M-150E. 38th St. House LP-0580

Retain this half of the form and present it to the person at the speaker's table when you come forward to address the Commission.

LANDMARKS PRESERVATION COMMISSION

BUILDING 152-150 East 38th St. House L.P. NO. 0579-0580

CALENDAR NO. ~~69-6~~ 69

FOR DESIGNATION AS A LANDMARK ✓ AGAINST DESIGNATION AS A LANDMARK

NAME Otto TEEGEN

ADDRESS 1220 PARK AVE

I REPRESENT N.Y. CHAPTER A.I.A.

ADDRESS 115 EAST 40th ST. N.Y.C.

LANDMARKS PRESERVATION COMMISSION

BUILDING 152 E 38 St. L.P. NO. [redacted] 0579

CALENDAR NO. 69

FOR DESIGNATION AS A LANDMARK ✓

AGAINST DESIGNATION AS A LANDMARK

NAME Charles E. Hughes

ADDRESS 33661 St

I REPRESENT Mon. Art. Soc.

ADDRESS 115 E 40 St.

The top half of this form goes to the Chairman of the meeting.

Retain this half of the form and present it to the person at the speaker's table when you come forward to address the Commission.

LANDMARKS PRESERVATION COMMISSION

BUILDING 150 E. 38 St. House L.P. NO. 0580 (LP 05 19)

CALENDAR NO. 70

FOR DESIGNATION AS A LANDMARK ✓ AGAINST DESIGNATION AS A LANDMARK

NAME Otto Teegen

ADDRESS 1220 Park Ave

I REPRESENT NY Chapter AIA

ADDRESS 115 E. 40th St. NYC

Retain this half of the form and present it to the person at the speaker's table when you come forward to address the Commission.

LANDMARKS PRESERVATION COMMISSION

BUILDING 150 EAST 38 ST L.P. NO. LP-0580

CALENDAR NO. 70

FOR DESIGNATION AS A LANDMARK _____ AGAINST DESIGNATION AS A LANDMARK X

NAME AUSTIN J. BELTON

ADDRESS 26 BROADWAY

I REPRESENT MRS. SHEILA JORDAN - OWNER

ADDRESS 150 EAST 38 ST.

70
0580

Mrs. Sheila Anne Jordan
150 East 38th Street
New York, N. Y. 10016

known as the 150 East 38th Street House,

Manhattan
Lot 58, Block 893.

342024

Memorandum in re Item No. 70
(LP-0580), (150 East 38th Street,
Manhattan), Calendar of the Hearing
of the Landmarks Preservation
Commission of the City of New York
held on Tuesday, December 27, 1966.

Submitted on behalf of Owner
of 150 East 38th Street,
Manhattan, by Casey, Lane &
Mittendorf, 26 Broadway,
New York, New York 10004

The Landmarks Preservation Commission of the City of New York proposes to designate 150 East 38th Street, New York City, as a Landmark and Landmark Site in accordance with Section 207-12.0 of Chapter 8-A (Preservation of Landmarks and Historic Districts) of the Administrative Code of the City of New York. In connection with the public hearing to be held on December 27, 1966 with respect to this proposed designation, the attorneys for the owner of this property, Casey, Lane & Mittendorf, 26 Broadway, New York City, respectfully submit this memorandum in opposition thereto.

Basis for proposed designation

The proposed designation of 150 East 38th Street as a landmark is apparently based upon a survey of the property conducted by the staff of the Commission in 1964 and also upon information furnished to the Commission by the National Sculpture Society, 250 East 51st Street, New York City. In the survey of 150 East 38th Street and of 152 East 38th Street (which is also proposed as a landmark [Item 69 (LP-0579) on Calendar of Hearings held on December 27, 1966]), conducted by the staff of the Commission in 1964, the buildings are described as follows:

> "These are two private dwellings, #152 being set on the rear of lot 57 with a deep yard in front. Its adjoining neighbor, #150, is set on the street end of lot 58, but its main entry is on the side facing, and thus sharing, the yard next door.

#152 is a 3-storey building which was begun in 1857 and finished in 1858 for William McCafferty. Lot value: $1,800; with house: $4,000.

#150, now a 4-storey building, was erected in 1861 for Whitehead & Wise. Lot value: $2,000; with house: $5,000. It was originally a 3-storey structure and remained so as late as 1897.

Both of these buildings, originally Italianate in design, have undergone extensive alterations, the most recent having been made in 1934 when they were treated as a single architectural unit and given a Federal-style facade. The architect was Robertson Ward of New Canaan, Connecticut.

In the 1880's and 90's, these buildings were held by the Van Buren family as real estate investments for rental and/or lease income.

According to the National Sculpture Society (see letter in file) the buildings at one time housed the studios of the late Gutzon Borglum, designer and sculptor of the Mount Rushmore National Memorial, and the late John Angel, designer and sculptor of the bronze doors, St. Patrick's Cathedral, New York, and sculptor for the Cathedral of St. John the Divine, New York."

The letter from the National Sculpture Society to which the report makes reference is one dated July 11, 1962, written by Mrs. M. W. Witherspoon on behalf of Mr. C. Paul Jennewein, then President of the National Sculpture Society, to Mr. Platt, Chairman of the Commission. The only statement concerning 150-152 East 38th Street contained therein is:

"In the news we noted that the Landmarks Preservation Commission is to concern itself with historical and aesthetic buildings. Under the latter category seems to be the property at 150-152 East 38 St., New York City, where the great Gutzon Borglum and John Angel had their studios. The building is unique and surely made cultural history."

