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## THE FRANCHISE AND CONCESSION REVIEW COMMITTEE: THE MAYOR'S VEHICLE TO CONTROL CITY FRANCHISES

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# THE FRANCHISE AND CONCESSION REVIEW COMMITTEE: THE MAYOR'S VEHICLE TO CONTROL CITY FRANCHISES

## I. INTRODUCTION

The Franchise and Concession Review Committee ("FCRC") was established to review and approve the granting of franchises and concessions in the City of New York ("City") by the 1989 New York City Charter ("Charter").<sup>1</sup> The 1989 Charter replaced an earlier Charter ruled unconstitutional by United States District Judge Edward R. Neaheer due to a problem with the City's then most powerful governmental body—the Board of Estimate.<sup>2</sup> Judge Neaheer found that each borough's equal representation on the Board of Estimate violated the "one person-one vote" standard mandated by the Fourteenth Amendment to the United States Constitution because, regardless of population size, each borough was represented equally.<sup>3</sup>

The fundamental restructuring in the 1989 Charter divided and redistributed the Board of Estimate's powers between the mayor and City Council ("Council"). Most land-use policy decisions were reassigned to the Council.<sup>4</sup> Land use in the form of franchises, concessions, and revocable consents,<sup>5</sup> however, must ultimately be approved by the FCRC and separately by the mayor.<sup>6</sup> The FCRC's role in any final decision to grant such land-use proposals represents a significant change from the system used by the Board of Estimate in that it limits the power of borough presidents and increases, ultimately, the power of the mayor.<sup>7</sup>

Little has been written on the FCRC and the role it plays in granting City franchises. The goal of this Note is to inform the reader about the FCRC and its composition, and to describe its responsibility (or lack thereof) for approving or rejecting proposals for City-granted franchises.

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1. See N.Y. CITY CHARTER ch. 14 § 373(d)(2) (1989).

2. See Joseph P. Viteritti, *The New Charter: Will It Make a Difference?*, in URBAN POLITICS NEW YORK STYLE 413 (Jewel Bellush & Dick Netzer eds., 1990) (discussing *Morris v. Board of Estimate*, 647 F. Supp. 1463, 1464 (E.D.N.Y. 1986)).

3. See *id.*

4. See N.Y. CITY CHARTER REVISION COMM'N, FINAL REPORT OF THE NEW YORK CITY CHARTER REVISION COMMISSION, JAN. 1989-NOV. 1989, at 22-23 (1990) [hereinafter FINAL REPORT].

5. For a more detailed explanation of these land uses, see *infra* notes 21-24 and accompanying text.

6. See FINAL REPORT, *supra* note 4, at 22-23.

7. See Viteritti, *supra* note 2, at 423-25.

Part II<sup>8</sup> of the Note introduces the FCRC's members. Part III<sup>9</sup> describes how the FCRC works. Part IV<sup>10</sup> expounds on the public's role in decisions to grant franchises. Part V<sup>11</sup> compares the current system of granting franchises under the Charter with the previous system. Part VI<sup>12</sup> discusses the Coordinated Street Furniture Franchise to illustrate the FCRC's actual role in a current franchise proposal. Part VII<sup>13</sup> concludes by asserting that the mayor wields the real power to grant City franchises; although the 1989 Charter alters the procedure for granting franchises, it continues to allow the mayor to exercise the final decision with respect to granting them.<sup>14</sup>

## II. THE COMPOSITION OF THE FCRC

The following City officials comprise the FCRC: (1) the mayor, who acts as the chairperson; (2) the director of the Office of Management and Budget; (3) corporation counsel; (4) the comptroller; (5) one additional appointee of the mayor; and (6) the borough president of the borough that will be affected by the franchise or concession.<sup>15</sup> In the event of more than one borough being affected, the borough presidents whose interests are at stake appoint one borough president, or another individual, to represent them.<sup>16</sup> Regardless of the number of boroughs affected, the borough presidents are allowed only one vote.<sup>17</sup> The affirmative vote of five members is required to approve a franchise.<sup>18</sup>

The FCRC's duties include establishing procedures for granting concessions, determining whether a City agency's proposal for a franchise is consistent with the authorizing resolution by the City Council, and reviewing and approving the ultimate selection of each franchise.<sup>19</sup> The Charter's description of the FCRC's role in land use and the granting of City franchises seems to indicate that the FCRC's role is rather substantial.<sup>20</sup> That description, however, is misleading. The FCRC

