NOTES

WHAT'S IT TO YOU? CITIZEN CHALLENGES TO LANDMARK PRESERVATION DECISIONS AND THE SPECIAL DAMAGE REQUIREMENT

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The special damage rule—a component of standing doctrine requiring a plaintiff's alleged injury to differ somehow from that of the general public—has long thwarted citizen challenges to inaction by government regulators, particularly in environmental suits. While courts in many jurisdictions have trended toward relaxing the special damage rule in environmental cases, the requirement has not been similarly adjusted in other areas of law. In particular, it remains a major obstacle for citizens seeking to challenge government actions relating to landmark preservation, decisions that can have monumental effects on a community's cultural and historical identity. As the rule stands in most jurisdictions, unless the citizen-plaintiff owns the property under consideration for landmark preservation, or perhaps owns property in close proximity with direct views of the site, it is likely that the special damage requirement will block her from challenging a landmark preservation decision. This Note argues that courts have applied the special damage test too narrowly in landmark preservation cases, distorting the incentives of the local bodies charged with implementing landmark preservation laws by encouraging them to pay disproportionate attention to the concerns of the few parties who can haul them into court. This Note also suggests modest but game-changing modifications to the special damage requirement and argues that more judicial review of landmark preservation is desirable.

INTRODUCTION

In similar lawsuits filed only eleven months apart, an architecture professor and a September 11 first responder sued the New York City Landmarks Preservation Commission (LPC) to save two buildings that they believed to be culturally and historically significant to New York City. The professor sought to block a landowner from substantially remodeling the "glass house" Manufacturers Trust Company Building on Manhattan's Fifth Avenue;[1] the first responder hoped to stop a developer

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from demolishing a warehouse that is located two blocks from the World Trade Center site and had suffered a "direct hit" by the landing gear that fell from United Airlines Flight 157 on September 11.[2] In trial court decisions from the same appellate department, issued a little more than one month apart, the professor's suit was allowed to proceed to the merits,[3] while the first responder's suit was dismissed for lack of standing.[4]

In both lawsuits, the LPC sought dismissal on grounds that the plaintiffs did not plead sufficient "special damage," a requirement for establishing standing to sue that the New York Court of Appeals has described as "injury that is in some way different from that of the public at large."[5] Justice Lucy Billings of the New York County Supreme Court found that the professor satisfied the special damage requirement, because he "regularly visits and leads walking tours to the MTC building."[6] Justice Paul Feinman, also of the New York County Supreme Court, held that the first responder did not meet the special damage requirement, despite his personal involvement with the site's history and his role as a city employee charged with preserving and rehabilitating buildings in the vicinity of the World Trade Center.[7] These decisions had consequences: As of the time of writing, the building near the World Trade Center awaits the wrecking ball,[8] while the professor's lawsuit delayed what would have been the irrevocable transformation of a historic building and led to a settlement that preserved many of the building's iconic features.[9]

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1. Allison v. N.Y.C. Landmarks Pres. Comm'n, 944 N.Y.S.2d 408, 412 (Sup. Ct. 2011) (describing plaintiff's request for injunction to stop "partial demolition and remodeling of the Manufacturers Trust Company (MTC) Building").

2. Amended Verified Petition at 1–4, Brown v. N.Y.C. Landmarks Pres. Comm'n, No. 110334/2010, 2011 WL 2672608 (N.Y. Sup. Ct. July 7, 2011), 2010 WL 6032811.

3. *Allison*, 944 N.Y.S.2d at 418 (denying LPC's motion to dismiss petition for lack of standing).

4. *Brown*, 2011 WL 2672608, at *7 ("[B]ecause . . . Mr. Brown's allegations, accepted as true, establish only that he is an individual with a profound interest in preservation of the building, but not that he has an injury-in-fact as defined by law, he cannot satisfy the legal test for standing.").

5. Soc'y of the Plastics Indus., Inc. v. County of Suffolk, 573 N.E.2d 1034, 1041 (N.Y. 1991).

6. *Allison*, 944 N.Y.S.2d at 413.

7. *Brown*, 2011 WL 2672608, at *4–*7.

8. See Anne Barnard, After Uproar, A New Tack to Build an Islamic Center, N.Y. Times, Aug. 2, 2011, at A21 (describing developer's plans to "quietly mov[e] ahead" with building Muslim mosque and community center at 51 Park Place in Lower Manhattan); Colin Moynihan, Judge Rules Ex-Firefighter Cannot Sue over Mosque, N.Y. Times, July 11, 2011, at A16 (noting first responder's lawsuit "would appear to be the last legal challenge to the project" but describing possible fundraising challenges).

9. See Robin Pogrebin, Modernist Landmark Behind a Court Battle, N.Y. Times, Sept. 29, 2011, at C1 [hereinafter Pogrebin, Modernist Landmark Battle] (describing how preservationists secured stop-work order to delay irrevocable changes to building pending lawsuit's resolution); Robin Pogrebin, Settlement Reached on 5th Avenue Landmark, N.Y. Times, Feb. 9, 2012, at C2 (describing how settlement provided for returning Harry

Juxtaposing these two cases illustrates how the special damage doctrine's rigidity leads to bizarre and occasionally contradictory results in landmark preservation cases. The outcome in the professor's case is an outlier, while the fate of the first responder's case is far more typical: Unless the plaintiff owns the property under consideration, or perhaps owns property in close proximity with direct views of the site, it is likely that the special damage requirement will block her from challenging a landmark preservation decision.[10] This Note argues that courts have applied the special damage test too narrowly in landmark preservation cases, distorting the incentives of the local bodies charged with implementing landmark preservation laws by encouraging them to pay disproportionate attention to the concerns of the few parties who can overcome the standing hurdle and haul them into court. This undermines the effectiveness of laws designed to benefit entire communities, laws whose capacious missions include safeguarding historical, aesthetic, and cultural heritage, stimulating business growth and tourism, and fostering civic pride in the accomplishments of the past.[11]

Although this Note focuses primarily on New York law—largely because New York City's aggressively invoked preservation ordinance[12] has generated an abundance of litigation—more than 2,300 landmark preservation ordinances have been enacted across the country,[13] and courts in other jurisdictions have struggled to apply special damage requirements to landmark preservation challenges.[14] Although several academics have analyzed the effects of special damage requirements on environmental suits,[15] none have considered its effects on landmark preservation, and this Note seeks to fill that void.

Bertola sculptural screen to its original home in building and also expanded scope of interior landmark designation). It is important to mention at the outset that this Note expresses no opinion about the substantive validity of any particular historic preservation claim and confines its analysis to the procedural issue of standing to sue.

10. See infra Part II.A (arguing special damage requirement thwarts preservationist lawsuits).

11. See infra note 21 and accompanying text (discussing statutory mission of New York City's Landmarks Preservation Ordinance).

12. N.Y.C., N.Y., Admin. Code §§ 25-301 to -321 (1992). Since the law's enactment, more than 27,000 buildings either have been designated a landmark or inhabit a designated historic district. Rebecca Birmingham, Note, Smash or Save: The New York City Landmarks Preservation Act and New Challenges to Historic Preservation, 19 J.L. & Pol'y 271, 277 (2010).

13. Local Preservation Laws, Nat'l Tr. for Hist. Preservation, http://www.preservationnation.org/information-center/law-and-policy/legal-resources/understanding-preservation-law/local-law (on file with the *Columbia Law Review*) (last visited Jan. 21, 2013).

14. See infra Part II.C (discussing how special damage requirement has had similar effects in states other than New York).

15. See, e.g., Joan Leary Matthews, Unlocking the Courthouse Doors: Removal of the "Special Harm" Standing Requirement Under SEQRA, 65 Alb. L. Rev. 421, 452–57 (2001)

Part I surveys the history and benefits of landmark preservation laws and describes how citizens can use state courts to challenge decisions made by the agencies charged with implementing these laws. It then introduces New York's special damage requirement, describing its origins in public nuisance law and its eventual emergence in other areas. Part II demonstrates how the special damage requirement has thwarted landmark preservation challenges in New York and other jurisdictions. Part II also describes how this distorts the incentives of landmark preservation agencies and undermines the goals of landmark preservation laws. Part III suggests modest but game-changing modifications to the special damage requirement and argues that more judicial review of landmark preservation is desirable.

I. FRAMEWORK FOR CHALLENGING LANDMARK PRESERVATION DECISIONS AND INTRODUCTION TO THE SPECIAL DAMAGE REQUIREMENT

During the nearly fifty-year existence of New York City's landmark law, preservationists and landowners alike have used the courts to challenge government decisions relating to landmarks. This Part provides background on landmark preservation in New York City and sketches the legal landscape that awaits those who litigate landmark claims. Part I.A introduces the mechanisms for preserving landmarks in New York City and summarizes what scholars in multiple disciplines have identified as the primary goals and effects of landmark preservation laws. Part I.B describes the statutory framework for challenging landmark preservation decisions in New York and differentiates between types of possible claims. Part I.C surveys the history and purpose of New York's standing doctrine, with a heavy emphasis on the special damage requirement.

A. *History and Mission of New York City's Landmarks Preservation Law*

New York City gained protection for its landmarks in 1965 when Mayor Wagner signed the Landmarks Preservation Ordinance.[16] The law's origin is commonly explained as a sudden response to public outcry over the demolition of Pennsylvania Station,[17] but a recent history by Professor Anthony Wood discredits this proposition as a "myth" and catalogues "numerous actions to advance some form of landmarks protec-

(describing how special harm requirement in State Environmental Quality Review Act (SEQRA) claims has "turned away legitimate claims at the courthouse doors").

16. Anthony C. Wood, Preserving New York: Winning the Right to Protect a City's Landmarks 361 (2008).

17. Id. at 6 ("[F]or years the question of how New Yorkers won the right to protect their landmarks (to the extent that anyone inquired) received the standard answer: the law was the result of the monumental and shocking loss of the legendary Pennsylvania Station.").

tion" that predated the demolition of Pennsylvania Station.[18] The law's constitutionality was famously challenged when the LPC denied a proposal to build a tower atop Grand Central Terminal, but the U.S. Supreme Court affirmed that landmark preservation is a constitutionally permissible goal for cities to pursue.[19] The Court further held that landmark preservation statutes are not required to provide compensation to landowners for restricting the "exploitation of property interests, such as air rights, to a greater extent than provided for under applicable zoning laws."[20]

The ordinance's mission—described in the statutory text as a matter of "public necessity"—encompasses many goals, including safeguarding the city's historical, aesthetic, and cultural heritage, stabilizing and improving property values, protecting and enhancing the city's attractions to tourists, strengthening the economy of the city, and promoting the use of historic districts, landmarks, interior landmarks, and scenic landmarks for the education, pleasure, and welfare of the people of the city.[21]

The law created the eleven-member LPC and authorized it to designate landmarks, interior landmarks, scenic landmarks, and historic districts.[22] The term "landmark" is defined as an improvement that is at least thirty years old and that has "a special character or special historical or

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18. Id. at 9. In particular, Professor Wood argues that preservationist movements in Greenwich Village and Brooklyn Heights in the 1950s laid the early foundation for developing laws to protect landmarks in New York City. Id. at 9–10.

19. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 129 (1978) ("[T]his Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city . . . ." (citations omitted)).

