
Nilda Soler

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol25/iss1/8

This Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.
LANDMARK PRESERVATION: THE PROBLEM OF THE SINGLE LANDMARK—LUTHERAN CHURCH IN AMERICA v. CITY OF NEW YORK

In July, 1974 the New York Court of Appeals decided the case of Lutheran Church in America v. City of New York, its first decision concerning the New York City Landmarks Preservation Law. The court held the landmark designation of the J.P. Morgan House an unconstitutional taking under the fifth and fourteenth amendments of the United States Constitution and sections 6 and 7 of article I of the New York Constitution. Thus ended a lengthy confrontation which was initiated in 1965, shortly after the enactment of the Landmarks Preservation Law.

The plaintiff-Church had owned and occupied the J. P. Morgan House, located in Manhattan, as its national headquarters since 1944. In November of 1965, the New York City Landmarks Preservation Commission designated the Morgan House a landmark and the land on which it is situated a landmark site, independent of any other landmark designation and not as a part of any historic district. A modern five-story office building completed by the Church in 1958 and joined to the House at basement level, was also designated by the commission as a part of the landmark site. The commission's designation was based on the property's importance:

it was a notable New York City residence during the first half of the 20th century, . . . [it] is significant as an early example of Anglo-Italianate architecture, . . . it is one of the few free standing Brownstones remaining in the City, . . . it displays an impressive amount of fine architectural detail and that with its conservative appearance, it is a handsome building of great dignity.

3. The fifth amendment to the U. S. Constitution provides in part that "private property [shall not] be taken for public use, without just compensation." N.Y. Const. art. I, § 6 (1938) provides in part that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I § 7(a) provides that "[p]rivate property shall not be taken for public use without just compensation." Since there was an independent state ground for determining the Law unconstitutional as applied, the case was not appealed to the United States Supreme Court.
LANDMARK PRESERVATION

As a result of the designation, plaintiff could neither alter nor destroy the structure without the commission's approval.\(^6\)

Before the enactment of the Law, plaintiff had received bids for construction of a nineteen-story building requiring the demolition of the Morgan House. Plaintiff's goals were to expand its office facilities and to provide space for other Lutheran organizations.\(^7\) The commission's designation of the house as a landmark precluded the proposed demolition and construction. The Church filed a constitutional declaratory judgment action seeking relief from the commission's designation. *Inter alia*, the Church contended that the restrictions of the Law applied to the site deprived it of a valuable incident of property ownership—the right to demolish an existing structure.\(^8\) While the lower court did not consider the constitutional issues,\(^9\) the New York Court of Appeals based its decision on precisely those issues.\(^10\)

Based on the facts presented to the reviewing court, the decision can be narrowly construed. The court held that the application of the Law's provisions concerning sites owned by a charitable organization\(^11\) where the landmark property was clearly inadequate for such organization's legitimate needs,\(^12\) constitutes the termination of the owner's free use of

---

6. *New York City, N.Y., Administrative Code*, ch. 8-A, § 207-4.0-a (1) (1965), provides that a landmark cannot be altered or demolished unless the commission has previously issued a certificate of no exterior effect (§ 207-5.0), a certificate of appropriateness (§ 207-6.0—8.0) or a notice to proceed authorizing such work (§§ 207-8.0-g. (2)(b) and i (4)(b)).


8. *Id.* at 9. The plaintiff's arguments in the brief were the following: 1) that the lower courts correctly found the designation of the Church House as a landmark to have been without substantial evidence; 2) that the Landmark Law is unconstitutional on its face because it authorizes an unconstitutional taking of property without compensation, it denies certain owners equal protection of the laws, it constitutes an unlawful delegation of legislative authority and it denies procedural due process of law; and 3) that the Landmark Law is unconstitutional as applied to the Church House.


10. "Since the plaintiff's proof of economic hardship is substantially unchallenged, [there are] only questions of [constitutional] law and we should decide them." 35 N.Y.2d at 123, 316 N.E.2d at 310, 359 N.Y.S.2d at 13.

11. *New York City, N.Y., Administrative Code*, ch. 8-A, § 207-8.0 (1965), provides for different standards for granting or denying a certificate of appropriateness for taxable or tax-exempt properties. For a full discussion of the difference see Comment, *Legal Methods of Historic Preservation*, 19 *Buffalo L. Rev.* 611, 631-38 (1970), and notes 12, 48, 50, 70, *infra*.

12. The New York Court of Appeals adopted in this case the test for constitutionality devised in *Trustees of Sailors' Snug Harbor v. Platt*, 29 App.Div.2d 376, 288 N.Y.S.2d 314 (1968): whether the maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose. *See* note 70, *infra*. 
the premises and is an unconstitutional taking. In spite of the limited factual context of the decision, the case has a far-reaching impact on the field of historic preservation law. The instant case is the initial state supreme court test of the validity of applying historic preservation regulations to a single site, not part of a historic district, and demonstrates the potential constitutional infirmities of such an approach. Additionally, it is a case of first impression in the New York Court of Appeals upholding the validity of the Landmarks Law itself. The tone of the opinion reflects the court's positive disposition toward single building landmark preservation and historic preservation in general under different factual situations.

