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**Is an Exemption from Historic Preservation Designation for Religious
Institutions Needed in the District of Columbia?**

By Susan Corts Hill

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Introduction

In December 2007, the District of Columbia's Historic Preservation Review Board (HPRB), in a unanimous decision, landmarked the Third Church of Christ Scientist, built by the firm of famous architect I.M. Pei in 1970, because of the building's architectural significance. The decision was controversial and drew community and media attention because the landmark was a modern structure and the designation was made over the opposition of the congregants and some community members. As a result of the landmark designation, the congregation's ability to redevelop the church will be limited and will require HPRB approval. The church argued that the building is too expensive to maintain while some community members argued that the building is "architectural blight."¹

Still, HPRB found that the church is an important and significant example of Brutalism, an architectural style associated with the 1950s to 1970s known for the use of roughly cast concrete.² Because of interest surrounding the Third Church of Christ Scientist landmark decision, city officials are now poised to engage in a conversation about the wisdom of passing an ordinance that specifically allows religious institutions to opt out of historic preservation designations. In fact, a bill that would allow religious exemptions for historic properties was recently proposed by a city council member then quickly withdrawn.³ Because the bill was withdrawn, this paper will not focus exclusively on this bill. However, the possibility remains

¹ Paul Schwartzman, *Church Awarded Landmark Status Despite Objections of Congregants*, WASH. POST, Dec. 7, 2007, at B03.

² *Id.*; Staff report for Third Church of Christ Scientist and Christian Science Monitor Building, Historic Preservation Review Board, November 1, 2007.

³ D.C. City Council Member Jack Evans proposed and withdrew a bill proposing amendment to the Historic Landmark and Historic District Protection Act of 1978. This bill defined religious institution as "an institution or assembly that avows beliefs that are sincerely held and religious in nature" and would have amended the current historic preservation statute to include a provision that the review board not designate a property owned and used by a religious institution for religious exercise as an historic landmark or a contributing building to an historic district if the religious institution submitted a substantial religious burden statement objecting to such designation. Amendment to Historic Landmark and Historic District Protection Act of 1978, D.C. Law 2-144 (offered and withdrawn, March 2008).

that a similar bill may be introduced and the previously proposed bill will be used for a point of reference for how a potential city ordinance in the District of Columbia could look.

Historic religious properties are an important part of the District's cultural and social fabric. These properties have historic and aesthetic value and serve as community and social hubs, as well as centers for worship. Historic religious properties retain social and cultural value even if they do not remain in use for religious purposes. As a result, the District currently has a local historic preservation law that provides for historic designation of religious institutions in the same way it treats other private property. The law provides no special exception for religious properties. However, the District of Columbia does not need a city ordinance specifically allowing religious institutions to opt out of historic preservation designations because existing laws and processes adequately protect religious institutions.

This paper will examine why the District's historic preservation law does not need a special protection for religious properties. Section I will establish that a new city ordinance in the District of Columbia allowing religious institutions to opt out of historic preservation laws would be duplicative of existing local and federal laws that adequately protect religious institutions. Section II will explain how many religious institutions have begun using their properties for multiple or different purposes as a way to make historic preservation viable. Section III will examine how HPRB has successfully worked with owners of historic religious properties to compromise between the goals of historic preservation and the needs of the property owners. Section IV will consider similar statutes that allow religious institutions to opt out of historic preservation designations in other states and localities. Section V will explore the legality of the retroactive provision included in the proposed (and subsequently withdrawn) District of Columbia ordinance.

I. A new city ordinance in the District of Columbia allowing religious institutions to opt out of historic preservation laws would be duplicative of existing local and federal laws that adequately protect religious institutions.

Currently, historic religious institutions located in the District of Columbia are protected under the local historic preservation law as well as under federal law via the First and Fifth Amendments of the Constitution and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). These laws provide protection against unreasonable economic hardship and substantial burden on the free exercise of religion. These current protections are adequate to ensure that a religious institution's economic and religious concerns are adequately balanced with historic preservation goals.

A. UNREASONABLE ECONOMIC HARDSHIP

Religious institutions, like other private property owners, have a protection against the uncompensated taking of property under the Fifth Amendment of the Constitution, which was made applicable to the states through the Fourteenth Amendment.⁴ In the District of Columbia, property owners, including owners of historic religious properties, that are subject to historic preservation designation have a similar protection against "unreasonable economic hardship" under the current District of Columbia historic preservation statute.⁵

St. Bartholomew's Church v. City of New York

In *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2nd Cir. 1990) (hereinafter *St. Bartholomew's Church*), St. Bartholomew's Church challenged New York City's designation of the church's property as a landmark as an uncompensated taking of the church's property under the 5th Amendment of the Constitution.⁶ The Fifth Amendment guarantees that no person "shall be deprived of life, liberty or property, without the due process of law; nor shall

⁴ U.S. CONST. amend. X.

⁵ D.C. CODE § 6-1104.

⁶ *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2nd Cir. 1990).

private property be taken for public use, without just compensation.”⁷ In this case, the church wanted to demolish a seven story building on its property and replace it with a fifty- six story office building. When the application for the fifty-six story office tower was denied, the church applied for permission to build a forty-seven story building which was also denied. The church argued the city’s denials of its building applications was a taking of the church’s property because the church was not able to recognize the full economic potential of the property. The Second Circuit Court of Appeals found there was no taking because the church was able to use the building for charitable and religious activities, its original purposes.⁸ This test sets a high bar for property owners, but it allows property owners, including religious organizations, to challenge a government action as an uncompensated taking.

Embassy Real Estate Holding, LLC v. District of Columbia

The recent case *Embassy Real Estate Holding, LLC v. District of Columbia*, No. 06-AA-1083, (D.C. Cir. March 20, 2008) (hereafter *Embassy Real Estate*), decided by the D.C. Circuit Court of Appeals, is illustrative of how the court views the “unreasonable economic hardship” provision of the District’s statute.⁹ The District’s law states that no demolition, alteration, or subdivision permit will be issued unless the issuance of the permit is “necessary in the public interest or failure to issue the permit will result in *unreasonable economic hardship*” (emphasis added).¹⁰ The statute defines unreasonable economic hardship as “circumstances where failure to issue a permit would amount to a taking of an 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

⁷ U.S. CONST. amend. X.

