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The Vision of Pierre L'Enfant: A City to Inspire, A Plan to Preserve

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Enforcement of the Historic Landmark and Historic District Protection Act in the District of Columbia

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I. INTRODUCTION

A. FRAMING THE ISSUE OF ENFORCEMENT

The Historic Landmark and Historic District Protection Act (“Preservation Act”) of 1978 established the policy of the District of Columbia to preserve historic properties.¹ Under the Preservation Act, properties designated by the District as historic properties are protected from undue demolition, alteration, and new construction, or any change that does not meet the standards set forth by the Act.² Owners intending to change their historic properties through demolition, alteration, or new construction must demonstrate that they meet these standards before the appropriate construction permits may issue.³ Despite the protective standards set forth by the Preservation Act and the obligation upon owners both to meet these standards, actual protection of historic properties has been limited by deficiencies in the District’s authority and ability both to compel compliance and to punish wrongdoers.⁴

¹ See D.C. Code Ann. § 6-1101 (2002). As used in this paper, the term Preservation Act refers only to Subchapter I of the Historic Landmark and Historic District Protection Act of 1978. The term “historic properties” means any buildings or structures that have been designated by the District as historic landmarks or any buildings or structures that are within an area designated by the District as an historic district. In other words, the terms refers to all properties that are subject to the review process set forth by the Preservation Act.

² See D.C. Code Ann. §§ 6-1104(e), 6-1105(f), 6-1107(f) (2002). The Preservation Act also sets forth standards for subdivision of historic properties. Subdivision is not addressed in this paper, as the act is substantively different from demolition, alteration, and new construction—one cannot subdivide property unless the District admits it to the record—and implicates different enforcement concerns.

³ In 2001, an amendment to the Preservation Act expanded protection of historic properties by placing an affirmative duty upon owners to maintain their historic properties. See D.C. Code Ann. § 6-1104.01 (2002). The amendment was made by the Abatement and Condemnation of Nuisance Properties Omnibus Amendment Act of 2001. See D.C. Law 13-281, April 27, 2001. The demolition by neglect provisions are not addressed in this paper, as the enforcement of an obligation to maintain requires enforcement tools different from those required by the enforcement of a “true” regulatory regime, where the law is *implemented by a permit*, or similar agency, process.

⁴ See generally D.C. Preservation League and the Coalition for Greater Preservation Enforcement, “Strengthening Preservation Enforcement in the District of Columbia: Report and Action Plan of the June 4, 1998 Summit.”

The District's inability to compel compliance is related primarily to a shortage of enforcement resources. The Preservation Act purports to protect several thousand structures within the District, including several hundred historic landmarks and all buildings and structures within forty historic districts.⁵ Currently, only two inspectors are assigned to monitor these properties for compliance with the Preservation Act. Unsurprisingly, violations are infrequently discovered, and compliance efforts often depend on the vigilance of people who are residents in an historic district or neighbors to an historic landmark. Were the District to allocate more resources to enforcement of the Preservation Act, however, there still remains considerable uncertainty regarding the legal *authority* of certain District agencies to do so.

Aside from its inability to *compel* compliance, the District has never exercised its authority to *punish* persons who fail to comply with the Preservation Act. In the twenty-five years since the Preservation Act was enacted, the District has never instituted a criminal or civil judicial proceeding for this purpose, due in part to the preference of the Office of the Corporation Counsel to expend its limited litigation resources on cases with relatively larger criminal and civil penalties.⁶ The under-enforcement of the Preservation Act through criminal and civil proceedings is exacerbated by the deficiencies in the compliance effort described above. Where there are not enough "eyes and ears" to monitor for compliance, evidence of Preservation Act violations goes undocumented, and District attorneys have little with which to bring judicial proceedings. In the criminal context, for example, egregious violators escape arrest for willful

⁵ Email from D. Maloney, Historic Preservation Office, April 28, 2002 (noting that there are twenty-six *neighborhood* historic districts, and 40 total historic districts). According to the D.C. Preservation League, as of June 1998, there were 557 individually designated landmarks and 22,439 buildings in thirty-seven historic districts. See footnote 4.

⁶ Interviews with B. Brennan, Office of Corporation Counsel, February 21, 2003, and K. Edwards, General Counsel, Department of Consumer and Regulatory Affairs, February 26, 2003.

violations of the Preservation Act, as the police are not notified in time to catch them *in the act* of violating the Act.⁷

As a consequence of the District's inability to compel compliance with the Preservation Act and to punish wrongdoers, several historic properties have been irreversibly altered or lost.⁸ Unless the tide is turned, many more historic properties are at risk. The District currently is dealing with two such properties. One property is one of only two remaining "shot-gun" style houses in the District and has been neglected by its owner for over a decade in violation of the Preservation Act's affirmative maintenance obligation.⁹ The other property, which shall be discussed below in more detail, is a "contributing building" in an historic district and has been altered by its owner arguably in violation of the Preservation Act. The District has attempted—unsuccessfully—to compel the owners of these properties to comply with the Preservation Act and is, for the first time, considering criminal prosecution.

B. OUTLINING THE DISCUSSION

This paper conceptualizes an enforcement scheme as having two separate parts. First, an enforcement scheme must contemplate a regulatory institution and provide it with adequate tools for *exacting compliance* with the regulatory regime. Second, an enforcement scheme must permit the *punishment* of those who fail to comply with the regulatory regime or with compliance orders issued by the regulatory institution. Certainly, the concepts are interrelated, as criminal and civil liability is predicated on a failure to comply with the law, and compliance is often effected through the general deterrence of punishment. In traditional criminal law

⁷ It is a misdemeanor to willfully violate any of the provisions of the Preservation Act. See D.C. Code Ann. 6-1110(a) (2002). The Metropolitan Police Department may not arrest persons for misdemeanors unless its officers witness the violation. Conversation with B. Brennan, Office of Corporation Counsel, March 31, 2003.

⁸ Examples of properties that have been irreversibly altered or demolished may be provided by the Historic Preservation Office.

⁹ Interview with B. Brennan, Office of Corporation Counsel, February 21, 2003.

enforcement, these concepts are considered one in the same: the consequence of a failure to comply is criminal liability, absent the exercise of investigatorial and prosecutorial discretion to the contrary. In the context of regulatory regimes such as historic preservation, however, there are *intermediary* consequences to the failure to comply. Agency inspectors, often with specialized training in the technical parts of the regulatory regime, may issue several orders to comply before referring cases to a prosecuting arm. In other words, an enforcement scheme for regulatory regimes should contain both sophisticated and well-developed mechanisms for compelling compliance, as well as ample authority to punish egregious violators.¹⁰

In keeping with this conceptualization, this paper discusses enforcement of the Preservation Act in two parts. First, the at-risk property discussed above is used to frame a discussion regarding the authority and ability of the District to order citizens to *comply* with the demolition, alteration, and new construction provisions of the Preservation Act. Second, this paper analyzes the *penalties* provisions of the Preservation Act. Throughout these two parts, the paper references a proposed draft of the Preservation Act, attached as an appendix, discusses how the proposed draft refines the currently available enforcement tools, and lists the issues that should be addressed by implementing regulation. Finally, this paper closes with an annotation of provisions of the proposed draft that are entirely new.

II. OVERVIEW: HISTORIC PRESERVATION IN THE DISTRICT OF COLUMBIA

¹⁰ There are many preventive tools available to *encourage* compliance with regulatory regimes, including training and education. However, these tools are outside the scope of this paper, as they more directly address the issue of prevention, rather than correcting [or punishing] existing or imminent noncompliance.

A. DUTIES WITH RESPECT TO DEMOLITION, ALTERATION, AND NEW CONSTRUCTION¹¹

Under the District’s Construction Code, an owner must obtain a permit from the Department of Consumer and Regulatory Affairs (DCRA) for nearly any kind of work to be performed on a building or structure, including demolition, alteration, and construction.¹² The Preservation Act established an additional layer of review for permit applications that concern historic properties in which the proposed work is evaluated for compatibility with the Preservation Act standards.¹³ An owner proposing to alter his historic property, for example, must demonstrate either that the alteration is necessary in the public interest or that he would suffer unreasonable economic hardship if permission to alter were withheld.¹⁴

Primary responsibility for reviewing permit applications concerning historic properties rests with the Mayor.¹⁵ Pursuant to the Preservation Act, the Mayor must refer the permit application to the Historic Preservation Review Board for a recommendation and formally consider this recommendation when making his finding.¹⁶ If requested by the applicant or

¹¹ As mentioned above, the Preservation Act also imposes upon owners a duty to maintain their historic properties and to correct any deficiencies that constitute demolition by neglect.

¹² See D.C. Mun. Regs. tit. 12 § 111.1, *et seq.* (2003). See also D.C. Code Ann. § 6-1401 (2002) (defining “Construction Codes” as the group of model codes adopted by the District for building, plumbing, mechanical, fire prevention, existing structures, one and two family dwellings, electrical, and building rehabilitation). These model codes, as well as the D.C. supplements that amend them, are collectively referred to as the Construction Codes and are codified at 12 DCMR.

¹³ On its face, the Preservation Act appears to establish a wholly separate permitting scheme wherein owners of historic properties apply to the Mayor for permits to change their historic properties. Nowhere in the text is it clear that the terms “permit to demolish,” “permit to alter,” or “permit to construct” must be read in reference to the Construction Code. However, legislative history supports the District’s implementation of the Preservation Act as an additional layer of review to the existing permitting process. See Council of the District of Columbia, Committee Report on Bill 2-367.

