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THE CONSTRUCTIVE TRUST: EQUITY'S ANSWER TO THE NEED FOR A STRONG DETERRENT TO THE DESTRUCTION OF HISTORIC LANDMARKS

*Jane Papademetriou Kourtis**

I. Introduction

In recent years, the destruction of buildings classified as historic landmarks[1] has received national attention.[2] In response to this growing concern, federal, state, and local legislatures have passed laws that protect historic landmarks.[3]

Although most historic preservation laws provide for penalties against landmark owners who violate relevant statutory provisions, preservationists have struggled with the question of whether these penalties are strong enough to be effective.[4] In ordering penalties, courts must weigh the important public interest in preserving the nation's heritage, through its historical and architecturally signifi-

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[1] A historic property may be designated as an individual landmark or as a structure within a historic district. *See* 11 Historic Preservation Law & Taxation, Real Estate Transactions (MB) § 1.03[3] (1987) [hereinafter Preservation Law & Taxation]. Generally, it is not overly important whether a structure is designated individually as a landmark or as part of a historic district. C. Duerkson, *Local Preservation Law*, in A Handbook on Historic Preservation Law 29 (1983). This Comment focuses on individual properties, whether designated as a landmark or part of a historic district, but the thesis expressed may also be applied to entire historic districts.

[2] *See* Preservation Law & Taxation, *supra* note 1, at iii.

[3] *See id.* For examples of such laws, see National Historic Preservation Act, 16 U.S.C. § 470 (1982); Mass. Gen. L. ch. 40C, §§ 1–17 (1986); 1975 Mass. Acts 772; New York, NY Admin. Code ch. 8-A, § 205-1.0 (1976), *cited in* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 109 (1977); Chicago, Ill., Mun. Code ch. 21, §§ 21-62 to 21-95 (1987).

[4] *See* Dennis, *Recommended Model Provisions for a Preservation Ordinance, With Annotations*, in A Handbook on Historic Preservation Law A1, A123 (1983).

cant buildings, against the interests of private landowners.[5] Many landmark owners feel constrained by landmark designation, claiming that their property would be more valuable if it were not so encumbered.[6]

Despite the potential conflict between private landmark owners and society at large, Congress, state, and local legislatures have decided that historic preservation is a valuable goal and have passed laws to protect historic landmarks.

Most historic preservation ordinances provide for a landmark commission to initiate and oversee the preservation of historic sites.[7] A commission usually has the power to designate a property as a landmark, and thereafter, to direct the maintenance or restoration of that property.[8]

Despite the broad power of these commissions and the abundance of laws regulating and protecting historic landmarks, landmark owners continue to violate these laws by destroying their property. This often results when the penalties imposed by the preservation law are small in comparison to the economic return that the owner expects to realize through the sale or development of unencumbered land.[9]

When a landmark owner violates a preservation ordinance by destroying a designated historic landmark, a municipality is forced to sue the landmark owner for the statutory violation and the unquantifiable loss to society. This litigation forces courts to grapple with the question of whether the penalty in an ordinance is strong enough to punish the violating landowner and to deter other land-

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[5] The constitutional arguments regarding the rights of private landowners versus the importance of preserving historic landmarks constitute separate issues that are beyond the scope of this Comment but which have been the subject of other law review articles. *See, e.g.*, Watson, *First Amendment Challenges to Landmark Preservation Statutes*, 11 FORDHAM URB. L.J. 115, 132 (1982); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Note, *Land Use Regulation and the Free Exercise Clause*, 84 COLUM. L. REV. 1562 (1984). Since *Penn Central*, 438 U.S. 104 (1978), in which the United States Supreme Court held that New York City's landmark preservation ordinance as applied to Grand Central Station did not constitute a taking of property, historic preservationists have been confident about the constitutionality of most historic preservation laws. *See* Lang, *Penn Central Transportation Co. v. New York City: Fairness and Accommodation Show the Way Out of the Takings Corner*, 13 URB. LAW. 89 (Wint. 1981).

[6] *See* D. LISTOKIN, LANDMARKS PRESERVATION AND THE PROPERTY TAX 43–44 (1982). *But see id.* at 29–43 (discussion of evidence that historic landmark designation frequently increases property values).

[7] *See infra* notes 107–14 and accompanying text.

[8] *See id.*

[9] Preservation Law & Taxation, *supra* note 1, at § 7.03[11] n.95; Duerkson, *supra* note 1, at 121 (1983).

mark owners from committing similar violations. In any event, the landmark is lost.

Because the goal of historic preservation is to prevent destruction of historic landmarks rather than to impose penalties after destruction, a stronger deterrent than current penalties is necessary. In an effort to impose an appropriate penalty on a landmark owner whose fraud resulted in demolition of the landmark, an Illinois court applied the equitable remedy of a constructive trust.[10] A constructive trust arises, typically, when a person holding title to property is subject to an equitable duty to transfer the title to another party in order to prevent the unjust enrichment of the holder of the title.[11] Today, the constructive trust is a device of wide application, but its main purpose continues to be the prevention of unjust enrichment.[12]

The application of the constructive trust in Illinois was significant because no court had ever before used it in a landmark preservation case. By using the constructive trust, the court was able to order the defendant landmark owner to pay the penalties in the ordinance as well as the money he saved by demolishing the property instead of moving and restoring it, as he had earlier agreed to do.[13]

Because the goal of historic preservation is to prevent demolition, rather than to impose penalties after destruction, the application of a constructive trust could serve as the most effective deterrent to egregious cases of landmark destruction. If landmark owners believe they may be exposed to a judicially created penalty of unknown severity in addition to the statutory penalty, they might hesitate before disturbing or letting fall into disrepair a historic landmark. Thus, the constructive trust could serve as both a strong penalty against violators and a strong deterrent to similar conduct on the part of other landmark owners.

This Comment explores the potential use of the constructive trust for cases involving the degradation of historic landmarks. The second section presents a background of historic preservation law, discusses the interaction between federal, state, and local preservation law, and explores the inadequacy of the typical statutory penalties used in landmark preservation cases. The third section focuses on the

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[10] City of Chicago v. Roppolo, 113 Ill. App. 3d 602, 613, 447 N.E.2d 870, 878 (1983).

[11] RESTATEMENT OF THE LAW OF RESTITUTION § 160 (1937).

[12] *See, e.g.*, Snepp v. United States, 447 U.S. 507 (1980); Chisholm v. Western Reserves Oil Co., 655 F.2d 94 (6th Cir. 1981); LaBarbera v. LaBarbera, 116 Ill. App. 3d 959, 452 N.E.2d 684 (1983); Estate of Mahoney, 220 A.2d 475 (Vt. 1966). *See infra* notes 199–218 and accompanying text.

[13] *See* City of Chicago v. Roppolo, 113 Ill. App. 3d 602, 612–13, 447 N.E.2d 870, 878 (1983).

evolution of the constructive trust as an equitable remedy, and its potential use in historic preservation cases. This Comment applies the constructive trust doctrine specifically to historic landmark cases, discussing how each element regarding the applicability of the constructive trust is satisfied in certain historic landmark cases where a landmark has been destroyed.

II. BACKGROUND

Today, there is a strong national consensus about the importance of historic preservation.[14] Historic preservation has grown from a mere recognition of old structures that either housed famous people or were the site of historically significant events[15] to the conservation of entire districts and singular properties because of their aesthetic, historical, and architectural significance and character.[16]

A. *Common Law Authority for Historic Preservation*

Courts have recognized the importance of landmark preservation since the late 1800's, beginning with *United States v. Gettysburg Electric Railway Co.*[17] In that case, the United States sought to condemn the Gettysburg Battlefield area, a historically significant Civil War site.[18] The United States Supreme Court upheld the federal government's power to acquire property for preservation purposes, approving Congress's desire to preserve the battlefield as a legitimate and constitutional objective.[19]

More recently, the Massachusetts Supreme Judicial Court also recognized the importance of preserving historic landmarks.[20] The Massachusetts senate asked the court to assess the validity of proposed enabling legislation authorizing the preservation and protection of historic buildings, places, and districts in Nantucket.[21] In an

[14] *See* Duerkson, *Preface* to A HANDBOOK ON HISTORIC PRESERVATION LAW at xxi (1983).

[15] C. Duerkson & D. Bonderman, *Preservation Law: Where It's Been, Where It's Going*, in A HANDBOOK ON HISTORIC PRESERVATION LAW 1 (1983).

[16] *See id.* at 7, 13. Affirmative maintenance and restoration is allowed in some cases, as long as it is not unduly oppressive to the owner of the property. Maher v. City of New Orleans, 516 F.2d 1051, 1067 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).

[17] 160 U.S. 668 (1896).

[18] *See id.* at 669–70, 671.

[19] *Id.* at 681–82.

