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Historic Preservation Law: The Metes & Bounds of a New Field

NICHOLAS A. ROBINSON*

Historic Preservation Law has come to mean that combination of regulations, common-law property principles, tax incentives, and adjective law in administrative proceedings, governing historic sites and property within the United States. Although Congress first recognized a need to conserve the nation's wealth of historic amenities in 1906 when it adopted The Antiquities Act,¹ it was only with the nation's bicentennial that the volume and diversity of laws designed to maintain, protect and preserve historic America grew to the point where it could be said that a new field of law had emerged.

The symposium which follows this essay represents the first attempt to comprehensively delineate the elements of this new field.² The conference entitled "Historic Preservation and the

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1. 16 U.S.C. §§ 431-33 (1976). This Act was preceded by the federal acquisition of the Gettysburg Battlefield in 1890, *see United States v. Gettysburg Elec. Ry.*, 160 U.S. 668 (1896).

2. An earlier important symposium at Duke Law School had reviewed the law for landmark protection in a conference whose papers appeared in 36 *LAW & CONTEMP. PROBS.* 311 (1971). At the time of that conference, there was not yet a perception that "Preservation Law" could stand by itself. Indeed, Professor Robert Stipe's often repeated statement published in that 1971 symposium tended to concede that Preservation Law was not its own field: "Historic conservation is but one aspect of the much larger

Law: The Metes & Bounds of a New Field" gathered 500 persons for two days at the House of the Association of the Bar of the City of New York in September of 1978.³ Organized by the Association and the New York Landmarks Conservancy, this conference traversed the entire range of preservation legal issues, from asking "what is historic?" to identifying the need for law reform already apparent in this new field. The proceedings of this conference comprise this symposium.

Identifying a coherent body of law governing historic values, however, does not mean that the field is mature or even widely recognized as having been established. The general dimensions of the field are, perhaps, evident, but the content or the substance within the field is changing dramatically. As the Tenth Annual Report of the Federal Council on Environmental Quality observed in 1979: "One man's cultural landscape is often another's rundown row house."⁴ Since the presentation of these symposium papers in 1978, the evolution of the field has been chronicled in continuing legal education course books on "Historic Preservation Law."⁵

Before 1978, the historic preservation field had been synthesized in part in a handful of essays.⁶ The nation's bicentennial in 1976 inspired publication of two law review symposia on the law

problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people." (quoted by Mr. Justice Brennan in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 108 n. 4 (1978), citing Gilbert, *Introduction, Precedents for the Future*, 36 LAW & CONTEMP. PROBS. 311, 312 (1971), quoting Address by Robert Stipe, CONFERENCE ON PRESERVATION LAW, WASHINGTON, D.C. 6, 7 (May 1, 1971) (unpublished text).

3. Robinson, *Environmental Law, Report of Conference on Historic Preservation*, N.Y.L.J. 1, Oct. 27, 1978, at 1, col. 5.

4. 1979 ENV'TL QUALITY 512.

5. HISTORIC PRESERVATION LAW (N.A. Robinson ed., PLI, 1979) and HISTORIC PRESERVATION LAW 1980 (N.A. Robinson ed., PLI, 1980); see also the annual coursebooks for 1979, 1980 and 1981 for the Environmental Law Course of study of the American Bar Association - American Law Institute Committee on Continuing Professional Education, given in Washington, D.C., in cooperation with the Smithsonian Institute and the Environmental Law Institute.

6. John Fowler, *Protection of the Cultural Environment in Federal Law*, in FEDERAL ENVIRONMENTAL LAW, 1466, 1468-73 (E. Dolgin & T. Guilbert eds. 1974); updated in Fowler, *FEDERAL HISTORIC PRESERVATION LAW: NATIONAL HISTORIC PRESERVATION ACT, EXECUTIVE ORDER 11593, AND OTHER RECENT DEVELOPMENTS IN FEDERAL LAW*, 12 WAKE FOREST L. REV. 31 (1976); see *Bibliography to Legal Periodicals Dealing with Historic Preservation and Aesthetic Regulation*, 12 WAKE FOREST L. REV. 275 (1976).

of historic preservation,⁷ and another law review symposium was published shortly thereafter in honor of Professor Robert Stipe.⁸

The consensus about what should exist within the bounds of historic preservation law is still taking form.⁹ Since it is still an immature field, the body of historic preservation law will evolve substantially in the near future.

By way of introduction, this essay provides background and a conceptual framework for the presentations which follow. This essay can best introduce the symposium by delineating first the scope of regulation by exercise of the police power and the definitions for what resources are "historic," then the elements of real property law which transect these regulations, and thereafter the operation of municipal ordinances and federal procedural statutes which are the body of historic preservation law. The essay will then raise several of the thorny issues currently in dispute within this evolving field.

I. Evolution of Historic Preservation Regulatory Controls

A. Legislative History

While isolated examples of historic preservation laws can be traced to the 19th century,¹⁰ the widespread contemporary use of these regulations dates only from the late 1960s. By the time of the United States Supreme Court's "landmark" ruling in *Penn Central Transportation Co. v. New York City* in 1978,¹¹ the role of municipal government in regulating landmarks and historic districts had become well established. With enactment

7. 8 CONN. L. REV. 199 (1976) and *Historic Preservation Symposium*, 12 WAKE FOREST L. REV. 1 (1976).

8. *Historic Preservation Symposium*, 11 N.C. CENT. L.J. 195 (1980).

9. At the state level, the perception also began to emerge that in each state there was a body of state historic preservation law. The fact that most states had enacted such laws was established by Morrison's study in 1965. MORRISON, *HISTORIC PRESERVATION LAW* (1965). A decade later, specific state guides and evaluations had emerged for California, see G. GAMMAGE, P. JONES & S. JONES, *HISTORIC PRESERVATION IN CALIFORNIA: A LEGAL HANDBOOK* (Stanford Environmental Law Society; National Trust for Historic Preservation, 1975) Virginia, see *HISTORIC PRESERVATION AND PUBLIC POLICY IN VIRGINIA* (R. Collins, R. Netherton & R. Pisney eds. 1978), and New York, see N.A. Robinson, *Municipal Ordinances for Historic Preservation in New York State*, 53 N.Y.S. B.J. 18 (1981).

10. See generally MORRISON, *HISTORIC PRESERVATION LAW*, *supra* note 9.

11. 438 U.S. 104 (1978).

of the Archaeological Resources Protection Act of 1979,¹² and the National Historic Preservation Act Amendments of 1980,¹³ the federal government had established strong patterns of involvement in the protection of archaeological and historically important sites.

New York State set the precedent for state governmental action for historic preservation in 1850 by acquiring Hansbrouck House, General Washington's headquarters in Newburgh;¹⁴ the federal government designated its first landmark in 1889.¹⁵ The United States Supreme Court upheld the constitutional propriety of the government's power to preserve landmarks by acquisition in 1896.¹⁶ In 1906, the Antiquities Act authorized the President to establish monuments on government lands.¹⁷ The City of New Orleans adopted its *Vieux Carré* Ordinance in 1937¹⁸ to preserve the "quaint and distinctive character" of the Vieux Carré section of the City; permits were required for any changes to buildings in the regulated section of the city. The New Orleans efforts and the historic preservation zoning laws of Charleston, S.C., represented the nation's only substantial local government action until after the Second World War.¹⁹

While European authorities undertook to inventory their historic properties in registries and to adopt strict preservation laws in the first half of the twentieth century,²⁰ the governments in the United States did little inventoring until after World

12. 16 U.S.C. § 470aa-470ll (Supp. III 1979).

13. 16 U.S.C.A. §§ 470-470w-6 (West Pam. 1981) (amending 16 U.S.C. §§ 470-470t (1976 & Supp. III 1979)).

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

15. Casa Grande National Monument, Gila Valley, Arizona (a four-story tower of packed earth built by Hohokam Indians over six centuries ago).

16. See *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668 (1896). (The Gettysburg Battlefield Acquisition).

17. 16 U.S.C. §§ 431-433.

18. New Orleans, La., *Vieux Carré* Ordinance no. 14538 CCS sec. 3 (1937); adopted pursuant to LA. CONST. art. 14, § 22A.

19. See Note, *supra* note 14, at 713-14.

20. See, e.g., *The U.K. Ancient Monuments Acts*, 1931, 218-22 Geo. 5, ch. 16; *The U.K. Ancient Monuments Consolidation and Amendment Act*, 1913, 384 Geo. 5, ch. 32; see also N.A. ROBINSON, *Environmental Laws and Conventions: Toward Societal Compacts With Nature*, EARTHCARE: GLOBAL PROTECTION OF NATURAL AREAS 513, 520-21 (Schofield ed. 1979).

War II. Skilled manpower available in the Depression Years of the 1930s did produce the Historic American Buildings Survey which nationally catalogued some 12,000 buildings by 1933,²¹ and Congress did enact an Historic Sites, Buildings, and Antiquities Act of 1935.²² At the time, however, these activities and laws had little effect on the actual status of protection of historic properties.

With each ensuing decade, the pace of urban change quickened, and one building after another was replaced. By the 1970s, along with the Metropolitan Opera House and Pennsylvania Station, over fifty percent of all buildings recorded in the Historic American Buildings Survey of 1933 had been demolished.²³ In the face of such rapid razing of historical buildings and areas, Congress established the National Trust for Historic Preservation in 1949 to encourage state and local preservation.²⁴

The use of specialized local legislation to assure historic preservation has been spreading to communities across the nation.²⁵ To such local laws have been added some federal enactments, many of them being procedural rather than substantive, to assure that officials consider historic values in their decisions. Chief among these are the Historic Preservation Act of 1966,²⁶ the historic protection sections of the Housing Acts of 1961 and 1965,²⁷ and the Department of Transportation Act of 1966.²⁸

In one way or another these federal laws advanced historic preservation as a governmental priority. The 1966 Historic Preservation Act authorized creation of the *National Register of Historic Places*, containing landmarks nominated by state governments, provided for grants in aid and required that the

21. See *Documenting A Legacy* (1973), reproduced from Quarterly Journal of the Library of Congress (Oct. 1973).

22. 16 U.S.C. §§ 461-467 (1976 & Supp. III 1979)), amended by 16 U.S.C.A. § 467(b) (West Supp. 1980).

23. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972).

24. 16 U.S.C. §§ 468-468e (1976).

25. See 1 ANDERSON, NEW YORK ZONING LAW AND PRACTICE §§ 8.46-8.53 (2d ed. 1973).

26. 16 U.S.C. §§ 470-470t (1976 & Supp. III 1979), amended by 16 U.S.C.A. §§ 470-470w-6 (West Pam. 1981).

27. See 42 U.S.C. § 1500d-1 (1976).

28. 49 U.S.C. §§ 1651(b)(2), 1653(f) (1976).

agency involved in any federal action affecting a registered landmark "take into account the effect" of the action and "afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment" on such effect.²⁹ More forceful was the Transportation Act, which mandated in section 4(f) that no historic site could be used unless there were "no feasible and prudent alternative" and "all possible planning to minimize harm" was undertaken.³⁰ The section has been construed to bar resort to historic sites for highway use.³¹

The Housing Acts do not specify the same sort of prohibitive bars as does the highway legislation. The 1966 Demonstration Cities and Metropolitan Development Act provided funds for local surveys of historic sites.³² Grants for urban beautification and open space were also provided. The Department of Housing and Urban Development has been criticized for functioning often "with apparent indifference to the destruction of historic sites, even *National Register* properties, whenever local development authorities [were] prepared to sacrifice those properties in the interests of urban renewal or other housing programs."³³

Essentially, historic preservation can expect little except financial aid and self-restraint from federal administrative sources. The federal laws are largely procedural. Commitment and action necessarily occur at the state and local levels; it is here that substantive controls are enacted.³⁴

29. 16 U.S.C. § 470f.

30. 49 U.S.C. § 1653(f).

31. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

32. 42 U.S.C. § 3301 (1976).

33. O. GRAY, *The Response of Federal Legislation to Historic Preservation*, in *LEGAL TECHNIQUES IN HISTORIC PRESERVATION* 7 (1972).

34. It is worth noting, parenthetically, that this weak federal law framework falls below the legal standards recommended for protecting national historic sites in 1972 by UNESCO; these standards are based largely on stricter European laws. Recommendation Concerning the Protection, At the National Level of General Conference of the United Nations Educational Scientific and Cultural Organization (17th Sess. 1972). Protection laws or regulations should be supplemented with provisions "to promote the conservation of the cultural and natural heritage." No building should be erected or changed or demolished without permit and planning. New developments should respect historic designation. Protection should be uniform, regardless of whether the property is in private or public hands. Penalties and administrative sanctions should be provided for those who do not protect such heritage.

More substantive federal and statewide laws may be developed if the loss of historic sites continue to grow. The legal rationale for enacting stiffer historic preservation laws at the local and state levels is evident. As Mr. Justice Douglas wrote in *Berman v. Parker*,³⁵ an early urban renewal case:

The concept of public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.³⁶

B. *Evolving Rationales and Judicial Acceptance*

Economic benefits are often conferred by historic preservation programs; unlike many regulatory restrictions on private property, property under historic controls can appreciate in market value, thereby either greatly altering or eliminating "taking" or due process considerations. Property values in preserved areas often are enhanced markedly.³⁷ Furthermore, sophisticated land use controls can be used to create new economic value in property in order to regulate urban development and preserve historic and other assets. The incentive zoning in New York City's Zoning Resolution illustrates this sort of innovation.³⁸ The "Special Madison Avenue Preservation District" enacted in 1973 is a good example;³⁹ so also is the provision for transfer of development rights to air space.⁴⁰ Condominium ownership of row houses can be a viable private ownership means to honor public preservation and secure tax and other legal benefits.⁴¹

35. 348 U.S. 26 (1954).

36. *Berman v. Parker*, 348 U.S. at 33. See Note, *Land Use Controls in Historic Areas*, 44 NOTRE DAME LAW. 379, 383-88 (1969). See also *Cromwell v. Ferrier*, 19 N.Y. 2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967); *People v. Stover*, 12 N.Y. 2d 462, 468, 191 N.E.2d 272, 277, 240 N.Y.S.2d 734, 738 (1963); *Penn Cent. Transp. Co. v. City of New York*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977).