20. Id. at 136.

21. The mission of the New York City Landmarks Preservation Ordinance is defined broadly:

> It is hereby declared as a matter of public policy that the protection, enhancement, perpetuation and use of improvements and landscape features of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people. The purpose of this chapter is to (a) effect and accomplish the protection, enhancement and perpetuation of such improvements and landscape features and of districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history; (b) safeguard the city's historic, aesthetic and cultural heritage, as embodied and reflected in such improvements, landscape features and districts; (c) stabilize and improve property values in such districts; (d) foster civic pride in the beauty and noble accomplishments of the past; (e) protect and enhance the city's attractions to tourists and visitors and the support and stimulus to business and industry thereby provided; (f) strengthen the economy of the city; and (g) promote the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.

N.Y.C., N.Y., Admin. Code § 25-301(b) (1992).

22. See id. § 25-303 (listing types of landmarks LPC is authorized to designate).

aesthetic interest or value" to the city.[23] Both citizens and LPC officials can propose landmarks for potential designation.[24] Once a landmark is designated, it becomes unlawful for any person to "alter, reconstruct or demolish" it unless the LPC issues a certificate of no effect on protected architectural features, a certificate of appropriateness, or a notice to proceed.[25] Finally, a party in charge of a landmark has an affirmative duty to keep it in good repair.[26]

Evaluating what types of injuries courts should consider "special" for standing purposes becomes easier after considering what scholars from a variety of disciplines have identified as the benefits of landmark preservation laws. Professor Carol Rose has identified community building as the principal benefit of landmark preservation: "Its substantive effects on our physical surroundings, including older structures and neighborhoods, can help to give residents a feeling of stability and familiarity, and they can aid in creating a sense of community among neighbors."[27] Professor Rose also pinpointed procedural benefits that accrue when neighbors come together to make historic preservation decisions, arguing that the process of mutual education and debate about shared history helps to "prevent a paralyzing sense of individual powerlessness."[28] In one example of a landmark controversy generating spirited public discourse, Harvard University's decision in 1996 to renovate the Great Hall dining room generated a "hyperbolic debate about tradition, diversity, the rela-

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23. Id. § 25-302(n).

24. See infra Part I.B.3 (describing process by which LPC decides whether to designate landmarks).

25. N.Y.C., N.Y., Admin. Code § 25-305; see N.Y.C., N.Y., Admin. Code §§ 25-317 to -317.1 (Supp. II 2012) (listing criminal and civil penalties for modifying landmark without authorization from LPC).

26. See N.Y.C., N.Y., Admin. Code § 25-311 (1992) (stating those in charge of landmarks "shall keep in good repair (1) all of the exterior portions . . . and (2) all interior portions thereof which, if not so maintained, may cause or tend to cause the exterior portions of such improvement to deteriorate, decay or become damaged or otherwise to fall into a state of disrepair"); see also City of New York v. 10-12 Cooper Square, Inc., 793 N.Y.S.2d 688, 693 (Sup. Ct. 2004) (issuing permanent injunction for defendant to "maintain the Skidmore House and to keep in 'good repair' all exterior portions and all interior portions which if not so maintained may cause or tend to cause the exterior portions of such improvement to deteriorate or otherwise fall into a state of disrepair").

27. Carol M. Rose, Preservation and Community: New Directions in the Law of Historic Preservation, 33 Stan. L. Rev. 473, 494 (1981). For a more recent inventory of the benefits of historic preservation, see J. Peter Byrne, Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development, 19 Geo. Mason L. Rev. 665, 670–87 (2012) ("Historic districts thus offer a narrative connection with the past. This connection offers cultural meaning and provides some counterpoints to the anomie of modern, rootless capitalism or bureaucracy."). But see Edward Glaeser, Triumph of the City 148–52 (2011) (arguing historic preservation restricts new construction, raises housing prices, and excludes low-income people from designated historic areas).

28. Rose, supra note 27, at 494.

tionship between space and intellectual life and the future of Harvard, not to mention the very fate of American culture."[29]

Others have concentrated on the psychological and even biological benefits of landmark preservation. Professor Nicholas Humphrey, an English psychologist who specializes in human intelligence, has noted that if a structure evokes a pleasurable response "regularly and consistently within the human species it is fair to assume that it confers some biological advantage . . . though . . . the beneficiaries may be quite unaware of [it]."[30] Meanwhile, Professor John Nivala has argued that landmark preservation meets people's "psychological need for a sense of place" and emotional security.[31]

Shifting to less abstract benefits, studies have found that landmark preservation increases property values and promotes tourism and economic development. For instance, in a 2003 study, the New York City Independent Budget Office found a correlation between property values and preservation, showing that market values of properties in historic districts were higher than those outside historic districts for every year in its study, and that properties in historic districts increased in price at a slightly higher rate than properties not in historical districts.[32] Preservation advocates argue, for instance, that designating TriBeCa a historical district in 1992 "accelerated the area's transformation into one of the city's most sought-after neighborhoods."[33] Surveys also show that the most important tourist destinations in New York State are historical sites, and visitors are four times more likely to explore a historical site than attend a sporting event on a visit to New York City.[34] Finally, a re-

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29. Sara Rimer, A Tradition Is Pounded by Hammers and Nails, N.Y. Times, Mar. 20, 1996, at A14.

30. Nicholas K. Humphrey, Natural Aesthetics, *in* Architecture for People: Explorations in a New Humane Environment 59, 59 (Byron Mikellides ed., 1980).

31. John Nivala, Saving the Spirit of Our Places: A View on Our Built Environment, 15 UCLA J. Envtl. L. & Pol'y 1, 12 (1996).

32. See N.Y.C. Indep. Budget Office, The Impact of Historic Districts on Residential Property Values 8 (2003) ("IBO found clear evidence that after controlling for property and neighborhood characteristics, market values of properties in historic districts were higher than those outside historic districts for every year in our study."). It should be noted that the study did not find "sufficient evidence to conclude that districting itself *causes* higher prices or greater price appreciation." Id.

33. Robin Pogrebin, Preservation and Development in a Dynamic Give and Take, N.Y. Times, Dec. 2, 2008, at C1. Recognizing the considerable economic effects of historic preservation, some cities have given it a position of prominence in their comprehensive plans. See, e.g., D.C., The Comprehensive Plan for the National Capital: District Elements 10–27 (2007) ("Historic preservation is also fundamental to the growth and development of District neighborhoods. Recent building permit and development activity in the city confirms that historic preservation is a proven catalyst for neighborhood investment and stabilization.").

34. Pres. League of N.Y. State, New York: Profiting Through Preservation 18 (2000) ("[S]urveys show that the most important destinations for leisure visitors to New York State are historic sites as diverse as the Statue of Liberty and Niagara Falls.").

cent study by Preservation Green Lab found that historic preservation yields tangible environmental benefits, helping communities combat the effects of climate change with energy savings up to forty-six percent.[35]

B. *Using the Courts to Challenge Landmark Preservation Actions or Inaction*

Before discussing how the special damage requirement prevents courts from hearing most landmark preservation challenges on their merits, it is useful to understand both why citizens might seek judicial review of landmark preservation decisions and the statutory framework that allows them to do so.

1. *Basic Framework of Article 78.* — Article 78 of the New York Civil Practice Law and Rules (NYCPLR) establishes uniform procedures for judicial review of decisions by state and local government officials by authorizing proceedings for relief previously obtained via the common law writs of certiorari, mandamus to compel, mandamus to review, and prohibition.[36] Each writ constitutes a different question through which a petitioner can challenge an administrative decision. Mandamus to compel asks whether "the body or officer failed to perform a duty enjoined upon it by law."[37] The writ of prohibition, meanwhile, asks whether "the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction."[38]

The distinction between the remaining two writs—mandamus to review and certiorari—hinges on whether the administrative decision was reached through a quasi-legislative or quasi-judicial process. The writ applicable to challenging quasi-legislative administrative determinations is mandamus to review, which asks "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion."[39] Quasi-judicial decisions, on the other hand, are challenged with a writ of certiorari, which asks instead, "whether a determination made as a result of a hearing . . . is, on the entire record, supported by substantial evidence."[40] As discussed be-

35. See Pres. Green Lab, The Greenest Building: Quantifying the Environmental Value of Building Reuse, at vi (2011) (finding energy savings from building reuse are "between 4 and 46 percent over new construction when comparing buildings with the same energy performance level").

36. See N.Y. C.P.L.R. § 7801 (McKinney 2008) ("Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article.").

37. Id. § 7803(1).

38. Id. § 7803(2).

39. Id. § 7803(3).

40. Id. § 7803(4). "Quasi-judicial" in this context refers to administrative proceedings that feature a hearing "required under constitutional or statutory provisions, held on notice, evidentiary and adjudicatory in nature, and [with] at least some of the characteristics of a trial or adversarial hearing, such as the possibility of cross-examination." 14 Jack B.

low, challenges to LPC decisions tend to sound in mandamus to compel and mandamus to review, although after a recent First Department decision, it appears that only mandamus to review claims remain available to future plaintiffs in preservation cases.[41]

2. *Challenging LPC Determinations Under Article 78.* — Landowners and preservationists comprise the two groups most likely to challenge decisions by the LPC. This Note focuses exclusively on challenges brought by non-landowners, because standing doctrine does not impede suits by owners of the subject properties.[42]

Preservationist challenges fall into three categories: claims that a pending landmark application should be brought to a final vote before the full LPC (referred to hereinafter as "pending landmark challenges"); claims that the LPC should not have voted to deny landmark status to a particular building (referred to hereinafter as "nondesignation challenges"); and claims that the LPC should not allow a landowner to modify or remodel an existing landmark (referred to hereinafter as "modification challenges"). As discussed in Part II, standing doctrine serves as a serious obstacle to claims in all three categories. Before discussing standing, though, it is helpful to understand what distinguishes the three categories from each other and what standard of review courts would use to evaluate these claims were they to pass the standing threshold and be heard on their merits.

3. *Pending Landmark Challenges.* — A building begins its journey to landmark designation when either a citizen or LPC staff member prepares a Request for Evaluation (RFE), which asserts the building's historical or architectural significance.[43] The chairman of the LPC reviews all RFEs and, in consultation with the LPC staff, decides whether to recommend that the LPC "calendar" a public hearing.[44] Motions to calendar a

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Weinstein, Harold L. Korn & Arthur R. Miller, New York Civil Practice § 7801.02[4] (David L. Ferstendig ed., 2d ed. 2011).

41. See infra notes 53–55 and accompanying text (describing First Department's rejection of mandamus to compel claim).

42. See Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 894 (1983) ("Thus, when an individual who is the very *object* of a law's requirement or prohibition seeks to challenge it, he always has standing."); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 561–62 (1992) ("[S]tanding depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury . . . ."). For a famous example of a landowner challenge to an LPC decision, see Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (reaching merits of plaintiff's claim without considering issue of standing).

43. See N.Y.C. Landmarks Pres. Comm'n, Request for Evaluation, available at http://www.nyc.gov/html/lpc/downloads/pdf/forms/request_for_evaluation.pdf (on file with the *Columbia Law Review*) (last revised Sept. 1999) (providing method for "requests from the public for the evaluation of the architectural, historical or culture significance of properties throughout the five boroughs").

44. See Transcript of the Minutes, May 16, 2005, Comm. on Gov't Operations, Sess. 2004–2005, at 29–30 (2005) [hereinafter N.Y.C. Council Hearing] (statement of Robert

public hearing must be approved by a majority of LPC commissioners present when the motion is made.[45] Only after a public hearing has been held can the LPC make a final decision about whether to designate the building a landmark.[46]

Therefore, there are four ways a building's journey might end short of designation: (1) The LPC chairman can unilaterally set an RFE aside rather than recommend it for calendaring;[47] (2) the full LPC can disregard the chairman's recommendation and decide that a building does not merit a public hearing;[48] (3) the LPC can fail to schedule a designation vote after a public hearing is held;[49] or (4) the LPC can vote against designation after a public hearing has been held.[50] Pending landmark challenges are those brought at any of the first three stages. Challenges at the fourth stage—which this Note labels nondesignation challenges—are considered in the next section.

