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## Municipal Ordinances for Historic Preservation in New York State

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# Municipal Ordinances For Histori

Nicholas A. Robinson

White Plains

*Mandated State agency action for historic preservation and encouragement to new local initiatives is found in The N.Y.S. Historic Preservation Act of 1980, Article 14 of the Parks and Recreation Law, L. 1980, Ch. 354 (A. 11779-A). Members of the NYSBA interested in following developments in Historic Preservation Law may wish to participate in the Historic Preservation Law Committee of the Association's new Section on Environmental Law.*

Mr. Justice Brennan began his analysis upholding the constitutionality of New York City's "Landmarks Preservation Law"<sup>1</sup> in the U.S. Supreme Court's *Penn Central*<sup>2</sup> decision with the following observation:

"Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings. These nation-wide efforts have been precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in eco-

nomically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. . . ."<sup>3</sup>

The Supreme Court went on to affirm the constitutionality of New York City's law under which Grand Central Terminal had been designated as a landmark. Other municipalities in New York State, such as Ithaca<sup>4</sup> and Rochester,<sup>5</sup> welcomed the ruling because they too had enacted local historic preservation ordinances. Some had been expressly adapted from the New York City model to suit a variety of needs, including those of a small village.<sup>6</sup> Within New York State there is enough range of experience for any local government with confidence to create or streamline an historic preservation ordinance.

New York State led the nation in pioneering historic preservation laws. The State's acquisition in 1850 of Hansbrouck House, General George Washington's headquarters in Newburgh, set a precedent for governmental action to preserve historic assets.<sup>7</sup> In the absence of any strong federal

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<sup>1</sup> N.Y.C. Charter & Admin. Code, ch. 8-A, §205-1.0 *et seq.*

<sup>2</sup> 438 US 104, 98 S.Ct. 2646 (1978).

<sup>3</sup> *Id.*, Slip. Op. at 1-2.

<sup>4</sup> "Ithaca Landmarks Preservation Commission" law.

<sup>5</sup> Rochester Landmark and Preservation Code, Rochester City Code §115-3713 (April 1, 1969).

<sup>6</sup> See "The Tarrytown Landmark and Historic District Act," Local L. #3 of 1978; Zoning Ordinance Amendment #64 (March 27, 1978) [Mimeo Edition from Village Clerk's Office].

<sup>7</sup> See Note, "The Police Power, Eminent Domain and The Preservation of Historic Property," 63 COLUM. L. REV. 708 (1963).

# Preservation In New York State

regulations to save landmarks, the responsibility for protecting historic values has rested with the state.<sup>8</sup>

Although historic landmark and district laws are valid locally under the State's mandate to local government to enact comprehensive zoning regulations, New York's delegation of authority to local government to regulate historic values expressly restated with the enactment of Section 96-a of the General Municipal Law in 1968:<sup>9</sup>

"In addition to any power or authority of a municipal corporation to regulate by planning or zoning laws and regulations or by local laws and regulations, the governing board or local legislative body of any county, city, town or village is empowered to provide by regulations, special conditions and restrictions for the protection, enhancement, perpetuation and use of places, districts, sites, buildings, structures, works of art, and other objects having a special character or special historical or aesthetic interest or value. Such regulations, special conditions and restrictions 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."

This enabling law, while brief, was sufficient to authorize New York City's elaborate landmark and historic district regulations.<sup>10</sup> The Appellate Division of New York's Supreme Court has ruled, in a review of a decision by the City of Rochester's Preservation Board, that §96-a permits vesting a discretionary power in the local historic body:<sup>11</sup>

"The decision of the Preservation Board involves judgment and expertise and its determination of what changes may or may not be undertaken in protected districts is to be judged by familiar standards of reasonableness. What might be an appropriate improvement in one preservation district may be wholly inappropriate in another. If the Board's decision, based upon sufficient evidence, is consistent with the values which the municipality sought to preserve in the special district involved, the Board's action is not arbitrary or capricious. The governing consideration is not whether

<sup>8</sup> See N.A. Robinson, "Historic Preservation: The Qualities of the Man-Made Environment," N.Y.L.J., p. 1, col. 1 (May 28, 1974).

<sup>9</sup> "Protection of historic places, buildings and works of art" §96-a, General Municipal Law, added by L. 1968, c. 513, §3; not to be confused with another §96-a adopted also in 1968 as c. 472 and given the same code number by mistake, on the use of lands for the construction and operation of neighborhood youth centers.

