

# Local Preservation

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## **When Preservation Commissions Go To Court A Summary of Favorable Treatment of Challenges To Ordinances and Commission Decisions**

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A recent study by the National Center for Preservation Law suggests that local preservation commissions are becoming involved in litigation much more frequently than had been previously thought. Seventeen percent (39 commissions) of the 222 preservation commissions responding to a National Center questionnaire stated that they had been involved in a court case within the previous two years. This indicates that it is important for commissions and their staffs to know how commissions and local preservation ordinances have fared in court over the years. This issue of **Local Preservation** briefly summarizes and analyzes preservation commissions' participation in litigation.

### **Historical Overview of Preservation Commission Litigation**

When one looks back over the evolution of American law relating to local preservation commissions, several distinct periods can now be seen. The first of these, a period of early development, lasted from the enactment of the nation's first historic preservation ordinance in Charleston in 1931 until about 1955, when the Massachusetts legislature enacted two special bills creating and protecting historic district on Beacon Hill in Boston and on the Island of Nantucket. These two legislative bills set the stage for statewide enabling legislation for local preservation commissions in a growing number of states.

The second of the periods showed a growth to maturity for local preservation commissions. This period lasted from 1955 until the U.S. Supreme Court decision in the Penn Central case in 1978. During this period, many cases involving local preservation ordinances were decided, almost invariably in favor of a challenged ordinance or a disputed commission decision.

The third period, which may still be underway, has been an aftermath to the Penn Central decision and lasted from 1978 until at least the early 1980s. During this period several important local preservation ordinances were strengthened, most notably those for the District of Columbia, Philadelphia, San Antonio, and Chicago. A strong decision on hardship under the District of Columbia ordinance helped make it clear that a loss in value because of landmarking will seldom be compensable.

The current period is also one of perfecting commission procedures and challenging the regulation of properties owned by charitable (particularly religious) institutions. Cases involving these issues are characterized by: (1) careful attention to the demands of particular preservation ordinances (the search for procedural irregularity); and (2) a persistent questioning of whether

non-profit organizations owning historic properties should be subject to rules different from those applicable to owners of residential or commercial properties. Cases in the second category grow out of arguments by churches that religious properties should not be subject to landmark designation and consequent regulation. No designation of property owned by a religious institution has yet been invalidated except on procedural grounds.

The great majority of court decisions have upheld the basic power of communities to use the police power to designate and regulate both historic districts and individual landmarks. When commissions have lost in court, it has usually been because of a procedural flaw in a designation or a decision, not because of a court's determination that the commission could not have achieved its goal had it acted properly under a valid local preservation ordinance.

### **Questions Addressed by the Courts**

Since 1941, nearly 100 court decisions involving local preservation commissions have been reported as published decisions that can be researched in a large law library. In a summary such as this, it is impossible to include every such case. Those discussed have been selected to illustrate principles and directions in legal thinking with which commissions should be acquainted.

#### **Does designation of private property as “historic” and subsequent governmental regulation affecting the property constitute a “taking” of that property for which the governmental unit must pay?**

Some courts have suggested that in exceptional situations the impact of the designation of property as historic could be so economically severe as to amount to a “taking”. (The term “taking” derives from a provision in the Fifth Amendment to the U.S. Constitution which states that private property shall not “be taken for public use, without just compensation.”) Courts have yet to identify such situations, or to provide firm guidance to preservation commissions on such potential “hardship” situations. Under the Supreme Court’s Penn Central decision and a District of Columbia decision discussed below, however, the judicial test for “hardship” would be quite difficult for most property owners to meet. Several state courts have defined “hardship” narrowly, holding, for instance, that an owner who is not willing to offer property for sale at its fair market value cannot establish a “hardship”.

The United States Supreme Court upheld in Penn Central Transportation v. New York City, 438 U.S. 104 (1978), the designation of Grand Central Terminal in New York City and the subsequent denial to the terminal’s railroad owner of a permit sought for the demolition of portions of the structure for erection of a high-rise office building on the site. The Supreme Court stated:

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 general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.

