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Note: Landmark Preservation: The Problem of the Tax-Exempt Owner

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LANDMARK PRESERVATION: THE PROBLEM OF THE TAX-EXEMPT OWNER

Introduction

In 1965, the City Council of New York, in a move reflective of a nationwide trend,[1] enacted the Landmark Preservation Act (Act)[2] in order to secure the survival of New York City landmarks. The Act, drafted with deference to aesthetic as well as legal principles, authorizes the Mayor to create a Commission[3] empowered to designate structures and districts in New York City as historic landmarks and landmark areas.[4]

This desire to preserve the physical "reminders" of the past, how-

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1. For background materials and surveys of the issues raised by the topic see *Symposium—Historic Preservation*, 36 LAW & CONTEMP. PROB. 309 (1971); Blumberg, *Legal Methods of Historic Preservation*, 19 BUFFALO L. REV. 611 (1970); Wolf, *The Landmark Problem in New York*, 22 N.Y.U. INTRA. L. REV. 99 (1967); Note, *The Police Power, Eminent Domain, and the Preservation of Historic Property*, 63 COLUM. L. REV. 708 (1963). The articles of Ada Louise Huxtable and Paul Goldberger, architecture critics of the New York Times, provided a useful source of information for this Note, in their coverage of the trend in the United States to preserve urban landmarks. *See* N.Y. Times, July 15, 1974, at 24, col. 5; *id.*, July 14, 1974, at 83, col. 1; *id.*, July 8, 1974, at 29, col. 2; *id.*, July 2, 1974, at 34, col. 4; *id.*, June 29, 1974, at 28, col. 2; *id.*, June 26, 1974, at 1, col. 4; *id.*, June 9, 1974, at 107, col. 1; *id.*, June 2, 1974, at 48, col. 4; *id.*, Apr. 15, 1974, at 35, col. 1; *id.*, Mar. 23, 1974, at 34, col. 1; *id.*, Mar. 20, 1974, at 45, col. 4.

2. Law of April 19, 1965, No. 46, [1965] N.Y. Local Laws 261 (codified at NEW YORK, N.Y. ADMIN. CODE ANN. ch. 8-A, §§ 205-1.0 to 207-21.0 (1971), *as amended*, [1973] N.Y. Local Law No. 71 [hereinafter cited as Landmarks Act]. The Act was passed under the New York Historic Preservation Enabling Act of 1956. Law of April 2, 1956, ch. 216, [1956] N.Y. Laws 908, formerly codified as N.Y. GEN. CITY LAW § 20(25-a) (McKinney 1968)). In 1968 the relevant provision of the original Enabling Act was repealed and reenacted in substance as N.Y. GEN. MUNIC. LAW § 96-a (McKinney Supp. 1974).

3. The Commission consists of eleven members appointed for three year terms, including architects, city planners, art historians, and real estate consultants. Interview with Charles Bolet, Community Relations Director of the Landmark Commission of New York City, in New York City, Aug. 7, 1974.

4. Landmarks Act § 207-2.0.

ever, has clashed with the individual's constitutional right to use and control his own property.[5] As a practical matter, landmark preservation laws fail to confront this conflict; litigation invariably results.[6] The effectiveness of the laws becomes increasingly questionable with every demolition of another landmark and with each uncompensated, deprived property owner. This Note will examine the effectiveness of the Act in meeting this conflict, with particular attention to the unprotected status of the tax-exempt property owner.[7]

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5. "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.

6. *See, e.g.*, Maher v. City of New Orleans, 371 F. Supp. 653 (E.D. La. 1974); Opinion of the Justices, 333 Mass. 773, 128 N.E.2d 563 (1953); Lutheran Church in America v. Landmarks Comm'n, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974); Sailors' Snug Harbor v. Platt, 29 App. Div. 2d 376, 288 N.Y.S.2d 314 (1st Dep't 1968).