<sup>10</sup> *Penn Central v. NYC*, *supra* note 3.

<sup>11</sup> *Zartman v. Reisem*, 59 A.D. 2d 237, 399 NYS 2d 506 (App. Div., 4th Dep't., Nov. 4, 1977), at 399 N.Y.S. 2d 509-510.

the improvement is beautiful, or tasteful, or even whether it promotes noise or quiet, but rather whether it preserves or interferes with the preservation of the character and values of the district in which it is located.”

Thus, the local landmark or historic district ordinance is viewed in New York as a land use technique distinct from zoning laws, from ordinances on aesthetics (which have long been held as constitutional in their own right in New York)<sup>12</sup> from local laws regulating noise,<sup>13</sup> and from other environmental laws more closely related to dangers to public health and welfare.<sup>14</sup>

Typically, what does such a local historic landmark and district ordinance do? The following elements are fairly common:

(1) Define the particular historic nature of the given community; what decades, events of history, architectural distinctions, or other objective criteria will define what is historic.

(2) Assemble a Board, Commission or Agency comprised of persons with experience or skills appropriate to apply the historic criteria to individual structures or districts within the given community; such persons might include a leader of a local historical society, an architect, a realtor, an attorney, an art or history teacher.

(3) Prepare, as part of a comprehensive plan, an inventory of the historic structures, sites or districts in the community which should be studied to determine if they meet the historic criteria.

(4) Compile facts and evaluations for each potential landmark or district.

(5) Give public notice of, and convene a

<sup>12</sup> See, e.g. *Cromell v. Ferrier*, 19 N.Y. 2d 263, 272 (1967); *People v. Stover*, 12 NY 2d 462, 468 (1963).

<sup>13</sup> See authorities collected in N.A. Robinson, “Local Noise Laws Come of Age,” N.Y.L.J., p. 1, col. 1 (June 26, 1979).

<sup>14</sup> See Environmental Conservation Law, 17½ McKinney’s Consol. L. of N.Y., discussed in R. Nichols and N.A. Robinson, “A Primer On NY’s Revolutionized Environmental Laws,” 49 N.Y.S. BAR J. 41 and III (Jan. and Feb., 1977).

public hearing to designate the landmark or district; assemble the evidence of historicity and make a record justifying the reasons why the designation is granted or denied.

(6) Some administrative appeal to municipal Trustees or an appeals board may be provided to review the designation decision, before normal judicial review would be available.

(7) When designation is made, it should specifically detail the identity of the landmark or the boundaries of the historic district; notice should be given to owners of record of designated parcels.

(8) Before a given landmark may be altered, an application for a certificate of appropriateness is filed with the same municipal board or commission which made the designation; if the alteration is compatible with historic values of the site, the certificate may be issued and, if not, it may be denied.

(9) Frequently, any demolition of any building over thirty years old must first be reviewed by the historic landmarks board or commission to determine if historic sites not yet designated may be involved or affected; a six month stay of the municipal building inspector’s issuance of a demolition permit is often available if the building appears worthy of designation.

(10) An obligation may be imposed on an owner of a designated landmark, or on an historic structure within a district, to affirmatively maintain the site to preserve the historic values from ruination by disrepair; if, after notice, an owner fails to keep the site in sound condition, the municipality could cause necessary repairs to be made by contracting to have the work done and assessing the costs against the owner.

(11) A procedure to annul designations is needed, especially for “non-conforming” sites within historic districts which do not reflect the historic values of the district, or for landmarks whose value may be lost by flood, fire or other acts of God.

In applying these elements to a given municipality, it may be appropriate to integrate them with other municipal laws. A Building Code may include elements reinforcing historic preservation laws; at a

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There are several *caveats* which must be examined in preparing or administering a municipal historic preservation ordinance.

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minimum, the portions of Building Codes inconsistent with the historic preservation ordinance should be amended.<sup>15</sup> Correlation should also be examined between the historic preservation ordinance and such zoning techniques as cluster zoning, planned unit development and site plan approvals.<sup>16</sup>

Where a community is involved in innovative land use concepts, such as time-phased zoning,<sup>17</sup> or flood plain zoning,<sup>18</sup> or the pending legislative proposals for coastal zone management with special provisions for protecting historic sites,<sup>19</sup> there should also be care given to correlating the landmark and historic district controls to these new techniques. Most innovative are the proposals for the transfer of development rights,<sup>20</sup> a technique already in use in New York City.<sup>21</sup> This tool removes the market

pressures to develop a landmark site by permitting the owner to sell or otherwise transfer the right to development of the landmark site to the extent allowed under available zoning limits; this development right is then added to expand the existing zoning limits on development governing another parcel.