[20] Opinion of the Justices to the Senate, 333 Mass. 773, 780–81, 128 N.E.2d 557, 562 (1955).

[21] *Id.* at 773, 128 N.E.2d at 558. The inquiry related to a proposed act known as House No. 775, then pending before the Massachusetts Senate, entitled "An Act establishing a historic districts commission for the town of Nantucket and defining its powers and duties, and establishing historic districts in the town of Nantucket." *Id.* at 774, 128 N.E.2d at 558.

Opinion of the Justices to the Senate, the court stated that the historic preservation act promoted the public welfare, and noted the national interest in preserving historic buildings, places, and districts.[22]

Judicial tolerance of historic preservation expanded in the 1970's. In *Maher v. City of New Orleans*,[23] the Court of Appeals for the Fifth Circuit affirmed the United States District Court's decision[24] to uphold New Orleans' refusal to grant permission to demolish a late nineteenth century Victorian cottage in the city's French Quarter.[25] The court upheld historic preservation as a legitimate state goal,[26] affirming the city's determination regarding the cottage's historical and architectural value.[27]

The strongest support for the legitimacy of historic preservation came from the United States Supreme Court in *Penn Central Transportation Co. v. New York City*.[28] In *Penn Central*, the Court upheld New York City's historic preservation ordinance.[29] The Court's decision significantly strengthened the status of historic preservation.[30]

In *Penn Central*, the owners of Grand Central Terminal, a historically and architecturally significant structure designated a New York City landmark,[31] wanted to build an office tower above the terminal.[32] According to the New York City landmark commission, this new tower would ruin the appearance and the original design of Grand Central Station.[33] After the landmark commission refused to issue a building permit regarding this development proposal,[34] the

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[22] *See id.* at 780, 128 N.E.2d at 562.

[23] 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976). When the Fifth Circuit decided *Maher*, it cited *Berman v. Parker*, 348 U.S. 26, 33 (1954) (court deemed demolition of a building for aesthetic reasons a constitutionally sound "public purpose") and stated that the constitutional requirement of a proper public purpose is very broad and may include not only the abatement of certain undesirable activities but also the promotion of goals that a community deems worthwhile. *See Maher*, 516 F.2d at 1060. In upholding New Orleans' historic preservation ordinance, *id.* at 1067, the court noted the country's increasing desire to preserve sites with historical and cultural value. *Id.* at 1060.

[24] Maher v. City of New Orleans, 371 F. Supp. 653 (E.D. La. 1974), *aff'd*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).

[25] *Maher*, 516 F.2d at 1067.

[26] *Id.*

[27] *Id.* at 1060.

[28] 438 U.S. 104 (1978).

[29] *See id.* at 138.

[30] C. Duerkson & D. Bonderman, *supra* note 15, at 17.

[31] *Penn Central*, 438 U.S. at 115–16.

[32] *Id.* at 116.

[33] *Id.* at 117–18.

[34] *Id.* at 117.

owners challenged the validity of the New York City ordinance that gave the commission its permitting power. New York's highest court upheld the ordinance.[35]

On further appeal, the United States Supreme Court ruled that the city's action to preserve structures and districts with historic, architectural, or cultural significance did not constitute an impermissible taking in violation of the fifth and fourteenth amendments.[36] The Court reasoned that because there was a reasonable remaining economic use of the property, there was no taking.[37] The Court found that aesthetic controls may be a proper basis for the government's use of the police power.[38] The court noted that "states and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city . . . ."[39] Justice Brennan wrote for the majority: "Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today."[40]

B. Statutory Authority for Historic Preservation

Buttressed by judicial approval of historic preservation goals, federal, state, and local governments have enacted numerous historic preservation statutes.[41] Although local ordinances are the major force behind historic preservation in this country today, it is useful to look at federal and state laws for the legal foundation they provide.[42]

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[35] *See* Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 337, 366 N.E.2d 1271, 1278–79 (1977).

[36] *Penn Central*, 438 U.S. at 107, 138.

[37] *See id.* at 121–22.

[38] *Id.* at 133–34.

[39] *Penn Central*, 438 U.S. at 129.

[40] *Id.* at 108. Lower courts also recognized the importance of historic preservation. In the *Penn Central* decision in the Court of Appeals of New York, Judge Breitel wrote: "[New York City] should not be forced to choose between witnessing the demolition of its glorious past and mortgaging its hopes for the future." *Penn Central*, 42 N.Y.2d at 337, 366 N.E.2d at 1278 (1977).

[41] *See, e.g.*, Antiquities Act of 1906, 16 U.S.C. §§ 431–433 (1982); Historic Sites, Buildings and Antiquities Act, 16 U.S.C. §§ 461–467 (1982); National Historic Preservation Act, 16 U.S.C. § 470 (1982); MASS. GEN. L. ch. 40C, §§ 1–17 (1986); 1975 Mass. Acts 772; CHICAGO, ILL., MUN. CODE ch. 21, §§ 21-62 to 21-95 (1987); NEW YORK, N.Y. ADMIN. CODE ch. 8-A, § 205-1.0 (1976), *cited in* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 109 (1977).

[42] *See* Preservation Law & Taxation, *supra* note 1, at § 7.01.

1. Federal Historic Preservation Statutes

The Antiquities Act of 1906[43] was the earliest federal preservation statute.[44] This statute gives the President the authority to designate and protect historic landmarks, structures, and objects located on lands controlled by the United States as national monuments.[45] This statute also gives the Executive the authority to grant permits for archeological excavations of federal land,[46] and provides for criminal and civil penalties for violations of the Act.[47]

In 1935, Congress expanded the scope of historic preservation by passing the Historic Sites, Buildings, and Antiquities Act.[48] This statute recognizes the importance of historic buildings and districts of national significance.[49]

The Historic Sites, Buildings, and Antiquities Act empowers the Secretary of the Interior to perform various duties and functions related to historic preservation.[50] The statute gives the Secretary the power to secure data of historic sites, buildings, and objects, and to make a survey of such historic sites, buildings, and objects.[51]

The Act also gives the Secretary the ability to acquire, in the name of the United States, by gift, purchase, or otherwise, any property interest of the historical estate, as long as the acquisition is with the consent of the owner.[52] The Secretary is further empowered to contract and make cooperative agreements with state or municipal governments or individuals to protect, preserve, maintain, restore, and reconstruct historic properties.[53]

Although the Historic Sites, Buildings, and Antiquities Act grants the Secretary of the Interior more specific powers than the earlier Antiquities Act, neither act sets forth specific methods of implementation.[54] It was not until 1966 that Congress passed a statute that more specifically implemented methods of preserving historic land-

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[43] 16 U.S.C. §§ 431–433 (1982).

[44] Bell, *Protecting the Built Environment: An Overview of Federal Historic Preservation Law*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 10354 (Nov. 1985).

[45] 16 U.S.C. § 431.

[46] *Id.* § 432.

[47] *See id.* § 433.

[48] 16 U.S.C. §§ 461–467 (1982).

[49] *See id.* § 461.

[50] *Id.* § 462.

[51] *Id.* § 462(a)–(b).

[52] *Id.* § 462(d).

[53] *Id.* § 462(e)–(f).

[54] *See*, Bell, *supra* note 44, at 10354.

marks. In 1966, the United States Conference of Mayors[55] compiled a report that identified a need for a more comprehensive national plan for the protection of historic resources.[56] In response to this study,[57] Congress passed the National Historic Preservation Act (NHPA).[58] Congress was convinced of the importance of historic preservation, stating that preservation of historic and cultural sites was necessary "to give a sense of orientation to the American people."[59]

It is clear that Congress intended to pass a statute that would not only express the importance of historic preservation, but would also provide a means for its implementation. For example, NHPA, which remains the primary federal historic preservation statute,[60] authorizes the Secretary of the Interior to maintain a National Register of Historic Places.[61] The National Register is an official list of national historic and cultural landmarks—designated either by the Secretary or by state or municipal governments—that have been deemed worthy of preservation.[62]

NHPA does not protect properties listed on the National Register from destruction.[63] Local ordinances generally are the only laws with the power to prevent the destruction or alteration of historic properties.[64] The National Register is significant, however, because it enables property owners who preserve the historical nature of their buildings to receive federal tax benefits.[65] The Tax Reform Act of 1976[66] contained a series of new provisions that offered economic incentives for rehabilitation work and preservation of historic buildings.[67] For example, the Act offered valuable depreciation rates for

[55] *See generally* SPECIAL COMM. ON HISTORIC PRESERVATION, U.S. CONFERENCE OF MAYORS, WITH HERITAGE SO RICH (1966).

[56] *Id.* at 208.

[57] C. Duerkson & D. Bonderman, *supra* note 15, at 8–10.

[58] 16 U.S.C. § 470 (1982).

[59] 16 U.S.C. § 470(b)(2).