¹⁴ See D.C. Code Ann. § 6-1105(f) (2002). See also D.C. Code Ann. § 6-1104(e) (2002) (stating that demolition must be necessary in the public interest or must be allowed to prevent the owner from suffering unreasonable economic hardship); D.C. Code Ann. § 6-1107(f) (2002) (stating that new construction must be compatible in both design and character).

¹⁵ See D.C. Code Ann. §§ 6-1104(a), 6-1105(a), 6-1107(a) (2002). The process by which permit applications are referred between the Mayor and DCRA is addressed by neither statute nor regulation.

¹⁶ See D.C. Code Ann. §§ 6-1104(b), 6-1105(b), 6-1107(b) (2002).

otherwise required by law, the Mayor must also convene a public hearing before making his finding.¹⁷ The Mayor has delegated these responsibilities to the Mayor's Agent.¹⁸

B. HISTORIC PRESERVATION INSTITUTIONS

1. THE HISTORIC PRESERVATION REVIEW BOARD

Pursuant to the Preservation Act, the Mayor established the Historic Preservation Review Board (HPRB) by Mayor's Order in 1983.¹⁹ HPRB is intended to be the Mayor's expert advisor in reviewing permit applications for compatibility with Preservation Act standards and has two major duties under the Preservation Act.²⁰ First, it must review and issue recommendations on all demolition, alteration, and new construction permit applications.²¹ Second, if it has recommended against granting a permit application, HPRB must notify the applicant of its reasons.²² HPRB also plays an active role in demolition by neglect cases and in the general effort to enforce the Preservation Act.²³

¹⁷ See D.C. Code Ann. §§ 6-1104(c), 6-1105(e), 6-1107(e) (2002).

¹⁸ It is unclear the legal instrument by which the Mayor has conveyed these responsibilities to the Mayor's Agent. The Preservation Act also requires the Mayor to place notice of the application in the District of Columbia Register and to refer the permit application to the Historic Preservation Review Board for a recommendation. It is unclear to whom these responsibilities have been conveyed.

¹⁹ See Mayor's Order 83-119, May 6, 1983 (ordering the establishment of HPRB). See also D.C. Code Ann. § 6-1103 (2002).

²⁰ Id.

²¹ See D.C. Code Ann. §§ 6-1104(b), 6-1105(b), 6-1107(b) (2002) (providing that all permit applications be referred to HPRB unless subject to review by the Commission of Fine Arts).

²² See D.C. Code Ann. §§ 6-1104(d), 6-1105(d), 6-1107(d) (2002). HPRB is also charged with performing the duties of a State Review Board pursuant to federal law, designating historic landmarks and historic districts within the District, and other historic preservation duties that may be assigned by the Mayor. See D.C. Code Ann. § 6-1103(c)(1) (2002).

²³ HPRB is not authorized by the Preservation Act or Mayor's Order to participate in demolition by neglect cases or enforcement efforts. HPRB *may* have undertaken these responsibilities pursuant to the Mayor's assignment. See D.C. Code Ann. § 6-1103(c)(4) (allowing the HPRB to perform "such other functions and duties" relating to the protection of the District's historic heritage "as the Mayor may from time to time assign"). However, the legal instrument by which the Mayor has assigned [or should assign] these responsibilities is unclear.

2. THE HISTORIC PRESERVATION OFFICE, OFFICE OF PLANNING

The Historic Preservation Review Board retains a staff to assist the Board in reviewing permit applications concerning historic properties.²⁴ All permit applications are first reviewed by HPRB staff.²⁵ Where the work proposed by a permit application clearly meets or clearly fails the applicable standard, the staff is authorized to submit to the Mayor the HPRB recommendation required by law.²⁶ If the permit application requires further review, the staff places it on the HPRB agenda for consideration. The HPRB staff also reviews cases of demolition by neglect.

For many years, historic preservation functions, as delineated by the Preservation Act and other federal and District laws, were delegated to the Historic Preservation Division of DCRA's Building and Land Regulation Administration (BLRA). As a division of the BLRA, the review process contemplated by the Preservation Act was an integrated part of the existing permitting process: permit applications would arrive in the BLRA and be routed through all the BLRA divisions, including the Historic Preservation Division. Each division, with the assistance of inspectors trained in the relevant inspection discipline, would review the permit application for compatibility with the laws within its administrative jurisdiction.

In 2000, historic preservation functions—and HPRB staff—were transferred out of DCRA and into the Office of Planning, a separate and coequal department.²⁷ The Office of

²⁴ See generally D.C. Mun. Regs. tit. 10 §§ 2609, 2617 (2003). These provisions discuss the general role of the staff, but the staff is not explicitly established by regulation.

²⁵ Regulations implementing the Preservation Act do not outline the particular duties of the staff. The regulations implementing the New York City Landmarks Law, on the other hand, articulates the particular responsibilities of the staff in the application process. See N.Y. City Rules & Regs. tit. 63 § 2-03 (2003).

²⁶ This is how the staff and HPRB operate in practice. Conversation with B. Brennan, Office of Corporation Counsel, March 31, 2003. However, this staff authority is not prescribed by regulation.

²⁷ See Omnibus Budget Revision Act of 2000 (stating that all of the “functions assigned and authority delegated to the Department of Consumer and Regulatory Affairs concerning historic preservation...are hereby transferred to the Office of Planning”). The transfer of historic preservation “functions” refers ostensibly to historic preservation

Planning placed these functions into the Historic Preservation Office. As will be discussed below, this transfer of historic preservation functions has created uncertainty about the legal authority of the Historic Preservation Office and its two inspectors to enforce the Preservation Act.²⁸

3. THE MAYOR'S DESIGNATED AGENT

Pursuant to the Preservation Act, the Mayor has delegated his responsibility to review permit applications to a series of Mayor's Agents.²⁹ When HPRB staff determines that it may directly issue a recommendation on a permit application, the Director of the Historic Preservation Office acts as the Mayor's Agent and "signs off" on the permit application before it is returned to DCRA.³⁰ On the other hand, when the staff refers the permit application to HPRB for its consideration, an individual unaffiliated with the Historic Preservation Office—typically an Administrative Law Judge—acts as the Mayor's Agent. Once the HPRB issues its recommendation, the Mayor's Agent convenes any public hearing required by law and makes a finding regarding the compatibility of the permit application with the appropriate standard.

In several instances where work was done on historic properties without appropriate permits, the Mayor's Agent has undertaken an enforcement role and issued orders requiring the

responsibilities set forth not only by the Preservation Act but by other federal and District laws. Consequently, the "staff" wears two hats. One is as staff to HPRB, in which it performs—or should perform—*only* those duties that are within the scope of HPRB's authority. The other hat is as staff of the Historic Preservation Office, which has responsibilities larger than those assigned to HPRB pursuant to all historic preservation laws applicable to the District. The consequence of this uncertainty is a confusion about which body—the HPRB or the Historic Preservation Office—has the authoritative voice in certain historic preservation matters.

²⁸ The transfer of historic preservation functions has also created procedural uncertainty about the permitting process itself. For example, Preservation Act regulations do not set forth the procedure by which permit applications are referred from DCRA to the Historic Preservation Office for Preservation Act review. On the other hand, the New York City Landmarks Law places the burden on permit applicants to file their applications with the Landmarks Commission. See N.Y. City Admin. Code § 25-305(c)(1) (2002).

²⁹ See D.C. Code Ann. § 6-1102(8) (2002) (acknowledging that the Mayor may designate an agent to perform his Preservation Act duties).

³⁰ The legal instrument by which this responsibility is assigned to the Historic Preservation Office Director is unclear.

work to be undone.³¹ These orders are of questionable authority, as the Mayor has not delegated enforcement authority upon the Mayor's Agents, and this paper does not discuss Mayor's Agent Orders as a tool for effecting compliance with the Preservation Act.³²

III. PRELIMINARY ISSUE: WHAT CONSTITUTES A VIOLATION OF PRESERVATION LAW?

The Preservation Act contains no clear statement of a person's responsibilities with respect to protection of historic properties. Consequently, we begin by addressing the issue of what actions constitute a violation of the Preservation Act.³³

Nearly all statutes creating regulatory regimes in the District clearly articulate an enforceable duty, or, alternatively, articulate the unlawful behavior. For example, the statute creating asbestos regulation states that "*no business entity shall engage in the abatement of asbestos...without a permit.*"³⁴ Historic preservation laws in jurisdictions with strong records of enforcement also clearly articulate one of these two parameters. The New York City Landmarks Law, for example, makes it "*unlawful for any person in charge of a [historic property] to alter, reconstruct or demolish [the historic property]*" unless he has previously *obtained permission* from the Landmarks Preservation Commission, the New York counterpart to the HPRB.³⁵ These examples suggest that the ability to ensure continuing compliance in a regulatory regime and to

³¹ See e.g., Mayor's Agent Orders regarding historic properties at 1635 Monroe St. NW, 1910 Vermont Ave. NW, 942 Westminister St. NW, 643 E St. NE, 1613 Hobart St. NW, 800 Maryland Ave. NE, and 443 M St. NW.

³² Even if the Mayor had delegated enforcement authority to the Mayor's Agent, Mayor's Agent Orders might still have uncertain effect, since, as discussed below, the Preservation Act gives the Mayor such limited enforcement mechanisms.

³³ On the other hand, the Preservation Act clearly requires owners to maintain their historic properties.

