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## Legal Methods of Historic Preservation

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# COMMENTS

## LEGAL METHODS OF HISTORIC PRESERVATION

### I. INTRODUCTION

The subject of this comment is the use of legal methods to preserve historic monuments, habitations and districts. The study will include a survey and critical evaluation of the goals to be served by historic preservation, an examination of the legal methods available for preservation, consideration of the European experience with historic preservation as well as the American, and will conclude with a detailed evaluation of the New York City Landmarks Preservation Act of 1965.

The term "historic preservation" has been used to cover a wide range of government and private activities: the Federal government exercises its power of eminent domain to preserve the actual site of a Civil War battle;<sup>1</sup> a private developer buys and reconstructs an entire city in its pre-revolutionary period of development;<sup>2</sup> and a city enacts zoning and anti-neglect ordinances to preserve a historic quarter to promote its aesthetic and economic value.<sup>3</sup> A federal government purchases and relocates old farm buildings in an urban park and combines them with domestic farm animals and costumed employees to enhance the weekend recreation of its citizens.<sup>4</sup> A state government grants a private preservation society tax exemptions and the power of eminent domain so that it may purchase and maintain an old building of unusual architectural or historical value and the society contracts with a private person to be a caretaker in exchange for maintenance and opening the building to the public on certain days and at certain times.<sup>5</sup> This is but a sampling of activities that have been designated as historic preservation. Preservation efforts involving government participation through regulation, eminent domain or selective taxation have taken two distinct forms in the United States, preservation of individual historic buildings and sites and preservation of historic districts. When a historic building is part of a historic district, the preservation of the district often obviates a need for any particular effort to preserve the building. When, however, the building is isolated and not encompassed within a historic district, special methods are needed to preserve it.

Before we consider the methods, however, it seems appropriate to consider the goals. Certain goals are omnibus and apply to all forms of preservation;

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1. *United States v. Gettysberg Electric Ry.*, 160 U.S. 668 (1896).

2. John D. Rockefeller, Jr., Williamsburg, Virginia.

3. *See, e.g.*, New Orleans, La., Vieux Carré Ordinance 14538, March 3, 1937; Charleston, S.C. Zoning Ordinance §§ 42-47 (1924).

4. Skansen, Sweden.

5. The Society for Preservation of New England Antiquities, the largest private American property owning historical society, owns fifty-seven properties in five states. *See*, Wolfe, *Conservation of Historical Buildings and Areas—Legal Techniques*, ABA PROC. SECTION OF REAL PROP., PROBATE AND TRUST LAW, Part II, 18, August, 1963.

others are only pertinent to certain types of preservation. The goals of preservation have not been constant; they have shifted and changed as our national ethic and aesthetic have. As the motivating factors have changed, the physical subjects of preservation efforts have also changed.

Early efforts were directed at individual buildings or sites of historical importance to the nation. Supreme Court Justice Peckham wrote in 1896, upholding a federal government taking in eminent domain,

Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them . . . must be valid. . . . Such action on the part of Congress touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were made. The greater the love of the citizen for the institutions of his country the greater is the dependence properly to be placed upon him for their defence in time of necessity . . . .<sup>6</sup>

John D. Rockefeller wrote,

As the work progressed [the restoration of Williamsburg], I have come to feel that perhaps an even greater value is the lesson that it teaches of the patriotism, high purpose and unselfish devotion of our fathers to the common good . . . .<sup>7</sup>

Patriotism in its pure Victorian form is seldom expressed as a motivating factor by preservationists today. When articulated at all, it is couched in psychological rather than chauvinistic terms, as a problem involving the memory of any people rather than the American people.

A nation can be the victim of amnesia. It can lose the memories of what it was, and thereby lose the sense of what it is or wants to be.<sup>8</sup>

The shift in emphasis from patriotism to concern with a national sense of historical continuity and perspective involves more than a change in the rationale of preservation. It also controls the selection of objects deemed worthy of preservation. Patriotism is most effectively kindled by maintenance of the site of some noteworthy event; a sense of historical continuity and development is best fostered by the preservation of single buildings or districts that represent distinctive architectural periods.

The basic argument for historic preservation today is two-fold; preservation is good aesthetics and preservation is good business. The first argument predominates in books on city planning; the latter argument appears more frequently in zoning act statements of legislative purpose and court opinions upholding challenged zoning regulations.

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6. *United States v. Gettysburg Electric Ry.*, 160 U.S. 668, 681-82 (1896).

7. As quoted by Whitehill, *The Right of Cities to be Beautiful* in *WITH HERITAGE SO RICH*, a report of the Special Committee on Historic Preservation under the auspices of the United States Conference of Mayors, at 54.

8. Hyman, *Empire for Liberty* in *WITH HERITAGE SO RICH* at 1.

If most preservationists were honest, they would admit that they seek to preserve ancient buildings and sites because these add to the variety and beauty of a life that is daily more mechanized and stereotyped . . . . We already have on exhibition more historic houses and museums than we need, or are good for us as a nation. Indeed, they multiply so fast that some form of institutional contraception must soon be invented. And some of these deal out, in the sacred name of 'education', some pretty dubious nostalgia disguised as 'history'. Meanwhile we urgently need to improve the quality of our lives and surroundings. Therefore let us save what we have around us that is good, not for exhibition, not for 'education' but for practical use as places to live in and work in.<sup>9</sup>

For the true loss in the measure of how well or meanly we and our descendants are to live: not in terms of historic sentimentality or preservation for preservation's sake. *The real value of any building to the community lies in its being a delight to the eye* and in its susceptibility to human use. Where true historical value exists, it is enriched by the possibility of continued use of the building . . . rather than lifeless embalment as a museum. Unhappily, in this decade we are losing many buildings which meet the criteria of beauty and usefulness. Many buildings . . . still suitable for their tenant's purposes, are demolished for reasons of financial gain rather than . . . unfitness for use.<sup>10</sup>

Emphasis has also shifted from preservation of one particular style or period in history, as manifested in the reconstruction of Williamsburg, toward preservation of the district as a unit which acquires character and meaning through its diverse historical development. The National Trust<sup>11</sup> advises,

It is ordinarily better to retain genuine old work of several periods, rather than arbitrarily to 'restore' the whole, by new work, to its aspect at a single period. This applies to work of periods later than those now admired . . . . In no case should our own artistic preferences or prejudices lead us to modify on aesthetic grounds, work of a bygone period representing other artistic tastes. Truth is not only stranger than fiction, but more varied and more interesting.<sup>12</sup>

9. Whitehill, *supra* note 7, at 54-55.

10. Zabriskie, *Window From the Past* in WITH HERITAGE SO RICH at 58.

11. The National Trust is a non-profit corporation, chartered by Congress in 1949 (16 U.S.C. § 468 (1960)) to further the policy of the Historic Sites Act of 1935 (16 U.S.C. §§ 461-67 (1960)). See text accompanying notes 71-78 *infra*.

12. *The National Trust Report on Principles and Guidelines*, 1964, as quoted in Whitehill, *supra* note 7, at 54.

The preference for historical diversity resembles Jane Jacobs' plea for diversified uses.

Intricate minglings of different uses in cities are not a form of chaos. On the contrary they represent a complex and highly developed form of order. . . . If the sameness of use is shown candidly for what it is—sameness—it looks monotonous. Superficially, this monotony might be thought of as a sort of order, however dull. But esthetically, it unfortunately also carries with it a deep disorder: the disorder of conveying no direction. . . . It takes differences—many differences—cropping up in different directions to keep us oriented.

J. Jacobs, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 222-24 (1961).

Uniformity of historical period, particularly when associated with uniformity of scale, tends to create the same spatial disorientation Jane Jacobs ascribes to uniformity of use. But uniformity of period also creates an additional dimension of disorientation, that of history or memory.

The other primary justification for the preservation of historic buildings is economic. The argument is often used by persons who seem to be primarily motivated by aesthetic values as well as by those whose basic interest is economic. Since courts and legislators prefer to base an exercise of the police power on the firmest available foundation, they frequently employ an economic rationale to support an essentially aesthetic regulation.<sup>13</sup> Planners tend to reserve the economic argument for recalcitrant communities unconvinced of the value of preservation and unamenable to the aesthetic argument.

In *Planning for Preservation*, Robert Montague and Tony Wrenn explain the economic benefits to be derived from preservation.<sup>14</sup> When an area is zoned for historic preservation, property values rise, the neighborhood benefits and the city's coffers fill through increased assessments. The authors cite tax statistics in such areas as Boston's Beacon Hill, Santa Barbara and Georgetown. The argument that the increase in value simply reflects increased investment is countered by the fact that it was the preservation zoning that initially stimulated people to improve their property, gave them confidence in the future architectural stability of the neighborhood and focused attention on the neighborhood to the advantage of local business.<sup>15</sup> The argument is also made that historic zoning tends to protect municipal revenues by obviating the need to turn buildings into tax exempt museums in order to insure their preservation.

The economic benefit to the neighborhood and community through increased property values is always computed in terms of prior property values in neigh-

13. It is difficult to find an authoritative holding to support the proposition that aesthetic consideration alone supports police power regulation.

*Berman v. Parker*, 348 U.S. 26, 33 (1954), is widely cited.

It is within the power of the legislature to determine that the community should be beautiful as well as healthy. . . .

*Berman*, however, validated a taking in eminent domain pursuant to a comprehensive plan for slum clearance and urban renewal; its holding provides no authority for aesthetic zoning regulations.