37. Note, *supra* note 36 at 387.

38. See Costonis, *supra* note 23, at 576-79.

39. NEW YORK, N.Y., ZONING RES. art. 9, ch. 9 (1981).

40. See Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 Yale L.J. 75 (1973).

41. Note, *supra* note 36, at 404-05. In Rome, N.Y., the local government secured state approval for and created an Historical Authority with power to issue bonds to preserve the historic value of the community. See N.Y. PUB. AUTH. LAW §§ 1900-1920 (Mc-

While some of these innovative land use and historic preservation techniques are untested in the courts, it is likely that they can withstand attacks grounded in due process or taking arguments. As the United States Supreme Court noted in *Berman v. Parker*: "If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."⁴²

Court challenges to local landmarks preservation laws initially were frequent, despite the *dicta* from the Court in *Berman v. Parker*. For example, in *Ithaca*,⁴³ the Landmark Commission designated a building owned by Tompkins County as a landmark. It is surrounded by an historic district. The county sought to demolish the building and sued to invalidate the ordinance. New York City's law has also withstood several attacks,⁴⁴ including the challenge to designation of Grand Central Station as a landmark;⁴⁵ the latter assault was litigated through the United States Supreme Court, settling the constitutionality of historic preservation laws as such.⁴⁶

Kinney 1981). The objective was to restore the Erie Canal and develop a tourist center as well as advanced aesthetic and educational assets.

42. *Berman v. Parker*, 348 U.S. at 33.

43. *Tompkins County v. Ithaca*, 77 Misc. 2d 882, 355 N.Y.S.2d 275 (Sup. Ct. Tompkins County 1974). This case parallels *Mayor of Annapolis v. Anne Arundel County*, 271 Md. 265, 316 A.2d 807 (1974).

44. See, e.g., *Trustees of the Sailors' Snug Harbor v. Platt*, 29 A.D.2d 376, 288 N.Y.S.2d 314 (1st Dep't 1968); see also *Ragone v. Landmarks Preservation Comm'n*, N.Y.L.J., Feb. 20, 1970, at 2, col. 1 (Sup. Ct. New York County), *aff'd*, 33 A.D.2d 1105, 308 N.Y.S.2d 293 (1st Dep't 1970); *Manhattan Club v. Landmarks Preservation Comm'n*, 51 Misc. 2d 556, 273 N.Y.S.2d 502 (Sup. Ct. N.Y. County 1966).

45. *Penn Cent. Transp. Co. v. City of New York*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977).

46. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). New York City's experience serves as a good case study of historic preservation by a local government. See Loflin, Rankin, Marcus, & Goldstone, *Historic Preservation in the American City: A New York Case Study*, 36 LAW & CONTEMP. PROBS. 362-85 (1971). See also the Commission's documents and procedures in D. Miner, *Case Study: Administrative Procedures of New York City Landmarks Preservation Commission* in HISTORIC PRESERVATION LAW 1980, *supra* note 5, at 43. The Landmark Preservation Commission's members are appointed by the Mayor and must include at least three architects, an historian, a city planner, a realtor and one resident from each borough.

Any site, building or other structure or area of the City with special character can be designated as a landmark by the Commission. Areas with numerous buildings of the same historic value can be designated as historic districts. The Board of Estimate must

The sort of regulatory scheme provided in local landmarks preservation laws is an administrative law alternative to civil suits grounded in aesthetic nuisance theories.⁴⁷ While private suits are a costly and imprecise tool, the landmark designation process is not. Landmark commission deliberations permit a more sophisticated balancing of interests within a mandate to preserve the historic built environment. Where a legislative consensus exists to protect historic sites, the landmarks process proves to be an effective way to identify specific sites worth saving, and in turn to conserve them. Suffice it to say that the New York City experience has been repeated, *mutatis mutandis*, in smaller communities across New York⁴⁸ and in other states.⁴⁹

The recurring motivation for such local laws, and at the same time an insight to their limitations, is provided by John Pyke, counsel in the Hanna Mining Company's Legal Department, when he characteristically described the need to preserve one historic site:

A poignant example is the riverbank site in Cleveland, Ohio, where the founder of that City first stepped ashore in 1796 after a Lake Erie voyage. Today its historic symbolism is lost in the shadow of a towering bridge that arches above it, while the pol-

approve all designations. Staff reports are prepared on all proposed landmarks, where upon a public hearing is held and the Commission prepares a report and acts.

As of February 16, 1982, New York City has designated 42 Historic Districts containing approximately 17,000 buildings, 662 individual landmarks, 8 scenic landmarks, and 27 interior landmarks. Figures provided by Dorothy Miner, General Counsel to New York City Landmarks Preservation Commission. Interiors to buildings and parks can be designated for landmark protection as well. NEW YORK, N.Y. ADMIN. CODE ANN. ch. 8-A § 207-2.0 (Williams 1976 & Supp. 1981).

Any alteration to a designated landmark requires an application to the Commission. Alteration includes repairs or modernization. Public hearings are provided when the Commission deliberates whether the proposed act is in keeping with the historic values of the landmark. *Id.* §§ 207-4.0, 207-6.0. In practice, informal consultations on changes are encouraged so that, through conferences, a course of action is achieved between the applicant and Commission staff.

New York City's Landmark Preservation Law includes enforcement provisions and criminal sanctions for altering or demolishing a landmark without permission of the Commission. Fines and imprisonment are provided for as ultimate sanctions. *Id.* § 207-16.0.

47. Note, *Aesthetic Nuisance: An Emerging Cause of Action*, 45 N.Y.U. L. REV. 1075 (1970); Noel, *Unaesthetic Sights as Nuisances*, 25 CORNELL L.Q. 1 (1939).

48. See, e.g., TARRYTOWN, N.Y., [1978] LOCAL LAW 3.

49. See, e.g., TOWN OF CRESTED BUTTE, COLORADO, HISTORIC PRESERVATION AND ARCHITECTURAL CONTROL-HISTORIC DISTRICT, TOWN CODE ch. 15, § 15-2-22 (1975).

luted waters of the Cuyahoga River flow past on one side and industrial buildings and parking lots flank it on the other.⁵⁰

Pyke might have added that the air not infrequently smelled foul; historic preservation in such circumstances highlights the larger need for environmental and land use controls. Historic sites do not exist in a vacuum.

While it may be premature to characterize historic preservation law, the Pyke observation graphically illustrates that landmark controls cannot be examined in isolation. The surrounding circumstances unavoidably limit the effectiveness of any landmark designation. Historic districts are only slightly less vulnerable. For these reasons, when the Supreme Court in its *Penn Central*⁵¹ ruling confirmed the constitutionality of this aspect of police power regulation, it appears to have distinguished municipal historic preservation ordinances as a distinct sort of land use control, possibly within the broader construct of Environmental Law generally, but evidently not a part of zoning.

Writing for the majority, Mr. Justice Brennan observed that "this Court has recognized, in a number of settings, that states and cities may enact land use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of the city."⁵² The Court recognized that there are two aspects to these regulations of private lands: "[B]oth historic district legislation and zoning laws regulate all properties within given physical communities whereas landmark laws apply only to selected parcels."⁵³

The application of these controls to private property has a varied impact from parcel to parcel depending upon the historic asset being protected; the objectives of the laws and the methods of application apply uniformly to all parcels:

It is of course true that the Landmark Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a "taking." Legislation designed to promote the general welfare commonly burdens some more than others. . . . [brickyard, cedar tree-apple blight, gravel and sand

50. J.S. PYKE, *LANDMARK PRESERVATION*, *supra* note 46, at 24.

51. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

52. *Id.* at 129.

53. *Id.* at 132.

mine restrictions reviewed]. Similarly, zoning laws often impact more severely on some property owners than others but have not been held to be invalid on that account.⁵⁴

While structuring land uses and employing "districts," historic preservation law is essentially a police power regulation of its own character, not a part of another field, such as zoning. For instance, Mr. Justice Brennan, writing for the *Penn Central* majority, observed that a landmark law "is no more an appropriation of property by government for its own uses than is a zoning law, prohibiting, for 'aesthetic' reasons, two or more adult theatres within a specified area. . . ." ⁵⁵ On the other hand, Mr. Justice Rehnquist, in the *Penn Central* dissent, observed that "[o]nly in the most superficial sense of the word can this case be said to involve zoning," citing the New York Court of Appeals ruling below which observed *inter alia* that "this is not a zoning case."⁵⁶

If not a part of zoning law, historic preservation land use controls would appear to correspond to other "critical area" land use regulations, for instance, those controlling coastal, wetland, or wildlife areas.⁵⁷ The origins of contemporary historic preservation law are rooted in two concerns which make these areas "critical" and justify regulation. The Supreme Court summarized these in the *Penn Central* ruling as follows:

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 economically 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. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today. "[H]istoric conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing — or perhaps developing for the

54. *Id.* at 133-34.

55. *Id.* at 135.

56. *Id.* at 139 (Rehnquist, J., dissenting).

57. See D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 76-84 (1976).

first time — the quality of life for people.”⁵⁸

The quotation used by the Court was one by Professor Robert Stipe, cited in an early law review symposium on Historic Preservation Law.⁵⁹ In another law review symposium a decade later, Professor Stipe more fully stated his reasons why land use controls for historic preservation should be viewed as part of a broader set of environmental controls. He observed that:

it is quite wrong to draw the preservation movement into a narrow corner and argue that preservation stops with ancient buildings having proper historical credentials. The historical and architectural traditions of Nantucket Island cannot be separated from the fragile natural landscape setting of that place, nor the unique quality of light or atmosphere that are integral parts of its setting. Similarly, it is no less important to preserve the quiet cultural landscape of Sandy Mush in Buncombe County historically or architecturally undistinguished though it may be. As we have seen, the traditional associative values of architecture and history are not enough if human purposes are to be served, and it seems more important than ever that those concerned with these traditional values should now make common cause with other facets of the environmental movement.⁶⁰

While there are some who would deny the relationship between historic preservation and environmental law,⁶¹ the two topics are most usefully viewed as part of the same field. In both fields, land use controls operate without regard for pre-existing zoning requirements and there is great similarity in “critical area” and environmental management objectives.⁶²

58. Penn Cent. Transp. Co. v. New York City, 438 U.S. at 108.

59. Gilbert, *supra* note 2 at 312 n.2, quoting Address by Robert Stipe, *supra* note 2 at 6-7.

60. Stipe, *A Decade of Preservation and Preservation Law*, 11 N.C. CENT. L. J. 214, 231 (1980).

61. See, e.g., Beckwith, *Preservation Law 1976-1980: Faction, Property and Ideology*, 11 N.C. CENT. L.J. 276, 304-6 (1980).

62. State land use programs designate as “critical,” areas such as wetlands or wild and scenic rivers, see, e.g., N.Y. ENVIR. CONSERV. LAW, §§ 15-2701 to 2723 (McKinney Supp. 1981). These designations are distinct from any existing zoning or local comprehensive land use plan. The designation of historic sites, also made without regard to pre-existing zoning, is analogous. These “critical area” controls have been promoted by the AMERICAN LAW INSTITUTE’S MODEL LAND DEV. CODE § 7-201 (Official Draft 1975), and are a part of public land planning, 43 U.S.C. § 1701 (1976), and of state coastal zone planning under the Coastal Zone Management Act, 16 U.S.C. § 1454 (b) (1976); see 15 C.F.R.

II. What is Historic?

Local enthusiasm for developing municipal landmarks preservation programs has tended to pass too quickly over the question of *what* such laws protect. What is historic? How can "historic" characteristics be defined with sufficient clarity to be a police power regulation? The substantive definition of "historic" differs widely from jurisdiction to jurisdiction. While logically the procedures employed to determine which of those traditions require the protection of law should be largely the same, in actuality they can vary greatly from jurisdiction to jurisdiction.

There is no single answer to the threshold question: what is historic? Since the subjects of historic preservation laws vary with the location and the history of each area, if one is to determine whether a property is historic, one must look at the standards which the local legislature has adopted. These standards identify the specific architectural, historic or other interests which are traditional or of cultural and social importance to the development of the region of the jurisdiction. Some include pre-historic or archaeological resources as well, although the importance of this aspect is still evolving. Having identified these tests, the procedures for burdens of proof and decisionmaking determine how the tests will be applied to the given property. Only when the process is concluded will it be known whether the parcel is "historic" in terms of the local preservation ordinance.

At the federal level, the National Historic Preservation Act of 1966⁶³ authorized establishment of the *National Register of Historic Places*.⁶⁴ The *National Register* is a list of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology or history. Data descriptive of each historic place is compiled and, if sufficiently documented, the historic site is placed on the *National Register* by the Keeper of the *National Register*, an official in the Department

§ 923.41 (1981).

The similarity of management objectives can be seen by comparing the National Historic Preservation Act with the National Environmental Preservation Act as the Second Circuit has done in *W.A.T.C.H. v. Harris*, 603 F.2d 310 (2d Cir.), *cert. denied sub nom. Waterbury Urban Renewal Agency v. W.A.T.C.H.*, 444 U.S. 995 (1979).

63. 16 U.S.C. §§ 470-470t.

64. 16 U.S.C. § 470a.

of the Interior. Places need not be of "national" significance in order to merit listing; sites of state, regional and local significance may be included,⁶⁵ as long as they meet the act's criteria for what is historic: essentially, being at least 50 years old and of identifiable historic importance.

The criteria for determining what documentation is needed for a *National Register* nomination are broad.⁶⁶ Under amendments to the National Historic Preservation Act in 1980, owners of places recommended for listing in the *National Register* must be consulted before the listing is made and must concur in the listing.⁶⁷

The nomination criteria may be understood only as applied. It is necessary to examine the actual listings on the *National Register*, and the record in support of each such listing, for each state or locality where the historic landmark is located in order to perceive the interpretation which the Department of the Interior gives these criteria. These criteria and the *Register* were developed as a planning tool, not a regulatory control.⁶⁸ Nonetheless, many local ordinances will regulate a property listed on the *National Register*.

An attempt to tighten up the federal criteria for *Register* nominations in 1980 left a marginally useful set of further guidelines. A new Title III was added to the National Historic Preser-

65. 16 U.S.C.A. § 470b (West Pam. 1981). See H.R. 89-1916, 89th Cong., 2d Sess. §§ 6, 9 (1966).

66. The criteria for evaluating potential nominations for *National Register* listing are as follows:

Those districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and:

- a) that are associated with events that have made a significant contribution to the broad patterns of our history; or
- b) that are associated with the lives of persons significant in our past; or
- c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master builder, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
- d) that have yielded; or may be likely to yield, information important in prehistory or history.