HISTORICAL AND LEGAL BACKGROUND

The beginnings of historic preservation law in the United States date to the nineteenth century declaration by the United States Supreme Court in United States v. Gettysburg Electric Railroad Co. that the acquisition of historic property was a public purpose under eminent domain. In Berman v. Parker the Supreme Court further expanded the public purpose concept by the often cited dictum favoring condemnation for solely aesthetic purposes: "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." Under the police power, historic preservation law has evolved as a

14. For other landmark preservation ordinances similar to New York City's, see, e.g., CHICAGO, ILL., MUNICIPAL CODE, ch. 21, §§ 21-62 to 21-64.2 (1968); PHILADELPHIA, PENN., CODE § 14-2008 (1956); and LOS ANGELES, CAL., ORDINANCE 121,971, April 30, 1962.
15. Previous cases upholding the validity of the New York City Landmarks Law pointed optimistically toward an upholding of the regulation of the single building landmark. See Manhattan Club v. Landmarks Preservation Comm'n, 51 Misc. 2d 556, 273 N.Y.S.2d 848 (Sup. Ct. 1966) which held that the city law permitting designation was not confiscatory as to owner who was free to do as he pleased with interior of building, was guaranteed a reasonable return on investment and, if no plan could be devised to materialize that guarantee, could make such changes as he wished; Trustees of Sailors' Snug Harbor v. Platt, 29 App.Div.2d 376, N.Y.S.2d 314 (1968), see note 70, infra. See also, Note, Police Power May Subject Single Building to Special Regulations of a Landmark, 18 SYRACUSE L. REV. 676, 679 (1967).
18. Id. at 33.
19. The test for upholding a zoning regulation under the police power is two-fold: the
part of the expanding definition of general welfare to include the preservation of cultural and aesthetic benefits. By the time the first historic district was established in Charleston, South Carolina, in 1924, a sufficient legal framework had been established in general zoning litigation and in zoning for aesthetics to facilitate the acceptance of historic preservation regulation. Since that time, numerous municipalities have passed historic preservation ordinances and the courts have, with few exceptions, upheld their validity.

In spite of the apparently optimistic picture regarding the validity of historic preservation ordinances, a distinction must be made between the regulation of historic districts and the regulation of the individual landmark. Historic districts have been upheld because they preserve regulation must have a public purpose and the "means" used to accomplish that public purpose must be reasonable. Note, The Police Power, Eminent Domain and the Preservation of Historic Property, 63 COLUM. L. REV. 708, 711 (1963).


21. See D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW §§ 28-32 (1971) (hereinafter cited as HAGMAN). By 1919, the United States Supreme Court had upheld the police power to set height limits and to eliminate near nuisances from particular areas, HAGMAN § 29. The 1916 New York City Zoning Ordinance, the first modern zoning ordinance, was upheld in Lincoln Trust Co. v. Williams Bldg. Corp., 229 N.Y. 313, 128 N.E. 209 (1920). Until the 1920's, however, most state courts frequently held zoning ordinances invalid when non-nuisance uses were prohibited. The United States Supreme Court finally settled these conflicting state decisions by upholding the constitutional validity of zoning in Village of Euclid v. Ambler Realty Co., 272 U.S. 359 (1926).

22. This is true primarily in the area of sign regulation. See HAGMAN, supra note 21, § 77.


25. See Pyke, Architectural Controls and the Individual Landmark, 36 LAW & CONTEMP.
the *tout ensemble*. Each property owner in the district is thus offered the advantage of predictability and increased property values in exchange for the curtailment of the free use of his property. Single landmark regulations, construed in relation to precedent established in general zoning law, may be attacked as invalid spot zones, floating zones or takings of property without compensation. The relationship between a floating zone and spot zoning in the context of landmark preservation is as follows: under the floating landmark zone, the governing body makes an advance statement of the specific criteria to be met for designation and, when the criteria are applied to a specific landmark, the action can be challenged as spot zoning.

It has been suggested that the problems of invalidating a single landmark designation using the zoning concepts of floating or spot zones can be avoided if courts are persuaded it is not unreasonable or arbitrary to distinguish historic properties from their unhistoric neighbors. A distinction is thus drawn between traditional and historic area zoning.

---

27. Spot zoning involves the singling out of a parcel or parcels of land for differential treatment and is considered by the majority of state courts as an invalid and arbitrary exercise of the police power, which is sometimes considered a taking of property without compensation. See Hagman, supra note 21, § 93; Pyke, supra note 25, at 399.
28. The floating zone is the creation of a "zone" in an ordinance which floats over the city until it is affixed to a particular parcel of land. See Hagman, supra note 21, § 62; Pyke, supra note 25.
30. Pyke, supra note 25, at 400. It would seem that the floating zone would be held invalid in those jurisdictions where spot zoning is held invalid, but this is not always the case. For example, in New York the floating zone technique was held valid in Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951), while spot zoning was held invalid in Vernon Park Realty v. City of Mt. Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954).
31. Pyke, supra note 25, at 401 states:
LANDMARK PRESERVATION

The Maryland Court of Appeals in City of Annapolis v. Anne Arundel County\(^2\) has noted that precise distinction:

\[
\text{[T]raditional zoning is primarily directed at the use of the land, [residential, commercial, industrial] as well as the density and the location of buildings on the land... whereas] [h]istoric area zoning... is not directed at any of these factors, but only at the preservation of the exterior of buildings having historic or architectural merit.\(^3\)
\]

By extending this distinction to the "taking issue," the court found that there was no confiscation since there was no deprivation of all reasonable use of the landmark site and improvement; the "use" was not affected since only exterior alterations were prohibited.\(^4\)

The taking of property without just compensation, occurring where a regulation is found to be unreasonable or not sufficiently public in purpose,\(^5\) has proven to be a significant legal hurdle to the use of the police power for historic preservation. Justice Holmes' statement in Pennsylvania Coal Co. v. Mahon,\(^6\) the well-known "balancing test," has been the test most often used by the courts to distinguish between " takings" and valid uses of the police power: "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."\(^7\) Since Pennsylvania Coal, legal commentators and

---

\(^2\) See generally note 25, supra.

\(^3\) 271 Md. 265, 316 A.2d 807 (1974).