The New York Court of Appeals, in *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272 (1963), upheld regulation of front yard clotheslines on aesthetic grounds alone but restricted the holding to regulatory as opposed to prohibitory ordinances. In a subsequent case, *In re Cromwell v. Ferrier*, 19 N.Y.2d 263, 269, 225 N.E.2d 749, 753 (1967), the Court of Appeals upheld an absolute prohibition of billboards but declined to base its decision on aesthetic considerations alone even though it found that "realistically, the primary objective of any anti-billboard ordinance is an esthetic one."

In concluding that the ordinance is constitutional . . . it does not mean that any esthetic consideration suffices to justify prohibition. The exercise of the police power should not extend to very artistic conformity or nonconformity. Rather, what is involved are those esthetic considerations which bear substantially on the economic, social and cultural patterns of a community or district. *Id.* at 272, 225 N.E.2d at 755.

In *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 192 N.E.2d 74 (Ct. App. 1963), the court sustained an aesthetically motivated refusal of a construction permit for a house of unusual design on the ground that the proposed structure might lower local property values.

14. R. MONTAGUE & T. WRENN, *PLANNING FOR PRESERVATION* 9-16 (1964).

15. Codman, *A Law for the Preservation of a Historic District*, 14 HISTORIC PRESERVATION 78 (1962).

borhoods that were usually deteriorating. The studies neglect to point out, however, that the decision to zone for historic preservation was usually made as an alternative choice to neighborhood demolition and urban renewal which might have yielded even greater property values and consequent city revenues. The Montague and Wrenn article does admit that a markedly increased tax valuation in a homeowner's neighborhood may have the undesirable effect of forcing out families unable to pay the new taxes or forcing them to take in boarders. This occurred in Georgetown.<sup>16</sup>

The most frequently advanced economic argument involves the increased revenue derived by businesses and the city from tourism. The pioneer district zoning laws of New Orleans, the Vieux Carré Laws,<sup>17</sup> have consistently weathered court challenge on this basis.

Finally, defendant takes the position that "Article XIV, Section 22A of the Louisiana Constitution and the ordinances enacted pursuant thereto are unconstitutional since they are enacted solely for esthetic purposes and are not within the police power." Perhaps esthetic considerations alone would not warrant an imposition of the several restrictions contained in the Vieux Carré Commission Ordinance. But, as pointed out in the Pergament case, this legislation is in the interest of and beneficial to the inhabitants of New Orleans generally, the preserving of the Vieux Carré section being not only for its sentimental value but also for its commercial value, and hence it constitutes a valid exercise of the police power. Incidentally, both the constitutional amendment and the ordinance recite that the preservation is for the public welfare.<sup>18</sup>

A 1962 survey of a Massachusetts commission appointed to study tourism tends to support the theory that historic preservation does increase tourism.<sup>19</sup> Eight out of ten visitors to Massachusetts listed "places of historic significance" as a major reason for coming to Massachusetts. Whether or not historical sites are a decisive factor or simply one that tourists are able and pleased to articulate has not been evaluated and would be perhaps impossible to evaluate with regard to a state like Massachusetts which has many other tourist attractions. It does seem fair to acknowledge, however, that New Orleans tourism is greatly enhanced by the Vieux Carré.

In conclusion, the main thrust of historic preservation today is to preserve historic districts, mainly in urban areas, for their aesthetic rather than strictly historic or inspirational value, to use rather than curate the buildings, and, depending on who is talking and who is listening, to exploit these districts economically for increased property values and tourism.

16. Montague & Wren, *supra* note 14, at 9.

17. New Orleans, La., Vieux Carré Ordinance 14538, March 3, 1937, enacted pursuant to LA. CONST. amend. art. XIV, § 22A.

18. New Orleans v. Levy, 223 La. 14, 28-29, 64 So. 2d 798, 802-03 (1953).

19. Montague & Wren, *supra* note 14, at 16.

## II. LEGAL TOOLS

Although strictly private preservation was the primary mode of preservation in this country until very recently, it is of minor significance today because it generally involves only individual buildings rather than districts. The largest property holder among the private American historical preservation societies is the Society for the Preservation of New England Antiquities, granted a special Massachusetts charter in 1910 authorizing it to acquire and hold property for preservation free of local real estate taxes. All other New England states except Vermont have given it similar tax status. The Society now owns fifty-seven properties dating from 1651 to 1811 in five states. The Society cannot accept a property without adequate endowment. "Curators", Society members who live in the house and open it to the public at certain times, maintain the houses and contribute to the cost of repairs. Their contribution is not an amount equivalent to rent as the arrangement must be an agency contract rather than a lease in order to maintain the local tax exemption.<sup>20</sup> Preservation of a few isolated old houses appears a pathetic and dreary effort; a visit to one of the "antiquities" is likely to evoke discomfoting thoughts of foolish elderly aunts and musty corners. Unlike area preservation, however, this individualized preservation does conserve the interior as well as the exterior and the societies generally furnish the interior in proper period décor, providing the casual visitor with curiosity value and the more serious visitor with antiquarian interest.

The public tools of historic preservation are zoning, anti-neglect ordinances, the power of eminent domain, tax incentives and urban renewal programs.

Zoning, legislative regulation of land use, is a specialized application of the police power, inherent in every sovereign, to regulate matters relating to the public health, safety and welfare. In order to be a constitutionally valid exercise of police power under the fourteenth amendment due process and equal protection clauses, zoning ordinances must be for a public rather than a private end.<sup>21</sup> The public end must relate to the public health, welfare, safety or morals.<sup>22</sup> If the regulation causes certain persons to be treated differently from

20. Wolfe, *supra* note 5, at 18.

21. The "public" need be no more than a small neighborhood. *State ex rel. Twin City Bldg. & Inv. Co. v. Houghton*, 144 Minn. 1, 176 N.W. 159 (1920), involved municipal condemnation of a development easement that prevented the complainant from constructing an apartment house. The court rejected the argument that the requisite "public use" was lacking:

. . . the fact that only a small part of the public is appreciably or directly benefited, does not make the use not public. 176 N.W. at 160-61.

While *Twin City* concerned the power of eminent domain, its broad construction of "public benefit" has been applied to zoning regulations as well.

See *Miller v. Board of Public Works of Los Angeles*, 195 Cal. 477, 234 Pac. 381 (1925), upholding the zoning of strictly one and two family residence neighborhoods so long as the restriction was in accordance with a comprehensive plan.

See also *Des Moines v. Manhattan Oil Co.*, 193 Iowa 106, 184 N.W. 823 (1921), petition for rehearing denied, 188 N.W. 921 (1922); *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N.Y. 313, 128 N.E. 209 (1920); *In re Opinion of Justices*, 234 Mass. 597, 127 N.E. 525 (1920).

22. In *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Supreme Court found

their fellow citizens, there must be a reasonable basis for the distinction.<sup>23</sup> Even though the regulation otherwise meets constitutional requirements, if the burden it casts on any individual landowner is sufficiently substantial to constitute a "taking", the fifth and fourteenth amendments require just compensation.<sup>24</sup>

Is historic preservation sufficiently related to the public health, welfare or safety to justify the state's exercise of its police power? Most commentators approach this issue by discussing the problem of aesthetic zoning at some length, citing *Berman v. Parker*<sup>25</sup> dictum, "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy," to either support the validity of aesthetic zoning or to distinguish it on the ground that *Berman* dealt with eminent domain rather than zoning. After many citations and considerable discussion, commentators generally reach the conclusion that zoning for purely aesthetic purposes is within the police power.<sup>26</sup> The emphasis on aesthetics is beside the point. Historic preservation zoning is generally upheld on economic grounds under the general welfare aspect of police power since courts, having a choice, chose the most traditional and tangible basis for their decisions. Furthermore, historic district zoning can be based on the recreation aspect of the general health and welfare powers. The city dweller is provided with adequate non-park space in which to stretch his legs and please his eyes. The economic benefit to be derived from tourism is predicated upon public recreational use of the historic district. A stroll through the historic district is as healthful and probably safer than a walk through a public park.

The requirement that the regulation bear a reasonable relation to the end to be achieved creates a substantial limitation on preservation zoning power.

the requisite public welfare purpose for a residential zoning ordinance in the possibility of improved fire control and family life. The Court held that the landowner bears the burden of showing that the regulation bears no substantial relation to the public health, welfare or safety. However, in *Nectow v. Cambridge*, 277 U.S. 183 (1928), the Court accepted a referee's finding that the contested regulation bore no substantial relation to a police power purpose and held the regulation invalid under the Fourteenth Amendment as a deprivation of property without due process of law.

23. The legislative classification must be rational but there is a judicial presumption of legislative rationality. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

24. In *Dooley v. Town Planning and Zoning Comm'n*, 151 Conn. 304, 197 A.2d 770' (1964), the plaintiffs' property was zoned as a flood district, effectively precluding any beneficial use. The Connecticut Supreme Court held the regulation invalid as a taking without compensation:

Where most of the value of a person's property has to be sacrificed so that community welfare may be served, and where the owner does not directly benefit from the evil avoided . . . , the occasion is appropriate for the exercise of eminent domain. *Id.* at 774.

*Accord*: *La Salle National Bank of Chicago v. County of Cook*, 12 Ill. 2d 40, 145 N.E.2d 65 (1957), in which the Illinois Supreme Court held a regulation producing a two-thirds decrease in the value of land to be a taking without compensation. *Morris County Land Improvement Co. v. Parsippany-Troy Hills Township*, 40 N.J. 539, 193 A.2d 232 (1963); *Denver v. Denver Buick, Inc.*, 141 Colo. 121, 347 P.2d 919 (1959).