36 C.F.R. § 60.6 (1981).

67. 16 U.S.C. § 470a(1)(B)(6), as amended by 16 U.S.C.A. § 470a(1)(B)(6) (West Pam. 1981).

68. If the *Register* is to have regulatory effect, property owners will want to know if their property can become listed. More explicit definitions probably are required.

vation Act to provide definitions.⁶⁹ Whatever broad guidance the *National Register* criteria provide, however, is of limited utility in defining what is historic under municipal preservation ordinances. Wide variations are possible. Some municipalities place no age limits on sites. Others, such as New York City, require that a landmark be over 30 years old.⁷⁰ The age threshold for the *National Register* is 50 years.⁷¹ In some localities, the entire municipality may be an historic district,⁷² whereas in others the district may include only select locations.⁷³

Given a sufficiently clear set of criteria, and a full record demonstrating that established criteria have been met, almost any site could be classified as "historic." The essence of these controls is what the legislative authority determines the body, social and political, requires. Repeated findings by local town boards and city councils that *their* local buildings and sites are patrimony, a legacy to be preserved, is the incremental process which has created the field of historic preservation law. This cumulative process began even before state enabling laws encouraged it, and well before federal laws sought to shape the trend.

Since perceptions of history differ, there is probably always going to be some dispute regarding what *should* be preserved.⁷⁴

69. 16 U.S.C.A. § 470w (West Pam. 1981). As relevant here, these include the following:

§ 470w(5): "Historic property" or "historic resource" means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, such term includes artifacts, records, and remains which are related to such a district, site, building, structure, or object."

§ 470w(10): "Historic conservation district" means an urban area of one or more neighborhoods and which contains (a) historic properties, (b) buildings having similar or related architectural characteristics, (c) cultural cohesiveness, or (d) any combination of the foregoing."

70. NEW YORK, N.Y., ADMIN. CODE ANN. § 207-1.0(m), (n) (Williams 1976).

71. 36 C.F.R. § 60.6 (1981).

72. See, e.g., TOWN OF CRESTED BUTTE, COLORADO, TOWN CODE ch. 15, §§ 15-2-3, 15-2-22 (1975).

73. See, e.g., TARRYTOWN, N.Y., [1978] LOCAL LAW 3 §§ II. A. 1 & IV.

74. Disagreement over what to regulate for historic preservation is hardly new. It is but one aspect of town and country planning, urban redevelopment, and natural resource management. Historic perspective on this debate can be found in the following essay from the English magazine, *THE STUDIO*, published in 1899. In this exchange, accounted by "The Lay Figure," a critic, a poet, a painter and the lay figure are engaged in animated discourse.

That is the nature of the subject being regulated; the normative

"I have been visiting old cities," said the Journalist, "and my heart is filled with sorrow at the works therein of the new men."

"I presume," remarked the Critic, "that your pocket is filled with the copy you have made out of their sins."

"To some extent, I admit," replied the Journalist. "We are all tradesmen, even the most artistic. But in the retirement of one's leisure moments, one may be permitted for a change to consume a thought, instead of selling it. And what I wanted to mourn over was the terrible sense of incongruity shown by the present generation. They never look where they are building. And so the modern iron girder-framed contract-built erection, with its veneer of terra cotta and brick, and its bedizenment of glazed tiles and gilt iron, is remorselessly set up side by side with one of those beautiful old houses that ought as in Belgium be guarded and watched over by the Government."

"You are right," the Painter remarked; "it is unpardonable: and another phase of the same disease is to be found in churches, especially those of importance, such as cathedrals. I mean the modern monument. Only too often is there a complete absence of sympathy, so to speak, between the memorial to some dead man of note, and its immediate surroundings. An effigy of glittering white marble on an altar-tomb of imitation Italian Renaissance work does not rest peacefully within the sober grey stone walls of an Early English transept. It produces a sense of cheapness, very often quite undeserved."

"Yet," said the Lay Figure, "there are difficulties. Would you relapse into mere imitation in order to keep your concords?"

"Or," the Critic remarked with a pleasant smile, "are you going to try to impose a limit of so many years, within which alone shall new buildings be allowed in a street containing old ones, or new tombs in a church that dates back more than a generation or so? You are entirely unpractical, and ought to devote yourselves to writing and painting pictures. Thinking, happily, is not an art."

"Moreover," the Minor Poet added, "these things must be so. Surely the jewel loses little by the banality of its setting."

"My idea," retorted the Painter, "tended rather in the direction of the banality, as you call it, of the jewel."

"Well," replied the Minor Poet, "everything must have a beginning. You have the new springing up side by side with the old until time blends them into harmony."

"That is very pretty and partly true," the Journalist meditated. "But time isn't going to worry about the modern jerry-build business premises, except to clear them out at short notice, when they become obsolete, and set up others like unto them, only more so."

"You do not think, then," said the Lay Figure, "that we are providing anything but public buildings for the admiration of the antiquarians and consumption of the Goths of future ages?"

"Hardly anything, I think, in our cities," was the reply. "The detached private house of the suburbs is the most characteristic and most successful product of Victorian architecture. Where these are built — as to them in justice I believe they generally are — of good material, they will age and weather into very beautiful buildings — of that kind which is likely to be always popular so long as we retain the domestic qualities of the nation."

"But what is it that you are complaining of?" interjected the Critic. "All this

judgment in the last analysis must be that of the legislature, a judgment similar to the prescription of what formal education society will require of its children. So long as the constitutional constraints of due process of law are met, the courts will sustain the effort.

III. The Real Property Law Transaction

However a legislative body may resolve the debate over use of the police powers to secure public protection of historic properties, there is also the realm of private property law to be considered. Common law provisions govern the nature and often the use of the land and buildings which come to be viewed as "historic." The nature of the fee, with any easements or covenants, transects the issue of historic preservation regulation; it is a necessary background dimension for any evaluation of preservation law.

In those jurisdictions where no municipal historic preservation law exists, or where a property owner wishes to establish private controls to protect an historic site wholly independent of governmental action, a range of real property law devices can effect the preservation of the site. Private preservation measures also may be sought in order for the property owner to realize a tax advantage under federal income or state real property tax laws.

is interesting. I can understand the point of view of the Painter who naturally objects to new tombs in old cathedrals. But do you want to abolish the old houses in the new cities, or what?"

"Well, I admit the difficulty," replied the Journalist. "For one thing I would like to see all old buildings of importance registered by a Government authority as national monuments. This should make it impossible for any one to knock them about indiscriminately. I fear the new shops must be suffered sadly. There is no remedy."

"Yet," meditated the Lay Figure, "there may be hardly the need for it that you think. When one visits a foreign country for the first time, one is generally struck by the harmony — a harmony covering all styles and periods which the architecture of a town displays when viewed as a whole. I have sometimes felt a suspicion of something of the same sort in our British cities, when returning to their grateful dinginess after a long absence. We are hardly far enough away from our age to criticise it; or from our country to tell how it looks. But the old places must be looked after; and it would be a really valuable institution if we could have a Society of the Education of Deans and Chapters in Elementary Taste. The tombs they erect or allow to be erected are driving away all the ghosts."

A. Easements

If an owner does not want to completely donate property to an historic trust or governmental body, the "preservation easement," or "facade easement" is available. This is akin to the conservation easement used in the protection of natural areas and is designed to assure continued preservation of historically important aspects of the property.⁷⁵ Such an easement is a voluntary limitation on a property, enforceable by another party such as a nonprofit historic society, trust or other institution, or a governmental body.

A major problem with the easement method is enforceability. Easements may be granted as either *appurtenant*, to the possessor of another tract of land which will be benefited by the easement, or *in gross*, to an individual without regard to whether he owns land near the property subject to the easement. An easement *in gross*, however, is usually extinguished upon transfer of title and therefore can have a limited life. Even if such easement were to be purchased in the name of a "perpetual" nonprofit historical society, if the society were ever reorganized, it is possible that the easement *in gross* would be terminated. *Appurtenant* easements, on the other hand, entail ownership of real property that will in fact be benefitted by the partial interest in the historically significant nearby parcel.

Recent legislative developments help alleviate such legal difficulties with the issue of easements. By statute, some states now authorize the donation of preservation easements to the state in perpetuity. For instance, Maryland accepts easements on historic property, thereby ensuring enforcement by the state as a perpetual entity.⁷⁶ Preservation restrictions, where authorized by statute, as in Massachusetts,⁷⁷ may be expressed in the form of an easement and are enforceable whether or not transferred and whether or not any particular tract of land is benefitted. An example of such an easement has been provided by Jef-

75. Creation of a preservation easement may serve a number of purposes. It restricts alterations to an interior or to the exterior which do not maintain the historic features. It can require continued maintenance of these historic features.

76. MD. REAL PROP. CODE ANN. § 2-118(e) (1981).

77. MASS. GEN. LAWS ANN. ch. 184, §§ 31-33 (West 1976 & Supp. 1981).

frey Jahns of Chicago, Illinois.⁷⁸ The enabling laws of Illinois make such easements possible⁷⁹ and provide for special tax treatment.⁸⁰

Whether such an easement is entitled to an exemption from real property taxes is an issue of state law.⁸¹ Federal income tax provisions allowing a charitable contribution for donations of an easement require that the donation be made in perpetuity.⁸² The donation must be to a nonprofit organization or governmental agency.⁸³ The Internal Revenue Code recognizes among the purposes for such easements, "conservation purposes," which are defined as the "preservation of historically important . . . structures."⁸⁴ When tax benefits are sought, it can be critical to create and donate the easement *before* the property is regulated by a local historic preservation ordinance. The easement is valued for federal tax purposes at "fair market value."⁸⁵ Once under the constraints of a local law, the easement may have little to no determinable market value,⁸⁶ and, therefore, no charitable deduction may be possible.⁸⁷

B. *Covenants and Equitable Servitudes*

In addition to preservation easements, a private property owner may employ covenants and equitable servitudes to facilitate historic preservation. Since each state has developed its own common-law or statutory peculiarities with regard to these doctrines, the specific real property law of the state where the historic site is located must be examined. Nonetheless, some observations on the general patterns are possible.

Covenants and equitable servitudes, as obligations constraining an owner's use of land, are usually contained in a deed

78. See J. Jahns, *Private Land-Use Controls Useful for Historic Preservation*, in *HISTORIC PRESERVATION LAW* 327, 343-66 (N.A. Robinson ed., PLI, 1980).

79. ILL. REV. STAT. ch. 30, § 401 (Supp. 1981-82).

80. ILL. REV. STAT. ch. 24, § 11-48.2 (Supp. 1981-82).

81. See, e.g., N.Y. CONST. art. 16, § 1; REAL PROP. TAX LAW § 421(1)(a) (McKinney Supp. 1980-81).

82. I.R.C. § 170(f)(3)(B)(iii) (1976).

83. *Id.* § 170(b)(1)(A).

84. *Id.* § 170(f)(3)(C).

85. Treas. Reg. § 1.170-1(c) (1981).

86. *Id.* § 1.170-1(e).

87. I.R.C. § 165(b) (1976).

or other recorded instrument. Perpetually enforceable covenants and most equitable servitudes usually are exacted by a seller of property at the time of transfer; however, because equitable servitudes can be secured from a property owner at any time, they may be more useful than covenants for private historic preservation.

At common law, covenants are the traditional form of establishing a private land use control; they require a number of legal technicalities to be met in order to be enforceable against subsequent owners. For the covenant to "run with the land," customarily it must be in writing, must be intended as perpetual when made, and must either benefit the covenantee or curtail the rights of the covenantor. In addition, one of the parties to the covenant must succeed to an interest in the other party's land. Covenants are usually enforceable only by an action for damages; this situation renders covenants of limited utility when the purpose of the covenant is to prevent an owner from radically altering the face of his property.

Equitable servitudes serve the same purpose as covenants, but with fewer technicalities, and have the advantage, from the preservationist's point of view, that they can be enforced by injunction. Their enforceability depends mainly upon notice. If a buyer acquires a property encumbered by an equitable servitude with notice of its encumbrance, he too becomes bound by the conditions of that equitable servitude. A court will look for an expression of intent, made at execution of the servitude, that the conditions are to run perpetually. The drawback of equitable servitudes is that they must benefit another tract of land if they are to be enforceable by anyone but the original promisee.

One use of the equitable servitude to achieve historic preservation objectives would be the purchase of a servitude from a neighbor or the exchange of equitable servitudes between two adjoining landowners. A provocative extension of this idea would be the exchange of reciprocal promises among a neighborhood of landowners.⁸⁸ Reliance on the restrictions by the neighborhood would satisfy the requirement that the servitude benefit other

88. See Beckwith, *Development in the Law of Historic Preservation & A Reflection on Liberty*, 12 WAKE FOREST L. REV. 93, 139 (1976); Note, *Equitable Servitudes as a Land Use Planning Tool*, 6 MEM. ST. U.L. REV. 101, 112-13 (1975).

land, and the owners could jointly issue a statement of perpetual intent. The result of this exchange would be to create a *de facto* historic district under private control.

Equitable servitudes can also be used in a "revolving fund" arrangement; an individual or historical society purchases deteriorated properties, rehabilitates the structures and restores their architectural integrity, and then sells the restored properties at a price reflecting their increased value. Proceeds from the sales go back to the purchase fund to finance the acquisition of more properties.⁸⁹ The resold properties carry equitable servitudes to ensure that the restoration will be maintained.

Statutes providing for preservation restrictions typically provide that restrictions be expressed either as covenants or as equitable servitudes; such restrictions pursuant to statutory authority are enforceable despite a lack of compliance with the common-law technicalities. The Massachusetts statute, for instance, authorizes restrictions in the form of equitable servitudes even though no parcel of land is benefitted and provides for the perpetual enforceability of covenants in situations where one party does not succeed to the interest of the other.⁹⁰

IV. The Operation of Local Preservation Ordinances

Before examining a given municipality's local law for historic preservation, it is necessary to examine that state's enabling legislation. Originally, localities relied upon the delegation by the state of the municipal police power authority to enact historic preservation controls; more frequently today, states provide an express authorization to the locality to enact such a law. These enabling laws delegate to and define the capacity of political subdivision of a state.⁹¹

The constitutional authority for such state and municipal

89. Howard, *Revolving Funds: In the Vanguard of the Preservation Movement*, 11 N.C. CENT. L.J. 256 (1980).

90. MASS. GEN. LAWS ANN. ch. 184, §§ 31-33 (West Supp. 1981).

91. The statutes can be brief or lengthy; they can be found in a general authorizing statute or in a special historic preservation law.

