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# New Steps to Preserve the Old: The Revised Historic Preservation Legislation for the City of Philadelphia

Charlotte E. Thomas

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1987]

# NEW STEPS TO PRESERVE THE OLD: THE REVISED HISTORIC PRESERVATION LEGISLATION FOR THE CITY OF PHILADELPHIA

CHARLOTTE E. THOMAS\*

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## I. INTRODUCTION

In 1955, the City of Philadelphia first enacted a city ordinance to preserve its historic structures.<sup>1</sup> At that time, Philadelphia was a pioneer for other cities in historic preservation legislation. Eventually, however, the old ordinance became outmoded, failing to keep up with the evolving jurisprudence of aesthetic regulation. By 1984, an overhaul of the ordinance was long overdue. The update finally occurred in December of that year, when the Council of the City of Philadelphia passed an ordinance which repealed the existing ordinance and replaced it with new legislation governing historic preservation in Philadelphia.<sup>2</sup>

This article analyzes the new historic preservation ordinance. It does so by first evaluating the evolution of the law of aesthetic regulation and the ways in which changes in the law affected the permissible bounds of historic preservation legislation. Second, historic preservation legislation of other cities or municipalities in the United States is reviewed. Finally, the new ordinance is evaluated and compared with its legislative predecessor.

## II. THE CONSTITUTIONAL EVOLUTION OF LAND USE REGULATION AND HISTORIC PRESERVATION LEGISLATION

There are three constitutional issues in historic preservation legislation, as well as in other land use regulation: 1) what is a proper public purpose under the police power, 2) what are sufficiently definite standards to guide powers delegated to a governmental entity, and 3) how is the regulation of property affected by the substantive due process clause of the fourteenth amendment to the United States Constitution. With respect to each issue, the

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1. PHILADELPHIA, PA., CODE § 14-2007 (1955) (amended 1956) (repealed 1984).

2. PHILADELPHIA, PA., CODE § 14-2007 (1984).

constitutional boundaries of land use regulation have expanded in the last two decades. This expansion has prompted the introduction of innovative land use controls, such as legislation which seeks to protect historic resources, into the regulatory arsenal of cities and municipalities.

*A. Aesthetics as a Proper Public Purpose Under the Police Power*

A municipality is not a sovereign and it has no independent power to legislate.<sup>3</sup> It may only enact legislation which is either directly or indirectly authorized by the state in which it is located.<sup>4</sup> The broad power of the states to regulate land use and development is termed the "police power."<sup>5</sup> Typically, the police power is delegated to municipalities by way of state enabling legislation, which gives local government the power to enact legislation which furthers the health, safety and welfare of that community.<sup>6</sup> Therefore, in analyzing the constitutionality of a land use ordinance, one question which arises is whether the ordinance furthers a proper public purpose.<sup>7</sup>

The first land use ordinance upheld by the United States Supreme Court against a constitutional challenge was that of the City of Euclid, Ohio, in *Village of Euclid v. Ambler Realty Co.*<sup>8</sup> The

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3. *Cleaver v. Board of Adjustment*, 414 Pa. 367, 373, 200 A.2d 408, 412 (1964) (municipalities can enact only those ordinances which are authorized by state legislature). For further discussion of this aspect of the *Cleaver* holding, see *infra* note 65.

4. *Cleaver v. Board of Adjustment*, 414 Pa. 367, 373, 200 A.2d 408, 412 (1964); *see also* *City of Pittsburgh v. Commonwealth*, 468 Pa. 174, 179, 360 A.2d 607, 610 (1976) ("Municipalities derive their power to enact zoning ordinances from specific grants by the Legislature."); *Kline v. Harrisburg*, 362 Pa. 438, 447, 68 A.2d 182, 187 (1949) ("It is settled in Pennsylvania that in the absence of the granting of specific power from the Legislature municipalities do not have the authority to pass zoning ordinances.").

5. *See* *Best v. Zoning Bd. of Adjustment*, 393 Pa. 106, 110, 141 A.2d 606, 609-10 (1958); *see also* *Cleaver v. Board of Adjustment*, 414 Pa. 367, 372, 200 A.2d 408, 412 (1964). In *Cleaver*, the police power was defined as follows: "[T]he Supreme Power of Government . . . to regulate or prohibit an owner's use of his property provided such regulation or prohibition is clearly or reasonably necessary to preserve or protect the health or safety or morals and general welfare of the people." *Cleaver*, 414 Pa. 367, 372, 200 A.2d 408, 412 (1964).

6. *See* *Archbishop O'Hara's Appeal*, 389 Pa. 35, 51-53, 131 A.2d 587, 595-96 (1957); *Kline v. Harrisburg*, 362 Pa. 438, 448-54, 68 A.2d 182, 187-89 (1949).

7. *See* *Best v. Zoning Bd. of Adjustment*, 393 Pa. 106, 111-12, 141 A.2d 608, 610 (1958).

8. 272 U.S. 365 (1926). In *Euclid*, an owner of unimproved land within the corporate limits of the village brought suit to enjoin the village and its building inspector from enforcing a zoning ordinance that excluded apartment houses and hotels from residential areas. *Id.* at 390. The landowner claimed that the

*Euclid* Court reasoned that the power to zone was included in the state police power, and further concluded that land use regulation which furthers the health, safety and welfare of a community is constitutionally valid.<sup>9</sup>

Regulation of land use within a community is related to regulation of the appearance of a community. Under *Euclid*, land use regulation which furthers the health, safety or welfare of a community is valid, but courts have been reluctant to uphold ordinances which regulate land uses based upon aesthetic factors. One reason for the judicial caution is the view that the government is an entity ill suited to oversee subjective decisions concerning beauty or taste.<sup>10</sup> Courts have conveyed the impression that land use regulation based upon aesthetics is a luxury and that only necessity can be the subject of valid land use regulation.<sup>11</sup>

Modern land use regulation now incorporates the concept of aesthetics as a fundamental element of community planning. Aesthetic regulation was first approved by the United States Supreme Court in *Berman v. Parker*.<sup>12</sup> According to the author of this landmark opinion, Justice Douglas:

The concept of the 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

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ordinance was unconstitutional because it reduced the normal value of his property and deprived him of liberty and property without due process of law. *Id.* at 371-72. The Supreme Court upheld the ordinance as a valid exercise of the state's police power. *Id.* at 396-97.

9. Although the *Euclid* Court did not expressly delineate the meaning of "health, safety and general welfare," it pointed out that experts had found that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc. *Id.* at 394.

10. For a discussion of the problem of setting objective standards and criteria in the field of aesthetic zoning, see generally Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROBS. 218, 226-27 (1955); Masotti & Selfon, *Aesthetic Zoning and the Police Power*, 46 J. URBAN L. 773 (1969); Comment, *Architecture, Aesthetic Zoning, and the First Amendment*, 28 STAN. L. REV. 179 (1975).

11. See, e.g., *City of Youngstown v. Kahn Bros. Bldg. Co.*, 112 Ohio St. 654, 148 N.E. 842 (1925). For a discussion of aesthetic considerations, as well as historic preservation generally, see P. ROHAN, *ZONING AND LAND USE CONTROLS* (1986).

12. 348 U.S. 26 (1954).

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.<sup>13</sup>

The trend in the law among the states is toward acceptance of the concept that aesthetic considerations alone will justify the exercise of the police power in land use regulation.<sup>14</sup>

At one time in Pennsylvania, aesthetics was not considered a legitimate basis for the regulation of private property.<sup>15</sup> Today, Pennsylvania courts, compared to those of other jurisdictions, continue to view aesthetic zoning with some hostility.<sup>16</sup> While aesthetics is accepted as a valid consideration in the enactment of land use regulation, Pennsylvania courts insist that aesthetic considerations alone cannot justify the invocation of the state's police power.<sup>17</sup>

The visually identifiable objective of legislation protecting

13. *Id.* at 33.

14. 3 P. ROHAN, *supra* note 11, at 16-211.

15. *See, e.g.*, *Miller v. Seaman*, 137 Pa. Super. 24, 8 A.2d 415 (1939). In *Miller*, the Pennsylvania Superior Court noted that the dwelling at issue may not harmonize or be in aesthetic agreement with [the buildings of abutting owners] . . . but zoning laws and regulations are not based on aesthetics but on the health, morals and safety of the community, and these are not affected by the proposed building. The limitation of the right to use one's own property, which is one of the consequences of zoning regulations must be reasonable and based on imperious considerations of public health, morals and safety, not on artistic or aesthetic considerations.

*Id.* at 31, 8 A.2d at 417.

16. 3 P. ROHAN, *supra* note 11, at 16-108.

17. *Berk v. Wilkesburg Zoning Hearing Bd.*, 48 Pa. Commw. 496, 410 A.2d 904 (1980); *see also* *White Advertising Metro, Inc. v. Zoning Hearing Bd. of Susquehanna Township*, 70 Pa. Commw. 308, 453 A.2d 29 (1982); *Bux-Mont, Inc. v. Township of Cheltenham*, 36 Pa. Commw. 397, 388 A.2d 1106 (1978); *County of Fayette v. Holman*, 11 Pa. Commw. 357, 315 A.2d 335 (1973). *But see* *Miller v. Seaman*, 137 Pa. Super. 24, 8 A.2d 415 (1939). These recent cases reflect the commonwealth court's refusal to accept the notion that aesthetics is a valid basis for land use regulation, despite the Pennsylvania Supreme Court's pronouncement regarding article 1, section 27 of the Pennsylvania Constitution. In *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 311 A.2d 588 (1973), the court stated:

It must be recognized, however, that up until now, aesthetic or historical considerations, by themselves, have not been considered sufficient to constitute a basis for the Commonwealth's exercise of its police power. . . .

Now, for the first time, at least insofar as the state constitution is concerned, the Commonwealth has been given power to act in areas of purely aesthetic or historic concern.

*Id.* at 200-01, 311 A.2d at 592.

historic structures, sites and districts is the promotion of aesthetically pleasing architecture and neighborhoods. Yet, historic preservation also has desirable effects upon, *inter alia*, economic growth, tourism and neighborhood vitality.<sup>18</sup> Thus, historic preservation legislation often contains a statement of legislative purpose which acknowledges that historic preservation advances the public welfare beyond mere aesthetics.<sup>19</sup> A determination by a legislature of a particular jurisdiction that the preservation of historic structures and areas furthers the public welfare is "well-nigh conclusive."<sup>20</sup> Indeed, the Pennsylvania State Legislature has enacted legislation specifically authorizing local historic district ordinances.<sup>21</sup>

### B. Standards

A second constitutional issue concerning historic preservation legislation is the requirement of standards or criteria by which governmental decisions affecting historic properties can be made. Any legislation which delegates decision making authority to a governmental entity must provide sufficiently clear standards to govern the decision-making process.<sup>22</sup> Standards are intended to curtail discretion in decision making by an administrative or quasi-judicial entity, as prohibited by the due process and equal protection clauses of the fourteenth amendment,<sup>23</sup> and thus to

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18. K. LYNCH, *GOOD CITY FORM* 257-58 (1981).

19. See, e.g., PA. STAT. ANN. tit. 71, § 1047.1b (Purdon Supp. 1986); PA. STAT. ANN. tit. 53, § 8002 (Purdon Supp. 1986); see also *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Therein, the United States Supreme Court stated:

Because 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 a city, . . . appellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal.

*Id.* at 129 (citations omitted).

20. *Berman*, 348 U.S. at 32.

21. See PA. STAT. ANN. tit. 53, §§ 8001-06 (Purdon 1972 & Supp. 1986). It should be noted that this enabling legislation does not cover first class cities in Pennsylvania. For the text of this legislation and a discussion of its omission of first class cities, see *infra* note 288 and accompanying text. Philadelphia, as the only first class city in Pennsylvania, is governed by the Home Rule Act. PA. STAT. ANN. tit. 53, §§ 13101-13157 (Purdon 1957 & Supp. 1986). For a discussion of the effect of the 1984 historic preservation ordinance on the Home Rule Charter, see *infra* notes 260-89 and accompanying text.

22. See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

23. See *Norate Corp., Inc. v. Zoning Bd. of Adjustment*, 417 Pa. 397, 403-

avoid constitutional infirmity by an improper delegation of legislative power.<sup>24</sup>

Standards are particularly important in the review of design or aesthetic proposals. Criteria which set forth the factors upon which design proposals will be judged protect landowners and designers from arbitrary administrative decisions and lend guidance to the governmental entity which must make those decisions. Yet standards which entirely eliminate discretion on the part of an administrative agency or commission are virtually impossible to formulate, since the review of design is by its nature essentially a subjective process.<sup>25</sup>

Many historic ordinances contain standards for both the designation process and for the review of alteration or demolition permits.<sup>26</sup> The omission of standards, however, may not invalidate a historic preservation ordinance as long as sufficient safeguards against unfettered discretion on the part of the governmental entity are included in the legislative structure of the ordinance.<sup>27</sup> Nevertheless, tightly drafted criteria are desira-

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04, 207 A.2d 890, 893-94 (1965); *see also* H.A. Steen Indus. Inc. v. Cavanaugh, 430 Pa. 10, 16, 241 A.2d 771, 775 (1968).

24. *See* 2 P. ROHAN, *supra* note 11, at 7-52.

25. *See generally* Dukeminier, *supra* note 10, at 20, 226-27 (1955). The author states:

Beauty cannot be any more precisely defined than wealth, property, malice, or a host of multiordinal words to which courts are accustomed. Planners can give *reasons* for saying a particular arrangement of objects in the environment is beautiful based upon perspectives common in high degree among the people in a community, but they cannot *prove* it

....

*Id.* (emphasis in original).

26. For a discussion of standards applied to designation and permit review, *see infra* notes 131-32 & 142-46 and accompanying text.

27. *See, e.g.,* Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975). The Maher court found:

While concerns of aesthetic or historical preservation do not admit to precise quantification, certain firm steps have been undertaken here to assure that the Commission would not be adrift to act without standards in an impermissible fashion. First, the Louisiana constitution, the Vieux Carré Ordinance and, by interpretation, the Supreme Court of Louisiana, have specified their expectations for the Vieux Carré and the values to be implemented by the legislation.

Further, the legislature exercises substantial control over the Commission's decision making in several ways. Where possible, the ordinance is precise, as for example in delineating the district, defining what alterations in which locations require approval, and particularly regulating items of special interest . . . .

Another method by which the lawmaking body curbed the possibility for abuse by the Commission was by specifying the composition of that body and its manner of selection.

