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### Don't Tear it Down, Inc. v. Pennsylvania Avenue Development Corp.: A Statutory Interpretation Sanctions the Use of the Wrecking Ball

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## NOTES

### ***DON'T TEAR IT DOWN, INC. v. PENNSYLVANIA AVENUE DEVELOPMENT CORP.: A STATUTORY INTERPRETATION SANCTIONS THE USE OF THE WRECKING BALL***

Pennsylvania Avenue, described by some as the most important avenue in the nation,<sup>1</sup> had gradually deteriorated into a state of diminished elegance posing economic and social pressures upon the District of Columbia government,<sup>2</sup> when President Kennedy, in his 1961 Inaugural Parade<sup>3</sup> took note of the Avenue's condition. Thereafter, he laid the groundwork for development of the historically significant area.<sup>4</sup> Revitalization plans for this ceremonial passageway linking the Capitol and White House eventually evolved into the congressionally created Pennsylvania Avenue Development Corporation (PADC or Corporation).<sup>5</sup>

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1. See generally H.R. REP. NO. 1445, 92d Cong., 2d Sess. 2 (1972), reprinted in 1972 U.S. CODE CONG. & AD. NEWS 4721, 4723 [hereinafter cited as HOUSE REPORT 1445]. Pennsylvania Avenue has been called "the symbolic passage between two lofty centers of government—illustrating the separation of powers but also their linkage in a deeper unity." REPORT OF THE UNITED STATES PRESIDENT'S COUNCIL ON PENNSYLVANIA AVENUE 2 (1964) [hereinafter cited as PRESIDENT'S REPORT ON PENNSYLVANIA AVENUE]. See also Early, *Avenue of the Presidents Distillation of D.C. History*, Wash. Post, Jan. 11, 1981, at F4, col. 4. The article referred to Pennsylvania Avenue as "the Nation's Capital at its worst, the Nation's Capital at its best." *Id.*

2. See HOUSE REPORT 1445, *supra* note 1, at 2. The House Report stated three major reasons for the economic deterioration of the north side of Pennsylvania Avenue: (1) the decline in the small investor; (2) a lag in private development; and (3) uncertainty in the commitment of the Federal Government towards redeveloping the Pennsylvania Avenue area. *Id.*

3. During the Inaugural Parade on January 20, 1961, President Kennedy discussed his concern for the economic and social decay of Pennsylvania Avenue with Justice Arthur J. Goldberg (then acting Secretary of Labor) and in June 1962 created the President's Advisory Council on Pennsylvania Avenue. See PRESIDENT'S REPORT ON PENNSYLVANIA AVENUE, *supra* note 1, at 2-3.

4. Pennsylvania Avenue has also been referred to as the Nation's "Main Street" or "Main Street, U.S.A." See, e.g., *Don't Tear It Down, Inc. v. Pennsylvania Ave. Dev. Corp.*, 642 F.2d 527, 538 (D.C. Cir. 1980). See also Knight, *Avenue Plan: Rich Men Feud, District Waits*, Wash. Post, Feb. 23, 1981 Wash. Bus., at 18, col. 1; Wheeler, *Suit Threatens Pennsylvania Avenue Development*, Wash. Post, Sept. 2, 1979, at B1, col. 1.

5. In 1972, Congress passed the Pennsylvania Avenue Development Corporation Act,

The Pennsylvania Avenue Development Corporation Act (PADC Act) provides for the development and implementation of a redevelopment plan (Pennsylvania Avenue Plan—1974 or the Plan) for the north side of Pennsylvania Avenue.<sup>6</sup> Pursuant to the requirements in the PADC Act, the Corporation executed a comprehensive plan for the area in 1974 because Congress found that the Avenue's "blighted character, impose[d] severe public, economic and social liabilities upon the District of Columbia as the seat of the government . . . and [thereby] constitut[ed] a serious and growing threat to the public health, safety, morals, and welfare of its inhabitants."<sup>7</sup> Because Pennsylvania Avenue has been designated a national historic site,<sup>8</sup> PADC must comply with a number of federal preser-

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Pub. L. No. 92-578, 86 Stat. 1266 (codified as amended at 40 U.S.C. §§ 871-885 (1982 & Supp. I 1983)) [hereinafter cited as PADC Act]. Prior to the PADC Act of 1972, presidential commissions were appointed under President Kennedy's administration and again under President Johnson's administration to prepare plans for revitalization of the area. Total redevelopment of the area did not progress, however, because both presidential commissions lacked adequate funds and did not have the power of condemnation by eminent domain to acquire property. See generally UNITED STATES DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, THE PENNSYLVANIA AVENUE DISTRICT IN UNITED STATES HISTORY (1965); see also PADC Act, 40 U.S.C. § 875(6) (1982 & Supp. I 1983) (giving PADC power of condemnation); *Pennsylvania Ave. Dev. Corp. v. One Parcel of Land*, 670 F.2d 289 (D.C. Cir., 1981); *Pennsylvania Ave. Dev. Corp. v. One Parcel of Land*, 494 F. Supp. 45 (D.D.C. 1980).

6. See PADC Act, 40 U.S.C. § 871 (1982 & Supp. I 1983). According to PADC, the projected year for completion of the Pennsylvania Avenue Development project is 1992.

7. PADC Act, 40 U.S.C. § 871(b) (1982 & Supp. I 1983). *Accord*, D.C. Mun. Regs. tit. 11, § 5105 (1983). The District Zoning Regulations also articulate particular needs and goals for the Pennsylvania Avenue Development (PAD) area. Section 5105.1 provides that the PAD District is established:

- (A) To encourage development to the potential permitted under the Act . . . along a portion of the north side of Pennsylvania Avenue, Northwest as designated in that Act and the Pennsylvania Avenue Plan-1974;
- (B) To reinforce Pennsylvania Avenue's unique role as a physical and symbolic link between the White House and the U.S. Capitol;
- (C) To improve land utilization in the prime location within the Downtown core of Washington, D.C.;
- (D) To improve the physical and economic relationship of the Downtown core of Washington, D.C.;
- (E) To encourage an appropriate mix of retail, entertainment, restaurants, and other facilities to serve shoppers, tourists and office populations; and
- (F) To encourage the development of appropriate public spaces for their symbolic value as well as for their public use.

D.C. Mun. Regs. tit. 11, § 5105.1 (1983).

