence dated May 29, 2018 the New York City Parks Department stated that they had no comments on the detailed shadows analysis; and

WHEREAS, by letter dated June 29, 2018, DEP states that they have reviewed the proposal for noise and determined that it would not result in any potential for significant adverse impacts in regards to noise; and

WHEREAS, the New York City Landmarks Preservation Commission ("LPC") reviewed the proposal for archaeological and architectural significance and notes that all three tax lots are of both archaeological and architectural significance, that 323-325 and 327 Avenue of the Americans (Tax Lots 31 and 30) are individually LPC-designated landmarks and all three tax lots are within the LPC-designated and State and National Register listed South Village Historic District, therefore permits from the LPC Preservation Department are required for construction; and

WHEREAS, LPC additionally notes that its review of archaeological sensitivity models and historic maps indicate that there is potential for the recovery of remains from 19th century residential occupation of the site and the Dutch Reformed Church previously on the site and recommends that an archaeological documentary study be performed to clarify these initial findings; and

WHEREAS, the Applicant provided an Archaeological Phase IA Documentary Center and LPC recommends that, while LPC largely concurs with the conclusions, the study should be amended to consider whether remnants of a mikvah, that may have been associated with the synagogue shown in the 1895 Sanborn map, may be present either within Lot 30 or adjacent to it; and

WHEREAS the Applicant performed additional research to address the possible presence of a cemetery, the mikvah, and other archaeological features on one or more of the project lots and determined the proposed project would not result in any significant adverse effect to historic resources;

WHEREAS, LPC issued a Certificate of Appropriateness (COFA-19-25117) for work associated with the revised proposal on June 20, 2018, expiring June 12, 2024; and

WHEREAS, no other significant effects upon the environment that would require an Environmental Impact Statement are foreseeable; and

WHEREAS, the Board has determined that the proposed action will not have a significant adverse impact on the environment; and

Therefore, it is Resolved, that the Board of Standards and Appeals does hereby issue a Type I Negative Declaration determination prepared in accordance with Article 8 of the New York State Environmental Conservation Law and 6 NYCRR Part 617 and § 6-07(b) of the Rules of Procedure for City Environmental Quality Review and Executive Order No. 91 of 1977, as amended, and makes each and every one of the required findings under ZR § 72-21 to permit, on a site located partially within an R6 zoning district and partially within a R7-2 (C1-5) zoning district and in the Greenwich Village Historic District Extension II, the enlargement of an existing motion picture theater contrary to use and bulk requirements set forth in ZR §§ 32-31, 32-421. 33-431, 33-283, 32-421, 33-121, 33-26, 22-10, 23-153, 77-22, 23-532 and 33-662; *on condition* that all work shall substantially conform to drawings filed with this application marked "Received June 25, 2018"-Eleven (11) sheets and "July 17, 2018"-Two (2) sheets; and *on further condition*:

THAT the following shall be the bulk parameters of the development: a maximum of 21,191 square feet of commercial floor area within the portion of the site

located within an R7-2 (C1-5) zoning district; a maximum of 2,614 square feet of commercial floor area, a maximum of 3,471 square feet of residential floor area and a maximum of 6,085 square feet of total floor area within the portion of the site located within an R6 zoning district; a maximum base height of 60 feet, a maximum building height of 60 feet and a setback of at least 0 feet on the Cornelia Street frontage; a rear yard or rear yard equivalent of at least 0 feet; and a maximum of 941 theater seats; and

THAT upon completion of the clean fill/top soil investigation activities at the site, the Applicant's consultant shall submit a detailed clean soil report to DEP—including, at a minimum, an executive summary, narrative of the field activities, laboratory data, and comparison of soil analytical results (i.e., NYSDEC 6 NYCRR Part 375 Environmental Remediation Programs)—for review and approval prior to importation and placement on-site;

THAT at the completion of the project, a Professional Engineer certified Remedial Closure Report be submitted to DEP for review and approval indicating that all remedial requirements have been properly implemented (i.e., installation of vapor barrier; proper transportation/disposal manifests and certificates from impacted soils removed and properly disposed of in accordance with all NYSDEC regulations; and one foot of DEP approved certified clean fill/top soil capping requirement in any landscaped/grass covered areas not capped with concrete/asphalt, etc.);

THAT the commercial occupancy at the site shall be maintained as a Use Group 8 theater;