⁸ *St. Bartholomew’s Church*, 914 F.2d 348.

⁹ *Embassy Real Estate Holding LLC v. District of Columbia*, No. 06-AA-1083, (D.C. Cir. March 20, 2008).

¹⁰ D.C. CODE § 6-1104 (demolitions), § 6-1105 (alterations), and § 6-1106 (subdivisions).

place an onerous and excessive financial burden upon such owner(s).”¹¹ Under this provision religious institutions can argue that a historic preservation designation will cause an undue economic hardship. In these cases, HPRB, (or Mayor’s Agent or D.C. Court of Appeals) must balance the goals of historic preservation with the financial concerns of individual property owners.¹²

In the case of *Embassy Real Estate*, the property in question was the former Italian embassy, a historic landmark. A private developer wished to demolish part of the property in order to build a large residential tower. Since HRPB has the ability to issue permits for demolition, alterations, subdivisions, and new construction of properties that are landmarked or located in historic districts, the developer had to request permission from HPRB to demolish part of the former embassy. When HPRB denied the property owner’s request, the owner appealed to the Mayor’s Agent and then to the Court of Appeals, challenging the denial of a demolition permit as posing an unreasonable economic hardship.¹³

Taking direction from the Supreme Court’s decision in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (hereinafter *Penn Central*), the court concluded that an inquiry into the question of unreasonable economic hardship was dependent on the facts of the case.¹⁴ While the court indicated there was “no single test,” the court followed *Penn Central* by enumerating the following three factors for consideration: “(1) the character of government

¹¹ *Id.* at § 6-1102.

¹² The District of Columbia’s historic preservation statute’s stated purposes include protecting and enhancing distinctive elements of the city’s history, fostering civic pride, promoting landmarks and historic districts for the education and pleasure of visitors and residents of the District. In order to meet these purposes, HPRB can landmark a property or create a historic district. In addition, HRPB has the ability to issue permits for demolition, alterations, subdivisions, and new construction of properties that are landmarked or located in historic districts. In making determinations about properties in historic districts or landmarks, HPRB is often required to balance competing concerns including the purposes of the Historic Preservation Act with the interests of the city, the public at large, and individual property owners. *Id.* at § 6-1101.

¹³ *Embassy Real Estate Holding LLC v. District of Columbia*, No. 06-AA-1083, (D.C. Cir. March 20, 2008).

¹⁴ *Id.* at 25 (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

action, (2) the economic impact of government regulation on the property owner; and (3) the owner's reasonable investment-backed expectations.¹⁵ The court used these factors to determine whether the government went too far in its regulations and owed compensation to the owner.¹⁶ Ultimately, the court found that the HPRB's denial of the demolition permit did not present an unreasonable economic hardship.

In establishing the economic impact of the regulations, unreasonable economic impact is to be found if "no reasonable economic uses for the building as it exists... If reasonable economic use exists, there is no unreasonable economic hardship from the denial of the ... permit... even if a more beneficial use of the property has been found."¹⁷ The court notes that petitioner's "sunk costs", money already spent on redevelopment plans, and a reduced value of the property will not be factored in evaluating whether reasonable economic use exists.¹⁸

In this case the property owner could not show that no reasonable economic alternative existed because the building was available for the use that it had been used for many years and because there were alternative designs available to the developer. The possibility remained that HPRB would approve alternative plans for the property that would generate income for the developer. The fact that the alternative plans would result in less income to the developer did not constitute an unreasonable economic hardship.

900 G Street Associates v. Department of Housing and Community Development

In another case before the D.C. Circuit Court of Appeals, 900 G Street Associates argued that the historic designation of its building constituted a taking because the expected property

¹⁵ *Id.* at 25.

¹⁶ *Id.* at 25.

¹⁷ *Id.* at 26.

¹⁸ *Id.*

value was greatly diminished.¹⁹ The court looked to see if the property had reasonable alternative economic uses and found that potential buyers for the building existed, supporting the court's conclusion that reasonable alternative economic uses for the property existed. As long as reasonable alternative economic uses exist, the court said, the historic designation does not result in a taking, even if the value of the property is diminished and even if more beneficial uses exist.

The standard for unreasonable economic hardship as it stands is a high bar, requiring that a designated property show that no reasonable economic use for the property exists. Still, the statute's unreasonable economic hardship provision provides a line of defense for owners of any designated property, including religious properties, to challenge a historic designation.

B. SUBSTANTIAL BURDEN ON FREE EXERCISE OF RELIGION

A religious institution may claim that a historic preservation designation places a substantial burden on the free exercise of religion, as guaranteed by the First Amendment of the Constitution in addition to, or separate from, a claim of unreasonable economic hardship.²⁰ The bill proposed to the D.C. City Council in March 2008 was particularly concerned with the ability of religious organizations to decide if landmark designation or designation as a contributing structure to a historic district posed a substantial burden on free exercise.²¹ The bill proposed that a property owned by a religious institution and used for "religious exercise" should not be landmarked or designated as a contributing building in a historic district if the religious institution submitted a statement of substantial religious burden objecting to the designation.²²

¹⁹ 900 G Street Associates v. Dept. of Housing and Community Development, 430 A.2d. 1387 (D.C. Cir. 1981).

²⁰ U.S. CONST. amend. I.

²¹ Amendment to Historic Landmark and Historic District Protection Act of 1978, D.C. Law 2-144 (offered and withdrawn, March 2008).

