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COURT OF APPEALS

STATE OF NEW YORK

IN THE MATTER OF
SAVE AMERICA'S CLOCKS, INC., ET AL.,

Respondents,

-against-

NO. 17

CITY OF NEW YORK, ET AL.,

Appellants.

20 Eagle Street
Albany, New York
February 13, 2019

Before:

ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Karen Schiffmiller
Official Court Transcriber



1 JUDGE RIVERA: The last case on the day's
2 calendar, Matter of Save America's Clocks v. the City of
3 New York, number 17.

4 MR. ROUHANDEH: May it please the court, James
5 Rouhandeh, for appellants. I'd like to save one minute for
6 a rebuttal.

7 JUDGE RIVERA: Yes, sir.

8 MR. ROUHANDEH: Respondents' argument with
9 respect to public access and mechanical operation cannot be
10 squared with the plain language of the statute, the purpose
11 of the statute, or this court's decision in Teachers. It
12 would have been very - - - quite easy, and extraordinarily
13 easy to - - - for the legislature to say or to write the
14 statute to require public access or to require contin - - -
15 continuous operation. They did not do that.

16 A lot is being placed on this word "use". Use of
17 an interior landmark, or use of an interior landmark
18 feature. But "use" doesn't mean public access. Obviously
19 if - - - if "use" meant public access, then every time a
20 door, a window, a gas lamp, a clock, these are
21 architectural features, every time they were designated,
22 then public access would be required to every one of them -
23 - - every gas lamp, every fire place, every door, every
24 window.

25 JUDGE RIVERA: But isn't the original historic



1 designation, the - - - that landmark designation based on
2 it being this interior item, the - - - the mechanics of it,
3 and - - - and you can't designate that without public
4 access, right?

5 MR. ROUHANDEH: No, you - - - you - - - either
6 has to have been - - - this goes to their definition of - -
7 - of an inter - - - an interior land - - - landmark, at the
8 time - - - there are three things that that - - - the four
9 things that, as they break it down, that have to - - - that
10 meet the definition of an interior landmark. It's got to
11 be thirty years old or older, customarily open or
12 accessible to the public, and a special historical or
13 aesthetic value. And what they say is, those are all in
14 the present tense. And that's okay for designation.

15 But then they say, it - - - there's a - - -
16 there's a fourth requirement. And this fourth requirement
17 is very important and there's a very plain-language
18 understanding of that. If we just stop with those three,
19 then the lobby of the pre-war coop building in Manhattan,
20 every one of them, that had any aesthetic value, would be
21 an interior landmark.

22 JUDGE RIVERA: But are they designated as such?

23 MR. ROUHANDEH: No, that's why it says they - - -

24 JUDGE RIVERA: Well, that's the point.

25 MR. ROUHANDEH: - - - have to have been



1 designated.

2 JUDGE RIVERA: If the - - - the point is the
3 designation, and the designation is based, as you've
4 correctly pointed out, in part, on the public access, so
5 once you no longer have public access, how - - - how is it
6 a landmark?

7 MR. ROUHANDEH: It's a landmark because it's been
8 designated a landmark and it's been preserved. The fact is
9 - - -

10 JUDGE RIVERA: Then you have - - - would you not
11 have to rescind the designation to no longer have it
12 satisfy these three factors?

13 MR. ROUHANDEH: No.

14 JUDGE RIVERA: I mean, that's a definition.

15 MR. ROUHANDEH: No, and in fact, that would be
16 inconsistent with Teachers, because in the Teachers' case,
17 the court looked at that argument. That was the case that
18 involved the - - - the restaurant, the Four Seasons
19 Restaurant. And, you know, one of the - - -

20 JUDGE RIVERA: Could I - - - I - - - I understood
21 the court to be saying the fact that it - - - it could be
22 closed off to the public doesn't mean that you can't
23 designate it as such when you have public access. Not that
24 the - - - that you are going to designate it as a landmark
25 and then cut off the public access without going through



1 the process by which you must go to - - - to decide it's no
2 longer a landmark, right, to undesignate it as such.

3 MR. ROUHANDEH: I - - - I think the court - - -
4 and I think there's a very simple way to - - - to read what
5 the court said there. And a basic - - - I think that what
6 the court did was reject the argument that you could
7 landmark the space, because it was different than a public
8 building, and a private space might be - - - might be a
9 restaurant now, but it might be converted into a private
10 space later, without presumably public access, and the
11 court said that doesn't matter; public buildings can be
12 converted into private spaces, as well - - -

13 JUDGE WILSON: Can I go back to your point about
14 use for a moment? Because I'm not sure it meets the
15 argument that's being made. It's - - - as I understand the
16 argument, it's not that an interior landmark must always be
17 kept open to the public, but "use" means that the
18 Commission must at least consider the loss to the public of
19 access in evaluating the - - - the application.

20 MR. ROUHANDEH: It has to consider the use. It
21 doesn't have to consider the public access.

22 JUDGE WILSON: Does - - - but does - - - well,
23 but does "use" mean public access?

24 MR. ROUHANDEH: No, "use" does not mean public
25 access. And that's where - - -



1 JUDGE WILSON: But - - - but - - -

2 MR. ROUHANDEH: - - - the Teacher case - - -
3 Teachers case comes in. It, in fact, cites - - - when this
4 discussion, this relevant discussion, about potentially
5 cutting off and taking a restaurant and turning it into a
6 private space - - -when the court's discussing that, it
7 refers specifically to a law review article. And that law
8 review article, it cites one section of the law review
9 article. And the law review article says - - - it leads
10 with a title - - -

11 JUDGE FAHEY: Is this the issue of taking? What
12 you're - - -

13 MR. ROUHANDEH: No.

14 JUDGE FAHEY: No? Okay.

15 MR. ROUHANDEH: The title is - - - of the section
16 that it cites is called, "Rejection of the Public View
17 Requirement." And it's a discussion that says, it's still
18 consistent with landmarking and the principals behind
19 landmarking, if you limit and indeed ban public access,
20 that is still consistent with the - - - with the purposes
21 of the laws permitting interior landmarking.

22 I think when you read that citation, you read
23 what Teachers cited to, I think Judge Kaye was clearly
24 saying that it - - - we can landmark a space that's opened
25 to the public and it can be converted - - - the fact that

1 it may be converted into a private space later, does not
2 prevent us from landmarking it now. Complicit in that is
3 it doesn't have to remain a private - - - a public space.
4 It can be privatized.

5 JUDGE RIVERA: Can - - - can you prevent - - -
6 can you - - - can you convert it to a private space that
7 diminishes the historical aspects that justified the
8 landmark designation?

9 MR. ROUHANDEH: Maybe not. Maybe one of the
10 purposes have to met, and every one - - - and it will be -
11 - - and this is a discussion that you don't have to meet
12 every purpose. So for example, preservation, protection
13 may actually be inconsistent with use. To have - - - and
14 there was a lot in the record about that. People traipsing
15 around the space and the public being there may, in fact,
16 harm the machinery and the clock. And so there's only - -
17 - are meeting one purpose, and protection and preservation
18 is the overarching purpose.

19 But I think also, if you look at those purposes,
20 it's very in - - - interesting what it says about use. Use
21 takes a backseat, in fact, to - - - this is in 2 - - -
22 301(b). Section (a) of that says, "The purpose of this" -
23 - - Section (b) says, "The purpose of this chapter is to,
24 (a) effect and accomplish the protection, enhancement and
25 perpetuation of such improvements." So effect and

1 accomplish. When you get down to use, it says "promote the
2 use." That's in Section (g), promote the use. It doesn't
3 say effect and accomplish. It doesn't say insure. It
4 doesn't say require. And when it comes to statutory
5 language, I think a court should nit - - - nitpick that.
6 That's an intentional - - -

7 JUDGE WILSON: Except that - - - except that
8 distinction is missing in 307(e), which particularly refers
9 to interior landmarks.

