# PRESERVING THE PAST: HISTORIC PRESERVATION REGULATIONS AND THE TAKING CLAUSE

Since 1931, when the City of Charleston, South Carolina, enacted legislation creating the Old Charleston District,[1] the federal government,[2] all fifty states,[3] and many municipalities[4] have enacted some form of legislation to preserve America's architectural and historic past.[5] Existing historic district and historic landmark[6] legislation regu-

1. *See* J. MORRISON, HISTORIC PRESERVATION LAW 133 (1965) [hereinafter MORRISON].

2. The Federal government enacted the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470-470w (1982) in 1966. The NHPA establishes the National Register of Historic Places and authorizes the Secretary of the Interior to promulgate criteria that properties must meet for placement on the Register. 16 U.S.C. § 470a (1980).

3. All fifty states and the District of Columbia have passed some form of preservation legislation, ranging from comprehensive coverage, to general enabling legislation, to merely authorizing a state agency to purchase historic properties. For examples of comprehensive coverage, *see, e.g.*, CONN. GEN. STAT. §§ 7-147a-m (1981) (statute originally passed in 1961 dealing with historic districts); D.C. CODE ANN. §§ 5-1001-1015 (1981) (originally passed in 1978, the statute protects historic landmarks and historic districts); LA. REV. STAT. ANN. tit. 25 (West 1975, Supp. 1986) (originally passed in 1974, regulates historic districts). *See* N.Y. GEN. MUN. LAW §§ 119aa-dd (McKinney 1986). For examples of limited legislation, *see, e.g.*, GA. CODE ANN. § 12-3-50.1 (1986) (the state government enacted the current legislation in 1986); R.I. GEN. LAWS §§ 42-45-1 to 10 (1984) (the Rhode Island legislature passed the Historic Preservation Commission Act in 1968).

4. *See infra* note 5 and accompanying text.

5. *See* MORRISON, *supra* note 1, at 61-186 (1965) and J. MORRISON, SUPPLEMENT TO HISTORIC PRESERVATION LAW 45-96 (1972) [hereinafter MORRISON SUPPLEMENT] for a representative sampling of state and municipal legislation regulating historic districts and historic landmarks. Morrison notes that in reality, Louisiana passed the first act creating a historic district in 1924. That act, regulating the Old French Quarter (Vieux Carre) in New Orleans, never went into effect. Only after the state passed a

lates the demolition, construction and maintenance of structures.[7] Some state enabling legislation allows municipalities to regulate interiors designated as landmarks.[8] In addition, other legislation imposes significant penalties against landowners who violate historic district/landmark mandates.[9] These penalties combined with often stringent rehabilitation requirements[10] make conflicts between

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constitutional amendment in 1936 was the historic district legislation extended to protect the Vieux Carre. MORRISON, *supra* note 1, at 17.

6. A historic district is an entire area designated as historic. *See* MORRISON, *supra* note 1, at 18-19. An example is the French Quarter in New Orleans, where all buildings are regulated by the historic district ordinance. MORRISON, *supra* note 1, at 19. A historic landmark is a building or other structure on a particular site, Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), which is specifically regulated by historic landmark legislation, regardless of the status of other structures in the area. *Penn Central*, 438 U.S. at 110-11. An example is Grand Central Station in New York City.

7. *See infra* notes 118-133 and accompanying text.

8. Interior regulations are far less common than exterior regulations. Courts may imply their existence from other legislation. States affirmatively permitting regulation of historic interiors include: The District of Columbia, D.C. CODE ANNOT. § 5-1002 (1981) (in defining the term "alter," the statute states: " 'alter' or 'alteration' . . . means a change in any interior *space* which has been specifically designated as an historic landmark"); Indiana, IND. CODE ANN. § 36-7-11-5 (Burns, 1981) (interior regulations permissible if the features are subject to public view); Maine, ME. REV. STAT. ANN. tit. 33, § 1553 (1986) ("A preservation interest may . . . forbid, limit or require . . . interior alterations of an historic property, including, but not limited to, maintenance, renovation, construction or decoration . . . ."); Michigan, MICH. STAT. ANN. § 5.3407(5) (Callaghan, 1982) (interior arrangements may be regulated if specifically authorized by the local legislative body).

Several states specifically forbid the regulation of interior space, including Connecticut, CONN. GEN. STAT. § 7-147f (1981); Idaho, IDAHO CODE § 67-4608 (1980); Louisiana, LA. REV. STAT. ANN. § 758 (1975); Massachusetts, MASS. ANN. LAWS ch. 40C, § 7 (1986); North Carolina, N.C. GEN. STAT. § 160A-397 (1982); and South Dakota, S.D. CODIFIED LAWS ANN. § 1-19B-44 (1985).

9. *See infra* notes 174 to 183. Several cities enacted statutes providing that if a landowner begins to demolish a historic structure without prior approval, the landowner must rebuild the structure to comply with Department of the Interior Guidelines. *See* 5 Preservation L. Rpt. 3006 (1985).

10. For example, the Connecticut statute provides:

> In passing on appropriateness as to exterior architectural features, buildings or structures, the commission shall consider, in addition to other pertinent factors, the type and style of exterior windows, doors, light fixtures, signs, aboveground utility structures, mechanical appurtenances and the type and texture of building materials. In passing upon appropriateness as to exterior architectural features the commission shall also consider, in addition to any other pertinent factors, the general design, arrangement, texture and material of the architectural features involved and the relationship thereof to the exterior architectural style and pertinent features of other buildings and structures in the immediate neighborhood. . . .

preservationists and developers inevitable.[11] Challengers may contest preservation legislation by relying on constitutional arguments based on the taking clause[12] and the appropriate scope of a state's police power.[13] This Note will review judicial responses to historic legislation regulating exterior design features,[14] exterior maintenance,[15] interior architectural features,[16] and penalty provisions.[17] In particular, it will examine the status of such legislation in light of three recent United States Supreme Court taking clause cases.

## I. BRIEF HISTORY OF HISTORIC PRESERVATION LEGISLATION

By 1965 every state had enacted some form of historic preservation

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CONN. GEN. STAT. § 7-147f(a) (1961).

11. In a newspaper article on the conflict between preservationists and businesses in the Vieux Carre, Malcolm Heard, a Tulane University instructor and an architect, stated: "If the first 50 years of the Vieux Carre Commission succeeded in getting the physical aspect of the Quarter under control . . . then perhaps during the next 50 years it could concentrate on the idea that the Quarter remains a viable neighborhood—a place where people work, live and tourists come." St. Louis Post-Dispatch, January 21, 1987, at 3F, col. 3. This statement summarizes the tension between preservation for the sake of history, and preservation to attract tourist revenue—an important concern in oil-dependent Louisiana. While the area residents seek to maintain the integrity of the architecture, businesses may prefer preservation only at the lowest possible cost.

12. The taking clause of the fifth amendment states: "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. The fifth amendment taking clause was made applicable to the states through the fourteenth amendment in Chicago, B. & O. Ry. Co. v. Chicago, 166 U.S. 226, 239 (1897).

Professor Michelman notes:

> 'Taking' is, of course, constitutional law's expression for any sort of publicly inflicted private injury for which the Constitution requires payment of compensation. Whether a particular injurious result or governmental activity is to be classed as a 'taking' is a question which usually arises where the nature of the activity and its causation of private loss are not themselves disputed.

Michelman, *Property, Utility & Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165, 1165 (1967). To decide what is a taking is to determine "when government may execute a public program while leaving associated costs disproportionately concentrated on a few persons." *Id.*

13. *See infra* notes 88-104 and accompanying text for an explanation of the police power.

14. *See infra* notes 105-116 and accompanying text.

15. *See infra* notes 117-147 and accompanying text.

16. *See infra* notes 148-173 and accompanying text.

17. *See infra* notes 174-186 and accompanying text.

legislation[18] and, by 1976, had granted municipalities and counties the authority to enact historic preservation laws.[19] The federal government passed the National Historic Preservation Act (NHPA)[20] in 1966. In NHPA, Congress recognized the importance of the historic and cultural foundations of the United States as reflected in historic properties.[21] Congress amended the statute in 1980 to provide that if the owner of a historic property objects to its inclusion on the National Register of Historic Places,[22] the government will not designate the

18. MORRISON SUPPLEMENT, *supra* note 5, at 1. *See also Penn Central*, 438 U.S. at 107.

19. N. ROBINSON, SCOPE & SOURCES OF HISTORIC PRESERVATION LAW: REHABILITATING HISTORIC PROPERTIES 15 (1984). By 1976, over 500 local historic preservation laws existed.