8. Most of the area between the Capitol and the White House was designated as a national historic site on September 30, 1965 pursuant to The Historic Sites, Buildings, and Antiquities Act, ch. 593, 49 Stat. 666 (1935) (codified as amended at 16 U.S.C. §§ 461-467 (1982 & Supp. I 1983)). The Pennsylvania Avenue National Historic Site is an area that is larger than, and includes most of, the PADC development area. Consequently, the area is subject to the provisions of the National Historic Preservation Act, 16 U.S.C. § 470 (1982 & Supp. I 1983).

vation laws and procedures<sup>9</sup> as well as local regulations and ordinances.<sup>10</sup> The PADC Act intrinsically limits the power of the Corporation<sup>11</sup> and stipulates the standards of cooperation between PADC and the District of Columbia government.<sup>12</sup>

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*See also* 16 U.S.C. § 470(i) (1982 & Supp. I 1983) (establishing the Advisory Council on Historic Preservation).

9. *See* National Historic Preservation Act, 16 U.S.C. § 470 (1982 & Supp. I 1983); *see also* Protection of Historic and Cultural Properties, 36 C.F.R. pt. 800 (1983). *See, e.g., id.* § 800.4(a)-(e) (stipulating a number of responsibilities imposed upon the federal agencies); *id.* § 800.6(c)(1)-(4) (specifically setting forth the preparation of a proposal for inclusion in the Memorandum of Agreement, review and effect of the Agreement as well as the amendment procedures for entering into the Agreement with the Advisory Council on Historic Preservation).

10. *See, e.g.,* Historic Landmark and Historic District Protection Act, D.C. CODE ANN. § 5-1001 (1981 & Supp. 1985) [hereinafter cited as D.C. Historic Protection Act]. *See infra* note 58 and accompanying text.

11. *See, e.g.,* PADC Act, 40 U.S.C. §§ 874-878 (1982 & Supp. I 1983) (defining the Corporation's powers and duties and its limitations regarding local and other federal agencies). *See infra* notes 53, 54 and accompanying text.

12. In various sections of the PADC Act, Congress has expressly provided compliance measures between PADC and the District of Columbia. Section 872(c) requires that PADC include on the Board of Directors key members of the District of Columbia government as well as District of Columbia residents.

The powers and management of the Corporation shall be vested in a Board of Directors consisting of fifteen members, as follows:

- (1) The Secretary of the Interior;
- (2) The Secretary of the Treasury;
- (3) The Secretary of Housing and Urban Development;
- (4) The Secretary of Transportation;
- (5) The Administrator of General Services;
- (6) The Mayor of the District of Columbia;
- (7) The Chairman, Council of the District of Columbia; and
- (8) Eight, at least four of whom shall be residents and who are registered voters of the District of Columbia, appointed by the President from private life, who shall have knowledge and experience in one or more fields of history, architecture, city planning, retailing, real estate, construction, or government.

40 U.S.C. § 872(c) (1982 & Supp. I 1983).

Section 872(g) requires PADC to include important members of the District of Columbia art community as well as other key figures in the community on the PADC Board of Directors.

The Chairman, upon his appointment, shall invite to serve on the Board of Directors as nonvoting members the following:

- (1) The Chairman of the Commission of Fine Arts;
- (2) The Chairman of the National Capital Planning Commission;
- (3) The Secretary of the Smithsonian Institution;
- (4) The Director of the National Gallery of Art;
- (5) The Architect of the Capitol;
- (6) The Archivist of the United States;
- (7) The Chairman of the District of Columbia, Commission on the Arts; and
- (8) The Director of the District of Columbia Department of Housing and Community Development.

A dispute arose concerning the historic preservation of the Market Space buildings in the Eastern Sector of the Plan area.<sup>13</sup> In *Don't Tear It Down, Inc. v. Pennsylvania Avenue Development Corp.*,<sup>14</sup> decided in early 1984, the United States District Court for the District of Columbia addressed the issue of whether the Memorandum of Agreement between PADC and the Advisory Council on Historic Preservation, stipulating the requisite statutory procedures for the Pennsylvania Avenue National Historic Site, had been fulfilled.<sup>15</sup> Additionally, the court addressed whether PADC's plan to de-

*Id.* § 872(g).

Section 874(b) also provides for input from various District of Columbia government representatives:

The development plan provided for in subsection (a) of this section shall be prepared with the cooperation of the Department of the Interior, the General Services Administration, and the District of Columbia government with the maximum feasible use of their staffs and other resources on a reimbursable basis by the Corporation.

40 U.S.C. § 874(b) (Supp. I 1983).

Section 878(b) requires that PADC give primary consideration to local needs and act in compliance with District laws and ordinances.

The Corporation shall comply with all District of Columbia laws, ordinances, codes, and regulations in constructing, reconstructing, rehabilitating, altering, and improving any project: Provided, That [sic] the provisions of section 428 of title 5 of the District of Columbia Code shall apply to all the constructing, reconstructing, rehabilitating, altering, and improving of all buildings by the Corporation. The construction, reconstruction, rehabilitation, alteration, and improvement of any project by non-Government sources shall be subject to the provisions of the District of Columbia Code and zoning regulations.

40 U.S.C. § 878(b) (1982 & Supp. I 1983); *see* D.C. CODE ANN. tit. 5, § 428 (1981).

13. In 1974, the Corporation executed a development plan for the entire Pennsylvania Avenue area. PENNSYLVANIA AVENUE DEVELOPMENT CORPORATION, THE PENNSYLVANIA AVENUE PLAN—1974 (reprint 1982) [hereinafter cited as PENNSYLVANIA AVENUE PLAN—1974]. Since that time, amendments to the Pennsylvania Avenue Development Plan—1974 have been adopted. In 1982 and 1983, amendments regarding the Eastern Sector, the area east of the FBI Building, were incorporated into the overall plan. PENNSYLVANIA AVENUE PLAN—1974 as amended. These amendments include a review of historic preservation plans in the sector. *See also* Forgy, *Designs On the Avenue*, Wash. Post, Sept. 29, 1984 at C1, col. 3. Four photographs in the article depict the competing architectural design proposals for the Market Square parcel, including the area occupied by the Market Space buildings. Further, the article highlights the advantages and disadvantages of the four proposals as well as the particular needs unique to the area. *Id.* at C2, col. 1. "The Market Square site is a vastly more varied, more complex design problem than was the Willard, in which a single bravura building set the dominant tone." *Id.* at C2, col. 1.

