

SUPREME COURT, STATE OF NEW YORK
COUNTY OF NEW YORK

X

Preserve BAMs Historic District Inc.;
Susan Spiller, Charles Cohen,
Jeff Tuller, Angela Fung,
Cordula Hahn, Geertui Van de Heyning,
Jorge Rodriguez, Jesse Montero, ,
Norman Ryan, Alexander Brebner,
David Lee, Thomas Maloney,
Anne Montero, Zachary Model,
Yukari Model, Stephanie Alleyne,
Bhagubhai K. Patel, Anna Raginskaya,
Matthew Zimmer, Natalie Zimmer,
Phillip A. Saperia, Elisabeth Talerman,
Stephen Kustero, Yulin Li,
Chieko Arai, Sarah Wolff,
James Golden, Douglas Riccardi,
Jay Reiburn, Sandy Reiburn,
Barbara Reynolds, Kendall Reynolds,
Meredith Genova Nicolaescu,
Mabel Lung, Peter Poon,
Narada Golden, Maria-Liisa Lydon,
Isabel Cohen, Rachel Lynn Golden,
Anna Landman, Max Anderson,
Marielle Liebman, Michelle Gile,
Chris Benfante, Stephanie Barragen,
George Wong, Wamkele Mene,
Charles Jarden, Michael Southgate,
Alleyne Roderick, Malika Mene,

Petitioners

-against-

Landmarks Preservation Commission of
City of New York,

Respondent

X

As and for their Petition, by their attorney, Michael S. Gruen, Petitioners
respectfully plead:

PETITION

Index No. 160481/2020

INTRODUCTION

1. This proceeding is brought to challenge the decision of the New York City Landmarks Preservation Commission (“LPC”) to permit construction of a 24 story out-sized building in the Brooklyn Academy of Music Historic District. The District is a small one comprised mainly of row houses three and four stories high, built between 1855 and 1859. (See LPC’s BAM Historic District Designation Report, Exh. [] hereto, pp.).

2. The proposed building would tower over all but one building within the historic district, the famed Williamsburgh Savings Bank Building built in 1929, which tops out at 512 feet, a skyscraper of the era. The Bank Building is the only building in the District that is also designated as a landmark. It is recognized as a landmark for, among other things, its elegance, its accumulative setbacks from the adjacent streets, its Neo-Romanesque style, and its narrow spire-like tower carrying clock dials facing in all four cardinal directions, and surmounted by a dome. (See Historic District designation report Ex. [] pp. [], and Landmark Designation Report Exh. []). The Bank building’s landmark status gives it strong protection as an individual structure. It may not be altered or destroyed by action on its site. Its historic district status adds an additional layer of protection from spoilage due to building and alteration on “neighboring” (in a broad sense) properties.

3. That, at least, is the theory.

4. The Commission action would allow construction of a 265 foot tower adjacent to the Bank building. The new building would substantially obscure views of the Bank building from the North, East and West. It would cast shadows in the same directions. It would cut off views from the Bank building itself (now primarily a residential condominium known as One

Hanson Place). And its predominantly shoe box shape and modernity would clash with the more delicate appearance of the Bank building.

5. The new building would also radically change the character of adjacent St. Felix Street, one of the two streets the new building would front on. St. Felix Street is a narrow street. Its eastern side at this location is lined entirely with row houses, mostly three and four stories high, until the street meets Lafayette Avenue Street where there is a slightly larger corner building. That residential composition and scale prevails with moderate exception through the rest of the historic district lying to the East. On the West side of St. Felix Street there are four former row houses that have been converted for use by the Brooklyn Music School. Just north of these row house structures is BAM main concert hall. At 100 feet in height, BAM is somewhat higher than the row houses, but not radically. That scale at present gives St. Felix Street height compatible with the residential character and scale that generally defines the historic district throughout, with the exception of the Bank building located at the District's southwest corner where the Bank building marks the border toward commercial use and scale toward South and East. The new building would impose a totally out-of-place tripling or more of height at the middle of St. Felix Street that will strip the sense of residential scale and character from any part of St. Felix Street, and throughout the District to the West of St. Felix.

6. The Bank building has significant grounds for being part of the Historic District. First, it was completed in 1929. The District was designated in 1977. The Bank building had, about a year earlier, been designated by the Commission as a landmark because of its outstanding architecture, and its iconic role as the home of a leading Brooklyn Savings Bank and the major "skyscraper" of the Borough, visible to all including those far away. Second, it existed at the time of designation of the Historic District, and it was on a block with other (though much

smaller) outstanding buildings. Not to designate it as part of the District would have left it protected against direct negative intervention – such as being torn down or insensitively remodeled – actions occurring on its own landmark site. But it would not have been protected against the harm caused by insensitive development of neighboring properties. That, however, was remedied by designation of the Bank building as part of the Historic District. (See NYC Admin. Code § 25-307(b)(1) and (d)).¹ Third, the Bank building has a special role as signal of the line that separates row housing residential use that dominates most of the rest of the historic district (as well as the neighboring Fort Greene Historic District), and cultural use of most of the rest of this block, from the commercial strip just beyond to the north.

7. The proposed new construction would be devastating and, to use the key word of the Landmarks Preservation Law, entirely “[in]appropriate.” It would very substantially hide views of the Bank building from the South and West. It would radically interfere with views of residents of the Bank building, in some cases actually obliterating views from apartment windows, in other cases adding diverting wall area that may allow residents to see straight out from their windows, but bar their former view toward the East, North and West. It would drastically change the character of life and abode of persons who reside on St. Felix Street opposite the main portion of the proposed building at 130 St. Felix Street. Their houses are on a

¹ Sub-section (d) provides, “In making the determination referred to in subdivision a of this section with respect to an application for a permit to alter, reconstruct or demolish a landmark, the commission shall consider the effects of the proposed work upon the protection, enhancement, perpetuation and use of the exterior architectural features of such landmark which cause it to possess a special character or special historical or aesthetic interest or value.”

Sub-section (b)(1)(b) concerning work in historic districts, contains much the same language for consequences to the individual site on which the work is to be done, but adds that the Commission must also consider “the relationship between the results of such work and the exterior architectural features of other, neighboring improvements in such district.”

key portion of the Historic District consisting entirely (or close to it) of 1855 to 1859 row houses, mostly restored around the time of designation. They now look across the street at a series of relatively low buildings – some of them former row houses reconfigured as the home of the Brooklyn Music School, the remainder being a church and the main BAM building – all no higher than 100 feet (with the possible exception of the Church which Petitioners do not yet have and accurate measure of). Their future view: A 265 foot high structure with much the shape of a gigantic shoe box.

8. One must question whether such a drastic reconfiguration of a historic district neighborhood is truly “appropriate,” as the Landmarks Law requires that it must be. And that is the essence of what Petitioners do question. They also challenge the LPC decision in several other respects which will be discussed below.

9. We refer to the proposed building as “proposed,” because it cannot be built without an upzoning that has not yet been passed and, also, of course, requires a building permit that has not been issued.