This information indicates that there are two possible bases, i.e., aesthetic or historical, for the designation of the property as a landmark, and the question thus presented to the Commission under the terms of the landmarks law is: Does the property have "special character or special historical or aesthetic interest or value" sufficient to justify designating the property as a landmark?

Owner's position

The owner's position can be summarized as follows:

(1) This property lacks sufficient aesthetic interest or value to be designated a landmark.

(2) The historical value of the property is seriously in question and is so slight as not to justify designation of the property as a landmark.

(3) If such designation is carried out, it is a taking of private property without "due compensation" as required by the New York State law authorizing the City to so designate property.

As established by the evidence to be presented to the Commission, copies of which are attached as exhibits to this memorandum, the property, 150 East 38th Street, does not possess such qualities as would justify designation as a landmark. Further, designation of the property as a landmark would deprive the owner of a valuable property

right without adequate compensation and is thus a violation of the rights of the owner. This legal question and several others presented by the landmarks law are discussed in the enclosed memorandum of law. The owner of the property is the single individual most immediately and directly affected by designation as proposed and her position deserves special consideration by the Commission.

Lack of aesthetic value

The owner of 150 East 38th Street requested George B. Post & Sons, Architects, 101 Park Avenue, New York City, to prepare an opinion as to the value of the building from an aesthetic and architectural viewpoint. Mr. Lessing Whitford Williams, a partner of that firm and a member of the American Institute of Architects, gave his opinion on this matter in a letter, dated December 24, 1966, to Mr. William Jordan, Jr., husband of the owner. This letter is attached hereto as Exhibit A. Mr. Williams has had personal knowledge of the property since 1934 and is also familiar with the work of the architect of the alterations done in that same year. While expressing his sympathy with the preservation of architectural heritage, Mr. Williams makes the following comments concerning 150 East 38th Street:

(1) It has no artistic relationship to the original brownstone because of the extensive alterations.

(2) The complete alteration of the exterior of the property in 1934 was inspired by Swedish examples of modernization popular at that time but is neither typical of the best or even better architectural work of that period nor of such independent artistic significance as to "justify retention of [the] house in particular in perpetuity."

(3) The architectural design of No. 150 is largely independent of the adjacent property, No. 152, although harmonious with it, and any artistic importance of the latter property is distinct from No. 150.

This opinion goes into much more specific detail than the report of the Commission on the property. This fact, plus the professional standing of the architectural firm which offers it, should add considerable weight to the opinion. The architect has been familiar with the property over a long period of time. He presents a reasoned and objective analysis of the aesthetic qualities of the property from an architectural viewpoint and reaches definite conclusions: No. 152 does not merit designation as a landmark because it is neither typical of a particular style nor artistically significant. Further, the building is not an integral part of the design of the adjacent property at No. 152 and therefore should not be designated a landmark because No. 152 may have such artistic qualities as warrant that property becoming a landmark.

Because aesthetic value necessarily involves subjective taste, the Commission should be more mindful of professional opinion in this area than elsewhere. This analysis of the property from an architectural viewpoint, at the very least, raises serious doubts as to the aesthetic value of the building. The Commission should not proceed to establish the property as a landmark in view of a professional opinion that those aesthetic qualities upon which designation as a landmark would be based are conspicuously absent.

Lack of historical value

The only significant basis upon which this property can be said to have historical value is that two sculptors, Gutzon Borglum and John Angel, had their studios at this address. In the letter of the National Sculpture Society which states this to be true and presumably is the only source of the Commission's information, no explanation or basis for the opinion is given although such is pertinent to the problem of determining the historical value of this property. It is the owner's position that this letter is insufficient evidence of such historical value of the property to justify its designation as a landmark. Further, it is contended that John Angel, one of the sculptors named as having had his studio at that location, did not in fact have such a connection with the property.

As indicated by the statement of Austin J. Belton, which is attached hereto as Exhibit B, efforts were made, in the short period of time allowed to the owner for preparation for this hearing, to verify the statement of the National Sculpture Society that the two named sculptors had their studios at this address. None of the members or officers of the National Sculpture Society contacted by Mr. Belton could provide any information as to the basis for the statement contained in the letter dated July 11, 1962, written on behalf of Mr. Jennewein to the Chairman of the Landmarks Commission. Mrs. Witherspoon, the writer of this letter, did not personally have such information. Mr. Jennewein was contacted by telephone in Tampa, Florida, where he is currently vacationing and he did not recollect any connection between these sculptors and 150-152 East 38th Street, although personally associated with both of them.

As indicated by a letter to Mr. Platt from Mr. Jennewein's secretary, Mrs. H. T. Muzzy, a copy of which is attached hereto as Exhibit C, Mr. Jennewein's personal files also fail to provide any information as to the connection between the two sculptors named and the property at 150 East 38th Street, although a copy of the letter is available.

In contrast to this lack of affirmative evidence of any relationship between the sculptors and this property, there is available to the Commission definite evidence that one of these sculptors, John Angel, did not in fact have any studio

at this address. First and most important is the letter to the Commission from Dr. Henry S. Angel, 79 Willow Avenue, North Plainfield, New Jersey, a copy of which is attached hereto as Exhibit D. Dr. Angel is one of the two sons of John Angel and is in possession of many of his father's diaries and personal records. This letter from Dr. Angel gives the location of each studio of his father from the time of the latter's arrival in this country in 1925 until his death in 1960 and 150-152 East 38th Street is explicitly excluded.