10 MR. ROUHANDEH: Yes, well, 307(e) and 307 in - -
11 - in its entirety actually says - - -

12 JUDGE WILSON: No, no, but 307(e) - - -

13 MR. ROUHANDEH: - - - this should be interpreted
14 with the effectuation of purpose.

15 JUDGE WILSON: 307(e) is a particularly about
16 interior landmarks.

17 MR. ROUHANDEH: Yes, right. And it says - - -

18 JUDGE WILSON: We're dealing here with interior
19 landmarks.

20 MR. ROUHANDEH: Yes, and so use certainly doesn't
21 mean - - - if it meant public access, it should have said
22 public access. It doesn't say public access, and this
23 court has interpreted public access - - -

24 JUDGE WILSON: Okay. What do we think use means?
25 Use by what? Use by whom?



1 MR. ROUHANDEH: Utilization.

2 JUDGE WILSON: By whom?

3 MR. ROUHANDEH: That it is used, private or
4 public, which is exactly what is the case is happening
5 here. The clock will be used. The clock, in fact, there's
6 a - - - there's a lot of alarm being raised by the other
7 side - - - pardon the pun - - - about what's going to
8 happen to this clock. The - - - the - - - it's said - - -
9 it's very clear that in the - - - in the COA, it permits -
10 - - it allows, requires - - - in fact, requires the
11 permanent operation of that - - - of this clock. It will
12 be used. The plain set - - - the plain language definition
13 of "use" is utilize, employ. The clock will be utilized;
14 it will be employed.

15 JUDGE RIVERA: But isn't the original designation
16 a particular type of mechanical use, and that's what's
17 going to be missing. It's going to be unplugged. You've
18 got, whatever it is, the digitized lighting.

19 MR. ROUHANDEH: Right, and to go that - - -

20 JUDGE RIVERA: Running it - - - run - - - not
21 running the clock by the hand mechanism, right?

22 MR. ROUHANDEH: Right. It'll - - - it'll be used
23 in the common sense. It - - - it says "or" - - -
24 electrical or mechanical, that's what it provides. And it
25 allows the owner to use either. Just like a restaurant



1 that has a gas lamp in it.

2 JUDGE FAHEY: Can I just take a - - -

3 MR. ROUHANDEH: The old Gage & Tollner
4 restaurant.

5 JUDGE FAHEY: You - - - you don't have much time
6 left, so I just wanted to - - - just one - - - one area
7 that - - - that I was curious about. How - - - how does
8 the designation of the - - - and access to the clock area,
9 affect the value of that space, I guess the tower space, in
10 terms of development?

11 MR. ROUHANDEH: It - - - it eliminates the - - -
12 the value of it because if it - - -

13 JUDGE FAHEY: And - - - and when you say it
14 "eliminates" it, what - - - what are we talking about?
15 What's the difference in value, say, between - - -

16 MR. ROUHANDEH: Well, I - - -

17 JUDGE FAHEY: - - - what the property's worth now
18 without that - - - or let's say - - - let's assume that
19 there's not the designation as of now, and then in the
20 future there would be. What - - - what - - - how would
21 that effect the value of that space?

22 MR. ROUHANDEH: Well, it couldn't be sold as a
23 private apartment.

24 JUDGE FAHEY: For - - - for what?

25 MR. ROUHANDEH: Tens of millions of dollars,



1 likely.

2 JUDGE FAHEY: I see, yeah. And so that value is
3 eliminated then?

4 MR. ROUHANDEH: It - - - it would. And that - -
5 - and that is - - - that is a crucial - - -

6 JUDGE RIVERA: Well, there's no record on that.

7 MR. ROUHANDEH: No, there's no record - - -

8 JUDGE RIVERA: No real record on that.

9 MR. ROUHANDEH: No, well - - -

10 JUDGE FAHEY: I had thought that - - - I - - -
11 excuse me. I had thought that there was a taking argument
12 that had been made.

13 MR. ROUHANDEH: Well, there is a po - - - a
14 potential taking argument, because what's going to happen
15 in cases like this is, you're going to see potential - - -
16 people petitioning, saying, well, you've designated a
17 theater - - - a theater on Broadway, the Four - - - former
18 Four Seasons Restaurant; I want access to it. You know,
19 those theaters on Broadway would be great for, you know,
20 town hall meetings and public meetings, because if there is
21 a right to demand public access to everything that's been
22 ad - - - demanded at - - - or have been designated as an
23 interior landmark, then not only do you get to go there,
24 you get to operate the windows, run the gas lamps, light
25 the fireplace, if that's what it means, and it clearly is

1 not consistent with the plain language of it.

2 JUDGE RIVERA: Thank you, counsel. You have your
3 rebuttal.

4 MR. ROUHANDEH: Thank you.

5 MS. LAWLESS: May it please the court, Diana
6 Lawless on behalf of the municipal appellants. I'd like to
7 reserve two minutes for rebuttal, Your Honors.

8 JUDGE RIVERA: Yes.

9 MS. LAWLESS: Your Honors, I think it's important
10 to go to what we were talking about, in the Teachers case,
11 was designation. At the time of designation, it turns on
12 whether the interior, or parts thereof, is worthy of
13 protection. We're here on a certificate of
14 appropriateness. That's what happens when work is reviewed
15 after this designation.

16 JUDGE GARCIA: And, counsel, on that point, which
17 I think is very important, I think the best argument there
18 is, okay, you have this process. They can say yes; they
19 can say no, right? This plan is submitted; they can say
20 yes. They can issue the certificate or they can refuse it
21 - - - reject it. The best argument, it seems to me, it's
22 irrational to accept a plan that, as a result of the plan,
23 the landmark is - - - no longer qualifies as a landmark,
24 meaning the interior - - - the access to the interior.

25 So what's the response to that? What is the



1 authority, I guess, of the Commission, in terms of what
2 they - - - the LPC, what can they do with respect to that
3 interior landmark? Can they accept a plan that demolishes
4 some of it? Can they - - - what is the authority? And how
5 do you answer that argument that the best, you know - - -
6 that you cannot approve - - - because this is really
7 approval or disapproval, you can't approve a plan that, as
8 a result of their - - - your approval, the item is no
9 longer a landmark.

10 MS. LAWLESS: The certificate of appropriateness
11 process itself is set forth in 25-307 envisions change, and
12 in fact, radical change. A owner can come to the
13 Commission and say, we want to demolish this. The
14 Commission can determine - - - has to look at two things:
15 One, is it consistent with the purpose of the landmark - -
16 -

17 JUDGE WILSON: Well, can - - - can I - - - can I
18 ask you about that? Because I'm struggling a little bit
19 with the language in 307. It does - - - I don't see where
20 it says you can, for example, demolish the landmark itself.
21 It says, among other things, "demolish an improvement on a
22 landmark site, or containing an interior landmark." But I
23 - - - it seems to me that there's at least an argument that
24 if what you're trying to do is demolish the landmark, that
25 requires a rescission.

1 MS. LAWLESS: Well, Your Honor, I think that the
2 demolishing would actually be, in fact, demolishing a bus -
3 - - a building. An improvement is a piece of real estate,
4 containing an interior landmark. This interior landmark is
5 20,000 feet of interior space. What is designated is only
6 certain parts of that, certain specific things. None of
7 those things are public access. It is features in a room.
8 So it looks at - - - to - - - it considers - - -

9 JUDGE WILSON: And so - - - but so the way I read
10 the statute is, if you were going to say, demolish - - -
11 you wanted to reconstruct a portion of the building, and it
12 has an interior landmark in it, you could then go through
13 this process. But if what you wanted to do is demolish the
14 clock, which itself is an interior landmark, that's a
15 rescission. That's a rescission of the designation of the
16 clock as a landmark.

17 MS. LAWLESS: Your Honor, I have to disagree. I
18 have to say that the - - - the clock is a feature. It
19 looks - - - the interior architectural feature. The
20 features are the things that are designated. The features
21 are defined in (1). It's the - - - we look at the style,
22 design, general arrangement, and components of the
23 interior. The Commission does not look at in either public
24 access at all, not how the building is being used. And we
25 mean, by the way, "use" in the conventional sense, if it's



1 being utilized by the property owner. And it does not look
2 at how the clock itself is going to operate. We can't, for
3 example, tell you to keep your lights on. That's not what
4 the Commission - - -

5 JUDGE RIVERA: But - - - but what if that's the
6 reason it's designated as a landmark. Would that not make
7 a difference?

8 MS. LAWLESS: No, Your Honor. I will say, you
9 can be designated for a reason, but 25-307 gives great
10 discretion to the Commission to decide what can be used - -
11 - what can be done going forward. And that's be - - -

12 JUDGE WILSON: What was - - - what was the
13 Commission's authority to keep the banking hall open
14 through a pub - - - public - - -

15 MS. LAWLESS: The banking hall was by an
16 agreement. The public access to the banking hall was by
17 the owner's agreement, which was memorialized in a
18 restrictive declaration.

19 JUDGE WILSON: Presumably you asked for that?

20 MS. LAWLESS: No, we did not ask. The record
21 does not show that we asked for it.

22 JUDGE WILSON: They volun - - - they volunteered
23 it?

24 MS. LAWLESS: Our position is we take the
25 proposal as put forth. They volunteered it. We asked them



1 to memorialize their voluntary agreement. The - - - these
2 are real buildings, real things that are being used. We
3 don't expect things to be like - - - look like they are in
4 a museum.