²² Substantial religious burden statement was defined in this proposed bill as "a statement attested to by a duly authorized official of a religious institution owning and using property for religious exercise that is subject to designation as a historic district, that such a designation or proposed designation by the District of Columbia pursuant to this act would impose substantial burden on that institution's religious exercise." *Id.*

While the bill as proposed would have allowed unsubstantiated substantial burden claims to allow religious organizations to opt out of historic preservation designations, currently religious organizations have protections against the substantial burden of religious exercise if the religious institution can show a substantial burden exists. If the religious institution feels that their free exercise of religion is substantially burdened by a historic preservation designation, the religious institution can challenge the designation under the First Amendment and under RLUIPA.²³

I. Free Exercise Clause of the Constitution

The First Amendment establishes that Congress should “make no law respecting an establishment of religion, or prohibiting the free exercise” of religion.²⁴ This Constitutional protection for the free exercise of religion has been extended to include state and local governments through the Fourteenth Amendment. While the Free Exercise Clause prohibits regulations that interfere with religious exercise, the Free Exercise Clause does not exempt religious institutions from neutral laws of general applicability.

As stated by the Tenth Circuit in *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643 (10th Cir. 2006), “[n]eutral rules of general applicability normally do not raise free exercise concerns even if they incidentally burden a particular religious practice or belief.”²⁵ A law is neutral if the law's purpose is not to infringe on or restrict religious practices.²⁶ In *Grace United Methodist Church*, the Tenth Circuit found that land use regulations are neutral and generally applicable laws if they are motivated by secular purposes and impact all land owners equally:

²³ U.S. CONST. amend. I. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc (RLUIPA).

²⁴ U.S. CONST. amend. I.

²⁵ *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643 (10th Cir. 2006).

²⁶ *Id.* at 649-50.

[S]everal federal courts have held that land use regulations ... are neutral and generally applicable notwithstanding that they may have individualized procedures for obtaining special use permits or variances.... According to these courts ... [zoning laws] are generally applicable if they are motivated by secular purposes and impact equally all land owners in the city seeking variances.²⁷

If land use regulations are generally applicable if they are motivated by secular purposes and impact all land owners equally, then land use regulations, including historic preservation designations, do not constitute a substantial burden on the free exercise of religion, unless the religious property owner can show a burden beyond the historic designation.

St. Bartholomew's Church v. City of New York

As mentioned previously, St. Bartholomew's Church, a historic landmark in the city of New York, was denied a permit to demolish a building on their property to build a high rise office tower. The church argued that the landmark designation substantially burdened the church's exercise of religion in violation of the First Amendment. The church argued that their ability to "carry on and expand ministerial and charitable activities central to its religious mission" was impaired as a result of the landmark designation.²⁸ The church's congregation had dwindled and the building no longer served the needs of the church. A new office tower, the church asserted, would generate needed income and provide better space for the church's programs. The Second Circuit Court found that the landmark law did not impose a substantial burden on the church's religious exercise, finding that the government cannot coerce an individual to adopt certain beliefs or punish an individual for religious beliefs, but the government may restrict certain activities associated with the practice of religion.²⁹

²⁷ *Id.*

²⁸ *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2nd Cir. 1990).

²⁹ *Id.*

Following Supreme Court precedent, the court asked “is the law a neutral and generally applicable law or does the law restrict conduct because it is religiously oriented?” to determine if the landmark designation substantially burdened the free exercise of the church³⁰ In applying this test, the Second Circuit Court found that the New York City landmarks law was a facially neutral law of general applicability and while it affected many religious buildings that did not mean that the landmark law targets or intends to discriminate against landmark sites on the basis of religion.³¹ Therefore, the court found the landmark designation did not substantially burden St. Bartholomew Church’s religious exercise.

Mount St. Scholastica, Inc. v. City of Atchison, Kansas

A very small minority of courts have found that a historic preservation designation has resulted in a substantial burden on free exercise of religion. In *Mount St. Scholastica, Inc. v. City of Atchison, Kansas*, 482 F.Supp.2d 1281 (D.Kan. 2007), the district court found that there was a substantial burden on the free exercise of religion that was not outweighed by a compelling government interest.³² In this case, a monastic community, Mount St. Scholastica, owned a historic property, the “Administration Building” which it wished to convert. The religious community’s philosophy requires that properties be administered in a way that the religious community “will be able to witness publicly to the evangelical poverty each member has promised in her commitment to monastic life.”³³

After determining that the Administration Building did not meet the needs of the religious community, the community applied for a demolition permit. The demolition permit application was denied on the basis that alternative uses for the building, either “mothballing”

³⁰ *Id.*

³¹ *Id.*

³² *Mt. St. Scholastica, Inc. v. City of Atchison, Kan.*, 482 F.Supp.2d 1281 (D.Kan. 2007).

³³ *Id.*

the building or selling it, existed.³⁴ The court found that the state historic preservation law was not a compelling interest and without a compelling government interest, the city's refusal to grant a demolition permit violated the church's rights under the Free Exercise Clause of the First Amendment.³⁵

Metropolitan Baptist Church

While the free exercise challenge is available to religious institutions, the D.C. Court of Appeals has determined that a historic designation alone is not enough to find a substantial burden. In 1998, the D.C. Circuit Court of Appeals decided a case regarding the Metropolitan Baptist Church.³⁶ Metropolitan Baptist Church owned five row houses in the Greater Fourteenth Street Historic District. The church contested that the designation violated the Free Exercise Clause of the First Amendment. The court held that the church's Free Exercise claim was not ripe for judicial review, because it was not yet clear if the designation would in fact burden the church's free exercise of religion. Citing *St. Bartholomew's Church*, the D.C. Circuit Court went on to say that to

the extent that the church is arguing that the mere inclusion of church property used for religious purposes within an historic district subject to a permit requirement is per se unconstitutional, regardless of the actual burden that might be imposed by such inclusion, that broad proposition has been rejected in cases with facts considerably more telling than those here.³⁷

In order to have standing to bring a Free Exercise claim under a historic preservation designation, a religious institution must be able to show a burden on the free exercise of religion actually exists, not that such a burden is possible as a result of a historic designation.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Metropolitan Baptist Church v. District of Columbia Dep't. of Consumer & Regulatory Affairs*, 718 A.2d 119 (D.C. Cir. 1998).