20. 16 U.S.C. §§ 470 to 470w (1980).

21. Specifically, the statute states:

(b) The Congress finds and declares that—

(1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;

(2) 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;

(3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency;

(4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans;

(5) in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation;

(6) the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development; and

(7) although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

16 U.S.C. § 470 (1980). *See also* H.R. REP. NO. 96-1457, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6378-6388, for the legislative history of NHPA.

22. *See supra* note 2 and accompanying text. One state statute defines the National

property as such unless the landowner withdraws his or her objection.[23] Similar provisions exist in the enabling legislation of various states.[24] State and local governments justify the implementation of historic property legislation by emphasizing the economic,[25] educational, historic, cultural, and aesthetic benefits of preservation.[26] Some state enabling legislation grants local legislative bodies significant discretion to determine the scope of local preservation laws.[27]

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Register as "[t]he national register of districts, sites, buildings, structures and objects significant in American history, architecture, archeology and culture." ALA. CODE § 41-10-136 (1982).

23. 16 U.S.C. § 470a(6) (1980). If the owner of any privately owned property, or a majority of the owners of such properties within the historic district object to inclusion or designation on the National Register, the property will not be included on the National Register or designated as a National Historic Landmark until the objection is withdrawn. *Id.*

24. New York, for example, amended its statute to remove the section requiring landowner approval for designation as a historic site. *See* FGL&L Property Corp. v. City of Rye, 66 N.Y.2d 111, 485 N.E.2d 986, 992 (N.Y. 1985). States in which landowner approval is required before the government can designate the property as historic include: Colorado, COLO. REV. STAT. § 24.80.1-107 (1982); Pennsylvania, PA. STAT. ANN. tit. 71, § 1047.1e (1986); Tennessee, TENN. CODE ANN. § 4-11-205 (1985); Virginia, VA. CODE § 10-138 (1985); West Virginia, W. VA. CODE § 8-26A-3 (1984).

25. Economically, many areas benefit from preservation because tourists are attracted to historic districts (Colonial Williamsburg in Virginia and the French Quarter in New Orleans, for example). *See* A HANDBOOK ON HISTORIC PRESERVATION LAW 63-64 (C. Duerksen ed. 1983) [hereinafter Duerksen]. *See also Struggle Over the French Quarter: New Orleans Wants to Preserve Charm and Attract Tourists*, St. Louis Post-Dispatch, January 21, 1987, p. 3F, col. 3.

26. Duerksen, *supra* note 25, at 63-64. *See also id.* A1-127 app., *Recommended Model Provision for a Preservation Ordinance, with Annotations*, prepared by the National Trust for Historic Preservation. The appendix excerpts local ordinances throughout the U.S.

The District of Columbia code lists the purposes of its preservation legislation as safeguarding "the city's historic, aesthetic and cultural heritage . . . foster[ing] civic pride . . . enhanc[ing] the city's attraction to visitors and the support and stimulus to the economy thereby provided. . . ." D.C. CODE ANN. § 5-1001 (1981).

Idaho provides in its list of purposes that "the historical, archeological, architectural and cultural heritage is among the most important environmental assets of the state . . . and [the purpose of the statute is] to promote the use and conservation of such property for the education, inspiration, pleasure and enrichment of the citizens of this state. . . ." IDAHO CODE § 67-4601 (1980).

27. Indiana, for example, allows the local governing body to decide whether to regulate interior landmarks. IND. CODE ANN. § 36-7-11-5 (Burns 1981). *See also* NEB. REV. STAT. § 14-2002 (1983) and N.H. REV. STAT. ANN. § 674:46 (1986) for examples of statutes that give local government significant discretion.

## II. THE TAKING CLAUSE ISSUE—PRE-1987 CASE LAW

State or local governments that wish to enact historic preservation laws may face several constitutional challenges from landowners.[28] Property owners may argue that the legislation is an invalid exercise of the police power.[29] Additionally, a landowner may dispute the legislation's validity on due process[30] grounds. Alternatively, an owner may allege that the legislation constitutes a taking of property without compensation in violation of the fifth and fourteenth amendments.[31] This Note will focus on the taking clause controversy.

In *Pennsylvania Coal v. Mahon*, the United States Supreme Court first addressed the taking issue with regard to a regulatory land use law.[32] In *Pennsylvania Coal*, Justice Holmes stated the now classic principle that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[33] The *Pennsylvania Coal* decision established a balancing test: a taking occurs only where the injury to a single landowner outweighs the public interest.[34]

The *Pennsylvania Coal* Court also examined whether the statute conferred an "average reciprocity of advantage";[35] that is, did the landowner also benefit in some way from the regulation? The Court

28. *See infra* note 111 and accompanying text. The cases in that note reflect the tension between preservationists and landowners.

29. Some statutes explicitly state that the statute is passed pursuant to the police power. *See, e.g.*, ARK. STAT. ANN. § 8-904 (1985) ("It is hereby declared to be public policy and in the best interests of the general economic, social, and educational welfare of all citizens of Arkansas for this state to [be] engaged in . . . historic preservation. . . ."); COLO. REV. STAT. § 24-80.1-101 (1982) ("[T]he preservation of such [historic] resources is in the interest of the citizens of the state. . . .").

30. Often, procedural due process challengers dispute the legitimacy of the administrative process. Such due process issues are beyond the scope of this note. *See* Bonderman, *Constitutional Law*, in Duerksen, *supra* note 25, at 343-50.

31. *See supra* note 12 and accompanying text for an explanation of the taking clause.

32. 260 U.S. 393 (1922). *See also supra* notes 52-64 discussing Keystone Bituminous Coal Assn. v. DeBenedictis, 107 S. Ct. 1232 (1987). In *Keystone*, on facts remarkably similar to those of *Pennsylvania Coal*, the Court declined to find a taking.

33. 260 U.S. at 415. In *Pennsylvania Coal*, the Court found a taking of private property without just compensation.

34. *Id.*

35. *Id.* at 415. *See also Id.* at 422 (Brandeis, J., dissenting); "[T]here was no reciprocal advantage to the owner . . . unless it be the advantage of living and doing business in a civilized community. That reciprocal advantage is given by the act to the coal operators." *Id.* (citations omitted).

concluded that the regulation imposed a high cost on the owner of subsurface rights without conferring a benefit.[36] In addition, because the regulation prohibited the coal company from using its subsurface property rights, the land's value diminished substantially.[37] As a result, the *Pennsylvania Coal* Court found a taking of private property without just compensation.[38] Since *Pennsylvania Coal*, however, courts have been reluctant to find that a government action constitutes a taking.

The leading taking case in the area of historic preservation is *Penn Central Transportation Co. v. City of New York*.[39] The *Penn Central* Court was unable to establish a specific "taking" formula.[40] Nevertheless, Justice Brennan indicated that if a regulation's restrictions are substantially related to promoting the public welfare and permit "reasonable beneficial use," then there is no "taking."[41] Justice Brennan did, however, enumerate several factors that courts should consider in taking clause analysis, including the landowner's reasonable invest-

36. *Id.* at 416.

37. *Id.* at 413. The Court stated: "The government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.*

38. *Id.* at 416.

39. 438 U.S. 104 (1978). In *Penn Central*, the owners of Grand Central Terminal sought to build a 50 story office building atop the terminal. The terminal structure, declared a historic landmark in 1967, is "a magnificent example of the French beaux-arts style. . . ." *Id.* at 115. The New York City Landmarks Preservation Commission refused permission to build the structure, stating that "to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke." *Id.* at 117-18. Penn Central, the landowner, charged that applying the preservation law constituted a taking of property without compensation. The trial court decided in the owner's favor, but the state appellate court reversed. *Id.* at 119-20. Justice Brennan wrote the U.S. Supreme Court decision upholding the appellate court's reversal. Justices Rehnquist, Stevens, and Chief Justice Burger dissented.

40. *Id.* at 124. The Court stated:

> [T]his 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 on a few persons. . . . 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.'