THAT egress from the Use Group 8 theater onto Cornelia Street shall be for emergency purposes only;

THAT substantial construction shall be completed pursuant to ZR § 72-23;

THAT a certificate of occupancy shall be obtained within four (4) years;

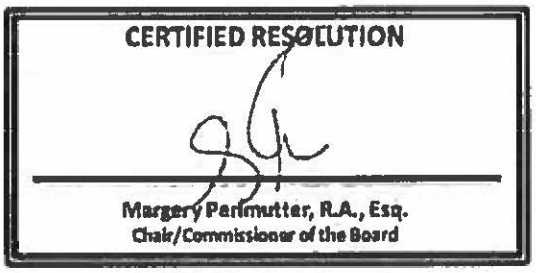
THAT this approval is limited to the relief granted by the Board in response to specifically cited and filed DOB/other jurisdiction objection(s);

THAT the approved plans shall be considered approved only for the portions related to the specific relief granted; and

THAT DOB must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code, and any other relevant laws under its jurisdiction irrespective of plan(s)/configuration(s) not related to the relief granted.

A true copy of resolution adopted by the Board of Standards and Appeals, July 17, 2018.
Printed in Bulletin Nos. 28-30, Vol. 103.

Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.



Testimony by Meenakshi Srinivasan

Board of Standards and Appeals Charter Revisions 2019

March 25, 2019

Good Evening, Chair Benjamin and members of the Charter Revision Commission, I am Meenakshi Srinivasan and I want to thank you for inviting me to participate in this comprehensive, rigorous and daunting process to consider reforms to the New York City Charter. I am here to testify and answer any questions on the Board of Standards of Appeals (BSA). I am a Senior Land Use and Zoning Advisor in the land use practice of Kramer Levin Naftalis and Frankel – however I am here today representing myself.

I am a former chair of the BSA appointed by, then, Mayor Bloomberg in 2004 and I served in that position until July 2014. When I arrived at the Board in 2004, one of my first initiatives was to establish an agency strategic plan to improve professionalism, quality, efficiency and transparency in the Boards processes. While I support the goals of this Commission to improve accountability and transparency, I would urge the Commission to resist the pressure to make revisions where they are not critically needed and where there are more appropriate ways to implement such revisions for example through changes to agency policy, rules, or legislation.

Some of the suggestions for reform stem from dissatisfaction with the BSA's fundamental authority to waive the Zoning Resolution or with specific decisions that may be in conflict with community sentiment, and therefore there is a perceived need to change the composition of the Board to include representation from elected officials or to allow the City Council to function in an appellate nature to review and overturn unpopular BSA decisions. I believe that neither should be included in the Commission's revisions.

First, the BSA is an independent body with experts and that independence should be both respected and protected. The Board is made up of five commissioners with a set 6-year term. The Charter mandates high levels of expertise requiring the Board to be composed of a city planner, an architect and an engineer, all with at least 10 years of experience, as well as a multi-borough or citywide perspective. Commissioners must reside in one of the five boroughs with no more than two members residing in one borough. Commissioners are barred from any ex-parte communication on pending applications, which was strictly held while I chaired the Board for 10 years and is being formalized through Rules by the agency. This composition and associated Charter mandates ensure that the Board has the independence and expertise required and the

geographic knowledge necessary to make decisions that are sound and impartial. While Commissioners are appointed by the Mayor, all appointments including the Chair must be approved by the City Council. The commissioners are protected by their term which may extend or cross different administrations. Unlike the City Planning Commission where elected official representation is appropriate, the Board is not a policy-making or quasi-legislative body, but instead it plays an administrative and quasi-judicial role. This system is well considered and safeguards the Board's independence and ensures that it functions outside of political considerations.

Second, the BSA's decisions should be final and should not be subject to City Council oversight. Its decisions are based on evidence and analyses that support findings, as well as legal precedents and case law. The Board's authority comes from various laws and code including the Zoning Resolution, the Building Code, the General City Law, and the Multiple Dwelling Law – each which set forth the process and bases for decisions. In the regard, there is no place for City Council review which by nature is political and understandably responds to constituent interests.