PROCEDURAL MATTERS

PETITIONERS

10. The following persons are designated as Petitioners. All are residents of the Brooklyn Academy of Art Historic Districts. Those who reside at 1 Hanson Place (formerly known as the Williamsburgh Savings Bank Building) are indicated by the initials OHP following their names. All others reside on the Street within the District appearing following their respective names:

Preserve BAMs Historic District Inc.; Susan Spiller, OHP; Charles Cohen, OHP; Jeff Tuller, OHP; Angela Fung, Ft. Greene Place; Cordula Hahn, OHP; Geertui Van de Heyning, St. Felix St.; Jorge Rodriguez, OHP; Jesse Montero, OHP; Norman Ryan, OHP; Alexander Brebner, St. Felix Street; David Lee, OHP; Thomas Maloney, OHP; Anne Montero, OHP; Zachary Model, OHP; Yukari Model, OHP; Stephanie Alleyne, St Felix St.; Bhagubhai K. Patel, St Felix St.; Anna Raginskaya, OHP; Matthew Zimmer, OHP; Natalie Zimmer, OHP; Phillip A. Saperia, OHP; Elisabeth Talerman, OHP; Stephen Kustero, OHP; Yulin Li, St. Felix St.; Chieko Arai, St. Felix St.; Sarah Wolff, OHP; James Golden, OHP; Douglas Riccardi, St. Felix St.; Jay Reiburn, So. Elliott Place; Sandy Reiburn, So. Elliott Place; Barbara Reynolds, OHP; Kendall Reynolds, OHP; Meredith Genova Nicolaescu, OHP; Mabel Lung, OHP; Peter Poon, OHP; Narada Golden, OHP; Maria-Liisa Lydon, St. Felix St.; Isabel Cohen, OHP; Rachel Lynn Golden, OHP; Anna Landman, OHP; Max Anderson, OHP; Marielle Liebman, OHP; Michelle Gile, OHP; Chris Benfante, OHP; Stephanie Barragen, OHP; George Wong, Saint Felix Street; Wamkele Mene, St. Felix Street; Charles Jarden, OHP; Michael Southgate, St. Felix Street; Alleyne Roderick, St. Felix Street; Malika Mene, St Felix St.

JURISDICTION AND VENUE

11. The Court has jurisdiction pursuant to CPLR Article 78.
12. Venue is based on the location of the office of the Landmarks Preservation Commission at 1 Centre Street, Manhattan.

I. THE LANDMARKS PRESERVATION LAW

13. Famously, as late as 1965, New York City had no effective means of protecting its magnificent array of outstanding individual buildings and dozens of neighborhoods which, by sharing architectural styles and complementary bulk to a significant extent established a pattern of identifiable areas – often referred to as “villages” as in the cases of Greenwich Village, the East Village, and the West Village – that exemplified individual buildings of exceptional architectural or other exemplary cultural importance, or prized “districts” that reflected a style of metropolis that was proud of, and comfortable with, the idea that the City was not only a magnificent whole, but a whole that is quite explicitly an assemblage of separate identifiable historic sections with their own individual style and coherence.

14. The City was shocked into action when the iconic Pennsylvania Railroad Station – an elegant beacon of glass channels covering and openly exhibiting the excitement of railroad travel – was torn down and replaced by pure conventionality in the form of the present Penn Station in the 1960s. Concerned citizens demanded legislation that would prevent such disregard in the future. In 1965, the Landmarks Preservation Law was adopted. It was one of the earliest of such laws, and remains a leading archetype for promoting preservation of what makes a great municipality great.

15. Among the most important features of the Law are these:

- a. It starts with a clean and well-expressed statement of intent that, in itself, defines not only its general purposes, but the scope of the law and the intent that it be applied liberally in favor of protecting individual landmarks and historic districts. (NYC Admin. Code §§ 25-301 and 307).

- b. Its next most important feature is its set of rules for determination whether an owner's desired modification is "appropriate" and "consistent" in light of the stated purposes of the Law. These guidelines serve to protect the Commission against charges that, without guidelines, the Landmarks Law would be subject to the criticism that it acts, or may act, as if it were a legislative body able to make policy as it wishes rather than simply applying the Legislature's policy within the bounds imposed by the Legislature. It is a common problem encountered in designing administrative agencies, especially where the subject matter of the agency's work concerns a great deal of judgment.²

These guidelines are supplemented by provision that, when determining whether to issue a certificate of appropriateness allowing alteration of a landmark or historic district property, the Commission must make an up or down vote: the Commission must determine that the proposed construction or modification is "appropriate" or is not. There is nothing in between. The result is to make clear that the Commission's job is not to enforce personal artistic preferences. A Commission that does not understand the importance of adherence to guidelines in making decisions runs an uncomfortable risk not only of judicial reversal, but of weakening the effect of the Law.

² The undersigned participated actively in a committee led by the then General Counsel to the Commission that drafted the law expanding the scope of the LPC's jurisdiction to interior landmarks and scenic landmarks, adopted in 1973. Making sure that the amendment would provide sufficient guidelines to protect against a challenge based on over-granting of administrative discretion was a major concern of the committee.

c. Thirdly, the Law recognizes that the exactitude of the “appropriateness” test may sometimes impose financially intolerable hardship on the owner. In such cases, the owner can seek de-dedication. (Admin. Code § 25-309). The process is not easy. See Stahl York Ave. Co., LLC v. City of New York, 162 A.D.3d 103, 107 (1st Dep’t.), appeal dismissed, leave to appeal denied, 32 N.Y.3d 1090 (2018), and cert. denied sub nom. Stahl York Ave. Co., LLC v. City of New York, New York, 140 S. Ct. 117 (2019). But it has been successfully invoked. See Lutheran Church in America v. City of New York, 35 N.Y.2d 121 (1974). Its existence as an option emphasizes that the Commission may not deviate from the standards of the “appropriateness” test because of sympathy to the owner or any other untoward standard. If a determination of inappropriateness is made, an alternative approach is available to the owner.

16. In this spirit, the Commission’s General Counsel, in the course of the Commission’s consideration of this very case, correctly advised that the Commissioners must decide the case on the basis of the aesthetic, cultural and historical factors prescribed by the Landmarks Law, and could not decide on the basis of any political or social considerations as the applicant strongly suggested the Commission do. Nevertheless, as will be described further below, the Commissioners expressed their sympathy for the facts that this project would directly aid the beloved Brooklyn Music School located adjacent to the proposed project and to be provided some 20,000 square feet of new space in the new building, and would provide affordable housing to the extent of 30% of the total housing to be built. Given what will be shown to be the paucity of reasoned analysis of issues that should be deemed material to a decision on “appropriateness,” the

expression of support on political and social grounds undermines the legitimacy of the Commission's action.

II. THE BROOKLYN ACADEMY OF MUSIC ("BAM") HISTORIC DISTRICT

17. This historic district was designated by the Landmarks Preservation Commission in 1978. It is small – two full blocks plus parts of two more – but intriguing. The Commission's designation report notes three major attributes: that the area exemplifies a typical Brooklyn residential neighborhood,³ unified in this instance by the fact that it was built almost entirely between 1855 and 1859; that it has the Brooklyn Academy of Music (popularly known as "BAM" at the southerly end of the same block, a cultural landmark of high architectural quality; and that at its southwesterly extreme it has the Williamsburgh Savings Bank tower built in 1929, an architectural gem with a thin final tower reaching to 512 feet. (See Designation Report). The Designation Report includes a map of the Historic District.