New York State, for instance, now has the short provision of General Municipal Law § 96-a, N.Y. GEN. MUN. LAWS § 96-a (McKinney 1977), in its general authorizing statute, and a long provision in Article 14 of the Parks and Recreation Law, N.Y. PARKS & REC. LAW § 14.05 (McKinney 1980). Most states do not have both of these alternatives.

ordinances is clear from the ruling in *Penn Central Transportation Co. v. New York City*.⁹² The ordinances implement the authority delegated to municipalities in the enabling law. Usually, a local administrative agency is charged with the responsibility of enforcing the local law. For instance, one court has described the Rochester, New York,⁹³ agency's role as follows:

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 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.⁹⁴

The National Trust for Historic Preservation has issued a "model" ordinance⁹⁵ based upon innovations used in a number of cities. Beyond the New York City law,⁹⁶ advanced ordinances have been adopted in the District of Columbia,⁹⁷ Cincinnati,⁹⁸ and St. Louis.⁹⁹ A wealth of comparative local historic preservation law exists with which to interpret the provisions of a given ordinance. There are certain elements which are common to most local ordinances for historic preservation.¹⁰⁰ In applying

92. 438 U.S. 104 (1978).

93. See ROCHESTER, N.Y., LANDMARKS & PRESERVATION CODE, § 115-37(B) (1969).

94. *Zartman v. Reisem*, 59 A.D.2d 237, 240-41, 399 N.Y.S.2d 506, 509-10 (4th Dep't 1977).

95. See S. Dennis, RECOMMENDED MODEL PROVISIONS FOR A PRESERVATION ORDINANCE WITH ANNOTATIONS (1980).

96. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 8-A, § 205-1.0 (Williams Supp. 1980-81).

97. Historic Landmarks and Historic Districts Protection Act of 1978, D.C. CODE ANN. §§ 5-821-5-835 (Supp. 1980).

98. Cincinnati, Ohio, Ordinances 189-1980, 190-1980, 191-1980 (June 1980), *amending* CINCINNATI, OHIO, ADMIN. CODE § 13; CINCINNATI, OHIO, MUNICIPAL CODE § 741; CINCINNATI, OHIO, ZONING CODE § 35.

99. ST. LOUIS, MO., HERITAGE AND URBAN DESIGN CODE, Ordinance No. 57986; ch. 24 REV. CODE OF CITY OF ST. LOUIS, § 895 (1980).

100. In general, such laws:

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 minimum, the portions of building codes inconsistent with the historic preservation ordinance should be amended.¹⁰¹ Correlation

(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) Constitute 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) Provide for the giving of public notice and convening of a public hearing to designate the landmark or district; direct assembling of the evidence of historicity and making a record to justify the reasons why the designation is granted or denied.

(6) Establish some procedure for administrative appeal, either to municipal Trustees or an appeals board to review the designation decision, before normal judicial review would be available.

(7) Provide that when designation is made, either the ordinance or administrative decision specifically details the identity of the landmark or the boundaries of the historic district; notice should be given to owners of record of designated parcels.

(8) Provide that 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) Provide that any demolition of any building over a specified age, e.g., 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) Impose in some circumstances, an obligation on an owner either of a designated landmark or of an historic structure within a district, to affirmatively maintain the site in order 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 cost against the owner.

This review synthesizes the patterns illustrated by the ordinances cited in *supra* notes 17, 96, 97, 99; see Robinson, *Municipal Ordinances for Historic Preservation in New York State*, 53 N.Y.S.B.J. 18 (Jan. 1981).

101. See PRESERVATION & BUILDING CODES, 1974 CONFERENCE ON HISTORIC PRESERVATION & BUILDING CODES (National Trust for Historic Preservation, 1975).

should also be examined between the historic preservation ordinance and such zoning techniques as cluster zoning, planned unit development and site plan approvals.

Where a community is involved in innovative land use concepts, such as time-phased zoning,¹⁰² flood plain zoning,¹⁰³ or pending legislative proposals or coastal zone management with special provisions for protecting historic sites,¹⁰⁴ care should also be given to correlating the landmark and historic district controls with these other land use techniques.¹⁰⁵ Most innovative of current land use law developments are the proposals for the transfer of development rights,¹⁰⁶ a technique already in use in New York City.¹⁰⁷ This tool removes the real estate market pressures which promote the development of landmark sites by permitting the owner to sell or otherwise transfer whatever rights for area or bulk development the zoning law allows for the given landmark site. This development right is then added to expand the existing zoning limits on development governing another parcel.

Sufficient experience exists with similar municipal ordinances to generate a number of judicial glosses on municipal practice. For instance, 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.¹⁰⁸ The failure to set forth with some precision the standards or criteria for historicity has caused at least one munici-

102. *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

103. 42 U.S.C. § 4001 (1976); 16 U.S.C.A. § 1452(2)(B) (West Supp. 1980); see Tierny, *The National Flood Insurance Program: Explanation and Legal Implications*, 8 URB. LAW. 279 (1976).

104. 16 U.S.C. § 1451 (1976); see D. MANDELKER, *supra* note 57, at 223.

105. For instance, a landmark in a flood plain may be under regulations which would prohibit its rehabilitation or repair; such anomalies need to be identified and reconciled.

106. See J. COSTONIS, *SPACE ADRIFT: SAVING URBAN LANDMARKS THROUGH THE CHICAGO PLAN* (1974).

107. See Marcus, *The Grand Slam Grand Central Terminal Decision: A Euclid for Landmarks, Favorable Notice of TDR and a Resolution of the Regulatory/Taking Impasse*, 7 ECOLOGY L.Q. 731 (1979).

108. *Texas Antiquities Comm. v. Dallas Community College Dist.*, 554 S.W.2d 924 (Tex. 1977).

pality to find its ordinance invalidated;¹⁰⁹ on the other hand, even vague criteria may be sufficient if the community's historic nature is well known and reasonably distinct.¹¹⁰ Creation of a thorough record whenever applying general or apparently vague criteria can permit a court to sustain the landmark designation.¹¹¹ Where demolition permits are denied, a clear record with stated reasons must be provided.¹¹²

V. The Operation of Federal Historic Preservation Laws

Federal environmental law affecting land use of sites with historic or archaeologically important resources is comprised of four principal parts.¹¹³ First are the laws whose express purposes are to advance historic preservation.¹¹⁴ Second are the income tax laws which encourage, or impede, preservation.¹¹⁵ Third are a range of laws which constrain the activities of federal agencies in order to protect historic amenities in the course of other ac-

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

110. *See, e.g., Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976); *Santa Fe v. Gamble-Skogmo Inc.*, 73 N.M. 410, 389 P.2d 13 (1968).

111. *Figarsky v. Historic District of Norwich*, 171 Conn. 198, 368 A.2d 163 (1976).

112. *In re Equitable Funding Corp.*, N.Y.L.J., Feb. 8, 1978, at 10, col. 3 (Sup. Ct., Kings County Feb. 8, 1978); *see also Citizen of Georgetown v. Zoning Comm'n*, 477 F.2d 402 (D.C. Cir. 1973).

In several jurisdictions, practice aids have appeared to guide practice under relevant historic preservation laws; the jurisdictions include: California, G. GAMMAGE, P. JONES, & S. JONES, *HISTORIC PRESERVATION IN CALIFORNIA: A LEGAL HANDBOOK* (1975); New York, Robinson, *Municipal Ordinances for Historic Preservation in New York State*, 53 N.Y.S.B.J. 18 (Jan. 1981); North Carolina, Morgan, *Reaffirmation of Local Initiative: North Carolina's 1979 Historic Preservation Legislation*, 11 N.C. CENT. L.J. 243 (1980); and Virginia, *HISTORIC PRESERVATION AND PUBLIC POLICY IN VIRGINIA* (R. Collins, R. Netherton, R. Pisney eds. 1978). New state level legislation is also emerging. Comprehensive controls have been enacted in New York State through the Historic Preservation Act of 1980, N.Y. PARKS & REC. LAW §§ 14.01-.09 (McKinney Supp. 1980). A careful examination of all possibly relevant laws in each jurisdiction of practice is required if one is to be able to synthesize the laws of the municipality relevant to historic preservation.

113. *See generally* J. Fowler, *supra* note 6, at 1468-73; and Hanslin, *Federal Framework for Historic Landmark Protection*, in *HISTORIC PRESERVATION LAW* (N.A. Robinson ed., PLI, 1979).

114. *See, e.g.*, 16 U.S.C. §§ 470-470t (1976 & Supp. III 1979), *amended by* 16 U.S.C.A. §§ 470-470w-6 (West Pam. 1981); 16 U.S.C. §§ 461-467 (1976 & Supp. III 1979); 16 U.S.C. §§ 469-469h (1976 & Supp. III 1979), *amended by* 16 U.S.C.A. §§ 469-3(c), 469c-1, 469h (West Supp. 1980).

115. I.R.C. § 191(d) (Supp. III 1979).

tivity.¹¹⁶ Finally, there is one federal law with direct regulatory force requiring protection of historic or archaeological sites.¹¹⁷

Sites of national historic significance first began to receive protection in incremental and isolated acts. The acquisition of the Gettysburg Battlefield was the result of such an act.¹¹⁸ This early approach gave way to a series of legislative enactments designed to more systematically further national preservation.

The first of these was the Historic Sites Act of 1935.¹¹⁹ In this act Congress announced "a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States."¹²⁰ The Secretary of the Interior was authorized to decide which sites were of "national historical significance" and to acquire such sites subject to receiving an appropriation from Congress to do so.¹²¹

The Secretary has inaugurated a "National Historic Landmark" program to identify sites under the Historic Sites Act.¹²² Other programs for data preservation have also been initiated.¹²³ No regulations have been issued under this authority, although sites have been designated and a few acquired.

The broad delegation of powers to the Secretary of the Interior has been sustained in litigation.¹²⁴ Questions regarding the Secretary's authority and procedures in designating the Historic Green Springs National Historic District resulted in a federal district court's setting aside the designation in 1980.¹²⁵ Congress legislatively reinstated the designation and reaffirmed the Secretary's authority later that year.¹²⁶

116. See, e.g., 49 U.S.C. § 1653(f) (1976 & Supp. III 1979); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-70 (1976 & Supp. III 1979).

117. Surface Mining and Control Act of 1977, 30 U.S.C. §§ 1201-1328 (1976 & Supp. III 1979).

118. Act of Congress, March 3, 1893, ch. 208; 27 Stat. 572, 599; see *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668 (1896).

119. 16 U.S.C. §§ 461-467 (1976 & Supp. III 1979).

120. *Id.* § 461.

121. *Id.* § 462(d).

122. *Id.* § 462(b).

123. *Id.* § 462(a).

124. *Barnidge v. United States*, 101 F.2d 295 (8th Cir. 1939).

125. *Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839 (E.D. Va. 1980).

126. 16 U.S.C.A. § 470a(a)(1)(A) (West Pam. 1981); see S. REP. No. 96-943 to accompany S. 3116, 96th Cong., 2d Sess. (1980), which says:

The Historic Sites Act is a reservoir of authority, mostly unused. By designating sites, the Secretary not only moves toward acquisition, but obliges other agencies to act under other laws to protect the site.¹²⁷

More expansive federal authority for national historic preservation was enacted three decades later by way of The National Historic Preservation Act of 1966, as amended.¹²⁸ This act instituted the *National Register of Historic Places*, the Advisory Council on Historic Preservation, and the National Historic Preservation Fund for awarding grants for historic preservation purposes. These elements are to encourage the protection of historic property and to assure that federal agencies do not unnecessarily harm such property. These provisions are not binding on property which is not under federal ownership.

The *National Register* is designed as a planning inventory. Its regulations govern only the listing procedures,¹²⁹ and not the consequences of listing under a local preservation ordinance or another law. Because these consequences can be substantial, the *Register's* planning function has become somewhat compromised when *Register* listings bring regulatory consequences as munici-

The purpose of this subsection is to also assure the continued validity of all National Historic Landmarks designated by the Secretary prior to the effective date of the legislation by the Congress declaring such landmarks, whether individual or districts, as National Historic Landmarks for the purposes of this legislation, the Historic Sites Act of 1935, and other applicable laws. The Federal Register of February 6, 1979, contains a listing of all such landmarks designated to that date as part of the National Register of Historic Places list. The Congressional declaration of National Historic Landmark status is effective as of the date each property was originally listed in the Federal Register as a National Historic Landmark. Recent legal challenges to the National Historic Landmark program have suggested that landmarks have been designated by the Secretary by inadequate procedures and beyond the scope of the Historic Sites Act. The definition of historic values contained in the National Historic Preservation Act of 1966, as amended, is equally applicable to the historic values sought to be preserved by the Historic Sites Act of 1935, except for the latter's requirement of national historical significance. By declaring these properties as National Historic Landmarks, the Committee recognizes the Secretary's continuing authority to determine that properties have lost the historic qualities for which they were designated as National Historic Landmarks, and, accordingly, to remove such designation.

Id.

127. 16 U.S.C. § 470; 42 U.S.C. § 4332(2)(c).

128. 16 U.S.C. §§ 470-470w-6. For discussion of the designation criteria to be applied, see *supra* notes 61-71 and accompanying text.

129. 36 C.F.R. §§ 60.1-17, 63.1-6 (1981).

palities automatically regulate *National Register* sites under their local historic preservation ordinance.¹³⁰ For this reason, the 1980 amendments to the act made it a condition of a listing that the owner concur in the nomination.¹³¹ The *Register* has been recognized in judicial decisions¹³² and is an established force in its own right, influencing land use decisions.