\(^4\) Id. at 291, 316 A.2d at 821. This reasoning led the court to hold that the county, which wanted to demolish the Mt. Moriah Church, a historic landmark, was subject to a municipal historic district ordinance even though it is exempt from traditional municipal zoning regulations. Accord, City of Ithaca v. County of Tompkins, 77 Misc. 2d 887, 355 N.Y.S.2d 275 (Sup. Ct. 1974) (county desiring to demolish a landmark building within a city).

\(^5\) 271 Md. at 294, 316 A.2d at 822.

\(^6\) Id. at 294, 316 A.2d at 822.

\(^7\) See generally note 25, supra.

---

characteristics of the neighborhood rather than factors intrinsic to the property itself, courts must be persuaded to accept historical and aesthetic distinctions of single buildings in addition to geographical ones.
judges have been wrestling with the distinction between "takings" and valid exercises of the police power. Additional evaluative tests have been either proposed or adopted to decide such issues. 38 "Nevertheless, the predominant characteristic of this area of the law is a welter of confusing and apparently incompatible results. . . . '[N]o rigid rules' or 'set formula' are available to determine where regulation ends and taking begins." 39

While the validity of historic preservation as a public purpose has been generally established, 40 courts have questioned the means employed to achieve this purpose. Limitations on demolition and change of exterior, and architectural controls on new construction, although accomplishing a public end, may sometimes improperly place the burden for achievement on the individual landowner. 41 These same controls as incident to historic district ordinances, however, have been typically upheld. 42 This approach can be easily justified on the basis of reciprocal benefits. 43 Such justification is not apparent in the case of controls im-


38. Some of these tests are: 1) the noxious use theory, which distinguishes whether the regulation restricts an owner to avoid public harm or to obtain a public benefit, see Pennsylvania Coal Co v. Mahon, 260 U.S. 393 (1922) (Brandeis, J., dissenting) and Dunham, A Legal and Economic Basis for City Planning, supra note 29, at 669; 2) the enterprise theory, (basically a modification of the above) which distinguishes between a detriment to a person enhancing the economic value of some governmental enterprise and the improvement of the public condition through resolution of conflict within the private sector of society, see Sax, supra note 29, at 63; 3) the physical invasion test, which involves determining whether or not the public or its agents have physically used or occupied something belonging to the claimant, see Michelman, supra note 29, at 1184; and 4) the fairness test, which involves determining whether the public welfare is furthered at the expense of particular individuals, see Michelman, supra note 29, at 1218-24.


40. See note 24 and accompanying text, supra.


42. See generally note 24, supra. This is true even if the property controlled is not itself of historic value but is within or adjacent to a historic district. Bohannan v. City of San Diego, 30 Cal.App.3d 416, 106 Cal. Rptr. 333 (1973); City of New Orleans v. Levy, 223 La. 14, 64 So.2d 798 (1953); City of New Orleans v. Pergament, 198 La. 852, 5 So. 2d 129 (1941).

43. Sax, supra note 29, at 73, explains reciprocal benefits stating that even though the "restriction clearly enhances the resource value of a government enterprise, . . . compensation is properly denied on the ground that the 'victims' received benefits which equal or exceed the detriment imposed." Usually, these ordinances are upheld because "the regulation is directed at the protection of property value or the preservation and the protection of an economically significant industry—tourism." Note, The Police Power, Eminent Domain and the Preservation of Historic Property, supra note 19, at 720.
posed upon individual historic property not a part of a historic district because the owner does not receive the benefits of area wide regulation.  

A particularly interesting aspect of historic district and landmark ordinances which raises additional legal issues is that the controls on alteration or demolition of historic property can be permanent or temporary in nature. Certain zoning case precedent suggests that permanent prohibition as applied to the single landmark is of questionable validity without a payment of compensation. There is, however, some precedent in zoning law for upholding temporary stays on alteration or demolition in regard to the single landmark as valid exercises of the police power.

The New York Landmarks Preservation Law adopts the technique of a temporary stay. Under the law, the Landmarks Commission is


45. See Comment, Landmark Preservation Laws: Compensation for Temporary Taking, supra note 29, and Note, The Police Power, Eminent Domain and the Preservation of Historic Property, supra note 19. Case precedent appears to uphold both permanent and temporary delays as incident to historic district ordinances. See City of Annapolis v. Anne Arundel County, 271 Md. 265, 316 A.2d 807 (1974) (temporary restriction of up to one year); City of New Orleans v. Pergament, 198 La. 852, 5 So.2d 129 (1941) (an untimed or permanent restriction). However, it could very well be that these two cases can be narrowly construed. The Anne Arundel case could be limited to situations where the landmark owner is a government body and thus held to a higher burden in pursuit of the public interest, see note 33, supra. The Pergament and other Louisiana cases cited in note 24, supra, might be unique since the Old French Quarter is protected by the Louisiana Constitution, article XIV, § 22A (1921). In any event, historic district ordinances are defensible under the traditional zoning concept of area wide benefits.

46. See Morris County Land Improvement Co. v. Township of Parsippany Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963) and notes 58-60 and accompanying text, infra; Vernon Park Realty Inc. v. City of Mt. Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954) and notes 58-59 and accompanying text, infra. Contra, Just v. Marinette County, 56 Wis. 2d 7, 201 NW.2d 761 (1972). This decision, however, can be attributed to the particularities of Wisconsin environmental law. See note 60, infra.

47. Two recent developments in land use control law point up a possible change in the law: 1) the approval of interim zoning controls by some states, see Hagman, supra note 21, § 40 & n. 86, and Freilich, Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning, 49 J. Urban L. 65 (1971); and 2) the upholding of timed or phased development by the New York Court of Appeals in Golden v. Planning Bd. of the Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972). Contra, Comment, Landmark Preservation Laws: Compensation for Temporary Taking, supra note 29. In comparing landmark ordinances with similar governmental restrictions, this Comment draws a distinction between the so-called freezing cases and the cases similar to set-back (distance away from public access way) requirements. The claim is that though similar factual situations, the freezing cases are takings and the set-back cases are not.

