REFLECTING THE BEST OF OUR ASPIRATIONS: PROTECTING MODERN AND POST-MODERN ARCHITECTURE

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"There should be a thoughtful balance between what man must build and that with which man must coexist—nature. What is built should reflect the best of our aspirations."[1]

"Aesthetic zoning symbolizes a culturally advanced society and the general 'refinement of . . . tastes . . . in a maturing society.'"[2]

I. INTRODUCTION

"It has been likened to the Acropolis and Stonehenge. . . . Like pilgrims to a shrine, architects travel to La Jolla, California, to see a vision—an affirmation of their faith in architecture's cosmic power."[3] The Salk Institute, designed by the renowned architect Louis Kahn in the early 1960s, consisted of two symmetrical laboratory buildings on either side of a stone courtyard—in front of the courtyard, a grove of eucalyptus trees, behind the courtyard, the vastness of the Pacific Ocean. However, in May 1993, over the protest of America's leading architects, the eucalyptus grove was bulldozed to make way for a new twenty-one million dollar addition.[4] Many architects "feel the new addition will destroy Kahn's vision and the spatial relationship among the original buildings."[5]

"With the distinctive skyward tilt of its suspended roof evoking the spirit of flight, Dulles [Airport] was the last great achievement of Finnish architect Eero Saarinen."[6] Built in 1966, the airport soon became too small for the amount of air traffic it handled. In

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1 Telephone Interview with Michel C. Ashe, President-Elect, Virginia Society American Institute of Architects (Apr. 15, 1995).

2 Oregon City v. Hartke, 400 P.2d 255, 261 (Or. 1965).

3 Michael J. Crosbie, *Dissecting the Salk: Analysis of Louis Kahn's Salk Institute Complex*, PROGRESSIVE ARCHITECTURE, Oct. 1993, at 40.

4 Blair Kamin, *Cutting Criticism: When Trees Fall, the Noise Can Be Deafening - Just Ask Jonas Salk*, CHI. TRIB., May 17, 1993, § 5, at 3.

5 Patty Gerstenblith, *Architect as Artist: Artists' Rights and Historic Preservation*, 12 CARDOZO ARTS & ENT. L.J. 431 (1994).

6 Lester Reingold, *Capital Improvements: Renovation of Washington National, Dulles Airports*, AIR TRANSP. WORLD, Apr. 1994, at 46.

the mid-1970s a proposed three-sided expansion of the terminal was announced which would, in the words of many architects, "'emasculate and . . . destroy'" one of the most magnificent buildings in America.[7] Those plans were thankfully scrapped after Dulles was placed on the National Register of Historic Places in 1978.[8] The new renovations, which were due to be completed in 1996, will continue the Saarinen design, allowing old and new to "blend seamlessly."[9]

Frank Lloyd Wright is best known for his Falling Water House in Pennsylvania. However, Wright is noted in the architectural community for many other buildings. One of those other buildings is the Thaxton House in Houston, Texas, which was put up for sale in 1991 and described as a "tear-down" home.[10] The house is noted for its parallelogram design; originally there were no right angles and the ceiling was smaller than the floor because the walls leaned inward. Another notable feature was its exemplification of Wright's philosophy of the family—Wright created expansive living areas while making the bedrooms very small.[11] Fortunately, a retired architect and Wright admirer purchased the house, sparing it from being torn down and replaced.[12]

Louis Kahn's Salk Institute, Eero Saarinen's Dulles Airport Terminal, Frank Lloyd Wright's Thaxton House—what do these buildings have in common? First, they are classic examples of Modern[13] and Post-Modern[14] architecture[15] designed by some of

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7 Paul Hodge, *Critics Say Additions Could Mar Design of Dulles Terminal*, WASH. POST, Dec. 15, 1977, at C3.

8 Paul Hodge, *Dulles Nominated to Historic List to Protect Design*, WASH. POST, Feb. 23, 1978, at C1. Normally inclusion on the National Register requires a building to be at least 50 years old; exceptions are made, however, for buildings that are of exceptional importance. *See infra* part III.A.

9 Reingold, *supra* note 6. Saarinen had apparently predicted that a linear expansion to his design would someday be necessary. Therefore, the renovated terminal will assume the dimensions originally intended. *Id.*

10 Danni Sabota, *Wright's House: Will It Be Wrecked or Rescued?*, HOUS. BUS. J., Jan. 28, 1991, § 1, at 1.

11 *Id.*

12 *Wright-Designed House Appears Saved*, N.Y. TIMES, May 4, 1991, § 1, at 6. Furthermore, the purchasing architect plans to restore the home to within 90% of Wright's original design, thus undoing several "cannibalized" renovations by prior owners. *Id.*

13 The Modern movement began in the late nineteenth century as a reaction against eclectic architecture and its use of past historic styles and, instead, sought to produce designs reflective of the times. ENCYCLOPEDIA OF AMERICAN ARCHITECTURE 425-32 (Thomas H. Quinn & Margaret Lamb eds., McGraw-Hill, Inc. 1980). Architects of the Modern movement tend to be more functional—often employing simple, rectangular forms and using mostly modern materials such as steel and glass. *Id.* Some Modernists view architecture not only as sculptural but also sensual and emotional. *Id.* Significant architects of the Modern movement included Walter Adolph Gropius, Le Corbusier, Ludwig Mies van der Rohe, Frank Lloyd Wright, Eero Saarinen, and Louis Kahn. *Id.*

14 The Post-Modernist movement developed as a reaction to the Modernists. They re-

the most recognized architects in the twentieth century. As such, these structures merit preservation. Second, they are all less than fifty years old, making most ineligible for many historic preservation statutes.[16] Third, they are all in danger of being destroyed or altered (which for most architectural purposes is tantamount to being destroyed).

How, then, can such buildings be protected during the interval between when they are built and when they reach "preservation" age? Existing historic preservation statutes are not fully adequate. The National Historic Preservation Act of 1966 ("NHPA")[17] allows designation in the National Register of properties that have achieved significance within the past fifty years, but only after a showing of "exceptional importance."[18] New York City's celebrated Landmarks Preservation Law, on the other hand, does not even provide any exceptions to its thirty year age requirement.[19]

Should we care, though? The answer, it seems, is yes. For example, on April 1, 1995, some 750 architects, planners, preservationists, historians, and archaeologists converged in Chicago to attend a National Park Service conference entitled *Preserving the Re-*

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jected what they considered to be the Modernists' unthinking tie to function over form. Though they still believed form should follow function, Post-Modernists believed that the Modernists had gone too far in rejecting the classical styles outright. Instead, they sought to embrace the older traditional forms within a contemporary design. Telephone Interview with Michel C. Ashe, President-Elect, Virginia Society American Institute of Architects (Apr. 23, 1995).

Robert Venturi is often credited with starting the Post-Modern movement. Other noted architects of this style include Michael Graves, Philip Johnson, and Robert A.M. Stern. *Id.*

For the most part, Post-Modernism was a short lived movement. Because Post-Modern design usually involved an overall modern design with classical touches here and there, many architects considered it too easy to produce bad designs. *Id.*

15 Though Modern and Post-Modern architecture is highlighted, this Article applies to contemporary architecture in general. Most architects today believe Post-Modernism to be dead. ENCYCLOPEDIA OF AMERICAN ARCHITECTURE, *supra* note 13, at 141. Contemporary architecture today is characterized both by a re-emergence of the Modern style, softened somewhat by Post-Modernism, and by what can most tactfully be described as the movement *du jour*. Telephone Interview with Michel C. Ashe, *supra* note 14. One such movement *du jour* still popular today is known as Deconstructionism. Deconstructionists rejected both Modern and Post-Modern styles, focusing instead on almost pure abstraction—resulting in buildings that look as if they were exploded and reassembled in not quite the original pattern. *Id.*

16 The federal regulations defining the criteria for inclusion in the National Register for Historic Places state that "properties that have achieved significance within the past 50 years shall not be considered eligible for the National Register." 36 C.F.R. § 60.4 (1995). State and local ordinances also reflect age limits. For example, New York City's celebrated Landmark Preservation Law, N.Y. CITY, N.Y., ADMIN. CODE tit. 25, §§ 25-301 to 25-321 (1994), places a 30 year age limit in the definition of "landmark." *Id.* § 25-302(m)-(n), (w).

17 16 U.S.C. §§ 470-470mm (1994).

18 36 C.F.R. § 60.4.

19 N.Y. CITY, N.Y., ADMIN. CODE tit. 25, §§ 25-301 to 25-321.

cent Past.[20] They came to discuss the question: "[w]hat's worth preserving as public mementos of our century?"[21]

Historic buildings that have withstood the test of time, such as New York's Empire State Building and Grand Central Station clearly are worth preserving as "public mementos." But what if ten years after it had been built, the owner of Grand Central Station had wanted to tear it down and start again because he was not thrilled with its Beaux Art style? How much poorer, culturally, would our nation be? Fortunately, that event never occurred.

