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What's Yours Is Mine: Public Access To Private Property

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Under New York City's Landmarks Law (Title 25, Chapter 3 of the New York City Administrative Code), the New York City Landmarks Preservation Commission may designate the exterior and the interior of buildings as landmarks. There are two requirements for designating a building's exterior: (1) the building must be at least 30 years old and (2) it must have "a special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation." Designation of an interior space as a landmark adds a third requirement: the interior space must be one that is "customarily open or accessible to the public, or to which the public is customarily invited."

The reason for this third requirement is clear. It is well-settled law that the regulation of land use is a valid police power of a municipality, provided, however, that there is an essential "nexus" between the regulation and a legitimate public interest. See, e.g., Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), Nollan v. California Coastal Commission, 483 U.S. 825 (1987), Dolan v. City of Tigard, 512 U.S. 374 (1994) and — with particular regard to the city's Landmarks Law — Penn Central v. City of New York, 438 U.S. 104 (1978). In the case of exterior landmarks, that public interest is obvious: the exteriors of buildings, visible to anyone walking or driving down the street, are by their very nature "open" and "accessible" to the public. Thus, the requirement need not be explicitly stated. Not so, interiors, which may be — and more often than not, are — private. Since there can be no nexus between landmark designation and a legitimate public interest without public access, the requirement is made explicit for interiors.

The question of what "customarily" means was addressed by the New York Court of Appeals in Teachers Insurance and Annuity Association of America v. City of New York, 82 NY2d 35 (1993), the controlling case involving the designation as an interior landmark of the Four Seasons Restaurant in the landmark Seagram Building. In that case, the owner of the Seagram Building challenged the designation of the Four Seasons Restaurant, arguing, among other things, that the public accessibility requirement of the Landmarks Law had not been met.

The Seagram Building's owner argued that restaurants such as the Four Seasons were distinguishable from interiors such as railroad stations and theaters, which are "inherently" public on account of being "intrinsically dedicated to public use by their public assemblage purposes." Id. at 43. The Court of Appeals rejected such a distinction, finding that "[n]o less than a theater, which generally requires a ticket for public entry, a restaurant by the very nature of its business invites the general public to enter." Id. at 43 (citing to Weinberg v. Barry, 634 F Supp. 86, 93). In other words, a space that opens its doors to

anyone ready, willing and able to pay the price of admission (including, in the case of a restaurant, the price of a meal), may be deemed to be "customarily open and accessible" to the public.

The threshold requirement prescribed by the legislature is that an interior be "customarily open or accessible to the public, or [a place] to which the public is customarily invited." The crux of this provision is customary openness, accessibility, invitation to the public — words that are readily understood to require *usual, ordinary or habitual (rather than rare or occasional) availability to the general public* [emphasis added] ... Consistent with the letter and purpose of the Landmarks Law, the relevant inquiry thus becomes an objective one of whether the interior is habitually open or accessible to the public at large. Id. at 43-44.

Thus, if an interior space is usually, ordinarily or habitually open and accessible to the general public at large, and it also meets the other two criteria — it is at least 30 years old and is of special historical or aesthetic interest or value — it may be designated as an interior landmark.

Although customary public access is a requirement for designation, it was never deemed an ongoing obligation of the owner. For the 50 years of the Landmarks Law's existence, it has been the city's policy and practice that an interior landmark owner's sole obligation was to preserve its protected features of special historical or aesthetic interest or value. For example, after 9/11, many building lobbies designated as interior landmarks, such as that of the Woolworth Building, were closed to the general public and only those persons having business in the building were allowed entry.

That long-standing policy and practice was invalidated in the case of Save America's Clocks Inc. v. City of New York, 2016 NY Slip Op 26100 (March 31, 2016), a CPLR Article 78 petition challenging the approval by the Landmarks Preservation Commission of alterations to a designated interior landmark for the purpose of converting it to a private residence. In addition to requesting the court to invalidate the commission's approval, the petitioners requested a judicial determination that the Landmarks Law empowered the Landmarks Commission to require that the subject interior landmark be kept open to the public. The court granted both requests. It invalidated the commission's approval of the specific alterations on the basis that they "would render the [interior landmark] ineligible to be designated an interior landmark once that work is completed." Accordingly, "it was irrational and arbitrary for the commission" to approve the alterations.

More significantly, finding that "the legislature has not specifically limited the commission's powers to impose any regulation or limitation or restriction on the maintenance of a landmark," the court held that:

Even though the Landmarks Law does not expressly require that public access to an interior landmark be maintained, absent an express limitation to that extent, the general provisions of the Landmarks Law vest the commission with the power to regulate an interior landmark. That power must include the ability to direct an owner to maintain public access, since public access is a specific characteristic of an interior landmark.

Noting that the extent and nature of such public access "is within the commission's discretion, to be determined by them in the exercise of their duties under the Landmarks Law," the court held that "absent a reviewable determination by the commission, there is no basis for the court to direct [the city] to provide public access." Essentially, the court ordered the city to direct the owner to provide public access, leaving it to the city to determine what such access should entail. At the same time, the court gave notice to the petitioners that if they were unhappy with the city's direction, they could then petition the court to decide the question.

The Landmarks Law properly requires as a condition of designation that an interior space be open or accessible to the public — otherwise there would be no public interest to be served and the designation would fail the constitutional requirement for an essential nexus between the regulation and a legitimate public interest. Save America's Clocks, in a bit of circular reasoning, turns the essential nexus around: if an interior is landmarked, it must forever after allow public access, effectively transforming a condition into a permanent requirement. But in Nollan, noting that the right to exclude others is "one of the most essential sticks" in the bundle of property rights, the Supreme Court held that the uncompensated requirement to provide a "permanent and continuous right to pass to and from, so that the real property may continuously be traversed" by the public was an unconstitutional taking. Nollan, at 831-832.

The city has yet to announce whether it will appeal Save America's Clocks, and if they do, it remains to be seen whether it will be upheld, but there is no question that it presents an important new development in the history of land use law with significant implications not just for New York City but potentially for jurisdictions across the country.

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