*Id.*

41. *Id.* at 138. Brennan noted: "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 not only the Terminal site proper but also other properties." *Id.*

ment-backed expectations.[42]

Investment-backed expectations arise when property owners invest in property believing that they will benefit from its development.[43] A landowner frustrated from realizing this anticipated gain by preservation regulations may raise a taking challenge. Although the Supreme Court has yet to address the issue, the purchaser of property with historic regulations already attached is probably unable to raise the investment-backed expectations claim. Because the buyer has notice of the restrictions,[44] he cannot realistically expect benefits outside of the preservation context.[45]

Justice Marshall's majority opinion in *Loretto v. Teleprompter Manhattan Cable Television Corp.*[46] indicated that the Court views even a slight physical occupation as more objectionable than any form of a regulatory taking.[47]

## III. 1987 SUPREME COURT TAKING CLAUSE CASES

The United States Supreme Court handed down three taking clause decisions in 1987, *Keystone Bituminous Coal Association v. DeBenedic-*

42. *Id.* at 131. While no set formula by which to analyze a taking claim exists, the Court will examine several factors, including economic impact of the regulation on the property owner, "the extent to which the regulation has interfered with distinct investment-backed expectations," the character of the governmental action (e.g., whether there is a physical invasion), and the reasonable expectations of the property owner. *Id.* at 124.

43. In his recent article, Professor Daniel Mandelker extensively examined investment-backed expectations. He stated: "Investment-backed expectations arise in property markets, where market participants invest with the expectation that they will obtain capital gains from the development of their property. . . . The question is whether a taking occurs if market-created expectations in capital gains are frustrated." Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 WASH. U. J. URB. & CONTEMP. L. 3, 4 (1987).

44. *See* Mandelker, *supra* note 43, at 12-13. A land use regulation devaluing unowned land is not a taking because the buyer has notice of the conditions attached. *Id.* at 12.

45. Professor Mandelker discusses investment-backed expectations in the historic preservation context. *See* Mandelker, *supra* note 43, at 24-27 (on investment-backed expectations in property markets) and 35-37 (discussing the application of investment-backed expectations to historic landmark restrictions).

46. 458 U.S. 419 (1982).

47. *Id.* at 436. Justice Marshall specifically stated that "such a . . . [physical] occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties upon the owner, since the owner may have no control over the timing, extent, or nature of the invasion." *Id.*

*tis*,[48] *Nollan v. California Coastal Commission*,[49] and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.[50] Considering how difficult it is for plaintiffs to meet the Court's ripeness requirement, all three cases are important.[51] However, *Keystone* and *First Evangelical Church* probably will have the most significant impact on historic preservation law.

The facts of *Keystone* parallel those of the earlier *Pennsylvania Coal* decision.[52] In response to a subsidence problem, the state of Pennsylvania enacted legislation restricting coal mining.[53] The new law requires miners to keep in place 50% of the coal under buildings.[54] Keystone Coal challenged the statute, alleging it constituted a taking of the company's property without just compensation.[55] The Court distinguished *Pennsylvania Coal*.[56] The Court examined the public purpose behind the legislation, finding it "genuine, substantial, and legitimate,"[57] and therefore refused to find a taking.[58]

In *Keystone*, the Court considered such factors as reciprocity of advantage, diminution in value, and investment-backed expectations. The Court found that the regulation conferred an average reciprocity

48. 107 S. Ct. 1232 (1987).

49. 107 S. Ct. 3141 (1987).

50. 107 S. Ct. 2378 (1987).

51. In Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), the Supreme Court made it difficult for an as applied taking case to be ripe for consideration. The Court stated that a taking issue is ripe only if the plaintiff applied for all available variances *and* sought compensation through the state's inverse condemnation procedures. *See* Merriam, *Caught in the Takings Muddle: Legally, We've Been Had*, PLAN. 23, 26 (Aug. 1985) (discussing the ramifications of the *Hamilton Bank* decision for land use lawyers and city planners).

52. *See supra* notes 32-38 and accompanying text.

53. 107 S. Ct. at 1236-37. Subsidence causes many problems, including damage to existing structures and the inhibition of future development because of sinkholes and other environmental problems. *Id.* at 1237.

54. *Id.* at 1238. The law permitted the state to revoke a mining permit if removing the coal would harm the structure and the mining company failed to cure the problem. *Id.*

55. *Id.* at 1238-39. Keystone Coal also alleged that the law violated the Constitution's contracts clause. *Id.* at 1236, 1239.

56. *Id.* at 1242. The Court distinguished *Pennsylvania Coal*, stating that the current state law addresses a perceived "significant threat to the common welfare," that the company is still able to engage in business, and that there is no interference with investment-backed expectations. *Id.*

57. *Id.* at 1242.

58. *Id.* at 1251.

of advantage, since the benefit to the public, including the company, outweighed the burden on the individual landowner.[59] With regard to the company's claim of economic injury due to the property's diminution in value, the Court stated that the landowner was unable to show a deprivation significant enough to demonstrate a regulatory taking.[60] The Court held that to succeed in a facial attack, the challenger must show the statute denies him all "economically viable use of his land."[61] Consequently, a court must examine the property to determine if any viable use remains.[62] The Court concluded that because the regulation requires only that a small percentage of coal remains in place, the law does not frustrate the landowner's investment-backed expectations.[63] Thus, the facial challenge to the legislation failed.[64]

In *Nollan*,[65] the California Coastal Commission conditioned a rebuilding permit on the owner's granting the city an easement for beach access.[66] In a five to four decision, the Court characterized the access condition as a "permanent physical occupation" and found a taking.[67] Because the Court found physical rather than a regulatory taking, the

59. *Id.* at 1245.

60. *Id.* at 1246. The Court noted that since this was a facial challenge to the statute, the court below granted summary judgment. Thus, the company may have had evidence of significant harm, but was unable to present it because of the law's facial validity. *Id.*

The burden of demonstrating a regulatory taking is significant. In contrast, *Loretto* suggests that showing a physical taking is relatively simple. *See supra* notes 46-47 and accompanying text discussing *Loretto*.

61. 107 S. Ct. at 1247. The Court excerpts the district court opinion, quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980).

62. 107 S. Ct. at 1248. The Court stated that it must examine the entire bundle of property rights. Destroying one strand alone does not constitute a taking since "the aggregate must be viewed in its entirety." *Id.* (quoting Andrus v. Allard, 444 U.S. 51, 65-66 (1979)).

63. *Id.* at 1249-50. The Court further concluded that the law regulates only a small part of the company's total land. *Id.* at 1250-51.

64. *Id.* at 1253.

65. 107 S. Ct. 3141 (1987).

66. *Id.* at 3143. The Nollans owned beachfront property and sought to tear down the existing bungalow and construct a three bedroom home. Seeking to prevent the house from becoming a "psychological barrier" to those desiring access to the beach, the commission conditioned approval of the building permit on the landowners granting an easement across their property. *Id.*

67. *Id.* at 3145. The Court quoted *Loretto*, stating that where there is a permanent physical occupation of property, a finding of a taking is almost inevitable. *Nollan*, 107 S. Ct. at 3145.

impact of *Nollan* on preservation legislation is limited. The most significant part of the case for preservationists is the finding that there must be a substantial relation, or close nexus, between a condition precedent and a legitimate governmental purpose.[68]

Finally, in *First English*,[69] the Court decided that a landowner who successfully establishes a taking can recover monetary damages.[70] The church owned property on which it built a recreation area for handicapped children.[71] A fire destroyed the forestry on a surrounding hillside and a subsequent flood destroyed the campground.[72] In response, Los Angeles County passed an interim ordinance prohibiting all building in the flood zone.[73] The Court stated that a taking must be found before reaching the remedial question,[74] and therefore remanded the case for reconsideration of the taking issue and valuation of a remedy.[75]

Nevertheless, the Court assumed that the ordinance[76] was a taking of private property for public use without compensation.[77] The major-

68. *Id.* at 3148. The Court stated: "In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an 'out-and-out plan of extortion.' " *Id.* (quoting J.E.D. Associates, Inc. v. Atkinson, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)).

Justice Brennan, joined by Justice Marshall, dissented, finding that the permit condition did not interfere with the Nollans' investment-backed expectations, since the public has a right of access to the beach. *Nollan*, 107 S. Ct. at 3151, 3152, 3153-54. In addition, the state can use its police power "to impose conditions on private development." *Id.* at 3151.