*Id.* at 1062 (footnotes omitted).



ble in the enactment of a historic preservation ordinance.<sup>28</sup>

### C. *The Substantive Due Process or "Taking" Issue*

The gradual judicial acceptance of aesthetics in land use regulation has been accompanied by a judicial trend of reluctance to find land use and historic preservation legislation to be "takings" under the fourteenth amendment.<sup>29</sup> From the days of *Pennsylvania Coal v. Mahon*,<sup>30</sup> the rule has been that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."<sup>31</sup> Thus, owners of designated historic structures who were denied opportunities to alter or demolish and develop their properties complained that preservation legislation amounted to a taking of their properties without compensation.<sup>32</sup> However, it is now clear that courts will not find a taking of property based solely on a decrease in property value resulting from the enforcement of a land use ordinance.<sup>33</sup> Rather, the property must become virtually valueless as a result of enforcing the regulation.<sup>34</sup>

A landmark case involving "taking" jurisprudence in the con-

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28. For a discussion of the constitutional importance of sufficiently defined standards of criteria, see *infra* notes 141-45 and accompanying text.

29. U.S. CONST. amend. XIV. The fourteenth amendment provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

30. 260 U.S. 393 (1922).

31. *Id.* at 415. In *Pennsylvania Coal*, the owner of land containing coal deposits deeded the surface to the Mahons, who assumed all risks and waived all rights to damages which might arise as the result of the coal owner's continued mining. *Id.* at 394-95. The state later enacted a statute forbidding mining in such a way as to cause subsidence of any human habitation. *Id.* at 393-94. The Court held that this prohibition exceeded the state's police power, because it deprived the coal owner of his property in violation of the contract and due process clauses of the Constitution. *Id.* at 414-16. *But see* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232 (1987).

32. *See, e.g., Figarsky v. Historic Dist. Comm'n*, 171 Conn. 198, 368 A.2d 163 (1976). In *Figarsky*, the owners of a house and lot located within the Norwich historic district applied to the town's historic commission for a permit to demolish the house. *Id.* at 199, 368 A.2d at 166. The commission denied the application on the basis that the building contributed to the importance of the area as an historic landmark. *Id.* at 201, 368 A.2d at 167. On appeal, the Supreme Court of Connecticut upheld the denial of the application. *Id.* at 212, 368 A.2d at 172. In response to plaintiffs' argument that the denial rendered the ordinance creating the historic district confiscatory as to them, the court stated that relief may be granted only when the regulation practically destroys or greatly decreases the value of property. *Id.* at 211-12, 368 A.2d at 171.

33. *See, e.g., id.* at 211-12, 368 A.2d at 171.

34. *See, e.g., id.*

text of historic preservation legislation is *Maher v. City of New Orleans*.<sup>35</sup> In *Maher*, the Court of Appeals for the Fifth Circuit found that the application of historic district legislation governing the Vieux Carré in New Orleans to plaintiff's property did not constitute a taking.<sup>36</sup> Plaintiff argued that his property had been "taken" because the Vieux Carré Commission denied his application for a permit to build an apartment complex on his land and because the legislation imposed an affirmative duty to maintain his property in good repair.<sup>37</sup> The court reasoned that police power regulation is not invalid merely because it prevents achieving the maximum economic potential of property.<sup>38</sup> Rather, an ordinance must be so "unduly onerous . . . as to be confiscatory."<sup>39</sup> The court concluded that plaintiff had failed to demonstrate that "the ordinance so diminished the property value as to leave Maher in effect, nothing."<sup>40</sup> It further found that the affirmative duty to maintain historic properties imposed by the ordinance did not amount to a taking.<sup>41</sup>

Pennsylvania courts have adopted the test of *Maher*. For example, in *First Presbyterian Church of York v. City Council of York*,<sup>42</sup> a church argued that enforcement of the historic ordinance was a taking as applied to the "York House," a structure which it had planned to raze.<sup>43</sup> The commonwealth court concurred with the trial court that the *Maher* test should be applied:

We agree . . . that the test to be applied is that of whether the refusal of the permit to demolish went so far as to preclude the use of York House for any purpose for which it was reasonably adapted; and [the] conclusion

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35. 516 F.2d 1051 (5th Cir. 1975).

36. *Id.* at 1066-67.

37. *Id.* at 1054.

38. *Id.* at 1065.

39. *Id.*

40. *Id.* at 1066 (footnote omitted).

41. *Id.* at 1054.

42. 25 Pa. Commw. 154, 360 A.2d 257 (1976).

43. *Id.* at 157-58, 360 A.2d at 259. The ordinance protected certain historical areas by authorizing a Board of Historical Review to issue certificates on the appropriateness of altering, demolishing, razing, etc., buildings located within historic districts. *Id.* at 156-57, 360 A.2d at 258-59. The ordinance prohibited obtaining a permit to make such changes without the certification of the Board. *Id.* In determining that the ordinance did not result in a taking, the court applied the Pennsylvania common-law rule that a variance from the ordinance could not be obtained on the mere showing that the property could be more gainfully used or sold for a purpose not allowed by the ordinance. *Id.* at 162, 360 A.2d at 261.

that the Church, having failed to show that a sale of the property was impracticable, that commercial rental could not provide a reasonable return or that other potential uses of the property were foreclosed, had not carried its burden of proving a taking without just compensation.<sup>44</sup>

The denial of the demolition permit was thus upheld.<sup>45</sup>

The *Maher* test was also applied in *Cleckner v. Harrisburg*.<sup>46</sup> In *Cleckner*, a property owner unsuccessfully applied for a permit to demolish two vacant houses which were located within the Harrisburg historic district.<sup>47</sup> Plaintiff argued that the application of the Harrisburg ordinance resulted in the taking of his property.<sup>48</sup> As in *Maher*, the court in *Cleckner* distinguished between the denial of the best use of property and the denial of all reasonable uses of the property.<sup>49</sup> It found that the landowner failed to show that he could not sell the properties for their market values, and thus failed to show that he was denied all reasonable uses for the sites.<sup>50</sup>

*Maher* antedated the United States Supreme Court's decision in *Penn Central Transportation Co. v. New York City*.<sup>51</sup> *Penn Central* involved a challenge to the application of New York City's Landmarks Preservation Law to Grand Central Terminal.<sup>52</sup> The terminal had been designated as a landmark, and appellants, Penn Central and U.G.P. Properties, Inc., applied for a permit to construct an office building in the air space over the terminal

44. *Id.* at 161-62, 360 A.2d at 261.

45. *Id.* at 162-63, 360 A.2d at 261.

46. 10 Pa. D. & C. 3d 393 (1979).

47. *Id.* at 394-95.

48. *Id.* at 395-96. The court found that there were two facets to the "taking" argument: one concerned history and aesthetics, the other economics. *Id.* With regard to the former aspect, the court concluded that demolition of the buildings could be detrimental to the preservation of the fabric of the historic district. *Id.* at 398. Regarding the economic issue, the court found that the test for "taking" was not whether the ordinance denied plaintiff the best use of his property. *Id.* at 400.

49. *Id.*

50. *Id.* at 400-01.

51. 438 U.S. 104 (1978).

52. *Id.* at 115. New York City's Landmarks Preservation Law provided for the formation of a historic commission to identify properties and areas of special historical or aesthetic interest or value. *Id.* at 110. Furthermore, the commission had the authority to designate landmarks, landmark sites and historic districts. 438 U.S. at 110-11. The ordinance imposed a duty on the owner of a designated property to keep the exterior of the building in good repair. *Id.* at 111-12. Moreover, the law required the commission to approve any alterations which the owner wished to make to the building. *Id.* at 112.

building.<sup>53</sup> The New York Landmarks Commission denied appellants' permit application, and appellants challenged both the designation and the permit denial as a taking.<sup>54</sup> The Court reaffirmed that a regulation which merely reduces the value of property is not a taking: "The submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."<sup>55</sup>

The Court applied the reasoning in *Maher* regarding the standard for a taking to New York City's landmarks legislation, which singled out historic buildings for preservation.<sup>56</sup> The *Penn Central* Court suggested that even where an ordinance singles out individual landowners, a diminution in the value of property alone will not establish a taking.<sup>57</sup>

Both *Maher* and *Penn Central* signify the expansion of constitutional jurisprudence on the taking issue as it is applied to historic preservation ordinances. As long as some value is left to property governed by a historic preservation ordinance, there is no taking of property. Some historic preservation ordinances include economic hardship as a consideration in the permit application process and, thus, have provided more protection from administrative decisions than the Constitution, as interpreted in *Penn Central*.<sup>58</sup>

### III. HISTORIC PRESERVATION LEGISLATION

Legislation designed to protect and preserve historic structures, sites and districts is a relatively recent addition to the land use regulatory structure of many communities. Much of the historic preservation legislation in effect today was enacted in the 1960's and 1970's.<sup>59</sup> Philadelphia's old ordinance attempted to protect urban historic resources,<sup>60</sup> and was written without the

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53. 438 U.S. at 115-16.

54. *Id.* at 116.

55. *Id.* at 130.

56. *Id.* at 131.

57. *Id.*

58. The new Philadelphia historic preservation ordinance includes hardship as a factor to be considered when not contrary to the public interest. PHILADELPHIA, PA., CODE § 14-2007(7)(k)(.7).

59. For the dates of enactment of the ordinances surveyed for this study, see *infra* note 63.

60. Philadelphia's first historic preservation ordinance was enacted in 1955. PHILADELPHIA, PA., CODE § 14-2007 (1955).

benefit of the jurisprudence of substantive due process and aesthetic regulation that later evolved.

The framework of most historic preservation legislation is essentially similar: Certain historic sites, structures or districts are designated as historically significant, and a quasi-judicial entity<sup>61</sup> gives heightened scrutiny to applications to alter or demolish those designated structures or structures within a designated district.<sup>62</sup> Beyond this basic framework, however, great variation exists among the ordinances of different cities.<sup>63</sup>

One reason for the variation among the local ordinances is the varied content of state historic preservation enabling legislation.<sup>64</sup> While most states have enacted enabling legislation authorizing local historic regulation, some states have not.<sup>65</sup> Local preservation legislation may only govern that which the state en-

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61. Usually, such a quasi-judicial entity is a historic commission, the membership of which is selected for its expertise or interest in historic architecture. For a discussion of the composition and appointment of historic commissions, see *infra* notes 74-80 and accompanying text.

62. Some ordinances authorize their town planning commissions to review applications for permits to alter or demolish designated historic sites. For examples of ordinances providing for such reviews by planning commissions, see *infra* note 73 and accompanying text.

63. Information regarding the substance and structure of historic preservation legislation was derived from the following ordinances: ALBANY, N.Y., CITY CODE div. 4, ch. 1 (1966); ALEXANDRIA, VA., CITY CODE §§ 7-6-221 to 238, 251 to 268 (1963); ANNAPOLIS, MD., CITY CODE art. XI, §§ 22-226 to 245 (1969) (amended 1985); BALTIMORE, MD., CITY CODE art. I, § 40 (1966); BOISE, IDAHO, ORDINANCE 4443, ch. 18 (Sept. 4 1979); 1975 Boston, Mass. Acts ch. 772 (Dec. 16, 1975) (amended 1982); BURLINGTON, VT., CODE, App. A-Zoning, §§ 1-88 (1980); CHARLESTON, S.C., CITY CODE art. 3, §§ 54-23 to 35 (1966) (amended 1973, 1975, and 1979); CHICAGO, ILL., MUNICIPAL CODE ch. 21, §§ 21-62 to 64.2 (1957) (amended 1968); DALLAS, TEX., CITY CODE §§ 51-3.103, 4.501 (1981); Washington, D.C. Law 2-144 (Dec. 27, 1978); Dover, Del., Historic District Ordinance §§ 3, 21; MINNEAPOLIS, MINN., CODE ch. 34, §§ 34.10-.90 (1960); New Orleans, La. Ordinances 5992 (Feb. 19, 1976) (revised Aug. 21, 1980), 6699 (Feb. 23, 1978) (revised May 7, 1981); NEW YORK, N.Y., CITY CHARTER § 2004 (1965); NEW YORK, N.Y. ADMIN. CODE ch. 8-A, §§ 205-1.0 to 207-21.0 (1965); PITTSBURGH, PA., CODE OF ORDINANCES § 513 (1985); PORTLAND, OR., MUNICIPAL CODE tit. 33, ch. 33.120 (1975); PORTSMOUTH, N.H., ZONING ORDINANCE art. X, §§ 10-1001 to 1008; St. Louis, Mo. Ordinance 57986 (Feb. 1, 1980); SAVANNAH, GA., HISTORIC DISTRICT ZONING ORDINANCE § 8-3029 (Dec. 1972); SEATTLE, WASH. ORDINANCE 106348 (Apr. 4, 1977); TRENTON, N.J. ORDINANCE 72-43.

64. See NATIONAL TRUST FOR HISTORIC PRESERVATION, RECOMMENDED MODEL PROVISIONS FOR A PRESERVATION ORDINANCE 1 (1980) (proposing uniform preservation legislation); see generally, 2 P. ROHAN, *supra* note 11, at 7-21 to 7-30.

65. For a discussion of the Pennsylvania enabling legislation, see *supra* note 20 and accompanying text. Some cities have relied upon the powers delegated by the state through general zoning enabling legislation to enact historic preservation ordinances. See 2 P. ROHAN, *supra* note 11, at 7-28.

abling legislation has authorized it to govern.<sup>66</sup> In addition, home rule legislation may be enacted by states for large cities, which empowers city to delineate through its city charter the permissible bounds of legislation, subject, of course, to constitutional limits.<sup>67</sup> Because there is considerable variation among the enabling acts and city charters, there are variations among the many ordinances. The following sections analyze the variations among a selected group of ordinances.

#### A. *Scope of the Ordinances*

The types of historic resources which historic preservation legislation seeks to protect varies considerably among the ordinances. Some ordinances govern only historic districts which have been so designated by the town legislature at the same time as passage of the ordinance.<sup>68</sup> Other ordinances protect landmarks (*i.e.* individual buildings, structures, etc.) as well as historic districts.<sup>69</sup> The ordinances for some localities authorize the designation and review of historic objects, improvements and

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66. *See* *Cleaver v. Board of Adjustment*, 414 Pa. 367, 200 A.2d 408 (1964). Therein, the Pennsylvania Supreme Court stated:

Municipalities are not sovereigns; they have no original or fundamental power of legislation; a municipal or councilmanic body can enact only the ordinances and exercise only the zoning powers which are authorized by the Legislature, and the Legislature can delegate or grant only those legislative and zoning powers which are Constitutionally permitted.