18. The Savings Bank/BAM block also includes a church built in 1873-74 west of the Bank, a second BAM building south of the main BAM building along Ashland Place and known as BAM Fisher, and four four-story row houses, South of the BAM building along St. Felix Street, which have been modified for use by the Brooklyn Music School, another local cultural site. (Designation Report). The entire lot is a slightly irregular rectangle approximately 450 feet

³ The Commission, in this case as will be seen, often uses the word "neighbor" as if it refers only to the most immediate abode or owner that exists. The lead definition for "neighbor" in the Oxford English Dictionary is "One who lives near or next to another; one who occupies a near or adjoining house, *one of a number of persons living close to each other, esp. in the same street or village.*" Emphasis added. See Mattone v. New York City Landmarks Pres. Comm'n., 5 Misc. 3d 1013(A)(*4) (Sup. Ct. N.Y. Co. 2004) (treating "neighboring" as referring to other properties throughout the subject historic district). The OED uses the spelling neighbour.

in length and 200 feet in width (estimated based on zoning map scale). The foregoing description covers all of the buildings in the block.

19. There is also an “L” shaped vacant lot at approximately one third of the way northerly from Hanson Place, the vertical portion of which is on the northerly side of the block, and the horizontal portion of which is on the southerly side of the block. That is the subject proposed construction lot. In total, the lot has an area of about 12,000 square feet. The block is bound by Hanson Place on the South, Ashland Place on the West, Lafayette Avenue on the North, and St. Felix Street on the East. (See Map in Designation Report). The other three blocks of the District lie easterly of the BAM/Bank block.

20. As the Designation Report explains, before about 1855, the area was a farm. Starting about then, the farm rapidly transitioned into row-house development. By 1859, the area including what is now the BAM Historic District was primarily residential. (Designation Report pg. 2). Stimulated by the religious needs of the developing population of the area, a Methodist church was constructed at the south-east corner of Hanson Place and St. Felix Street in 1857. (Id.) A Sanford map confirms that, as of 1904, the block where it is now proposed to build the project at issue was residential but for the Church. By 1915, BAM had built its main building. (Id.) By 1939, the current situation was largely in place, though the vacant lot was slightly larger than it is now. (See Sanford Maps at August 4, 2020 “Appendix” submitted by Gotham Development pg. 122.)

21. As the Designation Report says “Major change did not take place within the Historic District for nearly fifty years after its initial development. In 1907, one of Brooklyn's most important cultural institutions, the Brooklyn Academy of Music, moved to its present site at 30 Lafayette Avenue.”

22. Twenty years later, construction of the Williamsburgh Savings Bank began at the opposite end of the block; it was completed in 1929. (Designation Report pg. 3). The Salvation Army building (now BAM Fisher) was built in 1927, just east along Ashland Avenue of what is now the Ashland Avenue portion of the proposed construction site. (See Id.) The Salvation Army building was separated from the Bank building by a vacant lot, being the Ashland Place side of the proposed construction site. (Designation Report pg. 6 reference to lots at 325-327 Ashland Place).

23. The Methodist Church expanded from time to time and was rebuilt twice – all on increasingly enlarged land – until the present building was completed in or about 1929. (Designation Report pp. 11-12).

24. Thus, at this point, the block is occupied as follows: along Ashland Place from East to West, BAM, BAM Fisher (on the earlier Salvation Army site), the vacant lot on which the subject development is proposed located at about mid-block, and then the Bank building now a condominium known by its address, One Hanson Place; along Felix Street from East to West, BAM, the four row houses remodeled for the Brooklyn Music School, the vacant lot proposed for development, and the Methodist Church. This array is depicted on the annexed zoning [?] map. (Exhibit []).

25. The block's zoning is C6-1, a commercial district that allows residential and community facility use, as well as commercial use. Actual heights on the block are 512 feet for the Bank building, height which, until recent development of Downtown Brooklyn, was by far the tallest in the borough and functionally as well as architecturally a major landmark; an estimated 100 feet approximately [] for the Church; 100 feet for each of the BAM and BAM

Fisher; and about an estimated 80 for the four Music School buildings.⁴ [The zoning floor area calculates to an FAR of about []. (See LPC Decision 8/4/20, Exh. [], and, for dimensions and areas, applicant's August 4, 2020 drawings, Exh [] pp. []).

26. The Landmarks Preservation Commission has approved a height of 265 feet for the proposed new building, with gross floor area of 153,300 square feet. (August 4 Appendix of Applicant, pg. 104; and LPC Decision 8/4/20).

27. Existing zoning according to Gotham Development allows no development whatsoever on the proposed site because the Bank building is overbuilt. It appears that at the time the Bank building was constructed, the lot size of the Bank site included at least the subject lot and maybe more, and that this additional space – unbuilt when the Bank was built – may have provided floor area that could be utilized by the Bank.

28. Gotham Development has stated that, accordingly, the proposed project depends on rezoning and transfers of zoning rights. To Petitioner Preserve BAM's Historic District, Inc.'s knowledge, there is no pending application for the rezoning.

29. The last critical characteristic of the block is provided by the housing on the side of St. Felix Street, opposite to the Church, Music School, and BAM. This opposite side of St. Felix Street consists almost entirely of row houses almost all of them three to four stories high and built between 1855 and 1859. The Designation Report recognizes this row as being one of the best preserved housing rows of the entire Historic District. (Designation Report pg. 3).

30. For the many reasons expressed below, we submit that the Commission's approval of height of the proposed new building at 265 feet, and bulk for the proposed new building at 153,300 are illegal, and achieved by arbitrary and capricious decision.

⁴ Petitioners hope to be able to provide more accurate figures in lieu of the estimates.

III. HEARINGS FOR ISSUANCE OF A CERTIFICATE OF APPROPRIATENESS

31. As the Landmarks Preservation Commission once said, in denying a certificate of appropriateness for a tall tower to be added above Grand Central Station,

“Landmarks cannot be divorced from their settings – particularly when the setting is a dramatic and integral part of the original concept. The Terminal, in its setting, is a great example of urban design. Such examples are not so plentiful in New York City that we can afford to lose any of the few we have. And we must preserve them in a meaningful way – with alterations and additions of such character, scale, materials and mass as will protect, enhance and perpetuate the original design rather than overwhelm it.” Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 118 (1978).

32. Unfortunately, this wisdom – and precedent – was not followed in the current case.

A. THE PUBLIC HEARING OF JUNE 23, 2020.

33. Gotham Development formally presented its proposal to the Commission at a public hearing on June 23, 2020. The presentation was written and oral; the written part is in two parts dated June 23 and August 4 respectively. In sum, Gotham urged that the subject lot adjoins the Bank building lot and that the two should be related by a transitional building on the

vacant lot that would be a little more than half the height of the Bank building and would, thereby relate to one-another by suggesting an imaginary “whoosh” of rising structures. (Presentation 6-23-2020 pg. 30). Gotham referred to the next highest building in the Historic District – a 14 story apartment house in the District and three blocks away – as a basis for adding the heights of that building and the Bank building, then dividing by two, to get an average that supported the chosen height of 285 feet for the proposed building.

