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AN ANNOTATED LIST OF MAJOR HISTORIC PRESERVATION COURT DECISIONS

COMPILED BY STEPHEN N. DENNIS*

Ten years ago, when Bob Stipe wrote in the July 1970 issue of *Preservation News*¹ of the need for the occasional preservation court case to be monitored closely so that the result could be distributed quickly to city attorneys and others interested in land use issues, no one familiar with the few preservation cases that already had been litigated would have predicted the dramatic increase in the volume of preservation litigation that has occurred in only ten years. The following annotated list of major historic preservation court decisions illustrates this growth. Of the seventy-nine cases listed, only four were decided before 1950. Although six cases were decided between 1950 and 1960 and ten more cases were decided between 1960 and 1969, all but twenty of the seventy-nine cases listed have been decided since 1970. Thus, nearly three times as many cases involving historic preservation issues have been decided in the last ten years as in the seventy-four years between the United States Supreme Court's 1896 opinion in *United States v. Gettysburg Electric Railway Company*² and 1970.

The National Trust for Historic Preservation prepared this annotated list of major historic preservation court decisions primarily for use by attorneys, whether they are city attorneys who need to remain informed about developments in preservation law or private attorneys who can expect to have preservation clients. It should be useful, however, to local preservation commissions, to private preservation organizations, and to persons concerned with the protection and preservation of significant buildings.

For each listed case, the National Trust maintains a file containing a

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Earlier versions of this annotated list have been distributed by the National Trust for Historic Preservation and have appeared in conference materials prepared for a Special Symposium at the 1979 Annual Meeting of the American Bar Association and for the Third Annual Governor's Conference on Historic Preservation in 1979. A briefer version of the list appears at 12 URB. LAW. 87-101 (1980).

1. Stipe, *Preservation Lawyers- Unite!*, *Preservation News*, July 1970, at 5, col. 1, *reprinted in* 11 N.C. CENT. L.J. 208 (1980).

2. 160 U.S. 668 (1896).

copy of the full opinion in the case, and often copies of the complaint and briefs in the case. In addition to these seventy-nine major cases, the National Trust's litigation files contain information about scores of additional recent cases that did not result in significant decisions, were dropped before decisions could be rendered, or are still pending. In general, all cases decided before 1970 are listed.

Although a strong national historic preservation movement has developed in the thirty-one years since the creation of the National Trust for Historic Preservation in 1949,³ much of the strength of the historic preservation movement derives from local efforts in certain states. It is useful, therefore, to consider the development of historic preservation litigation in terms of the states in which preservation "situations" have been litigated, whether in state courts under local ordinances and state statutes or in federal courts under congressional enactments. States in which there has been a significant amount of historic preservation litigation are likely to be states in which knowledgeable preservationists are aware of the protections available to important buildings under federal statutes and local ordinances, as well as states in which attorneys have become familiar with historic preservation law through experience with more than a single case.

As recently as 1960 a city attorney or law student wishing to learn about historic preservation law might have concluded that it existed or was being created primarily in Louisiana⁴ or Massachusetts.⁵ By 1970 the situation would not have appeared very different, except for the addition of New York;⁶ two additional preservation law cases were decided in Louisiana between 1960 and 1970.⁷

Since 1970 preservation law has continued to develop in all three states, with two additional cases in Louisiana,⁸ four additional cases in Massachusetts,⁹ and eight additional cases in New York.¹⁰ There has also been significant case development in California,¹¹ Connecticut,¹² Maryland,¹³ Missouri,¹⁴ Pennsylvania,¹⁵ Texas,¹⁶ and Wisconsin.¹⁷

3. 16 U.S.C. §§ 468-468d (1976) (originally enacted as Act of Oct. 26, 1949, Pub. L. No. 81-408, 63 Stat. 927).

4. Cases 3, 4, 6, and 10 *infra*.

5. Cases 8 and 9 *infra*.

6. Cases 16 and 18 *infra*.

7. Cases 14 and 17 *infra*.

8. Cases 31 and 39 *infra*.

9. Cases 30, 40, 45, and 77 *infra*.

10. Cases 27, 28, 36, 48, 55, 56, 61, and 69 *infra*.

11. Cases 23, 43, and 71 *infra*.

12. Cases 37 and 73 *infra*.

13. Cases 5, 24, 47, and 78 *infra*.

14. Cases 21, 29, 52, and 79 *infra*.

15. Cases 1, 38, 50, 59, 64, and 73 *infra*.

16. Cases 25, 51, 60, and 70 *infra*.

17. Cases 7, 67, and 74 *infra*.

There has been more limited development in Colorado,¹⁸ the District of Columbia,¹⁹ Hawaii,²⁰ Illinois,²¹ Ohio,²² and Virginia.²³

Although preservation court cases are now being brought throughout the country, certain topics are litigated more frequently than others. By far the largest number of listed cases involved local preservation ordinances or the actions of local preservation commissions—forty-one of the seventy-nine listed cases.²⁴

Three cases involve property owners who wished to apply inappropriate siding to structures within local historic districts.²⁵ Six cases involve churches that wished to demolish significant structures.²⁶ Two cases involve banks that wished to demolish important buildings.²⁷ Seven cases involve HUD-funded projects.²⁸

In some areas there has been little preservation litigation to date. Only one case on the list²⁹ deals with a preservation easement question and only one case involves a tax question.³⁰ Only three cases involve the construction of wills or trust instruments affecting historic properties.³¹

From almost any viewpoint a major period of preservation litigation came to its conclusion in *Penn Central Transportation Company v. City of New York*,³² the United States Supreme Court's 1978 decision upholding against "taking" claims the validity of a landmark designation of a large commercial building located in the heart of a major American metropolis. In the future there should be fewer attacks than there have been in the past on the validity of local preservation ordinances under state law or the designation of landmarks and historic districts under such ordinances. Instead, future cases are likely to concentrate on "reasonable return" questions and the adequacy of the procedures used by local preservation commissions rather than on the decisions they reach.³³