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8. *See infra* notes 15-20 and accompanying text.
  9. *See infra* notes 21-40 and accompanying text.
  10. *See infra* notes 41-48 and accompanying text.
  11. *See infra* notes 49-54 and accompanying text.
  12. *See infra* notes 55-83 and accompanying text.
  13. *See infra* notes 84-85 and accompanying text.
  14. *See Viteritti, supra* note 2, at 425.
  15. *See* N. Y. CITY CHARTER REVISION COMM'N, SUMMARY OF FINAL PROPOSALS 45 (1989).
  16. *See* N. Y. CITY CHARTER ch. 14 § 373(a) (1989).
  17. *See id.*
  18. *See id.* § 373(c) (requiring the affirmative vote of four members for any other act).
  19. *See id.* § 373(d).
  20. *See id.*

actually plays a very small role in the franchise decisions that ultimately affect every New Yorker.

### III. HOW THE FCRC WORKS

Land use in the city is divided, for the purpose of the Charter, into three categories—franchises, concessions, and revocable consents.<sup>21</sup> Both franchises and concessions are grants, made by a City agency to a private individual or organization, to use City-owned property.<sup>22</sup> The fundamental difference between the two is that franchises must provide a public service while concessions are granted for private use.<sup>23</sup> Accordingly, building bus stop shelters is considered a franchise activity while maintaining sidewalk café tables is considered a concession activity. Revocable consents are grants by the City of a right to use, for example, pipes, conduits, and tunnels, for a private use, and are—as their name suggests—revocable at will.<sup>24</sup> As stated, this Note is focused on the granting of City franchises.

A franchise proposal is initially subject to approval by the top executive in city government, the mayor, and by the top legislative body, the City Council.<sup>25</sup> The elimination of the Board of Estimate by the Charter allows for this structure by creating the classic mayor-council form of government.<sup>26</sup> The process for granting franchises involves not only the City's legislative and executive bodies, but the general public of the City of New York as well. The agency with expertise in a particular area, with the advice of corporation counsel, initially determines the need for a franchise.<sup>27</sup> The agency then submits a proposed authorizing resolution to the mayor, which is an administrative document stating the nature of the franchise, the public service that will be provided, the specific terms of the franchise, any subsidies that may be given to the franchisee, and the criteria needed to evaluate proposals submitted by interested franchisees.<sup>28</sup> Should the mayor decide to submit the authorizing resolution to the

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21. *See id.* ch. 14.

22. *See id.* § 362.

23. *See id.*

24. *See id.*

25. *See id.* § 363(b)-(c).

26. *See Viteritti, supra* note 2, at 421.

27. *See N.Y. CITY CHARTER* ch. 14 § 363(b) (1989). The agency, in making the determination, is required by the Charter to be advised by corporation counsel and any other agencies as the mayor deems necessary. *See id.*

28. *See id.*

Council, the *City Record*<sup>29</sup> must publish the proposal's text and a public hearing must be held within ninety days.<sup>30</sup> The Council then approves, approves with modifications, or rejects the proposal by majority vote.<sup>31</sup>

If the Council approves the resolution, the responsible agency may issue a Request for Proposal ("RFP") provided the following two events occur.<sup>32</sup> First, corporation counsel must determine that the request is consistent with the authorizing resolution.<sup>33</sup> Second, modern concerns about environmental effects must be addressed—either the Department of City Planning must determine that the franchise has no land-use impact, or the request must be approved pursuant to the Uniform Land Use Review Procedures ("ULURP").<sup>34</sup>

Additionally, a public hearing must be scheduled to discuss the land-use impacts of the proposal unless the community board<sup>35</sup> of the community affected by the franchise waives it when, in its judgment, the franchise does not involve a substantial land use interest.<sup>36</sup> Even if the community board decides to waive the public hearing, however, the FCRC must hold a similar public hearing before it can give final approval to the proposed franchise.<sup>37</sup> The FCRC's hearing must occur within thirty days of the filing of the proposal by the responsible agency.<sup>38</sup> Furthermore, the summary of the terms of the proposal must be published in the *City Record* at least fifteen days prior to the hearing, and the notice of the hearing must be published in both a daily and a weekly newspaper that circulate in the

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29. The *City Record* is a newspaper, published Monday through Friday, that publishes only those official City matters that are expressly authorized in the Charter. *See id.* ch. 47 § 1066.