34. The reference to the other apartment house was the only substantial reference to any other portion of the Historic District that mattered for purposes of designing and planning the proposed building. Thus Gotham did not propose that the new building should relate in any way to the BAM or four row houses that bordered the subject lot on its other side, buildings that were perhaps deemed unimportant because a height relationship with them may have invited inquiry about whether a considerably lower height shouldn’t be considered.

35. Otherwise, Gotham rather frequently mentioned that the building as proposed was desirable because it would provide about 20,000 square feet of new space for the Brooklyn Music School, and would provide housing of which 30% would be “affordable” (to what degree was not mentioned). This prompted the Commission’s General Counsel to admonish the Commissioners that such political or social factors should not be considered; the only proper issues to consider concerned such architectural and aesthetic issues as height, positioning of bulk, colors and materials, etc. There was no mention of other statutory factors such as promoting preservation and public enjoyment of designated landmark properties.

36. In their questioning and comments, many of the Commissioners assured that they strongly support musical education and low-cost housing (although they recognized that it would not be proper to weigh those factors in their consideration). Otherwise, the Commissioners, on

the whole, expressed in strong terms their belief that the proposed building was far too massive and high. They raised concerns regarding architectural and other aesthetic details. But several felt that getting into deeper discussion of misgivings regarding details made no sense unless Gotham came back with a drastically reduced proposal for the structure.

37. More specifically,

Each speaker strongly criticized the basic concept of erecting a tall tower on this particular block. As Commissioner Goldblum, the first speaker, stated, “I think that putting [a high-rise element] on this block fails the most basic test of appropriateness in terms of scale, in terms of urban scale. I don’t think we would naturally feel that a high-rise building on this block would be appropriate.” He continued that, “in order to preserve the context of the block, one should either limit the St. Felix height to the town houses that were originally there, or, at the very most, to BAM, which constitutes a very significant percentage of this side of the block.” (Id. 77-81).

The next Commissioner to speak, Michael Devonshire, said that “Commissioner Goldblum took the words right out of my mouth. . . . The massing should be on the other side of this building so that the St. Felix Street scale is maintained.”

The next Commissioner, Jeanne Lutfy, endorsed what “both Michaels said,” but she went another step further. “[T]he building’s too tall,” she said. “It’s too tall for the street, and it’s too tall with respect to this landmark building [i.e. the Bank Building]. . . . It shouldn’t in any way compete with

the – with or get in the way of the majesty of this building, of Williamsburg Savings Bank building.” (Id. 82-85).

Commissioner Jefferson agreed with the previous speakers but emphasized preserving “the singularity of the tower” [i.e. the Bank Building]. “[W]hatever they do, whatever they redesign, there should be space around this building. . . . The [new] building should not overlap it. It should make sure that the tower is the dominant thing, not subordinate to their structure.” “I think,” he continued, “the whole idea of making the shoulder [i.e. a pronounced set-back of the Bank Building somewhat more than half way up its 512 foot height the same height of the tower doesn’t make any sense to me. I think the whole project has to be reduced in scale. The scale is . . . too tall.” (Id. 87-88).

Commissioner John Gustafsson endorsed testimony of three public opponents, one who, in his words, said “the building is alien to the district because it ruins the memory of the architectural drama of the contrast between the low scale on St. Felix and the Williamsburg Bank;” another said that the proposed new building “was shoehorned and was not part – that the district was not a skyscraper district;” and the third who “testified that it ruined the – or disrupted the historic sense of place.” Commissioner Gustafson declined to go into “any of the other details because I think there’s such a dramatic change has to go in this that it may affect the rest of the way they design the structure.” In other words, this says, the design should start from scratch and radically differ from what had been presented. (Id. 88-89).

Commissioner Adi Shamir-Baron shifted the emphasis somewhat. She pointed out that the proposal “tries to conjure the scale, in a sense, of the institutional buildings” on the block, rather than the music school buildings that had been built originally as row houses. “That is what makes . . . its size and the kind of scope of this proposal inappropriate.” (Id. 90-91).

Commissioner Holdford-Smith “agree[d] with a lot of the comments that have already been said about the size and replacement of the bulk of this building . . . ‘ . there’s a lot to be done here.” (Id. 91-92).

Commissioner Diana Chapin also said that she agreed with much of what Commissioner Goldblum expressed. “[T]he massing seems too large and inappropriate between BAM and the church and . . . should be on a scale on that side with the institutions. . . . [I]t’s very important that the new building not appear either as an addition or as competing with the Williamsburg Savings Bank And we need to make sure that the bank has – really is – stands apart from and has appropriate hierarchal relationship with the new structure.” (Id. 92-93).

Finally, without directly expressing a personal opinion, Chairperson Carroll summarized the practical gist of what had been said, being “that we’re obviously not going to vote to approve this today.” And she added that “there seems to be some, among some commissioners, some openness to do a taller building here, . . . but that you’ll need to restudy the overall height, the massing and the placement of the massing, the materiality, and the

relationship between the new building and One Hanson Place.” (Transcript 6-23-2020, pp. 77-94).

38. Many of the speakers also expressed their strong sympathy for the social and political aspects of the project – i.e. the welfare of the Music School and the provision for affordable housing – notwithstanding the earlier warning of the LPC General Counsel that such statements are inappropriate because the issue of appropriateness rests exclusively on architectural and related issues as set forth in the Landmarks Law. (Id. pp. 74-75).

B. THE PUBLIC HEARING OF AUGUST 4, 2020.

39. A new design came back quickly enough to schedule it for consideration about six weeks later, on August 4, 2020. Even viewing the comments of Commissioners on June 23 as liberally as possible in favor of the Chair’s evident desire to allow some degree of tower, it is hard to reconcile the new design with the expressed intent of the Commissioners that it should be smaller; that there should be little or no disturbance to views of the Bank Building from any vantage point, but especially from and toward St. Felix Street; and, the character, bulk and design aspects of the new building should in all ways protect the magnificent experience of viewing the Bank Building.

40. As in the past, the applicant presumed that a high tower was appropriate. It never justified that assumption (other than to contend that it should relate to the Bank Building because the two would be neighbors in the southern portion of the block), hence the “whoosh” drawing at Applicant’s June 23 Appendix, pg. 30. Nothing was said about the fact that there would be more mutual sharing of property line on the northerly than on the southerly between the new structure

and either the Bank building on the South or BAM and BAM Fisher because the mutual property line extends the entire 200 foot distance from Ashland Place to St. Felix Place, whereas the common property line between the new structure and One Hanson Place was only a little more than half that.

41. No serious design justification was provided and no serious necessity was pleaded. Implicitly, the height was something applicant wanted, period. Accordingly, the theory at all times rested exclusively on the relationship of the new building to the Bank Building.

42. The applicant's revision reduced the height by 20 feet, from 285 to 265 feet, or about seven percent. (Applicant Appendix 8/4/20 pg. 104).