³⁷ *Id.*

2. Religious Land Use and Institutionalized Persons Act

In 2000, Congress passed RLUIPA which gives specific protections for religious organizations under land use regulations.³⁸ This law provides that government should not impose a land use regulation that imposes a substantial burden on the religious exercise of a religious institution unless the government can show that the burden being placed on that institution is the result of a compelling government interest and is the least restrictive means of furthering that compelling interest. The test under RLUIPA requires that a showing be made that the land use regulation places a substantial burden on the religious institution's free exercise of religion. If a substantial burden is established, then the government bears the responsibility of showing that there is a compelling government interest for the land use regulation and that the land use regulation is the least restrictive means of achieving the compelling government interest.³⁹

As required by RLUIPA, the parties must first make a showing that a land use regulation places a substantial burden on the free exercise of religion. In *Metropolitan Baptist Church and St. Bartholomew's Church* as detailed in the previous section, the D.C. Circuit Court and the Second Circuit Court of Appeals respectively suggest that a burden placed on the churches religious exercise is not necessarily substantial. Furthermore, some courts have indicated that a historic designation alone is not a substantial burden. The D.C. Circuit Court in the *Metropolitan Baptist Church* case noted that to "the extent that the church is arguing that the mere inclusion of church property used for religious purposes within an historic district subject to a permit requirement is per se unconstitutional, regardless of the actual burden that might be imposed by

³⁸ U.S. CONST. amend. I. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc.

³⁹ *Id.*

such inclusion, that broad proposition has been rejected in cases with facts considerably more telling than those here” (quoting *St. Bartholomew’s Church*).⁴⁰

Episcopal Student Foundation v. City of Ann Arbor

In *Episcopal Student Foundation v. City of Ann Arbor*, 341 F.supp.2d 691 (E.D. Mich. 2004), the Canterbury House, a religious organization for students of the University of Michigan affiliated with the Episcopal Church, contested the decision of the Ann Arbor Historic District Commission to deny a building permit for their property.⁴¹ Canterbury House claimed that membership had grown and the current facility no longer accommodated all of the individuals wishing to participate. In addition, Canterbury House claimed that the limited space in the current facility impaired its ability to fulfill its mission to help the hungry by preparing and distributing meals. Canterbury House argued that relocation was not feasible due to the lack of suitable and affordable available property and that the denial of the permit for new building thus burdened Canterbury House’s exercise of religion.

The court found that the Canterbury House’s claim that the denial of a demolition permit for its historic property did not constitute a substantial burden on free exercise of religion because it did not rise to the level of severity necessary for the burden to be deemed substantial. The Court suggested a substantial burden might include being forced to choose between exercising its religious beliefs and “forgoing significant government benefits or incurring criminal or financial penalties,” or being prevented from pursuing religious beliefs, coercing members into abandoning or violating religious beliefs, or dissuading members from practicing their faith.⁴² The court added that Canterbury House has not exhausted their options in finding alternative ways to remedy the facilities shortcomings and noted that although alternative

⁴⁰ *Metropolitan Baptist Church*, 718 A.2d 119.

⁴¹ *Episcopal Student Found. v. City of Ann Arbor*, 341 F.supp.2d 691 (E.D. Mich. 2004).

⁴² *Id.* at 704.

properties may be more expensive, RLUIPA was intended to protect burdens on free exercise more severe than these.

II. Religious properties can be used in multiple ways to make historic preservation financially viable.

Many religious buildings, in and outside of the District of Columbia, are used for multiple or different purposes as a way to make historic preservation economically viable. In addition to serving as places for worship and religious exercise, religious properties can serve commercial, civic, and educational purposes. Calvary Baptist Church provides an example of a historic church that has maintained its historic building while opening its facilities to many community organizations. In addition to housing the church's own worship services and church activities, the church facilities are also home to community organizations like Brainfood, a nonprofit organization with the mission of using food and cooking as tools to teach life-skills and healthy living to teenagers, Kid Power-DC, a community youth organization, Theatre Lab Inc., a drama education center, and Washington DC Youth Choir, an afterschool music education and college preparatory program.⁴³

In another example, the First Church of Christ Scientist in Adams Morgan is currently being considered to house a boutique hotel. The congregation has not met in the church building for over a year and has relocated to a nearby reading room owned by the church. The church has had trouble covering the costs of maintaining the church building and stands to realize a significant financial gain if they are able to finalize a deal with a developer for the property. This deal could result in the city keeping a historic building and the church gaining a needed infusion of cash.⁴⁴

⁴³ Calvary Baptist Church website, <http://www.calvarydc.com>.

⁴⁴ Katie Pearce, *Builder floats plan for Adams Morgan hotel*, NORTHWEST CURRENT, March 26, 2008 at 3.

Religious institutions outside of the District of Columbia also serve as examples for how a property can be used for multiple or different purposes. St. Jean Baptiste Church in New York City has a long history of sharing the church space with other groups. Groups that use the church for meeting space include twelve-step programs like Alcoholics Anonymous, an organization for senior citizens, a toddlers' playgroup, as well as musical rehearsals and concerts and a theatre group. These groups contribute to the upkeep of the building either through paying a rental fee or by collecting donations for the church.⁴⁵

In another example, Old St. George, a historic Catholic church in Cincinnati, was purchased from the Archdiocese of Cincinnati for \$600,000. The former church now serves as a community cultural center and houses diverse activities as a coffeehouse, bookstore, and nonprofit organization. The facility's Great Hall can be rented for weddings and other events.⁴⁶ In Pittsburgh, St. John the Baptist Catholic Church has been turned into a popular restaurant and brewery known as Church Brew Works after the restaurant owner purchased the historic church property from the Catholic Archdiocese. Due to the popularity of the restaurant and the careful restoration of the property by the restaurant owner, the historic property has retained its community and architectural significance.⁴⁷

III. The District of Columbia's Historic Preservation Review Board (HPRB) is willing to work with religious institutions to achieve compromise when religious institutions have concerns about historic preservation designations.