But what of the Salk Institute, Dulles Airport, the Thaxton House, and countless other modern buildings? The problem is that "[w]e are still very much in the process of absorbing the achievements of the great innovators."[22] It is often the next generation which, when looking back at prior generations, decides what is worth preserving. However, this places upon the current generation an obligation to protect its buildings—not only until at least enough time has passed so that the next generation can make a knowledgeable decision about whether to preserve such buildings, but also to leave the next generation a rich heritage to preserve.

Congress, in enacting the NHPA, declared that "in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation."[23] This rich heritage includes more than just historic buildings like Mount Vernon, the Capitol, or even Grand Central Station; it also encompasses the Salk Institute, Dulles Airport, the Thaxton House, and other more recently erected buildings. Such structures provide a "vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits [that] will be maintained and enriched for future generations of Americans."[24]

This Article advocates stronger protection of Modern and Post-Modern architecture through the creation of an Architectural Landmark Designation ("ALD") program. Because such a designation rests more on aesthetic than historical grounds, Part II will discuss the constitutionality of aesthetic and landmark regulation.

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20 Alf Siewers, *Superdawg . . . And Other Modern-Day Landmarks; Architects, Historians Here for Tour*, CHI. SUN-TIMES, Mar. 30, 1995, at 1.

21 *Id.*

22 David Hamilton Eddy, *When to Preserve Modern Architecture*, INDEPENDENT (London), Feb. 22, 1993, at 18 (letter to the editor).

23 16 U.S.C. § 470(b)(5) (1994).

24 16 U.S.C. § 470(b)(4).

Part III will discuss existing preservation legislation—the NHPA, New York City's Landmark Preservation Law, other selected state and local preservation ordinances—and how these statutes both succeed and fail to serve as adequate protective devices for deserving contemporary buildings. Part IV will introduce the ALD program and discuss the criteria to be included in any proposed ALD legislation. Further, Part IV will analyze the legality and effectiveness of an ALD statute in protecting modern buildings.

II. LEGALITY OF AESTHETIC LANDMARK REGULATION

The historic preservation movement began in the mid-nineteenth century and was marked by private purchases of buildings in which famous people lived or great events took place.[25] This early movement was based more on a sense of patriotism and civic duty than on a sense of preserving a building because of its architectural quality.[26] Government action was rare, consisting mostly of purchasing a few park sites and landmarks of national significance, usually relating to either the Revolutionary War or the Civil War.[27]

By the turn of the century, however, historic preservation took on a more cultural, artistic, and architectural focus.[28] States and local governments became involved by passing ordinances protecting historic districts.[29] In 1931, Charleston, South Carolina, enacted the first preservation ordinance protecting the antebellum part of the city.[30] New Orleans soon followed in 1936, passing the Vieux Carre Ordinance protecting the historic French Quarter.[31]

By mid-century, preservationists began turning their attention to not only groups of buildings, as found in historical districts, but also to individual buildings of historic or architectural significance.[32] In 1965, New York City passed its now-celebrated Landmark Preservation Law, the first ordinance designed to pro-

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25 A HANDBOOK ON HISTORIC PRESERVATION LAW 1 (Christopher J. Duerksen ed. 1996). The movement to save Mount Vernon represents the epitome of this approach. Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 480 (1981).

26 Rose, *supra* note 25, at 479-80.

27 *Id.* at 474. One of the earliest reported "preservation" cases involved Congress' attempt to purchase land for the Gettysburg National Battlefield. In *United States v. Gettysburg Electric Railway Co.*, 160 U.S. 668, 682 (1896), the Supreme Court upheld Congress' purchase as a legitimate and constitutional public purpose. The Court's decision rested primarily upon the great and obvious historical value associated with Gettysburg. *Id.* at 681-82.

28 Rose, *supra* note 25, at 480.

29 *Id.* at 484.

30 A HANDBOOK ON HISTORIC PRESERVATION LAW, *supra* note 25, at 6.

31 *Id.*

32 *Id.* at 13.

tect individually designated buildings.[33] The federal National Historic Preservation Act of 1966[34] created the National Register of Historic Places. Today, over 1700 communities, in addition to all fifty states and the federal government, have all enacted various forms of preservation laws.[35]

Throughout its history, preservation laws have been attacked in court from many directions. Legislation enacting an ALD would be no different. Legal attack most likely will be directed at the fact that ALD is a landmarking law that singles out individual buildings rather than entire districts, and that, at heart, ALD is aesthetic rather than historic in its focus.

A. *The Constitutionality of Aesthetic Regulation*

"Beauty has been queen in many areas but has never been a favorite of the law."[36] In *Village of Euclid v. Ambler Realty*,[37] the Supreme Court upheld the constitutionality of zoning ordinances as a valid exercise of the police power. However, courts have been traditionally hostile to the notion that aesthetic considerations are a valid interest protected by the police power.[38] The police power is legitimate to prevent harm to the health, safety, morals, or the general welfare. Aesthetics, on the other hand, are considered a luxury[39] and too subjective and arbitrary to be the basis of valid regulation.[40] Notwithstanding this hostility, courts often uphold land use restrictions, usually by simply ignoring any aesthetic considerations and focusing on traditional police power objectives.[41]

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[33] *Id.*

[34] 16 U.S.C. §§ 470-470mm (1994).

[35] 2 EDWARD H. ZIEGLER, JR., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 15.01, at 15-4 (1996).

[36] William H. Agnor, *Beauty Begins a Comeback: Aesthetic Considerations in Zoning*, 11 J. PUB. L. 260, 260 (1962).

[37] 272 U.S. 365 (1926).

[38] ZIEGLER, *supra* note 35, § 14.02, at 14-11.

[39] City of Passaic v. Paterson Bill Posting, Adver. & Sign Painting Co., 62 A. 267, 268 (N.J. 1905) ("Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power . . . .").

[40] City of Youngstown v. Kahn Bros. Bldg. Co., 148 N.E. 842, 844 (Ohio 1925).

> [A]uthorities in general agree as to the essentials of a public health program, while the public view as to what is necessary for aesthetic progress greatly varies. Certain legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats. Successive city councils might never agree as to what the public needs from an aesthetic standpoint, and this fact makes the aesthetic standard entirely impractical as a standard for use restrictions upon property. The world would be at continual seesaw if aesthetic considerations were permitted to govern the use of the police power.

Id.

[41] ZIEGLER, *supra* note 35, § 14.02, at 14-13.

By the 1930s, however, attitudes towards aesthetic considerations began softening and a new attitude towards aesthetics-based regulation developed. This attitude is reflected in Judge Pound's statement in *Perlmutter v. Green*:[42] "Beauty may not be queen, but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality, and decency."[43] The doctrine developed that aesthetic values, while not sufficient standing alone to justify regulation, did constitute a legitimate factor for consideration in regulating land use provided there was also some other non-aesthetic public purpose to be furthered by the regulation.[44]

The Supreme Court, in *Berman v. Parker*,[45] marked this shift in judicial attitudes toward aesthetic regulation. In *Berman*, the Court upheld Congress's use of eminent domain to condemn a blighted section of the District of Columbia slated for urban renewal.[46] In dicta, Justice Douglas stated:

> The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[47]

With this statement, state courts could begin upholding regulation of land use based solely on aesthetic considerations.

The New York Court of Appeals was one of the first state courts to indicate that aesthetics alone were sufficient grounds for regulation. In *People v. Stover*,[48] the Court of Appeals upheld a local ordinance prohibiting the erection of clotheslines in front yards. In doing so, the Court wrote that "[o]nce it be conceded that aesthetics is a valid subject of legislative concern, the conclusion seems inescapable that reasonable legislation designed to promote that end is a valid and permissible exercise of the police power."[49] If a regulation is to be struck down, it should be because the regulation is arbitrary or an irrational method of achieving a legitimate end.[50]

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42 182 N.E. 5 (N.Y. 1932).
43 *Id.* at 6.
44 ZIEGLER, *supra* note 35, § 14.02, at 14-15.
45 348 U.S. 26 (1954).
46 *Id.*
47 *Id.* at 33 (citations omitted).
48 191 N.E.2d 272 (N.Y. 1963).
49 *Id.* at 275.
50 *Id.*

The Oregon Supreme Court strengthened the resolve that aesthetic considerations alone are a legitimate public purpose. In *Oregon City v. Hartke*,[51] the Oregon Supreme Court upheld a zoning ordinance prohibiting the operation of junkyards without city permission. The court observed that:

> [T]here is a growing judicial recognition of the power of a city to impose zoning restrictions which can be justified solely upon the ground that they will tend to prevent or minimize discordant and unsightly surroundings. This change in attitude is a reflection of the refinement of our tastes and the growing appreciation of cultural values in a maturing society. The change may be ascribed more directly to the judicial expansion of the police power to include within the concept of "general welfare" the enhancement of the citizen's cultural life.[52]

Then, after referring to both *Berman* and *Stover*, the court concluded that "we join in the view 'that aesthetic considerations alone may warrant an exercise of the police power.'"[53]

States today fall into three categories: states that allow "aesthetics only" regulation,[54] states that prohibit "aesthetics only" regulation, requiring some additional non-aesthetic public purpose,[55] and states that have not yet decided the issue.[56] In states where aesthetics alone can be a legitimate basis for regulation, the test for constitutionality evolved from regulation based primarily or exclusively on aesthetics to regulation based on reasonableness.[57] Typically this is done by balancing the private loss caused by the regulation against the public benefit of such regulation. In most cases, aesthetic regulation will be held unreasonable only when it is shown that the regulation is based upon some idiosyncratic

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51 400 P.2d 255 (Or. 1965).