18. Cases 44 and 62 *infra*.

19. Cases 33 and 46 *infra*.

20. Cases 32 and 52 *infra*.

21. Cases 19, 20, and 35 *infra*.

22. Cases 12 and 34 *infra*.

23. Cases 26 and 41 *infra*.

24. Cases 3, 4, 6, 8-11, 13-20, 22-24, 27, 30, 31, 37, 38, 40, 45, 47-50, 52, 55, 56, 61, 62, 69, 70, 73, 76-79 *infra*.

25. Cases 30, 40, and 78 *infra*.

26. Cases 27, 38, 48, 69, and 79 *infra*.

27. Cases 35 and 59 *infra*.

28. Cases 28, 44, 65, 66, 68, 69, 72, and 74 *infra*.

29. Case 53 *infra*.

30. Case 58 *infra*.

31. Cases 29, 34, and 43 *infra*.

32. 438 U.S. 104 (1978).

33. Since *Penn Central* the Supreme Court has considered the "taking" issue in both *Andrus*

The only North Carolina case included in the list is *A-S-P Associates v. City of Raleigh*,³⁴ which, by upholding the validity of a local preservation ordinance, cleared up doubts about the validity of such ordinances that had stemmed from a 1964 opinion of the North Carolina Attorney General.³⁵ That opinion, given in response to a request from a community considering the enactment of a preservation ordinance for an opinion on the constitutionality of such an ordinance, stated that "the municipality has no statutory authority to enact such an ordinance and, further, it would be doubtful if the General Assembly of North Carolina could grant a municipality the authority to enact such an ordinance since it is difficult for us to see that the establishment of the Historic District bears any relationship to the public safety, health and welfare as those words have been interpreted by our Supreme Court."³⁶

The North Carolina Supreme Court was careful to note in its first footnote that "the constitutionality of historic district preservation is a matter of first impression for this Court."³⁷ The court pointed out in the same footnote that although the City of Winston-Salem had created the Old Salem Historic Preservation District in 1948, the North Carolina General Assembly did not enact any enabling legislation permitting local historic districts until 1965.³⁸ In *A-S-P* the court stated that it found "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."³⁹ The *A-S-P* case is nationally important because it involved the applicability of a preservation ordinance to a vacant lot located at the edge of a local historic district.

It is clear that today attorneys with preservation clients have several advantages that were not available to them as recently as only ten years ago. The body of court precedents has expanded, information about unreported or pending cases is more readily available, and many attorneys have developed an interest in historic preservation law.⁴⁰

v. Allard, 100 S. Ct. 318 (1979), *Kaiser Aetna v. United States*, 100 S. Ct. 383 (1979), and *Aigens v. City of Tiburon*, 48 U.S.L.W. 4700 (June 10, 1980). In *Allard* Justice Brennan reiterated the interpretation of the fifth amendment's taking clause stated in *Penn Central*. NATIONAL TRUST FOR HISTORIC PRESERVATION, 5 LANDMARKS & HISTORIC DISTRICT COMMISSIONS, No. 1 (Feb. 1979). In *Aigens*, Justice Powell stated that ordinances intended to promote the retention of open-space within a community "substantially advanced legitimate governmental goals" because they are "exercises of the city's police power to protect the residents . . . from the ill-effects of urbanization."

34. 298 N.C. 207, 258 S.E.2d 444 (1979).

35. Op. Att'y Gen. (Apr. 7, 1964).

36. *Id.*

37. 298 N.C. 207, n.1, 258 S.E.2d 444, n.1 (1979).

38. *Id.*

39. *Id.* at 216, 258 S.E.2d at 450.

40. See, e.g., Bonderman, *Special Tactical Considerations Frequently Arise When Litigating*

Information about pending or decided historic preservation cases is available from the National Trust's Office of Real Estate and Legal Services and the Trust's six regional offices in Boston, Washington, Charleston, Chicago, Oklahoma City, and San Francisco. The Trust's ten periodic litigation charts list a total of 195 cases since September 1975.

The attorneys involved in these cases and the law professors teaching courses in historic preservation law employ a substantial body of developed and constantly-growing statutes and case law. In addition, staff members in several hundred municipal law offices have some knowledge of historic preservation objectives and the court precedents because of their work in connection with the drafting of a local preservation ordinance or the advice they are asked to render to a local preservation commission. Finally, many attorneys give generously of their time as members of local preservation commissions and add to their effectiveness as commission members by expanding their knowledge of historic preservation law. This annotated list should assist them in their endeavors:

1. *United States v. Gettysburg Electric Railway*, 160 U.S. 668 (1896). Upheld propriety of use of eminent domain power by federal government to condemn and take historic properties.
2. *Roe v. Kansas ex rel. Smith*, 278 U.S. 191 (1929). Upheld propriety of use of eminent domain power by state government to condemn and take historic properties.
3. *City of New Orleans v. Impastato*, 198 La. 206, 3 So. 2d 559 (1941). Upheld power of Vieux Carré Commission to regulate all exterior changes to buildings in Vieux Carré.
4. *City of New Orleans v. Pergament*, 198 La. 852, 5 So. 2d 129 (1941). Upheld power of Vieux Carré Commission to regulate signs within Vieux Carré.
5. *Flacomio v. Mayor of Baltimore*, 194 Md. 275, 71 A.2d 12 (1950). Upheld propriety of use of eminent domain by city government to condemn and take historic properties.
6. *City of New Orleans v. Levy*, 223 La. 14, 64 So. 2d 798 (1953). Upheld constitutionality of Vieux Carré ordinance against attack alleging vague standards, denial of equal protection, and use of police power for aesthetic purposes only.
7. *State ex rel. Saveland Park Holding Corp. v. Wieland (Fox Point)*, 269 Wis. 262, 69 N.W.2d 217, *cert. denied*, 350 U.S. 841 (1955). Upheld constitutionality of local ordinance requiring approval by village building board of exterior architecture of proposed construction before issuing building permit. Preservation of property

Preservation Law Controversies, Nat'l L.J., May 19, 1980, at 19, col. 1; Gilbert, *Preservation Law Coming Into Its Own*, Nat'l L.J., May 19, 1980, at 19, col. 4.

values held proper objective for exercise of police power, and standards in ordinance held adequate.