7. The legal ramifications of landmark preservation have been the subject of thorough and exhaustive study in law reviews in the past ten years. Historic district and preservation laws in other cities have received extensive attention by other writers. This Note does not speak to the area in a general way, nor does it deal with any preservation statutes other than the New York City Landmarks Preservation Act. It focuses particularly on the failure of the New York Act to provide viable alternatives for an uncompensated charitable owner of an individual landmark site. Such a failure warrants in-depth consideration because of the recent cases involving that situation, notably the Lutheran Church's ownership of the J.P. Morgan Mansion. *See* Lutheran Church in America v. Landmarks Comm'n, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974). The status of the tax-exempt owner in New York City has received only cursory attention. For a broader analysis of the area see Blumberg, *Legal Methods of Historic Preservation*, 19 BUFFALO L. REV. 611 (1970); Boasberg, *Washington Beat: Historic Preservation—Some Practical Problems with the Federal Funding Approach*, 5 URBAN LAW. 749 (1973); Kramer, *Proposed Guidelines for Historic Preservation in Texas*, 5 TEXAS TECH L. REV. 61 (1973); Wolf, *The Landmark Problem in New York*, 22 N.Y.U. INTRA. L. REV. 99 (1967); *Symposium—Historic Preservation*, 36 LAW & CONTEMP. PROB. 309 (1971); *Symposium—Aesthetics vs. Free Enterprise*, 15 PRAC. LAW. 17 (1969); Note, *Aesthetic Considerations in Land Use Planning*, 35 ALBANY L. REV. 126 (1970); Note, *Land Use Controls in Historic Areas*, 44 NOTRE DAME LAW. 379 (1969); Note, *Landmark Preservation Laws: Compensation for Temporary Taking*, 35 U. CHI. L. REV. 362 (1968).

The Constitutionality of Landmark Preservation Laws

Landmark preservation laws closely resemble zoning ordinances in that they constitutionally regulate real property.[8] The presumption of validity and constitutionality of comprehensive zoning was first established in *Euclid v. Ambler Realty Co.*[9] *Euclid* involved an ordinance forbidding the construction of industrial establishments in designated residential districts. While upholding the validity of the ordinance, the Supreme Court considered whether the right to property was violated by regulations promulgated under the guise of the police power. The Court stated:

> Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. . . . [I]n this there is no inconsistency, for while the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.[10]

The Court concluded that no fundamental right was violated, stating that zoning ordinances were constitutional unless clearly shown to be arbitrary, unreasonable, and without a "substantial relation to the public health, safety, morals, or general welfare."[11] After *Euclid*, zoning laws were enacted in forty-five states.[12]

While the Court established the validity of zoning in *Euclid*, it did not discuss the possible aesthetic aspects of such regulation.[13] Since *Euclid*, this issue has frequently been presented for judicial consideration. Early decisions held that purely aesthetic considerations were not sufficient to justify an invasion of an individual's property rights, though aesthetics could be said to be an element of the

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8. *See generally* R. ANDERSON, NEW YORK ZONING LAW AND PRACTICE (2d ed. 1973).

9. 272 U.S. 365 (1926).

10. *Id.* at 387.

11. *Id.* at 395. *See also* Nectow v. City of Cambridge, 277 U.S. 183 (1928), where the Court struck down an ordinance similar to that in *Euclid* on the grounds that it did not have the requisite relation to the public health and welfare. *Id.* at 187.

12. C. HAAR, LAND-USE PLANNING 165 (1959).

13. 272 U.S. at 386-90.

14. *See, e.g.*, Maher v. City of New Orleans, 371 F. Supp. 653 (E.D. La. 1974); Opinion of the Justices, 333 Mass. 773, 128 N.E.2d 563 (1955);

"general welfare."[15] Later, in *Berman v. Parker*,[16] the Supreme Court broadened "general welfare" to include both spiritual and aesthetic values:

> 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.[17]

In *People v. Stover*,[18] the New York Court of Appeals included aesthetics as an element to consider in zoning. Defendant homeowner had placed a clothesline on his front lawn and hung old clothing and rags as a protest against the city's high taxes. For the next five years defendant continued adding clotheslines. Finally, the city enacted an ordinance prohibiting, with exceptions, the placing of clotheslines in a front or side yard abutting a street. In ruling against the homeowner, the court held that aesthetic elements may be considered by a legislative body in enacting laws designed to promote health and safety.[19] Although the court may have based its

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Perlmutter v. Greene, 259 N.Y. 327, 182 N.E. 5 (1932); Manhattan Club v. Landmarks Preservation Comm'n, 51 Misc. 2d 556, 273 N.Y.S.2d 848 (Sup. Ct. 1966).