5 JUDGE STEIN: So could - - - could you have
6 required as part of your approval - - - could you have
7 required that they - - - that they continue to allow public
8 access to the banking hall?

9 MS. LAWLESS: No, because we only look at the
10 work under 25-307. That's the only thing that happens
11 post-designation.

12 JUDGE GARCIA: But you could then say - - - let's
13 say they had put in a proposal that sealed off the banking
14 hall from public access. You could just say no, right?

15 MS. LAWLESS: If the only thing was, we want to
16 seal off the banking hall. If that was the only thing.
17 This is a huge project. If the only thing was we want to
18 close the door; we want to lock it, we have nothing to do.
19 There's nothing for us to come to.

20 JUDGE GARCIA: No, no, but my point being, if you
21 felt that closing the banking hall is inconsistent with the
22 purposes, which as I understand the standard for issuing
23 the COA, you can reject the proposal.

24 MS. LAWLESS: We can reject the proposal, if we
25 don't believe that the work that's being done is in - - -



1 is consistent with the - - - the language.

2 JUDGE GARCIA: But my point - - -

3 JUDGE STEIN: You look at the overall - - -

4 MS. LAWLESS: Yes, absolutely.

5 JUDGE STEIN: Okay.

6 JUDGE GARCIA: And if you felt that that was a
7 big enough part of it, the Commission had - - - LPC can
8 reject the proposal. They could come back and then open
9 the banking hall, and say, okay, now we're opening the
10 banking hall; so accept or reject. It seems to me, it's a
11 negotiation process that way. If you don't like it, you
12 reject it; they come with something else.

13 MS. LAWLESS: I mean, I think that what really
14 goes on is that there's a - - - the talk is all about the
15 features, and protecting the features. There's been - - -
16 there's a great discussion, public hearings, public
17 meetings. Everybody talked about the things that were
18 happening. What the features were going to be used in this
19 space. I don't think that the Commission took an up or
20 down vote on whether or not a door was going to be locked
21 and who was going to go there.

22 It's only as to what the - - - what the effect
23 would be on the features. And I would like to point out
24 that the only mention in the statute about public access is
25 in the definition section.



1 JUDGE FAHEY: Can you - - - before - - - before
2 you sit down, if it's - - - if it's okay, Judge - - - I
3 just wanted to ask one - - - one - - - one area that really
4 hadn't been talked about. It seemed that - - - that your
5 opponents did - - - one of the primary arguments on the
6 other side was that, on the decision by the Board - - - by
7 the Landmark Preservation Commission was infected by an
8 error of law. And you didn't address that at all.

9 MS. LAWLESS: Sure. It's not an error of law.
10 First of all, the petitioners never showed that anything
11 but the scope of the Commission's authority was integral to
12 the decision. The Commission may have thought it was
13 deeply problematic - - -

14 JUDGE FAHEY: Well, the way I understood the
15 argument was, is they were told they didn't have the
16 authority to do something that they wanted to do. That's
17 the way I understood the argument. And are you saying
18 either that they were - - - were not told that, or that
19 they were - - - or that they were correctly told what
20 authority they had.

21 MS. LAWLESS: We - - - they were correctly - - -
22 they were correct - - - the - - - there was nothing wrong
23 with what the general counsel said. But to the first
24 point, this is not a case where the Commission had to
25 specifically answer the one question, do we have public - -



1 - is there authority for public access? The Commission was
2 approving work. It doesn't matter - - - what the general
3 counsel said was - - - was correct. The bottom line is
4 that - - -

5 JUDGE FAHEY: Well, well, see that - - - that's -
6 - - that's a separate question. Whether or not it matters
7 if what he said was correct is a little bit different from,
8 say, a balancing approach. If - - - if they had the right
9 information and they balanced the competing interest
10 between everyone, then they're probably perfectly within
11 their powers to make this decision. But if they made a
12 decision under a clear error of law, then it may be a
13 different situation. That's why I'm asking the question.
14 So what decision - - - what advice did he give, do you say
15 was correct?

16 MS. LAWLESS: The general - - -

17 JUDGE FAHEY: What was his correct - - - his
18 advice?

19 MS. LAWLESS: The - - - the general counsel
20 expressed a view that we laid out in our brief, which is
21 that there is nothing - - - there's no public access
22 mandate and there is no mechanical operation mandate, which
23 are the two things that - - -

24 JUDGE STEIN: How do we know whether they
25 rendered their determination based on that advice, even if



1 it was wrong?

2 MS. LAWLESS: We don't know, because - - -

3 JUDGE STEIN: How do we know that?

4 MS. LAWLESS: - - - views were presented on both
5 sides of the issue during the public hearing, the public
6 meeting, in order - - -

7 JUDGE STEIN: And do we, as - - - as judges, have
8 the right to go into the - - - the minds of - - - of these
9 commissioners, and - - - and make a determination as to
10 what we think they based their decision on?

11 MS. LAWLESS: No, and that's something we brought
12 up in our briefs, that we thought was extreme error with
13 the Appellate Division decision, where it kept going into
14 that.

15 JUDGE RIVERA: But why can we not presume that
16 this entity, where members are asking questions, relies on
17 legal advice, not just someone in the audience, not just a
18 - - - a co-commissioner, but actual counsel's legal advice.
19 Why can't we presume that they make their decision in
20 reliance on that advice? I mean, what - - - what is the
21 counsel there for?

22 MS. LAWLESS: Oh, the counsel is there to provide
23 legal advice; he is the legal advisor. There's just no - -
24 - there's no reason to believe that this project turned
25 specifically on public access or turned specifically about



1 the operational clock - - -

2 JUDGE RIVERA: Even - - - even if - - -

3 MS. LAWLESS: - - - because of its side.

4 JUDGE RIVERA: Even if several commissioners
5 asked about it specifically?

6 MS. LAWLESS: It - - - just because several
7 commissioners asked about it, does not mean that the things
8 that they're saying - - -

9 JUDGE RIVERA: Well, one would think - - - one
10 would think a commissioner would know the scope of their
11 authority. So if they are asking and counsel is giving
12 clear legal advice, why is that not an appropriate
13 presumption that they are acting on the legal advice of
14 counsel to the Commission?

15 MS. LAWLESS: Well, if we - - - if that's the
16 case, it's true, that they're listening to their counsel,
17 they are making the decision, but there is - - - we say
18 there's no reason why that was wrong, and - - -

19 JUDGE FAHEY: Well, let's - - - let's assume it
20 was wrong. Let's just, for argument's sake, assume it was
21 wrong. Would the decision survive?

22 MS. LAWLESS: That's the point I was making
23 before, Your Honor, that the petitioners never showed how
24 this was integral to the decision, although this is a very
25 large project, of which these are two small - - - one very,



1 very small part of the project.

2 JUDGE FAHEY: So - - - so I - the way I
3 understand your argument, is basically they balanced this -
4 - - even - - - even if they - - - they could do what - - -
5 what the petitioners requested and they decided not to,
6 they're balancing that against the overall project, is what
7 you're saying.

8 MS. LAWLESS: The upshot, Your Honor, is they
9 looked at the - - - what the statute told them to look at
10 in 25-307 for a certificate of appropriateness, and that's
11 what they did here.

12 JUDGE RIVERA: Okay.

13 JUDGE FAHEY: Thanks.

14 JUDGE RIVERA: Thank you, counsel.

15 JUDGE FAHEY: Thanks.

16 MR. HILLER: Good afternoon, may it please the
17 court, Michael Hiller, Hiller, P.C., on behalf of the
18 petitioner-respondent coalition.

19 JUDGE STEIN: Counselor, you'd - - - you'd agree
20 here that - - - that the Commission did a rather extensive
21 process, that they followed the procedural requirements of
22 the Landmarks Law in - - - in - - - in arriving at its
23 determination whether to grant this certificate or not?
24 Would you not?

25 MR. HILLER: I - - - I would - - - respectfully,



1 I would not agree with that statement. Essentially, what -
2 - -

3 JUDGE STEIN: What - - - what - - - what didn't
4 they do? They held - - - they held public hearings. They
5 had discussions. They viewed the site. I think they may
6 have consulted with experts. What - - - what - - - what
7 didn't they do that the law requires them to do here?

8 MR. HILLER: So beginning a process, whenever
9 you're discussing a certificate of appropriateness, starts
10 with Section 25-307 of the Landmarks Law, and 25-307, the
11 Landmarks Law, specifically directs the Commission to first
12 and foremost look to whether or not the application would
13 result in construction that would effectuate the purposes
14 of the law.