Plaintiffs have used two major legal theories to challenge pending landmark decisions: one that sounded in mandamus to compel[51] and one

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Tierney, Chairman, LPC) (on file with the *Columbia Law Review*) ("[W]hen I worked with the Research Department and I worked with other people in the agency, yeah, that would be true that I am the one who makes the final decision to go to the [calendaring] stage . . . I'm accountable for that . . . and I guess that's one of the reasons I'm here.").

45. N.Y.C., N.Y., Rules, Title 63, § 1-02 (2012). Meetings where calendar decisions are made require a quorum of six commissioners. Id. § 1-01.

46. See N.Y.C., N.Y., Admin. Code § 25-303 (1992) ("[T]he commission shall have power, after a public hearing: to designate . . . a list of landmarks.")

47. See, e.g., Williamsburg Indep. People, Inc. v. Tierney, No. 104249/09, 2010 WL 4093940, at *4 (N.Y. Sup. Ct. Oct. 5, 2010) (discussing plaintiff's claim that LPC chairman failed to "'uphold a fair and transparent process'" when deciding not to recommend calendaring public hearing for full Domino Sugar Refinery site); see also Verified Petition for Writ of Mandamus & Prohibition at 6–7, Citizens Emergency Comm. to Pres. Pres. v. Tierney, 896 N.Y.S.2d 41 (App. Div. 2010) (No. 103373-08) (listing six RFEs that had been pending for anywhere between thirty-five and seventy-nine months).

48. Though it is theoretically possible, buildings are not likely to falter at this stage in practice, because the chairman consults with commissioners during his RFE review process and has a sense of their interest before making his calendaring recommendation. See N.Y.C Council Hearing, supra note 44, at 28 ("My style . . . is to talk one on one with the individual commissioners after we get to this stage, and then make sure we get back feedback . . . then at that point we would say, okay, let's put it on the calendar.").

49. See *Tierney*, 896 N.Y.S.2d at 43 (noting LPC is not required to schedule designation votes within specific amount of time).

50. See, e.g., Brown v. N.Y.C. Landmarks Pres. Comm'n, No. 110334/2010, 2011 WL 2672608, at *1 (N.Y. Sup. Ct. July 7, 2011) (discussing plaintiff's claim that LPC's unanimous vote not to designate 45–47 Park Place was arbitrary and capricious).

51. In mandamus to compel claims, plaintiffs argue that the LPC has a legal duty to put the building to a final vote of the full LPC. Often, this claim is accompanied by a call for additional process and more transparency. See, e.g., Verified Petition for Writ of Mandamus & Prohibition, supra note 47, at 9 (describing plaintiff's claim that LPC has "duty to apply landmark designation standards that are clear, comprehensive and fairly applied in a transparent and public fashion consistent with law").

that sounded in mandamus to review.[52] The First Department recently foreclosed the future use of mandamus to compel claims,[53] leaving mandamus to review as the sole vehicle for pending landmark challenges. In mandamus to review claims, plaintiffs characterize inaction on a particular pending landmark as an active "determination" not to proceed.[54] Rather than arguing that the LPC has a duty to bring the potential landmark to a vote, plaintiffs in these claims argue that the decision not to bring a building to a vote is itself arbitrary and capricious and therefore is ripe for judicial review as though it were a final determination. Though this difference is subtle, courts seem willing to entertain mandamus to review claims in pending landmark challenges—assuming the special damage requirement is satisfied—even in cases where they have already rejected a plaintiff's claim for mandamus to compel.[55] In summary, to challenge the LPC on its failure to bring a pending landmark to a vote, plaintiffs must argue that the failure to move an application forward is an arbitrary and capricious "determination" under NYCPLR section 7803(3).

4. *Nondesignation and Modification Challenges.* — Nondesignation challenges arise after the LPC has made a final determination not to designate a landmark.[56] Nondesignation challenges sound in mandamus to review, and therefore the court uses an arbitrary and capricious standard to review these decisions.[57]

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52. Certiorari, with its stricter standard of review, is unavailable because the New York Court of Appeals has held that LPC actions are quasi-legislative rather than quasi-judicial. Lutheran Church in Am. v. City of New York, 316 N.E.2d 305, 309 n.2 (N.Y. 1974) ("Landmark designations are clearly administrative and not quasi-judicial in nature and as such would be reviewable under [NYCPLR section 7803(3)], where error of law, arbitrariness or capriciousness or abuse of discretion (i.e., reasonableness) defines the scope of review.").

53. *Tierney*, 896 N.Y.S.2d at 43 (holding "there is no statutory requirement that the Commission adhere to a particular procedure in determining whether to consider a property for designation," and Commission has "broad discretion in controlling its calendar"); see also Landmark West! v. Burden, 790 N.Y.S.2d 107, 108–09 (App. Div. 2005) (holding there is no "merit to the contention that the Landmarks Preservation Commission was obligated to hold a public hearing before declining to calendar a request for the property's designation as a landmark").

54. Mandamus to review claims ask "whether a *determination* was made in violation of lawful procedure, was effected by an error of law or was arbitrary and capricious or an abuse of discretion." N.Y. C.P.L.R. § 7803(3) (McKinney 2008) (emphasis added).

55. See, e.g., *Tierney*, 896 N.Y.S.2d at 43 (holding LPC had "articulated reasonable bases" for delaying votes on five potential landmarks and therefore lower court erred in finding this delay to be arbitrary and capricious). This holding is technically dictum because the First Department had already held that the plaintiff did not have standing to sue. Id.

56. See, e.g., Brown v. N.Y.C. Landmarks Pres. Comm'n, No. 110334/2010, 2011 WL 2672608, at *1 (N.Y. Sup. Ct. July 7, 2011) (discussing plaintiff's claim that LPC's unanimous vote not to designate 45–47 Park Place was arbitrary and capricious).

57. Id. ("[T]his proceeding is only about whether LPC's decision to deny the building located at 45–47 Park Place landmark status was arbitrary and capricious."). The same standard of review applies to LPC decisions to designate a landmark. See Soc'y for Ethical

Modification challenges, the final category of preservation claims, arise when the LPC approves a landowner's plan to remodel or modify an existing landmark. Before a landowner can construct, reconstruct, demolish, or modify a landmark, it must receive a certificate of appropriateness (COA) from the LPC. In deciding whether to issue a COA, the LPC considers the effect of the proposed work in "creating, changing, destroying or affecting" the special historical or architectural character of the building.[58] Modification challenges arise when a preservationist argues that the LPC's decision to issue a COA will inappropriately alter the character of the landmark.[59] Like pending landmark challenges and nondesignation challenges, modification challenges sound in mandamus to review, which subjects the determination to an arbitrary and capricious standard.[60]

5. *Summary of Categories of Preservation Claims.* — With the First Department's decisive rejection of mandamus to compel claims in preservation cases,[61] and the characterization by the Court of Appeals of LPC decisions as quasi-legislative,[62] it appears that mandamus to review claims, with their arbitrary and capricious standard, are all that remain available in the three categories of landmark preservation challenges. In one of only a few cases giving content to the arbitrary and capricious standard, the Court of Appeals held that "[a]rbitrary action is without sound basis in reason and is generally taken without regard to the facts."[63] Additionally, the Court of Appeals has written of the standard, "It is well settled that a court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion."[64] As a result, plaintiffs who meet the standing threshold will find themselves before a court that is very deferential to LPC actions.

Culture v. Spatt, 416 N.Y.S.2d 246, 250 (App. Div. 1979) ("[I]n the case at bar, our inquiry is directed to a determination of whether the Commission's designation had a rational basis or, if, as the Society contends, it was arbitrary and capricious."), aff'd, 415 N.E.2d 922 (N.Y. 1980).

58. N.Y.C., N.Y., Admin. Code § 25-307 (1992) (describing factors governing issuance of certificates of appropriateness).

59. See, e.g., Citineighbors Coal. of Historic Carnegie Hill v. N.Y.C. Landmarks Pres. Comm'n, 762 N.Y.S.2d 59, 60 (App. Div. 2003) (rejecting plaintiffs' claim that LPC decision to allow construction of residential building atop existing one-story Citibank branch in Carnegie Hill Historic District was arbitrary and capricious).

60. See id. ("Since the issuance of the COA was rationally based, the 'judgment . . . of the Commission's historians and architects' must be sustained." (citations omitted)).

61. See supra note 53 and accompanying text (describing First Department's holding in *Tierney*, which disallows future mandamus to compel claims).

62. See supra note 52 and accompanying text (discussing Court of Appeals' holding in *Lutheran Church* that LPC actions are administrative rather than quasi-judicial).

63. Pell v. Bd. of Educ., 313 N.E.2d 321, 325 (N.Y. 1974).

64. Diocese of Rochester v. Planning Bd., 136 N.E.2d 827, 833 (N.Y. 1956).

Although this deferential standard of review sets a high bar for overturning LPC decisions, courts have done so on numerous occasions, and judicial review of LPC decisions is not merely a rubber stamp. For example, in *Rudey v. Landmarks Preservation Commission*, the Court of Appeals affirmed the First Department's finding that an LPC order directing the plaintiff to restore fifteen windows in his cooperative apartment was arbitrary and capricious because 1) the LPC failed to file statutorily required notice of a historic district designation with the Department of Buildings, and 2) the LPC treated the plaintiff differently from similarly situated apartment owners.[65] In another example, the First Department invalidated a city committee's modification of an LPC designation, holding that the committee's removal of four buildings from a fourteen-building landmark complex was arbitrary and "inherently inconsistent."[66] Professor Nivala has catalogued other instances where courts have invalidated landmark decisions they viewed to be arbitrary and capricious, illustrating the important role that courts can play in the system of landmark preservation.[67]

C. *New York's Special Damage Requirement*

Special damage (or special harm) is one element required to establish standing to sue in New York.[68] A brief survey of the history and goals of standing doctrine in general will be helpful in understanding the role of the special damage requirement and how it has been applied too narrowly in landmark preservation cases.

1. *History and Goals of Standing Doctrine.* — Standing to sue, the modern concept of which first emerged in the federal courts in the early 1900s,[69] has been described by the U.S. Supreme Court as the question of whether a party has a "sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[70] Justice Scalia has explained it more colloquially as "an answer to the very first question that

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65. 627 N.E.2d 508, 509 (N.Y. 1993) ("It was arbitrary and capricious in the circumstances presented for the Landmarks Preservation Commission to differentiate between two residents in the same building in setting the timetable for replacement of nonconforming windows in both units.").

66. 400 E. 64/65th St. Block Ass'n v. City of New York, 583 N.Y.S.2d 452, 454 (App. Div. 1992).

67. See Nivala, supra note 31, at 46–50 (noting courts "have been capable of reviewing, and, if necessary, correcting preservation decisions").

68. See Soc'y of the Plastics Indus., Inc. v. County of Suffolk, 573 N.E.2d 1034, 1041 (N.Y. 1991) ("[W]e have long imposed the limitation that the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large.").

69. F. Andrew Hessick, Standing, Injury in Fact, and Private Rights, 93 Cornell L. Rev. 275, 290 (2008) ("Standing first flourished as an independent doctrine in the early 1900s."). For a general overview of the history of federal standing doctrine, which has influenced the development of standing doctrine in the states, see id. at 290–99.

