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# Comments

## Historic Preservation Cases in Pennsylvania: A Survey and Analysis

### I. INTRODUCTION

At the time of this writing, historic preservationists in Pittsburgh are conceding the extinction of "The Moose."<sup>1</sup> Described as downtown Pittsburgh's "most extravagantly designed small building," and distinguished for being the site where the Pittsburgh Pact, which led to the creation of the Czech nation, was signed, the 1915 Beaux Arts Moose will yield its place on Penn Avenue to Allegheny International's twin thirty story towers of post-modern design within the near future.<sup>2</sup>

Opposition to the demolition of the Moose exists and was ably articulated at a public information meeting conducted by Pittsburgh's City Planning Department and attended by seventy-five people. However, Pittsburgh History and Landmarks Foundation president and nationally known preservationist, Arthur P. Ziegler, Jr., after cooperating with architects, city planners, corporate chiefs and private developers in attempts to formulate plans to meet use, open space and other project requirements, finally concluded that fighting for the Moose was not worth losing the cultural and social benefits promised by the new development.<sup>3</sup> Profits from Allegheny International's towers will be funneled through a non-profit trust for cultural resources that will aid restoration and revival of the nearby Stanley Theatre.<sup>4</sup> In conjunction with this so-called "economic engine," the city intends to encourage national and local historic district designation to spur the growth of a "cultural" district to replace the existing red light area that pres-

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1. Preservation News, March, 1984 at 1, col. 4.
  2. *Id.* at 5, col. 1
  3. *Id.*
  4. *Id.*

ently abuts the location of the proposed towers.<sup>5</sup>

Despite the occurrence of controversies such as the decision to demolish the Moose, historic preservation activity both nationally and in Pennsylvania is impressive and expanding.<sup>6</sup> The National Trust for Historical Preservation, in *Older and Historic Buildings and the Preservation Industry*, reports that approximately twenty-one billion dollars is invested in the rehabilitation of historic and older buildings annually.<sup>7</sup> Obviously, such a figure means historic preservation is not an insignificant force in the construction industry.<sup>8</sup> However, with pre-1940 buildings accounting for twenty-five percent or more of the total existing building stock, the sum is less surprising.<sup>9</sup> According to the National Trust report, "[p]rivate investment in historic rehabilitation projects certified by the National Park Service has totaled \$2.98 billion in the six years the investment tax credits have been available, increasing steadily since 1977 to a high of \$1.5 billion in fiscal year 1983."<sup>10</sup>

As of January 1983, there were over 202,000 buildings eligible for certification and concomitant tax benefits listed in the National Register of Historic Places.<sup>11</sup> In Pennsylvania, as of March 1, 1984,

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5. *Id.*

6. For an overview of state and federal legislation affecting historic resources in Pennsylvania, see NATIONAL CENTER OF PRESERVATION LAW, A PRIMER ON HISTORIC PRESERVATION LAW IN PENNSYLVANIA (1982); Comment, *Preservation of Historic Architecture in Pennsylvania: A Report and Recommendations*, 85 DICK. L. REV. 717 (1981).

7. Preservation Projects Attract \$21 Billion Annually, Says National Trust, [Current Developments] Hous. & Dev. Rep. (BNA) 586 (Dec. 12, 1983). Overall, older and historic commercial properties annually attract \$10 billion in private investments, while residential buildings more than 50 years old attract \$11 billion in investments. *Id.* For authoritative articles on tax aspects of historic preservation see R. Roddewig, *Preservation Law and Economics*, in A HANDBOOK ON HISTORIC PRESERVATION LAW (C. Duerksen ed. 1983); R. Stipe, *State and Local Tax Incentives for Historic Preservation* in TAX INCENTIVES FOR HISTORIC PRESERVATION 91 (G. Andres ed. 1980); Powers, *Tax Incentives for Historic Preservation: A Survey, Case Studies and Analysis*, 12 URB. L. 103 (1980). See *infra* notes 188-195.

8. Preservation Projects Attract \$21 Billion Annually, Says National Trust, [Current Developments] Hous. & Dev. Rep. (BNA) 586 (Dec. 12, 1983).

9. *Id.*

10. *Id.* See also Use of Historic Rehab Tax Credit Continues to Increase, Says Interior, [Current Developments] Hous. & Dev. Rep. (BNA) 744 (Jan. 30, 1984). A recently released Interior Department Summary indicates there was a 43 percent increase in certified historic rehabilitation activity over fiscal 1982 and an 87 percent increase over fiscal 1981 activity. Furthermore, 2,572 projects were certified for the 25 percent investment tax credit on historic rehabilitation costs in 1983, affecting \$2.165 billion in private investments. *Id.* According to the Interior Department 7,510 certified projects nationwide have qualified for historic preservation tax incentives and 92 percent of property owners who apply receive the necessary certification. *Id.*

11. Preservation Projects Attract \$21 Billion Annually, Says National Trust, [Current Developments] Hous. & Dev. Rep. (BNA) 586 (Dec. 12, 1983).

there were 1,549 listings in the National Register.<sup>12</sup> Additionally, from 1965 when Old Economy, a National Historic Landmark as well as a National Register district, was listed, over 125 other historic districts have been deemed eligible for inclusion in the Register.<sup>13</sup> Surveys of historic sites, buildings, structures, objects and districts have been conducted in many localities, yielding a plethora of documentation that is now being analyzed and stored in a special computer program by the Bureau of Historic Preservation.<sup>14</sup>

Additionally, Pennsylvania boasts over 52 historic districts created by local ordinances and certified by the Pennsylvania Historical and Museum Commission.<sup>15</sup> Like historic buildings in National Register districts, those in locally created historic districts may be eligible for favorable tax treatments. Indeed, in 1983, two historic districts and forty projects were certified by the Bureau of Historic Preservation for the twenty-five percent investment tax credit.<sup>16</sup>

An historic preservation revolving fund is in its incipiency in Pennsylvania, and a Pennsylvania Preservation League has been formed.<sup>17</sup> Furthermore, easements, covenants and other zoning devices continue to be employed to preserve the cultural and environmental resources in Pennsylvania and elsewhere.<sup>18</sup>

When statistics which purport to show the use of historic preservation as both an economic tool and method by which aesthetic and cultural values can be transferred from one generation to the next are juxtaposed with the destruction of historic resources, it is clear that historic preservation issues are complex. Their resolution

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12. Letter from Gregory Ramsey, Chief, Preservation Services, Bureau of Historic Preservation, Pennsylvania Historical and Museum Commission, to Marnie M. Crouch (March 16, 1984) (discussing statewide historic preservation activity).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* The application consists of two parts. Part 1 is not necessary if a property is individually listed in the National Register. In calendar year 1983, the Bureau of Historic Preservation received 253 Part I applications and 219 Part II applications. *Id.*

17. Letter from Gregory Ramsey, Chief, Preservation Services, Bureau of Historic Preservation, Pennsylvania Historical and Museum Commission, to Marnie M. Crouch (March 16, 1984) (discussing statewide historic preservation activity).

18. *Id.* See, e.g., Brenneman, *Historic Preservation Restrictions: A Sampling of State Statutes*, 8 CONN. L. REV. 231 (1976). Brenneman, *Techniques for Controlling the Surroundings of Historic Sites*, 36 LAW & CONTEMP. PROBS. 416 (1971); Browne & Van Dorn, *Charitable Gifts of Partial Interests in Real Property for Conservation Purposes*, 29 TAX LAW. 69 (1975). Goetsch, *Conservation Restrictions*, 8 CONN. L. REV. 383 (1976); Reynolds, *Preservation Easements*, 44 APPRAISAL J. 260 (1976); Small, *The Tax Benefits of Donating Easements in Scenic and Historic Property*, 7 REAL EST. L.J. 304 (1979).

often engenders heated debate, and not infrequently litigation. In this comment, nine reported Pennsylvania cases will be discussed.

These nine cases fall into four categories. The two earliest cases, *Best v. Zoning Board of Adjustment*<sup>19</sup> and *National Land and Investment Co. v. Kohn*,<sup>20</sup> provide an introduction to the constitutionality of zoning ordinances. Furthermore, they highlight the significance and implications of protecting aesthetically pleasing urban and rural environments.

*First Presbyterian Church of York v. City Council of York*,<sup>21</sup> *B. P. Oil, Inc. v. City of Harrisburg*<sup>22</sup> and *Cleckner v. Harrisburg*<sup>23</sup> concern provisions of local historic district ordinances enacted pursuant to what is commonly referred to by preservationists in Pennsylvania as Act 167.<sup>24</sup> These cases establish beyond cavil the legitimacy of properly structured local historic districts and reflect judicial awareness of a link between historic preservation and economic revitalization.

*Commonwealth v. National Gettysburg Tower, Inc.*<sup>25</sup> and *Payne v. Kassab*<sup>26</sup> interpret Pennsylvania's environmental rights amendment.<sup>27</sup> These cases, no doubt, dampened the amendment's effectiveness as a preservation tool prior to the passage of Pennsylvania's Historic Preservation Act in 1978.<sup>28</sup>

Finally, two federal cases, *Philadelphia Council of Neighborhoods v. Coleman*<sup>29</sup> and *Weintraub v. Rural Electrification Administration*,<sup>30</sup> the latter involving the demolition of a National

19. 393 Pa. 106, 141 A.2d 606 (1958).

20. 419 Pa. 504, 215 A.2d 597 (1965).

21. 25 Pa. Commw. 154, 360 A.2d 257 (1976).

22. 99 Dauph. 182 (1977).

23. 101 Dauph. 134, 10 Pa. D. & C.3d 393 (1979).

24. Act of June 13, 1961, P.L. 282 (codified at PA. STAT. ANN. tit. 53, §§ 8001-8004 (Purdon 1972)), amended by PA. STAT. ANN. tit. 53, §§ 8001-8002 (Purdon Supp. 1983).

25. 8 Pa. Commw. 231, 302 A.2d 886, *aff'd*, 454 Pa. 193, 311 A.2d 585 (1973).