8. *Opinion of the Justices to the Senate (Nantucket)*, 333 Mass. 773, 128 N.E.2d 557 (1955). Proposed state enabling legislation creating historic district commission for Nantucket held constitutional, although in particular instances actions of commission might be unconstitutional.
9. *Opinion of the Justices to the Senate (Beacon Hill)*, 333 Mass. 783, 128 N.E.2d 563 (1955). Proposed state enabling legislation creating historic district commission for Beacon Hill held constitutional, and a number of commission's permissible powers enumerated.
10. *Whitty v. City of New Orleans*, Civil No. 6367 (E.D. La. Oct. 21, 1959). Vieux Carré ordinance held constitutional, and denial of demolition permit under that ordinance found not arbitrary or capricious and not to violate due process clause of United States and Louisiana Constitutions. Vieux Carré Commission held to have both legal and constitutional right to impose "reasonable conditions relative to replacement of . . . demolished structures before granting a demolition permit."
11. *Hayes v. Smith*, 92 R.I. 173, 167 A.2d 546 (1961). Upheld zoning board of review's reversal of decision by historic district commission to deny certificate of appropriateness for proposed addition to structure within district on ground board may consider question de novo because it, but not commission, held required public hearing on compatibility of proposed addition.
12. *Reid v. Architectural Board of Review*, 119 Ohio App. 67, 192 N.E.2d 74 (1963). Upheld board's denial of building permit for proposed residence of modern design to be constructed in neighborhood composed of houses in traditional styles.
13. *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 P.2d 13 (1964). Santa Fe historic district ordinance regulating window sizes as one detail of defined historic architectural style upheld under general grant of zoning power to city from state although no specific state enabling legislation permits municipalities to create historic districts. Ordinance held to contain adequate standards and not to be denial of equal protection.
14. *Vieux Carré Property Owners and Associates, Inc. v. City of New Orleans*, 246 La. 788, 167 So. 2d 367 (1964). Affirmed New Orleans' trust obligation, created by constitutional amendment, to protect entire area within Vieux Carré and held constitutional 1946 amendment to Vieux Carré ordinance exempting specified area within Vieux Carré from jurisdiction of Vieux Carré Commission.
15. *Town of Deering ex rel. Bittenbender v. Tibbetts*, 105 N.H. 481, 202 A.2d 232 (1964). Local ordinance permitting town selectmen to approve or disapprove planned new construction within one-

fourth mile of town common upheld as valid exercise of police power under state statute permitting town to enact by-laws to protect common. Criterion of ordinance that "atmosphere" of town is to be considered by selectmen held acceptable.

16. *Manhattan Club v. Landmarks Preservation Commission*, 51 Misc. 2d 556, 273 N.Y.S.2d 848 (1966). Designation of building as landmark held not confiscatory when owner guaranteed reasonable return on investment with option to demolish building if no scheme to provide such reasonable return can be devised.
17. *State ex rel. Phillips v. Board of Zoning Adjustments*, 197 So. 2d 916 (La. 1967). Mere location of property within Vieux Carré, such property consequently being subject to both Vieux Carré ordinance and general zoning ordinance, insufficient to constitute hardship justifying grant of variance to permit construction of additional structure on lot containing single main building; that both adjoining lots contain two main buildings and that many other lots in Vieux Carré also contain two main buildings are facts that must have been considered by drafters of Vieux Carré ordinance and do not justify grant of variance.
18. *Trustees of Sailors' Snug Harbor v. Platt*, 29 A.D.2d 376, 288 N.Y.S.2d 314 (1968). Constitutionality of municipal landmarks ordinance upheld; whether designation as landmark of building owned by charitable organization constitutes taking held to depend on whether (1) preservation of building would seriously interfere with use of property, (2) building capable of conversion to useful purpose without excessive cost, and (3) cost of maintaining it without use would entail serious expenditure.
19. *Rebman v. City of Springfield*, 111 Ill. App. 2d 430, 250 N.E.2d 282 (1969). Zoning ordinance placing property in historic district held not a taking, and ordinance held valid exercise of police power for zoning purposes; denial of building permit appropriate under ordinance because proposed construction not in keeping with historic area surrounding Lincoln Home.
20. *M & N Enterprises v. City of Springfield*, 111 Ill. App. 2d 444, 250 N.E.2d 289 (1969). State enabling legislation to permit establishment of historic districts held to have created new concept of public welfare permitting exercise of police power to protect historical areas; zoning ordinance for historic preservation that increases value of properties because of their proximity to historic structure held not confiscatory or unreasonable if it also limits properties to noncommercial uses.
21. *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970). Upheld architectural board's denial of building permit for modernistic home to be constructed in area containing homes in traditional styles because permit denial promotes general welfare of community and preserves property values.