70. Sierra Club v. Morton, 405 U.S. 727, 731–32 (1972).

is sometimes rudely asked when one person complains of another's actions: 'What's it to you?'"[71] Because federal standing law has shaped the development of standing law in the states,[72] and New York courts frequently cite federal precedents in their standing opinions,[73] it is useful as a preliminary matter to consider the goals of standing doctrine as they have been articulated by the U.S. Supreme Court.

The principal federal standing requirement is "injury in fact," defined as "an invasion of a legally protected interest which is . . . concrete and particularized."[74] According to the Supreme Court, the injury in fact requirement promotes careful jurisprudence by "assur[ing] that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[75] Injury in fact has also been justified on separation of powers grounds, most famously by Justice Scalia in an article he wrote before joining the Court.[76] According to this theory, standing doctrine performs the valuable role of diverting from the courts cases better heard in the political branches of government.[77] Part III of this Note, which proposes a more permissive application of the special damage requirement in landmark preservation cases, confronts the separation of powers problem directly.[78]

2. *Standing Doctrine in New York.* — Unlike federal standing doctrine, which is "grounded" in Article III of the U.S. Constitution, New York's standing doctrine is not tied to the state's constitution[79] but is rather an

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71. Scalia, supra note 42, at 882.

72. As one example, the Virginia Water Control Law's judicial review provision explicitly incorporates federal standing principles, declaring that a person is entitled to judicial review under the state Administrative Process Act "if such person meets the standard for obtaining judicial review of a case or controversy pursuant to Article III of the United States Constitution." Va. Code Ann. § 62.1-44.29 (2012).

73. See, e.g., Save the Pine Bush, Inc. v. Common Council, 918 N.E.2d 917, 921–22 (N.Y. 2009) (citing three U.S. Supreme Court decisions in single paragraph).

74. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citations omitted).

75. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

76. Scalia, supra note 42, at 894 ("[S]tanding is a crucial and inseparable element of [the separation of powers] principle, whose disregard will inevitably produce . . . an overjudicialization of the processes of self-governance . . . . [C]ourts need to accord greater weight . . . to the [injury in fact] requirement . . . ."); see also Allen v. Wright, 468 U.S. 737, 752 (1984) ("[S]tanding is built on a single basic idea—the idea of separation of powers.").

77. See Heather Elliott, The Functions of Standing, 61 Stan. L. Rev. 459, 477–83 (2008) (describing how Supreme Court has invoked standing doctrine to deflect questions it considers more proper for legislative and executive branches).

78. See infra Part III.B.1–2 (describing how traditional separation of powers justification for standing doctrine does not apply with full force to landmark decisions).

79. See Soc'y of the Plastics Indus., Inc. v. County of Suffolk, 573 N.E.2d 1034, 1040 (N.Y. 1991) ("The standing requirement in Federal actions has been grounded in the Federal constitutional requirement of a case or controversy, a requirement that has no

"ancient" principle of the common law.[80] But just like under federal law, the modern test for standing in New York is whether the plaintiff proves an "injury in fact," which the New York Court of Appeals has defined as "an actual legal stake in the matter being adjudicated."[81]

To this broad requirement, both federal and state courts have added other tests that apply to challenges to government action. The Court of Appeals has referred to these additional tests as "rules of self-restraint" or "prudential limitations."[82] One prudential limitation that the New York courts have adopted is the "zone of interests" test, which requires the plaintiff's injury in fact to "fall[] within the 'zone of interests' or concerns sought to be promoted or protected by the statutory provision under which the agency has acted."[83] In one application of this test, the Court of Appeals held that a trade association could not sue under New York's bidding procedure law because that law was designed to protect eligible bidders; because the trade association was not an eligible bidder for state service contracts, it was not within the zone of interests sought to be protected by the bidding procedure law.[84] This test has not blocked

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analogue in the State Constitution." (citing U.S. Const. art. III, § 2, cl. 1; *Allen*, 468 U.S. at 750–52; *Valley Forge*, 454 U.S. at 471–74)). Despite standing doctrine's alleged constitutional grounding, some scholars have noted that some standing requirements are more recent innovations. See, e.g., Cass R. Sunstein, What's Standing After *Lujan*? Of Citizen Suits, "Injuries," and Article III, 91 Mich. L. Rev. 163, 169–70 (1992) ("[T]he injury-in-fact test played no role in [federal] administrative and constitutional law until the past quarter century."). Professor Kimberly N. Brown has noted that

> [t]he first opinion to mention what is now known as the injury-in-fact test as a constitutional limit on standing was Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970), in which the Court unanimously applied the injury-in-fact test to enable judicial review of a decision by the Comptroller of the Currency to allow banks to provide data processing services to customers.

Kimberly N. Brown, Justiciable Generalized Grievances, 68 Md. L. Rev. 221, 237 n.79 (2008).

80. *Plastics*, 573 N.E.2d at 1040. An early articulation of New York's common law standing principle can be found in Schieffelin v. Komfort, 106 N.E. 675, 677 (N.Y. 1914) ("The court has no inherent power to right a wrong unless thereby the civil, property, or personal rights of the plaintiff in the action or the petitioner in the proceeding are affected.").

81. *Plastics*, 573 N.E.2d at 1040 ("The existence of an injury in fact—an actual legal stake in the matter being adjudicated—ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute 'in a form traditionally capable of judicial resolution.'" (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220–21 (1974))).

82. Id. at 1041.

83. Id. (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990); Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, 559 N.E.2d 641, 643 (N.Y. 1990)).

84. Transactive Corp. v. N.Y. State Dep't of Soc. Servs., 706 N.E.2d 1180, 1183 (N.Y. 1998) ("One of the purposes of article 11 of the State Finance Law is to protect those who bid on service contracts . . . . Check Cashers, however, was not an offerer within the meaning of article 11 and acknowledged that it did not have the capacity to be a bidder and prime responsible contractor for this project.").

individuals from challenging landmark preservation decisions in New York City, for two reasons: (1) the explicit beneficiary of the New York City Landmarks Preservation Law is the general public, and (2) the statutorily defined mission of the law is very broad.[85]

Of greater importance to preservationist challenges is a second prudential principle, referred to as the "special damage" requirement, which requires the plaintiff's injury to be "different in kind or degree from that of the public at large."[86] As discussed in Part II, infra, the special damage requirement has—more than any other procedural limitation—stopped preservationist challenges at the courtroom doors.[87]

3. *Special Damage Requirement in New York.* — The New York Court of Appeals has described the special damage requirement as "injury that is in some way different from that of the public at large."[88] New York courts have long considered special damage to be an indispensable component of standing to sue in certain causes of action. For example, courts have invoked the special damage requirement when plaintiffs have sought to enforce a safety law,[89] to bring damages claims arising from a public nuisance,[90] and to compel a neighbor to comply with a zoning ordinance.[91] In what Professor Michael Gerrard dubbed the "most controversial decision in New York environmental jurisprudence,"[92] the New York Court of Appeals in 1991 announced a special damage requirement in cases

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85. See N.Y.C., N.Y., Admin. Code § 25-301(b) (1992) (stating preservation of landmarks "is a public necessity" and listing broad goals that include improving property values, safeguarding history and culture, and promoting use of landmarks for "education, pleasure and welfare of the people of the city").

86. *Plastics*, 573 N.E.2d at 1042.

87. See, e.g., Brown v. N.Y.C. Landmarks Pres. Comm'n, No. 110334/2010, 2011 WL 2672608, at *5 (N.Y. Sup. Ct. July 7, 2011) (holding plaintiff "has not distinguished his potential injury, as he must do by law, from the potential injury suffered by the general public").

88. *Plastics*, 573 N.E.2d at 1041.

89. See, e.g., Empire City Subway Co. v. Broadway & S.A.R. Co., 33 N.Y.S. 1055, 1057 (Gen. Term 1895) ("[A]n individual cannot maintain a suit . . . to restrain the violation of a statute enacted for the protection of the public, unless he shows that he has been or will be injured . . . by the violation of the statute. It must be shown that the plaintiff has sustained . . . special damage.").

90. See, e.g., 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097, 1104 (N.Y. 2001) ("A public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large." (citing Burns Jackson Miller Summit & Spitzer v. Lindner, 451 N.E.2d 459, 468 (N.Y. 1983))).

91. See, e.g., Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals, 508 N.E.2d 130, 133 (N.Y. 1987) ("Aggrievement warranting judicial review requires a threshold showing that a person has been adversely affected by the activities of defendants (or respondents), or—put another way—that it has sustained special damage, different in kind and degree from the community generally." (citations omitted)).

92. Michael B. Gerrard, Court of Appeals Expands SEQRA Standing After an 18-Year Detour, N.Y. L.J, Nov. 27, 2009, at 3.

brought under the State Environmental Quality Review Act (SEQRA).[93] An empirical study conducted by Professor Gerrard demonstrates that this decision substantially reduced the share of SEQRA cases that have advanced to trial.[94]

Landowners easily meet the special damage requirement in challenges they bring to government actions concerning their property.[95] Non-landowners have a tougher time proving special damage, but the New York Court of Appeals has created a helpful rule in zoning cases for close neighbors. This rule bestows a rebuttable presumption of special damage to those individuals owning or renting land in close proximity to the site or building at issue.[96] According to the Court of Appeals, this presumption arises because "it is reasonable to assume that, when the use is changed, a person with property located in the immediate vicinity of the subject property will be adversely affected in a way different from the community at large."[97] The effect of zoning regulations on property values is one justification for this rule, because value fluctuations are likely to be most dramatic for close neighbors.[98]

The close proximity rule does not automatically confer standing, though. An adverse party can rebut the presumption where the plaintiff's property is "so far from the subject property that the effect of the proposed change is no different from that suffered by the public generally."[99] For instance, the Third Department found that separation of two properties by "at least seven residential lots and a set of railroad tracks" rebutted the plaintiff's presumption of special damage.[100] Another court found that a distance of 800 feet was "too far" to justify the presumption.[101] Conversely, the Second Department has held that all "aggrieved persons liv[ing] within a radius of 100 to 1,500 feet from the subject

93. *Plastics*, 573 N.E.2d at 1041–42 ("In land use matters especially, we have long imposed the limitation that the plaintiff, for standing purposes, must show that it would suffer [special damage]. This requirement applies whether the challenge to governmental action is based on a SEQRA violation or other grounds." (citations omitted)).

94. See Gerrard, supra note 92, at 3 ("I found that prior to *Plastics*, in those cases where standing was raised, 68 percent were allowed to go forward; but between *Plastics* and the time of the survey, only 48 percent were allowed to proceed.").

95. See Scalia, supra note 42, at 894 ("Thus, when an individual who is the very *object* of a law's requirement or prohibition seeks to challenge it, he always has standing.").

96. See *Sun-Brite*, 508 N.E.2d at 134 ("[A]n allegation of close proximity alone may give rise to an inference of damage or injury that enables a nearby owner to challenge a zoning board decision without proof of actual injury." (citations omitted)).

97. Id.

98. William K. Jaeger, The Effects of Land-Use Regulations on Property Values, 36 Envtl. L. 105, 114 (noting some environmental regulations have "successfully raised the average value of properties in a neighborhood").

99. *Sun-Brite*, 508 N.E.2d at 134.