14. 579 F. Supp. 1382 (D.D.C. 1984).

15. *Id.* at 1384. On June 15, 1978, PADC and the Advisory Council on Historic Preservation entered into an agreement to ensure compliance with the National Historic Preservation Act, 16 U.S.C. § 470(f) (1982 & Supp. I 1983), the PADC Act, 40 U.S.C. § 871 (1982 & Supp. I 1983), and the relevant procedures for protection of historic and cultural properties, 36 C.F.R. Part 800.6 (1984). *See* Memorandum of Agreement Concerning the Selection of Alternatives and Specific Projects of the Pennsylvania Avenue Plan (June 15, 1978) (on file at the Catholic University Law Review office) [hereinafter cited as Memorandum of Agreement]. *See also infra* note 27 and accompanying text.

molish the Market Space buildings was a "substantial change" in plans or a "significant action" requiring compliance with new notification procedures enunciated by recent amendments to the PADC Act.<sup>16</sup> The court held that PADC had complied with the Memorandum of Agreement.<sup>17</sup> Further, it

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16. *Don't Tear It Down, Inc.*, 579 F. Supp. at 1386-88 (construing PADC Act, 40 U.S.C. § 874(e) (Supp. I 1983)). If the court had found the demolition plans to be a "substantial change" in plans, then PADC would be required to submit the change to the Mayor of the District of Columbia, the Secretary of the Interior, and Congress. 40 U.S.C. § 874(c) (1982 & Supp. I 1983). This would result in further delays in order to obtain approval from these three authorities. Additionally, a constitutional challenge to the PADC Act would inevitably be raised. See *infra* note 90 and accompanying text. Because the court found the demolition plans to be a "significant action," however, PADC is required to notify the Committee on Interior and Insular Affairs of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate. PADC must then wait 30 days after notification to these committees prior to any demolition activity. PADC Act, 40 U.S.C. §§ 874(d)-874(e) (1982 & Supp. I 1983).

The important statutory amendment that was the subject of the dispute with *Don't Tear It Down, Inc.* provided:

(e)(1) Activities under the development plan shall be carried out in accordance with the approved development plan.

(2) The Corporation may alter, revise, or amend the plan, but any such alteration, revision, or amendment which is a substantial change from the approved development plan shall take effect only upon compliance with the procedures set forth in subsections (c) and (d) of this section. For the purposes of this subsection, the term "substantial change" shall mean one involving a major alteration in the character or intensity of an existing or proposed use in the development area which in the opinion of the Corporation causes an increase or decrease of 10 per centum or more of the dollar amount of the estimate prepared in accordance with subsection (a)(9) of this section, or one which, in the opinion of the Secretary of the Interior, affects his responsibilities for the administration, protection, and development of the areas within the Pennsylvania Avenue National Historic Site.

(3) Any alteration, revision, or amendment of the plan and any other action taken by the Corporation which is not a substantial change in the plan within the meaning of paragraph (2) but—

(A) which is a significant change in the plan, or which is another significant action taken by the Corporation, and

(B) which relates to housing, any major structure, historic preservation, parks, office space, or retail uses, within the development area shall not take effect until thirty days after notice of such change or other action has been submitted to the Committee on Interior and Insular Affairs of the United States House of Representatives and to the Committee on Energy and Natural Resources of the United States Senate, unless prior to the expiration of such thirty-day period each of such committees notifies the Corporation in writing that the committee does not object to such change or other action. Such notice to the committees shall include an explanation of the reasons why the change or other action is proposed and a summary of any recommendations received by the Corporation from the Secretary of the Interior, the Mayor of the District of Columbia, or from any other interested agency, organization, or individual.

PADC Act, 40 U.S.C. § 874(e) (Supp. I 1983):

17. See *Don't Tear It Down, Inc.*, 579 F. Supp. at 1386.

held that the demolition plans for the Market Space buildings were not a "substantial change" in plans, but a "significant action" requiring notification to the appropriate congressional committees.<sup>18</sup>

The case arose as a result of the recent amendments to the original Pennsylvania Avenue Plan. The Corporation, after careful reevaluation of the Pennsylvania Avenue Plan—1974, adopted amendments to the Plan concerning the Eastern Sector that allowed for the Market Space buildings to be retained and restored.<sup>19</sup> A 1983 amendment to the original Pennsylvania Avenue Development Plan—1974 precipitated the current dispute by calling for demolition of the Market Space buildings.<sup>20</sup>

Don't Tear It Down,<sup>21</sup> a citizen's action group for historic preservation, recently renamed the D.C. Preservation League, alleged PADC failed to meet statutory requirements prior to demolition.<sup>22</sup> Don't Tear It Down argued that the Corporation had not complied with the Memorandum of Agreement, neglected to consult with the Commission of Fine Arts and the National Capital Planning Commission, and did not submit the demolition plans for congressional, agency, and local approval.<sup>23</sup> The United States District Court for the District of Columbia granted a temporary restraining order to Don't Tear It Down, halting demolition pending the announcement of the current decision.<sup>24</sup> PADC claimed it had discharged all relevant statutory requirements and had complied with the Advisory Council on Historic Preservation's Memorandum of Agreement.<sup>25</sup>

In its decision on the merits, the district court rejected Don't Tear It Down's claims and held that PADC had fulfilled all requirements save one.<sup>26</sup> Writing for the court, Judge Flannery reasoned that PADC had satis-

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18. *Id.* at 1388, 1390.

19. PENNSYLVANIA AVENUE DEVELOPMENT CORP., PENNSYLVANIA AVENUE PLAN—1974 (as amended 1983). The amendments indicate PADC's acknowledgement of the area's historical significance: "A number of these structures, however, have some architectural interest, especially those fronting on Market Space . . . [and] several buildings of architectural note elsewhere on the block . . . ." *Id.* at 25 (amended June 15, 1983).

20. *Id.* (stating that "the remaining buildings on the square would be replaced by new development").

21. Don't Tear It Down was renamed D.C. Preservation League. D.C. Preservation League Newsletter (July 1984).

22. *Don't Tear It Down, Inc.*, 579 F. Supp. at 1384. See *supra* note 16 and accompanying text.