[60] NHPA was passed in 1966, and today it remains the primary federal historic preservation law. C. Duerkson & D. Bonderman, *supra* note 15, at 10.

[61] 16 U.S.C. § 470a(a)(1)(A).

[62] Preservation Law & Taxation, *supra* note 1, at § 2.02[1].

[63] *Id.* at § 2.02[2].

[64] *Id.* at § 1.04[3].

[65] *Id.* at § 2.02[2] & n.60 (citing 26 U.S.C. §§ 48(g)(3), 170(f)(3)(B)(iii), (h)(4)(B)(1982)).

[66] 26 U.S.C. § 191 (1976)(repealed 1981). In 1981, Congress allowed owners of historic structures to take investment tax credits for rehabilitation of historic structures. 26 U.S.C. § 48(g) (1982 & Supp. IV 1986). Roddewig, *Preservation Law and Economics*, in A HANDBOOK ON HISTORIC PRESERVATION LAW 427, 467 (1983).

[67] *See* 26 U.S.C. § 191 (1976) (repealed 1981); C. Duerkson & D. Bonderman, *supra* note 15, at 18.

approved rehabilitation expenditures to owners of properties listed in the National Register.[68] It also allowed a charitable deduction if an owner donated a preservation easement, such as an easement promising not to alter or demolish a landmark, to a nonprofit or governmental entity.[69] In an attempt to deter owners from illegally demolishing their structures, the Act also denied a deduction of demolition expenses and use of accelerated depreciation for replacement structures to deter owners from illegally demolishing their structures.[70] By 1981, through these tax incentives, an estimated $1.8 billion in rehabilitation work had been done in furtherance of historic preservation.[71]

The National Register is also significant because it triggers NHPA's Section 106 Review Process, which requires that the Advisory Council on Historic Preservation scrutinize any federal agency actions that have an effect upon National Register property.[72] Thus, although the listing of a historic property in the National Register is largely honorific in terms of its protection of properties from alteration and destruction, the list does put a locality on notice of a property's significance in the hope that the local landmark commission will take measures to protect the landmark.[73]

NHPA also regulates and encourages state and local preservation programs.[74] For example, NHPA gives the Secretary of the Interior the authority to regulate state and local historic preservation programs by requiring the appointment of a state historic preservation officer and board, and by periodically evaluating such programs.[75] NHPA also allows state historic preservation officers to certify the eligibility of local governments to participate in NHPA benefits.[76] After such programs are created, NHPA encourages them by providing matching grants-in-aid to states for historic preservation projects.[77] NHPA's grant program earmarks funds for states, historic

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[68] C. Duerkson & D. Bonderman, *supra* note 15, at 18.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 19.

[72] Preservation Law & Taxation, *supra* note 1, at § 2.02[2]. The Advisory Council on Historic Preservation is an independent agency of the federal government, 16 U.S.C. § 470i(a) (1982), responsible for advising the President on matters relating to historic preservation and encouraging private and public interest in historic preservation. *Id.* at § 470j(a)(1)–(2).

[73] *See* Preservation Law & Taxation, *supra* note 1, at § 2.02[2].

[74] *See* 16 U.S.C. § 470a(b)–(c) (1982).

[75] *See* 16 U.S.C. § 470a(b)(1)(A)–(B),(2).

[76] *See id.* § 470a(c)(1).

[77] *Id.* § 470a(d).

preservation projects, and individuals, to encourage the preservation of properties listed in the National Register.[78]

Since NHPA was first enacted, Congress has passed amendments to the Act[79] as well as other statutes that protect historic landmarks.[80] The National Environmental Policy Act (NEPA)[81] requires federal agencies to evaluate the impact of their planning and decisionmaking on the environment,[82] including historic properties.[83] The Department of Transportation Act[84] and the Federal-Aid Highway Act[85] require that federal agencies proceed with projects affecting historic properties only when there is no prudent and feasible alternative and the projects have been planned to minimize harm to historic properties.[86]

It is apparent, then, that Congress has recognized the importance of historic preservation not only by passing specific legislation, but also by including restrictions in other statutes that protect historic sites.

2. State Historic Preservation Statutes

Today all fifty states, and more than 500 municipalities, have enacted laws to provide incentives for or to mandate the preservation of buildings and areas with historic or aesthetic importance.[87] State

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[78] *See id.* § 470a(d)(1), (3)(A)(iv).

[79] National Historical Preservation Act Amendments of 1980, Pub. L. No. 96-515, 94 Stat. 2987 (1980).

[80] The Federal-Aid Highway Act of 1966, 23 U.S.C. §§ 101–157 (1982 & Supp. IV 1986); The Department of Transportation Act, 49 U.S.C. §§ 101–126 (1982).

[81] 42 U.S.C. §§ 4321–4370 (1982).

[82] *Id.* §§ 4332–4341(2)(c).

[83] *Id.* § 4331(b)(4).

[84] 49 U.S.C. §§ 101–526 (1982 & Supp. IV 1986).

[85] Federal-Aid Highway Act of 1966, 23 U.S.C. §§ 101–157 (1982 & Supp. IV 1986).

[86] 49 U.S.C. § 303(c)(1)–(2); 23 U.S.C. § 138 (1982). The executive branch has also shown support for historic preservation. In 1971, five years after Congress passed NHPA, President Nixon signed Executive Order No. 11,593 into law. *See* Exec. Order No. 11,593, 3 C.F.R. 559 (1971-1975), *reprinted in* 16 U.S.C. § 470, at 549–50 (1982). This order established federal agency guidelines for maintaining federal properties. Under this order, federal agencies must identify and nominate to the National Register all properties under their jurisdiction or control that may qualify for the Register.

[87] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 107 (1978). Massachusetts' historic preservation statute, MASS. GEN. L. ch. 40C, §§ 1–17 (1986), provides a good illustration of typical language of the purpose section of a state historic districts statute. The purpose of historic preservation is "to promote the educational, cultural, economic and general welfare of the public through the preservation and protection of the distinctive characteristics of buildings and places significant in the history of the commonwealth and its cities and towns

involvement in historic preservation began in the 1950's and early 1960's.[88] In the 1960's and 1970's, the states undertook primarily those responsibilities delegated to them by Congress.[89] States established State Historic Preservation Offices (SHPOs)[90] that nominated properties to the National Register, aided the Advisory Council on Historic Preservation in the NHPA Section 106 Review Process, and reviewed applications for federal tax incentive programs.[91]

States play a more expansive role in historic preservation.[92] They no longer simply implement federal programs.[93] All states have created historic preservation agencies, and a majority of states have enacted environmental policy acts which require that the adverse effects of governmental actions on the built environment be mitigated.[94] A few states have also set historic preservation as a goal in their constitutions.[95] Some states have passed tax laws relating to the ownership of historic properties.[96]

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or their architecture, and through the maintenance and improvement of settings for such buildings and places and the encouragement of design compatible therewith." *Id.* § 1.

New York's statute, 1980 N.Y. Laws ch. 354, § 119-aa, states:

> It is hereby declared to be the purpose of this article to encourage local government programs for the preservation, restoration and maintenance of the historical, architectural, archeological and cultural environment by clarifying and amplifying existing authority and providing necessary tools for such purpose. The framework provided by this article is intended to maintain and encourage the opportunity and flexibility for the counties, cities, towns and villages of the state to manage the historic and cultural properties . . . in a manner consistent with the preservation and enhancement of historic and cultural properties.

Id.

[88] Preservation Law & Taxation, *supra* note 1, at § 6.01.

[89] *Id.*

[90] *Id.*

[91] *Id.* at § 6.01, § 5.01[1].

[92] *See* Mantell, *State Preservation Law*, in A HANDBOOK ON HISTORIC PRESERVATION LAW 130 (1983).

[93] Preservation Law & Taxation , *supra* note 1, at § 6.01.

[94] Mantell, *supra* note 92, at 130.

[95] *Id.* In 1971, the Pennsylvania legislature added an amendment to its constitution which provides that "[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic value of the environment . . . ." PA. CONST. art. I, § 27. *See also* Frye, *Environmental Provisions in State Constitutions*, 5 Envtl. L. Rep. (Envtl. L. Inst.) 50028, 50029–30 (Feb. 1975); LA. CONST. art. VII, § 18C (Louisiana's Constitution measures taxes for historic properties based on current-use value rather than market value as an incentive to historic preservation).

[96] *See, e.g.*, MD. ANN. CODE art. 81, § 12G (1975) (Maryland authorizes localities to award tax credits up to a specified percentage for property owners who rehabilitate, restore, or even reconstruct a historic property). *See also* N.M. STAT. ANN. § 18-6-13 (1980); PA. STAT. ANN. tit. 72, §§ 4722–4727 (Purdon 1982); N.Y. GEN. MUN. LAW § 96-a (McKinney 1977) (New

The enactment of state enabling legislation in every jurisdiction is a clear indication of state recognition of the importance of preserving our nation's architectural heritage. Despite the importance of SHPOs and state enabling legislation in facilitating the preservation of historic properties, local ordinances, many of which give local commissions the power to control the alteration and demolition of historic properties, are the major force behind historic preservation.[97] Accordingly, the next section discusses the power and effectiveness of local ordinances.