The *Register* as a collection of data is used by the Advisory Council on Historic Preservation, which was created under the National Historic Preservation Act. The Council includes 19 persons: The Secretary of the Interior, Architect of the Capitol, Secretary of Agriculture, heads of four other agencies designated by the President, one Governor, one Mayor, the President of the National Conference of State Historic Preservation Officers, the Chairman of the National Trust for Historic Preservation, four preservation experts and three members of the public.¹³³

Under Section 106 of the National Historic Preservation Act, the head of any federal agency with "direct or indirect" authority over a proposed federal or federally-assisted "undertaking" or having licensing or permit authority shall take into account the effect on "any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register," and "shall afford the Advisory Council . . . a reasonable opportunity to comment" on the undertaking.¹³⁴

This comment process is elaborate and is designed to en-

130. See, e.g., TARRYTOWN, N.Y., [1978] LOCAL LAW 3 § II. A. 2. "Historic Landmark: A building, structure, or parcel of land . . . which has been duly included on the National Register of Historic Places maintained by the U.S. Secretary of the Interior. . . ." *Id.*

131. 16 U.S.C. § 470a(b):

The secretary shall promulgate regulations that before any property or district may be included on the National Register or be designated as a National Historic Landmark, the owner or owners of such property, or a majority of the owners of the properties within the district in the case of an historic district, shall be given the opportunity . . . to concur in, or object to, the nomination. . . . If the owner . . . objects to such inclusion or designation, such property shall not be included on the National Register or designated as a National Historic Landmark until such objection is withdrawn.

132. *Stop H-3 Assoc. v. Coleman*, 533 F.2d 434 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976).

133. The Advisory Council was reduced from 29 to 19 by section 301(a) of the 1980 Amendments to the National Historic Preservation Act, 16 U.S.C.A. § 470i (West Pam. 1981).

134. 16 U.S.C. § 470f.

courage voluntary mitigation of any adverse effects an undertaking may have on an historic site. The Advisory Council has detailed regulations structuring this “§ 106 Process.”¹³⁵ These regulations are binding on all federal agencies.¹³⁶ The regulations superseded in many respects an Executive Order on “The Protection and Enhancement of the Cultural Environment” issued in 1971.¹³⁷ While the “§ 106 Process” has been involved in numerous court tests,¹³⁸ it received its most expansive and compelling construction in the Second Circuit decision of *W.A.T.C.H. v. Harris*.¹³⁹ As long as any agency discretion over an undertaking can be found, section 106 review is required.

Under the 1980 Amendments to the National Historic Preservation Act, each federal agency is to establish a position for an Agency Historic Preservation Officer. Costs for agency activities to preserve historic amenities can be included in project budgets or passed on to parties receiving federal permits.¹⁴⁰

A separate further dimension of the National Historic Preservation Act of 1966 is the congressional creation of the National Historic Preservation Fund, which serves three purposes. First, grants are made to the states to assist in preparing comprehensive statewide historic surveys and plans.¹⁴¹ Second, grants are made to the states for “projects” to acquire or develop historic sites.¹⁴² Finally, the fund makes matching grants to the National Trust for Historic Preservation.¹⁴³

These grants were administered for the Secretary by the Heritage Conservation and Recreation Service (HCRS) in the Department of the Interior. The HCRS was abolished and these functions were transferred to the National Park Service in

135. 36 C.F.R. §§ 800.1-15 (1981).

136. 16 U.S.C. § 470s.

137. Exec. Order No. 11,593, 3 C.F.R. 559 (1971-75 Comp.) reprinted in 16 U.S.C. app. § 470 (1976).

138. See, e.g., *Ely v. Velde*, 497 F.2d 252 (4th Cir. 1974); *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971); *Save the Courthouse Comm. v. Lynn*, 408 F. Supp. 1323 (S.D.N.Y. 1975); *Ely v. Velde*, 356 F. Supp. 726 (E.D. Va. 1973).

139. *W.A.T.C.H. v. Harris*, 603 F.2d 310 (2d Cir.), cert. denied sub nom. *Waterbury Urban Renewal Agency v. W.A.T.C.H.*, 444 U.S. 995 (1979).

140. See *supra* note 126.

141. 16 U.S.C. § 470a(a)(1).

142. *Id.* § 470a(a)(2).

143. *Id.* § 470a(a)(3).

1981.¹⁴⁴ While no regulations currently exist, the Service has a grants manual describing how the fund is administered. Grants are made to the states based upon an allocation formula. Each state, in turn, decides which projects receive funding. Project grants are available for the improvement of privately-owned property. Although authorized at \$150 million per year, appropriated funds have ranged from \$60 and \$55 million in fiscal years 1979 and 1980, to \$32.5 million in 1981. President Reagan recommended funding in fiscal year 1982 of \$5 million.¹⁴⁵

The 1980 Amendments to the National Historic Preservation Act also did much to strengthen the role of the State Historic Preservation Officer (SHPO) and to promote the enactment of municipal historic preservation ordinances. The Secretary of the Interior is authorized to develop regulations for state programs, including assistance to local governments and private organizations. States must submit programs to the Secretary for approval. Each state program must (a) designate a SHPO, (b) provide for a State Review Board, and (c) provide for public participation, in particular for *National Register* nominations. These plans are to be reviewed every four years.¹⁴⁶

The State Historic Preservation Officer is assigned specific duties by the 1980 Amendments to the National Historic Preservation Act.¹⁴⁷ As part of his duties, the SHPO in each state ad-

144. Order by Secretary of the Interior James Watt, Feb. 19, 1981, reported in XXI PRESENTATION NEWS at 1, col. 1 (March 1981).

145. The 1980 Amendments to the National Historic Preservation Act, *see supra* note 13, authorized a further program of direct grants for threatened landmarks, demonstration and training projects and assistance to properties within historic districts. 16 U.S.C.A. § 470a(d)(3)(A) (West Pam. 1981). A loan program is also authorized. *Id.* § 470a(d)(3)(B).

146. 16 U.S.C.A. § 470a(b)(2) (West Pam. 1981).

147. *Id.* § 470a(b)(3) provides:

- (A) direct and conduct a comprehensive statewide survey of historic properties and maintain inventories of these properties in cooperation with local governments and private organizations and individuals;
- (B) identify and nominate eligible properties to the National Register and otherwise administer applications for listing historic properties in or removing them from the National Register;
- (C) prepare and implement a comprehensive statewide historic preservation plan;
- (D) administer the State program of Federal assistance for historic preservation within the State;
- (E) advise and assist, as appropriate, Federal agencies and local governments in

ministers the grants under the National Historic Preservation Fund.¹⁴⁸ The 1980 amendments provide for a 50 percent matching of federal funds by each state for projects or programs and 70 percent federal to 30 percent state matching funds for continuation of survey and inventory activities.

The SHPO also plays an important role in assisting local governments to have their ordinances certified by the Secretary of the Interior. The SHPO and Secretary may certify a local ordinance under NHPA to enable properties regulated by the ordinance to qualify for federal income tax incentives and to qualify for federal aid, if the ordinance meets certain requirements.¹⁴⁹

Until a state-approved program exists, the Secretary may certify local ordinances directly. A local government eligible for certification, but not yet certified, may receive grants from the fund.¹⁵⁰ Once a locality has been certified, the SHPO must re-evaluate certification annually, and confirm certification every three years. A second certification process for local ordinances serves the rehabilitation of historic sites under the Internal Revenue Code. "Rehab" projects must be approved by a tax certification unit in the National Park Service; the projects must deal

carrying out their historic preservation responsibilities;

(F) cooperate with the Secretary, the Advisory Council on Historic Preservation, and other Federal, State, and local agencies, and organizations and individuals to ensure that historic properties are taken into consideration at all levels of planning and development;

(G) provide public information, education, and training and technical assistance relating to the Federal and State Historic Preservation Programs; and

(H) cooperate with local governments in the development of local historic preservation programs and assist local governments in becoming certified

Id.

148. *Id.* § 470a(a)(2).

149. *Id.* § 470a(c). These requirements are:

(A) enforces appropriate State or local legislation for the designation and protection of historic properties;

(B) has established an adequate and qualified historic preservation commission by State or local legislation;

(C) maintains a system for the survey and inventory of historic properties that further the purposes of subsection (B);

(D) provides for adequate public participation in the local historic preservation program, including the process of recommending properties for nomination to the National Register; and

(E) satisfactorily performs the responsibilities delegated to it under this act.

Id.

150. *Id.* § 470a.

with sites on the *National Register* or designated under certified local ordinances.¹⁵¹ Both these certification processes have the indirect effect of promoting uniformity among different municipal ordinances in the various states.

Properties designated as historic landmarks or buildings located within historic districts may be subject to federal income tax incentives and disincentives.¹⁵² Tax consequences result from any one of three circumstances: (1) from listing the landmark on the *National Register of Historic Places*¹⁵³ or (2) from the property's being situated within an historic district which is on the *National Register*,¹⁵⁴ or (3) from the property's being a designated local landmark or a site within a designated historic district under a certified municipal ordinance.¹⁵⁵ Such buildings become known as "certified historic structures."¹⁵⁶ For rehabilitation of these structures prior to December 31, 1981, accelerated depreciation¹⁵⁷ and a five year amortization¹⁵⁸ of expenses can be used if the rehabilitation has been approved in advance by the Heritage Conservation and Recreation Service in the Interior Department.¹⁵⁹ A further incentive available to such properties is an investment credit for some certified rehabilitation.¹⁶⁰ Aided by the Revenue Act of 1978,¹⁶¹ this position allows a 10 percent investment tax credit. After December 31, 1981, any new work begun on an approved rehabilitation will be eligible for up to a 25 percent investment tax credit, however, the 60-month amortization and accelerated depreciation will no longer be available.¹⁶²

151. 36 C.F.R. § 67.6 (1981).

152. See TAX INCENTIVES FOR HISTORIC PRESERVATION (G. Andrews ed. 1980); Tiedt, Jandl, Oldham & Gilmore, *Historic Preservation Provisions of the Internal Revenue Code*, in HISTORIC PRESERVATION LAW *supra* note 5.

153. 16 U.S.C. § 470a.

154. *Id.*

155. See *supra* Part IV at 531 of this article.

156. I.R.C. § 191(d) (Supp. III 1979).

157. *Id.* § 167(o).

158. *Id.* § 191.

159. See generally Roddenvig & Young, *Neighborhood Revitalization & Historic Preservation Incentives of the Tax Reform Act of 1976*, 11 URBAN LAW. 35 (Jan. 1979).

160. I.R.C. § 191(d)(4) (Supp. III 1979).

161. I.R.C. §§ 48(a)(1)(E), 48(g) (Supp. III 1979).

162. See The Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 212(a)(2), 95 Stat. 183 (1981) (to be codified at I.R.C. § 46(a)(2)(F)).

Equally as critical as these incentives is the key disincentive.¹⁶³ No property owner can demolish any of these categories of property without incurring a substantial tax penalty. Even an unhistoric building within an historic district cannot be altered, demolished, or removed unless the owner obtains a ruling from the Heritage Conservation and Recreation Service in the Interior Department to remove the certification of the building.¹⁶⁴

Whenever a property in whole or in part is constructed, reconstructed, or used on a site where a certified historic structure was located on or after June 30, 1976, that property is automatically denied both the tax benefits of treating demolition costs as a business expense deduction¹⁶⁵ and accelerated depreciation for new buildings which may be constructed on the site.¹⁶⁶

In addition to these grants, tax incentives, and technical advice, and independent of the consultation process which all federal agencies must undertake with the Advisory Council on Historic Preservation under section 106 of the National Historic Preservation Act,¹⁶⁷ the National Environmental Policy Act (NEPA)¹⁶⁸ requires that historic values be included in the environmental impact assessment process of section 102(2)(C) of NEPA.¹⁶⁹ The *W.A.T.C.H. v. Harris*¹⁷⁰ ruling essentially concluded that NEPA and the National Historic Preservation Act both require careful consideration of historic amenities by federal agencies.

As part of a NEPA review, an analysis of historic sites is required.¹⁷¹ Some agencies may decide to merge the section 106 review and the NEPA review in their own regulations, but this has yet to be done.¹⁷² Some decisions, such as *W.A.T.C.H. v.*

163. These tax provisions extended through December 31, 1983. They were enacted with the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1916 (1976), due to expire in 1981. I.R.C. § 191 (1976). The extension is a limited one, and revisions in the law are likely. The regulations for these tax provisions appear in 36 C.F.R. § 1208 (1980) (Dep't of Interior) and 26 C.F.R. §§ 1.191-1 to -3 (1981) (Dep't of Treasury).

164. I.R.C. § 167(n)(2)(B)(iii) (Supp. III 1979).

165. *Id.* § 280B.

166. *Id.* § 167(n)(1).

167. See *supra* cases cited in note 138.

168. 42 U.S.C. § 4321-4370 (1976 & Supp. III 1979).

169. *Id.* § 4332.

170. 603 F.2d 310 (2d Cir.), *cert denied*, 445 U.S. 927 (1979).

171. See, e.g., *Ely v. Velde*, 451 F.2d 1130, 1138 (4th Cir. 1971).

172. For NEPA regulations, see *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1978); 40

Harris,¹⁷³ require full environmental review of historic sites in compliance with NEPA,¹⁷⁴ while others require only substantial compliance with the intent of the procedures.¹⁷⁵ Under authority of NEPA, the NHPA, and the 1906 Antiquities Act, Executive Order 11593 directs agencies to consider historic amenities in their decisionmaking and protect those amenities where possible.¹⁷⁶

Beyond NEPA and NHPA, several additional federal statutes can have importance for historic preservation. The Archaeological and Historic Preservation Act of 1960,¹⁷⁷ as amended, requires that any federal project or federally-licensed activity make financial provisions for the recovery of scientific, prehistoric, historic and archaeological data which might otherwise be lost in the course of the project's construction.¹⁷⁸ Whenever a federal agency finds, or is notified of, the possible loss of historic or archaeological information, that agency must either request that the Secretary of the Interior recover, preserve or protect the information, or use part of the project's funds to protect the information and undertake recovery itself. The act authorizes an agency's spending 1 percent of the project's costs on the recovery.

Thus, if an archaeological site is believed to be located in the path of any federal or federally-permitted project, and the NEPA or NHPA reviews have not disclosed ways to protect the site or avert injury to it, those conducting the project must either do the archaeological dig or ask the Secretary to do it. A "Statement of Program Approach" was issued in 1979, urging

C.F.R. §§ 1500-17 (1981), issued in 43 Fed. Reg. 55978 (1978).

173. *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971).

174. See, e.g., *Save the Courthouse v. Lynn*, 408 F. Supp. 1323, 1330 n. 4 (S.D.N.Y. 1972).

175. See, e.g., *D.C. Federation of Civic Assoc. v. Adams*, 571 F.2d 1310 (4th Cir. 1978); *Stop H-3 Assoc. v. Brinegar*, 389 F. Supp. 1102 (D. Hawaii 1974).

