Legal Materials on Historic Preservation in Philadelphia

1. Philadelphia Historic Preservation Ordinance

2. Philadelphia Historical Commission Rules & Regulations

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

Landmark U.S. Supreme Court case establishing the constitutionality of local historic preservation regulations.

4. United Artists Theater Circuit, Inc. v. Philadelphia Historical Commission, 528 Pa. 12 (1991) ("United Artists I")

Found historic designation of Boyd Theater without consent of the owner amounted to an unconstitutional taking without just compensation. (See court reversing decision below.)

5. United Artists Theater Circuit, Inc. v. Philadelphia Historical Commission, 535 Pa. 370 (1993) ("United Artists II")

Designation of privately owned Boyd Theater as historic without consent of owners was not (in and of itself) a taking. However, the Court voided the historic designation in light of the fact that the purpose of the designation was preservation of the Boyd's interior, which the then-ordinance did not expressly permit.

6. Merriam v. Philadelphia Historical Commission, 777 A.2d 1212 (Pa. Commw. 2001)

Philadelphia Board of License and Inspection Review has no jurisdiction to review the Historical Commission's designation of a building, site or object as historic. The Board only reviews the Historical Commission's permit decisions.

7. Turchi v. Philadelphia Board of License and Inspection Review, 20 A.3d 586 (Pa. Commw. 2011) ("Turchi I")

Historical Commission's interpretation and application of historic preservation ordinance in permit decisions entitled to deference by Board of License and Inspection Review unless plainly erroneous or inconsistent with the ordinance. This seminal case also provides a detailed explanation of the various powers of the Historical Commission: policy-making; quasi legislative (nominations); and administrative (permit decisions).

8. Berger & Montague, P.C. v. Philadelphia Historical Commission, 898 A.2d 1 (Pa. Commw. 2006)

Historical Commission is not obligated to send notice to a building owner who was not party to Historical Commission proceedings of its final approval of a plan to construct a

condominium within a historic district. Time to appeal begins when Historical Commission's decision is entered.

9. Woodland Terrace Homeowners' Association et al. v. Philadelphia Board of License and Inspection Review, 2015 WL 5436758 (Pa. Commw. 2016) (Unreported Panel Decision not to be cited as binding precedent)

Only appellate decision to examine and affirm a financial hardship decision under the Philadelphia ordinance. Opinion contains a detailed analysis of the financial hardship process and evidence necessary to establish the same. Moreover, the Court explains that an applicant for financial hardship does not have to prove that the historic designation at issue amounts to an unconstitutional taking.

10. Financial Hardship Test Defined

- **First Presbyterian Church of York v. City Council of City of York, 360 A.2d 257 (Pa. Commw. 1976)**

  Affirmed denial of demolition permit where appellant failed to show the historic district zoning ordinance precluded the use of its property for any purpose for which it was reasonably adapted. Property owner claimed that historic designation amounted to an unconstitutional taking.

- **Maher v. City of New Orleans, 516 F.2d 1051 (U.S. Ct of Appeals, 5th Cir 1975)**

  Historic Commission had adequate guidance to make a judgment where city had a detailed ordinance, the Commission was expert and there was clear data and an appeal process.

Print

The Philadelphia Code

CHAPTER 14-1000. HISTORIC PRESERVATION

§ 14-1001. Public Policy and Purposes.

It is hereby declared as a matter of public policy that the preservation and protection of buildings, structures, sites, objects, and districts of historic, architectural, cultural, archaeological, educational, and aesthetic merit are public necessities and are in the interests of the health, prosperity, and welfare of the people of Philadelphia. The purposes of this Chapter 14-1000 are to:

(1) Preserve buildings, structures, sites, and objects that are important to the education, culture, traditions, and economic values of the City;

(2) Establish historic districts to assure that the character of such districts is retained and enhanced;

(3) Encourage the restoration and rehabilitation of buildings, structures, sites, and objects that are designated as historic or that are located within and contribute to the character of districts designated as historic without displacing elderly, long-term, and other residents living within those districts;

(4) Afford the City, interested persons, historical societies, and organizations the opportunity to acquire or to arrange for the preservation of historic buildings, structures, sites, and objects that are designated individually or that contribute to the character of historic districts;

(5) Strengthen the economy of the City by enhancing the City's attractiveness to tourists and by stabilizing and improving property values; and

(6) Foster civic pride in the architectural, historical, cultural, and educational accomplishments of Philadelphia.

§ 14-1002. Definitions.

The following words and phrases, which are of direct relevance to the administration, interpretation and enforcement of this Chapter 14-1000, have meanings ascribed to them in Chapter 14-200.

(1) **Alter or Alteration.**

(2) **Building.**

(3) **Construct or Construction.**

(4) **Contributing Building, Structure, Site or Object.**

(5) **Demolition or Demolish.**

(6) **Design.**

(7) **District.**

(8) **Historic Building.**

(9) **Historic District, Object, Site or Structure.**

(10) **Object.**

(11) **Public Interior Portion.**

(12) **Site.**

(13) **Structure.**

§ 14-1003. Historical Commission.

(1) **Appointment.**

The Mayor shall appoint a Philadelphia Historical Commission consisting of

(a) the following individuals: 528

(.1) President of City Council or his or her designee;

(.2) the Director of Commerce;

(.3) Commissioner of Public Property;

(.4) the Commissioner of Licenses and Inspections;

(.5) the Chairman of the City Planning Commission or his or her designee;

(.6) the Director of Housing or his or her designee; and

(b) eight other persons learned in the historic traditions of the City and interested in the preservation of the historic character of the City. At least one of the appointees shall be:

(.1) an architect experienced in the field of historic preservation;

(.2) an historian;

(.3) an architectural historian;

(.4) a real estate developer;

(.5) a representative of a Community Development Corporation; and

(.6) a representative of a community organization.

(2) **Powers and Duties.**

The powers and duties of the Philadelphia Historical Commission shall be as follows:

(a) Designate as historic those buildings, structures, sites, and objects that the Historical Commission determines are significant to the City, pursuant to the criteria of § 14-1004(1);

(b) Designate as historic those public interior portions of buildings that the Historical Commission determines are significant to the City, pursuant to the criteria of § 14-1004(1);

(c) Delineate the boundaries of and designate as historic those districts that the Historical Commission determines are significant to the City, pursuant to the criteria of § 14-1004(1);

(d) Prepare and maintain or cause to be prepared and maintained a comprehensive inventory of historic buildings, structures, sites, objects, and districts;

(e) Review and act upon all applications for building permits to alter or demolish historic buildings, structures, sites, or objects, or to alter or demolish buildings, structures, sites, or objects located within historic districts, pursuant to § 14-1005;

(f) Review and comment upon all applications for building permits to construct buildings, structures, or objects within historic districts, pursuant to § 14-1005;

(g) Make recommendations to the Mayor and City Council concerning the use of grants, gifts, and budgetary appropriations to promote the preservation of buildings, structures, site, objects, or districts of historic importance to the City;

(h) Make recommendations to the Mayor and City Council that the City purchase any building, structure, site, or object of historic significance where private preservation is not feasible, or that the City acquire facade easements, development rights, or any other property interest that would promote historic preservation;

(i) Increase public awareness of the value of architectural, cultural, and historic preservation;

(j) Adopt rules of procedure and regulations and establishing any committees deemed necessary for the conduct of its business; and

(k) Keep minutes and records of all proceedings, including records of public meetings during which proposed historic designations are considered.

§ 14-1004. Designation.

(1) **Criteria for Designation.**

A building, complex of buildings, structure, site, object, or district may be designated for preservation if it:

(a) Has significant character, interest, or value as part of the development, heritage, or cultural characteristics of the City, Commonwealth, or nation or is associated with the life of a person significant in the past;

(b) Is associated with an event of importance to the history of the City, Commonwealth or Nation;

(c) Reflects the environment in an era characterized by a distinctive architectural style;

(d) Embodies distinguishing characteristics of an architectural style or engineering specimen;

(e) Is the work of a designer, architect, landscape architect or designer, or professional engineer whose work has significantly influenced the historical, architectural, economic, social, or cultural development of the City, Commonwealth, or nation;

(f) Contains elements of design, detail, materials, or craftsmanship that represent a significant innovation;

(g) Is part of or related to a square, park, or other distinctive area that should be preserved according to a historic, cultural, or architectural motif;

(h) Owing to its unique location or singular physical characteristic, represents an established and familiar visual feature of the neighborhood, community, or City;

(i) Has yielded, or may be likely to yield, information important in pre-history or history; or

(j) Exemplifies the cultural, political, economic, social, or historical heritage of the community.

(2) **Notice.**

(a) At least 30 days before holding a public meeting to consider the proposed designation of a building, structure, site, or object as historic, the Historical Commission shall send notice to the owner of the property proposed for designation. Such notice shall indicate the date, time, and place of the public meeting at which the Historical Commission will consider the proposed designation. Notice shall be sent to the registered owner's last known address as the same appears in the real estate tax records of the Department of Revenue and sent to "Owner" at the street address of the property in question.

(b) At least 60 days before holding a public meeting to consider the proposed designation of a district as historic, the Historical Commission shall send written notice of the proposed designation to the owners of each building, structure, site or object within the proposed district. The notice shall indicate the date, time, and place of the public meeting at which the Historical Commission will consider the proposed designation. Notice shall be sent to the registered owner's last known address as it appears in the real estate tax records of the Department of Revenue and sent to "Owner" at the street address of the property in question. The Historical Commission shall publish notice of the proposed designation of a district as historic in a newspaper having general circulation within the City at least 60 days before the Historical Commission holds a public meeting to consider the proposed designation. The Historical Commission shall post notice of the proposed designation at locations within the proposed district at least 60 days before the public meeting to consider the proposed designation.

(c) The Historical Commission shall send written notice of the designation as historic of a building, structure, site, object, or district to the owners of each separately designated building, structure, site, or object and to the owners of each building, structure, site, or object within a district designated historic, which shall include reason for the designation. Notice shall be sent to the registered owner's last known address as the same appears in the real estate tax records of the Department of Revenue and sent to the "Owner" at the street and address of the property in question. The Historical Commission shall send written notice of historic designation to any person appearing at the public hearing who requests notification.

(3) **Meetings.**

Any interested party may present testimony or documentary evidence regarding the proposed designation of a building, structure, site, object, or district at the public meeting of the Historical Commission.

(4) **Planning Commission Comment.**

During the 60 days prior to a Historical Commission hearing on designation of a particular historic district, the Planning Commission shall review and comment on creation of the district and transmit its comments to the Historical Commission to assist the Historical Commission in making its determination.

(5) **Amendment or Rescission of Designation.**

Any designation of a building, structure, site, object, or district as historic may be amended or rescinded in the same manner as is specified for designation.

(6) **Register of Historic Buildings, Structures, Sites, and Objects.**

The Historical Commission shall compile a register of buildings, structures, sites, objects, and districts designated as historic by the Historical Commission that shall make the register available in electronic form to the public for inspection during normal business hours.

(7) **Designation of Public Interior Portions of Buildings.**

(a) No public interior portion of a building or structure shall be considered designated for preservation pursuant to this Chapter 14-1000 or § 14-2007 of the prior zoning ordinance unless it has been specifically designated after December 28, 2009.

(b) A public interior portion, or any part of a public interior portion, of a building or structure may be designated for preservation regardless whether the remainder of the building, structure, site or appurtenances with which it is associated has been so designated.

(c) The designation of a building, structure, or district shall not constitute designation of any public interior portion of such building, structure or a building or structure in such district, unless the public interior portion is specifically identified in such designation.

§ 14-1005. Regulation.

(1) **Building Permit Required.**

Unless a building permit is first obtained from L&I, no person shall alter or demolish a historic building, structure, site, or object, or alter, demolish, or construct any building, structure, site, or object within a historic district, nor alter or demolish a historic public interior portion of a building or structure, nor perform work on a building or structure that requires a building permit if such building or structure contains a historic public interior portion.

(2) **Building Permit Application Referral.**

Before L&I may issue such a building permit, L&I shall forward the building permit application to the Historical Commission for its review.

(3) **Demolition Notice.**

When a person applies for a building permit involving demolition, L&I shall post, within seven days, notice indicating that the owner has applied for a building permit to demolish the property; that the property is historic or is located within a historic district; that the application has been forwarded to the Historical Commission for review. The notice shall be posted on each street frontage of the premises with which the notice is concerned and shall be clearly visible to the public. Posting of a notice shall not be required in the event of an emergency that requires immediate action to protect the health or safety of the public. No person shall remove the notice unless the building permit is denied or the owner notifies L&I that he or she will not demolish the property.

(4) **Comment Review.**

The Historical Commission's scope of review of applications for building permits for construction, as defined herein, shall be limited to a 45-day period of comment.

(5) **Submission Requirements.**

(a) At the time that a building permit application is filed with L&I for alteration, demolition or construction subject to the Historical Commission's review, the applicant shall submit to the Historical Commission the plans and specifications of the proposed work, including the plans and specifications for any construction proposed after demolition and such other information as the Historical Commission may reasonably require to exercise its duties and responsibilities under this Chapter 14-1000.

(b) 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 building permit application for alteration, or demolition is based, in whole or in part, on financial hardship, the owner shall submit, by affidavit, the following information to the Historical Commission:

(.1) Amount paid for the property, date of purchase, and party from whom purchased, including a description of the relationship, whether business or familial, if any, between the owner and the person from whom the property was purchased;

(.2) Assessed value of the land and improvements thereon according to the most recent assessment;

(.3) Financial information for the previous two years which shall include, as a minimum, annual gross income from the property, itemized operating and maintenance expenses, real estate taxes, annual debt service, annual cash flow, the amount of depreciation taken for federal income tax purposes, and other federal income tax deductions produced;

(.4) All appraisals obtained by the owner in connection with his or her purchase or financing of the property, or during his or her ownership of the property; 529

(.5) All listings of the property for sale or rent, price asked, and offers received, if any;

(.6) Any consideration by the owner as to profitable, adaptive uses for the property; and

(.7) The Historical Commission may further require the owner to conduct, at the owner's expense, evaluations or studies, as are reasonably necessary in the opinion of the Historical Commission, to determine whether the building, structure, site or object has or may have alternate uses consistent with preservation.

(6) **Building Permit Application Review.**

(a) **Determination.**

Within 60 days after receipt by the Historical Commission of a building permit application, the Historical Commission shall determine whether or not it has any objection to the proposed alteration or demolition. Before taking any action, the Historical Commission shall afford the owner an opportunity to appear before the

Historical Commission to offer any evidence the owner desires to present concerning the proposed alteration or demolition.

(.1) Where the Historical Commission has no objection, L&I shall grant the building permit subject to the requirements of any applicable provisions of The Philadelphia Code and regulations and subject to any conditions of the Historical Commission pursuant to § 14-1005(6)(c).

(.2) Where the Historical Commission has an objection, L&I shall deny the building permit.

(.3) Where the Historical Commission has determined that the purpose of this Chapter 14-1000 may best be achieved by postponing the alteration or demolition of any building, structure, site, or object subject to its review, the Historical Commission may, by resolution, defer action on a building permit application for a designated period not to exceed six months from the date of the resolution. The Historical Commission shall inform the owner in writing of the reasons for its action. Where the Historical Commission acts to postpone the proposed alteration or demolition pursuant to § 14-1005(6)(a), L&I shall defer action on the building permit application pending a final determination by the Historical Commission approving or disapproving the application.

(b) **Postponement of Determination.**

During the time that action on a building permit application is deferred, the Historical Commission shall consult with the owner, civic groups, public and private agencies, and interested parties to ascertain what may be done by the City or others to preserve the building, structure, site, or object that is the subject of the building permit application. When appropriate, the Historical Commission shall make recommendations to the Mayor and City Council.

(c) **Conditions on Approval.**

The Historical Commission may require that a building permit for the alteration or demolition of any building, structure, site, or object subject to its review be issued subject to such conditions as may reasonably advance the purposes of this Chapter 14-1000. L&I shall incorporate all such requirements of the Historical Commission into the building permit at the time of issuance. In cases where the Historical Commission, pursuant to § 14-1005(6)(a), agrees to the demolition of a historic building, structure, site, or object, or of a building, structure, site, or object located within a historic district that contributes, in the Historical Commission's opinion, to the character of the district, the Historical Commission may require that the historic building, structure, site, or object be recorded, at the owner's expense, according to the documentation standards of the Historic American Buildings Survey and the Historic American Engineering Record (HABS/HAER) for deposit with the Historical Commission.

(d) **Restrictions on Demolition.**

No building permit shall be issued for the demolition of a historic building, structure, site, or object, or of a building, structure, site, or object located within a historic district that contributes, in the Historical Commission's opinion, to the character of the district, unless the Historical Commission finds that issuance of the building permit is necessary in the public interest, or unless the Historical Commission finds that the building, structure, site, or object cannot be used for any purpose for which it is or may be reasonably adapted. In order to show that 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.

(e) **Review Criteria.**

In making its determination as to the appropriateness of proposed alterations, demolition, or construction, the Historical Commission shall consider the following:

(.1) The purposes of this Chapter 14-1000;

(.2) The historical, architectural, or aesthetic significance of the building, structure, site, or object;

(.3) The effect of the proposed work on the building, structure, site, or object and its appurtenances;

(.4) The compatibility of the proposed work with the character of the historic district or with the character of its site, including the effect of the proposed work on the neighboring structures, the surroundings, and the streetscape; and

(.5) The design of the proposed work.

(.6) In addition to the above, the Historical Commission may be guided in evaluating proposals for alteration or construction by the Secretary of the Interior's "Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings" or similar criteria.

(.7) In specific cases as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of this Chapter 14-1000 would result in unnecessary hardship so that the spirit of this Chapter 14-1000 shall be observed and substantial justice done, subject to such terms and conditions as the Historical Commission may decide, the Historical Commission shall by a majority vote grant an exemption from the requirements of Chapter 14-1000.

(.8) With respect to designated public interior portions,

(.a) the Historical Commission may grant an exemption when, owing to special consideration of the mission and financial status of a nonprofit organization, the Historical Commission determines that a literal enforcement of the provisions of this chapter would not be in the public interest and the spirit of this Chapter will be substantially observed, subject to such terms and conditions as the Historical Commission may establish; and

(.b) the Historical Commission shall approve a building permit application for an alteration to a non-designated interior portion if the proposed alteration neither has an effect on the appearance of, nor compromises the structural integrity of, a historic public interior portion.

(f) **Jurisdiction During Consideration of Designation.**

L&I shall not issue any building permit for the demolition, alteration, or construction of any building, structure, site, or object that is being considered by the Historical Commission for designation as historic or that is located within a district being

considered by the Historical Commission for designation as historic where the building permit application is filed on or after the date that notices of proposed designation have been mailed, except that L&I may issue a building permit if the Historical Commission has approved the application or has not taken final action on designation and more than 90 days have elapsed from the date the permit application was filed with the Historical Commission. Where the Historical Commission takes final action on designation within the time allotted herein, any building permit application on file with L&I shall be deemed to have been filed after the date of the Historical Commission's action for purposes of this Chapter 14-1000.

§ 14-1006. Performance of Work and Maintenance.

(1) **Inspection.**

L&I shall, upon the request of the Historical Commission, examine the buildings, structures, sites, and objects designated as historic by the Historical Commission and report to the Historical Commission on their physical condition.

(2) **Conformity to Permit Requirements.**

All work performed pursuant to the issuance of a building permit for the alteration or demolition of a building, structure, site, or object subject to the Historical Commission's review shall conform to the requirements of such permit. It shall be the duty of L&I to inspect from time to time any work performed pursuant to such building permit in order to ensure compliance. In the event that work is not being performed in accordance with the building permit requirements, L&I shall issue a stop work order and all work shall cease until the work is brought into conformity with the requirements of the building permit.

(3) **Maintenance Requirement.**

The exterior of every historic building, structure, and object and of every building, structure, and object located within a historic district, and every public interior portion of a building or structure, shall be kept in good repair as shall the interior portions of such buildings, structures, and objects, neglect of which may cause or tend to cause the historic portion to deteriorate, decay, become damaged, or otherwise fall into a state of disrepair.

(4) **Ordinary Maintenance and Repair.**

The provisions of this Chapter 14-1000 shall not be construed to prevent the ordinary maintenance or repair of any building, structure, site, or object where such work does not require a building permit by law and where the purpose and effect of such work is to correct any deterioration or decay of, or damage to, a building, structure, site, or object and to restore the same to its condition prior to the occurrence of such deterioration, decay, or damage.

§ 14-1007. Enforcement.

(1) **L&I Regulations.**

L&I is authorized to promulgate regulations to perform its duties under this Chapter 14-1000.

(2) **Violations.**

In the case of a violation of this Chapter 14-1000, L&I may issue orders directing compliance with the requirements of this Chapter. An order shall be served upon the owners or person determined by L&I to be violating the requirements of this Chapter. If the person

served is not the owner of the property where the violation is deemed to exist or to have occurred, a copy of the order shall be sent to the last known address of the registered owner and a copy shall be posted on the property. Where the owner's address is unknown, a copy of the order shall be posted on the property.

(3) **Penalties.**

In addition to those penalties listed in the Philadelphia Administrative Code, any person who alters or demolishes a building, structure, site, or object in violation of the provisions of this Chapter 14-1000 or in violation of any conditions or requirements specified in a building permit issued by the Historical Commission shall be required to restore the building, structure, site, or object involved to its appearance prior to the violation. Such restoration shall be in addition to and not in lieu of any penalty or remedy available under this Zoning Code or any other applicable law.

§ 14-1008. Appeals.

Any person aggrieved by the issuance or denial of any building permit reviewed by the Historical Commission may appeal such action to the Board of License and Inspection Review. Such appeal must be filed within 30 days of the date of receipt of notification of the Historical Commission's action. The Board of License and Inspection Review shall give written notice of any such appeal to the Historical Commission within three days of the filing of the appeal.

Notes

528 Amended, Bill No. 150264 (approved June 16, 2015).

529 Amended, Bill No. 150264 (approved June 16, 2015).

PHILADELPHIA HISTORICAL COMMISSION
RULES & REGULATIONS

Revision: 2-11-2010

Revision History

The Philadelphia Historical Commission adopted the original Rules & Regulations on 8 August 1990.

The Philadelphia Historical Commission revised the Rules & Regulations, effective 4 December 1997, with amendments to Sections 6.1, 6.2, and 6.3 and the addition of Section 6.7 (applications, submission requirements, review process, review in concept).

The Philadelphia Historical Commission revised the Rules & Regulations, effective 17 July 2003, with an amendment to Section 6.3.c.1.d (staff review of slate roofs).

The Philadelphia Historical Commission revised the Rules & Regulations, effective 11 July 2005, with the addition of Section 6.8 (murals).

The Philadelphia Historical Commission revised the Rules & Regulations, effective 23 March 2009, replacing Section 6.3.c.1 (staff review).

The Philadelphia Historical Commission revised the Rules & Regulations, effective 11 February 2010, revising and adding sections related to interior designation and regulation.

Table of Contents

1. DECLARATION OF POLICY AND PURPOSES

Pursuant to Section 14-2007(4)(h) of the Philadelphia Code, "Historic Buildings, Structures, Sites, Objects and Districts," 16 U.S.C., Sections 470-470w-6, "The National Historic Preservation Act of 1966, as amended," 36 C.F.R. 61.5, and the Pennsylvania Bureau for Historic Preservation, "Guidelines for Implementation of the Certified Local Governments Program in Pennsylvania," the Philadelphia Historical Commission originally adopted the following Rules & Regulations on 8 August 1990. The Rules & Regulations have subsequently been amended. See page 2 for a revision history.

Section 14-2007 of the Philadelphia Code, "Historic Buildings, Structures, Sites, Objects and Districts," established the Philadelphia Historical Commission as the municipal historic preservation agency. The Commission bears the responsibility to designate buildings, structures, sites, objects, public interior portions of buildings and structures, and districts as historic, to review and act upon all permit applications for the alteration or demolition of designated historic resources, to make recommendations to the Mayor and City Council to further historic preservation in the city, and to promote public awareness of the values of historic preservation.

The criteria and procedures defined by Section 14-2007 of the Philadelphia Code in the exercise of the Commission's powers and duties implicitly direct the Commission to make reasoned and informed judgments in the designation of resources as historic and in the review of permit applications. The Commission also, however, has an advocacy function within the municipal government in the duty to make recommendations to the Mayor and City Council and a like role with the public at large in its obligations to increase awareness of the values of historic preservation.

The Historical Commission may undertake other activities to further historic preservation and to assure the integration of historic preservation in the planning and development processes. Among these are participation in the National Register of Historic Places program, cooperation with federal and state historic preservation agencies in the implementation of all applicable statutes and regulations, and assistance to other municipal offices in complying with historic preservation considerations and goals. Here, too, the Commission may perform an administrative and regulatory function, an advocacy role, or both.

2. DEFINITIONS

The following words and phrases shall have the meaning ascribed to them in this section.

2.1 Alter or Alteration

A change in the appearance of a building, structure, site or object which is not otherwise covered by the definition of demolition, or any other change for which a permit is required under the Philadelphia Code of General Ordinances. Alteration includes the reroofing, cleaning or pointing of a building, structure, or object. Section 14-2007(2)(a).

2.2 Building

A structure, its site and appurtenances created to shelter any form of human activity, including a public interior portion of a building. Section 14-2007(2)(b).

2.3 Commission

The Philadelphia Historical Commission. Section 14-2007(2)(c).

2.4 Construct or Construction

The erection of a new building, structure, or object upon an undeveloped site. Section 14-2007(2)(d).

2.5 Contributing Building, Structure, Site or Object

A building, structure, site, or object within a district that reflects the historical or architectural character of the district as defined in the Commission's designation. Section 14-2007(2)(e).

2.6 Demolition or Demolish

The razing or destruction, whether entirely or in significant part, of a building, structure, site, or object. Demolition includes the removal of a building, structure, or object from its site or the removal or destruction of the facade or surface. Section 14-2007(2)(f).

2.7 Department

The Department of Licenses and Inspections. Section 14-2007(2)(g).

2.8 Design

Features including mass, height, appearance, volume, and the texture, color, nature and composition of materials, as well as their arrangement and relationships. Section 14-2007(2)(h).

2.9 District

A geographically definable area possessing a significant concentration,

linkage, or continuity of buildings, structures, sites, objects, and/or public interior portions of buildings and structures united by past events, plan or physical development. A district may comprise an individual site or individual elements separated geographically but linked by association, plan, design, or history.

2.10 Fixture

An article which has been so annexed to and/or affixed to a public interior portion of a building or structure that it is regarded as a part of the public interior portion of the building or structure. An article is deemed to be annexed to and affixed to a public interior portion of a building or structure when it is attached to it by roots, embedded in it, permanently resting upon it, or permanently attached to what is thus permanent, by means including but not limited to cement, plaster, nails, bolts, or screws.

2.11 Hearing

A formal public meeting of the Commission, pursuant to quorum, where the Commission takes an action affecting the rights of a property owner as authorized by Section 14-2007 of the Philadelphia Code. Hearings shall be held on the proposed designation of buildings, structures, sites, objects or districts and on applications for permits to alter or demolish. The formal submission of reports, testimony, and recommendations shall occur at these hearings. Hearings shall be publicized and open to the public as established by law.

2.12 Historic Building

A building or complex of buildings and site, or the public interior portion of a building, which is designated pursuant to Section 14-2007 of the Philadelphia Code or listed by the Commission under the prior historic buildings ordinance approved December 7, 1955, as amended. Section 14-2007(2)(j).

2.13 Historic District, Object, Site or Structure

A district, object, site, or structure, or a public interior portion of a structure, which is designated by the Commission pursuant to Section 14-2007 of the Philadelphia Code. Section 14-2007(2)(k).

2.14 Meeting

Meeting includes the regular stated assembling, pursuant to quorum, of the Commission as prescribed by ordinance and these Rules & Regulations, as well as special gatherings of the Commission called pursuant to these Rules & Regulations. As applied to sessions of the Commission, the words hearing and meeting are synonymous. Inasmuch as the Commission's standing and ad hoc committees serve in an

advisory capacity only, their gatherings are meetings, not hearings. Meetings shall be publicized and open to the public as established by law.

2.15 Non-Contributing Building, Structure, Site or Object
A building, structure, site, or object within a district that does not reflect the historical or architectural character of the district as defined in the Commission's designation. Cf. Section 14-2007(2)(e).

2.16 Object
A material thing of functional, aesthetic, cultural, historic, or scientific value that may be, by nature or design, movable yet related to a specific setting or environment. Section 14-2007(2)(l).

2.17 Public Interior Portion
An interior portion of a building or structure that is, or was designed to be, customarily open or accessible to the public, including by invitation. Does not include an interior portion of a building or structure that was designed to be customarily open or accessible to the public, which interior portion has been significantly altered physically such that a substantial portion of the features reflecting design for public use no longer remain. Terminating use of an interior portion of a building or structure by the public shall not in and of itself constitute conversion of the design of such interior portion. Does not include the interior portions of a building, which building was designed to be, and is still, used exclusively as one or more private residences. Section 14-2007(2)(m).

2.18 Public Notice
An advertisement placed in a newspaper of general circulation.

2.19 Significant Building, Structure, Site, or Object
A building, structure, site, or object within a district that warrants individual listing on the Philadelphia Register of Historic Places under the criteria established in Section 14-2007(5)(a)-(j) of the Philadelphia Code.

2.20 Site
The location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, or vanished, where the location itself maintains historical, cultural, or archeological value regardless of the value of any existing structure. Section 14-2007(2)(n).

2.21 Special Meeting
A meeting or hearing called, as needed, by the Chair or Vice Chair and limited to a particular question(s). In the public notice of such a meeting,

the purpose(s) of the meeting shall be stated.

2.22 Structure
A work made up of interdependent and interrelated parts in a definite pattern of organization constructed by man and affixed to real property, including a public interior portion of a structure. Section 14-2007(2)(o).

2.23 Undeveloped Site
An undeveloped site is a property within an historic district which is not individually designated, to which the inventory in the historic district nomination attributes no historical, cultural, or archaeological value, and upon which no building or structure stood at the time of the designation of the historic district. Non-historic foundations and other below-grade constructions; surface parking lots; non-historic parking kiosks and other kiosks, storage sheds, and other impermanent constructions without foundations; and non-historic walls, fences, and gates shall not be construed as buildings or structures for the purposes of this definition.

3. THE COMMISSION

3.1 Commission Membership

Appointments to the Commission and the filling of vacancies on the Commission shall be made by the Mayor pursuant to Section 14-2007(3) of the Philadelphia Code.

3.2 Officers

The members of the Commission shall choose among themselves a Chairperson, a Vice-Chairperson and such other officers as they may determine.

3.3 Compensation

Each appointed member of the Commission shall receive compensation as provided by ordinance of City Council.

3.4 Committees

The Commission may, by a majority present and voting, create such standing and *ad hoc* committees as it deems necessary for the conduct of the Commission's work.

3.4.a Architectural Committee. The Commission shall maintain an Architectural Committee to review applications and to advise the Commission on their appropriateness. This Committee shall be guided by Section 14-2007(7)(k) of the Philadelphia Code and such other portions of the Historic Preservation Ordinance that relate to permit issuance. The Commission shall select no fewer than five or more than seven persons to sit on this Committee without term at the pleasure of the Commission. The Committee may include members of the Commission as well as other qualified persons. The Committee shall consist of professionals who have knowledge of and experience with historic resources and who represent a breadth of perspective. The Chair of the Committee shall be the "architect experienced in the field of historic preservation" appointed to the Commission. Three members shall constitute a quorum. The Architectural Committee shall meet monthly or as needed.

3.4.b Committee on Historic Designation. The Commission shall maintain a Committee on Historic Designation to review nominations for the designation of buildings, structures, sites, objects, public interior portions of buildings and structures, and districts and to advise the Commission on their significance. This Committee shall be guided by Section 14-2007(5) of the Philadelphia Code and such other

portions of the Historic Preservation ordinance that relate to the designation of buildings, structures, sites, objects, public interior portions of buildings and structures, and districts as historic. The Committee shall utilize such forms and other documentation as established by the Commission. The Commission shall select no fewer than five or more than seven persons to sit on this Committee without term at the pleasure of the Commission. The Committee may consist of members of the Commission and other qualified persons. The membership shall include persons who have knowledge of history, architecture, cultural resources, and planning as well as at least one who represents the perspective of a civic or community organization. The Chair of the Committee shall be a member of the Commission. Three members shall constitute a quorum. The Committee on Historic Designation shall meet as needed.

3.4.c Committee on Financial Hardship. The Commission shall maintain a Committee on Financial Hardship to review applications claiming financial hardship under the several financial hardship provisions of Section 14-2007 of the Philadelphia Code. The members of this Committee shall include the Chair of the Commission, the Developer member of the Commission, the Chair of the City Planning Commission or his/her designee, the Director of the Office of Housing and Community Development or his/her designee, the Architectural Historian and the Architect. The Chair of the Commission shall appoint the Chair of this Committee. Three members shall constitute a quorum. The Committee on Financial Hardship shall meet as needed.

3.5 Conflict of Interest

In the event that any member of the Commission or its Committees has a personal or a business interest in any property or activity under consideration by the Commission or its Committees, that member shall declare said interest or its potential appearance, shall disqualify himself/herself from participation in discussion of the matter and from voting on it, and shall comply with Section 20-600 of the Philadelphia Code, "Standards of Conduct and Ethics," and the provisions of the Department of the Interior's Grants Manual.

4. CONDUCT OF MEETINGS

4.1 Meetings

The Commission shall meet monthly or as required. Special meetings may be held, as needed, upon the call of the Chair or Vice-Chair.

Public Notice shall be published in a newspaper of general circulation annually to specify the day, hour, and place of the regularly scheduled meetings of the Commission for the ensuing year. At least three days' notice in writing shall be given to members of the date, time, place, and purpose of all special meetings, unless such notice is waived in writing by all members. Public notice of a special meeting shall be given of the date, time, and place of such meeting at least twenty-four (24) hours prior to the time of the meeting.

In addition, the Commission may hold Briefing Sessions to receive and discuss information that does not require action. Briefing Sessions shall be open to the public; however, inasmuch as they are intended for the exchange of information and ideas among the Commission and staff, the public is not invited to participate in these discussions. The Commission shall take no action during Briefing Sessions.

From time to time, the Commission may also hold Executive Sessions, closed to the public, in accordance with the provisions of applicable law.

4.2 Quorum

A quorum of the Commission shall consist of eight members. An abstention for any reason shall not affect the presence of a quorum.

4.3 Recording

Each public hearing and meeting of the Commission shall be recorded as established by law.

4.4 Agenda

The agenda shall list items including but not limited to nomination and permit application items that require Commission action and may list items for information and discussion. Any member of the Commission may request the placing of an item for information and discussion on an agenda. The staff shall distribute agendas of regular monthly Commission meetings at least five (5) working days in advance to the Commission and to any person who has requested receipt. The staff shall distribute agendas of special Commission meetings at least twenty-four (24) hours in advance to the Commission and to any person who has requested receipt.

4.5 Order of Business

4.5.a The Chair shall call the meeting to order, and determine and announce the presence of a quorum. The Chair shall also announce the subject of any Executive Session held before the meeting and any changes in the agenda.

4.5.b The Chair shall ask for any additions or corrections to the minutes of the preceding meeting and then for a motion to approve the minutes. The staff shall have distributed the minutes to the Commission members at least forty-eight (48) hours in advance.

4.5.c Consent Agenda

The Consent Agenda allows the Commission to act expeditiously on applications for which there is general consent, thereby streamlining its meetings.

4.5.c.1 All applications for which neither the applicant nor an interested party has objected to the Architectural Committee's recommendation shall be included on the Consent Agenda section of the meeting agenda.

4.5.c.2 The applications included on the Consent Agenda shall also be listed in their normal positions on the agenda and clearly marked as Consent Agenda matters.

4.5.c.3 Any Commissioner may remove an application from the Consent Agenda and place at its normal position on the agenda to allow for discussion.

4.5.c.4 The Commission shall request comments on the Consent Agenda from the staff and public. In reaction to such comments, any Commissioner may remove an application from the Consent Agenda and place it at its normal position on the agenda to allow for discussion.

4.5.c.5 After the contents of the Consent Agenda are finalized, the Commission may, with a single motion, adopt all of the Architectural Committee's recommendations for applications on the Consent Agenda.

4.5.c.6 If the Commission fails to adopt the Consent Agenda, the applications on the Consent Agenda shall be placed at their normal positions on the agenda.

4.5.d Reports of the Standing Committees of the Commission. The Chair of each committee, or in his/her absence a designee from the

committee or staff, shall make the report and shall present motions for action. The staff shall distribute the reports of the standing committees to the Commission at least twenty-four (24) hours in advance.

4.5.e Reports of any Ad Hoc Committees of the Commission. The Chair of each committee, or in his/her absence a designee from the committee, shall make the report and shall present any motions for action. The staff shall distribute copies of Committee reports to the Commission at least twenty-four (24) hours in advance.

4.5.f Report on Staff Activities. The Executive Director shall present a report of the staff activities, which shall have been distributed in advance of the Commission meeting.

4.5.g Permit Approval Log. The staff shall submit to the Commission a monthly report in writing that includes the addresses and brief descriptions of the scopes of work for permit applications approved administratively, without referral to the Architectural Committee and Commission.

4.5.h Upon the completion of the agenda, the Chair shall request a motion to adjourn. At any time prior to the completion of the agenda, the Chair or any member of the Commission may offer a motion to adjourn.

4.6 Conduct of Business

4.6.a Upon the conclusion of the presentation of each agenda item by the committee chair or designee and/or the staff, and during the presentations at the discretion of the Chair, the Chair shall recognize Commission members who wish to raise questions or comment on the matter under consideration.

4.6.b After the Commission members have had an opportunity to question and comment, the Chair shall recognize the applicant and then other members of the public who wish to speak to the matter under consideration. The Chair may impose reasonable limitations upon public participation to ensure relevance and to avoid excessive repetition.

Parties to a matter before the Commission shall submit in writing seven (7) calendar days in advance of a Commission meeting any proposed substantial testimony, including any supporting documentation, reports and studies, to be offered at a public

meeting of the Commission. Parties to a matter before the Commission include an applicant and/or organization or person who has previously evinced an interest or position on a matter. In the event of a continuance by the Commission, parties include any applicant and any organization or person who offered previous testimony before the Commission or a committee of the Commission. This rule is designed to afford the Commission members and staff sufficient time to receive, read, and assess substantial testimony before a meeting or hearing. It shall not be interpreted to preclude full public participation or submission of comments at a meeting or hearing.

4.6.c Members of the Commission may make motions concerning an item under consideration before or after any public participation.

4.6.d The order of motions shall follow Roberts Rules of Order.

4.6.e A majority of the members present at the time of voting, including any members abstaining, is required to adopt a motion.

4.6.f Voting may be by voice vote, except that the Chair or any member may request a vote by show of hands.

4.6.g The Chair may vote on all motions, but shall cast his/her vote after the other Commission members have voted.

4.7 Minutes and Reports

4.7.a Written minutes of meetings and hearings and reports of the committees and staff shall be prepared by the staff of the Commission. The written minutes of meetings and hearings shall include the date, time, and place of meeting; the names of members present; the substance of the official actions or recommendations; record of roll call votes of individual members; and names of all citizens who appeared officially and the subject of their testimony.

4.7.b Minutes of meetings and reports of committees and the staff shall not be released until adopted by the Commission. Draft versions of minutes and reports may be released, provided they are clearly marked on every page as drafts subject to change.

4.8 Public Access to Nomination and Application Materials

The Commission shall provide public access to all nomination and application materials, except those documents identified as confidential in Section 9.8 of these Rules & Regulations.

5. DESIGNATION OF HISTORIC RESOURCES

5.1 Philadelphia Register of Historic Places

The list of buildings, structures, sites, objects, public interior portions of buildings and structures, and districts designated as historic by the Commission shall be called the Philadelphia Register of Historic Places.

5.2 Criteria for Designation

Section 14-2007(5) of the Philadelphia Code provides that the Commission may designate a building, structure, site, object, public interior portion of a building or structure, or district for preservation if it:

a. Has significant character, interest or value as part of the development, heritage, or cultural characteristics of the City, Commonwealth, or Nation or is associated with the life of a person significant in the past; or,
b. Is associated with an event of importance to the history of the City, Commonwealth, or Nation; or,
c. Reflects the environment in an era characterized by a distinctive architectural style; or,
d. Embodies distinguishing characteristics of an architectural style or engineering specimen; or,
e. Is the work of a designer, architect, landscape architect or designer, or engineer whose work has significantly influenced the historical, architectural, economic, social, or cultural development of the City, Commonwealth, or Nation; or,
f. Contains elements of design, detail, materials, or craftsmanship which represent a significant innovation; or,
g. Is part of or related to a square, park, or other distinctive area which should be preserved according to an historic, cultural, or architectural motif; or,
h. Owing to its unique location or singular physical characteristic, represents an established and familiar visual feature of the neighborhood, community, or City; or,
i. Has yielded, or may be likely to yield, information important in pre-history or history; or,
j. Exemplifies the cultural, political, social, or historical heritage of the community.

5.3 Nominators

Any person or organization including the Commission and its staff may prepare a nomination for submission to and consideration by the Commission.

5.4 Nomination Submission Requirements

Nominators shall submit one paper copy and one electronic copy of the nomination to the Commission. If the electronic copy of a nomination is formatted with customized or non-standard computer software, the nominator shall provide the software necessary to amend the electronic copy to the Commission.

5.5 Nomination of Buildings, Structures, Sites, and Objects

5.5.a Nominations of Buildings, Structures, and Sites to the Philadelphia Register of Historic Places shall be submitted in such form as the Commission shall prescribe. This form shall include:

1. the current and historic names of the resource;
2. the street address of the resource and the name and mailing address of the owner as they appear in the real estate tax records of the Department of Revenue;
3. a categorization of the type of resource, i.e. building, structure, or site;
4. a narrative description of the resource's boundaries and a graphic description of those boundaries delineated on a site or plot plan;
5. categorizations of the resource's condition, occupancy, and use;
6. the date or period of significance;
7. the dates of construction and major alteration, if known;
8. the names of architect, engineer, designer, builder, original owner, and/or other significant persons involved with the resource, if known;
9. a narrative description of its physical appearance;
10. a narrative statement of its significance citing all Criteria for Designation set forth in Section 14-2007(5) of the Philadelphia Code that the resource satisfies;
11. bibliographical references;
12. photographs of the resource and its site and surroundings; and,
13. the name and contact information of the nominator.

5.5.b Nominations of Objects to the Philadelphia Register of Historic Places shall be submitted in such form as the Commission shall prescribe. This form shall include:

1. the current and historic names of the resource;
2. the street address of the setting or environment of the resource and the name and mailing address of the owner as they appear in the real estate tax records of the Department of Revenue;

3. a categorization of the type of resource as an object;
4. a narrative description of the boundaries of the object and the boundaries of its specific setting or environment, and a graphic description delineating the object's location and the boundaries of the setting or environment;
5. categorizations of the resource's condition and use;
6. the date or period of significance;
7. the dates of creation and major alteration, if known;
8. the names of artist, architect, engineer, designer, builder, original owner, and/or other significant persons involved with the resource, if known;
9. a narrative description of the physical appearances of the object and its setting or environment;
10. a narrative statement of its significance citing all Criteria for Designation set forth in Section 14-2007(5) of the Philadelphia Code that the resource satisfies;
11. bibliographical references;
12. photographs of the object and setting or environment; and,
13. the name and contact information of the nominator.

5.5.c Public interior portions of buildings and structures may be nominated for designation in a nomination proposing the designation of a building or structure. However, the designation of a building or structure shall not constitute the designation of any public interior portion in the building or structure unless that public interior portion is specifically identified in the nomination for the building or structure. A separate nomination form for the public interior portion as defined in Section 5.6 of these Rules & Regulations must be attached to the building or structure nomination as an addendum.

5.6 Nomination of Public Interior Portions of Buildings and Structures

5.6.a No public interior portion of a building or structure shall be considered designated for preservation pursuant to Section 14-2007 of the Philadelphia Code unless the Commission has specifically designated it after 28 December 2009.

5.6.b The Commission may designate an interior portion of a building or structure that is, or was designed to be, customarily open or accessible to the public, including by invitation. The Commission shall not designate an interior portion of a building or structure that was designed to be customarily open or accessible to the public, but has been significantly altered physically such that a substantial portion of the features reflecting its design for public use no longer

remain. Terminating the use of an interior portion of a building or structure by the public shall not in and of itself disqualify it from designation. The Commission shall not designate the interior portions of a building, which building was designed to be, and is still, used exclusively as one or more private residences.

5.6.c The Commission may designate a public interior portion, or any part of a public interior portion, of a building or structure for preservation regardless of whether the remainder of the building, structure, site, or appurtenances with which it is associated has been so designated.

5.6.d When designating a public interior portion of a building or structure, the Commission may designate realty and fixtures, as defined in Section 2.10 of these Rules & Regulations. Articles within a nominated public interior portion of a building or structure that do not constitute fixtures may not be designated as part of the public interior portion, but may be nominated for designation as objects, as defined in Section 2.16 and as prescribed in Section 5.5.b of these Rules & Regulations. A nomination to designate an object or objects located within a public interior portion of a building or structure that is itself under consideration for designation may be attached to the nomination of the public interior portion as an addendum.

5.6.e Nominations of Public Interior Portions of Buildings and Structures to the Philadelphia Register of Historic Places shall be submitted in such form as the Commission shall prescribe. This form shall include:

1. the current and historic names of the resource;
2. the street address of the resource and the name and mailing address of the owner as they appear in the real estate tax records of the Department of Revenue;
3. a narrative description of the boundary or boundaries of the public interior portion(s) and a graphic description of the boundary or boundaries of the public interior portion(s) delineated on architectural plan(s);
4. an inventory of all features including fixtures proposed for inclusion within the designation with their locations within the public interior portion(s) indicated on architectural plan(s) and/or annotated photographs;
5. categorizations of the building's or structure's overall condition, occupancy, and use;
6. the date(s) or period(s) of significance;

7. the dates of construction and major alteration, if known;
8. the names of architect, engineer, designer, builder, original owner, and/or other significant persons involved with the resource, if known;
9. annotated photographs describing all aspects of the physical appearance(s) of the public interior portion(s) including but not limited to floors, ceilings, and walls, and their relations to the overall building or structure, with a key showing the locations from which each photograph was taken;
10. a narrative statement of significance citing all Criteria for Designation set forth in Section 14-2007(5) of the Philadelphia Code that the public interior portion(s) satisfies;
11. bibliographical references;
12. photographs of the primary exterior façade of the building or structure and its site and surroundings; and,
13. the name and contact information of the nominator.

5.6.f Objects may be nominated for designation in a nomination proposing the designation of a public interior portion of a building or structure. However, the designation of a public interior portion of a building or structure shall not constitute the designation of any object within that public interior portion unless that object is specifically identified in the nomination for the public interior portion. A separate nomination form for the object(s) as defined in Section 5.5.b of these Rules & Regulations must be attached to the public interior portion nomination as an addendum.

5.7 Nomination of Historic Districts

5.7.a Nominators of historic districts are urged to consult with the Commission's staff early in the district nomination planning process. The staff can provide guidance regarding feasibility, eligibility, significance, boundaries, formatting, and other aspects of the potential district nomination to avert investments in untenable nominations and to promote efficient, effective designation processes and successful designations.

5.7.b Nomination of Districts to the Philadelphia Register of Historic Places shall be submitted in such form as the Commission shall prescribe. This form shall include:

1. the current and historic names of the proposed district;
2. a graphic description of the district's location on a map of the City of Philadelphia;
3. a narrative description of the district's boundaries and a graphic description of those boundaries delineated on a

map;
4. a narrative description of the district's physical appearance;
5. a narrative statement of the district's significance citing all Criteria for Designation set forth in Section 14-2007(5) of the Philadelphia Code that the proposed district satisfies
6. bibliographical references;
7. photographs of the characteristic streetscape; and,
8. the name and contact information of the nominator.

5.7.c In addition, a district nomination shall include a descriptive, evaluative, and photographic inventory. The inventory shall be organized by street address and shall include an entry for every property within the district as it appears in the real estate tax records of the Department of Revenue. The inventory may also include entries for features without street addresses including but not limited to bridges and horse troughs. Each entry shall include:

1. the current and historic names of the resource;
2. the dates of construction and major alteration, if known;
3. the names of architect, engineer, designer, builder, original owner, and/or other significant persons involved with the resource, if known;
4. a brief description of the physical appearance of the resource;
5. a photograph of the primary public view of the resource;
6. a classification of the resource as significant, contributing, or non-contributing. A significant building, structure, site, or object within a district is one that qualifies for individual listing on the Philadelphia Register of Historic Places. A contributing building, structure, site, or object, while perhaps not eligible for individual listing, reflects the character of the district as set forth in the statement of significance. A non-contributing building, structure, site, or object has no relationship to the character of the district through history, architecture, design or plan as set forth in the statement of significance.
7. previous individual and district listings on the National and Philadelphia Register of Historic Places including designation date(s); and,
8. a statement of archeological significance, if any; this information shall be subject to the confidentiality provisions of 5.13 of these Rules & Regulations.

5.7.d Public interior portions of buildings and structures may be included as resources in a nomination proposing the designation of a district,

provided the inclusion of each public interior portion is justified in the Statement of Significance for the district. However, the designation of a district shall not constitute the designation of any public interior portion of a building or structure unless the public interior portion is specifically identified in the nomination for the district. For every public interior portion of building and structure included in a district nomination, a separate nomination for that interior portion as defined in Section 5.6 of these Rules & Regulations must be attached to the district nomination as an addendum.

5.8 Review of Nominations by the Staff

5.8.a The staff shall review nominations for technical and substantive correctness and completeness. The staff shall return incorrect and/or incomplete nominations to the nominators with written explanations of the deficiencies. The staff shall not forward incorrect and/or incomplete nominations to the Committee on Historic Designation or the Commission. The staff shall advise the Commission of all nominations deemed incorrect and/or incomplete.

5.8.b The staff shall evaluate the significance of nominated resources using the Criteria for Designation set forth in Section 14-2007(5) of the Philadelphia Code. The staff shall refer correct and complete nominations to the Committee on Historic Designation with an advisory recommendation for or against designation, with or without amendments to the nomination. When recommending for designation, the staff shall cite the Criteria for Designation upon which the recommendation is based.

5.9 Written Notice to Property Owners of Proposed Designations

5.9.a The Commission shall provide notice of public meetings at which the Commission and the Committee on Historic Designation will consider proposed designations of buildings, structures, sites, objects, public interior portions of buildings and structures, and districts as historic.

5.9.b At least thirty (30) days before holding a public meeting to consider the proposed designation of a building, structure, site, object, or public interior portion of a building or structure as historic, the Commission shall send written notice to the owner of the property proposed for designation. The notice shall indicate the dates, times, and places of the public meetings at which the Commission and the Committee on Historic Designation will consider the proposed

designation. Notice shall be sent to the registered owner's last known address as the same appears in the real estate tax records of the Department of Revenue and sent to "Owner" at the street address of the property in question.

5.9.c At least sixty (60) days before holding a public meeting to consider the proposed designation of a district as historic, the Commission shall send written notice of the proposed designation to the owners of each building, structure, site, object, and public interior portion of a building or structure within the proposed district. The notice shall indicate the dates, times, and places of the public meetings at which the Commission and the Committee on Historic Designation will consider the proposed designation. Notice shall be sent to the registered owner's last known address as the same appears in the real estate tax records of the Department of Revenue and sent to "Owner" at the street address of the property in question. The Commission shall provide public notice of the proposed designation of a district as historic in a newspaper having general circulation within the city and shall post notice of the proposed designation at locations within the proposed district at least sixty (60) days before the first public meeting to consider the proposed designation.

5.10 Review of Nominations by the Committee on Historic Designation

5.10.a The Committee on Historic Designation shall review nominations at meetings open to the public. The Committee provides technical advice to the Commission and its meetings do not constitute public hearings. Nevertheless, opportunity for public participation in these meetings shall be made available and shall be limited only by constraints of time and pertinence.

5.10.b The Committee on Historic Designation shall evaluate the significance of nominated resources using the Criteria for Designation set forth in Section 14-2007(5) of the Philadelphia Code. The Committee shall refer nominations to the Commission with an advisory recommendation for or against designation, with or without amendments to the nomination. When recommending for designation, the Committee shall cite the Criteria for Designation upon which the recommendation is based. If, when recommending against designation, the Committee determines that the resource may be eligible for designation but the nomination is deficient, the Committee may also recommend that the Commission return of the nomination to the preparer with a request for revision and subsequent resubmission. The recommendation shall be reported to the Commission for consideration at a public hearing.

5.11 Review of Nominations by the Commission

5.11.a The Commission shall conduct its public hearings on the designation of buildings, structures, sites, objects, public interior portions of buildings and structures, and districts as historic in the manner prescribed in Section 4 of these Rules & Regulations.

5.11.b Section 14-2007(5) of the Philadelphia Code provides that the Commission may designate a building, complex of buildings, structure, site, object, public interior portion of a building or structure, or district for preservation if the nominated resource satisfies one or more of the Criteria for Designation.

5.11.c The Commission may designate as historic a building, complex of buildings, structure, site, object, public interior portion of a building or structure, or district with or without the consent of the owner(s).

5.12 Written Notice of Designations

The Commission shall send written notice of the designation as historic of a building, structure, site, object, public interior portion of building or structure, or district to the owner of each separately designated building, structure, site, object, or public interior portion of building or structure, and to the owners of each building, structure, site, object, or public interior portion of building or structure within a district designated historic, which shall include reason for the designation. Notice shall be sent to the registered owner's last known address as the same appears in the real estate tax records of the Department of Revenue and sent to the "Owner" at the street and address of the property in question. The Commission shall send written notice of historic designation to any person appearing at the public hearing who requests notification.

5.13 Archaeological Sites

The Commission shall maintain the confidentiality of data on archeological sites in order to protect their integrity and context against unauthorized disturbance or excavation. This data may be released for cause at the discretion of the Executive Director. This rule is not intended to deny access to archeological information to persons with appropriate academic or professional credentials engaged in legitimate research.

5.14 Amendment and Rescission of Designations

Section 14-2007(6)(f) of the Philadelphia Code permits the Commission to amend or rescind the designation of a building, complex of buildings, structure, site, object, public interior portion of a building or structure, or district as historic in the same manner as specified for designation.

5.14.a Amendment

5.14.a.1 Amendment presupposes that the historic resource under consideration continues to meet the criteria for entry on the Philadelphia Register of Historic Places. Amendment includes the substantial revision or amplification of the description or statement of significance of a designated property or district, the revision of a district classification, or the alteration of the boundary of a district.

5.14.a.2 Amendment to a description or statement of significance may be made either by revising the existing nomination or by submitting a supplement to the file.

5.14.a.3 The Commission may amend a district boundary to enlarge or reduce the size of a district. The submission for a boundary change shall include the materials specified for a nomination in Sections 5.7.b and 5.7.c of these Rules & Regulations. Before considering a nomination to enlarge an historic district, the Commission shall notify those owners in the newly nominated but yet undesignated area, pursuant to Section 14-2007(6)(b) of the Philadelphia Code.

5.14.a.4 For an amendment, the Commission, Committee on Historic Designation, and staff shall follow the procedures established in Section 5 of these Rules & Regulations.

5.14.b Rescission

5.14.b.1 The Commission may rescind the designation of a building, structure, site, object, public interior portion of a building or structure, or district and remove its entry or entries from the Philadelphia Register of Historic Places if:

a. the resource has ceased to satisfy any Criteria for Designation because the qualities that caused its original entry have been lost or destroyed;
b. additional information shows that the resource does not satisfy one or more Criteria for Designation; or,
c. the Commission committed an error in professional judgment when it determined that the resource satisfied one or more Criteria for Designation.

5.14.b.2 A person who seeks to have a designation rescinded shall

make a written and documented submission to the Commission that demonstrates one of the three bases cited in Section 5.14.b.1 of these Rules & Regulations. The content of such a submission may vary from case to case. For example, a demonstration of the loss or destruction of qualities may require a report by a structural engineer.

5.14.b.3 For rescission, the Commission, the Committee on Historic Designation and the staff shall follow the procedures established in Section 5 of these Rules & Regulations.

5.15 Subdivision, Consolidation, and Condominium Conversion

When a property designated as historic and listed on the Philadelphia Register of Historic Places is subdivided into multiple properties, the Commission shall list all addresses assigned to the subdivided properties on the Philadelphia Register of Historic Places. For the purposes of these Rules & Regulations, a subdivision is the division or redivision of a lot, tract, or parcel of land by any means into two or more lots, tracts, parcels, or other divisions of land including changes in existing lot lines.

