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On June 26, 1978, the definition of an expert in historic preservation law changed; it became "a person who has read Justice Brennan's opinion in the *Penn Central* Case."[1] Today, historic preservation has a status that has been made secure by the Supreme Court.

It is a very special moment for me to come back to New York where, starting in 1965, I worked on the development of a comprehensive historic preservation program. In 1965, a frequent comment from some lawyers was, "Good luck. You're unconstitutional. You won't last six months."[2] Of course, there were also many lawyers who were supportive, giving their time and talent to our work and goals.

The goals we started with have been exceeded. The program has continued to grow and serve the city, its neighborhoods, and its people. My thoughts go back to the spring of 1966 when the New York City Landmarks Preservation Commission sent a registered letter to the New York Central saying that Grand Central would be considered for landmark designation. Grand Central Terminal became a member of my family. I heard about its plans for growth, its engagement to an English developer, and the dowry he was bringing with him. I worried about the physical condition of the Terminal. For many years its parents had treated it like a poor relation. As in many other families, we ended up in court. First we were in the New York State Supreme Court;[3] then we appealed to a second court;[4] next a third court looked at the controversy;[5] finally we reached another Supreme Court.[6] These family disputes are now behind us. *Penn Central* is going to be a symbol of a new and creative use of law.

While future plans are being developed, keep in mind the legislative and judicial background of historic preservation law over the last fifty years. In 1931, in Charleston, South Carolina,

zoning provided the basis for governmental action to preserve the city's "old and historic district." When preservation provisions were added to this zoning ordinance, Charleston established procedures that have been followed in other cities. A separate review board was created to protect designated areas by issuing certificates of appropriateness. An architect and other experts comprised a majority of this board which reviewed changes to exterior architectural features visible to the public from a public street.[7]

The emphasis in that ordinance was on work initiated by property owners; the board responded when owners decided to spend money on their buildings and prepared plans. While landmark and historic district commissions are interested in the maintenance and rehabilitation of historic buildings, so far they have not initiated programs that impose maintenance responsibilities on owners beyond the usual city requirement that property be kept in good repair.

Local commissions do face a problem in keeping the public interested in the work they do. Their success requires the careful review of many small changes to historic buildings. Gaining and retaining the confidence of property owners depends on reaching them before they spend money on unapproved and inappropriate plans. In addition, owners and architects want to know what is expected of them. Note a particular paragraph in the current Charleston ordinance:

> In order to provide guidance and insight into desirable goals and objectives for the old city district and the old and historic Charleston districts or for desirable types of development, and for the maintenance of consistent policies in guiding the building public towards better standards of design, the board of architectural review shall maintain a file containing records of all applications brought before the board for review, the action taken by the board, drawings submitted and amendments of drawings approved pertaining thereto, and drawings and photographs or reproductions thereof showing structures in authentic Charleston character which, in its opinion, may serve as general guides to appropriateness or as expressions of objectives to prospective developers or property owners.[8]

In 1936, the Vieux Carré District was established in New Orleans, and the actions of this commission were upheld in sev-

eral court decisions that helped preservationists elsewhere.[9] Other laws were passed including the one in 1955 creating the Beacon Hill District.[10] At the time, the Massachusetts Supreme Judicial Court gave an advisory opinion that rejected many of the objections to this type of law:

> The announced purpose of the act is to preserve this historic section [Beacon Hill] for the educational, cultural, and economic advantage of the public. If the General Court [the State Legislature] believes that this object would be attained by the restrictions which the act would place upon the introduction into the district of inappropriate forms of construction that would destroy its unique value and associations, a court can hardly take the view that such legislative determination is so arbitrary or unreasonable that it cannot be comprehended within the public welfare.[11]

In the early days of historic preservation, some buildings were saved from demolition by determined individuals and groups. It was good to have a few laws on the books, but those first ordinances were not the means by which major buildings were saved.

Until the 1960s, there were few law suits involving historic preservation. Then favorable precedents were established in states like New Mexico, New York, Illinois, California and Maryland. Usually, the preservation of the historic building or district was a popular cause locally, and the courts were comfortable in upholding preservation laws when some element of a statute was attacked.