Justice Stevens also dissented, stating that the Court's holding in *First English, infra* notes 69-87, led to the vague standards erroneously applied in this case. *Id.* at 3163-64.

69. 107 S. Ct. 1278 (1987). Chief Justice Rehnquist wrote for the majority, joined by Justices Brennan, White, Marshall, Powell, and Scalia. *Id.* at 2381.

70. *Id.* at 2389. The Supreme Court had the opportunity to address this question previously, but declined to do so in MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); and San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981).

71. *Id.* at 2381.

72. *Id.* at 2381.

73. *Id.*

74. *Id.* at 2382.

75. *Id.* at 2384-85. The Court further stated: "Here we must assume that the Los Angeles County ordinances have denied appellant all use of its property for a considerable period of years. . . ." *Id.* at 2389.

76. The ordinance was an "interim" one. However, the Court found that this "temporary" taking was in reality permanent. *Id.* at 2387.

77. *Id.* at 2389.

ity rejected the idea that repeal of the ordinance would adequately compensate an injured landowner.[78] Instead, the Court awarded monetary compensation, directing the court below to calculate the landowner's property value losses from the time of the invalid ordinance's enactment to its repeal.[79] The Court limited its holding to the facts presented, and specifically stated that the case would not require compensation for normal delays in the planning process.[80]

In dissent, Justice Stevens vehemently disagreed with the majority opinion.[81] He emphasized that the Court's holding did not require the state to compensate the church for the effects of the ordinance,[82] stating that precedent establishes that this sort of regulatory scheme is not a taking.[83] Stevens argued that legislative enactments enjoy a strong presumption of validity, and summarily rejected the church's taking claim.[84]

Justice Stevens concurred with the majority's finding that when there is a taking, the government can either discontinue the regulation or continue to regulate and compensate the property owner.[85] Stevens would give monetary relief only for a regulatory taking that was "substantial" and "in effect for a significant percentage of the property's useful life."[86] Justice Stevens noted that the majority's decision will

78. *Id.* at 2388. The Court found that "[i]nvalidation of the ordinance or its successor ordinance . . . is not a sufficient remedy to meet the demands of the Just Compensation Clause." *Id.*

79. *Id.* at 2388. The Court further stated that "depreciation in value of the property by reason of preliminary activity is not chargeable to the government." *Id.*

80. *Id.* at 2389.

81. 107 S. Ct. at 2389-2400. Justices O'Connor and Blackmun joined in the dissenting opinion.

82. *Id.* at 2391.

83. *Id.* The majority did not find a taking, but assumed one for the purpose of reaching the remedial question. *See supra* notes 76-77 and accompanying text. Justice Stevens stated:

> [T]hus, although the Court uses the allegations of this complaint as a springboard for its discussion of a discrete legal issue, it does not, and could not under our precedents, hold that the allegations sufficiently alleged a taking or that the County's effort to preserve life and property could ever constitute a taking.

107 S. Ct. at 2392.

84. *Id.* at 2392-93. Justice Stevens points out that it is inconceivable that the church could even expect to build anything on property in the middle of a flood zone. *Id.* at 2392.

85. *Id.* at 2393.

86. *Id.* at 2394. Justice Stevens uses the diminution in value inquiry and would look at the overall effect of the regulation on the entire project, as well as other potentially

deter local land use planners from implementing any program that may lead to a taking clause action for damages.[87]

These cases have muddled taking clause jurisprudence. *Keystone* suggests that landowners will have difficulty proving a regulatory taking, while *Nollan* suggests that land use planners must satisfy a stringent nexus test, and *First English* promises harsh results for an offending government.

## IV. THE POLICE POWER—AUTHORITY FOR ENACTING LAND USE REGULATIONS

State and local governing bodies generally enact land use laws based upon the police power.[88] In 1926, the United States Supreme Court legitimized municipal use of the police power to enact zoning ordinances.[89] Previous Supreme Court cases suggested that a valid police power regulation could never be a "taking."[90]

To determine the validity of a land use regulation, courts examine whether the ordinance is a reasonable attempt to promote the public health, safety, or general welfare.[91] For example, the court in *Maher v.*

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profitable uses of the land, and the duration of the restriction. *Id.* Justice Stevens reiterates *Agins*, holding that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership' . . . ." and courts cannot consider them a taking. *Id.* at 2395 (quoting Agins v. Tiburon, 447 U.S. 255, 263 n.9 (1981)) (citations omitted).

87. 107 S. Ct. at 2399. Justice Stevens stated:

> The policy implications of today's decision are obvious and, I fear, far reaching. Cautious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damage action. Much important regulation will never be enacted, even perhaps in the health and safety area . . . (citations omitted).

*Id.* at 2399-2400.

88. *See supra* note 26 and accompanying text.

89. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

90. Mugler v. Kansas, 123 U.S. 623 (1887), and Miller v. Schoene, 276 U.S. 272 (1928). *See also* Bonderman, *Federal Constitutional Issues*, in A HANDBOOK ON HISTORIC PRESERVATION LAW 351-52 n.24 (C. Duerksen ed. 1983).

91. *See generally* Berman v. Parker, 348 U.S. 28, 32 (1954) ("[S]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. . . ."); Maher v. City of New Orleans, 516 F.2d 1051, 1058-59 (5th Cir. 1975) (the city must be acting within the police power and the regulatory ordinance must bear a "real and substantial relation to a legitimate state purpose"); Bohannan v. City of San Diego, 30 Cal. App. 3d 416, 421, 106 Cal. Rptr. 333, 336 (1973) (preservation of Old San Diego for educational and cultural reasons is within the definition of the general public welfare); City of New Orleans v. Levy, 223 La. 14, 64 So. 2d 798, 802 (1953) (preservation of the Vieux Carre attracts tourists,

*City of New Orleans*[92] balanced the ordinance's public benefit against the individual landowner's freedom to dispose of the property.[93] Applying this balancing test, courts can determine if the legislature overstepped the boundaries of the police power[94] by enacting an arbitrary or confiscatory statute.[95]

The Supreme Court applies a presumption of constitutionality for the governing body's determinations[96] because use of the police power is an exercise of legislative discretion.[97] Both states and municipalities enjoy this presumption.[98] State legislatures often delegate substantial authority to local preservation districts along with certain standards the local commission must follow to legitimize its use of the police

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thereby promoting the economic general public welfare); Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856, 861 (Mo. Ct. App. 1977), *aff'd*, 599 S.W.2d 61 (Mo. 1980) (the validity of a zoning ordinance determined by whether the restriction imposed bears a substantial relation to the public health, safety, morals, or general welfare); A-S-P Associates v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444, 450 (1979) (preservation of historic districts promotes the general public welfare by providing a visual medium to understand the country's heritage); State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217, 222, *cert. denied*, 350 U.S. 841 (1955) (protection of property values constitutes a legitimate exercise of the police power to promote the public welfare).

92. 516 F.2d 1051 (5th Cir. 1975). *Maher* was the first case to deal with the constitutionality of a historic district ordinance. The ordinance in question created the Vieux Carre Commission in New Orleans.

93. *Id.* at 1059.

94. *Id.* at 1059. *See also A-S-P Associates*, 258 S.E.2d at 448-49, stating that where there is a challenge to the legislature's police power, the court must ask:

> Is the object of the legislation within the scope of the police power? . . . Considering all the surrounding circumstances and particular facts of the case, is the means by which the governmental entity has chosen to regulate reasonable? . . . Is the statute in its application reasonably necessary to promote the accomplishment of a public good, and . . . is the interference with the owner's right to use his property as he deems appropriate reasonable in degree?

*Id.*

*Maher* suggests that courts cannot place fixed constraints upon the exercise of the police power in the future; thus, the Court must decide each case on its own facts. The Supreme Court in the *Berman* case concluded that it is impossible to define the police power because each definition turns on a specific set of facts. *Berman*, 348 U.S. at 32.

95. Figarsky v. Historic District Commission, 368 A.2d 163, 171-72 (1976).

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

97. Goldblatt v. Hempstead, 369 U.S. 590 (1962); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); *Maher*, 516 F.2d at 1058.

98. City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13, 15 (1964).

power.[99] In the preservation context, courts have found that legitimate exercises of the police power include revitalizing urban areas,[100] encouraging tourism,[101] preserving and enhancing property values,[102] preserving historic and cultural heritage,[103] and developing a more attractive community.[104] So long as it is not used arbitrarily or capriciously, the police power legitimizes most preservation enactments.