22. *Hall v. Village of Franklin*, No. 69-52580 (Oakland County Cir. Ct., Mich. Feb. 10, 1972). State enabling legislation to permit municipalities to create historic districts upheld as proper exercise of police power, and local municipality held to have acted reasonably in creating historic district, but zoning change of plaintiff's property from commercial to residential held confiscatory.
23. *Bohannon v. City of San Diego*, 30 Cal. App. 3d 416, 106 Cal. Rptr. 333 (1973). Historic district ordinance requiring new construction and alterations to existing buildings to use materials and styles "in general accord with the appearance of the structures built in Old San Diego prior to 1871" held a valid exercise of police power because criteria included within ordinance.
24. *Mayor of Annapolis v. Anne Arundel County*, 271 Md. 265, 316 A.2d 807 (1974). County held subject to jurisdiction of municipal historic district commission with regard to county-owned building within municipal historic district; historic district commission's denial of demolition permit upheld because supported by substantial weight of evidence; county held to have offered no proof of hardship to justify demolition.
25. *City of Dallas v. Crownrich*, 506 S.W.2d 654 (Tex. Civ. App. 1974). Upheld authority of municipality to use its police power to impose moratorium on issuance of building permits pending action on designation of proposed historic district even though application for building permit made before moratorium imposed.
26. *Ely v. Velde*, 497 F.2d 252 (4th Cir. 1974). State which had planned to use LEAA funds to construct prison facility near National Register houses must either comply with both National Environmental Policy Act and National Historic Preservation Act or reimburse federal government for sums initially allocated to proposed facility but diverted to other state projects.
27. *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974). Designation of property owned by charitable organization held confiscatory because designated building inadequate for owner's needs; demonstration of economic or other hardship held sufficient for successful challenge to landmark designation.
28. *Save the Courthouse Committee v. Lynn*, 408 F. Supp. 1323 (S.D.N.Y. 1975). Granted injunction to prevent demolition of courthouse listed on National Register of Historic Places and included within urban renewal project area because HUD (1) failed to comply with HUD regulations governing review of its projects affecting National Register properties, and (2) failed to complete adequate environmental impact statement for project as required by the National Environmental Policy Act; injunction applicable to both HUD and local urban renewal agency.
29. *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210 (Mo. App.

- 1975). Testamentary provision directing demolition of home of testatrix on private street locally designated as landmark held void as violation of public policy.
30. *Forg v. Jaquith*, No. 35391 (Middlesex Super. Ct., Mass. July 22, 1975). Upheld historic district commission's denial of certificate of appropriateness for installation of vinyl siding and shutters on house fronting on Lexington Battle Green within historic district.
 31. *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir.), *cert. denied*, 426 U.S. 905 (1975). Upheld constitutionality of Vieux Carré ordinance creating historic district; ordinance held to contain adequate standards to guide decisions of Vieux Carré Commission; denial of demolition permit under ordinance held insufficient to constitute taking; ordinance provision requiring minimum maintenance held constitutional although as applied in individual circumstances it might constitute taking.
 32. *Stop H-3 Association v. Coleman*, 533 F.2d 434 (9th Cir.), *cert. denied sub nom. Wright v. Stop H-3 Association*, 429 U.S. 999 (1976). Determination by Secretary of Interior that site "may be eligible" for National Register because of local significance triggers protections of section 4(f) of Department of Transportation Act, despite determination by state board that site has only "marginal" local significance; construction of highway enjoined until Secretary of Transportation complies with section 4(f).
 33. *Dupont Circle Citizens Association v. District of Columbia Zoning Commission*, 355 A.2d 550 (D.C. Ct. App.), *cert. denied*, 429 U.S. 966 (1976). Upheld decision of zoning commission to approve planned unit development application involving transfer of development rights for Christian Heurich Mansion.
 34. *National City Bank v. Case Western Reserve University*, No. 29349 (Lorain County C.P., Ohio Mar. 1976). Despite testamentary direction to executors to raze home of testatrix, listed in National Register, executors permitted to sell house with deed restriction forbidding its use or conversion for commercial purposes.
 35. *Edwards v. First Bank of Dundee*, 534 F.2d 1242 (7th Cir. 1976). Dismissed action seeking injunction to prevent bank from demolishing building within National Register historic district because of lack of involvement of federal money in proposed demolition and failure of plaintiffs to join as party defendant any federal officer with federal responsibilities.
 36. *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *cert. denied*, 429 U.S. 990 (1976). Amendment to New York zoning resolution that created "Special Park District," rezoned two private parks as public parks, and granted to property owners transferable development rights declared unconstitutional because of lack of certainty development rights could or would be used elsewhere. In dictum, court ap-

proved schemes to separate development rights from properties when compensation paid for development rights at time of their separation.

37. *Figarsky v. Historic District Commission*, 171 Conn. 198, 368 A.2d 163 (1976). Local ordinance creating historic district found constitutional; denial of certificate of appropriateness for requested demolition permit upheld, in part because plaintiffs presented no evidence justifying hardship relief.
38. *First Presbyterian Church of York v. City Council*, 25 P. Commw. Ct. 154, 360 A.2d 257 (1976). Denial by historic district commission of certificate of appropriateness for demolition by church of house listed in National Register upheld because church failed to prove that denial of demolition permit precluded use of house for any purpose for which it is reasonably adapted.
39. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976). Ordinance prohibiting operation in Vieux Carré of pushcarts selling food-stuffs unless vendors had been in operation in Vieux Carré at least eight years found constitutionally permissible economic regulation. Court noted ordinance's objective had been "to preserve the appearance and custom valued by the Quarter's residents and attractive to tourists"; the unanimous opinion stated that the "legitimacy of that objective is obvious."
40. *Walerzak v. Gagnon*, No. LE-651-S-76T (Hampden County Housing Ct., Mass. Nov. 19, 1976). Denial by Springfield Historical Commission of certificate of appropriateness for application of aluminum siding to house in locally-designated historic district now partially covered by shaped shingles held a valid exercise of police power to protect "a unique example of early suburban (Shingle Style) single family residential development."
41. *Virginia Historic Landmarks Commission v. Board of Supervisors*, 217 Va. 506, 230 S.E.2d 449 (1976). Commission's identification (not designation) of potential 14,000-acre rural historic district held a "horatory act" that "did not determine any property rights of the landowners in the district."
42. *City of Louisville v. Woman's Club*, No. 76-2398 (Ky. Sup. Ct. Dec. 17, 1976). Trial court erred in dismissing city's condemnation action; constitutionality of Louisville landmarks ordinance held not relevant to city's planned use of eminent domain power to condemn property for historic preservation.
43. *Estate of Frances M. Molera*, No. 186019 (San Fran. County Super. Ct., Cal. Jan. 3, 1977). Testamentary trust directing trustee to raze barn contemporary with historic structure modified to permit retention and maintenance of barn in light of lessee's wish to restore barn and city's reluctance to permit barn's demolition.
44. *Hart v. Denver Urban Renewal Authority*, 551 F.2d 1178 (10th Cir. 1977). Affirmed injunction precluding sale by local urban renewal

authority of National Register structure until compliance by HUD with HUD regulations and NEPA, in part because of HUD's continuing involvement with project under section 108 of Loan and Grant Contract.