52 *Id.* at 261.

53 *Id.* at 262. The United States Supreme Court in 1978 finally placed its seal of approval on aesthetics-only regulation in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), when it recognized that "[s]tates 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." *Id.* at 129.

54 These include Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Tennessee, Washington, West Virginia, and Wisconsin. *See* ZIEGLER, *supra* note 35, § 14.02, at 14-15 to 14-18; Samuel Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 UMKC L. REV. 125, 131-44 (1980).

55 These include Idaho, Indiana, Iowa, Maine, Massachusetts, Maryland, Nebraska, North Dakota, Pennsylvania, Rhode Island, Texas, Vermont, and Virginia. *See* ZIEGLER, *supra* note 35, § 14.02, at 14-15 to 14-18; Bufford, *supra* note 54, at 145-51.

56 These include Alabama, Alaska, Nevada, South Carolina, South Dakota, and Wyoming. *See* Bufford, *supra* note 54, at 130-31.

57 ZIEGLER, *supra* note 35, § 14.02, at 14-23.

standard.[58]

B. *The Constitutionality of Landmark Regulation*

Most early preservation legislation was in the form of protecting historic districts, containing any number of historic and not-so-historic buildings as opposed to individual buildings, and was considered to be a type of zoning regulation.[59] In 1926, the Supreme Court upheld the constitutionality of zoning regulations in *Village of Euclid v. Ambler Realty Co.*[60] In addition, numerous state supreme courts have upheld the validity of historic district regulation.[61]

Landmark regulation, on the other hand, involves regulating a single building. The burden of landmark designation, therefore, is borne by a single owner and can resemble discriminatory zoning restrictions, which are universally condemned.[62] As a result, landmark regulation has faced additional challenges primarily on two fronts: first, that it is discriminatory "spot" zoning; and second, that it constitutes a "taking" under the Fifth Amendment.[63]

The first issue—whether landmark designation constitutes discriminatory zoning—was decisively resolved by the Supreme Court in *Penn Central Transportation Co. v. City of New York.*[64] There, the Court upheld the constitutionality of New York City's Landmark Law. Penn Central had argued that landmark designation was unconstitutional because (1) like "spot" zoning, it "arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones"; (2) it is "'inevitably arbitrary, or at least subjective, because it is basically a matter of taste'"; and (3) unlike normal historic districting, it does not impose identical or similar restrictions on all similarly situated structures.[65] Justice Brennan found all three of Penn Central's arguments to be equally without merit, noting that (1) the Landmark Law embodied a comprehensive plan to preserve structures of historic or aesthetic interest throughout the city and (2) all zoning has the effect of burdening some landowners more than others.[66]

Equally important, however, was the Court's holding that the

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58 *Id.* at 14-24 to 14-25.
59 Rose, *supra* note 25, at 504.
60 272 U.S. 365.
61 *See, e.g.*, City of New Orleans v. Pergament, 5 So.2d 129 (La. 1941) (upholding New Orleans' preservation ordinance protecting the Vieux Carre district).
62 ZIEGLER, *supra* note 35, § 15.02, at 15-16.
63 Gerstenblith, *supra* note 5, at 457.
64 438 U.S. 104 (1978).
65 *Id.* at 132-33.
66 *Id.*

application of the Landmark Law to Penn Central did not constitute a "taking" under the Fifth Amendment. Penn Central argued that the Landmark Law denied them any gainful use of the airspace above Grand Central Station, thus diminishing the overall value of the property.[67] In rejecting this argument, the Court first held that when deciding whether a taking has occurred, courts must look to the entire property being affected, not only discrete segments.[68] Next, the Court held that diminution in property value alone does not constitute a taking.[69] Finally, the Court concluded that the Landmark Law in no way interfered with Penn Central's primary expectation of the use of Grand Central Station—a railroad terminal with office space and concessions—nor did it deny Penn Central a "reasonable return" on its investment.[70]

More recent Supreme Court cases, however, have strengthened the Takings Clause. In *Lucas v. South Carolina Coastal Council*,[71] Justice Scalia held that a taking occurs when a regulation deprives a property owner of "all economically beneficial uses in the name of the common good."[72] However, because landmark designation, at most, only prevents destruction or alteration of a building and not its continued use, it is unlikely that landmark designation would rise to the level of a "total" taking.[73]

III. The Effectiveness of Existing Preservation Law

Today, there are over 1000 local preservation ordinances, as well as legislation in all fifty states and at the federal level.[74] The main federal law is the National Historic Preservation Act, which was passed in 1966[75] and amended in 1992.[76] New York City's Landmarks Law[77] is, perhaps, one of the most noted local preservation ordinances. However, despite the many positive aspects of these laws in protecting traditionally historic buildings, they fall short in protecting modern buildings.

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67 *Id.* at 130.

68 *Id.*

69 *Id.* at 131. In reaching this conclusion, the Court relied upon *Euclid*, 272 U.S. 365, where a 75% diminution in property value caused by a zoning ordinance did not constitute a taking.

70 *Penn Central*, 438 U.S. at 136.

71 505 U.S. 1003 (1992).

72 *Id.* at 1019.

73 Gerstenblith, *supra* note 5, at 458-59.

74 *Id.* at 455.

75 16 U.S.C. §§ 470-470mm (1994).

76 National Historic Preservation Act Amendments of 1992, Pub. L. No. 102-575, Title XL, 106 Stat. 4753 (1992).

77 N.Y. City, N.Y., Admin. Code tit. 25, §§ 25-301 to 25-321 (1994).

A. *The National Historic Preservation Act of 1966*

The National Historic Preservation Act ("NHPA")[78] was enacted in 1966 in order to "foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony"[79] and to "provide leadership in the preservation of the prehistoric and historic resources of the United States and of the international community of nations."[80] The NHPA arose out of growing concerns that many properties of historical, architectural, and cultural importance were not being protected against the wrecking ball in the onslaught of urban renewal programs and that existing legislation was insufficient.[81] In addition, in 1966, the United States Conference of Mayors published a persuasive report, *With Heritage So Rich*, which urged the federal government to implement a more comprehensive national plan for historic preservation.[82]

The NHPA sought to accomplish its preservation mission in two ways. First, the Secretary of the Interior was authorized to create and maintain a National Register of Historic Places composed of districts, sites, and buildings significant in American history, architecture, and culture.[83] In addition, the NHPA encouraged joint federal-state cooperation through the creation of State Historic Preservation Officers ("SHPOs")[84] who were charged, *inter alia*, with aiding the Secretary in identifying and nominating eligible properties to the National Register.[85]

Second, the NHPA created the Advisory Council on Historic Preservation, an independent federal agency consisting of nineteen members.[86] In addition to advising the President on preservation policy, the Council's main task is to review actions by federal agencies which might affect an historic building.[87] This is done through the Section 106 Review Process, in which any federal agency involved in an undertaking which affects a property either listed on or eligible for the National Register must first "take into

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78 16 U.S.C. §§ 470-470mm.

79 16 U.S.C. § 470-1(1).

80 16 U.S.C. § 470-1(2).

81 H.R. REP. NO. 1916 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3307, 3309.

82 Jane P. Kourtis, *The Constructive Trust: Equity's Answer to the Need for a Strong Deterrent To the Destruction of Historic Landmarks*, 16 B.C. ENVTL. AFF. L. REV. 793, 800 (1989).

83 16 U.S.C. § 470a(1)(A).

84 16 U.S.C. § 470a(b)(1). For example, the Commonwealth of Virginia created a Department of Historic Resources with its director also serving as the commonwealth's SHPO. VA. CODE ANN. § 10.1-2201 (Michie 1993).

85 16 U.S.C. § 470a(b)(3)(B).

86 16 U.S.C. § 470i(a).

87 16 U.S.C. § 470j(a).

account the effect of the undertaking" on the building and allow the Advisory Council a reasonable opportunity to comment on the proposed undertaking.[88]

Despite the NHPA's grand language of protecting historic properties, the NHPA is not an effective means of protecting modern buildings. First, the regulations defining the criteria for evaluating properties to be included on the National Register explicitly exclude properties less than fifty years in age.[89] The regulations go on, however, to allow two exceptions for buildings less than fifty years old: (1) if the building is an integral part of a district that otherwise meets the criteria for eligibility;[90] and (2) if the building "is of exceptional importance."[91]

One reason for adopting a general rule of fifty years was to

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[88] 16 U.S.C. § 470f.