## V. AESTHETIC REGULATION AND EXTERIOR DESIGN

In *Penn Central*,[105] the Court stated that localities may enact land use laws to preserve the character and aesthetics of a city.[106] However, whether legislative bodies can use the police power to regulate aesthetics is not as well settled in state courts.[107] Although local historic pres-

99. Vincino v. Wethersfield Historic District Commission, No. CV80-02493375 (Hartford/New Britain Sup. Ct. Apr. 30, 1984) *noted in* 4 Preservation L. Rptr. 3008.

100. *A-S-P Associates*, 258 S.E.2d at 450; *Maher*, 516 F.2d at 1060.

101. *Bohannan*, 30 Cal. App. 3d at 422, 106 Cal. Rptr. at 336; New Orleans v. Levy, 64 S.2d at 798; *A-S-P Associates*, 158 S.E.2d at 450.

102. *Wieland*, 69 N.W.2d at 220; *FGL&L Property Corp.*, 485 N.E.2d at 989.

103. *Maher*, 516 F.2d at 1061; *Bohannan*, 30 Cal. App. 3d at 422, 106 Cal. Rptr. at 336; Opinion of the Justices to the Senate, 128 N.E.2d 563, 566 (Mass. 1955); *A-S-P Associates*, 258 S.E.2d at 450.

104. *Maher*, 516 F.2d at 1060.

105. 438 U.S. 103 (1978). *See supra* notes 39-45 and accompanying text for a discussion of *Penn Central*.

106. *Penn Central*, 438 U.S. at 129. *See also* 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); *Berman*, 348 U.S. at 33.

107. In *Berman*, the Supreme Court stated that the taking clause does not prevent aesthetic regulation:

> The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

348 U.S. at 33-34.

State courts are moving toward the use of the police power to regulate aesthetics. For states where the question remains unsettled, *see Figarsky*, 368 A.2d at 171 (though not ripe for adjudication in this case, the court recognized modern trend toward aesthetics alone warranting exercise of the police power); *Santa Fe*, 389 P.2d at 17 ("[U]nder the restricted attack made upon the ordinance, it seems unnecessary to decide here whether aesthetic considerations, denied under earlier decisions, furnish ground for the exercise of the police power as is increasingly held by modern authorities."); *Weiland*, 69 N.W.2d at 22 (in light of *Berman*, it is doubtful whether 1952 case holding that the

ervation commissions[108] have legislative authority to regulate demolition, alteration, relocation, removal, or additions to a historic property,[109] some courts are reluctant to allow regulations based solely on the aesthetic value of a building.[110] While the aesthetic question is not fully settled in state courts, most allow regulation of exterior changes to historic structures.[111] As a result, landowners must receive

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zoning power cannot be exercised for purely aesthetic considerations remains good law).

The Fifth Circuit, like most federal courts, recognized that local governments can exercise their zoning power to regulate aesthetics. *Maher*, 516 F.2d at 1060. In addition, though the *Figarsky* court failed to directly confront the aesthetics issue, it refused to allow demolition of a building with little historic value because it served an important screening function for the rest of the community. *Figarsky*, 368 A.2d at 166-67.

Decisions refusing to uphold regulation of aesthetics alone include: *Bohannan*, 30 Cal. App. 3d at 422, 106 Cal. Rptr. at 336 (regulation of aesthetics "is not a proper objective of the police power"); City of St. Louis v. Friedman, 216 S.W.2d 475, 478 (1949) (holding that "[e]sthetic values alone are not a sufficient basis for classification, but are entitled to some weight where other reasons for the exercise of the police power are present"); *A-S-P Associates*, 258 S.E.2d at 448, 450 (a statute based "purely on aesthetic considerations, without any real or substantial relation to . . . the general welfare, deprives individuals of due process of law").

108. Most state enabling legislation authorizes the local body to establish a preservation commission to review preservation-related issues. *See, e.g.*, IDAHO CODE §§ 67.4601-67.4612 (1980).

109. *See S. Dennis, Appendix A: Model Ordinance*, in A HANDBOOK ON HISTORIC PRESERVATION LAW A65-A69 app. (C. Duerksen ed. 1983) (sample ordinance provisions listing those changes requiring a landowner to obtain a certificate of appropriateness from the local preservation commission).

110. *See supra* note 107 and accompanying text.

111. Numerous cases exist regarding appeals from denials of demolition permits. Courts permitted exterior regulation in: *Vincino*, 4 Preservation L. Rptr. at 3008 (the state can regulate all buildings within a historic district whether or not the specific building is itself of historic value); Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856, 861 (Mo. Ct. App. 1977) ("[U]nder an historic district ordinance . . . [i]t is the essence of such ordinances that such structures are not to be . . . substantially altered in outward appearance."); City of New Orleans v. Impastato, 3 So. 2d 559, 560 (La. 1941). The Vieux Carre ordinance requires a landowner to obtain a permit for any alterations or additions to an existing building; also, the property owner must submit an architectural plan. The court found that a change to the back of the building is considered an exterior alteration. *See also* Greenley v. Board of Selectmen of Nantucket, 358 N.E.2d 1011, 1014 (Mass. 1979) (court upheld statute creating historic Nantucket, which states that the commission shall "pass upon the appropriateness of exterior architectural features" in the public view); *Opinion of the Justices*, 128 N.E.2d at 565 (discusses definition of exterior architectural feature in an ordinance regulating the exterior of historic buildings); *FGL&L Property Corp.*, 485 N.E.2d at 880 (section 96a of the General Municipal Law permits the city's governing board to pass on exterior changes as long as the police power is reasonably used); *Buttnick*, 719 P.2d 93, 94 (Wash. 1986) (landowner not permitted to alter the exterior of a building when a permit to do so is denied); *Wieland*, 69 N.W.2d at 219 (Board may refuse to issue a building permit if the proposal

a permit to change or add such items as artificial siding,[112] parapets,[113] and fences.[114]

In *Berman v. Parker*,[115] the United States Supreme Court affirmed the validity of aesthetic regulation. The Court in *Berman* broadly defined "public welfare" to include aesthetic concerns. Thus, a state or local government can protect the public's interest in aesthetics through its police power.[116] Since the taking clause generally insulates governing bodies from liability if they regulate in the public interest, a regulation based on aesthetics alone will probably not amount to a taking.

## VI. MANDATORY MAINTENANCE REQUIREMENTS

Mandatory or affirmative maintenance provisions, required by many city and state historic preservation statutes, face taking clause challenges from property owners.[117] Affirmative maintenance provisions, which require owners to preserve historic buildings,[118] are especially suited to historic districts where the integrity of the locale must be conserved.[119] Irrespective of a structure's setting, if the cost of repair[120]

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will be architecturally inconsistent so as to cause "a substantial *depreciation* of values in said *neighborhood*").

112. *Vincino*, 4 Preservation L. Rptr. at 3008.

113. Buttnick v. City of Seattle, 105 Wash. 2d 857, 719 P.2d 93, 94 (1986).

114. Robitson v. Board of Supervisors, No. 7796 (Loudoun County Cir. Ct., Va., filed Aug. 3, 1984), *noted in* 4 Preservation L. Rptr. 1033-34.

115. 348 U.S. 28 (1954). *See supra* note 107 and accompanying text.

116. *Id.* at 33-34.

117. Many states allow ordinary maintenance without approval from the local commission. *See, e.g.*, MASS. ANN. LAWS ch. 40C, § 9 (Michie Law. Coop. 1986). Others affirmatively require maintenance. *See, e.g.*, IDAHO CODE § 67-4617 (1980).

118. Harris v. Parker, Chancery No. 3079 (Isle of Wight County, Va., Cir. Ct. Jan. 20, 1983) *noted in* 5 Preservation L. Rptr. 3007, contains an example of a municipal historic preservation ordinance requiring affirmative maintenance. Property owners must preserve historic buildings:

> against decay and deterioration and [maintain them] free from structural defect to the extent that such decay . . . may . . . result in the irreparable deterioration of any exterior appurtenance or architectural feature or produce a detrimental effect upon the character of the district as a whole or upon the life and character of the structure itself. . . .

*Id.*

119. *A-S-P Associates*, 258 S.E.2d at 451.