23. *Don't Tear It Down, Inc.*, 579 F. Supp. at 1385.

24. *Id.*

25. *Id.* See *infra* note 27 and accompanying text.

26. 579 F. Supp. at 1390. An order was issued on December 21, 1983, "permitting demolition of the Market Space Buildings contingent upon satisfaction of the remaining statutory requirement." *Id.* at 1385. PADC did not satisfy the requirement that it must report all demolition plans to the House Committee on Interior and Insular Affairs and the Senate Com-

fied the pertinent parts of the Memorandum of Agreement, paragraphs four and six.<sup>27</sup> The court relied upon the approval of PADC's actions granted by the Advisory Council on Historic Preservation and the Historic American Buildings Survey with respect to these provisions.<sup>28</sup> Furthermore, the court reasoned that the demolition plans could not be defined as a "substantial change" of plans based upon an analysis of the tenuous legislative history<sup>29</sup> and the statutory language of the PADC Act.<sup>30</sup>

This Note will discuss the legislative and administrative strictures circumscribing the Pennsylvania Avenue Development Corporation. An analysis of two recent disputes involving PADC and Don't Tear It Down reveals current judicial interpretations of the PADC Act pertaining to demolition procedures for the Pennsylvania Avenue area. This Note will conclude with a discussion of probable reasons underlying the court's reluctance in *Don't Tear It Down, Inc. v. Pennsylvania Avenue Development Corp.*<sup>31</sup> to place further procedural constraints upon PADC.

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mittee on Energy and Natural Resources pursuant to the PADC Act, 40 U.S.C. § 874(e)(3)(B) (Supp. I 1983).

27. 579 F. Supp. at 1386. See Memorandum of Agreement *supra* note 15 at 2. Paragraphs 4 and 6 were the court's primary focus of discussion. Paragraph 4 states in relevant part:

Structures that have been acquired by the PADC and which . . . may be scheduled for future demolition . . . will be retained in place, whenever possible, until the site they occupy is scheduled for new construction. If PADC determines that such a structure should be demolished . . . [PADC shall] consult with the Council and the . . . [District of Columbia Historic Preservation Officer] before taking action.

*Id.* Paragraph 6 states in relevant part: "Buildings scheduled to be . . . demolished . . . will be documented to the standards of the Historic American Buildings Survey (HABS) for ultimate deposit in the Library of Congress." *Id.*

28. 579 F. Supp. at 1386.

29. See *id.* at 1389 (legislative history behind the act was deficient due to limited floor debate and the lack of a conference report to aid in statutory interpretation of the words "significant action" versus "substantial change"). See also H.R. REP. NO. 15, 98th Cong., 2d Sess. 7, 9 (1983); S. REP. NO. 141, 98th Cong., 2d Sess. 4, 7 (1983) reprinted in 1983 U.S. CODE CONG. & AD. NEWS 1309.

30. See 40 U.S.C. § 874(e)(2) (Supp. I 1983) that defines the term "substantial change" as: one involving a major alteration in the character or intensity of an existing or proposed use in the development area which in the opinion of the Corporation causes an increase or decrease of 10 per centum or more of the dollar amount of the estimate prepared in accordance with subsection (a)(9) of this section, or one which, in the opinion of the Secretary of Interior, affects his responsibilities for the administration, protection, and development of the areas within the Pennsylvania Avenue National Historic Site.

*Id.*

31. 579 F. Supp. 1382 (D.D.C. 1984).



## I. STATUTORY CONSTRAINTS UPON PADC'S DISCRETION

Prior to demolition of a building within the development area, PADC must comply with a number of procedural requirements that, in effect, limit the Corporation's discretion.<sup>32</sup> There are three primary sources for these guidelines: (1) relevant sections of the United States Code (Code); (2) a Memorandum of Agreement; and (3) pertinent sections within the PADC Act.<sup>33</sup>

Title 40 of the Code empowers the National Capital Planning Commission to act as a pivotal agency for both federal and district governments in planning appropriate and methodical redevelopment of the Capital and to conserve important natural and historical features of Washington, D.C.<sup>34</sup> Thus, the statute requires PADC to consult the National Capital Planning Commission regarding plans affecting federal development activity in the Pennsylvania Avenue area.<sup>35</sup> The Commission of Fine Arts is another statutorily established commission that circumscribes PADC's activities.<sup>36</sup> The Fine Arts Commission essentially makes recommendations on applications for permits dealing with a building's alteration.<sup>37</sup> Recommendations primarily relate to appearance, texture, color and height of exterior construction.<sup>38</sup> Buildings on Pennsylvania Avenue extending from the Capitol to the White House, encompassing the Pennsylvania Avenue redevelopment area, are sub-

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32. Although an extensive survey of the entire procedural requirements that PADC must meet prior to demolition is beyond the scope of this Note, the essential requirements are set forth. See *Don't Tear It Down, Inc.*, 579 F. Supp. at 1385 (general overview of administrative and legislative requirements for PADC).

33. *Id.*

34. 40 U.S.C. § 71(a) (1982 & Supp. I 1983). See also S. REP. NO. 2055, 87th Cong., 2d Sess. (1962), reprinted in 1962 U.S. CODE CONG. & AD. NEWS 2617.

35. 40 U.S.C. § 71(a) (1982 & Supp. I 1983). Compare PADC Act, 40 U.S.C. § 871 (1982 & Supp. I 1983) with Dwight D. Eisenhower Memorial Bicentennial Civic Center Act, Pub. L. No. 92-520, 86 Stat. 1019 (codified as 40 U.S.C. § 616 (1982 & Supp. I 1983)) (both requiring consultation with the National Capital Planning Commission regarding federal development activity in the District of Columbia).

36. See Commission of Fine Arts Act, ch. 243, § 1, 36 Stat. 371 (1970) (codified as amended at 40 U.S.C. § 104 (1982 & Supp. I 1983)); see also Shipstead-Luce Act, ch. 291, § 1, 46 Stat. 366 (1930) (codified as amended at 40 U.S.C. § 121 (1982 & Supp. I 1983)).