48. See New York City, N.Y., Administrative Code, ch. 8-A, § 207.8.0 (1965), provides
authorized to designate historic districts as well as scattered individual landmark sites. Relief from the stay on demolition imposed on the single landmark varies with the profit status of the landowner. The

for prescribed time periods for the granting of a certificate of appropriateness. The maximum length of time for these administrative provisions vary substantially between tax-exempt (380 day maximum) and taxable (220 day maximum) properties. Section 207-5.0 governs the time limits for granting a certificate of no exterior effect and Section 207-9.0 governs the same for the regulation of minor work.


50. New York City, N.Y., Administrative Code ch. 8-A, § 207.8.0 a (1965) stipulates the standards which apply to 1) taxable and 2) tax-exempt properties when a demolition or alteration permit is requested on ground of insufficient return:

(1) . . . the applicant establishes to the satisfaction of the commission that:
   (a) the improvement parcel (or parcels) which includes such improvement, . . . is not capable of earning a reasonable return; and
   (b) the owner of such improvement:
      1) in the case of an application for a permit to demolish, seeks in good faith to demolish such improvement immediately (a) for the purpose of constructing on the site thereof with reasonable promptness a new building or other income-producing facility, or (b) for the purpose of terminating the operation of the improvement at a loss; or
      2) in the case of an application for a permit to make alterations or reconstruct, seeks in good faith to alter or reconstruct such improvement, with reasonable promptness, for the purpose of increasing the return therefrom;
   (2) . . . the applicant establishes to the satisfaction of the commission, . . . that:
      (a) the owner of such improvement has entered into a bona-fide agreement to sell an estate of freehold or to grant a term of at least twenty years in such improvement parcel, which agreement is subject to or contingent upon the issuance of the certificate of appropriateness or a notice to proceed;
      (b) the improvement parcel which includes such improvement, . . . would not, if it were not exempt . . . from real property taxation, be capable of earning a reasonable return;
      (c) such improvement has ceased to be adequate . . . for carrying out both (1) the purposes of such owner to which it is devoted and (2) those purposes to which it had been devoted when acquired unless such owner is no longer engaged in pursuing such purposes; and
      (d) the prospective purchaser or tenant:
         (1) in the case of an application for a permit to demolish seeks and intends, in good faith either to demolish such improvement immediately for the purpose of constructing on the site thereof with reasonable promptness a new building or other facility; or
         (2) in the case of an application for a permit to make alterations or reconstruct, seeks and intends in good faith to alter or reconstruct such improvement, with reasonable promptness.
profit-oriented owner must show that the landmark site is not capable of earning a reasonable return;\(^{51}\) the charitable owner must show that the property has ceased to be adequate for his purposes and that he has entered into an agreement for sale or lease of at least twenty years.\(^{52}\)

**THE DECISION**

In *Lutheran Church in America v. City of New York* the New York Court of Appeals, unlike the lower courts, proceeded directly to the salient issue of the case:

whether that part of the New York City Landmarks Preservation Law which purports to give the Landmarks Preservation Commission the authority to infringe upon the free use of individual premises remaining in private ownership is a valid use of the city’s police power in cases where an owner organized for charitable purposes demonstrates hardship, economic or otherwise.\(^{53}\)

The court decided the constitutional “taking issue”\(^{54}\) in spite of the fact that the trial court based its decision solely on the factual issue of whether or not the Morgan House was a landmark.

The court discusses at some length the “taking” law that applies to this case, and applies the “taking test” proposed by Sax: when a regulation enhances the value of some governmental enterprise there is a taking, but when the government regulates to resolve conflicts among

---

51. Reasonable return is defined as 6% of the current assessed valuation at the time of filing for a certificate of appropriateness. NEW YORK CITY, N.Y., ADMINISTRATIVE CODE, ch. 8-A. § 207-1.0 g (1965).

52. See generally note 70, infra for a discussion of how the requirements for charitable organizations were expanded to include the charities which did not want to sell or lease their property in Trustees of Sailors’ Snug Harbor v. Platt, 29 App.Div.2d 376, 288 N.Y.S.2d 314 (1968). See also note 78, infra.


54. The court said that “[s]ince this is not a case where the constitutional questions have not before been raised, we see no obstacle to our passing on them for the first time.” Id. at 127, 316 N.E.2d at 309, 359 N.Y.S.2d at 13. The dissenting opinion, on the other hand, voted to remit the constitutional question to the trial court for further proceedings on the factual issue of hardship. Id. at 133, 316 N.E.2d at 313, 359 N.Y.S.2d at 17. (Jasen, J., dissenting). The dissent argued that:

before undertaking adjudication of the constitutionality of the Landmarks Preservation Law, . . . , we should have the benefit of a full exposition of all factual issues with express findings made in the courts below. The instant record simply does not afford us that perspective and as such cannot suffice to render a constitutional determination of such far reaching import to the future of landmarks preservation in the City of New York, the State and the Nation as well.