25. 348 U.S. 26, 33 (1954). *See supra* note 13.

26. Comment, *The Police Power, Eminent Domain and the Preservation of Historic Property*, 63 COLUM. L. REV. 708 (1963). Comment, *Aesthetic Zoning: Preservation of Historic Areas*, 29 FORDHAM L. REV. 729 (1961). H. HAMILTON, REGULATION OF LAND USE BY LOCAL GOVERNMENT FOR AESTHETIC PURPOSES (1961). *But see supra* note 13.

As the goal to be achieved is no more than the external appearance of the neighborhood as it may be seen by a member of the public from a public place, the ordinance cannot regulate any more than just that. The Nantucket Ordinance<sup>27</sup> is most specific in requiring that the Zoning Commission not regulate any interior arrangement or exterior features not subject to public view. This provision, found to some degree in all preservation ordinances, calls to mind a scene from "Help!" in which the Beatles approach their four identical nineteenth century row houses as a chorus of matrons expresses approval of the group's traditionalism. Once inside we discover that the entire interior of the four houses has been demolished and replaced by bizarre mechanized furnishings. Walter Whitehill characterized the effect as "Queen Anne front and Mary Ann behind."<sup>28</sup> Although the results may be ludicrous from the point of view of an omniscient observer, the regulation is designed to enhance the view of the citizen who will enjoy a more limited vision. The purpose and effect of zoning regulation is not, therefore, to assure total historical authenticity of the building or district but to preserve that aspect of it which is subject to public view and appreciation. While God may laugh and preservationists may lament, the public view is preserved and the landowner can freely develop that part of his property which is not publicly visible.

The owner is subjected to two types of control. In order to change the exterior by alteration or demolition, he must secure a permit. The permit can be denied on the basis that the building itself is of significant historical or architectural interest<sup>29</sup> or that the alteration or demolition of a building which is not of unusual preservation value will affect the appearance of the neighborhood.<sup>30</sup> Permit denial has several possible effects. It may result in permanent<sup>31</sup> or temporary prohibition of demolition or alteration. A Richmond, Virginia ordinance<sup>32</sup> allows the city six months to decide whether to condemn or otherwise acquire an interest in the building. New York City allows demolition or alteration of the exterior only after the owner has made a showing of hardship and the City has decided not to acquire an interest in the building.<sup>33</sup>

Prohibiting the demolition or exterior alteration of an unexceptional building may seem like an unreasonable restriction in terms of the end to be achieved, harmony of the neighborhood, particularly if its replacement or alteration would not be grossly incongruous with the surroundings. The rationale for upholding such a restriction involves a domino theory. Although the loss of one building would cause little harm to the district, the cumulative effect of widespread

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27. Mass. Acts and Resolves 1955, Ch. 601 § 1-12.

28. Whitehill, *supra* note 7, at 51-52.

29. Preservation of Landmarks and Historic Districts, 2 N.Y.C. CHARTER AND ADMIN. CODE (Cum. Supp. 1968-69), chapter 8A, § 207-6.0 b(1)(a) [hereinafter cited as Landmarks Act].

30. *Id.* § 207-6.0 b(1)(b).

31. Los Angeles, Cal., Ordinance 121971 § 5, May 1, 1962.

32. Richmond, Va., Ordinance 52-249-53-11, Jan. 26, 1953.

33. See text accompanying notes 107-11 *infra*.

demolition would undermine preservation of the district. In *New Orleans v. Pergament*,<sup>34</sup> the court spoke of the necessity of preserving the "tout ensemble."

Closely allied with zoning regulations are anti-neglect ordinances. Although such ordinances are usually based on the police power to protect the health and safety of the public, historic site and district ordinances are more stringent than the generally applicable safety standards and draw their justification from the same factors that legitimize historic preservation zoning. The New York City Landmarks Act requires that:

(a) Every person in charge of an improvement on a landmark site or in an historic district shall keep in good repair (1) all of the exterior portions of such improvement and (2) all interior portions which, if not so maintained, may cause or tend to cause the exterior portions to . . . deteriorate . . . .

(b) The provisions of this section shall be in addition to all other provisions of law requiring any such improvements to be kept in good repair.<sup>35</sup>

Anti-neglect ordinances are particularly vital to historical districts to thwart the rejected demolition applicant who decides to let his property deteriorate to the point of forcing the Board of Health to demolish the structure. The New York City Landmarks Act acknowledges the priority of public health and safety over historic preservation but requires that municipal departments coordinate their activities in order to avoid unnecessary destruction of historic sites.<sup>36</sup>

If a historic site does become a threat to the public welfare, a 1962 amendment to the Multiple Dwelling Law<sup>37</sup> offers an alternative to demolition. After giving the owner and mortgagee a hearing and opportunity to repair, the City is empowered to make repairs and appoint a receiver of rents. There is, however, a distinction between a building that has fallen into historic preservation disrepair and one that threatens public safety. The Multiple Dwelling Law does not provide for receivership arising from the lesser preservation disrepair. The Landmarks Commission can, however, avoid potential demolition by enforcing its own anti-neglect regulations with their stringent penalties and seeking a court order enjoining the owner to repair.<sup>38</sup>

34. 198 La. 852, 858, 5 So.2d 129, 131 (1941).

35. Landmarks Act, § 207-10.0. Maintenance and repair of improvements.

36. *Id.* § 207-11.0. Remedying of dangerous conditions.

a. In any case where the department of buildings, the fire department or the department of health . . . shall order or direct the construction, reconstruction, alteration or demolition of any improvement on a landmark site or in an historic district . . . for the purpose of remedying conditions determined to be dangerous to life, health or property, nothing contained in this chapter shall be construed as making it unlawful for any person . . . to comply with such order or direction.

b. The department of buildings, fire department or department of health, as the case may be, shall give the commission as early notice as is practicable, of the proposed issuance of any such order or direction.

37. N.Y. MULT. DWELL. LAW § 309 (McKinney 1968). This regulation was held constitutional as against both the owner and mortgagee in *In re 1531 Brook Avenue*, 236 N.Y.S.2d 833 (Sup. Ct. 1962).

38. Landmarks Act § 207-10, § 207-16.0 a-e.

In summary, historic preservation under the police power usually includes regulation of the exterior appearance of buildings in designated historic districts through control of alteration, reconstruction, demolition and deterioration through neglect. Some zoning laws also regulate historic buildings that are not located in historic districts. The New York Landmarks Act is of this type:

the commission may, in exercising or performing its powers . . . with respect to any improvement in a historic district *or* on a landmark site, apply or impose . . . regulations, limitations . . .<sup>39</sup>

One commentator characterizes this type of regulation as a "non-zoning use of the police power" on the theory that legitimate zoning treats all persons in a certain district equally.<sup>40</sup> However, zoning is simply the regulation of land use in accordance with a general plan and does not preclude restrictions on the use of particular lots within one district. So long as the restriction is not arbitrary and is based on reasonable distinctions, there is no fourteenth amendment problem.<sup>41</sup> The presence of a building of unusual historical or architectural interest would seem to reasonably distinguish one lot from others. The distinction between reasonable "spot zoning" and generally applicable district zoning should not be the primary basis for evaluating the constitutionality of the regulation. The true question in police power regulation should relate to the weight of the burden placed on the individual land owner regardless of whether he is treated equally or differently from his immediate neighbors. The fact that an owner is treated differently from his neighbors should be only one of many factors in assessing the weight of the burden.

Zoning regulation allows a city to regulate large areas of land without paying landowners any compensation for the restrictions imposed on their property. For these reasons, particularly the latter, it is the preferred method of preservation in American cities. However, when the burden imposed on the owner becomes unreasonably heavy the regulation is judged to be a taking for which the fifth or fourteenth amendment requires just compensation. The perennial variable in the equation has been the point at which restriction becomes unreasonably heavy in terms of the burden imposed<sup>42</sup> and the public purpose to be achieved. The New York City Landmarks Act is designed to identify that point at which regulation becomes a taking and to remedy the situation; it provides for zoning without compensation as the basis for preservation and additionally for eminent domain, purchase, and tax compensation

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39. *Id.* § 207-3.0 b.

40. Comment, *The Police Power, Eminent Domain and the Preservation of Historic Property*, 63 COLUM. L. REV. 708 (1963).

41. Zoning of small business districts in otherwise exclusively residential areas is legitimate so long as it is part of a comprehensive municipal plan or policy. *E.g.* *Bartram v. Zoning Comm'n*, 136 Conn. 89, 68 A.2d 308 (1949).

42. Since historic preservation land is usually in a developed stage of use, unlike scenic easement land which is often held for speculation and future development, relevant factors of measuring the burden such as reasonable use, reasonable return and market value are readily ascertainable.

at a precisely defined and measurable point where the burden on the landowner becomes too heavy for him to bear alone. The partial or entire cost of the restriction then shifts to the City by way of compensation or removal of the restriction.<sup>43</sup>

While zoning is an aspect of the sovereign police power of regulation for public purpose, eminent domain is the power of the sovereign to seize property. The fifth amendment and parallel state constitution provisions require just compensation and have been construed to require a public use for the seized property. The taking of a fee interest in a battlefield or building is not likely to give rise to any claim that the use will be private rather than public. However, taking of the entire fee interest is generally not necessary for preservation programs which emphasize district and facade preservation. A partial taking for preservation purposes very closely resembles the taking of scenic easements in undeveloped country land, a more highly developed land use control offering various ramifications for historic preservation.