While local and federal laws provide protections for religious institutions suffering undue economic hardship or substantial burden on the free exercise of religion, in many situations

⁴⁵ Reverend John Kamas, *Preservation Profile: St. Jean Baptiste Church*, "St. Jean Baptist Church: A Tradition of Shared Use," <http://www.sacredplaces.org/PSP-InfoClearingHouse/articles/Preservation%20Profile%20St.%20Jean%20Baptiste%20Church.htm>.

⁴⁶ National Trust for Historic Preservation, *Old St. George*, June 15, 2005, <http://www.preservationnation.org/resources/case-studies/historic-houses-of-worship/old-st-george.html>.

⁴⁷ National Trust for Historic Preservation, *The Church Brew Works*, June 15, 2005, <http://www.preservationnation.org/resources/case-studies/historic-houses-of-worship/the-church-brew-works.html>.

religious institutions may not need to challenge historic preservation designations under the law. HPRB and the DC Historic Preservation Office (HPO) have shown they are willing to work with religious institutions to achieve compromise when religious institutions have concerns about historic preservation designations.

Calvary Baptist Church

The case of Calvary Baptist Church offers a good example.⁴⁸ The church wanted to demolish part of their facility in order to create a new development that would generate income. The church was faced with the difficulty of getting this project approved since one of the two buildings they hoped to demolish was considered a contributing building in the Downtown Historic District. The church and HPRB came to an agreement that part of the church's facilities would be demolished, but that the church would use funds from the redevelopment to fund restoration projects including the return of the historic steeple. HPRB recommended to the Mayor's Agent that the church's plans were compatible with the historic district and the Mayor's Agent then granted a demolition permit on the basis of a project of special merit.⁴⁹ Special merit is defined as a "plan or building having significant benefits to the District of Columbia or to the community by virtue of exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community services."⁵⁰

The Mayor's Agent found that Calvary Baptist Church's proposed restoration of the remaining property was a project of special merit and cited both the "specific features of land planning" and "high priority for community service" prongs of the special merit standard in making this finding. In particular, the Mayor's Agent found that the church's proposed mixed-use project would provide significant benefits to the community by helping to finance and

⁴⁸ *In re* Calvary Baptist Church, HPA Nos. 00-601, 01-044 (April 20, 2001).

⁴⁹ *Id.*

⁵⁰ D.C. CODE § 6-1102.

provide facilities for the church's ongoing social programs including counseling, working with the indigent, and providing day care for and tutoring to young people as well as restoring the exterior of the building and the restoration of the steeple, a prominent focal point in the neighborhood's skyline. In his decision, the Mayor's Agent cites the HPRB opinion that the restoration of Calvary Baptist Church would "constitute an unusual and substantial historic preservation accomplishment with clear benefits to the public at large and a direct relation to the public interest in perpetuating, enhancing, and promoting appreciation of the city's prime cultural assets."⁵¹

This permit allowed the church to proceed with the new development of an income generating office building and upgraded church facilities while retaining the historic building that houses the sanctuary. Calvary Baptist Church then used the proceeds of the new development to perform restoration projects on the site of the property including the restoration of the historic steeple. Calvary Baptist Church's steeple is now a defining part of the skyline in the Gallery Place/Chinatown neighborhood.

Mount Vernon Methodist Church

In another example, HPRB worked closely with Mount Vernon Methodist Church to reach an agreement on the demolition of some of the church's property and the restoration of the church's sanctuary and new construction on the site of the demolition.⁵² Mount Vernon Methodist Church was built in 1917-19 and is a "superb example of academic Classical Revival design."⁵³ The church was one of many institutions in Washington that made the city a monumental city in line

⁵¹ *In re* Calvary Baptist Church, HPA Nos. 00-601, 01-044 (April 20, 2001).

⁵² David Mahoney, Staff Report and Recommendation for Mount Vernon Place United Methodist Church, Historic Preservation Review Board, November 17, 2005.

⁵³ David Mahoney, Staff Report and Recommendation for Mount Vernon Place United Methodist Church, Historic Preservation Review Board, July 28, 2005.

with the McMillan Plan.⁵⁴ In addition to the main sanctuary, two adjacent four-story buildings were built in 1940 and 1958. The church originally came to HPRB in July of 2005 with plans to restore the sanctuary and to demolish the remaining buildings on the property. The church then hoped to build a 12 story office building with retail spaces and support spaces for the church on the lower levels.

At the initial hearing, the staff report recommended several changes to the church's plans including reducing the scale and massing of the proposed building and revisiting the appropriate façade for the new building.⁵⁵ The church subsequently came back to the HPRB with new plans in October 2005 and again in November 2005.⁵⁶ By November 2005, the HPRB and the church had reached a compromise proposal for the project that addressed the concerns of the HRPB and the desires of the church. Today, this property is in the midst of redevelopment as approved in the compromise plan.

Friendship Baptist Church

HPRB also worked to find compromise with private developers hoping to develop historic religious property to find compromise. For example, a developer acquired the historic former home of Friendship Baptist Church in the Southwest quadrant of Washington, D.C., a historic landmark. This church was one of only two churches to survive the redevelopment of the area in the 1950s and an important church in the African-American history of the District. By the time the developer acquired the property, the congregation was no longer meeting in the historic church and the developer hoped to build a seven-story condo building on the property. Working with the developer, the HPRB allowed the developer to demolish the non-distinct adjacent

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ David Mahoney, Staff Report and Recommendation for Mount Vernon Place United Methodist Church, Historic Preservation Review Board, October 27, 2005; David Mahoney, Staff Report and Recommendation for Mount Vernon Place United Methodist Church, Historic Preservation Review Board, November 17, 2005.

buildings but protected the sanctuary, which was going to be used by a non-profit group.⁵⁷ The developer was also allowed to build new construction on the property that met height, set back, and massing guidance given by HPRB.⁵⁸

The examples of Calvary Baptist Church, Mount Vernon Methodist Church and Friendship Baptist Church show that HPRB is willing to work with religious institutions to find solutions agreeable to both parties and to work with the owners of religious properties to find a way to generate income on the property or increase productive use of the property. As a result, religious institutions in the District of Columbia, will rarely, if ever, need to resort to challenging historic preservation designations under the law.