3. Local Historic Preservation Ordinances

Many local preservation ordinances[98] derive their authority from state enabling legislation.[99] Other ordinances derive their authority from a state statutory or constitutional home rule charter.[100] Thus, although local governments are a major force in historic preservation, they must act within the bounds of the authority granted to them.[101]

a. History of Local Preservation Ordinances

In 1931, Charleston, South Carolina became the first locality to pass a local, yet comprehensive, preservation ordinance, which covered the antebellum section of the city.[102] In 1937, New Orleans passed an ordinance,[103] which was upheld by Louisiana's highest court,[104] protecting the Vieux Carré district. From the 1930's through the 1950's the number of local ordinances grew steadily.[105] The number of local preservation commissions has also grown

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York allows localities to satisfy awards for damages in preservation "takings" cases by limiting or remitting taxes).

[97] Preservation Law & Taxation, *supra* note 1, at § 7.01.

[98] For a general discussion of local ordinances, see S. KASS, J. LABELLE & D. HANSELL, REHABILITATING OLDER AND HISTORIC BUILDINGS 157–91 (1985).

[99] *See, e.g.*, N.Y. GEN. MUN. LAW § 96-a (McKinney 1977); N.M. STAT. ANN. § 3-22-2 (1978); VA. CODE ANN. § 15.1-489 (1981).

[100] Mantell, *supra* note 92, at 131.

[101] *See id.*

[102] R. RODDEWIG, PREPARING A HISTORIC PRESERVATION ORDINANCE 1 (1983); C. Duerkson & D. Bonderman, *supra* note 15, at 6; Preservation Law & Taxation, *supra* note 1, at § 7.05[1].

[103] NEW ORLEANS, LA., ORDINANCES No. 14,538 C.C.S. (1937).

[104] *See* City of New Orleans v. Pergament, 198 La. 852, 5 So.2d 129 (1941).

[105] *See* R. RODDEWIG, *supra* note 102, at 1.

steadily. By 1983 there were between 800 and 1,000 local historic preservation commissions throughout the country.[106]

Today, over 1,000 jurisdictions have passed local ordinances to protect historic properties.[107] These ordinances establish preservation commissions to designate or to recommend for designation historic buildings as landmarks and then to monitor the alteration and demolition of these historic buildings.[108] The power of these commissions varies, often depending on the size of the municipality,[109] the number of historic buildings and sites, and the attitude of the community.[110] The typical commission is composed of approximately five to nine members,[111] and members may be selected from the fields of architecture, history, urban planning, archeology, law, and real estate.[112] The commission may also include other interested citizens who have demonstrated knowledge and interest in historic preservation.[113] Besides insuring that a commission functions as a well-informed body, the requirements for a broad-based membership also help protect a commission's decisions against court challenge.[114] A board comprised of a diverse and knowledgeable membership may be better able to refute any claim that it has acted in an arbitrary and capricious manner.[115]

A local ordinance, within the limits of its state's enabling legislation, should have certain components. A historic preservation ordi-

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[106] *Id.*

[107] Preservation Law & Taxation, *supra* note 1, at § 7.01.

[108] *See, e.g.*, SACRAMENTO, CA., CITY CODE § 32.208; ENFIELD, CT., ORDINANCES § 7; LOUISVILLE, KY., ORDINANCES § 2(e), *cited in* Dennis, *supra* note 4, at 22–23.

[109] *See* Preservation Law & Taxation, *supra* note 1, at § 7.01.

[110] Duerkson, *supra* note 1, at 71–72.

[111] Preservation Law & Taxation, *supra* note 1, at § 7.03[3][a]; *see also* ALEXANDRIA, VA. ORDINANCES § 42089; NEW ORLEANS, LA., ORDINANCES § II; OAK PARK, ILL., ORDINANCES § 2, *cited in* Dennis, *supra* note 4, at 16.

[112] *See* Preservation Law & Taxation, *supra* note 1, at § 7.03[3][c]; *see also* NEW ORLEANS, LA., VIEUX CARRÉ ORDINANCE § 65-2; CHARLESTON, S.C., ORDINANCES § 54-26, *cited in* Dennis, *supra* note 4, at 19–20.

[113] *See* Preservation Law & Taxation, *supra* note 1, at § 7.03[3][c]; *see also* LOUISVILLE, KY., ORDINANCES § 2(a), *cited in* Dennis, *supra* note 4, at 19–20. The Louisville, Kentucky ordinance provides:

> Of the members to be appointed by the Mayor at least one shall be an architect; at least one shall be an historian qualified in the field of historic preservation; at least one shall be a licensed real estate broker; at least one shall be an attorney; and all members shall have a known interest in historic landmarks and districts preservation.

Id.

[114] Preservation Law & Taxation, *supra* note 1, at § 7.03[3][c]; *see* Duerkson, *supra* note 1, at 69.

[115] *See* Preservation Law & Taxation, *supra* note 1, at § 7.03[3][c]; Duerkson, *supra* note 1, at 69.

nance should identify the enabling authority and the purpose of the ordinance. It should also establish criteria for the buildings that the ordinance is protecting and the methods of administration and enforcement.[116]

Perhaps the most ignored[117] but potentially most critical part of the local ordinance is the enforcement and penalty section. This section is important because despite the intensity of a community's preservation ideals, an ordinance that does not provide for effective enforcement can set a trap for the unwary.[118]

The next section will focus on enforcement and penalty sections typical of local ordinances, and the reasons why they do not always work to prevent demolition of historic landmarks. In particular, the next section will focus on the failure of Chicago's ordinance to save a designated landmark from destruction.

b. *Enforcement Problems in Local Ordinances*

Enforcement mechanisms can include fines, compliance orders, orders to reconstruct the landmark, various forms of injunctive relief, court-ordered receiverships, and imprisonment.[119] Preservation law experts caution that penalty provisions should be strong enough to deter potential violators, but not so harsh that the penalty is not likely to be enforced.[120] If the fines are too small, however, the penalty may be viewed merely as an additional cost for a building permit.[121]

Monetary fines typically range between $10 to $1,000 per day, depending on the nature of the offense and whether the violator is a first-time offender.[122] A typical penalty provision requires that any person violating the ordinance shall be fined not less than fifteen dollars, nor more than one hundred dollars per day, with each day

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[116] *See* R. RODDEWIG, *supra* note 102, at 7; Preservation Law and Taxation, *supra* note 1, at § 7.03; Duerkson, *supra* note 1, at 63.

[117] *See* Stein, *Buildings That Go Crash in the Night: A Special Problem in Historic Preservation Law*, 16 REAL EST. L.J. 242 (1988) (author asserts that historic preservation penalty sections of historic preservation statutes are largely ignored, and the author's solution is to impose a higher degree of criminalization as a deterrent to the destruction of historic properties); *see also* Duerkson, *supra* note 1, at 120.

[118] *See* Duerkson, *supra* note 1, at 120.

[119] Preservation Law & Taxation, *supra* note 1, at § 7.03[11].

[120] Dennis, *supra* note 4, at A123.

[121] *See* Duerkson, *supra* note 1, at 121. For an example of such a cost-benefit analysis, see *infra* text accompanying notes 131–47.

[122] *See* Preservation Law & Taxation, *supra* note 1, at § 7.03[11]. For example, the Chicago Municipal Code provides for a fine of not less than $500 nor more than $1,000 for each violation of the ordinance. CHICAGO, ILL., MUN. CODE ch. 21, § 21-94 (1987).

of continued violation constituting a separate offense.[123] Many ordinances also provide for imprisonment of not more than fifty days, or both a fine and imprisonment, for each offense.[124]

Some ordinances require reconstruction of a landmark where it has been willfully demolished or seriously altered.[125] Reconstruction can be an expensive penalty and reconstruction orders provide a good deterrent.[126] Courts, however, may be unlikely to order reconstruction except in the most unusual circumstances, because it is often impracticable to rebuild a landmark.[127]

Despite the threat of significant fines and potential criminal liability, preservation ordinances are generally inadequate to achieve their goal. This is best illustrated by the Chicago ordinance,[128] which failed to prevent the destruction of the Rincker House.

In *City of Chicago v. Roppolo*,[129] the defendant building contractor and his business partner purchased over five acres of land for development purposes in 1978.[130] Several buildings stood on the land, including the Rincker House.[131] The Rincker House, built in 1851, was the second oldest building in Chicago, and was the oldest example of the balloon frame construction method.[132] The balloon frame construction method is a construction type which originated in the Chicago area. It is significant because it allowed rapid building with light, standard lumber sizes, such as 2 X 4's and 2 X 6's. Chicago could not have expanded as rapidly as it did without the use of this construction technique.[133]

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[123] Dennis, *supra* note 4, at A123.