This decision is cited frequently in historic preservation situations for the principle that an owner who can obtain a “reasonable return” or a “reasonable beneficial use” from his property does not have a valid “taking” argument.

The Supreme Court included in the Penn Central decision useful language recognizing the permissible goals that American cities seek to implement through the enactment of local preservation ordinances:

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. These nationwide legislative efforts have been precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in 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.”

More recent U.S. Supreme Court opinions involving the “taking” question have focused on the procedural issues of: (1) when an owner may make a “taking” argument (“ripeness” and “exhaustion of administrative remedies” cases); and (2) whether a property owner who can demonstrate a “temporary taking” is constitutionally entitled to seek money damages as a remedy for the taking. These cases have not changed the substantive standard for when there is a “taking,” though, and thus pose no legal threat to local historic preservation programs.

A highly publicized Supreme Court opinion of June 1987 on the “temporary taking” issue did not hold that there had in fact been a “taking” in the fact situation before the court. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S.Ct. 2378 (1987). First English did not change the Penn Central standard for when a “taking” has occurred but does stand for the principle that money damages as compensation would be constitutionally required in the unlikely event that a temporary regulatory “taking” were found. Unfortunately, the implications of the case have been widely overstated by attorneys representing development interests. The case has been remanded to the California courts for a determination of whether any “taking” had in fact occurred.

Another 1987 Supreme Court decision, Keystone Bituminous Coal Association v. DeBenedictis, 107 S.Ct. 1232 (1987), is important because it reiterated the Penn Central principle that when an owner makes a “taking” claim, a reviewing court must look at the owner’s total interest in the property involved and should ignore the impact of a challenged regulation on individual components of the property:

Many zoning ordinances place limits on the property owner’s right to make profitable use of some segments of his property..... When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioner’s coal mining operations and financial-backed expectations, it is plain

that the petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property.

It is important to bear in mind that in a few states it might be possible for an action which would not be a “taking” under the federal constitutional standard of Penn Central to be a “taking” under the tougher standard of a particular state constitution. This possibility points up the importance to preservation commissions of keeping an eye on land use decisions in their own states.

**Is it constitutional to use police power to regulate private property for an “aesthetic” purpose such as historic preservation?**

The most important decision on this issue is certainly that of the U.S. Supreme Court in Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978), in which the court noted that:

(T)his Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city....

See also A-S-P Associates v. City of Raleigh, 258 S.E. 2d 444 (N.C. 1979):

(We) find no difficulty in holding that the police power encompasses the right to control the exterior appearance of private property when the object of such control is the preservation of the State’s legacy of historically significant structures.

A Connecticut court stated in Figarsky v. Historic District Commission, 368 A. 2d 163 (Conn. 1976):

In a number of recent cases, it has been held that the preservation of a historical area or landmark as it was in the past falls within the meaning of general welfare and, consequently, the police power.... We cannot deny that the preservation of an area or cluster of buildings with exceptional and architectural significance may serve the public welfare.

**May a local preservation commission regulate both historic and non-historic structures within a local historic district?**

In City of New Orleans v. Pergament, 5 So. 2d 129 (La. 1941), the Louisiana Supreme Court recognized that the Vieux Carre ordinance had a permissible purpose:

The purpose of the ordinance is not only to preserve the old buildings themselves, but to preserve the antiquity of the whole French and Spanish quarter, the tout ensemble, so to speak, by defending this relic against iconoclasm or vandalism. Preventing or prohibiting eyesores in such a locality is within the police power and within the scope of this municipal ordinance.

Pergament has been cited often by courts in other jurisdictions.

In Faulkner v. Town of Chestertown, 428 A.2d 879 (Md. 1981) the Maryland Court of Appeals stated that:

(T)he whole concept of historic zoning “would be about as futile as shoveling smoke” if .... because a building being demolished had no architectural or historical significance a historic district commission was powerless to prevent its demolition and the construction in its stead of a modernistic drive-in restaurant immediately adjacent to the State House in Annapolis.