This opinion of John Angel's son is given additional weight by the letter to the Commission from Mr. Cesare A. Contini, 340 West 12th Street, New York, New York, a copy of which is attached hereto as Exhibit E. In that letter Mr. Contini, who was professionally associated with John Angel from 1935 to 1960, states that at no time during that period did John Angel have a studio on 38th Street nor does he recall any statement by the late sculptor indicating that he ever had such a studio.

The net result of the foregoing exhibits must be the conclusion that John Angel did not have a studio at 150 East 38th Street as indicated by the National Sculpture Society. This naturally also brings into question the validity of the opinion concerning Gutzon Borglum and the property. Further, even if there did exist such a connection between these men and the property, its extent in terms of time should be

determined before the Commission relies on such a connection to designate the property as a landmark. Clearly, then, the Commission has before it no affirmative evidence upon which to designate this property as a landmark because of historical value. Rather, the evidence that is available to the Commission at this hearing indicates that the contrary conclusion should be reached.

Conclusion

Based upon the evidence presented to the Commission, the only conclusion which is available is that the property located at 150 East 38th Street does not possess sufficient unique qualities of either an aesthetic or historical nature so as to justify the Commission designating this property as a landmark. Further, such designation would raise serious questions of law, as indicated in the enclosed memorandum, which would provide a basis for judicial reversal of a decision by the Commission to designate the property a landmark. Such a designation would require that the Commission disregard completely the evidence presented herein and would represent an unreasonable and unauthorized exercise of the authority of the Commission.

Respectfully submitted,

CASEY, LANE & MITTENDORF
Attorneys for the Owner of
150 East 38th Street, Manhattan
26 Broadway
New York, New York 10004

EXHIBIT A

COPY

OFFICE OF
GEO. B. POST & SONS
Architects

December 24, 1960

Mr. William Jordan, Jr.
c/o Casey, Lane & Mittendorf
26 Broadway
New York, N.Y. 10004

Re: #158 East 38th Street, New York City

Dear Mr. Jordan:

Upon receipt of your communication my partner, E. Everett Post, and I looked at your residence at the above address, with the appearance of which I have been reasonably familiar since its complete transformation in 1934, having had a friend who then lived nearby. To me, the development of the adjacent house, Number 152, was a very pleasant example of intelligent development of the site, and its architecture an interesting essay in the manner of contemporary Swedish modernization of their classic style. Your house was treated in harmony, which may add, to a degree, to the ensembles.

The criteria of the Landmarks Preservation Society are not known to us in the necessary detail, but generally the justification for restricting future change in private property is the preservation of our architectural heritage, and with this one does not quarrel. This is commonly taken to concern, outside of buildings of clear historical significance, the preservation of buildings which are typical of the best or better work of an architectural era, even including styles not momentarily popular, and of course works of such important architects that their products can be considered as of transcendental importance. Interpretation of such criteria must be of a subjective nature. We can only give you our own reactions, colored as they may be by our general sympathy with the preservation of historic monuments.

As to the era of original construction, your residence has been so thoroughly altered as to have no artistic relation to the original brownstone. This is immediately apparent by comparison with Number 146, which is an almost intact example of a good facade of the period. All that remains in your home is the size of the original openings.

When we come to 1934, we pose ourselves two questions; first, is it typical, an example; second, is it in the near masterpiece "class"? As to the former, I have always regarded it as inspired by Swedish examples of its time. There were published rather extensively at the time, and I had considerable personal interest in them. Part of the appeal was that they were the result of intelligent modernization of what was popular in Sweden in the early part of the nineteenth century, and here the Committee could point to the fact that this is also the date of our Federal style. No guess is possible as to what went on in the architect's mind, even if it be conceded that the architectural magazines made the Swedish achievements very well known at the time. Nevertheless, there remains the question as

COPY

OFFICE OF
GEO. B. POST & SONS
Architects

Mr. William Jordan, Jr.
c/o Casey, Lane & Mittendorf

December 24, 1966

to whether it was typical, I do not feel that it was, and there is considerable doubt that it would contribute sufficiently to a future generation's understanding of the City's culture in 1934.

As to over-riding artistic significance, Number 150 apparently is being considered as an integral part of the design of Number 152. The two properties were, I believe, altered at the same time, and thus naturally in harmony. It may be said that the architectural details of Number 150 are carried out in a design largely independent of those of the adjacent development. It is possible to imagine other designs that would harmonize. The paint color, being the same, is to some degree a reinforcement to the design of Number 152. The one tie between the buildings that may be given greater weight is the addition of pilasters to the party wall between the buildings, which continue the motive of the colonnade across the front of Number 152 and help to frame its garden. Are not these pilasters on that property?

As a personal opinion, Number 152 with its garden and loggia, has much more importance artistically than your home, and most of its charm is independent of yours. Both houses have charm. They were done by an architect, author of considerable charming work in Bermuda, which we have seen and he did well with each, but there is question whether this would justify retention of your house in particular in perpetuity.

The fact that these two buildings housed the studios of two well known sculptors may be the determining factor. This in turn is bound up with whether reference is to the buildings as altered. We note exterior sculpture at Number 152 which might be Mr. Angel's in place, as I recall, of acroteria in the 1934 design. As to the historic importance of use by these sculptors, our opinion would have no special pertinence.