A thoughtful review of historic preservation was made in 1975 by a federal court of appeals in *Maher v. City of New Orleans*.[12] At the start of its opinion, the court recognized that the issues in the case "carry implications of nationwide import."[13] This acknowledgement of the importance of historic preservation appears in many court decisions and has helped in gaining acceptance from judges in later cases.

Preservationists who will want their work to continue to be respected by courts must support ordinances which are carefully drawn. Lawyers representing municipal commissions and other preservationists can help by establishing and maintaining fair procedures and by making certain that a full record is developed when a controversy appears likely.

In the *Maher* case, the court's conclusion sustained this approach:

> The Vieux Carré Ordinance was enacted to pursue the legitimate state goal of preserving the "tout ensemble" of the historic French Quarter. The provisions of the Ordinance appear to constitute permissible means adapted to secure that end. Furthermore, the operations of the Vieux Carré Commission satisfy due process standards in that they provide reasonable legislative and practical guidance to, and control over, administrative decision making.[14]

The court outlined the elements which ensured that the local commission had adequate guidance in the exercise of its administrative judgment: the detailed provisions of the ordinance, the membership of the commission ("architects, historians and business persons offering complementary skills, experience and interests"), the decision-making and appeal process itself, and the data used by the Commission — architectural surveys and research data, including old city plans, documents, photographs and contemporary writings. The court summarized by stating that "firm steps have been undertaken here to assure that the Commission would not be adrift to act without standards in an impermissible fashion."[15]

In *Figarsky v. Historic District Commission,*[16] the Connecticut Supreme Court upheld a local commission's order which prevented particular owners from demolishing their historic building. The court saw the need to evaluate alternatives:

> The plaintiffs had the burden of proving that the historic district commission acted illegally, arbitrarily, in a confiscatory manner or in abuse of discretion. This the plaintiffs failed to do. The plaintiffs went no further than to present evidence that their house was unoccupied and in need of extensive repairs. There was no evidence offered that the house, if repaired, would not be of some value, or that the proximity of the McDonald's hamburger stand rendered the property of practically no value as a part of the historic district.[17]

In the future, some owners applying for demolition will be more thorough in their presentations. That obligation to evaluate alternatives to demolition and to look more closely at historic buildings and their sites is a major improvement caused by preservation laws. In the past, owners and government depart-

ments had been quick to tear down buildings without any real plans for their replacements. Preservationists now have a mechanism to educate their community through hearings and, at the same time, to prepare alternatives for serious consideration.[18]

The Connecticut opinion illustrates the tasks that face an historic district commission. Courts will sustain a well-prepared decision by a commission. Prior to its decision on the demolition application, this local commission received extensive testimony, including information from the state historic preservation office. The court was impressed by the reasonable exercise of judgment by the local commission.[19]

From its start in the south, historic preservation has grown: today, designated landmarks and historic districts are found everywhere. Programs exist in places where tradition and interest in history are not nearly as great as they are in Charleston, New Orleans and Boston. A combination of federal, state and local laws has helped to make historic preservation programs constructive and effective. The steps taken by government are responses to energetic and persistent individuals who have made a strong case for preserving historic buildings and areas and protecting them from unnecessary changes.

At the municipal level, support for historic preservation is impressive. More than 600 cities and towns have passed local landmark or historic ordinances, a large increase from 1965, when there were fewer than 100 municipal preservation laws.[20] Thousands of legislators have voted for the enactment of these ordinances.[21]

Encouraged by federal legislation, all the state governments have established preservation offices that have undertaken building surveys, National Register evaluations, reviews of proposed Federal actions and project analyses under 1976 tax amendments. The matching grants to local projects have made it possible to complete the rehabilitation of some historic buildings. State preservation legislation is being studied in several states in order to see what additional responsibilities may be given to preservation offices. For example, in some states the government might encourage counties to protect landmarks in unincorporated areas.

At the federal level, the National Register of Historic Places has made a major contribution to the growth and acceptance of

preservation. Americans do pay attention to experts. In cities all over the country there is an awareness of which buildings are on the National Register. A determination that a building is of National Register quality is sent to the state capital and then to Washington for confirmation, and it comes back much stronger than when it left.