26. 11 Pa. Commw. 14, 312 A.2d 86 (1973), *exceptions dismissed*, 14 Pa. Commw. 14, 323 A.2d 407 (1974), *aff'd*, 468 Pa. 226, 361 A.2d 263 (1976).

27. PA. CONST. art. 1, § 27. This amendment, adopted in 1971, provides:

The people have a *right* to clean air, pure water, and to the *preservation of the natural scenic, historic and esthetic values of the environment*. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of the people.

*Id.* (emphasis supplied).

28. Act of November 22, 1978, Pub. L. No. 1160 (codified at PA. STAT. ANN. tit. 71, § 1047.1a-1o (Purdon Supp. 1983)).

29. 437 F. Supp. 1341 (E.D. Pa. 1977), *aff'd*, 578 F.2d 1375 (3d Cir. 1978).

30. 457 F. Supp. 78 (M.D. Pa. 1978).

Register property, will be discussed with reference to alleged violations of the National Historic Preservation Act<sup>31</sup> and Executive Order 11593<sup>32</sup> which engendered them.

Circumstances surrounding the fate of the Moose illustrate themes appearing in these nine cases: the demolition of irreplaceable historic landmarks and properties, the linkage between preservation of historically and architecturally significant buildings with community revitalization, and the social importance of protecting aesthetically pleasing and culturally meaningful urban (and rural) areas. This comment will evaluate the status of historic preservation law in Pennsylvania through an examination of these cases and their implications for future litigation.

## II. AESTHETIC AND EXCLUSIONARY ZONING

In 1958, in *Best v. Zoning Board of Adjustment*,<sup>33</sup> the Pennsylvania Supreme Court addressed the constitutionality of a single-family dwelling provision of Pittsburgh's zoning ordinance. In so doing, the court set forth basic precepts with respect to zoning.<sup>34</sup> Relying primarily on the landmark United States Supreme Court case of *Euclid v. Ambler Realty Co.*,<sup>35</sup> the court defined zoning as "the legislative division of a community into areas in each of which only certain designated uses of land are permitted so that the community may develop in an orderly manner in accordance with a comprehensive plan."<sup>36</sup> Noting that legislative authority to zone land is derived from the "police power," the court indicated such power is plenary, limited only by state and federal constitutions.<sup>37</sup> The court concluded, however, that constitutional provisions were not intended to upset reasonable property regulations designed to

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31. National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915 (codified as amended at 16 U.S.C. §§ 470-470t (1976)), amended by 16 U.S.C. §§ 470-470w-6 (Supp. V 1981). See *infra* notes 150-153.

32. Exec. Order No. 11593, 36 Fed. Reg. 8921 (1971), reprinted in 16 U.S.C. § 470 (1976). See *infra* note 163.

33. 393 Pa. 106, 141 A.2d 606 (1958).

34. See generally, 1 R. ANDERSON, LAW OF ZONING IN PENNSYLVANIA (1982 & Supp. 1983).

35. 272 U.S. 365 (1926).

36. 393 Pa. at 110, 141 A.2d at 609. The court's reference to a comprehensive plan must be read in light of the Pennsylvania Municipalities Planning Code, PA. STAT. ANN. tit. 53, §§ 10101-11202 (Purdon 1972 & Supp. 1983), which does not require comprehensive planning prior to zoning. 1 R. ANDERSON, *supra* note 34, at §1.13.

37. 393 Pa. at 110, 141 A.2d at 609. The court noted that the only restrictions upon the power of the legislature to regulate private property rights are imposed by Article 1, § 10 of the Pennsylvania Constitution and the fourteenth amendment. *Id.*

achieve a legitimate public purpose.<sup>38</sup>

With respect to the Pittsburgh ordinance challenged in *Best*, the court recognized that the city, in accordance with its comprehensive plan, had undertaken to control population density through residential districts for single-family homes, two-family dwellings and multiple-unit apartment houses.<sup>39</sup> It further indicated that such an undertaking was neither arbitrary nor unreasonable if it bore a substantial relationship to the health, safety, morals and general welfare of the community.<sup>40</sup>

The appellant in *Best* was the owner of a twenty-two room home on Morewood Avenue, a street lined with large, gracious homes.<sup>41</sup> According to the court, when *Best* bought her home she knew, or should have known, of the provisions of the zoning ordinance restricting the property for use as a single-family dwelling.<sup>42</sup> Therefore, the court had no difficulty in affirming the lower court's decision to sustain the denial of a variance. The court observed that a variance may be granted "only where a property is subjected to a hardship unique or peculiar to itself as distinguished from one arising from the impact of the zoning regulations on the entire district."<sup>43</sup>

The appellant urged the court to find that the application of the ordinance to her property was arbitrary and unreasonable. In her view, the lower court's two-fold determination that the proposed use of her home as a multiple-family dwelling was not adverse to the public health, safety or morals, and that the proposed use of her home as a multiple-family dwelling would be contrary to the general welfare was inconsistent.<sup>44</sup> The Pennsylvania Supreme Court, however, found that "general welfare" standing alone was sufficient to justify the zoning ordinance in question.<sup>45</sup>

Significantly, the court quoted the Massachusetts Supreme Judicial Court in *Opinion of the Justices to the Senate*, a renowned historic preservation case:

The proposed act can hardly be said in any ordinary sense to relate to the public safety, health, or morals. Can it rest upon the less definite and more

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38. 393 Pa. at 111, 141 A.2d at 610.

39. 393 Pa. at 111-12, 141 A.2d at 610.

40. *Id.*

41. *Id.* at 108, 141 A.2d at 608

42. *Id.* at 109, 141 A.2d at 608.

43. *Id.* at 109, 141 A.2d at 609.

44. *Id.* at 113-14, 141 A.2d at 611.

45. *Id.*

inclusive ground that it serves the public welfare? The term public welfare has never been and cannot be precisely defined. Sometimes it has been said to include public convenience, comfort, peace and order, prosperity and similar concepts . . .<sup>46</sup>

The court concluded that acceptance of Best's view would replace the statutory law of zoning with the law of nuisance.<sup>47</sup> Therefore, the court reiterated its holding in *Swade v. Zoning Board of Adjustment*<sup>48</sup> that considerations of the general welfare alone can support the constitutionality of zoning ordinances. The court buttressed its conclusion with Justice Douglas' often quoted statement:

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.<sup>49</sup>

The court was satisfied that Pittsburgh's ordinance preserved wholesome and attractive characteristics of the community and its property values. Furthermore, it was convinced that requiring Best to use her property in conformance with existing zoning provisions would serve to maintain the community's attractive characteristics and its property values. The court noted that Best introduced no evidence whatsoever to show that application of the ordinance would not promote the general welfare.<sup>50</sup> It, therefore, affirmed the lower court's order sustaining the denial of a variance by the zoning board of adjustment.

The significance of *Best* lies in the court's articulation of precepts relative to the constitutionality of zoning ordinances, and its endorsement of aesthetics as a consideration in determining their validity subsumed within the concept of general welfare. The court in alignment with the majority of states, however, refused to permit an aesthetic purpose, standing alone, to support a restriction on the use of private land.<sup>51</sup> Although *Best* is analytically

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46. Opinion of the Justices to the Senate, 333 Mass. 773, 778, 128 N.E.2d 557, 561 (1955). See 393 Pa. at 115, 141 A.2d at 611.

47. 393 Pa. at 115, 141 A.2d at 612.

48. 392 Pa. 269, 140 A.2d 597 (1958) (where a zoning ordinance prohibits a business use in a residential zone, the fact that the property owner's business has no reasonable relationship to the public health, safety or morals neither makes the ordinance unconstitutional as applied to him nor requires the issuance of a variance).

49. 393 Pa. at 116, 141 A.2d at 612 (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)).

50. 393 Pa. at 118, 141 A.2d at 613.

51. See 1 R. ANDERSON, *supra* note 34 at § 5.39. For cases holding that an aesthetic



sound, it is unfortunate that other Pennsylvania zoning decisions have been criticized as "erratic both in quality and in treatment of specific rules of law."<sup>52</sup>

Subsequent to the *Best* decision, Justice Bell cast doubt on whether general welfare standing alone will justify a zoning ordinance. In a concurring opinion in *Appeal of Key Realty Co.*,<sup>53</sup> he stated: "I would hold (a) that aesthetic values are not a factor in the consideration of the validity or constitutionality of a zoning Act or ordinance, and (b) that 'general welfare' *alone* is *not* sufficient to validate or constitutionalize a zoning Act or ordinance or regulation."<sup>54</sup> That confusion as to the current state of law exists as a consequence, is illustrated by two Pennsylvania Commonwealth Court decisions. In one, the court stated, "general welfare includes considerations of aesthetic and property values."<sup>55</sup> In the other, it noted:

Neither aesthetic reasons nor the conservation of property values nor the stabilization of economic values in a township are, singly, or combined, sufficient to promote the health or the morals or the safety or the general welfare of the township or its inhabitants or property owners, within the meaning of the enabling act or under the Constitution of Pennsylvania.<sup>56</sup>

Seven years after *Best*, the Pennsylvania Supreme Court again considered the constitutionality of a density ordinance in the landmark case, *National Land and Investment Co. v. Kohn*,<sup>57</sup> the first and most significant exclusionary zoning case in

purpose standing alone will not support a restriction on the use of private land, see *Appeal of Key Realty Co.*, 408 Pa. 98, 182 A.2d 187 (1962); *Rogalski v. Upper Chichester Twp.*, 406 Pa. 550, 178 A.2d 712 (1962); *Appeal of Medinger*, 377 Pa. 217, 104 A.2d 118 (1954); See generally, Annot., 21 A.L.R. 3d 1222 (1968). However, for cases that indicate aesthetics may be considered, see *H. A. Steen Indus., Inc. v. Cavanaugh*, 430 Pa. 10, 241 A.2d 771 (1968); *Exton Quarries, Inc. v. Zoning Bd. of Adjustment*, 425 Pa. 43, 228 A.2d 169 (1967); *National Land and Investment Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965); *Landis v. Zoning Bd. of Adjustment*, 414 Pa. 146, 198 A.2d 574 (1964); *Rogalski v. Upper Chichester Twp.*, 406 Pa. 550, 178 A.2d 712 (1962); *Appeal of Liggett*, 291 Pa. 109, 139 A. 619 (1927); *Mont-Bux, Inc. v. Twp of Cheltenham*, 36 Pa. Commw. 397, 388 A.2d 1106 (1978).