43. Nor was bulk materially reduced. It went from 159,000 gross square feet to 153,300 square feet, a drop of 3%. (Id.)

44. It appears that bulk is moved to an extent towards Ashland Place, at most floors by as much as about 36 feet, or 18%. That seems rather significant from the point of view of people with apartments on the Ashland side of One Hanson Place adjacent to the proposed construction side if they will lose views. That is not analyzed. From the St. Felix side, there may be some advantage for the residents immediately across the street who might gain a slight sense of openness. But whether the 265 feet of tower is set back 12 feet or 48 feet,⁵ it will still be a 265 foot tower and will still drastically change their views and, therefore, diminish their sense of being in a community of relatively low buildings. (Id.) And it will make little to no difference to residents who have only a diagonal view toward these lots as their view of the first few stories disappears as the angle of view becomes more acute. But that would have much less effect on the

⁵ There is some uncertainty about dimensions as the height drawing says (in very small letters at the lower right corner) that it is not drawn to scale.

view upwards to the portion of new tower that is visible because it within sight of probably anyone on the sidewalk or looking out a window. (Id.)

45. The comments from the Commissioners following this presentation almost as if they came from a whole new set of officials. First, there was not a word about sympathy for the Music School or the need for low-cost housing. Second, the modest move of bulk from one area to another was lauded to the extent of implying that there was no longer any serious concern about such things as height which had taken up so much attention at the previous meeting. Third, the Commissioners delved into details in a way they had previously refused to because there were too many overwhelmingly major flaws. All this despite the fact that very little had changed other than modest shifting of mass, and that had negatives as well as positives. But the negatives were not discussed. (Hearing transcript 8/4/20).

46. In this context, the silence concerning political and social issues was deafening.

47. The Commission voted to approve the plan at the end of the August 4 meeting. Nothing had changed materially from the first plan. The flaws were as patent as before. Although the rationale for acceptance was not cogently expressed, it appeared – by dint of eliminating other possible explanations – that the desire to provide more space to the Music School and to facilitate some “affordable” housing had won out and become the deciding factor. Those factors were not mentioned by the Commissioners at the August 4 hearing, almost as if the message had finally gotten through that such a reason must not be mentioned.

48. Petitioners can do no more at this stage than surmise that the socio-political factors became the decisive ones. But evidence on the issue is being sought through FOIL requests, and other discovery will be requested if necessary and appropriate.

IV. THE COMMISSION RULED INCORRECTLY IN LAW AND PROCESS, AND
ARBITRARILY AND CAPRICIOUSLY

49. An owner who wishes to build or remodel on a lot that is part of an historic district must obtain one of two types of Landmarks Commission approval. In very simple cases – and this is not claimed to be such a case – a Certificate of No Effect is available. The second option is a Certificate of Appropriateness, and that is what the developer applied for pursuant to NYC Admin. Code § 25-307.

50. The process requires application of several sets of criteria:

(a) “[T]he commission shall determine whether the proposed work would be appropriate for and consistent with the effectuation of the purposes of this chapter.” (Admin Code § 25-307(a)). “Appropriate for and consistent with . . .”: two distinct obligations, even though it is common to conflate the full statutory phrase and refer in shorthand just to “appropriate.” For convenience, we occasionally do that in Petitioners’ papers. In fact, the concepts are distinct, though they may overlap – they both generally concern achieving the objectives of the Landmarks Law. But we submit that they at least have different emphases. Logically, though not necessarily invariably, “appropriate” may involve a degree of exercise of judgment. Examples would include matters such as aesthetic issues and weighing the comparative advantages and disadvantages of alternative solutions. “[C]onsistent with the effectuation of the purposes of this chapter,” on the other hand, suggests a more objective quality: a solution must not be inconsistent with the express provisions of the Law, nor with its purposes. (Cf. dissent in Save America’s Clocks, Inc. v. City of

New York, 33 N.Y.3rd 198 (2019)). So, for example, as the Law requires promotion of the preservation of landmarks and the public's enjoyment of them (NYC Admin. Code § 25-301), it would be inconsistent with the Law to disregard the fact that a particular solution does not accomplish either.

(b) In the case of proposed work within an historic district, the Commission must consider "the relationship between the results of such work and the exterior architectural features of other, neighboring improvements in such district." (Admin Code § 25-307(b)(1)(b)). As noted in footnote 3 above, "neighboring" is used broadly and comprehensively. It surely applies in this case to the entirety of a district as small as the BAM District. Here is an obligation the Commission patently failed to discharge: by giving no consideration in its Decision to the impact on the neighboring BAM portion of the block, nor the impact on the neighboring row houses both on the BAM portion and on St. Felix Street opposite the proposed project, nor the impact on District properties beyond St. Felix Street.

(c) "In appraising such effects and relationship, the commission shall consider, in addition to any other pertinent matters, the factors of aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color." (Admin Code § 25-307(b)(2)). These factors notably focus on aesthetic considerations, but also encompass "historical" and thereby, by implication, other factors that justify the designation of a landmark or historic district, such as cultural significance. Thus, "other pertinent matters" include any and all of the considerations alluded to in sub-sections (a) and (b) above. Perhaps the most important function of Sec. 25-307(b)(2) is its implicit emphasis on the advice given to

the Commissioners in this case by their General Counsel not to be led astray into issues of political or social policy that go beyond the statutory bounds. (Admin. Code. 25-307(a), (b)(1)(b) and (b)(2); Admin. Code 25-301; see also Hilbertz v. City of New York, 64 Misc. 3d 697 (N.Y. Sup. Ct. 2019), holding that consideration must include reasons why site was designated, and prohibition against consideration of extrinsic issues such as expense of compliance or public benefit that might be achieved by lenience in enforcement.

(d) “In appraising such effects and relationship, the commission shall consider, in addition to any other pertinent matters, the factors of aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color.” (Admin Code § 25-307(b)(2)). This appears straight-forward . . .

(e) . . . Except perhaps for the phrase, “in addition to any other pertinent matters.” But there is one source left to which that must refer, the eloquent statement of legislative purposes and declaration of public policy in Admin. Code § 25-301. In part, it declares,

“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 [i.e., at a minimum, designated landmarks and historic districts] 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. (Emphasis added.)

This broad category, at a minimum, establishes the basis of interpretation of all else in the Landmarks Law. The predominant purpose is to preserve, and that should be a central concern in all administration of the Law.

(f) A final source for construction and application of the Law is the designation report relevant to the particular case. This may designate particular elements of special importance, and others that the designators might identify as being later additions that actually detract from the quality of the structure. (See Hilbertz v. City of New York, 64 Misc. 3d 697 (Sup. Ct. Kings Co. 2019)).

A. THE COMMISSION'S FORMAL DECISION, AUGUST 4, 2020

50. On August 4, 2020, after hearing further presentation from the applicant, and after hearing comments from the Commissioners, a proposed decision was read aloud to the Commission. That was followed by a vote of nine ayes, one nay, and one abstention based on recusal. (Hearing transcript 8/4/20 pp. 64-70).⁶

51. The Commission's formal decision barely touches on such overarching considerations, but dwells on design minutiae. Attention to such design minutiae is required by Admin Code § 25-307 (b)(1) and (2), but not to the exclusion of "any other pertinent matters" such as how the design and concept relate to the bigger consideration of protecting historic districts. (Id. at (b)(2)).