³⁴ D.C. Code Ann. §8-111.04 (2002) (emphasis added). See also D.C. Code Ann. § 6-641.09 (2002) (stating that "[i]t shall be unlawful to erect, construct, reconstruct, convert, or alter any building or structure...without obtaining a building permit); D.C. Code Ann. § 8-417 (2002) (defining specific acts considered unlawful under the pesticide regulatory regime); D.C. Code Ann. § 9-431.01 (2002) (stating that "[i]t shall be unlawful for any person to make any cut...in any highway, reservation, or public space...without a permit so to do and furthermore that "[t]he person obtaining such a permit shall abide by all conditions and provisions of the permit").

³⁵ N.Y. City Admin. Code § 25-305(a)(1) (2002) (emphasis added).

determine the particular point at which criminal, civil, or administrative penalties attach depends on a clear articulation of not only the authority to order compliance and exact penalties, but also the *obligations* with which specified persons must comply.³⁶ In the absence of such an articulation, a person subject to judicial proceedings for a violation of the law could argue that he has no enforceable duties under the law.³⁷

The District's Preservation Act is understood to impose two major obligations on persons intending to change historic properties through demolition, alteration, or new construction. First, prior to changing the property, an *owner* must submit a permit application to DCRA, where such application undergoes the review process established by the Preservation Act. Second, once a permit issues from the DCRA, *any person* overseeing or performing the work must abide by the terms of the permit. Unfortunately, this understanding of the Preservation Act is not supported by the statutory text. The provisions of the Preservation Act that set forth the protective standards for demolition, alteration, and new construction primarily address the obligations of the *Mayor* in the permit application review process, rather than obligations of citizen with respect to historic properties.³⁸ So, for example, were the Corporation Counsel to institute judicial proceedings against a citizen for changing his historic property without a permit, that citizen could argue that because he is not the party covered by the Preservation Act, historic preservation penalties technically cannot attach.³⁹

³⁶ Of course, there are other, more technical aspects of determining what constitutes a violation of the Preservation Act. For example, what is the "test" for differentiating between interior and exterior work, where work done to an interior affects the exterior and how long must a particular condition exist before it becomes a punishable violation, and what parts of a window must be altered to constitute a "windows violation"?

³⁷ This has not yet been argued, as the District has never brought judicial proceedings to enforce the Preservation Act.

³⁸ The owner *is* required to produce certain documents for a public hearing before the Mayor's Agent. See e.g., D.C. Code Ann. § 6-1104(f) (2002). This obligation, however, is self-enforcing—if an owner fails to comply, his permit simply does not issue.

³⁹ Penalties under the Construction Codes could attach, however, because changing a property without a permit is a violation of the Construction Codes.

As discussed above, the absence of a clear obligation of an actor in relation to historic property or a statement defining behavior that is unlawful makes the Preservation Act difficult to enforce. The proposed draft addresses this shortcoming by adding a section, entitled “unlawful acts; unlawful conditions,” to each provision of the Preservation Act setting standards for demolition, alteration, and new construction, explicitly stating that it is unlawful to demolish, alter, or commence new construction upon an historic property without a permit. Taking after the New York City Landmark Law, the proposed draft also makes it unlawful both to *maintain* the condition created by unlawful demolition, alteration, or new construction and to fail to comply with orders issued to enforce the Preservation Act.⁴⁰ The proposed draft also replaces the generalized language of the original penalties provision (e.g., “any violation of the Preservation Act” is punishable) with language that attaches penalties *specifically* to these articulated duties (e.g., “demolition of an historic property without a permit” is punishable).⁴¹

IV. THE HOMEOWNER

As mentioned above, the District is currently dealing with a citizen who is changing his historic property arguably in violation of the Preservation Act and has refused to comply with orders demanding that he stop all construction work or to pay penalties assessed upon him for such work. This section fleshes out the facts of his case and sets the framework for our discussion below of the District’s authority to comply compliance with the Preservation Act and to punish wrongdoers.⁴²

⁴⁰ See N.Y. City Admin. Code § 25-305 (a)(3) (2002) (making it unlawful for any person to maintain a condition created by work in violation of the standards governing demolition, alteration, and construction). The implication of making unlawful the maintenance of a condition is discussed below in Part VI.

⁴¹ Compare N.Y. City Admin. Code § 25-317(a) (2002) (“[a]ny person who violates [the duties related to demolition, alteration, and construction]”) with D.C. Code Ann. § 6-1110(a) (“[a]ny person who willfully violates any provision of [the Preservation Act]”).

⁴² The facts simplified: only matters relevant to illustrating the District’s enforcement authority are discussed.

In March 2001, a homeowner (“Homeowner”) submitted a permit application to DCRA proposing the replacement and rebuilding of parts of his historic property.⁴³ The permit application indicated that the proposed work would change neither the volume nor the gross floor area of his home. The appended drawings contained no side elevations but seemed otherwise in order. Believing the proposed work to be primarily a replacement job, an historic preservation staff member, acting as the Mayor’s Agent, approved the proposed work “over the counter” as being compatible with Preservation Act standards.⁴⁴ Thereafter, DCRA granted the Homeowner’s application and issued a series of permits for the proposed work.

Later that year, the Homeowner demolished several walls and began constructing a second-floor loft to the rear of his property. Believing this second-floor loft to be outside the scope of his permits, a stop-work order was issued upon the Homeowner in January 2002. Upon closer examination, the Historic Preservation Office determined that the work being done to the property was much more extensive than indicated in the permit application and asked that the Homeowner file a new permit application with a set of drawings to reflect accurately the work being done to the property.⁴⁵ The Homeowner continued to work on his property. In March and April 2002, three more stop-work orders were issued, citing the Homeowner for working outside the scope of his permits.⁴⁶ The Homeowner has maintained continually that he is working within

⁴³ See Application for Construction Permit on Private Property made by Homeowner, March 19, 2001.

⁴⁴ See Transcript of Proceedings, Government of the District of Columbia, Department of Consumer and Regulatory Affairs, Historic Preservation Review Board, Public Hearing, September 26, 2002 (“Transcript”), at 161.

⁴⁵ See Transcript at 163.

⁴⁶ During the time DCRA sought to enforce the Construction Code and Preservation Act using these notices and orders, the Homeowner applied for a permit to convert his second-story addition into a storage loft. The permit issued, and, because it contemplated only interior work, did not require review by the Historic Preservation Office. To avoid this in the future, the Preservation Act or its implementing regulations should contain a provision stating that no permit application for a property will be processed as long as an unresolved notice of violation, stop-work order, or notice of infraction is on file against the property and describing the manner in which HPRB and HPRB staff will go about researching whether such orders or notices exist. See e.g., N.Y. City Rules and Regs. tit. 63 § 2-04 (2002) (stating that no applications will be processed for properties where a notice of violation is in effect on the property and that the staff must verify that there are no outstanding notices on the property before processing any application).

the scope of his permit, that the work is adequately described in his original permit application, and that the DCRA and Historic Preservation Division had a clear understanding of that original permit application. As of January 2003, the Homeowner had not filed a new permit application in response to the Historic Preservation Office's January 2002 request.

In May 2002, a notice of violation was issued upon the Homeowner again directing him to submit plans to the Historic Preservation Office within 15 days for review.⁴⁷ In early September 2002, the Homeowner submitted new set of plans. In late September 2002, with the Homeowner present, HPRB convened a public hearing to discuss the Homeowner's case.⁴⁸ At the hearing, it was agreed that the Homeowner would restart the permit application process with drawings that adequately reflected the work he had in mind.⁴⁹ The Homeowner was also advised that any further work on his property could be punished criminally, as well as by an injunction ordering the restoration of the property to its appearance prior to the violation.⁵⁰

The Homeowner continued to work on his property. In November 2002, a stop-work order was issued for continued noncompliance with the May 2002 notice of violation, and in December 2002, a notice of infraction was issued for failure to comply with his permits and for continuance of work in violation of the most recent stop-work order.⁵¹

DCRA attempted several times to inspect the Homeowner's property to ensure that he had stopped work pursuant to the most recent stop-work order.⁵² The Homeowner denied entry, and, despite the presence of workmen in and around his home, insisted that we was in

⁴⁷ See Transcript at 158-159. The stop-work orders and notice of violation are discussed below in Part V.A.

⁴⁸ See Transcript at 153-221.

⁴⁹ See Transcript at 220.

⁵⁰ See Transcript at 219-220. See also Transcript at 213 (on notice to criminal penalties and injunctive remedy)

⁵¹ The Homeowner's appealed the November stop-work order, and the appeal was denied by DCRA. See December 23, 2002 letter to the Homeowner from the Director of DCRA. The Homeowner also sought a temporary restraining order to stay the stop-work order but was unsuccessful. The notice of infraction, no. 49636, was issued by Toni Cherry on December 3, 2002. The notice of infraction is further discussed in Part V.B.

⁵² See DCRA Application for an Administrative Search Warrant, April 2003.

compliance with the order. Thereafter, DCRA obtained an administrative search warrant from the Superior Court and executed a search in early April 2003. At the time this paper was finalized, the results of the search warrant were unknown.

V. COMPLIANCE WITH DEMOLITION, ALTERATION, AND NEW CONSTRUCTION STANDARDS

Below, we address the authority under which the District attempted—or should attempt—to bring the Homeowner’s historic property into compliance with the Preservation Act.