When a property designated as historic and listed on the Philadelphia Register of Historic Places is consolidated into another property, the Commission shall list all addresses assigned to the consolidated property on the Philadelphia Register of Historic Places. For the purposes of these Rules & Regulations, a consolidation is the integration or reintegration of two or more lots, tracts, or parcels of land by any means into a lot, tract, parcel, or other division of land including changes in existing lot lines.

When a property designated as historic and listed on the Philadelphia Register of Historic Places is converted into a condominium, the Commission shall list all addresses and unit numbers assigned to the condominium units on the Philadelphia Register of Historic Places. For the purposes of these Rules & Regulations, a condominium is real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions.

As with any listing on the Philadelphia Register of Historic Places, a property owner may petition to amend or rescind a listing resulting from subdivision, consolidation, or condominium conversion, as specified in Section 5.14 of these Rules & Regulations.

6. REVIEW OF PERMIT APPLICATIONS

6.1 Permit Review Authority

Pursuant to Section 14-2007(7) of the Philadelphia Code, a property owner or authorized representative must obtain a permit from the Department of Licenses and Inspections before altering or demolishing a historically designated building, structure, site, object, or public interior portion of a building or structure; constructing a building, structure, or object within a historic district; or performing work that requires a building permit on a building or structure, if such building or structure contains an historic public interior portion. To obtain such a permit, one must first apply to the Department. Before the Department may issue such a permit, it is required by Section 14-2007(7)(c) of the Philadelphia Code to forward the permit application to the Commission for its review.

6.2 Alteration

Section 14-2007(2)(a) of the Philadelphia Code defines an alteration as any change in the appearance of a building, structure, site, object, or public interior portion of a building or structure; or any work for which a permit is required under the Philadelphia Code. Alterations include but are not limited to reroofing, cleaning and pointing masonry, and replacing doors and windows.

6.3 Demolition

Section 14-2007(2)(f) of the Philadelphia Code defines a demolition as the razing or destruction, whether entirely or in significant part, of a building, structure, site, object, or public interior portion of a building or structure. The removal of a building, structure, or object from its site and the removal or destruction of a facade may be considered demolitions. Section 14-2007(7)(j) of the Philadelphia Code states that the Commission may approve the issuance of a permit for the demolition of a building, structure, site, object, or public interior portion of a building or structure that is individually designated or contributes to a historic district only if the Commission finds that the issuance of the permit is necessary in the public interest, or if the Commission finds that the historic resource in question cannot be used for any purpose for which it is or may be reasonably adapted. In order to show that a historic resource cannot be used for any purpose for which it is or may be reasonable 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.

6.4 Maintenance

Section 14-2007(8)(d) of the Philadelphia Code stipulates that the historic

preservation ordinance shall not be construed to prevent the ordinary maintenance or repair of a historically designated building, structure, site, object, or public interior portion of a building or structure when the maintenance or repair work does not require a permit by law and where the purpose and effect of such work is to correct any deterioration or decay of, or damage to, a building, structure, site, object, or public interior portion of a building or structure and to restore the same to its condition prior to the occurrence of such deterioration, decay, or damage.

6.5 Summary of the Building Permit Application Review Process

Applicants are urged to consult with the Commission staff early in the planning process for guidance in the preparation of permit applications that are correct and complete and satisfy the Commission's review standards. When the Commission receives a building permit application, it reviews the application as follows:

a. The staff determines whether the Commission holds jurisdiction over the property in question. If the property is not under the Commission's jurisdiction, the staff informs the Department of the lack of jurisdiction and the process is complete.
b. The staff then determines whether the application is complete. If it is not complete, the staff identifies the deficiencies, returns the application to the applicant, and the process is complete.
c. The staff then determines whether the work proposed in the application requires review. If the proposed work does not require review, the staff approves the application without additional evaluation and the process is complete.
d. The staff then determines whether the proposed work falls within the staff's purview to review according to Section 6.10.c of these Rules & Regulations. If the proposed work does fall within the staff's purview, the staff then determines whether it satisfies the review criteria set forth in Section 14-2007(7)(k) of the Philadelphia Code and Section 6.9 of these Rules & Regulations. If it does, the staff approves the application and the process is complete. If it does not fall within the staff's purview and/or does not satisfy the review criteria, the staff forwards it to the Architectural Committee for review with an advisory recommendation.
e. If the application proposes a mural or demolition, the property is posted with the appropriate public notification as required in Section 6.15 or 6.16 of these Rules & Regulations respectively.
f. The Architectural Committee reviews applications forwarded

to it by the staff. If the proposed work falls within the staff's purview, but was not approved by the staff, and the Architectural Committee determines that it satisfies the review criteria set forth in Section 14-2007(7)(k) of the ordinance and Section 6.9 of these Rules & Regulations, the Committee approves the application and returns it to the staff for final processing, after which the process is complete. If it does not fall within the staff's purview and/or does not satisfy the review criteria, the Architectural Committee reviews the application, formulates a non-binding recommendation, and forwards the application and recommendation to the Commission for review.

g. If an application makes a claim of financial hardship, the staff forwards the application to the Committee on Financial Hardship as well as Architectural Committee. Like the Architectural Committee, the Committee on Financial Hardship formulates a non-binding recommendation, which it forwards to the Commission. See Section 9 of these Rules & Regulations for guidance regarding financial hardship applications.
h. The Commission reviews all applications referred to it by the Architectural Committee. During its review, the Commission considers the recommendation of the Architectural Committee and, if the applicant has claimed financial hardship, the recommendation of the Committee on Financial Hardship, and bases its action on the review criteria set forth in Section 14-2007(7)(k) and Section 6.9 of these Rules & Regulations as well as the financial hardship, unnecessary hardship, and public interest provisions (Sections, 9, 11, and 12). For all but review-and-comment applications (see Section 7), the Commission must, within sixty (60) days of receipt of a complete application, approve it, object to it, or defer action on it for a period not to exceed six (6) months. For review-and-comment applications, i.e. applications proposing the erection of a new building, structure, or object on an undeveloped site in an historic district, the Commission does not have plenary jurisdiction, but only the authority to comment on the application within forty-five (45) days of its receipt.
i. After the Commission acts on an application, it returns it to the staff for final processing, during which the staff verifies that the final construction drawings comply with the Commission's action. Once the staff has verified the compliance, the process is complete.

Pursuant to the Philadelphia Code, applications may also be subject to review for approval by other City of Philadelphia departments, departmental units, boards, and commissions in addition to the Historical Commission. These include, for example, the Zoning Unit of the Department of Licenses and Inspections, the Philadelphia City Planning Commission, and the Art Commission. The Department of Licenses and Inspections directs applicants to agencies with potential jurisdiction.

6.6 Early Consultation

Applicants are urged to consult with the Commission's staff early in the planning process for guidance in the preparation of correct and complete permit applications for submission to the Commission. The staff can advise applicants on the preparation of applications that will satisfy the Commission's review standards.

6.7 Submission Requirements

The submission requirements may vary according to the proposed scope of work. The staff can advise the applicant on specific submission requirements. At a minimum, an applicant must submit the following:

6.7.a A completed Application for Building Permit, or such other form as the Commission and Department may adopt. The Application for Building Permit form may be obtained from the Department of Licenses and Inspections or the Historical Commission. Before any final action by the Commission to approve a proposal, to deny a proposal, or to defer action on a proposal for a designated period not to exceed six (6) months, an applicant must submit a completed building permit application to the Commission.

6.7.b A cover letter describing the proposed undertaking and any special circumstances.

6.7.c Copies of any historic documentation related to the project, for example, historic maps, photographs, or insurance surveys.

6.7.d Photographs of all elevations and areas proposed to be altered or demolished; of the street or interior context of the building, structure, site, or public interior portion of the building or structure; and, in the case of an object, of the specific setting or environment. All photographs shall be dated and labeled, and shall remain the property of the Commission.

6.7.e For applications proposing work to designated exteriors, a legible,

dimensioned, accurately-scaled plot or site plan and legible, dimensioned, accurately-scaled drawings of all elevations to which alterations are proposed. Depending on the nature of the project, section drawings and plans may also be required. If demolition is proposed, the area(s) of demolition must be clearly delineated on the drawings. All drawings must be annotated and/or be accompanied by a complete set of specifications that describe the proposed undertaking in detail. For less complex projects, annotated photographs and/or photomontages with notes and/or specifications may be acceptable in lieu of drawings.

6.7.f For applications proposing work to designated interiors, a legible, dimensioned, accurately-scaled interior plan with the interior designation boundary clearly demarcated and legible, dimensioned, accurately-scaled drawings of all elevations, floors, ceilings, and other features to which alterations are proposed. Depending on the nature of the project, section drawings may also be required. If demolition is proposed, the area(s) of demolition must be clearly delineated on the drawings. All drawings must be annotated and/or be accompanied by a complete set of specifications that describe the proposed undertaking in detail. For less complex projects, annotated photographs and/or photomontages with notes and/or specifications may be acceptable in lieu of drawings.

6.7.g Legible, dimensioned, accurately-scaled, detail or shop drawings of all features to be replaced and/or reconstructed. Such features may include but are not limited to doors, door frames, window frames and sash, shutters, cellar bulkheads, cornices, dormers, mantels, and stairways.

6.7.h Manufacturer's specifications and/or catalog cut-sheets for all off-the-shelf elements including but not limited to lighting and door hardware. The features enumerated in Section 6.7.d of these Rules & Regulations are not considered off-the-shelf elements.

6.7.i For applications claiming financial hardship, see Section 9 of these Rules & Regulations for additional submission requirements.

6.7.j For applications claiming unnecessary hardship, see Section 11 of these Rules & Regulations for additional submission requirements.

6.7.k For applications claiming necessity in the public interest, see Section 12 of these Rules & Regulations for additional submission requirements.

6.8 Submission Completeness

The Historical Commission staff shall review the application and ascertain its completeness pursuant to the submission requirements delineated in Section 6.7 of these Rules & Regulations. An incomplete application and submission may not be accepted by the staff and may be returned to the applicant with a request for additional information.

In the event that the Architectural Committee or Commission deems an application incomplete, it may direct the staff to return the application to the applicant. The sixty (60) day response requirement prescribed by Section 14-2007(7)(g) of the Philadelphia Code and Section 6.12 of these Rules & Regulations shall not apply to an incomplete application.

6.9 Review Criteria

6.9.a Review Criteria for Properties Designated as Historic pursuant to Section 14-2007 of the Philadelphia Code

In making a determination as to the appropriateness of proposed alterations, demolition, and/or construction for properties designated as historic pursuant to Section 14-2007 of the Philadelphia Code, the Commission, its committees, and staff shall consider the following:

6.9.a.1 The purposes of Section 14-2007 of the Philadelphia Code, the City of Philadelphia's historic preservation ordinance;

6.9.a.2 The historical, architectural, or aesthetic significance of the building, structure, site, object, or public interior portion;

6.9.a.3 The effect of the proposed work on the building, structure, site or object and its appurtenances;

6.9.a.4 The compatibility of the proposed work with the character of the historic district or with the character of its site, including the effect of the proposed work on the neighboring structures, the surroundings and the streetscape; and,

6.9.a.5 The design of the proposed work.

6.9.a.6 In addition to the above, the Commission, its

Architectural Committee, and staff shall be guided in their evaluations by the most recent edition of *The Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring & Reconstructing Historic Buildings*, hereafter cited as the Secretary's Standards.

6.9.a.7 In specific cases as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of this section would result in unnecessary hardship so that the spirit of this section shall be observed and substantial justice done, subject to such terms and conditions as the Commission may decide, the Commission shall by a majority vote grant an exemption from the requirements of Section 14-2007 of the Philadelphia Code, the historic preservation ordinance.

6.9.a.8 With respect to designated public interior portions, the Commission may grant an exemption when, owing to special consideration of the mission and financial status of a non-profit organization, the Commission determines that a literal enforcement of the provisions of Section 14-2007 of the Philadelphia Code would not be in the public interest and the spirit of Section 14-2007 of the Philadelphia Code will be substantially observed, subject to such terms and conditions as the Commission may establish.

6.9.a.9 In their review of applications proposing work to historic public interior portions of buildings and structures, the Commission, Architectural Committee, and staff shall not regulate the following:

a. the positioning or placing, but not affixing, of personal property including but not limited to furniture, artworks, rugs, carpets, and curtains within the public interior portion, except when the positioning or placing of such personal property would result in material injury to the public interior portion;
b. the use and/or occupancy of the public interior portion;
c. the public accessibility of the public interior

portion; and,

d. the environmental conditions of the public interior portion including but not limited to temperature and humidity, except when the environmental conditions would result in significant material injury to the public interior portion.

6.9.a.10 When reviewing permit applications, the Commission may consider development plans in place at the time of the issuance of the notice announcing the consideration of a designation. Section 14-2007(6)(a) of the Philadelphia Code requires the Commission to provide written notice to the owner of the proposed designation of a building, structure, site, object, or public interior portion at least thirty (30) days in advance of the public hearing to consider the designation. Section 14-2007(6)(b) of the Philadelphia Code requires the Commission to provide written notice to owners, a newspaper announcement, and notices posted in the proposed district at least sixty (60) days in advance of a public hearing to consider the designation of an historic district. In addition, Section 14-2007(7)(l) authorizes the Commission to review permit applications from the date of the mailing of notices to owners. The Commission, its committees, and staff may consider development plans in place at the time of the issuance of the notice announcing the consideration of a designation including but not limited to executed contracts, substantial design development, or other evidence of a material commitment to development in the review of applications. This regulation shall not apply to buildings, structures, sites, objects, and public interior portions within a proposed district that were previously designated individually.

6.9.a.11 The Commission, Architectural Committee, and staff shall employ different criteria when reviewing permit applications for non-contributing buildings, structures, sites, and objects within historic districts. Section 14-2007(2)(i) of the Philadelphia Code defines a historic district as a "geographically definable area possessing a significant concentration, linkage, or continuity of buildings, structures, site, or objects

united by past events, plan, or physical development." By implication, Section 14-2007(2)(e) defines a non-contributing building, structure, site, or object within a historic district as one that does not reflect the historical or architectural character of the district as defined in the Commission's designation. In Section 14-2007(7)(j), the Code also contains a strict standard of review for the proposed demolition of contributing buildings, structures, sites, objects, and public interior portions within an historic district, but not for non-contributing buildings, structures, sites, and objects. Sections 14-2007(7)(a) and (c), however, require that the Commission review all permits for buildings within historic districts. Moreover, the very concept of a historic district suggests that the district as a whole constitutes the principal historic resource and possesses greater significance than its individual component parts. Section 14-2007(7)(k) provides specific directions to the Commission in "its determination as to the appropriateness of proposed alterations." These include consideration of "the purposes of this section," "the historical, architectural or aesthetic significance of the building, structure, site or object," "the effect of the proposed work on the building, structure, site or object and its appurtenances," "the compatibility of the proposed work with the character of the historic district or with the character of its site, including the effect of the proposed work on the neighboring structures, the surroundings and the streetscape," and "the design of the proposed work." When reviewing applications for non-contributing buildings, structures, sites, and objects within an historic district, the Commission, its committees, and staff shall place particular emphasis on the compatibility of materials, features, size, scale, proportion, and massing with the historic district.

6.9.b For properties located in the Main Street Manayunk National Register Historic District, placed under the jurisdiction of the Historical Commission by Chapter 7 of the Philadelphia Property Maintenance Code, and not designated as historic pursuant Section 14-2007 of the Philadelphia Code, the Commission, its committees, and staff shall consider the following in making a determination as to whether the proposed alterations, demolition,

and/or construction preserve the character of the historic district:

6.9.b.1 Repair: Original architectural features such as cornices and bays shall not be removed. Deteriorated features shall be repaired where possible. Replacement material where necessary shall duplicate the original as closely as possible.

6.9.b.2 Facings: Refacing of facades, bays, cornices with inappropriate materials such as aluminum siding, or brick veneer shall be prohibited. Existing inappropriate facade facings shall be removed at the termination of the useful life of the facing. Any inappropriate facing material lawfully in existence shall not be repaired or altered in any substantial manner.

6.9.b.3 Elements: Original window and door openings, sills, lintels, and sashes shall be retained and repaired whenever possible. Replacement elements shall match the original appearance in proportion, form, and materials as closely as possible.

6.9.b.4 Storefronts: Original existing storefronts contributing to the character of the district shall be retained and repaired. New storefronts shall be compatible with the proportion, form and materials of the original building.

6.9.b.5 Design: Additions, alterations, and new construction shall be designed so as to be compatible in scale, building materials, and texture, with contributing buildings in the historic district.

6.10 Review by the Staff

6.10.a Staff Responsibilities

The staff shall adhere to the following procedures in the exercise of its discretion to review and approve permit applications.

1. The staff shall be forthright and act in good faith with applicants. The staff has an affirmative obligation to disclose all pertinent information in its possession to applicants.
2. The staff shall fully and clearly explain all Commission processes and procedures to applicants. The staff shall offer to provide copies of the historic preservation ordinance and these Rules & Regulations.
3. The staff shall provide applicants with access to all Commission-held documents related to their properties including but not limited property files, meeting minutes, designation records, and district inventories.

4. The staff shall fully and clearly explain the extent of the Commission's, Architectural Committee's, and staff's authority to applicants. The staff shall fully and clearly explain that the staff is not authorized to deny any application, but only to approve some applications and refer all others to the Architectural Committee and Commission.
5. The staff shall fully and clearly explain that the Commission's authority is limited to review within the scope of work defined by the applicant.
6. The staff shall fully and clearly explain that alterations undertaken prior to designation are grandfathered and may be retained when outside the scope of the proposed work.
7. The staff shall complete reviews not referred to the Architectural Committee and Commission within five (5) working days of the submission of a complete application.

6.10.b Applications for Undesignated Interior Spaces

The staff shall review and shall approve without referral to the Architectural Committee and Commission building permit applications for alterations to interior spaces that are not designated as historic, provided the proposed alteration has no effect on a designated public interior portion of the building or structure; has no effect on the exterior appearance of the building or structure, if such building, structure, or object is designated as historic; and does not compromise the structural integrity of the building or structure. The staff shall complete such reviews within five (5) working days of the submission of a complete application.

6.10.c Staff Approval Authority

In reviewing permit applications, the staff shall comply with the standards set forth in §14-2007(7)(k) of the Philadelphia Code and, as mandated in Section 6.9 of these Rules & Regulations, shall be guided in their evaluations by The Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring & Reconstructing Historic Buildings. The staff shall base its reviews on sufficient evidence including but not limited to physical evidence at the site or similar sites and historic documents such as photographs, architectural plans, insurance surveys, and maps. The staff shall review and may approve without referral to the Architectural Committee and the Commission permit applications proposing:

1. the restoration of the historic resource to a period of significance, provided the restoration is based on sufficient evidence and the undertaking will not cause the damage or

removal of significant original or later historic fabric;

2. the replacement of deteriorated features including, but not limited to, windows, doors, shutters, cornices, mantels, and stairways, provided the severity of deterioration requires replacement, the design of the replacement features is based on sufficient evidence, and the replacement features replicate the appearance of the historic features;
3. the replacement of roofing materials when the original materials are not extant, provided the proposed materials are based on sufficient evidence and closely approximate or replicate the historic roofing materials;
4. the replacement of slate roofing materials, with the exception of mansards, turrets, and other character-defining features, provided the severity of deterioration requires replacement and the substitute materials closely approximate the color and shape of the historic slate roofing materials;
5. the alteration of non-historic storefront features when the historic storefront is not extant;
6. the alteration of secondary elevations and site features that face service alleys and/or are not visible or have limited visibility from public rights-of-way;
7. the alterations of public interior portions including but not limited to plumbing, electrical, mechanical, and weatherproofing work, provided the alterations are not visible to the public and do not cause the damage and/or removal of significant historic fabric;
8. the removal and/or alteration of features that are not original, historically significant, or integral to the historic resource including exploratory removals;
9. the alteration or addition of minor, non-historic features including but not limited to awnings, signage, light fixtures, door hardware, window boxes, mechanical equipment, railings, fences, walls, gates, fire-suppression systems, and alarm and security systems, provided the new features are compatible with the character of the historic resource, do not block views of its character-defining features, and do not cause the damage and/or removal of significant historic fabric;
10. standard maintenance not exempted from review by §14-2007(8)(d) of the Philadelphia Code including but not limited to pointing, masonry cleaning, repainting, and paint removal;
11. work that reverses alterations performed without a permit;
12. the repair or removal of features determined Unsafe or Imminently Dangerous by the Department of Licenses &

Inspections, provided that the permit is issued with the condition that the owner is required to restore such historic features to their original appearance and location within one year of their removal; and,

13. alterations to and demolitions of non-contributing buildings, structures, sites, and objects within historic districts not also individually designated as historic, provided such alterations and demolitions do not adversely impact public interior portions designated as historic.

6.10.d Staff Referral of Applications to the Architectural Committee

In the event that the staff is not authorized or declines to approve an application, the staff shall forward the application to the Architectural Committee for review at its next meeting. The staff shall make a recommendation on the application to the Architectural Committee for approval, denial, or deferral, with or without conditions and qualifications. The staff may also enter a recommendation directly to the Commission.

6.11 Review by the Architectural Committee

6.11.a The Architectural Committee is a technical advisory committee of the Historical Commission. The Architectural Committee is established and defined in Section 3.4.a of these Rules & Regulations.

6.11.b For review at an Architectural Committee meeting, a complete application as described in Section 6.7 of these Rules & Regulations, and Section 9.2 of these Rules & Regulations if financial hardship is claimed, must be submitted to the staff at least nine (9) working days prior to the meeting. The staff shall release a list of applications to be reviewed by the Committee to all interested parties at least five (5) working days prior to the Committee meeting. All application materials, with the exception of some hardship documentation as defined in Section 9.8 of these Rules & Regulations, shall be considered public information and shall be available for public examination at the Commission office at least five (5) working days prior to the Committee meeting.

Supplemental materials may be submitted during the review process, provided such materials are submitted at least three (3) working days prior to the Committee meeting at which the application will be heard. Such materials, with the exception of some hardship documentation as defined in Section 9.8 of these Rules & Regulations, shall be considered public information and

shall be available for public examination at the Commission office upon submission.

6.11.c The applicant or an informed, authorized representative is expected to appear before the Committee to make a brief presentation of the proposed work and to address any questions that may arise about the application. Attendance at this meeting facilitates the review process and avoids delay.

6.11.d The Architectural Committee shall review the application based on the criteria set forth in Section 14-2007(7)(k) of the Philadelphia Code and Section 6.9 of these Rules & Regulations.

6.11.e The Architectural Committee shall review and may approve without referral to the Commission applications that are subject to staff approval but which the staff has declined to approve. If the Committee declines to approve such an application, it shall formulate an advisory recommendation for approval, denial, or deferral, with or without conditions and qualifications; and refer the application with recommendation to the Commission for review at its next meeting. The Architectural Committee approval or recommendation shall be confirmed in writing to the applicant.

6.11.f The Architectural Committee shall review applications that are not subject to staff approval; formulate an advisory recommendation for approval, denial, or deferral, with or without conditions and qualifications; and refer the application with recommendation to the Commission for review at its next meeting. The Architectural Committee recommendation shall be confirmed in writing to the applicant.

6.12 Review by the Commission

6.12.a The Commission shall review all applications and recommendations referred to it by the Architectural Committee. For applications claiming financial hardship, the Commission shall additionally consider the Committee on Financial Hardship's recommendation.

6.12.b As prescribed in Section 14-2007(7)(g) of the Philadelphia Code, the Commission must determine within sixty (60) calendar days of the receipt of a permit application whether or not it has any objection to the proposed alteration or demolition. In the absence of an objection by the Commission, the Department of Licenses and Inspections shall issue the permit subject to other provisions of the

Code; in the event of an objection by the Commission, the Department shall deny the permit. The Commission may, however, defer action on a permit application for a designated period not to exceed six (6) months from the date of its resolution to defer. The Commission may request that the applicant provide additional information during the deferral period.

6.12.c Supplemental materials may be submitted during the review process, provided such materials are submitted at least three (3) working days prior to the Commission meeting at which the application will be heard. Such materials, with the exception of some hardship documentation as defined in Section 9.8 of these Rules & Regulations, shall be considered public information and shall be available for public examination at the Commission office upon submission.

6.12.d During any deferral period, the Commission may consult with the owner, civic groups, public and private agencies, and interested parties to ascertain what may be done by the City or others to preserve the building, structure, site or object which is the object of the permit application. When appropriate, the Commission may make recommendations to the Mayor and City Council.

6.13 Withdrawals and Continuances

6.13.a Withdrawal

An applicant may withdraw an application at any time prior to the Commission's action on the application. An applicant may withdraw an application on the record during an Architectural Committee or Commission meeting or in writing to the Executive Director at any time prior to the Commission's action on the application.

6.13.b Continuances

An applicant who wishes to postpone the review of an application after its submission but before its review at the Architectural Committee meeting must withdraw the application in writing to the Executive Director. The applicant may resubmit the application for consideration during a subsequent review cycle. An applicant who wishes to postpone the review of an application by the Commission following its review by the Architectural Committee must make a request in writing to the Executive Director, who may grant one postponement to the subsequent Commission meeting. If the Executive Director declines to grant a postponement, the staff will present the postponement request to the Commission at its next meeting before it considers the application. The Commission may

grant the postponement or commence with its review.

Applicants may make requests for longer postponements and subsequent postponements in writing to the Executive Director or in person at the Commission meeting. The staff shall present such written requests for postponements to the Commission at its next meeting before it considers the application.

When an applicant requests a postponement that is granted, the clock measuring the time limit for review mandated by Section 14-2007 of the Philadelphia Code and/or these Rules & Regulations shall be paused at the start of the postponement and shall resume at the end of the postponement.

6.14 Appeals

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 pursuant to Section 5-1005 of the Philadelphia Home Rule Charter and Section 14-2007(10) of the Philadelphia Code. Such an appeal must be filed with the Board of License and Inspection Review within fifteen (15) days of written notice to the applicant of the decision.

6.15 Murals

6.15.a Policy

6.15.a.1 This policy applies to murals and other similar forms of outdoor visual art.

6.15.a.2 Murals shall not be placed directly upon historic fabric.

6.15.a.3 Murals shall not be placed in a manner that obscures historic fabric.

6.15.a.4 The Philadelphia Historical Commission, its committees, and staff shall not consider a mural's content as a part of its review of any application for a building permit, but may consider size, scale, and relationship to the historic context.

6.15.b Public Notice

6.15.b.1 The applicant for a mural or other similar form of outdoor visual art shall place a poster(s) provided by the Philadelphia Historical Commission on the premises notifying the public of the times and dates when the Architectural Committee and the full Commission will meet to consider the application.

6.15.b.2 The poster(s) shall be placed within 24 hours of the submission of a building permit application to the Historical Commission.

6.15.b.3 The poster(s) shall be placed on each street frontage of the premises and shall be clearly visible to the public.

6.15.b.4 The poster(s) shall remain on the premises until the date that the full Commission holds a hearing to consider the application.

6.15.b.5 The applicant shall take time-dated photographs of the poster(s) and present the photograph(s) to the Architectural Committee at its hearing.

6.16 Notice of Demolition Application

Within seven (7) days after the receipt of a demolition application, the Department of Licenses and Inspections shall place a notice of the application upon the property indicating that the owner has applied for a permit to demolish the property; that the property is historic or is located within an historic district; and that the application has been forwarded to the Commission for review. The notice shall be posted on each street frontage of the premises with which the notice is concerned and shall be clearly visible to the public. Posting of a notice shall not be required in the event of an emergency which requires immediate action to protect the health or safety of the public. No person shall remove the notice unless the permit is denied or the owner notifies the Department that the property will not be demolished.

7. REVIEW IN CONCEPT

7.1 Overview of Review In Concept

The Commission seeks to work affirmatively with owners, developers, architects, and contractors in the preparation of plans that meet the goals of both historic preservation and the property owner. Prospective applicants are encouraged to consult with the Commission staff early in the planning and design process before actually applying for a permit.

Owing to the potential complexity of a project or the conditional nature of contractual relationships, the staff may find the participation of the Architectural Committee and the Commission warranted in the consultative process. In such instances, the staff may refer applications for proposed developments to the Architectural Committee and Commission for reviews in concept. During such reviews, the Architectural Committee and Commission provide advice and guidance, but do not provide any final approvals.

7.2 Submission Requirements for a Review in Concept

At a minimum, an applicant must submit the following:

7.2.a A completed Application for Review in Concept with a description of the proposed development, including any demolition of buildings or parts of buildings on the site.

7.2.b A cover letter describing the proposed undertaking and any special circumstances.

7.2.c Copies of any historic documentation related to the project, for example, historic maps, photographs, or insurance surveys.

7.2.d Photographs of all elevations and areas proposed to be altered or demolished, and of the street and/or interior context of the building, structure, site, object, or public interior portion of the building or structure. All photographs shall be dated and labeled, and shall remain the property of the Commission.

7.2.e For applications proposing work to designated exteriors, a legible, dimensioned, accurately-scaled plot or site plan.

7.2.f For applications proposing work to designated interiors, a legible, dimensioned, accurately-scaled interior plan with the interior designation boundary clearly demarcated.

7.2.g Legible, dimensioned, accurately-scaled drawings of the proposed alterations. If demolition is proposed, the area(s) of demolition must

be clearly delineated on the drawings. Detailed drawings are not required, but the drawings must convey the concept. In some instances, massing drawings may suffice. For less complex projects, annotated photographs and/or photomontages may be acceptable in lieu of drawings.

7.3 Review Process and Procedure for a Review in Concept

7.3.a The review process and procedure for a review in concept shall follow those described in Section 6 of these Rules & Regulations.

7.3.b An endorsement of a review in concept of a development program shall apply only to the proposal submitted and reviewed as a whole, shall remain valid for one (1) year, and may be renewed for one period of six (6) months without resubmission to the Commission.

7.3.c An endorsement of a review in concept of a development program shall not constitute a final review for permit purposes, shall not vest a right in a permit, and shall be subject to review of the final plans by the Commission before the Commission takes final action on a permit application and before a permit may issue.

8. REVIEW OF NEW CONSTRUCTION IN HISTORIC DISTRICTS

8.1 45-Day Review and Comment Jurisdiction

The Commission asserts plenary jurisdiction over most new construction. However, the Commission exerts a limited form of jurisdiction, called review-and-comment jurisdiction, over new construction on one type of site in historic districts. Sections 14-2007(2)(d), (7)(a), and (7)(d) of the Philadelphia Code limit the Commission's jurisdiction to "a forty-five (45) day period of comment" for the "erection of a new building, structure or object upon an undeveloped site" that is "within an historic district." To conform to these provisions, the Commission exerts review-and-comment jurisdiction, not plenary jurisdiction, over construction on lots in historic districts that satisfy the definition of "undeveloped site." Section 2.23 of these Rules & Regulations defines the term "undeveloped site," which can be summarized as "a property within an historic district which is not individually designated, to which the inventory in the historic district nomination attributes no historical, cultural, or archaeological value, and upon which no building or structure stood at the time of the designation of the historic district." The Commission shall review applications proposing construction on undeveloped sites in historic districts within 45 days of submission of a complete application and shall offer advisory, non-binding comments on such applications. The Commission shall not approve or deny such applications.

8.2 Submission Requirements for a Permit for New Construction

At a minimum, an applicant must submit the following:

8.2.a A completed Application for a Building Permit. This form may be obtained from the Department of Licenses and Inspections.

8.2.b A cover letter describing the proposed undertaking and any special circumstances.

8.2.c Copies of any historic documentation related to the project, for example, historic maps, photographs, or insurance surveys.

8.2.d Photographs of the undeveloped site, and of its street context. All photographs shall be dated and labeled, and shall remain the property of the Commission.

8.2.e A legible, dimensioned, accurately-scaled plot or site plan and legible, dimensioned, accurately-scaled drawings of the proposed construction. All drawings must be annotated and/or be accompanied by specifications that describe the proposed undertaking.

8.3 Review Process and Procedure for a Permit for New Construction

8.3.a An application for new construction in historic districts shall be reviewed for completeness as stipulated in Section 6.8 of these Rules & Regulations.

8.3.b The staff shall forward the application for new construction in an historic district with comments to the Architectural Committee for review at its next meeting. The staff may also offer comments on application for new construction in an historic district directly to the Commission.

8.3.c The Architectural Committee shall review the application for new construction in an historic district as stipulated in Sections 6.11.a to 6.11.d of these Rules & Regulations.

8.3.d The Architectural Committee shall comment on the application for new construction in an historic district and refer the application with comments to the Commission for review at its next meeting. The Architectural Committee comments shall be confirmed in writing to the applicant.

8.3.e Within forty-five (45) days of the receipt of a complete application for new construction in an historic district, the Commission shall review the application applying the review criteria stipulated in Section 14-2007(7)(k) of the ordinance and Section 6.9 of these Rules & Regulations and comment. The Commission's comments shall be confirmed in writing to the applicant.

9. FINANCIAL HARDSHIP AND PERMIT APPLICATIONS

9.1 Financial Hardship in the Consideration of Permit Applications

9.1.a Pursuant to Sections 14-2007(7)(f) and (j) of the Philadelphia Code, the Commission may determine that a building, structure, site, object, or public interior portion of a building or structure cannot be used for any purpose for which it is or may reasonably be adapted. Such a finding, commonly referred to as a finding of financial hardship, allows the Commission to consider the approval of an application to alter or demolish an historic property that may not otherwise satisfy the Commission's review standards. However, such a finding does not release the historic resource from the Commission's regulation, but only allows the Commission to consider relaxing its review standards.

9.2 Additional Submission Requirements for Financial Hardship

9.2.a In addition to the standard submission documents required by Section 6.7 of these Rules & Regulations, an applicant claiming financial hardship shall submit, by affidavit, the following information for the entire property, as stipulated by Section 14-2007(f)(.1)-(.7) of the Philadelphia Code:

1. amount paid for the property, date of purchase, and party from whom purchased, including a description of the relationship, whether business or familial, if any, between the owner and the person from whom the property was purchased;
2. assessed value of the land and improvements thereon according to the most recent assessment;
3. financial information for the previous two (2) years which shall include, at a minimum, annual gross income from the property, itemized operating and maintenance expenses, real estate taxes, annual debt service, annual cash flow, the amount of depreciation taken for federal income tax purposes, and other federal income tax deductions produced;
4. all appraisals obtained by the owner in connection with the purchase or financing of the property, or during the ownership of the property;
5. all listings of the property for sale or rent, price asked, and offers received, if any; and,
6. any consideration by the owner as to profitable uses and adaptive uses for the property.

9.2.b As provided by Section 14-2007(7)(f)(.7) of the Philadelphia Code,

the Commission may also require the owner to conduct, at the owner's expense, evaluations and studies, as are reasonably necessary in the opinion of the Commission, to determine whether the building, structure, site, object, or public interior portion has or may have alternative uses consistent with preservation. If the Commission requires an owner to conduct additional evaluations and studies, these shall, at a minimum, include:

1. identification of reasonable uses or reuses for the property within the context of the property and its location;
2. rehabilitation cost estimates for the identified reasonable uses or reuses, including the basis for the cost estimates;
3. a ten-year pro forma of projected revenues and expenses for the reasonable uses or reuses that takes into consideration the utilization of tax incentives and other incentive programs;
4. estimates of the current value of the property based upon the ten-year projection of income and expenses and the sale of the property at the end of that period, and
5. estimates of the required equity investment including a calculation of the Internal Rate of Return based on the actual cash equity required to be invested by the owner.

9.3 Financial Hardship Submission Completeness

The Historical Commission staff shall review the financial hardship documents and ascertain their completeness pursuant to the submission requirements delineated in Sections 6.7 and 9.2 of these Rules & Regulations. An incomplete application and submission may not be accepted by the staff and may be returned to the applicant with a request for additional information.

In the event that the Committee on Financial Hardship or Commission deems the financial hardship documents incomplete, it may direct the staff to return the entire application to the applicant. The sixty (60) day response requirement prescribed by Section 14-2007(7)(g) of the Philadelphia Code and Section 6.12 of these Rules & Regulations shall not apply to an incomplete application.

9.4 Review Criteria

To substantiate a claim of financial hardship to justify an alteration, the applicant must demonstrate that the property cannot be used for any purpose for which it is or may be reasonably adapted. The applicant has an affirmative obligation in good faith to explore potential reuses for it.

To substantiate a claim of financial hardship to justify a demolition, the applicant 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. The applicant has an affirmative obligation in good faith to attempt the sale of the property, to seek tenants for it, and to explore potential reuses for it.

9.5 Review by the Committee on Financial Hardship

9.5.a The Committee on Financial Hardship is a technical advisory committee of the Historical Commission. The Committee on Financial Hardship is established and defined in Section 3.4.c of these Rules & Regulations.

9.5.b For review at a Committee on Financial Hardship meeting, a complete application as described in Section 6.7 of these Rules & Regulations and Section 9.2 of these Rules & Regulations must be submitted to the staff at least nine (9) working days prior to the meeting. The staff shall release a list of applications to be reviewed by the Committee to all interested parties at least five (5) working days prior to the Committee meeting. All application materials, with the exception of some hardship documentation as defined in Section 9.8 of these Rules & Regulations, shall be considered public information and shall be available for public examination at the Commission office at least five (5) working days prior to the Committee meeting.

Supplemental materials may be submitted during the review process, provided such materials are submitted at least three (3) working days prior to the Committee meeting at which the application will be heard. Such materials, with the exception of some hardship documentation as defined in Section 9.8 of these Rules & Regulations, shall be considered public information and shall be available for public examination at the Commission office upon submission.

9.5.c In addition to the Architectural Committee and Commission, the Committee on Financial Hardship shall review all permit applications claiming financial hardship. The staff shall forward complete applications to the Committee on Financial Hardship. The staff shall also forward an advisory recommendation on the application to the Committee on Financial Hardship. The recommendation shall advise the Committee on Financial Hardship to recommend that the Commission find that the application does or does not demonstrate that the property cannot be used for any

purpose for which it is or may be reasonably adapted, or that the application should be tabled for the submission of additional information. The staff may also enter a recommendation directly to the Commission.

9.5.d The applicant or an informed, authorized representative is expected to appear before the Committee on Financial Hardship to present the application and to address any questions that may arise about it. Attendance at this meeting facilitates the review process and avoids delay.

9.5.e The Committee on Financial Hardship shall review the application and formulate an advisory recommendation to the Commission for review at its next meeting. The recommendation shall advise the Commission to find that the application does or does not demonstrate that the property cannot be used for any purpose for which it is or may be reasonably adapted, or that the application should be tabled for the submission of additional information. The recommendation shall be confirmed in writing to the applicant.

9.6 Review by the Architectural Committee
The Architectural Committee shall review applications claiming financial hardship according to Section 6.11 of these Rules & Regulations.

9.7 Review by the Commission
The Commission shall review applications claiming financial hardship according to Section 6.12 of these Rules & Regulations.

9.8 Public Access to Hardship Documents
Inasmuch as community organizations, preservation groups, other associations, and private citizens may wish to evaluate and comment on a submission made under the financial hardship provision, the application materials described in Sections 6.7 and 9.2 of these Rules & Regulations shall not be subject to confidentiality. Should an applicant attach federal or state tax returns or other materials commonly regarded as confidential, however, these supplementary documents shall not be available to the public.

9.9 Financial Hardship and Non-profit Organizations
For Financial Hardship applications by non-profit organizations, see Section 10 of these Rules & Regulations.

9.10 Unnecessary Hardship

For Unnecessary Hardship applications by low- and moderate-income persons, see Section 11 of these Rules & Regulations.

10. FINANCIAL HARDSHIP AND NON-PROFIT ORGANIZATIONS

10.1 Financial Hardship for Non-Profit Organizations

Section 14-2007(7)(f) of the Philadelphia Code contains provisions for permit applications for alteration or demolition based in whole or in part on financial hardship. For a demolition permit, Section 14-2007(j) further requires an owner to demonstrate that sale of a property is impracticable, that commercial rental cannot yield a reasonable rate of return, and that other potential uses are foreclosed. In addition, Sections 6.7 of these Rules & Regulations describe the submission requirements and review procedures for a permit application; Section 9 of these Rules & Regulations describes the submission requirements and review procedures for an application under the financial hardship clause.

The Commission recognizes that the provisions of Section 14-2007 of the Philadelphia Code and other sections of these Rules & Regulations may not all have applicability to a property owned and used by a non-profit organization. No single set of measures can encompass the highly variegated types and contexts of buildings held by non-profit organizations. The economics of a building in the middle of a college campus may differ from that of a church, hospital, museum, or child care center.

10.2 Additional Submission Requirements

10.2.a The forms, photographs, drawings, and documents stipulated in Sections 6.7 and 9.2 of these Rules & Regulations shall be submitted.

10.2.b A copy of the IRS letter recognizing the organization as tax-exempt, proof of the organization's registration status with the Commonwealth of Pennsylvania's Bureau of Charitable Organizations, or equivalent documentation evidencing the organization's charitable or non-profit status.

10.2.c The Commission may also require the owner to conduct, at the owner's expense, evaluations and studies, as are reasonably necessary in the opinion of the Commission, to determine whether the building, structure, site, object, or public interior portion has or may have alternative uses consistent with preservation. Section 14-2007(7)(f)(.7) of the Philadelphia Code. If the Commission requires an owner to conduct additional evaluations and studies, these shall, at a minimum, include:

1. identification of reasonable reuses for the property within the context of the property and its location;

2. rehabilitation cost estimates for the identified uses or reuses, including the basis for the cost estimates;
3. the current standard of building and maintenance costs for the performance of the mission or function of the organization, particularly in Philadelphia;
4. a comparison of the cost of the performance of the mission or function of the organization in the existing building and in a new building, and a comparison of the cost of rehabilitation of the existing building with the demolition of the existing building and the construction of a new building;
5. the impact of the reuse of the existing building on the financial condition of the organization;
6. the impact of the reuse of the existing building on the organization's program, function or mission;
7. the additional cost, if any, attributable to the building of performing the organization's service or function within the context of costs incurred by comparable organizations, particularly in Philadelphia;
8. grants received or applied for to maintain or improve the property;
9. the organization's budget for the current and immediately past fiscal year; and
10. consideration, if any, given by the organization to relocation.

11. UNNECESSARY HARDSHIP

11.1 Unnecessary Hardship

Section 14-2007(k)(.7) makes specific provision for the exemption from the requirements of the historic preservation ordinance by a majority vote of the Commission in instances where its literal enforcement would result in unnecessary hardship. The legislative history of this ordinance indicates that this provision was included out of concern and consideration for low and moderate income persons. This provision also recognizes that in such instances, the preservation of basic form and rhythm rather than restoration can meet the objectives of the ordinance and the Commission.

11.2 Eligibility Criteria

11.2.a As its initial criterion for evaluating a request for an exception under the Unnecessary Hardship provision, the Commission may employ the Section 8 eligibility guidelines of the United States Department of Housing and Urban Development (HUD), which defines a low or moderate-income household as one with an income of not more than eighty percent (80%) of the median family income for the Philadelphia-Camden-Wilmington, PA-NJ-DE-MD Metropolitan Statistical Area. Should HU D change its definition of low and moderate income, the Commission may adopt that new definition.

The Commission also recognizes the existence of circumstances under which the rigid application of this standard could result in unnecessary hardship. Examples of this include, but are not limited to, extraordinary medical or education expenses, the cost of maintenance contrasted with the cost of alterations, and the financial ability of persons on fixed incomes, particularly in areas with markedly appreciating values. In view of these and similar situations, the Commission shall consider requests for exemptions under this provision from persons who do not meet the standard of the HUD or other formula.

11.3 Submission Requirements under the Unnecessary Hardship Provision

11.3.a To apply for the exemption under the Unnecessary Hardship provision, a low or moderate income person should submit a building permit application, a description of the scope of work, drawings if available, cost estimates for the proposed work and Federal Income Tax Returns for the previous two years demonstrating household income or other evidence to demonstrate qualification for this exemption. The personal financial information shall be kept confidential.

The Commission staff shall work affirmatively with the applicant in the preparation of the submission and in the provision of technical assistance to solve problems of design and materials.

11.4 Review Process and Procedure

11.4.a The staff shall evaluate the submission for completeness and shall discuss with the applicant possible methods and materials to achieve a higher degree of authenticity within the applicant's budget and needs.

11.4.b The staff shall prepare a recommendation on the application and submit it to the Architectural Committee which shall limit its review to design and refer the matter to the Commission.

11.4.c The Commission shall hear the application, recommendations and any public testimony in the manner prescribed in Section 4 of these Rules & Regulations.

12. DEMOLITION IN THE PUBLIC INTEREST

12.1 Necessity in the Public Interest

Section 14-2007(j) of the Philadelphia Code authorizes the Commission to approve a permit application for demolition that may not otherwise satisfy the Commission's review criteria if the Commission "finds that issuance of the permit is necessary in the public interest."

12.2 Submission Requirements

The applicant must submit the forms, photographs, drawings, and other documents stipulated in Section 6.7 of these Rules & Regulations. The applicant must provide documentation demonstrating the necessity of demolition in the public interest.

12.3 Review Process

The Commission shall process the application according to the procedures established in Section 6 of these Rules & Regulations.

13. PERFORMANCE OF WORK AND MAINTENANCE

13.1 Violations and Stop Work Orders

In the event of the alteration or demolition of an historic building, structure, site, or object, or of a designated public interior portion of a building or structure, or of a building, structure, site, or object within an historic district without a permit, without a permit issued pursuant to Section 14-2007 of the Philadelphia Code, or not in conformity with the plans and specifications approved by the Commission, the staff shall request the Department of Licenses and Inspections to issue a violation and a stop work order.

13.2 Demolition by Neglect

Section 14-2007(8)(c) of the Philadelphia Code provides that the exterior of every historic building, structure and object and of every building, structure and object located within an historic district, and every historic public interior portion of a building or structure, shall be kept in good repair as shall the interior portions of such buildings, structures and objects, neglect of which may cause or tend to cause the historic portion to deteriorate, decay, become damaged or otherwise fall into a state of disrepair.

In the event that the Commission staff has reason to regard a condition(s) as posing the threat of demolition by neglect as set forth in Section 14-2007(8)(c) of the Philadelphia Code, the staff shall request, within five (5) working days, that the Department of Licenses and Inspections examine the property with a Commission staff member, report its findings to the Commission staff, and, upon the request of the staff, issue an order to repair the condition(s).

13.3 Ordinary Maintenance

The provisions of Section 14-2007 shall not be construed to prevent the ordinary maintenance or repair of any building, structure, site, object, or public interior portion, where such work does not require a permit by law and where the purpose and effect of such work is to correct any deterioration or decay of, or damage to, a building, structure, site, object, or public interior portion of a building or structure and to restore the same to its condition prior to the occurrence of such deterioration, decay or damage.

14. ENFORCEMENT

14.1 Implementation

The Commission and its staff shall work affirmatively with the Department of Licenses and Inspections and its Enforcement Division to assure the full implementation of Section 14-2007 of the Philadelphia Code and, in particular, Subsection (9), "Enforcement."

14.2 Initiative

The staff shall assume the initiative with the Department of Licenses and Inspections in the application of Section 14-2007(9) of the Philadelphia Code. The staff may also request the Department to enforce Section 14-2007(9)(d) as it relates to alterations in violation of the provisions of Section 14-2007 of the Philadelphia Code or in violation of any conditions or requirements specified in a permit. Section 14-2007(9)(d), as it relates to demolition, however, shall be enforced only upon the adoption of a resolution by the Commission.

15. TRAINING

15.1 Annual Training

Each member of the Commission and of the staff shall participate in a training program that totals at least eight (8) hours annually and has received approval of the State Historic Preservation Officer.

16. HARRY A. BATTEN MEMORIAL FUND

16.1 Authorization and Disbursement

The Commission may maintain a fund to receive gifts and donations to further the work of the Commission to be called the Harry A. Batten Memorial Fund. Disbursements from this fund may be made only upon the approval of the Commission.

17. AMENDMENT

17.1 Amending Rules & Regulations

The Commission may amend these Rules & Regulations with the approval of five-sevenths of the full membership and as provided by the Philadelphia Home Rule Charter and any applicable statutes, ordinances and regulations.

18. MAIN STREET MANAYUNK NATIONAL REGISTER HISTORIC DISTRICT

18.1 Applicability of Rules & Regulations

For properties located in the Main Street Manayunk National Register Historic District, placed under the jurisdiction of the Historical Commission by Chapter 7 of the Philadelphia Property Maintenance Code, and not designated as historic pursuant Section 14-2007 of the Philadelphia Code, the Commission, its committees, and staff shall apply these Rules & Regulations except where they conflict with Chapter 7 of the Philadelphia Property Maintenance Code.

For properties located in the Main Street Manayunk National Register Historic District, placed under the jurisdiction of the Historical Commission by Chapter 7 of the Philadelphia Property Maintenance Code, and also designated as historic pursuant Section 14-2007 of the Philadelphia Code, the Commission, its committees, and staff shall apply these Rules & Regulations regardless of conflict with Chapter 7 of the Philadelphia Property Maintenance Code.

Penn Cent. Transp. Co. v. New York City

Supreme Court of the United States

April 17, 1978, Argued ; June 26, 1978, Decided

No. 77-444

Reporter
438 U.S. 104; 98 S. Ct. 2646; 57 L. Ed. 2d 631; 1978 U.S. LEXIS 39; 8 ELR 20528; 11 ERC (BNA) 1801

PENN CENTRAL TRANSPORTATION CO. ET AL. v. NEW YORK CITY ET AL.

Subsequent History: Petition For Rehearing Denied October 2, 1978.

Prior History: APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

Disposition: *42 N. Y. 2d 324, 366 N. E. 2d 1271*, affirmed.

Core Terms

landmark, Terminal, Preservation, designation, parcel, zoning, site, historic, just compensation, restrictions, appellees, City's, rights, purposes, appellants', properties, regulation, certificate, buildings, reasonable return, property owner, structures, ordinance, development rights, zoning law, aesthetic, construct, burdens, Coal, office building

Case Summary

Procedural Posture
Plaintiffs appealed a judgment from the Court of Appeals of New York holding that defendants had not taken property without just compensation and did not arbitrarily deprive plaintiffs of their property without *Fourteenth Amendment* due process of law in a case involving the application of the city's Landmarks Preservation Law, N.Y. City Admin. Code, ch. 8-A, § 205-1.0 et seq. (1976), to Grand Central Terminal.

Overview
The court affirmed the judgment holding that defendants had not taken plaintiffs' property without just compensation and did not arbitrarily deprive plaintiffs of their property without *Fourteenth Amendment* due process of law. The Court held that plaintiffs could not establish a "taking" simply by showing that they had been denied the ability to exploit a property interest that they had believed was available for development. The court noted that landmark laws were not like discriminatory or "reverse spot" zoning. The Landmarks Law did not interfere in any way with the terminal's present uses and plaintiffs' primary expectation concerning the use of the parcel. The restrictions imposed were substantially related to the promotion of the general welfare and not only permitted reasonable beneficial use of the landmark site, but also afforded plaintiffs opportunities further to enhance not only the terminal site, but also other properties.

Outcome
The judgment holding that defendants did not take plaintiffs' property without just compensation and did not deprive plaintiffs of their property without *Fourteenth Amendment* due process of law was affirmed because the application of the law had not effected a taking and the restrictions imposed were substantially related to the promotion of the general welfare and permitted reasonable beneficial use.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

HN1 *N.Y. Gen. Mun. Law § 96-a* declares that it is the public policy of the State of New York to preserve structures and areas with special historical or aesthetic interest or value and authorizes local governments to impose reasonable restrictions to perpetuate such structures and areas.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

HN2 The New York City Landmarks Preservation Law, N.Y. City Admin. Code ch. 8-A, § 205-1.0 et seq. (1976), is typical of many urban landmark laws in that its primary method of achieving its goals is not by acquisitions of historic properties, but rather by involving public entities in land-use decisions affecting the properties and providing services, standards, controls, and incentives that will encourage preservation by private owners and users. While the law does place special restrictions on landmark properties as a necessary feature to

the attainment of its larger objectives, the major theme of the law is to ensure the owners of any such properties both a "reasonable return" on their investments and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

HN3 See N.Y. City Admin. Code ch. 8-A, § 207-1.0(n) (1976).

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

HN4 A landmark site is an improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof used as and constituting part of the premises on which the landmark is situated, and which has been designated as a landmark site pursuant to the provisions under the New York City Landmarks Preservation Law, N.Y. City Admin. Code ch. 8-A, § 207-1.0(o) (1976).

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

HN5 See New York City Landmarks Preservation Law, N.Y. City Admin. Code ch. 8-A, § 207-1.0(h) (1976).

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

HN6 Final designation as a landmark results in restrictions upon the property owner's options concerning use of the landmark site. First, the New York City Landmarks Preservation Law, N.Y. City Admin. Code ch. 8-A, § 207-1.0(n) (1976), imposes a duty upon the owner to keep the exterior features of the building in good repair to assure that the law's objectives not be defeated by the landmark's falling into a state of irremediable disrepair under § 207-10.0(a). Second, the Landmarks Preservation Commission must approve in advance any proposal to alter the exterior architectural features of the landmark or to construct any exterior improvement on the landmark site, thus ensuring that decisions concerning construction on the landmark site are made with due consideration of both the public interest in the maintenance of the structure and the landowner's interest in use of the property under §§ 207-4.0 - 207-9.0.

Administrative Law > Judicial Review > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

HN7 In the event an owner wishes to alter a landmark site, three procedures are available to obtain administrative approval. The owner may apply to the Landmarks Preservation Commission for a certificate of no effect on protected architectural features under the New York City Landmarks Preservation Law, N.Y. City Admin. Code ch. 8-A, § 207-5.0 (1976). The owner may apply to the Commission for a certificate of appropriateness under § 207-6.0, which will be granted if it is concluded that the proposed construction on the landmark site will not unduly hinder the protection, enhancement, perpetuation, and use of the landmark. Denial of these certificates are subject to judicial review and the owner may submit an alternative plan for approval. The final procedure, seeking a certificate of appropriateness on the ground of insufficient return under § 207-8.0, provides special mechanisms, which vary depending on whether or not the landmark enjoys a tax exemption, to ensure that designation does not cause economic hardship.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

HN8 If the owner of a non-tax-exempt parcel has been denied certificates of appropriateness for a proposed alteration and shows that he is not earning a reasonable return on the property in its present state, the Landmarks Preservation Commission and other city agencies must assume the burden of developing a plan that will enable the landmark owner to earn a reasonable return on the landmark site. The owner is free to accept or reject a plan devised by the Commission and approved by the other city agencies. If he accepts the plan, he proceeds to operate the property pursuant to the plan. If he rejects the plan, the Commission may recommend that the city proceed by eminent domain to acquire a protective interest in the landmark, but if the city does not do so within a specified time period, the Commission must issue a notice allowing the property owner to proceed with the alteration or improvement as originally proposed in his application for a certificate of appropriateness.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

HN9 Tax-exempt structures become eligible for special treatment only if four preconditions are satisfied: (1) the owner previously entered into an agreement to sell the parcel that was contingent upon the issuance of a certificate of approval; (2) the property, as it exists at the time of the request, is not capable of earning a reasonable return; (3) the structure is no longer suitable to its past or present purposes; and (4) the prospective buyer intends to alter the landmark structure. When the owner demonstrates that the property in its present state is not earning a reasonable return, the Landmarks Preservation Commission must either find another

buyer or allow the sale and construction to proceed. If an owner files suit and establishes that he is incapable of earning a reasonable return on the site in its present state, he can be afforded judicial relief. Where a landmark owner who enjoys a tax exemption has demonstrated that the restricted landmark structure is totally inadequate for the owner's legitimate needs, the law has been held invalid as applied to that parcel.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN10 Although the designation of a landmark and landmark site restricts the owner's control over the parcel, designation also enhances the economic position of the landmark owner in one significant respect. Under New York City's zoning laws, owners of real property who have not developed their property to the full extent permitted by the applicable zoning laws are allowed to transfer development rights to contiguous parcels on the same city block under N.Y. City Zoning Resolution art. I, ch. 2, § 12-10 (1978).

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

HN11 The *Fifth Amendment's* guarantee is designed to bar a government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. There is no "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely upon the particular circumstances in that case.

Real Property Law > Eminent Domain Proceedings > General Overview

Real Property Law > Inverse Condemnation > Regulatory Takings

HN12 A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by the government, than when the interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Real Property Law > Eminent Domain Proceedings > General Overview

HN13 A use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial public purpose, or perhaps if it has an unduly harsh impact upon the owner's use of the property.

Energy & Utilities Law > Federal Oil & Gas Leases > Lease Terms > Assignments & Transfers

Energy & Utilities Law > Mining Industry > Coal Mining > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

Real Property Law > Mining > Surface Rights

HN14 A state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a "taking."