*Id.* at 135, 316 N.E.2d at 314, 359 N.Y.S.2d at 19. (Jasen, J., dissenting).
private parties, compensation is not required.\textsuperscript{55} In applying the test, the court concludes that the government in this case acted in its "enterprise capacity" since the regulation applied to the Morgan House is "neither in pursuance of a general zoning plan, nor is involved to curtail [a] noxious use. \ldots"\textsuperscript{56}

The court relies on Vernon Park Realty Inc. v. City of Mt. Vernon,\textsuperscript{57} and Morris County Improvement Co. v. Township of Parsippany-Troy Hills,\textsuperscript{58} to show how the net effect of a public regulation can be to add private property to a government's resources without compensation. In Vernon Park Realty the plaintiff's property was zoned for parking purposes only, thus prohibiting the "use of the property for any purpose except the parking and storage of automobiles, a service station within the parking area and the continuance of prior nonconforming uses,"\textsuperscript{59} and placing the burden of resolving the community's traffic problem on a single landowner. Parsippany involved the zoning of a swamp for use as a wildlife, recreation and agricultural area and for sewage facilities, which the court said added the property to municipal resources without the compensation required by the Constitution.\textsuperscript{60} In applying both deci-

\textsuperscript{55} Sax, supra note 29, at 67.

\textsuperscript{56} 35 N.Y.2d at 129, 316 N.E.2d at 310, 359 N.Y.S.2d at 14. It is granted that the regulation does not prohibit a noxious use, but the court does not clarify why it views the regulation as not pursuant to a general zoning plan and therefore arbitrary. Because the court relies upon Vernon Park Realty, Inc. v. City of Mt. Vernon, 307 N.Y. 493, 121 N.E. 2d 517 (1954), a spot zoning case, it could well be that the court is supporting its conclusion that the regulation is not pursuant to a general zoning plan by analogizing the landmark designation to spot zoning. See Wolf, The Landmark Problem in New York, supra note 49, at 105-07 which suggests that the New York City Landmarks Commission would have difficulty in meeting the test of arbitrariness because the ordinance does not clearly specify which structures are likely to be designated. However, as with any legislative or quasi-legislative body, the process and documentation of each individual designation should suffice as a declaration of purpose to be then tested for arbitrariness.

\textsuperscript{57} 307 N.Y. 493, 121 N.E.2d 517 (1954).

\textsuperscript{58} 40 N.J. 539, 193 A.2d 232 (1963).

\textsuperscript{59} 307 N.Y. at 498, 121 N.E.2d at 519. There are two levels of analysis in this case. First, the ordinance was declared void as arbitrary and invalid spot zoning. Contra, Ray Realty Co. v. Board of Zoning Adjustment, 328 Mass. 103, 101 N.E.2d 888 (1951) (a more restricted apartment zone) and Taylor v. Schlemmer, 353 Mo. 687, 183 S.W.2d 913 (1944) (extension of a lower density residential district to a block previously in an apartment district). Accord, Caputo v. Board of Appeals of Sommerville, 331 Mass. 547, 120 N.E.2d 753 (1954) (a three-acre residential island in forty-two-acres zoned industrial, where the character of the area was industrial). Second, the ordinance was declared unconstitutional taking as applied.

\textsuperscript{60} 40 N.J. at 555, 193 A.2d at 241. But see Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972), where the Wisconsin Supreme Court upheld the validity of a county shoreland ordinance because public rights to eradicate and prevent pollution of the natural state can be protected by means of the police power even if it means private lands are
sions to the instant case the court concluded that for practical purposes the commission had added the House to the resources of the city by depriving the plaintiff of the reasonable use of its land. The Sax test of enrichment of a government enterprise at the expense of a private landowner was met.

The New York Court of Appeals considered the validity of the Morgan House designation in view of the historical prohibition against unreasonable limitations on the “use” of property stating that “a zoning ordinance in order to be validly applied cannot . . . serve to prohibit the use to which the property is devoted at the time of the enactment of the ordinance.” The court relies on the Forster v. Scott definition of what constitutes an unreasonable infringement on the use of property:

What the legislature cannot do directly, it cannot do indirectly. . . . It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner.

The court concludes that the landmark designation in the instant case prohibits the “use” to which the property has been put for over twenty years because of the plaintiff’s inability under the designation to replace the building, a necessary prerequisite to continue its functioning. In arriving at this conclusion, the court does not distinguish between direct restrictions on the use of land as in traditional zoning ordinances and the “indirect” restrictions on use imposed by landmark and historic

---

restricted to their natural uses. “The changing of wetlands and swamps to the damage of the general public by upsetting the natural environment and the natural relationship is not a reasonable use of that land. . . .” Id. at 17, 201 N.W.2d at 768. The “natural state” theory proposed in Marinette County, though a hallmark in environmental law, is difficult to extend to landmark preservation law. In order to impose such a high burden on an individual property owner’s right to use his property, the public purpose must be one of extreme necessity, e.g., the prevention of pollution.

61. 35 N.Y. at 129, 316 N.E.2d at 310, 359 N.Y.S.2d at 14. Basically, a change in use would be classified as a nonconforming use with specific provisions for amortization, allowance of alterations, expansions, etc. HAGMAN, supra note 21, §§ 80-89.


63. Id. at 584, 32 N.E. at 977. Accord, Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951). In the Forster case, the property owner was deprived of the right to build upon his property. The deprivation was caused by a statute providing that after a map of a proposed street has been filed, no compensation can be made to the owner for any improvements put upon the land during the time between the filing of the map and the condemnation proceeding.

64. 35 N.Y.2d at 129, 316 N.E.2d at 310, 359 N.Y.S.2d at 14.
district ordinances as was done in *City of Annapolis v. Anne Arundel County.*

The court also does not distinguish between the absolute limitations in the *Vernon Park Realty,* the *Parsippany* and the *Forster* cases, and the temporary stay under the Landmark Preservation Law. The defendant in *Keystone Associates v. Moerdler,* an earlier case, attempted to draw such a distinction by suggesting that there was a taking in the *Forster* case because the ordinance was indefinite in duration. The court, however, said this contention was irrelevant since "where the restriction itself cannot be justified, the period of time during which it operates is of no relevance" other than to clarify the degree of damage or loss. Using the *Forster* and *Keystone* cases, the court seems to be saying that even an "indirect" restriction on use is constitutionally prohibited, and a definite time duration for a temporary restriction is irrelevant if the use of the property is impaired at all.