The Section 106 Review Process requires the agency to:

1) use reasonable effort to identify properties that might be affected by its undertaking, 36 C.F.R. § 800.4(b) (1995);

2) if any are found, the agency must assess the effects of the undertaking on the properties, 36 C.F.R. § 800.4(e);

3) if the agency determines no effects will occur, it must notify the SHPO of such and, if the SHPO does not object, Section 106 review is completed, 36 C.F.R. § 800.5(b);

4) if an effect will occur or the SHPO objects, then the agency must determine whether the effect is adverse, 36 C.F.R. § 800.5(c);

5) if the agency determines no adverse affects, it must notify the Advisory Council of such and, if the Council does not object, Section 106 review is completed, 36 C.F.R. § 800.5(d);

6) if an effect is determined to be adverse or the Council objects, then the agency must consult with the Council, the SHPO, and any other interested party, including the public, to find ways of mitigating the adverse effect, 36 C.F.R. § 800.5(e).

[89] 36 C.F.R. § 60.4 (1995).

[90] *Id.* In Denver, the HBE Corporation wants to tear down a 32-foot-tall glass hyperbolic paraboloid structure designed by I.M. Pei, a noted Modernist. Charlene Prost, *Building Controversy: HBE Embroiled in Disagreement in Denver*, ST. LOUIS POST-DISPATCH, Apr. 9, 1995, at 4C. The structure is only 40 years old; however, Denver is proposing to nominate the entire city block, known as Zeckendorf Plaza and also designed by Pei, as a city landmark district. This would require HBE to get approval before it can tear down the structure. *Id.* Though this example is at the municipal level, it serves to illustrate this first exception.

[91] 36 C.F.R. § 60.4 (1995). The National Park Service, in expanding upon this exception, stated that "[*e*]*xceptional* cannot by its own definition be fully catalogued or anticipated." MARCELLA SHERFY & W. RAY LUCE, HOW TO EVALUATE AND NOMINATE POTENTIAL NATIONAL REGISTER PROPERTIES THAT HAVE ACHIEVED SIGNIFICANCE WITHIN THE LAST 50 YEARS 1 (U.S. Dept. of Interior 1979). Furthermore,

> [e]xceptional importance does not mean national significance. The degree of a property's historical significance should be measured within the realm of its use, impact, or influence, whether that be a community, a state, a region, or a country.
>
> Hence a recent building may be of exceptional significance in one state because that building type is very scarce there while the same building might not be of exceptional importance to another state or community.

Id. at 2. But the Park Service cautions that, for example, "not every building by Frank Lloyd Wright, or any prominent architect, is automatically eligible for National Register listing and certainly all are not of 'exceptional importance,' even at the local level." *Id.* at 6.

> safeguard against listing properties of contemporary, faddish value. . . . Society rarely has the objectivity or the professional knowledge necessary to evaluate historical impact, role, or relative value immediately after . . . a building is constructed. If the Register is to be a useful tool over a length of time, it cannot include properties of only transient value or interest. The passage of time allows our perceptions to be influenced by education, the judgments of previous decades, and the dispassion of distance. We are thus better prepared to weigh the presence of enduring interest and value.[92]

However, this viewpoint ignores the fact that many modern buildings of potential architectural significance may no longer be around after the "passage of time," which allows us to properly weigh its "enduring interest and value." Some buildings are widely recognized by architects as being outstanding within years of completion. Of course, it is argued, those buildings should easily fall within the "of exceptional importance" exception. However, "the more recently a property has achieved significance, the more justification will be required to demonstrate its value" and such justification would need to include "clear, widespread recognition of [the building's] importance."[93]

Even if architecturally significant modern buildings could be listed on the National Register, the NHPA is extremely limited in what it can do. The NHPA does not protect properties listed on the National Register—generally only local ordinances have the power to prevent destruction or alteration of historic properties.[94] Section 106 is only triggered by a proposed *federal* or *federally assisted* undertaking.[95] A state or local project does not trigger Section 106 review, nor does a private project.

What constitutes an "undertaking" is one of the most heavily litigated aspects of the NHPA.[96] The NHPA defines undertaking to mean:

> [A] project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including (A) those carried out by or on behalf of the agency; (B)

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92 SHERFY & LUCE, *supra* note 91, at 1.

93 *Id.* at 3. Dulles Airport is a good example of a modern building that became listed on the National Register through this exception. Dulles was placed on the National Register when it was only 15 years old primarily due to the widespread belief among architects that it was "one of the most important post-World War II American architectural masterpieces." *Id.*

94 Kourtis, *supra* note 82, at 800.

95 16 U.S.C. § 470f (1994) (emphasis added).

96 ZIEGLER, *supra* note 35, § 15.06, at 15-54.

> those carried out with Federal financial assistance; (C) those requiring a Federal permit license, or approval; and (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.[97]

This definition, added in the 1992 Amendments, codified the holding of *Indiana Coal Council, Inc. v. Lujan*,[98] in which the district court held that state mining permits issued under the Surface Mining Control and Reclamation Act[99] were federal undertakings for purposes of the NHPA because (1) the state permit program was set up pursuant to federal law; (2) the state program was federally funded; and (3) the Department of Interior retained a powerful oversight role.[100] The test of whether federal action constitutes an undertaking can also be expressed as whether the agency has the opportunity to exercise authority at any stage of a project where alterations might be made to modify any impact on historic preservation goals.[101]

However, even if it were determined that a federal undertaking existed, Section 106 Review still does not do much. The NHPA is aimed solely at discouraging federal agencies from ignoring preservation values in projects they initiate, fund, license, or otherwise control.[102] The NHPA places no obligation on federal agencies to affirmatively protect historic buildings beyond allowing the Advisory Council, the SHPO, and other interested parties to make sug-

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97 16 U.S.C. § 470w(7).

98 774 F. Supp. 1385 (D.D.C. 1991).

99 30 U.S.C. §§ 1201-1328.

100 774 F. Supp. at 1400-03.

101 Vieux Carre Property Owners v. Brown, 948 F.2d 1436, 1445 (5th Cir. 1991) (*quoting* Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271, 280 (3d Cir. 1983)). In *Vieux Carre*, non-federal developers of a riverfront park were required to obtain a nationwide permit issued by the Army Corps of Engineers. *Id.* at 1439-40. The Fifth Circuit held that as long as the park project remained under federal license and the Army Corps had the ability to require changes, the project was a federal undertaking. *Id.* at 1445.

However, the ability to exercise control must be more than de minimis. The court in *Techworld Development Corp. v. D.C. Preservation League*, 648 F. Supp. 106, 119-20 (D.D.C. 1986), held that where the only role a federal agency played was in making nonbinding recommendations to the mayor of D.C., the agency's role was too minimal to become an undertaking.

Furthermore, failure of an agency to stop a project does not constitute a license or undertaking either. The court in *National Trust for Historic Preservation v. Department of State*, 834 F. Supp. 443 (D.D.C. 1993), *aff'd sub nom. Sheridan Kalorama Historical Ass'n v. Christopher*, 1995 U.S. App. LEXIS 4668 (D.C. Cir. Mar. 10, 1995), held that a license required explicit written permission not merely the failure to veto a project when it was possible to do so. *Id.* at 450; *see* Yerger v. Robertson, 981 F.2d 460, 465 (9th Cir. 1992) (holding that the Forest Service's refusal to renew a special use permit for the operation of a historical resort was not an undertaking even though denial of the permit was clearly preparatory to action that would eventually affect the historic site).

102 Lee v. Thornburgh, 877 F.2d 1053, 1056 (D.C. Cir. 1989).

gestions to mitigate adverse effects.[103] In fact, the statute and regulations do no more than require the agency to take into consideration the views of the Advisory Council, the SHPO, and other interested parties.[104] The agency may terminate the consultation process at its discretion.[105] The agency is not required to accept any outside findings; however, if it does enter into a memorandum of agreement, the agency will be bound to abide by it.[106]

Thus, the NHPA, though laudable in its goals, falls short of providing any meaningful protection to modern buildings. Not only are most buildings too young to fall within its protection, but even for those that do, the NHPA offers little affirmative protection. Something more is needed.