There are several *caveats* which must be examined in preparing or administering a municipal historic preservation ordinance. Where a landmark is owned by a not-for-profit society or association, the restrictions of the historic preservation ordinance should not be so restrictive as to impair the charitable, education, scientific or other non-profit function for which the group was chartered.<sup>22</sup> Where the landmark is owned by a religious society or church, and the religious use is abandoned, should the owner be treated as a merely not-for-profit society or still as a religious entity enjoying First Amendment protections under the U.S. Constitution? New York's Court of Appeals appears prepared to permit a church to shed the landmark restrictions at the church's own election.<sup>23</sup> Perhaps as a condition of receiving local or state aid in maintaining the landmark owned by a church, it could contractually agree to accept the landmark restrictions and become bound by them.<sup>24</sup> The Solicitor of the U.S. Interior Department has ruled that government aid may be given to maintain the landmark quality of a church without violating the Constitutional prohibition on the establishment of religion.<sup>25</sup>

(Continued on page 52)

<sup>15</sup> See PRESERVATION & BUILDING CODES, Papers from a Conference on Historic Preservation & Building Codes, May, 1974 (National Trust for Historic Preservation, 1975).

<sup>16</sup> See generally, ANDERSON, NEW YORK LAND USE.

<sup>17</sup> *Golden v. Planning Bd. of Town of Ramapo*, 30 NY 2d 359, 334 N.Y.S. 2d 138, 285 NE 2d 291 (1972).

<sup>18</sup> 42 U.S.C. 4001; see N.A. Robinson, "New Federal Rules Curb Flood Plain Developments," N.Y.L.J. p. 1, col. 1, (November 23, 1976).

<sup>19</sup> See Assembly Bills 8-A and 9-A (1979-80 Legislative Sessions), discussed in N.A. Robinson, "Law-Making for State's Coastal Management" 183 N.Y.L.J. p. 1, col. 1 (Jan. 22, 1980).

<sup>20</sup> See John J. Costonis, SPACE ADRIFT: Saving Urban Landmarks Through the Chicago Plan (1974).

<sup>21</sup> See Norman Marcus, "The Grand Slam Grand Central Terminal Decision: A *Euclid* for Landmarks, Favorable Notice for TDR, And A Resolution of the Regulatory/Taking Impasse," 7 ECOLOGY L.Q. 731 (1979).

<sup>22</sup> See criteria stated in *Trustees of Sailors' Snug Harbor v. Platt*, 29 App. Div. 2d 276, 288 NYS 2d 314 (1st Dep't, 1968).

<sup>23</sup> *Lutheran Church In America v. City of N.Y.*, 35 NY 2d 121, 316 N.E. 2d 305, 359 NYS 2d 7 (1974).

<sup>24</sup> See John J. Kerr, "Landmarks Preservation and Tax-Exempt Organizations: A Proposal in Response to Lutheran Church," 1 COLUM. J. ENVIR. L. 274 (1975).

<sup>25</sup> See Associate Solicitor's Memorandum to ACRS, dated March 6, 1979, reprinted in Robinson (Ed.) HISTORIC PRESERVATION LAW at 681-696 (1979, Practising Law Institute, NYC).

## HISTORIC PRESERVATION

(Continued from page 21)

Landmark designation procedures and decisions on certificates of appropriateness should also be coordinated with the requirements of State Environmental Quality Review Act ("SEQRA").<sup>26</sup> Local governments should adopt regulations specifying when a landmark decision would require an environmental impact review. Routine procedures for negative declarations and lead agency identifications should be established.<sup>27</sup> The N.Y.S. Department of Environmental Conservation has information on the operation of SEQRA which should be examined prior to fashioning SEQRA compliance by a municipal historic preservation agency.<sup>28</sup>

In drafting an ordinance, care should be taken to have it conform to criteria "which will substantially achieve the purpose of preserving and rehabilitating buildings of historic significance" under the Federal Internal Revenue Code.<sup>29</sup> If the ordinance is certified as meeting such criteria by the Secretary of the Interior through the Heritage Conservation and Recreation Service in the Interior Department,<sup>30</sup> sites in an historic district designated by the locality would qualify for federal income tax incentives.<sup>31</sup> Unless the ordinance has been so certified, the local landmarks or structures in an historic district must be independently certified and placed on the National Regis-

<sup>26</sup> Article 8, Environmental Conservation Law, 17½ McKinney's Consol. L. of N.Y.