Further, the BSA was created to provide a venue for relief for property owners from zoning regulations, and in doing so, protect the Zoning Resolution from constitutional challenge. In this context, it would appear to in conflict to designate the legislative body that enacts the Zoning Resolution to oversee the Boards decisions to waive zoning regulations. The 1989 Charter Reform carefully established the role of the City Council in the City's land use apparatus, and purposely did not replace the Board of Estimates review of BSA decisions with the Council. I don't believe that there is any basis to disturb or change the process prescribed in the Charter.

Third, I would implore this Commission to resist revisions that limit the flexibility of the Board to establish methodologies, analyses or other forms of evidence required to supplement its record or types of additional expertise needed to assist the Board in making fair and proper decisions. Similarly, the BSA should have the discretion to determine time-frames for its public hearings. Such discretion safeguards a more deliberate, transparent and fair review that responds to the complexity, the quality of the evidence, and the level of support and/or opposition in each individual case. Anything less would undermine the Board's ability to make rigorous and rational decisions and could create procedural inefficiencies by either forcing the Board to take untimely decisions or not take action or for applicants to withdraw, resubmit a new application and commence the process again.

March 25, 2019

TESTIMONY OF GABRIEL TAUSSIG BEFORE THE NEW YORK CITY CHARTER REVISION COMMISSION 2019

GOOD EVENING COMMISSIONERS. MY NAME IS GABRIEL TAUSSIG. I WAS AN ATTORNEY WITH THE NEW YORK CITY LAW DEPARTMENT FOR 39 YEARS—THE LAST 29 OF THOSE YEARS AS HEAD OF THE ADMINISTRATIVE LAW DIVISION. AMONG ITS RESPONSIBILITIES THE DIVISION REPRESENTS THE BSA IN CASES BROUGHT AGAINST IT.

AS I UNDERSTAND IT, ONE OF THE MATTERS BEING CONSIDERED BY YOU CONCERNS THE MAKEUP OF THE BSA. AS YOU KNOW THE CURRENT CHARTER PROVISION ADDRESSING THAT ISSUE REQUIRES THAT THE BOARD CONSIST OF AT LEAST ONE ARCHITECT, ONE PLANNER AND ONE LICENSED PROFESSIONAL ENGINEER, EACH WITH AT LEAST TEN YEARS EXPERIENCE. MY COMMENT IN THIS REGARD RELATES TO THE IMPORTANCE OF MAINTAINING A BOARD WITH A STRONG PRESENCE OF PROFESSIONAL EXPERTS. THE NEW YORK STATE COURT OF APPEALS HAS, ON SEVERAL OCCASIONS, RECOGNIZED THAT THE BSA IS COMPRISED OF EXPERTS IN LAND USE AND PLANNING, AND HAS ACCORDINGLY GIVEN DEFERENCE TO THE

BOARD'S INTERPRETATION OF THE ZONING RESOLUTION, SO LONG AS THAT INTERPRETATION IS NEITHER IRRATIONAL, UNREASONABLE NOR INCONSISTENT WITH THE GOVERNING STATUTE.

IN LIGHT OF THE OFTEN TECHNICAL NATURE OF THE MATTERS BROUGHT BEFORE THE BSA, I THINK IT ADVISABLE THAT ANY PROPOSAL TO CHANGE THE SIZE AND/OR MAKEUP OF THE BOARD TAKE INTO ACCOUNT THE IMPORTANCE OF MAINTAINING A BOARD WHICH HAS A SIGNIFICANT PRESENCE OF COMMISSIONERS WHO HAVE THE RELEVANT PROFESSIONAL EXPERTISE AND EXPERIENCE.

IT IS ALSO BEING PROPOSED THAT DETERMINATIONS BY THE BSA BE APPEALABLE TO THE CITY COUNCIL. A PRECEDENT FOR SUCH AN APPEAL WAS ESTABLISHED BY A CHARTER AMENDMENT ADOPTED IN 1975 WHEN THE BOARD OF ESTIMATE WAS EMPOWERED TO REVIEW CERTAIN DETERMINATIONS OF THE BSA. THAT PROCEDURE WAS OF COURSE ELIMINATED WHEN IN 1989 IT WAS DETERMINED THAT THE MAKEUP OF THE BOARD OF ESTIMATE WAS UNCONSTITUTIONAL