Before there was a National Register, the merits of threatened buildings were often debated. Today, there are still some public debates over the quality of buildings, but people have forgotten how much more time and energy were spent on this type of argument in the past. After the creation of the National Register, thousands of properties were listed with a minimum of objections. It is true that new listings are now, once again, more controversial because of activities of the Advisory Council and some provisions in the 1976 tax amendments.

With the passage of the preservation provisions in the Tax Reform Act of 1976,[22] the federal government did provide equal treatment for old buildings matching the encouragement given to the developers of new structures.[23] The tax incentives for rehabilitation go beyond the use of the police power for preservation and the early tradition of philanthropy that led to the saving of historic homes.[24]

Government agencies in the 1950s and 1960s, as represented by the highway and urban renewal administrators, often appeared to be recruiting agents for local preservation groups. Today, there is still vocal dissatisfaction with federal efforts to protect historic buildings from destruction. When other people's plans and priorities prevail, preservationists wonder how effective federal intervention is.

Federal departments have been taken to court, and federally-aided projects have been the subject of litigation.[25] Today much more attention is paid to procedural requirements, although administrators may still not make the extra effort involved to fit historic buildings into their plans.

It is easier for the courts when officials try to avoid meeting procedural requirements. Progress on a proposed project was stopped in such a situation:

> Residents of the Green Springs section of Louisa County, Virginia, appeal from a denial of their application for an injunction to restrain the construction of a penal reception and medical

> center in their neighborhood until the requirements of the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) have been met. The district court—ruling that the state had permissibly transferred federal funds from the penal center to other state projects, and finding no significant federal contact with the center—dismissed the complaint. While we conclude that the facts do not establish that the center has become an irrevocably federal project, we nevertheless hold that if it is to be constructed without compliance with federal environmental Acts, the state must reimburse the federal government for sums initially allocated to the center, but subsequently diverted to other state projects.[26]

In a recent case, a federal court of appeals summed up the intent of Congress:

> The sum and substance of all this is, we think, a congressional purpose, expanding over the years, to make certain that federal agencies give weight to the impact of their activities on historic preservation.[27]

At the local level, preservation activities face opposition from municipal departments with well-established priorities. An encouraging sign is the ability of preservationists to develop relationships with other city agencies and to shape their plans for historic buildings so that programs in housing, neighborhood conservation, and commercial revitalization are given assistance.

The need for governmental cooperation on a local level extends as well to higher levels of government. At least one court has been helpful on this question in a situation involving county property:

> Secondly, to accomplish the primary purposes of historic area zoning, it is necessary that the exterior of the building having historic or architectural value be preserved against destruction or substantial impairment by *every one*, whether a private citizen or a governmental body. In short, the historically or architecturally valuable building is just as much lost by destruction by a public body as it would be by a private owner. The facts in the present case should lay to rest the notion that public bodies—as contrasted with private owners—would not be likely to press for demolition of buildings having established historic or architectural value. The General Assembly could well conclude that, to accomplish historic and architectural preservation, the jurisdiction of the Commission should extend to all owners be they pri-

vate persons or governmental agencies. Otherwise, the primary purpose of the legislation would be frustrated.[28]

With many landmarks and historic districts identified and designated, some preservation issues are disposed of in an orderly way. However, there are still last-minute efforts, including attempts to get delays through government action:

> On March 19, 1973, thirty-eight days after appellee applied for a building permit, the City Council passed a resolution prohibiting the Chief Building Inspector from issuing building permits in the PD-19 area until such time as the matter of historic preservation was resolved. . . .
>
> Our holding in this case should not be construed so as to authorize a city's carte blanche denial of building permits anytime it contemplates changing the zoning in a given area. However, when as here, a city has placed its zoning machinery in operation before the permit is applied for and the impetus of the proposed new zoning is directed at and brought about by concern over the future general welfare of a particular area, i.e., Swiss Avenue, then we do not feel that the city's action in maintaining the status quo for a reasonable time until the rezoning can be completed can be considered as an arbitrary or capricious or unreasonable exercise of its police power.[29]

Following this delay an historic district was established in the Swiss Avenue neighborhood. A similar result was obtained in New Orleans where a series of demolition moratorium ordinances were passed to protect buildings within the central business district. The laws were related to land use studies that were being made, and each ordinance applied for a limited period of time. Thus, the city council reviewed the situation before extending the moratorium which eventually lasted nearly four years.