52. 1 N. WILLIAMS, AMERICAN PLANNING LAW § 6.12 (1974).

53. 408 Pa. 98, 182 A.2d 187 (1962) (refusal of zoning board to permit erection of an apartment house, after initial refusal to permit structure because of technical violations and subsequent amendment to ordinance, sustained).

54. *Id.* at 119, 182 A.2d at 198 (Bell, J., concurring).

55. *County of Fayette v. Holman*, 11 Pa. Commw. 357, 362, 315 A.2d 335, 338 (1973) (a zoning regulation excluding mobile homes from a residential district is valid where such regulation is reasonably related to the general welfare of the community and where there are unfavorable aesthetic impacts).

56. *Soble Constr. Co. v. Zoning Hearing Bd.*, 16 Pa. Commw. 599, 607, 329 A.2d 912, 917 (1974).

57. 419 Pa. 504, 215 A.2d 597 (1965).

Pennsylvania.<sup>58</sup>

In 1958, the appellee Dorothy McEnnis, a straw party employed in the office of the real owner's counsel, took title to approximately 130 acres of land known as "Sweetbriar" in Easttown Township. The court described Easttown Township as a semi-rural or estate rural community located west of Philadelphia, traversed by the Main Line of the Pennsylvania Railroad and U.S. Route 30.<sup>59</sup> In 1961, the appellee executed an agreement of sale with National Land for eighty-five acres of land contingent upon the suitability of the tract for subdivision development.<sup>60</sup> National Land expended approximately six thousand dollars preparing subdivision plans for one acre lots. It submitted these plans to Easttown Township in late 1961.<sup>61</sup> In early 1962, however, an amendment to the zoning ordinance imposed a four acre minimum lot requirement upon the land. This prompted National Land to file with the township a request for a building permit to construct a single dwelling house on a one acre lot.<sup>62</sup> The request was refused, but National Land was notified of its right to appeal to the board of adjustment for a variance.<sup>63</sup> At the board of adjustment hearing, the township moved to quash the appeal claiming that it was untimely and that no subdivision plan for "Sweetbriar" had been approved.<sup>64</sup> This motion was granted because no subdivision plan in fact had been approved and because the board was convinced that it was not qualified to consider the constitutional issues raised by National Land.<sup>65</sup> On appeal to the Court of Common Pleas of Chester County, the board's decision was reversed and the case was remanded for further testimony relative to the substantive issues.<sup>66</sup> The township then appealed to the Pennsylvania Supreme

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58. 1 R. ANDERSON, *supra* note 34, at § 7.12. Professor Anderson opines that the case "may plausibly be regarded as the foundation opinion in exclusionary zoning litigation." *Id.* See also D. MOSKOWITZ, *EXCLUSIONARY ZONING LITIGATION* 185 (1977). Exclusionary zoning has been defined as "the complex of zoning practices which results in closing suburban housing and land markets to low- and moderate-income families." Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509, 519 (1971), and zoning which "raises the price of residential access to a particular area, and thereby denies that access to members of low-income groups." Sager, *Tight Little Islands Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969).

59. 419 Pa. at 508-09, 521, 215 A.2d 600, 606.

60. *Id.* at 508, 215 A.2d at 600.

61. *Id.* at 509, 215 A.2d at 600.

62. *Id.* at 509, 215 A.2d at 600-01.

63. *Id.* at 509, 215 A.2d at 601.

64. *Id.* at 510, 215 A.2d at 601.

65. *Id.*

66. *Id.*

Court.<sup>67</sup>

The supreme court affirmed the order of the court of common pleas and concluded that "the board of adjustment committed an error of law in upholding the constitutionality of the Easttown Township four acre minimum requirement as applied to the appellee's property."<sup>68</sup> The court reached this result despite the fact that the board of adjustment refused to address the constitutionality of the requirement and the court of common pleas merely remanded the case for development of a record.

Ignoring this questionable procedural base, the Pennsylvania Supreme Court reviewed Easttown Township's four acre minimum lot requirement, noting that it was imposed on approximately thirty percent of the township's 5,157 acres.<sup>69</sup> The court juxtaposed National Land's deprivation of part of the value of its property with the township's justifications for the four acre minimum: inadequate means of sewage disposal, inadequate road systems, pollution and the need to preserve the character of the area. With respect to the township's pollution and infrastructure concerns, the court said:

Zoning is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities. It must not and cannot now be used by those officials as an instrument by which they may shirk their responsibilities. Zoning is a means by which a governmental body can plan for the future — it may not be used as a means to deny the future. . . . Zoning provisions may not be used . . . to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring.<sup>70</sup>

With respect to the township's need to preserve the character of the area, the court considered four arguments: (1) preserving open space and creating a "greenbelt," (2) presenting historic sites in their proper settings, (3) protecting the setting of old homes (some dating back to the beginning of the Commonwealth), a goal within the ambit of promoting the general welfare according to the township, and (4) preserving the rural character of the community.<sup>71</sup> The court was unmoved by these arguments. It noted that if preservation of open space was an objective, "cluster-zoning" or condemnation of development rights with compensation paid to the

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67. *Id.*

68. *Id.* at 533, 215 A.2d at 613.

69. *Id.* at 519, 215 A.2d at 606.

70. *Id.* at 528, 215 A.2d at 610.

71. *Id.* at 524-31, 215 A.2d at 608-12.

condemnees, were alternative means available to that end.<sup>72</sup> It concluded that the four acre requirement was an unreasonable way to preserve open space, particularly since the land would continue to remain open only if there was no market for four acre lots.<sup>73</sup>

The historic sites argument advanced by the township was belittled as a "makeweight" by the court.<sup>74</sup> The historic sites map introduced by the township demonstrated that the overwhelming number of historic sites were located in areas of dense population so that four acre zoning elsewhere in the township would hardly provide a proper setting for them.<sup>75</sup> According to the court, "the beautification of several structures of minor historical significance neither calls for nor legitimizes the imposition of low density zoning of the magnitude here contemplated upon 30% of the township."<sup>76</sup>

The township's "general welfare" argument was ill received also. Contending that the concept of general welfare defies meaningful definition and constitutes an exceedingly difficult standard against which to test the validity of legislation, the court indicated that a zoning ordinance serving purely private interests may be disguised as legislation for the public welfare.<sup>77</sup> Recognizing that many residents were probably desirous of keeping the area in a natural state, the court concluded that the minimum lots size was "purely a matter of private desire which zoning regulations may not be employed to effectuate."<sup>78</sup> Furthermore, the court thought it untenable that areas of less than four acres be declared immune from development simply because of an abundance of architecturally and historically interesting old homes nearby.<sup>79</sup> Finally, the court determined that the rural character of the township would not be preserved by four acre lots; "it would simply be dotted with large homes on larger lots."<sup>80</sup>

In 1958, the Pennsylvania Supreme Court, in another case involving Easttown Township, upheld one acre zoning.<sup>81</sup> In *National*

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72. *Id.* at 529, 215 A.2d at 611.

73. *Id.* at 529, 215 A.2d at 610.

74. *Id.* at 530, 215 A.2d at 611.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 531, 215 A.2d at 611.

79. *Id.*

80. *Id.* at 531, 215 A.2d at 612.

81. *Bilbar Const. Co. v. Eastown Twp. Bd. of Adjustment*, 393 Pa. 62, 141 A.2d 851 (1958). *Bilbar and Best v. Zoning Bd. of Adjustment*, 393 Pa. 106, 141 A.2d 606 (1958), were

*Land*, however, it was compelled to denounce four acre zoning as unconstitutional, finding that "the general welfare is not fostered or promoted by a zoning ordinance designed to be exclusive or exclusionary."<sup>82</sup>

Clearly, *National Land* forecloses preservation of historic resources by zoning provisions that smack of being exclusionary. A subtle inconsistency between the court's decision to uphold the single-family provisions disputed in *Best* and its decision in *National Land* exists.<sup>83</sup> This may be explained by the court's determination in *National Land* that "[e]very zoning case involves a different set of facts and circumstances in light of which the constitutionality of a zoning ordinance must be tested."<sup>84</sup> Alternatively, it may be an indication of the confused state of the law and the composition of the court.<sup>85</sup> Nevertheless for historic preservationists, the apparent ease with which the notions of the general welfare and aesthetics can be manipulated meant more predictable methods of protecting building and landscapes had to be developed. The court itself suggested the possibility of landowners by themselves, or with neighbors, purchasing land and protecting it with deed restrictions or covenants inter se.<sup>86</sup>

One avenue pursued by historic preservationists was the enactment of historic district ordinances. Unlike National Register Historic Districts which contain no such provisions,<sup>87</sup> local historic district ordinances authorized by Act 167<sup>88</sup> provide for the issuance of certificates of appropriateness by Historical Architectural Review Boards<sup>89</sup> with respect to "the erection, alteration, restoration, demolition or razing of a building, in whole or in part."<sup>90</sup> Further, they may grant to these boards "the power to institute any proceedings, at law or in equity, necessary for the enforcement of this act or of any ordinance adopted pursuant thereto, in the same manner as in its enforcement of other building, zoning or planning

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companion cases.

82. 419 Pa. at 533, 215 A.2d at 612.

83. In *Best*, a zoning provision that clearly favored owners of large, stately homes in urban areas was upheld with positive references to the general welfare and aesthetics while in *National Land*, an analogous provision, in effect, was denounced.

84. 419 Pa. at 533, 215 A.2d at 612.