Real Property Law > Eminent Domain Proceedings > General Overview

Transportation Law > Air & Space Transportation > Airspace > Easements

HN15 Government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions are often held to constitute "takings."

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

HN16 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.

Real Property Law > Eminent Domain Proceedings > General Overview

HN17 "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, courts focus both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.

Real Property Law > Eminent Domain Proceedings > General Overview

Real Property Law > Inverse Condemnation > Regulatory Takings

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

HN18 A showing of diminution in property value will not establish a "taking" if the restriction has been imposed as a result of historic-district legislation.

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > General Overview

Business & Corporate Compliance > ... > Environmental Law > Land Use & Zoning > Comprehensive & General Plans

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN19 Both historic-district legislation and zoning laws regulate all properties within given physical communities whereas landmark laws apply only to selected parcels. But landmark laws are not like discriminatory or "reverse spot" zoning. In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City Landmarks Preservation Law, N.Y. City Admin. Code ch. 8-A, § 205-1.0 et seq. (1976), embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city.

Real Property Law > Zoning > Judicial Review

HN20 When a property owner challenges the application of a zoning ordinance to his property, the judicial inquiry focuses upon whether the challenged restriction can reasonably be deemed to promote the objectives of the community land-use plan, and will include consideration of the treatment of similar parcels. When a property owner challenges a landmark designation or restriction as arbitrary or discriminatory, a similar inquiry will occur.

Environmental Law > Land Use & Zoning > Constitutional Limits

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN21 The New York City Landmarks Preservation Law, N.Y. City Admin. Code ch. 8-A, § 205-1.0 et seq. (1976), has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a "taking." Legislation designed to promote the general welfare commonly burdens some more than others. Similarly, zoning laws often affect some property owners more severely than others, but are not held to be invalid on that account.

Energy & Utilities Law > Pipelines & Transportation > Eminent Domain Proceedings

Real Property Law > Eminent Domain Proceedings > Elements > Just Compensation

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN22 The New York City Landmarks Preservation Law, N.Y. City Admin. Code ch. 8-A, § 205-1.0 et seq. (1976), is not rendered invalid by its failure to provide "just compensation" whenever a landmark owner is restricted in the exploitation of property interests, such as air rights, to a greater extent than provided for under applicable zoning laws.

Lawyers' Edition Display

Summary

In accordance with procedures established by New York City's Landmarks Preservation Law--a law enacted out of the city's conviction that its standing as a world-wide tourist center and capital of business, culture, and government would be threatened unless the city's historic landmarks and neighborhoods were protected from precipitate decisions to destroy or fundamentally alter their character--the Landmarks Preservation Commission, as the agency vested with primary responsibility for administering the landmarks law, designated Grand Central Terminal to be a "landmark." The owner of the terminal, a private corporation which opposed the landmark designation but which did not seek judicial review of the designation as authorized under the landmarks law, subsequently entered into a lease agreement whereby the lessee would construct a multistory office building in the space above the terminal. The owner and lessee then sought the Commission's approval for the contemplated construction as required under the landmarks law. Two plans for an office building of over 50 stories, both of which apparently satisfied the terms of the applicable zoning ordinance, were found unacceptable by the Commission. One of the plans was rejected because it involved tearing down a portion of the terminal and stripping off some of its features. The other plan, which involved cantilevering a 55-story building above the terminal's facade and resting it on the terminal's roof, was rejected because such a massive building would be aesthetically at odds with the terminal's architectural style. Rather than seeking review of the Commission's disapproval

of their plans, the owner of the terminal and the lessee brought an action in the New York Supreme Court, New York County, claiming that application of New York City's landmarks law had "taken" private property without just compensation in violation of *Fifth* and *Fourteenth Amendments*, and had violated the *Fourteenth Amendment* as constituting a deprivation of property without due process of law. The trial court held that the landmarks law, as applied to the plaintiffs' property, was unconstitutional, and the court enjoined the city from using the landmarks law to impede construction of any structure that might otherwise lawfully be constructed at the site of Grand Central Terminal. The New York Supreme Court, Appellate Division, reversed (*50 AD2d 265, 377 NYS2d 20*), and the Court of Appeals of New York affirmed, rejecting any claim that the landmarks law had "taken" property without just compensation (*42 NY 2d 324, 366 NE2d 1271*).

On appeal, the United States Supreme Court affirmed. In an opinion by Brennan, J., joined by Stewart, White, Marshall, Blackmun, and Powell, JJ., it was held that application of the Landmarks Preservation Law preventing use of the air space above Grand Central Terminal did not effect a "taking" of private property by the government without just compensation in violation of the *Fifth* and *Fourteenth Amendments*, since (1) the law did not interfere with the present uses of the building, but allowed the owner to continue using it as had been done in the past, permitting the owner to profit from the building and obtain a reasonable return on its investment, (2) the law did not necessarily prohibit occupancy of any of the air space above the landmark building, since under the procedures of the law, it was possible that some construction in the air space might be allowed, and (3) the law did not deny all use of the owner's preexisting air rights above the landmark building, since under a transferable development rights program, it was possible for the owner to transfer the development rights it was foreclosed from using as to Grand Central Terminal to other neighboring properties which it owned.

Rehnquist, J., joined by Burger, Ch. J., and Stevens, J., dissented on the ground that a compensable "taking" within the meaning of the *Fifth Amendment's* eminent domain clause had occurred.

Headnotes

DOMAIN §98 > preservation of historic landmarks -- restrictions on development -- Fifth Amendment -- "taking" -- > Headnote:

LEdHN[1A] [1A]***LEdHN[1B]*** [1B]

A city may, as part of a comprehensive statutory program to preserve historic landmarks, place restrictions--in addition to those imposed by applicable zoning ordinances--on the development of privately owned historic landmarks, as by restricting the owner's exploitation of air rights above such a landmark, without effecting a "taking" which requires the payment of "just compensation" under the *Fifth* and *Fourteenth Amendments*. (Rehnquist, J., Burger, Ch. J., and Stevens, J., dissented from this holding.)

DOMAIN §98 > landmark protection law -- Fifth Amendment -- "taking" of private property -- restricting use of air rights -- > Headnote:

LEdHN[2A] [2A]***LEdHN[2B]*** [2B]***LEdHN[2C]*** [2C]***LEdHN[2D]*** [2D]

The application of a city's law governing the preservation of historic "landmarks" within the city to the private owner of a building that had been declared to be a "landmark" under the law, so that the owner is prevented from using the air space above the building for the construction of structures which, under the procedures established by the law, had been found to be inappropriate because of their adverse impact upon the architectural features of the landmark building, does not effect a "taking" of private property by the government without just compensation in violation of the *Fifth* and *Fourteenth Amendments*, where (1) the law does not interfere with the owner's present uses of the building, (2) the law does not necessarily prohibit occupancy of any of the air space above the landmark building, and (3) the law does not deny all use of the air rights above the landmark. (Rehnquist, J., Burger, Ch. J., and Stevens, J., dissented from this holding.)

LAW §37 > Fifth Amendment -- eminent domain clause -- applicability to states -- > Headnote:

LEdHN[3] [3]

The provision of the *Fifth Amendment* which enjoins the taking of private property for public use without just compensation is applicable to the states through the *Fourteenth Amendment*.

DOMAIN §75 > Fifth Amendment -- taking private property -- government's transfer of control -- > Headnote:

LEdHN[4A] [4A]***LEdHN[4B]*** [4B]

With respect to the *Fifth Amendment's* injunction that private property not be taken for public use without just compensation, it is not necessary in order for there to be a "taking" that the government transfer physical control over a portion of a parcel.

DOMAIN §5 > Fifth Amendment -- government's taking private property -- > Headnote:

LEdHN[5] [5]

The *Fifth Amendment's* guarantee that private property not be taken for public use without just compensation bars government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

DOMAIN §98 > Fifth Amendment -- use of property -- government restriction -- importance of circumstances -- > Headnote:

LEdHN[6] [6]

Whether a particular restriction on the use of property will be rendered invalid under the *Fifth Amendment* on account of the government's failure to pay for any losses proximately caused by the restriction depends largely upon the particular circumstances.

DOMAIN §98 > Fifth Amendment -- government's restriction on use of property -- factors of significance -- > Headnote:

LEdHN[7] [7]

Factors of particular significance in determining whether a particular restriction on the use of property will be rendered invalid under the *Fifth Amendment* by government's failure to pay for any losses proximately caused by it are the economic impact of the regulation on the claimant--particularly, the extent to which the regulation has interfered with distinct investment backed expectations--and the character of the governmental action.

DOMAIN §75 > Fifth Amendment -- what constitutes "taking" -- physical invasion -- public program -- > Headnote:

LEdHN[8] [8]

For purposes of the *Fifth Amendment* injunction that private property cannot be taken for public use without just compensation, a "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

DOMAIN §5 > Fifth Amendment -- government laws or programs -- economic values -- adverse affect -- > Headnote:

LEdHN[9] [9]

Notwithstanding the injunction of the *Fifth Amendment* that private property not be taken for public use without just compensation, government may execute laws or programs that adversely affect recognized economic values, since government could hardly go on if to some extent values incident to property could not be diminished without government payment for every such change in the general law.

DOMAIN §98 > Fifth Amendment -- use restriction on real property -- "taking" -- > Headnote:

LEdHN[10] [10]

A use restriction on real property may constitute a "taking" for purposes of the *Fifth Amendment's* injunction against the taking of private property for public use without just compensation if the restriction is not reasonably necessary to the effectuation of a substantial public purpose, or perhaps if it has an unduly harsh impact upon the owner's use of the property.

DOMAIN §103 > Fifth Amendment -- "taking" -- investment-backed expectations -- frustration -- > Headnote:

LEdHN[11] [11]

A state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a "taking" within the meaning of the *Fifth Amendment's* injunction against the taking of private property for public use without just compensation.

CORPORATIONS §38 > STATES §4 > power -- use restrictions or controls on land -- preserving city's characteristics -- > Headnote:

LEdHN[12] [12]

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.

DOMAIN §75 > Fifth Amendment -- "taking" -- > Headnote:

LEdHN[13] [13]

A party does not establish a "taking" for purposes of the *Fifth Amendment's* injunction that private property not be taken for public use without just compensation simply by showing that he has been denied the ability to exploit a property interest that he previously had believed was available for development; "taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine

whether rights in a particular segment have been entirely abrogated, but rather, in deciding whether a particular governmental action has effected a taking, the focus is upon both the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.

DOMAIN §87 > Fifth Amendment -- "taking" -- air rights -- > Headnote:

LEdHN[14A] [14A]***LEdHN[14B]*** [14B]

A governmental restriction on the use of a parcel of land which deprives a party of air rights above the parcel does not invariably--irrespective of the impact of the restriction on the value of the parcel as a whole--constitute a "taking," for purposes of the *Fifth Amendment's* injunction against taking private property for public use without just compensation, merely because the party might have investment-backed expectations regarding the air above the parcel.

DOMAIN §98 > Fifth Amendment -- "taking" -- land use restriction -- servitude -- > Headnote:

LEdHN[15A] [15A]***LEdHN[15B]*** [15B]

For purposes of the *Fifth Amendment's* injunction against taking private property for public use without just compensation, a "taking" does not have to be found to have occurred whenever a governmental land use restriction may be characterized as imposing a servitude on a parcel of land.

DOMAIN §98 > Fifth Amendment -- "taking" -- landmark law -- privately owned landmark -- diminution of value -- > Headnote:

LEdHN[16] [16]

A city law embodying a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city does not constitute a "taking," for purposes of the *Fifth Amendment's* injunction that private property not be taken for public use without just compensation, simply because the law operates to diminish the value of a parcel of privately owned land by restricting the use to which the air space above that land can be put.

ZONING §3 > application of ordinance -- judicial inquiry -- > Headnote:

LEdHN[17A] [17A]***LEdHN[17B]*** [17B]

When a property owner challenges the application of a zoning ordinance to his property, the judicial inquiry focuses upon whether the challenged restriction can reasonably be deemed to promote the objectives of the community land use plan, and will include consideration of the treatment of similar parcels.

DOMAIN §98 > Fifth Amendment -- "taking" -- landmark law -- use restriction -- difference in impact -- > Headnote:

LEdHN[18] [18]

The mere fact that a city law providing for a comprehensive program to preserve property of historic significance has a more severe impact on some landowners than others--such law having placed restrictions on the use to which air space above a privately owned building could be put--does not in itself mean that the law effects a "taking" for purposes of the *Fifth Amendment's* injunction that private property not be taken for public use without just compensation.

DOMAIN §98 > government appropriation of property -- landmark law -- air space -- > Headnote:

LEdHN[19] [19]

A city law which, as part of a comprehensive program to preserve property of historic significance, places restrictions on the development of the air space above a privately owned building, and which simply prohibits the owner or anyone else from occupying portions of the air space above the building, while permitting use of the remainder in a gainful fashion, does not constitute an appropriation of property by government for its own uses so as to constitute a "taking" for purposes of the *Fifth Amendment's* injunction that private property not be taken for public use without just compensation.

Syllabus

Under New York City's Landmarks Preservation Law (Landmarks Law), which was enacted to protect historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character, the Landmarks Preservation Commission (Commission) may designate a building to be a "landmark" on a particular "landmark site" or may designate an area to be a "historic district." The Board of Estimate may thereafter modify or disapprove the designation, and the owner may seek judicial review of the final designation decision. The owner of the designated landmark must keep the building's exterior "in good repair" and before exterior alterations are made must secure Commission approval. Under two ordinances owners of landmark sites may transfer development rights from a landmark parcel to proximate lots. Under the Landmarks Law, the Grand Central Terminal (Terminal), which is owned by the Penn Central Transportation Co. and its affiliates (Penn Central) was designated a "landmark" and the block it occupies a

"landmark site." Appellant Penn Central, though opposing the designation before the Commission, did not seek judicial review of the final designation decision. Thereafter appellant Penn Central entered into a lease with appellant UGP Properties, whereby UGP was to construct a multistory office building over the Terminal. After the Commission had rejected appellants' plans for the building as destructive of the Terminal's historic and aesthetic features, with no judicial review thereafter being sought, appellants brought suit in state court claiming that the application of the Landmarks Law had "taken" their property without just compensation in violation of the *Fifth* and *Fourteenth Amendments* and arbitrarily deprived them of their property without due process of law in violation of the *Fourteenth Amendment*. The trial court's grant of relief was reversed on appeal, the New York Court of Appeals ultimately concluding that there was no "taking" since the Landmarks Law had not transferred control of the property to the city, but only restricted appellants' exploitation of it; and that there was no denial of due process because (1) the same use of the Terminal was permitted as before; (2) the appellants had not shown that they could not earn a reasonable return on their investment in the Terminal itself; (3) even if the Terminal proper could never operate at a reasonable profit, some of the income from Penn Central's extensive real estate holdings in the area must realistically be imputed to the Terminal; and (4) the development rights above the Terminal, which were made transferable to numerous sites in the vicinity, provided significant compensation for loss of rights above the Terminal itself. *Held*: The application of the Landmarks Law to the Terminal property does not constitute a "taking" of appellants' property within the meaning of the *Fifth Amendment* as made applicable to the States by the *Fourteenth Amendment*. Pp. 123-138.

(a) In a wide variety of contexts the government may execute laws or programs that adversely affect recognized economic values without its action constituting a "taking," and in instances such as zoning laws where a state tribunal has reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected real property interests. In many instances use restrictions that served a substantial public purpose have been upheld against "taking" challenges, *e. g.*, *Goldblatt v. Hempstead, 369 U.S. 590*; *Hadacheck v. Sebastian, 239 U.S. 394*, though a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to constitute a "taking," *e. g.*, *Pennsylvania Coal Co. v. Mahon, 260 U.S. 393*, and government acquisitions of resources to permit uniquely public functions constitute "takings," *e. g.*, *United States v. Causby, 328 U.S. 256*. Pp. 123-128.

(b) In deciding whether particular governmental action has effected a "taking," the character of the action and nature and extent of the interference with property rights (here the city tax block designated as the "landmark site") are focused upon, rather than discrete segments thereof. Consequently, appellants cannot establish a "taking" simply by showing that they have been denied the ability to exploit the superadjacent airspace, irrespective of the remainder of appellants' parcel. Pp. 130-131.

(c) Though diminution in property value alone, as may result from a zoning law, cannot establish a "taking," as appellants concede, they urge that the regulation of individual landmarks is different because it applies only to selected properties. But it does not follow that landmark laws, which embody a comprehensive plan to preserve structures of historic or aesthetic interest, are discriminatory, like "reverse spot" zoning. Nor can it be successfully contended that designation of a landmark involves only a matter of taste and therefore will inevitably lead to arbitrary results, for judicial review is available and there is no reason to believe it will be less effective than would be so in the case of zoning or any other context. Pp. 131-133.

(d) That the Landmarks Law affects some landowners more severely than others does not itself result in "taking," for that is often the case with general welfare and zoning legislation. Nor, contrary to appellants' contention, are they solely burdened and unbenefited by the Landmarks Law, which has been extensively applied and was enacted on the basis of the legislative judgment that the preservation of landmarks benefits the citizenry both economically and by improving the overall quality of city life. Pp. 133-135.

(e) The Landmarks Law no more effects an appropriation of the airspace above the Terminal for governmental uses than would a zoning law appropriate property; it simply prohibits appellants or others from occupying certain features of that space while allowing appellants gainfully to use the remainder of the parcel. *United States v. Causby, supra*, distinguished. P. 135.

(f) The Landmarks Law, which does not interfere with the Terminal's present uses or prevent Penn Central from realizing a "reasonable return" on its investment, does not impose the drastic limitation on appellants' ability to use the air rights above the Terminal that appellants claim, for on this record there is no showing that a smaller, harmonizing structure would not be authorized. Moreover, the pre-existing air rights are made transferable to other parcels in the vicinity of the Terminal, thus mitigating whatever financial burdens appellants have incurred. Pp. 135-137.

Counsel: Daniel M. Gribbon argued the cause for appellants. With him on the briefs were John R. Bolton and Carl Helmetag, Jr.

Leonard Koerner argued the cause for appellees. With him on the brief were Allen G. Schwartz, L. Kevin Sheridan, and Dorothy Miner.

Assistant Attorney General Wald argued the cause for the United States as amicus curiae urging affirmance. On the brief were Solicitor General McCree, Assistant Attorney General Moorman, Peter R. Steenland, Jr., and Carl Strass. *

Judges: BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and STEVENS, J., joined, post, p. 138.

Opinion by: BRENNAN

Opinion

[*107] [*638] [**2650]** MR. JUSTICE BRENNAN delivered the opinion of the Court.

LEdHN ***LEdHN*** The question presented is whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks -- in addition to those imposed by applicable zoning ordinances -- without effecting a "taking" requiring the payment of "just compensation." Specifically, we must decide whether the application of New York City's Landmarks Preservation Law to the parcel of land occupied by Grand Central Terminal has "taken" its owners' property in violation **[**2651]** of the *Fifth* and *Fourteenth Amendments*.

I

A

Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance. [1] These nationwide legislative efforts have been **[*108]** precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed [2] without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. [3] The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today. "[Historic] conservation is but one aspect of the much larger problem, **[***639]** basically an environmental one, of enhancing -- or perhaps developing for the first time -- the quality of life for people." [4]

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* Briefs of amici curiae urging affirmance were filed by David Bonderman and Frank B. Gilbert for the National Trust for Historic Preservation et al.; by Paul S. Byard, Ralph C. Menapace, Jr., Terence H. Benbow, William C. Chanler, Richard H. Pershan, Francis T. P. Plimpton, Whitney North Seymour, and Bethuel M. Webster for the Committee to Save Grand Central Station et al.; and by Louis J. Lefkowitz, Attorney General, Samuel A. Hirshowitz, First Assistant Attorney General, and Philip Weinberg, Assistant Attorney General, for the State of New York.

Briefs of amici curiae were filed by Evelle J. Younger, Attorney General, E. Clement Shute, Jr., and Robert H. Connett, Assistant Attorneys General, and Richard C. Jacobs, Deputy Attorney General, for the State of California; and by Eugene J. Morris for the Real Estate Board of New York, Inc.

[1] See National Trust for Historic Preservation, A Guide to State Historic Preservation Programs (1976); National Trust for Historic Preservation, Directory of Landmark and Historic District Commissions (1976). In addition to these state and municipal legislative efforts, Congress has determined that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people," National Historic Preservation Act of 1966, 80 Stat. 915, *16 U. S. C. § 470 (b) (1976 ed.)*, and has enacted a series of measures designed to encourage preservation of sites and structures of historic, architectural, or cultural significance. See generally Gray, The Response of Federal Legislation to Historic Preservation, 36 Law & Contemp. Prob. 314 (1971).

[2] Over one-half of the buildings listed in the Historic American Buildings Survey, begun by the Federal Government in 1933, have been destroyed. See Costonis, The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks, 85 Harv. L. Rev. 574, 574 n. 1 (1972), citing Huxtable, Bank's Building Plan Sets Off Debate on "Progress," N. Y. Times, Jan. 17, 1971, section 8, p. 1, col. 2.

[3] See, *e. g.*, N. Y. C. Admin. Code § 205-1.0 (a) (1976).

[4] Gilbert, Introduction, Precedents for the Future, 36 Law & Contemp. Prob. 311, 312 (1971), quoting address by Robert Stipe, 1971 Conference on Preservation Law, Washington, D. C., May 1, 1971 (unpublished text, pp. 6-7).

New York City, responding to similar concerns and acting **[*109]** pursuant to a New York State enabling Act, [5] adopted its Landmarks Preservation Law in 1965. See N. Y. C. Admin. Code, ch. 8-A, § 205-1.0 *et seq*. (1976). The city acted from the conviction that "the standing of [New York City] as a world-wide tourist center and world capital of business, culture and government" would be threatened if legislation were not enacted to protect historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character. § 205-1.0 (a). The city believed that comprehensive measures to safeguard desirable features of the existing urban fabric would benefit its citizens in a variety of ways: *e. g*., fostering "civic pride in the beauty and noble accomplishments of the past"; protecting and enhancing "the city's attractions to tourists and visitors"; "[supporting] and [stimulating] business and industry"; "[strengthening] the economy of the city"; and promoting "the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city." § 205-1.0 (b).

HN2 The New York City law is typical of many urban landmark laws in that its primary method of achieving its goals is not by **[**2652]** acquisitions of historic properties, [6] but rather by involving public entities in land-use decisions affecting these properties **[*110]** and providing services, standards, controls, and incentives that will encourage preservation by private owners and users. [7] While the law does place special restrictions on landmark properties as a necessary feature to the attainment of its larger objectives, the major theme of the law is to ensure the owners of any such properties both a "reasonable return" on their investments and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals.

The operation of the law can be briefly summarized. The primary responsibility for administering the law is vested in the Landmarks Preservation Commission (Commission), **[***640]** a broad based, 11-member agency [8] assisted by a technical staff. The Commission first performs the function, critical to any landmark preservation effort, of identifying properties and areas that have "a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation." § 207-1.0 (n); see § 207-1.0 (h). If the Commission determines, after giving all interested parties an opportunity to be heard, that a building or area satisfies the ordinance's criteria, it will designate a building to be a "landmark," § 207-1.0 (n), [9] situated **[*111]** on a particular "landmark site," § 207-1.0 (*o*), [10] or will designate an area to be a "historic district," § 207-1.0 (h). [11] After the Commission makes a designation, New York City's Board of Estimate, after considering the relationship of the designated property

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[5] See ***HN1*** ***N. Y. Gen. Mun. Law § 96-a*** (McKinney 1977). It declares that it is the public policy of the State of New York to preserve structures and areas with special historical or aesthetic interest or value and authorizes local governments to impose reasonable restrictions to perpetuate such structures and areas.

[6] The consensus is that widespread public ownership of historic properties in urban settings is neither feasible nor wise. Public ownership reduces the tax base, burdens the public budget with costs of acquisitions and maintenance, and results in the preservation of public buildings as museums and similar facilities, rather than as economically productive features of the urban scene. See Wilson & Winkler, The Response of State Legislation to Historic Preservation, 36 Law & Contemp. Prob. 329, 330-331, 339-340 (1971).

[7] See Costonis, *supra* n. 2, at 580-581; Wilson & Winkler, *supra* n. 6; Rankin, Operation and Interpretation of the New York City Landmark Preservation Law, 36 Law & Contemp. Prob. 366 (1971).

[8] The ordinance creating the Commission requires that it include at least three architects, one historian qualified in the field, one city planner or landscape architect, one realtor, and at least one resident of each of the city's five boroughs. N. Y. C. Charter § 534 (1976). In addition to the ordinance's requirements concerning the composition of the Commission, there is, according to a former chairman, a "prudent tradition" that the Commission include one or two lawyers, preferably with experience in municipal government, and several laymen with no specialized qualifications other than concern for the good of the city. Goldstone, Aesthetics in Historic Districts, 36 Law & Contemp. Prob. 379, 384-385 (1971).

[9] ***HN3*** "'Landmark.' Any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated as a landmark pursuant to the provisions of this chapter." § 207-1.0 (n).

[10] ***HN4*** "'Landmark site.' An improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof used as and constituting part of the premises on which the landmark is situated, and which has been designated as a landmark site pursuant to the provisions of this chapter." § 207-1.0 (*o*).

[11] ***HN5*** "'Historic district.' Any area which: (1) contains improvements which: (a) have a special character or special historical or aesthetic interest or value; and (b) represent one or more periods or styles of architecture typical of one or more eras in the history of the city; and (c) cause such area, by reason of such factors, to constitute a distinct section of the city; and (2) has been designated as a historic district pursuant to the provisions of this chapter." § 207-1.0 (h). The Act also provides for the designation of a "scenic landmark," see § 207-1.0 (w), and an "interior landmark." See § 207-1.0 (m).

"to the master plan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved," § 207-2.0 (g)(1), may modify or disapprove the designation, and the owner may seek **[**2653]** judicial review of the final designation decision. Thus far, 31 historic districts and over 400 individual landmarks have been finally designated, [12] and the process is a continuing one.

HN6 Final designation as a landmark results in restrictions upon the property owner's options concerning use of the landmark site. First, the law imposes a duty upon the owner to keep the exterior features of the building "in good repair" to assure that the law's objectives not be defeated by the landmark's **[*112]** falling into a state of irremediable disrepair. See § 207-10.0 (a). Second, the Commission must approve in advance any **[***641]** proposal to alter the exterior architectural features of the landmark or to construct any exterior improvement on the landmark site, thus ensuring that decisions concerning construction on the landmark site are made with due consideration of both the public interest in the maintenance of the structure and the landowner's interest in use of the property. See §§ 207-4.0 to 207-9.0.

HN7 In the event an owner wishes to alter a landmark site, three separate procedures are available through which administrative approval may be obtained. First, the owner may apply to the Commission for a "certificate of no effect on protected architectural features": that is, for an order approving the improvement or alteration on the ground that it will not change or affect any architectural feature of the landmark and will be in harmony therewith. See § 207-5.0. Denial of the certificate is subject to judicial review.

Second, the owner may apply to the Commission for a certificate of "appropriateness." See § 207-6.0. Such certificates will be granted if the Commission concludes -- focusing upon aesthetic, historical, and architectural values -- that the proposed construction on the landmark site would not unduly hinder the protection, enhancement, perpetuation, and use of the landmark. Again, denial of the certificate is subject to judicial review. Moreover, the owner who is denied either a certificate of no exterior effect or a certificate of appropriateness may submit an alternative or modified plan for approval. The final procedure -- seeking a certificate of appropriateness on the ground of "insufficient return," see § 207-8.0 -- provides special mechanisms, which vary depending on whether or not the landmark enjoys a tax exemption, [13] to ensure **[**2654]** that **[***642]** designation does not cause economic hardship.

[*113] ***HN10*** Although the designation of a landmark and landmark site restricts the owner's control over the parcel, designation also enhances the economic position of the landmark owner in one significant respect. Under New York City's zoning laws, owners of real property who have not developed their property **[*114]** to the full extent permitted by the applicable zoning laws are allowed to transfer development rights to contiguous parcels on the same city block. See New York City, Zoning Resolution Art. I, ch. 2, §

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[12] See Landmarks Preservation Commission of the City of New York, Landmarks and Historic Districts (1977). Although appellants are correct in noting that some of the designated landmarks are publicly owned, the vast majority are, like Grand Central Terminal, privately owned structures.

[13] ***HN8*** If the owner of a non-tax-exempt parcel has been denied certificates of appropriateness for a proposed alteration and shows that he is not earning a reasonable return on the property in its present state, the Commission and other city agencies must assume the burden of developing a plan that will enable the landmark owner to earn a reasonable return on the landmark site. The plan may include, but need not be limited to, partial or complete tax exemption, remission of taxes, and authorizations for alterations, construction, or reconstruction appropriate for and not inconsistent with the purposes of the law. § 207-8.0 (c). The owner is free to accept or reject a plan devised by the Commission and approved by the other city agencies. If he accepts the plan, he proceeds to operate the property pursuant to the plan. If he rejects the plan, the Commission may recommend that the city proceed by eminent domain to acquire a protective interest in the landmark, but if the city does not do so within a specified time period, the Commission must issue a notice allowing the property owner to proceed with the alteration or improvement as originally proposed in his application for a certificate of appropriateness.

HN9 Tax-exempt structures are treated somewhat differently. They become eligible for special treatment only if four preconditions are satisfied: (1) the owner previously entered into an agreement to sell the parcel that was contingent upon the issuance of a certificate of approval; (2) the property, as it exists at the time of the request, is not capable of earning a reasonable return; (3) the structure is no longer suitable to its past or present purposes; and (4) the prospective buyer intends to alter the landmark structure. In the event the owner demonstrates that the property in its present state is not earning a reasonable return, the Commission must either find another buyer for it or allow the sale and construction to proceed.

But this is not the only remedy available for owners of tax-exempt landmarks. As the case at bar illustrates, see *infra*, at 121, if an owner files suit and establishes that he is incapable of earning a "reasonable return" on the site in its present state, he can be afforded judicial relief. Similarly, where a landmark owner who enjoys a tax exemption has demonstrated that the landmark structure, as restricted, is totally inadequate for the owner's "legitimate needs," the law has been held invalid as applied to that parcel. See *Lutheran Church v. City of New York, 35 N. Y. 2d 121, 316 N. E. 2d 305 (1974)*.

12-10 (1978) (definition of "zoning lot"). A 1968 ordinance gave the owners of landmark sites additional opportunities to transfer development rights to other parcels. Subject to a restriction that the floor area of the transferee lot may not be increased by more than 20% above its authorized level, the ordinance permitted transfers from a landmark parcel to property across the street or across a street intersection. In 1969, the law governing the conditions under which transfers from landmark parcels could occur was liberalized, see New York City Zoning Resolutions 74-79 to 74-793, apparently to ensure that the Landmarks Law would not unduly restrict the development options of the owners of Grand Central Terminal. See Marcus, Air Rights Transfers in New York City, 36 Law & Contemp. Prob. 372, 375 (1971). The class of recipient lots was expanded to include lots "across a street and opposite to another lot or lots which except for the intervention of streets or street intersections [form] a series extending to the lot occupied by the landmark [building, provided that] all lots [are] in the same ownership." New York City Zoning Resolution 74-79 (emphasis deleted). [14] In addition, the 1969 amendment permits, in highly commercialized **[*115]** areas like midtown Manhattan, the transfer of all unused development rights to a single parcel. *Ibid*.

B

This case involves the application of New York City's Landmarks Preservation Law to Grand Central Terminal (Terminal). The Terminal, which is owned by the Penn Central Transportation Co. and its affiliates (Penn Central), is one of New York City's most famous buildings. Opened in 1913, it is regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French beaux-arts style.

The Terminal is located in midtown Manhattan. Its south facade faces 42d Street and that street's **[***643]** intersection with Park Avenue. At street level, the Terminal is bounded on the west by Vanderbilt Avenue, on the east by the Commodore Hotel, and on the north by the Pan-American Building. Although a 20-story office tower, to have been located above the Terminal, was part of the original design, the planned tower was never constructed. [15] The Terminal itself is an eight-story structure which Penn **[**2655]** Central uses as a railroad station and in which it rents space not needed for railroad purposes to a variety of commercial interests. The Terminal is one of a number of properties owned by appellant Penn Central in this area of midtown Manhattan. The others include the Barclay, Biltmore, Commodore, Roosevelt, and Waldorf-Astoria Hotels, the Pan-American Building and other office buildings along Park Avenue, and the Yale Club. At least eight of these are eligible to be recipients of development rights afforded the Terminal by virtue of landmark designation.

On August 2, 1967, following a public hearing, the Commission designated the Terminal a "landmark" and designated the **[*116]** "city tax block" it occupies a "landmark site." [16] The Board of Estimate confirmed this action on September 21, 1967. Although appellant Penn Central had opposed the designation before the Commission, it did not seek judicial review of the final designation decision.

On January 22, 1968, appellant Penn Central, to increase its income, entered into a renewable 50-year lease and sublease agreement with appellant UGP Properties, Inc. (UGP), a wholly owned subsidiary of Union General Properties, Ltd., a United Kingdom corporation. Under the terms of the agreement, UGP was to construct a multistory office building above the Terminal. UGP promised to pay Penn Central $ 1 million annually during construction and at least $ 3 million annually thereafter. The rentals would be offset in part by a loss of some $ 700,000 to $ 1 million in net rentals presently received from concessionaires displaced by the new building.

Appellants UGP and Penn Central then applied to the Commission for permission to construct an office building atop the Terminal. Two separate plans, both designed by

[14] To obtain approval for a proposed transfer, the landmark owner must follow the following procedure. First, he must obtain the permission of the Commission which will examine the plans for the development of the transferee lot to determine whether the planned construction would be compatible with the landmark. Second, he must obtain the approbation of New York City's Planning Commission which will focus on the effects of the transfer on occupants of the buildings in the vicinity of the transferee lot and whether the landmark owner will preserve the landmark. Finally, the matter goes to the Board of Estimate, which has final authority to grant or deny the application. See also Costonis, *supra* n. 2, at 585-586.

[15] The Terminal's present foundation includes columns, which were built into it for the express purpose of supporting the proposed 20-story tower.

[16] The Commission's report stated:

"Grand Central Station, one of the great buildings of America, evokes a spirit that is unique in this City. It combines distinguished architecture with a brilliant engineering solution, wedded to one of the most fabulous railroad terminals of our time. Monumental in scale, this great building functions as well today as it did when built. In style, it represents the best of the French Beaux Arts." Record 2240.

architect Marcel Breuer and both apparently satisfying the terms of the applicable zoning ordinance, were submitted to the Commission for approval. The first, Breuer I, provided for the construction of a 55-story office building, to be cantilevered above the existing facade and to rest on the roof of the Terminal. The second, Breuer II Revised, [17] called **[***644]** for tearing **[*117]** down a portion of the Terminal that included the 42d Street facade, stripping off some of the remaining features of the Terminal's facade, and constructing a 53-story office building. The Commission denied a certificate of no exterior effect on September 20, 1968. Appellants then applied for a certificate of "appropriateness" as to both proposals. After four days of hearings at which over 80 witnesses testified, the Commission denied this application as to both proposals.

The Commission's reasons for rejecting certificates respecting Breuer II Revised are summarized in the following statement: "To protect a Landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off." Record 2255. Breuer I, which would have preserved the existing vertical facades of the present structure, received more sympathetic consideration. The Commission first focused on the effect that the proposed tower would have on one desirable feature created by the present structure and its surroundings: the dramatic view of the Terminal from Park Avenue South. Although appellants had contended that the Pan-American Building had already destroyed the silhouette of the south facade and that one additional tower could do no **[**2656]** further damage and might even provide a better background for the facade, the Commission disagreed, stating that it found the majestic approach from the south to be still unique in the city and that a 55-story tower atop the Terminal would be far more detrimental to its south facade than the Pan-American Building 375 feet away. Moreover, the Commission found that from closer vantage points the Pan-American Building and the other towers were largely cut off from view, which would not be the case of the mass on top of the Terminal planned under Breuer I. In conclusion, the Commission stated:

"[We have] no fixed rule against making additions to designated buildings -- it all depends on how they are done . . . . But to balance a 55-story office tower above **[*118]** a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The 'addition' would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity.

"Landmarks cannot be divorced from their settings -- particularly when the setting is a dramatic and integral part of the original concept. The Terminal, in its setting, is a great example of urban design. Such examples are not so plentiful in New York City that we can afford to lose any of the few we have. And we must preserve them in a meaningful way -- with alterations and additions of such character, scale, materials and mass as will protect, enhance and perpetuate the original design rather than overwhelm it." *Id*., at 2251. [18]

Appellants **[***645]** did not seek judicial review of the denial of either certificate. Because the Terminal site enjoyed a tax exemption, [19] remained suitable for its present and future uses, and was not the subject of a contract of sale, there were no further administrative remedies available to appellants as to the Breuer I and Breuer II Revised plans. See n. 13, *supra*. Further, appellants did not avail themselves of the opportunity to develop **[*119]** and submit other plans for the Commission's consideration and approval. Instead, appellants filed suit in New York Supreme Court, Trial Term, claiming, *inter alia*, that the application of the Landmarks Preservation Law had "taken" their property without just compensation in violation of the *Fifth* and *Fourteenth Amendments* and arbitrarily deprived them of their property without due process of law in violation of the *Fourteenth Amendment*. Appellants sought a declaratory judgment, injunctive relief barring the city from using the Landmarks Law to impede the construction of any structure that might otherwise lawfully be constructed on the Terminal site, and damages for the "temporary taking" that occurred between August 2, 1967, the designation date, and the date when the restrictions arising from the Landmarks Law would be lifted. The trial court granted the injunctive and declaratory relief, but severed the question of damages for a "temporary taking."

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[17] Appellants also submitted a plan, denominated Breuer II, to the Commission. However, because appellants learned that Breuer II would have violated existing easements, they substituted Breuer II Revised for Breuer II, and the Commission evaluated the appropriateness only of Breuer II Revised.

[18] In discussing Breuer I, the Commission also referred to a number of instances in which it had approved additions to landmarks: "The office and reception wing added to Gracie Mansion and the school and church house added to the 12th Street side of the First Presbyterian Church are examples that harmonize in scale, material and character with the structures they adjoin. The new Watch Tower Bible and Tract Society building on Brooklyn Heights, though completely modern in idiom, respects the qualities of its surroundings and will enhance the Brooklyn Heights Historic District, as Butterfield House enhances West 12th Street, and Breuer's own Whitney Museum its Madison Avenue locale." Record 2251.

[19] See *N. Y. Real Prop. Tax Law § 489-aa et seq*. (McKinney Supp. 1977).

20

[2657]** Appellees appealed, and the New York Supreme Court, Appellate Division, reversed. *50 App. Div. 2d 265, 377 N. Y. S. 2d 20 (1975)*. The Appellate Division held that the restrictions on the development of the Terminal site were necessary to promote the legitimate public purpose of protecting landmarks and therefore that appellants could sustain their constitutional claims only by proof that the regulation deprived them of all reasonable beneficial use of the property. The Appellate Division held that the evidence appellants **[*120]** introduced at trial -- "Statements of Revenues and Costs," purporting to show a net operating loss for the years 1969 and 1971, which were prepared for the instant litigation -- had not satisfied their burden. [21] First, the court rejected **[***646]** the claim that these statements showed that the Terminal was operating at a loss, for in the court's view, appellants had improperly attributed some railroad operating expenses and taxes to their real estate operations, and compounded that error by failing to impute any rental value to the vast space in the Terminal devoted to railroad purposes. Further, the Appellate Division concluded that appellants had failed to establish either that they were unable to increase the Terminal's commercial income by transforming vacant or underutilized space to revenue-producing use, or that the unused development rights over the Terminal could not have been profitably transferred to one or more nearby sites. [22] The Appellate Division concluded that all appellants had succeeded in showing was that they had been deprived of the property's most profitable use, and that this showing did not establish that appellants had been unconstitutionally deprived of their property.

The New York Court of Appeals affirmed. *42 N. Y. 2d 324, 366 N. E. 2d 1271 (1977)*. That court summarily rejected any claim that the Landmarks Law had "taken" **[*121]** property without "just compensation," *id., at 329, 366 N. E. 2d, at 1274*, indicating that there could be no "taking" since the law had not transferred control of the property to the city, but only restricted appellants' exploitation of it. In that circumstance, the Court of Appeals held that appellants' attack on the law could prevail only if the law deprived appellants of their property in violation of the *Due Process Clause of the Fourteenth Amendment*. Whether or not there was a denial of substantive due process turned on whether the restrictions deprived Penn Central of a "reasonable return" on the "privately created and privately managed ingredient" of the Terminal. *Id., at 328, 366 N. E. 2d, at 1273*. [23] The Court of **[**2658]** Appeals concluded that the Landmarks Law had not effected a denial of due process because: (1) the landmark regulation permitted the same use as had been made of the Terminal for more than half a century; (2) the appellants had failed to show that they could not earn a reasonable return on their investment in the Terminal itself; (3) even if the Terminal proper could never operate at a reasonable profit, some of the income from Penn Central's extensive real estate holdings in the area, which include hotels and office buildings, must realistically be imputed to the Terminal; and **[*122]** (4) the development **[***647]** rights above the Terminal, which had been made transferable to numerous sites in the vicinity of the Terminal, one or two of which were suitable for the construction of office buildings, were valuable to appellants and provided "significant, perhaps 'fair,' compensation for the loss of rights above the terminal itself."

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[20] Although that court suggested that any regulation of private property to protect landmark values was unconstitutional if "just compensation" were not afforded, it also appeared to rely upon its findings: first, that the cost to Penn Central of operating the Terminal building itself, exclusive of purely railroad operations, exceeded the revenues received from concessionaires and tenants in the Terminal; and second, that the special transferable development rights afforded Penn Central as an owner of a landmark site did not "provide compensation to plaintiffs or minimize the harm suffered by plaintiffs due to the designation of the Terminal as a landmark."

[21] These statements appear to have reflected the costs of maintaining the exterior architectural features of the Terminal in "good repair" as required by the law. As would have been apparent in any case therefore, the existence of the duty to keep up the property was here -- and will presumably always be -- factored into the inquiry concerning the constitutionality of the landmark restrictions.

The Appellate Division also rejected the claim that an agreement of Penn Central with the Metropolitan Transit Authority and the Connecticut Transit Authority provided a basis for invalidating the application of the Landmarks Law.

[22] The record reflected that Penn Central had given serious consideration to transferring some of those rights to either the Biltmore Hotel or the Roosevelt Hotel.

[23] The Court of Appeals suggested that in calculating the value of the property upon which appellants were entitled to earn a reasonable return, the "publicly created" components of the value of the property -- *i. e.*, those elements of its value attributable to the "efforts of organized society" or to the "social complex" in which the Terminal is located -- had to be excluded. However, since the record upon which the Court of Appeals decided the case did not, as that court recognized, contain a basis for segregating the privately created from the publicly created elements of the value of the Terminal site and since the judgment of the Court of Appeals in any event rests upon bases that support our affirmance, see *infra*, this page and 122, we have no occasion to address the question whether it is permissible or feasible to separate out the "social increments" of the value of property. See Costonis, The Disparity Issue: A Context for the *Grand Central Terminal* Decision, 91 Harv. L. Rev. 402, 416-417 (1977).

Id., at 333-336, 366 N. E. 2d, at 1276-1278.

Observing that its affirmance was "[on] the present record," and that its analysis had not been fully developed by counsel at any level of the New York judicial system, the Court of Appeals directed that counsel "should be entitled to present . . . any additional submissions which, in the light of [the court's] opinion, may usefully develop further the factors discussed." *Id., at 337, 366 N. E. 2d, at 1279*. Appellants chose not to avail themselves of this opportunity and filed a notice of appeal in this Court. We noted probable jurisdiction. *434 U.S. 983 (1977)*. We affirm.

II

LEdHN LEdHN[3] [3]***LEdHN*** The issues presented by appellants are (1) whether the restrictions imposed by New York City's law upon appellants' exploitation of the Terminal site effect a "taking" of appellants' property for a public use within the meaning of the *Fifth Amendment*, which of course is made applicable to the States through the *Fourteenth Amendment*, see *Chicago, B. & Q. R. Co.* v. *Chicago , 166 U.S. 226, 239 (1897)*, and, (2), if so, whether the transferable development rights afforded appellants constitute "just compensation" within the meaning of the *Fifth Amendment*. [24]

[24] Our statement of the issues is a distillation of four questions presented in the jurisdictional statement:

"Does the social and cultural desirability of preserving historical landmarks through government regulation derogate from the constitutional requirement that just compensation be paid for private property taken for public use?

"Is Penn Central entitled to no compensation for that large but unmeasurable portion of the value of its rights to construct an office building over the Grand Central Terminal that is said to have been created by the efforts of 'society as an organized entity'?

"Does a finding that Penn Central has failed to establish that there is no possibility, without exercising its development rights, of earning a reasonable return on all of its remaining properties that benefit in any way from the operations of the Grand Central Terminal warrant the conclusion that no compensation need be paid for the taking of those rights?

"Does the possibility accorded to Penn Central, under the landmark-preservation regulation, of realizing some value at some time by transferring the Terminal development rights to other buildings, under a procedure that is conceded to be defective, severely limited, procedurally complex and speculative, and that requires ultimate discretionary approval by governmental authorities, meet the constitutional requirements of just compensation as applied to landmarks?" Jurisdictional Statement 3-4.

The first and fourth questions assume that there has been a taking and raise the problem whether, under the circumstances of this case, the transferable development rights constitute "just compensation." The second and third questions, on the other hand, are directed to the issue whether a taking has occurred.

We need only address the question whether a "taking" has occurred. [25]

[*123] A

LEdHN[5] [5]***LEdHN[6]*** [6]Before considering appellants' specific contentions, it will be **[***648]** useful to review **[**2659]** the factors that have shaped the jurisprudence of the *Fifth Amendment* injunction "nor shall private property be taken for public use, without just compensation." The question of what constitutes a "taking" for purposes of the *Fifth Amendment* has proved to be a problem of considerable difficulty. While this Court has recognized that ***HN11*** the "*Fifth Amendment's* guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States, 364 U.S. 40, 49 (1960)*, **[*124]** this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. See *Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)*. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." *United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958)*; see *United States v. Caltex, Inc., 344 U.S. 149, 156 (1952)*.

LEdHN[7] [7]***LEdHN[8]*** [8]In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. See *Goldblatt v. Hempstead, supra, at 594*. So, too, is the character of the governmental action. ***HN12*** A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, see, *e. g.*, *United States v. Causby, 328 U.S. 256 (1946)*, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

[25] ***LEdHN*** As is implicit in our opinion, we do not embrace the proposition that a "taking" can never occur unless government has transferred physical control over a portion of a parcel.

LEdHN[9] [9]"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Pennsylvania Coal Co.* v. *Mahon, 260 U.S. 393, 413 (1922)*, and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example. A second are the decisions in which this Court has dismissed "taking" challenges on the ground that, while the challenged government action caused **[*125]** economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for *Fifth Amendment* purposes. See, *e. g.*, *United States v. Willow River Power Co., 324 U.S. 499 (1945)* (interest in high-water level of river for runoff for tailwaters to maintain power head is not property); *United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913)* (no **[***649]** property interest can exist in navigable waters); see also *Demorest v. City Bank Co., 321 U.S. 36 (1944)*; *Muhlker v. Harlem R. Co., 197 U.S. 544 (1905)*; Sax, Takings and the Police Power, 74 Yale L. J. 36, 61-62 (1964).

More importantly for the present case, in instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. See *Nectow v. Cambridge, 277 U.S. 183, 188 (1928)*. Zoning laws are, of course, the classic example, see *Euclid v. Ambler Realty Co., 272 U.S. 365 [**2660] (1926)* (prohibition of industrial use); *Gorieb v. Fox, 274 U.S. 603, 608 (1927)* (requirement that portions of parcels be left unbuilt); *Welch v. Swasey, 214 U.S. 91 (1909)* (height restriction), which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property. See *Goldblatt v. Hempstead, supra, at 592-593*, and cases cited; see also *Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 674 n. 8 (1976)*.

Zoning laws generally do not affect existing uses of real property, but "taking" challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm. *Miller v. Schoene, 276 U.S. 272 (1928)*, is illustrative. In that case, a state entomologist, acting pursuant to a state statute, ordered **[*126]** the claimants to cut down a large number of ornamental red cedar trees because they produced cedar rust fatal to apple trees cultivated nearby. Although the statute provided for recovery of any expense incurred in removing the cedars, and permitted claimants to use the felled trees, it did not provide compensation for the value of the standing trees or for the resulting decrease in market value of the properties as a whole. A unanimous Court held that this latter omission did not render the statute invalid. The Court held that the State might properly make "a choice between the preservation of one class of property and that of the other" and since the apple industry was important in the State involved, concluded that the State had not exceeded "its constitutional powers by deciding upon the destruction of one class of property [without compensation] in order to save another which, in the judgment of the legislature, is of greater value to the public." *Id., at 279*.

Again, *Hadacheck v. Sebastian, 239 U.S. 394 (1915)*, upheld a law prohibiting the claimant from continuing his otherwise lawful business of operating a brickyard in a particular physical community on the ground that the legislature had reasonably concluded that the presence of the brickyard was inconsistent with neighboring uses. See also *United* **[***650]** *States v. Central Eureka Mining Co., supra* (Government order closing gold mines so that skilled miners would be available for other mining work held not a taking): *Atchison, T. & S.F.R. Co.* v. *Public Utilities Comm'n, 346 U.S. 346 (1953)* (railroad may be required to share cost of constructing railroad grade improvement); *Walls v. Midland Carbon Co., 254 U.S. 300 (1920)* (law prohibiting manufacture of carbon black upheld); *Reinman v. Little Rock, 237 U.S. 171 (1915)* (law prohibiting livery stable upheld); *Mugler v. Kansas, 123 U.S. 623 (1887)* (law prohibiting liquor business upheld).

LEdHN[10] [10]*Goldblatt v. Hempstead, supra*, is a recent example. There, a 1958 city safety ordinance banned any excavations below **[*127]** the water table and effectively prohibited the claimant from continuing a sand and gravel mining business that had been operated on the particular parcel since 1927. The Court upheld the ordinance against a "taking" challenge, although the ordinance prohibited the present and presumably most beneficial use of the property and had, like the regulations in *Miller* and *Hadacheck*, severely affected a particular owner. The Court assumed that the ordinance did not prevent the owner's reasonable use of the property since the owner made no showing of an adverse effect on the value of the land. Because the restriction served a substantial public purpose, the Court thus held no taking had occurred. It is, of course, implicit in *Goldblatt* that ***HN13*** a use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial public purpose, see **[**2661]** *Nectow v. Cambridge, supra*; cf. *Moore v. East Cleveland, 431 U.S. 494, 513-514 (1977)* (STEVENS, J., concurring), or perhaps if it has an unduly harsh impact upon the owner's use of the property.

Pennsylvania Coal Co. v. *Mahon, 260 U.S. 393 (1922)*, is the

leading case for the proposition that ***HN14*** a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a "taking." There the claimant had sold the surface rights to particular parcels of property, but expressly reserved the right to remove the coal thereunder. A Pennsylvania statute, enacted after the transactions, forbade any mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. Because the statute made it commercially impracticable to mine the coal, *id., at 414*, and thus had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land, see *id., at 414-415*, the Court held that the statute was invalid as effecting a "taking" **[*128]** without just compensation. See also *Armstrong v. United States, 364 U.S. 40 (1960)* (Government's complete destruction of a materialman's lien in certain property held a "taking"); *Hudson Water Co.* v. *McCarter, 209 U.S. 349, 355 [***651] (1908)* (if height restriction makes property wholly useless "the rights of property . . . prevail over the other public interest" and compensation is required). See generally Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1229-1234 (1967).

Finally, ***HN15*** government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute "takings." *United States v. Causby, 328 U.S. 256 (1946)*, is illustrative. In holding that direct overflights above the claimant's land, that destroyed the present use of the land as a chicken farm, constituted a "taking," *Causby* emphasized that Government had not "merely destroyed property [but was] using a part of it for the flight of its planes." *Id., at 262-263, n.7*. See also *Griggs v. Allegheny County, 369 U.S. 84 (1962)* (overflights held a taking); *Portsmouth Co.* v. *United States, 260 U.S. 327 (1922)* (United States military installations' repeated firing of guns over claimant's land is a taking); *United States v. Cress, 243 U.S. 316 (1917)* (repeated floodings of land caused by water project is a taking); but see *YMCA v. United States, 395 U.S. 85 (1969)* (damage caused to building when federal officers who were seeking to protect building were attacked by rioters held not a taking). See generally Michelman, *supra*, at 1226-1229; Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964).

B

LEdHN LEdHN[12] [12]In contending that the New York City law has "taken" their property in violation of the *Fifth* and *Fourteenth Amendments*, appellants make a series of arguments, which, while tailored to the facts of this case, essentially urge that **[*129]** any substantial restriction imposed pursuant to a landmark law must be accompanied by just compensation if it is to be constitutional. Before considering these, we emphasize what is not in dispute. Because this Court has recognized, in a number of settings, that ***HN16*** 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, see *New Orleans v. Dukes, 427 U.S. 297 (1976)*; *Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)*; *Village of Belle Terre v. Boraas, 416 U.S. 1, 9-10 (1974)*; **[**2662]** *Berman v. Parker, 348 U.S. 26, 33 (1954)*; *Welch v. Swasey, 214 U.S., at 108*, 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. They also do not dispute that the restrictions imposed on its parcel are appropriate means of securing the purposes of the New York City law. Finally, appellants do not challenge any of the specific factual premises of the decision below. They accept for present purposes both that the parcel of land occupied by Grand Central Terminal must, in its present state, be regarded as capable of earning a reasonable return, [26] **[***652]** and that the transferable development rights afforded appellants by virtue of the Terminal's designation as a landmark are valuable, even if not as valuable as the rights to construct above the Terminal. In appellants' view none of these factors derogate from their claim that New York City's law has effected a "taking."

[*130] They first observe that the airspace above the Terminal is a valuable property interest, citing *United States v. Causby, supra.* They urge that the Landmarks Law has deprived them of any gainful use of their "air rights" above the Terminal and that, irrespective of the value of the remainder of their parcel, the city has "taken" their right to this superjacent airspace, thus entitling them to "just compensation" measured by the fair market value of these air rights.

LEdHN[13] [13]***LEdHN LEdHN*** Apart from our own disagreement with appellants' characterization of the effect of

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[26] Both the Jurisdictional Statement 7-8, n. 7, and Brief for Appellants 8 n. 7 state that appellants are not seeking review of the New York courts' determination that Penn Central could earn a "reasonable return" on its investment in the Terminal. Although appellants suggest in their reply brief that the factual conclusions of the New York courts cannot be sustained unless we accept the rationale of the New York Court of Appeals, see Reply Brief for Appellants 12 n. 15, it is apparent that the findings concerning Penn Central's ability to profit from the Terminal depend in no way on the Court of Appeals' rationale.

the New York City law, see *infra*, at 134-135, 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. Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, see *Welch v. Swasey, supra*, but also in approving those prohibiting both the subjacent, see *Goldblatt v. Hempstead, 369 U.S. 590 (1962)*, and the lateral, see *Gorieb v. Fox, 274 U.S. 603 (1927)*, development of particular parcels. [27] ***HN17*** "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the **[*131]** parcel as a whole -- here, the city tax block designated as the "landmark site."

LEdHN[16] [16]Secondly, appellants, focusing on the character and impact of the New York City law, argue that it effects a "taking" because its operation has significantly diminished the value of the Terminal site. Appellants concede that the decisions sustaining other land-use regulations, which, **[**2663]** like the New York City law, are reasonably related to the promotion of the general welfare, uniformly **[***653]** reject the proposition that diminution in property value, standing alone, can establish a "taking," see *Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)* (75% diminution in value caused by zoning law); *Hadacheck v. Sebastian, 239 U.S. 394 (1915)* (87 1/2% diminution in value); cf. *Eastlake v. Forest City Enterprises, Inc., 426 U.S., at 674 n. 8*, and that the "taking" issue in these contexts is resolved by focusing on the uses the regulations permit. See also *Goldblatt v. Hempstead, supra.* Appellants, moreover, also do not dispute that ***HN18*** a showing of diminution in property value would not establish a "taking" if the restriction had been imposed as a result of historic-district legislation, see generally *Maher v. New Orleans, 516 F.2d 1051 (CA5 1975)*, but appellants argue that New York City's regulation of individual landmarks is fundamentally different from zoning or from historic-district legislation because the controls imposed by New York City's law apply only to individuals who own selected properties.

Stated baldly, appellants' position appears to be that the only means of ensuring that selected owners are not singled out to endure financial hardship for no reason is to hold that any restriction imposed on individual landmarks pursuant to the New York City scheme is a "taking" requiring the payment of "just compensation." Agreement with this argument would, of course, invalidate not just New York City's law, but all comparable landmark legislation in the Nation. We find no merit in it.