AT THE RISK OF SOUNDING SOMEWHAT "WONKY" I WOULD LIKE TO DESCRIBE THAT APPEAL PROCESS BECAUSE I THINK IT MIGHT PROVE HELPFUL IN YOUR CONSIDERATION OF THE MATTER BEFORE YOU. THE PROCEDURE CALLED FOR THE BOARD OF ESTIMATE TO

INITIALLY DETERMINE WITHIN 30 DAYS WHETHER IT WOULD ACCEPT JURISDICTION OVER AN APPEAL. THE BOARD WAS NOT REQUIRED TO, AND DID NOT, CONSIDER ALL APPEALS SUBMITTED TO IT. IF AN APPEAL WAS ACCEPTED BY THE BOARD OF ESTIMATE, THE CHARTER REQUIRED THAT THE BOARD RESOLVE THE APPEAL WITHIN 30 DAYS AND LIMITED ITS ROLE TO DETERMINING WHETHER THE DECISION OF THE BSA WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

IT SHOULD BE EMPHASIZED THAT THE BSA DOES NOT HAVE UNFETTERED DISCRETION WHETHER TO GRANT A VARIANCE OR SPECIAL PERMIT. RATHER, IT CAN ONLY DO SO AFTER IT ISSUES FINDINGS THAT EVIDENCE WAS SUBMITTED TO SUPPORT THE REQUIREMENTS SPECIFIED IN THE ZONING RESOLUTION. IN LINE WITH THAT, THE 1975 CHARTER PROVISIONS DID NOT GIVE THE BOARD OF ESTIMATE DISCRETION TO MAKE ITS OWN *DE NOVO* DETERMINATION IN CONSIDERING APPEALS FROM THE BSA. RATHER, IT LIMITED THE BOARD TO DECIDING WHETHER THE BSA'S DECISION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE WITH RESPECT TO EACH OF THE FINDINGS REQUIRED BY THE ZONING RESOLUTION.

IF THIS COMMISSION DECIDES TO PROPOSE THE ADOPTION OF AN APPEAL PROCESS, I THINK THAT THIS PRECEDENT CAN PROVE

HELPFUL IN CREATING A PROCESS THAT IS APPROPRIATELY LIMITED AND FOCUSED IN ITS SCOPE.

THANK YOU.

TESTIMONY OF SARAH CARROLL,
LANDMARKS PRESERVATION COMMISSION CHAIR,
BEFORE THE 2019 CHARTER REVISION COMMISSION
March 25, 2019

Thank you Chair Benjamin and members of the Charter Commission for the opportunity to testify about proposed changes to the Chapter 74 of the City Charter, concerning the Landmarks Preservation Commission. Under the city's Landmarks Law, authorized by the Charter, the Commission has designated more than 36,000 architecturally, historically, and culturally significant buildings and sites, and protects them by regulating proposed work. The city's law was the subject of the landmark Supreme Court case, Penn Central versus the City of New York, which established the constitutionality of historic preservation itself. Consequently it is the model for countless other municipal preservation laws around the country and even internationally. This year preservation leaders from across the globe, from Tunisia to Singapore, have come to visit and learn from the LPC, the largest preservation agency in the United States.

The Commission is composed of eleven commissioners and supported by a staff of about 80. Each year we designate individual buildings and historic districts throughout the city. This effort involves holding public hearings and working with property owners, elected officials, community members and other stakeholders. Once designated we work closely with property and business owners on a daily basis, host weekly public hearings, and review over 14,000 applications for work annually. Between 93-96% of applications are approved by the staff pursuant to LPC's rules; the remainder are referred to the relevant community board prior to a public hearing before the Commissioners. Commission-level applications may range from changing the color of a building's façade or installing a new storefront, to the construction of a major addition or new building. The law works well; we designate and regulate in an open and transparent process.

The drafters of the Charter recognized the need for an independent, diverse and expert Commission. The eleven-member Commission is required to have at least three architects, a historian, a planner or landscape architect, and a realtor, as well as a representative from each Borough. With the exception of the Chair, all of the Commissioners are volunteers. In addition to meeting all of the statutory expert requirements, four of the current Commissioners have significant experience in historic preservation in their professional lives. All commissioners are appointed by the Mayor for staggered three year terms, with the advice and consent of the Council. Having the Mayor appoint all of the Commissioners results in a truly expert body, where individuals have allegiance only to the institution. This impartial and expert approach is on view every hearing and meeting day.