30. *See id.* ch. 14 § 363(c).

31. *See id.* If the Council modifies the proposal, it is subject to mayoral veto and reconsideration, repassing, and adoption by Council override, in the same way as a local law. *See id.*

32. *See id.* § 363(e).

33. *See id.*

34. *See id.* ULURP establishes community consultation procedures for a host of land-use actions. Such procedures involve review of the proposal by the Department of City Planning, the City Planning Commission, community boards, and the public via public hearings. *See id.* ch. 8 § 197(c)(1).

35. Community boards, which consist of not more than 50 persons appointed by the borough president for staggered terms of two years, are responsible for, *inter alia*, the following: considering the needs of the districts they serve; advising public officers about any matters respecting the welfare of the districts; submitting annual reports to the mayor; at their discretion, holding public and/or private meetings regarding any matter relating to the welfare of the districts; and conducting substantial public outreach by maintaining records of community organizations. *See id.* ch. 70 §§ 2800(a), (d).

36. *See id.* ch. 14 § 363(e).

37. *See id.* § 371.

38. *See id.* § 371(a).

boroughs and districts where the franchise will have an effect.<sup>39</sup> Finally, the separate and additional approval of the mayor, notwithstanding the approval of the FCRC, is required before any franchise agreement takes effect.<sup>40</sup>

#### IV. THE PUBLIC'S ROLE IN FRANCHISE GRANTS

Because the granting of a franchise can affect entire communities within the city, public input and scrutiny is crucial to the determination of franchise grants. But how effectively do these franchise procedures include the public? The Charter mandates that the FCRC hold public hearings regarding franchises, and extensive regulations exist to publish proposals and notice of hearings in city newspapers.<sup>41</sup> Furthermore, the public elects the mayor, the members of the Council, and three of the six members of the FCRC.<sup>42</sup> These procedural safeguards indicate that franchise grants are repeatedly open to public forum, debate, and approval.

In addition, the decision to include the public in the new franchise procedures was itself influenced by members of the public. To illustrate, the 1987 Ravitch Commission,<sup>43</sup> which many assert initiated the most comprehensive assessment of New York City government in history,<sup>44</sup> consisted of forty-three staff members who held six public hearings at which nearly 350 city officials, community representatives, and private citizens testified.<sup>45</sup> Further, in 1989 the Schwarz Commission held ten public hearings and two public forums to discuss the new Charter provisions, including those legislating land-use determination procedures.<sup>46</sup> In total, another 200 hours were spent listening to testimony and commentary from over 800 people, and debates were scrutinized by members of the news media.<sup>47</sup>

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39. *See id.* (containing a more detailed explanation of the lengthy, specific notice requirements mandated by the Charter).

40. *See id.* § 372(a).

41. *See supra* notes 29-30, 35-40 and accompanying text.

42. These members are the mayor, the comptroller, and the borough president(s).

43. This Charter Commission, appointed in response to court invalidation of the Board of Estimate, was chaired by Richard Ravitch. *See* 1 N.Y. CITY CHARTER COMM'N, REPORT OF THE NEW YORK CITY CHARTER COMMISSION: DEC. 1986-NOV. 1988, at 14 (1989) [hereinafter JANUARY REPORT].

44. *See* Viteritti, *supra* note 2, at 419.

45. *See id.*

46. *See id.* The Schwarz Commission was named after Frederick A. O. Schwarz, former corporation counsel, whom Mayor Koch appointed to lead the 1989 Charter Commission.

47. *See id.* at 420.