[124] *Id.*

[125] Preservation Law & Taxation, *supra* note 1, at § 7.03[11].

[126] R. RODDEWIG, *supra* note 102, at 29.

[127] Duerkson, *supra* note 1, at 123–24. A typical ordinance with a reconstruction provision states:

> Any person who demolishes, alters, or constructs a building or structure in violation of sections 5,6, or 8 of this act shall be required to restore the building or structure and its site to its appearance prior to the violation. Any action to enforce this subsection shall be brought by the corporation counsel. This civil remedy shall be in addition to and not in lieu of any criminal prosecution and penalty.

Dennis, *supra* note 4, at A124.

[128] CHICAGO, ILL., MUN. CODE ch. 21, §§ 21-62 to 21-64.2 (1968).

[129] 113 Ill. App. 3d 602, 447 N.E.2d 870 (1983).

[130] *See id.* at 604, 447 N.E.2d at 872.

[131] *Id.* The parcel contained two grocery stores, a drugstore, a laundromat, a hamburger stand, the Rincker House and an adjacent toolshed. *Id.* The toolshed was demolished by the city shortly after defendant's purchase, because undesirables from a nearby Forest Preserve occasionally occupied the shed. Brief for Appellants at 19a, City of Chicago v. Roppolo, 113 Ill. App. 3d 602, 447 N.E.2d 870 (1983) (No. 81-1167).

[132] *Roppolo*, 113 Ill. App. 3d at 607, 447 N.E.2d at 874.

[133] Brief for Appellants at 7, City of Chicago v. Roppolo, 113 Ill. App. 3d 602, 447 N.E.2d

One month after the defendant contractor purchased the property, the defendant contractor arranged to demolish the Rincker House,[134] but the city refused to issue a demolition permit.[135] On August 10, 1979, the City Council formally approved the designation of the property, including the Rincker House, as a Chicago Historical Landmark.[136] In February 1980, the defendant applied for a zoning amendment in order to develop the land on which the Rincker House stood.[137] The Chicago Plan Commission approved the defendant's plan to develop the land on the condition that the defendant move the Rincker House to another part of the tract, and restore and reconstruct the house at the Commission's direction.[138] The defendant agreed with this proposal, which was to be known as "Landmark Square."[139]

Despite this agreement, the defendant sought to escape the proposal and found a demolition contractor who was willing to apply for a demolition permit.[140] On July 30, 1980, the demolition contractor began the application process.[141] After visiting the property, the contractor, wondering whether the house should be numbered higher than the address the defendant gave her, consulted with the defendant.[142] The defendant told her it was the correct address. The defendant then signed the application for the demolition permit.[143]

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870 (1983) (No. 81-1167). Moreover, the Rincker House was a rare example of the carpenter gothic architectural style. *Id.* at 7–8.

[134] *See Roppolo*, 113 Ill. App. 3d at 604, 447 N.E.2d at 872.

[135] *See id.* At the time of purchase, the Rincker House was occupied, but later was vacated and the windows boarded. *Id.*, 447 N.E.2d at 872.

[136] *Id.* at 605, 447 N.E.2d at 872. On June 5, 1978, the Chicago Landmark Commission had voted to begin proceedings to have the property declared an official Chicago landmark because of the architectural and historical significance of the property. *Id.* at 604, 447 N.E.2d at 872. At that time, the Chicago Municipal Code required that no building permit be issued to any applicant for demolition of a landmark without the written approval by the Commission on Chicago Historical Architectural Landmarks. CHICAGO, ILL., MUN. CODE ch. 21, § 21-64.1(a), § 21-64.1(a)(2) (1968). In the meantime, the defendant applied a second time for a permit to demolish the house. *Roppolo*, 113 Ill. App. 3d at 605, 447 N.E.2d at 872. The permit was issued and revoked on the same day. *Id.*, 447 N.E.2d at 872.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *See id.* The demolition contractor, Cirro Wrecking Co., and its owner, Lela Cirrincione, became co-defendants in the case. The court affirmed the lower court's refusal to impose a constructive trust on Cirro and Cirrincione because there was nothing in the record to suggest that they were aware of Roppolo's obligation to the City of Chicago to move, restore and reconstruct the Rincker House. *Id.* at 617, 447 N.E.2d at 880.

[141] *Id.* at 605, 447 N.E.2d at 873.

[142] *See id.* at 606, 447 N.E.2d at 873.

[143] *Id.*, 447 N.E.2d at 873.

It was not, in fact, the correct address,[144] and the city, therefore, issued the permit. Five days later the defendant's contractor demolished the Rincker House.[145] The Chicago Plan Commission never had an opportunity to review the application for a demolition permit.[146] By demolishing the Rincker House without authority, the defendant had violated Chicago's landmark ordinance.[147] As a result, a building of great historic importance was lost.[148]

The Rincker House in Chicago was destroyed despite the threat of the statutory penalty and fines. One explanation may be that the fines were set too low. In fact, after the Rincker House was destroyed, the Chicago City Council passed a new ordinance, increas-

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[144] *Id.* at 606, 447 N.E.2d at 874. Because of this incorrect address, the city's computer failed to signal and show the word "landmark" on the screen to indicate to the computer operator that the defendant sought a demolition application for a designated landmark. *See id.* at 607, 447 N.E.2d at 874.

[145] *Id.*, 447 N.E.2d at 874.

[146] *Id.*

[147] The Chicago Municipal Code stated "[n]o building permit shall issue to any applicant [for demolition of a landmark] without the written approval by the Commission . . . where such permit would allow the demolition of any improvement which constitutes all or part of a structure or district designated as a Chicago landmark." CHICAGO, ILL., MUN. CODE ch. 21, § 21-64.1(a)(2) (1968).

[148] Similar willful destruction of a historic landmark occurred in Boston despite statutory fines in historic landmark statutes. *See* City of Boston v. Lutheran Service Ass'n of New England, No. 55927 (Mass. Super. Ct. filed July 7, 1982). As in Chicago, the penalties in Boston were insufficient to prevent destruction. *See id.* In Boston, the owner of the Margaret Fuller Cottage on Brook Farm allowed the landmark structure to fall into such disrepair that nothing of the building remains. *See* S. Baer, Plaintiff's Trial Memorandum, City of Boston v. Lutheran Service Ass'n of New England, No. 55927, at 4–6 (Mass. Super. Ct. case filed July 7, 1982) (memorandum, not filed, available at Boston College Environmental Affairs Law Review Office). The Brook Farm site is of major significance to Boston and the Commonwealth of Massachusetts because it was the site of the early nineteenth century Transcendentalist social experiment and was later used as a Civil War training ground for Union troops. *Id.* at 2. In 1871, a private citizen bought Brook Farm and gave it to the Lutheran Service Association (LSA). *Id.*

For 140 years, much of Brook Farm's land remained unchanged, with the exception of the slow deterioration of the Margaret Fuller Cottage, the last remaining building on Brook Farm. *Id.* at 4–6. In 1977, because of growing concern about the deterioration of the Cottage, Brook Farm was designated a historic property. *See id.* at 3. Following designation, the owner of Brook Farm, the LSA, had a statutory duty to follow the Commission's requirements regarding the Margaret Fuller Cottage. *See id.*

A year and a half after designation, however, the Cottage remained in desperate need of maintenance and repair. *Id.* at 4. Even after the Commission sent the LSA several notifications regarding the LSA's continued violations, the LSA refused to take action. *Id.* at 5. In the Spring of 1986, during a time of rapidly rising real estate costs in the Boston area, LSA began negotiating with developers to sell the land for developing single family housing. *Id.* In August 1986, the Margaret Fuller Cottage was destroyed by arson. *Id.* There are no other architectural remains of Brook Farm. *See id.* The penalties of the Boston historic preservation ordinance were insufficient to prevent the destruction of the landmark.

ing the fines from not less than ten dollars nor more than five hundred dollars per day to not less than five hundred dollars nor more than one thousand dollars per day.[149]

Perhaps the increased fine in Chicago's new ordinance will help deter other landmark owners from destroying their properties. It is likely the problem will persist, however, because the predictable nature of fines allows landmark owners to calculate approximately how much it would cost them to destroy their property. Where an owner sees an economic advantage to destroying a historic landmark, no matter how high the fines are, the owner may simply consider the fines an addition to the cost of development or purchasing the right to unencumbered land.

Because the penalty scheme traditionally believed to provide the greatest deterrent to destruction of historic property has not served its objective, it seems clear that another remedy is appropriate. When a statute fails to deter future misconduct and allows past misconduct to result in unjust enrichment,[150] a judicial remedy may be necessary.