100. Oates v. Village of Watkins Glen, 736 N.Y.S.2d 478, 481–82 (App. Div. 2002).

101. Shepardson v. Kenville, 634 N.Y.S.2d 961, 964 (Sup. Ct. 1995).

area" had standing to sue.[102] Even setting aside the potential for rebuttal, with its seemingly arbitrary line-drawing, the close proximity rule has not been very useful in landmark preservation cases.[103] It does, however, provide a useful template for a new rule that would help reduce the asymmetry in access to the courts in landmark preservation cases.[104]

In the most recent development in special damage doctrine, the Court of Appeals in 2009 created a rule allowing plaintiffs suing under SEQRA to satisfy the special damage requirement by proving frequent use and enjoyment of a natural resource (hereinafter referred to as the *Pine Bush* rule).[105] In *Save the Pine Bush, Inc. v. Common Council*, frequent visitors to the Albany Pine Bush Preserve sued the Common Council of Albany for approving a rezoning when the rezoning's environmental impact statement (EIS) failed to consider threats to certain endangered species.[106] The Court of Appeals noted that people who visit the Pine Bush regularly "seem much more likely to suffer adverse impact . . . than the actual neighbors of the proposed hotel development," and their "repeated, not rare or isolated use" of the Pine Bush distinguished their potential injury from that of the general public.[107] The *Pine Bush* holding is limited to SEQRA cases,[108] and the opinion lacks dicta suggesting that the Court of Appeals intended it to apply in other contexts. This has not stopped lower courts from invoking the *Pine Bush* rule in non-SEQRA environmental cases,[109] but only one lower court has used the rule to confer standing in a landmark preservation case.[110] In Part III, this Note argues that the *Pine Bush* rule should be formally extended to landmark preservation cases, because frequent visitors to landmarks can experience

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102. Tuxedo Conservation & Taxpayers Ass'n v. Town Bd., 418 N.Y.S.2d 638, 640 (App. Div. 1979).

103. See infra Part II.B (describing use of close proximity presumption in historic preservation cases).

104. See infra Part III.A (suggesting personal connection to historic event should give rise to presumption of special damage in historic preservation cases).

105. Save the Pine Bush, Inc. v. Common Council, 918 N.E.2d 917, 918 (N.Y. 2009) ("We hold that a person who can prove that he or she uses and enjoys a natural resource more than most other members of the public has standing under [SEQRA] to challenge government actions that threaten that resource.").

106. Id. at 919–20.

107. Id. at 921.

108. Id. at 918.

109. See, e.g., Druyan v. Vill. Bd. of Trs., 938 N.Y.S.2d 226 (Sup. Ct. 2011) (unpublished table decision) (invoking *Pine Bush* rule to confer standing in case where deer hunters claimed that city's deer management plan was arbitrary and capricious); Dumbo Neighborhood Found., Inc. v. City of New York, 918 N.Y.S.2d 397 (Sup. Ct. 2010) (unpublished table decision) (invoking *Pine Bush* rule to confer standing on neighborhood organization in zoning amendment challenge), aff'd, 942 N.Y.S.2d 205 (App. Div. 2012).

110. See infra Part III.A.1 (discussing *Allison* court's unprecedented use of *Pine Bush* rule).

the same type of special injury that the Court of Appeals attributed to frequent visitors to a wildlife preserve.[111]

II. THE EFFECTS OF RIGID APPLICATION OF THE SPECIAL DAMAGE REQUIREMENT IN LANDMARK PRESERVATION CASES

Soon after the Court of Appeals began requiring special damage in environmental challenges,[112] the test became a common feature in landmark preservation challenges as well.[113] Part II.A explores three cases that epitomize how rigidly the special damage requirement has been applied in landmark preservation cases in New York. Part II.B discusses how the presumption of special damage remains available to close neighbors of a landmark, but then illustrates how courts have applied this special damage exception too narrowly to be useful in landmark preservation challenges. Part II.C briefly surveys how the special damage requirement has thwarted legitimate landmark preservation challenges in jurisdictions other than New York. Finally, Part II.D discusses how restrictively applying the special damage requirement undermines the goals of landmark preservation and perpetuates an asymmetry of access to the courts that arbitrarily distorts the incentives of the LPC.

A. *Special Damage Requirement and Preservationist Challenges in New York*

Five years after the New York Court of Appeals invoked the special damage requirement to dismiss an environmental challenge under SEQRA,[114] the requirement emerged as a threat to preservationist challenges. In *Heritage Coalition v. City of Ithaca Planning and Development Board*, three educators at Cornell's College of Architecture, Art, and Planning challenged a decision by the Ithaca Landmarks Preservation Commission (ILPC) authorizing Cornell to extensively renovate Sage Hall, an 1875 building that had served as one of the campus's earliest residence halls.[115] The plaintiffs claimed that their potential injury differed from the general public's because all three used Sage Hall as a "teaching tool" in their respective courses; one plaintiff further alleged that her extensive background and involvement with historic preserva-

111. See infra Part III.A (proposing formal extension of *Pine Bush* rule to historic preservation cases).

112. See supra notes 92–94 and accompanying text (discussing Court of Appeals' decision in *Plastics*, which added special damage requirement to SEQRA cases).

113. See, e.g., Heritage Coal., Inc. v. City of Ithaca Planning & Dev. Bd., 644 N.Y.S.2d 374, 376 (App. Div. 1996) ("Appreciation for historical and architectural buildings does not rise to the level of injury different from that of the public at large for standing purposes.").

114. See Soc'y of the Plastics Indus., Inc. v. County of Suffolk, 573 N.E.2d 1034, 1044 (N.Y. 1991) (holding plaintiff failed to allege special damage and therefore lacked standing to bring SEQRA challenge).

115. *Heritage Coal.*, 644 N.Y.S.2d at 375.

tion gave her "an appreciation for the historic importance of Sage Hall that is different from that of the ordinary citizen or resident of Ithaca."[116] The Third Department held that the plaintiffs' potential injuries failed the special damage test, and the court dismissed the case.[117] The court stated explicitly that the "use of a building as a demonstrative teaching tool" was insufficient to confer standing.[118]

Industrial Liaison Committee v. Williams,[119] the only case cited by the Third Department to support its pronouncement that use as a teaching tool is not sufficient special damage, is inapposite for two reasons: (1) It featured a substantially different fact pattern,[120] and (2) the court found that all standing requirements had been met.[121] In fact, the plaintiff in *Industrial Liaison Committee* did not allege any specific use of the threatened resource, much less use as a teaching tool, and the court still allowed the case to proceed.[122] Despite its weak precedential support—and its reliance on the counterintuitive notion that preservationists who teach about a building are situated exactly the same as the general public with respect to that building—courts have used *Heritage Coalition* to dramatically restrict what counts as special damage in landmark preservation cases.

In *Citizens Emergency Committee to Preserve Preservation v. Tierney*, for instance, the plaintiff was an organization comprised of "committed preservationists," including the director of a graduate program in historic preservation and the executive director of a leading historic preservation advocacy organization.[123] The case centered around six historic properties whose landmark applications had been pending for anywhere from thirty-five to seventy-nine months.[124] The lower court held that the organization members' "interest and involvement" in preservation distinguished their injury from that of the general public and therefore satisfied the special damage requirement,[125] and then went on to consider

116. Id. at 376.

117. See id. ("Appreciation for historical and architectural buildings does not rise to the level of injury different from that of the public at large for standing purposes.").

118. Id. (citing Indus. Liaison Comm. of Niagara Falls Area Chamber of Commerce v. Williams, 521 N.Y.S.2d 321 (App. Div. 1987)).

119. *Indus. Liaison Comm.*, 521 N.Y.S.2d at 321 ("[T]he use of a building as a demonstrative teaching tool [does not] constitute a 'use' sufficient to confer standing.").

120. Id. at 324–26 (describing Niagara Falls Chamber of Commerce's challenge to new water quality standards promulgated by Department of Environmental Conservation).

121. Id. at 325 ("[I]n light of SEQRA's broad definition of 'environment' and petitioners' allegations of environmental harm, petitioners have established standing to challenge DEC's compliance with SEQRA.").

122. Id. at 324–25.

123. No. 103373/08, 2008 WL 5027203, at *4 (N.Y. Sup. Ct. Nov. 14, 2008), rev'd, 896 N.Y.S.2d 41 (App. Div. 2010).

124. Id. at *5.

125. Id. at *8 ("This Court finds Petitioner's interest and involvement in the preservation of the City's landmarks is not the same as that suffered by the public at large.").

the case's merits, deciding that the LPC's failure to take action with respect to those six buildings was arbitrary and capricious.[126]

On appeal, the First Department reconsidered the issue of special damage and reversed the lower court, holding in a very brief opinion that "[a] general—or even special—interest in the subject matter is insufficient to confer standing, absent an injury distinct from the public in the particular circumstances of the case."[127] Curiously, in reversing the lower court, the First Department cited the frequent use and enjoyment rule from *Pine Bush*—which allows plaintiffs to meet the special damage requirement by proving frequent use or enjoyment of a threatened resource—but then failed to discuss why the rule did not apply in this case.[128] Two interpretations are plausible: Either the rule did not apply because the organization members' use of the sites was not frequent enough to satisfy the rule, or the rule did not apply because it is only valid in environmental claims under SEQRA. This absence of clarity has created confusion in the trial courts about the reach of the *Pine Bush* rule, as evidenced by the case discussed below.

In *Brown v. New York City Landmarks Preservation Commission*, Timothy Brown, one of the first responders at the site of the World Trade Center following the terrorist attacks on September 11, 2001, sued the LPC after it voted not to landmark 45–47 Park Place, one of the buildings damaged in the attacks.[129] Built in 1857, the warehouse "retains much of its Italian Renaissance-inspired palazzo-style design" and was originally part of a textile and dry goods district.[130] The building attained notoriety after September 11 because the landing gear from United Flight 157 crashed through its roof during the attacks.[131] Brown's petition suggested several ways that his potential injury differed from the general public's: his personal involvement as a first responder on September 11;[132] his post-attack employment by the Office of Emergency Management to "'preserv[e], rehabilitat[e] and restor[e] physical structures and services in the vicinity of Ground Zero'";[133] and the fact that the building might contain the remains of his friends and coworkers, because new remains had recently

126. Id. at *10 ("The LPC has utterly failed to articulate any reasonable basis for its failure to consider live referenced RFE's which, by its own admission, are meritorious. Its action is, then, arbitrary and capricious.").

127. *Tierney*, 896 N.Y.S.2d at 42.

128. Id. (citing Save the Pine Bush, Inc. v. Common Council, 918 N.E.2d 917, 921 (N.Y. 2009)). For discussion of the *Pine Bush* rule, see supra Part I.C.3.

129. No. 110334/2010, 2011 WL 2672608, at *2 (N.Y. Sup. Ct. July 7, 2011).

130. Id. at *1.

131. Javier C. Hernandez, Planned Sign of Tolerance Bringing Division Instead, N.Y. Times, July 14, 2010, at A22 ("On Sept. 11, the landing gear assembly of one of the planes used in the attack crashed through the roof of what was then a Burlington Coat Factory.").

132. *Brown*, 2011 WL 2672608, at *4.

133. Id. (citation omitted).

been found nearby.[134] Citing *Heritage Coalition* and *Citizens Emergency Committee*, the court rejected Brown's alleged special damage, offering little rationale beyond its conclusion that his potential injuries were not "distinguished . . . from the potential injury suffered by the general public."[135]

These three cases illustrate how the special damage requirement has served as a seemingly insurmountable barrier to preservationist challenges. If courts have rejected the potential injuries in *Heritage Coalition*, *Citizens Emergency Committee*, and *Brown* as insufficiently unique, it is difficult to imagine what type of injury would satisfy a court in a landmark preservation case. The next section describes how owning property in close proximity to the historic site remains the only clear way for plaintiffs in preservation actions to meet the special damage test.