But despite the public's role in forming the franchise procedures and the opportunity for the public to participate in franchise decisions under the Charter, public opinion may not be very influential on any final decision. For example, an individual's local interest may be trumped by the City's executive interest, even if that individual voted for both the borough president and the mayor. The public may have had an opportunity to help shape franchise procedure, but it is possible that the public will go unheard in the actual process of granting a franchise. This is true because, although the public elects key figures who play prominent roles in the decision-making of franchise grants, the public's voice is somewhat removed. For example, a proposal awarded FCRC approval may be approved regardless of opposition by a borough president and consequently, the borough's constituents. A more extreme, although concededly rare, example is that a proposal that affects every borough and is opposed by every elected borough president could still be approved by the FCRC. Such proposals may be approved because the borough presidents have only one collective vote, and a proposal may be approved without that vote (assuming all other members vote to approve). In contrast, if a franchise affecting every borough is welcomed by every borough president and wins the approval of the FCRC, the mayor still has the absolute power to reject it.<sup>48</sup>

#### V. THE OLD CHARTER VERSUS THE NEW CHARTER

In fairness, any procedural system created in a democracy will not ensure that every interested party is ultimately satisfied. How does the 1989 Charter, then, compare to the previous Charter concerning the process by which the City grants franchises? Under the pre-1989 Charter, the Board of Estimate had the power to approve franchises.<sup>49</sup> The Board consisted of three citywide elected officials—the mayor, the comptroller, and the president of the council (each of whom had two votes), and the five borough presidents (each of whom had one vote).<sup>50</sup> A three-fourths vote of the Board and separate approval by the mayor was needed to approve a franchise.<sup>51</sup>

In regard to land use, then, an important difference and an equally important similarity exist between the old and new Charters. The

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48. See N.Y. CITY CHARTER ch. 14 §§ 372(a)-(b) (1989).

49. See FINAL REPORT, *supra* note 4, at 7.

50. See JANUARY REPORT, *supra* note 43, at 14. On March 22, 1989, the Supreme Court of the United States affirmed lower court rulings and held that the Board of Estimate, because it gave equal representation to boroughs of dramatically unequal size, violated the "one person-one vote" standard of the Fourteenth Amendment. See *Board of Estimate v. Morris*, 489 U.S. 688, 690 (1986).

51. See FINAL REPORT, *supra* note 4, at 22.

difference lies in the loss of power suffered by the borough presidents in the new Charter, and the similarity lies in the mayor's final say in franchise decisions. In both cases the result is ultimate mayoral power of land use via franchises.

The following example illustrates the loss of power suffered by the borough presidents. In March 1992, the FCRC approved, by a four to two vote, an agreement to hold the Marlboro Grand Prix of New York races from 1993-2002 in lower Manhattan.<sup>52</sup> The two members who voted against the Grand Prix plan, former Manhattan Borough President Ruth Messinger and former Comptroller Elizabeth Holtzman, were opposed to the part of the deal allowing cigarette advertising to decorate the track.<sup>53</sup> Recall that both dissenting members are elected officials. This example demonstrates how easily a land-use decision can be made despite the opposition of the borough president and, arguably, the interest of his or her constituents.<sup>54</sup>

#### VI. AN ILLUSTRATION: THE COORDINATED STREET FURNITURE FRANCHISE

Currently, the Department of Transportation ("DOT") is reviewing proposals for an extremely large City franchise, the Coordinated Street Furniture Franchise.<sup>55</sup> The grantee of the franchise will be responsible for building 3,300 bus shelters, at least 30 self-cleaning public toilets, 430 newsstands, pay phones, computer information terminals, and litter bins on the streets of New York City over the next twenty years.<sup>56</sup> Some bidders for the proposal have estimated that the advertising revenue earned by selling space on the public furniture will generate upwards of \$1 billion over the twenty-year term, an incentive for bidders who must agree to pay the City \$100 million to merely submit a proposal to the DOT.<sup>57</sup>

The DOT, the agency designated by the mayor as having expertise in the furniture franchise, issued an RFP on January 17, 1997.<sup>58</sup> The seventy-

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52. See Joseph Siano, *A New York City Auto Race? Look Both Ways, It's Coming*, N.Y. TIMES, Mar. 4, 1992, at A1.

53. See *id.*

54. Interestingly, and despite the advertising that was allowed at the Grand Prix, in May 1993 the FCRC approved an agreement banning tobacco advertisements from over 4,000 phone booths on City property. See *id.*

55. See CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION REQUEST FOR PROPOSALS, Jan. 17, 1997 [hereinafter DOT RFP].

56. See Wayne Barrett, *Sidewalks for Sale: The Giuliani Rush to Build a Billion-Dollar Boondoggle*, VILLAGE VOICE (N.Y.), Apr. 8, 1997, at 27.