Potential appointees undergo vetting by the Office of Appointments and, if formally nominated, are subject to the advice and consent of the City Council. If confirmed, members must adhere to Conflicts of Interest Board rules. This requires recusal at the Commission for potential conflicts, and also recusal at their jobs from any work their firm may do at the Commission. While reasonable, these requirements can pose challenging obstacles for qualified experts who are willing, able and interested in serving on the Commission. Often the most qualified persons, with long careers in relevant fields, cannot serve on the Commission due to the loss of income required by the conflicts law.

All of the Commissioners are deeply committed to historic preservation and, given how much of their professional lives they donate to the Commission's work, they deserve any proffered stipend.

Regarding expanding the Commission's membership and who nominates commissioners, I want to emphasize that it is critical to our preservation mandate that we have objective, independent and expert members. The current composition ensures that our Commissioners are independent experts from across the city. I have concerns that these proposals could impact the Commission's ability to reach consensus and affect the ability of property owners to get a fair and efficient review of their applications. There will be great harm done to preservation if the quality of the Commission becomes diluted, if the size of the Commission becomes cumbersome, or if the Commission cannot make decisions in a timely manner. Finally, I note that it is unclear what qualifications the new members would or should have and which appointing body would be responsible for appointing which experts.

In closing, it bears emphasis that the Commission, as constituted today, works very well. Significant buildings and areas are designated, and proposed work is efficiently reviewed and potentially approved. All of this is done with extensive input from property owners, community members and organizations, and other stakeholders, in an open and transparent process. We want New York's property and business owners to feel pride in their special buildings. We don't want them to feel that preservation and LPC regulation is just an added burden. It is critical that we review applications for work in an efficient and fair manner. This is not only good government, but is essential if historic preservation is to continue to have broad support in our city.

I welcome the opportunity to answer any questions you may have. Thank you.

Testimony by Meenakshi Srinivasan

Landmarks Preservation Commission Charter Revisions 2019

March 25, 2019

Good Evening, Chair Benjamin and members of the Charter Revision Commission, I am Meenakshi Srinivasan and I want to thank you for inviting me to participate in this discussion on revisions to the City Charter with regards to the Landmarks Preservation Commission. I am a Senior Land Use and Zoning Advisor in the land use practice of Kramer Levin Naftalis and Frankel – however I am here as a private citizen.

I am the former Chair of the Landmarks Preservation Commission appointed by Mayor Bill de Blasio in 2014 and serving until June 2018. Under my tenure, the LPC instituted several reforms and initiatives including: addressing a backlog of calendared properties and advancing outstanding designation to fruition; designating historic resources alongside major planning efforts; applying more rigorous analyses, and committing to reasonable time-frames in the designation process; and leveraging technology and data to provide greater transparency and accessibility to the Commissions work.

2015 marked 50 years of the Landmarks Law and the LPC. Since it was adopted the City has flourished with over 36,000 designated properties. The vast majority of property owners of designated sites keeps their properties in good condition and follows the Landmarks Law. The agency has been efficient in addressing an ever-growing workload of applications through additional staff, internal tracking systems and LPC Rules; and LPC conducts a robust process for public input on commission-level applications. There have been very few hardship cases over the past five decades and the Courts have upheld LPC's authority time and time again. In fact, LPC and the Landmarks Law work extremely well, setting the standard for municipal agencies all over the country. As I said in my previous testimony, I work urge the Commission to resist any pressure to make revisions where they are not needed.

I would like to comment on a few recommendations as follows. First, the designation process should not be changed – the recommendation to delay designation until the City Council vote would undermine the Commission's ability, if needed, to act swiftly to save significant historic properties from irreparable harm – this is central to its mandate to protect and preserve the city's historic, architectural and cultural resources. The current designation process ensures fairness by requiring notification to property owners in advance of designation and provides the

opportunity for comments at a public hearing. The ability for LPC to designate after such requirements are fulfilled safeguards structures from inappropriate alterations or demolition. If LPC's vote must be ratified by the City Council, inappropriate work may ensue on such properties between LPC vote and City Council vote which is up to 120 days. On the reverse, under the current process, if properties are designated and later reversed by the City Council, property owners are not harmed since designation and applicability of the Landmarks Law would not compel owners to do work on their properties nor would it restrict work being done, only that it require LPC review. While LPC rarely acts without considerable discussion with property owners, that discretion should continue to empower the Commission.