In the *Roppolo* case, the Illinois court did not depend solely on monetary fines to punish the defendant contractor. The court applied a restitutive remedy, the constructive trust, in addition to the penalties provided for in the relevant historic preservation ordinance.[151] The next section examines how the *Roppolo* court applied the constructive trust to a historic preservation case, and the relative advantages and disadvantages of its application.

III. ANALYSIS

A. *The Application of a Constructive Trust in a Historic Landmark Case:* City of Chicago v. Roppolo

In the *Roppolo* case, the Illinois court imposed a constructive trust on the defendant building contractor who used a fraudulently obtained city demolition permit to destroy the Rincker House, a designated historic landmark.[152] The appellate court remanded the case to the district court for a calculation of the damages the contractor owed the city.[153]

[149] CHICAGO, ILL., MUN. CODE ch. 21, § 21-64.2(a) (1968); CHICAGO, ILL., MUN. CODE ch. 21, § 21-94(1) (1987).

[150] *See infra* notes 129–48 and accompanying text.

[151] City of Chicago v. Roppolo, 113 Ill. App. 3d 602, 613, 447 N.E.2d 870, 878 (1983).

[152] *See id.* at 612–13, 447 N.E.2d at 878.

[153] *Id.* at 617, 447 N.E.2d at 881.

The city argued that the defendant had fraudulently obtained the demolition permit and that subsequent demolition saved defendant the expense of having to move and restore the Rincker House pursuant to an agreement entered into with the city plan commission,[154] causing the defendant to be unjustly enriched.[155] The city further argued that the constructive trust was the appropriate equitable remedy to prevent unjust enrichment and cited a number of cases from other contexts in which a constructive trust was used.[156]

The *Roppolo* court imposed a constructive trust on the defendant for the benefit of the city.[157] The court found that the defendant breached his statutory obligation to the city by failing to secure the permission of the Landmark Commission prior to demolition.[158] The court also found that the defendant committed a wrongful act by fraudulently concealing that the actual address involved was that of a landmark.[159] The defendant benefited from the destruction of the Rincker House, moreover, because he no longer had to pay for moving and restoration costs.[160] The court held that these findings were sufficient to impose a constructive trust on the defendant.[161]

The Illinois court reasoned that: "[t]he particular circumstances in which equity will impress a constructive trust are . . . 'as numberless as the modes by which property may be obtained through bad faith and unconscientious acts.'"[162] The court further stated that the

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[154] Brief for Appellants at 7, City of Chicago v. Roppolo, 113 Ill. App. 3d 602, 447 N.E.2d 870 (1983) (No. 81-1167). The city prayed for a remedy to punish defendant's misrepresentations and to prevent his unjust enrichment. The city argued that the court should use its equitable power to impose a constructive trust upon the property to the extent of the defendant's saving of expense from demolition, with the proceeds of the trust to be put in the city's historic preservation fund, in addition to the penalties provided for in the ordinance. *Id.*

[155] *See id.* at 25. The saving of expense amounted to approximately $200,000–$250,000, according to the city. *Id.*

[156] *Id.* at 25–26.

[157] City of Chicago v. Roppolo, 113 Ill. App. 3d at 602, 613, 447 N.E.2d 870, 878 (1983).

[158] *See id.* at 613–14, 447 N.E.2d at 878. Fraud comprises "all acts, omissions, and concealments involving a breach of a legal or equitable duty and resulting in damage to another." *Id.*, 447 N.E.2d at 878 (citing BLACK'S LAW DICTIONARY 594–95 (5th ed. 1979)).

[159] *Id.* at 614, 447 N.E.2d at 878–79.

[160] *Id.* at 612–13, 447 N.E.2d at 878.

[161] *Id.* at 613, 447 N.E.2d at 878. The court did not, however, impose a constructive trust on the demolition contractor. *Id.* at 617, 447 N.E.2d at 880. Although the court did not condone the demolition contractor's actions, the court found nothing in the record to suggest that the contractor was aware of the defendant's obligation to the city to move, restore and reconstruct the Rincker House. *Id.*, 447 N.E.2d at 880. Thus, although the court found the contractor's actions distasteful, the court did not find her or her company liable. *See id.*, 447 N.E.2d at 880.

[162] *Id.* at 609, 447 N.E.2d at 875 (quoting County of Cook v. Barrett, 36 Ill. App. 3d 623,

method by which a constructive trust arises is immaterial to its applicability.[163] In deciding whether to use a constructive trust, the court considered the "principles of equity, good conscience and unjust enrichment."[164]

Although the court did not state explicitly why it used the constructive trust in addition to the penalties in the ordinance, one can infer that it was because the penalties provided for in the ordinance were miniscule in comparison to the benefit gained by the defendant.[165] One can infer, moreover, that the court recognized the possibility that the defendant had done a cost-benefit analysis in determining whether to tear down the Rincker House in light of the small and determinable fines. The ordinance's fines were minimal,[166] and the defendant may well have used a cost-benefit analysis to decide that it would cost less to destroy the building and pay the fine than it would to move and restore the building.[167]

The imposition of a constructive trust as an equitable remedy in a historic landmark case was a novel reaction to the perceived inadequacy of existing statutory penalties. The next section discusses the relative merits of using an equitable remedy in such cases, and the applicability of the constructive trust.

B. *Evolution of the Constructive Trust as an Equitable Remedy and Its Appropriateness in Historic Preservation Cases*

1. The Necessity For An Equitable Remedy

Rather than apply the constructive trust, the *Roppolo* court could have imposed only the penalties provided for in the historic preservation ordinance. It then could have recommended that local legislatures increase the fines in their ordinances to prevent future demolitions. Harsher fines might well deter most landmark owners from demolishing their properties.

In the Rincker House case, however, such a decision would have allowed the defendant to retain the benefits he wrongfully acquired.

627, 344 N.E.2d 540 (1975), *appeal denied*, 63 Ill. 2d 555 (1976) (quoting 4 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1045, at 97 (5th ed. 1941))).

[163] *See id.*

[164] *Id.*, 447 N.E.2d at 875.

[165] *See supra* note 149 and accompanying text.

[166] *See* CHICAGO, ILL., MUN. CODE ch. 21, § 21-64.2(a) (1968).

[167] Commentators have recognized that the defendant in this case may have performed a cost-benefit analysis. *See* Preservation Law & Taxation, *supra* note 1, at § 7.03[11] n.95; Duerkson, *supra* note 1, at 121.

Furthermore, a decision that simply recommended that municipalities increase the relevant fines, without any judicial action, would not serve as a deterrent to future violators. In some cases, even higher fines would not deter landmark owners from destroying a landmark, if the economic return on the unencumbered property is greater than the cost of noncompliance.

When a statutory penalty is not severe enough to prevent demolition, as occurred in *Roppolo*, the wrongful act should not go unpunished. The *Roppolo* court's use of an equitable remedy, in addition to the fines provided for in the ordinance, was warranted as a means to achieve fairness. In similar future cases, the use of an equitable remedy would not only prevent any unjust enrichment, but it would also be an effective way to deter landmark owners from contemplating the demolition of their properties. In light of the demonstrated public interest in historic preservation, the use of an equitable remedy to prevent destruction of historic landmarks would serve a useful social function.

2. History of the Constructive Trust as an Equitable Remedy

"A person who has been unjustly enriched at the expense of another is required to make restitution to the other."[168] Unjust enrichment[169] is often punished by the imposition of restitutive remedies.[170] Although the concept of restitution is one that appears throughout the common law, restitution occupies a particular area of law as a remedy for unjust enrichment.[171]

Historically, restitution developed separately at law and in equity.[172] For example, at law, if a defendant stole the plaintiff's goods and later sold them, the plaintiff was allowed a money judgment in the amount of the proceeds.[173] This method of compensation has come to be known as a quasi-contract.[174]

In equity, if the defendant thief used the proceeds to buy land, the defendant was ordered to transfer title to the land to the plaintiff

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[168] RESTATEMENT OF THE LAW OF RESTITUTION § 1 (1937).

[169] Unjust enrichment occurs when one party benefits at the expense of another party. G. PALMER, THE LAW OF RESTITUTION § 1.1, at 5 (1978 & Supp. 1988). For a more thorough discussion, see J. DAWSON, UNJUST ENRICHMENT 1 (1951).

[170] *See* G. PALMER, THE LAW OF RESTITUTION § 1.1, at 2 (1978).

[171] *See id.*

[172] *See id.* § 1.1, at 3.