B. *The Close Proximity Exception in Landmark Preservation Cases*

Within special damage doctrine, courts have fashioned shortcuts that bestow presumptions of special damage if certain facts are present. For example, Part I.C of this Note describes how courts in zoning cases have granted a presumption of special damage to individuals who own or rent property in close proximity to the site at issue. Close proximity has occasionally been useful in landmark preservation cases as well. For instance, a court allowed individuals who live on Fifth Avenue directly across from the Metropolitan Museum of Art to challenge the museum's renovation plans.[136] In a similar case, the Third Department permitted a neighbor to sue to prevent the demolition of the Freihofer Bakery Building because of potential disruptions to his scenic view.[137]

Yet close proximity only works in limited circumstances, as demonstrated by another Third Department opinion that dramatically shrank the pool of neighbors eligible to receive the presumption of special damage. In *Save Our Main Street Buildings v. Greene County Legislature*, a group of neighbors sued to prevent a developer from replacing ten historic downtown buildings with a single large office building.[138] One of the

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134. Id. at *6.

135. Id. at *5.

136. Application of Metro. Museum Historic Dist. Coal. v. De Montebello, No. 119635/03, 2004 WL 1326706, at *5 (N.Y. Sup. Ct. May 14, 2004) ("[T]hey allege that the expansion contemplated by the Plan will increase traffic congestion, noise and fumes . . . outside their apartments, and that demolition of the fountains will harm the aesthetic beauty of the Museum and . . . impair their quality of life. These allegations state a claim of injury in fact." (citations omitted)).

137. Ziemba v. City of Troy, 827 N.Y.S.2d 322, 325 (App. Div. 2006) ("Inasmuch as we have recognized standing based upon an allegation that a petitioner resides in the immediate vicinity of a project that will affect the petitioner's scenic view, we agree with Supreme Court that the individual petitioners established standing.").

138. 740 N.Y.S.2d 715, 716–17 (App. Div. 2002).

plaintiffs owned an antique shop two blocks from the demolition site.[139] The Third Department held that this neighbor did not meet the special damage requirement, because his nearby property had no direct view of the demolition site.[140] Thus, after *Save Our Main Street Buildings*, it appears that only neighbors with direct views of the historic site are eligible to receive the presumption of special damage. Due to the restrictive application of the special damage requirement in preservation cases, if the historic property does not reside within the sight lines of any neighboring property owners, it is likely that judicial review of preservation actions will be altogether foreclosed.

Further, it is not clear why neighbors (even those with scenic views) should be entitled to a presumption of special damage in cases where property value fluctuations are unlikely, a concern expressed by the Court of Appeals in *Pine Bush*. In that case, the court noted

> [P]eople who visit the Pine Bush . . . seem much more likely to suffer adverse impact from a threat to wildlife in the Pine Bush than the actual neighbors of the proposed hotel development[,] . . . [who] may care little or nothing about whether butterflies, orchids, snakes and toads will continue to exist on or near the site.[141]

To the extent that a close proximity presumption is available, its beneficiaries are not necessarily those who will suffer the greatest injury at the hands of the challenged landmark preservation action.

In summary, the sole remaining method for meeting the special damage requirement in landmark preservation cases—owning or renting property in close proximity to the landmark at issue—can only be invoked by a limited set of neighbors, many of whom may experience no injury at all.

C. *Special Damage Requirement in Other Jurisdictions*

A brief look at other jurisdictions reveals that the special damage requirement's rigid application in historic preservation cases is not unique to New York. In similar fashion, courts in other states have applied the requirement so narrowly as to keep out plaintiffs with legitimate and differentiated injuries. For example, the special damage requirement blocked an Illinois citizen from suing to prevent the demolition of the Du Page Theater, a 1920s movie palace to which he had directly contributed his labor and money.[142] Noting the voluntary nature of the plaintiff's contributions to the theater, the Illinois Appellate Court held that

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139. Id. at 717.

140. Id. at 718 ("[T]he record reflects that he would have no direct view of the Project because his business is located on the same side of the street . . . .").

141. Save the Pine Bush, Inc. v. Common Council, 918 N.E.2d 917, 921 (N.Y. 2009).

142. Lombard Historical Comm'n v. Village of Lombard, 852 N.E.2d 916, 919–20 (Ill. App. Ct. 2006).

"self-proclaimed interest" is not sufficient to differentiate a plaintiff's injury from that of the public.[143] This holding begs the question why an individual would bother donating time and money to preserve a building if its destruction would cause him no special injury.

Similarly, a Michigan appeals court dismissed a challenge to a preservation decision brought by three plaintiffs who had served on an official study committee of the historic district at issue in the case.[144] That the plaintiffs were willing to donate substantial amounts of their time to serve on a study committee and prepare multiple drafts of a report about the historic district should have persuaded the court that their potential injury differed from that of the general public. Although courts in some jurisdictions apply the special damage requirement even more liberally than this Note proposes,[145] many states follow New York's approach, and the solution suggested in Part III has application beyond the Empire State.

D. *Implications of Rigid Application of Special Damage Requirement*

If courts continue to apply the special damage requirement rigidly, it will perpetuate an asymmetry where the regulated entities (landowners) enjoy unfettered access to the courts while the regulatory beneficiaries (members of the general public) cannot survive motions to dismiss. Professor Richard Pierce has argued that agencies will take this asymmetry into consideration when making regulatory decisions, which will distort their incentives to act in the public interest.[146] He argues,

> Groups and individuals whose interests conflict with those of regulated firms [for example, owners of landmarked properties] will soon discover that their views are not considered as seriously as the views of regulated firms because only regulated

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143. Id. (citing Landmarks Pres. Council v. City of Chicago, 531 N.E.2d 9, 13 (Ill. 1988)) ("'[S]elf-proclaimed concern' cannot vest one with standing. That this concern was manifested by voluntary contributions does not alter these parties' status with regard to the theater, as a gift vests one with no interest after it is alienated.").

144. Franklin Historic Dist. Study Comm. v. Village of Franklin, 614 N.W.2d 703, 707 (Mich. Ct. App. 2000) ("The study committee has failed to establish that it suffered an injury that is different from that suffered by the citizenry at large.").

145. See, e.g., Hoboken Env't Comm., Inc. v. German Seaman's Mission, 391 A.2d 577, 581 (N.J. Super. Ct. Ch. Div. 1978) (holding mere "interest[] in assuring that the plans for the historic preservation of Hoboken are carried out" is sufficient to confer standing in suit to prevent demolition of historic building).

146. See Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power, 42 Duke L.J. 1170, 1194–95 (1993) ("In a world in which agencies can predict with confidence that every decision unfavorable to regulated firms will be subjected to judicial review and that no decision unfavorable to unregulated firms is reviewable, they inevitably will begin to act in accordance with this new incentive structure.").

> firms can impose on agencies the substantial costs, uncertainties, and delays that attend judicial review.[147]

Indeed, scholars have cautioned that this asymmetry "deprive[s] regulatory beneficiaries of an essential power that regulated entities possess, which is the power to challenge and therefore shape agency decisionmaking."[148]

Recognizing this risk in the context of the federal government, the U.S. Congress has expressly granted rights of action to regulatory beneficiaries in several environmental statutes.[149] Preservation agencies, like all regulatory bodies, should make decisions by weighing the costs and benefits of preserving a particular resource. The costs of potential court battles will inevitably factor into this equation, but one would expect the effect to be neutralized if both landowners and the public enjoyed relatively equal access to the court system.

Choking off public access to challenge landmark preservation actions in the courts also counteracts the emphasis on public participation that is embedded throughout the New York City Landmarks Preservation Ordinance. This underlying principle of public engagement resides, among other places, in its statutory charge to increase public use of historic landmarks,[150] the multiple public hearing requirements,[151] and the ability of citizens to nominate buildings for consideration as landmarks.[152] In his history of the Landmarks Preservation Ordinance, Professor Anthony Wood notes that the law owed its greatest triumphs to "inspired, dedicated, and passionate citizen activism."[153] The law's

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147. Id. at 1195.

148. Lisa Schultz Bressman, Judicial Review of Agency Inaction: An Arbitrariness Approach, 79 N.Y.U. L. Rev. 1657, 1715 (2004).

149. See, e.g., Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270 (2006) ("[A]ny person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this chapter."); Energy Policy and Conservation Act, 42 U.S.C. § 6305 (2006) ("[A]ny person may commence a civil action against . . . any Federal agency which has a responsibility under this part where there is an alleged failure of such agency to perform any act or duty under this part which is not discretionary."); Clean Air Act, id. § 7604 ("[A]ny person may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.").

150. See N.Y.C., N.Y., Admin. Code § 25-301 (1992) ("The purpose of this chapter is to . . . promote the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.").

151. See, e.g., id. § 25-303(4)(b) ("It shall be the duty of the commission, after a public hearing, to designate a landmark site for each landmark and to designate the location and boundaries of such site.").

152. See supra note 43 and accompanying text (describing how members of general public can submit RFE).

153. Wood, supra note 16, at 385. Professor Wood reports, "If the law's history teaches us anything, it is the essential role the citizen advocate played in securing New

encouragement of active public involvement further supports the position that courts should not apply a restrictive special damage requirement to block active users of landmarks from challenging actions that would allow the destruction or modification of such landmarks.

III. RELAXING THE SPECIAL DAMAGE REQUIREMENT

Relatively modest changes to New York's special damage doctrine could alleviate the problems identified above, and this Part suggests two such adjustments. First, the *Pine Bush* rule, which recognizes that special damage can flow from frequent use of an environmental resource, should be formally extended to landmark preservation cases. Secondly, a plaintiff's personal connection to a building's history should give rise to a new presumption of special damage. Part III.A describes this solution in greater detail and identifies how it might be implemented. While considering counterarguments, Part III.B discusses why more judicial review of landmark preservation decisions is desirable.

A. *Two Modifications to New York's Special Damage Requirement*

Neither extending the *Pine Bush* rule[154] nor creating a new presumption is a radical proposition, but both solutions would go a long way toward correcting the asymmetry discussed in Part II, wherein uneven access to the courts distorts the incentives of the LPC and undermines the goals of landmark preservation statutes.

1. *Justifying These Solutions.* — Extending the *Pine Bush* rule finds its easiest defense by way of analogy: Environmental and landmark preservation laws serve very similar goals, as both protect public resources that are typically owned by private parties. As one judge noted, "landmark preservation could not be more closely analogous to SEQRA."[155] If frequent use of an environmental resource distinguishes a plaintiff enough from the general public to justify granting him standing to sue, then plaintiffs in landmark preservation cases should be treated similarly.

Creating a new presumption of special damage for individuals who have a personal connection to a building's history can also be justified by analogy. As discussed in Part I.A, individuals owning or renting land in close proximity to the site or building at issue receive a rebuttable pre-

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York's right to protect its landmarks. Landmarks preservation depends on political will, and that begins with citizen advocacy." Id.