15. *See, e.g.*, Welch v. Swasey, 214 U.S. 91, 106-07 (1909); Dowsey v. Kensington, 257 N.Y. 221, 230-31, 177 N.E. 427, 430 (1931).

16. 348 U.S. 26 (1954). In this case, the District of Columbia Redevelopment Act of 1945, which empowered an administrative agency to redevelop a large area of the District of Columbia in order to eliminate slums and substandard housing conditions, was held constitutional as applied to the taking of appellant's building. The Court concluded that it was not beyond the power of Congress to attack the problems of slums in the cities, nor was it beyond Congress' power to authorize the taking of private property as part of such a project. *Id.* at 34.

17. *Id.* at 33 (citations omitted).

18. 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed for want of substantial federal question*, 375 U.S. 42 (1963).

19. *Id.* at 467, 191 N.E.2d at 274, 240 N.Y.S.2d at 737. The New York courts have found that the zoning power is derived from a specific grant "but not for a purely aesthetic purpose designed for the maintenance or development of the beautification of the city." Melita v. Nolan, 126 Misc. 345, 347, 213 N.Y.S. 674, 677 (1926). By 1931, however, the trend was one

decision on property value considerations,[20] *Stover* stands as an approval of aesthetic zoning allowable within the police power. The New York City Landmarks Act was designed to balance the interests of those aesthetic values and the economic protection of individual property owners.[21]

The New York City Landmarks Preservation Act

The Landmarks Act is distinguished from other cities' preservation laws by the broad definitions of what it seeks to preserve.[22] In the Act's declaration of legislative purpose[23] the City Council noted that New York City's standing:

> as a world-wide tourist center and world capital of business, culture and government cannot be maintained or enhanced by disregarding the historical and architectural heritage of the city and by countenancing the destruction of such cultural assets.[24]

The City Council's more general purposes included the protection of property values in a district,[25] the strengthening of the economy of the city, and the promotion of the use of historic districts for the education, pleasure, and welfare of the city's residents.[26]

The Act defines an "historic landmark" as:

> any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated as a landmark . . . .[27]

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of giving more credence to the concept of aesthetics. Judge Pound noted that it was unnecessary to think of the aesthetic value in extremes: "Beauty may not be queen but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality or decency." Perlmutter v. Greene, 259 N.Y. 327, 332, 182 N.E. 5, 6 (1932).

20. 12 N.Y.2d at 470, 191 N.E.2d at 277, 240 N.Y.S.2d at 740.

21. *See* notes 22-50 *infra* and accompanying text.

22. The preservation laws of other cities define more specifically in stylistic terms the kind of architecture they aim to preserve. *See* Blumberg, *Legal Methods of Historic Preservation*, 19 BUFFALO L. REV. 611, 632 (1970).

23. Landmarks Act § 205-1.0.

24. *Id.* § 205-1.0(a).

25. *See id.* § 207-1.0(h).

26. *Id.* § 205-1.0(b).

27. *Id.* § 207-1.0(k).

The designation of a structure as a landmark appears to be based on architectural rather than historical criteria.[28] The Landmarks Commission may designate a structure to be a landmark on the basis of its own investigative initiative, though neighborhood residents or community groups usually make proposals regarding certain buildings.[29] Notice[30] must be given of the required public hearings where arguments for and against designation are made.[31]

In regulating the maintenance of structures granted landmark status, the powers of the Landmarks Commission conflict with the rights of the property owner. Although the Act originally limited the powers of the Commission to regulation of the exteriors of buildings, in 1973 the City Council enlarged the scope of regulation to include interiors where public access is permitted.[32] In this respect the Commission may impose regulations more restrictive than otherwise provided by applicable law. The Act's regulations apply to construction, alteration, demolition, or use of landmark property, or to the performance of minor work thereon.[33] It is unlawful for any person in charge[34] of a landmark site to perform such work unless a certificate of appropriateness has been issued.[35] When an applicant requests a certificate, a public hearing is held, and the Commission must act on the application within ninety days.[36]

Under the Act the owner of a landmark is entitled to earn a net annual return of six percent of the value of his landmark property.