We thank you for your offer of reimbursement for our time, but we feel it is better that our expression of views be independent of any financial "contamination", however ridiculous such a charge might be.

Very truly yours,

LWW:P

Lessing Whitford Williams

EXHIBIT C

COPY OF A LETTER SENT FROM THE STUDIO OF C. PAUL JENNEWEIN
538 VAN NEST AVENUE
BRONX 60. N. Y.

December 23rd, 1966.

Mr. Geoffrey Platt, F.A.I.A. Chairman
305 Broadway,
New York City, N.Y. 10007 Att: Landmarks Preservation Commission

Dear Mr. Platt:

Mr. Jennewein is out of town, and in the capacity of being his secretary, he has authorized me to write the following letter to you which was requested by:-

Mr. Austin J. Belton

associated with the firm of:-

Casey, Lane and Mittendorf,
26 Broadway,
New York City

who represent the owner of the property located at:-

150 East 38th Street.

The reason for this letter is, that under date of July 11th 1962 while Mr. Jennewein was President of the National Sculpture Society he asked:

Mrs. M. W. Witherspoon
(on the staff of the National Sculpture Review Magazine)

to write to you relative to the above mentioned property, and also to congratulate you on your appointment to the Landmarks Preservation Commission. The letter was addressed to:-

Mr. Geoffrey Platt F.A.I.A. Chairman
Landmarks Preservation Commission
2 Lafayette Street,
New York, 7, N.Y.

In that letter a statement is made that this building at 150 East 38th Street is where the great Gutzon Borglum and John Angel sculptors had their studios, and, in as much as the Landmarks Preservation Commission was to concern itself with historical and aesthetic buildings, it was pointed out that this building was therefore unique and surely made cultural history.

While I have a copy of this letter in the files, I cannot find any further correspondence or information in connection with this matter.

I understand that this letter will be introduced to the Commission at the public hearing which is set for December 27th, 1966 regarding the designation of this particular property.

Yours very truly,

Secretary to Mr. C. Paul Jennewein.
(Mrs. H. T. Munzy)

EXHIBIT D

The Landmarks Preservation Committee
305 Broadway
New York City
New York

Gentlemen:

I am writing at the suggestion of Mr. Austin J. Belton, of Casey, Lane and Mittendorf, who represent the owners of the property at 150 E. 38th St. in New York City. I understand this letter is to be used in connection with the public hearing before the Landmark Preservation Commission of New York City on Tuesday, December 27, 1966.

Mr. Belton telephoned me to determine whether the building at 150 E. 38th St. had been the location of a studio used by my late father, John Angel, sculptor.

Based on a study of family records I can state that he occupied a studio in the Cathedral of St. John the Divine from the time he first came to this country in October, 1925 until October, 1927, when he moved to a studio at 119th St. and Lexington Ave. He occupied this studio until the summer of 1940 when he moved to Connecticut, where he stayed until his death in 1960. To the best of my knowledge and recollection there was never a connection between the property at 150 E. 38th St. and my father.

Sincerely yours,

Henry S. Angel

Dr. Henry S. Angel
79 Willow Avenue
North Plainfield
New Jersey

EXHIBIT E

340 West 12 Street
New York, New York
WA 9-2564

December 22, 1966

Geoffrey Platt, F.A.I.A., Chairman
Landmarks Preservation Commission
305 Broadway
New York, New York 10007

Dear Mr. Platt:

I am writing this letter at the request of Mr. Austin Belton of the firm of Casey, Lane & Mittendorf who represent the owner of the property located at 150 East 38 Street, New York City. This property is currently being considered by your Commission for designation as a landmark site. One of the reasons for such designation is that the American sculptor, John Angel, had his studio on that premises at some period of time.

It was my privilege to be associated with Mr. John Angel both professionally and socially, from approximately 1935 until his death in 1960. At no time during that period did Mr. Angel have his studio at any place on East 38 Street in New York City. Further, I do not recall any statement or reference by him indicating that he had such a studio prior to 1935. I am therefore unaware of any association between the American sculptor, John Angel, and this particular address.

I understand that this letter will be introduced to the Commission at its public hearing on December 27 in regard to the designation of this particular property.

I trust that the above statement will prove helpful to the Commission in reaching a decision.

Very truly yours,

Cesare A. Contini

ENCLOSURE

MEMORANDUM OF LAW

Re: Chapter 8-A, New York City, N. Y., Charter and Admin. Code (1965), Landmarks Preservation Law)

An examination of the law dealing with the establishment and regulation of landmarks in New York City should begin with reference to the state statute which specifically authorizes New York City to impose regulations on the exterior design of buildings. This is N.Y. Gen. City Law, §20, subdivision 25-A (1956) which provides:

> "Subject to the constitution and general laws of this state every city is empowered: . . . to provide, for places, buildings, structures, works of art, and other objects having an especial character or special historic or aesthetic interest or value, special conditions or regulations for their protection, enhancement, perpetuation or use, which may include appropriate and reasonable control of the use or appearance of neighboring private property within public view, or both. In any such instance such measures, if adopted in the exercise of police power, shall be reasonable and appropriate to the purpose, or if constituting a taking of private property shall provide for due compensation, which may include the limitation or remission of taxes." (Emphasis added.)