The majority states that the similarity between *Keystone,* *Forster* and the instant case is that in all of them title remained in the record owner during the period that the use of the property was severely impaired. The court distinguishes these former cases, however, by noting that they held the statute itself unconstitutional; whereas in the instant case the Landmark Law is not per se unconstitutional, although it may be unconstitutional as applied in certain factual situations.

Finally, the court articulates the confiscation test that is to be applied in the case of a charitable organization not seeking to sell or lease its property: Whether landmark designation would prevent or seriously interfere with the carrying out of the charitable purpose. The New York Court of Appeals, while using this test developed in *Trustees of Sailors' Snug Harbor v. Platt,* does not totally follow that case's precedent.

---

65. 271 Md. at 294, 316 A.2d at 822. See discussion in text accompanying notes 31-34, *supra.* This distinction could be important in terms of degrees of proof: to prove an indirect restriction on use would appear to require a higher burden of proof on the part of the property owner in view of the presumption of validity accorded to zoning ordinances.


67. *Id.* at 88, 224 N.E.2d at 703, 278 N.Y.S.2d at 189.

68. *Id.*

69. 35 N.Y.2d at 130, 316 N.E.2d at 311, 359 N.Y.S.2d at 15.

70. The test was developed in *Trustees of Sailor's Snug Harbor v. Platt,* 53 Misc. 933, 280 N.Y.S.2d 75 (Sup. Ct. 1967); rev'd on other grounds, 29 App.Div.2d 376, 288 N.Y.S.2d 314 (1968). The appellate division reversed a lower court ruling that there was a taking on the grounds that there were not sufficient facts on which to render a determination as to whether the preservation of the buildings would seriously interfere with the use of the property, whether the buildings were capable of conversion to a useful purpose without excessive cost, or whether costs of maintaining them would entail serious expenditure.

70.1. 53 Misc. 933, 280 N.Y.S.2d 75 (Sup. Ct. 1967).
Trustees was remanded for further fact finding on the issue of hardship. Whereas in Lutheran Church the court found that the test was met since the allegation of economic hardship of the plaintiff "stands substantially unrebutted by the defendants" and "it is uncontested that the existing building is totally inadequate for plaintiff's legitimate needs and must be replaced if plaintiff is to be able freely and economically to use the premises. ..." 71

There are two alternate theories for the holding in this case. One theory is that, although the public purpose of the ordinance is not challenged, perhaps the court was influenced by the apparently insufficient historic value of the Morgan House. 72 The fact that the artistic and historic value of the property was in dispute could have had a great impact in the court's application of the balancing test of public benefit versus private loss. Perhaps, the court is indirectly saying that preservation of buildings of questionable historic or architectural value is not a public purpose under the police power.

A second theory of the holding is based on the reasonableness of the regulation. The court highlights twice in the opinion 73 the fact that the ameliorative provisions of the Law that apply to taxable property do not apply to charitable owners: 74 "[p]laintiff is a charitable organization and not otherwise subject to the various administrative alternatives set up in section 207-8.0 which could result in condemnation of the property

71. 35 N.Y.2d at 132, 316 N.E.2d at 312, 359 N.Y.S.2d at 17. The dissent argued for remanding to the trial court for further fact-finding. Id. at 133, 316 N.E.2d at 313, 359 N.Y.S.2d at 18. (Jasen, J., dissenting). In addition, the dissent raises the defense alleged in defendant's brief that the property is not zoned for a nineteen-story office building. Id. at 133 n. 2, 316 N.E.2d at 313 n. 2, 359 N.Y.S.2d at 18 n. 2. (Jasen, J., dissenting). The dissent claimed the controversy is thus rendered academic until such a time as the zoning is appropriately varied. This allegation was summarily dismissed by the majority opinion as irrelevant to the constitutional issue before them. Id. at 126, 316 N.E.2d at 309, 359 N.Y.S.2d at 12. The majority's conclusion was well-reasoned since at issue before the court was whether a restraint on demolition constitutes a taking. Whether or not existing zoning permits the Lutheran Church to build their proposed building was not a factor in determining the constitutionality of the Landmarks Law as applied.

72. The court at one point said: "None of the defendants' witnesses, however, testified that this house was an architectural masterpiece, nor was there any evidence that any significant historical event ever took place therein." 35 N.Y.2d at 127, 316 N.E.2d at 309, 359 N.Y.S.2d at 12. Also, the court interjected at one point that the finding of hardship and legitimate need was somehow especially supported by the fact that "adjoining structures have been integrated with plaintiff's operations." Id. at 132, 316 N.E.2d at 312, 359 N.Y.S.2d at 17. This latter fact would seem to negate the value of the Morgan House as a "free-standing brownstone."