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28. Interview with Charles Bolet, Community Relations Director of the Landmark Commission of New York City, in New York City, Aug. 7, 1974.

29. *Id.*

30. Landmarks Act § 207-12.0(a).

31. *Id.* § 207-12.0(b).

32. [1973] N.Y. Local Law No. 71.

33. Landmarks Act § 207-3.0(b).

34. *Id.* § 207-1.0(t) defines a person in charge as "[t]he person or persons possessed of the freehold of an improvement or improvement parcel or a lesser estate therein, a mortgagee or vendee in possession, assignee of rents, receiver, executor, trustee, lessee, agent or any other person directly or indirectly in control of an improvement or improvement parcel."

35. *Id.* § 207-16.0. Violators of the Act's regulations of construction, alteration and demolition "shall be guilty of a misdemeanor and shall be punished by a fine of [$100 to $1000] . . . or by imprisonment for not more than one year, or by both . . . ."

36. *Id.* § 207-8.0(g)(2).

Most cases involve owners not realizing such a return.[37] If such an owner establishes his inability to earn the six percent return and the Commission denies him a certificate, the Act places upon the Commission the burden of devising a plan whereby the landmark may be preserved and rendered "capable of earning a reasonable return."[38] Such a plan may include, *inter alia*, a partial or complete tax exemption, remission of taxes, or an authorization of alteration, construction, or reconstruction consistent with the criteria of the Commission.[39] The owner need not accept the plan, and if rejected, the Commission may send the mayor a recommendation that the City condemn the property.[40]

These measures, enacted to ensure economic stability for landmark owners, are directed exclusively to the owner of taxed property,[41] and seem to have been effective in practice.[42] The Act, however, is ineffective insofar as it fails to protect owners of non-taxed property. The distinctions in the Act between owners of taxed property and tax-exempt property have been challenged as unconstitutional.[43]

In order to acquire a certificate of appropriateness to permit alteration or demolition on the ground of insufficient return, the owner of a tax-exempt landmark must establish that he has entered into an agreement to sell or lease the property, that the property is incapable of earning a reasonable return, that it has become unsuitable for its intended purpose, and that the prospective purchaser or tenant intends to alter or demolish the premises.[44] If the tax-exempt

37. *See* notes 53, 67 *infra* and accompanying text.

38. *See id.* § 207-1.0(c). A valuation of the "reasonable return" shall be "the current assessed valuation established by the city, which is in effect at the time of the filing of the request for a certificate of appropriateness . . . ." *Id.* § 207-1.0(v)(2).

39. *Id.* § 207-8.0(b).

40. *Id.* § 207-8.0(g)(1).

41. *Id.*

42. Interview with Charles Bolet, Community Relations Director of the Landmark Commission of New York City, in New York City, August 7, 1974. *See generally* Landmarks Act § 207-8.0.

43. Sailors' Snug Harbor v. Platt, 29 App. Div. 2d 376, 288 N.Y.S.2d 314 (1st Dep't 1968); *see* note 57 *infra* and accompanying text.