In scenic easement acquisition, the owner donates or the state purchases or condemns certain developmental interests in the land. The owner still maintains exclusive possession of his land and is free to use it in any way except those specifically prohibited by the easement. In historic preservation easements, the interest purchased or condemned is a negative easement running with the land which prohibits the owner from altering or demolishing the building without permission of the holder of the easement.

While a historic building taken in fee simple to be used as a museum is certainly a taking for public use, the land in which the preservation easement is taken remains devoted to private use. This should not present much of a problem today since the concept of public use has broadened considerably to include condemnation of urban renewal land destined to pass back into private ownership so long as a public benefit or purpose could reasonably be related to the program.<sup>44</sup> However, even when "public use" was more narrowly defined, an exercise of partial eminent domain which left property in private hands was upheld in *State ex rel. Twin City Bldg. and Inv. Co. v. Houghton*.<sup>45</sup> It seems safe to assume that the easement right itself is the public use and that the owner's actual physical possession of the remainder of the fee is immaterial. A broad survey of court approved eminent domain easements revealed only one judicial objection: the appropriated interest was too indefinite and left the owner uncertain as to his rights and restrictions.<sup>46</sup> Indefiniteness should not present a

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43. This aspect of the Landmarks Act is discussed in more detail in the text accompanying notes 107-11 *infra*. See also note 107 *infra*.

44. *Housing and Redevelopment Authority v. Greenman*, 255 Minn. 396, 96 N.W.2d 673 (1959). Recent decisions make no distinction between the "public purpose" required for police power regulation and "public use" required for the exercise of eminent domain.

See also *Asch v. Housing and Redevelopment Authority*, 256 Minn. 146, 97 N.W.2d 656 (1959), allowing resale of land taken in eminent domain to Sears, Roebuck & Co. for use as a retail store.

45. 144 Minn. 1, 176 N.W. 159 (1920). See *supra* note 21.

46. Comment, *Techniques for Preserving Open Spaces*, 75 HARV. L. REV. 1622, 1636

problem with historic easements as the restrictions can be clearly and precisely defined.

In 1964, only twenty states had agencies with the power of eminent domain to take historic sites.<sup>47</sup> Although easements can also be obtained by donation or purchase, without the power of eminent domain, the local agency has little flexibility in dealing with an uncooperative owner. Although, at first glance, withholding the eminent domain power seems designed to protect the interests of the land owner, it may have the reverse effect if the agency wishes to pursue a vigorous preservation program. The agency is forced to rely exclusively on zoning laws that may impose an excessive burden on some owners. Unable to secure a settlement with the agency through a partial taking in eminent domain, the owner must seek his relief through variance or the courts. On the other hand, if the owner is successful in avoiding the regulation, the agency is powerless to prevent disruption of the neighborhood. Mixed use of regulation and eminent domain offers more possibilities to both parties and would seem to increase the likelihood of speedy and equitable settlement.

Since the measure of compensation for a scenic or preservation easement is the difference between the market value of the unencumbered fee and the market value of the burdened fee, it would seem to follow logically that the tax assessment on the property would be lowered to reflect the easement. In the case of scenic easements however, some tax boards persist in taxing land at its "highest and best use" rate in spite of an easement precluding that use.<sup>48</sup> Scenic and historic preservation acts should therefore include a provision limiting tax assessment to the value of the burdened land.

New York State provides:

After acquisition of any such interest pursuant to this act the valuation placed on such an open space or area for purposes of real estate taxation shall take into account and be limited by the limitation on future use of the land.<sup>49</sup>

Both New Jersey and California have recently passed scenic easement statutes which have failed to include such a tax provision.<sup>50</sup> Although the provision is not theoretically necessary, its inclusion may save landowners needless administrative appeal and litigation.

If reduction of the tax assessment is substantial, owners who wish to maintain an existing use that is inferior to the "highest and best use" may be induced to donate a scenic or preservation easement. Absent statutory provision to the contrary, conservationists and commentators state that the owner must

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(1962). In *Pontiac Improvement Co. v. Board of Comm'rs*, 104 Ohio 447, 135 N.E. 635 (1922), the Ohio Supreme Court disapproved the taking of an easement which involved numerous unclear restrictions on floral planting, drainage and sewerage.

47. R. MONTAGUE & T. WREN, *supra* note 14, at 21.

48. Comment, *supra* note 46, at 1641-44.

49. N.Y. GEN. MUNIC. LAW § 247(3) (McKinney 1965).

50. N.J. STAT. ANN. § 13:8-A-6 (1961); CAL. GOV'T. CODE §§ 6950-54, §§ 7000-01 (West 1966).

grant an easement in perpetuity in order to qualify for a reduced tax assessment.<sup>51</sup> Hawaii has legislated scenic easements for shorter periods. Fenced forest land of which no use is made is tax exempt.<sup>52</sup> Land dedicated to agriculture and ranching for a minimum period of ten years is assessed at the value of such use so long as the land is in an agricultural, ranching or conservation district and the land is suited for such use and such use conforms with the comprehensive development plan of the state.<sup>53</sup>

Furthermore, as a donor to a public body or even to a charitable organization, the owner may be entitled to a charitable donation federal income tax deduction. In a case involving an owner of property within view of a federal highway who conveyed a perpetual scenic easement to the United States government, the Internal Revenue Service ruled:

A gratuitous conveyance to the United States of America of a restrictive easement in real property to enable the Federal Government to preserve the scenic view afforded certain public properties, is a charitable contribution within the meaning of section 170 of the Internal Revenue Code of 1954. The grantor is entitled to a deduction for the fair market value of the restrictive easement . . . .<sup>54</sup>

While private donation of easements for tax and charitable purposes seems to have been little exploited or encouraged for historic preservation, the Open Space Action Commission of New York State has been active in the area of scenic easement donation and has published a well documented guide to the prospective donor.<sup>55</sup>

Taxation as a historic preservation tool is usually used to encourage owners to restore and preserve their property.

In order to encourage restoration and preservation of historic sites and areas by private owners . . . all property designated [historic sites and areas] shall be exempt from that portion of local city, county and school property taxes which is offset by a properly documented showing by the owner thereof of restoration, preservation, and maintenance expenses thereon . . . . [A]mounts expended in any given year may be carried forward to as many as ten subsequent years for application to property taxes. . . .<sup>56</sup>

In San Juan, Puerto Rico, owners of certain property in designated historic districts are compelled to preserve and restore authentic Spanish architecture on their property but are compensated by exemption from property taxes.<sup>57</sup>

51. Whyte, *Securing Open Space for Urban America: Conservation Easement*, Technical Bulletin #36, Urban Land Institute as quoted by C. LITTLE & R. BURNAP in STEWARDSHIP at 66 (1965).

52. HAWAII REV. LAWS § 128-21 (1955).

53. *Id.* § 128-9.2.

54. Rev. Rul. 64-205, 1964-2 CUM. BULL. 62.

55. C. LITTLE & R. BURNAP, STEWARDSHIP (1965).

56. Proposed draft of Kentucky legislation quoted in R. MONTAGUE & T. WREN, *supra* note 14, at 21.

57. House Bill 1194, March 4, 1955.

The New York City Landmarks Act provides for partial or complete tax exemption and remission as part of a plan to mitigate the owner's burden after a showing that the burden of the restriction is unreasonable.<sup>58</sup>

The final legal device suited for preservation is the use of restrictive covenants in deed transfer. Wide scale urban renewal has the effect of making government agencies conduits for the passage of property from private owners (through purchase and eminent domain) back to private owners after the renewal area is secured. When the government reconveys the property to private owners it can impose negative easements prohibiting alteration or demolition and affirmative covenants running with the land enjoining the owner to perform positive maintenance of the structure.<sup>59</sup> Since the owner takes with notice and need not take if he considers the restrictions burdensome, the method seems fair. Buildings worthy of preservation will go to those who want them rather than those who discover they are saddled with them when their district is suddenly rezoned for historic preservation.

The legal devices available today may be divided between those that are free and those that cost the state money. The only expense involved in zoning is enforcement. Well trained personnel are needed to inspect buildings, enforce regulations and appraise alteration plans in historic districts. Zoning is more subject to political influence and abuse than any other method.

All the other preservation methods cost money. Relieving some owners of a tax burden shifts it to the remaining owners. While easements may be donated, it is more likely that they will have to be purchased or taken in eminent domain. Reconveying land from state to private citizen with restrictive covenants and easements will lower the purchase price. The problem in this country regarding historic preservation has been an unwillingness to spend the money necessary to buy it. We will examine this problem after making a brief survey of the bigtime preservation spenders, Britain and France.

### III. BRITAIN AND FRANCE

Although Sweden had the distinction of being the first modern European state to enter the field of historic preservation when King Gustavus Adolphus,

58. Landmarks Act, § 207-8.0(c). The plan must be approved by the Board of Estimate as well as the Landmarks Commission (§ 207-8.0(h)).

59. The relevant provisions of the redeveloper's contract with the local renewal agency are:

§ 401 *Restrictions on Use*. The Redeveloper agrees for itself, and its successors and assigns . . . [T]he Deed shall contain covenants . . . that the Redeveloper, and such successors and assigns, shall:

(a) Devote the Property to, and only to and in accordance with, the uses specified in the Urban Renewal Plan; . . .