15 JUDGE STEIN: No, I'm not talking about the - - -
16 the determination they reached. I'm talking about the
17 process.

18 MR. HILLER: I - - - I would agree sim - - - if
19 you're - - - if you're asking whether or not they had
20 hearings and meeting - - - they had a hearing and a
21 meeting, they did. But that's, again, and I don't mean to
22 quibble with you about this, but in order for them to have
23 followed the law correctly, from a procedural perspective,
24 they were required to look to the purposes and goals of the
25 Landmarks Law and that's where the wheels came off of this



1 determinative process.

2 JUDGE STEIN: Okay. Well, well, we can debate
3 that - - -

4 MR. HILLER: Sure.

5 JUDGE STEIN: - - - but I - - - I thought, at
6 least part of your argument was that they didn't do that.
7 That, at least with respect to these two issues of public
8 access and operation of the clock, all they did was - - -
9 they - - - they based their decision on the fact that
10 counsel told them that they couldn't restrict or re - - -
11 make certain requirements. But they - - - they wrote a - -
12 - a written decision or determination and they made certain
13 findings, and nowhere in that document, do I see any
14 reference to reliance on that - - - that - - - that legal
15 advice, right or wrong.

16 And so what I'm really getting to is, maybe they
17 did, maybe they didn't, maybe it was right, maybe it was
18 wrong. But I - - - I am of the understanding that the
19 court may not second guess that, may not question that, may
20 not presume or assume that. They have to go based on what
21 the Commission gave as their reasons for approving this - -
22 - this proposal. And what they gave was that they looked
23 at all these different factors, and that they decided that
24 this met the purposes of the act.

25 So how - - - so how - - - how do we get to



1 question what the basis was - - -

2 MR. HILLER: Okay.

3 JUDGE STEIN: - - - if they - - - if they told
4 you something - - -

5 MR. HILLER: So, the First Department made a
6 finding of fact in a very detailed decision by Justice
7 Gesmer, during which she went through each of the
8 statements and comments made by each of the commissioners,
9 and make - - - and the First Department determined - - -

10 JUDGE FEINMAN: So - - - so you just said that
11 they made a finding of fact - - -

12 MR. HILLER: Yes.

13 JUDGE FEINMAN: - - - and I guess that's part of
14 my problem with what the First Department is doing here,
15 because in an Article 78 proceeding, should they, in fact,
16 be making findings of fact?

17 MR. HILLER: With respect to the pro - - - what
18 happened during the procedural pro - - - during the
19 process, absolutely. That's the reason we have a
20 transcript. And that's the reason, by the way, we know
21 that the commissioners did, in fact, base they
22 determinations on the misadvice. And this court in a case
23 called Kilgus, which remarkably is cited by the appellants,
24 specifically said, while you - - - it is not for the court
25 to probe the mental processes of the commissioners - - -



1 JUDGE FAHEY: Well, you see that - - -

2 MR. HILLER: - - - if it's not clear. If it's in
3 the transcript and the statements are recorded, you can
4 look at those and render a determination based upon what
5 transpired, and the First Department did exactly that. The
6 First Department looked at the statements, went through
7 each of them, and made a determination that seven out of
8 eight commissioners wanted the clock to remain mechanical.
9 And half of the - - -

10 JUDGE FAHEY: I don't know. I don't know. I was
11 a councilman in Buffalo for thirteen years. And I sat in
12 on an enormous number of legislative hearings. And quite
13 often in those hearings, things were said that were musings
14 on - - - on people's positions on policy manner. Perfectly
15 appropriate - - - and I don't mean to - - - and yet this -
16 - - when I read this transcript, and when I looked at this
17 record, that - - - that's what this looked like to me, like
18 people were saying out loud, well, could it be this, and it
19 couldn't be that, and - - - and they were musing on it.

20 And usually when you get advice from counsel, you
21 don't - - - you - - - you get the advice from counsel, but
22 you also ask for a written opinion if you're going to make
23 that advice from counsel part of your findings that go into
24 the record. And - - - and I didn't see that - - - those
25 kind of actions taking place here. In other words, it



1 looked much more to me like a balancing of competing
2 interests and how to come to some conclusion about the
3 overall project and - - - and how this piece affected the
4 overall project.

5 MR. HILLER: What - - - what troubles me about
6 the direction of this - - - this dialogue now is that, at
7 the outset of this litigation, the appellants did not take
8 the position that the commissioners disregarded the advice
9 or didn't follow it. The position of the appellants at the
10 very outset of this litigation was that the advice that was
11 given was correct. And in that regard, if I would just
12 direct your attention to record 490 - - - 489 to 48 - - -
13 490.

14 At 489, the - - - the appellants recite what our
15 argument is. That the Commission - - - that the lawyer for
16 the Commission advised the commissioners that they had no
17 right to consider the absence of public access and had no
18 right to require that that the clock not be demechanized
19 and that it not be electrified. In response to that, they
20 wrote "Contrary to petitioner's claims, the interior
21 designation in Landmarks Law do not give the Commission the
22 authority to require that the clock towers be - - - be
23 publicly available, publicly accessible, or operated
24 mechanically." So - - -

25 JUDGE FAHEY: Right.



1 JUDGE STEIN: But that doesn't preclude the
2 alternative argument that even if you disagree with me on
3 that legal point, you still - - - they - - - that's not
4 what they relied on.

5 MR. HILLER: True, but it's because the issue was
6 not raised at the outset, and was only first raised at the
7 time - - - after they lost, by the time with the First
8 Department, it deprived us of the opportunity to say, hey,
9 well, if that's the case, we - - - we may have to take the
10 depositions of the commissioners, because the point of the
11 matter is, this is not a preserved point for this appeal.
12 They raised this issue before the First Department for the
13 first time, and - - - and they deprived us of the
14 opportunity to explore the issue that is concerning each of
15 you, or some of you. And that is a real problem.

16 The - - - the - - - you know, it's not a
17 situation in which this is an issue that the - - - that was
18 never before the courts before. I heard quite a bit about
19 Teachers earlier, and I do want to emphasize this point.

20 As we all know, the Teachers case involved the
21 designation of a restaurant over the objections of the
22 owner. And opposing counsel said the - - - this court in
23 Teachers said that public access is something that could
24 disappear tomorrow, so under the appellant's argument, if
25 public access - - - if - - - if the designation happened on



1 a Tuesday, then on Wednesday, the owner could file an
2 application with the Landmarks Preservations Commission,
3 ask for it to be residentially privatized, the pre - - -
4 the premises, and then after that point, access is cutoff.

5 And when you look at Teachers, you know that's
6 not possible, because at page 44 of the decision, and I'm
7 quoting now, "The restaurant interior, having been provided
8 for the enjoyment of New York City's residents and visitors
9 since it opened more than three decades ago, the Commission
10 now may seek to preserve it for others." And "for others"
11 is followed by a citation to 25-301(b).

12 So if I could just talk to you briefly about
13 301(b) of the - - - of the Landmarks Law. The Landmarks
14 Law at 301(b) has a series of bullet points, talking about
15 what the purposes of the Landmarks Law are - - - are. And
16 as I said earlier, any discussion of 25 - - - any types of
17 discussion of certificates of appropriates begins with 25-
18 307, which directs you to the purposes at 25-301(b). And
19 what they are, among others, are fostering "civic pride in
20 the beauty and noble accomplishments of the past,"
21 promoting tourism, and most importantly, promoting the use
22 of interior landmarks "for the education, pleasure and
23 welfare of the people of the city."

24 JUDGE STEIN: But you said - - -

25 JUDGE GARCIA: Counsel - - - I'm sorry.



1 JUDGE STEIN: No, go ahead.

2 JUDGE GARCIA: Those are all purposes and - - -
3 and we've read them. But my - - - my question is, is a
4 more basic one on the - - - on the advice. As I read the
5 advice, and as the Appellate Division says, the advice was,
6 you - - - you don't have the authority to require interior
7 access. You don't have the authority to require that this
8 be, you know - - - that you don't mechani - - - that you
9 don't mechanize it or electrify it. And if that advice is
10 wrong, as you say, what does that empower the Commission to
11 do? What does that empower - - - the advice is wrong, what
12 do they have the authority to do?