IV. A review of existing local and state exemptions that allow religious institutions to opt out of historic preservation designations

The vast majority of preservation ordinances at the state and local level do not include exemptions for religious property. In fact, very few examples of historic preservation ordinances with religious exemptions exist. The only prominent examples of city ordinances, Chicago and Pittsburgh, are discussed below. While these two ordinances, have not been challenged in court, it is possible, if challenged, these ordinances could be found unconstitutional as giving special treatment to religious institutions. As explored in greater detail in the following section, when the only existing state statute was challenged in California, the state supreme court narrowly upheld the law as Constitutional. A court in another jurisdiction could easily come out the other way.

City Historic Preservation Ordinances with Religious Exemptions

Of the few exemptions for religious properties that exist, some are narrowly tailored to apply only to places of worship. In these ordinances, any property owned by a religious institution,

⁵⁷ Tim Dennee, Staff Report and Recommendation for Friendship Baptist Church, Historic Preservation Review Board, July 22, 2004.

⁵⁸ *Id.*

other than a place of worship, like schools or community centers, are not exempted from historic preservation designations. For example, Chicago has a city ordinance that allows religious institutions to refuse to consent to historic designation for places of worship.⁵⁹ The ordinance reads: “No building that is owned by a religious organization and is used primarily as a place for the conduct of religious ceremonies shall be designated as a historical landmark without the consent of its owner.”⁶⁰ Chicago’s ordinance does not provide protection for buildings owned by religious institutions other than places of worship. In Chicago, owner consent is not required for other properties.

Chicago’s ordinance was created when a historic church in a booming commercial district was facing a historic preservation designation that would impede its ability to develop any income generating buildings on its land. The alderman representing the church’s district introduced the ordinance as a way to keep the church from being designated.⁶¹ Since the inception of this ordinance, many historic religious buildings in Chicago have been demolished.⁶² Only 5% of the city’s 217 landmarks are churches or synagogues. Compared with Chicago, every city surveyed by the Historic Landmarks Illinois organization, including Cleveland, Baltimore, Omaha, Kansas City, New Orleans and New York had a higher percentage of religious institutions as landmarked properties.⁶³

In 2005, at least nine of Chicago’s city aldermen and many local civic organizations began to push for the repeal of this ordinance. In fact, the same city alderman who initially pushed for the passage of the ordinance led the charge in repealing it. However, because of a strong push from

⁵⁹ MUNICIPAL CODE OF CHICAGO, ILL., ch. 2-120, § 660.

⁶⁰ *Id.*

⁶¹ Telephone Interview with Lisa DiChiera, Advocacy Director, Landmarks Illinois in Chicago, Ill. (April 15, 2008) [hereinafter Landmarks Ill. Interview].

⁶² *Id.*

⁶³ Landmarks Ill., *Should Religious Properties be Landmarked?*, Landmarks Ill. website, www.landmarks.org.

the Catholic archdiocese and other religious organizations in Chicago, the repeal was unsuccessful.⁶⁴ To date, there have been no notable legal challenges to the city's ordinance and the ordinance remains active.

Pittsburgh offers another example of a local ordinance that allows religious institutions to opt out of historic designation. Pittsburgh amended its ordinance in 2003 to preclude the nomination of religious properties for historic designation without the owner's consent.⁶⁵ The ordinance reads: "Nomination of a religious structure shall only be made by the owner(s) of record of the religious structure."⁶⁶ Religious structure is defined as: "any or all of the following: church, cathedral, mosque, temple, rectory, convent, or similar structure used as a place of religious worship."⁶⁷

Before this provision was passed, the city's Historic Review Commission and the Planning Commission voted unanimously to recommend that the Council not adopt this legislation, in a large part because the Commission had a long history of working with historic religious properties to find compromise.⁶⁸ In fact, between 1977 and the time of the hearing in 2002, the Commission had approved 19 of 20 applications from owners of designated historic religious properties including two demolition requests.⁶⁹ In that 25 year period, the only application that was turned down by the Commission was for the installation of aluminum awnings on a church

⁶⁴ Landmarks III. Interview, *supra* note 60.

⁶⁵ CODE OF ORDINANCES, PITTSBURGH, PA. Title 11, ch. 1101.

⁶⁶ *Id.* at § 1101.03.

⁶⁷ *Id.* at § 1101.02.

⁶⁸ Angelique Bamberg, *Testimony on behalf of the Department of City Planning and staff for the Historic Review Commission & Planning Commission on the Proposed Exemption of Religious Properties From Nomination as City Historic Structures Except By their Owners of Record*, Pittsburgh History and Landmarks Foundation, available at: <http://www.phlf.org/2003/01/28/testimony-by-angelique-bamberg-department-of-city-planning-and-staff-for-the-historic-review-commission-planning-commission-on-the-proposed-exemption-of-religious-properties-from-nomination-as-city-hi/>.

⁶⁹ *Id.*

building.⁷⁰ The Commission argued this provision was unnecessary given their past history of working with religious property owners and could discourage the preservation of religious properties in the future.⁷¹ When the bill was passed in 2003, the legal challenge seemed likely, but to date, the ordinance has not been challenged.⁷²

California's State Historic Preservation Law with Religious Exemptions

In addition, the state of California has a state law that allows religious property owners to exempt themselves from historic preservation if they can demonstrate a “substantial hardship.”⁷³ The statute provides that any religiously affiliated association or corporation should not be subject to historic regulations if:

“(1) the association or corporation objects to the application of the subdivision to its property (2) the association or corporation determines in a public forum that it will suffer substantial hardship which is likely to deprive the association or corporation of economic return on its property, the reasonable use of its property, or the appropriate use of its property in the furtherance of its religious mission.”⁷⁴

When the statute was challenged as unconstitutional, the California State Supreme Court upheld it in with a 4-3 decision in *East Bay Asian v. State of California*, 13 P.3d 1122 (Cal. 2000) (hereinafter *East Bay Asian*).⁷⁵ The majority found that the statute did not constitute unconstitutional government involvement in religion. Instead, the majority said these exemptions