A. ADMINISTRATIVE ENFORCEMENT

The Preservation Act contains few, if any, provisions that would allow it to be independently enforced.⁵³ While historic preservation functions were a part of DCRA, this statutory shortcoming was hardly noticeable, as the Historic Preservation Division exercised DCRA’s enforcement authority over historic preservation matters. Now that historic preservation functions have been transferred to the Office of Planning, the lack of independent enforcement authority in the Preservation Act has generated uncertainty about the legal authority of the Historic Preservation Office to enforce the Act. Recognizing the ambiguity of its enforcement authority, the Office of Planning entered into a Memorandum of Agreement with DCRA in 2001 in which DCRA agreed to give inspectors of the Office of Planning the authority to issue stop-work orders and notices of violation.⁵⁴ These powers are granted specifically to DCRA by Construction Code.⁵⁵

⁵³ Like most other statutes creating regulatory regimes, the Preservation Act did not create a new enforcement institution. Unlike statutes creating these regimes, however, the Preservation Act does not include an independent authority to *order* regulatory compliance that can be lodged with whatever institution assigned to administer the Preservation Act.

⁵⁴ “Memorandum of Agreement Between the Department of Consumer and Regulatory Affairs and the Office of Planning” regarding the enforcement authority of Preservation Act. May 2001.

⁵⁵ See D.C. Mun. Regs. tit. 12 §§ 117, 118 (2003).

There are at least two undesirable aspects of this arrangement. First, the Preservation Act is enforced *indirectly*. The owner of an historic property who works without or outside the scope of his DCRA permit would be cited for violation of the Construction Code, rather than the Preservation Act. As a general matter, it is better practice to provide enforcement tools within the Preservation Act itself.⁵⁶ Second, the Memorandum of Agreement may not be a valid legal instrument because it delegates powers legislatively endowed to one executive agency—DCRA—to another—the Office of Planning. According to the General Counsel of DCRA and an attorney at the Office of Corporation Counsel, these types of memoranda have never been challenged formally, but there is some indication that the Homeowner will call the validity of this particular memorandum into question.⁵⁷

The proposed draft creates an independent administrative authority to *order* compliance with the Preservation Act using stop-work orders. Because this tool “travels” with the Preservation Act, it may be used by any institution assigned to administer the Preservation Act. Below, we discuss the *DCRA* tools currently available for enforcement.

1. NOTICES OF VIOLATION AND STOP WORK ORDERS

It is a violation of the Construction Code to perform any work contrary to its provisions or to fail to comply with any order issued to enforce the Construction Code.⁵⁸ Upon discovering a violation, DCRA, under authority granted by the Construction Code, commonly issues one of two types of written enforcement orders. First, DCRA may issue a notice of violation on any person “responsible” for the violation, ordering such person to discontinue the illegal action or

⁵⁶ See e.g., Barbara Ditata, The Use of Criminal Sanctions in the Enforcement of Historic Preservation Laws, 22 Westchester Bar Journal 103, 107 (1995) (stating that it is better practice to provide criminal sanctions within historic preservation laws rather rely on enforcement provisions in other laws).

⁵⁷ Conversation with B. Brennan, Office of Corporation Counsel, March 31, 2003.

⁵⁸ See D.C. Mun. Regs. tit. 12 §§ 117, 118 (2003).

condition.⁵⁹ Second, DCRA may issue a stop-work order ordering all work to stop until the conditions for lifting the stop-work order are met.⁶⁰ In theory, notices of violation and stop-work orders can produce the same result: a notice of violation *orders* the curing of violations while a stop-work order orders work to stop *until* the violation is cured. In practice, however, inspectors issue notices of violations only to notify a person that he is in violation of the law and issue stop-work orders for more egregious cases.⁶¹ Between August 1999 and March 2002, 98 notices of violation and 168 stop-work orders were issued by an inspector with the Office of Planning to enforce the Preservation Act, and, as noted in Part IV above, both types of written enforcement orders have been used against the Homeowner to try to bring his property into compliance with the Preservation Act.⁶²

Our proposed draft of the Preservation Act models the authority to issue stop-work orders present in the Construction Codes and in the New York City Landmarks Law.⁶³ The proposed draft does not include authority to issue notices of violation: given the irreplaceable nature of historic properties, it is desirable to err on the side of caution and order all work to stop until the violation or other matters are resolved. The proposed stop-work authority includes the ability to issue an order orally, allowing inspectors, upon showing proper identification, to give an immediate, on-site order to stop work. This feature is modeled after the stop-work authority in the New York City Landmarks Law.⁶⁴ When given orally, the stop-work order subsequently

⁵⁹ See D.C. Mun. Regs. tit. 12 § 116.2 (2003).

⁶⁰ See D.C. Mun. Regs. tit. 12 § 118 (2003). DCRA also issued a notice of infraction upon the Homeowner. The notice of infraction is discussed below in part V as a punitive mechanism.

⁶¹ Conversation with the General Counsel, DCRA.

⁶² See Historic Preservation Office, Mayor Anthony Williams, Twenty-Third Annual Report to the Council of the District of Columbia on the Implementation of the Historic Landmark and Historic District Protection Act of 1978 at 23 (2002).

⁶³ Under the New York City Landmarks Commission, the authority to issue stop-work orders rests with the Chair of the Landmarks Commission, an independent agency. See N.Y. City Admin. Code § 25-317.2(a) (2002).

⁶⁴ See N.Y. City Admin. Code § 25-317.2(a)(2) (2002) (stating that stop-work orders “may be given orally...to a person in charge or apparently in charge” of the historic property and that “written notice” of a stop-work order

must be reduced to writing and either mailed to the owner within two days or affixed to the property. The owner may contest stop-work orders before an administrative tribunal within the Office of Planning, similar to the DCRA Office of Adjudication.

Under the proposed draft, the Mayor may issue a stop-work order at any time he “reasonably believes” that work is being performed in violation of the provisions of this subchapter. Regulations promulgated to implement this stop-work order authority should define the parameters of the phrase “reasonably believes” and the manner in which inspectors shall determine whether this standard is met. Regulations should also flesh out the procedure by which a stop-work order may be challenged and the conditions under which orders may be lifted.⁶⁵

2. VERIFYING COMPLIANCE

Respondents who fail to comply with a notice of violation or a stop-work order issued pursuant to the Construction Codes may be punished through a judicial or administrative proceeding, resulting in fines, penalties, or imprisonment.⁶⁶ Before initiating these proceedings, however, DCRA often requires an inspection to determine whether the respondent has complied with the notice of violation or stop-work order. As noted above, an inspection of the Homeowner’s property was required to determine whether he had complied with the April 2002 stop-work order, and the Homeowner denied entry.

given orally “shall be mailed to the person to whom the order was addressed or affixed to the premises where the violation occurred within forty-eight hours”).

⁶⁵ See e.g., N.Y. City Rules & Regs. tit. 63 § 11-01(d) and (f) (2002) (describing the factors to be considered when determining whether a violation has been “corrected” or “cured”).

⁶⁶ Penalties for failing to comply with enforcement orders are assessed *in addition* to penalties for the initial violation of the Construction Code (e.g., altering property without a permit). See D.C. Code Ann. § 6-1406(a) (2002) (stating that any violation of the Construction Code or *orders* issued pursuant to the Construction Code is criminally punishable by a fine not to exceed \$300, imprisonment not to exceed ten days, or both or administratively punishable as an infraction under the District of Columbia Civil Infractions Act); 12 D.C. Mun. Regs. tit. 12 § 117.2 (2003) (stating that failure to comply with a notice of violation is a misdemeanor punishable by a fine of \$100, imprisonment not to exceed ten days, or both); 12 D.C. Mun. Regs. tit. 12 § 118.2 (2003) (stating that violation of a

Where a person denies entry to an inspector, DCRA may obtain an administrative search warrant from the Superior Court if it demonstrates that (1) the property is subject to one or more statutes relating to the public health, safety, or welfare, (2) entry has been denied to officials authorized by civil authority to enforce the statutes, and (3) reasonable grounds exist for such administrative search and inspection.⁶⁷

In the Homeowner's case, DCRA obtained an administrative search warrant from the judge-in-chambers after making a satisfactory showing on all three elements.⁶⁸ First, DCRA argued that the property was subject to the Construction Code, a set of laws intended to ensure public safety, health, and welfare.⁶⁹ Second, DCRA argued that the inspectors had authority to enforce the Construction Code and had been denied.⁷⁰ Finally, DCRA argued that reasonable grounds existed to believe the Homeowner was continuing work in contravention of the stop-work order, given the presence of workmen and work vehicles on his property.⁷¹

Search warrants issued based on the Construction Codes nearly always will be adequate to inspect a property for compliance with the Preservation Act, since the obligation to obtain and to work within the scope of a permit is a part of both regulatory regimes. However, since the Preservation Act is no longer within DCRA's administrative jurisdiction, enforcement officials of the Historic Preservation Office should have independent ability to obtain an administrative search warrant based solely on the Preservation Act. As things stand, however, enforcement

stop-work order is an infraction punishable by the District of Columbia Civil Infractions Act). Penalties for failing to comply with enforcement orders are discussed below in Part VI.

⁶⁷ D.C. Super. Ct. R. Civ. P. 204(b).

⁶⁸ See DCRA Application for an Administrative Search Warrant, April 2003. Denzil Noble, Acting Administrative of BLRA, filed the warrant application with the judge-in-chambers on behalf of the DCRA Director.

⁶⁹ See generally D.C. Code Ann. § 6-1404 (2002) (stating that the intent of the Construction Codes is to "ensure public safety, health, and welfare).