13 MR. HILLER: I - - - in - - - in terms of what?

14 JUDGE GARCIA: In terms of this COA proposal.
15 What do they have the authority to do if the advice is
16 wrong?

17 MR. HILLER: Oh, they the ad - - - they had the
18 power to require that the tower clock's space remain open.

19 JUDGE GARCIA: Okay, that's - - - okay, so - - -
20 and - - -

21 JUDGE GARCIA: And by the way - - -

22 JUDGE GARCIA: Wait, wait, wait.

23 MR. HILLER: Okay. Sure.

24 JUDGE GARCIA: They have the authority to require
25 that. How do they do that? Do they say, we're accepting



1 your proposal, but there's a few changes we're making in
2 here. We're going to require public access to the clock
3 tower, and we're going to require that you do not electrify
4 the clock. Do they have the authority to do that?

5 MR. HILLER: Of course, they do. In fact, the -
6 - - the remarkable thing about this case - - -

7 JUDGE GARCIA: Where do you find that since the
8 authority section for the COA process says you have the
9 authority to approve or deny.

10 MR. HILLER: And the reason I know that is
11 because the Landmarks Preservation Commission did it in
12 this case. You heard a few moments ago that there was a
13 voluntarily undertaken - - - undertaking - - -

14 JUDGE GARCIA: Was the banking hall in the
15 proposal, that it would be public? Was that part of their
16 proposal?

17 MR. HILLER: Not initially. What happened - - -
18 if I may just rect your - - - direct your attention - - -

19 JUDGE WILSON: Are you relying - - - are you
20 relying at all on - - -

21 MR. HILLER: - - - to 444 of the record, because
22 this will resolve the issue.

23 JUDGE WILSON: Are you relying at all on 304(b)
24 for the authority of the Commission?

25 MR. HILLER: This certainly is the case that the



1 authority of the Commission re - - - rests in 304(b) for
2 purposes of use, absolutely. And of course, 307(e) which
3 speaks specifically to interior designations. But if - - -
4 if I may just respond quickly to Judge Garcia's point, you
5 asked how would they do it. If you look at record 444, you
6 will see that the Commission said, and I quote, "In voting
7 to approve this proposal, the Commission required the
8 applicant to record a restrictive declaration against the
9 property that provided for, .5, public access to the
10 banking hall, and that the main banking hall would not be
11 used for residential purposes."

12 They could do it, but they didn't do it in this
13 case, and what I have not heard from the petitioners - - -

14 JUDGE GARCIA: You - - - your view is, if they
15 had come in and said we're privatizing the pub - - - the
16 banking hall or making that into a condominium, they could
17 have put that thing in there?

18 MR. HILLER: And - - - and - - - and they did.

19 JUDGE GARCIA: They came in and said we're
20 turning the main banking hall into a condominium.

21 MR. HILLER: They - - - they came in - - - their
22 initial proposal was not to - - - not to make the - - - the
23 banking hall - - -

24 JUDGE GARCIA: But the proposal that was
25 approved, what was the thing - - - what was the designation



1 of the banking hall? Was it private or was it going to be
2 public access?

3 MR. HILLER: Public, because the - - - because
4 the Landmarks Preservation Commission did exactly what they
5 said they had no power to do - - -

6 JUDGE STEIN: But it wasn't - - -

7 MR. HILLER: - - - with the banking - - -

8 JUDGE STEIN: The power to do it wasn't really
9 tested, because the - - - the - - - the owners said, yeah,
10 no problem. I mean, I don't know what - - - exactly at
11 what point in the process they - - - they decided that was
12 okay, but - - -

13 MR. HILLER: With all due respect - - -

14 JUDGE STEIN: - - - they - - - it was agree - - -
15 it was - - - it was an agreement, so that doesn't really
16 test the legality of whether the Commission had the power
17 to require it.

18 MR. HILLER: Not - - -

19 JUDGE STEIN: It was - - - they were talking
20 about a whole bunch of different things, and they said,
21 okay, we'll do this, but we - - - you know, we don't want
22 to do that, and - - - and so they came together, and - - -
23 and they agreed on a proposal that satisfied both the
24 Commission and - - - and the owners. That, to me, is
25 different than the - - - than the owner saying, I don't



1 want to do that; you can't make me do that, and the
2 Commission saying, yes, we can.

3 MR. HILLER: Your - - - Your Honor, with all due
4 respect, what you've just described as that process is
5 inconsistent with the record. The record, in the
6 certificate of appropriateness, which the panel has
7 suggested to me should be the repository of information as
8 the basis for the decision does not say there's an
9 agreement. In fact, not a single commissioner on the
10 Commission, makes even a single reference to any supposed
11 agreement. It was a directive. It was required. It was
12 imposed upon them. And I think that's the critical
13 distinction here.

14 JUDGE RIVERA: But counsel, I'm - - - I'm - - -
15 but I'm a little confused. At the time that the developer
16 purchases this property, it is a designated landmark, is it
17 not?

18 MR. HILLER: Absolutely.

19 JUDGE RIVERA: It has public access, does it not?

20 MR. HILLER: It does.

21 JUDGE RIVERA: So where is the opportunity until
22 the Commission says otherwise to close the doors and close
23 it off? I - - - I'm a little confused by sort of whether
24 it's a negotiation or whether or not the only choice is
25 thumbs up or thumbs down on the request.



1 MR. HILLER: That issue comes up when they make
2 an application to - - - to - - - to alter the space. When
3 they make an re - - - an application to alter the space - -
4 -

5 JUDGE RIVERA: But that's my point.

6 MR. HILLER: Yes.

7 JUDGE RIVERA: If - - - if that's rejected, it
8 stays a landmark. It - - - it has the public access - - -

9 MR. HILLER: Absolutely.

10 JUDGE RIVERA: - - - and they can't prevent - - -
11 the developer can't prevent that public access, can they?

12 MR. HILLER: In the context of - - - in a
13 certificate of appropriateness or some other - - - I'm - -
14 - I'm sure - - - I just want to make sure - - -

15 JUDGE RIVERA: Upon the purchase.

16 MR. HILLER: Upon the purchase, that does not
17 allow the - - - the developer to close the doors, no;
18 that's correct.

19 JUDGE STEIN: But the developer could walk away
20 and say I'm not going to - - - I'm not going to develop it,
21 and - - - and - - - and the landmark may go into disrepair.

22 MR. HILLER: The - - - the developer bought the
23 property for 145 million dollars. I don't suspect that
24 there was any real risk that they were going to walk away
25 from the building.



1 JUDGE FAHEY: Let me just - - -

2 MR. HILLER: But - - -

3 JUDGE RIVERA: And knowing at the time it's a
4 designated landmark?

5 MR. HILLER: Yes. And more than that, by the
6 way, in addition to that, the developer met with the clock
7 master general of the City of New York, Marvin Schneider,
8 and actually went through him and talked about the clock,
9 and how he needs access, and how it's wound, and how he
10 takes tours there every week, and with that information, he
11 still purchased the building.

12 JUDGE WILSON: Section 311 also requires the
13 owner of a landmark to maintain it, no?

14 MR. HILLER: It does. And - - - and - - - and
15 that's significant because Marvin Schneider, who's the
16 Clock master general, and his deputy, Forest Markowitz, as
17 well as one of the foremost experts on tower clocks in the
18 United States, Chris DeSantis, all said that disconnecting
19 the clock from its mechanism, would actually force it into
20 permanent disrepair; it would destroy the clock. And in
21 addition, the - - - the curator, and the executive director
22 of the Ame - - - of America's Watch and Clock Museum in
23 Washington, D.C. (sic), which has no connection with this
24 lawsuit at all, submitted a statement saying exactly the
25 same thing.



1 JUDGE GARCIA: Let's say they bought this
2 building and then they run out of money. It happens. The
3 building's empty. It's boarded up. Can they bring an
4 enforcement action to make the owner open the boards and
5 bring people through to tour it, or can they say, look, the
6 clock's not being wound; you know, you have to wind the
7 clock. Can - - - do they have the authority to do that?

8 MR. HILLER: What - - - what - - - if - - - if
9 the owner is - - - is suffering from a hardship, there's a
10 wonderful provision under Section 25-309 that allows for an
11 application. And by the way, that's an exception to 25-
12 307. 25-307 is the process by which applications are made
13 to - - - to renovate space, and it states in 25-307 that if
14 it does not satisfy the purposes of the Landmarks Law, you
15 shall deny the application. The only exception to that is
16 similar to what you've just raised, 25-309, specifically
17 gives the owner an out.