[173] *Id.*

[174] *Id.* A history of quasi-contract is presented in RESTATEMENT OF THE LAW OF RESTITUTION 5 (1937).

by means of a constructive trust.[175] The court would consider the defendant a trustee of the land for the benefit of the plaintiff.[176]

Today, at law, the principal remedy is in quasi-contract, leading most often to a money judgment.[177] Quasi-contract developed in cases where a promise to pay money was "implied" as a means of allowing recovery for money paid or services rendered by mistake where no actual contract existed.[178] This remedy was used to prevent the unjust enrichment of the recipient of such services.[179]

In equity, the principal remedy is the constructive trust,[180] which gives rise to a "working out" of various solutions for unjust enrichment.[181] As one court has said, the usefulness of the constructive trust "is limited only by the inventiveness of men [and women] who find new ways to enrich themselves unjustly by grasping that which does not belong to them."[182]

Technically, although law and equity have merged, quasi-contracts and constructive trusts remain separate restitutive remedies.[183] Many courts today, however, often find it easier to choose the constructive trust as a remedy, even when the judgment is one for money and can be obtained at law.[184] When neither a constructive

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[175] There are two different kinds of trust: express and implied. An express trust is a fiduciary relationship with respect to property, arising out of a manifestation of intent to create the trust. 5 SCOTT ON TRUSTS § 62.1 (3d ed. 1967). An implied trust means a resulting trust or a constructive trust, neither of which depends on an intent of the parties to create it. *See* G. BOGERT, TRUSTS § 71 (6th ed. 1987). A constructive trust, which lacks the attributes of a true trust, 89 C.J.S. Trusts § 139 (1955 & Supp. 1989), arises when a court wishes to achieve an equitable result, as in a case of unjust enrichment. *Id.*; *see also* RESTATEMENT (SECOND) OF THE LAW OF TRUSTS § 23 (1959); 3 G. BOGERT, TRUSTS AND TRUSTEES § 471 (2d. 1978). A constructive trust is also called *ex maleficio* or *ex delicto*, 3 G. BOGERT, TRUSTS AND TRUSTEES § 471 (2d ed. 1978).

[176] G. PALMER, THE LAW OF RESTITUTION § 1.1, at 3–4 (1978).

[177] *Id.* § 1.1, at 4. A quasi-contract, as a restitutive remedy, should not be confused with a contract form of action. *See, e.g.*, *id.* at 8.

[178] *Id.* at 7.

[179] *Id.*

[180] *Id.* § 1.1, at 4. Equitable lien, subrogation and equitable accounting are other equitable devices frequently used to prevent unjust enrichment. *Id.* For a description of these remedies, see *id.* § 1.5, at 20–29.

[181] *Id.* § 1.4, at 17.

[182] Latham v. Father Divine, 299 N.Y. 22, 27, 85 N.E.2d 168, 171 (1949) (court imposed a constructive trust on defendant devisees for the benefit of plaintiffs because defendants, through fraud and coercion, kept the testatrix from making a will in favor of the plaintiffs), G. PALMER, THE LAW OF RESTITUTION § 1.4, at 17 (1978 & Supp. 1988).

[183] *See id.* § 1.3, at 16.

[184] *Id.* (citing Hochman v. Zigler's Inc., 139 N.J. Eq. 139, 50 A.2d 97 (1946) (In *Hochman*, the court, noting that the judgment was appropriately rendered through a constructive trust rather than at law in assumpsit, named defendant lessor a constructive trustee for the benefit of plaintiff lessee, for the money lessor obtained by threatening not to renew the plaintiff's lease)).

trust, embracing all of a wrongdoer's unjustly acquired property, nor a quasi-contract remedy is wholly appropriate, courts have shaped the constructive trust doctrine to fit the circumstances to achieve equity.[185] The discussion below illustrates the wide application of a constructive trust.

3. Constructive Trust Case Law

In the early cases, courts recognized the constructive trust as an equitable device by which the holder of legal title to land was ordered to convey title to a party rightfully entitled to the beneficial interest.[186] Plaintiffs did not have to prove that they had suffered any monetary loss or that the defendant had profited from the acquisition of title.[187] A plaintiff had to prove, rather, that title to the land had been wrongfully obtained.[188]

Courts have considered several conditions or requirements for the imposition of a constructive trust.[189] These requirements include: a confidential relationship or a fiduciary duty; a wrongful act, such as fraud, duress, or undue influence; and unjust enrichment.[190]

Over the years, the constructive trust has developed from a limited remedy used in cases where title or property had been wrongfully obtained[191] to a more expansive remedy limited only by the

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[185] *Id.* § 1.3, at 15–16 (citing Tebin v. Moldock, 14 N.Y.2d 807, 200 N.E.2d 216 (1964) (In *Tebin*, the court limited the scope of the constructive trust imposed on the defendant heiress niece for the benefit of decedent's son, by reducing it from all of the assets of the estate to $25.00 per month)).

[186] *See* G. BOGERT, TRUSTS AND TRUSTEES § 471, at 3 (2d ed. 1978).

[187] *See id.* § 1.3, at 16.

[188] *Id.*

[189] *See id.* § 1.4, at 18.

[190] *Id.* § 1.4, at 18, 20.

[191] For example, the Supreme Court imposed a constructive trust in *Angle v. Chicago, St. Paul, Minneapolis & Omaha Ry.*, 151 U.S. 1 (1894). In *Angle*, a contractor who had contracted to work for the original property owner, *see id.* at 7, sought payment for work done for the defendant who had obtained title to the property through his wrongful acts. *Id.* at 27. Finding that the defendant wrongfully obtained title to the land, *id.*, and that equity required the plaintiff to be paid, *see id.* at 27, the Court imposed a constructive trust on defendant. *See id.* The Court stated that:

> whenever the legal title to property . . . has been obtained through actual fraud, misrepresentation, concealments, or through undue influence . . . or under any similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property . . . in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein.

Id. at 26–27 (citing 4 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1053 (5th ed. 1941)).

In *Newton v. Porter*, 69 N.Y. 133 (1877), thieves stole plaintiff's bonds and invested the proceeds in securities. The thieves were subsequently arrested. *Id.* at 135. Thereafter, the

"inventiveness" of human beings.[192] More recently, courts have been willing to mold a constructive trust to fit various circumstances when a money judgment or specific restitution is not adequate.[193] In fact, even if the judgment is one for money and can be obtained at law, in quasi-contract, courts have frequently granted relief through the imposition of a constructive trust.[194]

The constructive trust is used, perhaps most notably, when a person acquires legal title to property through some sort of egregious wrongdoing. For example, in *Estate of Mahoney*,[195] the court held that a wife who was convicted of voluntary manslaughter of her husband could be charged as a constructive trustee of the decedent's estate for the benefit of the decedent's heirs if it could be shown that the wife willfully killed the decedent.[196] The court noted that, although legal title may pass to the slayer according to the probate

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thieves hired defendants as their lawyers and used the securities to pay the lawyers, who had notice of the unlawful origin of the securities. *Id.* at 136. The court transferred title to the securities to the plaintiff as an equitable owner, by means of a constructive trust imposed on defendants. *Id.* at 137–40. The court applied the constructive trust even though the conventional relationship of trustee and *cestui que trust* was lacking. *Id.* at 139. It stated that plaintiff's equitable right to follow the proceeds "would continue and attach to any securities or property, in which the proceeds were invested, so long as they could be traced and identified, and the rights of bona fide purchasers had not intervened." *Id.* at 137–38.

The Supreme Court imposed a constructive trust on the defendants in *Moore v. Crawford*, 130 U.S. 122 (1889), in which the defendants fraudulently obtained title to land. *Id.* at 123, 129. Finding that the defendant seller fraudulently conveyed title of the property to his wife rather than to the plaintiff buyers, *id.* at 128–29, the court stated that defendant breached his duty to plaintiff. *See id.* at 133. The Court saw the need for an equitable remedy, and imposed a constructive trust. *See id.* at 129.

The Supreme Court, however, has not always imposed constructive trusts in cases where the remedy was seemingly appropriate. For example, *Ridgway v. Ridgway*, 454 U.S. 46 (1981) involved a dispute over the proper beneficiaries of a life insurance policy. *See id.* at 47. In *Ridgway*, a Maine court had issued a divorce decree ordering an army sergeant to keep in force his life insurance policy for the benefit of his three children, *see id.* at 48. Subsequently, the army sergeant remarried and changed the policy's beneficiary designation, directing that the proceeds be paid "by law." *Id.* Under the applicable statute the proceeds would be paid to the lawful spouse at the time of the insured's death. *Id.* at 48–49. The army sergeant then died, and the two wives brought suit to collect the proceeds of the policy. The first wife asked the court to impose a constructive trust for the children's benefit for any policy proceeds paid to the second wife. *Id.* The court held that the imposition of a constructive trust in this case was inconsistent with the statute governing the policy, under which an insured service member could freely designate a beneficiary at any time. *Id.* at 55–60. Thus, the Court denied the imposition of a constructive trust, *see id.* at 60, even though the Court admitted the decision went against the "equities" which favored the minor children and their mother. *See id.* at 62.

[192] G. PALMER, THE LAW OF RESTITUTION § 1.4, at 17 (1978).