In 1965, the New York City Council amended Chapter 8A, N.Y.C., N.Y., Charter & Admin. Code (1965), the pertinent provisions of which may be summarized as follows:

(1) A Landmarks Preservation Commission is created, the primary responsibility of which is to designate historic districts or landmarks and to thereafter control the

kinds of physical changes owners may make to the exterior of buildings so designated (Ibid., §§207.20, 270-4.0);

(2) all such designations can be made only after notice and a public hearing and are thereafter subject to ratification by the Board of Estimate. (Ibid. §207.20(b), (e), (f)(2);

(3) after designation as a landmark, no changes in the exterior of the landmark, either minor or major, including demolition, can be made without the consent of the commission (Ibid., §207-5.0, 207-9.0);

(4) the owner may thereafter contest the commission's decision in regard to these alterations only on the ground that he is not receiving a fair return from the landmark in its present condition (Ibid., §207-8.0(a)(1) and (a)(2);

(5) reasonable return is defined as a net annual return of six per cent of the current assessed valuation of the property (Ibid., §207-1.0(q); and

(6) if the owner can establish that he is getting less than a "reasonable return", the commission can thereafter seek to improve the return by granting a real estate tax rebate or, failing such, seek to provide a new owner for the property, including the city, which might be willing to maintain the exterior of the landmark in its current state (Ibid., §207-8.0(c), (g)(2).

A statute which regulates the exterior design of buildings is generally considered a zoning type of ordinance which is an exercise of the police power and which must be justified not in terms of public health, safety or morals but rather in that it contributes to the "public welfare," which contribution must necessarily involve some aesthetic considerations. Anderson, Zoning Law and Practice in New York State, Section 8.42 at p. 200 (1953); Note, The Aesthetic Problem in New York, 156 N.Y.L.J. 2, 3 and 4 (July 1966); Berman v. Parker, 348 U.S. 26 (1954).

In Section 203.1.0 of the Landmarks Bill, the purposes of the bill are stated and include such considerations as education, stabilizing and improving property values and encouraging tourism. In identifying the aesthetic or historic purposes of this legislation with such other established exercises of the police power, the draftsmen were undoubtedly seeking to avoid the former general rule reflected in cases that aesthetics were not comprehended under "welfare" and, therefore, the police power could not be invoked to uphold building regulations based thereon. Welch v. Swasey, 214 U.S. 91 (1909); Wulfsohn Adv. Co. v. Burke, 195 N.Y. 126 (1909).

In Berman v. Parker, 348 U.S. 26, 33 (1954), however, which involved rehabilitation in the District of Columbia, an explicit dictum stated that aesthetic values were also included within the scope of public welfare:

"The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the Legislature to determine that the community should be beautiful as well as clean, well balanced as well as carefully controlled. In the present case the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to substitute them. If those who govern the District of Columbia decide that the nation's capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."

This evolution in the interpretation of the "welfare" clause has also been reflected in cases in New York, the latest of which is People v. Stover, 240 N.Y.S.2d 734 (1963), which presents a concise review of the law in New York in connection with a prosecution of property owners for violation of an ordinance prohibiting clotheslines in the front yards in the city of Rye. The court indicates that since 1930 the question of whether aesthetic considerations alone are sufficient to justify exercise of the police power in an open and "unsettled" area in New York. The court has recognized, however, the governmental interest in preserving the appearance of a community by consideration of aesthetics by a legislative body in enacting laws which were also designed to promote health and safety.

The court gave the standard for judging ordinances based upon aesthetic considerations as yet:

"Consequently, whether such a statute or ordinance should be voided should depend upon whether the restriction was 'an arbitrary and unreasonable method of achieving an objective, additionally sanctioned, prosperous community' . . . and not upon whether the objectives were primarily aesthetic."

The court enunciated certain other considerations in determining if the legislative body goes too far in the case of architecture, at 739:

> "The ordinance before us is in a large sense regulatory rather than prohibitory. It causes no undue hardship to any property owner, for it expressly provides for the issuance of a permit . . . in cases where there is presented economic or unnecessary hardship . . . . Moreover the ordinance imposes no arbitrary or capricious standard of beauty or aesthetics upon the community. It simply prohibits conduct which is unreasonably offensive to the visual sensibilities of the average person."

More recently and most important, the landmark law has already been reviewed and upheld in the case of Matter of Manhattan Club, Spec. Sm. Part I, Sup. Ct. N.Y.Co. (1956), reported in 149 N.Y.L.J. 49, p. 15 (Sept. 9, 1956). This was an Article 78 proceeding to review and annul a determination concerning the designation of the "Leonard Jerome House" in Manhattan as a landmark.

In dismissing the petition of the owner and upholding the action of the Landmark Commission, the court commented that the architectural, historical and aesthetic value of the building was fully established in administrative hearings and that such was a proper subject for judgment on the part of the administrative agency, and that the court would not substitute its judgment in the matter. The court went on to state that the purpose of the statute was a valid and permissible exercise of the police power, quoting Penn v. Stern, supra, and Penn v. Parker, supra. The court also considered that the statute is

not confiscatory because the owner of the property is free to do as it pleases with the interior of the building, is guaranteed a reasonable return on its investment and if no plan can be devised to materialize this guarantee, it may make such change as it wishes.

The court concluded by quoting Matter of Satanket Development Corp. v. Romeo, 18 A.D.2d 825, 826 (2d Dept. 1963):

> "It is not sufficient in order to render a zoning ordinance confiscatory and unconstitutional, that permitted uses result in lower profits, no profits, or actual loss. What must be established is that the ordinance precludes use of property 'for any purpose for which it is reasonably adapted' (Levitt v. Incorporated Village of Sands Point, 6 N.Y.2d 269, 273)."