B. *New York City's Landmarks Law*

Perhaps the most celebrated local preservation ordinance is New York City's Landmarks Law,[107] passed in 1965. The City Council feared that many buildings, "representing the finest architectural products of distinct periods in the history of the city, have been uprooted, notwithstanding the feasibility of [preservation]."[108] The Council therefore declared it to be the policy of New York City to protect the buildings that represented the cultural, social, economical, political, and architectural history of the city.[109]

The Landmarks Law creates an eleven member Landmarks Preservation Commission[110] with the authority to designate landmarks, interior landmarks, scenic landmarks, and historic districts.[111] The law defines the term "landmark" to include improvements at least thirty years old that have "a special character or special historical or aesthetic interest or value" to the city.[112] Once designated, it becomes unlawful for any person to "alter, reconstruct or demolish" the landmark unless the Commission issues either a certificate of no effect on protected architectural features, a certificate of appropriateness, or a notice to proceed.[113] Fur-

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103 Waterford Citizen's Ass'n v. Reilly, 970 F.2d 1287, 1291 (4th Cir. 1992).
104 ZIEGLER, *supra* note 35, § 15.06, at 15-53.
105 36 C.F.R. § 800.5(e)(6) (1995).
106 ZIEGLER, *supra* note 35, at 15-53 (citing Don't Tear It Down, Inc. v. Pennsylvania Ave. Dev. Corp., 642 F.2d 527 (D.C. Cir. 1980)).
107 N.Y. CITY, N.Y., ADMIN. CODE tit. 25, §§ 25-301 to 25-321 (1994).
108 *Id.* § 25-301(a).
109 *Id.* § 25-301(b).
110 N.Y. CITY, N.Y., CHARTER § 3020(1) (1994).
111 N.Y. CITY, N.Y., ADMIN. CODE § 25-303(a).
112 *Id.* § 25-302(n).
113 *Id.* § 25-305(a). Violation of this provision is a misdemeanor offense carrying either

thermore, a party in charge of a landmark is given an affirmative duty to keep the landmark in good repair.[114]

The Landmarks Law was upheld as constitutional in *Penn Central*.[115] Land owners still challenge the constitutionality of designation, however, by asserting that the law as applied to them is unreasonable.[116] The Landmarks Law provides for a public hearing before any landmark designation or issuance of any certificate or permit, during which the owner and any other interested party is given reasonable opportunity to comment.[117] Any decision by the Commission can be appealed to the courts; however, the courts have stated that landmark designation is an administrative action and will review the Commission's decisions solely to determine whether they are rationally based or arbitrary and capricious.[118] In fact, the courts have repeatedly given great deference to the expertise of the Landmarks Preservation Commission.[119]

The New York City law has been hailed as being widely successful in preserving and protecting historic buildings.[120] To date, over

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a fine of not more than $1,000, imprisonment for not more than one year, or both. *Id.* § 25-317(a).

One of the grounds for seeking a certificate of appropriateness is inability to earn a reasonable return. *Id.* § 25-309. The law defines reasonable return as "[a] net annual return of six per centum of the valuation of an improvement parcel." *Id.* § 25-302(v)(1). Section 25-309 sets out a complex procedure for invoking this request.

An unsuccessful applicant for a certificate of appropriateness can appeal the Commission's decision either to the courts or to an independent, five-member Hardship Appeals Panel. N.Y. CITY, N.Y., CHARTER § 3021 (1994).

114 N.Y. CITY, N.Y., ADMIN. CODE § 25-311. First time violations of this provision carry a penalty of either a fine not more than $250, imprisonment for not more than 30 days, or both; while any subsequent violation results in either a fine not more than $500, imprisonment for not more than three months, or both. *Id.* § 25-317(b).

115 438 U.S. 104.

116 The test for reasonableness, when related to a commercial property, requires that the owner not be deprived by the regulation of a reasonable return on his property. Society for Ethical Culture v. Spatt, 415 N.E.2d 922, 935 (N.Y. 1980). With respect to charitable organizations, the standard is refined to permit landmark designation so long as it does not physically or financially prevent or seriously interfere with the carrying out of the charitable purpose. *Id.*

117 N.Y. CITY, N.Y., ADMIN. CODE § 25-313.

118 *See, e.g.*, Gilbert v. Bd. of Estimate, 575 N.Y.S.2d 840, 841 (N.Y. App. Div. 1991). Article 78 of the New York Civil Practice Law and Rules limits judicial review of administrative determinations to whether the determination was arbitrary or capricious. N.Y. C.P.L.R. § 7803(3) (McKinney 1994).

119 *See, e.g.*, Shubert Org., Inc. v. Landmarks Preservation Comm'n, 570 N.Y.S.2d 504, 507 (N.Y. App. Div. 1991). One reason for this is the composition of the Commission itself. The Commission must contain at least three architects, one historian, one city planner or landscape architect, and one real estate agent. N.Y. CITY, N.Y., CHARTER § 3020(1).

120 There are still many critics who argue that the law affords too much discretion to the Commission and that persons with interests other than preservation of historic sights and aesthetic structures may influence the Commission's decisions. Saint Bartholomew's Church v. City of New York, 914 F.2d 348, 354-55 (2d Cir. 1991). The *Saint Bartholomew's* court noted that in Tom Wolfe's *The Bonfire of the Vanities*, the law was used as a vehicle for political retaliation against a clerical official wanting to develop church property. *Id.* at 355

1000 buildings and other structures have been designated as landmarks.[121] As a vehicle for protecting modern buildings, however, the law falls short because only buildings that are at least thirty years old get the protection of the law.[122] Unlike the NHPA, there is no exception for "exceptional importance." Because of this, there is often the incentive to developers to either demolish or alter a building shortly before the building's thirtieth birthday in order to avoid the risk of landmark designation. Clearly, something must be done to protect architecturally significant buildings during the thirty year interim.

C. *Other State and Municipal Laws*

By far the majority of historic preservation occurs at the state and local level. Almost every state has enacted enabling legislation giving local government authority to protect historic properties.[123] In addition, many states have legislation both creating local historic districts directly[124] and creating a state register of historic properties.[125] Most preservation, however, still occurs at the local level through various preservation ordinances.

This section summarizes preservation ordinances of Chicago, Vallejo, California, San Francisco, King County (Seattle), Washington, Alexandria, Virginia, and Norfolk, Virginia.[126] In addition the effectiveness of those ordinances with respect to protecting modern buildings will be analyzed.

1. Chicago

The City Council of Chicago established its Commission on Chicago Landmarks with the goal of identifying, preserving, and protecting "areas, districts, places, buildings, structures, works of art, and other objects having a special historical, community, architectural, or aesthetic interest or value to the City of Chicago and its citizens."[127] The ordinance creates a nine member Commission on Chicago Landmarks with the responsibility of identifying and designating buildings as landmarks and reviewing permit applica-

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n.3 (citing TOM WOLFE, THE BONFIRE OF THE VANITIES 569 (1987) ("Mort? You know that church, St. Timothy's? . . . Right . . . LANDMARK THE SON OF A BITCH!")).

121 Gerstenblith, *supra* note 5, at 456.

122 *Id.*

123 ZIEGLER, *supra* note 35, at 15-10.

124 For example, Florida established a board of trustees to protect historic properties in St. Augustine, Pensacola, Tallahassee, and Key West. *Id.* at 15-12.

125 *Id.* at 15-67.

126 The jurisdictions chosen are meant to be illustrative only. The author makes no representation that they are representative of local ordinances in general.

127 CHICAGO, ILL., MUN. CODE § 2-120-580(1) (1991).

tions for the alteration or demolition of those landmarks.[128] Once designated as a landmark, a building cannot be altered or demolished without written approval from the Commission.[129] Unlike the New York City law, the Chicago ordinance has the potential to aid in the protection of modern buildings, primarily because Chicago has no age requirement for landmark designation. The ordinance lists as the sole criteria such things as the property's value as "an example of the architectural . . . heritage of the City of Chicago;"[130] its identification with a person "who significantly contributed to the architectural . . . development of the City of Chicago;"[131] and its "exemplification of an architectural type or style distinguished by [its] innovation, rarity, uniqueness, or overall quality."[132] Chicago thus seems to differentiate between historical and architectural significance which is critical when using historic preservation laws to protect modern buildings.

2. Vallejo, California

The city of Vallejo, California adopted its Architectural Heritage and Historic Preservation ordinance with the goal of preserving and protecting the city's historical and cultural aesthetic heritage.[133] The ordinance creates a nine member commission that designates landmarks[134] and reviews permits for certificates of approval.[135] Certificates of approval are required before any designated building can be altered or demolished.[136] In addition, designation obligates the owner to keep the building in good repair.[137]

Vallejo's ordinance is interesting in that it creates four tiers of landmark—(1) "City Landmark," for those buildings which are eligible for listing on the National Register; (2) "Historic Structure," for buildings with "outstanding" historical, architectural, or aesthetic interest; (3) "Structure of Merit," for buildings with "significant" historical, architectural, or aesthetic interest; and (4)

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128 *Id.* § 2-120-610.
129 *Id.* § 2-120-740. Similar to the New York City law, upon denial of such a permit request, the owner can file for an economic hardship exception if denial of the permit would result in the loss of all reasonable and beneficial use of or return from the property. *Id.* § 2-120-830.
130 *Id.* § 2-120-620(1).
131 *Id.* § 2-120-620(3).
132 *Id.* § 2-120-620(4).
133 VALLEJO, CAL., MUN. CODE § 16.38.020 (1985).
134 *Id.* § 16.38.140.
135 *Id.* § 16.38.270.
136 *Id.*
137 *Id.* § 16.38.360.