44. Owners of tax-exempt property must establish that: "(a) the owner of such improvement has entered into a bonafide agreement to sell an estate of freehold or to grant a term of at least twenty years in such im-

property owner satisfies these requirements, the Commission must find an alternate purchaser or tenant who will buy or lease without a certificate of appropriateness.[45] If the Commission fails to do so, the owner may do as he wishes with the property.[46] Almost without exception, demolition of the landmark is the end result.[47]

The *Lutheran Church* Case

The problem presented to the owner of tax-exempt property who wishes to retain the property in an altered form is raised in *Lutheran Church in America v. Landmarks Commission.*[48]

The Lutheran Church in America has owned the J.P. Morgan mansion since 1942.[49] In November, 1965, over the Church's opposition, the Landmarks Commission designated it a landmark.[50] Subsequently, the Church unsuccessfully[51] attempted to obtain Com-

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provement 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, as existing at the time of the filing of such request, would not, if it were not exempt in whole or in part from real property taxation, be capable of earning a reasonable return; (c) such improvement has ceased to be adequate, suitable or appropriate for use 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 purchasers 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 improvement, with reasonable promptness." Landmarks Act §§ 207-8.0(a)(2)(a)-(d).

45. *Id.* § 207-8.0(i)(1).

46. *Id.* § 207-8.0(i)(4)(b).

47. *Id.* § 207-8.0(i)(5).

48. Lutheran Church in America v. Landmarks Comm'n, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974).

49. *Id.* at 124, 316 N.E.2d at 307, 359 N.Y.S.2d at 10.

50. *Id.* The Church registered its official complaint: "It appears undisputed that plaintiff's office space requirements increased to such an extent that, even with the addition of a brick wing in 1958, the building became totally inadequate." *Id.*

51. *Id.*

mission permission to demolish the mansion and replace it with a fifteen story office building to house its administrative offices. The New York Court of Appeals ruled in favor of the Church, and granted permission to demolish the landmark structure. Finding a "taking" without just compensation by the state, the court ruled that the Church's economic hardship outweighed any intrinsic merit in maintaining the structure for the general welfare.[52]

Lutheran Church illustrates the statute's paucity of alternatives for the owner of tax-exempt property. Because the tax rebate or remission option is inapplicable, the owner of such tax-exempt property who does not want to sell is faced with the prospect of being forced to retain the property in its burdensome condition. The court rejected this result as violative of the fifth and fourteenth amendments of the United States Constitution and the corresponding sections in the New York State Constitution:[53]

> What has occurred here . . . where the commission is attempting to force plaintiff to retain its property as is, without any sort of relief or adequate compensation, is nothing short of a naked taking . . . . [T]he commission, without any move toward invoking the power of eminent domain, is attempting to add this property to the public use by purely and simply invading the owner's right to own and manage. Legitimate zoning stops far short of this because it does not appropriate to public use. Where the owner can make a case for alteration or demolition the municipality would have to relinquish the designation, provide agreeable alternatives or condemn the premises.[54]

If the court of appeals is saying that the economic burden placed upon the owner of the property voids the decision of the Landmarks Commission, the full effectiveness of the Act could be in serious jeopardy. It can be argued, however, that a reduction in value of the church's property rights is not unconstitutional because the general welfare of the people of New York is being enhanced by the unaltered presence of the mansion. New York courts have consistently upheld the validity of zoning restrictions imposed in the public

52. *Id. See generally* Masotti & Selfon, *Aesthetic Zoning and the Police Power*, 46 URBAN LAW. 773 (1969); Sax, *Taking and the Police Power*, 74 YALE L.J. 36 (1964); Comment, *Aesthetic Considerations and the Police Power*, 35 B.U.L. REV. 615 (1955); Comment, *Landmark Preservation Laws: Compensation for Temporary Taking*, 35 U. CHI. L. REV. 362 (1968).

53. U.S. CONST. amends. V, XIV; N.Y. CONST. art. I, §§ 6-7.

54. 35 N.Y.2d at 132, 316 N.E.2d at 312, 359 N.Y.S.2d at 16-17.

interest,[55] although they may result in a reduction in the value of specific property.[56] The court in *Little v. Young*[57] stated:

> For the benefit of all some of the public, when zoning was ordained by the state, were destined to surrender some of their rights. . . . Properly administered zoning power by local authorities may legally leave in its wake scars of lost profits to land owners as well as restricted uses causing inconvenience and disappointments but that is the exact meaning of zoning.[58]

One might expect the zoning theory to apply with equal force in instances of landmark preservation because landmark preservation laws are similar in concept.[59] The question remains, however, as to what extent the public welfare may justify harm to a property owner, without raising constitutional problems.