120. *See, e.g., Buttnick*, 719 P.2d at 94-95 (Building Department and Preservation Board ordered immediate stabilization of a parapet though the owner sought its removal).

does not impose an "unnecessary or undue hardship" on the property owner, the court is likely to enforce the requirement.[121]

*Maher v. City of New Orleans* was one of the earliest cases to uphold an affirmative maintenance provision challenged as an unconstitutional taking.[122] In *Maher*, the Fifth Circuit Court of Appeals held that since the purpose of the historic district legislation was legitimate, the upkeep of buildings in the Vieux Carre section of New Orleans was "reasonably necessary" to accomplish the goals of the ordinance.[123] The court stated that the party alleging a taking must show that a mandatory maintenance provision is unduly burdensome.[124] Courts must determine the reasonableness of maintenance provisions on a case-by-case basis to ascertain the individual burden.[125] However, a landowner's expenditure of funds to maintain a structure does not necessarily constitute an undue burden,[126] nor does it mean that a taking has occurred.[127]

Mandatory maintenance provisions are within the scope of the municipal police power because they enhance aesthetics and prevent public safety hazards created by deteriorating buildings.[128] Consequently,

121. *Figarsky*, 268 A.2d at 166; *Buttnick*, 719 P.2d at 95. *But see* McCrimmon v. City of Charleston, No. 84-CP-10-3360 (Charleston Cty. Ct. of Com. Pleas, filed Oct. 30, 1984) *noted in* 4 Preservation L. Rptr. 3009 (landowner seeks to install siding to reduce maintenance costs).

122. 516 F.2d 1051, 1067 (5th Cir. 1975).

123. *Id.* at 1066-67.

124. *Id.* at 1067. The plaintiff made a taking claim but failed to show that the ordinance was unduly burdensome.

125. *Id.* at 1067. The court stated: "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." *Id.*

126. *See Buttnick*, 719 P.2d at 96 (a taking exists only if the regulation is unduly oppressive); *Harris*, 5 Preservation L. Rptr. at 3007 (mandatory maintenance provision found constitutional and court ordered significant repairs to the house). *But see FGL&L Property Corp.*, 485 N.E.2d at 992 ("Landmark and historic preservation law . . . may be held unconstitutional . . . [if] it forces the owner to assume the cost of providing a benefit to the public without recoupment.").

127. "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." *Maher*, 516 F.2d at 1067. For example, an ordinance requiring fire alarms in every building would require a private expenditure of funds, but does not constitute a taking. The court noted that "if the purpose be legitimate and the means reasonably consistent with the objective, the ordinance can withstand a frontal attack of invalidity." *Id.*

128. City of New Orleans v. Pergament, 5 So. 2d 129, 131 (La. 1941).

when the state's enabling legislation fails to specifically provide for a municipal maintenance ordinance, some courts infer such authority from the zoning power.[129] Courts will normally uphold inferred or express maintenance provisions if the degree of maintenance required is reasonable.[130]

Utilizing some of the factors the Supreme Court has discussed in its taking clause decisions, the validity of a mandatory maintenance provision depends on the economic cost of its implementation, including the landowner's investment-backed expectations.[131] Mandatory maintenance protects the public safety by insuring that buildings are structurally sound. In addition, such provisions protect the public's interest in its historic past. A maintenance scheme, however, that costs more than the building is worth,[132] or that interferes with legitimate investment-backed expectations, may effect a taking.

Emphasis on the reasonableness of maintenance costs jeopardizes provisions that mandate rehabilitation of historic structures. Unlike mandatory maintenance provisions, absent explicit authority in enabling legislation, attempts to compel rehabilitation are beyond the scope of municipal authority.[133]

In *FGL&L Property Corp. v. City of Rye*, the court held unconstitutional a zoning ordinance mandating and specifying the manner of rehabilitation.[134] The case suggests that imposing unreasonable restoration costs or conditions constitutes the taking of private property for a public use.[135] The court considered the economic and technical aspects of rehabilitation when determining the reasonableness of the regulation.[136] For instance, if a property owner cannot technically

129. *Harris*, 5 Preservation L. Rptr. at 3007.

130. *Figarsky*, 368 A.2d at 169.

131. *See supra* note 41 and accompanying text discussing the factors examined in *Penn Central*.

132. *See infra* notes 133-138 discussing the impact of a large economic burden on mandatory rehabilitation requirements.

133. 66 N.Y.2d 111, 485 N.E.2d 986, 987 (N.Y. 1985). Nothing in the zoning enabling legislation "empowers the City to mandate the manner in which property may be owned or held to impose upon the owner of a tract containing historic structures . . . the cost of rehabilitation or enhancement of the properties."

134. *Id.* at 988.

135. *Id.* at 991. *See also Lafayette*, 553 S.W.2d at 864 ("[W]here a landowner is unable because of his own financial status to rehabilitate . . . enforcement of the ordinance would practically serve to confiscate his land.").

136. *Id.* at 863.

rehabilitate a structure, or if the cost to rehabilitate is significantly greater than the value of any possible use of the restored structure, the landowner and local commission may consider demolition.[137] When a rehabilitation ordinance involves an unreasonable expenditure of funds, a court is likely to find the ordinance invalid as applied to the landowner.[138]

The decision in *FGL&L* suggests that a local ordinance may include rehabilitation requirements provided for in the state enabling legislation.[139] Other courts and statutes provide that if it is economically and technically reasonable to rehabilitate a building, property owners should undertake "extreme efforts" to preserve the "streetscape," even if the building in question is itself of little historic significance.[140]

A synthesis of the recent Supreme Court decisions reveals the difficulty in ascertaining whether mandatory rehabilitation provisions constitute a taking. A plaintiff who is able to demonstrate ownership of property prior to the institution of such a provision may have a legitimate argument for interference with investment-backed expectations.[141] There is a difference between the situation in *Keystone*, where the regulation required the landowner to avoid any action that could damage the public welfare, and an affirmative rehabilitation requirement dictating that an owner expend funds to improve a property.[142]

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137. *Id.* at 862-63.

138. Texas Antiquities Comm. v. Dallas Community College Dist., 554 S.W.2d 924 (Tex. 1977). A landowner is more likely to succeed on an as applied rather than facial challenge to an ordinance because the court must determine the reasonableness of expenditures on a case-by-case basis, and the state enabling legislation allows a local commission to mandate restoration.

139. The court in *FGL&L Property Corp.* stated that a redrafted law may pass constitutional muster. *FGL&L Property Corp.*, 485 N.E.2d at 992. The court further noted that "[w]e do not hold that the General Municipal Law sections could not be drafted to impose restoration costs on an owner without violating the Constitution. . . ." *Id.*

140. *Lafayette*, 553 S.W.2d at 860. The court held that "[e]xisting structures are to be removed only where their conditions are judged to be beyond rehabilitation or to accommodate important elements of the neighborhood plans. Extreme efforts must be taken to retain the existing structures, maintain continuity and preserve the streetscape." *Id.*

141. *See supra* notes 43-45 and accompanying text explaining the investment-backed expectations theory in the context of *Penn Central*. *See supra* note 63 discussing the theory as applied in *Keystone Coal*.

142. Requiring a landowner to refrain from using her property to the greatest extent possible may diminish the value of the site. Forcing an owner to expend money to actually rehabilitate, however, appears more intrusive because such a regulation (1) tells the landowner generally how the property should appear, (2) limits its use to one that

Under *Keystone*, if any viable use of the land remains, or if the property has any reasonable economic use, it is unlikely that a court will find a taking. The public interest in preservation,[143] along with tax credits to landowners who rehabilitate historic properties,[144] will normally be sufficient justification for reasonable rehabilitation requirements.

Requiring rehabilitation that would cost more than the value of the property after repairs, however, may amount to a taking. Such a requirement would force the owner of historic property to bear a large cost without a corresponding economic benefit. Although the reciprocity of advantage theory dictates that such costs are the inevitable result of doing business in a civilized society,[145] municipalities should avoid

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will accommodate a historic structure, and (3) may require an owner to borrow funds, and at the very least to spend money in order to comply with the statute.

The contrary argument is that an owner faced with a rehabilitation requirement may increase the property value because (1) he is spending money to make the structure usable; (2) if the property is in a historic district, each property that is rehabilitated enhances the appearance and attractiveness of the area, thus allowing property values to rise; and (3) the property owner may be able to take advantage of historic preservation tax credits.