*Id.* at 373, 200 A.2d at 412 (citations omitted). Enabling legislation, however, is to be liberally construed. *See, e.g.,* *Exton Quarries, Inc. v. Zoning Bd. of Adjustment*, 425 Pa. 43, 49, 228 A.2d 169, 174 (1967); *Commonwealth v. Ashenfelder*, 413 Pa. 517, 520, 198 A.2d 514, 515 (1964).

67. The Pennsylvania Legislature authorized home rule through city charter for Philadelphia, its only first class city. PA. STAT. ANN. tit. 53, § 13101 (Purdon 1957). The authorization for zoning regulation and enforcement for first class cities is PA. STAT. ANN. tit. 53, § 14751 (Purdon 1957). This statute states in part that "[f]or the purpose of promoting the public health, safety, order, and general welfare, cities of the first class may regulate the location, size, and use of buildings therein, and may make different regulations for different districts thereof." *Id.* For a discussion of the concept of home rule, see generally Comment, *Home Rule in Pennsylvania*, 81 DICK. L. REV. 265 (1977).

68. *See, e.g.,* ANNAPOLIS, MD., CITY CODE art. XI, § 22-227 (1969); CHARLESTON, S.C., CITY CODE art. 3, § 54-24 (1966) (amended 1973); DOVER, DEL., HISTORIC DISTRICT ORDINANCE § 21; PORTSMOUTH, N.H., ZONING ORDINANCE art. X, § 10-1001; SAVANNAH, GA., HISTORIC DISTRICT ZONING ORDINANCE § 8-3029(b) (Dec. 1972).

In Pennsylvania, the Historic Districts Enabling Act authorizes the establishment of historic districts only in other than cities of the first class. *See* PA. STAT. ANN. tit. 53, § 8002 (Purdon 1972 & Supp. 1986).

69. *See, e.g.,* DALLAS, TEX., CITY CODE § 51-4.501(a)(1) (1981); District of Columbia Law 2-144 §§ 3(e)-(f) (Dec. 27, 1978); NEW YORK, N.Y., ADMIN. CODE § 207-2.0 (1965).

sites,<sup>70</sup> or areas, places, buildings, structures, works of art and other objects of special historic, community or aesthetic interest.<sup>71</sup> Still other ordinances govern interior landmarks.<sup>72</sup>

### B. *Historic Commissions*

Historic preservation legislation universally provides for heightened scrutiny in the review of applications for alteration or demolition permits for designated properties. A historic commission with specialized expertise or interest in historic preservation generally performs the review of these applications. Most historic preservation legislation expressly authorizes or mandates the establishment of a historic commission. A few ordinances provide that the town planning commission shall be the entity to review permit applications for historic districts or structures.<sup>73</sup>

The composition and manner of appointment of the historic commission is an important consideration in historic preservation legislation, since it is presumably desirable to insulate decisions regarding the preservation of structures from political influences. Thus, while some ordinances authorize the mayor to appoint the historic commission,<sup>74</sup> other ordinances require city council approval of appointees<sup>75</sup> or mandate that appointments be chosen from nominees selected by special interest groups or professional associations.<sup>76</sup> In addition, many ordinances require some ap-

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70. See, e.g., Seattle, Wash. Ordinance 106348 § 1.02 (April 4, 1977).

71. See, e.g., CHICAGO, ILL., MUNICIPAL CODE ch. 21, § 21-64(b) (1957) (amended 1968).

72. See, e.g., NEW YORK, N.Y., ADMIN. CODE ch. 8-A, § 207-2.0 (1965); PORTLAND, OR., MUNICIPAL CODE tit. 33, § 33.120.50(e) (1975); TRENTON, N.J., ORDINANCE 72-43 § 2-22.5(B).

73. See, e.g., BURLINGTON, VT., CODE, App. A-Zoning, § 18(A)(1) (1980); DOVER, DEL., HISTORIC DISTRICT ORDINANCE §§ 3.1, 21.3.

74. See, e.g., ALBANY, N.Y., CITY CODE div. 4, ch. 1 § 3(a) (1966); CHICAGO, ILL., MUNICIPAL CODE ch. 21, § 21-62 (1957) (amended 1968).

75. See, e.g., Washington, D.C. Law 2-144 § 4(a) (Dec. 27, 1978); New Orleans, La., Ordinances 5992 § 2 (Feb. 19, 1975) (revised Aug. 21, 1980), 6699 § 2 (Feb. 23, 1978) (revised May 7, 1981); PITTSBURGH, PA., CODE OF ORDINANCES § 513.5(a) (1985); Seattle, Wash., Ordinance 106348 § 2.01(b) (April 4, 1977).

76. See, e.g., BALTIMORE, MD., CITY CODE art. 1 § 40(c)(1) (1966); 1976 Boston, Mass. Acts ch. 772, § 3 (Dec. 16, 1975) (amended 1982); DALLAS, TEX., CITY CODE § 51-3.103 (1981); MINNEAPOLIS, MINN., CODE ch. 34, § 34.10 (1960). The Baltimore ordinance is illustrative. It provides:

The Commission shall consist of eleven members to be appointed by the Mayor as follows: One to be chosen from a list of two nominated by the Board of Trustees of the Baltimore Museum of Art; one from a list of two nominated by the Board of Trustees of the Municipal Museum of Baltimore; one from a list of two nominated by the Board of Trustees of the Walters Art Gallery; one from a list of two nominated by the

pointees to have professional experience in some facet of historic preservation.<sup>77</sup>

There is clearly a need to isolate historic preservation from political pressure. Some municipalities have also deemed it important to have community representation on their historic commissions. Residency is, therefore, a requirement for appointment to the historic commissions of some communities.<sup>78</sup> Moreover, the two New Orleans ordinances require that one resident or property owner from each historic district be appointed to the respective historic commissions.<sup>79</sup> Other ordinances require expertise in a profession or academic field related to historic preservation.<sup>80</sup>

### C. *Powers and Duties of the Historic Commissions*

A local legislative body cannot delegate to a historic commission powers that it does not have. The role of a given historic commission will be, therefore, limited by the political philosophy and imagination of the drafters of the ordinance in question as well as the applicable state enabling legislation. It follows that

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Council of the Maryland Historical Society; one to be a member of the Baltimore City Council nominated by the President of that body . . . . BALTIMORE, MD., CITY CODE § 40(c)(1). The ordinance goes on to require that membership appointments be experienced in professional fields. For a discussion of ordinances which require professional experience in the field of historic preservation, see *infra* note 77.

77. See, e.g., 1975 Boston, Mass. Acts ch. 772, § 3 (Dec. 16, 1975) (amended 1982); CHARLESTON, S.C. CITY CODE art. 3, § 54-26 (1966) (amended 1979); NEW YORK, N.Y., CITY CHARTER § 2004 (1965); PITTSBURGH, PA., CODE OF ORDINANCES § 513.5(a) (1985); St. Louis, Mo. Ordinance 57986, 24.08.010 (Feb. 1, 1980); SEATTLE, WASH., ORDINANCE 106348, § 2.01(a) (Apr. 4, 1977). There are many variations as to professional requirements. The Seattle ordinance provides one example:

The membership of the [Landmarks Preservation] Board shall consist of at least two architects, (one of whom may be a landscape architect), two historians, one representative from the City Planning Commission, one structural engineer, one representative from the field of real estate management, and one representative from the field of finance. Three additional members shall also be appointed without regard to occupation or affiliation. All Board members shall have a demonstrated sympathy with the purposes of this Ordinance.

*Id.*

78. See, e.g., ANNAPOLIS, MD., CITY CODE art. XI, § 22-230 (1969) (amended 1985).

79. See, e.g., New Orleans, La. Ordinances 5992 § 2 (Feb. 19, 1976) (revised Aug. 21, 1980), 6699 § 2 (Feb. 23, 1978) (revised May 7, 1981). There are two historic commissions for New Orleans: 1) the Central Business District Historic District Landmarks Commission (Ordinance 6699) and 2) the New Orleans Historic District/Landmarks Commission (Ordinance 5992). *Id.*

80. See, e.g., PORTLAND, OR., MUNICIPAL CODE tit. 33, § 33.120.020 (1975).



there is considerable variation in the powers and duties of different historic commissions.

Some commissions are extremely limited in their role in city government. Their only task is to review and to recommend the approval or denial of applications for permits to alter or demolish designated structures or structures in designated historic districts.<sup>81</sup> In some instances, a permit to alter or demolish may be issued by the appropriate building authority even after the historic commission has recommended against issuance of the permit.<sup>82</sup> With this type of limited role, the ability of the historic commission to implement preservation goals would depend upon the desire of other city governing entities to accept the recommendations of the historic commission.

On the other hand, the powers and duties of historic commissions can be quite broad. In some communities, the historic commission not only reviews but also decides applications for demolition or alteration. If the historic commission disapproves the permit application, no permit may be issued,<sup>83</sup> subject, of course, to judicial review of the commission's decision.

Most historic commissions have no independent power to designate historic buildings or structures.<sup>84</sup> Some commissions

81. See, e.g., ALBANY, N.Y., CITY CODE div. 4, ch. 1, § 6 (1966).

82. See, e.g., *id.*; CHICAGO, ILL., MUNICIPAL CODE ch. 21, § 21-64.1(f). The Chicago ordinance expressly provides that "[n]o decision of the commission disapproving an application for permit to construct, reconstruct, alter, add to, or demolish property designated a 'Chicago Landmark' shall be deemed by the applicant for permit as a denial thereof." *Id.*

83. See, e.g., MINNEAPOLIS, MINN., CODE ch. 34, § 34.60(d) (1960) ("If the commission shall have disapproved the plans, the director of inspections shall not issue such permit."); St. Louis, Mo. Ordinance 57986, § 24.12.190 (Feb. 1, 1980) ("No permit . . . shall be issued by the building commissioner unless the heritage commissioner shall have determined that the proposed work complies with the applicable historic district standards, or the commission or heritage commissioner has recommended that the application for permit be approved."); SAVANNAH, GA., HISTORIC DISTRICT ZONING ORDINANCE § 8-3029(g) (Dec. 1972) ("If the Board of Review disapproves the application, a certificate of appropriateness shall not be issued. The Board shall state its reasons in writing, and the zoning administrator shall advise the applicant and a permit shall not be issued.").

84. The ordinance of the District of Columbia was the only ordinance surveyed which gives the historic commission the power to designate buildings or districts without ratification by a separate government entity. That ordinance provides that the Historic Preservation Review Board shall "designate and maintain a current inventory of historic landmarks and historic districts in the District of Columbia and, in connection therewith, adopt and publish appropriate procedures . . . ." Washington, D.C. Law 2-144, § 4(c)(3) (Dec. 27, 1978). For a detailed discussion of designation procedures, see *infra* notes 110-30 and accompanying text.

may designate landmarks or districts subject to ratification by another government entity.<sup>85</sup> Other historic commissions study and review prospective designations, and prepare ordinances designating structures or districts for passage by the city legislature.<sup>86</sup> Finally, some ordinances merely authorize the city historic commission to recommend designations for eventual action by the local legislature.<sup>87</sup>

The powers of a historic commission may extend beyond its review of applications for alteration and demolition permits and its role in the designation process. Some ordinances have broad, generic provisions which empower their commissions to act in furtherance of the spirit of the historic preservation ordinance.<sup>88</sup> Of course, the delegation of such broad powers may be subject to constitutional challenge unless specific standards accompany such powers to govern their use.<sup>89</sup>

Other powers and duties of historic commissions may be loosely categorized as "discretionary powers." In some ordinances, the local historic commission is charged with the duty of conducting studies of historic preservation for that community.<sup>90</sup> Some ordinances include the duty of preparing historic surveys or of making lists of historically significant structures.<sup>91</sup> Other local-

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85. See, e.g., New Orleans, La., Ordinances 5992 § X(A)(10), (13) (Feb. 19, 1976) (revised Aug. 21, 1980); 6699 § X(A)(6), (10) (Feb. 23, 1978) (revised May 7, 1981); NEW YORK, N.Y., ADMIN. CODE § 207-2.0(b), (g)(2) (1965).

86. See, e.g., St. Louis, Mo., Ordinance 57986, §§ 24.12.020, .130 (Feb. 1, 1980); BOISE, IDAHO, ORDINANCE 4443, ch. 18, § 2-18-7(d) (Sept. 4, 1979).

87. See, e.g., PITTSBURGH, PA., CODE OF ORDINANCES, § 513.3(a)(3) (1985).

88. See, e.g., ALBANY, N.Y., CITY CODE div. 4, ch. 1, § 2 (1966). The Albany ordinance provides:

It is the intent of this ordinance that the Historic Sites Commission carry out the following purposes in the best interest of the City of Albany.

a. To protect, preserve and enhance those places, buildings, structures and objects which are of special character or interest to the City of Albany.

b. To foster civic beauty.

c. To safeguard and preserve the historical, cultural and architectural heritage of the City of Albany.

*Id.*

89. For a discussion of the necessity for using specific standards for governmental entities in making land use regulation decisions, see *supra* notes 22-28 and accompanying text.

90. See, e.g., 1975 Boston, Mass. Acts ch. 772, § 11 (Dec. 16, 1975) (amended 1982); St. Louis, Mo. Ordinance 57986, § 24.08.030(c) (Feb. 1, 1980).

91. See, e.g., BALTIMORE, MD., CITY CODE art. 1 § 40(K), (M) (1966); BOISE, IDAHO, ORDINANCE 4443, ch. 18, § 2-18-5(A) (Sept. 4, 1979); PORTLAND, OR., MUNICIPAL CODE tit. 33, § 33.120.040(i) (1975). Lists of this nature should not

ities entrust to the historic commission the responsibility for promoting community education in historic preservation,<sup>92</sup> or articulating a community policy regarding preservation.<sup>93</sup>

Historic commissions in many communities have been empowered to establish historic preservation programs. Some ordinances authorize historic commissions to prepare historic preservation plans.<sup>94</sup> Baltimore, Maryland's ordinance empowers its commission to develop incentive programs for preservation,<sup>95</sup> and Pittsburgh, Pennsylvania's ordinance authorizes its commission to facilitate redevelopment.<sup>96</sup> The Portland, Oregon preservation ordinance requires its historic commission to keep a pictorial history of historic buildings which have been destroyed.<sup>97</sup>

Other powers given to historic commissions include the acquisition of interests in property to further the objective of historic preservation. In this regard, some ordinances go as far as to authorize their historic commissions to acquire and restore buildings.<sup>98</sup> More restrictive ordinances grant only the authority to recommend the acquisition of interests in property<sup>99</sup> or the lease, sale, or transfer of property.<sup>100</sup> Some ordinances allow the commission to contract for and accept grants or gifts,<sup>101</sup> while others

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be confused with designating property. Designation is the process by which a structure is determined to be significant and officially proclaimed a historic structure. Designation requires heightened review through the permitting process. A list is a compilation of historically important places, or an inventory of the historic resources of a municipality.