"Contributing Structure," for buildings that "warrant special" historical, architectural, or aesthetic interest.[138] How the building is designated determines the amount of protection afforded when the commission reviews requests for certificates of approval. For city landmarks, the proposed activity "shall not" affect the exterior architectural features; while for historic structures or structures of merit, the standard is only whether the proposed activity will "adversely affect" the exterior architectural features; and for contributing structures, there is no special standard.[139]

Like Chicago's ordinance, Vallejo's ordinance has the potential to protect modern buildings, but this protection is limited to an "adverse effects" standard because of the multi-tiered classification. Thus, modern buildings could be protected from demolition but, significantly, not from alteration.

3. San Francisco

San Francisco's ordinance was enacted, *inter alia*, to protect cultural resources that represent "significant examples of architectural styles of the past or are landmarks in the history of architecture" and to preserve and encourage a city with a varied architectural style, "reflecting the distinct phases of its history."[140] The ordinance creates a nine member Landmarks Board, which recommends to the Board of Supervisors buildings to be designated[141] and evaluates applications for certificates of appropriateness.[142] Certificates of appropriateness are required for any major alteration to a designated landmark.[143] In addition, designation obligates the owner to keep the building in good repair.[144]

The ordinance does not define what a landmark is; instead, the ordinance states in broad language that "the Board of Supervisors may, by ordinance, designate an individual structure . . . having a special character or special historical, architectural or aesthetic interest or value, as a landmark."[145] Like the previous two ordinances, San Francisco's ordinance does not place any age limit

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138 *Id.* § 16.38.160. When considering a building's architectural merit, the commission can look to whether the building is the first, last, or only example of an architectural style within the city or a prototype or outstanding example of an architectural movement. *Id.* § 16.38.150(A).

139 *Id.* § 16.38.290.

140 S.F., CAL., MUN. CODE § 1001(a), (d) (1996).

141 *Id.* § 1004.1.

142 *Id.* § 1006.4.

143 *Id.* § 1006.

144 *Id.* § 1008.

145 *Id.* § 1004(a)(1). The ordinance then lists, in table form, those structures that have been designated as landmarks to date in a series of appendices.

for landmark designation. Thus it also has the potential to protect modern buildings.[146]

4. King County (Seattle), Washington

The King County Council, in adopting its preservation ordinance, declared that "[p]resent heritage and preservation programs and activities are inadequate for insuring present and future generations . . . a genuine opportunity to appreciate and enjoy our heritage."[147] In order to preserve the county's historic and architectural heritage, a nine member Landmarks and Heritage Commission[148] was created to designate, approve, and deny landmark status,[149] as well as review applications for certificates of appropriateness.[150] A certificate of appropriateness is required before any alteration may be made to the significant features of the landmark.[151]

King County's ordinance creates a two-tiered classification system—an historic resource can be either a King County landmark or a community landmark.[152] Designation criteria for the former is modeled to some extent on the NHPA—an historic resource must be more than forty years old.[153] A community landmark, on the other hand, need only have "an easily identifiable visual feature of a neighbor had . . . and contributes to the distinctive quality or identity of such neighborhood."[154] A community landmark, however, does not require a certificate of appropriateness for alteration or demolition.[155]

Because certificates of appropriateness are required only for

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146 In addition to landmark designation under article 10 of the Planning Code, San Francisco has, under article 11, a program in its C-3 District to further protect certain buildings having "special architectural, historical, and aesthetic value." *Id.* § 1101(a). Every building in the C-3 District is categorized as either a Significant Building—Category I, Significant Building—Category II, Contributory Building—Category III, Contributory Building—Category IV, or Unrated Building—Category V. *Id.* § 1102. However, only buildings in the first four categories are protected from indiscriminate alteration, *id.* § 1110, and a building must be at least 40 years old to fall within one of those four protected categories. *Id.* § 1102(a)(1), (b)(1), (c)(2), (d)(2). Thus, because of its 40 year age restriction, article 11 cannot effectively protect modern buildings.

147 KING COUNTY, WASH., CODE § 20.62.010(C) (1994).

148 *Id.* § 20.62.030(A).

149 *Id.* § 20.62.070(A).

150 *Id.* § 20.62.080(A).

151 *Id.* If the owner can establish that denial, or partial denial, of a certificate would deprive her of a reasonable economic use of the landmark and there is no viable and reasonable alternative which would have less impact on the features of significance of the landmark, then the Commission must grant the certificate. *Id.* § 20.62.100(A).

152 *Id.* § 20.62.040.

153 *Id.* § 20.62.040(A).

154 *Id.* § 20.62.040(B).

155 *Id.*

King County landmarks, the King County ordinance does not protect modern buildings as effectively as other ordinances. Designation as a King County landmark requires that a building be at least forty years old, and the ordinance's only two exceptions to this requirement parallel the NHPA.[156] Thus, few modern buildings can be designated. Unlike the NHPA, however, if a modern building gets designated, there is significant protection because of the certificate of appropriateness requirement.

5. Alexandria, Virginia

Alexandria's preservation ordinance is mainly concerned with protecting historic districts. The ordinance creates the Old and Historic Alexandria District[157] and the Parker-Gray District.[158] Buildings outside of these two districts may be placed on a preservation list but only if they are over 100 years old.[159] If listed, a building must have a certificate of appropriateness before any alterations can be made.[160]

There are no exceptions to Alexandria's 100 year old requirement, making this ordinance particularly unhelpful in protecting modern architecture. In fact, the only way to protect modern buildings is if they happen to be located within one of the two districts—then a certificate of appropriateness would be necessary.[161]

6. Norfolk, Virginia

Norfolk, similar to Alexandria, does most of its preservation through Historic and Cultural Conservation Districts ("HCC Districts") rather than individual landmarking.[162] However, the zoning ordinance does provide for the creation of Historic Overlay Districts ("HO Districts") for the purposes of protecting individual buildings located outside of the HCC Districts.[163] HO Districts can be created to protect buildings of historical, cultural, or architectural value provided they have at least one of several characteristics, including (1) "portrayal of the environment of a group of people in an era of history characterized by a distinctive architectural

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156 *Id.* § 20.62.040(C); *see supra* part III.A. for discussion of the NHPA exceptions to the 50 year age requirement.

157 ALEXANDRIA, VA., MUN. CODE § 10-101 (1992).

158 *Id.* § 10-201.

159 *Id.* § 10-303.

160 *Id.* § 10-304(A).

161 *Id.* §§ 10-103(A), 10-203(A). Of course, it is very unlikely that a Modern or Post-Modern style building would ever be built, let alone approved, in either district.

162 NORFOLK, VA., ZONING ORDINANCE § 9-0.1 (1992).

163 *Id.* § 11-4.1.

style;"[164] (2) "embodiment of distinguishing characteristics of an architectural type or style;"[165] (3) "identification as the work of an architect whose . . . work has influenced the city;"[166] (4) "embodiment of elements . . . represent[ing] a significant architectural innovation;"[167] and (5) "relationship to other distinctive buildings . . . which are eligible for preservation according to a plan based on . . . an architectural motif."[168]

Buildings in an HO District are afforded the same protection as buildings in an HCC District, including the requirement of certificate of appropriateness before any alteration can be made.[169] HO Districts thus have the potential to protect modern buildings. In addition, any modern building within an HCC District is also afforded the protection of a certificate of appropriateness requirement.[170]

7. Analysis of Local Preservation Ordinances

The protection afforded modern buildings under most local preservation ordinances is slim. Some ordinances simply do not protect modern buildings; Alexandria requires buildings to be at least 100 years old[171] and King County has a 40 year age requirement.[172] Others, such as Vallejo, condition the level of protection to the age of the building, thus affording less protection to modern buildings.[173] Still others, while not explicitly placing any age limits, are implicitly aimed at preserving older buildings.[174] The ordinances speak in terms of protecting a city's architectural history or heritage—these words connote a view towards protecting more historical buildings. It is doubtful that a modern, contemporary building would get the protection of such an ordinance. What is needed, then, is affirmative protection for modern buildings.

IV. Architectural Landmark Designation

This Article proposes the creation of a new designation—the

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164 *Id.* § 11-4.2(e).
165 *Id.* § 11-4.2(f).
166 *Id.* § 11-4.2(g).
167 *Id.* § 11-4.2(h).
168 *Id.* § 11-4.2(i).
169 *Id.* § 11-4.5.
170 *Id.* § 9-0.4.
171 *See supra* part III.C.5.
172 *See supra* part III.C.4.
173 *See supra* part III.C.2.
174 For example, San Francisco speaks of preserving "the architectural styles of the past" and "landmarks in the history of architecture," and Chicago's ordinance aims at protecting the "architectural heritage" of the city. 36 C.F.R. part 61, App. A (1995).