45. *Gumley v. Board of Selectmen*, 371 Mass. 718, 358 N.E.2d 1011 (1977). Standard of review to be used by court hearing appeal from historic district commission is similar to that used for reviewing grant or denial of special zoning permits. Court affirmed annulment of historic district commission's decision, but reversed order that certificates of appropriateness must be issued. Court held it proper for Nantucket historic district commission to consider length of new buildings. Court held that zoning board of appeals cannot reverse historic district commission decision "unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary."
46. *Dunbar High School Alumni Association v. Department of Housing and Community Development*, Civ. No. 8911-76 (D.C. Super. Ct. Apr. 1, 1977). Portion of former preservation ordinance permitting 180-day demolition delay period held to require "meaningful negotiations" during delay period among building owner, civic groups, public agencies, interested citizens, and State Historic Preservation Officer.
47. *Annapolis Emergency Hospital Association v. Annapolis Historic District Commission*, No. D-962 (Anne Arundel County Cir. Ct. Apr. 14, 1977). Decision of historic district commission reversed because applicant was denied procedural due process when commission chairman, who had long been associated as both member and/or officer with local private preservation organization publicly opposed to granting of application, refused to disqualify herself from voting on application.
48. *St. James United Methodist Church, Inc. v. City of Kingston*, (Ulster County Sup. Ct., N.Y. May 6, 1977). Designation of local church structure as landmark invalidated because notice requirement of local preservation ordinance had not been met when structure was designated.
49. *Lafayette Park Baptist Church v. Scott*, 553 S.W.2d 586 (Mo. Ct. App. 1977). Church which acquired at foreclosure sale property within locally-designated historic district held to have had constructive notice of property's location in historic district. Court held that "it is necessary that the standards established governing demolition in a historic district take into account the economic impact upon a given parcel where demolition is sought" and that demolition must therefore be permitted if condition of building is such that economics of restoration would preclude owner from making reasonable use of its property. Court held owner would be protected if it could sell property for "reasonable value without

regard to the non-demolition features of the ordinance." (See case 79 *infra* for result on appeal.)

50. *B.P. Oil, Inc. v. City of Harrisburg*, No. 2059 (Dauphin County C.P., Pa. June 13, 1977). Upheld decision by city council, acting on recommendation of Board of Historical and Architectural Review, to deny demolition permits for several structures within locally-designated historic district because owner of structures "failed to sustain its burden of showing conclusively that these . . . properties could not be used for rentals, nor does the record indicate any attempt to sell."
51. *Texas Antiquities Committee v. Dallas County Community College District*, 554 S.W.2d 924 (Tex. 1977). Section 6 of Texas Antiquities Code, pursuant to which Antiquities Committee had denied demolition permits for several buildings, held unconstitutional because it contains no standards for use by Antiquities Committee in identifying structures of historical significance. Court found no substantial evidence to support decision of Antiquities Committee because restoration of structures would involve improper diversion of school district funds committed to public purpose and unreasonable expenditures of money would be required to restore buildings that even after restoration could not be used for educational purposes. Dissent argued that majority opinion "is tantamount to a judicial declaration that no property held by a political subdivision can be protected under the legislative banner of historical preservation unless the property originally was acquired for its aesthetic characteristics, or unless the Legislature takes the property by exercise of eminent domain."
52. *Dempsey v. Boys' Club*, 558 S.W.2d 262 (Mo. Ct. App. 1977). Board of Adjustment decision to grant demolition permits reversed because record did not contain substantial evidence of economic feasibility or infeasibility of rehabilitating nine structures within locally-designated historic district.
53. *Aluli v. Brown*, 437 F. Supp. 602 (D. Hawaii 1977). Aerial and surface bombardment of Kahoolawe Island held to be for NEPA purposes a major federal action significantly affecting quality of human environment, and defendants held under obligation to prepare new environmental impact statements (EIS) because of discovery of additional archeological sites on island. Defendants ordered to file EIS annually as long as they continue to bomb Kahoolawe. Court found that private right of action to enforce Executive Order 11593 can be implied to effectuate purpose of executive order and National Historic Preservation Act. Defendants found in violation of Executive Order 11593 and ordered to begin nominating known archeological sites to National Register before completion of survey of entire island and to request from Secretary of the Interior determination of eligibility of Kahoolawe as island to National Register.