92. *See, e.g.*, BOISE, IDAHO, ORDINANCE 4443, ch. 18, § 2-18-5(I) (Sept. 4, 1979); PITTSBURGH, PA., CODE OF ORDINANCES § 513.5(b)(5) (1985).

93. *See, e.g.*, St. Louis, Mo. Ordinance 57986, § 24.08.030(A) (Feb. 1, 1980).

94. *See, e.g.*, DALLAS, TEX., CITY CODE § 51-3.103(c)(2) (1981); PITTSBURGH, PA., CODE OF ORDINANCES § 513.3(b)(11) (1985).

95. BALTIMORE, MD., CITY CODE art. I, § 40(t) (1966).

96. PITTSBURGH, PA., CODE OF ORDINANCES § 513.5(b)(8) (1985). The ordinance imposes upon the historic commission the responsibility of "facilitat[ing] the redevelopment of historic structures and districts in accordance with approved development plans of the city." *Id.*

97. PORTLAND, OR., MUNICIPAL CODE tit. 33, §§ 33.120.100(a), .040(g) (1975).

98. *See, e.g.*, BALTIMORE, MD., CITY CODE art. I § 40(5) (1966). The Boston ordinance requires consent of the mayor and council prior to acquisition. 1975 Boston, Mass. Acts ch. 772, § 11 (Dec. 16, 1975) (amended 1982).

99. *See, e.g.*, BOISE, IDAHO, ORDINANCE 4443, ch. 18, § 2-18-5(B) (Sept. 4, 1979); DALLAS, TEX., CITY CODE § 51-3.103(c)(4) (1981).

100. *See, e.g.*, BOISE, IDAHO, ORDINANCE 4443, ch. 18, § 2-18-5(D) (Sept. 4, 1979).

101. *See, e.g.*, BALTIMORE, MD., CITY CODE art. I, § 40(S) (1966); Boston, Mass. Acts ch. 772, § 11 (Dec. 16, 1975) (amended 1982); St. Louis, Mo. Ordinance 57986, § 24.08.050 (Feb. 1, 1980).

authorize the commission to solicit funding.<sup>102</sup> The Portland, Oregon ordinance directs that its commission may obtain and keep historical artifacts.<sup>103</sup>

Many ordinances give historic commissions the power to enforce their provisions, which may differ from the duty to enforce a preservation ordinance. In Charleston, South Carolina, the Board of Architectural Review may file a petition with the Public Safety and Housing Officer to require the repair of historic structures.<sup>104</sup> Baltimore, Maryland empowers its Historical and Architectural Commission to apply to the court for an injunction preventing the demolition or alteration of a designated structure.<sup>105</sup> The Trenton, New Jersey ordinance gives to its Landmarks Commission for Historic Preservation the duty of supervising the "ordinary maintenance and repairs" of designated structures.<sup>106</sup> Many ordinances authorize commissions to prepare "use guidelines" for designated historic structures or structures within designated historic districts.<sup>107</sup>

In several instances, local legislatures have expressly delegated to their historic commissions the responsibility for interacting with other bodies in the local government. These duties range from keeping the mayor informed of historic preservation activities<sup>108</sup> to acting as liaison between government branches.<sup>109</sup>

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102. *See, e.g.*, MINNEAPOLIS, MINN., CODE ch. 34, § 34.40(d) (1960).

103. PORTLAND, OR., MUNICIPAL CODE tit. 33, § 33.120.100 (1975).

104. CHARLESTON, S.C. CITY CODE, App. A-Zoning, art. 3, § 54-32 (1966) (amended 1973).

105. BALTIMORE, MD., CITY CODE § 40(v) (1966). That provision reads:

The Baltimore City Court, upon application of the Commission, may restrain and/or enjoin the excavation, construction or erection, reconstruction, alteration, removal of any exterior architectural feature, change in exterior color, or demolition of any buildings or structures, now or hereafter in an Historical and Architectural Preservation District, or to any building on the Landmark List or on the Special List, in violation of such section and order the removal of any such exterior architectural feature constructed or reconstructed in violation thereof, and the substantial restoration of any such exterior architectural feature altered or demolished in violation thereof or the exterior color of which is changed in violation thereof.

*Id.*

106. TRENTON, N.J., ORDINANCE 72-43, § 2-22(A)(b).

107. *See, e.g.*, MINNEAPOLIS, MINN., CODE ch. 34, § 34.40(e) (1960); PITTSBURGH, PA., CODE OF ORDINANCES § 513.5(b)(3) (1985); PORTLAND, OR., MUNICIPAL CODE tit. 33, § 33.120.040(K) (1975).

108. *See, e.g.*, Washington, D.C. Law 2-144, § 4(c)(1) (Dec. 27, 1978); St. Louis, Mo. Ordinance 57986, § 24.08.030 (Feb. 1, 1980). The St. Louis ordinance provides for its commission to keep all government branches and private entities informed. *Id.*

109. *See, e.g.*, PITTSBURGH, PA., CODE OF ORDINANCES § 513.5(b)(9) (1985).

### D. *Designation of Landmarks or Districts*

Any attempt to protect historic resources must be accompanied by a method to single out the resources worthy of preservation. As might be expected, great variety exists in the ways in which structures and areas may be designated as historically significant.

In jurisdictions in which both historic districts and structures are protected, a different method may be employed to designate landmarks or individual historic structures from that employed to designate a historic district.<sup>110</sup> It is likely that the separate designation process is used because the designation of a historic district is viewed as a greater imposition of government regulation, affecting a broader segment of the population. Thus, the procedural safeguards used for the designation of historic districts are often somewhat stricter than those used for individual structures.

In some communities, the local legislature alone is capable of designating structures, landmarks or historic districts for preservation.<sup>111</sup> It is usually the case for such "legislative designations" that at least some city landmarks or historic districts were designated at the same time as the city historic preservation ordinance was enacted—perhaps in the same or a companion bill.<sup>112</sup> In a legislative designation, the city legislature must follow the same procedural safeguards as it would to enact or amend its zoning ordinance or other legislation, including notice and an opportunity to be heard by citizens.

Most ordinances reviewed, however, require joint effort between the local legislature and the historic commission in the designation process. Using this method, a locality may combine the specialized knowledge of the historic commission with the procedural safeguards of designation through the legislature. Ordinances using this approach usually direct that the local historic commission investigate important historic structures and

110. See, e.g., PORTLAND, OR., MUNICIPAL CODE tit. 33, §§ 33.120.050, .055, .060 (1975); St. Louis, Mo., Ordinance 57986, § 24.12.060, .250 (Feb. 1, 1980).

111. See, e.g., ALBANY, N.Y., CITY CODE div. 4, ch. 1 (1966); CHARLESTON, S.C., CITY CODE art. 3, §§ 54-23, -24 (1966) (amended 1973); Dover, Del., Historic District Ordinance § 21; SAVANNAH, GA., HISTORIC DISTRICT ZONING ORDINANCE § 8-3029 (Dec. 1972); see also ALEXANDRIA, VA., CITY CODE §§ 7-6-221, -251 (1963). The Alexandria ordinance legislatively designates landmarks and districts. In designating landmarks, the ordinance oddly calls for the advice of many administrative entities, but not the historic commission. ALEXANDRIA, VA., CITY CODE §§ 7-6-253, -255 (1963).

112. See, e.g., ALEXANDRIA, VA., CITY CODE §§ 7-6-221 to 238, 251 to 268.

compile a list of buildings with the potential for historic designation. After public hearings, and possibly after the advice of other city agencies, the structures or districts are sent to the local legislature for designation approval.<sup>113</sup>

The St. Louis, Missouri ordinance exemplifies this common commission/legislative designation procedure.<sup>114</sup> Historic district designation is begun by a petition by a member of the commission or by the alderman for the ward in which the proposed district is located.<sup>115</sup> The petition includes a map and a legal description of the proposed district, a statement of historic significance and economic condition, a plat, a general plan, proposed historic standards and a statement of necessary zoning amendments.<sup>116</sup> The petition is then forwarded within five days to the St. Louis Community Development Agency, Arts and Humanities Commission, and to the Board of Public Service.<sup>117</sup> Within forty-five days after receipt, these agencies must make recommendations on the proposed designation.<sup>118</sup> Within ninety days of filing, a public hearing is held.<sup>119</sup> Within fifteen days prior to the hearing, written notice must be sent to the landowners affected<sup>120</sup> and published in two daily newspapers.<sup>121</sup> Within ten days of the hearing, a placard reading "Proposed Historic District In This Block" must be posted in the proposed historic district.<sup>122</sup> The ordinance prescribes that an opportunity to be heard shall be afforded to all interested parties at the public hearing.<sup>123</sup> The St. Louis Historic Commission must, within sixty days of the hearing,<sup>124</sup> make a determination regarding designation. A designa-

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113. *See, e.g.*, BOISE, IDAHO, ORDINANCE 4443 ch. 18, §§ 2-18-7, -8 (Sept. 4, 1979); CHICAGO, ILL., MUNICIPAL CODE ch. 21, § 21-64 (1957) (amended 1968); PITTSBURGH, PA., CODE OF ORDINANCES § 513.3 (1985); PORTLAND, OR., MUNICIPAL CODE tit. 33, §§ 33.120.050, .055, .060 (1975).

114. St. Louis, Mo. Ordinance 57986, § 24.12.070 (Feb. 1, 1980).

115. *Id.*

116. *Id.*

117. *Id.* § 24.12.080(A).

118. *Id.* § 23.12.080(B).

119. *Id.* § 24.12.090.

120. *Id.* § 24.12.100(B). The ordinance actually calls for written notice "[t]o the extent practicable," and authorizes reliance upon the current city tax lists or other city lists. *Id.*

121. *Id.* § 24.12.100(A).

122. *Id.*

123. *Id.* § 24.12.110. Unfortunately, the ordinance does not define "interested parties." Thus, it is assumed by the author that "interested parties" refers to people interested in the outcome of the hearing, rather than those with an interest recognized at law.

124. *Id.* § 24.12.120.

tion bill is then prepared by the Historic Commission.<sup>125</sup> The bill will not reach a final vote until a second public hearing has been held, with notice in two daily newspapers and a placard posted in the proposed district.<sup>126</sup> The designation bill is then sent to the Board of Aldermen for passage.<sup>127</sup>

The method for designation of a landmark in St. Louis is similar to that for designation of a district. A petition for landmark designation, however, may be commenced by a landowner.<sup>128</sup> In addition, it is within the discretion of the Historic Commission as to whether an initial public hearing on designation will be held.<sup>129</sup> A public hearing is still held by the Board of Aldermen before passage of the ordinance designating the landmark.<sup>130</sup>

The St. Louis ordinance also contains criteria for designation.<sup>131</sup> While it is difficult to draft standards to ensure that historic properties of significance will be identified, it is nonetheless important to establish at least some standards to prevent arbitrary designations. Specific standards are most important for ordinances which delegate to the commission a great deal of discretion in the designation process.<sup>132</sup>

#### E. *Commission Review of Applications for Demolition or Alteration*

The purpose of historic legislation is to prevent demolitions

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125. *Id.* § 24.12.130.

126. *Id.* § 24.12.150.

127. *Id.* § 24.12.160.

128. *Id.* § 24.12.260.

129. *Id.* § 24.12.280.

130. *Id.* § 24.12.320.

131. *Id.* § 24.12.010. That section provides:

An area, site or improvement may be designated for preservation as an historic district or as a landmark and/or landmark site if it:

- A. Has significant character or value as part of the development, heritage or cultural characteristics of the city, state or nation; or
- B. Is the site of a significant historic event; or
- C. Is the work of a master whose individual work has significantly influenced the development of the city, state or nation; or
- D. Contains elements of design, detail, materials or craftsmanship which represent a significant innovation; or
- E. Owing to its unique location or singular physical characteristic represents an established and familiar visual feature of a neighborhood, community or the city; or
- F. Has yielded, or is likely to yield, according to the best available scholarship, archaeological artifacts important in prehistory or history.

*Id.*

132. For a discussion of the necessity for using specific standards when making land use regulation decisions, see *supra* notes 22-28 and accompanying text.

and unsuitable alterations of structures which hold historic importance to a community. This purpose is effectuated by reviewing with heightened scrutiny, applications for permits to demolish or alter structures. Theoretically, the commission, with its knowledge of and interest in historic preservation, reviews each application with greater sympathy to historic architecture than would the municipal building department reviewing building permit applications.<sup>133</sup>

The procedure employed by municipalities to review historic permit applications varies from community to community. Yet, almost all towns surveyed require that the historic commission either actually approve the permit itself or, after review, issue a certificate of appropriateness which is a prerequisite to obtaining a permit to alter or amend.<sup>134</sup> Some ordinances give the commission only the power to delay granting the demolition or alteration permits.<sup>135</sup> Most ordinances contain provisions concerning appeals from commission decisions. Appeals are heard by a range of public bodies, from city councils to the courts.<sup>136</sup>

The due process and equal protection guarantees of the United States Constitution require that notice and some kind of hearing be provided<sup>137</sup> before a state or federal government may deprive an individual of property.<sup>138</sup> To comply with this constitutional mandate, some ordinances prescribe the level of no-

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133. For a review of the various requirements for the composition and manner of appointment of members of historic commissions, see *supra* notes 73-80 and accompanying text.

134. See, e.g., CHARLESTON, S.C., CITY CODE art. 3, § 54-25 (1966); CHICAGO, ILL., MUNICIPAL CODE ch. 21, § 21-62.1(a)-(g) (1957) (amended 1966); MINNEAPOLIS, MINN., CODE ch. 34, § 34.60 (1960); SAVANNAH, GA., HISTORIC DISTRICT ZONING ORDINANCE § 8-3029(e)(g) (Dec. 1972).

135. E.g., TRENTON, N.J., ORDINANCE 72-43 § 11.

136. See, e.g., ANNAPOLIS, MD., CITY CODE art. II, § 22-236 (1969) (amended 1985) (direct appeal to court); PORTLAND, OR., MUNICIPAL CODE tit. 33, § 33.120.080(e) (1975) (city council); PORTSMOUTH, N.H., ZONING ORDINANCE art. X, § 10-1008 (Board of Adjustment). A significant question remaining is whether any "aggrieved person" has the standing to appeal a Commission's decision, or whether only an applicant may appeal.