154. See supra Part I.C.3 (discussing current scope of *Pine Bush* rule).

155. Allison v. N.Y.C. Landmarks Pres. Comm'n, 944 N.Y.S.2d 408, 414 (Sup. Ct. 2011) ("Both the LPL and SEQRA address preservation of the environment; the LPL preserves the urban environment; and SEQRA specifically includes 'objects,' and 'resources of historic or aesthetic significance' in the definition of the environment to be preserved." (citations omitted)).

sumption of special damage in zoning cases.[156] The Court of Appeals has defended this presumption in the following way: "[I]t is reasonable to assume that, when the use is changed, a person with property located in the immediate vicinity of the subject property will be adversely affected in a way different from the community at large."[157] It is similarly reasonable to assume that an individual with a personal connection to a building's history will be adversely affected in a way different from the general public. This presumption would allow, for instance, a descendant of a famous historical figure to challenge a decision by the LPC to allow the demolition of that historical figure's onetime home.[158] Common sense dictates that such a descendant is likely to feel greater injury than members of the general public.

This solution would also increase the likelihood that landmark preservation challenges will be brought by the most sincere and committed advocates, a commonly recited goal of standing doctrine.[159] Frequent visitors to a landmark and individuals with a special relationship to the site's history are well positioned to show a court why an LPC decision with respect to that site is arbitrary and capricious.

In its moderation, this solution falls midway between the opposite extremes of closing the courthouse completely and allowing anyone inside, a difficult balance considered by the New York Court of Appeals in an early zoning case:

> Standing principles, which are in the end matters of policy, should not be heavy-handed; in zoning litigation in particular, it is desirable that land use disputes be resolved on their own merits rather than by preclusive, restrictive standing rules. Because the welfare of the entire community is involved when enforcement of a zoning law is at stake there is much to be said for permitting judicial review at the request of any citizen, resident or taxpayer; this idea finds support in the provision for public notice of a hearing. But we also recognize that permitting *everyone* to seek review could work against the welfare of the community by proliferating litigation, especially at the instance of special interest groups, and by unduly delaying final dispositions.[160]

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156. See Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals, 508 N.E.2d 130, 134 (N.Y. 1987) ("[A]n allegation of close proximity alone may give rise to an inference of damage or injury that enables a nearby owner to challenge a zoning board decision without proof of actual injury.").

157. Id.

158. See Wood, supra note 16, at 379 fig.13.4 (describing razing of cottage where Dorothy Day lived for ten years).

159. Cass R. Sunstein, Standing and the Privatization of Public Law, 88 Colum. L. Rev. 1432, 1448 (1988) ("Standing limitations are also said to be a way of ensuring sincere or effective advocacy.").

160. *Sun-Brite*, 508 N.E.2d at 133 (citation omitted).

These modifications to the special damage requirement would not open the floodgates to any "citizen, resident or taxpayer," but rather would make room for a limited universe of parties whose connection to a landmark substantially exceeds that of the average taxpayer.

The Court of Appeals' appetite for at least one of these changes was almost tested in 2011, because a trial judge recently invoked the *Pine Bush* rule in a landmark preservation case,[161] and the LPC had vowed to appeal.[162] The case settled before the First Department or Court of Appeals had the opportunity to consider whether to extend the *Pine Bush* rule to landmark preservation.[163] The property at issue in that case, the first and second floor interiors of the iconic Manufacturers Trust Company (MTC) building, had been designated an interior landmark by the LPC in February 2011.[164] Two months after noting that the building's public interiors "changed the course of American bank design,"[165] the LPC allowed the current owner to cut new doorways into the Fifth Avenue facade, rotate the famous escalators and move them farther away from the windows, and reduce the vault wall.[166] Alleging that the LPC's permit amounted to an arbitrary and capricious de-designation of an interior landmark it had named just months earlier, Eric Allison, adjunct professor of architecture and historic preservation at the Pratt Institute, sued to enjoin the LPC from authorizing the remodeling.[167]

The landowner moved to dismiss on the grounds that Allison did not have standing to sue.[168] Justice Lucy Billings, seizing on the similarities between environmental and landmark preservation cases, held that the *Pine Bush* rule applied to Allison's claim.[169] Because Allison "regularly

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161. See Allison v. N.Y.C. Landmarks Pres. Comm'n, 944 N.Y.S.2d 408, 414 (Sup. Ct. 2011) ("*Save the Pine Bush*'s standards now apply to standing under the LPL.").

162. Andrew Keshner, Attempt To Block Landmark's Remodeling May Go Forward, N.Y. L.J., Aug. 23, 2011, at 1, 2. Gabriel Tausig, an attorney from the New York City Law Department, stated of the ruling, "We believe . . . that none of the plaintiffs had standing to bring this proceeding. We respectfully disagree with the court's conclusion to the contrary. We're considering our options whether to seek appeal on that issue now or preserve it for possible assertion at a later time." Id. at 2.

163. See supra note 9 and accompanying text (describing settlement of *Allison*).

164. See Keshner, supra note 162, at 1 ("The New York City Landmarks Preservation Commission deemed the building's glass exterior a landmark in 1997 and landmarked its interior this past February.").

165. N.Y.C. Landmarks Pres. Comm'n, Designation List 439, No. LP-2467, at 15 (2011), available at http://www.nyc.gov/html/lpc/downloads/pdf/reports/2467.pdf (on file with the *Columbia Law Review*).

166. See Pogrebin, Modernist Landmark Battle, supra note 9, at C1 (describing Vornado's remodeling plan for 510 Fifth Avenue).

167. Allison v. N.Y.C. Landmarks Pres. Comm'n, 944 N.Y.S.2d 408, 412–13, 424 (Sup. Ct. 2011).

168. Id. at 413.

169. See id. at 414 (holding "*Pine Bush*'s standards . . . apply to the [Landmarks Ordinance]" because "landmark preservation could not be more closely analogous" to environmental protection).

visits and leads walking tours to the MTC Building to teach his architectural students about the unique qualities of the building," and the remodeling will "directly curtail [his] professional use and enjoyment of the unique site," the court found that he met the special damage requirement, and the suit was allowed to proceed to its merits.[170] The appeal of that standing determination would have been the first opportunity by the Court of Appeals to consider whether frequent use of a landmark should satisfy the special damage requirement, but the case's settlement has postponed resolving that issue to another day.

2. *Implementing These Modifications to the Special Damage Requirement.* — These modifications to the special damage requirement could be implemented judicially or legislatively. Because standing is a common law rather than constitutional doctrine in New York, courts are free to modify it.[171] The state legislature also has authority to relax standing requirements, and it has done so on other occasions. For instance, to protect taxpayers from illegal disbursement of state funds, the legislature created "citizen-taxpayer standing" for "any person, who is a citizen taxpayer, *whether or not such person is or may be affected or specially aggrieved by the activity herein referred to.*"[172] The Court of Appeals upheld the constitutionality of this statute when a taxpayer challenged Governor Pataki for entering into a gaming compact with a Native American tribe without receiving legislative approval. The court explicitly endorsed citizen standing, holding that, "where a denial of standing would pose 'in effect . . . an impenetrable barrier to any judicial scrutiny of legislative action,' our duty is to open rather than close the door to the courthouse."[173]

To address a similar concern, a bill was introduced in the New York Assembly in February 2011 that would relax the individualization requirement in environmental enforcement actions. The bill provides that "any person who has suffered or may suffer an injury in fact, regardless of whether such injury is different in kind or degree from that suffered by the public at large, may commence a civil action in a court of competent jurisdiction for injunctive and declaratory relief" under New York's environmental protection laws.[174] A similar law could be enacted to relax the special damage requirement in landmark preservation cases.

3. *Applying This Solution.* — Most of the cases discussed in this Note would come out differently under the new rules proposed above: *Heritage Coalition*, *Citizens Emergency Committee*, and *Save Our Main Street Buildings*

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170. Id. at 413–17.

171. Soc'y of the Plastics Indus., Inc. v. County of Suffolk, 573 N.E.2d 1034, 1040 (N.Y. 1991) ("The standing requirement in Federal actions has been grounded in the Federal constitutional requirement of a case or controversy, . . . a requirement that has no analogue in the State Constitution.").

172. N.Y. State Fin. Law § 123-b (McKinney 2011) (emphasis added).

173. Saratoga Cnty. Chamber of Commerce, Inc. v. Pataki, 798 N.E.2d 1047, 1054 (N.Y. 2003) (quoting Boryszewski v. Brydges, 334 N.E.2d 579, 581 (N.Y. 1975)).

174. Assemb. B. 4801, 234th Gen. Sess. (N.Y. 2011).

would almost certainly be covered by an extension of the *Pine Bush* rule, and *Brown* would benefit from a presumption of special damage owing to the plaintiff's personal connection to the events of September 11 and his post-attack employment restoring buildings in the neighborhood.[175] Whether the plaintiffs would ultimately have succeeded in saving their cherished landmarks is another matter entirely, and one beyond the scope of this Note. The next section asserts that judicial review of landmark preservation decisions has intrinsic value that can be captured even if the court does not side with the plaintiff after hearing the case on its merits.

B. *Why Judicial Review of Landmark Preservation Actions Matters*

Without a doubt, relaxing the special damage requirement would allow new plaintiffs to challenge landmark preservation decisions. This section argues that more judicial review of landmark preservation agencies is desirable.

1. *Lack of Political and Administrative Checks.* — The late Professor Louis Jaffe, a longtime professor of administrative law at Harvard Law School, wrote, "[T]he work done by public actions could, in my opinion, be *better* performed in most—though possibly not in all—cases by political and administrative controls. The prime argument, thus, for the public [judicial] action would be the *absence of these controls*."[176] Unlike decisions to designate a landmark—which are reviewed by three distinct political entities[177]—decisions not to calendar or designate a landmark are not reviewed by any entity other than the LPC, whose decision stands unless overturned in court.

LPC commissioners are accountable to the public only in the sense that a popularly elected mayor appoints them, but their three-year, staggered terms[178] mean that "a mayor only has a chance to appoint the full commission by the final year of his or her first term in office."[179] Even if

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175. See supra Part II.A–B (describing *Heritage Coalition*, *Citizens Emergency Committee*, *Save Our Main Street Buildings*, and *Brown*).

176. Louis L. Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265, 1284 (1961) (emphasis added).

177. Decisions by the LPC to designate landmarks or historic districts are reviewed by the City Planning Commission, which sends a report to the City Council indicating whether it recommends approving that designation. The City Council may "modify or disapprove by majority vote any designation of the Commission or amendment thereof." N.Y.C., N.Y., Admin. Code § 25-303(g) (1992). The mayor may veto the City Council's decision with respect to the designation, and the City Council can overturn his veto with a two-thirds vote. Id.

178. N.Y.C., N.Y., Charter § 3020(2)(a) (1992) ("The members of the commission shall be appointed by the mayor for terms of three years, provided that of those members first taking office, three shall be appointed for one year, four for two years, and four for three years.").

179. Joachim Beno Steinberg, New York City's Landmarks Law and the Rescission Process, 66 N.Y.U. Ann. Surv. Am. L. 951, 966 (2011).

the mayor were able to appoint the full board all at once, scholars have noted the limited capacity of a single executive to effectively monitor the voluminous work of a complex government bureaucracy—of which landmark preservation agencies are but a small part.[180] The lack of political and administrative controls over LPC decisions not to calendar or designate a landmark argues for greater access to the courtroom than is currently afforded by the austere special damage requirement.