Summarizing then, it appears that the underlying aesthetic or historic purposes of the landmark bill are within the "general welfare" clause of the police power, as such is presently defined by the courts. Despite the decision of Manhattan Club, supra, the methods by which the Landmark Commission will achieve these aesthetic or historic purposes can still be examined from a constitutional viewpoint, especially in view of the enabling act which is the basis for the landmark law and its requirements that "such measures, . . . shall be reasonable and appropriate to the purpose, or if constituting a taking of private property shall provide for due compensation . . . ." The tests used in People v. Stover, supra, at 739, quoted above, further justifies such an analysis. Applying these same criteria to the landmark bill, it would appear that undue hardship

is caused to the property owner, that an arbitrary and capricious standard is involved and that no affirmative conduct is sought to be regulated. The question at this point, therefore, becomes one of whether or not the disputed regulation constitutes a taking of private property.

The most apparent criticism at the very outset is that no definite standard for determination of a landmark is set forth in either the enabling act or the landmark bill itself. The bill speaks of "improvement of special character or special historical or aesthetic interest or value" and, in this regard, the New York statute may differ from legislation passed in other cities or states; for example, the Vieux Carre Ordinance designed to protect the French Quarter in New Orleans (Ordinance No. 14,538 (Vieux Carre Ordinance), City of New Orleans, La.) defines a specific geographic area within the city. Other ordinances specify rather the particular style or elements of exterior design sought to be preserved. (Grant, Law of Man., ch. 40-c, §5.) As such, there is definitely a possibility that such amounts to an illegal delegation of legislative power wherein the Landmark Commission itself determines the standards rather than applying standards determined by the appropriate legislative body. Little v. Penn, 294 N.Y. 459 (1945).

Another criticism that may be leveled at the landmark bill is that it is unconstitutional as applied. The burden of maintaining those buildings designated as landmarks will fall entirely on the shoulders of the owner of the building and this

burden may not be immediately offset by the reduction in taxes which the Commission is authorized to recommend. The individual owner is charged with the duty of maintaining an historic or architectural landmark in a particular style, unlike his neighbors. It would seem apparent that this burden is inequitable.

A comparable situation was involved in Vernon Park Realty, Inc. v. City of Mount Vernon, 307 N.Y. 493 (1954), where the court held that 86,000 square feet in the center of a business district could not be so zoned as to be restricted to parking lot purposes only, as such a scheme would put the solution of the city's parking problem on the shoulders of an individual property owner. In addition, the fact that the owner was uncompensated for his burden, the court held, amounted to a taking. The proper method of proceeding was for Mount Vernon to invoke its power of eminent domain and condemn for public use. The court said at 498:

> "However compelling and acute the community traffic problem may be, its sanction does not lie in placing an undue and uncompensated burden on the individual owner of a single parcel of land in the guise of regulation, even for a public purpose."

The Vernon Park case would seem very close to the problem of individual landmark designation in that it involves a particular piece of land restricted to use in a manner different than that of the surrounding property. Despite the pressing needs of any community as determined by its legislative authority, the burden should not be placed wholly upon an individual [illegible]. [illegible],

buildings which will be designated as landmarks are older and, therefore, more expensive to maintain in a particular style. In addition to this burden of maintenance, the owner of an individual landmark is deprived of possible economic benefits by reason of the fact that he cannot utilize this property in the same manner as his immediate neighbors. In the event of a change in the neighborhood, for better or worse, the individual owner would be in effect "locked" into a situation which might result in economic loss.

The enabling statute of the landmark bill requires that the bill, "in constituting a taking of private property shall provide for due compensation, which may include the limitation or remission of taxes." This suggests caution inside upon which the action of the Commission in the context of the present situation may be criticized. Is "due compensation" provided to the owner of a landmark for the expense of maintaining a particular exterior design and for the restrictions upon the use or disposition of the property which this bill imposes? If the answer is negative, then the landmark bill fails to meet the requirements of the enabling act and represents the taking of property without compensation.

The only provision for compensation found in the landmarks bill is in Section 207-8.0. That section provides that prior to receiving permission for demolishing, altering or reconstructing any landmark building, the owner must establish

that it is not capable of earning a reasonable return and that his intent in either demolishing or altering it is to increase or improve the return thereon. As an alternative to these items of proof the owner may establish that an agreement to sell or to lease for a period of 20 years is conditioned upon the obtaining of permission to proceed with a regulated alteration in the property, that such property is now incapable of earning a reasonable return and that the prospective purchaser intends to achieve the same purposes as the prior owner. In either of the foregoing cases the Commission is authorized to produce a plan which may include partial or complete tax exemption or reduction of taxes. In the event that the owner of the property rejects any plan presented by the Commission as an alternative to the proposed alteration which he intends to make, the Commission may thereafter recommend that the city acquire the property, presumably by condemnation if necessary. In the situation wherein the owner has established that he intends to sell the property and that such sale is conditioned upon the granting of permission to make certain changes in the property and that the purchaser of the property intends to proceed with the demolition or alteration specified, the Commission is authorized to seek a substitute purchaser or tenant of the property. The city has six months within which to obtain such a substitute purchaser or tenant and may still thereafter recommend that the city acquire the property, but within 90 days after such recommendation, if no action is taken thereon, a notice to proceed will be granted.