While the ordinances were in effect, owners were able to obtain demolition permits by appealing to the city council and showing hardship or definite plans to construct new buildings on the sites to be cleared. After its studies were completed, the city established a central business district historic district.[30]

Many local landmark and historic district laws need amendment to strengthen municipal preservation programs. In some cities, the next step would be a longer delay period during which a commission and the public could find an alternative to demoli-

tion. When a twelve-month delay is provided, an owner takes more seriously the interest in preserving an historic building. Part of the public expects more results from preservation laws than some commissions can deliver with the powers they have.[31]

At the same time, the expansion of historic preservation activities has affected more property owners and has led to close examination of existing laws and their implementation. Many owners argue that these laws should not apply to them. Because of court decisions favorable to historic preservation, these critics are making their arguments to legislators.

In spite of that shift in emphasis, courts will continue to be asked to review the implementation of historic preservation programs. Factual, economic and administrative issues will be emphasized by opponents and their lawyers. Litigation will involve whether a building or area qualifies as historic, whether proper procedures have been followed, and whether the alternatives to demolition and other changes are acceptable. Preservationists will continue to bring suits trying to get courts to intervene in projects where there is a relationship to the federal government.

A review of laws and cases does show the acceptance of historic preservation as a factor in public and private decisions. Property owners and public officials have modified the way historic buildings are treated. The development of historic preservation law has been impressive, and this new field has helped Americans to save many historic landmarks and districts.

Current Statutory and Case Law Developments in Historic Preservation

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1. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978). Justice Brennan continues to speak out on issues of importance to historic preservation. In a recent land use case, *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981), he delivered a dissenting opinion for four members of the Court. A fifth member of the Court, Justice Rehnquist, concurred in the disposition of the case on jurisdictional grounds but agreed with "much of what is said" in the Brennan dissent. Justice Rehnquist wrote the dissent in the *Penn Central* case.

In the *San Diego Gas* case, Justice Brennan warns against "arbitrary or excessive" use of the police power that then becomes a taking of property. "Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property." *Id.* at 652 (Brennan, J., dissenting) (footnote omitted).

Along with this warning, Justice Brennan refers back to the satisfactory standard in the *Penn Central* case that an owner must be able to make "reasonable beneficial use of the landmark site" and must have "opportunities further to enhance" this site and other properties. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 (1978).

In order to retain the confidence of the public and the support of elected officials, landmark and historic district commissions have always had to be sensitive to the needs of property owners. In addition, the commission must respond successfully to economic problems that may arise. At the end of the *Penn Central* case, Justice Brennan had said, ". . . . [I]f appellants can demonstrate at some point in the future that circumstances have so changed such that the Terminal ceases to be 'economically viable,' appellants may obtain relief." *Id.* at 138 n. 36.

2. It is instructive to recall the mood of inevitability when the plans for the new building at Grand Central were announced. After referring to a newspaper photograph of the proposed 2,000,000-square-foot building, the *New Yorker* magazine said, "The accompanying story seems to make it clear that neither zoning regulations nor the City Planning Commission nor the Landmarks Preservation Commission nor any uprising of maddened standees on the 5:07 to Larchmont had the power or energy to put a stop to the project." NEW YORKER, June 29, 1968, at 23.

3. *See* Penn Cent. Transp. Co. v. City of New York, 50 A.D.2d 265, 377 N.Y.S.2d 20 (1st Dep't 1975) which overturned the judgment and order of the N.Y. State Supreme Court, New York County, in Penn Cent. Transp. Co. v. City of New York, N.Y.L.J., Jan. 23, 1975 at 16, col. 3 (Sup. Ct. New York County).