<sup>27</sup> See R. Sandler, "State Environmental Quality Review Act," 49 N.Y.S. BAR J. 110 (Feb. 1977); P. Weinberg, "What Every Real Estate Lawyer Should Know About New York's SEQRA," 52 NYS BAR J. 114 (Feb., 1980).

<sup>28</sup> See, e.g. Richard A. Persico, "State Procedures and Rulings Under New York's SEQRA," prepared for N. Robinson & J. Sachs (Eds.), NYS ENVIRONMENTAL LAW INSTITUTE 2d at 93-148 (N.Y.S. Bar Assoc. CLE Coursebook, 1979).

<sup>29</sup> I.R.C. Section 191 (d)(2)(B).

<sup>30</sup> See 36 C.F.R. Section 67.9.

<sup>31</sup> See R. Roddewig & M. Young, "Neighborhood Revitalization and Historic Preservation Incentives In the Tax Reform Act of 1976," II URBAN LAWYER (Jan., 1979).

ter before the tax incentives will become available.<sup>32</sup>

Experiences in other states also provide guidance useful to New York municipalities. The possible resort to enacting a quick "last minute" landmark ordinance on the eve of designation to thwart a demolition has been criticized in at least one instance.<sup>33</sup> The failure to set forth with some precision the standards or criteria for historicity has caused at least one municipality to loose its ordinance,<sup>34</sup> but may be sufficient if the community's historic nature is well known and reasonably distinct.<sup>35</sup> Creation of a thorough record in the application of general (and even apparently vague) criteria can permit a court to sustain the landmark designation.<sup>36</sup> Where demolition permits are denied, a clear record with stated reasons must be provided.<sup>37</sup>

Several new or threatening legal developments have the capacity to confuse this area of the law. The U.S. Supreme Court has noted probable jurisdiction in the case of *Agins v. City of Tiburon*,<sup>38</sup> and will be ruling again this year on the "taking issue" as it applied to land use constraints. The issues of just compensation will be reviewed with possible changes in whether a municipality owes compensation for the loss of market value suffered when land is under restrictive zones.<sup>39</sup> This case should be followed closely.

<sup>32</sup> 36 C.F.R. Sections 67.3 through 67.5.

<sup>33</sup> *Texas Antiquities Committee v. Dallas Community College District*, 554 S.W. 2d 924 (Tex., 1977).

<sup>34</sup> *Southern Nat'l. Bank v. City of Austin*, 582 S.W. 2d 229 (Tex. Civ. App. 1979).

<sup>35</sup> See, e.g. *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir., 1975) or *Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 S.W. 2d 13 (1968).

<sup>36</sup> *Figarsky v. Historic District of the City of Norwich*, 368 A.2d 163 (Conn., 1976).

<sup>37</sup> *Matter of Equitable Funding Corp.*,—NYS 2d—, 179 N.Y.L.J. at p. 10 (N.Y. Sup. Ct., Kings Co., Feb. 8, 1978); see also *Citizens of Georgetown v. D.C.*, 477 F.2d 402 (1973).

<sup>38</sup> Sup. Ct. Docket No. 79-602 (Jan. 7, 1980) appeal from 157 Cal. Rep. 372, 24 Cal. 3d 266, 598 P.2d 25 (March 14, 1979).

<sup>39</sup> See N.A. Robinson, "U.S. Supreme Court to Hear 'Taking Issue,'" 183 N.Y.L.J. p. 1, col. 1 (Feb. 26, 1980).

Whether or not landmark laws are anti-competitive and thus violative of the Antitrust Laws must be considered in the wake of the U.S. Supreme Court's decision to apply the Sherman Antitrust Act to municipalities.<sup>40</sup> This issue will affect local governments which provide a service in competition with private sector services and at the same time try to designate a landmark owned by the competing private sector service.