85. See *supra* notes 55-56. See also N. WILLIAMS, *supra* note 52, at § 6.12.

86. 419 Pa. at 523, 215 A.2d at 607-08. See *supra* note 18.

87. See *infra* note 152.

88. See *supra* note 24.

89. PA. STAT. ANN. tit. 53, § 8003 (Purdon 1972).

90. PA. STAT. ANN. tit. 53, § 8004 (Purdon 1972).

legislations or regulations."<sup>91</sup> Prior to *National Land*, there were three local historic districts in Pennsylvania.<sup>92</sup> Between 1966 and February 1980, thirty-eight additional historic districts were created.<sup>93</sup> While this development cannot be attributed solely to the outcome of *National Land*, reliance on aesthetic or exclusionary zoning as a means to maintain the historical and architectural integrity of a community was simply ill-advised and ineffectual.

### III. LOCAL HISTORIC DISTRICTS

National Trust for Historic Preservation attorney, Frank Herbert, also former executive director of the prominent New York City Landmarks Preservation Commission and an important figure in the *Penn Central Transportation Co. v. City of New York*<sup>94</sup> case, recently said in conjunction with his appointment as head of a program to aid communities setting up or administering historic districts:

It's the old 'taking' issue . . . Some developers think their property rights are inviolate and they can build as they please on their land. But zoning is an established concept, and we've finally established preservation as both a reasonable use of government power and a continuation of zoning regulations. In other words, if you set up your district right and administer it properly, you don't have to worry about law suits.<sup>95</sup>

Decisions in Pennsylvania courts and elsewhere attest to the veracity of Herbert's statement. Three reported cases from the late nineteen seventies conclusively establish that the refusal of Boards of Historical Architectural Review to issue permits to demolish buildings within historic districts pursuant to Act 167, the historic district act, is not an unconstitutional "taking" of property.

The first case arising under the historic district act, *First Presbyterian Church of York v. City Council of York*,<sup>96</sup> concerned York

91. PA. STAT. ANN. tit. 53, § 8005 (Purdon 1972).

92. COMMONWEALTH OF PENNSYLVANIA, DEPT. OF COMMUNITY AFFAIRS, HISTORIC DISTRICTS IN PENNSYLVANIA 7-8 (2d ed. 1980).

93. *Id.*

94. 438 U.S. 104 (1978). In *Penn Central*, the United States Supreme Court upheld New York City's landmark ordinance against a claim that it violated plaintiff's constitutionally protected property rights. *Id.*

95. Preservation News, March 1984, at 7, col. 2. Herbert's statement that preservation is a continuation of zoning power is not novel. The preservation of historically and aesthetically significant buildings has been described as being "in a very real sense a branch of the law of land use and development" with illuminating parallels "to the history of zoning and similar land use controls—subdivision regulation and master planning." Hershman, *Critical Legal Issues in Historic Preservation*, 12 URB. L. 19 (1980).

96. 25 Pa. Commw. 154, 360 A.2d 257 (1976).

House, "an exceptional specimen of Victorian Italian-Villa architecture, virtually unaltered, and representing the highest level of design, workmanship, materials and aesthetic values of the time of construction."<sup>97</sup> In 1972 the appellant church applied for permission to demolish York House, which adjoined the church edifice, and which it had acquired in 1959. Notably, York House was listed in the National Register of Historic Places,<sup>98</sup> as well as being within the local historic district.

Procedurally, after a hearing at which York's Board of Historical Architectural Review recommended refusal of the demolition permit, which advice the city council followed, the church appealed to the Court of Common Pleas of York County pursuant to the local agency law.<sup>99</sup> That court remanded the case for further hearings and findings with the aim of obtaining a record sufficient for application of the *Trustees of Sailors' Snug Harbor v. Platt*<sup>100</sup> test of constitutionality.<sup>101</sup> At a further hearing, at which both parties adduced additional evidence, the Board again recommended denial of the church's application, and city council again followed its recommendation. The court of common pleas upheld the council's actions and the church appealed to commonwealth court alleging an unconstitutional "taking."<sup>102</sup>

Between the time of the lower court's order of remand and the church's second appeal, *Maher v. City of New Orleans*,<sup>103</sup> a case involving an historic district as opposed to an individual landmark as in *Snug Harbor*, was decided. In *Maher*, the Louisiana district court determined that the historic district ordinance affecting the

97. *Id.* at 158, 360 A.2d at 259.

98. *Id.*

99. *Id.*

100. 29 A.D.2d 376, 288 N.Y.S.2d 314 (1968). The test employed in *Snug Harbor* was stated as follows:

The criterion for commercial property is where the continuance of the landmark prevents the owner from obtaining an adequate return. A comparable test for a charity would be where maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose. In this instance the answer would depend on the proper resolution of subsidiary questions, namely, whether the preservation of these buildings would seriously interfere with the use of the property, whether the buildings are capable of conversion to a useful purpose without excessive cost, or whether the cost of maintaining them without use would entail serious expenditure—all in the light of the purposes and resources of the petitioner.

*Id.* at 378, 288 N.Y.S.2d at 316. See also 25 Pa. Commw. at 159, 360 A.2d at 259.

101. 25 Pa. Commw. at 158-59, 360 A.2d at 259.

102. *Id.* at 159, 360 A.2d at 260.

103. 371 F.Supp. 653 (E.D. La. 1974), *aff'd*, 516 F.2d 1051 (5th Cir. 1975).

Vieux Carre was a proper zoning regulation within the scope of the police power. Furthermore, it found, in the words of the commonwealth court that:

[T]he test of constitutionality to be applied to a particular property for which a demolition permit was refused was not that of whether the detriment to the individual landowner outweighed the benefit conferred on the public, but that of whether the ordinance went so far as to preclude the use of the property for any purpose for which it was reasonably adapted.<sup>104</sup>

The Court of Appeals for the Fifth Circuit affirmed the district court's order refusing Maher's application to demolish his Victorian cottage, noting "Maher did not show that the sale of the property was impracticable, that commercial rental could not provide a reasonable rate of return, or that other potential use of the property was foreclosed."<sup>105</sup>

Commonwealth court Judge Rogers approved the lower court's utilization of an identical analysis with respect to the First Presbyterian Church. He concluded, as did the court below, that the church's evidence only established that it had no desire to use the building for religious purposes, not that the building was incapable of conversion to a useful purpose without excessive cost.<sup>106</sup> Finding support from Pennsylvania cases dealing with applications for use variances,<sup>107</sup> the court determined that there is no unconstitutional "taking" if the property owner cannot establish that the regulation precludes use of the property for any purpose for which it is reasonably adapted.<sup>108</sup>

The second case involving a local municipal ordinance, *B.P. Oil, Inc. v. City of Harrisburg*<sup>109</sup> involved the appellant's "fixation" on demolishing structures of Richardsonian style, featuring facades embellished with intricately designed terra cotta plaques and other architectural delights, and constructing a gas station in "Historic Harrisburg." This historic district was created by city ordinance

104. 25 Pa. Commw. at 161-62, 360 A.2d at 260. See also 371 F.Supp. at 662.

105. 561 F.2d at 1066.

106. 25 Pa. Commw. at 162, 360 A.2d at 261.

107. See, e.g., *Peirce v. Zoning Bd. of Adjustment*, 410 Pa. 262, 189 A.2d 138 (1963); *Crafton Borough Appeal*, 409 Pa. 82, 185 A.2d 533 (1962); *Magrann v. Zoning Bd. of Adjustment*, 404 Pa. 198, 170 A.2d 553 (1961); *Lally Zoning Case*, 404 Pa. 174, 171 A.2d 161 (1961); *J. Richard Fretz, Inc. v. Hilltown Twp. Zoning Hearing Bd.*, 18 Pa. Commw. 471, 336 A.2d 464 (1975); *Marple Gardens, Inc. v. Zoning Bd. of Adjustment*, 8 Pa. Commw. 436, 303 A.2d 239 (1973); *DiBello v. Zoning Bd. of Adjustment*, 4 Pa. Commw. 546, 287 A.2d 856 (1972).

108. 25 Pa. Commw. at 162, 360 A.2d at 261. Cf. *Best v. Zoning Bd. of Adjustment*, 393 Pa. 106, 109, 141 A.2d 606, 609 (1958).

109. 99 Dauph. 182 (1977).



passed by Harrisburg City Council on July 23, 1974. One of the oldest residential districts in Harrisburg containing nineteenth and early twentieth century townhouses and mansions, the portion of the district in question also was listed in the National Register of Historic Places in January 1976.<sup>110</sup>

Relying on tests articulated in *First Presbyterian Church of York* and *Maher*, the Court of Common Pleas of Dauphin County affirmed the order of Harrisburg City Council denying the appellant's request for a permit to build the gas station, noting that "B.P. has failed to sustain its burden of showing conclusively that these Second Street properties could not be used for rentals, nor does the record indicate any attempt to sell. The sole basis for this appeal is B.P.'s fixation on a gas station."<sup>111</sup>

Likewise, *Cleckner v. Harrisburg*<sup>112</sup> involved an appeal under the recently enacted local agency law from a decision of the City Council of Harrisburg denying a permit to demolish two vacant houses. Although testimony concerning the aesthetic-historic value and the economic value of the buildings was conflicting, the Court of Common Pleas of Dauphin County concluded that the Board of Historical Architectural Review, whose recommendation city council adopted, did not abuse its discretion in relying on appellee's evidence.<sup>113</sup> Further, the court decided it was not at liberty to declare that the appellant's view of the evidence was correct and more reasonable.<sup>114</sup> The court then reiterated that denial of the best and most profitable use of the property was not the test for an unconstitutional "taking."<sup>115</sup> Although the appellant testified that he placed a sign on the properties and advertised them for sale in *Preservation News*, a national paper published by the National Trust for Historic Preservation, the court found Cleckner did not "proceed prudently in offering his properties for sale," and that he had set an inflated asking price. According to the court, "if appellant were able to sell his properties for their fair market value, he could not consider them 'taken' by operation of the Historic District Ordinance."<sup>116</sup>

110. *Id.* at 183.