[*132] It is true, as appellants emphasize, that ***HN19*** both historic-district legislation and zoning laws regulate all properties within given physical communities whereas landmark laws apply only to selected parcels. But, contrary to appellants' suggestions, landmark laws are not like discriminatory, or "reverse spot," zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. See 2 A. Rathkopf, The Law of Zoning and Planning 26-4, and n. 6 (4th ed. 1978). In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, [28] and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan.

LEdHN Equally without merit is the related argument that the decision to designate a structure as a landmark "is inevitably arbitrary or at least subjective, because it is basically a matter of taste," Reply Brief for Appellants 22, thus unavoidably singling out individual landowners for disparate and unfair treatment. The argument has a particularly hollow ring in this case. For appellants not only did not seek judicial review of **[***654]** either the designation or of the denials of the certificates of appropriateness and of no exterior effect, but do not even now suggest that the

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[27] ***LEdHN*** ***LEdHN*** These cases dispose of any contention that might be based on *Pennsylvania Coal Co.* v. *Mahon, 260 U.S. 393 (1922)*, that full use of air rights is so bound up with the investment-backed expectations of appellants that governmental deprivation of these rights invariably -- *i. e.*, irrespective of the impact of the restriction on the value of the parcel as a whole -- constitutes a "taking." Similarly, *Welch*, *Goldblatt*, and *Gorieb* illustrate the fallacy of appellants' related contention that a "taking" must be found to have occurred whenever the land-use restriction may be characterized as imposing a "servitude" on the claimant's parcel.

[28] Although the New York Court of Appeals contrasted the New York City Landmarks Law with both zoning and historic-district legislation and stated at one point that landmark laws do not "further a general community plan," *42 N. Y. 2d 324, 330, 366 N. E. 2d 1271, 1274 (1977)*, it also emphasized that the implementation of the objectives of the Landmarks Law constitutes an "acceptable reason for singling out one particular parcel for different and less favorable treatment." *Ibid.*, *366 N. E. 2d, at 1275*. Therefore, we do not understand the New York Court of Appeals to disagree with our characterization of the law.

Commission's decisions concerning the Terminal were in any sense arbitrary or unprincipled. But, in **[*133]** any event, a landmark owner has a right to judicial review of any Commission decision, and, quite simply, there is no basis whatsoever for a conclusion that courts will have any greater difficulty identifying arbitrary or discriminatory action in the context of landmark regulation than in the **[**2664]** context of classic zoning or indeed in any other context. [29]

LEdHN[18] [18]Next, appellants observe that New York City's law differs from zoning laws and historic-district ordinances in that the Landmarks Law does not impose identical or similar restrictions on all structures located in particular physical communities. It follows, they argue, that New York City's law is inherently incapable of producing the fair and equitable distribution of benefits and burdens of governmental action which is characteristic of zoning laws and historic-district legislation and which they maintain is a constitutional requirement if "just compensation" is not to be afforded. It is, of course, true that ***HN21*** the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a "taking." Legislation designed to promote the general welfare commonly burdens some more than others. The owners of the brickyard in *Hadacheck*, of the cedar trees in *Miller* v. *Schoene*, and of the gravel and sand mine in *Goldblatt* v. *Hempstead*, were uniquely burdened by the legislation sustained in those cases. [30] Similarly, zoning **[*134]** laws often affect some property owners more severely than others but have not been held to be invalid on that account. For example, the property owner in *Euclid* who wished to use its property for industrial purposes was affected far more severely by the ordinance than its neighbors **[***655]** who wished to use their land for residences.

In any event, appellants' repeated suggestions that they are solely burdened and unbenefited is factually inaccurate. This contention overlooks the fact that the New York City law applies to vast numbers of structures in the city in addition to the Terminal -- all the structures contained in the 31 historic districts and over 400 individual landmarks, many of which are close to the Terminal. [31] Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole -- which we are unwilling to do -- we cannot **[*135]** conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law. Doubtless appellants believe they are more burdened than **[**2665]** benefited by the law, but that must have been true, too, of the property owners in *Miller*, *Hadacheck*, *Euclid*, and *Goldblatt*. [32]

LEdHN[19] [19]Appellants' final broad-based attack would have us treat the law as an instance, like that in *United States* v. *Causby*, in which government, acting in an enterprise capacity, has appropriated part of their property for some strictly governmental purpose. Apart from the fact that

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[29] ***LEdHN HN20*** When a property owner challenges the application of a zoning ordinance to his property, the judicial inquiry focuses upon whether the challenged restriction can reasonably be deemed to promote the objectives of the community land-use plan, and will include consideration of the treatment of similar parcels. See generally *Nectow v. Cambridge, 277 U.S. 183 (1928)*. When a property owner challenges a landmark designation or restriction as arbitrary or discriminatory, a similar inquiry presumably will occur.

[30] Appellants attempt to distinguish these cases on the ground that, in each, government was prohibiting a "noxious" use of land and that in the present case, in contrast, appellants' proposed construction above the Terminal would be beneficial. We observe that the uses in issue in *Hadacheck*, *Miller*, and *Goldblatt* were perfectly lawful in themselves. They involved no "blameworthiness, . . . moral wrongdoing or conscious act of dangerous risk-taking which [induced society] to shift the cost to a [particular] individual." Sax, Takings and the Police Power, 74 Yale L. J. 36, 50 (1964). These cases are better understood as resting not on any supposed "noxious" quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy -- not unlike historic preservation -- expected to produce a widespread public benefit and applicable to all similarly situated property.

Nor, correlatively, can it be asserted that the destruction or fundamental alteration of a historic landmark is not harmful. The suggestion that the beneficial quality of appellants' proposed construction is established by the fact that the construction would have been consistent with applicable zoning laws ignores the development in sensibilities and ideals reflected in landmark legislation like New York City's. Cf. *West Bros. Brick Co.* v. *Alexandria, 169 Va. 271, 282-283, 192 S. E. 881, 885-886*, appeal dismissed for want of a substantial federal question, ***302 U.S. 658 (1937)***.

[31] There are some 53 designated landmarks and 5 historic districts or scenic landmarks in Manhattan between 14th and 59th Streets. See Landmarks Preservation Commission, Landmarks and Historic Districts (1977).

[32] It is, of course, true that the fact the duties imposed by zoning and historic-district legislation apply throughout particular physical communities provides assurances against arbitrariness, but the applicability of the Landmarks Law to a large number of parcels in the city, in our view, provides comparable, if not identical, assurances.

Causby was a case of invasion of airspace that destroyed the use of the farm beneath and this New York City law has in nowise impaired the present use of the Terminal, the Landmarks Law neither exploits appellants' parcel for city purposes nor facilitates nor arises from any entrepreneurial operations of the city. The situation is not remotely like that in *Causby* where the airspace above the property was in the flight pattern for military aircraft. The Landmarks Law's effect is simply to prohibit appellants or anyone else from occupying portions of the airspace above the Terminal, while permitting appellants to use the remainder of the parcel in a gainful fashion. This is no more an appropriation of property by government for its own uses than is a zoning law prohibiting, for "aesthetic" reasons, two or more adult theaters within a specified area, see *Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)*, or a safety regulation prohibiting excavations below a certain level. See *Goldblatt* v. *Hempstead*.

C

LEdHN LEdHN Rejection of appellants' broad arguments is not, however, the end of our inquiry, for all we thus far have established is **[*136]** that ***HN22*** the New York City law is not rendered invalid by its failure to provide "just compensation" whenever a landmark owner is restricted in the exploitation of property interests, such as air rights, to a greater extent than provided for under applicable zoning laws. We now **[***656]** must consider whether the interference with appellants' property is of such a magnitude that "there must be an exercise of eminent domain and compensation to sustain [it]." *Pennsylvania Coal Co* . v. *Mahon, 260 U.S., at 413*. That inquiry may be narrowed to the question of the severity of the impact of the law on appellants' parcel, and its resolution in turn requires a careful assessment of the impact of the regulation on the Terminal site.

Unlike the governmental acts in *Goldblatt, Miller, Causby, Griggs*, and *Hadacheck*, the New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.

Appellants, moreover, exaggerate the effect of the law on their ability to make use of the air rights above the Terminal in two respects. [33] First, it simply cannot be maintained, on this record, that appellants have been prohibited from occupying *any* portion of the airspace above the Terminal. While the Commission's actions in denying applications to construct an **[*137]** office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate **[**2666]** of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit *any* construction above the Terminal. The Commission's report emphasized that whether any construction would be allowed depended upon whether the proposed addition "would harmonize in scale, material, and character with [the Terminal]." Record 2251. Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal. [34]

Second, to the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's transferable development-rights program is far from ideal, [35] **[***657]** the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation. Cf. *Goldblatt v. Hempstead, 369 U.S., at 594 n. 3*.

[*138] On this record, we conclude that the application of New York City's Landmarks Law has not effected a "taking" of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance

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[33] Appellants, of course, argue at length that the transferable development rights, while valuable, do not constitute "just compensation." Brief for Appellants 36-43.

[34] Counsel for appellants admitted at oral argument that the Commission has not suggested that it would not, for example, approve a 20-story office tower along the lines of that which was part of the original plan for the Terminal. See Tr. of Oral Arg. 19.

[35] See Costonis, *supra* n. 2, at 585-589.

not only the Terminal site proper but also other properties. [36]

Affirmed.

Dissent by: REHNQUIST

Dissent

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE STEVENS join, dissenting.

Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks. [1] The owner of a building might initially be pleased that his property has been chosen by a distinguished committee of architects, historians, and city **[*139]** planners for such a singular distinction. But he may well discover, as appellant Penn Central Transportation Co. did here, that the landmark designation imposes upon him **[**2667]** a substantial cost, with little or no offsetting benefit except for the honor of the designation. The question in this case is whether the cost associated with the city of New York's desire to preserve a limited number of "landmarks" within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties.

Only in the most superficial sense of the word can this case be said to involve "zoning." [2] Typical zoning restrictions **[***658]** may, it is true, so limit the prospective uses of a piece of property as to diminish the value of that property in the abstract because it may not be used for the forbidden purposes. But any such abstract decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring **[*140]** properties. All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another. In the words of Mr. Justice Holmes, speaking for the Court in *Pennsylvania Coal Co.* v. *Mahon, 260 U.S. 393, 415 (1922)*, there is "an average reciprocity of advantage."

Where a relatively few individual buildings, all separated from one another, are singled out and treated differently from surrounding buildings, no such reciprocity exists. The cost to the property owner which results from the imposition of restrictions applicable only to his property and not that of his neighbors may be substantial -- in this case, several million dollars -- with no comparable reciprocal benefits. And the cost associated with landmark legislation is likely to be of a completely different order of magnitude than that which results from the imposition of normal zoning restrictions. Unlike the regime affected by the latter, the landowner is not simply prohibited from using his property for certain purposes, while allowed to use it for all other purposes. Under the historic-landmark preservation scheme adopted by New York, the property owner is under an affirmative duty to *preserve* his property *as a landmark* at his own expense. To

[36] We emphasize that our holding today is on the present record, which in turn is based on Penn Central's present ability to use the Terminal for its intended purposes and in a gainful fashion. The city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be "economically viable," appellants may obtain relief. See Tr. of Oral Arg. 42-43.

[1] A large percentage of the designated landmarks are public structures (such as the Brooklyn Bridge, City Hall, the Statue of Liberty and the Municipal Asphalt Plant) and thus do not raise ***Fifth Amendment*** taking questions. See Landmarks Preservation Commission of the City of New York, Landmarks and Historic Districts (1977 and Jan. 10, 1978, Supplement). Although the Court refers to the New York ordinance as a *comprehensive* program to preserve *historic* landmarks, *ante*, at 107, the ordinance is not limited to historic buildings and gives little guidance to the Landmarks Preservation Commission in its selection of landmark sites. Section 207-1.0 (n) of the Landmarks Preservation Law, as set forth in N. Y. C. Admin. Code, ch. 8-A (1976), requires only that the selected landmark be at least 30 years old and possess "a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation."

[2] Even the New York Court of Appeals conceded that "[this] is not a zoning case. . . . Zoning restrictions operate to advance a comprehensive community plan for the common good. Each property owner in the zone is both benefited and restricted from exploitation, presumably without discrimination, except for permitted continuing nonconforming uses. The restrictions may be designed to maintain the general character of the area, or to assure orderly development, objectives inuring to the benefit of all, which property owners acting individually would find difficult or impossible to achieve . . . .

"Nor does this case involve landmark regulation of a historic district. . . . [In historic districting, as in traditional zoning,] owners although burdened by the restrictions also benefit, to some extent, from the furtherance of a general community plan.

. . . .

"Restrictions on alteration of individual landmarks are not designed to further a general community plan. Landmark restrictions are designed to prevent alteration or demolition of a single piece of property. To this extent, such restrictions resemble 'discriminatory' zoning restrictions, properly condemned . . . ." *42 N. Y. 2d 324, 329-330, 366 N. E. 2d 1271, 1274 (1977)*.

suggest that because traditional zoning results in some limitation of use of the property zoned, the New York City landmark preservation scheme should likewise be upheld, represents the ultimate in treating as alike things which are different. The rubric of "zoning" has not yet sufficed to avoid the well-established proposition that the *Fifth Amendment* bars the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States, 364 U.S. 40, 49 (1960)*. See discussion *infra*, at 147-150.

In August 1967, Grand Central Terminal was designated a landmark over the objections of its owner Penn Central. Immediately upon this designation, Penn Central, like all **[*141]** owners of a landmark site, **[***659]** was placed under an affirmative duty, backed **[**2668]** by criminal fines and penalties, to keep "exterior portions" of the landmark "in good repair." Even more burdensome, however, were the strict limitations that were thereupon imposed on Penn Central's use of its property. At the time Grand Central was designated a landmark, Penn Central was in a precarious financial condition. In an effort to increase its sources of revenue, Penn Central had entered into a lease agreement with appellant UGP Properties, Inc., under which UGP would construct and operate a multistory office building cantilevered above the Terminal building. During the period of construction, UGP would pay Penn Central $ 1 million per year. Upon completion, UGP would rent the building for 50 years, with an option for another 25 years, at a guaranteed *minimum* rental of $ 3 million per year. The record is clear that the proposed office building was in full compliance with all New York zoning laws and height limitations. Under the Landmarks Preservation Law, however, appellants could not construct the proposed office building unless appellee Landmarks Preservation Commission issued either a "Certificate of No Exterior Effect" or a "Certificate of Appropriateness." Although appellants' architectural plan would have preserved the facade of the Terminal, the Landmarks Preservation Commission has refused to approve the construction.

I

The *Fifth Amendment* provides in part: "nor shall private property be taken for public use, without just compensation." [3] **[*142]** In a very literal sense, the actions of appellees violated this constitutional prohibition. Before the city of New York declared Grand Central Terminal to be a landmark, Penn Central could have used its "air rights" over the Terminal to build a multistory office building, at an apparent value of several million dollars per year. Today, the Terminal cannot be modified in *any* form, including the erection of additional stories, without the permission of the Landmark Preservation Commission, a permission which appellants, despite good-faith attempts, have so far been unable to obtain. Because the Taking Clause of the *Fifth Amendment* has not always been read literally, however, the constitutionality of appellees' actions requires a closer scrutiny of this Court's interpretation of the three key words in the Taking Clause -- "property," "taken," and "just compensation." [4]

A

[*660]** Appellees do not dispute that valuable property rights have been destroyed. And the Court has frequently emphasized that the term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." *United States v. General Motors Corp., 323 U.S. 373 (1945)*. The term is not used in the

"vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] . . . [denotes] the *group of rights* inhering in the citizen's relation to the physical thing, *as* ***[*143]*** *the right to possess, use and dispose of it.* . . . The constitutional provision is addressed to *every sort of interest* the **[**2669]** citizen may possess." *Id., at 377-378* (emphasis added).

While neighboring landowners are free to use their land and "air rights" in any way consistent with the broad boundaries of New York zoning, Penn Central, absent the permission of appellees, must forever maintain its property in its present state. [5] The property has been thus subjected to a

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[3] The guarantee that private property shall not be taken for public use without just compensation is applicable to the States through the ***Fourteenth Amendment***. Although the state "legislature may prescribe a form of procedure to be observed in the taking of private property for public use, . . . it is not due process of law if provision be not made for compensation." *Chicago, B. & Q. R. Co.* v. *Chicago, 166 U.S. 226, 236 (1897)*.

[4] The Court's opinion touches base with, or at least attempts to touch base with, most of the major eminent domain cases decided by this Court. Its use of them, however, is anything but meticulous. In citing to *United States v. Caltex, Inc., 344 U.S. 149, 156 (1952)*, for example, *ante*, at 124, the only language remotely applicable to eminent domain is stated in terms of "the destruction of respondents' terminals by a trained team of engineers in the face of their impending seizure by the enemy." *344 U.S., at 156*.

[5] In particular, Penn Central cannot increase the height of the Terminal. This Court has previously held that the "air rights" over an area of land are "property" for purposes of the ***Fifth Amendment***. See *United States v. Causby, 328 U.S. 256 (1946)* ("air rights" taken by low-flying airplanes); *Griggs v. Allegheny County, 369 U.S. 84*

nonconsensual servitude not borne by any neighboring or similar properties. [6]

B

Appellees have thus destroyed -- in a literal sense, "taken" -- substantial property rights of Penn Central. While the term "taken" might have been narrowly interpreted to include only physical seizures of property rights, "the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." *Id., at 378*. See also *United States v. Lynah, 188 U.S. 445, 469 (1903)*; **[*144]** [7] *Dugan v. Rank, 372 U.S. 609, 625 (1963)*. Because "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense," *Armstrong v. [***661] United States, 364 U.S., at 48*, however, this does not end our inquiry. But an examination of the two exceptions where the destruction of property does *not* constitute a taking demonstrates that a compensable taking has occurred here.

1

As early as 1887, the Court recognized that the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use.

"A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be *injurious to the health, morals, or safety of the community*, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not -- and, consistently with the existence and safety of organized society, cannot be -- burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, *by reason of their not being permitted, by a noxious use of* ***[*145]*** *their property, to inflict* **[**2670]** *injury upon the community."* *Mugler v. Kansas, 123 U.S. 623, 668-669*.

Thus, there is no "taking" where a city prohibits the operation of a brickyard within a residential area, see *Hadacheck v. Sebastian, 239 U.S. 394 (1915)*, or forbids excavation for sand and gravel below the water line, see *Goldblatt v. Hempstead, 369 U.S. 590 (1962)*. Nor is it relevant, where the government is merely prohibiting a noxious use of property, that the government would seem to be singling out a particular property owner. *Hadacheck, supra, at 413*. [8]

The nuisance exception to the taking guarantee is not coterminous with the police power itself. The question is whether the forbidden use is dangerous to the safety, health, or welfare of others. Thus, in *Curtin v. Benson, 222 U.S. 78 (1911)*, the Court held that the Government, in prohibiting the owner of property within the boundaries of Yosemite National Park from grazing cattle on his property, had taken the owner's property. The Court assumed that the Government could constitutionally require the owner to fence his land or take other action to prevent his cattle from straying onto others' land without compensating him.

"Such laws might be considered as **[***662]** strictly regulations of the use of property, of so using it that no injury could result to others. They would have the effect of making the owner of land herd his cattle on his own land and of making him responsible for a neglect of it." *Id., at 86*.

The prohibition in question, however, was "not a prevention of a misuse or illegal use but the prevention of a legal and essential use, an attribute of its ownership." *Ibid.*

(1962) (same); *Portsmouth Harbor Land & Hotel Co.* v. *United States, 260 U.S. 327 (1922)* (firing of projectiles over summer resort can constitute taking). See also *Butler v. Frontier Telephone Co., 186 N. Y. 486, 79 N. E. 716 (1906)* (stringing of telephone wire across property constitutes a taking).

[6] It is, of course, irrelevant that appellees interfered with or destroyed property rights that Penn Central had not yet physically used. The ***Fifth Amendment*** must be applied with "reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, *or such as may be reasonably expected in the immediate future." Boom Co.* v. *Patterson, 98 U.S. 403, 408 (1879)* (emphasis added).

[7] "Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." *188 U.S., at 470*.

[8] Each of the cases cited by the Court for the proposition that legislation which severely affects some landowners but not others does not effect a "taking" involved noxious uses of property. See *Hadacheck; Miller v. Schoene, 276 U.S. 272 (1928)*; *Goldblatt*. See *ante*, at 125-127, 133.

Appellees are not prohibiting a nuisance. The record is **[*146]** clear that the proposed addition to the Grand Central Terminal would be in full compliance with zoning, height limitations, and other health and safety requirements. Instead, appellees are seeking to preserve what they believe to be an outstanding example of beaux arts architecture. Penn Central is prevented from further developing its property basically because *too good* a job was done in designing and building it. The city of New York, because of its unadorned admiration for the design, has decided that the owners of the building must preserve it unchanged for the benefit of sightseeing New Yorkers and tourists.

Unlike land-use regulations, appellees' actions do not merely *prohibit* Penn Central from using its property in a narrow set of noxious ways. Instead, appellees have placed an *affirmative* duty on Penn Central to maintain the Terminal in its present state and in "good repair." Appellants are not free to use their property as they see fit within broad outer boundaries but must strictly adhere to their past use except where appellees conclude that alternative uses would not detract from the landmark. While Penn Central may continue to use the Terminal as it is presently designed, appellees otherwise "exercise complete dominion and control over the surface of the land," *United States v. Causby, 328 U.S. 256, 262 (1946)*, and must compensate the owner for his loss. *Ibid.* "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired." *United States v. Dickinson, 331 U.S. 745, 748 (1947)*. See also *Dugan v. Rank, supra, at 625*. [9]

[*147] [2671]** 2

Even where the government prohibits a noninjurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross section of land **[***663]** and thereby "[secures] an average reciprocity of advantage." *Pennsylvania Coal Co.* v. *Mahon, 260 U.S., at 415*. [10] It is for this reason that zoning does not constitute a "taking." While zoning at times reduces *individual* property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another.

Here, however, a multimillion dollar loss has been imposed on appellants; it is uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other "landmarks" in New York City. Appellees have imposed a substantial cost on less than one one-tenth of one percent of the buildings in New York City for the general benefit of all its people. It is exactly this imposition of general costs on a few individuals at which the "taking" protection is directed. The *Fifth Amendment*

"prevents the public from loading upon one individual more than his just share of the burdens of government, **[*148]** and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela Navigation Co.* v. *United States, 148 U.S. 312, 325 (1893)*.

Less than 20 years ago, this Court reiterated that the

"*Fifth Amendment's* guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States, 364 U.S., at 49*.

Cf. *Nashville, C. & St. L. R. Co.* v. *Walters, 294 U.S. 405, 428-430 (1935)*. [11]

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[9] In *Monongahela Navigation Co.* v. *United States, 148 U.S. 312 (1893)*, the Monongahela company had expended large sums of money in improving the Monongahela River by means of locks and dams. When the United States condemned this property for its own use, the Court held that full compensation had to be awarded. "Suppose, in the improvement of a navigable stream, it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress to condemn whatever land may be necessary for such canal, there can be no question; and of the equal necessity of paying full compensation for all private property taken there can be as little doubt." *Id., at 337*. Under the Court's rationale, however, where the Government wishes to preserve a pre-existing canal system for public use, it need not condemn the property but need merely order that it be preserved in its present form and be kept "in good repair."

[10] Appellants concede that the preservation of buildings of historical or aesthetic importance is a permissible objective of state action. Brief for Appellants 12. Cf. *Berman v. Parker, 348 U.S. 26 (1954)*; *United States v. Gettysburg Electric R. Co., 160 U.S. 668 (1896)*.

For the reasons noted in the text, historic *zoning*, as has been undertaken by cities such as New Orleans, may well not require compensation under the ***Fifth Amendment***.

[11] "It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. . . . But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some

As Mr. Justice Holmes pointed out in *Pennsylvania Coal Co.* v. *Mahon*, "the question at bottom" in an eminent domain case "is upon whom the loss of the changes desired should fall." *260 U.S., at 416*. The benefits that appellees believe will flow from preservation of the Grand **[***664]** Central Terminal will accrue to all the citizens of New York City. There is no **[**2672]** reason to believe that appellants will enjoy a substantially greater share of these benefits. If the cost of preserving Grand Central Terminal were spread evenly across the entire population of the city of New York, the burden per person would be in cents per year -- a minor cost appellees would **[*149]** surely concede for the benefit accrued. Instead, however, appellees would impose the entire cost of several million dollars per year on Penn Central. But it is precisely this sort of discrimination that the *Fifth Amendment* prohibits. [12]

Appellees in response would argue that a taking only occurs where a property owner is denied *all* reasonable value of his property. [13] The Court has frequently held that, even where a destruction of property rights would not *otherwise* constitute a taking, the inability of the owner to make a reasonable return on his property requires compensation under the *Fifth Amendment*. See, *e. g.*, *United States v. Lynah, 188 U.S., at 470*. But the converse is not true. A taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some "reasonable" use of his property. "[It] is the character of the invasion, not the amount of damage resulting from it, **[*150]** so long as the damage is substantial, that determines the question whether it is a taking." *United States v. Cress, 243 U.S. 316, 328 (1917)*; *United States v. Causby, 328 U.S., at 266*. See also *Goldblatt v. Hempstead, 369 U.S., at 594*.

C

Appellees, apparently recognizing that the constraints imposed on a landmark site constitute a taking for *Fifth Amendment* purposes, do not leave the property owner emptyhanded. As the Court notes, *ante*, at 113-114, the property owner may theoretically "transfer" his previous right to develop the landmark property to adjacent properties if they are under his control. Appellees have coined **[***665]** this system "Transfer Development Rights," or TDR's.

Of all the terms used in the Taking Clause, "just compensation" has the strictest meaning. The *Fifth Amendment* does not allow simply an approximate compensation but requires "a full and perfect equivalent for the property taken." *Monongahela Navigation Co.* v. *United States, 148 U.S., at 326*.

"[If] the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken." *Ibid.*

[2673]** See also *United States v. Lynah, supra, at 465*; *United States v. Pewee Coal Co., 341 U.S. 114, 117 (1951)*. And the determination of whether a "full and perfect equivalent" has been awarded is a "judicial function." *United States v. New River Collieries Co., 262 U.S. 341, 343-344 (1923)*. The fact **[*151]** that *appellees* may believe that TDR's provide full compensation is irrelevant.

"The legislature may determine what private property is needed for public purposes -- that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation.

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reasonable relation to the evils to be eradicated or the advantages to be secured. . . . While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment, . . . so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them." *294 U.S., at 429-430*.

[12] The fact that the Landmarks Preservation Commission may have allowed additions to a relatively few landmarks is of no comfort to appellants. *Ante*, at 118 n. 18. Nor is it of any comfort that the Commission refuses to allow appellants to construct any additional stories because of their belief that such construction would not be aesthetic. *Ante*, at 117-118.

[13] Difficult conceptual and legal problems are posed by a rule that a taking only occurs where the property owner is denied all reasonable return on his property. Not only must the Court define "reasonable return" for a variety of types of property (farmlands, residential properties, commercial and industrial areas), but the Court must define the particular property unit that should be examined. For example, in this case, if appellees are viewed as having restricted Penn Central's use of its "air rights," *all* return has been denied. See *Pennsylvania Coal Co.* v. *Mahon, 260 U.S. 393 (1922)*. The Court does little to resolve these questions in its opinion. Thus, at one point, the Court implies that the question is whether the restrictions have "an unduly harsh impact upon the owner's use of the property," *ante*, at 127; at another point, the question is phrased as whether Penn Central can obtain "a 'reasonable return' on its investment," *ante*, at 136; and, at yet another point, the question becomes whether the landmark is "economically viable," *ante*, at 138 n. 36.

The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry." *Monongahela Navigation Co.* v. *United States, supra, at 327*.

Appellees contend that, even if they have "taken" appellants' property, TDR's constitute "just compensation." Appellants, of course, argue that TDR's are highly imperfect compensation. Because the lower courts held that there was no "taking," they did not have to reach the question of whether or not just compensation has already been awarded. The New York Court of Appeals' discussion of TDR's gives some support to appellants:

"The many defects in New York City's program for development rights transfers have been detailed elsewhere . . . . The area to which transfer is permitted is severely limited [and] complex procedures are required to obtain a transfer permit." *42 N. Y. 2d 324, 334-335, 366 N. E. 2d 1271, 1277 (1977)*.

And in other cases the Court of Appeals has noted that TDR's have an "uncertain and contingent market value" and do "not adequately preserve" the value lost when a building is declared to be a landmark. *French Investing Co.* v. *City of New York, 39 N. Y. 2d 587, 591, 350 N. E. 2d 381, 383*, appeal dismissed, *429 U.S. 990 (1976)*. On the other hand, there is evidence in the record **[***666]** that Penn Central has been **[*152]** offered substantial amounts for its TDR's. Because the record on appeal is relatively slim, I would remand to the Court of Appeals for a determination of whether TDR's constitute a "full and perfect equivalent for the property taken." [14]

[14] The Court suggests, *ante*, at 131, that if appellees are held to have "taken" property rights of landmark owners, not only the New York City Landmarks Preservation Law, but "all comparable landmark legislation in the Nation," must fall. This assumes, of course, that TDR's are not "just compensation" for the property rights destroyed. It also ignores the fact that many States and cities in the Nation have chosen to preserve landmarks by purchasing or condemning restrictive easements over the facades of the landmarks and are apparently quite satisfied with the results. See, *e. g.*, *Ore. Rev. Stat. §§ 271.710*, *271.720* (1977); Md. Ann. Code, Art 41, § 181A (1978); Va. Code §§ 10-145.1 and 10-138 (e) (1978); Richmond, Va., City Code § 17-23 *et seq.* (1975). The British National Trust has effectively used restrictive easements to preserve landmarks since 1937. See National Trust Act, 1937, 1 Edw. 8 and 1 Geo. 6 ch. lvii, §§ 4 and 8. Other States and cities have found that tax incentives are also an effective means of encouraging the private preservation of landmark sites. See, *e. g.*, *Conn. Gen. Stat. § 12-127a* (1977); Ill. Rev. Stat., ch. 24, § 11-48.2-6 (1976); Va. Code § 10-139 (1978). The New York City Landmarks Preservation Law departs drastically from these traditional, and constitutional, means of preserving landmarks.

II

Over 50 years ago, Mr. Justice Holmes, speaking for the Court, warned that the courts were "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

LEdHN[11] [11]*Pennsylvania Coal Co. v. Mahon, 260 U.S., at 416*. The Court's opinion in this case demonstrates **[**2674]** that the danger thus foreseen has not abated. The city of New York is in a precarious financial state, and some may believe that the costs of landmark preservation will be more easily borne by corporations such as Penn Central than the overburdened individual taxpayers **[*153]** of New York. But these concerns do not allow us to ignore past precedents construing the Eminent Domain Clause to the end that the desire to improve the public condition is, indeed, achieved by a shorter cut than the constitutional way of paying for the change.

References

Supreme Court's views as to what constitutes "taking," within meaning of *Fifth Amendment's* command that private property not be taken for public use without just compensation.

26 Am Jur 2d, Eminent Domain 26, *63*

7 Am Jur Pl & Pr Forms (Rev), Constitutional Law, Form 41

4 Am Jur Proof of Facts 649, Eminent Domain

USCS, *Constitution, Fifth* and *Fourteenth Amendments*

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ALR Digests, Eminent Domain 156

L Ed Index to Annos, Eminent Domain

ALR Quick Index, Eminent Domain; Historical Matters

Federal Quick Index, Eminent Domain; Historical Sites and Buildings

Annotation References:

Supreme Court's views as to what constitutes "taking," within meaning of *Fifth Amendment's* command that private property not be taken for public use without just compensation. *57 L Ed 2d 1254*.

What provisions of the *Federal Constitution's Bill of Rights* are applicable to the states. *18 L Ed 2d 1388, 23 L Ed 2d 985*.

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Supreme Court of Pennsylvania.
UNITED ARTISTS THEATER CIRCUIT, INC., Appellant,
v.
CITY OF PHILADELPHIA, PHILADELPHIA HISTORICAL COMMISSION, Appellee.

No. 48 E.D. 1990
Argued Dec. 6, 1990.
Decided July 10, 1991.
Reargument Granted Aug. 30, 1991.

Theater owner brought action challenging city's designation of the theater property, seeking preliminary injunction and declaratory judgment that the city historic commission was without authority to designate the theater building as historic. The Court of Common Pleas of Philadelphia County, No. 3955 April Term 1987, Charles A. Lord, J., dismissed the appeal from the commission at No. 1277 C.D. 1987 and quashed the appeal at No. 1985 C.D. 1987. Owner appealed. The Commonwealth Court, Crumlish, Jr., President Judge, 125 Pa. Cmwlth. Ct. 520, 558 A.2d 155, affirmed. Owner appealed. The Supreme Court, No. 48 E.D. Appeal Docket 1990,Larsen, J., held that provisions in city's code authorizing historic designation of private property without consent of the owner were unfair, unjust and amounted to unconstitutional taking without just compensation.

Reversed.

Cappy, J., concurred with opinion in which Nix, C.J., and McDermott, J., joined.

West Headnotes

[1] Eminent Domain 148 ⚿2.27(3)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.27 Environmental Protection
148k2.27(3) k. Historic Preservation; Landmarks. Most Cited Cases
(Formerly 148k2(5))

Provisions in city's code authorizing historic designation of private property without consent of the owner were unfair, unjust and amounted to unconstitutional taking without just compensation; after historic designation, law required that property be maintained in its present state at the owner's expense unless the city historical commission granted permission for a change, thus city was forcing owner to bear a public burden. Const. Art. 1, § 10.

[2] Eminent Domain 148 ⚿2.27(3)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.27 Environmental Protection
148k2.27(3) k. Historic Preservation; Landmarks. Most Cited Cases
(Formerly 148k2(5))

Where exercise of police power concerns restrictions on use of private property, such as regulation of property designated as historic, it is subject to constitutional limitations. Const. Art. 1, § 10.

****7*13** Richard A. Sprague,J. Shane Creamer, Hugh J. Bracken, Pamela W. Higgins, Philadelphia, for United Artists Theater Circuit, Inc.

Maria L. Petrillo, Chief Asst. City Sol., Katherine L. Niven, Chief Counsel, for amicus-Penna. Historical and Museum Com'n.

Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, ZAPPALA, PAPADAKOS and CAPPY, JJ.

OPINION OF THE COURT

LARSEN, Justice.

In this appeal of United Artists Theater Circuit, Inc., the question is whether the appellee, Philadelphia Historical Commission (Commission), acting pursuant to the "Historic Buildings, Structures, Sites, Objects and Districts" provisions of The Philadelphia Code (Section 14-2007) in designating the appellant United Artists' Boyd Theater building ***14** as historic is in violation of the constitutional rights of the appellant. The Commonwealth Court found no constitutional violation and affirmed the Philadelphia County Common Pleas Court's order dismissing the action. We disagree. After review, we find that by designating the theater building as historic, over the objections of the owner, the City of Philadelphia through its Historical Commission has "taken" the appellee's property for public use without just compensation in violation of Article 1, Section 10 of the Pennsylvania Constitution and we, therefore, reverse.

By a letter dated March 28, 1986, the Commission notified Sameric Corporation of Chestnut St., Inc., the predecessor owner of the Boyd Theater, that it, the Commission, pursuant to Section 14-2007 of the Philadelphia Code, planned to consider, at a public meeting scheduled for April 30, 1986, the proposed designation of the Boyd Theater as historic. The Commission's letter explained its views as to the benefits, limitations and responsibilities which derive from the ownership of property which is designated historic. The then owner, Sameric Corporation, investigated the Commission's proposal of historic designation and did not favor the idea. Sameric Corporation was able to obtain a continuance of the proposed consideration of its building for historic designation at the April 30, 1986 meeting. Subsequently, the matter was continued on five additional occasions. Eventually, consideration of the proposed historic designation was rescheduled for the Commission's meeting of January 28, 1987. Sameric Corporation responded by filing two consecutive lawsuits seeking to enjoin the Commission from holding a meeting on the proposed designation, both of which lawsuits ended without the injunction Sameric Corporation sought. Thereafter, on March 25, 1987, the Commission met, denied Sameric Corporation's motion for a further continuance, presumedly proceeded to hear evidence and argument, and then voted to designate the Boyd Theater as historic. On that same day, Sameric Corporation returned to court requesting an order that the historic designation be vacated and the matter be rescheduled at a Commission ***15** meeting held no earlier than April 2, 1987. Sameric Corporation's request was granted and the proposal to designate the Boyd Theater as historic was rescheduled by the Commission for consideration at a public meeting on April 2, 1987.

A public meeting was held before the Commission on April 2, 1987, commencing at 3:30 p.m. The meeting was called to order by the Chairman, Edward A. Montgomery, Jr. who recognized Commissioner David Brownlee. Commissioner Brownlee took the floor and, specifically referring to the unanimous recommendation of the Designation Committee, raised the matter of the proposed historic designation of the ****8** Boyd Theater. Commissioner Brownlee then gave testimony and argument in support of the Commission's proposal to designate the Boyd Theater as historic. (R.R., pps. 53a-63a). Commissioner Brownlee advanced three reasons in support of the recommendation of historic designation: (1) the building is an important example of art deco architecture; (2) the building is the work of an important Philadelphia architectural firm; and (3) the building as a movie palace represents a significant phase in American cultural history and in the history of Philadelphia. (R.R., pps. 53a-54a).

Following Commissioner Brownlee's testimony, Commissioner Randall Baron offered a slide presentation of the Boyd Theater property and furnished additional testimony and argument in favor of the recommendation to designate the Boyd Theater as historic. (R.R., pps. 63a-64a). The testimony of Commissioner Brownlee along with the slide presentation and testimony offered by Com-

missioner Baron constituted the "case" for historic designation presented "by the Commission",[FN1] to the Commission. (R.R., p. 64a). ***16** Commissioners Brownlee and Baron then answered questions posed by their fellow Commissioners (R.R. pps. 64a-80a), and by counsel for the owner, Sameric Corporation (R.R., pps. 83a-89a).

> FN1. We are troubled by a procedure where the Commission, apparently through a designation committee, recommends properties for historical designation, provides the testimony and evidence in support of its recommendation, argues the case for historical designation through one or more of its commission members, and then decides whether the property it recommended should be so designated. There is an obvious lack of due process in such a procedure. The property owner, whose property rights are put in jeopardy by the Commission's proposal of historical designation, is entitled to a neutral and detached arbiter in the first instance. *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed2d 267 (1972). Under the circumstances, the Commission is hardly a neutral and detached arbiter. To the contrary, the Commission is a determined advocate.

Mr. Merton Shapiro of Sameric Corporation gave testimony opposing the proposed historic designation. Also giving testimony in opposition to the proposed designation was Emanuel Reider an architect.[FN2] At the conclusion of the meeting, the Commission voted for historic designation. By letter dated April 14, 1987, the Commission officially notified the owner, Sameric Corporation, that the Boyd Theater property had been designated historic.

> FN2. Mr. Reider of the award-winning firm Evantash Reider Architects testified, inter alia, that of a list of eighteen features which distinguishes the art deco style, only five of those features are incorporated in the exterior of the Boyd Theater. (R.R., p. 120a) He further testified that the architectural firm which designed the Boyd Theater was not known for its art deco work. (R.R., p. 121a) Additionally, it was his opinion that the theater was a mediocre building. (R.R., p. 122a)

Sameric Corporation reacted to the notice of designation by filing a suit in equity and a petition for a preliminary injunction in the Court of Common Pleas of Philadelphia County. Sameric's suit, inter alia, sought a declaratory judgment that the Commission was without authority to designate its Boyd Theater building as historic. The trial court properly treated the suit and petition as an appeal pursuant to the provisions of the Local Agency Law, 2 Pa.C.S. § 752, and the matter was submitted to the lower court upon the record of the meeting before the Commission and the briefs of counsel.[FN3] The lower court dismissed ***17** the appeal. Subsequently, upon further appeal, the Commonwealth Court affirmed. We granted appellant's petition for allowance of appeal to consider, inter alia, the constitutionality of the Commission's actions.[FN4] While this matter was pending in ****9** this court, the Boyd Theater was sold by Sameric Corporation to United Artists and the new owner, United Artists, was substituted as the appellant.

> FN3. Prior to the hearing in the lower court, the parties agreed that the Commission was a local agency and Sameric's suit in equity and petition for an injunction should be treated as an appeal from the Commission's decision pursuant to the provisions of the Local Agency Law, 2 Pa.C.S. § 752.
>
> "If a complaint in the nature of equity ... is commenced against a government unit ..., objecting to a governmental determination ..., where the proper mode of relief is an appeal from the determination of the government unit, ... the papers

whereon the process ... was commenced shall be regarded and acted on as an appeal from such determination....” 42 Pa.C.S. § 708.

FN4. The standard of review in an appeal from a determination of a local agency is: “[A] reviewing court must affirm the adjudication of the commission unless it is in violation of the constitutional rights of the appellant or not in accordance with law, the procedural provisions of the local agency law are violated, or a finding of fact of the commission necessary to support its adjudication is not supported by substantial evidence, Local Agency Law, Act of April 28, 1978, P.L. 202, No. 53, § 5, 2 Pa.C.S.A. § 754....”

Tegzes v. Township of Bristol, 504 Pa. 304, 308, 472 A.2d 1386, 1387 (1984).

Article I, Section 27 of the Pennsylvania Constitution provides as follows:

The people have a right to clean air, pure water, and to the preservation of the natural scenic, historic and esthetic values of the environment. Pennsylvania's 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.

Pursuant to that constitutional provision, the City of Philadelphia amended The Philadelphia Code by enacting Section 14-2007, Historic Buildings Structures, Sites, Objects and Districts which states that the purposes of the section are to:

(1) preserve buildings, structures, sites and objects which are important to the education, culture, traditions and economic values of the city;

***18** (2) establish historic districts to assure that the character of such districts is retained and enhanced;

(3) encourage the restoration and rehabilitation of buildings, structures, sites and objects which are designated as historic or which are located within and contribute to the character of districts designated as historic without displacing elderly, long-term, and other residents living within those districts;

(4) afford the City, interested persons, historical societies and organizations the opportunity to acquire or to arrange for the preservation of historic buildings, structures, sites and objects which are designated individually or which contribute to the character of historic districts;

(5) strengthen the economy of the City by enhancing the City's attractiveness to tourists and by stabilizing and improving property values; and,

(6) foster civic pride in the architectural, historical, cultural and educational accomplishments of Philadelphia.

Section 14-2007 further provides that the Mayor shall appoint a Philadelphia Historical Commission which shall have the power, inter alia, to:

Designate as historic those buildings, structures, sites and objects which the Commission determines, pursuant to the criteria set forth in Subsection (5) of this Section, are significant to the City FN5

FN5. Additionally, the Commission has the power: to designate historic districts and delineate the boundaries thereof; to maintain a comprehensive inventory of historic buildings, sites and districts; to review and act upon all applications for permits to alter or demolish historic buildings, etc. or buildings, etc. located in a historic district; to make recommendations to the Mayor and City Council concerning the use of funds to promote preservations aims of the Code; to make recommendations to the Mayor and City Council for the City to

> purchase any building, etc. where private preservation is not feasible, or that the City acquire any property interest that would promote historic preservation; to increase public awareness of the value of historic preservation; to adopt rules of procedure for the conduct of Commission business; and to keep minutes and records of all proceedings in which proposed historic designations are considered. Section 14-2007(4)(b)-(i).

***19** Section 14-2007(4)(a). Subsection 5, which establishes criteria for historic designation, provides that: "A building ... may be designated for preservation if it;

> (a) Has significant character, interest or value as part of the development, heritage or cultural characteristics of the City, Commonwealth or Nation or is associated with the life of a person in the past; or,
>
> (b) Is associated with an event of importance to the history of the City, Commonwealth or Nation; or,
>
> ****10** (c) Reflects the environment in an era characterized by a distinctive architectural style; or,
>
> (d) Embodies distinguishing characteristics of an architectural style or engineering specimen; or,
>
> (e) Is the work of a designer, architect, landscape architect or designer, or engineer whose work has significantly influenced the historical, architectural, economic, social, or cultural development of the City, Commonwealth or Nation; or,
>
> (f) Contains elements of design, detail, materials or craftsmanship which represents a significant innovation; or,
>
> (g) Is part of or related to a square, park or other distinctive area which should be preserved according to an historic, cultural or architectural motif; or,
>
> (h) Owing to its unique location or singular physical characteristics, represents an established and familiar visual feature of the neighborhood, community or City; or,
>
> (i) Has yielded, or may be likely to yield, information important in pre-history or history; or,
>
> (j) Exemplifies the cultural, political, economic, social or historical heritage of the Community.

The stated purposes of Section 14-2007 are laudable, but the question is whether the costs associated with Philadelphia's desire to preserve "historic" buildings, sites, objects and districts should be borne by all of the taxpayers or whether those costs can be lawfully imposed on the owner ***20** of any property the Commission chooses to designate as historic.

Under Section 14-2007, historical designation has a significant impact on the rights and interests of the owner of the property designated. The Philadelphia Code provides that "[b]efore the Department (of Licenses and Inspections) may issue a permit to alter or demolish an historic building, structure, site or object; ... the permit application shall be forwarded to the Commission for its review." Section 14-2007(7)(c). The Department of Licenses and Inspections "shall post, within seven (7) days, notice indicating that the owner has applied for a permit to demolish the property; that the property is historic ...; that the application has been forwarded to the Commission for review" Section 14-2007(7)(b). Further,

> At the time that a permit application is filed with the Department (of Licenses and Inspections) for alterations, demolition or construction subject to the Commission's review, the applicant shall submit to the Commission the plans and specifications of the proposed work, including the plans and specifications for any construction proposed after demolition and such other information as the Commission may reasonably require to exercise its duties and responsibilities under [the or-

dinance]. Section 14-2007(7)(e).

Additionally, "[i]n 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, the following information to the Commission:" (1) the amount the owner paid for the property, the date of purchase and the name of the former owner; (2) the assessed value of the property; (3) detailed financial information pertaining the the property for the previous two years; (4) all appraisals of the property obtained by the owner relating to the purchase of financing of the property; (5) a schedule of every listing of the property for sale or for ***21** rent with financial details; (6) a statement of any consideration which the owner gave pertaining to profitable adaptive uses for the property. Section 14-2007(7)(f)(1-6). Additionally, "the Commission may further require the owner to conduct, at the owner's expense, evaluations or studies, as are reasonably necessary in the opinion of the Commission to determine whether the building ... has or may have alternate uses consistent with preservation." Section 14-2007(7)(f)(7). Where the Commission has an objection, the Department ("of Licenses and Inspections) *shall* deny the permit." Section 14-2007(7)(g)(2). (Emphasis supplied).

> ****11** The Commission may require that a permit for the alteration or demolition of any building ... subject to its review be issued subject to such conditions as may reasonably advance the purposes of [the ordinance]. The Department (of Licenses and Inspections) *shall* incorporate all such requirements of the Commission into the permit at the time of issuance. Section 14-2007(7)(i). (Emphasis supplied).

At the hearing on April 2, 1987, counsel for the owner stated that he was informed that in Philadelphia the only changes or improvements a property owner can lawfully do without a permit is paint and paper. (R.R., p 127a) Thus, after historic designation, any work other than painting and papering would require the Commission's approval. He further observed that the owner would be legally obligated to obtain permission from the Commission to move a mirror from one wall to another.[FN6] (R.R., pps. 127a-128a). No one on the Commission disputed counsel's observation.

> FN6. There was much testimony concerning a variety of mirrors which adorned the interior of the theater and which Commissioners Brownlee and Baron believed to be significant. (R.R., pps. 58a, 63a, 64a, 65a, 111a and 112a)

[1] When, in April, 1987, the Boyd Theater was designated as historic over the objections of the owner, the Commission obtained almost absolute control over the property, including the physical details and the uses to which it could be put. Further, the historic designation imposed upon the owner an affirmative duty to preserve the building,***22** at the exclusive expense of the owner, in the condition, configuration, style and appearance mandated by the Commission.

> The exterior of every historic building ... shall be kept in good repair as shall the interior portions of such buildings ..., neglect of which may cause or tend to cause the exterior to deteriorate, decay, become damaged or otherwise fall into a state of disrepair. Section 14-2007(8)(c).

This affirmative obligation to preserve the building in the manner dictated by the Commission is backed by criminal penalties. Section 14-2007(9)(c).[FN7]

> FN7. "Any person who violates a requirement of this Section or fails to obey an order issued by the Department shall be subject to a fine of three hundred (300) dollars or in default of payment of the fine, imprisonment not exceeding ninety (90) days." Section 14-2007(9)(c).

Article 1, Section 10 of the Pennsylvania Constitution provides in part: "nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." FN8 Prior to the historical designation of the Boyd Theater that property could have been used by the owner for any lawful purpose just as neighboring property owners could and can so use their properties. Further, prior to the historical designation of the Boyd Theater the owner could, without governmental control, alter, revise and remodel the premises in any lawful way just as neighboring properties could and can be altered, revised and remodeled. Now, however, after the Commission has designated the Boyd Theater as historic, the law requires that the property be maintained in its present state at the owner's expense unless the Commission grants permission for a change. "Regulation amounts to a taking when government forces 'some people alone to bear public ***23** burdens, which in all fairness and justice, should be borne by the public as a whole.' " *Pennsylvania Public Utility Commission v. Pennsylvania Gas and Water Co.*, 492 Pa. 326, 334, 424 A.2d 1213, 1218 (1980) citing *Armstrong v. U.S.*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960). Here, Philadelphia, in assuming control over the Boyd Theater property, is forcing the owner of that property to bear a *public* ****12** burden, ostensibly to enhance the quality of life of the public as a whole. Philadelphia has decided that the Boyd Theater shall be preserved for the benefit of sightseers and the public at large. This is a burden that, in fairness and justice, should be borne by all.

FN8. This right is also secured by the Fifth Amendment of the Federal Constitution which provides in part: "nor shall private property be taken for public use, without just compensation." This Fifth Amendment provision is made applicable to the states by the Fourteenth Amendment. *Chicago B & Q R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897). We, however, do not consider the Fifth Amendment of the Federal Constitution in our decision. Rather, we decide this case entirely upon Article 1, Section 10 of the Pennsylvania Constitution.

[2] The Commission, citing the United States Supreme Court opinion in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) argues that historic preservations laws have been enacted, principally in recognition of two concerns:

> The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that *structures with special historic, cultural, or architectural significance enhance the quality of life for all.* Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today. '[H]istoric conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing-or perhaps developing for the first time-the quality of life for people.' 438 U.S. at 108 [98 S.Ct. at 2651] (footnotes omitted) (Emphasis added).

(Brief of Appellee, p. 27) The Commission argues that these values are explicitly embodied in the Pennsylvania Constitution FN9 and are the basis of historic preservation ordinances including Section 14-2007 of the Philadelphia ***24** Code. The Commission contends that the historic designation of the Boyd Theater pursuant to the provisions of Section 14-2007, and in furtherance of those values, constitutes a valid exercise of the police power. In *Redevelopment Authority of Oil City v. Woodring*, 498 Pa 180, 445 A.2d 724 (1982) we stated:

FN9. Article 1, Section 27.

In a case involving the constitutionality of a zoning ordinance, this Court held that 'neither aesthetic reasons nor the conservation of property values or the stabilization of economic values ... are, singly or combined, sufficient to promote the health or the morals or the safety or the general welfare of the ... inhabitants or property owners.' *Medinger Appeal*, 377 Pa. 217, 226, 104 A.2d 118, 122 (1954). This Court concluded that actions taken in furtherance of these objectives could, therefore, never constitute an exercise of the police power. This definition of police power is equally applicable in a case where there is an alleged exercise of the power of eminent domain; police power is the same, whether it is used to justify a zoning ordinance or a taking for public use without compensation....

Id., 445 A.2d at 727. This interpretation of police power is likewise applicable where, as here, government seeks to exercise control over private property through a historic preservation ordinance. "Police power controls the use of property by the owner, for the public good, its use otherwise being harmful ..." *White's Appeal*, 287 Pa. 259, 264, 134 A. 409, 411 (1926). "If after investigating there is doubt as to whether the statute is enacted for a recognized police object, or if, conceding its purpose, its exercise goes too far, it then becomes the judicial duty [to] ... declare the given exercise of the police power invalid." *Id.*, 287 Pa. at 265, 134 A. 409. Additionally, where the exercise of police power concerns restrictions on the use of private property, such as regulation of property designated as historic, it is subject to constitutional limitations. See *Id.*, 287 Pa. at 264, 134 A. 409.

***25** In a dissenting opinion filed by Judge Harry Kramer in the case of *First Presbyterian Church of York v. City Council of the City of York*, 25 Pa.Commw. 154, 360 A.2d 257 (1976) he observed that:

> [O]ur founding fathers and their contemporary patriots were as much interested in protecting citizens' private property ****13** rights against encroachments by government as they were in liberty itself. And so they made constitutional provisions against government taking private property for public use except through the stringent and restrictive governmental powers of eminent domain.
>
> These very basic private property principles have been eroded during the past fifty years especially through, inter alia, the application of zoning laws [FN10] and urban redevelopment laws.... It seems ... that with the advent of historical [preservation] statutes, such as [that] involved in this case, ... the legislatures and the courts are adding a new dimension which may do violence to constitutional private property rights, for now we hold that a private property owner must make his property available without compensation for public view. In effect,***26** he must dedicate his property without compensation for public historical, aesthetic, educational, and museum purposes, which in reality are public uses.
>
> FN10. Restrictions established by historic preservations laws such as Section 14-2007 of the Philadelphia Code differ from those imposed by zoning laws.
>
> > Typical zoning restrictions may, it is true, so limit the prospective uses of a piece of property as to diminish the value of that property in the abstract because it may not be used for the forbidden purposes. But any such abstract decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties. All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another. In the words of Mr. Justice Holmes, speaking for the

> Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922), there is 'an average reciprocity of advantage.'
>
> *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 2667, 57 L.Ed.2d 631 (1978) (Dissenting opinion by Rehnquist, J. now C.J.) When a specific piece of property is targeted and treated differently from neighboring properties, no such reciprocity exists. If anything, singling out the Boyd Theater for historic designation is akin to "spot zoning" which we have declared to be illegal. *French v. Zoning Board of Adjustment*, 408 Pa. 479, 184 A.2d 791 (1962).

Id., 25 Pa. Commonwealth Ct. at 165 360 A.2d at 62-263. In this case, the owner of the Boyd Theater is required by ordinance to assume and discharge an affirmative duty to use the property and preserve the premises in the condition and style as dictated by the Commission, at the owner's exclusive expense and without compensation. "A man's home and property used to be his castle." *Cass Plumbing & Heating Co. v. PPG Industries, Inc.*, 488 Pa. 564, 565, 412 A.2d 1376, 1377 (1980) (Dissenting Opinion, Larsen, J. joined by Flaherty, J.) Because one's property was built in a certain architectural style or designed by a particular architect does not make it any less his castle. "Over [60] years ago, Mr. Justice Holmes, ... warned that the courts were 'in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change'." (citation omitted) *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 152, 98 S.Ct. 2646, 2673, 57 L.Ed.2d 631 (Dissenting Opinion by Rehnquist, J., now C.J.). Accordingly, we hold that the "Historic Buildings, Structures, Sites, Objects and Districts" provisions of the Philadelphia Code (Section 14-2007), which authorize the historic designation of private property-in this case the Boyd Theater-without the consent of the owner,[FN11] are unfair, unjust and amount to an unconstitutional taking without just ****14** compensation in violation***27** of Article 1, Section 10 of the Pennsylvania Constitution.[FN12] The order of the Commonwealth Court is reversed.

> FN11. Unlike the Philadelphia Code, under Pennsylvania's Historic Preservation Act, 1988, May 26, P.L. 414, No. 72, 37 Pa.C.S. § 501, et seq., private property may not be included on the historic register if the owner objects.
>
> > The owner of private property of historic, architectural or archaeological significance, or a majority of the owners of private properties within a proposed historic district, shall be given the opportunity to concur in, or object to, the nomination of the property or proposed district for inclusion on the Pennsylvania Register of Historic Places. If the owner of the property, or a majority of the owners of the properties within the proposed historic district, object to the inclusion, the property shall not be included on the register.
>
> 37 Pa.C.S. § 503. This provision requiring the consent of the owner avoids the constitutional violation of "taking" without just compensation.
>
> FN12. The appellant also challenged the Commission's power to designate the interior of a private building, such as its Boyd Theater, as historic, and the sufficiency of the evidence. Since we have held that the Commission's designation of appellant's building violates the Pennsylvania Constitution, we find it unnecessary to address the other issues raised.