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Tom Barnes, *City Council shelters religious buildings from historic preservation rules- Only owners allowed to seek historic status*, PITTSBURGH POST-GAZETTE, February 26, 2003. In an interview with Jack Schmitt, a member of Preservation Pittsburgh working on the group's Sacred Sites Initiative, Mr. Schmitt noted that although there was talk about a legal challenge at the time the ordinance was passed, the strong presence of the Catholic church in Pittsburgh and its enthusiastic support for this legislation ultimately made it unpopular to challenge the ordinance. While noting the several churches have closed without being nominated to become landmarks since this ordinance had passed and describing himself as very opposed to the legislation when it was introduced, Mr. Schmitt said he did not think the ordinance has had a significant negative effect on historic preservation in Pittsburgh. Telephone Interview with Jack Schmitt, Member, Preservation Pittsburgh in Pittsburgh, Pa. (April 30, 2008).

⁷³ CALIFORNIA GOVT. CODE §§ 25373(c), (d).

⁷⁴ *Id.*

⁷⁵ *East Bay Asian v. State of California*, 13 P.3d 1122 (Cal. 2000).

simply allow the owners to use the property as they would have if the property had not been landmarked.⁷⁶

The dissenting judges vigorously disagreed with the majority. The dissenting opinions found the statute to be at odds with the neutrality of the California state constitution regarding religion.⁷⁷ The state constitution guarantees “free exercise and enjoyment of religion without discrimination or preference.”⁷⁸ Therefore, legislation should not advance, promote, or endorse religion.⁷⁹ Instead of being neutral, the dissenting judges argued this statute advances religion by singling out religious organizations for special exemptions from generally applicable laws and improperly delegating traditional governmental powers to religious organizations.⁸⁰ Although the California Supreme Court ultimately found this statute constitutional, in another state or locality, the minority view expressed by the dissent in *East Bay Asian* could easily be the prevailing view. Until more states and localities have such laws and more are challenged in the courts, the constitutionality of such laws remains unclear.

These examples of state and local ordinances represent a small fraction of all state and local historic preservation ordinances. In fact, these are the only three notable examples of ordinances that exempt religious institutions from historic preservation designation. Most state and local ordinances do not treat properties owned by religious institutions differently than other historic properties. In fact, many state and local ordinances incorporate the language of the National Register in their criteria for evaluating properties for historic designation. Among the criteria for consideration, the National Register lists “religious property deriving primary significance from

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

architectural or artistic distinction or historical importance.”⁸¹ Since this language specifically encourages the preservation of religious properties, widespread use of the National Register language may actually contribute to the historic designation of more religious properties.

A. EXEMPTIONS FOR PROPERTIES OWNED BY RELIGIOUS INSTITUTIONS THROUGH THE JUDICIAL SYSTEM

In addition to the statutory provisions reviewed above, the Washington state supreme court has effectively exempted properties owned by religious institutions from historic preservation ordinances through its interpretation of the free exercise clause of the state constitution.⁸² For example, in *Munns v. Martin*, 930 P.2d 318 (Wash. 1997), the supreme court of Washington found that the City of Walla Walla’s demolition permit ordinance violated the St. Patrick’s Roman Catholic Church’s right of free exercise of religion as guaranteed by the constitution of Washington state.⁸³

The test employed by the court requires the complaining party to prove the government action has a coercive effect on religious exercise. If a coercive effect is found, the government has the burden of proof to show the action serves a compelling state interest and that the action taken is the least restrictive means for achieving the government’s objective. If no compelling interest exists, then the restrictions on religious exercise are found to be unconstitutional.⁸⁴

In *Munns v. Martin*, court found that the government’s interest in the preservation of “aesthetic and historic structures” through the landmark designations was not a compelling

⁸¹ National Register of Historic Places Regulations, 36 C.F.R. § 60-4.

⁸² The supreme court of Massachusetts in *Society of Jesus of New England v. Boston Landmarks Commission*, 564 N.E.2d 571 (Mass. 1990), created a religious exemption to interior historic preservation designations. However this exemption did not extend to external historic preservation designations. In this case, the MA court found that a historic designation of the interior of a place of worship is a violation of the free exercise clause of the MA Constitution. The court noted that the interior of a church is “so freighted with religious meaning that it must be considered part and parcel of [the congregation’s] religious worship.” *Society of Jesus of New England v. Boston Landmarks Com’n*, 564 N.E.2d 571 (Mass. 1990).

⁸³ *Munns v. Martin*, 930 P.2d 318 (Wash. 1997). The state constitution grants “absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion.” WASH. CONST. art.1, § 11.

⁸⁴ *Munns*, 930 P.2d 318.

interest.⁸⁵ The majority noted that a trade-off was necessary between the preservation of historic properties and the free exercise of religion, but found that the right to religious freedom was “paramount” and noted that the possible loss of significant architectural elements is a “price we must accept” to guarantee religious freedom.⁸⁶ As a result of the findings in this case and others like it,⁸⁷ the state of Washington essentially has a court ordered rule that religious institutions can opt out of landmark designations by showing that the designation places a burden on their religious exercise. This interpretation of the state constitution also means that any religious institutions that were designated as historic properties are no longer subject to landmark designations even if the religious property was designated before the original ruling.

The recent experiences in Seattle and Tacoma illustrate how this ruling has effectively removed all possibility of historic preservation for religious institutions that do not consent to such designations.⁸⁸ The city of Seattle has determined that the city’s landmarks law will not be applied to religious properties, although the city government has not codified this.⁸⁹ Even so, Seattle has not seen a total loss of religious properties consenting to historic preservation designation, due to efforts by the city and local preservationist groups.⁹⁰

Often the historic religious properties face great financial burdens. In many cases, the religious institutions have dwindling congregations or finances and cannot afford the restoration or maintenance work that historic properties require. In order to combat the financial difficulties faced by the religious congregations, Seattle offers an incentive program to encourage historic preservation. This city-run program makes height bonuses available for developers that make a

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *See also* First United Methodist Church of Seattle v. Hearing Examiner for the Seattle Landmarks Preservation Bd., 916 P.2d 374 (Wash. 1996); First Covenant Church v. City of Seattle, 787 P.2d 1352 (Wash. 1990), vacated and remanded, 499 U.S. 901 (1991), 840 P.2d 174 (Wash. 1992).