2. *Regulatory Capture.* — This absence of checks and balances is particularly troublesome in the context of historic preservation, because, even setting aside the asymmetry in access to the courts, the LPC's structure makes it especially vulnerable to regulatory capture. Regulatory capture, a version of public choice theory, describes a phenomenon where "agencies deliver regulatory benefits to well organized political interest groups, which profit at the expense of the general, unorganized public."[181] An agency is typically thought to be vulnerable to capture if there is an interest group, or a small number of interest groups, with a disproportionate stake in the work of the agency relative to the general public.[182]

Landowners and preservationists are the most frequent players in landmark disputes, and their interests are typically at odds with one another. Because landmarks operate as public goods in private hands, landowners have a lopsided stake in the outcome of LPC decisions, providing them with strong incentives to "capture" the agency.[183] This imbalance occurs because the cost of landmarking is incurred solely by the developer, while the benefits are dispersed widely to the public. If a developer prevents his property from being designated a landmark, he avoids the obligation to finance a public benefit from which he will be unable to capture the full return. On the other hand, a preservationist group will not have to pay to maintain an historic building once it is designated a landmark. Landowners' disproportionate stake in LPC decisions creates fertile ground for regulatory capture, and the possibility of

180. Bressman, supra note 148, at 1690 ("The reality is that the President cannot possibly police all or even all major executive branch agency decisions for evidence of improper influence . . . . The President has responsibilities in our constitutional democracy that prevent him from exercising the type of comprehensive control upon which agency legitimacy depends.").

181. Steven P. Croley, Theories of Regulation: Incorporating the Administrative Process, 98 Colum. L. Rev. 1, 5 (1998).

182. See Michael E. Levine & Jennifer L. Forrence, Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis, 6 J.L. Econ. & Org. (Special Issue) 167, 194 (1990) (explaining capture depends on "the existence of a group that would be specially benefitted by the policy or act").

183. See Steinberg, supra note 179, at 966–67 (describing how LPC is particularly vulnerable to regulatory capture).

regulatory capture provides strong support for greater judicial scrutiny of an administrative agency.[184]

A counterargument, often raised to defend standing doctrine in general, is the alleged superiority of the political process for policing regulatory capture.[185] According to this view, issues affecting broad swathes of the public are better handled by the representative branches, especially the legislature.[186] But two major political process failures make elections ill-suited to solving problems of landmark preservation. First, in a city as large and diverse as New York, landmark issues are unlikely to captivate the interests of enough voters to swing an election. A review of articles in *The New York Times* before a recent mayoral election reinforces this proposition, as it uncovered scant evidence that landmark issues influence the public's electoral choices.[187] One explanation for this is that the benefits of landmark preservation accrue to many individuals who cannot vote in municipal elections, namely future generations and out-of-town visitors.[188] A second failure of the political process is that real estate development interests exercise lopsided influence over local government elections by making large campaign contributions.[189] Professor Heather Elliott has noted that "dismissing a case because an injury is widely shared, on the assumption that the group will mobilize to obtain redress through the political branches, does not take into account the political reality that some groups have more access than others."[190] Relaxing the special damage requirement will mitigate this unequal influence on the political branches by restoring balance in access to the court system.

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184. See Louis L. Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. Pa. L. Rev. 1033, 1044 (1968) ("It has been remarked that administrative agencies are sometimes captured by particular interests. . . . For these reasons procedural devices, which enable citizen groups to participate in the decision-making process and to invoke judicial controls, are very valuable.").

185. See FEC v. Akins, 524 U.S. 11, 35 (1998) (Scalia, J., dissenting) ("If the effect [of a plaintiff's injury] is 'undifferentiated and common to all members of the public,' the plaintiff has a 'generalized grievance' that must be pursued by political, rather than judicial, means." (quoting United States v. Richardson, 418 U.S. 166, 177 (1974))).

186. See Elliott, supra note 77, at 477–83 (discussing argument that standing doctrine diverts from courts those cases better heard in political branches).

187. See Steinberg, supra note 179, at 966 n.113 (describing results of press scan prior to 2005 mayoral election, which revealed few mentions of landmark preservation).

188. See supra notes 27–35 and accompanying text (describing benefits of historic preservation).

189. Brian E. Adams, Fundraising Coalitions in Open Seat Mayoral Elections, 29 J. Urb. Aff. 481, 484 (2007) (arguing that in order to raise sums necessary for effective campaigns, mayoral candidates in large cities must seek funds from certain business sectors with capacity for large political contributions, including real estate, and that real estate sector in particular has incentive to contribute because of greater stake in local political decisions).

190. Elliott, supra note 77, at 491.

3. *Irrevocability.* — Judicial review of antipreservation actions is particularly important because, unlike garden variety land use decisions that can be easily reversed, the demolition of a landmark is permanent. The City Council noted this concern in the preamble to the Landmarks Preservation Ordinance:

> The council finds that many improvements . . . having a special character or a special historical or aesthetic interest or value . . . have been uprooted, notwithstanding the feasibility of preserving and continuing the use of such improvements and landscape features, and without adequate consideration of the irreplaceable loss to the people of the city . . . .[191]

The court system should be available to prevent hasty decisionmaking about the irrevocable destruction of public resources.

4. *Declining Public Confidence in the LPC.* — The past decade has seen a marked increase in preservationist outcry over LPC actions; some preservationist leaders believe New York is "again facing a true landmark crisis."[192] In October and November of 2004, the New York City Council Subcommittee on Landmarks, Public Siting and Maritime Uses held two hearings regarding the administrative practices of the LPC. In May of 2005, the Committee on Governmental Operations did the same. One of the common refrains voiced in those hearings was that "it feels as though deals are being made behind closed doors, and there isn't enough transparency."[193] Another individual mentioned at the hearing, "I think that it would be fair to characterize the [LPC] procedures with respect to designation as less open to the public than many of their counterparts across the country."[194] The creation in 2006 of the Citizens Emergency Committee to Preserve Preservation is another indication of the heightened level of public concern over the LPC's procedures.

Relaxing the special damage requirement provides an opportunity to bolster public confidence in the LPC. Social scientists Tom Tyler and Allan Lind have argued that "a key factor affecting legitimacy across a variety of settings is the person's evaluation of the fairness of the procedures used by the authority in question."[195] They note further,

> In many social situations it is not at all clear what decision or action is correct in an objective sense. . . . In these circumstances . . . what is critical to good decisionmaking is adherence to norms of fairness, and fairness is most evident when procedures that are accepted as just are used to generate the decision. . . .

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191. N.Y.C., N.Y., Admin. Code § 25-301 (1992).

192. Wood, supra note 16, at 375.

193. See Transcript of the Minutes, Nov. 29, 2004, Subcomm. on Landmarks, Siting, and Maritime Uses, Sess. 2004–2005, at 105 (2004) (statement of Cynthia Doty, Democratic District Leader, 69th Assembly District) (on file with the *Columbia Law Review*).

194. Id. at 81–82 (statement of Roger Lang, New York Landmarks Conservancy).

195. Tom R. Tyler & E. Allan Lind, A Relational Model of Authority in Groups, 25 Advances Experimental Soc. Psychol. 115, 133 (1992).

> [T]he best guarantee of decision quality is the use of good—which is to say fair—procedures.[196]

Not only will evening out access to the courts make the landmarking process seem more fair, but more importantly, the knowledge that some citizen challenges will be heard by courts on their merits will incentivize the LPC to adopt more transparent and deliberative procedures, particularly at the calendaring stage.

CONCLUSION

In its current form, New York's special damage requirement barricades citizens from challenging government decisions about the physical structures that embody their community and cultural identity. So long as landowners enjoy unfettered access to the judicial system, the resulting asymmetry will motivate preservation agencies to discount the concerns of those parties who cannot confront them in the courtroom. This Note suggests two modest but game-changing modifications to the special damage requirement, modifications that would accommodate citizens with genuine stakes in the outcomes of preservation decisions while still honoring the principles that underlie standing doctrine. These changes would correct an imbalance in judicial access, provide important checks and balances where none currently exist, and, in the case of New York City, shore up public confidence in an agency whose decisions shape the streets and skylines of the United States' most famous metropolis.

196. Id. at 134.

SELECTED BIBLIOGRAPHY

Barnard, Anne, After Uproar, A New Tack to Build an Islamic Center, N.Y. Times, Aug. 2, 2011, at A21.

Birmingham, Rebecca, Note, Smash or Save: The New York City Landmarks Preservation Act and New Challenges to Historic Preservation, 19 J.L. & Pol'y 271 (2010).

Bressman, Lisa Schultz, Judicial Review of Agency Inaction: An Arbitrariness Approach, 79 N.Y.U. L. Rev. 1657 (2004).

Byrne, J. Peter, Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development, 19 Geo. Mason L. Rev. 665 (2012).

Croley, Steven P., Theories of Regulation: Incorporating the Administrative Process, 98 Colum. L. Rev. 1 (1998).

Elliott, Heather, The Functions of Standing, 61 Stan. L. Rev. 459 (2008).

Gerrard, Michael B., Court of Appeals Expands SEQRA Standing After an 18-Year Detour, N.Y. L.J., Nov. 27, 2009, at 3.

Glaeser, Edward, Triumph of the City (2011) .

Hernandez, Javier C., Planned Sign of Tolerance Bringing Division Instead, N.Y. Times, July 14, 2010, at A22.

Hessick, F. Andrew, Standing, Injury in Fact, and Private Rights, 93 Cornell L. Rev. 275 (2008).

Humphrey, Nicholas K., Natural Aesthetics, *in* Architecture for People: Explorations in a New Humane Environment 59 (Byron Mikellides ed., 1980).

Jaffe, Louis L., Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265 (1961).

Keshner, Andrew, Attempt to Block Landmark's Remodeling May Go Forward, N.Y. L.J., Aug. 23, 2011, at 1.

Levine, Michael E., & Jennifer L. Forrence, Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis, 6 J.L. Econ. & Org. 167 (Special Issue) (1990).

Matthews, Joan Leary, Unlocking the Courthouse Doors: Removal of the "Special Harm" Standing Requirement Under SEQRA, 65 Alb. L. Rev. 421 (2001).

Moynihan, Colin, Judge Rules Ex-Firefighter Cannot Sue over Mosque, N.Y. Times, July 11, 2011, at A16.

N.Y.C. Indep. Budget Office, The Impact of Historic Districts on Residential Property Values (2003).

Nivala, John, Saving the Spirit of Our Places: A View on Our Built Environment, 15 UCLA J. Envtl. L. & Pol'y 1 (1996).

Pierce, Jr., Richard J., *Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power, 42 Duke L.J. 1170 (1993).

Pogrebin, Robin, Modernist Landmark Behind a Court Battle, N.Y. Times, Sept. 29, 2011, at C1.

Pogrebin, Robin, Preservation and Development in a Dynamic Give and Take, N.Y. Times, Dec. 2, 2008, at C1.

Pogrebin, Robin, Settlement Reached on 5th Avenue Landmark, N.Y. Times, Feb. 9, 2012, at C2.

Pres. Green Lab, The Greenest Building: Quantifying the Environmental Value of Building Reuse (2011).

Pres. League of N.Y. State, New York: Profiting Through Preservation (2000).

Rimer, Sara, A Tradition Is Pounded by Hammers and Nails, N.Y. Times, Mar. 20, 1996, at A14.

Rose, Carol M., Preservation and Community: New Directions in the Law of Historic Preservation, 33 Stan. L. Rev. 473 (1981).

Scalia, Antonin, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881 (1983).

Steinberg, Joachim Beno, New York City's Landmarks Law and the Rescission Process, 66 N.Y.U. Ann. Surv. Am. L. 951 (2011).

Sunstein, Cass R., Standing and the Privatization of Public Law, 88 Colum. L. Rev. 1432 (1988).

Sunstein, Cass R., What's Standing After *Lujan*? Of Citizen Suits, "Injuries," and Article III, 91 Mich. L. Rev. 163 (1992).

Wood, Anthony C., Preserving New York: Winning the Right to Protect a City's Landmarks (2008).