In examining this section of the landmarks bill, it is to be noted that no provision is made for the individual owner who uses the property as his residence and, therefore, has no return on the property to be established as an "insufficient." By failing to make any provision for due compensation of the owner who cannot prove that he is getting an insufficient return from the property by reason of the fact that he is using the property as his personal residence, but who is subject to the same restrictions as the investor-owner, the requirement of the enabling act that any taking of private property shall provide for due compensation is clearly not met.

Another argument which can be made as to the confiscatory nature of the landmarks bill concerns the amount of return provided. A reasonable return is defined six per cent of the current assessed valuation of the improvement parcel with provision for an allowance for depreciation of two per cent. The choice of this figure was based upon the decision in Matter of Hartley Holding Co. v. Cabot, 242 N.Y.S.2d 97 (1963), which upheld the six per cent formula for rent-controlled buildings. Wolf, op. cit. supra, 156 N.Y.L.J. 4, p. 4, col. 1. In that same article, the argument is made that the return which is reasonable under the conditions of Emergency Rent Control is not necessarily reasonable for landmarks. "Emergency" conditions prompted the passage of the Rent Control Law and the entire purpose of that law is different from the objects of the

Lindquist bill, it is designed to protect tenants against unjust, unreasonable and unwarranted rent increases. The purpose of the Lindquist bill, on the other hand, is to protect buildings permanently. The rent control laws have usually been of short duration, their re-enactment depending upon a finding of continued emergency. Further, insofar as value is concerned, it is a matter of common knowledge that the assessed value normally is considerably less than the true value of the property and, therefore, the provision allowing for reasonable returns to be computed on the current assessed valuation is one that does not provide a correct or fair basis for arriving at what amounts to a "reasonable return." These criticisms were made on behalf of the City Bar Association in a letter to the then chairman of the Committee on Codification of the City Council, quoted at length in Wolf, ibid.

The term "spot zoning" is used by the courts to describe a zoning amendment which is invalid because it is not in accordance with a comprehensive or well-considered plan. Anderson, Zoning Law and Practice in New York State, Section 5.03 at p. 85 (1963). The Court of Appeals has defined spot zoning as:

> ". . . the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners . . .' 'spot zoning' is the very antithesis of planned zoning.' Rodgers v. Village of Tarrytown, 302 N.Y. 123-128 (1951).

That case upheld the validity of a "floating zone" whose location was to be determined upon application for designation as a zone for use as garden apartments. The court went on to say at p. 124 that the relevant inquiry in determining whether or not a particular zoning ordinance is "spot zoning" is

> ". . . whether it was accomplished for the benefit of individual owners rather than pursuant to a comprehensive plan for the general welfare of the community."

Size, use and location of the property along with legislative background constitute some of the controlling consideration in the determination of whether or not a particular zoning scheme is comprehensive. Anderson, op. cit. supra, Sections 5.04-5.07. Connell v. Gramby, 209 N.Y.S.2d 379 (4th Dept. 1961), for example, involved a zoning ordinance which established 10% of a town as a residential zoning, leaving the remainder unzoned. The court struck down the ordinance as invalid for failure to conform to a comprehensive plan.

From the foregoing it appears that any court in examining a particular zoning ordinance will determine in each instance on the basis of the evidence before it whether or not the zoning is comprehensive and will only upset the decision of the zoning board if it has been arbitrary. Can the Landmarks Commission prove that its designation of the landmarks scattered throughout the city is "comprehensive" and not arbitrary when there is an absence of any criteria in the landmarks bill other than undefined "historic" or "aesthetic" intent whereby the scheme can be determined?

Summarizing then, the first and most pertinent argument that can be made against the present wording of the landmarks bill from a constitutional viewpoint is that it fails to provide for any compensation to the individual owner who uses the property as his residence and, in so doing, unfairly discriminates against such a person as distinguished from the owner who holds the property for investment purposes. Secondly, the return in fact fixed by the Commission is inadequate, both because of the rate of return that is used and because the computation involves assessed valuation which does not reflect current market values and is, therefore, unrealistic and unfair.

Next, the designation of particular sites as landmarks amounts to spot zoning in that it is not in accordance with a "comprehensive" plan because of the absence of adequate criteria for the determination of landmark sites. This same absence of criteria also exposes the bill to the charge that it amounts to an "arbitrary and irrational method" of achieving the desired community purpose, using the precise words of People v. Stover, which represents the latest statement of the Court of Appeals on zoning for aesthetic purposes. Using the tests of that same case, in regard to this proposed designation, it is clear that the rights of the owner are restricted and no compensation for such a taking is given to an owner who uses the property as a residence. Further, an "arbitrary and capricious standard" of beauty is imposed upon the community in that the standard to be

used and the application of that standard are left to the discretion of the Commission. Especially in the present case where the historic and architectural character of the property is proven to be at least questionable, its designation as a landmark is clearly unwarranted and would be an unauthorized exercise of the authority of the Commission.