**May a community deny altogether demolition permission when an owner wishes to demolish a building?**

Courts in several states have now upheld total denials of demolition permission for designated properties. In Maher v. City of New Orleans, 516 F.2d 1051 (5<sup>th</sup> Cir. 1975), the United States Court of Appeals for the Fifth Circuit stated:

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. 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.

For similar results, see also Mayor and Aldermen of City of Annapolis v. Anne Arundel County, 316 A.2d 807 (Md. 1974); Figarsky v. Norwich Historic District Commission, 368 A.2d 163 (Conn. 1976); First Presbyterian Church v. City Council of City of York, 360 A.2d 257 (Penn. 1976); Lafayette Park Baptist Church v. Board of Adjustment of City of St. Louis (No. 782-3455, St. Louis City Cir. Ct., May 3, 1979).

In the Figarsky case from Connecticut, the court stated:

Whether the denial of the plaintiffs' application for a certificate of appropriateness to demolish their building has rendered the Norwich ordinance, as applied to them, confiscatory, must be determined in the light of their particular circumstances as they have been shown to exist.... In regulating the use of land under the police power, the maximum possible enrichment of a particular landowner is not a controlling purpose.

**May a preservation commission review all exterior alterations to a structure or must it confine its jurisdiction to those exterior facades visible from public streets?**

Commissions do not have all the same power on this issue. An early New Orleans decision, City of New Orleans v. Impastato, 3 So. 2d 559 (La. 1941), established the principle that in New Orleans the Vieux Carre Commission may regulate all changes to the exterior facades of buildings within its jurisdiction:

The word “exterior” as used in the Constitution cannot be limited to include only the front portion of the building as contended by defendant’s counsel. Such a strained interpretation of the language employed in the constitutional amendment would merely serve to defeat the obvious intention of the people... by rendering it

impossible for the Commission to preserve the architectural design of the sides, rear and roof of any building in the Vieux Carre section.”

Unless a commission is precluded by a local ordinance or state enabling legislation from reviewing all changes to the exterior of a structure, the commission may assume that its jurisdiction is total rather than partial.

### **Are religious properties immune from designation and regulation?**

Religious institutions often argue that the constitutionally-mandated separation between church and state precludes the designation and regulation of properties owned by such institutions. However, these arguments have not been successful in the courts. See, in particular, Society for Ethical Culture in the City of New York v. Spatt, 415 N.E.2d 922 (N.Y. 1980):

The Society also contends that the existence of the designation interferes with the free exercise of its religious activities; however, rather than argue its desire to modify the structure to accommodate these religious activities, the Society has suggested that it is improper to restrict its ability to develop the property to permit rental to non-religious tenants.... Although the Society is concededly entitled to First Amendment protection as a religious organization, this does not entitle it to immunity from reasonable government regulation when it acts in purely secular matters....

In a recent interim ruling in Rectors, Wardens and Members of Vestry of St. Bartholomew's Church v. City of New York, (No. 86 Civ. 2848 (JES), U.S. District Court for Southern District of New York, transcript of July 10, 1987 conference with District Judge John E. Sprizzo), a federal judge stated:

Under no stretch of the imagination is it clear to the Court that St. Bart's is entitled to the relief which they are seeking here, which is the right to demolish the building and construct a skyscraper, even assuming arguendo that this is a taking – and I have found that it is not a taking as a matter of law. It doesn't follow that you would have the right to demolish the building and construct a skyscraper, because I think at that point, if it were a taking, the state would be entitled to condemn it for its own purposes if the state thought that the preservation of the landmark was significant enough a state interest to warrant the action. They would then have to pay you for the property. But it wouldn't follow that you would have the right, which I think seems to be at least the assumption in your papers, to demolish the building and develop it into a skyscraper. I think the city would then have the choice of paying you what it is worth or designating it, in effect.