18 And - - - and - - - and to me, that - - - that
19 really is where we are here, because if you think about - -
20 - if you think about what the purpose of the Landmarks Law
21 ultimately is, because ultimately, what - - - the decision
22 that this court makes will decide, really, for whom the
23 Landmarks Law was enacted. If the Landmarks Law was
24 enacted for the purpose of making properties interior
25 designated landmarks, and other properties available to the



1 public for their education, welfare, and pleasure, as set
2 forth in 301(b)(g), then the answer is, they must - - -
3 there must be some minimal level of access, but - - -

4 JUDGE GARCIA: But this is - - -

5 JUDGE STEIN: But here's my concern - - -

6 JUDGE GARCIA: I'm sorry.

7 JUDGE STEIN: - - - if too many restrictions are
8 put on people, they won't buy these properties, and - - -
9 and I think the Landmarks Law is very, very clear that it
10 was intended to promote private ownership and maintenance
11 of these landmarks, so that it - - - it didn't rest on - -
12 - on - - - on the government. So I - - - I mean I think in
13 the long run, it - - - it could disserve this purpose.

14 MR. HILLER: Well, the - - - Judge Stein, the
15 alternative to that is that developers will ac - - -
16 acquire interior landmarks and then immediately privatize
17 them. And I can tell you that at record 119 - - -

18 JUDGE STEIN: But - - - but only - - -

19 MR. HILLER: - - - you will see there's - - -

20 JUDGE STEIN: But only if the Landmark Commission
21 is willing to - - - to - - - to, you know, let them do
22 certain things. They can't just walk in and do it, as you
23 said.

24 MR. HILLER: No, but what they could do is make
25 the same application this developer made here, and the



1 outcome of this appeal will determine whether or not this
2 Commission will grant or deny that application.

3 JUDGE GARCIA: But aren't they balancing also
4 different things, and I think a number of people have
5 raised this. In an exterior landmark, a building landmark,
6 you'll walk by, the clock tower outside you can see the
7 clock, not a takings argument, but there certainly are
8 takings issues here, where you designate an interior space,
9 and you're going to say, no way, no how, from now until
10 eternity, you need public access to this. That's a very
11 different calculation than designating the clock tower that
12 you see from the outside.

13 So isn't that what they're really they're getting
14 at with the purposes of it, and giving the Commission,
15 which they appear to have used here, the discretion to look
16 at all those purposes, and all this space, and approve or
17 disapprove a plan?

18 MR. HILLER: The answer to that question actually
19 lies in what the statute initially said in 1965 versus what
20 it said in 1973. When I was preparing for argument last
21 night, I had a lot of trouble, but I did find it. What's
22 interesting about it is, that in 1973, the statute was
23 amended to include protection for interior landmarks.

24 And the - - - the - - - when they did that, they
25 had to, obviously, sprinkle interior landmarks throughout



1 the statute to make sure that it fit in with all those
2 places. One place where they - - - where they were very
3 clear was in 301(b)(g). And 301(b)(g) states, and I just
4 want to - - - it's - - - it's so important. It says that
5 among the purposes of the Landmarks Law is to promote the
6 use of interior landmarks "for the education, pleasure and
7 welfare of the people of the city."

8 Now it's interesting that they did not include
9 interior landmarks in a couple of others, but they did in
10 this one, and if you cannot use the - - - if you cannot see
11 an interior landmark, then it certainly cannot even begin
12 to satisfy that - - - that purpose if the - - - and then go
13 into the others as well. You can't promote tourism if
14 people come to New York to look at it, but can't see it.

15 JUDGE GARCIA: But do you have to satisfy every
16 purpose?

17 MR. HILLER: I think - - -

18 JUDGE GARCIA: It - - - it doesn't say that. It
19 says consistent with purposes. So each purpose, tourism,
20 well, this would be - - - this really doesn't promote
21 tourism, so you can't do that. And - - - and it's arguable
22 this doesn't. But I see that as, look at the purposes,
23 make a determination, given their expertise, given the
24 people that are on the LPC, make a determination whether
25 this is consistent with that.



1 MR. HILLER: But the problem here is that,
2 commissioners on the Landmarks Preservation Commission
3 wanted to consider public access, because it is among the
4 purposes set forth in 301(b), and they were - - - they were
5 - - -

6 JUDGE WILSON: So let me ask you about that.

7 MR. HILLER: - - - sidetracked on that.

8 JUDGE WILSON: Let me ask you about that
9 directly.

10 MR. HILLER: Sure.

11 JUDGE WILSON: Had - - - had they gotten what you
12 deemed to be the correct legal advice - - -

13 MR. HILLER: Yes.

14 JUDGE WILSON: - - - could they have reached the
15 same decision after balancing everything?

16 MR. HILLER: No.

17 JUDGE WILSON: Why?

18 MR. HILLER: Because - - -

19 JUDGE WILSON: Why not?

20 MR. HILLER: Because there has to be some minimal
21 level of access. There has to be some level. It doesn't
22 have to be 24/7, and there's no risk that people are going
23 to be - - -

24 JUDGE WILSON: So - - - so they - - - so in your
25 view, they couldn't conclude - - - they - - - they might be



1 - - - let's say we're faced with a little bit different set
2 of circumstances, where the building was going to fall
3 apart and crumble, or they found one party was interested,
4 but the only condition they would take it on was
5 dismantling and removal of the clock. And that was their
6 option. You're saying they couldn't balance that and
7 conclude, we're going to have the lose the clock to
8 preserve the whole building.

9 MR. HILLER: Judge Wilson, I'm sorry. I
10 misunderstood your question. I thought you were asking
11 about this particular property, as opposed to in general.
12 If we're talking about this particular property, which is
13 what I thought you were asking about, the answer is they
14 had to consider public access. They had to.

15 JUDGE WILSON: To consider it.

16 MR. HILLER: But - - - right. They had to
17 consider, and in this instance - - - in the absence of a
18 rational basis for privatizing this clock tower, the answer
19 is they had to make it - - - they had to make it available.
20 And I would say to you, I still haven't - - - I've read all
21 of their papers - - - I still haven't seen the place where
22 they say - - -

23 JUDGE STEIN: But what if the rational basis - -
24 - what if the rational basis was, the public can still see
25 it. We're - - - we're preserving it; we're preserving all



1 the mechanics, and we have this building that has a whole
2 bunch of other interior landmarks, and they're getting
3 preserved, and they're going to be open to public. Why
4 isn't that a rational basis?

5 MR. HILLER: Okay. There is a lot in there. I
6 just want to unpack that. With respect to the exterior
7 seeing on the outside, this building is both an exterior
8 landmark and an interior landmark. And there's no
9 precedent, whatsoever, for the proposition that you can
10 sacrifice an interior landmark because you can see it from
11 the outside.

12 JUDGE STEIN: No, I'm talking about the clock
13 faces, that you can - - -

14 MR. HILLER: The clock - - -

15 JUDGE STEIN: The clock itself.

16 MR. HILLER: The clock faces from the - - - from
17 the outside.

18 JUDGE STEIN: Yeah.

19 MR. HILLER: But that's - - - that's exterior.
20 We're talking about the mechanism itself.

21 JUDGE STEIN: Well, that's sort of a - - -

22 MR. HILLER: We're talking about the clock tower
23 suite, which has been open and available to the public from
24 1972 to 2013, when - - - when the - - - the art gallery was
25 unceremoniously closed. This was a regular place that was



1 - - - was visited by people to see the space. Now the
2 balancing that you're talking about, that balancing process
3 never had its opportunity to truly mature, because while
4 the commissioners were asking the question, can we consider
5 pub - - - we want to be able to make it available - - -

6 JUDGE RIVERA: All right, counsel, we know your
7 argument on that, and your light has been off for quite
8 some time. Judge Garcia has a question.

9 Please proceed.

10 JUDGE GARCIA: It wasn't - - - my problem with
11 that is it wasn't - - - you can't consider going to Judge
12 Wilson's point. It was you can't require. So isn't that a
13 difference? I mean, here's this Appellate Division
14 majority. The LPC's counsel responded that "LPC does not
15 have the power under the Landmarks Law to require interior
16 designated spaces to remain open." That's a quote. And
17 "to require that the clock mechanism remain operable."

18 So is there a difference between telling the
19 commissioners you can't require that, you can't line item
20 veto a plan, versus you can't consider that at all in
21 looking at the purposes of the Landmarks Law?

22 MR. HILLER: Well, if you say you cannot consider
23 - - - if you tell the commissioners you cannot consider
24 whether or not the absence of public access is inconsistent
25 with the purposes, we cannot require, under any - - - we



1 cannot require ever that an interior landmark be available
2 to the public. If that's what he's saying, then you're
3 effectively discounting that as a consideration altogether.