176. 36 Fed. Reg. 8921 (1971), included in the annotations following 16 U.S.C.A. § 470 (West 1974).

177. 16 U.S.C. § 469-469(h) (1976 & Supp. III 1979), as amended by 16 U.S.C.A. §§ 469a-3(c), 469c-1, 469h (West Supp. 1980).

178. This act was supplemented by the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470ll (Supp. III 1979), which protects archaeological resources over 100 years old located on federal public lands. Regulations for this act were issued in draft form on January 19, 1981. 46 Fed. Reg. 5566 (Jan. 19, 1981).

preservation of historic or archaeological finds *in situ*.¹⁷⁹ The future implementation of this program under the administration of President Reagan is unclear.

Beyond laws expressly governing historic sites, protection is found in other statutes. Chief among these is section 4(f) of the Department of Transportation Act. This provision limits the authority of the Department to use any public or private land containing an historic site for a federal highway or for a federally-assisted highway purpose. Such land may only be interfered with if (a) there is "no feasible and prudent alternative" to the use of such land and (b) all possible planning to minimize harm is undertaken.¹⁸⁰ The efficacy of this provision was proven in litigation to preserve a city park in Memphis, Tennessee. *Citizens To Preserve Overton Park v. Volpe*¹⁸¹ became an important re-statement of the section 4(f) limitation.

The only federal law to directly regulate private property is not one which expressly protects historic values. The Surface Mining and Control Act of 1977 is unlike the pattern of federal law which provides constraints on federal actions or incentives to state, local and private actions, which entails little direct federal regulation of historic private property.¹⁸² This act controls all coal strip mining operations.

Under the Surface Mining and Control Act, all permit applications¹⁸³ require the applicant to describe and identify properties eligible or listed on the *National Register of Historic Places*.¹⁸⁴ Any known archaeological resources in the area of the proposed mining activity must also be identified "based on all available information."¹⁸⁵ Permits may not be issued for mining on lands which will affect sites eligible for listing or already listed on the *National Register* unless the appropriate federal,

179. 44 Fed. Reg. 18117 (March 26, 1979).

180. 49 U.S.C. § 1653(f) (1976).

181. 401 U.S. 402 (1976).

182. 30 U.S.C. §§ 1201-1328 (Supp. III 1979); regulations are at 30 C.F.R. §§ 700.1-950.20 (1981).

183. These permit applications include those made to state governments under federally approved state permit programs, to the federal government for mining on federal lands, or to the federal government for mining on private or other non-federal lands. See 30 U.S.C. § 1256 (1976 & Supp. III 1979).

184. 30 C.F.R. § 779.12(b) (1981).

185. *Id.*

state or local agency with authority over the archaeological or historic site concurs in issuing the permit.¹⁸⁶

The act also permits any person to seek a declaration that "historic lands" may be unsuitable for mining.¹⁸⁷ The regulations define "historic lands" as eligible or listed *National Register* sites with cultural or religious significance to American Indians or religious groups.¹⁸⁸ By directly regulating and curbing mining on private land which may have archaeological or historic values, this act serves as an historic preservation land use control. As such it stands as the only direct federal regulation of historic sites on private lands.

VI. Select Unresolved Issues In Preservation Law

Despite the large and growing body of law dealing with historic resources, there are more issues which remain to be resolved than are now settled. Many of the presentations in the symposium following this introductory essay explore these issues. Four sets of issues which are not explored in the symposium will be briefly noted here:

- (1) under state law, some understanding is needed of the extent to which a municipality may require private maintenance or restoration of an historic structure and assess such structures for real property tax purposes;
- (2) at the federal level, the ambiguous countervailing tendencies of federal preservation laws either to become regulatory or to remain as an aid and encouragement to the states need to be resolved;
- (3) under the federal Constitution, the question of whether regulation of or aid to religious institutions controlling historic sites runs afoul of the First Amendment should be scrutinized; and
- (4) at the substantive level, it must be determined whether laws governing archaeological and prehistoric resources are or should be their own field or a part of historic preservation law, art law, or some other kindred subject.

186. *Id.* § 776.13(b)(3).

187. *Id.* § 762.11(2).

188. *Id.* § 762.5.

A. State and Municipal Regulation

The clearest body of historic preservation law is that of the municipal ordinances dealing with landmarks and historic districts. Notwithstanding adaptations to meet the varied forms of local enabling legislation, there are great similarities among the functions of these local laws, as discussed above.¹⁸⁹

Although the historic preservation community has made much of the economic advantages of rehabilitating historic structures¹⁹⁰ and has paid substantial attention to the reform of federal income tax laws to provide financial incentives to save buildings,¹⁹¹ little attention has been directed to the other financial consequences of preserving a structure. There are chiefly two problems encountered: can a municipality require a landmark owner to maintain or restore a regulated landmark, and how should an historic building under landmark constraints be valued for real property tax assessments?

1. Maintenance Requirements

Even if a building has substantial historic value, its owner may not have the financial resources to maintain the structure. Churches and not-for-profit entities often have limited incomes which are dedicated to their religious, educational or eleemosynary purposes. An individual home owner or small business may not have the motivation or capital to invest in an expensive restoration.

Municipal ordinances typically require that anything more than routine repairs or maintenance¹⁹² be done pursuant to a

189. See note 100 and accompanying text *supra*.

190. See, e.g., ECONOMIC BENEFITS OF PRESERVING OLD BUILDINGS, PAPERS FROM THE ECONOMIC BENEFITS OF PRESERVING OLD BUILDINGS CONFERENCE, SEATTLE, (1975); BUSINESS AND PRESERVATION: A SURVEY OF BUSINESS CONSERVATION OF BUILDINGS AND NEIGHBORHOODS (F. Stella ed. 1978); B. Diamonstein, BUILDINGS: REBORN, NEW USES, OLD PLACES (1978).

191. See TAX INCENTIVES FOR HISTORIC PRESERVATION, (G. Andrews ed. 1980); HERITAGE CONSERVATION AND RECREATION SERVICE, UNITED STATES DEP'T OF THE INTERIOR, FEDERAL TAX PROVISIONS TO ENCOURAGE REHABILITATION OF HISTORIC BUILDINGS: AN ASSESSMENT OF THEIR EFFECT (1979).

192. See, e.g., definitions of "minor work" and "ordinary repairs and maintenance" in New York City Landmarks Act, NEW YORK, N.Y. ADMIN. CODE ANN. ch. 8-A, § 207-1.0(q) & (r) (Williams 1976).

"Certificate of Appropriateness" which governs the alteration to assure that it is consistent with the historic value of the building.¹⁹³ Often the expense of recreating architectural features of a past period can be substantial, and yet the Certificate of Appropriateness is likely to require such costs. Similarly, a landmark law is likely to prohibit aluminum siding as inappropriate for wood structures, and thereby require annual painting costs which otherwise could be avoided.

Whenever such tough choices have become apparent to a Landmarks Commission, the tendency has been to relax the standards of appropriateness, to compromise with the property owner.¹⁹⁴ This practice colors the rigor of the local law's requirements. Rather than compromise the historic preservation objectives of the local law, it would make more sense to recognize that the affirmative maintenance of regulated structures is costly and to allow a credit against local real property taxes to cover these costs. Such a process would necessitate an amendment of the state's real property tax system to allow it. Precedent exists in civil law countries such as France for such indirect subsidies of historic structures.¹⁹⁵

Until the costs are met either through such an indirect subsidy or through direct grants, the municipal landmark constraints entail a forced donation by the property owner to the community of the added costs of maintenance. Where the property owner can protect the historic site while making a substantial profit, requiring such donations may be accepted, as in the case of dedicating park land in a residential subdivision.¹⁹⁶ More frequently, the landmarks authority and developer split the difference, as was literally the case with the New York Palace Hotel which destroyed about 40 percent of the Villard Houses for a high rise hotel tower, saving the other 60 percent and securing

193. See, e.g., *id.*, § 207-6.0.

194. This fact is difficult to document without an empirical analysis of actual Landmark Commission decisions. In my discussions with local Commission members and staffs, a pattern has recurred suggesting such compromises occur. The actual practice should be factually researched.

195. See Stipe, 1 PACE L. REV. 567 (1981).

196. E.g., *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *appeal dismissed*, 404 U.S. 878 (1971).

zoning bulk incentives as well.¹⁹⁷

The more equitable approach, which permits full preservation and subsidizes the expenses of preservation, is a real property tax credit. Only such a system covers the affluent and needy private property owner. Such a system would not, however, cover the tax-exempt property owner. For such owners, there are no real property taxes to pay, and there are therefore no savings. Some compelled contribution may be required, as suggested by the teaching of the *Sailors' Snug Harbor* decision¹⁹⁸ discussed by Terence H. Benbow in the following symposium.¹⁹⁹ Just as all property owners must adhere to building code requirements for public safety reasons, whether or not they can afford to do so, so also may some limited adherence to historic preservation and aesthetic police power controls be required.

Moreover, the real property tax exemption is a creature of

197. The "Villard Houses" are a set of six brownstones, adjacent to each other and forming a semi-circle around a courtyard. They are in the style of an Italian Renaissance palazzo, inspired by the Chancery of the Vatican in Rome. The bulk of the buildings were to be destroyed for development of the Palace Hotel, according to an as-of-right plan under the City's Zoning Resolution, with a variance. In 1974, the variance application for the planned hotel was made by the building's owner, the Archbishopric of New York, before New York City's Board of Standards and Appeals, its zoning appeals body, when the New York Landmarks Conservancy intervened calling for preservation of the landmark and challenging the Board's jurisdiction over the variance application. The developer withdrew the application, which necessitated shaping a new building plan with the City's Planning Commission staff, involving Landmarks Commission staff also; the developer agreed to save the "Gold Room," a gilded two-story music room in the Villard House, but won concessions to destroy a later wing of that House and most of three entire houses of the five, leaving only their courtyard facade intact. See Robinson, *Urban Environmental Law: Emergent Citizen's Rights for the Aesthetic, the Spiritual, and the Spacious*, 4 FORDHAM URBAN L.J. 467, 474-75 (1976). The architectural aspects of the Villard Houses and their transformation are related in W. SHOPSIN & M. BRODERICK, *THE VILLARD HOUSES - LIFE STORY OF A LANDMARK* 131-139 (1980); this account does not chronicle the administrative or legal aspects of the compromise and has been criticized as "a carefully worded political dispatch." Smith, *Palace Intrigues*, 33 HISTORIC PRESERV. 54-58 (March/April 1981). The counsel for the City's Planning Commission, Norman Marcus, has described the process in Marcus, *Villard Preserv'd: Or Zoning for Landmarks in the Central Business District*, 44 BROOKLYN L. REV. 1 (1977).

198. *Trustees of Sailors' Snug Harbor v. Platt*, 29 A.D.2d 376, 288 N.Y.S.2d 314 (1st Dep't 1968); see also the application of this decision in *Lutheran Church In America v. City of New York*, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1944), discussed *infra* at note 233 and accompanying text.

199. Benbow & McGuire, *Zoning and Police Power Measures for Historic Preservation: Properties of Nonprofit and Public Benefit Corporations*, 1 PACE L. REV. 635 (1981).

state law. So long as it is provided by the legislature, the non-profit association's realty is exempt from taxes.²⁰⁰ If the legislature wishes, it can require taxes for historic preservation purposes and then apply a credit against such taxes when the otherwise exempt entity uses the funds to meet actual preservation expenses. Such an amendment would be an adjustment in the legislature's existing social policy to subsidize certain non-profit activity in order to add the social goal of historic preservation.

2. *Valuation of Designated Property*

Regardless of whether such state real property taxation reform is realized, there must also be a better understanding of the process used by an assessor to fix value on an historic property under a landmark or district regulation. This issue is explored in the following symposium by Commissioner Mary E. Mann, President of New York City's Tax Commission.²⁰¹ Whenever a property is under a valid police power constraint, and, therefore, cannot be developed to a theoretical "highest and best use" from a market perspective, that property should not be taxed as if it were freely developable. The assessors should examine not just the size, location and zoning of a parcel in order to come up with comparables for estimating market value. If market value is to be the test of valuing property for real property taxation, the role of historic preservation constraints should be considered.

Perhaps the market value appraisal test is the wrong basis for setting real property values for tax purposes. Many states have begun assessing agricultural lands based on income capitalization of the actual capacity of farm land in crop uses.²⁰² Historic sites could be appraised, in whole or in part, based upon what the community finds of broad social value in the landmark; such public value would be computed and the value reduced by

200. *Mohonk Trust v. Board of Assessors*, 47 N.Y.2d 476, 392 N.E.2d 876, 418 N.Y.S.2d 763 (1979).

201. Mann, *Valuation of Historic Properties*, 1 PACE L. REV. 667 (1981).

202. See generally Keene, *A Review of Governmental Policies and Techniques for Keeping Farmers Farming*, 19 NAT. RESOURCES J. 119 (1979); Robinson, *New York Sets Tax Relief on Farm Lands*, N.Y.L.J., Mar. 25, 1981, at 1, col. 1.

that social amount. If a facade is regulated to preserve it, the legislature could provide that the proportion of the structure so controlled would be exempt from taxes. The savings could be used by the property owner to help maintain the facade.

If easements and other private property law encumbrances are relevant to limiting the market value on a site,²⁰³ the historic preservation constraints ought also to act as a limit.²⁰⁴ There have been instances in which local assessors actually increased the market value on historic sites after restoration.²⁰⁵ Where the land is in a marginal neighborhood, such reassessment could force low or middle income families out of historic homes solely because of the increased real property taxes due. In other locations, where a true market for historic homes exists, and absent competing land use demands, an historic site could have a market value determined by a special use or special market value rule.

How a community decides to value property under historic preservation controls is an unresolved and largely unaddressed issue. It deserves a high priority in the councils of government and preservationists alike. No consensus exists on how valuation should be made. Use of market value comparables, now blind to the historic preservation constraints, can unwittingly penalize the owner of an historic structure.

B. *Federal Ambivalence*

In contrast to the relatively settled patterns of preservation regulatory law at the local government level, the federal role in this field is unsettled. There is a policy ambivalence: should the federal government do no more than assure that federal agencies protect historic properties, should federal rules shape the substance of local governments' control of historic sites, or should the federal government regulate historic properties directly?