### **Are minimum maintenance provisions which require owners to take steps to prevent gradual deterioration of their buildings permissible in local preservation ordinances?**

In Maier v. City of New Orleans, 516 F.2d 1051 (5<sup>th</sup> Cir. 1975), the United States Court of Appeals for the Fifth Circuit stated that:

(O)nce it has been determined that the purpose of the Vieux Carre legislation is a proper one, upkeep of the buildings appears reasonably necessary to the accomplishment of the goals of the ordinance... 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 emergency facilities for exits and light. In pursuit of health, provisions for plumbing or sewage disposal might be demanded. Yet, if the purpose be legitimate and the means reasonable consistent with the objective, the ordinance can withstand a frontal attack of invalidity.

### **Does a local preservation commission have the authority to regulate property owned by a county or state?**

In Mayor and Aldermen of City of Annapolis v. Anne Arundel County, 316 A.2d 807 (Md. 1974), a Maryland court held that a local historic preservation commission had jurisdiction over a county-owned structure and could refuse to issue a demolition permit:

(T)o accomplish the primary purposes of historic area zoning, it is necessary that the exterior of the building having historic or architectural value be preserved against destruction or substantial impairment by every one, whether a private citizen or a governmental body.

The power of a local preservation commission to regulate county-owned property may vary from state to state.

A still more difficult question is whether a local historic preservation commission may regulate state-owned property. The answer to this question is far less certain, though courts in both Washington and New Mexico have suggested that it is not an impossible power for a local commission to have. State of Washington v. City of Seattle, 615 P.2d 461 (Wash. 1980); City of Santa Fe v. Armijo, 634 P.2d 685 (N.M. 1981).

### **May a vacant lot be included within a historic district?**

See A-S-P Associates v. City of Raleigh, 258 S.E.2d 444 (N.C. 1979), for a case upholding inclusion of a vacant lot on the edge of a historic district.

### **How can a commission respond to an owner who makes a “hardship” argument?**

A District of Columbia court state in 900 G Street Associates v. Department of Housing and Community Development, 430 A.2d 1387 (1981):

The basic question presented in this case is: at what juncture does the diminishment in value allegedly resulting from the governmental restriction on the use of property constitute an “unreasonable economic hardship” to the owner, which is here synonymous with an unconstitutional “taking”?... (I)f there is a reasonable alternative economic use for the property after the imposition of the restriction on that property, there is no taking, and hence no unreasonable economic hardship to the owners, no matter how diminished the property may be

in cash value and no matter if “higher” or “more beneficial” uses of the property have been proscribed.

### **What about the owner who ignores or is unaware of the preservation commission?**

Not infrequently, an owner will attempt to argue that he was unaware that his property was located in a historic district or will simply ignore the terms of a certificate of appropriateness. Cases in both Maryland and Massachusetts indicate that courts will take an extremely unsympathetic attitude toward such violations of a local historic preservation program.

In Faulkner v. Town of Chestertown, 428 A.2d 879 (Md. 1981), a property owner applied for a permit to install vinyl siding an obtained a permit which specified “no trim to be covered.” The owner proceeded to cover four second-story windows on the front of his building. The court upheld a lower court order that the siding should be removed from the windows:

In plain language what the ordinance and the Act are saying is that if one proposes to do anything to a building within a historic district which will involve changes to the exterior appearance of the structure visible from a street or alley in the district, then one must obtain a permit. That is so plain we see no reason why people of ordinary intelligence would be unable to comprehend the meaning of the Act and the ordinance.

In a more recent Massachusetts trial court opinion, Chase F. Parker, Trustee v. Beacon Hill Architectural Commission (No. 80370, Suffolk County Superior Court, decided June 21, 1988), a court found that:

(T)he facade of 31 Brimmer Street stands in violation of the Beacon Hill Act, with respect to included features which are not specified in the approved plans, and with respect to features specified in the approved plans which have been omitted from the facade.