37. 40 U.S.C. § 121 (1982 & Supp. I 1983). Compare *District of Columbia v. Benenson*, 329 A.2d 437 (D.C. App. 1974) (where property owners did not have to obtain the approval of the Fine Arts Commission because the court held demolition of all but the girders of a hotel did not constitute an "alteration" within the meaning of the statute) with *Don't Tear It Down, Inc. v. Pennsylvania Ave. Dev. Corp.*, 579 F. Supp. 1382 (D.D.C. 1984) (where the approval of the Fine Arts Commission was required prior to "alteration" of a building through demolition).

38. 40 U.S.C. § 121 (1982 & Supp. I 1983). If the Commission does not report approval or disapproval of the submitted plans within 30 days, approval is assumed and a permit issued. *Id.*

ject to the Commission's recommendations.<sup>39</sup> Therefore, PADC is required to obtain the Commission's review particularly "along the lines of good order, good taste, and with due regard to the public interests involved . . . ."<sup>40</sup> The authority of these two organizations, however, must be exercised within the framework of the Pennsylvania Avenue Plan—1974, as amended.<sup>41</sup>

The Pennsylvania Avenue development area has been declared a National Historic Site<sup>42</sup> thereby subjecting PADC's activities to the strictures of the National Historic Preservation Act of 1966<sup>43</sup> and requiring compliance with the Procedures for the Protection of Historic and Cultural Properties.<sup>44</sup> Pursuant to these regulations, a Memorandum of Agreement<sup>45</sup> must be drafted, negotiated, and signed by representatives of the Advisory Council on Historic Preservation, PADC, and the District of Columbia Historic Preservation Officer.<sup>46</sup>

The Memorandum of Agreement, created in compliance with the National Historic Preservation Act, is the second major source of restrictions that PADC must satisfy.<sup>47</sup> Regarding the Memorandum of Agreement between the Advisory Council and PADC as applied to demolition within the

39. *Id.*

40. *Id.* See also PENNSYLVANIA AVENUE DEVELOPMENT CORPORATION HISTORIC PRESERVATION PLAN OF THE PADC (1977). The PADC's vision of historic preservation along the Avenue is described as "an effort [that] will not preclude new development, but will encourage new construction designed within the parameters . . . determined by the older designs. By juxtaposing old and new . . . the image of the historical downtown will be eclectic rather than pure, impressionistic rather than historically accurate." *Id.* at 6. But see Gamarekian, *The Rebirth of Pennsylvania Avenue*, N.Y. Times, June 8, 1984, at A16, col. 4. The president of Don't Tear It Down, Robert Peck, was quoted in reference to PADC's preservation plans. "They [PADC] now point with pride to the Old Post Office and the Willard, but we took them to court to save the Willard. . . . PADC's main plan for restoring buildings is to put facades in storage—it's an architectural Disneyland concept." *Id.*

41. PADC Act, 40 U.S.C. § 876(a) (1982 & Supp. I 1983).

42. See *supra* note 8 and accompanying text.

43. 16 U.S.C. § 470 (1982 & Supp. I 1983). In reference to designated historic areas, President Nixon required that if "the Federal agency head proposes to transfer, sell, *demolish* or substantially alter the property he shall not act with respect to the property until the Advisory Council on Historic Preservation shall have been provided an opportunity to comment on the proposal." Exec. Order No. 11,593, 36 Fed. Reg. 8921 (1971), *reprinted in* 16 U.S.C. § 470 at 549-50 (1982 & Supp. I 1983) (emphasis added).

44. 36 C.F.R. § 800 (1984). See *also supra* note 9 and accompanying text.

45. 36 C.F.R. § 800.6(c) (1984) (requiring the parties to formulate a Memorandum of Agreement).

46. *Id.* § 800.2(m). The State Historic Preservation Officer defined as the "official, who is responsible for administering the Act within the State or jurisdiction. . . . These officers are appointed pursuant to 36 C.F.R. § 61.2 (1983) by the Governors of the 50 states . . . and the Mayor of the District of Columbia." *Id.*

47. See *supra* notes 15, 27 and accompanying text.

development area, two paragraphs further restrict PADC's discretion.<sup>48</sup> Paragraph four stipulates that buildings acquired by PADC should remain in place until construction commences.<sup>49</sup> However, if PADC elects to demolish the structures prior to scheduling of new construction, the Corporation must consult with the Advisory Council on Historic Preservation<sup>50</sup> and the District of Columbia Historic Preservation Officer.<sup>51</sup> Paragraph six requires that buildings scheduled for demolition be documented according to standards set by the Historic American Buildings Survey and deposited at the Library of Congress.<sup>52</sup> These guidelines enunciated in the Memorandum of Agreement serve as restrictive procedures for PADC in preservation, relocation, and demolition of historic structures.

## II. JUDICIAL REINFORCEMENT: PADC ACT INTRINSICALLY LIMITS THE CORPORATION'S POWER

### A. Don't Tear It Down, Inc. v. Pennsylvania Avenue Development Corp.—*The 1980 Decision*

A third source of procedural constraints imposed upon the Corporation prior to demolition exists within the PADC Act itself.<sup>53</sup> Recent judicial interpretations of the PADC Act clarify particular statutory ambiguities as well as articulate the exact procedures and approvals PADC must secure prior to demolition.<sup>54</sup>

In 1980, the United States Court of Appeals for the District of Columbia Circuit addressed the issue of whether PADC must comply with local District of Columbia regulations that require participation in a hearing before securing a demolition permit from the Mayor.<sup>55</sup> In *Don't Tear It Down, Inc.*

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48. See *supra* note 27.

49. *Id.*

50. 16 U.S.C. § 470(i) (1982 & Supp. I 1983).

51. See *supra* note 46. The District of Columbia Historic Preservation officer is responsible for review and consultation concerning activities by federal agencies in an area of potential environmental impact. This role includes determination of an activity's potential effects upon the historical aspects of property which qualified under the National Register Criteria. 36 C.F.R. § 800.4(b) (1984).

52. See Memorandum of Agreement, *supra* note 15, at 2 (paragraph 6 refers to the Historic American Buildings Survey).

53. PADC Act, 40 U.S.C. §§ 874(a)-874(e), 876, 878 (1982 & Supp. I 1983).

54. See, e.g., *Don't Tear It Down, Inc.*, 579 F. Supp. at 1388-90. The court stated that "the recent amendment differentiates between 'significant changes' and 'significant actions.' Demolition of the Market Space Buildings is certainly an 'action,' so the critical question here is whether the action is 'significant.'" *Id.* at 1389. See also *id.* at 1388 n.4 (court stipulates the exact statutory procedures PADC must follow).