⁷⁰ See D.C. Code Ann. § 6-1405.01 (2002) (giving general enforcement authority). DCRA also could have cited other provisions. See D.C. Mun. Regs. tit. 12 §§ 109.1, 110.1 (2003) (authorizing the DCRA Director to "enforce all provisions" of the Construction Codes); D.C. Mun. Regs. tit. 12 § 115.4 (2003) (giving the DCRA Director the right to enter any building under construction, alteration, or repair in the performance of his duties).

officials would have difficulty obtaining an administrative search warrant from the Superior Court. The first prong of the test for issuing such warrants is met because the Preservation Act was promulgated expressly in the interests of the health and welfare of the District’s citizens.⁷² The second prong of the test, however, is more difficult to prove because the Preservation Act contains no civil authority to enforce the Preservation Act by, for example, inspecting an historic property for compliance. The proposed draft addresses this shortcoming with a provision expressly authorizing the Mayor—or the Mayor’s Agent—to enforce the Preservation Act and allowing him a limited right to enter “any building under construction, alteration, or repair.” This provisions is modeled after the right of the DCRA Director to enter properties in performance of his Construction Codes duties.⁷³

B. JUDICIAL ENFORCEMENT: INJUNCTIVE RELIEF

The enforcement mechanisms discussed above are all creations of the Construction Code, not of the Preservation Act, and technically may only be used by DCRA. However, there is one enforcement mechanism that may be used to compel compliance *specifically* with the duties prescribed by the Act: injunctive relief. Under the injunctive relief provision of the Preservation Act, the Corporation Counsel may ask the court to require “any person” who demolishes, alters, or commences new construction upon an historic property in violation of the demolition, alteration, or new construction provisions to restore the historic property to its appearance prior

⁷¹ See DCRA Application for an Administrative Search Warrant, April 2003.

⁷² See D.C. Code Ann. § 6-1101(a) (stating that the protection of historic properties are “in the interests of the health, prosperity, and welfare of the people of the District of Columbia”).

⁷³ See D.C. Mun. Regs. tit. 12 § 115.4 (2003). See e.g., D.C. Code Ann. § 6-1405.01 (2002) (stating that “the Mayor...is authorized to administer and enforce the provisions of this chapter...and all regulations issued pursuant thereto”); D.C. Mun. Regs. tit. 12 § (2003).

to the violation.⁷⁴ There is also a punitive element to injunctions: failure to comply with an injunctive order is itself punishable by contempt of court.

The Corporation Counsel might consider instituting parallel criminal and civil proceedings against the Homeowner, seeking criminal penalties, as described below, and an injunction that directs the Homeowner to remove the second-floor loft and restore the home at his expense.

VI. PENALTIES FOR NONCOMPLIANCE WITH THE PRESERVATION ACT

The Preservation Act contemplates two types of penalties for failing to comply with the Act: assessment of criminal penalties through criminal prosecution or assessment of civil fines, fees, or penalties through an administrative process established by the District of Columbia Consumer and Regulatory Affairs Civil Infractions Act (“Civil Infractions Act”) of 1985.⁷⁵ These penalties can—and should—be utilized while exercising the compliance authorities described above to both punish citizens who willfully fail to comply and force them to give up the benefits derived from noncompliance and restore the historic property to a compliant condition.⁷⁶

A. CRIMINAL PENALTIES

As noted above, the District is considering criminal prosecution of the Homeowner. While the Homeowner potentially is liable under the criminal provisions of the Construction Code, the Office of Corporation Counsel has expressed interest in utilizing the criminal penalty

⁷⁴ D.C. Code Ann. § 6-1110(b) (2002) (covering unlawful demolition, alteration, and new construction, but not violations of the demolition by neglect and subdivision provisions).

⁷⁵ See D.C. Code Ann. § 6-1110 (2002).

⁷⁶ For example, under the Preservation Act, criminal penalties may be sought in addition to an injunction require the restoration of the historic property to its appearance prior to the violation. See D.C. Code Ann. § 6-1110(b) (2002) (stating that the civil remedy shall be “in addition to and not in lieu of any criminal prosecution and penalty”).

provision of the Preservation Act.⁷⁷ The penalties provision of the Preservation Act authorizes the Corporation Counsel to prosecute “[a]ny person who willfully violates any provision” of the Preservation Act and its implementing regulations.⁷⁸ In other words, this provision permits the prosecution of both owners of historic property and individuals contracted to work on the property, as well as any other individual otherwise responsible for changing the property in violation of the Preservation Act.⁷⁹ Dual-party liability is common in other regulatory schemes—for example, under the Construction Codes and New York Landmarks Law—because fulfillment of regulatory goals require the cooperation of each participant in the regulated activity.⁸⁰ Upon conviction, such person shall be punished by a fine of not more than \$1,000 or imprisonment for not more than 90 days or by both such fine and imprisonment.⁸¹ The terms of the criminal penalty in the District’s Preservation Act are similar in severity to those in historic preservation laws of other jurisdictions.⁸²

There has always been controversy over whether criminal punishment is justified for regulatory, or public welfare, offenses, especially since regulatory offenses, which are unlawful by proclamation (i.e., *malum prohibitum*), do not comport with the traditional notion of criminal

⁷⁷ See D.C. Code Ann. § 6-1406(a) (2002). The Homeowner is also liable for civil penalties pursuant to the Civil Infractions Act for failing to comply with a stop-work order. See D.C. Code Ann. § 6-1406(c) (2002); D.C. Mun. Regs. tit. 12.....(2003).

⁷⁸ See D.C. Code Ann. § 6-1110(a) (2002) (emphasis added).

⁷⁹ A review of Part III is helpful here. The Preservation Act, on its face, does not prescribe any duties upon persons intending to change historic properties through demolition, alteration, or new construction. Read in that context, the penalties provision—making any person liable for violations—is meaningless. However, recall that the Preservation Act is understood to impose a duty on the *owner* to obtain a permit and a duty on *any person* to work within the scope of that permit. Read in this context, the penalties provision makes both owners and contractors liable, as well as any person otherwise responsible for the work on the historic property.

⁸⁰ See D.C. Mun. Regs. tit. 12 § 117.4 (2002); N.Y. Admin. Code § 25-317 (2002) (placing liability on “any person” responsible for the building or the construction work). See also 42 U.S.C. §§ 6922-6924 (2002) (imposing duties on disposers, as well as generators and transporters of hazardous waste to fulfill the federal goal of regulating land disposal of hazardous wastes).

⁸¹ See D.C. Code Ann. § 6-1110(a) (2002).

⁸² See Barbara Ditata, *The Use of Criminal Sanctions in the Enforcement of Historic Preservation Laws*, 22 Westchester Bar Journal 103, 107-112 (1995) (discussing criminal penalties in Philadelphia, PA, San Antonio, TX, Chicago, IL, and New York, NY, historic preservation laws).

acts, which are inherently unlawful (i.e., *malum in se*). Criminal punishment for violations of the Preservation Act, which are regulatory in nature may be justified because the standard of intent required by the Preservation Act for criminal liability is sufficiently high that it does not trigger the concerns that accompany other regulatory regimes that punish offenses on a reduced-intent standard. Criminal punishment for regulatory offenses is sometimes established by statutes that allow conviction under a standard of reduced intent, such as strict liability or negligence, which disposes of the conventional requirement of awareness of wrongdoing.⁸³ The U.S. Supreme Court recognizes the authority of legislative bodies to create such statutes, as they are often the only way to protect the public in situations where they have no other individual recourse for protecting themselves against activities that pose a risk of a wide distribution of harm.⁸⁴ The District's Preservation Act avoids this controversy over criminal liability under a reduced intent standard, as it requires *willful* violations of the Preservation Act, or violations in which the actor knows that he is acting illegally.⁸⁵ In requiring such a high level of intent, only citizens who engender an awareness of wrongdoing would be criminally liable, while citizens who believed in good faith that they were acting lawfully would not be criminally liable.⁸⁶ Also, from a practical standpoint, meaningful enforcement of historic preservation laws against citizens who

⁸³ See e.g., 33 U.S.C. § 1319(c)(1) (2002) (establishing misdemeanor punishment on the basis of a negligent violation of the federal Clean Water Act). See generally Lawrence Friedman & H. Hamilton Hackney III, *Questions of Intent: Environmental Crimes and "Public Welfare" Offenses*, 10 Vill. Envtl. L.J. 1, 5 (1999).

⁸⁴ See *id.* For example, violators may be criminally liable under the Food and Drug Act's strict liability standard and the Clean Water Act's negligence standard. See *U.S. v. Park*, 421 U.S. 658 (1975); *U.S. v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999) (writ of certiorari denied).

⁸⁵ See *Bryan v. U.S.*, 524 U.S. 184 (1998) (holding that a willful standard of intent requires general knowledge of the unlawfulness of an act but not specific knowledge of the law making the act illegal).

⁸⁶ For example, cases before the Mayor's Agent regarding unlawful window alterations often involve owners who were not aware their properties were subject to the Preservation Act. These owners likely would not be criminally liable under the "willful violation" standard.

deliberately violate such laws requires some type of socially weighty punishment, such as criminal punishment.⁸⁷

With these justifications in mind, the proposed draft of the Preservation Act clarifies the types of acts subject to criminal punishment without substantially expanding the circle of liability.⁸⁸ First, *willful* violation of the demolition, alteration, and new construction provisions is subject to criminal prosecution and punishable by fine, imprisonment, or both. As mentioned above, the proposed draft articulates two unlawful acts: first, the act of constructing without a permit and second, the act of maintaining the condition caused by unlawful construction. The second act is unlawful for *each day* during which the owner maintains the condition. This distinction creates a penalty differential: a person who, having willfully violated the Preservation Act, quickly corrects the unlawful condition receives a lesser monetary penalty than the person who refuses to correct under any circumstance. Second, *willful* violation of any order issued by the Mayor pursuant to the administrative enforcement provision of the proposed draft (e.g., a stop-work order) is punishable by fine, imprisonment, or both. This provision is modeled after both the Construction Codes and the New York Landmarks Law and is intended to give some teeth to compliance orders when initially issued.⁸⁹

Finally, the proposed redraft makes unlawful willful false statements or omissions of material facts in any document submitted to the District, such as a permit application, documents supporting such application, or certifications of compliance with the Preservation Act. This false

⁸⁷ See generally Barbara Ditata, The Use of Criminal Sanctions in the Enforcement of Historic Preservation Laws, 22 Westchester Bar Journal 103 (1995).