The court ordered an owner who had added an extra floor to his building after permission to do so had been repeatedly denied by the Beacon Hill preservation commission to

correct all outstanding violations.... and further orders that all construction involving the facade of 31 Brimmer Street be done in accordance with the Commission’s decision....

### **Will a Decision From Another State Convince a Court in Our State?**

It is important to remember that historic preservation litigation has not occurred in all states, and that in some states the preservation cases which have been decided have not involved local preservation ordinances. For this reason, a commission in a state with no court decisions in cases involving commissions should not assume that decisions from other states are automatically applicable.

Despite this caveat, the strong body of established precedents makes it unlikely that any court would find local historic preservation ordinances entirely impermissible in a particular state,



though an ordinance not in conformity with state enabling legislation would be subject to challenge.

### **Some Practical Suggestions**

Because the number of court decisions involving local preservation commissions is continuing to grow, a preservation commission should work with staff in the city attorney's office to create a local file of court decisions involving the powers of preservation commissions. Such a file can be helpful to commission members and may save city legal staff valuable time should a challenge to the commission's power ever be made in court.

The chairman of a local preservation commission should try to become generally familiar with the principles argued and decided in these cases, and may want to bring this information to the attention of the local municipal attorney who works with the preservation commission.

Some commissions distribute to commission members notebooks with pertinent materials such as copies of the local preservation ordinance, the state enabling legislation under which it was adopted and even copies of court decisions in the state involving local preservation commissions. This information can do much to reassure preservation commission members that their goals are valid so long as their actions are correct. New commission members, in particular, need to develop quickly a basic understanding of the broad issues which have been argued and decided in these cases.

### **Some Responsible Preservation Commissions Never Go to Court**

It is important to note that most of the law involving local preservation commissions has been made in a handful of major cities such as New York, New Orleans and Boston. Curiously, and perhaps significantly, Charleston's Board of Architectural Review (BAR), the county's oldest preservation commission, has never made a decision that was appealed into court and resulted in a "reported" appellate court decision. Occasionally a decision has been appealed from this commission into a local trial court, but there is still no appellate court opinion in South Carolina involving a local preservation commission.

The situation may be a tribute to the ability of the Charleston BAR to resolve controversial issues in a responsible manner or simply a recognition by local property owners that even when they remain personally unsatisfied by a decision of the BAR, community support for the BAR is strong.

### **Where to Look for Help If Your Commission Is Challenged In Court**

A number of national preservation organizations are actively monitoring court cases involving historic preservation issues. The Office of General Counsel at the National Trust for Historic Preservation maintains extensive litigation files of cases which have involved local preservation commissions. The Trust's regional and field offices are often able to put commission representatives in touch with other commissions which have dealt successfully with a particular problem. The Trust's Preservation Law Reporter (1982-present) contains a variety of case summaries, articles, and new development reports that are useful for local commissions seeking guidance in the legal area. For further information, contact:

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The National Center for Preservation Law issues a series of frequent newsletters called the "Preservation Law Update" which summarize court decisions involving local preservation commissions and announce significant new publications in the area of preservation law. The National Center is working with the University of Virginia Law School Library on the creation of a comprehensive national Preservation Law Collection which will include copies of hundreds of local preservation ordinances and court papers which have been filed in cases involving local preservation commissions.

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The National Alliance of Preservation Commissions distributes information on the work of preservation commissions. The Alliance Review newsletter is available by subscription. For further information contact:

The National Alliance of Preservation Commissions  
School of Environmental Design  
609 Caldwell Hall  
University of Georgia  
Athens, Georgia 30602

#### **For Further Information:**

- ❖ Historic Preservation Law and Taxation, Boasberg, Coughlin, & Miller, Matthew Bender, 1986.
- ❖ A Handbook on Historic Preservation Law, The Conservation Foundation and National Center for Preservation Law, 1983.
- ❖ Federal Historic Preservation Case Law: A Special Report. Advisory Council on Historic Preservation, 1985. Available from the Advisory Council at the above address.