CAPPY, J., filed a concurring opinion joined by

NIX, C.J., and McDERMOTT, J.

CAPPY, Justice, concurring.

I concur in the result reached by the majority herein. I believe that the ordinance in question, section 14-2007, permits only the exterior of buildings to be designated as historical and does not refer to the interior of such buildings. The only reference within the entire ordinance that makes any distinction between exterior and interior is section 14-2007(8)(c), which provides, in pertinent part:

> The exterior of every historic building, structure and object and of every building, structure and object located within an historic district shall be kept in good repair *as shall the interior portions of such buildings, structures and objects, neglect of which may cause or tend to cause the exterior to deteriorate, decay, become damaged or otherwise fall into disrepair.*

I find the plain meaning of this ordinance is that any reference to the interior of the building is only to the extent that it affects the exterior. As such, I do not believe we need to reach the issue of whether the designation of the subject building, both the exterior and interior, constitutes an unconstitutional "taking" for which compensation is required.[FN1] Rather, I would find that the Commission is ***28** without authority, under the ordinance, to designate the interior of a privately owned building historical. As such, I would deem the acts of the Commission in the instant case as overbroad and without force and effect.

> FN1. I note that the majority opinion herein does not address the holding of the United States Supreme Court decision in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), but rather focuses on the dissent. In *Penn Central*, the Court held, *inter alia*, that the New York City Landmark's Preservation Law did not constitute a "taking" under the Fifth Amendment to the United States Constitution that would require "just compensation." Although *Penn Central* was decided on federal constitutional law and the majority has decided the case *sub judice* under state constitutional law, I do not believe that the language of our state constitution necessarily mandates a different outcome on the issue of "taking."

It is a long standing principle of jurisprudence that where an issue can be resolved on a basis other than constitutional law, the court should not address the constitutional question. See *Krenzelak v. Krenzelak*, 503 Pa. 373, 469 A.2d 987 (1983); *Ballou v. State Ethics Commission*, 496 Pa. 127, 436 A.2d 186 (1981); *Mt. Lebanon v. County Board of Elections*, 470 Pa. 317, 368 A.2d 648 (1977). Furthermore, "courts may not declare a statute unconstitutional 'unless it *clearly*, *palpably*, and *plainly* violates the Constitution.' " *Tosto v. Pennsylvania Nursing Home Loan Agency*, 460 Pa. 1, 16, 331 A.2d 198, 205 (1975), quoting *Daly v. Hemphill*, 411 Pa. 263, 271, 191 A.2d 835, 840 (1963) (emphasis in original).

For the foregoing reasons, I would reverse the opinion of the Commonwealth Court and find that the acts of the Commission were without force and effect. I concur in the result.

NIX, C.J., and McDERMOTT, J., join the concurring opinion of CAPPY, J.

Pa.,1991.
United Artists Theater Circuit, Inc. v. City of Philadelphia, Philadelphia Historical Com'n
528 Pa. 12, 595 A.2d 6

END OF DOCUMENT

Supreme Court of Pennsylvania.
UNITED ARTISTS' THEATER CIRCUIT, INC., Appellant,
v.
CITY OF PHILADELPHIA, Philadelphia Historical Commission, Appellees.

Reargued Oct. 23, 1991.
Decided Nov. 9, 1993.

Owner of Boyd Theater brought action challenging designation of theatre as historic and seeking preliminary injunction and declaration that city historic commission was without authority to designate building as historic. The Court of Common Pleas of Philadelphia County, No. 3955 April Term 1987, Charles A. Lord, J., dismissed and quashed appeal. Owner appealed. The Commonwealth Court affirmed and appeal was taken. The Supreme Court, No. 48 E.D. Appeal Docket 1990,Larsen, J., 528 Pa.12, 595 A.2d 6, reversed. Following reargument, the Supreme Court, No. 48 E.D. Appeal Docket 1990,Nix, C.J., held that: (1) designation of privately owned building as historic without consent of owners was not taking, but (2) Philadelphia Historic Preservation Ordinance did not authorize designation of interior building as historical.

Reversed.

Papadakos, J., concurred and filed opinion.

West Headnotes

[1] States 360 ⚿4.1(1)

360 States
360I Political Status and Relations
360I(A) In General
360k4.1 Operation Within States of Constitution and Laws of United States
360k4.1(1) k. In General. Most Cited Cases

Pennsylvania Constitution can provide greater rights and protection to citizens of Commonwealth than provided under similar provisions of Federal Constitution.

[2] Eminent Domain 148 ⚿2.27(3)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.27 Environmental Protection
148k2.27(3) k. Historic Preservation; Landmarks. Most Cited Cases
(Formerly 148k2(1.1))

Designation of privately owned building as historic without consent of owner is not taking under the Pennsylvania Constitution. Const. Art. 1, § 10.

[3] Eminent Domain 148 ⚿2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases
(Formerly 148k2(1))

Conditions for determining that state or governmental action does not constitute taking requiring just compensation under Pennsylvania Constitution are: interest of general public rather than particular class of persons requires governmental action; means are necessary to effectuate that purpose; and means are not unduly oppressive upon property holder considering economic impact of regulation and extent to which government physically intrudes upon property. Const. Art. 1, § 10.

[4] Eminent Domain 148 ⚿2.27(3)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.27 Environmental Protection

148k2.27(3) k. Historic Preservation; Landmarks. Most Cited Cases
(Formerly 148k2(1.2), 148k2(1.1))
Historic designation of Boyd Theatre without owner's consent was not taking requiring just compensation under Pennsylvania's Constitution; general public had interest in preserving historical landmarks which required legislation, historic designation was essential to preserve historical landmarks, and the owner was not wholly deprived of any profitable use of theatre nor was there physical intrusion on property itself. U.S.C.A. Const. Art. 1, § 10.

[5] Environmental Law 149E 78

149E Environmental Law
149EIII Historical Preservation
149Ek77 Property Protected; Designation and Listing
149Ek78 k. In General. Most Cited Cases
(Formerly 199k25.5(8) Health and Environment)
City historical commission exceeded its authority under Philadelphia Historic Preservation Ordinance by designating interior of privately owned Boyd Theatre as historic; ordinance required only that interior be maintained physically for express purpose supporting exterior of building.

****613*372** Richard A. Sprague,J. Shane Creamer and Hugh J. Bracken, Sprague, Higgins & Creamer, Philadelphia, for appellant, United Artists Theater Circuit, Inc.

Maria L. Petrillo, Chief Asst. City Sol., Charles W. Bowser, Philadelphia, for appellee.

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Frank M. Thomas, Jr. and Mark P. Edwards, Philadelphia, for amicus curiae, Nat. Trust for Historic Preservation, et al.

Mary K. Conturo, Pittsburgh, for amicus curiae, City of Pittsburgh.

Keith Welks, Harrisburg, for amicus curiae, Comm., D.E.R.

Kenneth M. Jarin and Robert C. Drake, Philadelphia, for amicus curiae, Pa. League of Cities.

Gregory R. Neuhauser, Walter W. Cohen, Harrisburg, for amicus curiae, Attorney General of Pa.

Anthony Green, Washington, DC, for amicus curiae, Congressman Thomas M. Foglietta, et al.

Henry Ingram, Pittsburgh, for amicus curiae, Pa. Builders Assoc., et al.

Nancie G. Marzulla, Defenders of Property Rights, Washington, DC.

Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, ZAPPALA, PAPADAKOS and CAPPY, JJ.

****614 OPINION**

NIX, Chief Justice.

FACTS

On July 10, 1991, this Court found that the Philadelphia Historic Preservation Ordinance "which authorize[d] the historic designation of private property ... without the consent ***373** of the owner, [is] unfair, unjust and amount[s] to an unconstitutional taking without just compensation in violation of Article I, Section 10 of the Pennsylvania Constitution." *United Artists' Theater Circuit, Inc. v. City of Philadelphia, Philadelphia Historical Commission*, 528 Pa. 12, 26-27, 595 A.2d 6, 13-14 (1991).[FN1] This result stands in contrast to the result reached by the United States Supreme Court in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), in which that Court held that historic designation without the consent of the owner is not a "taking" under the Fifth and Fourteenth Amendments to the United States Constitution.

FN1. For a more detailed explanation of

the facts, *see id.* 528 Pa. at 13-17, 595 A.2d at 7-9.

The City of Philadelphia filed a petition pursuant to Rule 2543 of the Pennsylvania Rules of Appellate Procedure requesting this Court to hear reargument and reconsider our July 10, 1991 ruling that the designation of a building as historic is a "taking" under our Constitution and requires "just compensation." We granted reargument on August 23, 1991, and on October 23, 1991, the parties reargued the sole issue of whether the designation of a building as historic is a "taking" under our Constitution, requiring just compensation. United Artists requests that we reaffirm our July 10, 1991 decision, and hold that a designation as historic is a taking which requires just compensation. The City of Philadelphia and the Philadelphia Historical Commission ("Commission") argue that the rights afforded by the takings provision in our Constitution mirror those of the United States Constitution; moreover, our Environmental Rights Amendment empowers the state and local governments to protect the historic resources of our Commonwealth. For the reasons that follow, we hold that under the Constitution of Pennsylvania, the designation of a building as historic without the consent of the owner is not a "taking" that requires just compensation; however, because the Commission acted outside of its statutory authority, we vacate the Commission's designation of the Boyd Theater as historic.

***374 I. TAKING**

A. UNITED STATES CONSTITUTION

Before we turn to the Commission's actions in this case, we must first examine the constitutionality of historic designation. The United States Supreme Court has ruled that the Fifth and Fourteenth Amendments to the United States Constitution do not prohibit a state or municipality from designating a building as "historic" and placing restrictions on the owner's use of the building. In *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), the Supreme Court examined a claim that the New York City Landmarks Preservation Law constituted a "taking" under the Fifth and Fourteenth Amendments of the United States Constitution. The Appellants presented "a series of arguments, which, while tailored to the facts of [that] case, essentially urge[d] that any substantial restriction imposed pursuant to a landmark law must be accompanied by just compensation if it is to be constitutional." *Id.* at 128-29, 98 S.Ct. at 2661-62, 57 L.Ed.2d at 651. The Supreme Court rejected these arguments, and upheld the New York City Landmark Preservation Law. The Court found that there was no taking, that the restrictions imposed were substantially related to the general welfare, and that the regulation permitted a reasonable beneficial use of the landmark site. *Id.* at 138, 98 S.Ct. at 2666, 57 L.Ed.2d at 657.

The issue which confronted the United States Supreme Court mirrors the question before us today: "whether the designation of a property as historic without consent of the property owner constitutes a taking" pursuant to Article I, Section 10 of the Pennsylvania Constitution. Likewise, we are examining****615** many of the same arguments which were raised by the Penn Central Transportation Company. It is without question that this issue, if framed as an examination under the federal Constitution, is answered by the decision of the United States Supreme Court in *Penn Central*. Here the parties urge that we examine the rights afforded to property owners under the Constitution of this Commonwealth, to determine if ***375** the rights under our Constitution are more expansive than those rights guaranteed under the federal Constitution.

B. PENNSYLVANIA CONSTITUTION

[1] This Court has recognized that our Constitution can provide greater rights and protection to the citizens of this Commonwealth than are provided under similar provisions of the federal Constitution. We have stated:

> [T]he federal Constitution establishes certain minimum levels which are "equally applicable to the [analogous] state constitutional provision." However, each state has the power to provide

broader standards and go beyond the minimum floor which is established by the federal Constitution.

Commonwealth v. Edmunds, 526 Pa. 374, 388, 586 A.2d 887, 894 (1991) (quoting *Commonwealth v. Sell*, 504 Pa. 46, 63, 470 A.2d 457, 466 (1983)). In *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991), this Court examined the state and federal Constitutions in an appeal which challenged the acceptance of a "good faith" exception to the exclusionary rule. In *Edmunds*, we held that the Pennsylvania Constitution did not incorporate a good faith exception to the exclusionary rule for the violation of the constitutional requirement that search warrants accompany any search or seizure. Mr. Justice Cappy, writing for the majority of the Court, established the following four-part framework for analyzing our state Constitution:

litigants [must] brief and analyze at least the following four factors:

1) text of the Pennsylvania constitutional provision;

2) history of the provision, including Pennsylvania case law;

3) related case law from other states;

4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

Depending upon the particular issue presented, an examination of related federal precedent may be useful as part of the state constitutional analysis, not as binding authority, ***376** but as one form of guidance. However, it is essential that courts in Pennsylvania undertake an independent analysis under the Pennsylvania Constitution.

Edmunds, 526 Pa. at 390-91, 586 A.2d at 895. Therefore, in accordance with *Edmunds*, we will undertake this four-part analysis.

II. EDMUNDS

A. TEXT

[2] The first element to be examined is the text of the Pennsylvania Constitution. It protects the citizens of Pennsylvania from deprivations of property or takings for public use in the following provision:

[N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.

Pa. Const. art. I, § 10.

Similarly, the federal Constitution protects all citizens of the United States from deprivation of their property:

No person ... shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

Both provisions contain two elements. The first element is that no property may be taken without due process of law or authority of law; the second element requires that just compensation accompany any taking for public use. Therefore, the texts of both constitutional provisions are almost identical for our purposes.

****616 B. THE HISTORY OF THE PROVISION

The second element of the *Edmunds* analysis is an examination of the history of the provision, including Pennsylvania case law.

Section 10 of Article I has its origins in Clause VIII of the Declaration of Rights in the 1776 Pennsylvania Constitution. This original clause allowed the owner's legal representative, ***377** i.e., the state legislature, to authorize the taking of property without compensation. After the federal Constitution had been ratified, Pennsylvania added a just compensation requirement to its Declaration of Rights in 1790. Since 1790, the relevant provision has remained unchanged. *See* Pa. Const. art. I, § 10 Historical Note (Purdons 1969).

An examination of our case law reveals that this Court has continually turned to federal precedent for guidance in its "taking" jurisprudence, and indeed has adopted the analysis used by the federal courts. In *Best v. Zoning Board of Adjustment,* 393 Pa. 106, 141 A.2d 606 (1958), this Court was faced with a challenge to the determination of the Zoning Board of the City of Pittsburgh that the proposed use of a property as a multiple unit dwelling was adverse to the public health, safety and morals of the community. In *Best,* we explicitly relied upon federal precedent for two propositions. First, in examining the police powers of a state under Section 1 of Article I, we explicitly adopted the following test enunciated by Mr. Justice Harlan in *Chicago, Burlington and Quincy Railway Co. v. Illinois,* 200 U.S. 561, 26 S.Ct. 341, 50 L.Ed. 596 (1906): "We hold that the police power of a state *embraces regulations designed to promote the public convenience or the general prosperity,* as well as regulations designed *to promote the public health, the public morals or the public safety."* *Id.* 393 Pa. at 114, 141 A.2d at 611 (emphasis added). Second, in response to the arguments that the denial of the most profitable use of the owner's property was an unconstitutional taking, this Court flatly rejected that proposition, citing the opinion of *Hadacheck v. Sebastian,* 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915). *Best,* 393 Pa. at 119, 141 A.2d at 613 ("Appellant's evidence on this issue amounts to no more than that she is prevented by the ordinance from putting her property to its most profitable use. This is not a constitutional objection.").

Five years later, in *Andress v. Zoning Board of Adjustment of the City of Philadelphia,* we articulated four observations regarding limitations of governmental power:

> ***378** 1) Our State and Federal Constitutions ordain, protect and guarantee *the ownership and use of private property.*
>
> 2) The Constitutionally ordained right of private property ... and other Constitutionally granted rights are not absolute. These rights and freedoms are subject to the paramount right of the Government to reasonably regulate and restrict, under a reasonable and non-discriminatory exercise of the police power, the use of property, whenever necessary for the public health, safety, morals and general welfare.
>
> 3) Neither the Executive nor the Legislature, nor any legislative body, nor any zoning or planning commission, nor any other Governmental body has the right-under the guise of the police power, or under the broad power of general welfare, or under the power of the Commander-in-Chief of the Armed Forces, or under any other express or implied power-*to take, possess or confiscate private property for public use or to completely prohibit or substantially destroy the lawful use and enjoyment of property without paying just compensation therefor.*
>
> 4) It has been difficult and at times impossible to sharply or clearly draw the dividing line between valid or constitutional zoning on the one hand and illegal or unconstitutional zoning on the other hand, *i.e.,* a taking of property with respect to the entire district zoned or with respect to a particular property.

Andress, 410 Pa. 77, 83-84, 188 A.2d 709, 712-13 (1963) (citations omitted). This Court fashioned these limitations from United States Supreme Court precedents in addition to our own jurisprudence. Analyzing the Zoning Board ruling at issue with regard to the limitations on governmental power discussed above, we explicitly relied on ****617***United States v. Central Eureka Mining Company,* 357 U.S. 155, 168, 78 S.Ct. 1097, 1104, 2 L.Ed.2d 1228, 1236 (1958) for the following analysis:

> Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the ***379** particular circumstances of each case. In doing so, we have recognized that *action in the form of regulation can so diminish the value of property as to*

constitute a taking. However, the mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation.

Andress, 410 Pa. at 89, 188 A.2d at 715 (quoting *United States v. Central Eureka Mining Co., supra*). This rationale formed the basis of our holding that the lower court must reevaluate the granting of a variance for the construction of an apartment building in an "A" Residential Zone.

Our reliance upon federal precedent continued in *Commonwealth v. Barnes and Tucker Co.,* 455 Pa. 392, 319 A.2d 871 (1974), where we adopted the following "classic rule" of the United States Supreme Court to determine whether state action constitutes a valid exercise of the police power or a "taking" requiring "just compensation":

To justify the State in ... interposing its authority in behalf of the public, it must appear, first, that the interests of the public ... require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Id. at 418, 319 A.2d at 895 (1974) (quoting *Lawton v. Steele,* 152 U.S. 133, 137, 14 S.Ct. 499, 501, 38 L.Ed. 385 (1894)). We affirmed the test when these parties returned to the Court in *Commonwealth v. Barnes and Tucker Co. (Barnes II),* 472 Pa. 115, 123, 371 A.2d 461, 465 (1977) to challenge a Commonwealth Court Order that the owners of a mine operate a facility to treat 7.2 million gallons of untreated acid mine water, 6 million gallons of which was from sources not owned by the Appellant company. We restated the classic rule of *Lawton v. Steele* to examine the parties "taking" claim. Armed with this test, and having recognized the state's interest in protecting the Commonwealth from additional discharge of polluted water into the waters of the Commonwealth, we held that the Appellant failed to meet its burden of proving ***380** that the Order was unconstitutional. *Id.* at 123-29, 371 A.2d at 465-68.

Following the evolution of the *Lawton v. Steele* test in federal law, this Court refined its taking analysis to include a two-part analysis of the "unduly oppressive" element of the test. In *National Wood Preservers, Inc. v. Commonwealth of Pennsylvania, Dep't. of Envtl. Resources,* 489 Pa. 221, 414 A.2d 37, *appeal dismissed, National Wood Preservers, Inc. v. Pennsylvania Dep't. of Envtl. Resources,* 449 U.S. 803, 101 S.Ct. 47, 66 L.Ed.2d 7 (1980), this Court upheld Section 316 of the Clear Streams Law, 35 P.S. § 691.316, as a constitutional exercise of the Legislature's police power and we held that Section 316 regulated water pollution resulting from conditions other than mine drainage. *Id.* at 225, 414 A.2d at 39. The Appellant in *Wood Preservers* focused his challenge on the requirement that the regulation not be "unduly oppressive upon individuals," the third element of the test enunciated by the United States Supreme Court in *Lawton v. Steele* and adopted by our Court in both *Barnes and Tucker* cases. In response to that challenge, a majority of this Court adopted the following two-part test for determining "unduly oppressive" regulations as enunciated in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978):

The first consideration is the economic impact of the regulation on the property holder. Specifically, it is relevant to compare property values before and after the regulation, though such a consideration is by no means conclusive.

The second factor identified in *Penn Central* is the character of the governmental action. The greater the extent to which governmental interference with property can be characterized as a physical intrusion, the more likely it is that such interference will be considered an unreasonable exercise of police power.

****618** *Wood Preservers,* 489 Pa. at 236-37, 414 A.2d at 45 (citations omitted). We dismissed

the Appellant's claim that Appellant bore no responsibility for the condition of their land and ***381** therefore, should not bear the burden of cleaning it. *Id.* at 238-40, 414 A.2d at 46-47.

Our most recent examination of a taking claim occurred in 1991 where a majority of this Court struck down as unconstitutional an amortization provision in a zoning ordinance which placed a ninety-day expiration period on all nonconforming uses. *PA Northwestern Distributors, Inc. v. Zoning Board of the Township of Moon,* 526 Pa. 186, 584 A.2d 1372 (1991). In *PA Northwestern,* the majority of this Court did not turn to federal precedent for guidance,[FN2] but relied instead on the long-standing Pennsylvania law that "municipalities lack the power to compel a change in the nature of an existing lawful use of property." *Id.* at 192, 584 A.2d at 1375.

FN2. The majority's analysis is contrary to federal law, which allows amortization of nonconforming uses provided that the amortization schedule is reasonable with regard to the nature of the business, including any improvements, the character of the neighborhood and the harm to the property owner. *See, e.g., Major Media of the Southeast, Inc. v. City of Raleigh,* 792 F.2d 1269 (4th Cir.1986), *cert. denied,* 479 U.S. 1102, 107 S.Ct. 1334, 94 L.Ed.2d 185 (1987).

[3] Thus, from the above case law, we glean the following three conditions for determining that state or governmental action does not constitute a taking requiring just compensation:

1) the interest of the general public, rather than a particular class of persons, must require governmental action;

2) the means must be necessary to effectuate that purpose;

3) the means must not be unduly oppressive upon the property holder, considering the economic impact of the regulation, and the extent to which the government physically intrudes upon the property.

[4] The first consideration is specifically analyzed in subsection D, "Policy Considerations," *infra* at pp. 619-620. As discussed *infra,* the citizens of Pennsylvania empowered the Commonwealth to act in areas of purely historic concern reflecting a general public interest in preserving historic landmarks which requires this type of legislation.

***382** With regard to the second element, Appellant urges that instead of historic designations, the City of Philadelphia should exercise its eminent domain powers to purchase properties it seeks to preserve. The United States Supreme Court noted a similar argument in *Penn Central,* and we find instructive its observations:

The consensus is that widespread public ownership of historic properties in urban settings is neither feasible nor wise. Public ownership reduces the tax base, burdens the public budget with costs of acquisitions and maintenance, and results in the preservation of public buildings as museums and similar facilities, rather than as economically productive features of the urban scene.

Penn Central, 438 U.S. at 109 n. 6, 98 S.Ct. at 2652 n. 6, 57 L.Ed.2d at 639 n. 6. There is no other practical means to accomplish the public interest in preserving historic landmarks. Therefore, historic designation is essential to preserve historic landmarks.

Finally, under our last consideration, the unduly oppressive test, we review the economic impact of the regulation and the degree of physical intrusion by the government. Neither side presents specific evidence on the issue of the economic impact of the historic designation; we do note that we have upheld as constitutional regulations that prevent the most profitable use of property. Here, the

regulations at issue could arguably deprive the owner of the most profitable use of his property, but this Court does not see the possibility that the owner is wholly deprived of any profitable use.[FN3] *See* ****619*383***Andress,* 410 Pa. at 89, 188 A.2d at 715; *Best,* 393 Pa. at 119, 141 A.2d at 613. Nor do the parties allege that there is any physical intrusion on the property itself. Thus, the action not being "unduly oppressive," historic designation does not fulfill the elements for a "taking" requiring just compensation.

FN3. There may be circumstances in which the mere designation of a property as historic would constitute a taking due to the extreme financial hardship resulting from such designation. No such facts have been presented in the instant case, nor need we decide here what level of financial hardship would meet this test.

Moreover, we note that the Philadelphia Ordinance in question provides a vehicle for relief when the designation would cause a substantial hardship. The Ordinance provides relief for a party who asserts that he is deprived of "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...." Philadelphia Code § 14-2007(7)(f).

C. RELATED CASE LAW

The third factor requires an analysis of related case law from other jurisdictions. Appellees and several Amici stress that no other state has held that historic designation is a taking under its constitution, and our research confirms that point. Appellant concedes the point as well, but argues that this should not be dispositive of the issue.

The fact that no other state has broken with the *Penn Central* decision is not dispositive of the matter, but it is persuasive. In *Edmunds,* when we rejected the United States Supreme Court's recognition of a good faith exception to the exclusionary rule, we noted that the highest courts of four states had rejected the good faith exception. New York had rejected it in 1985, one year after the Supreme Court recognized it. By 1990, at least seven other state appellate courts had eschewed the good faith exception in *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

Conversely, in fifteen years since *Penn Central,* no other state has rejected the notion that no taking occurs when a state designates a building as historic. The decade and a half in which the *Penn Central* decision has enjoyed widespread acceptance weighs against our rejecting the *Penn Central* analysis.

D. POLICY CONSIDERATIONS

The last prong of the *Edmunds* test is an examination of policy considerations, including unique issues of state and local concern, and their applicability within modern Pennsylvania jurisprudence. The first issue for us to examine is the issue of unique state concern.

I. STATE POLICY

Appellant and Appellees argue that two separate sections of Article I of our Constitution ("Declaration of Rights") have ***384** bearing on the state policy regarding historic preservation. Appellant, United Artists, argues that Section 1 of our Declaration of Rights prohibits the historic designation of private property without the owner's consent or compensation. Appellees, City of Philadelphia and the Philadelphia Historical Commission, offer Section 27 of our Declaration of Rights as authority for the historic designation ordinance.

Appellant, United Artists, argues that Section 1 of Article I[FN4] of our Constitution provides a "direct expression ... of the inherent and fundamental nature of private property." Appellant's Brief at 17. Appellant argues that the lack of such direct acknowledgement of the fundamental and indefeasible right of property in the federal Constitu-

tion demonstrates that "private property occupies a more hallowed ground in our Constitution than it does under the Federal Constitution." *Id.* at 18. Therefore, historic designation is contrary to the "inherent and fundamental nature of property." *Id.*

> FN4. All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.
>
> Pa. Const. art. I, § 1.

This is contrary to our case law which views the scope of Section 1 of Article I in relation to its federal counterparts, the Fifth and Fourteenth Amendments. In *Best v. Zoning Board of Adjustment,* 393 Pa. 106, 110-11, 141 A.2d 606, 609 (1958) we stated:

> Section 1 of Article 1 of the Pennsylvania Constitution establishes the right of "acquiring, possessing, and protecting property...." The requirements of this *section are not distinguishable from those of section 1 of the Fourteenth Amendment to the Federal Constitution*-"nor shall any state ****620** deprive any person ... of property without due process of law...."

(emphasis added) (footnotes omitted). Therefore, Section 1 of Article I is not a source of additional rights for property owners in Pennsylvania.

***385** Appellees, conversely, argue that Section 27 of Article I, the Environmental Rights Amendment,[FN5] establishes a state policy for the preservation of historic resources. Appellees assert that the Historic Preservation Ordinance "seeks to honor the mandate of Article 1, Section 27, that historic and aesthetic resources be preserved." Appellees' Brief at 32. We agree with Appellees that the Environmental Rights Amendment reflects a state policy encouraging the preservation of historic and aesthetic resources.

> FN5. The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic 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.
>
> Pa. Const. art. 1, § 27 (adopted May 18, 1971).

In 1971, the citizens of Pennsylvania adopted the Environmental Rights Amendment which recognized the "right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." Pa. Const. art. 1, § 27. Using this provision of the Constitution, a group of citizens sought to block the construction of a battle tower at the site of the Battle of Gettysburg. *See Commonwealth v. Nat'l Gettysburg Battle Tower, Inc.*, 454 Pa. 193, 311 A.2d 588 (1973). In *Gettysburg*, a majority of this Court agreed that the Environmental Rights Amendment authorized the Commonwealth to act in matters of purely historic concerns. *See id.* at 201-02, 311 A.2d at 592, (O'Brien, J.) ("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"); *id.* at 207, 311 A.2d at 595, (Roberts, J., concurring) ("[p]arklands and *historical sites*, as 'natural resources' are subject to the same considerations"). Ultimately a plurality of the Court held that the Environmental Rights Amendment was not self-executing, and legislative action was necessary to accomplish the goals of that Amendment. *Id.* at 202, 311 A.2d at 592. Thus, this legislative action, the Philadelphia Historic Preservation Ordinance, is consistent with our state policy to preserve historic or aesthetic resources.

II. LOCAL POLICY

The City of Philadelphia has declared the following local policy regarding the preservation of historic resources:

> It is hereby declared as a matter of public policy that the preservation and protection of buildings, structures, sites, objects, and districts of historic, architectural, cultural, archaeological, educational and aesthetic merit are public necessities and are in the interests of the health, prosperity and welfare of the people of Philadelphia.

Philadelphia Code § 14-2007(1)(a). This policy is consistent with the Environmental Rights Amendment and is consistent with our findings in *Gettysburg Battle Tower,* 454 Pa. 193, 311 A.2d 588 (1973). Therefore, similar to the state policy, the local policy issue also weighs against our finding that historic designation is a taking.[FN6]

> FN6. The parties did not raise nor were we successful in identifying any other unique issues of state and local concern that were relevant to this case.

E. CONCLUSION

Analysis of our case law and related case law from other jurisdictions, the texts of the constitutional provisions and policy concerns of this Commonwealth compels us to conclude that the designation of a privately owned building as historic without the consent of the owner is not a taking under the Constitution of this Commonwealth.[FN7]

> FN7. Both parties briefed and argued the issue of whether historic designation constitutes spot zoning. However, spot zoning is not a form of a taking which requires just compensation, it is an arbitrary exercise of police powers that is prohibited by our Constitution. *See Mulac Appeal,* 418 Pa. 207, 210 A.2d 275 (1965); *Glorioso Appeal,* 413 Pa. 194, 196 A.2d 668 (1964); *French v. Zoning Bd. of Adjustment,* 408 Pa. 479, 184 A.2d 791 (1962). Therefore, the spot zoning issue is wholly separate and distinct from a "taking" analysis and therefore, it is outside of the scope of this limited appeal.

****621 III.**

[5] Even though the Historic Ordinance is not a taking under our Constitution, we must address the Appellant's other original claims: that the Commission exceeded its statutory ***387** authority by designating the interior of the Boyd Theater, and that the Commission's order was not supported by sufficient evidence. We find the Commission exceeded its statutory authority and thus we vacate the Commission's order designating as historical the Boyd Theater; therefore, we need not reach the issue of the sufficiency of the evidence.

The Historical Commission notified the owners of the Boyd Theater that it had determined that both the interior and exterior of the theater was historically and architecturally significant in the following notice:

> The Boyd Theater at 1908 Chestnut Street has architectural and historical significance as a magnificent and rare example of an intact Art Deco movie palace and as the finest remaining movie theater of Hoffman and Henon, the most important theater design firm in Philadelphia. The Boyd Theater which opened in 1928 is one of only two remaining first run movie palaces left in Philadelphia and the only one that is largely intact inside and out. The exteriors of the theater with its unusual curl gable and deeply recessed entryway encompassing flanking storefronts is a fine example of the Art Deco style. The interior of the Boyd through its fine detail and rarity is one of the most important Art Deco interiors left in the City. The lobbies contain magnificent etched, gilded and stained mirrors with stylized nudes and flowers, Art Deco niches and plaster elements. The auditorium retains its balcony, scalloped proscenium arch and stage, is profusely decorated and contains a mural honoring "The Modern Woman." The Boyd which had an organ and full time organist was the first theater where

> "Cinerama" was used in Philadelphia. The architects and engineers, Hoffman and Henon, who designed the Boyd built over 100 theaters in the Philadelphia area between 1921 and 1930 creating such theater masterpieces as The Erlanger, The Stanley and the enormous Mastbaum Theater. The Boyd, the only Art Deco theater by Hoffman and Henon serves as their finest remaining work in Philadelphia.

***388** Appellant's Reproduced Record at 179 (48 E.D.App.Dkt. (1990)). United Artists argued that the designation of the interior of the building is outside of the scope of the ordinance.

Our review of the Philadelphia Historic Commission's determination is limited to whether

> 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.[FN8]

FN8. Section 706 provides:

> An appellate court may affirm, modify, vacate, set aside or reverse any order brought before it for review, and may remand the matter and direct the entry of such appropriate order, or require such further proceedings to be had as may be just under the circumstances.

2 Pa.C.S. § 754(b) ("Disposition of Appeal"). *See, e.g., Tegzes v. Bristol Twp.,* 504 Pa. 304, 308, 472 A.2d 1386, 1387 (1984).

The original owner, Sameric Corporation, challenged the Commission's designation of the interior of the Boyd Theater. The Commonwealth Court rejected the owner's argument, and held that the intent of the ordinance was to encompass the interior as well as the exterior of historic landmarks:

> The more perplexing problem we must resolve is whether the Commission exceeded its authority by designating as historic the *interior* of the theater. The ordinance vests the Commission with the authority to designate "buildings, structures, sites and objects." The Commission relied on the ordinance's definition of "building" as "[a] structure, its site and appurtenances created to shelter any form of human activity." ****622** On this aspect alone, we believe that in order for a building to effectuate the process of sheltering it most certainly requires an interior. Moreover, where the words of a statute or ordinance are not explicit, the intent ***389** may be ascertained by considering, among other matters, the object to be attained.
>
> Here, without explicit reference to building *interiors,* the ordinance seeks to protect architectural styles significantly representative of historical and cultural development. Thus, we are not persuaded by [United Artists] argument that the ordinance may legitimately preserve the theater's exterior but exclude the interior. This is so, particularly where the interior design reflects the same architectural elements. Rather, we conclude that the City Council intended "building" to include both the interior and exterior.

Sameric Corp. v. City of Philadelphia, 125 Pa.Commw. 520, 524-25, 558 A.2d 155, 157 (1989) (citations omitted) (footnotes omitted).

The Commonwealth Court is incorrect. The Historical Commission is not explicitly authorized by statute to designate the interior of the building as historically or aesthetically significant. "[T]he power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistakable. A doubtful power does not exist." *Pennsylvania Human Relations*

Comm'n. v. St. Joe Minerals Corp., 476 Pa. 302, 310, 382 A.2d 731, 735-36 (1978) (quoting *Green v. Milk Control Comm'n.*, 340 Pa. 1, 3, 16 A.2d 9 (1940)). The only reference to the interior of the building is in Section 14-2007(8)(c) which places the following duty of care on the owner of a historically designated structure:

> The exterior of every historic building, structure and object and of every building, object and structure located within an historic district shall be kept in good repair *as shall the interior portions of such buildings, structures and objects, neglect of which cause or tend to cause the exterior to deteriorate, decay, become damaged or otherwise fall into disrepair.*

(emphasis added). The plain meaning of this ordinance is that the interior must be maintained physically (and not aesthetically) for the express purpose of supporting the exterior of the building. However, the Commission exceeded that authority by designating the interior of the Boyd Theater. There is no ***390** "clear and unmistakable" authority to designate the interior of a building; therefore, the Commission possesses no such power. By designating the interior of the Boyd Theater, the Commission committed an error of law.

Having determined that the Commission made an error of law, we must apply the appropriate remedy. It would not be possible for us to vacate only the portion of the Order which designates the interior. We do not have before us any evidence regarding what interior portions support the exterior, nor can we separate the rationale and evidence which referred only to the exterior of the Boyd Theater from that of the interior in order to review its sufficiency. Thus, we are constrained to vacate the entire order of the Commission.

Accordingly, the Order of the Commonwealth Court is reversed, and the Order of the Commission is vacated.

LARSEN and McDERMOTT, JJ., did not participate in the decision of this case.

PAPADAKOS, J., files a concurring opinion.

PAPADAKOS, Justice, concurring.

Although I remain firmly committed to the proposition that the effects of an historic designation of private property without the consent of the owner constitute a "taking" and requires just compensation under our Constitutions, both federal and state, yet, nevertheless, I can join with the majority in reversing the Order of the Commonwealth Court and in vacating the Order of the Commission. I read the Majority Opinion as limiting the issue to "the sole issue of whether the designation of a building as historic is a "taking" under our Constitution, requiring just compensation." (Opinion, p. 614).

Pa.,1993.
United Artists' Theater Circuit, Inc. v. City of Philadelphia
535 Pa. 370, 635 A.2d 612

END OF DOCUMENT

777 A.2d 1212
Commonwealth Court of Pennsylvania.

Estate of John W. MERRIAM, Mrs. Elizabeth C.L. Merriam, Executrix, Appellant,
v.
PHILADELPHIA HISTORICAL COMMISSION.

Argued March 7, 2001.
|
Decided May 29, 2001.
|
Reargument Denied Aug. 10, 2001.

Owner of work of art sought review of city historical commission's designation of the work as historic, which designation prevented its removal from building lobby. The Court of Common Pleas, Philadelphia County, No. 9901–2358, Levin, J., entered order quashing the appeal as premature, and owner appealed. The Commonwealth Court, No. 246 C.D. 2000, McGinley, J., held that: (1) city home rule charter did not require appeal of the designation to city board of license and inspection review before seeking judicial review, and (2) the designation was a final, appealable adjudication.

Reversed and remanded.

West Headnotes (11)

[1] Environmental Law
Exhaustion of administrative remedies

City's home rule charter provision, requiring board of license and inspection review to provide appeal procedure for any person aggrieved by any notice, order, or other action as a result of any city inspection affecting him directly, did not require owner of work of art designated as historic by the city historical commission to appeal the commission's designation to the board before bringing appeal in common pleas court, where city's municipal code provided for inspection only after designation of an object as historic, in connection with work carried out under a permit, but made no provision for inspection before designation.

Cases that cite this headnote

[2] Environmental Law
Administrative review of administrative decisions

Municipal code provision which stated that any person aggrieved by the issuance or denial of any permit reviewed by the city historical commission may appeal such action to the board of license and inspection review provided appeal process relating to denial of a permit, but not to the commission's designation of an object as historic.

Cases that cite this headnote

[3] Environmental Law
Nature and form of remedy;applicable law

Statutes governing judicial review of local agency action controlled procedure for appellate review of city historical commission's designation of an object as historic, in the absence of any appellate review procedure under the city's charter or municipal code. 2 Pa.C.S.A. § 751–754.

Cases that cite this headnote

[4] Administrative Law and Procedure
Exhaustion of administrative remedies

Administrative Law and Procedure
Finality;ripeness

The concepts of ripeness and exhaustion of administrative remedies are similar but distinct; both deal with timing of judicial review, but ripeness arises out of a judicial concern not to become involved in abstract disagreements of administrative policies, while exhaustion is concerned with agency autonomy. 2 Pa.C.S.A. §§ 101, 752.

1 Cases that cite this headnote

[5] Administrative Law and Procedure

Exhaustion of administrative remedies

The doctrine of exhaustion of administrative remedies prohibits prospective parties of administrative agency actions from bypassing that process and challenging the administrative action directly to the courts. 2 Pa.C.S.A. §§ 101, 752.

Cases that cite this headnote

[6] **Environmental Law**

Exhaustion of administrative remedies

Doctrine of exhaustion of administrative remedies did not apply to aggrieved owner of work of art designated as historic by city historical commission, to foreclose judicial review of the designation, where city code provided no statutory appeal from such a designation. 2 Pa.C.S.A. §§ 101, 752.

Cases that cite this headnote

[7] **Administrative Law and Procedure**

Finality;ripeness

The rationale of the ripeness doctrine is to prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies. 2 Pa.C.S.A. §§ 101, 752.

3 Cases that cite this headnote

[8] **Administrative Law and Procedure**

Finality;ripeness

In determining whether an administrative matter is "ripe" for review, appellate court will consider both whether the issues are adequately developed for judicial review and what hardship the parties will suffer if review is delayed. 2 Pa.C.S.A. §§ 101, 752.

1 Cases that cite this headnote

[9] **Environmental Law**

Ripeness

Appeal by aggrieved owner of work of art of its designation as historic by city historical commission was ripe for judicial review, in that the owner alleged it had suffered actual and present harm as a result of the designation; proposed sale of the work for nine million dollars collapsed due to threat of historic designation, the designation prevented the owner from moving or altering the work, forestalling any chance of future sale, and requiring owner to seek permit from the commission to move or alter the work would be futile, since the commission designated the work historic in large part due to its unique location. 2 Pa.C.S.A. §§ 101, 752.

Cases that cite this headnote

[10] **Environmental Law**

Exhaustion of administrative remedies

Owner of work of art designated as historic by city historical commission who sought to test whether the commission had constitutional authority to designate the work as historic was not required to exhaust administrative remedies before bringing appeal in common pleas court. 2 Pa.C.S.A. §§ 101, 752.

Cases that cite this headnote

[11] **Courts**

Of cause of action or subject-matter

Courts

Determination of questions of jurisdiction in general

A court has the duty to raise, sua sponte if necessary, the issue of its power to hear an action, and the parties may not confer jurisdiction over a cause of action or the subject matter of an action by consent or agreement.

Cases that cite this headnote

Attorneys and Law Firms

***1214** Richard A. Sprague, Philadelphia, for appellant.

Jane L. Istvan, Philadelphia, for appellee.

Murray S. Levin, Philadelphia, for amicus curiae.

Before McGINLEY, Judge, FLAHERTY and LEDERER, Senior Judges.

Opinion

McGINLEY, Judge.

The Estate of John W. Merriam, Mrs. Elizabeth C.L. Merriam, Executrix (Estate) appeals from the order of the Court of Common Pleas of Philadelphia County (common pleas court) quashing as premature the Estate's appeal from the designation by the Philadelphia Historical Commission **(Commission) of the glass mosaic "Dream Garden"** (Dream Garden) as an historic object.

At issue is whether the appeal procedure set forth in the Philadelphia Home Rule Charter (Charter), § 5-1005, requires an appeal first be taken to the Board of License and Inspection Review (Board) [1] when the designation of an object as historic is questioned.

[1] The espoused purpose of the Board is to afford "citizens adversely affected by the exercise of licensing and inspection powers vested in City agencies, an orderly procedure, in conformity with due process, for the review of action taken against them." Annotation, Charter § 5-1005; Reproduced Record (R.R.) at 400a.

Also, at issue is whether the Commission's designation of the Dream Garden as an historic object is a final adjudication and thus appealable under Local Agency Law. [2]

[2] 2 Pa.C.S. §§ 751-754.

On July 29, 1998, the Commission notified the Estate that it intended to consider designating Dream Garden as an historic object under the City of Philadelphia's historic preservation ordinance. [3] ***1215** The notification described the Dream Garden as "[d]esigned specifically for the Curtis Publishing Company Building at 6th and Walnut Streets, this work of art is uniquely suited for its location and has come to be known as a defining piece of Philadelphia to locals and visitors." Nomination Form, Philadelphia Register of Historic Places at 12; R.R. at 222a.

[3] Section 14-2007(2)(1) defines an object as "a material thing of functional, aesthetic, cultural, historic or scientific value that may be, by nature or design, movable yet related to a specific setting or environment." The Philadelphia Code (Code) § 14-2007(2)(*l*); R.R. at 133a. The Code empowers and requires the Commission to designate historic buildings, structures, sites, objects and districts that meet the Code's criteria and are significant to the City. Code § 14-2007(4)(a) (c); R.R. at 134a-135a. The Code provides for notice to owners whose properties are being considered and permits any interested party to present testimony regarding the designation. Code, § 14-2007(6)(a)-(c); R.R. at 136a-137a. The notice invokes the Commission's jurisdiction over the properties being considered for designation and states that owners subject to the Commission's jurisdiction may not remove, demolish or alter the property without applying for a permit from the Department of Licenses and Inspections which refers any permit applications to the Commission for its review. Code, § 14-2007(7)(c); R.R. at 138a.

The Dream Garden is an epic glass mosaic, executed by Tiffany Studios in New York, based upon a painting by Philadelphia native Maxfield Parrish. It consists of twenty-four panels, measures fifteen feet high and forty-nine feet wide and weighs over four tons. The panels are set in frames of white marble. The Dream Garden was moved from the New York studio and installed on a wall in the lobby of the Curtis Building, where it has remained since 1916. The Curtis Building is the original home of the Curtis Publishing Company which published the Ladies Home Journal and the Saturday Evening Post.

In 1968, John W. Merriam (Merriam) bought the Curtis Building and most of the furnishings and contents including the Dream Garden from the Curtis Publishing Company. Merriam sold the building in 1984, but retained all ownership rights to the Dream Garden. The new owners of the Curtis Building imposed no obligation on Merriam to retain the Dream Garden in the lobby of the Curtis Building.

Merriam died in 1994, leaving a sizeable estate of which the University of Pennsylvania, the University of the Arts, the Pennsylvania Academy of Fine Arts and Bryn Mawr College are the beneficiaries of fifty-nine percent. One of

the estate's remaining assets is the Dream Garden. In April 1998, the Estate negotiated the sale of the Dream Garden to an anonymous buyer for nine million dollars, executed a memorandum of intent and received an escrow deposit of nine hundred thousand dollars.

On July 22, 1998, a Philadelphia newspaper reported the sale of the Curtis Building mosaic and ran several articles regarding the proposed sale. On July 29, 1998, by letter, the Commission served the Estate with a notice of intent to consider the Dream Garden for entry on the Philadelphia Register of Historic Places as an historic object.

As a result of this notice of intent to designate, the Estate could not remove the Dream Garden from the Curtis Building lobby. The letter stated:

> Designation also entails some restrictions. To ensure authenticity and compatibility, the Commission reviews all proposed alterations to historic resources. The Commission also has jurisdiction over the issuance of demolition permits by the Department of Licenses and Inspections for historic resources; under the Code, the definition of demolition includes the removal of an object from its site. Pursuant to Section 14-2007(7)(*l*) of the Philadelphia Code, the Commission exercises this jurisdiction over any resource being considered by the Commission for designation as historic. The period of consideration has now begun with respect to Dream Garden. You are hereby notified that no one may remove or demolish Dream Garden, the Parrish/Tiffany mural, which is the object under consideration, without first seeking a demolition permit from the Department of Licenses and Inspections, pursuant to Philadelphia Code Sections 14-2007(2)(f), 7(a) and 7(*l*). No ***1216** one may otherwise alter the appearance of the same mural without applying for a construction permit ... The Department will refer any permit application which relates to this object to the Historical Commission for its review. This restriction is in effect now.

Letter, July 29, 1998, at 3; R.R. at 320a.

On July 30, 1998, the buyer, acting through an agent, declined to exercise the option to acquire the mosaic under the memorandum of intent, and stated, "the recent developments concerning the landmark status for the Mosaic by the City of Philadelphia has made the purchase thereof imprudent at the present time." Letter, July 30, 1998; R.R. at 322a-323a.

On November 20, 1998, after two continuances, the Designation Committee proceeded to hearing. Over the Estate's objections, the Commission voted to recommend that the Dream Garden be designated as an historic object on November 30, 1998, and issued its decision on December 28, 1998.

The Commission noted in designating Dream Garden:

> [T] he Committee and others have received a nomination of Dream Garden to the Philadelphia Register of Historic Places as an object. And as Dick [Richard Tyler, Historic Preservation Officer] just defined object according to our ordinance, Dream Garden mosaic may be a movable object, designed specifically for the Curtis Building lobby and is significant for its cultural and aesthetic merits.
>
> Dream Garden meets four criteria enumerated in the historic preservation ordinance, section 14-2007, subsection 5 A, B, E and H to qualify as an historic object. One, Dream Garden possesses significant character, interest, and value as a part of the development, heritage and cultural characteristics of the City and it is associated with the life of a person or persons in the past; Cyrus H. Curtis, the publisher of the Saturday Evening Post and Ladies Home Journal; Edward Bok, the editor of Ladies Home Journal; Maxfield Parrish and Louis Comfort Tiffany are associated with the creation, placement and execution of this object.
>
> ... [L]astly, owing to its unique location or singular physical characteristics, Dream Garden represents an established and familiar visual feature of the

neighborhood, community and City. The Curtis Building is open to the public during business hours and in the evening, when the building is locked, visitors can see the mosaic through the glass doors at the 6th street entrance. Philadelphians and tourists frequent the Curtis Building to see this object. Extensive press coverage, numerous letters and a petition have been sent to this office expressing support for keeping Dream Garden in the lobby of the Curtis Building.

Hearing, Philadelphia Historic Designation Committee, November 20, 1998, (N.T. 11/20/98) at 4-7; R.R. at 14a-17a.

On January 22, 1999, the Estate filed a notice of appeal in common pleas court pursuant to Local Agency Law seeking review of the Commission's designation. On December 20, 1999, the common pleas court quashed the appeal and on August 1, 2000, the common pleas court issued its opinion. The common pleas court concluded:

> The Philadelphia Home Rule Charter § 5-1005 states the following: 'The Board of License and Inspection shall provide an appeal procedure whereby any person aggrieved by the issuance, transfer, renewal, refusal, suspension, revocation or cancellation of any City license or by any notice, order or other action as a ***1217** result of any City inspection, affecting him directly, shall upon request be furnished with a written statement of the reasons for the action taken and afforded a hearing thereon by the Board of License and Inspection Review.' ... This provision provides a forum for the appellant to assert its rights.
>
> ... Pennsylvania case law clearly holds that where an appellant has not exhausted its administrative remedies an appeal to the courts is not proper ... Additionally, the Commonwealth Court has held that the requirement to exhaust administrative remedies applies to historic designations specifically. In *Miller & Son Paving*, 156 Pa.Cmwlth. 523, 628 A.2d 498 (1993), the Commonwealth Court quashed a Petition for Review which arose as a result of an administrative decision to designate a landmark as historic. The Court held that this designation was not a final adjudication and wrote that 'if there exists by statute or regulation an administrative procedure by which the landowner could obtain viable economic use of his property, a takings challenge is not ripe until the administrative remedy has been exhausted' (quoting *Gardner v. Commonwealth Dept. of Environmental Resources,* 145 Pa.Cmwlth. 345, 603 A.2d 279, 282 (1992)).

Common Pleas Court Opinion, August 1, 2000, at 1-3.

On appeal,[4] the Estate contends that the common pleas court's finding that the Estate had not exhausted its administrative remedies was in error. Initially, the Estate argues that there is no procedure under the Code or the Charter for an appeal to the Board or to any other entity for any administrative review of the designation of an object as historic.[5]

4 Our standard of review of the trial court's order is to determine whether the trial court abused its discretion or committed an error of law. *Gardner v. Commonwealth of Pennsylvania Department of Environmental Resources,* 658 A.2d 440, 444 (Pa.Cmwlth.1995).

5 Section 14-2007(10) of the Code provides "[a]ny 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 ..."

This Court agrees with the Estate that neither the Charter nor the Code sanctions the Board as the proper forum for an appeal from the designation of an object as historic.

Procedure under Code and Charter

The Charter provides for the creation of the Board, which functions as an "independent tribunal charged with providing an administrative appeal procedure, in conformity with due process, to citizens who are adversely affected by actions of the City agencies." *City of Philadelphia v. Philadelphia Board of License and Inspection Review,* 669 A.2d 460 (Pa.Cmwlth.1995). Section 5-1005 of the Charter states:

> The Board of License and Inspection Review shall provide an appeal procedure whereby any person aggrieved by the issuance, transfer, renewal, refusal, suspension, revocation or cancellation of any City license or by any notice, order or other action as a result of any City inspection, affecting him directly, shall upon request be furnished

> with a written statement of the reasons for the action taken and afforded a hearing thereon by the Board of License and Inspection Review. Upon such hearing the Board shall hear any evidence which the aggrieved party or the City may desire to offer, shall make findings and render a decision in writing. The Board may affirm, modify, reverse, vacate or revoke the ***1218** action from which the appeal was taken to it.

Charter, § 5-1005 at 55; R.R. at 400a.

The Charter defines inspection as follows:

> (b) Inspection shall mean any inspection, test or examination to which any person is subject as an applicant for or a holder of a license or to which any property is subject under any statute, ordinance or regulation which it is the duty of the Mayor or of any other officer or of any department, board, or commission to enforce.

Charter, § 5-1001 at 52; R.R. at 397a.

[1] Reviewing the Charter, the only potential for the Board's appellate jurisdiction in this instance must be based on the phrase "any notice, order or other action as a result of any City inspection affecting him directly." *Id.* "Inspection" is defined in the annotation to § 5-1001 of the Charter. The definition states that it is intended to relate to inspections required to enforce the ordinances of the City necessary to protect the health and safety of the citizens.[6] However, the Code makes no provision for an inspection in connection with designation. Instead, the Code quite specifically mandates inspection by the Board after designation in connection with work carried out under a permit, but not before designation. Code, § 14-2007(8)(b); R.R. at 145a.

6 "Inspection is defined in the broadest possible sense of the examination or testing of property or the conduct of activities subject to regulation by statute or ordinance or to licensing...." Annotation, Charter, § 5-1001.

In sum, the Code does not provide any authority for an inspection in advance of historic designation. Therefore, no inspection is authorized in connection with historic designation and, consequently any appeal to the Board based on this provision lacks any foundation or support.

The Code does not contemplate the appeal of historic designation to the Board in the same manner as specifically delineated for the appeal of the issuance or denial of a permit to demolish. Instead the Code provides that a designation may be amended or rescinded "in the same manner as is specified for designation." Code, § 14-2007(5)(f); R.R. at 138a.

[2] Also, the Code does not provide that a designation may be appealed. The Code details an appeal process, but that appeal process specifically relates to the denial of a permit, not to the appeal of a designation. The Code states: "[a]ny 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." Code, § 14-2007(8)(a); R.R. at 144(a).

It is well settled that an administrative agency can only exercise those powers, which have been granted to it by statute. "[A]n administrative body cannot, by mere usage, invest itself with authority or powers not fairly or properly within the legislative grants ..." *Commonwealth v. American Ice Co.,* 406 Pa. 322, 331, 178 A.2d 768, 773 (1962). "The power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistakable." *Pennsylvania Human Relations Commission v. St. Joe Minerals Corp.,* 476 Pa. 302, 310, 382 A.2d 731, 736 (1978).

[3] In the absence of any appellate review procedure under the Code or the Charter, the Estate contends that Local Agency Law, 2 Pa.C.S. §§ 751-754 controls. The Pennsylvania Supreme Court's decision in ***1219** *United Artists Theater Circuit, Inc. v. City of Philadelphia,* 528 Pa. 12, 595 A.2d 6 (1991)(*United Artists I*), *reversed* by 535 Pa. 370, 635 A.2d 612 (1993) (*United Artists II*) supports this contention. In *United Artists I,* the Pennsylvania Supreme Court noted:

> Sameric Corporation reacted to the notice of designation by filing

> a suit in equity and a petition for a preliminary injunction in the Court of Common Pleas of Philadelphia County. Sameric's suit, inter alia, sought a declaratory judgment that the Commission was without authority to designate its Boyd Theater Building as historic. The trial court properly treated the suit and petition as an appeal pursuant to the provisions of the Local Agency Law, 2 Pa. C.S. § 752 ...

United Artists I, 528 Pa. at 16, 595 A.2d at 8.

In this instance, the Code confers no authority on the Commission to conduct an inspection in connection with historic designation or to appeal an historic designation. Therefore, this Court agrees with the Estate, and consistent with *United Artists I,* that based on the Charter and the Code an appeal to the Board of the designation of the Dream Garden as an historic object was not an option, and, Local Agency Law controls.

Appeal under Local Agency Law

Under Local Agency Law aggrieved parties may appeal an agency adjudication directly to common pleas court. Section 752 of the Local Agency Law provides that "[a]ny person aggrieved by an adjudication of a local agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals ..." 2 Pa.C.S. § 752. "Adjudication" is defined as "any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made." 2 Pa.C.S. § 101.

In order to appeal under Local Agency Law the Commission's designation must be a final order affecting personal or property rights. The common pleas court held that because the Estate failed to exhaust its administrative remedies the designation of Dream Garden was not a final adjudication, and the matter was not ripe for adjudication. This Court respectfully disagrees.

[4] The concepts of ripeness and exhaustion of administrative remedies are similar but distinct. In *Gardner v. Commonwealth of Pennsylvania, Department of Environmental Resources,* 658 A.2d 440 (Pa.Cmwlth.1995) we addressed whether a property owner's claim seeking compensation for the alleged taking of coal rights under land taken for a state park was ripe for adjudication or whether the owner had to first exhaust administrative appeals by applying for a variance. We noted, "[r]ipeness and exhaustion are similar in that they both deal with timing of judicial review but they are distinct concepts. Ripeness arises out of a judicial concern not to become involved in abstract disagreements of administrative policies." Exhaustion is concerned with "agency autonomy." *Gardner,* 658 A.2d at 444.

[5] First, we address exhaustion of administrative remedies. "The doctrine of exhaustion prohibits prospective parties of administrative agency actions from by passing that process and challenging the administrative action directly to the courts." *Id.*

As our Pennsylvania Supreme Court noted in *Machipongo Land and Coal Company of Pennsylvania v. Department of Environmental Resources,* 538 Pa. 361, 648 A.2d 767 (1994), litigants are not always compelled to exhaust administrative ***1220** remedies if there are no reasonable remedies available.