4 If you - - - if you look at one point at 785, the
5 - - - at 785, Mr. Silberman of the Commission that - - -
6 the lawyer, said "There's no power in the landmarks mor - -
7 - law to require interior designated landmark spaces to
8 remain public." And at 786, "There's no power to require
9 them to remain public."

10 JUDGE GARCIA: Right, that's the language I just
11 quoted.

12 MR. HILLER: Right.

13 JUDGE GARCIA: But it - - - it goes to a
14 requirement rather than you cannot consider that, in
15 rejecting or accepting the plan. Isn't that a - - - isn't
16 that Judge Wilson's point? I mean, they could consider it.
17 They could just consider that it doesn't overcome the other
18 things in the plan, that they believe that are appropriate
19 and they want to approve.

20 MR. HILLER: I think if - - - if you review the
21 transcript in its entirety, you can see very clearly the
22 trajectory of the deliberative process stopped, when this
23 issue came up. There was no opportunity to engage in the -
24 - - these more - - - I don't want to use the word Talmudic,
25 but - - - a much more detailed analysis that you're



1 discussing.

2 And - - - and just - - - I just want to answer
3 Judge Stein's question - - -

4 JUDGE RIVERA: If that's your last point, yes.

5 MR. HILLER: Yeah. Just to answer Judge Stein's
6 question, because I didn't get to finish it. You said,
7 what about, you know, difficult to get to, because I think
8 you said, you know, maybe they decided this one's more
9 difficult to get to; it's at the top of the tower. I would
10 just point out that at 784 and 785 of the record, you'll
11 see that the architect for the developer, was specifically
12 asked whether or not this was - - - it was possible to make
13 the tower accessible to the public, and he said, it is
14 possible, but we have no intention of doing that.

15 I would just leave you with this last point. I
16 still have not heard from the re - - - the appellants, why
17 it advances the po - - - the purposes of a Landmarks Law to
18 residentially privatize this space, that has been open and
19 available since 1898.

20 JUDGE RIVERA: Thank you, counsel.

21 MR. HILLER: Thank you.

22 MS. LAWLESS: A few points, Your Honor. I hear
23 my adversary speak about the Landmarks Commission aligning
24 for residential privatization. The Landmarks Commission
25 did no such thing here. It was not the Landmarks



1 Commission's job to tell - - -

2 JUDGE RIVERA: Let me just ask, what - - - what
3 recourse does an owner/developer have if, taking Judge
4 Wilson's hypothetical, the - - - the property is falling
5 apart?

6 MS. LAWLESS: There - - -

7 JUDGE RIVERA: Is there recourse to avoid any
8 kind of demand by the Commission? Can the Commission make
9 a demand that they maintain the property? What recourse do
10 they have?

11 MS. LAWLESS: There are hardship provisions that
12 I really will not speak to, because they're not - - - they
13 are in the statute, and I don't have a very extreme
14 familiarity of them, a very detailed familiarity of them.
15 Here, I will say the only requirements on the property
16 owner are two things. Under 311, keep the property in good
17 - - - keep the features in good repair. Two, come to the
18 Landmarks Commission for work, to get work approved.

19 The Commission only deals with work. I know Your
20 Honor was talking about, well, what if it's no longer a
21 landmark. Designation is a starting point, and we know
22 that, because in 25-307 - - -

23 JUDGE RIVERA: Is there not a process to
24 eliminate the designation, to rescind the designation?

25 MS. LAWLESS: Yes, Your Honor, but it's an



1 extreme - - -

2 JUDGE RIVERA: And isn't that what the developer
3 should have done?

4 MS. LAWLESS: The developer could have done that,
5 but I - - - it's an extreme sit - - -

6 JUDGE RIVERA: No, no, no. Should have done
7 that?

8 MS. LAWLESS: No, because the - - -

9 JUDGE RIVERA: Why not?

10 MS. LAWLESS: Because the developer was asking
11 the com - - - the com - - - the - - - this was a large-
12 scale restoration project, and they were looking - - -

13 JUDGE RIVERA: But I'm just talking about the
14 tower. I'm just talking about the tower right now.

15 MS. LAWLESS: I don't know - - -

16 JUDGE RIVERA: The clock mechanism. That's what
17 I'm asking you about. If they no longer - - - look, they
18 want to make millions of dollars off it, fine. It's a
19 capitalist country. They - - - they think that having
20 public access and maintaining the mechanism in its original
21 condition or the way it was intended to be used, somehow
22 means that they - - - it won't be as marketable as they
23 want it to be, or it won't be marketable at all, as - - -
24 as - - - as whatever penthouse or condo they were going to
25 make it, why isn't that what the law provides as their



1 recourse? Because they bought it knowing it's a landmark,
2 so if they no longer want it to - - - to be treated as a
3 landmark, doesn't the law provide them that mechanism?
4 Shouldn't they have used that? That's what I'm having
5 difficulty - - -

6 MS. LAWLESS: So I - - - I can't - - -

7 JUDGE RIVERA: - - - with here.

8 MS. LAWLESS: I can't speak for the developer,
9 but from the Commission's perspective - - -

10 JUDGE RIVERA: Yeah.

11 MS. LAWLESS: - - - we would like things to be
12 landmarked. We would like to maintain jurisdiction. If
13 there was an - - -

14 JUDGE RIVERA: But isn't it difficult to get
15 something landmarked?

16 MS. LAWLESS: I - - - I can't speak to how
17 difficult. I will speak to the difficulty of interiors - -
18 -

19 JUDGE RIVERA: Well, my - - - my understanding is
20 it's - - - it's not an easy task.

21 MS. LAWLESS: In the interiors, there's only 117.
22 But - - -

23 JUDGE GARCIA: Counsel, if you go and you do this
24 process and get it delisted, let's call it. All bets are
25 off, right? And then you can - - -



1 MS. LAWLESS: You can do anything you - - -

2 JUDGE GARCIA: - - - disassemble the clock. You
3 can take the mechanism out. You can knock the tower down.
4 You can do whatever you wanted.

5 MS. LAWLESS: And it's not a guarantee that the
6 Commission would approve that. Here - - -

7 JUDGE GARCIA: No, but let's say they do. Let's
8 say you go in and you make that hardship case, and they
9 approve it. Then you can do whatever you want to that
10 clock. Whereas here, you have to go the Landmarks
11 Commission. They can approve; they can disapprove. You -
12 - - you're preserving the mechanism. So it really a policy
13 you would want to encourage to have people who are in this
14 situation go and get to nothing - - - get this
15 dedesignated, so all bets are off, or go to the Landmarks
16 Commission, where you can present a proposal that balances
17 those issues. It seems to me to say, hey, if you want re -
18 - - you want recourse here, go get this delisted, which the
19 Commission can certainly do under the right circumstances.
20 Why would that be the appropriate course to take?

21 MS. LAWLESS: Well, the - - - I think as a whole,
22 it would be less preservationist to do that. The
23 Commission retains jurisdiction. The Commission retains
24 jurisdiction over the features. Here, in this situation,
25 we will always - - - the Commission will always be there to



1 look at the features, and - - - and see how they're
2 preserved and approve all plans for preservation, so that
3 this can be preserved - - -

4 JUDGE STEIN: And, in fact, there's a permanent -
5 - - there's a permanent restrictive covenant, saying that
6 they have ac - - - they have access and they get to
7 inspect.

8 MS. LAWLESS: They did enter into that. I know
9 my adversary made some agreement. Is there some shadiness
10 that went on about this, I - - - I don't think so. I think
11 that there was - - - they could not mandate it.

12 JUDGE STEIN: No, I don't mean public access. I
13 mean the Commission has access.

14 MS. LAWLESS: Yes, we have access. Yes, we have
15 access to inspect at all times. And I will just emphasize
16 that a categorical public acc - - -

17 JUDGE RIVERA: Can I just clarify? Is - - - is
18 the Commission the body that can indeed rescind a landmark
19 designation?

20 MS. LAWLESS: I would point you to provision
21 which I think is 3-0 - - - 303, and it also requires City
22 Council and mayoral approval, so it's a very exhaustive
23 process to get rescission of a - - - of a designation.

24 JUDGE RIVERA: But doesn't that - - - doesn't
25 that at a minimum suggest that the treatment of a landmark,



1 once you go through that process, and it's not an easy
2 process - - - it's a costly process - - - that to rescind
3 that designation, the - - - the city takes it seriously,
4 that it's actually going to the Council; it's beyond the
5 authority of the Commission?