[193] *See id.* § 1.3, at 15–16.

[194] *Id.* § 1.3, at 16.

[195] 220 A.2d 475 (Vt. 1966); *see also* Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889) (court imposed a constructive on grandson who, overeager to acquire the remainder interest in his grandfather's will, murdered his grandfather).

[196] 220 A.2d at 479.

statutes of descent and distribution, "equity holds him to be a constructive trustee for the heirs . . . of the decedent."[197] The court stated that: "[t]he legal title will not pass to the slayer because of the equitable principles that no one should be permitted to profit by his own fraud, or take advantage and profit as a result of his wrong or crime."[198]

Courts have applied the constructive trust in cases where the property holder's conduct has not been so heinous. For example, in *Snepp v. United States*,[199] the Supreme Court imposed a constructive trust for the federal government's benefit on the profits from a former CIA agent's book.[200] The former agent, by writing about his experiences in the CIA, violated a pre-employment agreement with the CIA that he would not write about any classified material, and that he would seek pre-publication clearance for any material.[201]

Accepting the lower court's findings that the agent had deliberately violated his obligation to submit all material for pre-publication review, and as a result had exposed classified information to the risk of disclosure,[202] the Court held that the author violated the CIA's trust and breached a fiduciary obligation.[203] The Court imposed a constructive trust on the agent, holding the agent as a constructive trustee of the profits on the book for the benefit of the United States.[204] The Court recognized the constructive trust as an appropriate remedy because the relief conformed to the "dimensions of the wrong," and because it provided a good deterrent to future violations.[205]

The *Snepp* case is significant because it illustrates: (1) the Supreme Court's acceptance of government plaintiffs in such cases; (2) the Court's willingness to impose a constructive trust in cases that do not relate to land; and (3) the Court's willingness to use the constructive trust as a deterrent device.

Other courts have also been willing to expand the application of the constructive trust. For example, in *LaBarbera v. LaBarbera*,[206]

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[197] *Id.* at 477.

[198] *Id.*

[199] 444 U.S. 507 (1980).

[200] *Id.* at 507–08, 516.

[201] *Id.* at 507–08.

[202] *Id.* at 509, 511.

[203] *See id.* at 510–11. The Court agreed with the lower courts' findings that the CIA agent's publication of information that had not been cleared relating to intelligence activities could be detrimental to vital national interests. *Id.* at 511–12.

[204] *Id.* at 507–08, 516.

[205] *See id.* at 515.

[206] 116 Ill. App. 3d 959, 452 N.E.2d 684 (1983).

the appellate court of Illinois imposed a constructive trust on one half of the funds listed in an agreement between two brothers.[207] In *LaBarbera*, one brother, who managed his mother's affairs after his father's death, misappropriated some of his brother's money.[208] Finding a breach of the special relationship between defendant and his parents, the court imposed a constructive trust to prevent defendant's unjust enrichment.[209]

Similarly, the Court of Appeals for the Sixth Circuit molded the constructive trust to fit the circumstances of *Chisholm v. Western Reserves Oil Co.*[210] In *Chisholm*, the court found that an implied contract existed between the defendant oil company and the plaintiff gas lease broker.[211] The court found that by not paying the plaintiff for his services, the defendant breached both the implied contract and the confidential relationship between the defendant oil company and the plaintiff gas lease broker.[212] To remedy this breach, the court imposed a constructive trust.[213]

In reaching this decision, the court stated that a constructive trust can be used wherever specific restitution in equity is appropriate on the facts.[214] According to the court, a constructive trust may be used where there has been embezzlement of money, conversion of goods, a benefit transferred under mistake, or where there has been fraud, duress, or undue influence, or where gains have been received by misuses of position.[215] The court added that especially the "murderer for gain," such as the wife in *Mahoney*, may be a constructive trustee.[216] The court stated, moreover, that it was immaterial how the unjust enrichment occurred.[217] Courts will exercise their discretion in deciding on the type of conduct that can justify the imposition of a constructive trust.[218]

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[207] *Id.* at 961, 966, 452 N.E.2d 686, 689.
[208] *See id.* at 965, 452 N.E.2d at 688–89.
[209] *See id.* at 966, 452 N.E.2d at 689.
[210] 655 F.2d 94 (6th Cir. 1981).
[211] *See id.* at 95–96.
[212] *Id.* at 97.
[213] *Id.*
[214] *See id.* at 96.
[215] *Id.* (citing D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 246 (1973)).
[216] *Chisholm*, 655 F.2d at 96.
[217] *Id.* The court commented that what is important is the fairness and workability of the judicial decree. *Id.*
[218] *See* G. BOGERT, TRUSTS § 77, at 288 (6th ed. 1987); *see also* Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 389, 122 N.E.2d 378, 381 (1919) ("A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief.").

4. The Appropriateness of Applying the Constructive Trust Doctrine in Historic Landmark Violation Cases

Because courts are willing to mold the constructive trust to fit different circumstances,[219] the court's use of the constructive trust in the Rincker House case was an appropriate remedy. All of the traditional conditions of a constructive trust existed.[220] The defendant: (1) had a duty to the city, both statutory and according to the agreement he had signed,[221] (2) breached the duty by fraudulently obtaining the demolition permit,[222] and (3) received the benefit of not having to move, reconstruct, and restore the Rincker House, and thus was unjustly enriched by gaining unencumbered property without paying fair market value, at the expense of the city.[223]

Despite the attacks by critics at the use of the constructive trust in *Roppolo*,[224] a constructive trust was not only appropriate, but afforded a better remedy than the city would have had in quasi-contract. Although the final judgment was for money and could have been obtained at law under a "savings of expense" rationale, the court was correct in choosing the constructive trust because of its strong potential as an effective remedy for future historic preservation cases. For example, if the cost of moving and restoring was $20,000, then the judgment at law would only have been for $20,000. The expense saved might still be nominal relative to the benefit conferred. This method of punishment, similar to statutory penalties, would no longer serve as a deterrent. Forceful deterrence value exists in the potential for a large financial disgorgement that can be obtained only with the constructive trust, with the court molding it to fit the particular circumstances. The constructive trust as applied in *Roppolo*, therefore, leaves the door open for future courts to use the constructive trust to recover profits from real estate development as well as amounts saved through circumvention of obligations associated with the property's landmark status.

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[219] *See supra* notes 199–218 and accompanying text.

[220] *See supra* notes 189–90 and accompanying text.

[221] *See* City of Chicago v. Roppolo, 113 Ill. App. 3d 602, 614, 447 N.E.2d 870, 878 (1983); CHICAGO, ILL., MUN. CODE ch. 21, § 21-64.1.

[222] *See Roppolo*, 113 Ill. App. 3d at 612–14, 447 N.E.2d at 878–79.

[223] *Id.* at 613–14, 447 N.E.2d at 878–79.

[224] *See* G. PALMER, THE LAW OF RESTITUTION § 1.3, at 16 n.27 (1978 & Supp. 1988). At least one commentator, citing the *Roppolo* case, claimed that many judges find it easier to remedy unjust enrichment by using a constructive trust, even though a money judgment is possible and can be obtained at law in quasi-contract, G. PALMER, THE LAW OF RESTITUTION § 1.3, at 16 (1978 & Supp. 1988). He further stated that a constructive trust "stirs the judicial imagination" in ways that quasi-contractual remedies have not. *Id.*

In light of historic preservation's primary goal, which is to prevent demolition rather than simply to punish violations after the fact, a constructive trust would serve as a more forceful deterrent to future landmark owners. Although the constructive trust cannot recreate a historic landmark, it is likely to serve as the most effective deterrent to other landowners who may do a cost-benefit analysis to determine whether the demolition and subsequent payment of fines are worthwhile. If landowners know that their profits may be disgorged, and that they may have to pay for the restoration costs that were avoided by permitting the property to deteriorate, they may hesitate to neglect or destroy their property. If the defendant in *Roppolo* had known that he would have to pay the moving and restoration costs of the Rincker House to the city, he may have kept the landmark intact and used the restoration money for actual restoration and not for satisfaction of a judicial decree.

IV. Conclusion

Landmark preservation is an area of growing concern. As land values increase, landowners have sought to "cash in" on their property at the expense of important public interests. The main source of this problem is the insufficiency of current penalties, and to a large degree, the predictability of the fines and their amenability to a cost-benefit analysis. Local governments can and should seek equitable relief through the imposition of constructive trusts, and courts must consider the constructive trust and apply it when the circumstances require.

Courts should take the *Roppolo* court's lead and impose a constructive trust when a landowner has violated his or her duty to prevent the demolition of a designated landmark and has thereby been unjustly enriched. In an effort to keep our national landmarks intact, more courts should use this remedy as a method of punishing wrongdoers and of deterring other landmark owners from allowing personal profit motives to outweigh society's interest in historic preservation.