52. The Commission materially failed to consider fundamental issues. In general, it treated the matter as isolated and concerning only the block containing BAM and the Bank building, ignoring the purposes of the Commission in creating the District, and ignoring the detrimental impacts outside of that block as well as inside. The following sub-paragraphs address the most serious errors in the order in which they appear in the Decision. Except for the first sentence entered below as a sub-paragraph, these are set up in the Decision as un-numbered

⁶ The reading at the meeting is substantially similar to the written decision setting forth the decision. It differs occasionally in ways that could be accounted for by typographical errors and/or by minor instances of mis-reading, but do not, at least on the surface, appear intended to alter any meaning. We have relied on the printed version.

sub-paragraphs to the general introduction that “the Commission APPROVED THE PROPOSAL WITH MODIFICATIONS,⁷ finding . . . “

(a) “The Commission NOTED that while much of the Brooklyn Academy of Music Historic District is comprised of three and four-story row houses this particular block within the district is unique in exclusively containing buildings of a larger scale and institutional uses, including the Brooklyn Academy of Music, the BAM Fisher Building, the Williamsburgh Savings Bank Building individual Landmark, the Hanson Place Central United Church, and the Brooklyn Music School.”

The errors are numerous and egregious:

(i) “This block” is not “unique in exclusively containing buildings of a larger scale” At the time of designation, the District included, at the opposite end of Hanson Street within the District, a fifteen story residential building. Thus, two taller buildings were included in the District at the extremities of the District, in recognition of their particular importance. They are not promoted in the Designation as examples of what ought to be permitted elsewhere in the District. Rather the Designation focuses most strongly on the predominance of row houses and their contribution to creating a recognizable District-wide community.

⁷ The modifications provision reads: However, in voting to grant this approval, the Commission REQUIRED: that the applicant work with staff to reduce the scale of the school entrance on St. Felix Street; and to soften and modify the scale of the streetwall façade on Ashland Place to be more in harmony with the rest of the block.”

- (ii) Even “this block” itself does not “exclusively contain[] buildings of a larger scale. . . .” It also contains four row house buildings adapted for music school use. They are not uniquely tall. They remind that “this block” started out, after conversion from farm land, as almost exclusively row houses.
- (iii) Except for the Bank building, the other buildings on “this block” are not egregiously tall. Four are row houses. The two BAM buildings do not exceed 100 feet. The Church height must be ascertained, but it is probably not significantly different from 100 feet, and, except at its ends, the roof is not visible from the street. Yes, 100 feet may be more than the height of a typical row house (although their floor heights are surely often at least 12 feet). But, at this nascent stage of proceedings, let us conservatively assume that row houses are often 50 feet high. That would mean that, generally, the buildings on “this block” are 100% higher than the neighboring row houses. Is that a reasonable basis for permitting a 265 foot high building on “this block”? That issue has not even been addressed in the Commission’s proceedings.
- (iv) The very idea that “this block” should be treated as a unique and distinct portion of this very small Historic District (two full blocks and one and a half partial blocks) is problematical to say the least. Clearly, the 265 foot tower will be visible – and offensive – to neighbors on the other side of St. Felix Street. Almost equally

certain is that such a high tower will be seen over the row houses of the next short portions of row house blocks. Such effects are required to be considered. No rational basis has been offered for not considering the integrity of this District as a whole, nor the high probability that this project will affect neighbors, and the character of the District, throughout. Certainly the Commission, when it designated the District, did not itself think of the District as a collection of sub-districts, each with its own unique character and to be administered on a block by block basis. While most of the District was covered with row houses, the two ends of Hanson Place were marked by relatively high buildings that seemed to mark the end of the District. The Commission was well aware of this aberration. In its description of the Bank building, it mentioned that there was another building, 15 stories high, and a few blocks away and within the district. (Designation Report pp. 2 through 5). It is also rather overwhelmingly likely that the Commission would have been aware at the time of designation that including the Bank building in the Historic District, even though it was already protected by landmark designation, would add to the protection of the Bank building by protecting it from damage caused by alteration or building of other buildings near by, as well as protecting it under the landmark rules only against the impacts of work on the landmark site itself. (See Admin Code § 25-307).

(v) Nothing, however suggests that the presence of this taller buildings was meant to suggest that the Commission, as it might see the opportunity or be asked to act, should encourage the spread of such tall aberrations and the consequent eventual death of the character the Commission sought to protect. To the contrary, the Commission expressed its “hope[] that Historic District designation will help to insure the protection of the architectural character of the area.” Not just parts of it, but “the area.” (BAM HD Designation Report pg. 5).

(b) The “new building will infill a vacant through-block site with frontage on St. Felix Street and Ashland Place, completing the streetscape on both blocks.”

(1) The new building will do more than “infill”; it will overwhelm. That has not been appropriately considered.

(2) It is noted that “this block” has very quickly evolved into “both blocks,” whatever that may mean.

(c) The “block features a variety of building heights and types and is uniquely composed of institutional structures within this historic district, including, on St. Felix Street, the Brooklyn Music school combined rowhouses and the Central United Church, and on Ashland Place, the Williamsburgh Savings Bank tower and BAM, therefore the transitional nature of the lot enables the new building to participate in a larger scale.”

(1) If this is meant to constitute a rational and understandable explanation for the exaggerated height of the subject building, we submit that it fails. Factually, again, to refer to heights that, other than for the Bank building,

hover in the area of 100 feet of height, does not provide a convincing premise for allowing another aberration, that the Commission does not claim affirmatively enhances the District in any way other than to “infill” a long-vacant lot on a block that is otherwise fully developed. But, although that rationale may justify a building of row-house height or, possibly, of BAM height, the Commission makes no rationale for jumping to the conclusion that “infilling” justifies extra height.

(2) Its unexplained conclusion that “therefore the transitional nature of the lot enables the new building to participate in a larger scale” is a non-sequitur.

(d) The “massing and placement of the building on the lot will include multiple setbacks that reduce the bulk as it rises, with much of the upper floors situated adjacent to the back of the bank tower, thereby preserving views of both the bank tower and church while resulting in a harmonious composition.”

(1) This misleads more than it enlightens. First, the “multiple setbacks” do not transform the basic shoe-box shape of the proposed building into a soaring shapely masterpiece. These “multiple setbacks” are not very multiple (at least beyond the first few floors) and cannot be compared to the variety, lightness, and coda of the long narrow tower leading to the clocks and dome of the Bank building.

(2) “[U]pper floors situated adjacent to the back of the bank tower,” do not, unless they are perhaps totally transparent, tend to “preserv[e] views of . . . the bank tower.” And, they surely would interfere with views *from* the Bank building.

(3) Views both from and to the Bank building will be inhibited by new tower construction on its southern and western portions on the St. Felix side.

(e) The “overall height of the new building will be significantly below the first major setback of the bank tower, maintaining that building’s visual prowess, and primacy in the streetscape and the historic district.”

(1) The evidence does not appear to sustain this conclusion. Rather, it indicates that, even when based upon a rendering made from a point of view approximating the height of the first major setback of the bank tower, one at best would see little to no base portion of the Bank building, and the visible portion, starting at the base of the thin upper tower, lacking its base, would have the look of a sore thumb or similar appendage. That is not what would generally be thought of as visual prowess and primacy in the streetscape.

(2) If one then takes into account that changing the viewing base point from the first major setback to eye level of a person standing at street level, the view gets interrupted by any intervening jutting material such as, for example, the shelf of the setback itself.