57. See *id.*

58. See DOT RFP, *supra* note 55.



seven page request, prepared according to and in compliance with the franchise-granting procedure, was submitted to the mayor by the DOT.<sup>59</sup> After it was published in the *City Record* and discussed at a public hearing, the mayor submitted it to the Council, who approved it by a majority vote.<sup>60</sup> The authorizing resolution of the Council was issued on March 6, 1997.<sup>61</sup> Because street furniture will undoubtedly have an immense impact on land use, the proposal was also approved pursuant to ULURP.<sup>62</sup> The RFPs were due at the Contracts Division of the DOT by March 21, 1997.<sup>63</sup> The DOT has accepted bids and is in the process of selecting a vendor; the proposals being considered are not, however, available for public review.<sup>64</sup>

The Coordinated Street Furniture Franchise RFP is a lengthy document detailing the franchisee's responsibilities concerning the design, maintenance, and operation of the furniture.<sup>65</sup> A company or corporation seeking to become the future franchisee of this project must adhere to very specific, exacting requirements. Any proposal submitted to DOT must contain the following: (1) a proposal cover sheet; (2) a statement of qualifications of the proposer, including a narrative, organizational outline, and references, names and titles of project team members, and financial statements of each firm who is a party to the proposal; (3) a technical proposal, including a narrative, color drawings of each basic structure design, and scale models of the two basic designs for each structure; (4) a cash flow analysis; (5) a compensation proposal outlining the amount to be paid to the City each year; (6) various City documents, such as questionnaires required under the City's Vendor Information System; and (7) an acknowledgment that the proposer received each of five addenda distributed by the DOT prior to the proposal deadline.<sup>66</sup> An evaluation committee, consisting of at least three persons deemed qualified to evaluate the proposals properly, will review all responses to the RFP in five phases.<sup>67</sup> The RFP states that such qualified persons will probably include representatives of the DOT, the Department of Design and Construction, the Department of City Planning, and various technical advisors.<sup>68</sup> FCRC members are not among those qualified evaluators expected to review the

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59. *See id.*

60. *See id.*

61. *See* THE COUNCIL OF THE CITY OF NEW YORK RESOLUTION NO. 1548, L.U. NO. 562-A, *in* DOT RFP, *supra* note 55, at 35.

62. *See* DOT RFP, *supra* note 55, at 25-28.

63. *See id.* at 24.

64. I visited the DOT on November 5, 1997 and was told by an employee that, due to privacy concerns, the proposals are not subject to public perusal.

65. *See* DOT RFP, *supra* note 55.

66. *See id.* at 19-23.

67. *See id.* at 25.

68. *See id.*

responses.<sup>69</sup> A detailed account of the evaluation committee's criteria and procedures is provided in accordance with the Charter.<sup>70</sup> Finally, the proposers are informed that the franchise contract award will not be effective until it is the subject of a public hearing, approved by the FCRC, approved separately by the mayor, and registered with the comptroller.<sup>71</sup>

An important aspect of the Coordinated Street Furniture Franchise is the inclusion of city newsstands in the proposal. Coinciding with such an inclusion is Local Law Number 29, effective April 18, 1997.<sup>72</sup> This law mandates that any new newsstands built by the Coordinated Street Furniture Franchise, other than those built to replace existing newsstands, would be subject to a competitive bidding system in the selection of the newsstand operators.<sup>73</sup> As for current operators, they will be able to continue to operate their existing newsstands, or to operate newsstands built by the Coordinated Street Furniture franchisee to replace their newsstands, for a period of five years after enactment of this law.<sup>74</sup> Furthermore, the licensing fee for current operators will increase from \$538 per year to as much as \$5,000 per year.<sup>75</sup>

Nine months before the expiration of the five-year period, the DOT commissioner must submit a report to the Council on the effectiveness of the new newsstand competitive concession program, and the mayor must submit a separate proposal as to the future operation of newsstands that continue to be operated by licensees as of the effective date of this law.<sup>76</sup> The Council may accept the mayor's proposal, which could call for competitive bidding after the five-year period.<sup>77</sup> Considering Mayor Giuliani's history and the Revision Commission's goal of maximizing competition in the selection of franchisees and concessionaires,<sup>78</sup> it is probable that after the five-year period a competitive system will be put in place. If the Council rejects the mayor's proposal, on the other hand, and fails to enact its own alternative, the DOT commissioner "may" ask the FCRC to approve the continuation or renewal of concessions covering these

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69. *See id.*

70. *See id.* at 25-28; N.Y. CITY CHARTER ch. 14 § 363 (1989).