⁸⁸ An interesting and important issue, but one that is beyond the scope of this paper, is the amount of monetary penalty and length of imprisonment that is effective against violators: they must not be so lenient that people accept them as a cost of doing business and not be too harsh that they overstep the justifications for punishing regulatory offenses.

⁸⁹ See N.Y. City Admin. Code § 25-317(a) (2002) (attaching misdemeanor penalties to violations of the duty to obtain a permit or “any order” issued by the chair of the Landmarks Commission); § 25-317.1 (2002) (attaching civil

statements provision is the only substantial expansion to criminal liability made by the proposed draft and may be justified by reference to the fact that willful misstatements on official documents submitted to the District are routinely punishable by criminal penalties.⁹⁰

Under the proposed draft, the Homeowner could be prosecuted for one count of omitting material fact (i.e., side elevations necessary to properly assess the project), and the Homeowner and his contractor would each be guilty of one count of working outside the scope of the permit, several counts of maintaining the unlawfully constructed work, depending on the number of days since it was first erected, and several counts of violating stop-work orders. The Homeowner's willfulness in violating the Preservation Act may be shown by pointing out that HPRB had warned him that any further work would be done at his own peril and be punishable by criminal penalties.

B. CIVIL PENALTIES RECOVERED PURSUANT TO THE CIVIL INFRACTIONS ACT

1. THE CIVIL INFRACTIONS ACT GENERALLY

Prior to the Civil Infractions Act, DCRA pursued violations of the law by suspending, revoking, or refusing renew licenses and permits or by requesting criminal prosecution pursuant to the penalties provision of the applicable law.⁹¹ It soon became apparent that these two mechanisms were ill-suited for enforcement. Suspension, revocation, or refusal to renew licenses and permits too harshly punished otherwise law-abiding citizens by forcing them to shut down entire business operations, and criminal penalties were rarely imposed on egregious violators due to the burden of preparing a criminal case for trial and to a full criminal docket at

penalties to the violations previously described); § 25-317.2(d) (2002) (authorizing the corporation counsel to use "all necessary actions" to compel compliance with stop-work orders).

⁹⁰ See e.g., D.C. Code §§ 3-1205.14, 3-1210.04 (2002) (punishing false statements in the context of licensing of health professionals); D.C. Code § 4-218.01 (2002) (punishing fraudulent statements in obtaining public assistance); D.C. Code § 8-103.16 (2002) (punishing knowing false statements in the context of water pollution control).

the D.C. Circuit.⁹² The Civil Infractions Act gave DCRA an option to these two mechanisms, one that DCRA has exercised with great success.

Under the Civil Infractions Act, DCRA is authorized to issue notices of infraction for violations of laws within its administrative jurisdiction.⁹³ If a respondent admits to the stated infraction, he pays the applicable fines and penalties.⁹⁴ If a respondent denies the infraction, the matter is taken before an administrative law judge for a hearing in accordance with the Civil Infractions Act, and an administrative order outlining the sanctions is issued. The respondent may appeal the order to the D.C. Board of Appeals and Review.⁹⁵

The Civil Infractions Act buffers citizens from the harsh penalty of having their licenses or permits revoked by allowing them to admit their infractions and pay a fine. Revocation, instead, is saved for citizens who subsequently refuse to comply with the notice of infraction. The Civil Infractions Act also saves DCRA and the courts from the burden of a full-blown criminal trial by, in effect, decriminalizing some regulatory violations and making them administratively adjudicable.⁹⁶

2. USING THE CIVIL INFRACTIONS FRAMEWORK TO PENALIZE VIOLATIONS OF THE PRESERVATION ACT

At the time the Civil Infractions Act was enacted, the Preservation Act was among the laws within DCRA's administrative jurisdiction. The Civil Infractions Act amended the Preservation Act to allow the imposition of civil fines, fees, and penalties as an alternative to

⁹¹ See Committee on Consumer and Regulatory Affairs, Council of the District of Columbia, Committee Report on Bill 11-111, the "District of Columbia Civil Infractions Act of 1985" (1985).

⁹² See *id.*

⁹³ See D.C. Code Ann. § 2-1802.01 (2002).

⁹⁴ See D.C. Code Ann. § 2-1802.02(d) (2002).

⁹⁵ Because of lack of funding for the D.C. Board of Appeals and Review, appeals of administrative orders issued pursuant to the Civil Infractions Act are heard in the Office of Adjudication within the DCRA. Conversation with K. Edwards, General Counsel, DCRA, February 26, 2003.

⁹⁶ Of course, the D.C. Superior Court may become involved if it is requested to reduce an administrative order to judgment and exercise its contempt of court power.

criminal prosecution.⁹⁷ However, the transfer of historic preservation functions to the Office of Planning in 2000 casts some uncertainty on the meaning of this amended provision. As with the administrative tools discussed in Part III (i.e., notices of violation and stop-work orders), the authority to utilize the civil infractions system rests solely with DCRA through delegation by the Mayor. The Memorandum of Agreement that authorized inspectors from the Office of Planning to issue notices of violation and stop-work orders also authorized them to issue notices of infraction. The December 2002 notice of infraction was issued upon the Homeowner by an Office of Planning inspector pursuant to this Memorandum of Agreement.

Enforcing the Preservation Act with the Civil Infractions Act incurs the same problems as with enforcing using Construction Code's administrative compliance mechanisms: the enforcement is effected indirectly, and the Memorandum of Agreement assigning authority across agencies is of questionable authority. However, it may be possible to address both of these problems and allow the Historic Preservation Office to use the Civil Infractions Act system. Though the Civil Infractions Act was passed with DCRA in mind, the text of the Act technically confers the authority to use the civil infractions system upon the Mayor. Because DCRA received civil infractions authority by delegation from the Mayor, it may be possible to give the Office of Planning the authority to use the civil infraction system by asking the Mayor to split his delegation and to give the Office of Planning the ability to promulgate regulations regarding infractions of laws under its administrative jurisdiction (i.e., the Preservation Act). The DCRA General Counsel unaware of any authority that has been spread across agencies by a split delegation.⁹⁸

⁹⁷ See D.C. Law 6-42 ("Civil Infractions Act") § 412 (1985).

⁹⁸ Phone interview with K. Edwards, April 18, 2003.

Assuming that the Mayor can split delegation of Civil Infractions Act authority or that the Memorandum of Agreement is valid (i.e., authority to utilize the civil infractions system *can* be spread across agencies), the Office of Planning must promulgate regulations adding violations of the Preservation Act to the schedule of fines.⁹⁹ Notices of infraction may be issued only for infractions defined in the DCRA's Civil Infractions Act regulations, which list a select groups of laws whose violations constitute an infraction.¹⁰⁰ The notice of infraction issued upon the Homeowner, for example, cited two infractions of a zoning provision.¹⁰¹ The Preservation Act must be listed, either in the DCRA Civil Infractions Act regulations or in a separate title devoted to Office of Planning regulations, in order for violations of the Preservation Act to be considered infractions punishable by the Civil Infractions Act system.

The proposed draft of the Preservation Act dodges entirely the question of Civil Infractions Act authority and instead provides the Office of Planning with the authority to adjudicate administratively any stop-work orders issued under the enforcement provision of the proposed draft. This authority is discussed more fully below.

VI. PROPOSED DRAFT OF THE PRESERVATION ACT

A. GENERAL COMMENTS

The proposed draft of the Preservation Act provides independent and comprehensive enforcement authority to the Office of Planning and the Historic Preservation Office. The enforcement authority is independent in that it is created directly by the Preservation Act and

⁹⁹ See D.C. Mun. Regs. tit. 16 § 3200, *et seq.* (2003) (listing the schedule of fines and defining infractions as violations of specific laws under the administrative jurisdiction of DCRA).

¹⁰⁰ *Id.*

¹⁰¹ Actually, the notice of infraction cited a statutory provision (D.C. Code Ann. § 5-426 (old)) that is not classified as an infraction in the Civil Infractions Act regulations. More than likely, the provision classified as an infraction (D.C. Code Ann. § 5-425 (old)) in the regulations is a typographical error, and the provision cited by the notice of infraction is the correct provision.

inheres with whichever regulatory institution is assigned to administer the Preservation Act. The enforcement authority is comprehensive in that, even without the assistance of enforcement tools under the Construction Code or Civil Infractions Act, the tools provided by the proposed draft should be adequate to ensure compliance with the Preservation Act and to punish those who fail to comply.

D.C. agencies are often charged with much more than their resources allow them to handle, so any changes to the proposed draft must be evaluated for their impact on agency resources. The proposed draft includes several new provisions articulating acts and conditions that are unlawful. However, because these provisions merely state what has always been assumed about a person's substantive obligations with respect to historic properties, they do not demand more of administrative resources. Correspondingly, most of the enforcement tools may be utilized without extra expense. The only significant cost might be the proposed establishment of an administrative adjudicatory tribunal—an Office of Adjudication—within the Office of Planning to adjudicate stop-work orders issued pursuant to the Preservation Act and Civil-Infractions-Act-type civil penalties. However, the Office of Planning could agree to let the DCRA Office of Adjudication to have initial jurisdiction over the adjudication of historic preservation stop-work orders, since they would be substantially similar to stop-work orders issued on the property pursuant to the Construction Codes.¹⁰²

B. ENTIRELY NEW PROVISIONS

1. ADMINISTRATIVE PROCEEDINGS

¹⁰² The City Council has authorized a city-wide administrative tribunal called the Office of Hearings and Appeals to be the central administrative adjudicatory body, bringing together adjudications currently occurring in Offices of Adjudication in various agencies, including DCRA. However, this tribunal has not yet been established, due to lack of funding. Conversation with K. Edwards, General Counsel, DCRA, February 26, 2003.