111. *Id.* at 185. See *First Presbyterian Church of York*, 25 Pa. Commw. at 161-62, 360 A.2d at 261; *Maher*, 516 F.2d at 1066.

112. 101 Dauph. 134, 10 Pa. D. & C.3d 393 (1979).

113. *Id.* at 137, 10 Pa. D. & C.3d 398.

114. *Id.*

115. *Id.* at 138, 10 Pa. D. & C.3d at 400. See generally Note, *Historic Zoning: The Test for an Unconstitutional Taking*, 81 DICK. L. REV. 136 (1976).

116. 101 Dauph. at 139, 10 Pa. D. & C.3d at 401.

While it is exceedingly unlikely that these decisions would be overruled by the Pennsylvania Supreme Court,<sup>117</sup> Judge Kramer's concurring opinion in *First Presbyterian Church of York*, in which Judges Crumlish and Mencer joined, highlights judicial reservations respecting historic district ordinances. Noting the tension between expansion of police power concepts and erosion of private property principles, Judge Kramer asserted that "we have reached a constitutional precipice that an advancement of even a fraction of an inch will result in excessive governmental encroachment upon private property rights."<sup>118</sup> In particular, he was skeptical of private property owners being made to make their property available for public view without compensation. In the view of three members of the seven member court, the public should pay for protecting, restoring or maintaining places of historical value if the public wants to use, take or apply a private property for these purposes.<sup>119</sup>

In addition, although the *Penn Central* and *Maher* decisions have made historic preservation regulation on the local level far less susceptible to challenges on "taking" grounds, the issue has not been completely settled.<sup>120</sup> Notably, the Supreme Court in *Penn Central* expressed the view that there is no "'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."<sup>121</sup> It concluded that "[w]hether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particu-

117. Courts in other jurisdictions have repeatedly upheld the validity of architectural control ordinances as police power regulations when historic or tourists districts are concerned. *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975); *Sunad, Inc. v. City of Sarasota*, 122 So. 2d 611 (Fla. 1960); *City of New Orleans v. Levy*, 223 La. 14, 64 So. 2d 798 (1953); *Opinion of the Justices to the Senate*, 333 Mass. 773, 128 N.E.2d 557 (1955); *Town of Deering ex rel. Bittenbender v. Tibbetts*, 105 N.H. 481, 202 A.2d 232 (1964); *Opinion of the Justices*, 103 N.H. 268, 169 A.2d 762 (1961); *City of Sante Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 P.2d 13 (1964); *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 192 N.E.2d 74 (1963); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217, cert. denied, 350 U.S. 841 (1955).

118. *First Presbyterian Church of York*, 25 Pa. Commw. at 165, 360 A.2d at 263.

119. *Id.* at 166, 360 A.2d at 263.

120. See D. Bonderman, *Federal Constitutional Issues*, in A HANDBOOK FOR HISTORIC PRESERVATION LAW (C. Duerksen ed. 1983). Edmondson, *Historic Preservation Regulation and Procedural Due Process*, 9 ECOLOGY L.Q. 743, 743-44 (1981); Hershman, *Critical Legal Issues In Historic Preservation*, 12 URBAN L. 19, 27 (1980).

121. *Penn Central*, 438 U.S. 104, 124 (1977).

lar circumstances [in that] case.'"<sup>122</sup> Proceeding to identify factors relative to its "essentially ad hoc, factual inquiries" the Court emphasized the economic impact of the regulation on the claimant, and the character of the governmental action. It also opined that the extent of interference with investment-backed expectations was a relevant consideration.<sup>123</sup> It is more likely, however, that future challenges to historic preservation ordinances will be based on procedural deficiencies.<sup>124</sup>

These sentiments of reservation are not confined to the judiciary. Particularly with respect to landmark ownership in downtown areas with high land values, the perception that such ownership is less profitable than redevelopment of landmark sites exists. Accordingly, historic district ordinances have proven most useful in preserving landmarks and buildings that are either within residential areas or outside areas with high land values. This is because these areas hold little interest for speculators and tend to contain smaller, more readily maintainable residential structures in low density settings. Owners frequently welcome historic district designation for the sake of prestige and property values. Furthermore, building owners recognize that costs associated with litigating permit denials are likely to offset gains from demolition or alteration.<sup>125</sup> Clearly, nonlegal factors are primarily responsible for the success of historic districts.

This conclusion is bolstered by surveys of agencies responsible for administering historic district ordinances which reveal that most communities are enthusiastic about their ordinances.<sup>126</sup> Despite the potential for distinct tax advantages, however, dissatisfaction can lead to repeal of historic district ordinances. For example, Upland Borough in Delaware County, Pennsylvania, repealed its historic district and repeal is being threatened in Allentown as well.<sup>127</sup> Nevertheless, in most instances, advantages, such as increased property values, blight reversal and heightened awareness of the nation's heritage, offset potential politicalization of the

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122. *Id.*

123. *Id.*

124. Edmondson, *supra* note 120, at 744.

125. See generally Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 582 (1972).

126. See COMMONWEALTH OF PENNSYLVANIA, DEPT. OF COMMUNITY AFFAIRS 8-11 (2d ed. 1981); Costonis, *supra* note 125, at 582 n.33.

127. Letter from Gregory Ramsey, Chief, Preservation Services, Bureau of Historic Preservation, Pennsylvania Historical and Museum Commission, to Marnie M. Crouch (March 16, 1984) (discussing historic preservation activities in Pennsylvania).

review of board determinations by city councils, delays in processing permits and noncooperation due to a community consensus in favor of having an historic district ordinance.<sup>128</sup>

In an attempt to improve the efficacy of municipally sanctioned preservation efforts, the Bureau of Historic Preservation is presently preparing a draft amendment to Act 167 to strengthen the ability of communities without architecturally and historically cohesive districts to preserve landmarks.<sup>129</sup> Both Philadelphia and Pittsburgh, cities exempt from Act 167, have landmark ordinances.<sup>130</sup> Thus, the proposed amendment would rectify the situation with respect to the rest of the state.

#### IV. PENNSYLVANIA'S ENVIRONMENTAL RIGHTS AMENDMENT AND HISTORIC PRESERVATION ACT

In the decades of the 1950's and 1960's, the mushrooming of urban and suburban development and the concomitant dwindling of rural landscapes spawned concern about the preservation of open space and the historical and aesthetic components of the American landscape. The irreversible destruction of this patrimony was not infrequently tied to the great variety of state and federal programs that affect the form and distribution of urban development. Arguably, federally assisted highways constructed by states and subject to extensive federal regulation affected and continue to affect the landscape more than any other federal program, "implementing in effect a hidden policy to bring land into development with an even handed dynamism that enhances access by automobile to center cities and remote wilderness at an extraordinary pace."<sup>131</sup>

This concern prompted adoption in 1971 of what is known as Pennsylvania's environmental rights amendment.<sup>132</sup> Entitled "Natural resources and the public estate," the amendment gives Penn-

128. COMMONWEALTH OF PENNSYLVANIA, DEPT. OF COMMUNITY AFFAIRS, *supra* note 126, at 8-11.

129. Letter from Gregory Ramsey, Chief, Preservation Services, Bureau of Historic Preservation, Pennsylvania Historical and Museum Commission, to Marnie M. Crouch (March 16, 1984) (discussing historic preservation activities in Pennsylvania).

130. See generally Tinkcom, *The Philadelphia Historical Commission: Organization and Procedures*, 36 LAW & CONTEMP. PROBS. 386 (1971).

131. W. Reilly, *National Landuse Policy*, 1414, 1415 in FEDERAL ENVIRONMENTAL LAW (E. Dolgin & T. Guilbert eds. 1974). See also Brenneman, *Techniques for Controlling the Surroundings of Historic Sites*, 36 LAW & CONTEMP. PROBS. 416 (1971).

132. PA. CONST. art. 1, § 27. Article I, § 27 was passed on by the legislature in 1969, amended and then approved in 1970, and finally adopted by the voters on May 18, 1971. *Payne v. Kassab*, 468 Pa. 226, 246 n.22, 361 A.2d 263, n.22 (1976). See Broughton, *The Proposed Pennsylvania Declaration of Environmental Rights*, 41 PA. B.A.Q. 421 (1970).

sylvanians "a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment."<sup>133</sup> It declares that public natural resources are the common property of all people and directs the Commonwealth, as trustee, to conserve and maintain them for the benefit of everyone.<sup>134</sup> Not surprisingly, historic preservationists, among others, sought to utilize the amendment, believing it to be self-executing — not requiring legislative authority for suits to be brought.

In two cases, *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*<sup>135</sup> and *Payne v. Kassab*,<sup>136</sup> the Supreme Court of Pennsylvania addressed preservation issues within the ambit of the seemingly plain words of the amendment. The Gettysburg tower, described by the *New York Times* as a "monster," subjecting Gettysburg to "a new low in historical tastelessness,"<sup>137</sup> was designed to appeal to fast-paced tourist schedules and to avoid the need to actually walk the battlefield. Its promoters opined that the educational benefits of the tower would surpass existing educational services.<sup>138</sup> Unconvinced, the Commonwealth of Pennsylvania brought an action in the Court of Common Pleas of Adams County to enjoin construction of the tower on private property near the battlefield, alleging the 307-foot tower would cause immediate and irreparable harm to the natural, scenic and aesthetic values of the environment. Two years of litigation ensued before a split Pennsylvania Supreme Court, in a heavily criticized decision,<sup>139</sup> held that article 1, section 27 provisions merely state a general principle of law. According to the court, supplemental legislation was required to define the values which the amendment sought to protect and to avoid implicating the due process and equal protection clauses of the fourteenth amendment.<sup>140</sup> In a forceful dissent, Chief Justice Jones argued that the court chose to emasculate the amendment.<sup>141</sup> He contended that the amendment created a common law public

133. PA. CONST. art. 1, § 27.

134. *Id.*

135. 454 Pa. 193, 311 A.2d 588 (1973).