Historic preservation needs must be synthesized with the N.Y. Court of Appeals

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mandates for full property valuation,<sup>41</sup> like environmental limitations, historic limits remove "full" value and landmark sites should not be appraised at full value.<sup>42</sup> The locality must also integrate its historic designations with its court-imposed duty to assure housing equity by providing sufficient variety and volume of residential housing for all economic and social classes.<sup>43</sup>

Legislative developments also bear watching. The federal tax incentives have a five year term. They must be renewed by July, 1981, or they expire. Congress already has study bills expanding the tax incentives and the federal role in protecting historic sites. Similarly, New York State's legislature may enact a new state law as it did last year. The possibility of the legislature enacting a N.Y.S. Coastal Zone Management Plan providing yet another means to

safeguard historic sites has already been mentioned. Municipalities need to adapt and adjust their local laws once such state or federal laws are enacted.

Many of these observations will inspire an interest in further study. Annotated bibliographies exist to guide research.<sup>44</sup> Symposia have been published.<sup>45</sup> Continuing Legal Education materials are available.<sup>46</sup> A PRIMER on New York State Historic Preservation Law will soon be available from the National Center for Preservation Law. The bar will probably be in the forefront of developing the law of historic preservation.

Lawyers have an affinity for history. Our roots are in the Common Law. Our talents built the framework for American society. This interest in history has advanced the bar into creation of a new field of law: Historic Preservation Law. The case of the courthouse states the impetus for the emergence of this new field as well as any other.

For many years, the *New York State Bar Journal* has featured the historic courthouses of the state on its covers. Many are in active use still; others are museums and a few have been converted to other uses. The richness of architecture, historicity of the halls where legal precedents were forged, and importance of each courthouse to local government, make preservation of New York's courthouses worthwhile.

Some, such as the 1839 Richmond County Courthouse, are incorporated in historic districts. The Ontario County Courthouse, where in 1873 Susan B. Anthony was tried and convicted for having persuaded Rochester's election inspector to register her to vote "without having a lawful right to vote," is still in use. The "Tweed" New York County Courthouse is a local landmark and being protected

<sup>40</sup> *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

<sup>41</sup> *Hellerstein v. Islip*, 37 N.Y. 2d 1 (1975).

<sup>42</sup> See N.A. Robinson, "Real Property Tax and Assessment Reforms," N.Y.L.J. p. 1, col. 1 (March 27, 1979).

<sup>43</sup> *Berenson v. New Castle*, 38 NY 2d 102, 341 NE 2d 236, 378 NYS 2d 673 (1975).

<sup>44</sup> Kettler & Reams, HISTORIC PRESERVATION LAW: AN ANNOTATED BIBLIOGRAPHY (Nat'l. Trust, 1976); 12 WAKE FOREST L. REV. at 276.

<sup>45</sup> 12 WAKE FOREST L. REV. (1976); 8 CONN. L. REV. (1975-76).

<sup>46</sup> *Supra* note 25.

through the vigorous attention of the New York Landmarks Conservancy.<sup>47</sup>

Not all courthouses have been preserved. A number, such as the White Plains Courthouse, have been demolished. One student of courthouses in America stated the case for protection in this way:

“So the American county courthouses, sentinels of and for the people, have played out their unique roles, sometimes inspiring, sometimes tragic, always witnessing. Age and change have robbed them of some of the functions for which they were built. Too many, sadly, have been sentenced to the wrecker’s ball by a forgetful society. Others . . . have been saved by enlightened community efforts

<sup>47</sup> Herbert Alan Johnson and Ralph K. Andrist, *HISTORIC COURTHOUSES OF NEW YORK STATE* (Columbia University Press, 1977).

and given new roles as museums or have been turned to other practical uses. Many other old courthouses, now in their final days of service, deserve to be and hopefully will be left standing to join this honored list.”<sup>48</sup>

Historic Preservation Law is emerging as the field of law in response to such aspirations. Whether it is courthouses, or other public buildings, or markets, bridges, banks and even factories, the historic patrimony of our State’s built environment is increasingly appreciated and valued. To protect society’s valued historical sites, new legal tools have emerged.



<sup>48</sup> Paul C. Reardon, “The Origins and Impact of the County Court System” in Richard Pare (Ed.), *COURTHOUSE: A PHOTOGRAPHIC DOCUMENT* (1978), at 33.

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