For Mr Austin Bolton
he will call

Form 10-445
(5 62)

SUPPLEMENTAL INFORMATION AND PHOTOGRAPHS MAY BE ADDED ON SHEET OF SAME SIZE

~~HISTORIC AMERICAN BUILDINGS SURVEY~~
~~INVENTORY~~

1. STATE New York
COUNTY New York
TOWN Manhattan VICINITY
STREET NO. 150 - 152 East 38th Street
ORIGINAL OWNER Wm. McCafferty -- #152
Whitehead & Wise - #150
ORIGINAL USE 2 private dwellings
PRESENT OWNER
PRESENT USE 2 private dwellings
WALL CONSTRUCTION Brick
NO. OF STORIES #152 - 3-S; #150 - 4-S

2. NAME
DATE OR PERIOD #152 - 1858
#150 - 1861
STYLE Orig. Italianate - alt. to
ARCHITECT Federal Revival in 1934
BUILDER

3. FOR LIBRARY OF CONGRESS USE

4. NOTABLE FEATURES, HISTORICAL SIGNIFICANCE AND DESCRIPTION OPEN TO PUBLIC

Block 893 - Lot 57 - #152
58 - #150

These are two private dwellings, #152 being set on the rear of lot 57 with a deep yard in front. Its adjoining neighbor, #150, is set on the street end of lot 58, but its main entry is on the side facing, and thus sharing, the yard next door.

#152 is a 3-storey building which was begun in 1857 and finished in 1858 for William McCafferty. Lot value: $1,800; with house: $4,000.

#150, now a 4-storey building, was erected in 1861 for Whitehead & Wise. Lot value: $2,000; with house: $5,000. It was originally a 3-storey structure and remained so as late as 1897.

Both of these buildings, originally Italianate in design, have undergone extensive alterations, the most recent having been made in 1934 when they were treated as a single architectural unit and given a Federal-style facade. The architect was Robertson Ward of New Canaan, Connecticut.

In the 1880's and 90's, these buildings were held by the Van Buren family as real estate investments for rental and/or lease income.

According to the National Sculpture Society (see letter in file) the buildings at one time housed the studios of the late Gutzon Borglum, designer and sculptor of the Mount Rushmore National Memorial, ~~and the~~ late John Angel, designer and sculptor of the bronze doors, St. Patrick's Cathedral, New York, and sculptor for the Cathedral of St. John the Divine, New York.

5. PHYSICAL CONDITION OF STRUCTURE Endangered Interior Exterior

6. LOCATION MAP (Plan Optional)

7. PHOTOGRAPH

8. PUBLISHED SOURCES (Author, Title, Pages)
INTERVIEWS, RECORDS, PHOTOS, ETC.

Plans Desk, Dept. of Buildings
National Sculpture Society

9. NAME, ADDRESS AND TITLE OF RECORDER

Landmarks Preservation Commission
2 Lafayette Street, New York 7, NY

DATE OF RECORD 1964 RK

5439

NATIONAL SCULPTURE SOCIETY

1083 FIFTH AVENUE • NEW YORK 28, N. Y.

July 11, 1962

PAUL MANSHIP
HONORARY PRESIDENT

C. PAUL JENNEWEIN
PRESIDENT

HERBERT L. KAMMERER
1ST VICE-PRESIDENT

LEWIS G. ADAMS
2ND VICE-PRESIDENT

FRANCES K. TREES
TREASURER

ROBERT A. WEINMAN
SECRETARY

RUTH NICKERSON
RECORDING SECRETARY

MILDRED J. AMABILE
EXECUTIVE SECRETARY

THEODORA MORGAN
PUBLIC RELATIONS

COUNCIL
ADOLPH BLOCK
GRANVILLE W. CARTER
FRANK ELISCU
LOUIS FERON
EVANGELOS FRUDAKIS
MAURICE GAUTHIER
ADLAI S. HARDIN
EDWARD F. HOFFMAN, III
FRANCIS KEALLY
K. GEORGE KRATINA
THOMAS G. LO MEDICO
BRUNO MANKOWSKI
MOISSAYE MARANS
PIETRO MONTANA
LORIMER RICH
CARL L. SCHMITZ
J. KELLUM SMITH, JR.
JOHN R. TERKEN

ADVISORY BOARD
OF PAST PRESIDENTS
PAUL MANSHIP
EDMOND AMATEIS
DONALD DE LUE
SIDNEY WAUGH
KARL H. GRUPPE
WHEELER WILLIAMS
LEO FRIEDLANDER
ADLAI S. HARDIN

TELEPHONES:
TRAFALGAR 6-1233-3660

Mr. Geoffrey Platt, F.A.I.A., Chairman
Landmarks Preservation Commission
2 Lafayette Street
New York 7, N. Y.

Dear Chairman Platt:

The President of National Sculpture Society, Mr. C. Paul Jennewein, of 538 Van Nest Ave., Bronx 60, N. Y., asked me to write you on his behalf and to congratulate you on your appointment.

In the news we noted that the Landmarks Preservation Commission is to concern itself with historical and aesthetic buildings. Under the latter category seems to be the property at 150-152 East 38 St., New York City, where the great Gutzon Borglum and John Angel had their studios. The building is unique and surely made cultural history.

The preservation of this building would solve many of our problems - for instance, Georg Lober's widow called me in distress - what to do with her late husband's models and sculptures. Perhaps the National Sculpture Society could be appointed caretaker of the building.

Such a landmark would point up the fact of the rich cultural heritage of sculpture in this country. This year there is an exhibit of 200 years of American sculpture. The exhibit of 150 years of American sculpture in the gardens of the Phipps Estate was outstanding. Present members of the Society were trained by older members who in turn were taught by the earlier masters.

We trust that you will give this matter your serious thought and consideration.

Sincerely yours,

M. W. Witherspoon - Mrs.
Staff of REVIEW

For Mr. Jennewein

Enc: Current REVIEW