> Appellees rely upon *Gardner* v. *Commonwealth of Pennsylvania, Department of Environmental Resources,* 145 Pa. Commw. 345, 603 A.2d 279 (1992), for the proposition that the mere existence of statutory and regulatory remedies compels Appellants to first avail themselves of those mechanisms before proceeding to a judicial forum. However, this is too broad a reading of Gardner. Rather in Gardner, the Commonwealth Court held only that the trial court properly ruled that there appeared to be a reasonable administrative remedy still available, and that therefore, the injured party must first exhaust those remedies before challenging the matter in court. Here, a specific finding was made

> by Commonwealth Court that there were *no* reasonable administrative remedies available; thus Gardner is inapplicable. (emphasis in orginal).

Machipongo, 538 Pa. at 365, 648 A.2d at 769.

[6] Here, no reasonable administrative remedy is available because the Code simply does not provide any statutory appeal from the designation of an object as historic. In fact, the Commission has forced the Estate to first seek a permit to move the Dream Garden before providing judicial review of the decision to designate. This procedure is rife with futility at a time when the Estate has already lost a potential sale by virtue of the designation. [7] Therefore, we agree with the Estate that because no reasonable administrative remedy is available, the Estate did not fail to exhaust its administrative remedies to appeal the designation of the Dream Garden.

[7] We note that the Estate did seek a permit to remove Dream Garden from the lobby of the Curtis Building and was denied that permit. Moreover, The Commission's Committee on Financial Hardship found that the Estate had failed to demonstrate that the denial of the permit resulted in a financial hardship to the Estate. Letter, October 25, 1999.

[7] **[8]** Also at issue is whether the Estate's appeal is premature and therefore not ripe for judicial review. The rationale of the ripeness doctrine "is to prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies...." *Rouse & Associates Ship Road Land Limited Partnership v. Pennsylvania Environmental Quality Board* 164 Pa.Cmwlth. 326, 642 A.2d 642, 645 (1994). In *Rouse,* we addressed whether developer Rouse & Associates (Rouse) challenge of a change in the designation of water quality standards for a creek prior to seeking a permit to discharge into the creek was ripe for review.

> In determining whether the present matter is ripe for review, this Court will consider both whether the issues are adequately developed for judicial review and what hardship the parties will suffer if review is delayed. *Braksator v. Zoning Hearing Board of Northampton Township,* 163 Pa.Cmwlth. 332, 641 A.2d 44 (1994).

Id.

In *Rouse,* we found that Rouse would suffer actual and present harm before seeking a permit. First, it would be required to spend endless amounts of time and money to prepare plans for a new treatment plant when the Department of Environmental Resources (now Department of Environmental Protection) had already determined that a treatment plant with this discharge into this stream would cause an adverse change to the stream. Next, Rouse would have to wait for an administrative determination before obtaining ***1221** judicial review. *Rouse,* 642 A.2d at 645. Finally, Rouse could not proceed with the development or sell the development because of the uncertainty of the sewer proposal. *Id.*

[9] In this instance, the Estate alleged it has suffered actual and present harm as a result of the Commission's designation. First, the proposed sale of the Dream Garden for nine million dollars collapsed due to the threat of historic designation. Currently, the Estate is prevented from moving or altering the work of art from its present location forestalling any chance of any future sale. Unlike the designation of a building or a structure, which can be adapted for other uses, the historical designation of Dream Garden precludes any right of private ownership of the work of art. The Estate has no viable economic use of its property, following designation. It remains a privately owned piece of art in a building owned by a third party. We conclude that this hardship to the Estate establishes this challenge to the Code is ripe for judicial review.

It is futile for the Estate to seek a permit from the Commission to alter or move Dream Garden. Dream Garden was designated as an historic object in large part because of its unique location in Curtis Building lobby. For the Estate to seek a permit to remove it from the Curtis Building lobby puts the Estate at odds with one of the primary characteristics the Commission used to define the Dream Garden as historic, its location.

While the Curtis Building is open to the public during business hours, and visitors may view the mosaic after hours through glass doors, and tourists seek out the mosaic, and many support keeping the Dream Garden in the Curtis Building, nothing prevents the owner or owners

of the Curtis Building from a change in policy, such as restricting admission to tenants or covering the glass doors. It may well be determined that the Commission's designation is an unjustified reach to accommodate visitors and tourists at the urging of the media and at the expense of the lawful owner. The sooner the merits of the designation are reviewed, the better.

[10] **[11]** Moreover, the Estate not only challenges the designation of the Dream Garden, it seeks to test whether the Commission had the authority to designate the Dream Garden as an historic object. In *United Artists II,* the Pennsylvania Supreme Court found that the Commission had exceeded it authority under the preservation law when it designated the interior of the Boyd Theater as historic. By application of this prior finding, the Estate argues that the under the Code, the designation of the Dream Garden, an object located in the interior of a building, constituted an unconstitutional taking. As we stated in *Rouse,* the exhaustion of administrative remedies is not required where a statutory scheme's constitutionality or validity is challenged. *Rouse,* 642 A.2d at 647.

Because we find that it is futile and unrealistic to require the Estate to seek a permit and that the Estate has suffered actual harm, this Court must disagree with the common pleas court and concludes that the Commission's designation of an object as historic is appealable under Local Agency Law. [8]

[8] The Pennsylvania Supreme Court's previous approval of an appeal of an historic designation under Local Agency Law in *United Artists I,* buttresses our decision. This Court believes that the Supreme Court would have raised the jurisdictional issue had it disapproved of treating the suit under Local Agency Law. "... court has the duty to raise, sua sponte if necessary, the issue of its power to hear an action, and the parties may not confer jurisdiction over a cause of action or the subject matter of an action by consent or agreement." *Pheasant Run Civic Organization v. Board of Commissioners,* 60 Pa.Cmwlth. 216, 430 A.2d 1231, 1233, n. 4 (1981).

***1222** Accordingly, we reverse the decision of the common pleas court and reinstate the Estate's appeal.

ORDER

AND NOW, to wit, this 29th day of May, 2001, the order of the Court of Common Pleas of Philadelphia County in the above-captioned matter is reversed and the appeal is reinstated and the matter remanded to be treated as an appeal under local agency law.

All Citations

777 A.2d 1212

20 A.3d 586
Commonwealth Court of Pennsylvania.

John J. TURCHI, Jr. and Mary E. Turchi, Appellants
v.
PHILADELPHIA BOARD OF LICENSE AND INSPECTION REVIEW and Concerned Citizens in Opposition to the Dilworth Development.

Argued Feb. 8, 2011.
|
Decided April 18, 2011.

Synopsis

Background: Landowners sought review of decision of city board of license and inspection review that reversed decision of city historical commission approving permit for the renovation and development of a historically designated building. The Court of Common Pleas, Philadelphia County, Nos. 00890 October Term, 2008, and 00899 October Term, 2008, Idee C. Fox, J., affirmed. Landowners appealed.

Holdings: The Commonwealth Court, Nos. 1273 and 1274 C.D. 2010, Cohn Jubelirer, J., held that:

[1] commission's interpretation of historic preservation ordinance was entitled to deference by board, and

[2] board failed to give proper deference to decision of commission.

Vacated and remanded.

West Headnotes (4)

[1] Appeal and Error
Review Dependent on Whether Questions Are of Law or of Fact

The Commonwealth Court's scope of review when reviewing questions of law is plenary.

1 Cases that cite this headnote

[2] Environmental Law
Administrative review of administrative decisions

City historical commission's interpretation of historic preservation ordinance was entitled to deference by the city board of license and inspection review on review of commission's approval of permit for renovation and development of a historically designated building, where commission had the policy-making role and was charged with administering the ordinance and the board had nonpolicy-making, but quasi-judicial or adjudicatory review authority, commission was composed of members with specialized knowledge, background, and expertise in the area of historic preservation, and commission had a greater number of encounters with the issues.

3 Cases that cite this headnote

[3] Administrative Law and Procedure
Deference to agency in general

Administrative Law and Procedure
Erroneous construction;conflict with statute

An administrative agency's interpretation of the statute it is charged to administer is entitled to deference on appellate review absent fraud, bad faith, abuse of discretion, or clearly arbitrary action.

9 Cases that cite this headnote

[4] Environmental Law
Administrative review of administrative decisions

City board of license and inspection review failed to give proper deference to city historical commission's approval of permit for renovation and development of a historically designated building; when the board replaced the commission's definitions of terms in historic preservation ordinance with its own, transforming the interpretation of phrases into credibility determinations,

the board exceeded its appellate scope of review, and board's duty was to determine whether commission's actions could have been sustained or supported by the evidence.

3 Cases that cite this headnote

Attorneys and Law Firms

***587** Neil Sklaroff and Matthew N. McClure, Philadelphia, for appellants.

Richard C. DeMarco, Philadelphia, for appellee Concerned Citizens in Opposition to the Dilworth Development.

Jane L. Istvan, Philadelphia, for amicus curiae Philadelphia Historical Commission.

BEFORE: COHN JUBELIRER, Judge, and BROBSON, Judge, and McCULLOUGH, Judge.

Opinion

OPINION BY Judge COHN JUBELIRER.

John J. Turchi, Jr. and Mary E. Turchi (Landowners) appeal from the May 19, 2010, Order of the Court of Common Pleas of Philadelphia County (trial court) affirming the November 9, 2008, decision of the Philadelphia Board of License and Inspection Review (Board) that reversed the November 19, 2007, decision of the Philadelphia Historical Commission (Historical Commission) approving a permit for the renovation and development of a historically designated building, the Dilworth House, located at 223–25 South Sixth Street within the City of Philadelphia's (City) Society Hill Historic District (the Project). Based on its interpretation of the Historic Preservation Ordinance, Philadelphia Code (Code) §§ 14–2007(1)–(10), the Historical Commission approved the Project and concluded that: (1) the renovations proposed in the Project were not a "demolition in significant part" and, therefore, the Project was an "alteration"[1] and not a "demolition"[2] under Section 2(f) (Minutes of Meeting of the Historical Commission, September 8, 2006, at 32, R.R. at 341a; Minutes of Meeting of the Historical Commission, November 9, 2007, at 14, R.R. 366a); and (2) the Project's renovations were "appropriate" under Section 7(k) of the Historic Preservation Ordinance. (Minutes of Meeting of the Historical Commission, September 8, 2006, at 35, R.R. at 344a; Minutes of Meeting of the Historical Commission, November 9, 2007, at 14, R.R. at 366a; Code §§ 14–2007(2)(f), (7)(k).) Concerned Citizens in Opposition to the Dilworth Development (Concerned Citizens) and the Society Hill Civic Association appealed to the Board. The Board disagreed with the Historical Commission's interpretations of "demolition in significant part" and "appropriateness" of the Project under the Historic Preservation Ordinance and disapproved the permit. (Board Op. at 1–9.) Landowners appealed to the trial court, which affirmed the Board on the basis that neither the Philadelphia ***588** Home Rule Charter (Home Rule Charter), nor the Code, contains any language requiring that the Board grant deference to the Historical Commission. Landowners now appeal to this Court.[3]

1 An "alteration" is defined as "[a] change in the appearance of a building, structure, site or object which is not otherwise covered by the definition of demolition, or any other change for which a permit is required under The Philadelphia Code of General Ordinances." (Section 2(a) of the Historic Preservation Ordinance, Code § 14–2007(2)(a), R.R. at 316a.)

2 A "demolition" is defined as "[t]he razing or destruction, whether entirely or *in significant part,* of a building, structure.... Demolition includes the removal of a building, structure ... from its site or the removal or destruction of the façade or surface." (Section 2(f) of the Historic Preservation Ordinance, Code § 14–2007(2)(f), R.R. at 316a (emphasis added).)

3 We note that the Society Hill Civic Association was an original appellant to the Board, and in this appeal is an Amicus Curiae and did not file a brief. The Preservation Alliance for Greater Philadelphia has filed a brief as Amicus Curiae herein.

This appeal arises from Landowners' application to the Historical Commission for a permit to develop the Project pursuant to Section 7 of the Historic Preservation Ordinance, Code § 14–2007(7) (establishing the procedures for obtaining a permit to alter or demolish an historically-designated building).[4] The Project consists of the renovation and preservation of the brick-clad main portion of the Dilworth House and

the removal of the side and rear wings, which would be replaced with a sixteen-story condominium structure that would connect to the Dilworth House. Because the Project requires the removal of the side and rear wings, along with integration of the condominiums into this historically-designated property, Landowners must comply with the permitting procedures of the Historic Preservation Ordinance. Additionally, because the Project requires the removal of a portion of an historically-designated property, the Historical Commission must first determine, pursuant to Section 2(f), whether this removal constitutes a "significant part" of the building because, and if it does, Section 7(j) prohibits the issuance of a permit unless the Historical Commission finds that the removal is in the public interest or that the building, structure, site, or object cannot be used for any purpose for which it may reasonably be adapted. (Code §§ 14–2007(2)(f), (7)(j), R.R. at 316a, 323a.) If the Project constitutes a removal *not* "in significant part," the removal is considered an "alteration," not a "demolition." (Code §§ 14–2007(2)(a), (f), R.R. at 316a.) The characterization of the Project as either an "alteration" or a "demolition" determines the factors that a permit applicant must satisfy to obtain a permit. Where the Historical Commission has no objection, the Board shall grant the permit subject to other applicable requirements, including, *inter alia,* those found in Section 7(k) regarding "appropriateness." (Code §§ 14–2007(7)(g), (k), R.R. at 322a–324a.)

[4] Section 7(g) of the Historic Preservation Ordinance provides that the Historical Commission can approve or deny a permit application for alterations to, or demolition of, a historic building. (Code § 14–2007(7)(g), R.R. at 321a.)

In this case, upon Landowners' application for a permit to renovate the Dilworth House,[5] the Historical Commission initially referred the application to its Architectural Committee.[6] After hearing testimony that the wings, which Landowners sought to remove, were not a defining feature of ***589** the Dilworth House because they were service areas, were not architecturally significant portions of the Dilworth House, and were not visible parts of the Dilworth House, the Architectural Committee determined that the Project: (1) was not a "demolition in significant part" pursuant to Section 2(f) of the Historic Preservation Ordinance and, therefore, was an "alteration" pursuant to Section 2(a); and (2) was "appropriate" pursuant to Section 7(k) of the Historic Preservation Ordinance.

[5] This was the fourth proposal submitted for the Project. The first application proposed a total demolition with construction of a 15–story residential building in its place, which was denied. Landowners withdrew the proposal. The second application proposed a total demolition with construction of a 15–story residential building with a portion of the front façade of the historic building to be rebuilt at the ground level of the new building, which was denied, followed by its withdrawal by Landowners. The third proposal, never officially submitted but distributed to the Historical Commission, proposed retaining most of the Dilworth House and constructing a residential building at the rear of the lot. No action was taken on this unofficial proposal. (Minutes of Meeting of the Architectural Committee, July 25, 2006, at 9, R.R. at 327a.)

[6] The Architectural Committee included noted preservation architects Robert Thomas and Daniela Holt Voith.

Next, the full Historical Commission bifurcated its consideration of the Project. The Historical Commission first voted unanimously to approve the Project in concept, with one abstention. (Minutes of Meeting of the Historical Commission at 35, September 8, 2006, at 35, R.R. at 344a.) The Historical Commission granted final approval on November 9, 2007, after the Project was again discussed in an open public meeting, unanimously approving it as "*not* a 'demolition in significant part' " and, therefore, an alteration. (Minutes of Meeting of the Historical Commission, November 9, 2007, at 14, R.R. at 366a (emphasis added).)

Concerned Citizens appealed the Historical Commission's decision to the Board claiming, *inter alia,* that it committed errors of law: (1) in finding that the Project was not a "demolition" pursuant to the Historic Preservation Ordinance; (2) by not applying the proper Secretary of the Interior's "Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings" (the Secretary's Standards), specifically Standards 1, 2, 9, and 10 of 36 C.F.R. § 67.7(b); and (3) by not applying the Historic Preservation Ordinance to the Project. Additionally, the Society Hill Civic Association, Matthew DiJulio, and Benita Fair Langsdorf appealed the Historical Commission's decision on similar grounds

and also claimed, *inter alia,* that the decision should be reversed because it was arbitrary and capricious. The Board held six full record hearings, issued findings of fact and conclusions of law, and reversed the Historical Commission. In doing so, the Board disagreed with the Historical Commission's interpretations of the terms "alteration" and "appropriateness" in the Historic Preservation Ordinance and determined that: (1) "the November [ ]9, 2007 approval by the Historical Commission that ... [the] application 'is not a demolition in significant part' was in error," (Board Op., Conclusion of Law (COL) ¶ 5); and (2) "the ... approval [of] ... [the] application to construct the [Project] was in error," (COL ¶ 6), because the Historical Commission did not define the Project as "appropriate" as the Board would have defined it. (*See* Board Op., Findings of Fact (FOF) ¶ ¶ 35–44.)

Landowners appealed to the trial court, which affirmed the Board's determination, concluding that the Board "plays a supervising role over the [Historical] Commission subject to [the trial court's] review," and that the Board "has the authority to hear appeals directly from the [Historical] Commission and render a binding decision that affirms, modifies or reverses the [Historical] Commission." (Trial Ct. Op. at 6.) The trial court also concluded that "substantial evidence and testimony" taken by the Board "proved that the [Historical] Commission's decision conflicted with several factors under" the Historic Preservation Ordinance. (Trial Ct. Op. at 6.) The trial court reasoned that the Board has broad powers of review under Section 5–1005 of the Home Rule Charter. Concluding that the Home Rule Charter is clear and unambiguous, the trial court further explained that the Board's standard of review of the Historical Commission's decisions is *de novo.* The trial court rejected the argument that the Board must grant ***590** deference to the decisions of the Historical Commission because "[n]either the Code nor the [Home Rule] Charter has any language that the Board is required to give deference to the [Historical] Commission [ ]or any similar agency." (Trial Ct. Op. at 5.)

[1] Landowners now appeal to this Court. A principal issue on appeal is whether the Board must give deference to the Historical Commission's determinations made pursuant to the Historic Preservation Ordinance, which the Historical Commission is charged with administering, and, if so, how the Board should apply this deference within its own proper scope and standard of review. [7]

7 Because the issue in this case is a question of law, this Court's scope of review is plenary. *Great Lakes Energy Partners v. Salem Township,* 931 A.2d 101, 103 (Pa.Cmwlth.2007).

I. The Historical Commission

Under the Historic Preservation Ordinance, the Historical Commission is the City agency empowered to designate buildings as historic and to approve or deny permit applications for alterations to and/or demolitions of historically-designated buildings. (Sections 4(a), (b), and (d) of the Historic Preservation Ordinance, Code §§ 14–2007(4)(a)–(b), (d), R.R. at 317a–18a). The composition of the Historical Commission is mandated by the Historic Preservation Ordinance and is very specific; it consists of various City government representatives and eight members appointed by the Mayor, including "an architect experienced in the field of historic preservation," a historian, an architectural historian, a real estate developer, "a representative of a Community Development Corporation," and "a representative of a community organization." (Section 3 of the Historic Preservation Ordinance, Code § 14–2007(3), R.R. at 317a.) The Historic Preservation Ordinance empowers the Historical Commission to exercise quasi-legislative discretion in designating buildings historic and administrative discretion in reviewing applications for alterations or demolitions of historically-designated properties. (Code § 14–2007(4), R.R. at 317a–18a.) The administration of the Historic Preservation Ordinance requires reasoned applications of specialized knowledge and experience in the areas particularly affecting historic preservation in order to interpret the operative terms of the Historic Preservation Ordinance, such as those at issue in this case: "alteration," "demolition," "significant," and "appropriateness." (*See generally* Code §§ 14–2007(1)–(10), R.R. at 315a–26a.) Thus, there are no bright-line standards or mechanical applications similar to those found in ordinary zoning or land use regulations, such as height restrictions or parking ratios; rather, the standards involved here, such as the "appropriateness" of a particular project, must take into consideration the historical importance of a particular property or structure and the design of a project. (Code § 14–2007(7)(k), R.R. at 323a–24a.) To meet the specialized needs and requirements of administering a specialized ordinance, the Historic Preservation Ordinance empowers the Historical

Commission to promulgate regulations and establish committees to assist in its administration of the Historic Preservation Ordinance and in setting the City's historic preservation policy. (*See, e.g.,* Code § 14–2007(4)(e)–(h), R.R. at 318a.)

II. The Board of License and Inspection Review

Like the Historical Commission, the Board is a City agency. The Board was ***591** created by Chapter 10 of Article V of the Home Rule Charter. Phila. Charter § 5–1005. The Home Rule Charter provides:

> The Board of License and Inspection Review shall provide an appeal procedure whereby any person aggrieved by the issuance, transfer, renewal refusal, suspension, revocation or cancellation of any City license [8] or by any notice, order or other action as a result of any City inspection, affecting him directly, shall upon request be furnished with a written statement of the reasons for the action taken and afforded a hearing thereon by the Board of License and Inspection Review. Upon such hearing the Board shall hear any evidence which the aggrieved party or the City may desire to offer, shall make findings and render a decision in writing. The Board may affirm, modify, reverse, vacate or revoke the action from which the appeal was taken to it.

[8] Pursuant to Section 5–1001(a), the term "license" also includes a "permit." Phila. Charter § 5–1001(a).

Phila. Charter § 5–1005. In the official annotation to this section, the Board is referred to as an "agency created for the purpose of affording citizens, adversely affected by the exercise of licensing and inspection powers vested in City agencies, an orderly procedure, in conformity with due process, for the review of action taken against them." *Id.,* annotation. In sum, the Board hears appeals involving all City permits and licenses, including those relating to building safety and sanitation, signs, zoning, plumbing and drainage facilities, sanitary facilities, sewage disposal systems, dumpsters, and handguns. Section 5–1002 of the Home Rule Charter, Phila. Charter § 5–1002.

Unlike the Historical Commission, the Board is empowered to hear appeals on many subject areas involving the issuance or denial of all permits and licenses in the City. The Board's members are not required to have specialized expertise in the area of historic preservation. Although Section 5–1005 of the Home Rule Charter gives the Board jurisdiction over City permit and license appeals generally, Section 10 of the Historic Preservation Ordinance specifically provides the right of appeal to the Board for "[a]ny person aggrieved by the issuance or denial of any permit reviewed by the [Historical] Commission." (Code § 14–2007(10), R.R. at 326a.)

III. The Principle of Administrative Agency Deference

[2] **[3]** It is a fundamental principle of administrative law that an administrative agency's interpretation of the statute it is charged to administer is entitled to deference on appellate review absent "fraud, bad faith, abuse of discretion, or clearly arbitrary action." *Winslow–Quattlebaum v. Maryland Insurance Group,* 561 Pa. 629, 635–36, 752 A.2d 878, 881 (2000). Our Supreme Court has stated:

> It is well settled that when the courts of this Commonwealth are faced with interpreting statutory language, they afford great deference to the interpretation rendered by the administrative agency overseeing the implementation of such legislation.

Id. at 635, 752 A.2d at 881. In another case in which our Supreme Court was confronted with an agency's interpretation of its own regulations, the Supreme Court cited the United States Supreme Court for the principle that:

> In reviewing an administrative agency's interpretation of its own regulations, courts are governed by a two step ***592** analysis. First, "[i]n construing administrative regulations, 'the ultimate criterion is the administrative

interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' "

Department of Public Welfare v. Forbes Health System, 492 Pa. 77, 81, 422 A.2d 480, 482 (1980) (quoting *United States v. Larionoff,* 431 U.S. 864, 872, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977) (quoting *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945))) (alteration in original). In the instant case, the reviewing body is not a court, but a reviewing board found within the City's executive department that was created by the Home Rule Charter and granted adjudicatory authority to hear appeals on permit decisions from within its own Department of Licenses and Inspections. In addition, Section 10 of the Historic Preservation Ordinance specifically authorizes the Board to hear appeals by parties "aggrieved by the issuance or denial of any permit reviewed by the [Historical] Commission." (Code § 14–2007(10), R.R. at 326a.)

In examining the issue of competing interpretations of regulations by the quasi-judicial Environmental Hearing Board (EHB) and the Department of Environmental Protection (DEP), the agency charged with administering the Commonwealth of Pennsylvania's various environmental laws and regulations, this Court, in *Department of Environmental Protection v. North American Refractories Co.,* 791 A.2d 461, 465–66 (Pa.Cmwlth.2002), looked to the United States Supreme Court's analysis in *Martin v. Occupational Safety and Health Review Commission,* 499 U.S. 144, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991), for guidance. "It is well established 'that an agency's construction of its own regulations is entitled to substantial deference.' " *Id.* at 150, 111 S.Ct. 1171 (quoting *Lyng v. Payne,* 476 U.S. 926, 939, 106 S.Ct. 2333, 90 L.Ed.2d 921 (1986)).

In *Martin,* the Supreme Court expressed the principle that, "[i]n situations in which 'the meaning of [regulatory] language is not free from doubt,' the reviewing court should give effect to the agency's interpretation so long as it is 'reasonable.' " *Id.* (quoting *Ehlert v. United States,* 402 U.S. 99, 105, 91 S.Ct. 1319, 28 L.Ed.2d 625 (1971)) (alteration in original). In *North American Refractories,* this Court noted that, "the Supreme Court had to decide to whom a reviewing court ought to defer when two actors, assigned different roles by statute, furnish reasonable but conflicting interpretations of an ambiguous regulation." *North American Refractories,* 791 A.2d at 465. In *North American Refractories,* one actor was an administrative agency having a role similar to the Historical Commission, and the other was assigned an adjudicatory responsibility, similar to that assigned to the Board. Thus, when we were confronted with competing, but reasonable, interpretations by two dueling agencies, the DEP and the EHB, we were guided by *Martin* in three ways; we: (1) "applied a presumption against the adjudicative actor;" (2) "concluded that [the Legislature] did not intend the adjudicative actor to play a policy-making role;" and (3) concluded that the legislative body "intended to invest" the administrative actor with "authoritative interpretive powers." *North American Refractories,* 791 A.2d at 465.

In *North American Refractories,* we explained, pursuant to *Martin,* why the administrative actor should "possess authoritative interpretive powers." *North American Refractories,* 791 A.2d at 465. The administrative actor has the greater number of encounters with the issues and is, therefore, "more likely to develop the ***593** expertise relevant to assessing the effect of a particular regulatory interpretation." *Id.* (quoting *Martin,* 499 U.S. at 152–53, 111 S.Ct. 1171). This expertise, along with the administrative actor's authority over the legislation or regulations it is charged to administer, were the factors that influenced the Supreme Court "to presume that Congress intended to invest the administrative actor with authoritative interpretive powers." *Id.* We, in turn, applied this reasoning in *North American Refractories* and determined "that the General Assembly intended to invest the [administrative actor] with authoritative interpretive powers." *Id.* We found it persuasive that the Supreme Court concluded in *Martin* that "Congress did not intend the adjudicative actor to play a policy-making role" but, rather, intended to delegate the "nonpolicy-making adjudicatory powers typically exercised by a *court* in the agency-review context." *North American Refractories,* 791 A.2d at 465–66 (quoting *Martin,* 499 U.S. at 154, 111 S.Ct. 1171 (emphasis in original)). We believe that this reasoning is equally valid in the instant case where the Historical Commission has the policy-making role and is charged with administering the Historic Preservation Ordinance and the Board has nonpolicy-making, but quasi-judicial or adjudicatory review authority.

This principle of granting deference to administrative agency interpretations of the statutes or regulations they are charged with administering has been reaffirmed

repeatedly by this and our Supreme Court. In *Rendell v. State Ethics Commission,* 603 Pa. 292, 983 A.2d 708 (2009), the Pennsylvania Supreme Court once again relied upon *Winslow–Quattlebaum* when it noted that the Ethics Commission's interpretation of what constitutes "business" under the conflict of interest provisions of the Public Official and Employee Ethics Act, 65 Pa.C.S. §§ 1101–1113, was entitled to deference and that "courts are to afford substantial deference to the interpretation rendered by the agency charged with [a law's] administration." *Rendell,* 603 Pa. at 306, 983 A.2d at 716. In *Dechert LLP v. Commonwealth,* 606 Pa. 334, 998 A.2d 575 (2010), in examining the question of what constituted "tangible personal property" subject to sales tax, the Supreme Court stated that

> [i]t is this Court's practice to afford substantial deference to the interpretation rendered by the agency charged with its administration.

Id. at 586.

The Pennsylvania Supreme Court also has applied this principle to local administrative agencies as well. In *Colville v. Allegheny County Retirement Board,* 592 Pa. 433, 926 A.2d 424 (2007), the administrative agency's interpretation of a section of the county's retirement legislation it administered was in dispute based on the agency's interpretation of the word "within" to mean "before the end of." *Id.* at 442–43, 926 A.2d at 430. Our Supreme Court, citing *Winslow–Quattlebaum,* stated that we "afford great deference to the interpretation" of an administrative agency "overseeing the implementation of such legislation." *Colville,* 592 Pa. at 443, 926 A.2d at 430 (quoting *Winslow–Quattlebaum,* 561 Pa. at 635, 752 A.2d at 881).

It is undisputed that the Historical Commission is the local administrative agency charged by City Council with administering the Historic Preservation Ordinance. It is also undisputed that City Council required that the Historical Commission be composed of members with specialized knowledge, background, and expertise in the area of historic preservation. Applying these facts to the principles of administrative law in this case where there are ***594** competing actors on the local level, i.e., the Historical Commission and the Board, we rely upon the analysis in *Martin,* as we did in *North American Refractories,* and apply that analysis to the case at bar.

We begin by applying *Martin's* presumption against the adjudicative actor, i.e., the Board, because it is the administrative actor, i.e., the Historical Commission, that has numerous encounters with matters of historic preservation and those areas where the concern for historic preservation may conflict with the growth and development necessary to a large city. We also consider it important that the Historical Commission has greater expertise in this area and has been authorized to promulgate regulations and administer the Historic Preservation Ordinance. City Council invested the Historical Commission with the necessary authoritative interpretive powers to execute and interpret the Historic Preservation Ordinance. From this, we conclude that City Council did not intend the Board to have the same authoritative interpretative powers. To permit the Board to reinterpret and reconsider the deliberative, purposeful, and carefully examined interpretations and policies of the Historical Commission would be beyond the Board's limited role as an appellate adjudicative entity, which must give deference to the Historical Commission's reasonable interpretations pursuant to *Martin* and *North American Refractories.* Therefore, we conclude that the Historical Commission's reasonable interpretations of the Historic Preservation Ordinance are entitled to deference and that these interpretations "become[ ] of controlling weight unless [they are] plainly erroneous or inconsistent" with the Historic Preservation Ordinance. *Forbes Health System,* 492 Pa. at 81, 422 A.2d at 482. Therefore, the Board must not substitute its own interpretation of a definition or term of the Historic Preservation Ordinance where the Historical Commission has already provided a reasonable interpretation of that definition or term.

IV. The Board's Decision

[4] After holding public hearings and creating its own record in this case, the Board issued Findings of Fact and Conclusions of Law. (Board Op. at 2–9.) The Board received evidence, as authorized by Section 5–1005 of the Home Rule Charter, and determined, *inter alia,* that the Historical Commission erroneously: (1) interpreted the Historic Preservation Ordinance's definition of a demolition; and (2) applied the Historic Preservation Ordinance's list of factors for assessing the

"appropriateness" of an alteration in a historic district. In making these determinations and reversing those made by the Historical Commission, the Board gave no deference to the Historical Commission's interpretations of the relevant terms of the Historic Preservation Ordinance by limiting its review to determining whether the Historical Commission's interpretations were clearly erroneous or an abuse of discretion.

The Board stated that "[t]he term 'significant part' is not defined in Philadelphia Code § 14–2007." (Board Op., FOF ¶ 23.) On this point, the Board noted that "[t]here was conflicting testimony on the precise amount of space either measured by square feet or as a percentage of the building's footprint that would be removed." (FOF ¶ 25.) The Board then found there was "sufficient and substantial evidence in the Record to support a finding that just over half of the building's footprint would be removed by the proposed project" in contrast to the Historical Commission's statement "that 48% of the footprint would be removed." (FOF ¶ 26.) However, the Board also noted that:

> ***595** Mr. Schelter encouraged a more global view on the issue of whether removal of portions of Dilworth House would be "significant." That is, rather than looking at the numerical value of square footage or footprint area that would be removed, Mr. S[c]helter pointed to the "public experience" when viewing Dilworth House after completion of the proposed project. Both Messrs. Schelter and Thomas testified that the "box" of the Colonial Revival structure of Dilworth House is the 'significant' part of the structure and that most of that box would be retained and remain visible to the public.

(FOF ¶ 30.) Next, the Board found "the position advanced by Mr. Gallery to be credible and persuasive" and stated that "[a]ny evidence that is inconsistent with Mr. Gallery's testimony and with the Conclusions of Law of this Board, this Board finds to be not credible." (FOF ¶ 34.) In this finding of fact, the Board rejected as not credible the testimony of Mr. Schelter and Mr. Thomas regarding the percentage of the footprint of the Dilworth House to be razed, as well as their position that the percentage of the footprint to be razed is not the sole criterion to be used to determine whether the Project involved a "significant" part of the Dilworth House. Unlike Mr. Gallery, Mr. Schelter and Mr. Thomas advocated a more global view in interpreting what was "significant" from the perspective of the historical importance.

We agree with the Historical Commission that the administrative interpretation and "[c]onstruction of the phrase 'in significant part' and the meaning of the statutory term 'demolition' are not matters of 'credibility,' " (Historical Comm'n Br. at 27), but are matters within the province of the administrative expertise of the Historical Commission. As such, the Historical Commission's interpretation of those phrases, as well as the Historic Preservation Ordinance in general, must be accorded deference under *Martin, Colville,* and *North American Refractories.* Where there are competing interpretations of the definitions of the operational terms in the Historic Preservation Ordinance, it is "within the province of the [Historical] Commission, not the Board," to interpret the Historic Preservation Ordinance and adopt a definition. (Historical Comm'n Br. at 29.) When the Board replaced the Historical Commission's definitions with its own, transforming the interpretation of phrases into credibility determinations, the Board exceeded its appellate scope of review. When reviewing a decision of the Historical Commission, the Board's duty was to "determine if [the Historical Commission's] actions can be sustained or supported by evidence taken by [the Board]." *North American Refractories,* 791 A.2d at 466. In reversing the Historical Commission's determinations, the Board erred in not giving the Historical Commission's interpretation of the definitions and phrases contained within the Historic Preservation Ordinance deference as required by, *inter alia, Martin* and *North American Refractories.*

The Board further exceeded its scope of review when it did not grant deference to the Historical Commission's interpretation of the meaning of "appropriateness" under the Historic Preservation Ordinance. The Board's findings of facts about structure height, neighboring properties, and the neighborhood's environment were within its province. However, the Historic Preservation Ordinance states in Section 7(k) that "[i]n making its determination as to the appropriateness of proposed alterations, demolition or construction, the [Historical] Commission *shall* consider the following:" and then continues by listing

seven items. (Code, ***596** §§ 14–2007(7)(k), R.R. at 323a–24a (emphasis added).) The Board seemingly confined its examination of "appropriateness" to only some of the factors in the Historic Preservation Ordinance and did not review each of the factors set forth in the Historic Preservation Ordinance, and considered by the Historical Commission, in examining whether there was evidence in the record to support the Historical Commission's determination that the Project was appropriate for the neighborhood rather than explaining why the Historical Commission's interpretation of appropriateness was clearly erroneous under Section 7.

In sum, this Court concludes that the Board erred when it did not give deference to the Historical Commission's interpretations of the Historic Preservation Ordinance, specifically its interpretation of the terms "alteration" under Section 2(a), "in significant part," and "demolition," under Section 2(f), and "appropriateness" under Section 7(k) of the Historic Preservation Ordinance. (Code §§ 14–2007(2)(a), 2(f), (7)(k), R.R. at 316a, 323a–24a.) Accordingly, we must remand this matter to the Board for further review and for the Board to issue a new determination based on the evidence presently before it, with deference being given to the Historical Commission's interpretation of the Historic Preservation Ordinance and the application of the principle that the Historical Commission's interpretations "become[ ] of controlling weight unless [they are] plainly erroneous or inconsistent with" the Historic Preservation Ordinance. *Forbes Health System,* 492 Pa. at 81, 422 A.2d at 482.

For these reasons, the trial court's Order is vacated and this matter is remanded to the Board to issue a new determination in accordance with the foregoing opinion.

ORDER

NOW, April 18, 2011, the Order of the Court of Common Pleas of Philadelphia County in the above-captioned matter is hereby **VACATED** and this matter is **REMANDED** to the Philadelphia Board of License and Inspection Review for it to issue a new determination in accordance with the foregoing opinion.

Jurisdiction relinquished.

All Citations

20 A.3d 586

898 A.2d 1
Commonwealth Court of Pennsylvania.

BERGER & MONTAGUE, P.C. and
David Berger, Trustee, Appellants
v.
PHILADELPHIA HISTORICAL COMMISSION,
Ceebraid–Signal Corporation, St. Mark's
Church, M. Mark Mendel, Ltd., and
Board of License and Inspection Review.

Argued Nov. 15, 2005.
|
Decided Jan. 20, 2006.
|
Publication Ordered May 2, 2006.

Synopsis

Background: Owner of historically certified building appealed city historical commission's final approval of plan by developer to construct a condominium within historic district, two doors away from owner's building. The Court of Common Pleas, County of Philadelphia, August Term, 2004 No. 3373, Carrafiello, J., granted developer's motion to quash appeal. Owner appealed.

Holdings: The Commonwealth Court, 547 C.D. 2005, Flaherty, Senior Judge, held that:

[1] owner's appeal to trial court was untimely, and

[2] owner was not entitled to receive notice of plan approval.

Affirmed.

West Headnotes (3)

[1] Environmental Law
Accrual, Computation, and Tolling

Faced with issue of timeliness of building owner's appeal of city historical commission's final approval of plan to construct condominium within historic district, trial court should have conducted hearing to determine when owner had notice of commission's decision.

1 Cases that cite this headnote

[2] Environmental Law
Accrual, Computation, and Tolling

Time for owner of historically certified building to appeal city historical commission's final approval of plan to construct condominium within historic district began to run when commission's decision was entered, and not when owner received notice of decision. 2 Pa.C.S.A. § 752; 42 Pa.C.S.A. §§ 5571(b), 5572.

1 Cases that cite this headnote

[3] Environmental Law
Notice and Comment

City historical commission was not obligated to send notice of its final approval of plan to construct condominium within historic district to building owner who was not party to commission proceedings, but later sought review of the commission's decision; commission was only obligated to send notice to plan applicant.

Cases that cite this headnote

Attorneys and Law Firms

***1** Tyler E. Wren, Philadelphia, for appellants.

Jane L. Istvan, Philadelphia, for appellee, Philadelphia Historical Commission.

Neil Sklaroff, Philadelphia, for appellee, Ceebraid–Signal Corporation.

Mark M. Mendel, Philadelphia, for appellee, M. Mark Mendel, Ltd.

BEFORE: SMITH–RIBNER, Judge, and FRIEDMAN, Judge, and FLAHERTY, Senior Judge.

Opinion

OPINION BY Senior Judge FLAHERTY.

Berger & Montague, P.C. (Berger) appeals from an order of the Court of Common Pleas of Philadelphia (trial court) which granted the motion to quash Berger's appeal filed by Ceebraid–Signal Corporation, Ceebraid–Signal Acquisition Corporation and CSC Locust Club, L.P., (Ceebraid) from a decision of the Philadelphia ***2** Historical Commission (Commission) due to its untimeliness. [1] We affirm.

[1] The arguments made by Commission are incorporated with those of Ceebraid.

Ceebraid proposes to construct an eight story condominium on the 1600 block of Locust Street in Philadelphia. The property is located within the Rittenhouse/Fitler Historic District. The proposed project would involve the rehabilitation of 1618 Locust Street, demolition of a non-historic building at 1612–16 Locust Street and the erection of an eight story building. The renovation is two doors away from a historically certified building owned by Berger.

On April 13, 2004, Ceebraid filed a concept approval application with the Commission for the project. [2] The property was duly posted indicating that the application would be reviewed by the Commission's Architectural Committee on April 27, 2004 and by the Commission on May 14, 2004. The Architectural Committee voted unanimously to recommend that the Commission approve the plan. The Commission, at its meeting, voted unanimously to grant concept approval. Counsel for Berger attended the meeting but did not stay for the duration. A letter was sent to Ceebraid's counsel on May 14, 2004 informing Ceebraid of the approval.

[2] The Commission's rules and regulations set forth a two part process. A preliminary concept approval application is initially submitted by the developer for preliminary non-binding Commission review and approval. The developer then files a separate final approval application which is submitted to the Commission for review and final approval. Both procedures involve an initial review and recommendation by the Commission's Architectural Committee.

Thereafter, St. Mark's Church filed an appeal of the concept approval to the Philadelphia Board of License and Inspection Review (Board). Berger did not file an appeal of the concept approval.

On May 12, 2004 Ceebraid filed its final approval application. On the same day, Ceebraid also docketed the necessary building permit application with the Department of Licenses and Inspection. Specifically, Phila. Code § 14–2007(7)(c) requires an applicant to submit a building permit application for a proposed alteration or demolition of a historic building to the Department of Licenses and Inspection and deliver same to the Commission.

The Architectural Committee recommended approval of the final approval application. The Commission then reviewed and granted the final approval application at its June 11, 2004 public meeting. Ceebraid received notice of the Commission's decision on June 15, 2004.

In accordance with Phila. Code § 14–2007(10) any person aggrieved by the issuance or denial of any permit by the Commission may appeal such action to the Board of License Inspection and Review within 15 days of the date of receipt of notification of the Commission's action. As such, the appeal period expired on June 30, 2004.

On June 29, 2004, St. Mark's Church filed a timely appeal of the final approval with the Board of License Inspection and Review pursuant to Phila. Code § 14–2007(10). The Board then informed St. Mark's that its appeals of the concept plan approval and the final plan approval would be heard together.

On July 23, 2004, counsel for Berger requested intervention in St. Mark's appeal to the Board and also filed its own late appeal with the Board alleging that it did not have knowledge of the Commission's decision. After a hearing, the Board denied the motion to intervene and also ***3** denied the late review finding that Berger's claim as "to ignorance and surprise pertaining to the Historical Commission's process ring hollow." (Board's decision at p. 6.)

Thereafter, Berger filed three separate appeals to the trial court. The first and second appeals concerned the Board's denial of intervention and the Board's denial of the late appeal. The third appeal filed August 26, 2004 was a direct

appeal of the Commission's final approval of the plan to the trial court pursuant to the Local Agency Law, 2 Pa.C.S. § 752. Although filed beyond the 30 days provided for under the Judicial Code, 42 Pa.C.S. § 5571(b), Berger claimed that it did not have notice of the Commission's decision until July 28, 2004.

In response, Ceebraid filed a motion to quash all three appeals. As to the direct appeal, Ceebraid claimed that the appeal was untimely and that Berger failed to exhaust administrative remedies. Specifically, Ceebraid claimed that in accordance with Phila. Code § 14–2007(10), Berger was required to appeal the Commission's decision to the Board of License and Inspection Review within fifteen days of the decision. Berger filed an answer stating that the Board of License and Inspection Review does not have jurisdiction to entertain an appeal from the Commission, where, as here, no permit was actually issued. Berger also maintained that he filed the appeal to the trial court within 30 days of learning of the Commission's decision and as such, the appeal was timely. Berger also provided affidavits stating that it did not have notice of the Commission's decision until July 28, 2004.

Berger informed the trial court that the affidavits presented indicated that the issue of when Berger obtained actual notice of the Commission's decision was disputed, that the issue could not be resolved on the record and that depositions and further discovery were needed. The trial court thereafter issued an order on December 7, 2004 ordering that the Commission's motion to quash be deferred for decision at the time of hearing the appeal. On December 10, 2004 the Commission filed a motion for reconsideration with respect to its motion to quash, asserting various bases other than timeliness as a reason for quashing the appeal. Thereafter, the trial court granted the motion for reconsideration.

On February 7, 2005, the trial court issued three separate orders. First, the trial court quashed the late Board appeal as untimely. The second order permitted Berger to intervene in St. Mark's appeal to the Board. The final order, quashed the direct appeal. In its opinion, the trial court quashed the appeal from the Commission's decision on the grounds of untimeliness and because the court had permitted Berger to intervene in the St. Mark appeal pending before the Board of License and Inspection Review. This appeal followed. [3]

[3] The only order before this court is the trial court's order granting Ceebraid's motion to quash the untimely direct appeal filed by Berger. Our review in this case is limited to determining whether the trial court abused its discretion or committed an error of law. *Tongel v. City of Pittsburgh,* 756 A.2d 707 (Pa.Cmwlth.2000).

Initially, Berger claims that a hearing was necessary to determine when Berger had notice of the Commission's decision.

There is no dispute that Berger did not file an appeal to the trial court of the Commission's decision within 30 days of its issuance. Berger claims, however, that a hearing must be conducted to determine when Berger had notice of the decision because an appeal would be timely under ***4** 42 Pa.C.S. § 5571(b) if, as was done here, the appeal was filed within 30 days of Berger's actual knowledge of the agency decision.

Berger maintains that the local agency appeal to the trial court was timely under 42 Pa.C.S. § 5571(b) in accordance with this court's decisions in *Oliver v. Board of License and Inspection Review,* 761 A.2d 214 (Pa.Cmwlth.2000), *petition for allowance of appeal denied,* 566 Pa. 653, 781 A.2d 150 (2001) and *Rabenold v. Zoning Hearing Board of the Borough of Palmerton,* 777 A.2d 1257 (Pa.Cmwlth.2001).

In *Oliver,* protestant appealed the issuance of a building permit to the Board of License and Inspection Review. The appeal was filed beyond the 30 day appeal period. Noting that the Municipalities Code (MPC) does not apply to Philadelphia, the court nonetheless stated that the principles of Section 914.1 of the MPC apply and the 30 day time period does not begin to run until an aggrieved party knew or should have known of the decision. [4]

[4] Act of July 31, 1968, P.L. 805, *as amended,* 53 P.S. §§ 10101–11202. Section 914.1 was added by the Act of December 21, 1988, P.L. 1329.

Similarly, in *Rabenold,* where neighbors were unaware that a permit issued to the owner of property to renovate a funeral home also included installation of a crematory, this court stated that the 30 day appeal period to the zoning hearing board did not begin to run until the neighbors knew or should have known of the precise nature of the construction.

[1] Here, given the affidavits provided by all parties, it was necessary for the trial court to conduct a hearing to determine when Berger had notice of the Commission's decision. As such, Berger maintains that a remand is necessary to determine the disputed issues of fact and also states that due process requires such a hearing. Berger relies on *City of Philadelphia v. AFSCME, District Council 47,* 708 A.2d 886 (Pa.Cmwlth.1998), wherein this court held that the trial court erred in quashing the City's appeal as untimely without first conducting a hearing to resolve disputed issues of fact as to when the City received notice of the underlying award against it. Faced with the issue as to the timeliness of the City's appeal, the trial court should have conducted an evidentiary hearing to resolve the issue.

[2] We agree with Ceebraid, however, that Berger's direct appeal to the trial court from the Commission's decision was required to be filed within 30 days of the decision. Specifically, in accordance with Local Agency Law, 2 Pa.C.S. § 752 "any person aggrieved by an adjudication of a local agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals pursuant to Title 42." Section 5571(b) of the Judicial Code, 42 Pa.C.S. § 5571(b) provides that "an appeal from a tribunal or other government unit to a court ... must be commenced within 30 days after the entry of the order from which the appeal is taken, in the case of an interlocutory or final order." In accordance with 42 Pa.C.S. § 5572, the date of entry of the decision is "the date of service of a government unit which shall be the date of mailing if service is by mail...."

Here, the Commission granted final approval at its June 11, 2004 meeting and sent its decision to Ceebraid on June 15, 2004. As such, Berger had until July 15, 2004 to appeal to the trial court. Unlike 914.1 of the MPC, which was applicable in *Oliver* and *Rabenold,* the statute in this case, like the statute in ***5** *Residents Against Matrix v. Lower Makefield Township,* 802 A.2d 712, 715 (Pa.Cmwlth.2002), *petition for allowance of appeal denied,* 572 Pa. 716, 813 A.2d 847 (2002) "does not permit late appeals for lack of notice."

In *Residents Against Matrix,* the township supervisors approved an amendment to a master plan agreement with a developer. Neighbors filed a late appeal to the trial court pursuant to Section 1002–A of the MPC alleging lack of sufficient public notice. [5] Neighbors argued that following *Rabenold,* the appeal period does not begin to run where general notice of a decision fails to provide sufficient notice of exactly what was approved.

5 Section 11021–A was added by the Act of December 21, 1988, P.L. 1329.

This court quashed the appeal as untimely noting that *Rabenold* did not concern a direct appeal to the court under the Judicial Code, but was instead, an appeal of an administrative officer's decision to a zoning hearing board pursuant to Section 914.1 of the MPC. Section 914.1 of the MPC provides that appeal must be filed within thirty days "unless such person alleges and proves that he had no notice, knowledge, or reason to believe such approval has been given."

Section 1002–A of the MPC, which was applicable in *Residents Against Matrix,* expressly incorporates the 30 day appeal period of Section 5572 of the Judicial Code. [6] Thus, this court determined that pursuant to Section 5572, the 30 day appeal period began to run upon the township's mailing of the written decision to the developer. In addition, Section 1002–A of the MPC, does not permit late appeals for lack of notice and neighbors were not entitled to their own written notice of the Board's decision.

6 Section 1002–A of the MPC provides that "[a]ll appeals from all land use decisions ... shall be taken to the court of common pleas ... and shall be filed within 30 days after the entry of the decision as provided in 42 Pa.C.S. § 5572...."

Ceebraid argues that this case and *Residents Against Matrix* involve direct statutory appeals pursuant to Section 5572 of the Judicial Code. In contrast, *Oliver* and *Rabenold* involved Section 914.1 of the MPC which applies the knew or should have known standard. Because the Judicial Code states that an appeal must be commenced within 30 days after entry of the order and does not contain the knew or should have known language of 914.1 of the MPC, we agree that *Oliver* and *Rabenold* are not controlling.

[3] Moreover, to the extent that Berger claims it was entitled to written notice of the Commission's decision, we agree with Ceebraid that the Commission is not obligated to send a notice to anyone other then the applicant. In *Residents Against Matrix,* neighbors argued that they

were entitled to written notice of the governing body's approval of an amendment to a master plan agreement with a developer. This court held, however, that because neighbors were not a party to the underlying approval, they were not entitled to written notice of the Board's decision. Similarly, here, Ceebraid was not a party to the underlying action and not entitled to written notice of the Board's decision. In addition, like the neighbors in *Residents Against Matrix,* Berger never sought permission to appeal nunc pro tunc before the trial court.

In addition, Berger's reliance on *City of Philadelphia* for the proposition that a hearing was required as to the timeliness of Berger's appeal is misplaced. In that case, the City was a party to the underlying matter and therefore entitled to notice as a matter of law. Here, Berger is not a ***6** party to the Commission's proceedings and not otherwise entitled to notice.

We note that given our disposition we need not address Berger's remaining arguments or those of the Commission which claims that Ceebraid failed to exhaust its administrative remedies. Nonetheless, we do note that Berger's appeal of the Commission's decision is properly brought before the Board of License and Inspection Review.

The Board of License and Inspection Review was created under Section 5–1005 of the Philadelphia Home Rule Charter which provides that the Board of License and Inspection Review "shall provide an appeal procedure whereby any person aggrieved by the issuance ... refusal ... of any City license ... shall upon request be ... afforded a hearing thereon by the Board of License and Inspection Review." Section 5–1001(a) of the Philadelphia Home Rule Charter defines a license as "any license or permit required by statute, ordinance, or regulation to be obtained from and officer, department, board or commission as a prerequisite to engaging in any activity ... or using any property...." The official notes to Section 5–1001(a) clarify that a "License is to be defined in the broadest sense as a grant of permission required from the City by private persons engaging in activities or using property subject to regulations by statute or ordinance." In accordance with Phila. Code § 14–2007(10), "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...."

Consequently, the proper avenue for Berger's appeal of the Commission's decision is to the Board of License and Inspection Review. We note that Berger will have an opportunity to argue its position before the Board of License and Inspection Review inasmuch as the trial court has ordered that Berger be permitted to intervene in St. Mark's appeal to the Board of License and Inspection Review.

In accordance with the above, the decision of the trial court is affirmed.

ORDER

Now, January 20, 2006, the order of the Court of Common Pleas of Philadelphia County, in the above-captioned matter, is affirmed.

All Citations

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Commonwealth Court of Pennsylvania.

WOODLAND TERRACE HOMEOWNERS' ASSOCIATION, Maryann Kurmlavage and Constellar Corp., Appellants
v.
PHILADELPHIA BOARD OF LICENSE AND INSPECTION REVIEW, Trustees of the University of Pennsylvania, O.A.P., Inc., and Azalea Gardens Partners, LP.

No. 801 C.D.2014.
|
April 22, 2015.

BEFORE: RENÉE COHN JUBELIRER, Judge, and ROBERT SIMPSON, Judge, and JAMES GARDNER COLINS, Senior Judge.

MEMORANDUM OPINION

COHN JUBELIRER, Judge.

***1** Woodland Terrace Homeowners' Association, Maryann Kurmlavage, and Constellar Corporation (collectively, "Objectors") appeal from an Order of the Court of Common Pleas of Philadelphia County (trial court), which affirmed a decision by the Philadelphia Board of Licensing and Inspection Review (Board). The Board affirmed, by virtue of a tied vote, the Philadelphia Historical Commission's (Historical Commission) decision to grant a financial hardship application (Application) to demolish a building, designated as historic, located at 400 S. 40th Street in West Philadelphia (Property) to Azalea Gardens Partners, LP [1] (Azalea Gardens) and the Trustees of the University of Pennsylvania (University) (together, "Applicants"). [2] On appeal, Objectors argue that (1) the Board erred when it accepted the Historical Commission's interpretation of Applicants' obligation to attempt a sale of the Property in good faith prior to approval of the Application; (2) the Board abused its discretion by accepting the Historical Commission's conclusions in the absence of substantial evidence; and (3) the trial court erred by affirming the Board when Applicants had not shown that an unconstitutional taking would occur should the Application be denied. The University and the City of Philadelphia (City) [3] contend that Objectors lack standing and that judicial estoppel bars the instant appeal. We affirm.

1 Azalea Gardens are the developers retained by the University to develop the Property should the Application be granted.

2 The Philadelphia Historic Preservation Ordinance (Ordinance), as set forth in Title 14 of The Philadelphia Code, governed financial hardship applications at the time of this action. Title 14 was repealed and reenacted effective August 22, 2012. Because this action commenced March 7, 2012, the previous version of the Ordinance governs this appeal.

3 The Board is a nominal appellee and is represented in this appeal by the City; Applicants are Intervening Appellees.

I. BACKGROUND

This case involves Objectors' challenge to the proposed demolition of the Property, which had been designated historic. [4] The trial court discussed the Property's history in detail, which we summarize. The Property was built in the mid-nineteenth century as a private mansion. The once beautiful mansion was transformed into a convalescent nursing home in 1942. (Meeting Minutes of the Historical Commission at 7, May 11, 2012, R.R. 581a.) Since becoming a nursing home, the Property had been significantly "altered and almost entirely encased in a series of unsympathetic concrete block additions." (Meeting Minutes of the Historical Commission at 7, May 11, 2012, R.R. 581a.) The Property was granted historical status in 1973, and has since entered into a state of serious disrepair. (Board Decision, Findings of Fact (FOF) ¶¶ 5, 44. [5]) The nursing home was shut down in September of 2002 and the University purchased the Property in 2003 with the goal of

eliminating blight and redeveloping the Property. [6] (FOF ¶ 44.) The Property was not habitable at the time the University purchased it. (FOF ¶ 44.) The previous owner shut the heat off prior to closing, causing the pipes to burst. (FOF ¶ 44.) The ensuing flood completely destroyed the heating and plumbing system. (FOF ¶ 44.) Although the University spent between $25,000 to $35,000 annually to make the Property safe, the Property has remained vacant and in an uninhabitable condition. (Hr'g Tr. at 201–02, December 17, 2012, R.R. at 309a–10a.)