Architectural Landmark Designation ("ALD")—to adequately protect architecturally significant modern buildings. The ALD is a temporary landmark designation which would last until the subject building was old enough to fall within the scope of more "traditional" historic preservation legislation. The purpose, then, of the ALD is to protect the building so long that it will still exist when "[w]e are . . . better prepared to weight the presence of enduring interest and value"[175] and to decide whether the building is deserving of more permanent protection.

A. *Criteria for ALD Legislation*

Rather than draft a model statute, this Article sets out criteria that should be used when designing legislation that would establish an ALD program. These criteria represent the who, what, how, when, and where of the ALD.[176] Although it is hoped that proposed legislation would incorporate all criteria, states would certainly be free to tailor the criteria to fit their specific customs.

1. ALD should be a statewide program.

There are several reasons for requiring ALD legislation to be implemented at the state level. The first is ease of administration. Since most states already have some type of historic preservation bureaucracy,[177] an ALD program could most easily be integrated into that existing framework. Statewide implementation is preferable to local implementation because, although most preservation legislation is enacted at the local level, not every locality has preservation legislation.

Second, statewide implementation allows for a more objective and thoughtful evaluation of buildings nominated for ALD status. By pooling the architectural resources of an entire state, rather than a single local jurisdiction, not only will there be a wider pool of buildings for selection but the reviewing body will also have a more diverse viewpoint when evaluating those buildings. This will

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175 SHERFY & LUCE, *supra* note 91, at 1.

176 To some extent, these criteria reflect the goals of a community-conscious landmarks ordinance—(1) "even though landmark control may not be a 'taking' since *Penn Central*, it is desirable to have some consent or compensation scheme to protect . . . owners . . . ;" (2) "it is crucial that landmark designations avoid the appearance of unpredictability and caprice, and that the standards and procedures for landmark designation and control be clear from the outset;" (3) a provision for public comment before landmarking decisions are made; and (4) recognition that "community-conscious preservation . . . might better be enforced through a delay of the owner's proposed changes than through absolute prohibition of demolition or alteration." Rose, *supra* note 25, at 502-03.

177 *See, e.g.*, VA. CODE ANN. § 10.1-2201 (Michie 1993) (creating Virginia's Department of Historic Resources).

help to ensure that architecturally significant buildings and not "properties of contemporary, faddish value"[178] will be designated.

2. An Architectural Landmark Review Commission ("ALRC") should be created to implement the program.

Following the NHPA guidelines for State Review Boards, the ALRC should contain at least five persons.[179] Because ALD status should be conferred solely on the basis of architectural merit, it is proposed that the ALRC be composed entirely of architects.[180] The minimum professional qualifications should include a professional degree in architecture, a state license to practice architecture, and at least two years of full-time professional experience in architecture.[181] In addition, the ALRC should be allowed to consult with any necessary expert or technical staff.

The ALRC would be an executive branch commission within a state's Department of Historic Resources (or its equivalent) and at the same organizational level as the state's historic review board.[182] While appointment to the ALRC would be made by the governor, the governor should appoint those persons who are nominated by the state chapter of the American Institute of Architects ("AIA").[183] Involving the state chapter of the AIA in selecting the ALRC will help both to insure that the ALRC remains non-partisan and to ensure the knowledge and expertise of the ALRC's members. To provide diversity of opinion, no more than two members of the ALRC should come from the same geographic region of the state.

Though terms of appointment will vary between states, appointments should be staggered so that the ALRC always contains a mixture of newer and older members. Furthermore, following New York City's Landmarks Commission, members of the ALRC should serve without compensation, although they should be reimbursed for expenses incurred in the performance of their duties.[184]

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178 SHERFY & LUCE, *supra* note 91, at 1.

179 36 C.F.R. § 61.4(e)(1) (1995).

180 In addition to the architect members, the SHPO should also be a member of the ALRC to provide coordination with the state's overall preservation policy.

181 These qualifications are based on 36 C.F.R. part 61, app. A.

182 In Virginia, for example, the ALRC would be located within the Department of Historic Resources and would be distinct from but co-equal to the Board of Historic Resources.

183 Authority for requiring a governor to consult with non-governmental groups can be placed in a state's code. *See, e.g.*, VA. CODE ANN. § 10.1-2203(B) (Michie 1993) (requiring the Governor to consult with non-governmental organizations when making selections to Virginia's Board of Historic Resources); *see also* KING COUNTY, WASH., CODE § 20.62.030(A)(2) (1994) (allowing county executive to solicit nominations for landmarks commission from the Seattle chapter of the AIA).

184 *See* N.Y. CITY, N.Y., CHARTER § 3020(3) (1994).

3. Nominations for ALD should be able to be made by the owner or architect of a building as well as the ALRC.

Some preservation laws place the responsibility of nominating properties for landmark status solely with the appropriate commission.[185] Others allow other persons to nominate buildings.[186] An ALD program should follow the latter group and allow owners and architects of architecturally significant buildings to nominate their buildings to the ALRC for ALD status. By increasing the number of persons who can nominate, the pool of potential landmark buildings increases, thereby helping to improve the overall quality of those buildings selected. Furthermore, knowing that they can nominate their own building for landmark status, owners and architects might engage in greater architectural creativity, encouraging "public architectural 'statements' of imagination and drama."[187] In addition, some commentators argue that architects, as artists, have a moral right to protect their work from alteration;[188] allowing architects to nominate their buildings for landmark status, then, would aid in the protection of this right.

4. An ALD program should have an affirmative goal of protecting modern buildings.

One of the major shortcomings of most preservation laws is that they are directed primarily at preserving historic, "old" buildings.[189] Therefore, legislation establishing an ALD program should contain, in its purpose and goals section or preamble, an affirmative statement that the goal of an ALD program is to protect modern buildings from premature alteration or destruction. Furthermore, this statement can include *additional* language that protection of modern buildings is necessary for the effective protection and preservation of historic buildings and that protection of modern buildings serves to enhance the economic, cultural, aesthetic, and general welfare of the state. Such additional statements may be necessary in states where "aesthetics-only" legislation is still deemed unconstitutional and non-aesthetic purposes are re-

185 *See, e.g.*, 36 C.F.R. § 60.6(a) (SHPO is responsible for nominating properties to the National Register); 16 U.S.C. § 470a(a)(4) (persons may nominate properties to National Register directly only when their state does not have an approved state program); N.Y. CITY, N.Y., ADMIN. CODE § 25-303 (1994) (Landmarks Commission has responsibility of nominating buildings for landmark status).

186 *See, e.g.*, KING COUNTY, WASH., CODE § 20.62.050(A) (1992) (allowing any person to nominate); S.F., CAL., MUN. CODE § 1004.1 (allowing owners to initiate designation).

187 Rose, *supra* note 25, at 501-02.

188 *See generally* Gerstenblith, *supra* note 5.

189 *See supra* part III.C.7.

quired in order to validate an ALD program.[190]

5. Selection criteria for nominated buildings should be based upon architectural merit.

The ALD program is designed to protect architecturally significant modern buildings from destruction and alteration; therefore, only architectural merit should be considered when deciding whether a proposed building be designated an architectural landmark. A standard of "architectural significance" would suffice to separate the wheat from the chaff.[191] Such a standard need not be an amorphous "I know it when I see it" standard either. This Article recommends the use of a standard recently promulgated in an article in *Architectural Record*:

> To qualify as a candidate, a building would need to be rated against its underlying architectural principles—for example, the machine-made look sought by the Modernists—the significance of its architect, the functional and economic drivers (e.g. the inherent obsolescence of an investment commercial structure vs. the long-term life of a museum), and the physical context.[192]

Such a standard provides discrete criteria on which the ALRC can rely when deciding whether a proposed building should be classified as an ALD. Furthermore, this standard is no more vague then existing historic preservation criteria such as whether a building is "an outstanding work of a designer or builder,"[193] whether a building has "a special character or special historical or aesthetic interest or value,"[194] and whether a building "possess[es] high artistic values."[195]

6. There should be no age limit requirement to an ALD.

In order to truly protect modern buildings, this criterion must be incorporated into the ALD program. Age limit requirements are a slippery slope. The justification for even a short limit, such as five or ten years, can easily be used to justify longer limits such as

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190 *See supra* part II.B.

191 The AIA has successfully implemented this standard in many of its national and statewide design awards. For example, the "Test of Time Award," offered by the Virginia Society of the AIA, recognizes the lasting value of "good architectural design." VIRGINIA ARCHITECTS HANDBOOK 13 (Phyllis M. Laslett ed. 1993). The only other criteria are that the building be at least 25 years old and function "in essentially the manner originally designed." *Id.*

192 *The Care and Nurturing of 20th-Century Landmarks*, ARCHITECTURAL RECORD, Feb. 1995, at 66.