71. *See* DOT RFP, *supra* note 55, at 33.

72. *See* NEW YORK, N.Y., LOC. L. NO. 29 (1997) (amending the administrative code of the City of New York concerning newsstands).

73. *See id.* § 1.

74. *See id.* § 2.

75. *See* Michael Blood, *Bad News for NYC Newsstand Operators?*, COMMERCIAL APPEAL (Memphis), July 23, 1997, at A6.

76. *See* NEW YORK, N.Y., LOC. L. NO. 29 § 1 (1997).

77. *See id.*

78. *See* N.Y. CITY CHARTER REVISION COMM'N, THE CHAIR'S RECOMMENDATIONS FOR CHARTER REVISION 30 (1989).

newsstands.<sup>79</sup> Thus, the Council effectively has the final say on whether or not operation of newsstands renovated by the Coordinated Street Furniture Franchise will be granted by a process of competitive bidding. Notably, it is only in the unlikely event of a failure to act after disapproving the mayor's proposal that the FCRC, by default, may be consulted about allowing current newsstand operators to renew their concessions and/or licenses. Thus, the Charter removes the FCRC from important franchise decision making regarding government use of private sector capabilities.<sup>80</sup>

The effect of Local Law Number 29 and the Coordinated Street Furniture Franchise is that gradually ownership of newsstands will shift from individual operators to the future franchisee.<sup>81</sup> Attorney Robert Bookman, general counsel and spokesperson for the New York City Newsstand Operators Association, which represents most of the city's current newsstands, was quoted in *The Commercial Appeal* as saying, "[o]nce the newsstands are no longer owned by the operators, which will be happening soon, it's not a big leap from there to say we are going to have one entity operate all newsstands."<sup>82</sup> Nearly 280 of the city's 331 licensed newsstands are in the borough of Manhattan.<sup>83</sup> This statistic raises again the issue of borough representation on the FCRC; although Manhattan newsstands comprise most of the newsstands citywide, a single representative chosen by all five borough presidents will ultimately share but one vote on the FCRC, the committee officially designed to review and ultimately approve or disapprove the Coordinated Street Furniture Franchise.

The Coordinated Street Furniture Franchise will have an impact on every New Yorker who rides the bus, buys a paper at the local newsstand, or uses pay phones. It will also have enormous effects on City land use, public advertising, and the livelihood of the city's roughly 300 newsstand operators. At this point, Mayor Giuliani is in control. On selection of a proposal by the evaluation committee of the DOT, and after a public hearing on the proposal, the Coordinated Street Furniture Franchise only needs to be approved by the FCRC before he can approve it.

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79. See NEW YORK, N.Y., LOC. L. NO. 29 § 1 (1997).

80. See E.S. Savas, *Considering Privatization*, in NEW YORK UNBOUND: THE CITY AND THE POLITICS OF THE FUTURE 109, 112 (Peter D. Salins ed., 1988).

81. See NEW YORK, N.Y., LOC. L. NO. 29 (1997).

82. Blood, *supra* note 75.

83. See Anthony Ramirez, *Neighborhood Report: Upper West Side: Newsstands Go Downhill, for Now*, N.Y. TIMES, Jan. 19, 1997, § 13, at 6.

## VII. CONCLUSION

As demonstrated by the Coordinated Street Furniture Franchise example, the FCRC—always subject to veto by the City's mayor—wields no real independent power in the granting of City franchises. The alternate duties performed by the FCRC—such as reviewing procedures that must be followed by those asking for franchise grants and determining whether a City agency's proposal is consistent with the RFP for which such agreement was negotiated<sup>84</sup>—are strictly administrative acts capable of being performed without the bureaucratic hassle of designating a special committee and introducing new sections into the City Charter. As was true before the Board of Estimate was destroyed by our nation's federal courts, mayoral power over City franchises is stronger than ever.<sup>85</sup>

*Laura Sulem*

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84. See N. Y. CITY CHARTER ch. 14 § 373(d) (1989).

85. See Viteritti, *supra* note 2, at 419.