To date, most federal historic preservation law has been adjective and has focused on the procedures useful to oblige the

203. See, e.g., *People ex rel Poor v. O'Donnell*, 139 A.D. 83, 124 N.Y.S. 36 (1st Dep't 1910), *aff'd*, 200 N.Y. 518, 93 N.E.1129 (1911).

204. See generally Robinson, *Real Property Tax and Assessment Reforms*, N.Y.L.J., Mar. 27, 1979, at 1, col. 1.

205. E.g., Benefit Street on College Hill in Providence, Rhode Island.

federal agencies to take historic interests into account rather than deciding the substantive issue of whether or not to preserve them. Through the section 106 Advisory Council procedures²⁰⁶ and through the parallel environmental impact assessment process,²⁰⁷ agencies are obliged to consider the value of historic sites whenever the agency's action will affect the sites. The *National Register* listed or eligible properties are those identified for these reviews of the historically important properties. Essentially these procedures are constraints on the decisionmaking of federal agencies. They can, however, have significant consequences for private land use development²⁰⁸ or public urban renewal programs²⁰⁹ which have in the past proceeded in disregard of historic factors.

Two federal laws combine to provide more direct controls over private land for historic preservation. A designation as a "Natural Historic Landmark" under the Historic Sites Act of 1935,²¹⁰ essentially allows federal control of private lands. An illustration is the designation of 14,000 acres in Louisa County, Virginia, as the Historic Green Springs District.²¹¹ This area was placed on the *National Register* in 1973; thereafter, a nonprofit civic group, the Historic Green Springs, Inc., acquired easements over half the land in the district and proffered them to the Secretary of the Interior. The Secretary at first rejected the easements, but did designate the site as a National Historic Landmark in 1974. On January 24, 1978, following several public hearings, the Secretary announced he would accept the easements.²¹²

By combining private property rights to enforceable easements with a *National Register* listing²¹³ and a National Historic Landmark designation, the Secretary is controlling land use of private lands as certainly as if he had zoning authority.

206. 16 U.S.C. § 470(f).

207. 42 U.S.C. § 4332; 40 C.F.R. §§ 1502.1-25 (1981).

208. See *Save the Courthouse v. Lynn*, 408 F. Supp. 1373 (S.D.N.Y. 1970).

209. See *W.A.T.C.H. v. Harris*, 603 F.2d 310.

210. 16 U.S.C. §§ 461-467 (1976 & Supp. III 1979).

211. The District is described in *Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839, 842 (E.D. Va. 1980).

212. 43 Fed. Reg. 3317-18 (Jan. 24, 1978).

213. National Historic Landmarks are listed on the *National Register*. 36 C.F.R. § 60.2 (1981).

Although a federal district court confirmed the Secretary's authority to take title to the easements, it rejected this National Historic Landmark designation as inadequately justified in the record.²¹⁴ Congress legislatively reversed the court's ruling on this point in the National Historic Preservation Act Amendments of 1980.²¹⁵

The *Green Springs* approach to federal land use control for historic preservation is an initial step toward a regulatory mode rather than a procedural mode. This step was administratively developed over a seven-year period and confirmed by Congress. The controls imposed limit the interests of two mining companies, Virginia Vermiculite, Ltd., and W.R. Grace Co., to use their mining rights to mine and process vermiculite in the area. Such controls were characterized by the court as "intrusive" but "not confiscatory."²¹⁶

A second step toward regulation was a more deliberate decision, but, unlike *Green Springs*, one that has yet to be tested. The Surface Mining and Control Act of 1977²¹⁷ goes well beyond the sort of consultation and review authority conferred on the Secretary by the Mining in the Parks Act.²¹⁸ The 1977 Strip Mine Act requires that those who seek permits for surface mining inventory all *National Register* listed sites and known archaeological sites "based on all available information,"²¹⁹ and also requires protection for any *Register* site unless the consents of federal and local officials are obtained.²²⁰ Moreover, the Secretary of the Interior, or a stage official to whom the Secretary's authority has been delegated, may classify lands as "Historic Lands" which are not suitable for mining because of historic, cultural or religious sites.²²¹

The effect of these provisions can be substantial. Persons who wish to mine will be obliged to survey the known literature

214. *Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839 (E.D. Va. 1980).

215. 16 U.S.C. § 470a.

216. *Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. at 849, *citing, inter alia*, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

217. 30 U.S.C. §§ 1201-1328 (Supp. III 1979). See 30 C.F.R. §§ 700-943 (1980). See also *supra* notes 182-88 & accompanying text.

218. 16 U.S.C. §§ 1901-12 (1976).

219. 30 C.F.R. § 779.12(b) (1981).

220. *Id.* § 776.13(b)(3).

221. *Id.* § 762.11.

and expertise in archaeology to identify possible resources needing protection. Areas with *National Register* listed sites, or those which are important enough to be classified as "Historic Lands," may not be available for mining at all.

Will these regulatory patterns be repeated in other contexts? The announced positions of the Secretary of the Interior James Watt make it unlikely in the present administration. The more serious question will be whether in the longer term the Congress will decide to act more rigorously to protect the nation's historic patrimony. It is in the realm of archaeological protection that this is apt to arise; the built environment can be protected effectively by local municipal ordinances. If the regulatory mode is not advanced, however, federal historic preservation law will remain largely a set of procedural requirements governing administrative agency decisionmaking, together with a relatively small number of national monuments owned in fee simple absolute by the United States.

C. *Constitutional Law Issues For Religious Landmarks*

Although most issues of both procedural and substantive due process under the U.S. Constitution appear settled,²²² there are a number of possible historic preservation problem areas for further legal development in constitutional law.²²³ One area that raises thorny questions of competing public interests is the relationship between the First Amendment's guarantee of religious freedom and prohibition of the establishment of religion,²²⁴ and its effect on federal historic preservation programs and also,

222. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

223. Other issues not discussed here include: (1) The availability of an "inverse condemnation" remedy, raised but not decided in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), in the open space and parkland context, an issue which can substantially influence historic preservation regulation if a remedy is to receive recognition by the Supreme Court. (2) The sufficiency of federal criteria for designating historic resources if a federal regulatory program is developed. See the discussion in *Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. at 851-856. (3) The matter of what kind of hearing is required in the historic preservation context has not yet been litigated definitely, and as the regulatory patterns in local laws grow, designation or dedesignation decisions may raise the issue. See *Board of Regents v. Roth*, 408 U.S. 564 (1976).

224. "Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof. . . ." U.S. CONST. amend. I.

through the Fourteenth Amendment, on those of the states.²²⁵

Religious structures represent every historic period and architectural style since the 17th century. Indian religious sites are found throughout North America, many on the public lands of the United States. Since the colonization of North America, religious buildings have been built. Many important acts of national and state history took place inside or in connection with churches. Unlike residential and commercial buildings which tend to become obsolete for their intended uses as building designs improve, in most cases, religious uses of specific buildings remain constant over the years. Many churches and synagogues have been designated as landmarks under local laws. The designations were often welcomed by congregations as a sign of recognition and honor; historic commissions often began by designating old churches, not only because they clearly met landmark criteria, but also because no change in use or economic loss was likely in the wake of a designation. It was a "safe" designation and was often important in terms of local politics.

What is the effect of a designation of a house of worship for the congregation? The full implications of such designation are not yet clear. Will a religious society be obliged to maintain and repair a designated landmark and do so by diverting its funds from other religious undertakings, as would any other nonprofit society? Or would such requirements inhibit the free exercise of religion? Can the state give financial assistance to one religion to maintain its old church building and deny it to another which has built a new house of worship? While no definitive judicial statement addresses these issues, some guideposts do exist. The pattern of law on this subject is neither uniform nor settled.

At the outset, it is clear that the state may constitutionally regulate a religious building for valid police power purposes. The test, stated in *Braunfield v. Brown*,²²⁶ provides that

if the state regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the state's secular goals, the statute is valid despite its indirect burden on religious observance unless the state may accomplish its purpose

225. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

226. 366 U.S. 599 (1961); see also *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

by means which do not impose such a burden.²²⁷

The New York City Landmarks Preservation Act²²⁸ has encountered religious sites and problems in their designation in several instances. The Archbishopric of New York had assembled title to the Villard Houses and, after removing religious uses from the complex to the Catholic Center near the East River, ultimately only wished to receive as much income as possible to fund religious activities. The secular status as landlord was but one means to the religious end. In leasing the Villard Houses to the would-be New York Palace Hotel, the Archbishopric assisted the developer in the plans for partial demolition and reuse.²²⁹

While the Villard contest resulted in a compromise, the Lutheran Church did battle with the Landmarks Commission and won. The Lutheran Church acquired the J.P. Morgan mansion, an elaborate "Anglo-Italianate" structure, in 1942 to use as administrative offices. The Landmarks Commission designated Morgan House a city landmark in 1965. Once the administrative needs of the Church outgrew the space, Lutheran leaders proposed to demolish the Morgan House and build a contemporary office building. The New York City Court of Appeals ultimately invalidated the landmark designation, deciding in the negative the question

whether that part of the New York City Landmarks Preservation Law which purports to give the Landmarks Preservation Commission the authority to infringe upon the free use of individual premises remaining in private ownership is a valid use of the city's police power in cases where an owner for charitable purposes demonstrates hardship, economic or otherwise.²³⁰

The court treated the Church like any not-for-profit organization, rather than one protected by the First Amendment.²³¹ Un-

227. *Braunfield v. Brown*, 366 U.S. at 607.

228. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 8-A, §§ 205-207 (Williams 1976 & Supp. 1981).

229. See discussion *supra* at note 197.

230. *Lutheran Church In America v. City of New York*, 35 N.Y.2d 121, 123, 316 N.E.2d 305, 307, 359 N.Y.S.2d 7, 9 (1974).

231. See the discussion in Comment, *Landmarks Preservation and Tax-Exempt Organizations: A Proposal In Response to Lutheran Church*, 1 COLUM. J. ENV'T'L L. 274 (1975).

like the Villard House, the Morgan House was for a religious use, albeit for administrative rather than for worshipful purposes.

The direct question of religious use versus landmark preservation was also presented in the case of the Ethical Culture Society, which sought to demolish its landmark Meeting House in order to replace it with an apartment complex built for investment purposes. The Society asserted that its First Amendment rights took precedence over the City's Landmark Act.²³² The Court of Appeals declined to repeat its *Lutheran Church*²³³ precedent; it observed that

the Society does not seek simply to replace a religious facility with a new, larger facility. Instead, using the need to replace as justification, it seeks the unbridled right to develop its property as it sees fit. This is impermissible, and the restriction here involved cannot be deemed an abridgement of any First Amendment freedom, particularly when the contemplated use, or a large part of it, is wholly unrelated to the exercise of religion, except for the tangential benefit of raising revenue through development.²³⁴

The court went on to suggest that if the Society needed to replace its Meeting House with a larger one "and is denied permission," possibly "a claim of First Amendment impairment might lie."²³⁵

Thus, there has not yet been a reported confrontation between the constraints of a landmark designation and the decision of a religious society to demolish a landmark structure in direct furtherance of religious objectives. Quite probably the preservation of a validly designated landmark will be allowed, and the religious society obliged to pursue other building plans. This would be the teaching of *Braunfield v. Brown*, since the imposition on the religious society "neither prohibits nor di-

232. In doing so, the Society relied upon *Westchester Reform Temple v. Brown*, 22 N.Y.2d 488, 239 N.E.2d 891, 293 N.Y.S.2d 297 (1968).

233. *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7.

234. *Society for Ethical Culture v. Spatt*, 68 A.D.2d 112, 122, 416 N.Y.S.2d 246, 253 (1979), *aff'd*, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980).

235. *Id.*

rectly addresses religious observance.”²³⁶ The rationale is not unlike that expressed by Judge Jasen of the New York State Court of Appeals in his dissent from the *Lutheran Church* decision:

Perhaps it is time that aesthetics took its place as a zoning end *independently* cognizable under the police power for “a high civilization must . . . give full value and support to the . . . great branches of man’s scholarly and cultural activity in order to achieve a better understanding of the past, a better analysis of the present, and a better view of the future.” . . . Indeed, under our cases that would be but a moderate and logical extension.²³⁷

New York’s legislature took such a step in enacting the State’s Historic Preservation Act of 1980.²³⁸

One seasoned Constitutional lawyer summed up the current First Amendment conflicts with historic preservation objectives as follows:

Thus, it appears that a church cannot raise the First Amendment as a bar to landmark designation, or even to prevent application of adequate maintenance and anti-demolition provisions. However, there may be instances in which a church will claim that a particular remodeling or perhaps demolition is necessary for the use of the property for church purposes, and no other solution is feasible. In such a case the First Amendment issues will receive careful consideration, and the result is by no means clear.²³⁹

The other side of the First Amendment coin is the prohibition against the establishment of religion. This prohibition may be violated in the historic preservation context because government grants for maintenance of historic structures are often sought by churches. The Solicitor of the Department of the Interior has ruled that grants from the Historic Preservation Fund²⁴⁰ may be made for purposes of renovating historic churches with active congregations.²⁴¹

236. *Braunfield v. Brown*, 366 U.S. at 607.

237. *Lutheran Church in America v. City of New York*, 35 N.Y.2d at 134-35 n. 4, 316 N.E.2d at 314 n. 4, 359 N.Y.S.2d at 19 n. 4 (Jasen, J., dissenting).

238. N.Y. PARKS & REC. LAW §§ 14.01-.09 (McKinney 1981).

239. D. Bonderman, *Constitutional Issues for Preservation Law*, in *HISTORIC PRESERVATION LAW 1980*, *supra* note 5 at 39.

240. 16 U.S.C. § 470a.