53. In sum, the analysis of the Decision strains credulity, and does not impart an impression of careful reasoning buoyed by the recognition that Admin Code § 25-301, at a minimum, demands interpretation of any uncertainties of the law in a manner that takes into account the policy aim of the Law to preserve the City’s culture and beauty and facilitate public learning and enjoyment of such designated treasures. The sad and gnawing conclusion is that the Commission’s turn-about vote after its initial strenuous criticism of the proposed plan was not

made with enthusiasm nor a sense that this outcome would serve to better the beauty and enjoyment of this site and its dedicated surroundings.

IV A: APPLICANT ENTITLEMENT? COMMISSIONERS' OBLIGATION

54. The Applicant came into the first public meeting on June 23, 2020, with what seemed a strange expectation of entitlement. It wanted a 285 foot high building. It sought to justify that, not on the basis of what would be appropriate and consistent, but on the implicit assumption that it was entitled to a building of the height and bulk that it felt it needed. It gave no hint of consideration for what the consequences of its plan would be on the Bank building or others on the block, or residents along the other side of St. Felix Street and beyond.

55. All without any concern that it might not be able to remedy its zoning problem that rendered the lot unbuildable.

56. The fact is that it was right. In the end, it got substantially what it wanted and with very little in the way of modifications.

57. The big question is why.

58. The comments from Commissioners at the end of this first session were generally appropriate. (One would certainly have to exempt the comments on sympathy for the Music School and "affordable" housing.) At that time, the Commissioners largely did their job.

59. The Chair's comment at the close, that "there seems to be some, among some commissioners, some openness to do a taller building here," did not quite accurately describe what seemed rather to be a quite uniform insistence by the other Commissioners that the height must be drastically reduced. Was this an innocent misunderstanding? Or a subtle hint to other

Commissioners that they should be rethinking their positions? The Chair did then go back to a more accurate statement to the developer that “you’ll need to restudy the overall height, the massing and the placement of the massing, the materiality, and the relationship between the new building and One Hanson Place.” (Transcript 6-23-2020, pp. 77-94). The end result was uncertainty, at least to an outsider.

60. Six weeks later, matters became much clearer in terms of end result, if not of how the Commissioners got to that result. The Commissioners expressed appreciation for the minor concessions the developer offered, made some small objections, and voted 9-1-1 in favor of granting the Certificate of Appropriateness.

61. But the 20 foot diminution of the height, and the 30 foot shift in bulk did not cure the major problems the Commissioners had identified and strenuously criticized on June 23. The building was still too high – by at least 165 feet in the eyes of most Commissioners, and more in the eyes of others who urged that row-house height would be the right height. Moving mass somewhat shifted the burden, but it left the same basic problem of a very tall (relatively) building straddling a block that, except for one building at one end, generally tops at 100 feet high. Aside from that, the revision actually added some building length, presumably to counterbalance the loss of 20 feet of height while retaining essentially the originally planned amount of total floor area.

62. Did the applicant lose anything by these modest shifts that maintained most of the height and virtually all of the floor area? Not that has been articulated.

63. The magnitude of the difference between the Commissioners’ highly negative statements on June 23 and their virtually flat-out capitulation on August 4 must have a reason. That will be addressed below. The issue here is whether the applicant has a legally supportable

right to what he demands, and whether the Commission is justified in succumbing to the demand.

64. Both questions are answered by the essence of the Landmarks Law. It is not a plea to owners to take the public welfare into account in their building plans. That went out with the adoption of a zoning law in 1916, and centuries earlier with the common law of nuisance. The Landmarks Law gives significant authority to the City to regulate property bulk and design for the public welfare. See Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978). In addition, the Landmarks Law imposes on the Commission the obligation to decide questions of appropriateness by application of legislative standards and with a view to the public welfare. (See Admin Law §§ 25-301 and 25-307).

65. Here, the Commission's decision addresses public welfare to the extent of opining that the proposed building will fill a gap of open space in the development of the entire block. Fair enough. But filling that gap does not require filling it to a height of 265 feet where most surrounding, and neighboring, buildings stop no higher than 100 feet. Furthermore, that rationale is compromised by the willingness to set back from the sidewalk and pile bulk into the mid-block. But the Commission leaves these issues essentially unaddressed.

66. The Commission also expresses very little interest in parts of the District beyond the western end of "this block," and precious little to even that. It says nothing about whether the proposed new building, at a height of more than 250% of almost anything in the District beyond the "this block" side of St. Felix Street will adversely affect the character of that area, although the fact of such an effect is almost certain. The fact that this District is a unit, and a small one at that, bypassed the Commission – or at least its record – in these proceedings.

67. The result is arbitrary and capricious and violates the Law.

V B: UNTOWARD ROLE OF SYMPATHY FOR SOCIAL AND POLITICAL
ISSUES

68. The Commission is designed to be a quasi-independent body. Its charter defines its mission, its mode of operation, and its limitations. Its charter requires decision-making by a group of experts in relevant professional fields. The strength of its authority rests on such expertise and zealous adherence to the standards set by its charter. Hence the sage advice of its General Counsel that Commissioners must decide applications for certificates of appropriateness on the basis of those standards, not on the basis of social and political considerations.

69. Too many indications cast doubt that the system worked here, and suggest that it may be susceptible to undue influence in other instances. Those indications pervade this Petition. They include (a) the susceptibility of the Commissioners to a temptation to support solutions that will promote the general public welfare, such as by aiding music schools and low cost housing; (b) the multiple expressions of such desire in this instance; (c) the sharp and weakly explained reversal of position of the vast majority of Commissioners between the June 23 hearing, and the radical turn-around at the August 4 hearing though significant changes in the plan had not been made.

70. Less tangible is the Mayor's well-known policy in favor of "affordable" housing. It is surely likely that the Commissioners were aware of this policy; many of them expressed sympathy for it at the June 23 hearing, despite their General Counsel's urging that they should not.

71. Whether the Mayor or personnel of his Office did, or did not, more directly encourage favorable action for the project is not known. But it is the subject of outstanding

FOIL applications and, if necessary and appropriate, may become subjects of discovery in this proceeding. It is certainly not unknown that political pressure may be asserted to bring about development favored by government officials. Cf. Municipal Art Soc. of New York v. City of New York, 137 Misc. 2d 832, 837 (Sup. Ct. N.Y. Co. 1987),

72. It appears also that a governmental structural practice may also plays a role. Charter § 3020(2)(a) provides that Landmarks Commissioners are appointed for three year terms; when a terms ends, the Commissioner automatically remains in office until appointment and installation of his or her successor. On information and belief, the common practice is not to extend terms formally, but to permit incumbents to remain beyond expiration of terms. This may be for an extended period. For example, the Commission's website section naming the current incumbents and, in some cases, the date of their appointment, includes the dates of appointment of four current Commissioners. Three of those were appointed in 2007 to 2010 (Diana Chapin, 2007; and Michael Devonshire and Michael Goldblum (2010).

<https://www1.nyc.gov/site/lpc/about/commissioners.page> While we have found no explicit statement that these persons were not formally reappointed, it is disappointing that a public record of such a matter apparently does not exist. We anticipate requesting discovery on this issue. Obviously, if incumbents do, in fact, continue in office without formal reappointment, simple indication of the Mayor's interest in a given case may easily suffice to influence the vote.

73. If the system is as we think very probable, then the rule precluding Commissioners from considering such political/social issues as inclusion of low rent housing in the project inevitably becomes unrealistic. The decision becomes the Mayor's, not the Commission's.