137. See *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123, 178 (1950) (Douglas, J. concurring). In *Joint Anti-Fascist*, the Attorney General, purporting to act under an executive order, designated the three petitioner organizations as communist in a list to be used in the determination of loyalty among government employees. *Id.* at 126-29. Neither notice nor hearings were provided. *Id.* The Supreme Court held that the Attorney General acted outside the scope of his authority, and that the petitioners had stated a claim for which relief could be granted. *Id.* at 137-42.

138. For a discussion of the substantive due process "taking" issue, see *supra* notes 29-58 and accompanying text.



tice<sup>139</sup> and hearing<sup>140</sup> to which an applicant for a demolition or alteration permit and other interested parties are entitled. Other ordinances merely provide that meetings of the historic commission are open to the public, thus implying that an applicant is entitled to a public hearing.<sup>141</sup>

Standards or criteria for granting or denying a permit or certificate of appropriateness are also important to the constitutional validity of a historic ordinance.<sup>142</sup> An ordinance which fails to include or fails to define sufficiently criteria for such decisions may be found by a court to violate the equal protection clause of the fourteenth amendment or to be an invalid delegation of legislative power.<sup>143</sup> The requirement of specific standards presents a "Catch 22" in that a decision regarding aesthetics in design is always ultimately subjective, and thus difficult to define with specificity. One safeguard for ordinances which regulate aesthetics, such as historic ordinances, is to require expertise in the composition of the reviewing board or commission.<sup>144</sup> Most of the ordinances reviewed for this Article contain at least some criteria by which the historic commission can adjudge compliance with the ordinance.

The Savannah, Georgia ordinance provides a good example of specific standards for the inherently subjective task of deter-

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139. The Baltimore ordinance requires that the property be posted with notice of the hearing no sooner than ten but no later than twenty days before the public hearing. BALTIMORE, MD., CITY CODE art. 1, § 40(g)(5) (1966). The Boston ordinance requires written notice to abutting landowners as well as posted notice in the city clerk's office. 1975 Boston, Mass. Acts ch. 772, § 10 (Dec. 16, 1975) (amended 1982). The Charleston ordinance provides written notice to interested organizations if such organizations prepay postage. CHARLESTON, S.C., CITY CODE art. 3, § 54-27(b) (1966).

140. See, e.g., PORTLAND, OR., MUNICIPAL CODE tit. 33, § 33.120.080(c) (1975). The Portland ordinance provides that the applicant, a representative of the Bureau of Buildings, and the Planning Commission all have the right to testify at the public hearing. *Id.* The ordinance further requires, if the structure is located within a designated district, that recommendations be made by the district advisory council of the designated district. The Commission retains the discretion to hear testimony from any interested party. *Id.*

141. See, e.g., SAVANNAH, GA., HISTORIC DISTRICT ZONING ORDINANCE § 8-3029(h)(5) (Dec. 1972). This ordinance is silent as to procedures for public hearings.

142. For a discussion of the necessity for using specific standards when making land use regulation decisions, see *supra* notes 22-28 and accompanying text.

143. For the pertinent text of the equal protection clause of the fourteenth amendment, see *supra* note 29.

144. For a review of the required background for members of historic commissions, see *supra* notes 77-80 and accompanying text. See also *Maher v. City of New Orleans*, 516 F.2d 1051, 1062 (5th Cir. 1975).

mining appropriate designs for historic structures.<sup>145</sup> It also differentiates the standards applicable to buildings based upon their historic significance. The preservation ordinances of New Orle-

145. SAVANNAH, GA., HISTORIC DISTRICT ZONING ORDINANCE § 8-3029(i)(6) (Dec. 1972). The ordinance provides as follows:

- (6) *Visual Compatibility Factors*. Within said Zone I, new construction and existing buildings and structures and appurtenances thereof which are moved, reconstructed, materially altered, repaired, or changed in color shall be visually compatible with buildings, squares, and places to which they are visually related generally in terms of the following factors:
  - (a) Height: The height of proposed buildings shall be visually compatible with adjacent buildings.
  - (b) Proportion of building's front facade: The relationship of the width of the building to the height of the front elevation shall be visually compatible to buildings, squares, and places to which it is visually related.
  - (c) Proportion of openings within the facility: The relationship of the width of the windows to height of windows in a building shall be visually compatible with buildings, squares, and places to which the building is visually related.
  - (d) Rhythm of solids to voids in front facades: The relationship of solids to voids in the front facade of a building shall be visually compatible with buildings, squares, and places to which it is visually related.
  - (e) Rhythm of buildings on streets: The relationship of the building to open space between it and adjoining buildings shall be visually compatible to the buildings, squares, and places to which it is visually related.
  - (f) Rhythm of entrance and/or porch projection: The relationship of entrances and porch projection to sidewalks of a building shall be visually compatible to the buildings, squares, and places to which it is visually related.
  - (g) Relationship of materials, texture, and color: The relationship of materials, texture, and color of the facade of a building shall be visually compatible with the predominant materials used in the buildings to which it is visually related.
  - (h) Roof shapes: the roof shape of a building shall be visually compatible with the buildings to which it is visually related.
  - (i) Walls of continuity: Appurtenances of a building such as walls, wrought iron, fences, evergreen landscape masses, building facades, shall, if necessary, form cohesive walls of enclosure along a street to ensure visual compatibility of the building to the buildings, squares, and places to which it is visually related.
  - (j) Scale of a building: The size of a building, the building mass of a building in relation to open spaces, the windows, door openings, porches, and balconies shall be visually compatible with the buildings, squares, and places to which it is visually related.
  - (k) Directional expression of front elevation: A building shall be visually compatible with the buildings, squares, and places to which it is visually related in its directional character, whether this be vertical character, horizontal character, or nondirectional character.

*Id.*

ans, Louisiana provide another good approach in that they differentiate criteria based upon the action desired by the landowner.<sup>146</sup> Thus, the criteria for a permit to demolish is different from that for a permit to alter or to erect a sign on a historic site.

The ordinances also vary in the magnitude and types of actions which constitute an "alteration" and that would thus trigger

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146. New Orleans, La. Ordinance 5992 § VIII (Feb. 19, 1976) (revised Aug. 21, 1980); 6699 § VIII (Feb. 23, 1978) (revised May 7, 1981). The ordinances provide:

The commission shall adhere to and seek compatibility of structures in the district in terms of size, texture, scale, and site plan and in so doing, the following guidelines shall be considered by the Commission in passing upon application for a Certificate of Appropriateness:

A. For new construction:

- (1) All new construction shall be visibly compatible with the buildings and environment with which they are related.
- (2) The general design, scale, gross volume, arrangement, site plan, texture, material and exterior architectural features of new construction shall be in harmony with its surroundings and shall not impair the 'toute ensemble' of the neighborhood.
- (3) No one architectural style shall be imposed.
- (4) Quality and excellence in design should be major determinants.

B. For exterior alterations:

- (1) All exterior alterations to a building shall be compatible with the building itself and other buildings with which it is related, as provided in A(2) above and in applying these standards, the original design of the buildings may be considered.
- (2) Exterior alterations shall not affect the architectural character or historic quality of the building.

C. For signs:

- (1) The scale, and design of any sign should be compatible with the buildings and environment with which it is related.
- (2) The materials, style, and patterns used in any sign should be compatible with the buildings and environment with which it is related.

D. Demolition:

In considering an application for the demolition of a landmark or a building in an historic district, the following shall be considered:

- (1) The historic or architectural significance of the building.
- (2) The importance of the building to the 'toute ensemble' of the district.
- (3) The special character and aesthetic interest that the building adds to the district.
- (4) The difficulty or impossibility of reproducing such a building because of its design, texture, material, or detail.
- (5) The future utilization of the site.

E. Destruction of a non-conforming use:

The reconstruction of buildings legally nonconforming as to use and destroyed by fire, storms, or other Acts of God shall be governed by the provisions of the zoning ordinance except that the Commission shall regulate the exterior design of such buildings.

*Id.* 5992 § VIII, 6699 § VIII.

the review process. For example, some ordinances expressly specify that certain minor repair work is excluded from the ambit of the ordinance.<sup>147</sup> Under these ordinances, minor work requires only administrative approval while substantial change to a structure triggers review by the commission and other agencies. Other ordinances make no distinction as to degrees of alteration.<sup>148</sup> Most ordinances include only exterior changes within their purview.<sup>149</sup>

#### F. *Duty to Keep Designated Buildings in Repair*

Many of the historic preservation ordinances studied create an affirmative duty for property owners to maintain in good repair their designated structures or structures located in a designated district. The purpose of imposing such a duty is to prevent a landowner from avoiding the preservation of a structure of historic significance by intentionally neglecting its maintenance. This inaction is commonly termed "demolition by neglect" because it often results in such dilapidation that the structure is ultimately demolished or an equivalent result is achieved.<sup>150</sup>

The ordinances attempt to resolve the problem of demolition by neglect in a number of ways. In Annapolis, Maryland and Boise, Idaho, for example, the ordinances not only affirmatively require that owners maintain their historic structures, but set forth exactly which types of maintenance must be performed as well.<sup>151</sup> Other ordinances include demolition by neglect within

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147. See, e.g., DALLAS TEX., CITY CODE § 51-4.501(b)(3)(A) (1981). The Dallas ordinance provides that the director of planning make a threshold decision as to whether an application requires a certificate of appropriateness review by the committee. That review is not required for actions such as water blasting, stripping, painting, replacing, duplicating or stabilizing deteriorated or damaged architectural features (roofing, windows, columns and siding) *Id.*; see also PITTSBURGH, PA., CODE OF ORDINANCES § 513.5(b)(2) (1985).

148. See, e.g., CHICAGO, ILL., MUNICIPAL CODE ch. 21, § 21-64.1 (1957) (amended 1968).

149. See, e.g., BOISE, IDAHO, ORDINANCE 4443, ch. 18, § 2-18-9(A) (Sept. 4, 1979).

150. See New Orleans, La. Ordinance 5992, § XVI (Feb. 19, 1976) (revised Aug. 21, 1980); see also *Figarsky v. Historic Dist. Comm'n*, 171 Conn. 198, 368 A.2d 163 (1976); 7 P. ROHAN, *supra* note 11, at 7-61-64.

151. See, e.g., ANNAPOLIS, MD., CITY CODE art. XI, § 22-231.1 (1969). The Annapolis provision provides:

(a) Neither the owner of nor the person in charge of a property within the historic district of the city as described within the boundaries set forth in section 22-227 shall permit such structure to fall into a state of disrepair which may result in the deterioration of any exterior appurtenance or architectural feature so as to produce or tend to produce, in the judgment of the city building inspector, after consultation with the

the statutory definition of "demolition," and thus require a permit application before an owner may fail to maintain the structure.<sup>152</sup> Obviously, an owner intending to neglect his or her historic structure to avoid the effect of protective legislation is unlikely to submit a formal application beforehand. The practical result of this provision, however, is to subject an owner to the penalty provisions of the ordinance for failing to apply for the permit. In Charleston, South Carolina, the Board of Architectural Review may file a petition with the Public Safety and Housing Officer to require the correction of defects.<sup>153</sup> In New Orleans, Louisiana, a property owner may be called before the Historic Commission if his or her historic property has not been kept in good repair.<sup>154</sup>

Each approach is probably sufficient to combat the problem of demolition by neglect. It may, however, be easier to enforce an ordinance such as that of Annapolis, which specifically addresses those components of the structure which must be maintained.<sup>155</sup>

### G. Penalties

Some ordinances contain penalties for violation of their provisions, while others are silent as to how the ordinance should be enforced. Most ordinances that contain penalty provisions also

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historic district commission, a detrimental effect upon the character of the district as a whole or the life and character of the structure in question, including but not limited to:

- (1) The deterioration of exterior walls or other vertical supports;
- (2) The deterioration of roofs or other horizontal members;
- (3) The deterioration of exterior chimneys;
- (4) The deterioration or crumbling of exterior plaster or mortar;
- (5) The ineffective waterproofing of exterior walls, roofs and foundations, including broken windows or doors;
- (6) The deterioration of any feature so as to create or permit the creation of any hazardous or unsafe condition or conditions.

(b) "Demolition" within this article includes any wilful negligence in maintenance and repair of a structure, not including any apertenances and environmental settings, held or used in a trade or business or for the production of income, that does not result from financial inability to maintain and repair the structure and that threatens the result in any substantial deterioration of the exterior features of the structure.

*Id.*; see also BOISE, IDAHO, ORDINANCE 4443 ch. 18, § 2-18-15 (Sept. 4, 1979) (similar provisions).

152. See, e.g., BALTIMORE, MD., CITY CODE art. I, § 40(q)(1) (1966); 1975 Boston, Mass. Acts ch. 772, § 2 (Dec. 16, 1975) (amended 1982).

153. CHARLESTON, S.C., CITY CODE art. 3, § 54-32 (1966) (amended 1973).

154. New Orleans, La., Ordinance 5992, § XII (Feb. 19, 1976) (revised Aug. 21, 1980).

155. For a discussion of the Annapolis ordinance, see *supra* note 151.

authorize their respective historic commissions to bring an action to enjoin any impermissible conduct, such as the alteration or demolition of a structure.<sup>156</sup> Presumably, an action could similarly be brought to enjoin an owner's demolition by neglect, particularly in jurisdictions in which the ordinance defines "demolition" to include demolition by neglect. Some ordinances authorize the imposition of fines<sup>157</sup> and others authorize imprisonment for noncompliance.<sup>158</sup>

#### IV. THE NEW PHILADELPHIA HISTORIC PRESERVATION ORDINANCE

Philadelphia's new historic preservation ordinance changes Philadelphia's law in this area in a number of ways. Supporters of the ordinance suggest that two major changes in the law appear in the new ordinance.<sup>159</sup> First, the protective ambit of the new ordinance now extends to historic districts, objects and sites, rather than merely to historic buildings as it once did.<sup>160</sup> Second, the new ordinance directs the Department of Licenses and Inspection (L&I) to deny a building permit if the Historical Commission objects to its approval.<sup>161</sup> The permanent denial of a permit for demolition or alteration is allowed under the new ordinance, unless the permit applicant demonstrates the non-feasibility of adaptive reuse that the property cannot provide a reasonable economic rate of return.<sup>162</sup> The old ordinance had merely authorized the delay of demolition for, at most, six months by the

156. *See, e.g.*, 1975 Boston, Mass. Acts ch. 772, § 10 (Dec. 16, 1975) (amended 1982).

157. *See, e.g.*, CHICAGO, ILL., MUNICIPAL CODE ch. 21, § 21-64.2 (1957) (amended 1968).

158. *See, e.g.*, NEW YORK, N.Y., ADMIN. CODE § 207-16.0 (1965).