The Act requires a different showing of need for taxable and tax-exempt property owners.[60] In *Sailors' Snug Harbor v. Platt*,[61] a char-

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55. *See, e.g.*, Palmer v. Furman, 283 App. Div. 664, 127 N.Y.S.2d 7 (2d Dep't 1954); Nattin Realty, Inc. v. Ludewig, 67 Misc. 2d 828, 324 N.Y.S.2d 668 (Sup. Ct. 1971); Udell v. McFadyen, 40 Misc. 2d 265, 243 N.Y.S.2d 156 (Sup. Ct. 1963), *rev'd on other grounds sub nom.* Udell v. Haar, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968); Little v. Young, 82 N.Y.S.2d 909 (Sup. Ct.), *aff'd*, 274 App. Div. 1005, 85 N.Y.S.2d 41 (2d Dep't 1948), *aff'd*, 299 N.Y. 699, 87 N.E.2d 74, 86 N.Y.S.2d 288 (1949). A municipality, as a general rule, does not have authority to spot zone, that is, to arbitrarily place a specific piece of property in a different zone from that of neighboring property. Santmyers v. Town of Oyster Bay, 10 Misc. 2d 614, 615, 169 N.Y.S.2d 959, 961 (Sup. Ct. 1957). However, since a city generally has the power to rezone with respect to a small area, improper spot zoning does not exist where there is no arbitrariness or unreasonableness. Momeier v. John McAlister, Inc., 231 S.C. 526, ____, 99 S.E.2d 177, 180 (1957).

56. Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120, 210 N.Y.S. 941 (1925) (mem.).

57. 82 N.Y.S.2d 909 (Sup. Ct.), *aff'd*, 274 App. Div. 1005, 85 N.Y.S.2d 41 (2d Dep't 1948), *aff'd*, 299 N.Y. 699, 87 N.E.2d 74, 86 N.Y.S.2d 288 (1949) (mem.).

58. 82 N.Y.S.2d at 916 (citation omitted).

59. *See* notes 6-20 *supra* and accompanying text. *See also* Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951); Shepard v. Village of Skaneateles, 300 N.Y. 115, 89 N.E.2d 619 (1949); Nappi v. La Guardia, 295 N.Y. 652, 64 N.E.2d 716, 54 N.Y.S.2d 722 (1945); Higbee v. Chicago, B. & Q.R.R., 235 Wis. 91, 292 N.W. 320 (1940).

60. *See* notes 48-51 *supra* and accompanying text.

61. 53 Misc. 2d 933, 280 N.Y.S.2d 75 (Sup. Ct.), *rev'd*, 29 App. Div. 2d 376, 288 N.Y.S.2d 314 (1st Dep't 1968).

itable organization, whose concern was to provide housing for retired seamen, wished to replace certain buildings with more modern and adequate accommodations. It was argued that the Act's distinction between taxed and tax-exempt property constituted an unreasonable discrimination in violation of the Fourteenth Amendment.[62] The trial court refused to rule on the constitutional question.[63] Although the court stated that aesthetic and cultural benefits to the community were an adequate basis for the exercise of the police power,[64] it held for the charitable organization, finding that application of the Act here exceeded the limits of reasonable regulation.[65] In reversing, the appellate division set forth a standard for determining what constitutes an undue burden upon charitable organizations: the maintenance of a landmark must physically or financially prevent or seriously interfere with the charitable purpose.[66]

Other decisions, though not involving charitable institutions, have upheld ordinances where more than mere financial hardship is proven.[67] New Orleans' preservation ordinance, the Vieux Carre law,[68] is similar to the Act, and is intended to aid in the preservation of the French and Spanish quarters of the city.[69]

In *Maher v. City of New Orleans*,[70] a federal district court examining the preservation ordinance found that the test of constitutionality is not whether detriment to the landmark owner outweighs the benefits conferred on the public, but whether the ordinance goes so far as to preclude use of the property for any purpose for which it was reasonably adopted.[71] The court stated that a "zoning ordi-