4. Penn Cent. Transp. Co. v. City of New York, 50 A.D.2d 265, 377 N.Y.S.2d 20 (1st Dep't 1975).

5. Penn Cent. Transp. Co. v. City of New York, 42 N.Y. 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977).

6. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

7. The board originally had five members. Today there are two additional members

who are not required to have professional qualifications but who "have demonstrated outstanding interest and knowledge in historical or architectural development within the city." CHARLESTON, S.C., CITY CODE § 54-26.

Because of the neighborhood and development issues in which these boards become involved, mayors now include a wider range of persons on landmark and historic district commissions. Under the historic conservation legislation adopted in Cincinnati in May, 1980, the historic conservation board shall "facilitate the implementation of measures which further conservation and development of historic structures and districts by private and public persons, including coordination of actions required of various city departments," and shall "act as a catalyst to expedite the flow of projects through departments and agencies." CINCINNATI, OHIO, ADMIN. CODE art. II, § 13.

8. CHARLESTON, S.C., CITY CODE § 54-28.

9. *See* Friedmann, *The Vieux Carré: The Administration of Municipal Laws*, 1 Pace L. Rev. 585 (1981).

10. 1955 Mass. Acts, ch. 616, § 1.

11. Opinion of Justices to the Senate, 333 Mass. 783, 787, 128 N.E.2d 563, 566-67 (1955).

12. 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).

13. *Id.* at 1053.

14. *Id.* at 1067. The North Carolina Supreme Court approved the "tout ensemble" principle as it upheld the inclusion of a vacant lot within an historic district: "It is widely recognized that preservation of the historic aspects of a district requires more than simply the preservation of those buildings of historical and architectural significance within the district. . . . This 'tout ensemble' doctrine, as it is now often termed, is an integral and reasonable part of effective historic district preservation." A-S-P Assoc. v. City of Raleigh, 298 N.C. 207, 216, 258 S.E.2d 444, 451 (1979).

15. Maher v. City of New Orleans, 516 F.2d 1051, 1062 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976). In an earlier footnote, the court had given a warning that is applicable to other commissions: "[W]e pause to note that past enforcement of the Ordinances does not seem to have been uniformly predictable." *Id.* at 1061 n.57. Preservation ordinances often call for a commission to prepare guidelines at the time of designation. *See, e.g.*, CINCINNATI, OHIO, MUNICIPAL CODE §§ 741-7, 741-11.

16. 171 Conn. 198, 368 A.2d 163 (1976).

17. *Id.* at 212, 368 A.2d at 171-72 (citation omitted). In a recent Missouri decision, the court used "the reasoning generally applied in historic district demolition cases," stating that "the landowner must not only establish that he cannot economically utilize the property but that it is impractical to sell or lease it, or that no market exists for it at a reasonable price." The opinion added "the city has supplied some testimony that the property was of a value in excess of the amount expended by the church to acquire title." Lafayette Park Baptist Church v. Board of Adjustment, 599 S.W.2d 61, 65, 67 (Mo. Ct. App. 1980).

18. In rejecting a possible attack on constitutional grounds, the New York State Court of Appeals attached significance to a landmark commission's opportunity to prepare alternative plans. "Although we note that the challenge here is not to the facial validity of the statute, such a challenge would be to no avail because of the ameliorative provisions of section 207-8.0 which contains a number of alternative methods by which the Commission may seek to devise a scheme so that the impediments to the owner's earning a reasonable return, created by landmark designation, may be offset by other pecuniary benefits." Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 455, 415 N.E.2d 922, 925, 434 N.Y.S.2d 932, 935-36 (1980).

19. When an historic district commission had not given the evidence related to its decision, a Maryland court remanded to the commission a case brought by an owner who

had been denied permission to install redwood siding over a brick facade within the district. The court said: "The record must disclose the facts on which the commission acted and a statement of the reasons for its actions. Without such a record the reviewing court cannot perform its duty of determining whether the action of the Commission was arbitrary or capricious." Fout v. Frederick Historic District Commission, Misc. No. 4005 (Frederick Cty. Cir. Ct. Feb. 5, 1980).

20. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 107 (1978). At the start of the majority opinion, Justice Brennan refers to the many state and local historic preservation laws. This reference is an early indication of his eventual conclusion on the constitutionality of the law under attack.