136. 468 Pa. 226, 361 A.2d 263 (1976).

137. N.Y. Times, December 31, 1970, at 22, col.2.

138. 454 Pa. at 214-15, 311 A.2d at 599 (Jones, C.J., dissenting).

139. See, e.g., Comment, *The Gettysburg Tower Case: Testing Pennsylvania's Environmental Rights Amendment*, 48 TEMP. L.Q. 46, 52 (1974); Comment, *An Analysis of Pennsylvania's New Environmental Rights Amendment and the Gettysburg Tower Case*, 78 DICK. L. REV. 331 (1973).

140. 454 Pa. at 205, 311 A.2d at 594-95.

141. *Id.* at 208, 311 A.2d at 596 (Jones, C.J., dissenting).

trust. The trust *res* consisted of "natural, scenic, historic and aesthetic values of the environment." The trust beneficiaries were the people of the Commonwealth, and the trustee was the executive branch.<sup>142</sup>

Subsequent to the *National Gettysburg Battlefield Tower* decision, the Pennsylvania Supreme Court considered *Payne v. Kasab*.<sup>143</sup> In *Payne*, several residents of the City of Wilkes-Barre and a group of students from Wilkes College in Wilkes-Barre sought to enjoin the widening of River Street, a project proposed by the Pennsylvania Department of Transportation.<sup>144</sup> The street-widening project, plaintiffs argued, would adversely affect River Common, a thirty-two acre tract on the Susquehanna River used continuously as a public common since 1770, the year the original town of Wilkes-Barre was plotted out by Connecticut settlers.<sup>145</sup> It was undisputed that public officials were entrusted with the management of the land and were precluded from diverting it to either private use or public use not within the dedicatory language.<sup>146</sup> The plan envisioned by the Department of Transportation called for diversion of less than one acre of land, and the removal of twenty-three trees and two historical markers. The plan did, however, call for replacement of the tree lawn and re-landscaping.<sup>147</sup>

On appeal from the dismissal of their complaint, the plaintiffs argued that the project was outside the scope of the statutory dedications of the land as a public common, that the Department of Transportation abused its discretion and violated obligations imposed by Act 120<sup>148</sup> by approving the project, and that the Commonwealth through the Department of Transportation, violated its duties as trustee under article 1, section 27 of the Pennsylvania Constitution.<sup>149</sup>

The plaintiffs asserted that the amendment was self-executing and that they had standing as beneficiaries of the public trust to

142. *Id.* at 209, 311 A.2d at 596 (Jones, C.J., dissenting).

143. 468 Pa. 226, 361 A.2d 263 (1976).

144. 468 Pa. at 229, 361 A.2d at 264.

145. *Id.* at 235, 361 A.2d at 267.

146. *Id.* at 237, 361 A.2d at 268.

147. *Id.* at 233-34, 361 A.2d at 266.

148. PA. STAT. ANN. tit. 71, § 519 (Purdon Supp. 1975). This act required that the Department of Transportation determine that no feasible or prudent alternative to the project existed and the project was planned to minimize harm to the affected tract. *Id.* See 468 Pa. at 239, 361 A.2d at 269.

149. 468 Pa. at 234-44, 361 A.2d at 267-72.

bring suit to enjoin the Commonwealth from breach of its duties.<sup>150</sup> Although the commonwealth court agreed with the plaintiffs that the amendment was self-executing, contrary to the *National Gettysburg Battlefield Tower* view, the supreme court chose not to explore that "difficult terrain." The court distinguished *National Gettysburg Battlefield Tower*, which involved use of private property, noting that "the property here involved is public property, a 'public Common,' . . . possessed of certain natural, scenic, historic and aesthetic values."<sup>151</sup>

The court then considered whether the street-widening project would violate the trust imposed on the Commonwealth to conserve these values. The court recognized that static land use practices were not compelled by the public trust doctrine and that a balancing of interests approach was required for changed uses of public trust property.<sup>152</sup> However, the court resorted to familiar standards of judicial review for administrative actions, thus permitting reallocations of public trust property absent an abuse of discretion. In short, the court concluded that compliance with Act 120 was equivalent to satisfying trustee duties imposed by article 1, section 27, and thus denied plaintiff's request for injunctive relief.<sup>153</sup>

The Pennsylvania legislature enacted the Historic Preservation Act<sup>154</sup> five years after Chief Justice Jones penned his dissent in *National Gettysburg Battlefield Tower* and two years after *Payne v. Kassab*, specifically finding "section 27 of article 1 of the Constitution of Pennsylvania makes the Commonwealth trustee for the preservation of the historic values of the environment."<sup>155</sup> Additionally, the legislature declared that, confronted with rapid social and economic development, the irreplaceable historical, architectural, archeological and cultural heritage of Pennsylvania should be preserved because it promotes the public health, property and general welfare.<sup>156</sup> Significantly, the act authorized the Attorney General, the Pennsylvania Historical and Museum Commission, any political subdivision and any person to bring actions to protect

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150. *Id.* at 244, 361 A.2d at 272.

151. *Id.* at 245, 361 A.2d at 272

152. *Id.* at 246, 361 A.2d at 273.

153. *Id.* at 246-47, 361 A.2d at 273. See generally Comment, *The Gettysburg Tower Case: Testing Pennsylvania's Environmental Rights Amendment*, 48 TEMP. L.Q. 46 (1974).

154. Act of November 22, 1978, P.L. 1160 (codified at PA. STAT. ANN. tit. 71, § 1047.1a-1o (Purdon Supp. 1983)).

155. PA. STAT. ANN. tit. 71, § 1047.1(b) (Purdon Supp. 1983).

156. *Id.*

or preserve any historic resource in the Commonwealth.<sup>157</sup>

The enforcement provisions of Pennsylvania's Historic Preservation Act have yet to be tested. Nevertheless, the Act's findings and declaration of policy, as well as its creation of an Historic Preservation Board with duties to advise the Pennsylvania Historical and Museum Commission on criteria for inclusion of historic resources in the Pennsylvania Register of Historic Places and to recommend nominations to the National Register, indicate that if the *Gettysburg Tower* case were to be decided today, a different result might obtain. Thus, at least with respect to historic resources, the environmental rights amendment is no longer emasculated.

## V. HISTORIC PRESERVATION CASES IN THE FEDERAL COURTS

Reported Pennsylvania cases litigated in federal courts have all alleged violations of the National Historic Preservation Act of 1966,<sup>158</sup> the key law designed to promote identification and preser-

157. *Id.* at § 1047.1(n). This section was repealed in part insofar as it was inconsistent with the Commonwealth's Attorneys Act, Act of October 15, 1980, P.L. 950 (codified at PA. STAT. ANN. tit. 71, §§ 732-101 et seq. (Purdon Supp. 1983)). It does not appear that this Act would jeopardize enforcement of the Historic Preservation Act or article 1, § 27.

158. 16 U.S.C. § 470(f) (1976 & Supp. V 1981). Section 106 requires that:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470v of this title a reasonable opportunity to comment with regard to such undertaking.

*Id.* For detailed discussions of early historic preservation efforts, see C. HOSMER, PRESENCE OF THE PAST: A HISTORY OF PRESERVATION MOVEMENT IN THE UNITED STATES BEFORE WILLIAMSBURG (1965) and C. HOSMER, PRESERVATION COMES OF AGE: FROM WILLIAMSBURG TO THE NATIONAL TRUST (1981). For more recent developments in federal historic preservation law, see THE CONSERVATION FOUNDATION & THE NATIONAL CENTER FOR PRESERVATION LAW, A HANDBOOK ON HISTORIC PRESERVATION LAW (C. Duerksen ed. 1983) [hereinafter cited as HANDBOOK] and Fowler, *Federal Historic Preservation Law: National Historic Preservation Act, Executive Order 11593, and Other Recent Developments in Federal Law*, 12 WAKE FOREST L. REV. 31 (1976). Fowler discusses the development of federal historic preservation law, including the Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (1976 & Supp. V 1981) and the Historic Sites Act of 1935, 16 U.S.C. §§ 461-467 (1976 & Supp. V 1981). Fowler indicates that the 1935 Act was significant because it established a national policy of historic preservation and provided authority for the development of an administrative program to identify and evaluate historical cultural resources of national significance. *Id.* at 34. The 1966 Act removed the national significance standard, thus expanding the role of the federal government in the preservation of resources of state and local significance. *Id.* at 39.



vation of America's historical and cultural resources. Section 106, the heart of the 1966 act, interrelates two major components<sup>159</sup> of the Historic Preservation Act: the National Register of Historic Places<sup>160</sup> and the Advisory Council on Historic Preservation.<sup>161</sup> It

159. A third component of the 1966 Act is the authorization of federal grants to states and the appointment of state historic preservation officers to implement federal historic preservation programs. 16 U.S.C. § 470a(b)-(c) (1976 & Supp. V 1981) details the requirements of a state historic preservation program, the duties of a state historic preservation officer and the mechanism for certifying local governments to carry out the purposes of the act and to become eligible for funds under § 470c(c). Provisions for the administration of a matching grants-in-aid program are provided in 16 U.S.C. § 470a(d). These funds are available to the states, and in certain cases to local governments, for surveying, planning, acquisition and development. Due to limited appropriations to the fund by Congress, activities such as preparing National Register nominations, reviewing tax certification applications and developing technical preservation information are emphasized by the states, all of which have historic preservation laws. HANDBOOK, *supra* note 158, at 196 n.13, 226.

160. 16 U.S.C. § 470a(a)(1)(A) authorizes the Secretary of the Interior to "expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures and objects significant in American History, architecture, archaeology, engineering, and culture." *Id.* The Register is administered by the Keeper of the National Register within the National Park Service. The Heritage Conservation and Recreation Service administered the federal program between 1978 and 1981 prior to Secretarial Order No. 3060, Amendment No. 1 (February 19, 1981) which abolished it and reinvested responsibility for the Register with the National Park Service. HANDBOOK, *supra* note 158, at 197 n.19. Qualifications for listing in the Register and nomination procedures are detailed at 36 C.F.R. §§ 60, 63 (1983) and 48 Fed. Reg. 46306 (1983).