241. Memorandum from the Associate Solicitor, Conservation and Wildlife, James

Under *Lemon v. Kurtzman*,²⁴² the constitutional test for aid to religion is the following: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion. . . .; finally, the statute must not foster an excessive government entanglement with religion."²⁴³

There has yet to be a constitutional test of funding for maintenance of religious buildings to preserve their historic values. Like providing buses to students attending parochial schools,²⁴⁴ providing restoration grants for restoring an historic facade after a fire could meet the *Lemon v. Kurtzman* tests. The Supreme Court has noted the effect such grants might have in aiding religion indirectly and acknowledged that it is to be allowed just as the indirect burdens on freedom of religion which the police power may entail must be allowed.²⁴⁵

Thus, like all not-for-profit entities, religious societies may be bound by the duties to preserve a landmark and may receive the benefits available to do so. Should the duty to preserve not be economically possible for the religious society, a tough impasse is likely. While the First Amendment will probably prevail as a constitutional mandate over a statutory obligation for preservation of a landmark, such a tough case may well yield poor law. This eventuality should be addressed legislatively by way of anticipation. Special aid for such extreme cases should be pro-

D. Webb, to the Director, Heritage Conservation and Recreation Service, on Historic Preservation Grants for Renovation of Church Properties (March 6, 1979), reprinted in *HISTORIC PRESERVATION LAW*, *supra* note 5 at 287-302 (N.A. Robinson ed., PLI, 1979). This advisory opinion reaffirmed a Solicitor's ruling in 1977 to the same effect).

242. 403 U.S. 602 (1976).

243. *Id.* at 612-613.

244. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

245. In *Roemer v. Board of Public Works*, 426 U.S. 736, 745-47 (1975), the Court noted that:

The Court has enforced a scrupulous neutrality of the state, as among religions and other activities, but a hermetic separation of the two is an impossibility it has never required. . . . And religious institutions need not be quarantined from public benefits that are neutrally available to all. . . . The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. If this were impermissible, however, a church could not be protected by police and fire departments, or have the public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way.

Id. (citations omitted).

vided to religious landmarks in order to avert such a predictable impasse. The secular basis of such aid in furthering the community's interest in the landmark must be made clear. Probably the aid should be available to all such landmarks, secular or religious.

D. *Archaeological Preservation*

Although many religious landmarks of the native American peoples are found throughout the continent, their preservation is sadly neglected. Construction of the Tellico Dam on the Little Tennessee River, for instance, would inundate the site of the ancient Cherokee towns of Echota and Tennase; Echota was the sacred capital of the Cherokee nation as early as the 16th century. Congress had enacted laws to preserve the snail darter, an endangered species,²⁴⁶ but not the sacred sites of the Cherokee.²⁴⁷ The preservation of these sacred sites is, arguably, required to honor the Constitutional mandate not to prohibit the free exercise of religion. The closest Congress had come to providing a system to preserve sacred sites was enactment of the Reservoir Salvage Act of 1960,²⁴⁸ and all that this act did was require notice to the Secretary of the Interior of dam construction so that the Secretary could authorize an archaeological survey of affected areas and initiate salvage operations if the Secretary wished.

This illustration puts in relief one aspect of the issue of archaeological preservation. Federal law on archaeological resources does not yet embody strong statutory mandates. Archaeological law does not by itself alone protect archaeological sites, but only constrains the government to study those sites. As with the federal historic preservation law generally,²⁴⁹ architectural sites and landmarks can equally likely be destroyed. The problems inherent in such an unclear policy context, however,

246. *Percina mostoma tanasi*.

247. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).

248. 16 U.S.C. §§ 469-469h (1976 & Supp. III 1979), as amended by 16 U.S.C.A. §§ 469a-3(c), 469c-1, 469h (West Supp. 1980). The Reservoir Salvage Act of 1960 is also known as the Archaeological and Historic Preservation Act of 1960. See *supra* note 177 and accompanying text. Pub. L. No. 86-523, 74 Stat. 220 (codified at 16 U.S.C.A. §§ 469-469c-1 (West Supp. 1980)).

249. See notes 207-22 and accompanying text *supra*.

are compounded by a further uncertainty. Is archaeological preservation properly a part of historic preservation law or of the emergent field of art law, or is it *sui generis*? The status of the legal protection of archaeological resources is unsettled and evolving. It is noted here as an unresolved issue in the development of historic preservation law.

Because of the importance of the various Indian peoples in the states, the state governments early enacted a wide range of laws to protect archaeological resources.²⁵⁰ These were of varying purpose and effectiveness. In the most recent comprehensive revision of historic preservation law by a state, New York included archaeological heritage within the purview of its Historic Preservation Act,²⁵¹ defining historic preservation to include the study, designation, protection, restoration, rehabilitation and use of sites significant to, *inter alia*, archaeology.²⁵²

Most other states have yet to address the policy issue of whether archaeology falls within or without the field of historic preservation. California has taken the same position as New York, employing archaeologists within the State Historic Preservation Office. This pattern may well continue.

The federal pattern, however, remains unclear. Since one-third of the nation's land is public, that is, in the custody of the federal government, a substantial volume of archaeologically important resources are found within federal jurisdiction and wholly under government control.

The Antiquities Act of 1906²⁵³ included within its scope areas of prehistoric value. This has been used to justify federal protection of archaeological resources.²⁵⁴ The usefulness of this act in preserving archaeological sites was jeopardized by a decision of the Court of Appeals for the Ninth Circuit²⁵⁵ reversing a conviction under the act's criminal provisions²⁵⁶ on the grounds

250. See the compilation in MORRISON, *HISTORIC PRESERVATION LAW* (1965).

251. See N.Y. PARKS & REC. LAW §§ 14.01-.09 (McKinney 1981); N.Y. GEN. MUN. LAW §§ 119aa-119dd (McKinney 1980).

252. N.Y. PARKS & REC. LAW §§ 14.03(4) & 14.03(5) (McKinney 1981).

253. 16 U.S.C. §§ 431-33 (1976).

254. Fish, *Federal Policy and Legislation for Archaeological Conservation*, 22 ARIZ. L. REV. 681, 686-88 (1981).

255. *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974).

256. 16 U.S.C. § 433 (1976).

that the act was so vague that it violated due process. The court observed that the act fails to define "such terms as 'ruin' or 'monument' (whether historic or prehistoric) or 'object of antiquity.'" ²⁵⁷ While the Tenth Circuit Court has declined to follow the construction of the Ninth Circuit, ²⁵⁸ there is evident need to clarify the preservation enforcement mechanism.

The National Historic Preservation Act of 1966²⁵⁹ provides scant references to archaeological sites; the act's findings make no substantial reference to archaeology, including it within the list of subjects eligible for inclusion on the *National Register*.²⁶⁰ The regulations specifying the criteria for nominating and including sites on the *National Register* include those that "have yielded, or may be likely to yield, information important in prehistory or history."²⁶¹

When President Richard Nixon issued Executive Order No. 11,593 on "Protection and Enhancement of the Cultural Environment,"²⁶² there was no explicit mention of protecting archaeological sites on federally-controlled lands or those affected by federal permits. Only with enactment of the Archaeological and Historic Preservation Act of 1974²⁶³ did Congress give clear policy direction on archaeological resources. This act, however, is not fully implemented. It provides that whenever any federal agency finds out that archaeological and historic resources may be lost, that agency must advise the Secretary of the Interior. The agency may then ask the Secretary to recover the archaeological resources or use agency project funds to do so. The Secretary may also investigate and recover archaeological resources under his authority.²⁶⁴

After five years of little use, the Secretary issued a "Statement of Program Approach" in 1979.²⁶⁵ This statement advised

257. *United States v. Diaz*, 499 F.2d at 114.

258. *United States v. Smyer*, 596 F.2d 939 (10th Cir. 1979).

259. 16 U.S.C. § 470.

260. *Id.* §§ 470, 470a(a)(1).

261. 36 C.F.R. § 60.2 (1981).

262. Exec. Order No. 11,593, 3 C.F.R. 559 (1971-75 Comp.), reprinted in 16 U.S.C. app. § 470 (1976).

263. 16 U.S.C. § 469a-1.

264. *Id.* § 469a-2.

265. 44 Fed. Reg. 18117 (March 26, 1976), reprinted in HISTORIC PRESERVATION LAW, *supra* note 5, at 43-44.

agencies about the steps to take in implementing their consideration and recovery of prehistoric and archaeological data. No binding regulations nor any reported use of the act have appeared.

The most explicit Congressional archaeological policy is set forth in the Archaeological Resources Protection Act of 1979.²⁶⁶ This act governs archaeological resources on public lands and Indian lands. It expressly finds that "existing federal laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage."²⁶⁷ No archaeological resource may be removed from public lands without a permit. Criminal safeguards are provided,²⁶⁸ as well as civil penalties.²⁶⁹

While the 1979 act curbs the commercial exploitation of archaeological digs, the 1974 act has the potential to curb the inadvertent or uncaring destruction of archaeological sites in the course of mining, pipeline construction, and other land development activity. It remains to be seen whether either act will be implemented. Will a new energy-related development suspend activity to allow an archaeological dig? Federal law provides that it must, but there is little evidence of preparation for this eventuality.

Equally unclear is the impact this growing body of federal law will have on state law. The section 106 Advisory Council process requires State Historic Preservation Officers to consider archaeological matters.²⁷⁰ Some states, such as New York,²⁷¹ require state agencies to protect archaeological resources. No express obligations are set for hiring archaeologists to carry out these policies. While the use of archaeologists in the preparation of environmental impact statements has grown,²⁷² it is not evi-

266. 16 U.S.C. §§ 470aa-470ll (Supp. III 1979).

267. *Id.* § 470aa(a)(3).

268. *Id.* § 470ee.

269. *Id.* § 470ff.

270. 36 C.F.R. §§ 800.4(a)-(b), 800.5 (1981).

271. N.Y. PARKS & REC. LAW § 20.01 (McKinney 1981).

272. When § 102(2)(c) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(c) (1976), requires a decision as to whether or not to prepare an EIS, it is necessary to consider "the degree to which the action may adversely affect districts, sites, highways, structures or objects listed in or eligible for listing in the *National Register of Historic Places* or may cause loss or destruction of significant scientific, cultural or his-

dent that local governments or even most state governments have obtained expert archaeological assistance.

Few municipal landmark or historic district ordinances have included controls over archaeological sites. St. Louis does provide that a landmark or district may qualify for designation if it "has yielded, or is likely to yield, according to the best available scholarship, archaeological artifacts important in prehistory or history."²⁷³ If the *National Register* criteria are to influence local government in requiring preservation of archaeological resources, a whole further set of financial undertakings will be required. Can an ordinance require a developer on private land to undertake an archaeological dig to document and preserve archaeological resources in connection with a project? Like the affirmative maintenance issue discussed above,²⁷⁴ this issue is pregnant with both promise and problems.

A recent symposium of the Law & Arts Section of the Association of American Law Schools explored this growing body of law on archaeological resource protection.²⁷⁵ The introduction to the printed proceedings of this meeting urged, "It is important for the archaeological and legal professions to assume a joint guardianship of our [archaeological] heritage."²⁷⁶ It may be that archaeologists will cultivate their own legal field; the preservationists of the built environment, stimulated by the National Trust for Historic Preservation, have done little to promote the archaeological dimension of historic preservation.

In sum, the test has yet to appear which will propel archaeological law into its own field or prod it fully into historic preservation law. Since a separate discipline of experts is required for archaeology, there are practical implications to this evolution. Art historians, architects, and local historians hold the center stage on historic preservation at present.

toric resources." 40 C.F.R. § 1508.27(b)(8) (1980).

273. ST. LOUIS, MO., HERITAGE AND URBAN DESIGN CODE, Ordinance No. 57986, § 896.010(6) reprinted in HISTORIC PRESERVATION LAW 1980, *supra* note 5 at 239, 243 (N.A. Robinson ed., PLI, 1980).

274. See *supra* notes 192-200 & accompanying text.

275. AALS Annual Meeting, Phoenix, Arizona, Jan. 3, 1980.

276. Nafziger, *Introduction, Symposium: Legal Protection of America's Archaeological Heritage*, 2 ARIZ. L. REV. 675, 676 (1980).

VII. Conclusions

There is much more to historic preservation law than the following Symposium or this introduction can review here. A wealth of detail has emerged, with discussion and material ranging from the design of an historic district to the administrative steps needed for a landmark's designation.²⁷⁷ There are many more normative issues, such as how urban redevelopment should treat which historic resources.²⁷⁸

This symposium is meant to suggest the parameters of Historic Preservation Law and to identify some of the variables at work in shaping those boundaries and the content therein. The only area which has so changed since the symposium was held that it was not prudent to include with these printed proceedings was the income tax analysis.²⁷⁹ That presentation by Frederick Goldstein²⁸⁰ was printed in the coursebook for the conference²⁸¹ and not only have more recent publications have superseded it,²⁸² but the Economic Recovery Tax Act of 1981 further revises tax incentives for the rehabilitation of historic structures and renders prior tax analysis largely inapplicable.²⁸³

The rest of the principal presentations have been transcribed and edited as necessary by the authors and students at Pace University School of Law and are included here. The authors provide a wealth of useful insights and guidance for practitioners of this new field.

With the passing of the bicentennial benchmark, the United States maturely has concluded that its historic patrimony must

277. See, e.g., the outline and illustrative documents provided by D. Miner, *Case Study: Administrative Procedures of New York City Landmarks Preservation Commission*, in *HISTORIC PRESERVATION LAW 1980*, *supra* note 5 at 43.

278. See, e.g., *Case Study: Applying Federal Preservation Law Administrative Agency Procedures for Urban Renewal*, in *HISTORIC PRESERVATION LAW 1980* *supra* note 5 at 417, 581.

279. Goldstein, *Federal Tax Aspects*, in Panel on *Legal Avenues for Preserving Private Properties and Districts* (Sept. 23, 1978).

280. Member of the Massachusetts bar; partner in Csaplar & Bok, Boston, Mass.

281. *HISTORIC PRESERVATION & THE LAW: THE METES AND BOUNDS OF A NEW FIELD*, Conference, September 22-23, 1978 (E. Cowan ed. 1978) (privately printed for the conference participants).

282. *TAX INCENTIVES FOR HISTORIC PRESERVATION* (G. Andrews ed. 1980).

283. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, §§ 1, 101-832, 95 Stat. 183 (1981).

be conserved. Succeeding generations will view themselves as stewards of the art, architecture and accomplishments of those who planned and built the nation. The evidence is in the near spontaneous flowering of municipal historic preservation laws in villages, towns and cities in every state.

Once recognized, historic preservation law will not pass. A new facet of the exercise of society's police powers has been cut, and its refractive light increasingly is found throughout the body politic. In another decade, this symposium may look as dated as the one held ten years ago at Duke University.²⁸⁴ For the short term, these authors illuminate the new field as ably and comprehensively as is currently possible.

284. Published in 36 *LAW & CONTEMP. PROBS.* 311 (1971).