§ 402 *Covenants; Binding Upon Successors in Interest; Period of Duration*. . . the agreements and covenants provided in Section 401 hereof shall be covenants running with the land and that they shall . . . be binding . . . and enforceable by the Agency, . . . the City, . . . and the owner of any other land in the Project Area . . . Urban Renewal Administration, Terms and Conditions Part II of Contract for Sale of Land for Private Redevelopment (1964).

in 1630, created the post of Director General of Antiquities to record and collect ancient stones, objects and runic inscriptions,<sup>60</sup> Britain and France have achieved preeminence in the field through imaginative and systematic use of legal controls. Their excellence in the area of historic preservation is undoubtedly due to the presence of monuments, buildings and districts worth preserving as well as to their diligence in preserving them. This factor is seldom articulated in critical evaluations of preservation plans and perhaps deserves more attention. While a nation cannot, of course, presently create a material heritage, the worth of its stock of historical tangibles should be carefully considered for the purpose of evaluating the benefits to be derived from a preservation effort.

Before considering the history and legal operation of Britain's preservation laws, it would be best to direct our attention to the concept of "amenity" and to the 1947 Town and Country Planning Act. "Amenity" is considered a legitimate basis for exercise of the police power and the English thus never find it necessary to rationalize their preservation laws in economic terms. Planning commissions refuse applications with the phrase "injurious to the interests of amenity."<sup>61</sup>

[A]menity is not a single quality, it is a whole catalogue of values. It includes the beauty that an artist sees and an architect designs for; it is the pleasant and familiar scene that history has evolved . . .<sup>62</sup>

The following areas are cases in which the claim of amenity is fairly clear, though the decision on each must turn on the balance of conflicting interests: . . . the spoiling of a stretch of country by ugly houses or perhaps by any house at all; the erection anywhere of a badly designed house or badly sited building, unsightly in itself or unneighborly; the alteration or destruction of a particularly charming or interesting building . . .<sup>63</sup>

The 1947 Town and Country Planning Act nationalized all development rights and their associated values.<sup>64</sup> A property owner cannot develop his land without permission from the local public planning agency. If permission is refused there is compensation in only a very limited number of hardship cases. If permission is granted, any resulting increase in land value is subject to a development charge. The rationale is that since development value is solely a function of community growth, it should be possessed by the community. Since owners possess only existing land uses, the compensation paid for a taking in eminent domain is equal to the existing land use value. No allowance is made for future development.<sup>65</sup> When all property owners are restricted to existing

60. Garvey, *Europe Protects Its Monuments* in WITH HERITAGE SO RICH at 151.

61. J. CULLINGSWORTH, *TOWN AND COUNTRY PLANNING IN ENGLAND AND WALES* 132 (1966).

62. W. Holford, in an address to the Royal Society of Arts, as quoted *id.*, 133.

63. TOWN AND COUNTRY PLANNING, 1943-1951, PROGRESS REPORT (md 8204 at 139 (1951)), as quoted *id.* 133-34.

64. Town and Country Planning Act of 1947, 10 and 11 Geo. 6 c. 51, § 12; Town and Country Planning Act of 1962, 10 and 11 Eliz. 2 c. 38, Pt. III, § 13.

65. J. CULLINGSWORTH, *supra* note 61, at 117.

uses, a preservation zoning regulation should create relatively less hardship for a landowner than it would in a country which, like the United States, imposes no general restrictions on development rights.

The first effective English preservation act was passed in 1913.<sup>66</sup> The Ministry of Public Buildings and Works was charged with the task of making a schedule of "ancient monuments," broadly defined to include any structure made or occupied by man at any time. Monuments are not generally houses; they are more dramatic and massive structures such as Norman castles, ancient ruins, Roman roads and fortresses, and Gothic abbeys. In 1961, there were 12,000 scheduled monuments. The owner of land on which a scheduled monument is located must give the Ministry of Works three months notice of intention to alter, repair or demolish. If a monument is in danger of damage or destruction, an Interim Preservation Notice of up to twenty-one months or a Permanent Preservation Notice is issued which prohibits any work without the written consent of the Minister. The Minister can become the "guardian" of the monument, assuming permanent responsibility for preservation, management, and maintenance or he can acquire the monument. In 1966, 700 monuments were in the charge of the Ministry.

The Historical Building and Ancient Monument Act of 1953 was passed to deal with preservation of houses and buildings that were inhabited or "capable of occupation" since these structures were not covered by the earlier legislation. The Minister prepares lists of buildings of outstanding architectural or historical interest and is empowered to make grants for the preservation of the building, its contents and adjoining land. He can also purchase or accept them as gifts. The list is sent to local planning authorities for purposes of future planning. The owner of a building in a slum clearance area can get a grant for rehabilitation and upkeep under the Housing Act as well as under the Historic Building Act.

Once a building is listed, no demolition or alteration which would materially affect it can be undertaken by the owner without two months written notice to the local planning authority. The authority thus has time to decide whether the building should be preserved. If they decide affirmatively they can make a building preservation order which must be affirmed by the Minister of Housing and which prohibits demolition and alteration. Nine years after the passage of the 1953 Act, over 1,000 grants totaling four million pounds had been utilized by building owners for preservation.

In 1962, new provisions were added to the Act to include listings of buildings of mere "special interest," as opposed to "outstanding interest," and to enable local authorities to contribute directly by either grant or loan to the cost of repairing and maintaining the building.

In conclusion, the British preservation system is based on broad regulation tempered by economic assistance to avoid placing an undue burden on par-

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66. *Id.* at 138-41 for the following survey of British preservation.

ticular owners. This is also the basis for the French system which differs however in its organization and structure. Close control over all preservation work is exercised by the national government in Paris. Little is left to the local authorities except the privilege of disagreement. Legislation dates from 1913, and is considered the most extensive in the world.<sup>67</sup> There are two classes of monuments and buildings, *monuments classés*, of primary importance, and *monuments inscrits*, of lesser importance. Restrictions on both encompass not only the building and the land but also the surrounding field of visibility including up to 500 yards.

After a *monument classé* is so designated, the owner is informed and is entitled to a contribution towards upkeep from the state. The owner may claim compensation for any inconveniences caused by the designation. There can be no alteration, demolition or restoration without the Minister's consent. When permission is granted, the Minister's own architects supervise the work and in some instances the Minister's staff performs the work itself at state expense. The owner of a *monument inscrit*, a building of lesser importance, must give four months notice of proposed modification and may be refused approval. The state can contribute forty percent of the cost of maintenance to *monuments inscrits*.

Until 1962, French preservation law applied only to individual buildings. There was no apparatus for the preservation of historic towns or districts. The "Malraux Law" of 1962 established the *Commission National des Secteurs Sauvegardés* consisting initially of fourteen pilot projects but intended eventually to regulate 1,000 towns and villages. The program is designed to substitute urban rehabilitation for urban reconstruction and involves a joint effort of the Ministry of Construction and the Ministry of Cultural Affairs.

The central government designates "protected areas" in a town. The local authorities have the right to object and can be overruled only by a decree from the *Conseil d'Etat*; local approval is considered essential for the success of the project. Following designation both ministries have two years to prepare a joint plan during which time no work can be done in the protected area without the approval of the Minister of Cultural Affairs. The 1962 law provides for exercise of eminent domain and eviction because many owners in small towns cannot afford even a small percentage of the expense of restoration. By using urban renewal funds for restoration rather than replacement of substandard housing, the State can provide up to eighty percent of the cost of restoration. If the owner cannot or does not want to pay the remaining twenty percent, the government takes consensually or by eminent domain. Buildings once so acquired are not forever lost to the original owner. After restoration, he can resume ownership by paying his twenty percent of cost. If he does not chose to do so, the building will be sold with the right of first option to the previous owner.

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67. Garvey, *supra* note 60 at 154-55 for the following background on French preservation.

Tenants can be evicted with six months notice for the duration of restoration and are found temporary accommodations elsewhere. Upon completion, tenants can return or, if they are unable to pay the rent increase due to the cost of restoration, the government finds other accommodations for them.

#### IV. THE UNITED STATES

What is our national posture with regard to historic preservation? We stand with our feet in the mud, our hands tightly clutching the national purse, talking out of both sides of our mouth, echoing European concern with the values of preservation but carefully avoiding any substantial action. Federal action in the area of historic preservation has consisted mainly of drawing up lists. The Historic Sites Act of 1935 declared the preservation of historic sites to be a national policy of the United States.<sup>68</sup> By 1941, the Historic American Buildings Survey of the National Park Service, in accordance with the 1935 act, had listed 6,400 buildings. Recent reports estimate that between forty and fifty percent of them have been demolished or destroyed by mutilation.<sup>69</sup> In 1958, the National Park Service undertook a further national survey and in 1960, set up a Registry of National Historical Landmarks for sites of exceptional value in private or semi-private hands. An owner who agrees to preserve the historical integrity of the property "so far as practicable" gets a bronze plaque. As of 1963, there were 230 takers.<sup>70</sup>

In 1949, the National Trust for Historic Preservation was chartered by Congress<sup>71</sup> to further the policy set forth in the Historic Sites Act of 1935; the Secretary of the Interior, the Attorney General and the Director of the National Gallery sit on the board of directors. The non-profit National Trust Corporation was privately financed insofar as it was financed at all. The Trust was authorized to receive significant sites and buildings as donations but due to a lack of maintenance funds it could not accept properties without a complete endowment. As of 1963, after fourteen years of operation, it owned five buildings.

Congress amended the Historic Sites Act in 1966<sup>72</sup> but did not adequately remedy its basic weakness, inadequate funding. The scope of the National Register was expanded to including listing of sites of state and local significance,<sup>73</sup> making our lists more comparable to European lists. Matching funds are provided to State equivalents of the Trust for the purpose of making state registers.<sup>74</sup> But lists are of little value without funds for actual preservation. The 1966 funding provisions are not generous. No funds are available if a project

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68. 16 U.S.C. § 461 (1960).