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54. *Thayer v. Commissioner*, T.C. Memo 1977-370 (Oct. 25, 1977). Court determined that value of open-space or scenic easement over sixty-acre estate near Gunston Hall outside Washington, D.C. was between appraisal valuations provided by appraiser for Virginia Division of Conservation and Economic Development (valuation used by petitioner) and appraiser for Internal Revenue Service. Easement had been donated to Virginia Outdoors Foundation. Court noted with approval that both appraisers had used "before and after approach" of Rev. Rul. 73-339 in determining value of scenic easement, but emphasized that appraiser for Virginia state agency "did not prepare a written appraisal report" and probably did not "go through all of the detailed appraisal procedures" used by the IRS appraiser, so that "he relied to some extent on his general knowledge of the subject and surrounding properties in determining the highest and best use of Overlook Farm before and after easement and the values to be assigned thereto." Court determined values of farm before and after granting of easement.
55. *Zartman v. Reisem*, 59 A.D.2d 237, 399 N.Y.S.2d 506 (1977). Decision of Rochester Preservation Board to permit construction of tennis court in backyard of residential property within locally-designated historic district upheld over opposition of adjoining property owners because Board's decision was based on sufficient evidence and was consistent with values municipality sought to preserve when it designated historic district. Court also held that notice claim of adjoining property owners was not of constitutional dimension.
56. *Equitable Funding Corp. v. Spatt*, No. 12832/77 (Kings County Sup. Ct., N.Y. Feb. 8, 1978). New York City Landmarks Preservation Commission held to have violated New York City Landmarks Preservation Ordinance by failing to give reasons for denial of requested certificate of appropriateness for structure within locally-designated historic district. Matter remanded to commission for reconsideration of possible blighting effect of structure on historic district containing it.
57. *Hall County Historical Society v. Georgia Department of Transportation*, 447 F. Supp. 741 (N.D. Ga. 1978). Injunctive relief granted to prevent continuation of federally-funded highway widening project into National Register historic district because Federal Highway Administration improperly delegated to state highway officials its responsibilities under National Historic Preservation Act and "failed to undertake any independent studies, reports, or evaluations of the project's potential environmental effects." Court also held that National Historic Preservation Act "requires that the determinations of effect, adverse effect, or no effect by the appropriate federal agency official be an independent one, and not simply a 'rubber stamp' of the state's work."

58. *Historic House Museum Corp. v. Commissioner*, 70 T.C. No. 2 (Apr. 5, 1978). Petitioner held to have deducted improperly certain taxes and maintenance expenses when computing "net investment income" for four-percent excise tax imposed by I.R.C. section 4940(a). Petitioner is private foundation maintaining a historic house, and whose sole income is interest in connection with which there are no expenses. Petitioner had expended, in taxable years at issue, amounts in excess of its interest income for maintenance expenses and taxes, claimed deductions for such items, and reported no excise tax due. Court held "that there is no evidence that any of the expenses which petitioner seeks to deduct is in any way related to the possibility of earning future income by way of 'interest, dividends, rents, and royalties.' . . . Potential admission fees do not fall within any of these categories."
59. *Weintraub v. Provident National Bank*, No. 78-1577 (E.D. Pa. May 11, 1978). Held policy of National Banking Act "infused with a new dimension" by National Historic Preservation Act so that when arguable case can be made that branch bank is changing its location, Comptroller of the Currency has authority under National Banking Act to approve change of location and responsibility under National Historic Preservation Act to seek comments of Advisory Council before doing so. Temporary restraining order granted.
60. *Crownrich v. City of Dallas*, No. CA-3-76-1080-G (N.D. Tex. May 25, 1978). Loss to plaintiff caused by imposition of allegedly restrictive zoning and enactment of preservation ordinance that prohibited plaintiff's construction of highrise apartment building within local historic district held "not of the type requiring compensation." Court noted that "many zoning changes present numerous losses of the type suffered by Crownrich. These losses fall into that category of risks of investment to be suffered by the entrepreneur, not all taxpayers. To do otherwise would make land investment a one-way street in the sense that many zoning changes increase the value of property, an enhancement the investor takes for himself."
61. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Designation of Grand Central Terminal as landmark structure by New York City Landmarks Preservation Commission and denial of certificate of appropriateness for construction of fifty-five story office tower on Terminal site held not a taking because "[t]he restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but afford appellants opportunities further to enhance not only the Terminal site proper but also other properties."
62. *South of Second Associates v. Town of Georgetown*, 580 P.2d 807 (Colo. 1978). Local preservation ordinances found unconstitu-

tionally vague because of their failure to define the differently classified "areas" within a community-wide historic district, in light of fact local preservation commission was empowered to consider effect of proposed new construction or alteration on "general historical and/or architectural character of the structure or area."

63. *Hoboken Environment Committee, Inc. v. German Seaman's Mission*, 161 N.J. Super. 256, 391 A.2d 577 (1978). Despite listing of Mission structure in New Jersey Register of Historic Places and nomination of Mission to National Register of Historic Places, court found no basis to restrain demolition of Mission by private owner when no federal, state, or local action to compel building's preservation could be anticipated. Court held that issuance of demolition permit would not constitute a prohibited municipal project under New Jersey Environment Rights Act and noted that Hoboken preservation ordinance contains exemption for building permits issued prior to effective date of ordinance (enacted *after* issuance of demolition permit for Mission).
64. *Weintraub v. Rural Electrification Administration*, 457 F. Supp. 78 (D. Pa. 1978). Remote effect of federal spending held not sufficient to trigger section 106 of National Historic Preservation Act. Congress, in court's view, only intended to control direct federal spending for actions or projects which would otherwise destroy buildings in National Register. Congress did not intend to reach every effect of federal spending. Court further concluded that "license" in section 106 must be given limited definition: "Congress did not intend to affect every action which required federal approval. Consequently, the Court concludes that the regulation of REA, which requires approval of headquarters buildings and their adjuncts, does not provide for a license within the meaning of 16 U.S.C. § 470f. For the reasons indicated above, the Court is also of the view that the right of REA to approve and control the expenditure of surplus funds of the electric cooperatives which compose AEC does not relate to a license within the meaning of 16 U.S.C. § 470f."
65. *Citizens Defense Fund v. Gallagher*, No. Cv. 78-63-Bu (D. Mont. Nov. 3, 1978). HUD's National Historic Preservation Act responsibilities held non-delegable to funding applicant. Court held that notification to HUD by Department of Interior that properties within a project area might be eligible for National Register listing "triggered the responsibility of defendants to comply with the laws on historic preservation. These laws and regulations must be complied with as long as it is still possible to do so."
66. *Wisconsin Heritages, Inc. v. Harris*, 460 F. Supp. 1120 (E.D. Wis. 1978). HUD held to have obligation under NEPA (but not under National Historic Preservation Act, Executive Order 11593, or HUD's own regulations) to consider relocation alternatives to

demolition of Richardsonian-Romanesque Edith Plankinton Mansion in area of federally-funded urban renewal project in Milwaukee. Court held that "HUD retained sufficient control over the expenditure of funds under the project feasibly to make a study of the mansion's demolition and to consider alternatives," although court noted that contractual right of Marquette University to acquire site cleared of improvements may preclude HUD from considering as a NEPA alternative "the retention of the mansion at its present site."