21. *See* Robinson, *Historic Preservation Law: The Metes and Bounds of a New Field*, 1 PACE L. REV. 511 (1981).

22. Tax Reform Act of 1966, Pub. L. No. 94-455, 90 Stat. 1520 (1976) (codified in scattered sections of 26 U.S.C.).

23. "Although tax considerations are only a part of the total financial equation, it is evident that the Internal Revenue Code in the past has done little to encourage preservation in the private preservation efforts. I do not mean to suggest that those who drafted the code consciously intended to frustrate preservation activities, but some provisions in the code are clearly intended as incentives for new construction and others simply have the effect. Unfortunately, an incentive for new construction is very often a disincentive for preservation." CAPLIN, *Federal Tax Policy as an Incentive for Enhancement of the Built Environment*, in TAX INCENTIVES FOR HISTORIC PRESERVATION 9 (G. Andrews, ed. 1980).

24. At the end of 1980, nearly 2,000 rehabilitation projects had been approved by the Department of the Interior and thus qualified for the favorable tax treatment under the 1976 amendments.

25. *See, e.g.*, Central Okla. Preservation Alliance v. Oklahoma City Urban Renewal Auth., 471 F. Supp. 68 (W.D. Okla. 1979); Hall County Historical Soc'y v. Georgia Dep't of Transp., 447 F. Supp. 741 (N.D. Ga. 1978).

26. Ely v. Velde, 497 F.2d 252, 253-54 (4th Cir. 1974) (footnote omitted).

27. W.A.T.C.H. v. Harris, 603 F.2d 310, 325 (2d Cir.), *cert. denied sub nom* Waterbury Urban Renewal Agency v. W.A.T.C.H., 444 U.S. 995 (1979).

28. Mayor of Annapolis v. Anne Arundel County, 271 Md. 265, 291-92 316 A.2d 807, 821 (1974). That type of argument was also made in a dissenting opinion in a case involving property in downtown Seattle that was part of the original campus of the University of Washington and is still owned by it. The city's Landmarks Preservation Board had wanted to designate a commercial building. While the university had no present demolition plans, it opposed the action of the board. The Washington Supreme Court held that the city had no power to make this designation. State v. City of Seattle, 94 Wash. 2d 162, 163, 615 P.2d 461, 464 (1980).

The court said that the legislature had given the University Board of Regents full control over the property including the power to raze, reconstruct, alter or remodel buildings it owned. The decision was based on the language of a statute, and the court declined to apply a rule of immunity that would exempt state property from city regulations unless the state legislature specifically provided otherwise. *Id.* at 162, 615 P.2d at 461.

29. City of Dallas v. Crownrich, 506 S.W.2d 654, 655-56, 660 (Tex. 1974).

30. In adopting the first ordinance, the city noted that there had been "an inordinate amount of demolition" in the central business district that in most cases had not resulted in new construction and that had led to an extensive amount of open space. New Orleans, La., Ordinance No. 5409 M.C.S. The other ordinances were Nos. 5616, 5883, 6009, 6010, 6032, 6149, 6197 and 6550.

31. A recent ordinance in the District of Columbia goes further than many laws. It authorizes the city government to deny permits for the demolition of historic buildings and brings important factors into these decisions. (Under an earlier law, permits could be delayed for 180 days to permit negotiations with the owners). Now a request demolition permit may not be issued "unless the Mayor finds that the issuance of the permit is necessary in the public interest, or that failure to issue a permit will result in unreasonable economic hardship to the owner." The phrase "unreasonable economic hardship" is defined to mean "that failure to issue a permit would amount to a taking of the owner's property without just compensation or, in the case of a low-income owner(s) as determined by the Mayor, failure to issue a permit would place an onerous and excessive financial burden upon such owner(s)." When the mayor finds demolition necessary "to allow the construction of a project of special merit," a demolition permit cannot be issued "unless a permit for new construction is issued simultaneously . . . and the owner demonstrates the ability to complete the project." District of Columbia Historic Landmark and Historic District Protection Act, D.C. Mun. Regs. tit. 25, §§ 5(e), 3(n), 5(h) (1978).