For examples of increased property values in a historic district where landowners rehabilitated their properties, *see* Muhammad, *The Next Hot Neighborhoods: The Gap*, CHICAGO 109-11 (Oct. 1987), a CHICAGO magazine article discussing rehabilitation in the Gap area of the city. Houses increased in value almost tenfold from the 1970's, and "[q]uite a few owners of these old houses now are holding on, anticipating that the price will rise higher." *Id.* at 110 (quoting Cornelius Goodwin, Gap real estate agent and property owner).

*See infra* note 144 discussing historic tax credits.

143. *See, e.g.*, the recent TIME cover story on rehabilitation in urban areas, *Spiffing up the Urban Heritage*, TIME, 72-83 (Nov. 23, 1987). The article demonstrates the mainstream appreciation of historic preservation and its prevalence throughout the country. *Id.*

144. *See* the TIME article, *supra* note 143, stating:

> Trendiness goes only so far. Money talks. The mania for preservation has been propelled for the past decade by federal tax laws. Developers who rehabilitate historic buildings can get back 20% of their renovation costs in the form of income tax credits. . . . Under the program, which began in earnest in 1981, an estimated $11 billion has been spent to renovate some 17,000 historic buildings in 1,800 cities and towns.

*Id.* at 79. *See also Historic Preservation Law and Tax Planning for Old and Historic Buildings*, ALI ABA COURSE OF STUDY MATERIALS 1-150 (1987) (from a seminar conducted with the National Trust for Historic Preservation, Oct. 5-6, 1987 in Washington, D.C. where several seminars dealt with the tax aspect of historic preservation).

145. *Pennsylvania Coal*, 260 U.S. at 415 (Brandeis, J., dissenting). *See supra* note 35.

imposing rehabilitation costs that exceed the property's value.[146] Otherwise, cities might be required to pay compensation for a taking pursuant to *First English*.[147]

## VII. HISTORIC LANDMARK DESIGNATION OF PRIVATELY OWNED INTERIORS

The battle between preservationists and opponents of stringent preservation legislation recently moved indoors. Although few municipalities currently attempt to designate building interiors as historic landmarks, several statutes and a discrete body of caselaw address this issue.[148]

In June of 1985 the City of Pasadena enacted a temporary ordinance forbidding the removal of fixtures in any historic structure more than fifty years old.[149] Debate over the ordinance centered upon its scope.[150] In an attempt to avoid a facial challenge, the council ultimately decided to rely on the existing landmark ordinance.[151] According to the ordinance, the local commission must approve the removal or alteration of any interior architectural feature.[152] Violators are guilty of a misdemeanor.[153]

The District of Columbia enacted an ordinance regulating interior features.[154] In *Weinberg v. Barry*,[155] a District of Columbia landowner challenged the law as being facially unconstitutional, arguing that an

146. *See* Mandelker, *supra* note 43, at 26.

147. 107 S. Ct. 2378 (1987). *See supra* notes 69-87 and accompanying text.

148. *See infra* notes 149-173 and accompanying text.

149. *Pasadena Enacts Emergency Ordinance to Protect Architectual Features*, 4 Preservation L. Rptr. 1066-67 (1985). Pasadena enacted the ordinance in response to the sale of fixtures from an important historic house in the area. Antique enthusiasts eagerly sought these fixtures and paid significant prices on the market. The City passed the ordinance in a 36 hour time span to prevent the further removal of fixtures from the house. *Id.*

150. *Id.* at 1067.

151. *Id.* The existing ordinance requires the city's Heritage Commission "to review any proposed alteration or demolition of historic building exteriors—and extend it to interior fixtures on an emergency basis by expanding the scope of the ordinance."

152. *Id.*

153. *Id.*

154. D.C. CODE ANN. § 5-1001 (1981). *See supra* note 8 and accompanying text for an explication of the ordinance.

155. Weinberg v. Barry, 634 F. Supp. 86 (D.D.C. 1986). The plaintiff privately owned the Warner Theater, which is open to the public for performances. *Id.* at 87.

ordinance permitting designation of a building interior as a historic landmark violates the taking clause.[156] Specifically, the plaintiff charged that a taking exists because an interior designation fails to serve a public purpose,[157] is a public invasion of private property,[158] and completely denies the landowner of any economically viable use of the property.[159] The court found the ordinance's purposes reasonable[160] and gave the legislature broad discretion to decide what land uses serve a public purpose.[161] The court also found it unnecessary that the interior be open to public view to serve a public purpose under the Act.[162] Because the court failed to find a facial taking,[163] the landowner in *Weinberg* must make an "as applied" challenge to the ordinance. The court in the District of Columbia implied that it would uphold the designation of interior private property as a historic landmark.[164]

Although scant case law exists and few states permit interior regulation,[165] when municipalities invoke these statutes, taking challenges are likely to arise. The government can justify regulating interiors exposed

156. *Id.* at 93.

157. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

158. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982). *Loretto* held that even a minor physical occupation of property constitutes a taking. *See supra* notes 46-47 and accompanying text.

159. *Penn Central*, 438 U.S. at 138 and n.36.

160. The purposes of the District of Columbia's interior designation act are:

> . . . to accomplish the protection, enhancement and perpetuation of features of landmarks which represent distinctive elements of the city's cultural, social, economic, political and architectural history; to safeguard the city's historic, aesthetic and cultural heritage; to foster civil pride in the accomplishments of the past; to protect and enhance the city's attraction to visitors, thereby supporting and stimulating the economy; and to promote the use of landmarks and historic districts for the education, pleasure and welfare of the people of the District of Columbia.

*Weinberg*, 634 F. Supp. at 92-93, *citing* D.C. Code § 5-1061(a).

161. *Id.* at 93, *citing* Euclid v. Ambler Realty Co., 272 U.S. 365, 386-88 (1926).

162. The court stated that the purposes of the act do not require actual public viewing of the interior designated as a landmark. *Id.* at 93.

It is unlikely that the city will attempt to regulate the interiors of private homes. *See, e.g.*, Greenya, *Is This the Future?*, HISTORIC PRESERVATION 40 (Jan./Feb. 1987) (discussing the modern interior rehabilitation of a Victorian rowhouse in DuPont Circle in the District of Columbia). *Id.*

163. The *Weinberg* court noted that "[b]ecause it appears that there are conceivable situations in which designation of a building interior would not constitute a taking, the District of Columbia Act is not unconstitutional on its face." 634 F. Supp. at 93.

164. *See supra* note 111 and accompanying text.

165. *See supra* note 8 detailing the states that allow interior regulation.

to public view, similar to the theater in *Weinberg*,[166] on much the same grounds that support exterior regulations.[167] This is especially true if the state judiciary or legislature determines that regulation of aesthetics alone is permissible.[168]

There is a major distinction between interior and exterior regulation: the latter is seen by passers-by and contributes to an aesthetic whole, especially in a historic district; the former is evident only to those who actually enter the structure. If the purpose of guidelines for exterior rehabilitation is to ensure slightliness and preserve historic architecture, interior guidelines may serve the same goals.

A facial challenge to a statute such as the one in *Weinberg*[169] may fail because of the law's public welfare purpose, but "as applied" challenges may succeed. The owner of a historic interior may successfully combine some of the *Penn Central* factors[170] by demonstrating interference with investment-backed expectations, unreasonable rehabilitation costs, and diminution in the property's value. Unfortunately, courts have not definitively indicated what combination of factors will lead to a taking.[171]

Municipalities must therefore exercise care in assessing when to demand compliance with interior regulations. The local historic commission might consider elements such as the cost of accurate interior rehabilitation, the aesthetic, architectural, and historic importance of the interior, the uses of the building, and the possible costs to the city in light of *First English*.[172] Thus, the municipality must weigh the importance of the regulation to the community as a whole against potential monetary costs imposed by a taking determination. Because there is a presumption in the city's favor, a careful balancing process will

166. 634 F. Supp. at 90.

167. *See supra* notes 105-116 and accompanying text.

168. *See supra* notes 107, 110-111 and accompanying text discussing the aesthetic regulation issue.

169. 634 F. Supp. 86 (D.D.C. 1985).

170. *See supra* note 41 and accompanying text.

171. *See* Mandelker, *supra* note 43, at 4-5, stating: "Justice Brennan [in *Penn Central*] did not indicate whether frustration of investment-backed expectations would be enough to find a taking. His inclusion of these expectations in a list of 'factors' suggests that frustration alone is not enough. The Court has not yet resolved this question. . . ." (citations omitted).