159. Longergan, *Bill No. 318: It Saves Buildings*, Philadelphia City Paper, December 7-21, 1984, at 26.

160. *Compare* PHILADELPHIA, PA., CODE § 14-2007(4)(a), (b) (1984) (delegates to Historical Commission power to designate historic districts, structures, sites and objects, as well as historic buildings) *with id.* § 14-2007(4) (1956) (repealed 1984) (provides that Department of Public Property and Historical Commission classify historic buildings).

161. *Id.* § 14-2007(7)(g)(2) (1984).

162. *Id.* § 14-2007(7)(f). Section 2007(7)(f) provides as follows:

In any instance where there is a claim that a building, structure, site or object cannot be used for any purpose for which it is or may be reasonably adapted, or where a permit application for alteration, or demolition is based, in whole or in part, on financial hardship, the owner shall submit, by affidavit . . . [financial] information to the Commission.

*Id.*

Department of Public Property.<sup>163</sup>

While these two differences between the new and old ordinances are certainly significant, the new ordinance varies a great deal from its predecessor in a number of other ways. Undoubtedly, the current ordinance adds much in terms of mere length, and consequently, detail. But some of its additions may also have a real impact upon the preservation of historic structures in Philadelphia.

#### A. *The Historical Commission*

While the Historical Commission will continue to be the governing entity for historic preservation,<sup>164</sup> the new ordinance makes significant changes to the powers and the composition of the commission. Under the old ordinance, for example, the very existence of the commission was a matter of discretion for the Mayor of Philadelphia.<sup>165</sup> The new ordinance requires the Mayor to appoint a Historical Commission.<sup>166</sup>

The composition of the Commission is also changed by the new ordinance. The Historical Commission must now consist of the President of City Council or his or her designee, the Director of Commerce, the Commissioner of Public Property, the Commissioner of Licenses and Inspections, the Chairman of the City Planning Commission or his or her designee, and the Director of Housing or his or her designee.<sup>167</sup> Mayoral appointees on the Historical Commission must include a historical preservation ar-

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163. *Id.* § 14-2007(5)(e) (1956) (repealed 1984). That section provided: If the Department [of Public Property] concludes that the demolition or alteration should be postponed, it shall, before issuing any final order with respect to such postponement, afford the applicant an opportunity to appear before the Commission to offer any evidence he may desire to present concerning the proposed order. No order issued by the Department postponing a proposed demolition shall be for a period in excess of six months.

*Id.* Although this section may be read to mean that demolitions and alterations may only be postponed, it was interpreted by the Commission as authorizing the Commission to permanently deny an application for an alteration permit. Telephone interview with Richard Tyler, Philadelphia Historical Preservation Commission (July 21, 1986).

164. PHILADELPHIA, PA., CODE § 14-2007(4) (1984).

165. *Id.* § 14-2007(3) (1956) (repealed 1984). That section provided: "The Mayor *may* appoint a Philadelphia Historical Commission . . ." *Id.* (emphasis added).

166. *Id.* § 14-2007(3) (1984). The new ordinance provides that "[t]he Mayor *shall* appoint a Philadelphia Historical Commission . . ." *Id.* (emphasis added).

167. *Id.*

chitect, a historian, or architectural historian, a real estate developer, a community development corporation representative, a representative of a community organization and two other persons learned in the historic traditions of the city.<sup>168</sup> Under the old ordinance, the Historic Commission consisted of the Director of Finance, the Commissioner of Public Property and five persons interested in preservation and learned in the historic traditions of the city.<sup>169</sup> Apparently, the Philadelphia City Council thus deemed valuable the experience and services of preservationists, architects and historians to the work of the Commission, and desired an approach to preservation which integrated the work of a greater range of city administrative agencies. The requirement that the Commission include professionals associated with historic architecture and design is typical of many modern ordinances.<sup>170</sup> It should add both experience and community perspective to the Commission, which, in turn, should lead to more knowledgeable decisions regarding designation and the review of demolition and alteration permit applications.

#### B. *Duties of the Historical Commission*

The duties of the Historical Commission set forth by the old ordinance were limited. The Commission was to assist the Department of Public Property in the preparation of an inventory of buildings of historic significance<sup>171</sup> and advise the department of its objections to applications for permits for demolition or alteration.<sup>172</sup> The new ordinance grants the Commission a range of new substantive duties. The Commission is directed to: 1) designate historic buildings, structures, sites and objects subject to stated criteria;<sup>173</sup> 2) designate and delineate the boundaries of historic districts;<sup>174</sup> 3) prepare and maintain an inventory of historic buildings, structures, sites objects and districts<sup>175</sup> and 4) review applications to alter or demolish designated historic buildings, structures, sites, objects, and those buildings, struc-

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168. *Id.*

169. *Id.* § 14-2007(3) (1956) (repealed 1984).

170. For a discussion of the authorization for, and the composition and appointment of historic preservation commissions, see *supra* notes 73-80 and accompanying text.

171. PHILADELPHIA, PA., CODE § 14-2007(4)(a) (1956) (repealed 1984).

172. *Id.* § 14-2007(5)(c).

173. *Id.* § 14-2007(4)(a) (1984).

174. *Id.* § 14-2007(4)(b).

175. *Id.* § 14-2007(4)(c).



tures, sites, and objects located within a historic district.<sup>176</sup> The new legislation also delegates to the Commission certain duties which may be described as discretionary duties. These latter duties include: 1) recommending to the Mayor the allocation of grants, gifts and the budget for preservation;<sup>177</sup> 2) recommending acquisitions of structures or objects of historic significance;<sup>178</sup> 3) increasing public awareness of historic preservation;<sup>179</sup> 4) adopting rules, regulations and committees<sup>180</sup> and 5) keeping records and minutes of all proceedings.<sup>181</sup>

The new historic preservation ordinance substantially adds to the duties of the Philadelphia Historical Commission. It is also among the broadest historic preservation ordinances surveyed with regard to the duties it delegates to the Philadelphia Historical Commission. It authorizes the Commission to designate landmarks and to delineate the boundaries of historic districts.<sup>182</sup> The only other historic preservation legislation surveyed which authorizes a historic commission to designate landmarks or districts without legislative approval is that of the District of Columbia.<sup>183</sup> The ordinance also authorizes a broad range of discretionary duties to the Commission, which are similar to those duties delegated in other municipal ordinances.<sup>184</sup>

### C. *Criteria for Designation*

The inclusion of criteria for designating historic sites, objects or districts in the new ordinance is also a major change because the old ordinance contained no criteria for historic designation. The inclusion of criteria for designation is important, as it may

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176. *Id.* § 14-2007(4)(d). This section provides that the Historical Commission will have the power and duty to:

Review and act upon all applications for permits to alter or demolish historic buildings, structures, sites or objects; to alter or demolish buildings, structures, sites or objects located within historic districts, and to review and comment upon all applications for permits to construct buildings, structures or objects within historic districts as provided in this section.

*Id.*

177. *Id.* § 14-2007(4)(e).

178. *Id.* § 14-2007(4)(f).

179. *Id.* § 14-2007(4)(g).

180. *Id.* § 14-2007(4)(h).

181. *Id.* § 14-2007(4)(i).

182. *Id.* § 14-2007(4)(a)-(b).

183. Washington, D.C. Law 2-144 § 4(c)(3) (Dec. 27, 1978).

184. For a discussion of various powers and duties of historic commissions, see *supra* notes 81-109 and accompanying text.

protect the legislation from constitutional challenges based on the denial of equal protection or procedural due process which threaten vague legislation.<sup>185</sup>

The designation of a building, building complex, structure, site, object or district is dependent upon its historic integrity. A property may be designated as historic if it "has significant character, interest or value as part of the development, heritage or cultural characteristics of the City, Commonwealth [of Pennsylvania] or Nation, or is associated with a person significant in the past."<sup>186</sup> Designation may also be premised upon association of the property with an event of historical significance,<sup>187</sup> the property's reflection of the environment of a distinctive architectural style,<sup>188</sup> or the characteristics of an architectural style or engineering specimen.<sup>189</sup> If the property is the product of a designer, architect, engineer or landscape architect that influenced the development of the City, Commonwealth or Nation,<sup>190</sup> or contains elements which represent a significant innovation,<sup>191</sup> the Commission may then designate it as historic. Other criteria include: the relationship of the property to a square, park or distinctive area;<sup>192</sup> the location or visual features of the property as related to the neighborhood, community or city;<sup>193</sup> its yield or likelihood of yielding historic information<sup>194</sup> and its exemplification of the cultural, political, economic, social or historical heritage of the community.<sup>195</sup>

#### D. *Procedure for Designation*

The old historic preservation ordinance provided no set procedure for designation. That ordinance directed the Department of Public Property, with the assistance of the Historical Commission, to prepare a list of buildings in Philadelphia deemed to be

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185. For a discussion of the necessity for specific standards to be employed by governmental entities making land use regulation decisions, see *supra* notes 22-28 and accompanying text.

186. PHILADELPHIA, PA., CODE § 14-2007(5)(a) (1984).

187. *Id.* § 14-2007(5)(b).

188. *Id.* § 14-2007(5)(c).

189. *Id.* § 14-2007(5)(d).

190. *Id.* § 14-2007(5)(e).

191. *Id.* § 14-2007(5)(f).

192. *Id.* § 14-2007(5)(g).

193. *Id.* § 14-2007(5)(h).

194. *Id.* § 14-2007(5)(i).

195. *Id.* § 14-2007(5)(j).

historically significant.<sup>196</sup> The old ordinance, however, contained no procedural safeguards concerning notice or hearings for either the designation or listing of the property.

No designation of a building, structure, site, object or historic district under the new ordinance may occur without a public meeting.<sup>197</sup> Notice of a proposed designation of a building, structure, site or object must be sent to the owner of the concerned property at both the address of the property and the owner's last known tax address at least thirty days in advance of the public meeting.<sup>198</sup> For the designation of a historic district, the owners of each building within the proposed district must receive the same type of notice of the proposed district designation sixty days before the public meeting.<sup>199</sup>

Any interested individual may submit evidence at the public meeting, either in testimonial or documentary form.<sup>200</sup> In the case of the designation of a historic district, the City Planning Commission must send comments on the proposed district to the Commission prior to the hearing.<sup>201</sup>

Notice of the decision to designate must be sent to the owners of buildings, structures, sites, objects and the owners of individual structures in a proposed historic district.<sup>202</sup> Such notice is also sent to the individuals who appeared and so requested it at the public meeting.<sup>203</sup> The substance of the notice must contain the reasons for designation.<sup>204</sup> As with notice of the public meeting, notice of designation must be sent to the owner's last known address in the real estate tax records and to the street address of the designated property.<sup>205</sup>

196. *Id.* § 14-2007(4)(a) (1956) (repealed 1984).

197. *See id.* § 14-2007(6) (1984).

198. *Id.* § 14-2007(6)(a). Notice must indicate the date, time and place of the public meeting, and must be sent to the registered owner both at his last known address as it appears in his real estate tax records, and at his street address. *Id.*

199. *Id.* § 14-2007(6)(b). The notice must include the date, time and place of the public meeting, and is to be forwarded to the registered owner's last known address as it appears on the real estate tax records. The notice must also be published in a newspaper of general circulation and be posted at locations in the proposed district. *Id.*

200. *Id.* § 14-2007(6)(c).

201. *Id.* § 14-2007(6)(d).

202. *Id.* § 14-2007(6)(e). Apparently the ordinance does not require that notice of a decision by the Commission denying the designation of a particular property be given to owners or interested parties.

203. *Id.*

204. *Id.*

205. *Id.*

All designated buildings, structure, sites, objects and districts are to be recorded in a register, which is to be available for public inspection at the Historical Commission Office, the Department of Licenses and Inspections and at the Department of Records.<sup>206</sup> Rescission or amendment of a designation takes place under the same procedure as would designation.<sup>207</sup>

#### E. *Permits for Demolition or Alteration*

Under both the new ordinance and the repealed ordinance, no designated structure or structure within a historic district may be demolished or altered without a permit to do so obtained from L&I.<sup>208</sup> The new ordinance, however, gives broader powers to the city government to deny a permit.<sup>209</sup>

Under the old ordinance, the Department of Public Property forwarded applications for permits to alter or demolish historic buildings to the Historical Commission.<sup>210</sup> After consulting with the Commission, the Department had sixty days to decide whether to grant the permit or delay demolition.<sup>211</sup> A Department order could delay demolition for no longer than six months under the old ordinance.<sup>212</sup>

The new ordinance considerably expands both the permit application process and the powers of the Commission to deny a permit. Perhaps the most important change concerns the six-month delay of denial of a permit to demolish a designated structure.<sup>213</sup> The new ordinance gives the Commission the power

206. *Id.* § 14-2007(6)(g).

207. *Id.* § 14-2007(6)(f).

208. *See id.* § 14-2007(7)(a) (1984) ("Unless a permit is first obtained from the Department [of Licenses and Inspections], no person shall alter or demolish an historic building . . ."); *Id.* § 14-2007(5) (1956) (repealed 1984) ("No person shall demolish or alter any building on the list prepared pursuant to this section unless he has obtained a permit from the Department of Licenses and Inspections.").

209. *Compare id.* § 14-2007(7)(g)(.2) (1984) ("Where the Commission has an objection, the Department [of Licenses and Inspections] shall deny the permit.") *with id.* § 14-2007(5)(e) (1956) (repealed 1984) (when Department of Public Property issues final order to *postpone* alteration or demolition for six months, applicant may appear before Commission to offer evidence concerning proposed order).

210. *Id.* § 14-2007(5)(b) (1956) (repealed 1984).

211. *Id.* § 14-2007(5)(c).

212. *Id.* For the text and a discussion of the provision of the repealed ordinance which delayed demolition for a six month period, see *supra* note 163 and accompanying text.

213. PHILADELPHIA, PA., CODE § 14-2007(7)(h) (1984).

both to deny permission to demolish or alter<sup>214</sup> and power merely to delay demolition or alteration for six months in cases where postponing such a decision is appropriate.<sup>215</sup>

There are, however, other differences between the old and new ordinances and the means by which they treat permit applications. The new ordinance, for example, requires L&I to post notice of an application for demolition on each street frontage of the proposed premises within seven days of receipt of the application.<sup>216</sup> Similar to the old ordinance, the new legislation requires review and comment by the Historical Commission within forty-five days of the application.<sup>217</sup> The applicant must file with the Commission the plans and specifications of the proposed alteration, and in the event of a proposed demolition, the applicant must include the plans and specifications of the proposed new construction.<sup>218</sup>

Any objections by the Historical Commission to the application must be announced within sixty days of receipt of the application by the Commission.<sup>219</sup> To avoid conflict with the City Charter regarding advisory committees such as the Historical Commission, L&I is the entity which actually grants or denies a permit application.<sup>220</sup> But, under the language of the ordinance, the objection of the Commission to the permit application has the effect of requiring L&I to deny the permit.<sup>221</sup> Its approval merely has the effect of granting the permit subject to the applicant's compliance with other laws.<sup>222</sup> The Commission may postpone its decision on a proposed alteration or demolition for up to six months.<sup>223</sup> It may also grant conditional approval to an application and incorporate the conditions into the permit.<sup>224</sup>

Unlike its predecessor, the new ordinance sets forth criteria for the approval or denial of an application for demolition or al-

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214. *Id.* § 14-2007(7)(g)(.2).