67. *State ex rel. Association for Preservation of Tennessee Antiquities v. City of Jackson*, 573 S.W.2d 750 (Tenn. 1978). Upheld lease by city to private corporation of National Register property in light of consistent deficits city had run in attempting to operate property as museum and because lease agreement adequately protected city's interest. Court declined to decide case solely on question of whether city owned property in "proprietary" or "governmental" capacity.
68. *Central Oklahoma Preservation Alliance, Inc. v. Oklahoma City Urban Renewal Authority*, 471 F. Supp. 68 (W.D. Okla. 1979). Determination by Keeper of National Register that a building is eligible for the National Register held to impose no new duties on HUD when "[e]ven the routine, ministerial, and perfunctory clearances and approvals required under the contract and HUD procedures with respect to the redevelopment site" in which the building in question was located had occurred prior to notification of HUD by Keeper of National Register.
69. *Society of Ethical Culture v. Spatt*, 68 A.D.2d 112, 416 N.Y.S.2d 246 (1979). Court held that "rational basis" test must be used in reviewing New York City Landmarks Preservation Commission's designation of Art Nouveau Meeting House of Society for Ethical Culture as landmark, and noted that trial court had improperly made "a subjective substitution of its judgment for that of the Commission's historians and architects." Court stated: "If the preservation of landmarks were limited to only that which has extraordinary distinction or enjoys popular appeal, much of what is rare and precious in our architectural and historical heritage would soon disappear. It is the function of the Landmarks Preservation Commission to ensure the continued existence of those landmarks which lack the widespread appeal to preserve themselves." Court found no taking because "the only hardship upon the Society is speculative upon a prospective use of the property, i.e. large scale development and the revenues to accrue therefrom" and that "no interference with a hitherto existing charitable purpose or function will result from landmark designation." Court noted "there is no evidence that the property was ever purchased for investment purposes." Court stated: "In the final analysis, obsolescence should be measured by the Society's needs, not on the

prospects for development of a valuable place of property.” Court held that “the restriction here involved cannot be deemed an abridgement of any first amendment freedom, particularly when the contemplated use, or a large part of it, is wholly unrelated to the exercise of religion, except for the tangential benefit of raising revenue through development.” (Appeal pending.)

70. *Southern National Bank v. City of Austin*, 582 S.W.2d 229 (Tex. Civ. App. 1979). Held portion of Austin preservation ordinance invalid that extended to any property placed on agenda of preservation commission for consideration as possible landmark those protections to which actually designated landmarks would be entitled, because of lack of reasonable time limit during which city council must decide whether to designate property as landmark, and because of lack of standards to guide those empowered to place properties on commission’s agenda for landmark consideration. Additionally, court held that placement of property on commission’s agenda amounts to imposition of servitude on property and is a damaging of property for public use without adequate compensation.
71. *Young v. Mellon*, 156 Cal. Rptr. 165 (Ct. App. 1979). California State Historic Preservation Officer held to have discretion in choosing whether to approve recommendation by state Historic Resources Commission of nomination to National Register of Historic Places. Court held that “architectural and historical characteristics of a building must be weighed against its societal functions and the significance of its preservation in human terms.” (On August 29, 1979, California Supreme Court directed Reporter of Decisions not to publish opinion in Official Reports).
72. *WATCH (Waterbury Action to Conserve Our Heritage, Inc.) v. Harris*, 603 F.2d 310 (2d Cir.), *cert. denied sum nom.* *Waterbury Urban Renewal Agency v. WATCH*, 100 S. Ct. 530 (1979). HUD held to have continuing responsibilities under section 106 of the National Historic Preservation Act for federally-funded urban renewal projects. Court held that date of signing of Loan and Capital Grant Contract is not, as determined by earlier courts, the “cut-off” point for National Register properties, but that buildings determined after date of Contract’s signing to be eligible for Register listing are also entitled to protections of section 106. Court stated that the mandate of the National Historic Preservation Act is “quite broad,” so that the court was “no more willing to give a ‘crabbed interpretation’ of section 106 of the Act than the courts have been in respect to NEPA.”
73. *Cleckner v. City of Harrisburg*, 101 Dauph. 134 (1979). Denial of demolition permission for dilapidated structures in local historic district held not a taking because owner failed to prove his inability to sell structures at fair market value. Property owner did not

offer buildings for sale through real estate broker or advertise them in a local newspaper, and set inflated sales prices.