In lieu of the Civil Infractions Act system, the proposed draft provides for administrative proceedings by the Office of Planning to impose civil penalties for violations of the Preservation Act and to adjudicate contested stop-work orders. This provision also allows the administrative tribunal to use permit revocation and suspension as part of its arsenal of penalties. Implementing regulations should define and classify specific violations, as is done in Civil Infractions Act regulations and by the New York City Landmarks Law.¹⁰³

2. CIVIL PENALTIES RECOVERABLE THROUGH JUDICIAL PROCEEDINGS

Civil penalties are already recoverable through the above-described administrative proceedings. Consequently this provision, providing for recovery of civil penalties through judicial proceedings may potentially be repetitive. However, if modeled after the New York City Landmarks Law, it allows the Corporation Counsel, in his civil judicial proceeding to recover any economic benefit or savings resulting from failing to comply with the regulatory regime.¹⁰⁴ Recovery of economic benefit or savings resulting from violations of the regulatory regime are common in environmental laws.¹⁰⁵

VII. CLOSING COMMENTS: USING THIS PAPER

The changes suggested in this paper and by the proposed draft of the Preservation Act can be implemented in stages. First, there should be a clearer delineation of authorities within Preservation Act institutions. For example, the legal instruments (e.g., Mayor's Orders, Memoranda of Agreement, implementing regulations) by which Preservation Act responsibilities

¹⁰³ See N.Y. City Admin. Code § 25-317.1(b)(2) (2002).

¹⁰⁴ See N.Y. City Admin. Code § 25-317.1(a) (2002). Recovery of economic benefit is common to environmental regulatory regimes. See e.g., U.S.C. (2002).

are delegated to the Mayor's Agent, HPRB, and HPRB staff should be drafted, if they have not already been, or revised such that each responsibility is clearly assigned. Second, given the difficulty of amending substantial portions of the Preservation Act, as many suggestions as possible should be accomplished by regulation. For example, the particular aspects of a Preservation Act violation (e.g., the standards by which minor alterations will be judged to be unlawful alterations) can be identified and described and specific penalties can be assigned. Finally, the District should aspire to revise portions of the Preservation Act itself, especially portions regarding the substantive obligations of owners to their historic properties, as this articulation is central to the overall idea of enforcement of the Preservation Act.

¹⁰⁵ See e.g., 33 U.S.C. 1319(g)(3) (2002) (directing the court, when determining the amount of a penalty, to consider the amount of economic benefit or savings accrued to the defendant resulting from violations of the Clean Water Act).

A. APPENDIX. PROPOSED DRAFT OF THE PRESERVATION ACT

§ 6-1104. Demolitions.

(a) Standard for the issuance of a permit to demolish.

No permit to demolish an historic landmark or a building or structure in an historic district shall issue unless

- (1) The Mayor finds that issuance of the permit is necessary in the public interest, except that if issuance of the permit is necessary to construct a project of special merit, the permit shall issue simultaneously with a permit for new construction pursuant to [the Construction Codes] and [§ 6-1107], and the permit applicant shall demonstrate the ability to complete the project; or
- (2) The Mayor finds that failure to issue the permit will result in unreasonable economic hardship to the permit applicant.

(b) Unlawful work; unlawful conditions.

It shall be unlawful to

- (1) Demolish an historic landmark or a building or structure in an historic district without a permit to demolish issued pursuant to the [Construction Code] and the provisions of this subchapter.
- (2) Maintain the condition created by the unlawful work defined in subsection (b)(1).

§ 6-1105. Minor Repairs and alterations.¹⁰⁶

- (a) Standard for the issuance of a permit to perform minor repairs or a permit to alter.

No permit to perform minor repairs or permit to alter an historic landmark or a building or structure in an historic district shall issue unless

- (1) The Mayor finds that issuance of the permit is necessary in the public interest or
- (2) The Mayor finds that failure to issue the permit will result in unreasonable economic hardship to the permit applicant.

- (b) Unlawful work; unlawful conditions.

It shall be unlawful to

- (1) Perform minor repairs on or alter an historic landmark or a building or structure in an historic district without a permit to perform minor repairs or a permit to alter issued pursuant to the [Construction Code] and the provisions of this subchapter.
- (2) Maintain the condition created by the unlawful work defined in subsection (b)(1).

¹⁰⁶ Both the Construction Codes and the New York City Landmarks Law contain provisions concerning “minor” repair or work, as distinct from alteration. See D.C. Mun. Regs. tit. 12 § 104.1 (2002) (defining “minor repair”); D.C. Mun. Regs. tit. 12 § 111.1.2 (2002) (requiring permits for minor repair to historically protected structures); N.Y. City Admin. Code § 25-302(q) (2002). Furthermore, the New York City Landmarks Law defines the terms “alteration” with reference to the building code. See N.Y. City Admin. Code § 25-302(a) (2002). To allow for simultaneous enforcement of the Preservation Act and the Construction Codes, the Preservation Act should include a consideration for minor repairs [that affect building *exteriors*] and define the terms “minor repairs” and “alteration” with reference to the Construction Codes.

§ 6-1107. New construction.

- (a) Standard for the issuance of a permit for new construction.

A permit for new construction affecting an historic landmark or a building or structure in an historic district shall issue unless the Mayor, giving due consideration to the zoning laws and regulations, finds

- (1) That the design of the building and is incompatible with the character of the historic district or historic landmark, or
- (2) In any case where the permit application is made for the construction of an additional building or structure on a lot upon which there is present a building or structure, that any additional construction will be incompatible with the character of the historic district or historic landmark.

- (b) Unlawful work; unlawful conditions.

It shall be unlawful to

- (1) Perform new construction affecting an historic landmark or a building or structure in an historic district without a permit to construct issued pursuant to the [Construction Code] and the provisions of this subchapter.
- (2) Maintain the condition created by the unlawful work defined in subsection (b)(1).

§ 1107.01. Review of permit applications; Mayor’s findings.¹⁰⁷

- (a) The Mayor shall review all permit applications submitted pursuant to the [Construction Codes] to determine whether the subject of the permit is an historic landmark or a building or structure in a historic district.
- (b) If the Mayor determines that the subject of a permit application is an historic landmark or a building or structure in a historic district, the Mayor shall place notice of the permit application in the District of Columbia Register and review the permit application pursuant to subsections (c) through (e) of this section and make a finding pursuant to subsection (f) of this section.
- (c) Within [15] days of receiving the permit application, the Mayor shall refer to the Commission of Fine Arts all applications subject to its review under the [Old Georgetown Act] and refer all other applications to the Review Board.
- (d) The Review Board shall review the permit application for compatibility with the purposes of provisions of this subchapter and with the standards articulated in [§§ 6-1104(a), 6-1105(a), 6-1107(a)] and shall recommend, within [90] days of the referral, that the permit application be granted or denied. If the Review Board recommends the denial of the permit application, it shall promptly notify the permit applicant in writing of its recommendation and the reasons for such recommendation.

¹⁰⁷ In this proposed draft, the following terms becomes terms of art: “find” and “finding,” “review,” “recommendation,” “permit (which is issued by DCRA) v. “permit application” (which is reviewable by both bodies).

(e) Public hearing.¹⁰⁸

The Mayor shall hold a public hearing to consider the recommendations of the Review Board and the Commission of Fine Arts and other information pertinent to the permit application in any case that the Mayor deems appropriate or if the applicant so requests. The Mayor need not hold a public hearing if the Review Board recommends that the subject of an application for a permit to demolish does not contribute to the historic district or the historic landmark.

- (1) At such hearing, the permit applicant shall submit at the public hearing such information as is relevant and necessary to support his permit application under the appropriate standard.
- (2) In any instance where the permit applicant claims an unreasonable economic hardship, relevant and necessary information shall include
 - (a) For all property...¹⁰⁹
 - (b) For income-producing property...¹¹⁰
 - (c) Any additional information required by the Mayor.

(f) The Mayor's finding.

Within 120 days of the referral and after considering the recommendations of the Review Board and the Commission of Fine Arts, the Mayor shall conclude his review of a permit application by issuing a finding granting or denying the permit application with reference to the standards set forth in [§ 6-1104(a), § 6-1105(a), § 6-1107(a)].

¹⁰⁸ The Preservation Act included several versions of when to hold public meetings. These versions are unnecessary. The proposed draft gives broad authority for the Mayor's Agent to call a public hearing. If this authority must be narrowed, or if there are some cases in which a public hearing must be called, these conditions may be addressed by regulation.

¹⁰⁹ Insert text from D.C. Code Ann. § 6-1104(g)(1)(A).

¹¹⁰ Insert text from D.C. Code Ann. § 6-1104(g)(1)(B).

§ 6-1110. Enforcement: administrative orders and injunctive relief.

(a) In general.

- (1) The Mayor is authorized to enforce the provisions of this subchapter and all regulations issued pursuant thereto.¹¹¹
- (2) The Mayor, in the performance of his enforcement duties, shall have the right to enter and inspect any historic landmark or any building or structure in a historic district that is under alteration or construction.¹¹² With respect to the inspection of any occupied habitable portion of the historic landmark or building or structure in a historic district, the consent to such inspection shall first be obtained from any person of suitable age and discretion therein.