172. 107 S. Ct. 2378 (1987). *See supra* notes 69-87 and accompanying text.

probably prevent a municipality from being held liable for a taking.[173]

## VIII. IMPERMISSIBLE DESTRUCTION OF HISTORIC PROPERTIES—STATUTORY ENACTMENTS

The penalty provisions contained in some historic preservation ordinances vary widely.[174] Generally, a penalty attaches when a landowner alters property without first obtaining the requisite permit.[175] Furthermore, if a landowner alters or constructs a building without a permit, the owner could be required to remove the offending use.[176]

Cities and states have adopted legislation penalizing landowners who

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173. *See supra* note 97 and accompanying text (discussing the presumption of constitutionality for legislative enactments).

174. In some state ordinances, no penalty provisions are specifically stated. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 41-861 to 41-864 (1985); other ordinances contain provisions for fines. *See, e.g.*, CONN. GEN. STAT. ANN. § 7-147h(b) (1981); IDAHO CODE § 67-4617 (1980); ILL. ANN. STAT. ch. 127, § 133d12 (Smith-Hurd 1986).

Still other state statutes require that the offending landowner restore the structure to its previous condition. *See, e.g.*, CONN. GEN. STAT. ANN. § 7-147h(a) ("Such order may direct the removal of any building, structure or exterior architectural feature erected in violation of said sections . . . or the restoration of any building, structure or exterior architectural feature altered or demolished in violation of said sections. . . ."); D.C. CODE ANN. § 5-1010(b) (1981) ("Any person who demolishes, alters or constructs a building or structure in violation [of the code] . . . shall be required to restore the building . . . and its site to its appearance prior to the violation. . . .").

Criminal penalties may be levied. *See, e.g.*, D.C. CODE ANN. § 5-1010(a) (1981); FLA. STAT. ANN. § 267.13 (West 1987).

Still other states allow the local body to determine the remedy. *See, e.g.*, IND. CODE ANN. § 36-7-11-18 (1981); N.H. REV. STAT. ANN. § 674:50 (1983); N.C. GEN. STAT. § 160A-399.13 (1982).

175. The permit is usually in the form of a certificate of appropriateness. *See, e.g.*, CONN. GEN. STAT. ANN. § 7-147d (1981) which provides:

> No building permit for erection of a building or structure or for alteration of an exterior architectural feature within an historic district and no demolition permit for demolition or removal of a building or structure within an historic district shall be issued by a municipality or any department, agency or official thereof until a certificate of appropriateness has been issued. A certificate of appropriateness shall be required whether or not a building permit is required.

176. *See* Robitson v. Board of Supervisors, No. 7796 (Loudoun County Cir. Ct., Va. filed Aug. 3, 1984), *noted in* 4 Preservation L. Rptr. 1033-34 (1984). The case involved owners of property in a local historic district who were denied a permit to erect a chain link fence. The plaintiff challenged the ordinance in court, but the case settled, with the landowner agreeing to install a wooden picket fence, and "[t]o the extent that the costs of removing the chain link fence in front and constructing the picket fence exceed the amount the plaintiffs would have spent otherwise, those additional costs will be shared by a Waterford preservation organization and a local developer." *Id.*

try to circumvent the preservation process.[177] Such legislation is intended to deter landowners from deliberately defacing a potential landmark property, either to avoid designation[178] or to lose landmark status.[179] In 1985 an Indiana court enforced a municipal ordinance mandating reconstruction for violations and ordered the reconstruction of a facade on a state-owned historic building demolished without a permit.[180] Notably, the structure was nominated for the National Register of Historic Places.[181] The court construed the ordinance to include a prohibition against demolition of a nominated site.[182] While penalties vary, little case law exists regarding this type of penalty provision.[183]

If property is demolished pursuant to the issuance of a municipal permit, a plaintiff may have a valid taking claim if the city requires reconstruction. Since the permit holder relied on the city in demolish-

177. 1 Preservation L. Rptr. 12,007 (1982).

178. *Id.*

179. Idaho, for example, penalizes "the deterioration by willful neglect of any designated historic property or any property within an established historic district." IDAHO CODE § 67-4617 (1980). Similarly, South Dakota provides:

> The governing body of any county or municipality may enact an ordinance to prevent the deterioration by intentional neglect of any designated historic property or any property within an established historic district. Any property owner violating an ordinance established pursuant to this section shall be guilty . . . of a misdemeanor. . . .

S.D. CODIFIED LAWS ANN. § 1-19B-52 (1985).

180. Indiana *ex rel.* Historic Landmarks Foundation of Ind., Inc. v. White River Development Comm'n, No. 5385-112 (Marion Cty. Ind. Sup. Ct. Oct. 10, 1985) *noted in* 5 Preservation L. Rptr. 3005 (1985). The case involved a state-owned school, nominated, but not yet on the National Register of Historic Places. The building was partially demolished after the School Board met during a late night surreptitious session to avoid preservationists. The Board ordered demolition within hours after the meeting. The construction company who began the demolition was also held liable for reconstruction.

181. *Id.* at 3006. This is especially interesting in light of NHPA § 470a, which allows a landowner to veto placement of his/her property on the National Register. 16 U.S.C. § 470a(6) (1982). *See also supra* note 21 and accompanying text.

182. *Id.* at 3006. The Indiana ordinance allows the local legislative body to adopt almost any penalty it chooses. *See* IND. CODE ANN. §§ 36-7-11-18 & 36-1-3-8 (Burns 1981).

183. The West Virginia statute fails to recognize that a landowner may allow a building to deteriorate in order to lose its historic status. The statute provides: "[The commission can] [w]ith the consent of the property owners, certify & mark . . . structures . . . it has registered . . ., [e]stablish standards for the care and management of certified landmarks, and *withdraw such certification for failure to maintain the standards so prescribed. . . .*" (emphasis added). W. VA. CODE § 8-26A-3 (1984).

ing the building, a requirement that the owner rebuild at his own expense may constitute a taking. A court may require the city to compensate the owner for rebuilding and other costs.[184]

Absent a demolition permit, it is unlikely that a plaintiff would be able to make an as applied taking claim against a penalty provision. Normally, a property owner can only tear down a building after obtaining a permit. In the federal courts, an as applied taking claim is not ripe until the party has pursued all appropriate appeals.[185] Thus, absent a demolition permit, an as applied claim will never be ripe for adjudication in federal court.

Considering the strong presumption in favor of legislative enactments, and the extensive purposes clause that precedes most historic preservation legislation,[186] a facial taking challenge to reconstruction laws is also likely to fail.

## IX. CONCLUSION

The Supreme Court's recent pronouncements have not made taking challenges any easier for preservation opponents. Instead, *Keystone*[187] bolsters municipalities against taking challenges by, in effect, reversing *Pennsylvania Coal*, the most persuasive regulatory taking case.[188]

Since an easement is a physical rather than a regulatory taking, *Nollan*[189] is not as relevant to preservationists as *Keystone*. In addition, since most preservation legislation "serves the same governmental purpose as the development ban,"[190] the *Nollan* taking decision does not attach.

If a taking does occur, however, the penalty for a municipality is extreme. *First English*[191] provides that the plaintiff must have both a

184. 107 S. Ct. 2378 (1987).

185. *See supra* note 51 and accompanying text discussing *Hamilton Bank*'s ripeness requirement.

186. *See supra* note 26 and accompanying text discussing some of the purposes behind preservation legislation.

187. *See supra* notes 52-64 and accompanying text.

188. *See supra* notes 32-38 and accompanying text.

189. *See supra* notes 65-68 and accompanying text.

190. *Nollan*, 107 S. Ct. at 3148. For example, a commission gives a certificate of appropriateness to a landowner to construct an addition consistent with historic preservation requirements. Granting the certificate and the building requirements serves the same governmental purpose, namely, historic preservation.

191. *See supra* notes 69-87 and accompanying text.

legislative remedy in the form of repeal of the offending law and a monetary remedy. Given the result in *Keystone*, combined with the difficulty of proving ripeness from *Hamilton Bank*, a taking that results in the need for monetary compensation will be rare. Nevertheless, municipalities should exercise caution when implementing unchallenged preservation laws.

*Faith L. Kalman**

* J.D., Washington University, 1988.