74. *Wisconsin Heritages, Inc. v. Harris*, 476 F. Supp. 300 (E.D. Wis. 1979). Court granted in part motion to alter previously issued preliminary injunction. In light of HUD's selection in Final Environmental Impact Statement of alternative of "No Federal Action," and in light of pending efforts to arrange for relocation of Edith Plankinton Mansion, court agreed that if (1) parties contract by March 1, 1980, for removal of mansion by August 1, preliminary injunction will terminate when mansion is removed; but if (2) contracts for removal of mansion have not been entered into by March 1, preliminary injunction will terminate on that date. Court denied request that Wisconsin Heritages post bond during pendency of preliminary injunction: "The plaintiff in this case is a nonprofit organization with no apparent financial stake in the outcome of this suit. If it were forced to post thousands of dollars in security, it would be effectively deterred from bringing this sort of action. Such deterrence would contravene Congress' intention that groups such as the plaintiff bring actions to aid in the enforcement of national environmental policy."
75. *Barcelo v. Brown*, 478 F. Supp. 646 (1979). Complaint sought to enjoin United States Navy from continuing its use of Navy-owned land on Puerto Rican island of Vieques and from use of waters surrounding island for naval training operations. Court ordered Navy to seek a National Pollution Discharge Elimination System (NPDES) permit for release or firing of ordnance into the waters of Vieques; to nominate to Secretary of the Interior sites eligible for listing in the National Register, to seek determinations of eligibility for other sites, and to "take appropriate action for the protection of any such prospective sites pending decision as to their eligibility"; and to comply with NEPA by filing an environmental impact statement. Total opinion is 118 pages long, and historic preservation portion of case is covered briefly in opinion.
76. *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979). In case of first impression in North Carolina, court upheld constitutionality of Oakwood Historic District, an overlay zoning district in Raleigh. Court found "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." Court noted wide recognition "that preservation of the historic aspects of a district requires more than simply the preservation of those buildings of historical and architectural significance within the district," so that new construction as well as existing buildings can be regulated. Court stated that although a North Carolina municipality "has unlimited discretion to determine whether or not to establish a historic district or districts," if it

establishes a district, "its discretion insofar as the method and the standard by which a historic district ordinance is to be administered is, by contrast, extremely limited." Court stated that "a general, yet meaningful, contextual standard has been set forth to limit the discretion of the Historic District Commission" because general standard of "incongruity" is meaningful, given fact that the characteristics of Victorian architecture, the "predominant architectural style" in the district, are "readily identifiable." Court therefore upheld lower court's holding that Oakwood Ordinance does not impermissibly delegate legislative power to historic district commission. Court held that City of Raleigh had not engaged in spot zoning in designating Oakwood district. Court upheld lower court holding that inclusion of vacant lot owned by petitioners within historic district and exclusion of adjacent lots owned by State Medical Society did not deny petitioners equal protection, noting that "legislative bodies may make rational distinctions with substantially less than mathematical exactitude."

77. *Sleeper v. Bourne*, No. 216 (Mass. App. Div. Jan. 10, 1980). Court upheld trial court opinion affirming preservation commission's denial of certificate of appropriateness for erection within historic district of sixty-eight foot radio antenna on residential property. Court held Sleeper suffered no particular hardship and that federal broadcasting statutes did not preempt state regulation of property rights. Court found no taking because "Sleeper has not demonstrated that the application of the Statute as to him has diminished to any degree the value of his property as a residence" and because the local preservation commission "has not taken the position that it would not approve any sort of communications tower anywhere in the region." Court held that mandate of preservation ordinance "is not that one type [of architecture] be preserved to the exclusion of the other, but that the cultural heritage in its entirety be preserved from encroachments by incongruous structures" and that commission therefore need not have made specific findings as to early appearance of area containing Sleeper's property. Court suggested "a balancing of the competing interests of the individual seeking to use his property in a manner which might offend the purposes of the Statute and that of the inhabitants of the region to enjoy unimpaired the heritage of the area." Court also suggested that commission should "include in its decision specific findings of fact on the issue of substantial hardship . . . whether or not the issue is specifically raised by an applicant." Court held that "the constitutional guarantee of freedom of speech does not require that the Town Committee award Sleeper a certificate of appropriateness for a radio tower."
78. *Fout v. Frederick Historic District Commission*, Misc. No. 4005 (Frederick County Cir. Ct., Md. Feb. 5, 1980). Court remanded to local preservation commission consideration of application for

certificate of appropriateness to install redwood siding over brick facade of residence in local historic district. Court noted that commission's initial denial of permission was not explained: "The record must disclose the facts on which the Commission acted and a statement of the reasons for its action. Without such a record the reviewing court cannot perform its duty of determining whether the action of the Commission was arbitrary or capricious." Court stated that Maryland enabling legislation for local preservation commissions "was not a *carte blanche* authorization" but limited counties and cities "to certain guidelines set forth in the legislation." Under Maryland legislation, a local preservation commission "must be strict in its judgment of plans of those structures deemed to be valuable according to studies and lenient in its judgment of plans of structures of little historic value." Court noted disapprovingly that record in the case was "completely void of any reference to the historic or architectural value of the subject property. There is no indication that the Commission used a strict or lenient approach to its decision. Certainly not every structure in the historic district has historic or architectural value. There must be a finding of fact to that effect and that finding must be spread upon the record and supported by evidence." Court noted that commission must consider "economic impact on the owner . . . as well as the best interest of the majority of the persons in the community." Court stated that although commission members must be "qualified by public interest, knowledge or training in such fields as history, architectural preservation or urban design" the commission members may not "apply their own expertise in granting or refusing exterior structural change." Court noted disapprovingly that commission decisions had been based in part on report submitted to commission by individual who "did not testify concerning his report nor was he ever qualified on the record as an expert." Court stated that although "[i]t is quite proper for the Commission to act informally in arriving at their decision, . . . the decision of the Commission should be a formal writing setting forth the factors which it considered, the evidence in support thereof and the reasons for its decision."

79. *Lafayette Park Baptist Church v. Board of Adjustment*, No. 41816 (Mo. Ct. App. Apr. 29, 1980). Upheld trial court decision sustaining denial of demolition application. (*See* case 49 *supra*). Court stated that incorporation by reference of standards contained in other documents does not give rise to constitutional violation. Court upheld challenged standards in St. Louis preservation ordinance against vagueness claim because in earlier cases [*See* cases 49 and 52 *supra*] Court has "interpreted the standards which, although loosely written, were fashioned by this interpretation into a cohesive and understandable set of rules." Court noted "reasoning generally applied in historic district dem-

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olition cases to the effect the landowner must not only establish that he can not economically utilize the property but that it is impractical to sell or lease it or that no market exists for it at a reasonable price.” Court held that church, as applicant for permit, had burden of proof and failed to show that property could not be economically productive.