Second, several recommendations reflect the call for deliberation and balancing of historic preservation with housing, economic development or resiliency. I would agree that it is legitimate to have a forum to weigh the benefits of historic preservation with other citywide goals. However, I would urge the Commission to reject these specific recommendations. The draconian suggestion to transfer Landmarks authority to the City Planning Commission should be rejected as it fails to understand LPC's unique, separate and independent role from the City Planning Commission. As to the need for planning and economic analyses in the context of the landmark designation process, the Charter already allows the City Planning Commission to hold a public hearing and report to the City Council with respect to the relationship of any designation to the Zoning Resolution, projected public improvements and any plans for development, growth, improvement or renewal of the area. As the Charter conceived, these considerations are already vested with the City Council today.

Third, with regards to recommendations concerning the Commission composition, I believe that the current Charter mandated composition which includes three architects, a city planner, landscape architect or engineer, an historian and a real estate professional provide the professional expertise necessary to review LPC applications. This composition establishes the minimum requirements for the Commission and allows the remaining commission positions to be filled by other related professionals. Historically, the Commission has always had preservation-minded professionals willing to serve the public. However, I believe that by including more requirements of the commissions' composition would only limit the flexibility and diversity of this body that has been effective for over the past five-decades.

Finally, I would ask your Commission to give consideration to compensation of LPC commissioners. At the time it was established as a volunteer commission, the focus of the

Commission's work centered on landmark and historic district designation. Perhaps the drafters never anticipated that over the next five decades, LPC would grow into the largest municipal preservation department in the country, which receives over 14,000 applications a year, and whose jurisdiction continues to expand as it designates additional sites and neighborhoods. While additional staff has addressed the steadily increasing number of applications, the Commission which reviews over 400 applications at the 34 to 36 public hearings a year, is finite and at this point volunteer close to 15% of their time to the City. I would ask you to consider parity of the Landmarks Commissioners with City Planning Commissioners who are compensated. My word of caution is that, because of the conflicts rules, compensation should not unduly impede the City's ability to appoint deserving, civic-minded professionals from serving on the Commission and at the same time allow them to continue their work in their professional careers.

THE NEW YORK
LANDMARKS
CONSERVANCY

March 25, 2019

STATEMENT OF THE NEW YORK LANDMARKS CONSERVANCY BEFORE THE NEW YORK CITY CHARTER REVISION COMMISSION 2019

Good evening Chair Benjamin and Commission members. I am Peg Breen, speaking on behalf of the New York Landmarks Conservancy--a 46-year old private non-profit preservation organization.

The City's Landmarks Preservation Commission is one of the strongest and most effective preservation agencies in the country. That said, there are ways it could be strengthened and improved.

The Conservancy supports requiring one or more members of the LPC to be trained preservationists. While preservation architects serve on the Commission, and the current Chair has an advanced degree in preservation, the requirement should be codified. When the Commission was formed, preservation was a relatively new academic discipline. It is established now. A commission devoted to preservation deserves preservation expertise.

Commission members should receive stipends. Serving on the LPC today requires a considerable amount of time at hearings, on field trips and in preparation for decision making. Much more time than when the Commission was created. Stipends would recognize the important service Commission members perform.

We do not support changing the composition of the LPC to include appointments of other elected officials. The charter already requires Commission Members from each borough. Mayoral control maintains clear accountability.

Let me repeat from our earlier testimony before this Commission. The Charter should make clear the LPC has binding authority over City –owned landmarks, including schools. Important landmarks such as Erasmus Hall Academy in Brooklyn and Frederick Law Olmsted's home on State Island have suffered substantial deterioration under the neglect of agencies responsible for them. The Commission acts when private owners practice demolition by neglect. It needs to act when the City fails to maintain its landmark properties.

The LPC needs to remain independent. Its mission is distinct from that of the City Planning Commission—and equally important.

The Conservancy commissioned the first comprehensive study on the economic impacts of preservation in New York City. The data-based report found that more than $800 million is invested annually in New York's historic buildings, creating 9,000 local jobs. Tech firms, the fastest growing segment of New York's economy, prefer to locate in older buildings with character, most often in historic districts.

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The study shows that the LPC has done its job. But we believe that the LPC would be even more successful continuing as an independent agency with the changes we support today.

Thank you for the opportunity to express the Conservancy's views.