62. *Id.* at 936, 280 N.Y.S.2d at 77-78.
63. *Id.* at 936, 280 N.Y.S.2d at 78.
64. *Id.* at 936, 280 N.Y.S.2d at 77.
65. *Id.* at 937, 280 N.Y.S.2d at 78.
66. 29 App. Div. 2d at 378, 288 N.Y.S.2d at 316.
67. *See* Levitt v. Village of Sands Point, 6 N.Y.2d 269, 160 N.E.2d 501, 189 N.Y.S.2d 212 (1959); Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120, 210 N.Y.S. 941 (1925) (mem.); Setauket Dev. Corp. v. Romeo, 18 App. Div. 2d 825, 237 N.Y.S.2d 516 (2d Dep't 1963).
68. New Orleans, La., Vieux Carre Ordinance 14538, Mar. 3, 1937 (enacted pursuant to LA. CONST. art. XIV, § 29).
69. *Id.*
70. 371 F. Supp. 653 (E.D. La. 1974).
71. *Id.* at 662, *citing* Summers v. City of Glen Cove, 17 N.Y.2d 307, 309, 217 N.E.2d 663, 664, 270 N.Y.S.2d 611, 612 (1966).

nance, as an exercise of the police power, will almost always 'reduce the value of rights of some individuals', but that does not make it unconstitutional."[72] According to the standards set in *Maher* and *Sailors' Snug Harbor*, the property in *Lutheran Church* was practically unuseable and the organization was prevented from carrying out its charitable purpose.[73]

Conclusion

Single landmarks are rarely profitable, and perhaps a different standard of value must be applied with respect to them. History preserved is not often appreciated in an economic way with any lasting success; the measure of appreciation therefore must be determined by different and perhaps necessarily less legalistic principles. The Act founders at this crucial juncture because it fails to mesh the two conflicting goals of preservation and just compensation to property owners.

The right to property has a blessed heritage. As Lord Pitt reminded us: "The poorest man in his cottage could defy the King—storms may enter—the rain may enter but the King of England cannot enter."[74] But the rights so established are not absolute. The question is whether the preservation of our history, as seen through our architecture, is a laudable goal, worthy of imposing an infringement on property rights without compensating the landowner.

The Landmarks Act was enacted to preserve our past; but the answers to the legal issues unfortunately do not lie within the statute.[75] Such a law, designed to protect the individual property owner

72. 371 F. Supp. at 662, *citing* Neef v. City of Springfield, 380 Ill. 275, 282, 43 N.E.2d 947, 951 (1942).

73. 35 N.Y.2d at 132, 316 N.E.2d at 312, 359 N.Y.S.2d at 17.

74. C. HAAR, LAND-USE PLANNING vii (1959).

75. There are alternatives to demolition not mentioned thus far in this Note; those include air rights transfers, and specific protective interest on the part of the city. *See generally* J. COSTONIS, SPACE ADRIFT (1974). The effectiveness of the Act may ultimately depend on the interest, in financial terms, the city is willing to take in preserving its architecture. Alternatives such as a tax on the city's residents or condemnation of every building the city finds worth preserving are subjects which are worthy of lengthy comment in themselves.

and the history of our city, will never work unless the community and the courts decide that the community is being served by preservation. The dissent in *Lutheran Church* supports such thinking:

> [T]his law [the Landmarks Act] leans heavily on economic reasons for its justification as a valid exercise of the police power. But . . . in the main the purposes sought to be achieved are aesthetic. Historic preservation promotes aesthetic values by adding to the variety, the beauty and the quality of life. Perhaps it is time that aesthetics took its place as a zoning end independently cognizable under the police power for "a high civilization must . . . give full value and support to the . . . great branches of man's scholarly and cultural activity in order to achieve a better understanding of the past, a better analysis of the present, and a better view of the future."[76]

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76. 35 N.Y.2d at 134-35 n.4, 316 N.E.2d at 311 n.4, 359 N.Y.S.2d at 19 n.4 (dissenting opinion) (emphasis omitted), *quoting* the National Foundation on the Arts and Humanities Act of 1965, 20 U.S.C. § 951 (1970).