V C: RESPONDENT'S FAILURE TO COMPLY WITH ITS OWN PRECEDENT

74. Around 2009, the Commission considered whether to allow enlargement of the former Salvation Army building that had been acquired by BAM with a view to remodeling and enlarging it to create BAM Fisher. That site is immediately adjacent to the subject lot belonging to Gotham Development on Ashland Place. On the other side, the Salvation Army lot adjoins BAM.

75. The Commission allowed the reconstruction of the Salvation Army site, and it was built to almost exactly the 100 foot height of BAM. Petitioners' information is that BAM sought to build to 170 feet of height but that the LPC refused to permit anything over 100 feet.

76. New York law recognizes a rule of stare decisis for bureaucratic agencies quite similar to the rule applied to courts. Stare decisis requires agencies to either follow their own precedent or to avoid following the precedent on either of the grounds that the agency had wrongly decided the precedent or that the facts of the two cases justify distinguishing one from the other differ. so materially that a distinction may reasonably be drawn. Any such decision not to follow stare decisis must be articulated in the decision itself so that the judgment of the agency can be readily reviewed by the courts. Like courts, administrative agencies are subject to a rule of stare decisis. As with courts, the rule is not absolute: an agency in general must follow its own precedents; but, it may avoid doing so by either concluding that the precedent was wrongly decided, or that the present case is sufficiently different on its facts to make a different decision appropriate. In either case, the agency, as part of its decision must recite the basis for the decision, which must be rational and conform to law. See e.g. Matter of Charles A. Field Delivery Serv., Inc., 66 N.Y.2d 516 (1985); Klein v. Levin, 305 A.D.2d 316 (1st Dep't 2003); Hamptons, LLC v. Zoning Bd. of Appeals of Inc. Vill. of E. Hampton, 98 A.D.3d 738 (2d Dep't

2012); 20 Fifth Ave., LLC v. New York State Div. of Hous. & Cmty. Renewal, 109 A.D.3d 159, 164 (1st Dep't 2013); Stahl York Ave. Co., LLC v. City of New York, 76 A.D.3d 290, 299 (1st Dep't. 2010) (applying rule in landmarks case). "The policy reasons for consistent results, given essentially similar facts, are, however, largely the same whether the proceeding be administrative or judicial – to provide guidance for those governed by the determination made (Matter of Howard Johnson Co. v. State Tax Commn., 65 N.Y.2d 726 (1985)); to deal impartially with litigants; promote stability in the law; allow for efficient use of the adjudicatory process; and to maintain the appearance of justice. . . ." Matter of Charles A. Field Delivery Serv., Inc., 66 N.Y.2d 516, 519.

77. The Certificate of Appropriateness for the BAM Fisher project [Exh.], does not specifically point to a requirement to reduce height to 100 feet, although it alludes to such a possibility by reciting that approval was conditioned upon reducing bulkhead height.

"Based on these findings, the Commission determined the proposed work to be appropriate and voted to approve it. However, in voting to approve this proposal, the Commission required that the proposed elevator bulkhead be lowered as much as possible; that the depth of the proposed patterned brickwork be increased; and that a rendering of the rear of the addition as visible from St. Felix Street be submitted to the Commission. Subsequently, the staff received five revised drawings dated July 14, 2009, prepared by Hugh Hardy, R.A. Accordingly, the staff reviewed these drawings, and found that the elevator bulkhead has been lowered 1'8; veneer has been increased to 3 5/8;" that the rear of the addition will be clad in gray

stucco to match the side elevations; and that the proposal approved by the Commission has been maintained. Based on this and the above findings, the drawings have been marked approved by the Landmarks Preservation Commission with a perforated seal, and this Certificate of Appropriateness is being issued.”

78. Three things in particular support the inference that the Commission required deference to the maximum 100 foot height limitation. First, that was at least the approximate height of BAM, it was therefore appropriate to keep the height of BAM Fisher to the same level. Second, the Commission (by staff action), did obtain a reduction of the elevator bulkhead, thereby indicating an intention to keep the height down to a limit. Third, the final built height of BAM Fisher is generally a very little below the height of BAM, as best we have been able to determine.

V D: THE COMMISSION’S DECISION IS NO MORE THAN ADVISORY AND, THEREFORE, ILLEGAL

79. It is generally considered unwise – and, therefore illegal – for courts to make advisory decisions, or to address hypothetical issues. (See NYJur Declaratory Judgments, particularly §§ 33 and 35; NYJur Constitutional Law § 48). Premises for such rules include conservation of judicial time; avoidance of making decisions on insufficient information or hypothetical suppositions which may not come to pass or assume a form which renders the court’s earlier decision unnecessary, or compels reconsideration on the basis of new facts; etc. (Id.)

80. The LPC has issued what is nothing more than an advisory opinion, impermissible under the law.

81. The same considerations must apply to administrative agency proceedings, especially because premature administrative action results in premature judicial action, and on an accelerated Article 78 basis.

82. The risks and practicalities in the present case are fairly self-evident. As applicant acknowledges, present zoning does not allow it to build anything on its site. The zoning capacity of the lot has been absorbed by over-building of the Bank building. Gotham Development surmises that it will have to secure an upzoning of certain lots including, in addition to the subject proposed building site, the Bank, Church and Music School lots – that is to say, all of “this block” other than the portion owned by BAM. Certain transfers of air rights will have to occur. We understand that no request for rezoning has been filed as of a recent inquiry. We have no information concerning the status of air rights transfers. (Applicant Appendix 8/4/20 pp. 127-128).

83. Petitioners have reason to doubt that obtaining the upzoning would be simple. For one thing, upzoning on a selective scale commonly raises legal issues. The City Planning Department could well advise that the more appropriate process is a request for a variance.

84. It should be noted too, that the subject lot has been used for many decades as a parking lot, at least in part for the benefit of tenants, and/or residents of One Hanson Place and/or the Bank. Continuation of that use might be deemed most appropriate, at least by some.

85. Rezoning is initially an administrative agency step, which is then followed by Council/Mayoral approval pursuant to ULURP. The possibilities that such a process will end in nothing or in a different scheme are infinite. Not only does that raise question as to why Gotham

would want to proceed by the cart-before-the-horse sequence, but it imposes on the Court the prospect of a possibly difficult and time-consuming case that may prove pointless or, worse, require relitigation on related but new facts.

WHEREFORE, Petitioners respectfully request judgment determining and declaring that the decision of the Landmarks Preservation Commission in this matter is in violation of lawful procedure, was affected by errors of law, and was arbitrary, capricious and/or an abuse of discretion; that said decision is void; and for such other and further relief as the Court may deem just and proper.

Dated: December 3, 2020

Respectfully Submitted,

S/

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VERIFICATION

The undersigned, an attorney admitted to practice before the Courts of the State of New York, affirms under penalty of perjury that he is the attorney for the Petitioners named in the Petition, the allegations contained herein are true and correct to the best of his knowledge and belief, except allegations stated to be made on the basis of information and belief, and as to those matters he believes them to be true, and bases such belief on documents and persons and other

sources he believes to be reliable. This verification is made by the undersigned because the
Petitioners are not residents of the County of New York which is the location of the office of the
undersigned.

Dated: December 3, 2020

S/

Michael S. Gruen