215. *Id.* § 14-2007(h).

216. *Id.* § 14-2007(7)(b).

217. *Id.* § 14-2007(7)(c), (d).

218. *Id.* § 14-2007(7)(e).

219. *Id.* § 14-2007(7)(g).

220. For a discussion of possible conflicts between the 1984 historic preservation legislation and the Philadelphia City Charter, see *infra* notes 259-88 and accompanying text.

221. PHILADELPHIA, PA., CODE § 14-2007(7)(g)(.2) (1984).

222. *Id.* § 14-2007(7)(g)(.1).

223. *Id.* § 14-2007(7)(g)(.3), (h).

224. *Id.* § 14-2007(7)(i).

iteration of a designated historic structure.<sup>225</sup> The standards include: 1) compliance with the purposes of the new ordinance, 2) the historic, architectural or aesthetic significance of the structure, 3) the effect of the proposed work on the surroundings of the structure, 4) the compatibility of the proposed work with the surroundings of the structure, 5) the design of the proposed work, and 6) the compliance of the proposed work with the Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings as set forth by the Secretary of the Interior<sup>226</sup> or as per similar building criteria.

#### F. *Financial Hardship and Non-Feasibility of Adaptive Reuse*

Constitutional law has established that a mere diminution in the value of regulated property will not establish a taking.<sup>227</sup> Yet a government may not deprive a landowner of all value of his land without complying with the fifth amendment requirement of compensation.<sup>228</sup> The new ordinance, however, provides more protection to the landowner than the United States Constitution. It sets forth a number of bases upon which the Historical Commission may authorize the issuance of a permit for demolition, even where the ordinance has not reduced value of land entirely, and thus where a taking has not occurred under constitutional jurisprudence.<sup>229</sup>

The first basis upon which issuance of a permit may be authorized is if a designated structure or building in a historic district "cannot be used for any purpose for which it is or may be reasonably adapted."<sup>230</sup> The standard as set forth by the ordinance is virtually co-extensive with the test for a taking under *Maher*.<sup>231</sup> In *Maher*, the court ruled that Maher failed to show that a taking occurred by the ordinance leaving his property virtually valueless.<sup>232</sup> The court wrote:

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225. *Id.* § 14-2007(7)(k).

226. See 36 C.F.R. § 67.7 (1986) (Secretary of the Interior's "Standards for Rehabilitation").

227. See, e.g., *Figarsky v. Historic Dist. Comm'n*, 171 Conn. 198, 368 A.2d 163 (1976). For a discussion of *Figarsky*, see *supra* note 32.

228. For a discussion of the "taking" issue, see *supra* notes 28-57 and accompanying text.

229. PHILADELPHIA, PA., CODE § 14-2007(7) (1984).

230. *Id.* § 14-2007(7)(j).

231. 516 F.2d 1051 (5th Cir. 1975). For a discussion of *Maher*, see *supra* notes 35-41 and accompanying text.

232. *Maher*, 516 F.2d at 1066.

In particular, Maher did not show that the sale of the property was impractical, that commercial rental could not provide a reasonable rate of return, or that other potential use of the property was foreclosed. To the extent that such is the theory underlying Maher's claim, it fails for lack of proof.<sup>233</sup>

The new ordinance uses virtually identical language to require a showing that a building cannot be used for any purpose for which it is or may be reasonably adapted. The ordinance provides:

In order to show that a building, structure, site or object cannot be used for any purpose for which it is or may be reasonably adapted, the owner must demonstrate that the sale of the property is impracticable, that commercial rental cannot provide a reasonable rate of return and that other potential uses of the property are foreclosed.<sup>234</sup>

The second basis upon which the Commission may grant a permit to demolish a designated structure exemplifies how the ordinance protects the landowner beyond the protections of the fourteenth amendment. The ordinance provides that the Commission may provide an exemption from the requirements of the ordinance where a literal enforcement of the ordinance would result in unnecessary hardship<sup>235</sup> and where the exemption would not be contrary to the public interest.<sup>236</sup> This provision is very similar to the standard for variance from a zoning ordinance.<sup>237</sup> It

233. *Id.*

234. PHILADELPHIA, PA., CODE § 14-2007(7)(j) (1984).

235. *Id.* § 14-2007(7)(c)(7). The language of the ordinance does not designate *who* must suffer the unnecessary hardship: the owner or the applicant.

236. *Id.* § 14-2007(7)(k)(7).

237. The constitutional limitations on the granting of a zoning variance were discussed in *National Land and Investment Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965). In *National Land*, the Pennsylvania Supreme Court stated:

[A]n application for a variance implies a challenge to the legality of the zoning ordinance as it applies to a specific piece of property. Zoning is permitted when exercised for the promotion of the health, safety, morals or general welfare of the community. Such exercise of the police power, however, may . . . impose upon the owner of . . . properties an 'undue hardship.' When so applied, the ordinance can not be termed a reasonable or constitutional exercise of the power. To preserve the validity of the zoning ordinance . . . the variance provision of the enabling act functions as an 'escape valve' so that . . . a means of relief from the mandates of the ordinance is provided.

*Id.* at 511-12, 215 A.2d at 602 (citations omitted).

allows the Commission more flexibility and affords the landowner greater protection from the application of the historic preservation ordinance.

Finally, the Commission may grant a permit to demolish a designated historic structure if it finds that "issuance of the permit is necessary in the public interest."<sup>238</sup> This is a very broad grant of discretion by the legislature to the Historical Commission. There are no guidelines as to what the public interest might be in a given circumstance. This final basis is a large loophole in the ordinance which could conceivably allow very important historic structures to be demolished based on a factual finding by an agency which would probably be difficult to reverse on appeal.

If a property owner desires to assert one of these three bases for permit approval, he or she must submit detailed financial information to the Historical Commission.<sup>239</sup> The Commission may also require that further feasibility studies be conducted at the owner's expense.<sup>240</sup>

*G. The Duty to Maintain Designated Buildings and Perform  
Adaptation and Repairs with  
Historic Integrity*

Another major substantive addition to the new historic preservation ordinance is the requirement that repairs or alterations to historic structures conform to the style of the era in which the construction took place<sup>241</sup> and that designated structures be kept in good repair.<sup>242</sup> The repealed ordinance had no provision of any nature for overseeing maintenance or alterations.

The new ordinance directs that upon request from the Historical Commission, L&I will examine the physical condition of any designated structure.<sup>243</sup> L&I also has the duty under the or-

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238. PHILADELPHIA, PA., CODE § 14-2007(7)(j) (1984).

239. *Id.* § 14-2007(7)(f). The information which must be provided to the Commission includes: 1) the amount paid for the property, 2) the date of purchase, 3) the seller, and the seller's relationship to the buyer, 4) the assessed value of the land and improvements, 5) annual gross income from the property, 6) itemized operating and maintenance expenses, 7) real estate taxes, 8) annual debt service, 9) annual cash flow, 10) deductions and depreciation from federal income taxes, 11) all appraisals of the property, 12) all listings for sale or rent, price asked, and offers received and 13) any considerations for profitable adaptive reuses. *Id.*

240. *Id.* § 14-2007(7)(f)(7).

241. *Id.* § 14-2007(7)(k).

242. *Id.* § 14-2007(8)(c).

243. *Id.* § 14-2007(8)(a).



dinance to inspect structures for which alteration permits have been granted to ascertain whether the alterations are being performed in accord with the conditions or requirements of the permit.<sup>244</sup> The ordinance authorizes L&I to issue a stop work order if the alterations fail to conform with the permit.<sup>245</sup>

The new ordinance further places an affirmative duty upon owners of designated structures or structures within a designated district to maintain the exterior of the structure.<sup>246</sup> Compliance with the duty to repair is policed by the Commission, which may request that L&I inspect property and report on its condition.<sup>247</sup> The purpose of this provision is to prevent "demolition by neglect" of historic property.<sup>248</sup> However, acts of ordinary maintenance or repair, where the purpose of the repair is to prevent deterioration, are excluded from the provisions of the ordinance which require that a permit be obtained before any work is performed,<sup>249</sup> and thus might be construed as prohibiting the repair.<sup>250</sup>

Legislative provisions which place an affirmative duty of maintenance upon an owner appear in the strongest historic preservation ordinances. It was prudent for the drafters of the ordinance to designate a department of city government responsible for reviewing compliance with permits and with the affirmative obligation to maintain property.

#### H. *Enforcement of the Ordinance and Appeals*

The new historic preservation ordinance gives certain powers of enforcement to L&I. The old ordinance was silent with regard to the enforcement of its provisions. On the other hand, the old ordinance contained no affirmative requirement for maintenance of designated buildings, and it gave L&I little more than the power to postpone demolitions for six months. Arguably, there were few prohibitions under the old ordinance which would need to be enforced.

The new ordinance authorizes L&I to adopt regulations for

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244. *Id.* § 14-2007(8)(b).

245. *Id.*

246. *Id.* § 14-2007(8)(c).

247. *Id.* § 14-2007(8)(a).

248. For a definition of the term "demolition by neglect," see *supra* text accompanying note 150.

249. PHILADELPHIA, PA., CODE § 14-2007(7)(a) (1984).

250. *Id.* § 14-2007(8)(d).

the enforcement of the ordinance.<sup>251</sup> In the event that L&I uncovers a violation, it may issue an order to comply, which is served on the owners of the designated property.<sup>252</sup> The ordinance authorizes a fine of three hundred dollars or imprisonment for up to ninety days for its violation.<sup>253</sup> The ordinance also directs that a person who alters or demolishes a designated structure must restore the structure to its pre-violation condition.<sup>254</sup>

The new ordinance sets forth a procedure for appeal by an aggrieved party of any decision of the Historical Commission regarding the issuance or denial of a permit.<sup>255</sup> Perhaps it was unnecessary that the old ordinance include such a procedure, since a property owner could merely wait out the six month postponement of the permit denial.<sup>256</sup> In any event, the new ordinance contains such a provision where the old ordinance is silent.

An aggrieved person may appeal the action of the Historical Commission to the Board of License and Inspection Review within fifteen days of notice of the Commission's decision.<sup>257</sup> The Review Board must then give notice to the Commission of the appeal within three days of the filing of the appeal.<sup>258</sup> Presumably, after exhaustion of administrative remedies, an aggrieved party may seek judicial review.<sup>259</sup>

#### V. ANALYSIS AND CRITICISM OF THE NEW PHILADELPHIA HISTORIC PRESERVATION ORDINANCE

The newly enacted Historic Preservation Ordinance for the City of Philadelphia represents a substantial change in the law since its predecessor of 1955. The new legislation reflects the evolution of constitutional jurisprudence in land use law, as well as, the experiences of many communities in enacting and enforcing historic preservation legislation. It undoubtedly falls into the category of ordinances which grant more power and discretion to historic commissions to carry out their prescribed functions.

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251. *Id.* § 14-2007(9)(a).

252. *Id.* § 14-2007(9)(b).

253. *Id.* § 14-2007(9)(c).

254. *Id.* § 14-2007(9)(d).

255. *Id.* § 14-2007(10).

256. For a discussion of this aspect of the old ordinance, see *supra* notes 162 & 211 and accompanying text.

257. PHILADELPHIA, PA., CODE § 14-2007(10) (1984).

258. *Id.*

259. See PHILADELPHIA, PA., HOME RULE CHARTER art. v, § 5-1005 (1951); see, e.g., *H. A. Steen Indus., Inc. v. Cavanaugh*, 430 Pa. 10, 241 A.2d 771 (1968).

There are, however, some problems with the new ordinance. The problems may be categorized as: 1) the conflict between the Historical Commission's responsibilities under the ordinance and the Philadelphia City Charter, 2) appellate review by the Board of Review of Licenses and Inspections, and 3) the effect of the ordinance upon the Philadelphia Historic Preservation Corporation's Facade Easement Program.

#### A. *Conflict with the Philadelphia City Charter*

Under the repealed historic preservation ordinance, the existence of the Historical Commission was a matter of discretion for the Mayor.<sup>260</sup> The new legislation mandates that the Mayor appoint a Historical Commission.<sup>261</sup> While that change is beneficial in terms of promoting preservation activities in Philadelphia, it is not entirely clear that the change complies with the Philadelphia Home Rule Charter.<sup>262</sup>

The Charter only authorizes certain enumerated administrative agencies.<sup>263</sup> The Charter provides that executive and administrative powers shall be vested in "a Mayor and such other officers, departments, boards and commissions as are designated and authorized in this Charter."<sup>264</sup> The Charter, therefore, anticipates that there will be no additional administrative agencies other than those authorized therein. The Charter does allow for the establishment of "such additional advisory boards as the mayor may permit."<sup>265</sup> Section 3-971 of the Charter provides that "[t]he Mayor may upon request of the head of any department or of his own volition appoint a board of seven citizens to act in an advisory capacity to such department regarding the department's work or any specified phase of it."<sup>266</sup> The Charter does not include and express authorization for the Philadelphia Historical Commission as an administrative agency. Thus, its sole basis for existence would be as an advisory board, which, under the Charter, may have only advisory powers.

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260. *Id.* § 14-2007(3) (1956) (repealed 1984). For the text of this provision, see *supra* note 165.

261. PHILADELPHIA, PA., CODE § 14-2007(3) (1984). For the text of this provision, see *supra* note 166.

262. PHILADELPHIA, PA., HOME RULE CHARTER (1951).

263. *Id.* art. I, § 1-102(1).

264. *Id.*

265. *Id.* § 3-100(h).

266. *Id.* § 3-917. It should be noted that, under the 1984 historic preservation ordinance, the Philadelphia Historical Commission includes at least seven citizens in its membership. See PHILADELPHIA, PA., CODE § 14.2007(3) (1984).