55. *Don't Tear It Down, Inc. v. Pennsylvania Ave. Dev. Corp.*, 642 F.2d 527 (D.C. Cir. 1980).

*v. Pennsylvania Avenue Development Corp.*,<sup>56</sup> the court held that PADC was not required to participate in a hearing prior to obtaining a demolition permit for the Munsey Building<sup>57</sup> in compliance with the District of Columbia's Historic Landmark and Historic District Protection Act.<sup>58</sup> Nevertheless, the language of the PADC Act does require conformity between PADC activities and all District of Columbia laws and regulations in reconstructing or rehabilitating any project.<sup>59</sup>

The court, in a well-reasoned opinion, asserted that in implementing a federal program the doctrine of sovereignty<sup>60</sup> applies because of the supremacy clause of the Constitution.<sup>61</sup> Consequently, the court held that the federal statutes preempt the local regulations.<sup>62</sup> The court emphasized that if no clear congressional mandate authorizes local regulations to function in the achievement of a federal activity, then only federal law applies in order to avoid duplicative procedures.<sup>63</sup> In a rather condescending reference

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56. *Id.*

57. The Munsey Building, an early twentieth century structure, was occupied by government and private tenants. It has since been replaced by the Marriott Hotel.

58. D.C. Historic Protection Act, provides in relevant part: "'Demolish' . . . means the razing or destruction, entirely or in significant part, of a building or structure and includes the removal or destruction of any facade of a building or structure." D.C. CODE ANN. § 5-1002(3) (1981 & Supp. I 1982). "Before the Mayor may issue a permit to demolish . . . a building or structure in an historic district, the Mayor shall review the permit application in accordance with this section and place notice of the application in the District of Columbia Register." *Id.* § 5-1004(a). *But cf.* Citizens Comm. to Save Historic Rhodes Tavern v. District of Columbia Dep't of Hous. & Community Dev., 432 A.2d 710, *cert. denied*, 454 U.S. 1054 (1981) (hearing prior to issuance of demolition permit for historic district building is required from the Mayor as compared to present case where no hearing is required prior to obtaining a permit because demolition was a part of implementation of a federal program). *Accord* D.C. Mun. Regs. tit. 10, § 2506 (1984).

59. PADC Act, 40 U.S.C. § 878(b) (1982 & Supp. I 1983).

60. *See Don't Tear It Down, Inc.*, 642 F.2d 534-35. The state power, when in conflict with federal power, may be restricted based on the constitutional doctrine of sovereignty. *See, e.g.*, *Kleppe v. New Mexico*, 426 U.S. 529, 543, 545 (1976); *see also Don't Tear It Down, Inc.*, 642 F.2d at 534 n.65 (preemption doctrine applies to D.C. legislation as it does to state legislation).

61. U.S. CONST. art. IV, cl. 2.

62. *Don't Tear It Down, Inc.*, 642 F.2d at 533. *Accord* *Kleppe v. New Mexico*, 426 U.S. at 543, 545; *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 640 (1973); *United States v. Pink*, 315 U.S. 203, 232-33 (1942) (cases where federal power preempted parallel local laws).

63. *Don't Tear It Down, Inc.*, 642 F.2d. at 536. Two provisions were the central focus of the court's reasoning: PADC Act, 40 U.S.C. § 876(a) (1982 & Supp. I 1983) (requires that federal agencies and the District of Columbia act consistently with the Pennsylvania Avenue Plan—1974 and neither may depart from any feature of the development plan without PADC's approval); PADC Act, 40 U.S.C. § 878(b) (1982 & Supp. I 1983) (stipulates that PADC shall comply with District of Columbia laws, codes, and regulations in reconstructing and rehabilitating any project). Due to the existence of these "discordant provisions" within the PADC statute, the court concluded there was no clear, unambiguous Congressional authorization that local regulation should control the federal activity. *Don't Tear It Down, Inc.*, 642 F.2d at 533.

to District of Columbia lawmakers, the court concluded that "Pennsylvania Avenue—the Nation's 'Main Street'—is the concern of all Americans; we are not persuaded that Congress relegated the national interest to the uncertainties of local decisionmaking."<sup>64</sup> Thus, despite the statutory language within the PADC Act calling for compliance with all District laws, the PADC does not have to meet local regulations that are parallel to or conflict with the requirements prescribed in the federally mandated PADC Act.<sup>65</sup>

The holding of this case, discharging PADC from compliance with the District of Columbia Historic Protection Act,<sup>66</sup> does not vest PADC with autonomous discretion to demolish historic structures along Pennsylvania Avenue.<sup>67</sup> The Corporation must still comply with procedures pursuant to various sections of the United States Code,<sup>68</sup> including the PADC Act,<sup>69</sup> and the Memorandum of Agreement.<sup>70</sup> These two latter compliance measures became the principal subject of a dispute between these same parties less than four years later.

*B. Don't Tear It Down, Inc. v. Pennsylvania Avenue Development Corp.—The 1984 Decision*

In 1984, the United States District Court for the District of Columbia, in *Don't Tear It Down, Inc. v. Pennsylvania Avenue Development Corp.*,<sup>71</sup> held that PADC had complied with the Memorandum of Agreement and fulfilled the statutory requirements as applied to the Corporation's demolition plans for the Market Space area except for the congressional notification requirement.<sup>72</sup> The court, focusing directly upon paragraphs four and six of the Memorandum of Agreement entered into with the Advisory Council on His-

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64. See 642 F.2d at 538.

65. *Id.* The court's discussion also focused on the Memorandum of Agreement between the PADC and the Advisory Council on Historic Preservation. *Id.* at 531. It held that PADC had met parts of the Agreement and that the remaining sections were inapplicable to demolition. *Id.*

66. D.C. CODE ANN. § 5-1001 (1981 & Supp. 1985).

67. See *supra* note 11 and accompanying text. *Cf.* 642 F.2d at 529. The court admitted that PADC is "armed with a variety of powers to cope with the exigencies of executing the plan." *Id.*; see *id.* at 537 n.89. The court acknowledged that various sections of the PADC Act grant PADC substantial discretion. *Id.* The PADC Act provides that "[i]n carrying out its powers and duties, [PADC has] all necessary and proper powers for the exercise of the authorities vested in it . . . ." PADC Act, 40 U.S.C. § 875(1) (1982 & Supp. I 1983).