69. Comment, *Police Power, Eminent Domain and Preservation of Historic Property*, 63 COLUM. L. REV. 708 (1963). *Findings and Recommendations of the Special Committee on Historic Preservation* in WHITE HERITAGE SO RICH at 205.

70. Wolfe, *supra* note 5, at 24.

71. 16 U.S.C. § 468 (1960).

72. 16 U.S.C. § 470 (1970).

73. *Id.* § 470 a(a)(1).

74. *Id.*

## COMMENTS

has received any other federal funds;<sup>75</sup> but a grant may not exceed fifty per cent of the cost of the project.<sup>76</sup> No funds are available for maintenance subsequent to restoration but the applicant must assure the federal government that it has access to adequate maintenance funds.<sup>77</sup> A state cannot apply for any funds, not even survey funds, until it has formulated a comprehensive statewide preservation plan and a statewide outdoor recreation plan, both of which have been approved by the Secretary of the Interior.<sup>78</sup>

The most notable effort of the federal government to prevent the destruction of historic sites seems to be directed at its own destructive activities. The 1966 Department of Transportation Act provides that:

the Secretary shall not approve any program or project which requires the use . . . of any land from an historic site . . . unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such . . . historic site. . . .<sup>79</sup>

The Department of Housing and Urban Development (HUD), as might be expected from its recent trend away from demolition towards reconstruction and rehabilitation, has entered the preservation field. Like its brother agencies, it entered on the listing, survey and planning level. As of 1966, HUD had surveyed the historical assets and preservation potential of 119 communities. Under 1966 law,<sup>80</sup> HUD contributed nothing to the cost of restoration and continued maintenance. No grant or loan was available for the specific purpose of restoration. Funds could only be used to make the structure habitable and marketable. Any historic design elements which did not relate to structural safety and economic usefulness were not eligible for public funds.

Although funds were not, under 1966 law, available to restore buildings to authentic historical condition, there were several ways HUD could assist communities in historic preservation activities.<sup>81</sup> Funds are available under the open space land program to create open space to enhance the settings of

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75. *Id.* § 470 d(a).

76. *Id.* § 470 b(a)(3) and 470 c(a).

77. *Id.* § 470 b(a)(5). The Secretary of the Interior may in his discretion waive this provision for the National Trust and include maintenance funds in a grant to the Trust. The Secretary of Housing and Urban Development may give up to \$90,000 to the Trust for the renovation of any one structure. *Id.* § 470 b(a)(1). However this provision is also limited by § 470 b(a)(3) which sets a 50% ceiling *e.g.*, a \$90,000 grant could only be obtained if the project cost were at least \$180,000. Note that this section allows funds for restoration and renovation only. There is no provision for acquisition.

78. *Id.* § 470 b(a)(2). With the exception of § 470 b(a)(1) discussed *supra* note 77, the Secretary of the Interior is the administrator of the amendments.

79. 49 U.S.C. § 1653(f) (1970). While the "no feasible and prudent alternative" proviso would appear to allow the Secretary broad discretion, Congress, in 1968, added additional language to emphasize that the section was not intended to prohibit the Secretary's destruction of historic sites. Pub. L. 90-495, § 18(b), 82 Stat. 824, *amending* 49 U.S.C. § 1653(f) (1968).

80. 42 U.S.C. § 1500 (1966).

81. U.S. Dept of Housing and Urban Development, *PRESERVING HISTORIC AMERICA* 6 (1966).

historical buildings. Funds are also available for installation of new public facilities in the surrounding area and removal of blighting influences encroaching on the historical building and site. Provision is made for the relocation of historic structures standing in the path of various public improvements and for the acquisition of restorable buildings in jeopardy and their disposal for restoration by others.<sup>82</sup> Until late 1966 it was as though historic sites carried the plague; HUD was authorized to do anything but touch the buildings.

The Demonstration Cities and Metropolitan Development Act of 1966 contains several meaningful preservation provisions. HUD is now authorized to grant local agencies and states up to fifty per cent of the cost of acquisition of fee or other permanent interests,

in areas, sites and structures of historic or architectural value in urban areas, and in their restoration and improvement for public use and benefit, in accord with the comprehensively planned development of the locality.<sup>83</sup>

HUD is empowered to grant the National Trust up to \$90,000 for the restoration and renovation of each building it acquires; HUD cannot, however, provide funds for acquisition.<sup>84</sup> No grants are available to private persons or organizations. The Model Cities Bill initially included a provision allowing three percent loans for the private acquisition and rehabilitation of historic structures but the section did not survive passage.<sup>85</sup>

This new legislation seems to have been a response, albeit partial, to the *Findings and Recommendations of the Special Committee on Historic Preservation* published earlier in 1966.

It is clear to the Committee that our own needs and the evidence of experience in Europe, where historic preservation is a major responsibility of government, suggest an expansion and development of our own programs . . . .<sup>86</sup>

The Committee made recommendations for a national plan, strongly emphasizing the need for adequate funding. They suggested power and funds for federal acquisition of threatened buildings and sites, expansion of the urban renewal program to include acquisition of historical buildings both within and without project areas, direct federal financial aid by grant and loan to communities and individual property owners for preservation and maintenance. They suggested an expansion of the Federal Income Tax charitable deduction to include dona-

82. This aspect was mentioned above in connection with the possibility of having the urban renewal agency burden the land with negative easements and affirmative covenants before reconveyance. *See supra* text at notes 58-59.

83. 42 U.S.C. § 1500d-1 (1969).

84. 16 U.S.C. § 470b-1 (1970). *See supra* note 77.

85. Pub. L. No. 89-754, § 605 (Nov. 3, 1966). The provision would have provided loans of up to \$10,000 on residential property and \$50,000 on non-residential property. An analogue appears in 42 USC § 1452(b) (1970), which provides three per cent loans for the private rehabilitation of property with serious physical defects or code violations.

86. In *WITH HERITAGE SO RICH* at 203.

tion of historic easements to government bodies even when the land is used for private revenue producing purposes. They recommended that limited tax deductions for restoration and preservation expenses be available to owners of registered historical property. The Committee also proposed that the federal government adopt restrictive legislation of the type found in France, Britain, and American municipalities to prevent unauthorized demolition or alteration of sites. With the exception of the new Historic Sites and Demonstration Cities provisions, nothing has been done.

#### V. NEW YORK CITY'S LANDMARKS ACT

The state or city that wishes to actively preserve its architectural history must rely on its own legislation, planning and primarily on its own financial resources. New York City passed, in 1965, the Historic Landmarks Act, a lengthy, comprehensive law containing a variety of legal tools.

The Landmarks Act was passed under the New York State Historic Preservation Enabling Act of 1956,<sup>87</sup> granting municipalities the authority to provide conditions and regulations for the protection of buildings and places of "special historical or aesthetic interest or value" and for control of the use and appearance of neighboring property within the public view.

The New York City Landmarks Act<sup>88</sup> is prefaced by a statement of legislative purpose listing every reason ever advanced for historic preservation. Heading the list is the disinterested or gratuitous motive, simple preservation of districts and sites of cultural, social, economic, historic and architectural value. Following are: protection of property values in such districts; fostering civic pride in accomplishments of the past; promoting tourism; generally strengthening the economy of the city; and finally, promoting the use of historic districts for the education, pleasure and welfare of the city's residents.<sup>89</sup>

87. N.Y. GEN. CITY LAW § 20 (McKinney 1968). "Subject to the constitution and general laws of this state, every city is empowered:"

25-a. To provide, for places, buildings, structures, works of art, and other objects having a special character or special historical or aesthetic interest or value, special conditions or regulations for their protection, enhancement, perpetuation or use, which may include appropriate and reasonable control of the use or appearance of neighboring private property within public view, or both. In any such instance such measures, if adopted in the exercise of the police power, shall be reasonable and appropriate to the purpose, or if constituting a taking of private property shall provide for due compensation, which may include the limitation or remission of taxes. N.Y. GEN. CITY LAW added L. 1956, c. 216 eff. April 2, 1956.

Although commentators stress the desirability of a special state enabling act for historic preservation (*see* R. MONTAGUE & T. WREN, *supra* note 14), a municipality can probably rely on the general zoning enabling act. In the one case in which a restriction was challenged because the special historic district enabling act was passed after the municipal restriction was enforced, *Santa Fe v. Gamble Skogmo, Inc.*, 73 N.M. 410, 389 P.2d 13 (1964), the New Mexico Supreme Court upheld an extremely restrictive regulation regarding the size and design of window panes on the ground that historic preservation was within the scope of the general zoning enabling act under the general welfare provision.

88. Landmarks Act, Chapter 8-A.

89. *Id.* § 205-1.0 b.

What immediately distinguishes the Landmarks Act from most American municipal acts is the very broad definition of the subject of preservation. New Orleans and San Juan, Puerto Rico confine their preservation regulations to clearly defined districts. Nantucket attempts to preserve one style of architecture. Santa Barbara defines buildings to be preserved by descriptive reference to already preserved buildings.<sup>90</sup> The significance of careful delineation of districts and building styles relates to the constitutionality of the regulation. One of the reasons courts reject aesthetic considerations alone as a basis for exercise of the police power lies in the vagueness of statutory definition and broad range of administrative discretion which may characterize aesthetic judgments. Most preservation ordinances avoid this pitfall by specifically defining what is to be preserved, where it is to be preserved and how the administrator is to go about preserving it.