6 MS. LAWLESS: Sure, we take it seriously, but the
7 Commission itself - - -

8 JUDGE RIVERA: I'm not asking if you take it
9 seriously. I'm asking about the Council taking it
10 seriously.

11 MS. LAWLESS: Well, I can't - - - I can't speak -
12 - - you know, for the City Council. The City Council spoke
13 when the City Council drafted the legislation, it allowed
14 for this to happen, but I will point out. I'll emphasize
15 what the City Council did not do was impose a public access
16 mandate. It could have done that; it should have done
17 that, because - - -

18 JUDGE RIVERA: If - - - if we disagree with you -
19 - - if we disagree with you, do they win?

20 MS. LAWLESS: I think - - - I think, Your Honors
21 - - - I think Judge Stein in particular, they - - - you - -
22 - Your Honors have emph - - - have pointed out that there
23 are ways that this project was rational; this project was
24 reasonable. At the end of the day, what matters is 25-307.

25 JUDGE RIVERA: Thank you, counsel.



1 MS. LAWLESS: Thank you.

2 JUDGE RIVERA: Thank you.

3 Counsel?

4 MR. ROUHANDEH: Just two quick cites and then two
5 other points. One is, a cite to the Weinberg v. Barry
6 case, 634 F. Supp. at 93. It also makes the point that
7 public access is not necessary to achieve the purposes
8 under the statute. It dealt with the D.C. statute, which
9 is very similar. And the reason it doesn't is because one
10 of the goals of the - - - a primary purpose is
11 preservation. And we want preservation even without public
12 access, because it preserves the - - - the property for
13 future generations. That's what the case says. That's
14 what the law - - -

15 JUDGE RIVERA: How - - - okay, so then how is the
16 - - - is this particular clock preserved if you're
17 unplugging part of this mechanism and you're changing the
18 way it functions, which was the reason it was - - - part of
19 the reason it was designated?

20 MR. ROUHANDEH: It's all stays in place and could
21 be - - - that evidence was presented that it could be put
22 back together - - -

23 JUDGE STEIN: Like the gas lamps.

24 MR. ROUHANDEH: - - - and - - - mechanically
25 operated. And we want - - - we do not want owners like



1 this owner to buy these properties and rescind. We want
2 there - - - there are many owners that - - -

3 JUDGE RIVERA: Rescind, I'm sorry. Rescind what?
4 I lost you.

5 MR. ROUHANDEH: Rescind the landmark designation.
6 What we want to do, is there are many landmark owners.
7 They want to preserve it. It's part of the - - - the whole
8 project is to have these beautiful landmarked features
9 preserved, and the policy is to encourage them to do that.

10 And also, if you look back, it goes all the way
11 back to Penn Central. It's not going to happen under
12 public ownership. It didn't happen under public ownership
13 when the City owned it. They had scaffolding for ten
14 years, so people didn't get - - -

15 JUDGE RIVERA: But you - - - you don't have
16 anything in the record that suggests the developer would
17 not make a fair market value return if indeed they could
18 not do what they wanted to do with - - - with the clock
19 tower?

20 MR. ROUHANDEH: No. That's not the takings
21 argument. The takings argument is - - - is, one, the
22 effect on other buildings and properties, a restaurant that
23 can no longer function.

24 JUDGE RIVERA: No, no, we're talking about this
25 property.



1 MR. ROUHANDEH: Yeah. This one - - -

2 JUDGE RIVERA: I'll - - - my question is about
3 this property.

4 MR. ROUHANDEH: - - - I think the takings
5 argument is an interesting one, which is, what makes a pri
6 - - - a property private? Being able to decide who comes
7 into it and who doesn't.

8 JUDGE RIVERA: Sure.

9 MR. ROUHANDEH: This is worse is eminent domain.
10 To take somebody's property that they bought, and say, you
11 keep it up, you repair it, you use it, except for we can
12 control who comes in, when, why, and how.

13 JUDGE RIVERA: Yeah, but - - - but that's - - -
14 that's actually not the - - - the understanding of that
15 whole takings line of jurisprudence, because of course the
16 developer here bought what was designated a landmark. This
17 is not where you have property and your rights - - - that
18 bundle, right, that bundle of rights is - - - sticks are
19 being pulled out and - - - and - - - and somehow, you're
20 being - - -

21 MR. ROUHANDEH: I don't think - - -

22 JUDGE RIVERA: - - - compromised in that
23 ownership.

24 MR. ROUHANDEH: No, I don't think that question
25 was answered - - - that I'm raising was answered in Penn



1 Central. But in any event, when they bought it pursuant to
2 the landmark, it was never intended at the time of the
3 designation to have public access. If you look at 4 - - -
4 the record 495; it's that volume that is the printed-up
5 copies of the CDs. There's a picture in it at LPC-81, and
6 you can't get to the clock tower through the designated
7 portions. If they - - - if they had intended that it be
8 publicly accessible, they would have allowed access to it.

9 And in fact, it wasn't - - - many of the
10 landmarked spaces were not accessible at the time. If you
11 look at 1029 of the record and 786 of the record, at - - -
12 the city had closed off access to certain landmarked
13 offices.

14 So I - - - but I think this comes back to this
15 fundamental goal of - - - two goals. One is, you can - - -
16 preservation without public access is a very important goal
17 that should be pursued. And the answer to - - - and we
18 want to encourage people to preserve, because otherwise
19 building owners will not buy these buildings if there's too
20 many restrictions on them. They won't find a return.

21 JUDGE RIVERA: What about - - - what about
22 denying public access, ending public access, but
23 maintaining the functioning of the mechanism as - - - as it
24 was when it was designated?

25 MR. ROUHANDEH: There's just not a sta - - -



1 there's just no basis in the statute to say that that has
2 to be done that way, and the problem with that - - -

3 JUDGE RIVERA: But if that's the point, let - - -
4 just take my hypothetical. Let's say that's the point of
5 the designation. There's something so unique and of
6 historical value and consequence, of - - - of the
7 functioning, right. Even if you say no more public access,
8 either because it might degrade the functioning, or you
9 want to profit in some other way, right. What - - - why -
10 - - why doesn't that fit within the purposes of the
11 statute?

12 MR. ROUHANDEH: Well, it might - - - it - - - the
13 - - - the - - - you could read the - - - the statutory
14 purposes quite broadly, but there's no statutory language
15 and no ability to effectuate that and require that and
16 police that, and if there were, then one could think of the
17 problems that that would create, about fireplaces and gas
18 lamps, and all of the other things that would have to be
19 kept functioning. And would this really be kept
20 functioning? There's a time - - - nobody's preparing or
21 making parts for this clock anymore. And to what expense
22 and how far would an owner have to go - - -

23 JUDGE RIVERA: But wouldn't that be sort of the -
24 - - that - - - then that's when the owner comes back, and
25 says, look, I - - - I can't - - - I would love to do it,



1 but I can't do it. That's a different scenario, is it not,
2 then when you're still able to do it, but you choose not
3 to?

4 MR. ROUHANDEH: Yeah, you - - -

5 JUDGE RIVERA: Or request not to?

6 MR. ROUHANDEH: - - - and you choose not to
7 because it's your right not to, and the Landmarks
8 Commission - - -

9 JUDGE RIVERA: Well, because you request not to,
10 yeah.

11 MR. ROUHANDEH: Right. If the Landmarks
12 Commission - - - if the - - - if the City of New York,
13 wants to require owners to operate interior landmarks in
14 the spe - - - in a specific way, they should amend the
15 statute to require that. It will set back development. It
16 will set back the purposes of Penn Central. But they
17 should do that. That should not be placed on this one
18 owner, only because clocks have a great appeal to all of
19 us, including this owner, whereas maybe people don't qui -
20 - - care quite as much if the gas lamp keeps burning, or
21 the other interior architectural features keeps functioning
22 - - -

23 JUDGE RIVERA: Well, gas lamps aren't as unique
24 in the way I think you're suggesting. Maybe there's a
25 Tiffany lamp.



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MR. ROUHANDEH: They - - - they certainly are unique these days.

JUDGE RIVERA: But - - - but we know what gas lamps are. But this clock is unique.

MR. ROUHANDEH: Yeah, I mean, and - - -

JUDGE RIVERA: I appreciate your point.

MR. ROUHANDEH: - - - there other landmark interior features that are quite unique that would have to be kept. But again, that uniqueness is not something that's built into the statute, that would say, in - - - under these circumstances, and here would be the factors under which you would have to determine whether or not to keep something running continuously in the predicative mode. That should be written into the statute.

JUDGE RIVERA: Thank you, counsel.

MR. ROUHANDEH: Thank you.

JUDGE RIVERA: Thank you, everyone.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of In the Matter of Save America's Clocks, Inc., et al. v. City of New York, et al., No. 17 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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