68. *Supra* notes 34-41 and accompanying text.

69. *Supra* notes 53, 54 and accompanying text.

70. See *supra* notes 15, 27, 45, 52 and accompanying text.

71. 579 F. Supp. 1382 (D.D.C. 1984).

72. 579 F. Supp. at 1390. Under the congressional notification requirement, PADC was ordered to notify the appropriate congressional committees of its demolition plans. See Pub. L. No. 98-141, § 8, 97 Stat. 909, 910 (1983).

toric Preservation, determined PADC had satisfied all requirements of the Agreement.<sup>73</sup> According to the court, PADC produced strong evidence of compliance by presenting letters of approval from various relevant parties.<sup>74</sup> A letter of approval from the Advisory Council provided the salient basis for the court's finding of compliance.<sup>75</sup> The court pronounced that the primary responsibility for ensuring that proper demolition procedures are followed for historically significant structures lies in the Advisory Council.<sup>76</sup> The operational tool for effectuating this responsibility is the Memorandum of Agreement.<sup>77</sup> In a deferential statement, the court conceded that "[i]f the Council is satisfied that [paragraph] 4 has been complied with, the court would be hard pressed to substitute its non-expert judgment for that of the Council's."<sup>78</sup>

In a similar manner, the Court of Appeals for the District of Columbia Circuit, in the 1980 case of *Don't Tear It Down, Inc. v. Pennsylvania Avenue Development Corp.*,<sup>79</sup> expeditiously dismissed the issue of compliance with the Memorandum of Agreement in a footnote.<sup>80</sup> In the 1980 case, the court merely reiterated the district court's holding that PADC and the Advisory Council had concurred by finding that some parts of the Agreement were inapplicable and that other parts had been discharged.<sup>81</sup> Therefore, according to the court, there was sufficient evidence to resolve the issue altogether.<sup>82</sup> Despite the varying circumstances in both the 1980 and 1984 cases, the district court in the 1984 case came to the same conclusion concerning the Memorandum of Agreement without mentioning the 1980 circuit court decision and its precedential value.

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73. 579 F. Supp. at 1386. See also *supra* note 27 and accompanying text.

74. On August 29, 1983, *Don't Tear It Down* was granted a temporary restraining order halting demolition of the Market Space buildings. Between this time and the December 21, 1983 decision, PADC procured, in accordance with statutory requirements, approval letters from the Historic American Buildings Survey, the Commission of Fine Arts, the National Capital Planning Commission, and most importantly, the Advisory Council on Historic Preservation that were later introduced as evidence at trial. 579 F. Supp. at 1385.

75. *Id.*

76. *Id.* at 1386.

77. *Id.*

78. *Id.*

79. 642 F.2d 527 (D.C. Cir. 1980).

80. *Id.* at 531 n.49. The Court stated in regard to the Memorandum of Agreement that PADC and the Advisory Council found provisions two and five inapplicable to the current situation. *Id.* The court asserted that substantial deference must be afforded to the parties' interpretation of a contract because the interpretation was a reasonable one. *Id.* Furthermore, the court found the requirements of provisions four and six of the agreement had been satisfied. *Id.*

81. *Id.*

82. *Id.*

In the 1984 case, the United States District Court for the District of Columbia primarily focused on statutory interpretation of the PADC Act in an attempt to clarify ambiguities within the statute.<sup>83</sup> The court firmly disagreed with Don't Tear It Down's allegation that PADC made a "substantial" change of plans or even a change of plans.<sup>84</sup> Emphasizing that the plan to retain the Market Space buildings was a mere recommendation<sup>85</sup> by PADC and not a requirement, the court concluded it was PADC's prerogative not to retain the buildings.<sup>86</sup> Acknowledging that PADC was vested with substantial discretion under the Act,<sup>87</sup> the court seemed averse to limiting this discretion any further than it had already been limited by the statute. Perhaps the most evident reason for the court's reluctance to find the demolition amendment a "significant action," and not a "substantial change" of plans, was that PADC is clearly a well-regulated federal entity.<sup>88</sup> Consequently, congressional committee notification would act as a sufficient check on the Corporation's activities without the need to require approval from the Mayor, the Secretary of the Interior, and the Congress.<sup>89</sup>

Nevertheless, there could arguably be another underlying reason for the court's determination. In a footnote, the court addressed a constitutional challenge to section 874(d) of the PADC Act.<sup>90</sup> A recent Supreme Court

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83. 579 F. Supp. at 1387-90.

84. *Id.* at 1387.

85. *Id.* The Court stated that the Corporation had at no time committed itself to the preservation of the buildings. *Id.* PADC did recommend, however, that the Market Space buildings be retained in the 1982 Eastern Sector amendments. *Id.* See also PADC, 1983 ANN. REP. 23 (1984). The report, in the section entitled "Special Focus on Historic Preservation," also discusses the historic preservation planned for Market Square:

The Corporation's historic preservation efforts are best characterized by their comprehensiveness, in that they go beyond a concern for the few individual structures to recognize that the urban setting for preserved structures is critical to their appreciation. Using this comprehensive approach, the Corporation has begun to tackle the difficult problems of its *Market Square area*, with the goal of turning the area into a national showcase for *downtown preservation*, in-town housing, and public space design.

*Id.* (emphasis added).

86. 579 F. Supp. at 1387.

87. The district court reasoned that "PADC has broad discretion under the Act, and can only be deemed to have 'changed' its plan when it seeks to undertake an action that is contrary to a previous requirement." *Id.* (emphasis in original). See *supra* notes 67, 80 and accompanying text.

88. See, e.g., *supra* notes 9, 15, 34-36, 43 and accompanying text. PADC maintains close liaison with the Advisory Council on Historic Preservation, the Commission of Fine Arts, and the National Capital Planning Commission as well as daily interaction with the District of Columbia's permits office, which is part of the Department of Consumer and Regulatory Affairs.