73. Id. at 124, 131, 132, 316 N.E.2d at 307, 312, 359 N.Y.S.2d at 10, 16.

74. New York City, N.Y., Administrative Code, ch. 8-A, § 207-8.0 a (1965). See also note 50, supra.
sought to be altered or demolished. 75

Section 207-8.0 i of the Landmarks Law provides that, upon a determination by the Landmarks Commission that the four requirements for a charitable organization are met, 78 the commission should find a purchaser or tenant of the improvement parcel or parcels within one hundred and eighty days of the initial determination. If this endeavor is not successful within the stipulated period, the commission then may, within twenty days after the expiration of the one hundred eighty day period, recommend to the mayor that the city acquire a protective interest in the structure. If within ninety days after transmission of this recommendation, the city does not give notice to condemn, the commission will issue a notice to proceed. 77 The court seems to construe these provisions as only applicable to charities seeking to sell or lease their properties. However, in the same way that the court adopted the Trustees' test for charities not wanting to sell or lease their properties, it could have applied these provisions in Lutheran Church. 78

Even if the court had construed that the charitable provisions of section 207-8.0 applied, in all likelihood the court would still have found an invalid "taking" by applying the principles articulated in the

75. 35 N.Y.2d at 131-32, 316 N.E.2d at 312, 359 N.Y.S.2d at 16. The dissent stated the same conclusion, limiting it to the absence of any express ameliorative provisions for charitable owners who do not wish to sell or lease their property and not charitable owners in general. 35 N.Y.2d at 135, 316 N.E.2d at 314, 359 N.Y.S.2d at 19. (Jasen, J., dissenting). However, the dissenting opinion suggested that all possible remedies had not been exhausted since "there has been no exposition whatever of plaintiff's option to transfer the air rights, the theoretical surplus of unused floor area, from the landmark site to plaintiff's adjacent five story administrative office annex." 35 N.Y.2d at 122 n. 2, 316 N.E.2d at 313 n. 2, 359 N.Y.S.2d at 18 n. 2 (Jasen, J., dissenting). See note 91, infra for a discussion of New York's transfer of development rights provisions.

76. See note 50, supra, for an exposition of the four requirements for charities. See also notes 11, 70, supra.

77. NEW YORK CITY, N.Y., ADMINISTRATIVE CODE, ch. 8-A, § 207-8.0 i (1965).

78. Id. These provisions, however, are of a different nature than those provided for taxable property such as total or partial tax exemption, remission of taxes and authorization for alterations, construction or reconstruction appropriate to the Landmark Law. The main remedy provided for non-tax-exempt properties in order to guarantee a reasonable return is the remission of taxes. Id. § 207-8.0 c. The more stringent requirements for charitable organizations have been criticized by some legal commentators as questionable provisions. Rankin, Operation and Interpretation of the New York City Landmarks Preservation Law, 36 LAW & CONTEMP. PROB. 306 (1971) and Comment, Legal Methods of Historic Preservation, supra note 11. On the other hand, it could be argued that a more stringent standard should apply to charities since they are already the recipients of substantial benefits resulting from their tax-exempt status. The development of additional remedies for charitable organizations amounts to a "windfall" because they already possess the main remedy allowed for taxable properties."
Keystone case. The fact that condemnation at the end of the temporary stay period is "optional" with the commission as well as the New York City Council, and that the law contains no explicit provisions for delay damages or other express relief, would provide a basis for the court of appeals' "taking" conclusion. It is apparent that where there is a "freezing" of the incidents of ownership (in this case demolition) without any administrative relief or adequate compensation, the action will be construed a "taking."

Previous New York case law appears to uphold this view of a freezing action. However, in Golden v. Planning Board of Town of Ramapo, the New York Court of Appeals said, "the fact that [an] ordinance limits the use of, and may depreciate the value of the property will not render it unconstitutional . . . unless it can be shown that the measure is either unreasonable in terms of necessity or the diminution in value is such as to be tantamount to a confiscation." Though the court of appeals could have found that in terms of the rapidity with which urban landmarks are disappearing there is a great public necessity to stop the trend, and that a temporary stay on demolition to seek other solutions is not an unreasonable means of attaining the objective, it decided to follow the precedent of Keystone to find a taking.

---

79. Keystone Assoc. v. Moerdler, 19 N.Y.2d 78, 224 N.E.2d 700, 278 N.Y.S.2d 185 (1966). This case, declaring a statute relating to the disposition of the old opera house void as unconstitutional, has three main points: 1) compensation for taking must be sure and certain; 2) the legislature cannot set a maximum figure on the amount of compensation that will be paid; and 3) if a restriction itself cannot be justified, the period of time during which it operates is of no relevance.

80. See New York City, N.Y., Administrative Code, ch. 8-A, § 207-8.0 i (1965) and discussion in text accompanying notes 76-77, supra.


82. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972). In this case, a series of requirements had to be met in order to uphold the validity of a timed growth ordinance. First, the purpose of the ordinance was one of public necessity i.e., orderly community growth with adequate public facilities. Second, the restricted property owners received a benefit from the restriction. The hardship of holding nonproductive property for some time might be compensated for by the ultimate benefit reverting to the owner as a result of substantial increase in value. The restriction could be for as long as 18 years in accordance with the long-range capital improvements program. Third, there was a guarantee that the temporary restrictions would be lifted at the specified time. (The Town of Ramapo committed itself to a program of development while placing restrictions on land use.) Fourth, there was an ameliorative provision in the ordinance allowing the property owner to develop his land if he provided the public facilities.

83. Id. at 381, 285 N.E.2d at 304, 334 N.Y.S.2d at 155.

Urban landmarks are increasingly threatened with extinction because of the pressures of the marketplace for the "highest and best use" of the land. Landmark ordinances restricting the right of individual landmark owners to demolish or alter the landmark structure impose a dual burden on the property owners: higher maintenance costs to preserve the landmark and reduced property values. Even temporary restrictions on demolition, while alternative plans for preservation are developed, may result in delay damages and decreased property values. Furthermore, due to the large amount of public funds required, and the problems attendant to removal of properties from the marketplace, the government purchase of fee interests for urban landmarks is impracticable.