⁸⁸ Interview with staff, Washington Trust for Historic Preservation in Seattle, Wash. (April 25, 2008).

⁸⁹ *Id.*

⁹⁰ *Id.*

financial contribution to the preservation of a landmark within a designated area.⁹¹ A few religious institutions in Seattle have benefitted from this program and have gone through the landmark process as a result. Some additional religious institutions have voluntarily landmarked their properties.⁹²

The city of Tacoma has also tried to be proactive about saving historic religious properties.⁹³ The city is currently surveying all of the city's religious properties as part of a Sacred Sites Initiative. The city hopes that by identifying all of the historic religious properties they can begin proactively working with the local congregations to preserve the historic properties without having to take on case-by-case efforts to preserve historic religious properties when these properties are threatened.⁹⁴

V. The legality of a retroactive provision that allows religious institutions already designated as historic properties to opt out of historic designation

The removal of a designation of a historic district or landmark usually occurs only if the historic integrity of the property has been lost or destroyed.⁹⁵ However, the bill submitted and then withdrawn to the D.C. City Council, which would allow religious institutions to exempt themselves from historic preservation ordinances, included a provision to extend the exemption to any religious institutions landmarked or designated part of a historic district after 1993.⁹⁶ This provision did not require that the properties show a loss of integrity or other similar criteria.

The National Register of Historic Places provides the following model criteria for the removal historic designations which have been incorporated into many local statutes.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See e.g., National Register of Historic Places Regulations, 36 C.F.R. § 60-15(a).

⁹⁶ Amendment to Historic Landmark and Historic District Protection Act of 1978, D.C. Law 2-144 (offered and withdrawn, March 2008).

(1) Property has ceased to meet the criteria for listing in the National Register because the original qualities have been lost or destroyed (2) Additional information shows that the property does not meet the qualifying criteria (3) error in professional judgment as to whether the property meets the criteria for evaluation (4) prejudicial procedural error in the nomination or listing process.⁹⁷

This criteria provides for the removal of historic designation only if conditions related to the diminished qualities of the property or an improper designation is met. In order to protect against vandalism or the purposeful destruction of the property, local ordinances can incorporate further conditions requiring property was lost or destroyed due to natural causes. Limiting removal of historic designation to these circumstances strengthens historic preservation designations by ensuring that designations are only removed due to a mistake or improper designation or due to an unavoidable loss of property.

While it may be legal for an ordinance to remove or repeal historic preservation designation without requiring loss of integrity, a retroactive ordinance like this may not be politically favorable. A local government may not look favorably at a provision that retroactively repeals decisions made through a statutory process and presided over by a city agency. Evidence for this may be found in the fact that none of the existing statutory exemptions for religious institutions from historic preservation designation (Chicago, Pittsburgh, and California as noted above) contain a retroactive provision.

A. EX POST FACTO CONSIDERATIONS IN APPLYING THE PROVISION RETROACTIVELY

In addition, a retroactive provision of any law should be analyzed to determine if it violates the constitutional protection against ex post facto laws. Although the phrase “ex post facto” literally means any law passed “after the fact,” the Supreme Court has long recognized that the constitutional prohibition on ex post facto laws “applies only to penal statutes which

⁹⁷ National Register of Historic Places Regulations, 36 C.F.R. § 60-15(a).

disadvantage the offender affected by them,” not to all laws with retroactive effects.⁹⁸ Therefore, all retroactive laws are not necessarily ex post facto laws.

In 1798 case of *Calder v. Bull*, 3 U.S. 386 (1798), the court established four types of ex post facto laws that are still recognized today. They are: (1) a law that criminalizes an action that was taken before the law was passed and was innocent when taken; (2) a law that aggravates a crime, or makes the crime greater than it was when committed; (3) a law that changes the punishment or inflicts a greater punishment than was applicable to the crime at the time it was committed; and (4) a law that alters the rules of evidence and requires less testimony to convict the offender than was required at the time the crime was committed.⁹⁹ The court makes clear that ex post facto laws are laws that are “manifestly unjust and oppressive.”

Analyzed under the court’s established view of ex post fact law through these four categories, a retroactive provision like the one introduced to the D.C. City Council is not an ex post fact law. Rather than increasing or changing the nature of penalties or disadvantaging the offender (in this case a church which does not wish to follow the mandates of the city’s historic preservation ordinance), a provision that allows religious institutions to be exempt from historic preservation ordinances actually has the opposite effect. This kind of provision would give increased protection the potential offender (the religious institution) and advantage rather than disadvantage the religious institution.

VI. Conclusion

Historic religious properties are an important part of the District of Columbia’s cultural and social fabric. Because of the historic and aesthetic value of these properties and because of the important role these properties serve in community life in the District, the city has chosen to

⁹⁸ The Supreme Court has said ex post facto laws are laws that “create, or aggravate, the crime; or encrease the punishment, or change the rules of evidence, for the purpose of conviction.” *Calder v. Bull*, 3 U.S. 386 (1798).

⁹⁹ *Calder v. Bull*, 3 U.S. 386.

protect these resources, like other historic resources in the city, from being altered or demolished. Any application of the district's historic preservation powers through HPRB require the board to balance competing concerns including the purposes of the historic preservation with the interests of the city, the public at large, and individual property owners. The examples included in this paper illustrate how HPRB is willing to work with religious property owners to find compromise on projects that serve historic preservation goals and met the needs of the property owners. While this process has been successful in finding compromise, property owners also have legal recourse under the D.C. statute, RLUIPA, or the U.S. Constitution depending on the claim. The current system serves the needs of the city and the individual property owners well. As a result, the District of Columbia does not need a city ordinance specifically allowing religious institutions to opt out of historic preservation designations because existing laws and processes adequately protect religious institutions.