(b) Stop-work orders.¹¹³

- (1) The Mayor may issue a stop-work order at any time he reasonably believes that work is being performed in violation of provisions of this subchapter.
- (2) The Mayor may issue separate stop-work orders upon any person who is working or has worked on or any person in charge or apparently in charge of the historic landmark or building or structure in an historic district.
- (3) The stop-work order shall be served upon the person orally or in writing. Where the order is served orally, a written stop-work order shall be mailed to the person or affixed to the premises where the violation occurred within forty-eight hours of such service.
- (4) Each written order to stop work shall include the signature of the Mayor, identify the specific provision of provisions of this subchapter violated, identify the allegedly illegal work or conditions with reasonable specificity, and describe the right to appeal the order.
- (5) Upon request, the police department shall assist the Mayor in the enforcement of the stop-work order.
- (6) Failure to comply with a stop-work order shall be subject to the payment of a civil penalty in the sum of [\$500] for each day there is noncompliance, to be recovered in a civil action shall be liable for a civil penalty which may be recovered in a civil action brought in the name of the District of Columbia in the Superior Court

¹¹¹ See D.C. Code Ann. § 6-1405.01 (2002); D.C. Mun. Regs. tit. 12 § 109 (2003); N.Y. City Admin. Code § 25-317.2(f) (2002).

¹¹² See D.C. Mun. Regs. tit 12 § 115.4 (2003) (establishing a right of entry for inspections).

¹¹³ See D.C. Mun. Regs. tit. 12 § 118.1 (2003); N.Y. City Admin. Code § 25-317.2(a) (2002). Regulations should address the process by which stop-work orders may be appealed and the conditions under which the stop-work order may be lifted (e.g., upon certification by the owner that the property is in compliance).

of the District of Columbia by the Corporation Counsel or any of his assistants or in an administrative proceeding. This civil penalty may be in addition to criminal punishment and fines, civil fines, and administrative proceedings provided for in provisions of this subchapter.¹¹⁴

(c) Orders to correct defects.

[For demolition by neglect properties.]

(d) Injunctive relief.

- (1) The Mayor may request that the Corporation Counsel to institute all necessary actions or proceedings to restrain, correct or abate violations or potential violations of any provision of this subchapter, including the failure to comply with a stop-work order or order to correct defects.
- (2) Such actions and proceedings may be instituted by the Corporation Counsel in the name of the District of Columbia in the Superior Court of the District of Columbia. In such actions or proceedings, the city may apply for restraining orders, preliminary injunctions or other provisional remedies, with or without notice.

¹¹⁴ See D.C. Mun. Regs. tit. 12 § 118.2 (2003). To implement this subsection, one of the infractions in the schedule of fines established pursuant to § 6-1103(b)(1) (below) must be failure to comply with a stop-work order.

§6-1110.01. Criminal punishment and fines.

(a) Any person who willfully violates

(1) [§ 6-1104(b), § 6-1105(b), or § 6-1107(b)] or

(2) any order issued by the Mayor pursuant to § 6-1110(b) and (c)

shall be guilty of a misdemeanor and punished by a fine of [not more than \$10,000 and not less than \$5,000] or by imprisonment for [not more than one year] or by both such fine and imprisonment.¹¹⁵

(b) Any person who willfully violates [the demolition by neglect provisions] shall be guilty of a misdemeanor and shall be punished

(1) For the first offense by a fine of [not more than \$1,000 and not less than \$500] or by imprisonment for [not more than 30 days] or by both such fine and imprisonment, and

(2) For the second or subsequent offenses by a fine of [not more than \$5,000 or less than \$2,500] or by imprisonment [for not more than 90 days] or by both such fine and imprisonment.¹¹⁶

(c) Any person who willfully makes any false statement or an omission of material fact in a permit application subject to review under the provisions of this subchapter, in any document submitted in support of the permit application, or in any document submitted to certify the correction of a violation shall be guilty of a misdemeanor and punished by a fine of [not more than \$5,000 or less \$1,000] or by imprisonment for [not more than 90 days] or by both such fine and imprisonment.¹¹⁷

(d) For the purposes of this section, each day during which there exists any violation of [§ 6-1104(b)(2), § 6-1105(b)(2), or § 6-1107(b)(2)] shall constitute a separate violation.¹¹⁸

(e) All prosecutions under this section shall be brought in the name of the District of Columbia in the Superior Court of the District of Columbia by the Corporation Counsel or any of his assistants.

¹¹⁵ See N.Y. City Admin. Code § 25-317(a) (2002).

¹¹⁶ See N.Y. City Admin. Code § 25-317(b) (2002).

¹¹⁷ See N.Y. City Admin. Code § 25-317 (c) (2002).

¹¹⁸ See N.Y. City Admin. Code § 25-317(d) (2002).

§ 6-1110.02. Civil fines.

(a) Any person who

- (1) Violates [§ 6-1104(b), § 6-1105(b), or § 6-1107(b)] or
- (2) Violates any order issued by the Mayor pursuant to § 6-1110(b) and (c) or
- (3) Makes any false statement or an omission of material fact in a permit application subject to review under provisions of this subchapter, in any document submitted in support of the permit application, or in any document submitted to certify the correction of a violation

shall be liable for a civil penalty which may be recovered in a civil action brought in the name of the District of Columbia in the Superior Court of the District of Columbia by the Corporation Counsel or any of his assistants.¹¹⁹

(b) Such civil penalty shall be determined as follows.

- (1) Up to the fair market value of the building or structure, before or after the violation, whichever is greater, where, as a result of the violation,
 1. All or substantially all of the historic landmark or building or structure in an historic district has been demolished; or
 2. The structural integrity of the historic landmark or building or structure in an historic district has been significantly impaired; or
 3. More than 50% of the square footage of two facades of the historic landmark or building or structure in an historic district has been destroyed, removed, or significantly altered.¹²⁰
- (2) Two times the estimated cost of replicating the protected features, where, as a result of the violation, a significant portion of the protected features identified in the designation report have been destroyed, removed, or significantly altered.¹²¹
- (3) For all other violations, not more than \$5,000.¹²²

¹¹⁹ See N.Y. City Admin. Code § 25-317.1(a) (2002).

¹²⁰ See N.Y. City Admin. Code § 25-317.1(a)(1) (2002). This provision should be adjusted to reflect the District's preferences.

¹²¹ See N.Y. City Admin. Code § 25-317.1(a)(2) (2002). This provision should be adjusted to reflect the District's preferences.

¹²² See N.Y. City Admin. Code § 25-317.1(a)(3) (2002).

(c) For the purposes of this section, each day during which there exists any violation of the provisions of [§ 6-1104(b)(2), § 6-1105(b)(2), or § 6-1107(b)(2)] shall constitute a separate violation.

§ 6-1110.03. Administrative proceedings for civil penalties.¹²³

(a) Administrative law judges.

(1) The Mayor shall appoint 1 or more attorneys to serve as administrative law judges to implement the provisions of this section.

(2) The administrative law judges shall have the following powers.

1. Presiding over hearings in contested matters under this section.
2. Compelling the attendance of witnesses by subpoena, administering oaths, taking testimony of witnesses under oath, and dismissing, rehearing, and continuing cases.
3. Imposing civil fines in accordance with the schedule of fines authorized to be established in subsection (a)(1) of this section and any applicable penalties.
4. Suspending permits or licenses for the purpose of enforcing the payment of civil penalties, fines, or hearing and inspection costs...¹²⁴

¹²³ This section imports the Civil Infractions Act structure into the Preservation Act, effectively giving the Office of Planning a reason to build an administrative tribunal similar to the Office of Adjudication in DCRA. However, there is an alternative to building an administrative tribunal in the Office of Planning. Though, in practice, all of the administrative law judges are located in the DCRA Office of Adjudication and the system adjudicates infractions of laws predominantly in DCRA's administrative jurisdiction, the Civil Infractions Act, on its face, allows the Civil Infractions system to be used by nearly *any* agency. Under the Civil Infractions Act, the Mayor appoints a "floating" group of administrative law judges to hearing Civil Infractions Act cases. See D.C. Code Ann. § 2-1801.03(a) (2002). Thereafter, various agencies *delegate* to these administrative law judges the *specific* authority to conduct hearings under the laws in the agency's administrative jurisdiction. See D.C. Code Ann. § 2-1801.03(c) (2002). One would have to determine the legal instruments needed to change the system as it is currently implemented (i.e., only for DCRA use) to the system permitted by a plain reading of the text (disregarding the legislative history regarding DCRA).

¹²⁴ See D.C. Code Ann. § 2-1801.03(b) (2002).

(b) Civil fines, penalties, costs.

- (1) The Mayor shall establish and periodically amend a schedule of fines for violations of the provisions of this subchapter.¹²⁵
- (2) In addition to the civil fine, a civil penalty may be imposed for failure to answer a notice of infraction equal to the amount of the civil fine for the infraction set forth in the notice.
- (3) In addition to any civil fines and penalties imposed following an adjudication of an infraction adverse to the respondent, the administrative law judge may order him to pay the costs of inspections and other costs associated with the hearing.

(c) Administrative proceedings for civil fines...¹²⁶

¹²⁵ See D.C. Code Ann. § 2-1801.04(a)(1) (2002).

¹²⁶ See D.C. Code Ann. §§ 2-1802.01-1803.03 (2002). The proposed draft would continue importing specific provisions of the Civil Infractions Act.