The case of Lutheran Church in America v. City of New York, even though narrowly decided on its facts, sets an important precedent for single landmark preservation. A temporary restriction on a charitable organization's landmark property, designated as such under a landmark ordinance which has no express ameliorative provisions for charities not wanting to sell or lose their property, will be considered a "taking" if the existing structure is totally inadequate for the charitable purpose. Though the case did not invalidate any provision of the Landmarks Law and, in fact did not even test any of the express provisions of the Act, another New York case, Keystone Associates v. Moerdler9 suggests that even the express ameliorative provisions for taxable property86 and for tax-exempt property where the owner wishes to sell or lease might still amount to a taking.87

In order to avoid the pervasiveness of the taking issue, landmark ordinances should incorporate certain explicit provisions in order for the courts to view single landmark preservation more favorably. The two New York cases, Golden v. Planning Board of Town of Ramapo88 and Keystone Associates v. Moerdler,89 offer some criteria that could be

86. See New York City, N.Y., Administrative Code, ch. 8-A, § 207-8.0 c (1965). See also Keystone Assoc. v. Moerdler, 19 N.Y.2d 89, 224 N.E.2d 700, 278 N.Y.S.2d 185 (1966), note 79, supra, which mentions that the legislature cannot set a maximum figure on the amount of compensation that will be paid. This could mean that the setting of a fixed 6% return for taxable properties will also be invalid. See Wolf, The Landmark Problem in New York, supra note 49, at 107-08, which explains that the 6% of assessed valuation established as a reasonable return for landmarks in the N.Y. Landmarks Preservation Law is based on the amount allowed under the Rent Control Laws. The position is that what may be reasonable for emergency rent control may not be reasonable for landmarks.
87. See discussion in text accompanying notes 73-80, supra.
88. See note 82, supra.
89. See note 79, supra.
applied to New York City's Landmarks Law as well as to similar ordinances in other states. First, courts and legislatures must be persuaded to expand the concept of "public necessity" to include the predicament of the urban landmark. In this way the weight of the public purpose for application of the constitutional balancing test between public benefit and private loss would be increased. This can be done both by legislative findings of fact in adoption of landmark ordinances and by evidence introduced in the courtroom. Second, there must be some benefit or remedy accruing to the landmark owner as a result of the restriction. This would amount to the provision of explicit remedies in the ordinance to cure any delay damages as well as property value loss. *Keystone* refines the requirements for ameliorating loss; compensation for a "taking" must be sure and certain. The New York City Landmarks Law makes condemnation optional both for the Landmark Commission to recommend such to the City Council and for the council to take action. Thus a landmark owner's property rights of demolition and alteration are delayed for a specified time period and, if no plan for preservation is accepted and the city does not condemn, the landowner is left remedyless even if he incurred a loss for the delay. Alternate remedies must be provided for negotiation during the period of delay and, hopefully, even before a landmark owner asks for a demolition or alteration permit. The New York City Landmarks Law provides for the remission of taxes in the case of taxable properties, but other remedies are possible such as the creation of a transfer development rights bank, the creation of a

90. 19 N.Y.2d at 89, 224 N.E.2d at 703, 278 N.Y.S.2d at 190.
91. J. Costonis, *Space Adrift: Landmark Preservation and the Marketplace* 56-57 and 105-06 (1974). See also Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 Yale L.J. 75 (1973); Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 Harv. L. Rev. 574 (1972); and Note, *Development Rights Transfer in New York City*, 82 Yale L.J. 338 (1972). The transfer of development rights provisions under New York City's Zoning Ordinance were established to supplement the relief provisions of the Landmark Preservation Law. Note, *Development Rights Transfer in New York City*, supra, at 351, mentions two "resolutions;" the 1961 § 74-79 resolution, which allows transfer of potential development rights to a contiguous parcel provided that both areas were under the same ownership; and a 1968 amendment, which expands the definition of "contiguous" to include land across the street and permits transfers between separately owned properties. In order to effectuate such a transfer certain conditions must be met: there must be a willing buyer of the rights, the property owner must be willing to sell (unless the municipality wants to condemn the rights), the property must have an excess or unused portion of development rights, and the transfer of the rights to contiguous property however defined should not unduly increase the density or destroy the historical or architectural character of the landmark structure. The facts of *Lutheran Church* mandate compliance with the last three requirements. First, the property owner must be willing to accept the plan to transfer its rights to the adjacent 5-
revolving fund for building maintenance subsidies in order for landmark owners to maintain a reasonable return, acquisition by the city of a scenic easement over the exterior of the structure, and the creation of a landmarks not-for-profit corporation to buy, by negotiation or condemnation, and lease landmark properties back into the marketplace.

If these alternatives are not feasible, the landmark owner must still be guaranteed compensation. This could be done by the municipality guaranteeing, if none of the plans are accepted by the end of the delay period, that it will either condemn the property and pay the assessed value prior to designation or that the landmark owner will be allowed to alter or demolish but be paid any actual delay damages. If some or all of these ameliorative provisions are not included in a landmarks ordinance, dependence must be placed solely on the courts to find temporary stays on demolition without compensation constitutional. The stance of the New York Court of Appeals in Lutheran Church, as clarified using the criteria identified in the Keystone and Ramapo cases, and the precedent value a New York case will have on landmark preservation law in general, makes the prospects of such a finding questionable. Landmark preservation is a costly proposition and the basic issue is whether the public will be willing to bear the cost.

Nilda Soler

story building. Second, the Morgan House landmark site must have unused rights to transfer. Since the site is not zoned to permit a 19-story office building the question is raised as to whether there were any such unused rights. However, the city could negotiate to amend or change the zoning to allow for such a transfer. Would this again be spot zoning? Third, there is the problem of the architectural character of the Morgan House being diminished by an adjacent 19-story office building. In spite of these problems, the possibility of using transfer development rights as an ameliorative device was lost in this case because of the majority's insistence that there was sufficient proof introduced at the trial court level to decide the constitutional issue.

92. Comment, Legal Methods of Historic Preservation, supra note 11, at 621.

93. For other possible approaches, see id. at 616-24.