161. 16 U.S.C. § 470(i) establishes the Advisory Council on Historic Preservation. Sections 470(j)-(v) and 36 C.F.R. § 800 (1983) detail the scope of the Council's responsibilities and powers. Generally, the Council, which is a small (20 person staff, \$1 million annual budget) independent federal agency, is to advise other federal agencies on effects their actions may have on historic properties and to advise the President and Congress on preservation matters. HANDBOOK, *supra* note 158, at 210-11. The intricacies of the section 106 review process, codified at 36 C.F.R. 800 (1983), are diagrammed in HANDBOOK, *supra* note 158, at 249.

To satisfy § 106, the agency must:

1. apply the council's "criteria of effect" to proposed federal actions that could have an effect on National Register or Register-eligible properties;
2. if there is such an effect, apply the council's criteria of "adverse" effect to determine the precise nature of the effect;
3. if the effect is found to be adverse, request the comments of the council;
4. obtain the comments of the council, which must be taken into account in the agency's decision-making processes—the comments may be obtained either by (i) an MOA [Memorandum of Agreement] entered into by the council, federal agency (or its legal delegatee), and the SHPO [state historic preservation officer] or (ii) written comments from the full council or a panel of its members;
5. if the comments are all in an MOA, the agency must carry out the terms of the agreement. Failure to do so effectively voids the agreement; and
6. if the agency received only the comments of the council, it must demonstrate that it took the comments into account in reaching a final decision on the project, and that its behavior falls within the purview of the Administrative Procedures Act, but it is not required to follow the council's advice.

directs the head of any federal agency having direct or indirect jurisdiction over a proposed federal or federally-assisted undertaking in any state and the head of any federal department or independent agency having authority to license any undertakings to take into account the effect of the undertaking on any district, site, building, structure or object included in, or eligible for inclusion in, the National Register prior to approving the expenditure of any federal funds on the undertaking. Furthermore, it requires that the Advisory Council be afforded a reasonable opportunity to comment with regard to such undertaking.

In *Philadelphia Council of Neighborhood Organizations v. Coleman*,<sup>162</sup> a group of civic and community organizations and individuals sought declaratory and injunctive relief in an action against the United States Secretary of Transportation, the Administrator of the Urban Mass Transportation Administration, the Secretary of the Pennsylvania Department of Transportation and the City of Philadelphia and its mayor. An alleged violation of the National Environmental Policy Act, the Historic Preservation Act of 1966 and Executive Order 11593,<sup>163</sup> was only one of the numerous legal challenges raised by the plaintiffs in opposition to the United States Secretary of Transportation's decision to provide a \$240 million federal grant to Philadelphia for construction of a commuter rail tunnel connecting the existing Penn Central Suburban Station with a new underground station.<sup>164</sup>

Prior to the commencement of the action, an environmental assessment had been prepared by the City of Philadelphia and its consultant. The assessment included the results of community meetings and public hearings, as well as the A-95 review, a process requiring applicants for federal assistance to solicit comments concerning proposed projects from interested parties.<sup>165</sup> A draft envi-

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HANDBOOK, *supra* note 158, at 265-66.

162. 437 F. Supp. 1341 (E.D. Pa. 1977), *aff'd*, F.2d 1375 (3d Cir. 1978).

163. See *supra* note 32. Executive Order 11593 supplemented the Historic Preservation Act of 1966. It required federal agencies to "locate, inventory and nominate all sites, buildings, districts and objects" on their lands no later than July 1, 1973. Arguably, Executive Order 11593 was "an attempt to prod the bureaucratic behemoth into some sort of concrete action. . . ." There was a problem with funding, "although not really from lack of it but more from a lack of what to do with it." Note, *Historic Preservation—An Individual's Perspective*, 67 Ky. L.J. 1018, 1022 n.19 (1979). See also S. REP. No. 781, 91st Cong., 2d Sess. 2, reprinted in [1970] U.S. CODE CONG. & AD. NEWS, 988, 2989. The 1980 amendments to the Historic Preservation Act codified most of the executive order's requirements.

164. 437 F. Supp. at 1345.

165. Office of Management and Budget Circular A-95 was adopted pursuant to the Intergovernmental Cooperation Act of 1968, 42 U.S.C. §§ 4201-4244 (1976), *repealed by Act*

ronmental impact statement was subsequently prepared and circulated for comment to nine agencies and parties, including the Advisory Council on Historic Preservation and the Preservation Committee of the Philadelphia Chapter, Society of Architectural Historians.<sup>166</sup>

The District Court for the Eastern District of Pennsylvania, in considering all of the plaintiffs' challenges, limited the scope of its review to that provided by the Administrative Procedures Act — only agency actions found to be arbitrary and capricious or to involve an abuse of discretion or legal error could be set aside.<sup>167</sup> After a searching and careful review of the record, including the environmental assessment, the court held that there was no basis for overturning the agency decision or remanding the case.<sup>168</sup>

The court, considering the alleged violations of section 106 and Executive Order 11593, noted that the environmental impact statement listed seventeen historic buildings and structures that might be adversely affected by the project, including the Reading Terminal and train shed and the Reading Terminal Market. The court found that the effect of the tunnel on historic buildings was adequately considered and there was no violation of the statute or executive order. It cited consideration of alternative alignments of the tunnel, an engineering study to determine the feasibility of underpinning the Reading Terminal and a memorandum of agreement between the Urban Mass Transportation Authority and the Advisory Council on Historic Preservation to support its conclusion.<sup>169</sup>

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of September 13, 1982, P.L. 97-258, 96 Stat. 1068. Similar provisions appear at 31 U.S.C.A. §§ 6501-6508 (West 1983).

166. The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4361 (1976) applies to major federal actions significantly affecting the quality of the human environment, including historic and cultural resources. It requires that an environmental impact statement be prepared if both parts of its two-part test are met, i.e., there is a proposal for "a major federal action" "significantly affecting" the environment. NEPA applies to a broader range of historic and cultural resources than does the National Historic Preservation Act, but the latter applies to a broader range of federal actions. See HANDBOOK, *supra* note 158, at 215-20, 270-309.

167. 437 F. Supp. at 1346. See 5 U.S.C. § 706(2)(A)(1976). Judicial review of agency decisions has ensured compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4361 (1976). Although NEPA neither requires a federal agency to take or refrain from taking a particular action nor forbids demolition of significant buildings, it insures that an agency has taken a "hard look" at environmental consequences. See HANDBOOK, *supra* note 158, at 301.

168. 437 F. Supp. at 1350.

169. The environmental impact statement is divided into three sections: alternatives, including the proposed action; description of the affected environment; and environmental

*Philadelphia Council of Neighborhood Organizations* details an assault on an expensive public undertaking. It is representative of similar actions and illustrates not only the scope of review utilized by courts with respect to administrative determinations under the National Historic Preservation Act, but also the interrelationship between the National Historic Preservation Act and the National Environmental Policy Act.

Shortly after the third circuit affirmed the district court's decision in *Philadelphia Council of Neighborhood Organizations, Weintraub v. Rural Electrification Administration*<sup>170</sup> was decided. The plaintiffs, the Director of the Office of Historic Preservation and Historic Harrisburg Association, Inc., alleged violation of section 106. At different points in the proceeding, plaintiffs sought a temporary restraining order to prevent demolition of the Telegraph Building, a property listed in the National Register of Historic Places, and injunctive relief.

An initial issue decided by Judge Muir was the defendant's motion to dismiss for failure to set forth the basis for subject matter jurisdiction.<sup>171</sup> Specifically, the defendants contended that the assertion of \$10,000 in damages was speculative. Citing *Save the Courthouse v. Lynn*,<sup>172</sup> Judge Muir recognized that the building had sufficient historical and architectural significance to warrant inclusion in the National Register of Historic Places. He, therefore, concluded that "considerable interests are involved in the preservation of cultural resources and that would seem to put beyond question the jurisdictional amount provided for in § 1331(a)."<sup>173</sup> He recognized that federal courts are frequently asked to protect intangibles, such as goodwill adhering to a trademark and rights of free speech and free assembly, and determined that "there is no reason to lay down a rule of law that the cultural, historical, and architectural value of a building presents a non-justiciable problem of valuation."<sup>174</sup>

The defendants alleged, also, that the plaintiffs lacked standing, citing *United States v. SCRAP*.<sup>175</sup> Judge Muir set forth the appli-

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consequences. All reasonable alternatives to the proposed action must be conscientiously evaluated. See HANDBOOK, *supra* note 158, at 292.

170. 475 F. Supp. 78 (M.D. Pa. 1978).

171. 475 F. Supp. at 87.

172. 408 F. Supp. 1323 (S.D.N.Y. 1975).

173. 475 F. Supp. at 87.

174. *Id.*

175. 412 U.S. 669 (1973).

cable standard: injury in fact to the plaintiffs caused by the challenged action and injury arguably within the zone of interests protected or regulated by the statutes that the federal agencies allegedly violated.<sup>176</sup> The court indicated that the injury in fact requirement was met by showing harm to the aesthetic and environmental well-being of "Historic Harrisburg," which had among its members individuals who resided in the area of the Telegraph Building.<sup>177</sup> Finding "[a]n association even in the absence of injury to itself, may have standing as a representative of its members," he asserted that the plaintiffs' complaint was arguably within the zone of interests section 106 was designed to protect.<sup>178</sup> With respect to the Director of the Office of Historic Preservation, Judge Muir determined that as State Historic Preservation Officer, the director had standing and acted as *parens patriae* for the citizens of the Commonwealth.<sup>179</sup> This portion of Judge Muir's opinion was cited in *Committee to Save the Fox Building v. Birmingham Branch of the Federal Reserve Bank of Atlanta*<sup>180</sup> for the proposition that a showing of the imminent demolition of a building in the National Register was sufficient to establish standing to sue.