New York has been more bold, necessarily so in terms of its goals. A landmark is defined as

[a]ny improvement, any part of which is thirty years or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated as a landmark pursuant to the provisions of this chapter.<sup>91</sup>

A historic district is one which contains improvements which have a special character or special historic or aesthetic interest or value; and represents one or more periods or styles of architecture typical of one or more eras in the history of the city; and forms a distinctive section of the city; and has been designated a historic district pursuant to the provisions of the Act.<sup>92</sup>

The Commission takes the initiative in designating a district or a landmark. It must hold a public hearing before it makes such a listing<sup>93</sup> and the Board of Estimate has ninety days to exercise veto power over such a designation on the ground that it will interfere with projected development plans.<sup>94</sup> Designations must be recorded with the City Registrar.<sup>95</sup>

After a designation is recorded, the Commission may:

with respect to any improvement in a historic district or on a landmark site, apply or impose, with respect to the construction, reconstruction, alteration, demolition or use of such improvement, or the performance of minor work thereon, regulations, limitations, determinations or conditions which are more restrictive than those prescribed . . . [by] other provisions of law applicable to such activities, work or use.<sup>96</sup>

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90. New Orleans, La., Vieux Carré Ordinance 14538, March 3, 1937; San Juan House Bill 1194, March 4, 1955; Nantucket Act, Mass. Acts and Resolves 1955, ch. 601, §§ 1-12; Santa Barbara, Cal., ordinance 2758 § 6, May 9, 1960.

91. Landmarks Act, § 207-1.0 k.

92. *Id.* § 207-1.0 h.

93. *Id.* § 207-2.0.

94. *Id.* § 207-2.0 f(2).

95. *Id.* § 207-2.0 j.

96. *Id.* § 207-3.0 b.

## COMMENTS

Any alteration, reconstruction, demolition or construction on a covered site or in a covered district requires a certificate from the Commission.<sup>97</sup> Exception is made for city aided projects but no final project plans can be made until they have been referred to the Landmarks Commission and a report has issued from the Commission. However, Commission approval is not required to proceed with a city aided project.<sup>98</sup>

Like all other municipal ordinances, the Landmarks Act regulates only the exterior appearance of improvements.<sup>99</sup> Although an applicant must apply for a certificate to do any work on the improvement, the Commission is authorized to consider only

(a) the effect of the proposed work in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done and (b) the relationship between the results of such work and the exterior architectural features of other, neighboring improvements in such district.<sup>100</sup>

The Commission is directed to consider, among other relevant factors, aesthetic, historical and architectural values, architectural style, design, arrangement, texture, material and color.<sup>101</sup> The Commission is prohibited, however, from doing the work of the zoning commission and is specifically enjoined from passing on height and bulk, open space, density of population, and location of trade and industry.<sup>102</sup>

If the Commission finds that the work proposed by the applicant does not in any way relate to the exterior appearance of the improvement, it issues a certificate of no exterior effect and work may be commenced.<sup>103</sup> If the Commission finds that the work will alter the exterior of the improvement, the applicant must apply for a certificate of appropriateness, or the applicant may initially request a certificate of appropriateness in the alternative when he applies for a certificate of no exterior effect.<sup>104</sup>

The Commission must hold a public hearing on each application for a certificate of appropriateness and must make a determination within ninety days of filing of the application.<sup>105</sup> The Commission must set forth the reasons for its determination when it gives notice to the applicant of its decision.<sup>106</sup> The rejected applicant is not in any way restricted from making a new application. A rejected applicant who is making what the act defines as a reasonable return from his property has no choice but to abandon his plans or alter them and re-apply.

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97. *Id.* § 207-4.0 a(1).

98. *Id.* § 207-4.0 b, § 207-17.0.

99. *See* text at notes 27-28.

100. Landmarks Act, § 207-6.0 b(1).

101. *Id.* § 207-6.0 b(2).

102. *Id.* § 207-3.0 a.

103. *Id.* § 207-5.0.

104. *Id.* § 207-6.0.

105. *Id.* § 207-7.0.

106. *Id.* § 207-14.0 a.

However, an owner who cannot realize a reasonable return<sup>107</sup> is protected by the Act. After a showing that the parcel cannot earn a reasonable return and after the Commission has rejected the owner's plan, the burden shifts to the Commission to devise a plan which may include but is not limited to partial or complete tax exemption, remission of taxes and authorization of alteration, construction or reconstruction consistent with Commission standards.<sup>108</sup> Within sixty days of a finding of insufficient return, the Commission must send a copy of the plan to the applicant. The Commission then holds a public hearing and if it subsequently approves its own plan, it denies the certificate of appropriateness, application for which was revived by a showing of insufficient return. If the plan involves tax abatement or remission, it must be approved by the Board of Estimate.

The owner can accept or reject the plan. If the owner rejects it or the Commission does not formulate a plan in sixty days or does not approve the plan after a hearing, the Commission has ten days to send the mayor a recommendation that the city acquire a specified appropriate protective interest in the parcel.<sup>109</sup> The Act defines an appropriate protective interest as

[a]ny right or interest in or title to an improvement parcel or any part thereof, including but not limited to, fee title and scenic or other easements, the acquisition of which by the city is determined by the commission to be necessary and appropriate for the effectuation of the purposes of this chapter.<sup>110</sup>

The burden of action thus shifts to the city which has ninety days to either apply for condemnation of such interest or to make a contract with the owner to acquire the interest. If the city takes no action, the Commission must grant the owner a notice to proceed which means that he can undertake the plan that the Commission originally rejected.<sup>111</sup>

107. *Id.* § 207-1.0 g, "Reasonable Return"

(1) A net annual return of six percentum of the valuation of an improvement parcel.

(2) Such valuation shall be the current assessed valuation established by the city, which is in effect at the time of filing for a certificate of appropriateness. . . .

An owner can contest the assessed valuation if there has been a bona fide sale since 1958.

This provision raises several questions which are beyond the scope of this study but deserve brief mention. With regard to those owners who purchased prior to 1958, what is the relationship between assessed valuation and market valuation in New York City? Can a six % rate of return, the blue chip stock rate, reasonably compensate even an owner who has made an extremely secure real property investment in terms of his risk, expectation and the rate of return for similar property?

Beyond the apparent inadequacy of six % return, it would seem unfair to set one rate of return for all properties. Reasonable return is a function of each investment and should be individually determined. Reference to government standardization of a public utilities rate of reasonable return is not persuasive. Utilities are quasi-public corporations and enjoy monopoly benefits; the property owner does not have any special obligation to the public and competes in a market in which other owners are not similarly restricted by one rate of return.

108. *Id.* § 207-8.0 c.

109. *Id.* § 207-8.0 g(1).

110. *Id.* § 207-1.0 b.

111. *Id.* § 207-8.0 g(2).

## COMMENTS

Aside from the highly questionable "reasonableness" of the six per cent "reasonable return" provision,<sup>112</sup> the system seems fair: The owner who is making a profit from his parcel is bound by the restriction. Once the owner shows his burden is unreasonable, the Commission must create a plan to lighten the burden to the weight of reasonableness; or the city must pay for the interest it has already taken without compensation by zoning; or the owner is free to proceed because the restriction is lifted.

There is a certain logical contradiction in the city's second alternative, the taking of a protective interest. The interest most likely to be taken is the scenic or historic easement. Since the measure of compensation would be the market value of land as it is currently zoned (with the preservation regulation)<sup>113</sup> minus the value of the land encumbered by the equivalent easement, the value of a scenic easement in a historic district would be exactly nothing. However, since the restriction would be lifted if the interest were not taken by the city, the compensation should probably be based on the market value of the land without the preservation restriction.

A much more questionable provision of the act applies to property held by non-profit associations. Since the reasonable return standard is not applicable to such owners, a different standard had to be formulated for unreasonable burdens resulting from the regulations. A special section<sup>114</sup> covers improvement parcels that have received an exemption from New York State real property taxes (under sections 420 to 474 of the Real Property Tax Law which includes almost all charitable organizations) in the three years immediately preceding filing of an application for a certificate of appropriateness.

In order to qualify for relief from the regulations affecting reconstruction, alteration and demolition, a charitable owner must meet each of four requirements. He must have already entered into an agreement to sell in fee or to grant at least a twenty year lease and that agreement must be contingent upon his procurement of a certificate of appropriateness or a notice to proceed. Furthermore, the parcel must not be capable of earning a reasonable return without its tax exempt status. Also, the improvement sought to be altered or demolished must no longer be adequate for carrying out the purposes to which it is currently devoted and the purposes to which it had been devoted when acquired unless the charitable owner is no longer pursuing such purposes.<sup>115</sup> Finally, the prospective purchaser must intend to promptly demolish, alter or re-construct the improvement and will be held to that intention if a certificate is issued.<sup>116</sup>

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112. *Id.* § 207-1.0. *See supra* note 107.

113. As opposed to the market value of the land were it unzoned. *See Euclid v. Lakeshore Co.*, 133 N.E.2d 372 (1956), *appeal dismissed*, 165 Ohio St. 501, 137 N.E.2d 750 (1956), *cert. denied*, 352 U.S. 1025 (1957).

114. Landmarks Act, § 207-8.0 a(2).

115. *Id.* § 207-8.0 a(2)(a)-(d).

116. The notice to proceed will authorize demolition, alteration or reconstruction only if undertaken promptly after issuance of the notice. *Id.* § 207-8.0 i(5)(b).