4 The Historical Commission described the Property as follows:

> Thomas and James T. Allen, plasterers, constructed the historic house in the Italianate style in 1853 or 1854 for John P. Levy, a partner in the Neafie & Levy Ship & Engine Building Company. James T. Allen is known to have commissioned famed architect Samuel Sloan to design speculative Italianate and Gothic style houses for the area around 40th (then called Till) and Pine Streets in early 1854. Sloan may have designed this house. David P. Leas, a partner in Leas & McVitty, a leather tannery, substantially altered and expanded the house in the Colonial Revival style in 1902. Architects Keen & Mead probably prepared the plans for the Leas rehabilitation and expansion. The house to the south along 40th Street was demolished about 1907; part of its lot was incorporated into the 400 S. 40th Street lot. Twins were constructed on the remainder along Baltimore Avenue. The Italianate–Colonial Revival house at 400 S. 40th Street was converted into a convalescent home in 1942, but still retained its 1902 appearance. In 1964 and 1975, the house was significantly altered and almost entirely encased in a series of unsympathetic concrete block additions. Although the Historical Commission designated the property on 1 November 1973, it appears that it did not review the 1975 additions and alterations.
>
> (Meeting Minutes of the Historical Commission at 7–8, May 11, 2012, R.R. 581a–82a.)

5 The Board issued two separate sets of findings: one issued by the two members voting to affirm the Historical Commission and one issued by the two members voting against granting the Application. Because a tie results in affirmation, the findings of the two members voting to affirm the Historical Commission will serve as the factual findings of the Board.

6 After a University Professor by the name of Vladimir Sled was murdered by someone who lived across the street from the Property in 1996, the President of the University told his employees to do all they could "to fix and cure the neighborhood of these issues." (Hr'g Tr. at 198, December 17, 2012, R.R. at 309a.)

The University began to explore potential future uses soon after purchasing the Property. (Hr'g Tr. at 202–03, R.R. at 310a.) Over the next ten years, the University took a variety of steps to find a feasible adapted use of the Property. First, the University hired an architectural firm to evaluate whether the existing structure could be used for either a fraternity/sorority house or market rate apartments. (Hr'g Tr. at 202–04, R.R. at 310a.) Based on the firm's findings, the University determined that conversion of the Property into residential use was not economically feasible. (Hr'g Tr. at 209, R.R. at 311a.) The University also solicited interest from users within the University, such as academic departments or research centers, which resulted in no interest being expressed. (Hr'g Tr. at 209–10, R.R. at 311a–12a.) At the same time, the University's in-house real estate broker employed direct marketing efforts to developers the University worked with in the past. (Hr'g Tr. at 211–12, R.R. at 312a.) From 2003–06 there was no interest in the Property from developers. (FOF ¶ 48.) In fact, the University had to convince developers to look at the Property and some did so only as a favor to the University. (Hr'g. Tr. at 211–13, R.R. at 312a.)

***2** The University changed course in 2006 and began to solicit proposals from developers in connection with a "long-term ground lease" deal. [7] (Hr'g Tr. at 21415, R.R. at 313a.) This solicitation led to a proposal for an eleven-story hotel, which was subsequently abandoned by the University during the zoning process due to community opposition. (FOF ¶¶ 50–51.) The University once again solicited proposals for a long-term ground lease from nineteen developers in 2010, this time with the added requirement that the Property be redeveloped into graduate student housing. (FOF ¶ 51.) Five proposals were received, three of which proposed demolition of the Property. (FOF ¶ 51.) Of the two proposals that did not require demolition, one required a "significant public subsidy" and the other was a proposal for a "seven-story adaptive re-use scheme." (FOF ¶ 52.) The seven-story project, however, was strongly opposed by the Objectors and a local community organization,

Spruce Hill Community Association, and was ultimately abandoned. (FOF ¶¶ 52–53.)

7 The University explained a ground-lease deal as "conveying all the rights and benefits of ownership to a developer, except for the ground, itself." (Hr'g Tr. at 215, R.R. at 313a.)

After almost ten years of failing to find a feasible adapted use for the Property, the University believed that the only practical solution remaining was demolition of the Property and the subsequent construction of a five-story apartment building. (Hr'g Tr. at 232–33, R.R. at 317a.) On March 7, 2012, Applicants submitted the Application requesting permission to demolish the Property with an accompanying affidavit to the Historical Commission. (FOF ¶ 1.) The Application was referred to the Historical Commission's Committee on Financial Hardship and the Architectural Committee. (FOF ¶¶ 13, 16.) Both committees held open meetings and heard arguments from some of the Objectors. (FOF ¶¶ 14, 16; Meeting Minutes of Architectural Committee of the Historical Commission, April 24, 2012, R.R. at 613a–23a; Meeting Minutes of the Financial Hardship Committee, April 24, 2012, R.R. 624a–45a.) The committees recommended the Application be granted and forwarded the Application to the Historical Commission for its consideration. (FOF ¶¶ 15–17.)

In addition to review by the two committees, the Historical Commission added an additional level of scrutiny in this case by hiring Margaret Sowell, an independent real estate expert. The executive director of a prominent historical preservation group in Philadelphia recommended that the Historical Commission hire Sowell to provide it with advice. (FOF ¶¶ 21–23.) Sowell issued three reports to aid the Historical Commission in its decision. (Reports of Real Estate Strategies, Inc., R.R. at 706a–36a.) The Historical Commission then held a public meeting on the issue on May 11, 2012. After hearing arguments, the Historical Commission voted:

> 1. to find that the [A]pplicant[s] [have] demonstrated that the sale of the [P]roperty is impracticable, that commercial rental cannot provide a reasonable rate of return, and that other potential uses of the [P]roperty are foreclosed;
>
> ***3** 2. to find that the building's required retention would result in a financial hardship for the [P]roperty owner; and,
>
> 3. to approve the demolition, pursuant to Section 14–2007(7)(j) of the [H]istoric [P]reservation [O]rdinance, provided no demolition is undertaken until all prerequisite approvals for the building permit are obtained and the building permit has been issued for the new construction.

(FOF ¶ 6.)

On May 29, 2012, Objectors appealed the Historical Commission's decision to the Board. Objectors Kurmlavage and Constellar Corporation are the owners of properties that abut the subject Property and Objector Woodland Terrace Homeowners' Association is a homeowners' association with members that live in the area adjacent to the Property. (Trial Ct. Op. at 2; Bylaws for the Woodland Terrace Homeowners' Association at § 1, R.R. at 1486a.) On July 16, 2012, the University filed a motion to quash Objectors' appeal due to lack of standing. (University's Motion to Quash, R.R. 1552a.) The Board held ten hearings between July 2012 and February 2013, including three focused exclusively on the issue of standing. (FOF ¶¶ 9, 10.) In support of their Application, Applicants presented the testimonies of (1) Jonathan Farnham, Executive Director of the Historical Commission; (2) Paul Sehnert, Director of Real Estate for the University; (3) James Hoolehan, an expert in construction cost estimating; (4) David Hollenberg, an architect at the University and member of the Historical Commission's Architectural Committee; and (5) Jonathan Weiss, a developer with Azalea Gardens. (FOF ¶¶ 21, 42, 59, 62, 67.) Sowell also testified before the Board as an independent expert for the Historical Commission.

The Board issued its decision on February 26, 2013, where two members voted to affirm the decision and two voted to sustain the appeal. (FOF ¶ 11.) The legal effect of a tie was to deny the appeal and let the Historical Commission's decision stand. *See Giant Food Stores, Inc. v. Zoning Hearing Board of Whitehall Township,* 501 A.2d 353, 355 (Pa.Cmwlth.1985) (stating that "a tie vote of an administrative body constitutes a refusal of action requested from it").

The prevailing members of the Board found that all Objectors had standing to bring the appeal. (FOF ¶ 10.) The prevailing members also found that all the testimony and documentary evidence presented by Applicants' witnesses were credible, and adopted the testimony within their findings of fact. (FOF ¶¶ 34, 41, 58, 61, 66, 71, 75.) Thereafter, the Board set forth the following conclusions of law:

> 1. The only issue before the Board is whether the Historical Commission's decision to approve the demolition of the historic building on the Property based on financial hardship should be affirmed.
>
> 2. The Historical Commission has the power and duty to review and act upon all applications for permits to demolish historic buildings. (*see* Section 14–2007(4)(d) of the Historic Preservation Ordinance) Moreover, no permit shall be issued for the demolition of an historic building unless the Historical Commission finds that the building cannot be used for any purpose for which it is or may be reasonably adapted. (*see* Section 14–2007(7)(j) of the Historic Preservation Ordinance) In order to show that a building 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. (*see* Section 142007(7)(j) of the Historic Preservation Ordinance)
>
> ***4** 3. In the instant case, the Applicant[s] [have] the responsibility to submit an affidavit to the Historical Commission which included the information set forth in Section 14–2007(7)(f) of the Historic Preservation Ordinance. The two members of the Board who voted City affirmed find that the Historical Commission properly determined that the Application was complete.
>
> 4. The two members of the Board who voted City affirmed recognize that the Historical Commission is a body comprised of experts in the field of historic preservation and other officials and that it regularly interprets the Historic Preservation Ordinance and its Rules and Regulations.
>
> 5. The two members of the Board who voted City affirmed conclude that the Historical Commission made a reasonable and informed judgment in approving the Application because there was sufficient testimony and documentation to support the Applicant[s'] claim of financial hardship.
>
> 6. The two members of the Board who voted City affirmed conclude that in approving the Application the Historical Commission properly considered, interpreted and applied the provisions of the Historic Preservation Ordinance and its own Rules and Regulations.
>
> 7. The two members of the Board who voted City affirmed have considered all testimony and the entire record. Based on this evidence and upon giving due discretion and deference to the decision of the Historical Commission, the two members of the Board voted to affirm the Historical Commission's approval of the Application. Additionally, the two members of the Board who voted City affirmed conclude that the record before it contains substantial evidence to affirm the decision of the Historical Commission.
>
> 8. The two members of the Board who voted City affirmed conclude that the Historical Commission's decision to approve the Application to demolish the historic building on the Property was not plainly erroneous and was consistent with the Historic Preservation Ordinance and its own Rules and Regulations.
>
> 9. The City should be affirmed.

(Board Decision, Conclusions of Law (COL) ¶¶ 1–9.)

The two members of the Board who voted to sustain the appeal disagreed with the Board's conclusion that Applicants satisfied the Historical Commission's Rules and Regulations. (Conclusions of Law of the Two Board Members Who Voted Appeal Sustained ¶¶ 16–20.) Specifically, the two members who voted to sustain the appeal concluded that, because Applicants admitted that the Property was never listed for sale, Applicants did not make a good faith effort to sell the Property and the Historical Commission's decision to permit the demolition for financial hardship is inconsistent with the Historical Commission's regulations. (Conclusions of Law of the Two Board Members Who Voted Appeal Sustained ¶ 17.) The two members who voted to sustain the appeal also concluded that the Historical Commission's conclusions were not supported by substantial evidence. (Conclusions of Law of the Two Board Members Who Voted Appeal Sustained ¶ 20.)

***5** Objectors appealed the Board's decision to the trial court on March 21, 2013. (Trial Ct. Op. at 13.) On March 29, 2013, Applicants filed a praecipe to intervene and oral argument was held on April 8, 2014, though no new evidence was presented. (Trial Ct. Op. at 13.) The trial court affirmed the Board's decision by Order of April 9, 2014. This appeal followed. [8]

8 When reviewing an appeal from a trial court order affirming or denying a decision of the Board, and where the trial court takes no new evidence, this [c]ourt must affirm the Board's decision unless the decision violated the appellant's constitutional rights, the decision was not in accordance with law, the proceedings before the Board violated the practices and procedures of local agencies, or any necessary findings of fact made by the Board [were] not supported by substantial evidence.

Siloam v. City of Philadelphia, Board of License and Inspection Review, 79 A.3d 1257, 1260 n. 3 (Pa.Cmwlth.2013) (internal quotations omitted). We have construed the requirement that the agency decision be "in accordance with law" to mean that an "agency's decision must not represent a manifest and flagrant abuse of discretion or a purely arbitrary execution of its duties or functions as set forth in the case law prior to the enactment of the Administrative Agency Law [2 Pa.C.S. §§ 501–508, 701–704]." *Leckey v. Lower Southampton Township Zoning Hearing Board,* 864 A .2d 593, 596 (Pa.Cmwlth.2004); *see also, Slawek v. State Board of Medical Education and Licensure,* 586 A.2d 362, 365 n. 4 (Pa.1991) (stating that an agency's decision is not in accordance with the law if "the agency decision represents a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions" (internal quotations omitted)). Although our review of all questions of law is plenary, the interpretations of statutory language by the administrative agency charged with the law's implementation are given great deference. *Smith v. Zoning Hearing Board of Huntingdon Borough,* 734 A.2d 55, 57 (Pa.Cmwlth.1999).

II. DISCUSSION

By raising issues of standing and judicial estoppel, Applicants and the City raise two threshold questions which shall be addressed prior to reaching the merits of Objectors' appeal. [9]

9 The trial court's decisions on standing and judicial estoppel are questions of law and reviewed by the Court under a plenary standard. *Hoffman Mining Company, Inc. v. Zoning Hearing Board of Adams Township,* 958 A.2d 602, 608 (Pa.Cmwlth.2008).

A. Standing

Applicants and the City contend that none of the Objectors have standing because demolition of the Property, which is vacant and in a state of serious disrepair, will not cause them harm. They contend that the harm that any Objectors would face is no greater than that of any member of the general public.

"The core concept" of standing is that a person or entity that "is not adversely affected in any way by the matter he seeks to challenge is not 'aggrieved' thereby and has no standing to obtain a judicial resolution of his challenge." *William Penn Parking Garage, Inc. v. City of Pittsburgh,* 346 A.2d 269, 280 (Pa.1975). Because this case comes from Philadelphia, the standing provisions contained in Section 17.1 of the First Class City Home Rule Act [10] (Home Rule Act) apply. The Supreme Court, in *Spahn v. Zoning Board of Adjustment,* 977 A.2d 1132 (Pa.2009), interpreted Section 17.1 of the Home Rule Act as providing standing in challenges to decisions of "board[s] or commission[s] created to regulate development within the city" to "two classes of persons and entities—the governing body *and* 'any aggrieved person.' " *Id.* at 1149. An aggrieved person under the Home Rule Act means a person who "has a substantial, direct and immediate interest in the claim sought to be litigated." *Id.* (citing *William Penn,* 346 A.2d at 280).

10 Act of April 21, 1949, P.L. 665, *as amended,* added by Section 2 of the Act of November 30, 2004, P.L. 1523, 53 P.S. § 13131.1. Section 17.1 provides:

> In addition to any aggrieved person, the governing body vested with legislative powers under any charter adopted pursuant to this act shall have standing to appeal any decision of a zoning hearing board or other board or commission created to regulate development within the city. As used in this section, the term "aggrieved person" does not include taxpayers of the city that are not detrimentally harmed by the decision of the zoning hearing board or other board or commission created to regulate development.

Id.

It is long established that a property owner need not establish pecuniary or financial loss if he owns property abutting the property at issue in a zoning case. *Aquaro v. Zoning Board of Adjustment of the City of Philadelphia,* 673 A.2d 1055, 1059 (Pa.Cmwlth.1996); *see also Society Created to Reduce Urban Blight (SCRUB) v. Zoning Hearing Board of Adjustment of the City of Philadelphia,* 951 A.2d 398, 404 (Pa.Cmwlth.2008) (stating "[i]t is well-established that an adjoining property owner, who testifies in opposition to a zoning application before the zoning board, has sufficient interest in the adjudication to have standing to appeal the board's decision to the trial court"). Objector Kurmlavage owns 4003 Baltimore Avenue and Objector Constellar Corporation owns 4001 Baltimore Avenue, both of which abut the Property. (Hr'g Tr. at 66–67, August 7, 2012, R.R. at 40a–41a; Hr'g Tr. at 4–5, September 18, 2012, R.R. at 75a.) Because both Kurmlavage and Constellar Corporation own property that abuts the Property, it is presumed that a decision related to the Property will have an impact on both property owners and, as such, they have standing to bring this appeal. [11]

11 Because we find that Constellar Corporation and Kurmlavage have standing, we need not assess whether Woodland Terrace Homeowners' Association has standing.

B. Judicial Estoppel

***6** Applicants' estoppel argument is rooted in a 2009 hearing before the City's Zoning Board of Adjustment (ZBA) addressing the University's abandoned attempt to construct an eleven-story hotel on the Property. The issue at the 2009 ZBA hearing was whether the University's request for rescission of the Property's historical designation should be granted. (ZBA Hr'g Tr. at 10, February 19, 2009, R.R. at 1568a.) Objectors' expert at the ZBA hearing opined that rescission was not appropriate because the University failed to meet the applicable test. (ZBA Hr'g Tr. at 13, R.R. at 1568a.) Specifically, the expert stated, in response to a question on cross examination, that the University should have submitted a financial hardship application to demolish the Property, and that in his opinion such an application would be granted. (ZBA Hr'g Tr. at 13, R.R. at 1568a.) Because Applicants now bring a financial hardship application as recommended by Objectors' expert, Applicants argue that Objectors should be judicially estopped from opposing the Application.

"[T]he purpose of the doctrine of judicial estoppel is to uphold the integrity of the courts by preventing parties from abusing the judicial process by changing positions as the moment requires." *Gross v. City of Pittsburgh,* 686 A.2d 864, 867 (Pa.Cmwlth.1996). As a general rule, a party may be judicially estopped when (1) the party asserts a position inconsistent with his or her assertion in a previous action; and (2) his or her contention in the previous action was "successfully maintained." *Trowbridge v. The Scranton Artificial Limb Company,* 747 A.2d 862, 864 (Pa.2000).

Applicants argue that Objectors prevailed in the previous litigation even though the University abandoned the project prior to the ZBA deciding the matter. Applicants contend that the requirement that a contention be successfully maintained does not mean Objectors won their previous case. All that is required, Applicants argue, is that Objectors received the remedy sought and reaped the benefit of the proceeding.

We conclude that Objectors are not judicially estopped from bringing this appeal. The University abandoned the proposal in 2009 prior to Objectors' contention being "successfully maintained." (FOF ¶ 51); *See Associated Hospital Service of Philadelphia v. Pustilnik,* 439 A.2d 1149, 1151 (Pa.1981) (concluding that appellant did not "successfully maintain" his claim because there was a settlement prior to adjudication). Applicants cite a footnote to *In re Adoption of S.A.J.,* 838 A.2d 616, 620 n. 3 (Pa.2003), to argue the "successfully maintained" requirement is not strictly necessary. In that footnote, the Supreme Court stated:

> Whether successful maintenance of the prior inconsistent position of litigant is strictly necessary to implicate judicial estoppel in every case, or whether success should instead be treated as a factor favoring the doctrine's application, is the subject of some uncertainty ... While some prior decisions of this Court appear to indicate that it is always a requirement, *see, e.g., Associated Hosp. Svc. of Phila. v. Pustilnik,* ... 439 A.2d 1149, 1151 ([Pa.] 1981) ("[A]s a general proposition, a party to an action is estopped from assuming a position inconsistent with his assertion in a previous action, if his contention was successfully maintained." (internal quotation marks omitted)),

others seem to suggest that a broader application of the doctrine may be appropriate. *See, e.g., Sunbeam Corp. v. Liberty Mut. Ins. Co., ...* 781 A.2d 1189, 1192 ([Pa.] 2001) (noting that regulatory estoppel (a form of judicial estoppel) was applicable whether or not the Pennsylvania Insurance Department relied upon the insurance company's prior inconsistent position); *In re Pivirotto's Estate, ...* 97 A. 80 ([Pa.] 1916) (applying judicial estoppel to the wife of a decedent because she helped her children contest her husband's will, although the will was never avoided). Because we ultimately conclude, *infra,* that Appellant prevailed in the earlier proceedings, we need not definitively resolve this question here.

***7** *Id.* at 620 n. 3.

Notwithstanding the uncertainty caused by the Supreme Court's decision to not resolve the issue in *In re Adoption of S.A.J.,* we are bound to follow precedent and not apply judicial estoppel when a party unilaterally abandoned its previous effort. *Associated Hospital Service,* 439 A.2d at 1151. Even if "successfully maintain" is only a factor, the fact that the University unilaterally abandoned the project is significant. Accordingly, Objectors are not judicially estopped from bringing this appeal.

Having addressed Applicants' standing and judicial estoppel arguments, we now turn to the merits of Objectors' appeal.

C. The Financial Hardship Application

The Application was based on a claim of financial hardship; thus, Section 2007(j) of Philadelphia's Historic Preservation Ordinance (Ordinance), § 142007(7)(j), applied. At the time this controversy arose Section 14–2007(7)(j) stated:

> No permit shall be issued for the demolition of an historic building, structure, site or object, or of a building, structure, site or object located within an historic district which contributes, in the [Historical] Commission's opinion, to the character of the district, unless the [Historical] Commission finds that issuance of the permit is necessary in the public interest, **or unless the [Historical] Commission finds that the building, structure, site or object cannot be used for any purpose for which it is or may be reasonably adapted. In order to show that [the] 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.**

(Ordinance § 14–2007(7)(j), R.R. 507a (emphasis added).)[12] The Historical Commission's regulations implementing the Ordinance then in effect explained:

12 Section 14–2007(7)(j) was repealed and reenacted after the initiation of this action as Section 14–1005(6)(d). The two provisions are nearly identical. Section 14–1005(6)(d) provides:

> No building permit shall be issued for the demolition of a historic building, structure, site, or object, or of a building, structure, site, or object located within a historic district that contributes, in the Historical Commission's opinion, to the character of the district, unless the Historical Commission finds that issuance of the building permit is necessary in the public interest, or unless the Historical Commission finds that the building, structure, site, or object cannot be used for any purpose for which it is or may be reasonably adapted. In order to show that [the] 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.

To substantiate a claim of financial hardship to justify a demolition, the applicant 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. **The applicant has an affirmative obligation in good faith**

to attempt the sale of the property, to seek tenants for it, and to explore potential reuses for it.

(Historical Commission Rules & Regulations § 9.4, R.R. at 561a–62a (emphasis added).) The Historical Commission's regulations provided flexibility to nonprofit entities, such as the University, recognizing

> that the provisions of Section 14–2007 of the [Ordinance] and other sections of these Rules & Regulations may not all have applicability to a property owned and used by a non-profit organization. No single set of measures can encompass the highly variegated types and contexts of buildings held by non-profit organizations. The economics of a building in the middle of a college campus may differ from that of a church, hospital, museum, or child care center.

***8** (Historical Commission Rules & Regulations § 10.1, R.R. 565a.)

Objectors contend that the Board did not require Applicants to meet their good faith obligation to attempt a sale of the Property as required by Section 9.4 of the Historical Commission's regulations. Applicants and the City argue that the Historical Commission reasonably interpreted and applied its regulation as being satisfied, under these facts, because the Property was exposed to the real estate market in good faith for over a decade through a variety of means, including, most recently, soliciting a long-term ground lessee.

In *Turchi v. Philadelphia Board of License and Inspection Review,* 20 A.3d 586 (Pa.Cmwlth.2011), we held that "the Historical Commission's reasonable interpretations of the ... Ordinance are entitled to deference and that these interpretations 'become[ ] of controlling weight unless [they are] plainly erroneous or inconsistent' with the ... Ordinance.' " *Id.* at 594 (quoting *Department of Public Welfare v. Forbes Health System,* 422 A.2d 480, 482 (Pa.1980)). Although the Board may disagree with the Historical Commission's understanding of the Ordinance and the associated regulations, the Historical Commission's interpretations should not be disturbed in the absence of plain error. *Id.*

The Minutes of the Historical Commission's May 11, 2012 meeting show that the interpretation and application of its regulations in Section 9.4 were considered by the Historical Commission. (Meeting Minutes of Historical Commission at 27, May 11, 2012, R.R. at 601a.) The Historical Commission was presented with evidence of the University's marketing efforts for over ten years, including its direct outreach to the real estate development market, its efforts to find adaptive reuses for the Property, and its financial analysis. Objectors' counsel argued that an attempt to secure a ground lease was insufficient to satisfy Section 9.4 of the Historical Commission's regulations. (Meeting Minutes of Historical Commission at 26–28, May 11, 2012, R.R. at 600a–02a.) After the Historical Commission heard an exchange between Objectors' counsel and its Executive Director, Dr. Farnham, on the issue of whether Applicants demonstrated that the sale was impracticable, the Historical Commission, by a vote of seven to two, found "that the applicant has demonstrated that the sale of the property is impracticable." (Meeting Minutes of the Historical Commission at 27–29, May 11, 2012, R.R. at 601a–03a.)

We agree that the regulation does not require the Property to be listed for sale with a third party broker if the facts establish that such a listing would be futile.[13] The Historical Commission concluded that the good faith attempt to sell requirement was satisfied by the efforts made by Applicants in this case. Cognizant of both the deference we give to the Historical Commission's interpretations of its regulations and the liberal standards applied to non-profits in Section 10.1 of the Historical Commission's regulations, we agree that the Historical Commission's application and interpretation of the Ordinance and its regulations based on its knowledge and experience was not erroneous. Accordingly, the Board did not commit an error of law by accepting the Historical Commission's interpretation.

13 We note that Dr. Farnham testified regarding a prior Historical Commission decision where Section 9.4 was also interpreted not to require an applicant to actually list a property for sale where it would be futile and a financial hardship application was granted. (Hr'g Tr. at 3637, December 17, 2012, R.R. at 268a.)

***9** Objectors next contend that, even if the Historical Commission's interpretation of Section 10.1 of its

regulations is correct, the Board abused its discretion because the evidence shows that the University failed to demonstrate that the Property could not be used for any purpose for which it is or may be reasonably adapted. [14] To this end, Objectors first argue that the evidence shows that the University only pursued options it favored and chose to not pursue all alternatives. The focus, Objectors argue, should be on whether **any owner** could use the Property in a profitable manner, and not whether the potential reuse fits within the University's vision for the Property.

14 A local agency abuses its discretion "only if its findings are not supported by substantial evidence." *Valley View Civic Association v. Zoning Board of Adjustment,* 462 A.2d 637, 640 (Pa.1983). Substantial evidence is "such relevant evidence of record which a reasonable person might accept as adequate to support a conclusion." *Mulberry Market, Inc. v. City of Philadelphia, Board of License & Inspection Review,* 735 A.2d 761, 767 (Pa.Cmwlth.1999).

It is true that the University only solicited proposals from developers it knew so that any development would align with the University's interests. (Hr'g Tr. at 97, January 15, 2013, R.R. at 396a.) However, the Board heard this argument and concluded, based on the evidence presented, that any prospective buyer would be faced with the same situation as the University. (FOF ¶¶ 54–56.) The Property was in a state of serious disrepair and salvaging the entity was cost prohibitive. (Hr'g Tr. at 16–20, R.R. at 375a–76a.) Although it is conceivable that a buyer willing to spend unlimited funds could adapt or reuse the Property, the regulations only require owners of historic properties to do what is reasonable. *See* Ordinance § 14–2007(7)(j) (providing, "[n]o permit shall be issued for the demolition of an historic building, structure, site or object, or of a building, structure, site or object located within an historic district ... unless the [Historical] Commission finds that the building, structure, site or object cannot be used for any purpose for which it is or may be **reasonably** adapted") (emphasis added).

Substantial evidence also supports the Board's finding that alternative uses for the Property were foreclosed. Sowell, the independent expert hired by the Historical Commission, testified that "there is not a scenario that ... yields an adequate financial return on investment to make a prudent investment out of the [P]roperty and save the mansion." (Hr'g Tr. at 134, December 17, 2012, R.R. at 293a.) According to Sowell's report to the Historical Commission, the University could expect a return on its investment of (1) .91 percent if the Property was converted into apartments, (Addendum to Report of Real Estate Strategies, Inc. at Attachment A, R.R. at 734a); (2) 1.9 percent if ground leased at the level of $20,000 per year, (Addendum to Report of Real Estate Strategies, Inc. at Attachment B, R.R. at 735a); and (3) 2.83 percent if converted and rented as a commercial office, (Addendum to Report of Real Estate Strategies, Inc. at Attachment C, R.R. at 736a). The Board also relied on the testimony of Sehnert, the University's real estate expert, wherein he opined that a seven percent cap rate and an eleven percent cash on cash return represented the lowest rates of return a third party developer would expect from this Property. (Hr'g Tr. at 207, R.R. at 311a.) The testimonies of Sehnert and Sowell were corroborated by Hoolehan, testifying as Applicants' construction cost expert. Hoolehan opined that the lowest possible price for responsible historic rehabilitation is $200 per square foot and that this project would be a "total gut job" and cost $207 per square foot. (Hr'g Tr. at 14–15, 17, 20, January 15, 2013, R.R. at 375a–76a.) With regard to the University's marketing efforts, the Board relied on testimony from Sehnert concerning (1) the lack of interest from University departments to use the Property, (Hr'g Tr. at 209–10, R.R. at 311a–12a); (2) the proposals received between 2003 and 2006 and his opinion that the only response that was feasible was opposed by community members, (Hr'g Tr. at 218–23, R.R. at 312a–15a); and (3) the University's failed efforts in 2010 to find a developer, soliciting proposals for a long-term ground lease, (Hr'g Tr. at 223–33, R.R. at 315a–17a).

***10** Objectors next argue that the Property was not sufficiently marketed to warrant a finding that Applicants made a good faith attempt to sell the Property. Objectors point to the fact that the 2006 solicitation was only a half-page long and was not posted publicly or marketed widely. Objectors also note that the 2010 solicitation for a ground lease had a response time of only two weeks.

We conclude that substantial evidence supports the finding that the Property was marketed in good faith. Of particular relevance are the testimonies of Sehnert and Hollenberg explaining how the Property was marketed since 2003, and the placement of the 2010 solicitation into evidence. (FOF ¶¶ 48–51; 2010 Statement of Interest, R.R. at 810a–17a.) These testimonies show that Applicants conducted extensive marketing and did not arrive at

the decision to apply for the demolition permit lightly. Hollenberg testified that, when he first became involved with the Property in 2006, he was eager to save the Property and have it adaptively reused. (Hr'g Tr. at 76, 80, January 15, 2013, R.R. at 390a–91a.) Hollenberg stated that he has taught a graduate program on historic preservation for the University for 24 years and approached the demolition with "great sadness and gravity." (Hr'g. Tr. at 74–76, 79; R.R. at 390a–91a.) Likewise, Sehnert's testimony supports a finding that the Property was marketed in good faith. According to Sehnert:

> Between the time of 2003 and 2006 we were continuously marketing this project to developers and partners of ours ... There was more or less a continuous marketing, but we had two bands of process, between 2003 and 2006, and then subsequently, in 2010. And each of these was a solicitation and a reach out to developers to say: Here's the [P]roperty. Tell us what you would do with it. And we didn't impose any restrictions on it, whatsoever, other than to say: You tell us what makes sense to do here.

(Hr'g Tr. at 211, December 17, 2012, R.R. at 312a.) The University's marketing efforts resulted in multiple concrete proposals. (Hr'g Tr. at 137–41, August 7, 2012, R.R. at 58a–59a.) Notwithstanding the fact that all proposals except the proposal currently under review proved to be infeasible, the Board's finding that the Property was marketed in good faith was supported by substantial evidence.

Accordingly, the Board did not abuse its discretion in upholding the Historical Commission's approval of the permit because the record contains evidence that is sufficient to convince a reasonable person that the Property "cannot be used for any purpose for which it is or may be reasonably adapted." [15] (Historical Commission Rules & Regulations § 9.4, R.R. at 561a–62a.)

15 In *Turchi,* this Court stated that "the Board's duty was to 'determine if the [Historical Commission's] actions can be sustained or supported by evidence taken by' the Board." *Turchi,* 20 A.3d at 595 (quoting *Department of Environmental Protection v. North American Refractories Co.,* 791 A.2d 461, 466 (Pa.Cmwlth.2002)).

D. Takings Clause

As a final matter, Objectors argue that the trial court erred by affirming the Board's decision when Applicants failed to demonstrate that failure to grant the Application would amount to an unlawful taking without compensation. Objectors argue that because the requirements of the Ordinance were derived from takings law, a property owner seeking approval to demolish a historically preserved property cannot, as a matter of law, claim financial hardship unless the applicant first establishes that failing to grant the application would amount to an unconstitutional taking without compensation. [16] We disagree.

16 Both the constitutions of this Commonwealth and of the United States protect citizens from deprivations of property without just compensation. Pa. Const. art. I, § 10; U.S. Const. amend. V, XIV. Pennsylvania courts construe the texts of the two provisions as essentially identical and have "continually turned to federal precedent for guidance in its 'taking' jurisprudence." *United Artists' Theater Circuit, Inc. v. City of Philadelphia,* 635 A.2d 612, 616 (Pa.1993).

***11** The United States Supreme Court, in *Penn Central Transportation Company v. City of New York,* 438 U.S. 104 (1978), affirmed the rights of cities to enact reasonable land-use restrictions "to enhance the quality of life by preserving the character and desirable aesthetic features of a city." *Id.* at 129. In determining the reasonableness of the restrictions, courts look at the economic impact of the regulation, the character of the government action, and the interests that would be promoted by the regulation. *Id.* at 124–25. When the interference is of great magnitude, " 'there must be an exercise of eminent domain and compensation to sustain [it].' " *Id.* at 136 (quoting *Pennsylvania Coal Company v. Mahon,* 260 U.S. 393, 413 (1922)).

The Pennsylvania Supreme Court and this Court have applied the above takings analysis to multiple situations involving the demolition of properties protected by historic preservation regulations. *See, e.g., City of Pittsburgh v. Weinberg,* 676 A.2d 207, 211 (Pa.1996); *Park Home v. City of Williamsport,* 680 A.2d 835, 837 (Pa.1996); *United Artists' Theater Circuit, Inc. v. City of Philadelphia,*

635 A.2d 612, 620 (Pa.1993); *First Presbyterian Church of York v. City Council of the City of York,* 360 A.2d 257, 261 (Pa.Cmwlth.1976). In fact, the requirements of Section 14–2007(7)(j) of the Ordinance mirrors the requirements for establishing an unconstitutional taking established by this Court in *First Presbyterian Church of York.* In that case, we adopted the Fifth Circuit Court of Appeals approach of finding an unconstitutional taking in the context of a historic preservation ordinance upon a showing " 'that the sale of the property was impracticable, that commercial rental could not provide a reasonable rate of return, or that other potential use of the property was foreclosed.' " *First Presbyterian Church of York,* 360 A.2d at 261 (quoting *Maher v. City of New Orleans,* 516 F.2d 1051, 1066 (5th Cir.1975)).

Although Objectors are correct that takings jurisprudence can be implicated in cases addressing Section 14–2007(7) of the Ordinance, Objectors are incorrect that a finding of a constitutional violation is a condition precedent to awarding a financial hardship application. Objectors conflate the question of whether the decision to not allow demolition of an historic property is a taking with the question of what an owner of an historic property must demonstrate as a prerequisite to receiving a demolition permit. These are two distinct questions. Even if Section 14–2007(7) of the Ordinance was developed to prevent unlawful takings, it does not follow that financial hardship applications must be denied unless denying the application would amount to an unlawful taking. Our review of the relevant case law demonstrates that unconstitutional taking arguments in this context are properly employed by property owners, such as Applicants, seeking to demolish an historic property after a local agency denied the relief sought. *See Park Home,* 680 A.2d at 836 (rejecting a property owner's argument that an unconstitutional taking occurred after being denied a permit to demolish its property); *City of Pittsburgh,* 676 A.2d at 212 (rejecting property owners' challenge to the Pittsburgh Historic Review Commission's decision to deny a demolition permit because the property owners did not meet their burden of proving that it was impracticable or impossible to sell their property); *First Presbyterian Church of York,* 360 A.2d at 261 (holding that the taking clause was not violated by the City's decision to not award a demolition permit because the property owner did not establish that the property could not be reasonably adapted). Here, Applicants do not argue that an unconstitutional taking has occurred; they simply contend that the requirements necessary to have their financial hardship Application granted are met. Because Applicants do not argue that their property was unlawfully taken, we need not address Objectors' takings argument any further.

***12** For the foregoing reasons, the trial court's Order is affirmed.

Judge LEADBETTER did not participate in the decision in this case.

ORDER

NOW, April 22, 2015, the Order of the Court of Common Pleas of Philadelphia County, entered in the above-captioned matter, is **AFFIRMED.**

All Citations

Not Reported in A.3d, 2015 WL 5436758

First Presbyterian Church v. City Council of York

Commonwealth Court of Pennsylvania

January 7, 1976, Argued ; June 15, 1976, Decided

No. 991 C.D. 1975

Reporter
25 Pa. Commw. 154 *; 360 A.2d 257 **; 1976 Pa. Commw. LEXIS 1091 ***

The First Presbyterian Church of York, Pennsylvania, Appellant v. City Council of the City of York, Appellee

Prior History: [*1]** Appeal from the Order of the Court of Common Pleas of York County in case of The First Presbyterian Church of York, Pennsylvania v. City Council of the City of York, No. 127 January Term, 1975.

Disposition: Affirmed.

Core Terms

ordinance, historic, Zoning, architectural, demolish, purposes, rights, private property, regulation, buildings, governing body, demolition, adapted, Museum

Case Summary

Procedural Posture
Appellant landowner sought review of an order of the Court of Common Pleas of York County (Pennsylvania), which affirmed appellee city council's refusal to issue a permit for the demolition of a structure on appellant's grounds.

Overview

Appellant landowner sought permission to destroy a house on its property to provide extra parking and landscaping. Appellee city council had adopted an ordinance pursuant to *53 P.S. § 8001 et seq.* which designated a historic district, and appellant's structure was the flagship of this district. Appellee refused to grant the application, and the trial court affirmed the denial. On review, the court affirmed, finding that the proper test of constitutionality of the ordinance was whether it precluded the use of the property for any purpose for which it was reasonably adapted. The court found that appellant failed to show that the sale of the property was impractical or that renting it could not provide a reasonable return. The court noted that appellant made no attempt to rent the property, did not bother maintaining or repairing it, declined to consider any offer to purchase the building, and refused to enter into any cooperative agreement to restore, maintain, or use the building.

Outcome
The court affirmed the denial of the permit to demolish the structure on appellant landowner's grounds, finding that appellant failed to show the historic district zoning ordinance precluded the use of its property for any purpose for which it was reasonably adapted.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

HN1[] **Zoning, Historic Preservation**
See *53 P.S. § 8002*.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

Real Property Law > Brokers > Discipline, Licensing & Regulation

HN2[] **Zoning, Historic Preservation**
53 P.S. § 8003 authorizes the municipal governing body to appoint a Board of Historical Review of not less than five members, consisting of a registered architect, a licensed real estate broker, a building inspector, and the remaining members persons with knowledge of and interest in the preservation of historic districts. The function of the Board is to give counsel to the governing body regarding the issuance

of certificates.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

HN3[] **Zoning, Historic Preservation** *53 P.S. § 8004*, empowers the governing body to certify to the appropriateness of the erection, reconstruction, alteration, restoration, demolition or razing of any building within the historic district or districts and prohibits the issuance of a permit for such changes until such a certificate shall have been issued. The same section requires the governing body in its determination of whether the certificate should issue to consider the effect of the proposed change on the general historic and architectural nature of the district, and with respect to the building to consider only exterior architectural features which can be seen from the street but in this regard also to take into account the general design, arrangement, texture, material and color of the building or structure and the relation of such factors to similar features of buildings and structures in the district.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

Environmental Law > Land Use & Zoning > Constitutional Limits

HN4[] **Zoning, Historic Preservation** The test of constitutionality to be applied to a particular property for which a demolition permit was refused is not that of whether the detriment to the individual landowner outweighs the benefit conferred on the public, but that of whether the ordinance goes so far as to preclude the use of the property for any purpose for which it is reasonably adapted. The property owner must establish that the regulation precludes use of the property for any purpose for which it is reasonably adapted, pertinent reference may be made to familiar Pennsylvania cases employing substantially the same test to applications for use variances -- that is, that such a variance must be granted if the property in question cannot be used or sold for any purpose permitted by the applicable zoning regulations but that it should be denied if the showing is merely that the property could be more gainfully used or sold for a purpose not allowed by such regulations.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Environmental Law > Land Use & Zoning > Conditional Use Permits & Variances

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

HN5[] **Zoning, Ordinances**

Counsel: *G. Thomas Miller*, with him *William M. Young, Jr.*, *Judson E. Ruch* and *McNees, Wallace and Nurick*, for appellant.

John W. Thompson, Jr., City Solicitor, for appellee.

Lavere C. Senft, for Historic York, Inc.

Judges: President Judge Bowman and Judges Crumlish, Jr., Kramer, Wilkinson, Jr., Mencer, Rogers and Blatt. Opinion by Judge Rogers. Concurring Opinion by Judge Kramer. Judges Crumlish, Jr. and Mencer join in this concurring opinion.

Opinion by: ROGERS

Opinion

[*155] **[**258]** The First Presbyterian Church of York, Pennsylvania, has appealed from an order of the Court of Common Pleas of York County sustaining the action of the Council of the City of York refusing to certify **[*156]** the appropriateness of, and the consequent refusal by the City building inspector of a permit for, the demolition of a structure on the Church's grounds.

So far as we are aware, this is the first case occasioned by the Act of June 13, 1961, P.L. 282, *as* **[***2]** *amended*, *53 P.S. § 8001 et seq.* Although the appellant raises no question as to that enactment's general validity, we believe that a brief description of its provisions would be helpful to an understanding of this litigation. *HN1*[] Section 2 of the Act, *53 P.S. § 8002*, provides in full: "For the purpose of protecting those historical areas within our great Commonwealth, which have a distinctive character recalling the rich architectural and historical heritage of Pennsylvania, and of making them a source of inspiration to our people by awakening interest in our historic past, and to promote the general welfare, education and culture of the communities in which these distinctive historical areas are located, 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 within the geographic limits of such political subdivisions. No such ordinance shall take effect until the Pennsylvania Historical and Museum Commission has been notified, in writing, of the ordinance and has certified, by resolution, to the historical significance of the district or districts **[***3]** within the limits defined in the ordinance, which resolution shall be transmitted to the executive authority of the political subdivision."

HN2[↑] Section 3, *53 P.S. § 8003*, authorizes the municipal governing body to appoint a Board of Historical Review of not less than five members, consisting of a registered architect, a licensed real estate broker, a building inspector, and the remaining members persons "with knowledge of and interest in the preservation of historic districts." The function of the Board **[*157]** is to "give counsel" to the governing body regarding the issuance of certificates. *HN3*[↑] Section **[**259]** 4, *53 P.S. § 8004*, empowers the governing body to certify to the appropriateness of the erection, reconstruction, alteration, restoration, demolition or razing of any building within the historic district or districts and prohibits the issuance of a permit for such changes until such a certificate shall have been issued. The same section requires the governing body in its determination of whether the certificate should issue to consider the effect of the proposed change on the "general historic and architectural nature of the district", and with respect to the building **[***4]** to consider only exterior architectural features which can be seen from the street but in this regard also to take into account "the general design, arrangement, texture, material and color of the building or structure and the relation of such factors to similar features of buildings and structures in the district."

At a time not disclosed in the record, York City Council adopted an ordinance pursuant to the Act of 1961 creating and defining a historic district in the central part of the City. York House, the building which the appellant Church wishes to demolish, is located within this district. The lot containing about 15,000 square feet on which York House rests, and which adjoins the appellant's Church ediface, was acquired by the appellant from the Historical Society of York County in 1959. [1] York House itself was constructed as his residence by a wealthy citizen of York **[*158]** in about 1860. It is, as the York Historical Architectural Board of Review after hearings found, an exceptional specimen of Victorian Italian-Villa architecture, virtually unaltered, and representing the highest level of design, workmanship, materials, and aesthetic values of the time of its **[***5]** construction. It is the most important building in a city block of residences built both before and after 1860 providing an authentic view of an 1890's street, unspoiled by later architectural styles. York House is on the National Register of Historic Places of the Department of Interior and has been described in publications of the Pennsylvania Historical and Museum Commission as the finest Victorian house in the City of York. The appellant Church does not dispute that York House possesses these qualities and deserves these special honors.

It is here appropriate to note that the Church concedes not only the historical and architectural value of York House, but **[***6]** also the facial constitutional validity of the Act of June 13, 1961 and York City's ordinance adopted pursuant thereto. Its contention is that the City's refusal to permit it to demolish York House is, in the circumstances, confiscatory and a deprivation of its property rights without due process of law.

The Church's application for permission to demolish York House was made May 1, 1972. The York Board of Historical Architectural Review, after hearing, recommended refusal of the application and City Council followed the Board's recommendation. The Church appealed Council's action to the Court of Common Pleas of York County pursuant to the Local Agency Law, Act of December 2, 1968, P.L. 1133, 53 P.S. § 11308. The lower court, by the late President Judge Atkins, remanded the record for further hearing and findings by the Board of Historical Architectural Review sufficient for the application of the test **[*159]** of constitutionality provided by *Trustees of Sailors' Snug Harbor v. Platt, 288 N.Y.S. 2d 314 (1968)*.

The test of *Trustees of Sailors' Snug Harbor v. Platt, supra*, referred to by Judge Atkins and still proposed by the **[**260]** Church for application here, **[***7]** goes as follows: "The criterion for commercial property is where the continuance of the landmark prevents the owner from obtaining an adequate return. A comparable test for a charity would be where maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose. In this instance the answer would depend on the proper resolution of subsidiary questions, namely, whether the preservation of these buildings would seriously interfere with the use of the property, whether the buildings are capable of conversion to a useful purpose without excessive cost, or whether the cost of maintaining them without use would entail serious expenditure -- all in the light of the purposes and resources of the petitioner."

[1] The lot seems (by a deed not of record) to have been conveyed either to the appellant or to another religious body in 1785 subject to a restriction of use to religious activities. Since the appellant used the house for other than religious purposes after 1959, its suggestion in argument here that it may not do so in the future is not impressive.

Upon remand, the Board of Historical and Architectural Review conducted a further hearing at which the Church adduced evidence tending to show that the costs of renovating York House for use by the Church would be $ 29,900, that the cost of repairing fire damages sustained in a fire in 1972 would be an additional $ 17,000 (against a still unspent insurance recovery of $ 10,000) and that annual maintenance costs, **[***8]** including about $ 4500 for janitorial services would be about $ 12,500. Persons opposed to the demolition were able to demonstrate that the Church's annual budget was about $ 254,000, that the Church had provided little or no maintenance after it decided to raze the building for campus or parking use, that the Church had used a substantial portion of the lot on which York House is located for the construction of a new parish house and that the Church had refused offers by public **[*160]** spirited persons or groups to purchase or make other arrangements to assume or share with the Church the burden of the restoration and maintenance of the structure.

The Board again recommended denial of the Church's application, City Council followed the Board's recommendation, the Church again appealed. The court below, by Judge Shadle, again upheld Council's action and this appeal followed.

In the interval of time between the lower court's order of remand and the Church's second appeal, *Maher v. City of New Orleans, 371 F. Supp. 653 (E.D. La. 1974)*, had been decided. Whereas in *Trustees of Sailors' Snug Harbor v. Platt, supra*, the requirement of the permit for demolition was one **[***9]** imposed with respect to individual properties designated as historic landmarks and was not one imposed on all properties within a district declared to have architectural or historic interest, the questioned local legislation requiring such a permit in *Maher v. City of New Orleans, supra*, as does that of York City here in question, defined an area or district in which every building was subject to its requirements. The Federal district court in *Maher* held the ordinance there in question to be a proper exercise of the police power because it advanced the desirable public end of preserving buildings in the historic *vieux carre* section of New Orleans; that the ordinance was a zoning regulation; and that ***HN4***[⬆] the test of constitutionality to be applied to a particular property for which a demolition permit was refused was not that of whether the detriment to the individual landowner outweighed the benefit conferred on the public, but that of whether the ordinance went so far as to preclude the use of the property for any purpose for which it was reasonably adapted. The district court concluded that Maher, the landowner, had not proved that the refusal of his application **[*161]** **[***10]** to demolish his victorian cottage and replace it with a spanish style house precluded the use of his property for any purpose for which it was reasonably adapted.

Shortly after the instant appeal was filed in the Commonwealth Court, the United **[**261]** States Court of Appeals filed its opinion on Maher's appeal from the district court's order. The circuit court affirmed, declaring with respect to the claim that the property in question was taken without just compensation that: "As the ordinance was applied to Maher, the denial of the permit to demolish and rebuild does not operate as a classic example of eminent domain, namely the taking of Maher's property for governmental use. Nor did Maher demonstrate to the satisfaction of the district court that a taking occurred because the ordinance so deminished the property value as to leave Maher, in effect, nothing. In particular, Maher did not show that the sale of the property was impracticable, that the sale of the property was impracticable, 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 **[***11]** claim, it fails for lack of proof." *Maher v. City of New Orleans, 516 F.2d 1051, 1066 (5th Cir. 1975)*.

Judge Shadle in this case noted the factual dissimilarity between the single property designation of *Sailors' Snug Harbor v. Platt, supra*, and the area designation of *Maher v. City of New Orleans, supra*, and concluded that the *Maher* test was therefore applicable, although expressing his conviction that the Church had not met even the more stringent test of *Sailors' Snug Harbor v. Platt, supra.* We agree with Judge Shadle 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 with **[*162]** his conclusion 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. With regard to the facts, we agree with the lower court, that the evidence shows that "[t]he appellant has made no attempt to rent the premises **[***12]** since 1971, it has performed no maintenance or repairs since that time, it has not used ten thousand dollars of fire insurance proceeds to repair damage by an accidental fire in the meantime, and it has declined to consider any offer to purchase the premises or to enter into a cooperative arrangement with others to restore, maintain and use it"; and further that "[The Church] desires only to use the land occupied by the building for landscaping and parking purposes. . . . [T]he building is capable of conversion to a useful purpose without excessive cost. . . . [The Church] offered evidence merely that it had no desire to use it for religious purposes, but that it is incapable of such use."

Reverting to the test of *Maher v. City of New Orleans, supra*,

applicable to district historic zoning, that ***HN5***[⬆] the property owner must establish that the regulation precludes use of the property for any purpose for which it is reasonably adapted, pertinent reference may be made to familiar Pennsylvania cases employing substantially the same test to applications for use variances -- that is, that such a variance must be granted if the property in question cannot be used or sold for any purpose **[***13]** permitted by the applicable zoning regulations but that it should be denied if the showing is merely that the property could be more gainfully used or sold for a purpose not allowed by such regulations. *Peirce v. Zoning Board of Adjustment, 410 Pa. 262, 189 A.2d 138 (1963)*; *Crafton Borough **[*163]** Appeal, 409 Pa. 82, 185 A.2d 533 (1961)*; *Magrann v. Zoning Board of Adjustment, 404 Pa. 198, 170 A.2d 553 (1961)*; *Lally Zoning Case, 404 Pa. 174, 171 A.2d 161 (1961)*; *J. Richard Fretz, Inc. v. Hilltown Township Zoning Hearing Board*, 18 Pa. Commonwealth Ct. 471, **[**262]** *336 A.2d 464 (1975)*; *Marple Gardens v. Zoning Board of Adjustment*, 8 Pa. Commonwealth Ct. 436, *303 A.2d 239 (1973)*; *DiBello v. Zoning Board of Adjustment*, 4 Pa. Commonwealth Ct. 546, *287 A.2d 856 (1972)*.

Order affirmed.

Concur by: KRAMER

Concur

Concurring Opinion by Judge Kramer:

I concur in the result because the Church failed to carry its burden of proving by substantial evidence that its property had been confiscated or that the use of its property had been unreasonably restricted so as to constitute a taking or application of its property for a public use. The Church failed to prove that **[***14]** the ordinance in question was unduly oppressive to it, or that it was inordinately burdensome, or that as a result of the application of the ordinance the value of its property was so diminished that for all practical purposes nothing of value remained. The Church did not prove that the denial of a permit to demolish York House precluded the Church from using that property for any purpose for which it was reasonably adapted. It is for these reasons that I concur.

Because of the importance of the constitutional issues which have been raised, I feel constrained to note my reservations concerning the result we have reached in this case. My reservations are made in full recognition of the constantly developing and broadened principles established by the federal judiciary under concepts of the police power. I have noted with interest the language of the Circuit Court in *Maher v. City of New Orleans, 516 F.2d 1051, 1059 (5th Cir. **[*164]** 1975)*: "Drawing on the rich and flexible police power, a legislature has the authority to respond to economic and cultural developments cast in a different mold, and to essay new solutions to new problems. . . . '[P]roblems have developed, **[***15]** and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.'" As those police powers expand, especially through the use of zoning-type laws, we reach a point or line beyond which we cannot go without infringing upon private property owners' constitutional rights. When we have this conflict between two constitutional provisions, we must either reconcile those powers and rights or else amend the Constitution. I am reminded in this bicentennial year of the birth of our nation that our founding fathers and their contemporary patriots were as much interested in protecting citizens' private property rights against encroachments by government as they were in liberty itself. And so they made constitutional provisions against government taking private property for public use except through the stringent and restrictive governmental **[***16]** powers of eminent domain.

These very basic private property principles have been eroded during the past fifty years especially through, *inter alia*, the application of zoning laws and urban redevelopment laws. As zoning law developed, the courts held, in the interest of protecting the public health, welfare and safety, that a private property owner could not use or build on his property in certain ways. But under all the zoning laws and cases, **[*165]** the private owner was always permitted the alternative of leaving the land as it was, or if he illegally built he was ordered to remove the offensive part. Under the urban renewal laws whole areas of municipalities were declared to be blighted and private property was taken, but under all of these laws, the owner was fully protected through condemnation proceedings.

It seems to me that with the advent of historical district statutes, such as those involved **[**263]** in this case, in opinions such as *Maher, supra*, *Gaebel v. Thornbury Township*, 8 Pa. Commonwealth Ct. 399, *303 A.2d 57 (1973)*, and in the decision in this case, the legislatures and courts are adding a new dimension which may do violence to constitutional **[***17]** private property rights, for now we hold that a private property owner must make his property available without compensation for public view. In effect, he must dedicate his property without compensation for public historical, aesthetic, educational, and museum purposes,

which in reality are public uses. Under the provisions of the ordinance in question, the Church can permit the interior or rear portions of its property to rot or deteriorate in a burned condition in any manner it sees fit, but it can't touch that portion of its property viewable from the street without permission of the local governing body, which uses vague standards founded on aesthetics and historical values, two concepts upon which reasonable men can disagree. There are no state health or safety standards involved whatsoever, rather the standards are based solely upon the feelings or observations of people interested in protecting neighboring properties in the historical district in the name of public welfare. I am concerned that we have reached a constitutional precipice and that an advancement of even a fraction of an inch will result in excessive governmental encroachment upon private property rights.

[*18]** **[*166]** I want to make it clear that I agree with and applaud the scheme to protect, restore, and maintain places of historic value, but if the public wants to use, take, or apply a private property for that public purpose, then the public should pay for that laudatory purpose through constitutional means, *e.g.*, eminent domain. In the past we have accomplished these purposes through parks and museums provided by public funds or the benevolence of private donors. Today we change that trend by our holding and instead provide for the establishment of public museums through restrictions on private property owners' rights. The very thought that the next step may be a governmental regulation that all buildings in York's historical district must be painted colonial blue is to me repugnant to the Constitution, and if anything like that should develop, perhaps that will be the place to draw the line.

End of Document

Maher v. New Orleans

United States Court of Appeals for the Fifth Circuit

July 31, 1975

No. 74-2022

Reporter
516 F.2d 1051 *; 1975 U.S. App. LEXIS 13385 **; 5 ELR 20524

Paula-Beth Lashley MAHER, Administratrix of the Succession of Morris G. Maher, Plaintiff-Appellant, v. The CITY OF NEW ORLEANS et al., Defendants-Appellees

Subsequent History: [1]** Petition for Rehearing and Rehearing En Banc Denied September 29, 1975.

Prior History: Appeal from the United States District Court for the Eastern District of Louisiana.

Disposition: Affirmed.

Core Terms

Ordinance, district court, preservation, regulation, police power, res judicata, buildings, cause of action, cottage, collateral estoppel, architectural, parties, historic, zoning, due process, cases, demolition permit, demolition, appears, merits, historic preservation, recommended, provisions, appointed, domain, issues, values, legislative determination, property owner, federal court

Case Summary

Procedural Posture
Plaintiff appealed from decision of the United States District Court for the Eastern District of Louisiana, which upheld validity of ordinance, New Orleans, La., Code ch. 65 (Ordinance No. 14,538), that regulated the preservation and maintenance of buildings in historic section of city known as the French Quarter.

Overview
Plaintiff appealed from decision which upheld validity of ordinance, New Orleans, La., Code ch. 65 (Ordinance No. 14,538), that regulated preservation and maintenance of buildings in historic section of city. Plaintiff contended that ordinance affronted due process clause, because it provided no objective criteria to guide Commission charged with its administration. Plaintiff contended that ordinance, as applied and under guise of its regulation, constituted taking of his property without just compensation. The court held that ordinance was enacted to pursue legitimate state goal of preserving "tout ensemble" of the historic French Quarter, and that provisions of the ordinance constituted permissible means adapted to secure that end. The court held that operations of Commission satisfied due process standards in that they provided reasonable legislative and practical guidance to, and control over, administrative decision-making. Finally, decision of district court that ordinance did not constitute taking of plaintiff's property was not clearly erroneous.