If the Philadelphia Historical Commission is merely an advisory board because the Charter does not expressly provide for its existence, the question is then whether the ordinance has delegated more than advisory powers to the Commission. The ordinance does delegate certain duties to the Commission which are clearly advisory, such as recommending the uses of grants<sup>267</sup> and purchases of historic structures.<sup>268</sup> Certain other duties delegated by the ordinance, such as increasing public awareness<sup>269</sup> or preparing an inventory of historic structures,<sup>270</sup> may not be strictly "advisory," but few people would likely claim that these innocuous duties constitute an improper delegation of power.

On the other hand, the duties of designating historic structures,<sup>271</sup> delineating and designating historic districts,<sup>272</sup> and reviewing all applications for permits to alter or demolish historic structures<sup>273</sup> are powers which clearly are not "advisory." The ordinance attempts to avoid conflict with the Charter while giving the Commission the authority to determine the outcome of permit applications. It does so by authorizing only L&I the power to grant or deny permit applications.<sup>274</sup> At the same time, it requires that L&I deny any permit application to which the Com-

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267. PHILADELPHIA, PA., CODE § 14-2007(4)(e) (1984).

268. *Id.* § 14-2007(4)(f).

269. *Id.* § 14-2007(4)(g).

270. *Id.* § 14-2007(4)(c).

271. *Id.* § 14-2007(4)(a).

272. *Id.* § 14-2007(4)(b).

273. *Id.* § 14-2007(4)(d).

274. *Id.* § 14-2007(7)(g). Subsection (7)(g) provides:

(g) Within sixty (60) days after receipt by the Commission of a permit application, the Commission shall determine whether or not it has any objection to the proposed alteration or demolition.

(.1) where the Commission has no objection, the Department shall grant the permit subject to the requirements of any applicable provisions of the code and regulations and subject to any conditions of the Commission pursuant to the subsection (7)(i).

(.2) where the Commission has an objection, the Department shall deny the permit.

(.3) where the Commission acts to postpone the proposed alteration or demolition pursuant to subsection (7)(h) of this Section, the Department shall defer action on the permit application pending a final determination by the Commission approving or disapproving the application. Before taking any action, the Commission shall afford the owner an opportunity to appear before the Commission to offer any evidence the owner desires to present concerning the proposed alteration or demolition. The Commission shall inform the owner in writing of the reasons for its action.

*Id.*

mission has an objection.<sup>275</sup> Effectively, therefore, the ordinance gives the Commission the power to deny permit applications.

The ordinance makes no attempt to reconcile the conflict with the Charter regarding the designation of historic structures and districts. Quite simply, the Commission itself may designate properties as historic.<sup>276</sup> In other communities, legislative ratification or some other legislative action is required before a property may be so designated.<sup>277</sup> Indeed, the old ordinance mandated designation by the Department of Public Property "with the aid of the historic commission," thus eliminating any potential conflict with the Charter.<sup>278</sup>

There is one case in Pennsylvania which deals with advisory boards under Philadelphia's Home Rule Charter. In *Harrington v. Tate*,<sup>279</sup> plaintiffs were successful in convincing a chancellor that the Philadelphia Police Advisory Board was improperly established.<sup>280</sup> The Police Advisory Board was established to investigate citizen complaints regarding police personnel.<sup>281</sup> The Board conducted hearings at which rules of evidence were followed, and made recommendations to the Police Commissioner, who could either take or refrain from taking action.<sup>282</sup> On appeal, the Pennsylvania Supreme Court reversed.<sup>283</sup> In its analysis, the court commented:

An advisory board, while it may go about its tasks in much the same manner [as a review board], is not statutorily charged with governmental functions and its decisions are not judicial. Those decisions are merely recommendations which the receiver thereof is free to

275. *Id.*

276. *Id.* § 14-2007(4)(a)-(b).

277. For a discussion of ordinances requiring legislative ratification or action prior to property designation, see *supra* notes 112-29 and accompanying text.

278. See PHILADELPHIA, PA., CODE § 14-2007 (1956) (repealed 1984).

279. 435 Pa. 176, 254 A.2d 622 (1969).

280. *Id.* at 178, 254 A.2d at 624. The Pennsylvania Supreme Court stated that "[i]n considering that the Board was improperly established, the chancellor strayed far from the legal issue." *Id.*

281. *Id.* The Philadelphia Home Rule Charter provided the statutory authorization for the creation of the Board. See PHILADELPHIA, PA., HOME RULE CHARTER art. III, ch. 1, § 3-100(h) (1951); *id.* ch. 9, § 3-917.

The court found that the Charter provisions gave the mayor the authority "to appoint a board to advise the police department on community relations and police discipline." 435 Pa. at 178-79, 254 A.2d at 624.

282. 435 Pa. at 179, 254 A.2d at 624.

283. *Id.* at 181, 254 A.2d at 625.

ignore . . . . [T]he Police Advisory Board has always recognized this essential difference in that it made recommendations which the Police Commissioner was free to accept or ignore in disciplining the city policemen.<sup>284</sup>

Under the *Harrington* rationale, the processes used by the Historical Commission to designate and to review permit applications would be found inappropriate, because in both cases no other governmental entity is free to reject the Historical Commission's decision.

A strong argument can be made under the Home Rule Charter that the creation of the Historical Commission was valid. The Home Rule Charter provides:

Any additional executive and administrative power which may be conferred on the City by amendment of the Constitution or by the laws of the Commonwealth of Pennsylvania shall be vested in and exercised by the Mayor and, as far as practicable, by the officers, departments, boards and commissions designated in this charter. The Council shall by ordinance distribute among such officers, departments, boards and commissions such new powers and duties, but to the extent that this is not practicable, *it may create* additional offices, boards and commissions for the exercise of such powers and the performance of such duties. . . .<sup>285</sup>

This provision anticipates the creation of new commissions when additional powers or duties for the city are created by constitutional amendment or legislation.

Since the Charter was enacted, the Pennsylvania Constitution has recognized the right to environmental protection<sup>286</sup> and the

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284. *Id.* at 179, 254 A.2d at 624.

285. PHILADELPHIA, PA., HOME RULE CHARTER art. I, § 1-102(2) (1951) (emphasis added).

286. PA. CONST. art. 1, § 27 (1971). Section 27 provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

*Id.*; see also *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commw. 231, 302 A.2d 886, *aff'd*, 454 Pa. 193, 311 A.2d 588 (1973) (enjoining construction of observation tower on historic site pursuant to PA. CONST. art. 1, § 27).

Pennsylvania legislature has promulgated enabling legislation for historic district ordinances.<sup>287</sup> Arguably, the enabling legislation for historic districts creates no powers or duties for Philadelphia, because the act refers only to second class cities.<sup>288</sup> The Pennsylvania constitutional amendment, however, refers to the preservation of historic values as a right of the commonwealth's citizens.<sup>289</sup> Thus, there exists a constitutional expression of public concern regarding historic preservation which did not exist at the time that the Home Rule Charter was enacted.

Arguably, it would be difficult for an advisory board to effectively implement policies developed at the state constitutional level; thus, the Charter authorizes the Commission's creation.

#### B. *Review by the Board of License and Inspection*

There has also been concern about the appeal provisions of the new historic preservation ordinance. This appeal provision provides:

Any person aggrieved by the issuance or denial of any permit reviewed by the Commission may appeal such action to the Board of License and Inspection Review. Such appeal must be filed within fifteen (15) days of the date of receipt of notification of the Commission's action. The Board of License and Inspection Review shall give written notice of any such appeal to the Commission within three (3) days of the filing of the appeal.<sup>290</sup>

The first problem with the appeal provision is with who may appeal a decision of the Historical Commission. The ordinance allows "any person aggrieved" by the decision to appeal.<sup>291</sup> That category would most certainly include a property owner who was denied a permit. Moreover, because the section permits an appeal of the issuance of a permit,<sup>292</sup> it implies that at least an adja-

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287. PA. STAT. ANN. tit. 53 §§ 8001-8006 (Purdon 1972 & Supp. 1986).

288. *Id.* § 8002. The provision for creating and defining districts states that "all counties, cities, *except cities of the first class*, boroughs, incorporated towns and townships, are hereby authorized to create and define, by ordinance, a historic district or districts . . . ." *Id.* (emphasis added).

289. For the text of the Pennsylvania constitutional provision, see *supra* note 85.

290. PHILADELPHIA, PA., CODE § 14-2007(10) (1984).

291. *See id.*

292. *See id.*

cent property owner would be an aggrieved person. Perhaps even a Philadelphia citizen's group could have standing to complain of a commission decision.<sup>293</sup> Obviously, the ordinance would be clearer if it defined who is an aggrieved person.

There has also been concern that the Board of License and Inspection Review is composed of citizens less experienced in preservation matters than the members of the Historical Commission.<sup>294</sup> The ordinance lends no guidance as to what scope of review the Board of License and Inspection Review is to employ on appeal. On the one hand, review could have been intended to be *de novo*, to avoid any allegations that the Historical Commission had powers beyond that of an advisory board. On the other hand, review could be construed to be parallel with that prescribed by law for review by courts of local agency adjudications.<sup>295</sup> The applicable Act provides for review of whether the finding was supported by sufficient evidence where the record was complete.<sup>296</sup> In any event, several questions remain to be answered with regard to appeals under the new legislation.

### C. *Facade Easements and the New Ordinance*

There has been some criticism that the ordinance will adversely affect the Philadelphia Facade Easement Program of the

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293. See *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973). But see *Sierra Club v. Morton*, 405 U.S. 727 (1972).

294. For a discussion of the composition and manner of appointment of the Commission, see *supra* note 164-70 and accompanying text.

295. The Pennsylvania statute provides for judicial review of local agency adjudications:

#### Disposition of Appeal

(a) Incomplete record.—In the event a full and complete record of the proceedings before the local agency was not made, the court may hear the appeal *de novo*, or may remand the proceedings to the agency for the purpose of making a full and complete record or for further disposition in accordance with the order of the court.

(b) Complete record.—In the event a full and complete record of the proceedings before the local agency was made, the court shall hear the appeal without a jury on the record certified by the agency. After hearing the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter B of Chapter 5 (relating to practice and procedure of local agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. If the adjudication is not affirmed, the court may enter any order authorized by 42 Pa. C.S. § 706 (relating to disposition of appeals).

2 PA. CONS. STAT. ANN. § 754(b) (Purdon Supp. 1987).

296. *Id.*



Philadelphia Historic Preservation Corporation (PHPC). The Facade Easement Program permits a property owner to donate a legal interest in the facade of a historic building to PHPC.<sup>297</sup> The facade easement "imposes restrictions upon modifications to one or more of the facades of a building [that part of a building that can be seen by a person facing it] and imposes requirements for their proper maintenance and repair."<sup>298</sup> Because the easement is granted in perpetuity,<sup>299</sup> subsequent purchasers of the property purchase subject to the easement, and will thus be required to maintain the facade accordingly.

The incentives for a property owner to donate a facade easement include potential income, gift, estate and property tax benefits.<sup>300</sup> The tax benefits inure from the reduction in value of a structure resulting from the restrictions of the easement.<sup>301</sup>

One criticism of the new historic preservation ordinance has been its potential adverse effect on the Facade Easement Program. Many of the structures which would be eligible for the Facade Easement Program might also qualify for designation under the ordinance. The ordinance imposes the affirmative obligation of maintenance upon the owner of a designated structure. Thus, the restriction contained in the easement might only reiterate those restrictions to which a property owner is already subjected under the ordinance. The easement then may lose the effect of reducing the value of the property and, consequently, the tax benefits of donating a facade easement would be minimized.

Of course, the PHPC easement generally contains restrictions beyond the affirmative obligation of keeping the exterior of a structure in "good repair," as is required by the ordinance.<sup>302</sup> The easement may dictate detailed requirements such as the color of paint or frequency of painting. Restrictions beyond the obligation to keep an exterior in "good repair" may have the effect of reducing the value of a property, even if the reduction is less than

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297. See generally *Historic Preservation*, PA. BAR INST. 326-31 (1984). The article describes the transfer of a facade easement to be "in the form of a deed granted in perpetuity to Philadelphia Historic Preservation Corporation, which specifies the level of restoration to which the building is to be restored and maintained and provides for monitoring and enforcement." *Id.* at 326.

298. *Id.*

299. See *supra* note 297.

300. *Historic Preservation*, PA. BAR INST. 326, 328 (1984).

301. *Id.* at 328.

302. The 1984 ordinance requires only that "[t]he exterior of every historic building, structure and object located within an historic district shall be kept in good repair." PHILADELPHIA, PA., CODE § 14-2007(8)(c) (1984).

it would have been absent the obligations of repair under the ordinance.

This criticism only applies to structures which are both designated under the ordinance and enrolled in the Facade Easement Program. The benefits of the program are still available to structures not governed by the ordinance. Few easements on properties certified as Philadelphia landmarks have been donated to PHPC since the new ordinance was enacted. Thus, it is impossible to assess the actual value of the decline in easement donations.<sup>303</sup> Appraisals indicate a reduction of approximately two points in the value of a non-income producing facade easement donation. While the ordinance may reduce the value of the donation to the taxpayer, it has not eliminated the charitable contribution for easement donations. PHPC expects a slight decline in value for designated historic properties.<sup>304</sup>

## VI. CONCLUSION

The new ordinance for the preservation of historic structures in the City of Philadelphia was long overdue. The prior ordinance was inadequate in that the only enforcement mechanism for the Historical Commission was the power to delay the demolition of an historic structure. It is also possible that the old ordinance was constitutionally infirm for its lack of standards for both designation and the process to review permit applications.

The new ordinance is sound in comparison with both its legislative predecessor and with historic preservation legislation in other communities. However, the ordinance is not without flaws. The new ordinance may conflict with the Philadelphia Home Rule Charter. Its process for appeals is ambiguous in terms of standing on appeal and the scope of administrative review. In addition, the ordinance may weaken other preservation tools, such as the Facade Easement Program. Of course, the ordinance can always

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303. Letter from Donna A. Harris, Director of Preservation Programs for Philadelphia Historic Preservation Corporation, to Charlotte E. Thomas (November 13, 1986) (discussing appraisal of Philadelphia's certified easements and the problems resulting from over-valuation penalties for appraisers).

304. *Id.* A more significant problem with the Facade Easement Program is the lack of suitable appraisers who are willing to risk over-valuation penalties which can be assessed against the appraiser. *Id.* One of these penalties precludes the appraiser from giving credible testimony before the Internal Revenue Service. *Id.* These penalties have resulted in a scarcity of appraisers willing to value easements. *Id.*

be changed by amendment.<sup>305</sup> Nevertheless, the ordinance is a welcome addition to the historic preservation program in the City of Philadelphia.

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305. *See, e.g.*, PHILADELPHIA, PA., CODE § 14-2007 (proposed amendment, Bill No. 1006, introduced June 26, 1986).