If the charitable owner can establish all four requirements, the Commission has 180 days in which to find an alternate purchaser or tenant, as the case may be, who will agree to buy or lease without a certificate of appropriateness. The substitute taker must accept a durational interest identical with that tentatively accepted by the original purchaser on reasonably equivalent terms and conditions.<sup>117</sup>

If after 180 days the Commission has not found a substitute taker or if a substitute taker fails to reach an agreement with the owner, the Commission can send the mayor a recommendation that the city acquire a specified appropriate protective interest by contract or condemnation. If the city does not act within ninety days, the Commission must grant the owner a notice to proceed.<sup>118</sup> So long as the original purchaser or tenant has maintained his interest for nine months and undertakes the originally rejected reconstruction plans promptly, the interests of both the charitable owner and purchaser are secured.

There is, however, no provision made for the charitable owner who does not wish to sell or lease his property but finds it entirely unsuited to his purposes and cannot obtain the Commission's approval for his demolition or reconstruction proposals. The only significant case that has arisen to date under the Landmarks Act concerns this situation.<sup>119</sup> Sailors' Snug Harbor, a charitable institution caring for retired mariners, sought an order vacating a determination by the Commission that certain of its buildings are landmarks.<sup>120</sup> The buildings are notable examples of Greek revival and Anglo-Italianate style dating from 1830 to 1880. The institution wished to demolish them because they are no longer fit for use as dormitories for the seamen. It was alleged that they are intrinsically obsolete as they are not fire-proofed, have no elevators and provide their occupants with very cramped quarters. The petitioner planned to construct a high-rise dormitory and claimed that not only were the buildings useless and expensive to maintain but also that they would block the sailors' view of the Kill Van Kull from the proposed high-rise building. Although the society had full opportunity to be heard when the buildings were designated as landmarks, the Commission, not confined to the evidence presented at the hearing,<sup>121</sup> went ahead and designated the buildings as landmarks. The Trust-

117. *Id.* § 207-8.0 i(1).

118. *Id.* § 207-8.0 i(4)(b).

119. *Trustees of the Sailors' Snug Harbor v. Platt*, 53 Misc. 2d 933 (Sup. Ct. 1967). The only other reported case arising under the Landmarks Act was *Manhattan Club v. Landmarks Comm'n*, 51 Misc. 2d 556 (Sup. Ct. 1966). The Manhattan Club alleged that the designation of its building as a landmark impaired a pre-existing sales contract but did not offer evidence that the purchaser refused to take. The complainant claimed that the building was not worthy of landmark designation but the court found that the Commission's designation was supported by substantial evidence. The Manhattan Club also argued that the designation was sufficiently confiscatory to constitute a taking without compensation in violation of the fourteenth amendment. The Court pointed out that only the appearance of the exterior was regulated.

120. *Trustees of the Sailors' Snug Harbor v. Platt*, 53 Misc. 2d 933 (Sup. Ct. 1967).

121. Landmark Act, § 207-12.0 b.

ees argued that the distinction created by the Act between tax-paying and tax-exempt owners is unreasonable discrimination in contravention of the fourteenth amendment and the New York State Constitution.<sup>122</sup> The court declined to treat this question but did, however, grant an order vacating the designation on the ground that the burden on the Trustees was out of proportion to the benefit to be derived by the public. The court took notice of the fact that Staten Island and Sailors' Snug Harbor are seldom visited by tourists, and considered the burden of maintaining useless property in light of the Landmarks Act's anti-neglect provisions. The court also took into account the "spot zoning" aspect of the case; the fact that the surrounding area was not zoned as an historic district meant that the Trustees were not getting the benefit of total scheme zoning that is often considered to compensate restricted owners.<sup>123</sup>

The Appellate Division unanimously reversed and remanded.<sup>124</sup> The court refused to hear argument on whether or not aesthetic and cultural benefit to the community is an adequate basis for exercise of the police power; it deemed the issue long since resolved in favor of aesthetics. The only issue was whether the regulation amounted to a taking. The court believed that the Landmarks Act was clearly designed to avoid taking without compensation and simply failed to spell out criteria for weighing the burden in cases in which the charitable owner does not wish to sell.

We agree with Special Term that this does not render the statute unconstitutional. It must be interpreted as giving power to the commission to provide relief in the situation covered by the statute, but not restricting the court from doing so in others. The criterion for commercial property is where the continuance of the landmark prevents the owner from obtaining an adequate return. *A comparable test for a charity would be where maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose* (emphasis added).<sup>125</sup>

The court remanded because although the Trustees alleged and argued serious interference, they did not introduce evidence tending to prove it. The court recommended that relevant considerations include the possibility and cost of converting the buildings to a useful purpose, the extent of interference with the use of the property and the cost of maintenance. The appellate court thus remedied the only flagrant inequity in the act by providing a standard for granting relief to the heavily burdened charitable owner who does not wish to sell.

The Landmarks Act is a well conceived law. It serves the worthwhile goal

122. N.Y. Constr. art I, § 2.

123. A district wide preservation regulation or condemnation of easements may increase rather than decrease property values, particularly in residential neighborhoods. See *supra* text accompanying notes 14-15.

124. 29 A.D. 2d 376, 288 N.Y.S.2d 314 (1st Dep't 1968).

125. *Id.* at 378, 288 N.Y.S.2d at 316.

of preserving the continuity of the city's history, architecture and distinctive districts. It does not attempt to impose one period or style on any area as other acts do by arbitrarily requiring that all construction, including new buildings, be in one designated style.<sup>126</sup> The Act itself defines the point at which regulation becomes a taking and saves property owners the trouble of resorting to the courts. When it appears that regulation does constitute a taking, the Commission assumes the burden of finding a remedy, and when it cannot find a remedy, the Commission releases the owner from the restriction.

The success of the Act, like most historic preservation activity, depends on how much the city is willing to spend on it. If the Board of Estimate refuses to grant tax exemptions or remissions to burdened owners and the mayor declines to acquire protective interests and the Commissioner does not have adequate staff to inspect and enforce,<sup>127</sup> to carefully evaluate applications for certificates of appropriateness and seek out substitute purchasers, the regulations will be inoperative and the Act undermined. Legal tools make historic preservation possible but do not assure it. To be effective as well as equitable for the affected property owners, preservation law requires substantial expenditure of government funds.

#### VI. SUMMARY AND CONCLUSIONS

Every public preservation program should begin with a comprehensive evaluation of the goals as well as the objects of preservation. Even though courts will invariably skirt the aesthetic zoning issue and find some basis for justifying preservation regulation as a valid exercise of police power, planners and legislators have a duty to responsibly allocate community resources. Preservation for preservation's sake, or for patriotism's sake, may constitute extravagant expenditure in terms of the resultant public benefit. A community should probably think twice before it decides to preserve a geographically remote or architecturally unexceptional Vice-President's birthplace. Certain preservation efforts, however, clearly justify public expense and a reasonable amount of private restriction. District preservation serves a recreational function by satisfying aesthetic, psychological and physical needs of city dwellers. It also attracts tourists, both day-trippers from suburbia and visitors from out of town. Tourism stimulates business which in turn increases municipal sales tax revenues. The city's real property tax base is also broadened as property values rise.

Having decided that preservation will yield public benefit commensurate with public expense and private restriction, the community should attempt to

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126. See, e.g., Santa Fe, N.M., Ordinance 1957-18, October 30, 1957, upheld by the New Mexico Supreme Court in *Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 P.2d 13, 18-19 (1964). See *supra* note 87.

127. Penalties for violation of all provisions are severe. They range from \$25 to \$1,000 for each day of violation and up to one year in prison depending on the seriousness of the violation. (Landmarks Act, § 207-16.0 a-b). The Commission is empowered to secure an injunction against any person about to or actually engaging in a violation. *Id.* § 207-16.0 e.

utilize and coordinate a variety of legal tools including regulation, easement acquisition through purchase and eminent domain, restrictive covenants, tax incentive and federal assistance.

The city should realistically and compassionately anticipate that its preservation program may work hardship on certain land owners. Instead of forcing an aggrieved owner to go to court to plead a "taking," the legislature should define the point at which regulation does create unreasonable personal hardship. The preservation law should then provide for adjustment through purchase of the interest effectively condemned by regulation, or removal of the restriction.

Prior to 1966, the federal government did little to materially assist local preservation efforts. The Historic Sites and Model Cities Amendments of 1966 represent an effort, albeit inadequate, to assist local projects. A more effective program would allow the federal government to assume a larger percentage of local project costs, to provide grants or low cost loans to private persons willing to acquire and rehabilitate historic structures, and to offer federal income tax incentives for private rehabilitation.

Beyond the narrow confines of the National Trust, a nonprofit corporation chartered by Congress, the federal government does not initiate preservation programs. Federal assistance is intended to merely support local efforts. French and British preservation experience suggests that federal initiative might be desirable. While an aggressive preservation program would appear incompatible with the Government's indirect approach to national housing problems, preservation need not be conceptualized as a housing problem. Preservation law appears in conservation as well as housing statutes; the Historic Sites Act is contained within the National Parks Chapter. It would therefore require no profound change in congressional policy to treat historic preservation as a conservation problem calling for federal initiative rather than a housing problem in which Government efforts must be restricted to local assistance.

GRACE BLUMBERG

### CURRENT LEGAL EDUCATION OF MINORITIES: A SURVEY

The societal crisis our country faces in terms of racial discrimination is evident. In like manner the American legal profession faces a crisis of its own.

We must encourage Negroes to become lawyers and, thus, enable them to have a larger voice in their own and their people's destiny; to share the obligations as well as the privileges of citizenship; and to achieve self-fulfillment as individual members of society.<sup>1</sup>

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1. Gosset, *Bar Must Encourage More Negro Lawyers*, April/May TRIAL 22, 24 (1968). At the time his article appeared, Mr. William Gosset was the President-elect of the ABA.