Outcome
Judgment affirmed, as (1) ordinance was enacted to pursue legitimate state goal of preserving "tout ensemble" of historic section of city; (2) operations of Commission satisfied due process standards; and (3) decision of district court that ordinance did not constitute taking of plaintiff's property was not clearly erroneous.

LexisNexis® Headnotes

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN1[] **Estoppel, Collateral Estoppel**

Where applicable, res judicata prohibits readjudication of all matters that were, or might have been, litigated respecting the same cause of action between two parties. By comparison, collateral estoppel would preclude renewed controversy over an issue decided in an earlier case even when, in a subsequent case, a different cause of action is presented.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN2[] **Preclusion of Judgments, Res Judicata**
Res judicata in Louisiana is stricti juris, forbidding relitigation only on the ultimate judgment rendered, but not extending broadly to matters that might have been litigated and not comprehending intermediate facts. Under the Louisiana view, less weight is attached to finality than in common law jurisdictions, and all doubts are resolved in favor of relitigation.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN3[] **Estoppel, Collateral Estoppel**
Where federal jurisdiction is bottomed on state law, as in a diversity matter, state law principles of collateral estoppel govern, under the rationale of the Erie doctrine.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN4[] **Estoppel, Collateral Estoppel**
The doctrines of collateral estoppel and res judicata must be used not as clubs, but as fine instruments that protect the litigant's right to a hearing as well as his adversary and the courts from repetitive litigation.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN5[] **Preclusion of Judgments, Res Judicata**
For res judicata to interdict an action, the rule is that a judgment "on the merits" in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN6[] **Preclusion of Judgments, Res Judicata**
There is no per se rule that the existence of earlier litigation between the same parties, predicated on a common fact nucleus, establishes res judicata. Rather, the principal test for comparing causes of action is whether or not the primary right and duty, and the delict or wrong are the same in each action.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Ordinances & Regulations

HN7[] **Case or Controversy, Constitutionality of Legislation**
A legislative determination is generally accorded a presumption of constitutionality, but it is nevertheless

subjected to several tests before its validity is established. To be sound, the enactment must be within the perimeter of the police power, an authority residing in the law-making body to secure, preserve and promote the general health, welfare and safety. A regulatory ordinance, to be sustained as a suitable exercise of the police power, must bear a real and substantial relation to a legitimate state purpose. The means selected must be reasonable and of general application, and the law must not trench impermissibly on other constitutionally protected interests.

Governments > Local Governments > Duties & Powers

Real Property Law > Environmental Regulations > Indoor Air & Water Quality

Governments > Local Governments > Police Power

HN8[] **Local Governments, Duties & Powers**
Legislative bodies are entrusted with the task of defining the public interest and purpose, and of enacting laws in furtherance of the general good. While the police power is not unlimited, its boundaries are both ample and protean. Drawing on the rich and flexible police power, a legislature has the authority to respond to economic and cultural developments cast in a different mold, and to essay new solutions to new problems.

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Ordinances & Regulations

Governments > Local Governments > Police Power

HN9[] **Local Governments, Duties & Powers**
No fixed constraints may be placed on the police power. Rather, each case must be evaluated as it arises, on its own facts and in light of the prevailing circumstances.

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Ordinances & Regulations

Governments > Local Governments > Police Power

HN10[] **Local Governments, Duties & Powers**
Proper state purposes may encompass not only the goal of abating undesirable conditions, but of fostering ends the community deems worthy.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

Environmental Law > Land Use & Zoning > Constitutional Limits

Environmental Law > Land Use & Zoning > Equitable & Statutory Limits

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Police Power

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

HN11[] **Zoning, Constitutional Limits**
Zoning ordinances may be sustained under the police power where motivated by a desire to enhance the aesthetic appeal of a community.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

Governments > Federal Government > Property

HN12[] **Zoning, Historic Preservation**
See *16 U.S.C.S. § 470 (1974)*.

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Ordinances & Regulations

Governments > Local Governments > Police Power

HN13[] **Local Governments, Duties & Powers**
Where a legislative determination is fairly debatable, the legislative judgment must be allowed to control.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

Governments > Local Governments > Duties & Powers

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Environmental Law > Land Use & Zoning > Constitutional Limits

Real Property Law > Inverse Condemnation > Constitutional Issues

Real Property Law > Inverse Condemnation > Regulatory Takings

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN14[] **Zoning, Historic Preservation**
To survive attack as a taking, the zoning regulation must -- as a threshold matter -- satisfy the due process requirements that its purpose and means are reasonable. Even if it comports with due process, a regulatory ordinance may nonetheless be a taking if it is unduly onerous so as to be confiscatory. Every regulation is in some sense a prohibition. Whether a given regulation treads over the line of proper regulation and operates as a taking of property is a matter to be determined under all the circumstances in a specific case.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Governments > Local Governments > Police Power

HN15[] **Zoning, Historic Preservation**
An ordinance within the police power does not become an unconstitutional taking merely because, as a result of its operation, property does not achieve its maximum economic potential.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

Real Property Law > Eminent Domain Proceedings > Elements > Just Compensation

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Governments > Local Governments > Police Power

Real Property Law > Eminent Domain Proceedings > Procedures

HN16[] **Zoning, Historic Preservation**
A properly enacted prohibition against a use of property for purposes adverse to the public weal is not controlled by the doctrine of eminent domain. Such regulation is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Governments > Local Governments > Duties & Powers

HN17[] **Zoning, Historic Preservation**
Refusals to allow razing may be accompanied by tax credit arrangements, by permission to transfer "building rights" to other owners or by other economic incentives or palliatives; ordinances may prohibit demolition conditionally or temporarily.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Governments > Local Governments > Duties & Powers

HN18[] **Zoning, Historic Preservation**
An ordinance forbidding the demolition of certain structures, if it serves a permissible goal in an otherwise reasonable fashion, does not seem on its face constitutionally distinguishable from ordinances regulating other aspects of land ownership, such as building height, set back or limitations on use. A provision requiring a permit before demolition and the fact that in some cases permits may not be obtained does not alone make out a case of taking.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Governments > Local Governments > Duties & Powers

HN19[] **Zoning, Historic Preservation** The fact that an owner may incidentally be required to make out-of-pocket expenditures in order to remain in compliance with an ordinance does not per se render that ordinance a taking.

Judges: Gewin, Dyer and Adams, * Circuit Judges.

Opinion by: ADAMS

Opinion

[*1053] ADAMS, Circuit Judge:

The issues posed in the case at hand, although they concern a municipal ordinance, nevertheless carry implications of nationwide import.

Plaintiff Maher, on the basis of the *Fifth Amendment*, assails an ordinance of the City of New Orleans that regulates the preservation and maintenance of buildings in the historic Vieux Carre section of that city, [1] **[**2]** popularly known as the French Quarter. Maher asserts that, on its face, the Vieux Carre Ordinance affronts the due process clause, because it provides no objective criteria to guide the Commission charged with its administration. Maher also contends that the Ordinance, as applied and under the guise of regulation, constitutes a taking of his property without just compensation. [2]

After dealing with prefatory issues of res judicata and collateral estoppel, the district court reached the merits and concluded that the Ordinance was valid. [3] We affirm.

I. Factual Background.

By amendment to the Louisiana Constitution in 1936, authority was vested in the City **[**3]** of New Orleans to create a Commission whose purpose was stated to be:

> The preservation of such buildings in the Vieux Carre section of the City **[*1054]** of New Orleans as, in the opinion of said Commission, shall be deemed to have architectural and historical value, and which buildings should be preserved for the benefit of the people of the City of New Orleans and the State of Louisiana, and to that end the Commission shall be given such powers and duties as the . . . City of New Orleans shall deem fit and necessary. [4]

[4]** To implement the historical preservation plan, the City enacted the Vieux Carre Ordinance. That Ordinance establishes the Vieux Carre Commission and creates a framework of rules governing its powers, duties and operations. Among its other provisions, the Ordinance stipulates that, to perform construction, alteration or demolition work within the geographic boundaries controlled by the legislation, one must procure a permit approved by the Commission. [5]

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* Of the Third Circuit, sitting by designation.

[1] New Orleans, La., Code ch. 65 (Ordinance No. 14,538) (Vieux Carre Ordinance).

[2] This appears to be the first reported case in a federal court of appeals determining the constitutionality of such an enactment. *But see* Whitty v. City of New Orleans, Civ. No. 6367 (E.D.La., filed June 30, 1959) appeal dismissed, No. 18,059, 5th Cir., filed March 29, 1960 (denial of demolition permit in Vieux Carre does not offend constitution).

See also *City of New Orleans v. Dukes, 501 F.2d 706 (5th Cir. 1974)*, cert. granted ***421 U.S. 908, 95 S. Ct. 1556, 43 L. Ed. 2d 773 (1975)*** (constitutionality of pushcart vendor regulation in Vieux Carre).

[3] *371 F. Supp. 653 (E.D.La.1974)*.

[4] La.Const. Art. XIV, *Sec. 22*A. The same section further charges the Commission with assuring "that the quaint and distinctive character of the Vieux Carre section of the City of New Orleans may not be injuriously affected, . . . that the value to the community of those buildings having architectural and historical worth may not be impaired, and . . that a reasonable degree of control may be exercised over the architecture of [buildings in] said Vieux Carre section . . . ."

[5] Vieux Carre Ordinance § 65-8. *Submission of plans for exterior changes to Commission.*

> Before the commencement of any work in the erection of any new building or in the alteration or addition to, or painting or repainting or demolishing of any existing building, any portion of which is to front on any public street or alley in the Vieux Carre Section, application by the owner for a permit therefor shall be made to the Vieux Carre Commission, accompanied by the full plans and specifications thereof so far as they relate to the proposed appearance, color, texture of materials and architectural design of the exterior, including the front, sides, rear and roof of such building, alteration or addition or of any out building, party wall, courtyard, fence or other dependency

[5]** The present controversy centers on the fate of the Victorian Cottage situated at 818-22 Dumaine Street, adjacent to the Maher residence in the Vieux Carre. Mr. Maher, who owned the property until his recent death, [6] had sought since 1963 to demolish the cottage and to erect a seven-apartment complex on the site.

Following a preliminary approval of Maher's proposal by its Architectural Committee, the Commission on April 16, 1963, disapproved Maher's application to raze the cottage. Almost from the time of the original application, interested individual neighborhood owners, as well as organized groups -- including the Vieux Carre Property Owners and Associates, Inc., the French Quarter Residents Association and the Louisiana Council for the Vieux Carre -- vigorously opposed **[**6]** the Maher plan to tear down the cottage and to develop the property. [7]

Maher undertook a succession of attempts to secure approval of his plans from the Commission. [8] After several refusals, the Commission was finally prevailed upon to issue the permit. Ultimately, however, construction was prohibited when on August 16, 1966, the City Council for New Orleans, on the basis of an appeal, forbade the grant of a demolition permit.

[7]** While the proceedings before the Commission and City Council were pending, Maher instituted suit in the Civil District Court for Orleans Parish, Louisiana. Upon the City Council's final refusal to issue a demolition permit, the litigation in the state court was pressed. The relief **[*1055]** requested was a declaration that the City Council's action was beyond its statutory authority and, hence, null and void. On February 26, 1968, the Civil District Court granted judgment for Maher.

The Louisiana Court of Appeal reversed, holding that the City Council's review was proper and, further, that the Ordinance was constitutional -- both on its face and as applied to the Maher application. [9] On appeal, the Louisiana Supreme Court affirmed the judgment of the Court of Appeals that the City Council's action lay within its authority, but held that the constitutionality of the Ordinance had not been pleaded in the trial court and consequently could not be considered on appeal. [10]

[8]** Subsequently, in 1971, Maher filed the present federal suit under the civil rights act against the City and its agencies, seeking a declaratory judgment that the Ordinance is unconstitutional and an injunction against its enforcement. [11]

The district court held that res judicata and collateral estoppel were not barriers to the litigation, and proceeded to hold the Ordinance constitutional. This appeal followed.

II. Collateral Estoppel and Res Judicata Do Not Foreclose the Suit.

The initial issue before us is whether, because of the prior state court action, the present suit is barred by principles of res judicata or collateral estoppel. [12] **[**10]** Serving the interest of finality and judicial economy, these doctrines eliminate needless relitigation. **[**9]** *HN1*[↑] Where applicable, res judicata prohibits readjudication of all matters

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thereof.

Additional procedures are set forth at §§ 65-9, -10.

[6] Morris Maher, original plaintiff in this dispute, died in 1973. Thereafter, his wife was substituted as plaintiff in the district court, in her capacity as administratrix of his estate. For convenience we refer to the plaintiff as Maher.

[7] As intervenors, the Vieux Carre Property Owners and Associates, Inc. and the French Quarter Residents Association have filed a brief in this Court jointly with the City of New Orleans. Also participating in the brief as intervenors are the Crescent Council of Civic Associations and Louisiana Landmarks Society.

[8] The route that Maher pursued through the Commission and City Council is elaborated by the district court in its opinion. *371 F. Supp. 653 (E.D.La.1974)*.

[9] *Maher v. City of New Orleans, 222 So.2d 608 (La.App.1969)*.

[10] *Maher v. City of New Orleans, 256 La. 131, 235 So.2d 402 (1970)*. Nonetheless, the State Supreme Court observed in dictum that in light of earlier cases where it had held the Vieux Carre Ordinance constitutional, it was "inclined to agree" with the Court of Appeal that the Ordinance on its face was not vulnerable to charges of vagueness or indefiniteness. *235 So.2d at 405, n. 3*, citing *City of New Orleans v. Levy, 223 La. 14, 64 So.2d 798 (1953)*; *City of New Orleans v. Pergament, 198 La. 852, 5 So.2d 129 (1941)*; *City of New Orleans v. Impastato, 198 La. 206, 3 So.2d 559 (1941)*.

[11] Jurisdiction is asserted pursuant to ***28 U.S.C. §§ 1331(a)***, *1343(3)* and *(4)*. Maher claims that the Ordinance and its enforcement deprive him of rights under ***42 U.S.C. § 1983***.

[12] Maher asserts that the City may not seek a result predicated on finality because the City has not filed a cross-appeal. However, the traditional rule is that an appellee need not cross-appeal in order to "urge in support of a decree any matter appearing in the record . . . ." *Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185, 57 S. Ct. 325, 81 L. Ed. 593 (1937)*, quoting *United States v. American Railway Express Co., 265 U.S. 425, 44 S. Ct. 560, 68 L. Ed. 1087 (1924)*; *SEC v. Fifth Ave. Coach Lines, Inc., 435 F.2d 510 (2d Cir. 1970)*. *See* Stern, When to Cross-Appeal or Cross-Petition -- Certainty or Confusion?, 87 Harv.L.Rev. 763 (1974).

that were, or might have been, litigated respecting the same cause of action between two parties. [13] By comparison, collateral estoppel would preclude renewed controversy over an issue decided in an earlier case even when, in a subsequent case, a different cause of action is presented. [14]

Subsumed in the determination whether principles of finalty govern our disposition of the present case is the underlying inquiry whether the issue is one of state or federal law. Different tests are relevant depending whether the choice of law issue is resolved in favor of federal or state rules. However, in the circumstances here, the outcome is unaffected, since we are persuaded that the suit is not barred under either Louisiana or federal finality rules. Louisiana state **[*1056]** law, stemming from the French Code Civile, takes a more narrow perspective on doctrines of repose than do jurisdictions **[**11]** whose rules derive from the common law. [15] *HN2*[] Res judicata in Louisiana is *stricti juris*, [16] forbidding relitigation only on the ultimate judgment rendered, but not extending broadly to matters that "might have been litigated" and not comprehending intermediate facts. Under the Louisiana view, less weight is attached to finality than in common law jurisdictions, and all doubts are resolved in favor of relitigation. [17]

[12]** The district court and the parties have proceeded on the assumption that the applicable law regarding finality is that of Louisiana. We have reviewed the cases relied upon by the district court and by the parties in their briefs and, if Louisiana law controls, the conclusion of the district court that this suit may be maintained does not appear to be erroneous. [18]

Where federal jurisdiction is bottomed on state law, as in a diversity matter, state law principles of collateral estoppel govern, under the rationale of Erie Railway Co. v. Tompkins. [19] Unlike a diversity case, however, the suit here presents a federal constitutional question to the federal courts for resolution according to principles of federal law. Despite the fact that questions of state law and issues of local importance undeniably play a core role, this case **[**13]** would seem more aptly characterized as a federal matter. In such event, federal notions of repose must provide the guideposts for analysis. [20]

In Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., this Court applied federal concepts of finality in an antitrust case springing from certain business practices in Louisiana. [21] The Court eschewed rough hewn results, and carefully balanced the interests implicated in finality determinations:

> *HN4*[] The doctrines [of collateral estoppel and res judicata] must be used, however, not as clubs but as fine instruments, **[**14]** that protect the litigant's right to a hearing as well as his adversary and the courts from repetitive litigation. [22]

Bearing this admonition in mind, we address the City's claims that the present suit should be dismissed.

The argument is advanced that collateral estoppel controls the disposition of this case. However, the constitutional issues posed now by Maher were expressly excluded from consideration by the Louisiana Supreme Court. It is thus difficult to perceive in what manner the state court proceeding can operate in the case *sub judice* to estop Maher from airing his allegations. We therefore conclude that collateral estoppel does not prohibit this suit. [23]

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[13] *Chicot Co. Drainage District v. Baxter State Bank, 308 U.S. 371, 60 S. Ct. 317, 84 L. Ed. 329 (1940)*; *Stoll v. Gottlieb, 305 U.S. 165, 59 S. Ct. 134, 83 L. Ed. 104 (1938)*.

[14] *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971)*; *Cromwell v. County of Sac, 94 U.S. (1 Wall.) 351, 24 L. Ed. 195 (1877)*. *See* 1B J. Moore, Federal Practice paras. 0.401, 0.410, 0.441.

[15] *371 F. Supp. 653 (E.D.La.1974)* and cases cited therein. O'Quin, Res Judicata -- "Matters Which Might Have Been Pleaded," 2 La.L.Rev. 347 (1940).

[16] *International Paper Co. v. Maddox, 203 F.2d 88 (5th Cir. 1953)*, cited in *Wright Root Beer Co. v. Dr. Pepper Co., 414 F.2d 887 (5th Cir. 1969)*. *See* O'Quin, supra note 15.

[17] *Wright Root Beer, supra* note 16; *Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp., 421 F.2d 1313 (5th Cir. 1970)* (antitrust).

[18] A review of the doctrine of judicial estoppel also supports the district court result.

HN3[] -

[19] *304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)*. *Heiser v. Woodruff, 327 U.S. 726, 66 S. Ct. 853, 90 L. Ed. 970 (1946)* (bankruptcy); *Wright Root Beer Co. v. Dr. Pepper Co., 414 F.2d 887 (5th Cir. 1969)*.

[20] *Heiser, supra* note 19; *Exhibitors Poster, supra* note 17.

[21] *421 F.2d 1313 (5th Cir. 1970)*.

[22] *Id. at 1316*.

[23] Nevertheless, collateral estoppel may effectively preclude new

[15]** The contention that res judiciata prevents Maher's presentation to the federal court requires a rather more subtle sifting of the facts and procedures. HN5[↑] For res judicata to interdict an action, the rule is that "a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action." [24] It **[*1057]** is not disputed that the state action in City of New Orleans v. Maher was between parties identical with or privy to the parties here, and the judgment in that case was on the merits and final. The inquiry thus centers on whether the cause of action set forth in the present federal case is identical with that in the prior state case.

[16]** There is no per se rule that the existence of earlier litigation between the same parties, predicated on a common fact nucleus, establishes res judicata. [25] Rather, in this circuit it has been held, **[**17]**

> The principal test for comparing causes of action is whether or not the primary right and duty, and the delict or wrong are the same in each action. [26]

This test is perhaps easier to formulate than to apply, but in its application we are aided by precedent. In *Exhibitors Poster* this Court tolerated a succession of federal suits presenting related antitrust claims. Although a single business-policy decision dating from a specific period formed the basis for the suit before the Court as well as the earlier litigation, res judicata did not bar the action, the Court held, because the conduct alleged to be illegal continued, giving rise to new damage claims. After paying due heed to the possible collateral estoppel impact of individual issues previously adjudicated, the Court, focusing solely on the definition of "cause of action," held that new causes of action were alleged in the later suit. [27]

[18]** Since Maher brought the first suit in state court, we must assess the similarity of the two causes of action by reference to the local Louisiana definition of "cause of action." This Court -- applying Louisiana law in a franchise dispute -- has held no res judicata barrier to a federal suit for breach of contract following a state action for conversion and business injury, both arising out of the same sequence of events. [28] The panel stated that the gists of the actions were different,

> [even though] the language in the two complaints bear some similarity because of the pleading requirements of Louisiana law. [29]

We have examined the causes of action presented in the state and federal cases regarding Maher's zoning battle with the City of New Orleans. The state case was pleaded flatly as a challenge to the findings and procedures of the City Council and its agencies. **[**19]** The Louisiana Supreme Court declared:

> Neither in the petition nor in any other pleading was there any attack on the legality or constitutionality of Article 14, Section 22A of the Louisiana Constitution, or of the ordinance of the City enacted pursuant thereto. [30]

[*1058] The state Supreme Court expressly refused to reach the constitutional arguments offered on appeal by the parties.

Admittedly, there is an overlap in the operative facts

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litigation of isolated factual issues already determined elsewhere.

[24] *Lawlor v. National Screen Service Corp., 349 U.S. 322, 326, 75 S. Ct. 865, 867, 99 L. Ed. 1122 (1955)*; *Exhibitors Poster, supra* note 17.

HN6[↑] -

[25] *Wasoff v. American Automobile Ins. Co., 451 F.2d 767 (5th Cir. 1969)*; *DeHart v. Richfield Oil Corp., 395 F.2d 345 (9th Cir. 1968)*.

[26] *451 F.2d at 769*, quoting *Seaboard Coast Line R. Co. v. Gulf Oil Corp., 409 F.2d 879, 881 (5th Cir. 1969)*. *Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 47 S. Ct. 600, 71 L. Ed. 1069 (1926)*.

[27] *See DeHart v. Richfield Oil Corp., 395 F.2d 345 (9th Cir. 1968)* (the court must examine precisely what was decided between the parties); *Falk v. United States, 375 F.2d 561 (6th Cir. 1967)*. *See* generally 1B J. Moore, Federal Practice para. 410[1].

By contrast, in *Wasoff, supra* note 25, a dismissal of a federal suit claiming recovery for hail damage was affirmed. It was held that the cause of action was identical with that pursued in an earlier case based on the same insurance contract, the same hailstorm and seeking to recover substantially the same damages. The plaintiff, it was stated, "merely asserted a new theory of relief." *451 F.2d at 769*.

In Seaboard Coast Line R. Co. v. Gulf Oil Corp., summary judgment was affirmed against the plaintiff on grounds of res judicata, *409 F.2d 879 (5th Cir. 1969)*. There, two suits for contractual indemnity were found to state the same cause of action where the allegations were based on similar clauses contained in two different documents of a complex leasecum-license agreement.

The causes of action set forth in each of the Maher cases bear far less resemblance to one another than the causes of action in *Wasoff* and *Seaboard*.

[28] *Wright Root Beer Co. v. Dr. Pepper Co., 414 F.2d 887 (5th Cir. 1969)*.

[29] *Id. at 892*.

[30] *235 So.2d at 404*.

respecting both claims. It is true that Maher's success in either action might result in the same ultimate outcome, namely, dismantling the cottage. Nevertheless, the state and federal complaints articulate distinct causes of action -- one based on state law, one on federal constitutional precepts. [31] The analysis and precedents employed in making the two arguments are quite distinct. Somewhat disparate proof would be required in assessing whether the City Council has overstepped its authority under Louisiana law, **[**20]** or whether a taking has occurred in contravention of the *Fifth Amendment*.

We need not decide whether the same result would obtain had the initial suit been brought in the federal court operating under federal rules and policies respecting joinder of claims arising from a common factual basis. [32] All we decide here is that, under the configuration of this case, entwined with local Louisiana pleading and practice rules, disposition of the merits is not foreclosed by res judicata.

[21]** Indeed, the very policies favoring an end to litigation point to the immediate adjudication of the merits. At this juncture, no fewer than five tribunals have been presented with Maher's claims respecting the elimination of his cottage. The parties have spent themselves -- to date unsuccessfully -- to obtain a definitive judicial response. But, even if this Court were to dismiss the present action, litigation between the parties would not necessarily be terminated. Maher might still return to the state courts to pursue his constitutional claim. The interest of judicial peace would thus seem poorly served by a dismissal here granted on grounds of res judicata.

Furthermore, it appears that proceedings have been instituted against Maher for violation of the maintenance clauses of the Vieux Carre Ordinance. [33] As a defense to any prosecution under such provisions the question of an unconstitutional taking of Maher's property might arise, requiring judicial attention in yet another forum.

[22]** For these reasons we conclude that res judicata and collateral estoppel are inapplicable, and that the energy of both the parties and the courts would be best conserved by proceeding to address the merits of Maher's allegations.

III. The Vieux Carre Ordinance is a Proper Exercise of the Police Power.

The Supreme Court has erected wayposts to guide our consideration whether an enactment such as the Vieux Carre Ordinance violates due process. ***HN7***[⬆] A legislative determination is generally accorded a presumption of constitutionality, [34] but it is nevertheless subjected to several tests before its validity is established. To be sound, the enactment must be within the perimeter of the police power, an authority residing in the law-making body to secure, preserve and promote the general health, welfare and safety. [35] A regulatory ordinance, to be sustained as **[*1059]** a suitable exercise of the police power, must bear a real and substantial relation to a legitimate state purpose. [36] The means selected must be reasonable and of general application, [37] **[**24]** and the law must not trench impermissibly **[**23]** on other constitutionally protected interests. [38]

Maher contends that, although the legislative purpose underlying the preservation of the Vieux Carre, may be unobjectionable, the general program of effectuation as well as the denial of Maher's demolition permit have inadequate standards and an arbitrary enforcement that violate due

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[31] Since the state court did not address the constitutional questions and since a subsequent state court action would not seem to be barred by local res judicata rules, the court cannot conclude that the present action is foreclosed because the matters raised "should have been litigated" in the earlier suit. *See* note 12 supra.

[32] At oral argument an analogy was suggested to *England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964)*. *England* adopted a rule for adjudication of state and federal claims in an abstention situation. Had all of Maher's claims been brought as a single matter in the federal court, and had abstention been ordered regarding the state law claims, the *England* case would have been apposite.

[33] Vieux Carre Ordinance §§ 65-36, -37. The suit against Maher for noncompliance is in abeyance pending resolution of this appeal. *See* note 85 infra.

[34] *Goldblatt v. Hempstead, 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962)*; *Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926)*.

[35] *Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1959)*.

[36] *Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974)* (family values); *Paris Adult Theatre I v. Slater, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973)* (quality of life); *Euclid, supra* note 34 (health, traffic, safety); *Walls v. Midland Carbon Co., 254 U.S. 300, 41 S. Ct. 118, 65 L. Ed. 276 (1920)* (preserve natural gas resource); *Lawton v. Steele, 152 U.S. 133, 14 S. Ct. 499, 38 L. Ed. 385 (1894)* (preserve fishery resource); *Mugler v. Kansas, 123 U.S. 623, 8 S. Ct. 273, 31 L. Ed. 205 (1887)* (discourage intoxication).

[37] *Berman, supra* note 35; *Euclid, supra* note 34; *Reinman v. Little Rock, 237 U.S. 171, 35 S. Ct. 511, 59 L. Ed. 900 (1915)*.

[38] *Belle Terre, supra* note 36; *Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922)*; *Mugler, supra* note 36.

process. Furthermore, he asserts that the law is confiscatory in its operation and constitutes a taking that requires compensation.

A substantial body of precedent exists respecting the appropriate balancing of interests where an ordinance diminishes the freedom of an individual owner to dispose of his property in the name of what the lawmaker deems the greater public benefit. It is generally accepted that ***HN8***[⬆] legislative bodies [39] are entrusted with the task of defining the public interest and purpose, and of enacting laws in furtherance **[**25]** of the general good. [40] The Supreme Court has made it clear that, while the police power is not unlimited, its boundaries are both ample and protean. [41] Drawing on the rich and flexible police power, a legislature has the authority to respond to economic and cultural developments cast in a different mold, and to essay new solutions to new problems. In Village of Euclid v. Ambler Realty Co., the watershed case upholding the right of a municipality to enact a general zoning ordinance, the Supreme Court observed:

> Problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. [42]

Accordingly, ***HN9***[⬆] no fixed constraints may be placed on the police power for the future. Rather, each case must be **[**26]** evaluated as it arises, on its own facts and in light of the prevailing circumstances. [43]

A keystone of due process analysis is the determination that the state purpose **[**27]** to be served is legitimate. It would therefore appear beneficial to detail the substantial support that exists for a legislative determination to preserve historic landmarks and districts. [44] **[**28]** **[*1060]** The Ordinance in question here declares as its objective:

> The Vieux Carre shall have for its purpose the preservation of such buildings in the Vieux Carre section of the City as, in the opinion of the Commission, shall have architectural and historical value and which should be preserved for the benefit of the people of the City and State. [45]

Proper state purposes may encompass not only the goal of abating undesirable conditions, but of fostering ends the community deems worthy. In Berman v. Parker the Supreme Court, giving "well-nigh conclusive" effect to the legislative determination of community needs and solutions, upheld the purposes of a slum clearance program designed to "develop a more balanced, more attractive community." [46]

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[39] Local ordinances are accorded the same ***Fifth Amendment*** due process and "taking" analysis as state statutes. *See, e.g.*, *Goldblatt, supra* note 34; *Seattle Trust Co. v. Roberge, 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210 (1928)*; *Euclid, supra* note 34.

[40] *Belle Terre, supra* note 36; *Goldblatt, supra* note 34; *Berman, supra* note 35; *Mahon, supra* note 38; *Midland Carbon, supra* note 36.

[41] *Paris Adult Theatre, supra* note 36; *Berman, supra* note 35; *Euclid, supra* note 34; *Hadacheck v. Sebastian, 239 U.S. 394, 36 S. Ct. 143, 60 L. Ed. 348 (1915)*.

[42] *272 U.S. at 386-87, 47 S. Ct. at 118*.

[43] *Berman; Euclid*.

[44] The district court stated:

> The courts have repeatedly sustained the validity of architectural control ordinances as police power regulation, especially when historic or touristic districts like the Vieux Carre are concerned."

371 F. Supp. at 661, citing *Santa Fe v. Gamble, Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964)*; *Town of Deering ex rel. Bittenbender v. Tibbetts, 105 N.H. 481, 202 A.2d 232 (1964)*; *Reid v. Architectural Board of Review, 119 Ohio App. 67, 192 N.E.2d 74 (1963)*; *Opinion of Justices, 103 N.H. 268, 169 A.2d 762 (1961)*; *Sunad, Inc. v. City of Sarasota, 122 So.2d 611 (Fla.1960)*; *State ex rel. Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217*, cert. den. *350 U.S. 841, 76 S. Ct. 81, 100 L. Ed. 750 (1955)*; *Opinion of the Justices, 333 Mass. 773, 128 N.E.2d 557 (1955)*; *New Orleans v. Levy, 223 La. 14, 64 So.2d 798 (1953)*.

[45] Vieux Carre Ordinance § 65-6. In addition to conferring cultural benefits, it is not contested that preservation of the Vieux Carre district promotes the economic welfare of the city by attracting tourists.

See also *La.Const. supra note 4*.

HN10[⬆] -

[46] *348 U.S. 26, 32, 33, 75 S. Ct. 98, 102, 99 L. Ed. 27 (1954)*. To like effect, *see* *Village of Belle Terre v. Boraas, 416 U.S. 1, 9, 94 S. Ct. 1536, 1541, 39 L. Ed. 2d 797 (1974)* ("the police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values . . . and the blessings of quiet seclusion . . . make the area a sanctuary for people."); *Euclid, supra* note 34.

[29]** Nor need the values advanced be solely economic or directed at health and safety in their narrowest senses. The police power inhering in the lawmaker is more generous, comprehending more subtle and ephemeral societal interests. "The values [that the police power] represents are spiritual as well as physical, aesthetic as well as monetary. It is within the domain 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." [47]

[30]** This circuit has held in Stone v. City of Maitland that *HN11*[] zoning ordinances may be sustained under the police power where motivated by a desire to "enhanc[e] the aesthetic appeal of a community." [48] The Court noted with approbation city action to maintain "the value of scenic surroundings" and "the preservation of the quality of our environment." [49]

One of the nation's distinctive historic districts is found in New Orleans. The federal, [50] state and local government have each ascertained that benefits would be conferred on society by preservation of the French Quarter.

Throughout the country, there appears to be **[**31]** a burgeoning awareness that our heritage and culture are treasured national assets. Many locales endowed with historic sites have enacted protective measures for them. The Vieux Carre Ordinance is among the earliest efforts in this regard, and has served as a prototype for similar enactments elsewhere. [51]

The federal government also has acknowledged our debt to the past, in the *HN12*[] National Historic Preservation Act of 1966:

> **[*1061]** The Congress finds and declares --
>
> (a) that the spirit and direction of the Nation are founded upon and reflected in its historic past;
>
> (b) that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people . . . . [52]

An Advisory Committee on Historic Preservation **[**32]** was established, and a National Register of Historic Places was developed that included the Vieux Carre. [53]

[33]** The Court is not free to reverse the considered judgment of the legislature that it is in the public interest to preserve the status quo in the Vieux Carre and to scrutinize closely any proposed change in the ambiance by private owners. *HN13*[] Where a legislative determination is "fairly debatable, the legislative judgment must be allowed to control." [54] We thus conclude that, considering the nationwide sentiment for preserving the country's heritage and with particular regard to the context of the unique and characteristic French Quarter, the objective of the Vieux Carre Ordinance falls within the permissible scope of the police power.

Since we deal here with legislation designed to effect a legitimate economic and social policy, so long as the means **[**34]** chosen -- a matter largely entrusted to the legislature -- are reasonable and not arbitrary, due process is satisfied. [55] It is not disputed that the Vieux Carre Ordinance furthers the object of preserving the character of the district in a meaningful fashion.

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[47] *Berman, 348 U.S. at 33, 75 S. Ct. at 102*. *Paris Adult Theatre, supra* note 36 (police power includes authority to regulate against obscenity).

The Supreme Court has also affirmed the power of legislatures to enact protective measures regulating the use of the natural resources of the community. *Walls v. Midland Carbon Co., 254 U.S. 300, 41 S. Ct. 118, 65 L. Ed. 276 (1920)* (natural gas); *Lawton v. Steele, 152 U.S. 133, 14 S. Ct. 499, 38 L. Ed. 385 (1894)* (fish).

[48] *446 F.2d 83, 89 (5th Cir. 1971)*.

[49] *Id.*

[50] *See* notes 52-53, infra, and accompanying text.

[51] *See, e.g.*, the legislation under discussion in cases at note 44, supra.

[52] *16 U.S.C. § 470 (1974)*. *See also* 42 U.S.C. § 1460(b) (1970) (federal support for local historic preservation in urban renewal programs). The problem of landmark and historic district preservation has generated considerable scholarly attention. J. Costonis, Space Adrift: Saving Urban Landmarks Through the Chicago Plan (1974). Forman, Historic Preservation and Urban Development Law in Louisiana, 21 La.B.J. 197 (1974); Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971); Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv.L.Rev. 1165 (1967); Note, 63 Colum. L.Rev. 708 (1963).

See also Aesthetics vs. Free Enterprise -- A Symposium, 15 Prac.Law. 17 (1969); Legal Methods of Historic Preservation, 19 Buffalo L.Rev. 611 (1970).

[53] National Park Service, The National Register of Historic Places, 103-06 (1969).

[54] *Euclid, 272 U.S. at 388, 47 S. Ct. at 118*. *See also Paris Adult Theatre, supra* note 36; *Goldblatt, supra* note 34.

[55] *Berman, supra* note 35; *Euclid, supra* note 34.

The Ordinance is of general application to a well-defined geographic area. In addition, it establishes a Commission whose professional qualifications and means of selection are delineated. Within the boundaries of the French Quarter, the Commission is directed to review plans for all proposed demolition or construction and its duties and procedures are specific. After due consideration the Commission reports its recommendations to the Director of the Department of Safety and Permits, whereupon a permit for the proposed work may issue. Provision is made for review by the City Council. [56]

[35]** Though generally the procedures ordained are not faulted, [57] Maher attacks the schema as violative of due process because, in his view, it provides inadequate guidance to the Commission for the exercise of its administrative judgment. **[*1062]** The City concedes that no official objective standards have been promulgated in this regard. Maher suggests that formal standards are mandatory to guide the Commission in its resolution of the buildings deserving of preservation.

[36]** To satisfy due process, guidelines to aid a commission charged with implementing a public zoning purpose need not be so rigidly drawn as to prejudge the outcome in each case, precluding reasonable administrative discretion. Because of the circumstances pertaining to the Vieux Carre, we conclude that the Ordinance provides adequate legislative direction to the Commission to enable it to perform its functions consonant with the due process clause.

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, [58] the Vieux Carre Ordinance [59] **[**37]** and, by interpretation, the Supreme Court of Louisiana, [60] have specified their expectations for the Vieux Carre, 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, [61] defining what alterations in which locations require approval, [62] and particularly regulating items of special interest, such as floodlights, overhanging balconies or signs. [63]

[38]** 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. [64] Thus, the City is assured that the Commission

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[56] *See* note 66, infra.

[57] The suggestion was advanced that the Ordinance has been, and continues to be, enforced in an arbitrary fashion and not altogether free from influence. Evidence, including a federally funded report on the Commission's operations, was inserted in the record to support such claims. Charges that improper considerations play a role in decision making respecting the French Quarter merit serious attention by the Court. The district court decided that on balance, the allegations in this respect were not substantiated by the record. On review, we affirm the district court on the basis that its result finds support in the record and is not clearly erroneous. In so affirming, however, we pause to note that past enforcement of the Ordinance does not seem to have been uniformly predictable.

[58] La.Const. Art. XIV, § 22A, urges the City to protect "the quaint and distinctive character of the area." *See* note 4 *supra*.

[59] Vieux Carre Ordinance § 65-6 charges the Commission to "preserv[e] such buildings . . . [as] shall have architectural and historical value and which should be preserved for the benefit of the people. . . ."

[60] *See, e.g.*, City of New Orleans v. Pergament, 198 La. 852, 5 So.2d 129, 131 (1941), which characterized the Commission's purpose as "preserv[ing] the antiquity of the whole French and Spanish Quarter, the tout ensemble, so to speak, by defending this relic [the Vieux Carre] against iconoclasm or vandalism."

[61] Vieux Carre Ordinance § 65-6.

[62] Vieux Carre Ordinance § 65-8 (Ordinance extends to exterior work on any building that fronts on a public street or alley within the Vieux Carre). *See* note 5, supra.

[63] Vieux Carre Ordinance §§ 56-11; -13; -17 to -33.

[64] Vieux Carre Ordinance §§ 56-2 to -4. *Recommendation and appointment of members.*

> The Vieux Carre Commission shall consist of nine members, all of whom shall be citizens of the city. They shall be appointed by the Mayor with the advice and consent of the Council. The members of the Commission shall be appointed by the Mayor as follows: one from a list of two persons recommended by the Louisiana Historical Society; one from a list of two persons recommended by the Curators of the Louisiana State Museum; one from a list of two persons recommended by the Association of Commerce of the city; three qualified architects from a list of six qualified architects recommended by the New Orleans Chapter of the American Institute of Architects and three at large.

§ 65-3. *Term; vacancies.*

> Each of the members of the Vieux Carre Commission shall be appointed for a term of four years. Whenever the term of a member of the Commission expires the Mayor shall appoint his successor from a list selected by the body which made the

includes architects, historians and business persons offering complementary skills, experience and interests.

[39]** The elaborate decision-making and appeal process set forth in the ordinance creates another structural check on any potential for arbitrariness that might exist. **[*1063]** [65] Decisions of the Commission may be reviewed ultimately by the City Council itself. Indeed, that is the procedure that was followed in the present case. [66]

[40]** It is true, as Maher observed, that no officially promulgated regulations pinpoint each decision by the Commission. Nonetheless, apart from the evident purpose of the legislation and the taut lines of review maintained by the legislature over the operation of the Commission, other fertile sources are readily available to promote a reasoned exercise of the professional and scholarly judgment of the Commission. It may be difficult to capture the atmosphere of a region through a set of regulations. However, it would seem that old city plans and historic documents, as well as photographs and contemporary writings may provide an abundant and accurate compilation of data to guide the Commission. And the district court observed,

> In this case, the meaning of a mandate to preserve the character of the Vieux Carre "takes clear meaning from the observable character of the district to which it applies." [67]

[41]** Aside from such contemporary indicia of the nature and appearance of the French Quarter at earlier times, the Commission has the advantage at present of a recent impartial architectural and historical study of the structures in the area. The Vieux Carre Survey Advisory Committee conducted its analysis under a grant to Tulane University from the Edward G. Schleider Foundation. Building by building, the Committee assessed the merit of each structure with respect to several factors. For example, regarding the Maher cottage at issue here, the Louisiana Supreme Court noted that the Survey Committee "was of the opinion that this cottage was worthy of preservation as part of the overall scene." [68] While the Schleider survey in no way binds the Commission, it does furnish an independent and objective judgment respecting the edifices in the area. The existence of the survey and other historical source material assist in mooring the Commission's discretion firmly to the legislative purpose. [69]

[42]** We thus conclude that the present zoning ordinance, enacted to promote the social and economic goals of preserving an historical district judged of public value, does not delegate unfettered authority to the Vieux Carre Commission. Rather, the legislature has provided adequate structure and guidelines to that administrative body.

Although it primarily concerned a taking, Berman v. Parker [70] supplies an apt **[*1064]** analogy to the present situation. The question arose whether it was necessary to have legislative guidance for each individual decision in a context of a district-wide project to eliminate slums and blighted areas. A

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original selection from which the vacancy has occurred.

§ 65-4. *Employees and committees.*

> The Vieux Carre Commission may select and employ such persons as may be necessary to carry out the purposes for which it is created. The City Attorney shall be ex officio the attorney for the Commission. The Commission may designate and appoint, from among its members, various committees with such powers and duties as the Commission may have and prescribe.

[65] Vieux Carre Ordinance §§ 65-5; -8 to -10.

[66] The Ordinance provides for review by the City Council of a disapproved petition. § 65-10. No provision expressly exists for appealing the grant of a permit, but the Louisiana Supreme Court has interpreted the Ordinance to allow such review as well. *Maher v. City of New Orleans, 256 La. 131, 235 So.2d 402 (1970)*. Its determination of Louisiana law is binding on this Court. *Reinman v. City of Little Rock, 237 U.S. 171, 35 S. Ct. 511, 59 L. Ed. 900 (1915)*.

At oral argument it was contended that an element of arbitrariness was interjected by the right to appeal from the Commission, a body of experts, to the City Council, a legislative body responsive to the electoral process. The apparent suggestion was that the City Council does not enjoy the expert status of the Commission and, in addition, would be susceptible to political pressure in reaching its decisions. We reject such an intimation here. The expert status of the Commission members is particularly relevant to sustain its ability to function under power delegated by the legislature; the legislators themselves are the repository of public trust, and no delegation problem arises where the City Council itself decides a matter. Insofar as the suggestion is of impropriety, we affirm the district court conclusion that the proof was inadequate. *See* note 57 supra.

[67] *371 F. Supp. at 664*, *quoting* *Town of Deering ex rel. Bittenbender v. Tibbets, 105 N.H. 481, 202 A.2d 232 (1964)*.

[68] *256 La. 131, 235 So.2d 402, 407, n. 4*.

[69] In this regard, we find the present case distinguishable from *Barnes v. Merritt, 428 F.2d 284 (5th Cir. 1970)*, and *Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964)*. In those cases successful attacks were mounted on the denial of liquor permits, because of a total absence of proper standards to govern the administrative discretion. This circuit found that the unfettered, unreviewable power granted the agency in those situations offended due process.

[70] *348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1959)*.

redevelopment agency had decided to raze an entire district, and an individual owner objected to implementing the decision with respect to its property, insisting that its building should be allowed to stand because it was safe, sanitary and profitable.

The Supreme Court held that the agency, acting with the needs **[**43]** of the whole community in mind and the advantage of expert consultation, was free to implement its mandate with respect to the entire district without the need for a specific showing in each case that its action was necessary to the purpose of the legislation. Allowing each affected party to challenge the basis for an agency determination could thwart a comprehensive project, the Court held. It would appear that the Vieux Carre Commission, like the agency in *Berman*, acts in harmony with the public interest and directive, affords procedural fairness, and utilizes expert assistance.

By contrast, there is a case in which the Supreme Court did strike down a zoning regulation because of its improper delegation of arbitrary, unreviewable decision-making power by the enacting body. In Seattle Trust Co. v. Roberge, [71] a local ordinance prohibited the erection of a philanthropic institution in a specified area, unless written consent was acquired from surrounding neighbors. Such provision, the Court held, violated due process, because no standards existed to govern consent, and consent could be withheld for any reason or for no reason. An owner was afforded no review or other recourse, **[**44]** and was thus entirely subject to the caprice of its neighbors.

In addition to his argument, that the ordinance is arbitrary for want of standards, Maher asserts that the ordinance as applied to him was arbitrary, because the decision of the City Council to prohibit him from leveling the Dumaine Street residence was unsupported by reasons. [72] **[**45]** The district court, faced with this contention stated,

> Considerable testimony supported the [Council's] position that the Maher cottage had substantial architectural value as part of the Vieux Carre scene as well as some individual architectural merit.
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> . . .
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> [Although] a finding [in Maher's favor] would have certainly been possible[,] . . . the fact that the city authorities did not ultimately agree . . . does not make their action arbitrary. [73]

The district court was persuaded that

> This case has not been an example so much of a lack of standards as a disagreement as to whether the Maher cottage qualified for demolition under the applicable standards. In view of the whole record of this case, it is the opinion of the Court that since the City Council, rather than acting arbitrarily, merely resolved a fair, albeit heated, difference of opinion, the judgment of that zoning authority should be followed. [74]

As a reviewing tribunal, we cannot detect reversible error in the district court's conclusion.

IV. There is no Taking of the Dumaine Cottage that Would Require the Payment of Compensation.

Maher presents a twofold basis for his contention that the application of the Vieux Carre Ordinance to the cottage constitutes a taking of his property. **[*1065]** First, **[**46]** he claims that unless he can build the desired apartment complex, he may not pursue the most profitable use to which his property may be put. Second, he asserts that the city may not permissibly impose an affirmative maintenance duty upon a property owner without taking the property under the power of eminent domain. We deal with these two contentions in turn.

HN14[↑] To survive attack as a taking, the zoning regulation must -- as a threshold matter -- satisfy the due process requirements that its purpose and means are reasonable. Even if it comports with due process, a regulatory ordinance may nonetheless be a taking if it is unduly onerous so as to be confiscatory. The Supreme Court has held that every regulation is in some sense a prohibition [75] and that whether a given regulation treads over the line of proper regulation and operates as a taking of property is a matter to be determined under all the circumstances in a specific case. Justice Holmes has remarked:

> Constitutional rights like others are matters of degree. To illustrate: Under the police power, in its strict sense, a certain **[**47]** limit might be set to the height of

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[71] *278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210 (1928)*.

[72] The adequacy of the factual basis for the decision to withhold the Dumaine cottage demolition permit was determined on the merits by the Louisiana Supreme Court, *235 So.2d at 406*. It would therefore seem that the value of retaining the cottage is established by collateral estoppel, leaving open constitutional questions only. *See* note 23 supra.

[73] *371 F. Supp. at 663*.

[74] *Id. at 664*.

[75] *Euclid, supra* note 30.

> buildings without compensation; but to make that limit five feet would require compensation and a taking by eminent domain. [76]

The Supreme Court repeatedly made clear that *HN15*[↑] an ordinance within the police power does not become an unconstitutional taking merely because, as a result of its operation, property does not achieve its maximum economic potential. [77] In Goldblatt v. Hempstead an ordinance was amended to forbid excavation below the water table. Goldblatt owned property theretofore dedicated to quarrying which had through the years created a rather deep lake of several acres. The ordinance as applied to Goldblatt substantially reduced the value of his property and its potential utility. The Supreme Court **[**48]** nevertheless upheld the validity of the measure as a reasonable regulation, stating,

> Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an oftrepeated truism that every regulation necessarily speaks as a prohibition. If this ordinance otherwise is a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional. [78]

Relying on Mugler v. Kansas, [79] the Supreme Court in *Goldblatt* observed **[**49]** that *HN16*[↑] a properly enacted prohibition against a use of property for purposes adverse to the public weal is not controlled by the doctrine of eminent domain. Such regulation "is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain . . . ." [80]

The Court's attention has been directed to ordinances of other municipalities where the authority to prohibit destruction of designated buildings is more limited. *HN17*[↑] Refusals to allow razing may be accompanied by tax credit **[**50]** arrangements, by permission to transfer "building rights" to other owners or by other economic incentives or palliatives; ordinances may prohibit demolition conditionally or temporarily. [81] Such measures **[*1066]** may be considered wiser or fairer by a legislature which contemplates an historic preservation enactment. All we must decide today is whether an enactment that does not furnish alleviating devices may be constitutional.

An ordinance forbidding the demolition of certain **[**51]** structures, if it serves a permissible goal in an otherwise reasonable fashion, does not seem on its face constitutionally distinguishable from ordinances regulating other aspects of land ownership, such as building height, set back or limitations on use. We conclude that the provision requiring a permit before demolition and the fact that in some cases permits may not be obtained does not alone make out a case of taking.

As the ordinance was applied to Maher, the denial of the permit to demolish and rebuild does not operate as a classic example of eminent domain, namely, a taking of Maher's property for government use. [82] **[**52]** Nor did Maher demonstrate to the satisfaction of the district court that a taking occurred because the ordinance so diminished the property value as to leave Maher, in effect, nothing. [83] In particular, Maher did not show that the sale of the property was impracticable, that commercial rental could not provide a reasonable rate of return, or that other potential use of the

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[76] *Martin v. District of Columbia, 205 U.S. 135, 139, 27 S. Ct. 440, 441, 51 L. Ed. 743 (1907)*.

[77] *Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962)*; *Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926)*; *Hadacheck v. Sebastian, 239 U.S. 394, 36 S. Ct. 143, 60 L. Ed. 348 (1915)*.

[78] *369 U.S. at 593, 82 S. Ct. at 989*, citing cases.

[79] *123 U.S. 623, 8 S. Ct. 273, 31 L. Ed. 205 (1887)*.

[80] *369 U.S. at 593, 82 S. Ct. at 989*, *quoting* *Mugler v. Kansas, 123 U.S. 623, 8 S. Ct. 273, 31 L. Ed. 205 (1887)*.

[81] *See, e.g.*, Building and Zone Code of Portland, Oregon, Chapter 33.120, Historical Buildings and Sites (delay in grant of demolition permit to allow for public or private acquisition); Code of the City of Alexandria, Virginia, Article 14 (same); Administrative Code of the City of New York, Section 207.1.9 (demolition permit will issue if owner shows loss or inadequate return on property). *See generally* Costonis, supra note 52.

HN18[↑] -

[82] *See* *United States v. Central Eureka Mining Co., 357 U.S. 155, 78 S. Ct. 1097, 2 L. Ed. 2d 1228 (1958)*. *But see* *Keystone Associates v. Moerdler, 19 N.Y.2d 78, 278 N.Y.S.2d 185, 224 N.E.2d 700*, aff'd ***19 N.Y.2d 598, 278 N.Y.S.2d 243, 224 N.E.2d 744 (Ct.Appeals 1967)*** (a taking of property of the old Metropolitan Opera House found where demolition was retarded and use limited severely).

[83] In any case, while a substantial diminution in value may be evidence of a taking, "it is by no means conclusive." *Goldblatt v. Hempstead, 369 U.S. at 594, 82 S. Ct. at 990*. *See also* *Euclid, supra.*

property was foreclosed. [84] To the extent that such is the theory underlying Maher's claim, it fails for lack of proof.

We finally consider Maher's objection to that portion of the ordinance requiring reasonable maintenance and repair of buildings in the French Quarter. [85] By imposing an affirmative duty on property owners to prevent and correct defects, Maher claims that the City Council has overstepped permissible bounds of police power and by requiring him to make expenditures has effectively taken his property. To do this, Maher invokes the eminent domain provisions and **[**53]** demands just compensation.

Tests set forth by the Supreme Court again inform our analysis. [86] Once it has been determined that the purpose of the Vieux Carre legislation is a proper one, **[**54]** upkeep of buildings appears reasonably necessary to the accomplishment of **[*1067]** the goals of the ordinance. [87] As noted above, the responsibility for determining the wisdom of a legislative determination is not lodged with the judiciary.

The fact that an owner may incidentally be required to make out-of-pocket expenditures in order to remain in compliance with an ordinance does not per se render that ordinance a taking. In the interest of safety, it would seem that an ordinance might reasonably require buildings to have fire sprinklers or to provide **[**55]** emergency facilities for exits and light. In pursuit of health, provisions for plumbing or sewage disposal might be demanded. Compliance could well require owners to spend money. Yet, if the purpose be legitimate and the means reasonably consistent with the objective, the ordinance can withstand a frontal attack of invalidity.

Our decision is narrow regarding the requirement reasonably to maintain property in the French Quarter. In holding that the ordinance provision necessitating reasonable maintenance is constitutional, we do not conclude that every application of such an ordinance would be beyond constitutional assault. For, as the Supreme Court emphasized in *Goldblatt*, even a generally constitutional regulation may become a taking in an isolated application if "unduly oppressive" to a property owner. [88] It may be that, in some set of circumstances, the expense of maintenance under the Ordinance -- were the city to exact compliance -- would be so unreasonable as to constitute a taking. **[**56]** [89]

The burden of proof as to this point falls on the party alleging the taking. [90] On the evidence presented here, the district court found that Maher had not sustained his burden of demonstrating that the upkeep provisions were inordinately burdensome. [91] We go no further than to state that we cannot find the district court determination in this regard to be erroneous.

V. Conclusion.

The Vieux Carre Ordinance was enacted to pursue the legitimate state goal of preserving the "tout ensemble" of the historic French Quarter. The provisions of the Ordinance appear to constitute permissible means adapted to secure that end. Furthermore, the operations of the Vieux Carre Commission satisfy due process standards in that they provide reasonable legislative and practical **[**57]** guidance to, and control over, administrative decision making.

Once the district court concluded it was at liberty, under

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[84] Maher objects strenuously to the district court's observation that rental values in the French Quarter are reputedly relatively high. We need not decide whether judicial notice was improperly exercised in this regard, for any error that may have occurred was not reversible. We also find unpersuasive Maher's contention that a critical fact is that he inherited the property rather than purchasing it.

[85] Vieux Carre Ordinance § 65-36. *Preservation of existing structures by owner or person having legal custody thereof.*

> All buildings and structures in that section of the city known as the Vieux Carre Section . . . shall be preserved against decay and deterioration and free from certain structural defects in the following manner, by the owner thereof . . . [who] . . shall repair such building if it is found to have any of the following defects:

There follows a list of unsafe, nonweather sound and deteriorated conditions, including falling portions of buildings, deteriorated or inadequate foundation, floors, walls, support, ceilings, roofs, chimneys, and ineffectively weathertight exterior or windows.

Under Section 65-37, charges may be brought against a noncomplying owner. *See* note 33 supra.

[86] *Goldblatt supra note 34*; *Euclid supra note 34*. In *Goldblatt*, the Supreme Court did not reach the question whether an affirmative duty to erect a fence and fill in the lake was overly burdensome and beyond the police power.

[87] *Goldblatt, supra* note 34. *Euclid, supra* note 34.

[88] *369 U.S. at 595, 82 S. Ct. 987*, *quoting* *Lawton v. Steele, 152 U.S. 133, 137, 14 S. Ct. 499, 38 L. Ed. 385 (1894)*.

[89] *See* *Keystone Associates, note 82 supra.*

[90] *Goldblatt, 369 U.S. at 596, 82 S. Ct. 987*.

[91] *371 F. Supp. at 662*.

HN19[↑] -

principles of finality, to reach the merits of Maher's case, that court was not persuaded that the denial of a demolition permit was arbitrary. It did not find that the ordinance as applied to Maher constituted a taking of Maher's property for which compensation was indicated. These determinations, based on the proof proffered there, are not clearly erroneous.

An order will, therefore, be entered affirming the judgment of the district court.

Affirmed.