89. See *supra* note 18.

90. 579 F. Supp. at 1386 n.2. The court addressed the defendant's challenge to the consti-

decision, *Immigration and Naturalization Service v. Chadha*,<sup>91</sup> held that a section of the Immigration and Naturalization Act permitting one house of Congress to veto a decision of the executive branch was unconstitutional.<sup>92</sup> The "substantial change" provision of the PADC Act is a similar provision that allows for a one-house veto and consequently could be unconstitutional.<sup>93</sup> This issue was avoided by the district court in *Don't Tear It Down, Inc. v. Pennsylvania Avenue Development Corp.* because the court did not find PADC's actions to be a "substantial change" of plans that would have required submission to the Senate or the House of Representatives under the potentially unconstitutional section 874(d) of the PADC Act.<sup>94</sup> Because the district court maintained the demolition plans were only a "significant action,"<sup>95</sup> congressional approval was not mandated under the Act. The constitutional challenge thereby remains unresolved.

Perhaps one reason why the court diligently searched the scant legislative history to decipher what Congress meant by "significant action" was to reach an interpretation of the phrase that avoids consideration of the constitutional issue. The sole basis for the judicial interpretation of the PADC Act was a House report by the Interior and Insular Affairs Committee.<sup>96</sup> Due to the lack of a conference report and full floor debate, the court compared an identical provision, considered by an earlier Congress but not then adopted,<sup>97</sup> to the "significant action" language subsequently adopted in the PADC Act.<sup>98</sup> Relying on congressional intent deduced from the earlier House report, the court concluded that demolition of the Market Space buildings was a "significant action." Thus, the court placed no further restrictions on PADC except to require reporting to the appropriate congressional committees.<sup>99</sup>

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tutionality of the one-house legislative veto provision stipulated in 40 U.S.C. § 874(d) (1982 & Supp. I 1983) by citing *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983). "Although the court believes defendant's argument has considerable merit, it need not reach this issue because it does not believe PADC's demolition plans are a 'substantial change,' and therefore § 874(d) is not applicable to this case." 579 F. Supp. at 1386 n.2.

91. 462 U.S. 919 (1983).

92. *Id.* at 959.

93. See PADC Act, 40 U.S.C. § 874(d) (1982 & Supp. I 1983).

94. *Id.*

95. See generally *supra* notes 16, 30, 54 and accompanying text.

96. See H.R. REP. NO. 520, 97th Cong., 2d Sess. at 1-2 (1982).

97. Compare H.R. 5990, 97th Cong., 2d Sess. § 2 (1983), reprinted in H.R. REP. NO. 520, 97th Cong., 2d Sess. at 1-2 (1982) with Pub. L. No. 98-141 § 8(b), 97 Stat. 909, 910 (1983) (both bills contain the "significant action" language and the court construed this as an indication of Congress' ultimate intent as to the meaning of these words).

98. 579 F. Supp. at 1389; compare *supra* note 96 with PADC Act, 40 U.S.C. § 874(e)(2) (Supp. I 1983).

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



The seemingly slight differentiation between the terms "substantial change" and "significant action" does not completely resolve the ambiguity in the PADC Act because the court did not fully define or illustrate what conditions represent a "substantial change" in the Pennsylvania Avenue Plan—1974.<sup>100</sup> Relying on the deficient legislative history, the district court succeeded, however, in clarifying to some extent the statutory meaning of the words "significant action."<sup>101</sup> The issues presented in *Don't Tear It Down, Inc. v. Pennsylvania Avenue Development Corp.*<sup>102</sup> illustrate the importance of decisive statutory language and full-bodied legislative histories for the purpose of statutory interpretation.

Although the courts found in favor of PADC in both the 1980 and 1984 cases involving *Don't Tear It Down*, the important role of this vital historic preservation group must be noted. The goals and activities of *Don't Tear It Down* serve the same purpose as provisions in the PADC Act that allow interested individuals and organizations to comment upon proposed development plans.<sup>103</sup> This nonprofit historic preservation group illuminates public sentiment and concern for historically significant structures. Arguably, without the diligent efforts of *Don't Tear It Down*, PADC might not have followed the requisite statutory path and notified the appropriate congressional committees concerning the Market Space area. Moreover, by ensuring that these statutory constraints were enforced, *Don't Tear It Down* increased public awareness and reinforced statutory limitations circumscribing PADC's discretion in redevelopment along Pennsylvania Avenue.<sup>104</sup>

### III. CONCLUSION

In *Don't Tear It Down, Inc. v. Pennsylvania Avenue Development Corp.*,<sup>105</sup> the United States District Court for the District of Columbia held that PADC had complied with all pertinent sections of the United States Code, the Memorandum of Agreement with the Advisory Council on Historic Preservation, and procedural constraints in the PADC Act. The district court based its decision on documentation submitted by PADC indicating

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100. See 579 F. Supp. at 1387.

101. *Id.* at 1389.

102. 579 F. Supp. 1382 (D.D.C. 1984).

103. See, e.g., PADC Act, 40 U.S.C. § 874(c) (1982 & Supp. I 1983) (provides for public hearings on the PADC Plan—1974, as amended); 40 U.S.C. § 874(e)(3) (Supp. I 1983) (allows for receipt of recommendations from any interested individual, organization or agency relating to significant changes in the Plan).

104. It has also been asserted that the Willard Hotel and the Old Post Office along Pennsylvania Avenue were retained as a direct result of the legal battles fought against PADC by *Don't Tear It Down*. See *supra* note 40 and accompanying text.

105. 579 F. Supp. 1382 (D.D.C. 1984).

that the requisite notification had been secured from the appropriate commissions. Furthermore, the court engaged in statutory interpretation in order to clarify ambiguities in the PADC Act.

PADC's decision to tear down the Market Space buildings rather than retain them as originally allowed in the Pennsylvania Avenue Plan—1974 was determined to be a "significant action" rather than a "substantial change" of plans. The effect of this decision was that the Corporation was required to notify two congressional committees of its demolition plans rather than engage in the extensive process of securing approval from the Mayor, the Secretary of the Interior and Congress. The United States District Court appeared reluctant to place further restrictions upon PADC. Furthermore, by finding the action to be a "significant action" rather than a "substantial change," the court avoided addressing the constitutional issue of the one-house veto provision in the PADC Act. In sum, PADC's activities remain subject to three general sources of statutory constraint: notification to organizations under the United States Code; approbation of the Advisory Council on Historic Preservation under the Memorandum of Agreement; and full compliance with the PADC Act. Although PADC remains vested with a substantial amount of discretion, it is a well-regulated federal entity performing the important task of redevelopment along the nation's main street—Pennsylvania Avenue.

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