Before addressing the critical issue—the sufficiency of federal involvement in the demolition of the Telegraph Building as required by section 106—the court found the Rural Electrification Administration to be a suable party. The court denied defendants' motion to dismiss, on the ground that it was not such a party because of procedural defects.<sup>181</sup>

The standard for granting an injunction, the court noted, is that the moving party show a reasonable probability of eventual success and irreparable injury if relief is not granted. The court indicated that it would consider the possibility of harm to other interested parties and the public interest as well.<sup>182</sup> With respect to these considerations, Judge Muir found that the plaintiffs established irreparable harm and that the public interest would be served by the preservation of the Telegraph Building. Furthermore, he concluded that the substantial financial losses the defendant would suffer

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176. 475 F. Supp. at 88.

177. *Id.*

178. *Id.*

179. *Id.*

180. 497 F. Supp. 504 (N.D. Ala. 1980).

181. 457 F. Supp. at 88-89. The defendant's argument that the United States was not a named defendant was not set forth in the brief accompanying the motion to dismiss. *Id.*

182. *Id.* at 89.

were outweighed by the irreparable harm to the plaintiffs and the Harrisburg community.<sup>183</sup>

Nevertheless, the court focused on the facts concerning the ownership and destruction of the building, finding that Pennsylvania Rural Electric Association (PREA) and defendant Allegheny Electric Cooperative, Inc. (AEC) essentially owned the defendant Telegraph Building Corporation and that parking problems affecting AEC's and PREA's Locust Building headquarters adjacent to the Telegraph Building prompted the sought after demolition.<sup>184</sup> The court chronicled the complicated factual scenario, summarizing it as follows: "[p]laintiffs essentially maintain that because federal funds enabled AEC to construct the Locust Building Corporation Project which created the need for parking and thus caused the proposal for demolition . . . the demolition is a federal undertaking."<sup>185</sup>

The court determined that "Congress only intended to control direct federal spending for actions or projects which would otherwise destroy buildings on the National Register. Congress did not intend to reach every effect of federal spending."<sup>186</sup> It categorically rejected plaintiffs' interpretation of section 106 as too far reaching, citing *Ely v. Velde*,<sup>187</sup> in which the plaintiffs, Virginia residents, appealed the denial of an injunction but failed eventually to meet their burden of proving that through bookkeeping shifts the Department of Welfare and Institutions intended to finance construction of a medical reception center with federal funds, thus triggering agency compliance with section 106.

The court also interpreted the word "license" in section 106, since plaintiffs argued that Rural Electrical Administration regulations requiring approval of the demolition constituted a license. The court determined that Congress intended the word "license" to have its technical meaning — "a written document constituting permission or right to engage in some governmentally supervised activity."<sup>188</sup> According to the court, "Congress did not intend to affect every action which required federal approval."<sup>189</sup>

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183. *Id.*

184. *Id.* at 90.

185. *Id.* at 91.

186. *Id.*

187. 363 F. Supp. 277 (E.D. Va. 1973), *rev'd and remanded*, 497 F.2d 252 (4th Cir. 1974).

188. 475 F. Supp. at 92.

189. *Id.*

The court, therefore, denied the plaintiffs' request for a preliminary injunction, finding that the minimal showing was not outweighed by the other criteria. Nevertheless, it placed the case on the trial list for a determination as to whether a permanent injunction should issue. The result, however, was not changed and section 106 was deemed not to apply to the Telegraph Building, thus permitting its demolition.<sup>190</sup> The court's decision, however, is inconsistent with the "Criteria of Effect and Adverse Effect" set forth in federal regulations which provide: "An effect may be direct or indirect."<sup>191</sup> Thus, this case appears to have been incorrectly decided.<sup>192</sup>

Two unreported federal cases are worth noting, *Weintraub v. Provident National Bank*<sup>193</sup> and *Nardy v. Secretary of the Interior*.<sup>194</sup> In the former case, the National Banking Act<sup>195</sup> was held to have been infused with a new dimension by the National Historic Preservation Act. As a consequence, section 106 was applicable to the Comptroller of the Currency, requiring him to seek comments from the Advisory Council on Historic Preservation prior to approving the demolition of an historic bank building upon construction of a new facility.<sup>196</sup>

In *Nardy*, the District Court for the Eastern District of Pennsylvania upheld the denial of certification for a rehabilitation project under the Tax Reform Act of 1976, thus denying the building's owner substantial tax savings. Although the building's facade had been restored in conformance with the Secretary of the Interior's Standards for Rehabilitation, the rear of the building and its interior had been thoroughly modernized in contravention of these standards. The Department of the Interior, on appeal, indicated that "the intent of the Federal tax incentives is to preserve entire buildings and not merely facades."<sup>197</sup>

This case illustrates both the complexity and stakes involved in

190. *Id.*

191. 36 C.F.R. § 800.3 (1981).

192. See HANDBOOK, *supra* note 158, at 251 n.233.

193. No. 78-1577 (E.D. Pa. May 11, 1978).

194. No. 80-3070 (E.D. Pa. July 7, 1981), reported in S. Dennis, *Currently Pending or Recently Decided Historic Preservation Court Cases*, in HISTORIC PRESERVATION LAW 621, 672-73 (N. Robinson ed. 1982).

195. 12 U.S.C. § 36(e)(1982) provides: "no branch of any national banking association shall be . . . moved from one location to another without the . . . approval of the Comptroller of the Currency." *Id.*

196. See HANDBOOK, *supra* note 158, at 251.

197. Dennis, *supra* note 194, at 67.

obtaining certification for the income tax credit available under the Economic Recovery Tax Act of 1981,<sup>198</sup> which requires that historic structures be rehabilitated in accordance with Secretary of Interior Standards.<sup>199</sup> A building is automatically a certified historic structure if it is listed individually in the National Register of Historic Places. However, the National Park Service, aided by state Historic Preservation officers, must certify buildings in National Register districts or state and locally designated districts.<sup>200</sup>

To obtain the tax credit, rehabilitation costs must be substantial—in excess of five thousand dollars or the basis of the property whichever is greater.<sup>201</sup> Rehabilitated historic structures may qualify for a twenty-five percent tax credit, while non-historic structures may qualify for either a fifteen percent or twenty percent tax credit. Although only nonresidential buildings qualify for the latter credits, the twenty-five percent credit is available for either residential or nonresidential certified historic structures.<sup>202</sup> The credit serves to offset the first twenty-five thousand dollars of tax liability in full and eighty-five percent of any excess liability in the year the building is placed in service. On the positive side, any unused credit may be carried back three years and forward fifteen years until fully used.<sup>203</sup> However, on the negative side, investors who use the twenty-five percent tax credit must deduct one-half the amount of the credit taken from rehabilitation expenditures included in the depreciable basis.<sup>204</sup> Furthermore, the difference be-

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198. Pub. L. No. 97-34, 97th Cong. 1st Sess. (1981). I.R.C. § 48 (1982). See HANDBOOK, *supra* note 158, at Appendix B for "Overview: Economic Recovery Tax Act of 1981 ("ERTA") Rules for Real Estate Depreciation and Investment Tax Credit for Qualified Rehabilitations, as Revised by the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA") and the Technical Corrections Act of 1982" prepared by Thomas A. Coughlin III, Assistant General Counsel, National Trust for Historic Preservation. ERTA repealed the five-year amortization incentive of the Tax Reform Act of 1976, I.R.C. § 191 (1976).

199. I.R.C. § 48 (g)(2)(C) (1982). "[T]he term 'certified rehabilitation' means any rehabilitation of a certified historic structure which the Secretary of the Interior has certified to the Secretary as being consistent with the historic character of such property or the district in which such property is located." *Id.* See also 36 C.F.R. § 68 (1982).

200. B. Barrett, *Certification of Historic Significance*, in FEDERAL TAX INCENTIVES FOR HISTORIC PRESERVATION 44, 44-46 (P.B.I. 1982); see also HANDBOOK, *supra* note 158, at 467. Ms. Barrett, Director of Pennsylvania's Bureau of Historic Preservation, details the specific steps preceding completion of a National Register form, i.e., preparation of an Historic Resource Form, and lists the priorities for reviewing nominations to the National Register. See also "Historic Preservation Certifications Pursuant to the Tax Reform Act of 1976 and the Revenue Act of 1978," 36 C.F.R. § 67 (1982).

201. I.R.C. § 48(g)(1)(C) (1982).

202. I.R.C. § 46(a)(2)(F)(i) (1982).

203. I.R.C. § 46(b) (1982).

204. I.R.C. § 48(q) (1982).



tween accelerated depreciation and allowable straight-line depreciation must be recaptured at sale.<sup>205</sup> Despite these requirements, the tax credit for certified rehabilitations of historic structures is of paramount importance since it provides a strong incentive to preserve rather than demolish historic resources.<sup>206</sup>

## VI. CONCLUSION

Commenting on demolition of the Loyal Order of the Moose Building of 1915, Michael L. Anslie, National Trust for Historic Preservation president, said "[in] my view Pittsburgh is getting good value for its effort. Preservationists there are helping a worthwhile project while building institutional relationships that will earn respect with the development and political communities. Cooperation like this will in the long run preserve more than the old rhetoric might have done."<sup>207</sup> Clearly, Anslie's remarks are applicable to all preservation efforts in Pennsylvania.

The relative paucity of historic preservation litigation in Pennsylvania's state and federal courts suggest that cooperation is preserving historic sites more than litigation. Even though pressure for repeal of historic district ordinances has arisen, and reduced federal appropriations threaten to impede preservation efforts in Pennsylvania and elsewhere, the state and its citizens have consistently demonstrated initiative and creativity in responding to preservation challenges such as the demolition of the Moose.

*Marnie M. Crouch*

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205. I.R.C. §§ 1245, 1250 (1982).

206. I.R.C. § 280B (1982).

207. Preservation News, March 1984, at 5, col.4.