193 KING COUNTY, WASH., CODE § 20.62.040(A)(5).

194 N.Y. CITY, N.Y., ADMIN. CODE § 25-302(n).

195 36 C.F.R. § 60.4 (1995), National Register criteria for evaluation.

forty or fifty years. Thus, if an age limit requirement is set, even if it is only five or ten years, the whole purpose of ALD legislation—to protect architecturally significant modern buildings—will be lost. "You cannot save the buildings of Le Corbusier and Louis Kahn to guidelines formulated by John Ruskin."[196]

7. The ALRC should allow an opportunity for public comment before acting upon a nomination for ALD status.

The Fifth and Fourteenth Amendments to the U.S. Constitution state that no person shall be deprived "of life, liberty, or property, without due process of law."[197] The touchstones of due process are notice and the opportunity to be heard.[198] Accordingly, any ALD program must at least give notice to the owner of a nominated building of such nomination, as well as an opportunity to oppose it. Furthermore, any interested party should also be allowed an opportunity to support or oppose a nomination. A public hearing would also be required before the ALRC could act upon a request for a certificate of appropriateness or termination of landmark status.

At such public hearings, interested parties would be allowed to present both oral and written testimony to the ALRC and such testimony would then become part of the public record. Furthermore, if the ALRC was relying upon any expert studies or reports, such reports should be made available, as part of the public record, prior to the hearing to allow parties an opportunity to respond.

8. Decisions of the ALRC should be reviewable by a court of competent jurisdiction.

Requiring that ALRC decisions be reviewable in court creates a structural check to insure that decisions are not made arbitrarily. Of course, each state has its own unique court system, and therefore each state must determine which court has jurisdiction to hear appeals from the ALRC, although the court chosen should at least be a court of record.[199]

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196 *The Care and Nurturing of 20th-Century Landmarks*, *supra* note 192, at 66.

197 U.S. CONST. amend. XIV, § 1; *see* U.S. CONST. amend V, § 1 ("nor shall private property be taken for public use, without just compensation").

198 JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.8, at 525 (4th ed. 1991).

Another essential element of procedural due process is a fair and unbiased decisionmaker. *Id.* Accordingly, any members of the ALRC who own or designed a building that comes up for review would be required to recuse themselves from any decision regarding such a building.

199 In Virginia, for example, an appeal of an ALRC decision should be heard in either

The ALRC will include some of the best and brightest architects in the state. Their decisions will be made after a public hearing and will supported by a public record. Therefore, ALRC decisions should be treated as administrative actions and should be reviewed solely to determine whether they are rationally based or arbitrary and capricious.[200] It is intended that the ALRC will achieve a reputation for expertise and integrity sufficient to warrant the same great deference given by reviewing courts to decisions by the New York City Landmarks Commission.[201]

9. An ALD should be temporary in duration.

The goal of an ALD program is to protect a building considered to be architecturally significant from alteration until such time as the building comes within the scope of existing historic preservation legislation. An ALD, therefore, could last no more than fifty years.[202]

The intention of the ALD is to protect modern buildings until they come under the protection of existing historic preservation legislation. Therefore, decisions by local, state, or federal historic preservation commissions or officers would trump ALRC decisions. If a landmarks commission refused to designate an ALD building as a landmark under that jurisdiction's preservation ordinance for any reason other than the building's young age, then ALD status would be automatically removed. The owner would then be free to do as she pleased with the building. If the landmarks commission designated the building a landmark, the ALD status would still be automatically removed, but the building would now be protected under that jurisdiction's preservation law, and would no longer need protection from the ALD program.[203]

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the supreme court, the court of appeals, or the circuit courts but not in the general district courts.

200 This is the standard of review courts give the New York City Landmarks Commission. N.Y. C.P.L.R. § 7803(3) (McKinney 1994) (limiting judicial review to whether administrative decision is arbitrary and capricious). *See, e.g., Gilbert*, 575 N.Y.S.2d at 841. This is also the standard of review for federal agencies under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1988). *See, e.g.*, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

201 *See, e.g.*, N.Y. C.P.L.R. § 7803(3); *Shubert Org.*, 570 N.Y.S.2d at 507 (noting that the Landmarks Commission is deserving of great deference because of its expertise).

202 This is the age when the building becomes eligible for the National Register. *See supra* part III.A.

203 A state, of course, would be free to allow the title of Architectural Landmark to remain on a building subsequently designated an historic landmark. The main point is that protection would come from the relevant jurisdiction's preservation ordinance and not from the state's ALD program. Authority to approve or deny certificates of appropriateness, for example, would pass from the ALRC back to that jurisdiction's landmarks commission.

Furthermore, ALD status is based upon a building's being architecturally significant and thus worth protecting. Therefore, an owner of an ALD building should be allowed to petition the ALRC for a termination of ALD status.[204] A petition to terminate ALD status should have the same procedural requirements of notice, public hearing, and judicial review of the ALRC decision.[205]

10. The owner of a designated building should receive some form of just compensation.

Compensating the owner serves two purposes. First, compensation provides an incentive for owners to seek out or support ALD nomination of their building. Second, compensation removes the likelihood that individual designations will be held to be a "taking" under the Fifth Amendment.[206]

Compensation should take the form of favorable tax treatment, under state taxation law, for the owners of ALD buildings. Since most states provide favorable tax relief for properties designated as historic landmarks,[207] adoption of an ALD program would involve mostly amending applicable tax provisions to include ALD properties in the category of tax-favored properties.

However, for most states, favorable tax treatment is in the form of special tax assessments or tax credits for historic rehabilitation and restoration.[208] Since few modern buildings need rehabilitation or restoration, though, those favorable tax treatments do not transfer easily into an ALD program. Other states, however, provide favorable tax treatment without requiring rehabilitation or restoration.[209] Thus, an ALD program would require the adoption

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204 In the case where a landmarks commission would deny landmark status to an ALD building solely because of the building's age, an owner would need to petition the ALRC in order to terminate ALD status.

205 Although there should be no limitation on an owner's ability to petition for termination of ALD status, it is possible that owners may take advantage of that right by repeatedly filing such petitions in the hopes that the ALRC will "give in" and grant the petition. States should, therefore, consider methods to prevent such abusive and strategic behavior.

206 The Fifth Amendment states that private property shall not "be taken for public use, without just compensation." U.S. CONST. amend. V. The Takings Clause is made applicable to the states through the Fourteenth Amendment. Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 239 (1897).

Landmark laws, in general, have been held to not constitute a taking, thus most constitutional challenges are directed at individual landmarks decisions. *See supra* part II.B.

207 ZIEGLER, *supra* note 35, at 15-73.

208 *Id.*

209 In Oregon, properties designated as historic are assessed for 15 years at the same value as when application for historic classification was made. OR. REV. STAT. § 358.505(1) (1994). In North Carolina, historic properties are assessed at 50% of their true value. N.C. GEN. STAT. § 105-278 (1992). In the District of Columbia, where a historic property owner can show that her "use" value is less than the property's fair market value, the use value is used for tax purposes. D.C. CODE ANN. § 47-842 (1990). In California, historic properties

of similar provisions, modified so that both ALD and historic properties received tax-favorable treatment.

11. ALD should not be conditioned upon owner consent.

The issue of owner consent to landmark designation is a controversial topic.[210] In 1992, Virginia adopted a provision requiring owner consent before the Board of Historic Resources could designate a landmark.[211] Meanwhile in 1993, "Governor Barbara Roberts [of Oregon] vetoed legislation that would have required owner consent for . . . [historic] designation."[212]

An ALD program should not require owner consent for designation. Requiring consent would only serve to "undermine the police power objective of preserving historic resources"[213]—here the protection of architecturally significant modern buildings. Furthermore, it is not even certain whether owner consent legislation is constitutional or an unconstitutional delegation of authority to private individuals.[214]

12. ALD designation should trigger a requirement of a certificate of appropriateness before any modification can be undertaken.

Designation as a landmark, alone, does nothing to protect a building. An owner of an ALD building should be required to obtain a certificate of appropriateness before any alterations can be done to the designated building.

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are assessed based on the amount of income the property, as restricted, could earn and not based upon the income nearby, unrestricted properties could earn. CAL. REV. & TAX. CODE § 439.2 (West 1995).

210 *See generally* Julia Hatch Miller, *Owner Consent Provisions in Historic Preservation Ordinances: Are They Legal?*, 10 PRESERVATION L. REP. 1020 (1991).

211 1992 Va. Acts 801, *codified at* VA. CODE ANN. § 10.1-2206.2 (Michie 1993).

212 *Oregon Governor Vetoes Owner Consent Legislation*, 12 PRESERVATION L. REP. 1129 (1993).

213 Miller, *supra* note 210, at 1027.

214 *Id.* at 1020. The only case dealing with owner consent to historic designation was *Department of Land Conservation & Development v. Yamhill County*, 783 P.2d 16 (Or. Ct. App. 1989), *cited in* Miller, *supra* note 210, at 1037, in which the Oregon Supreme Court struck down an owner consent provision to landmark designation as violating the state's planning law.

More recently in *County of Fairfax v. Fleet Industrial Park Ltd. Partnership*, 410 S.E.2d 669 (Va. 1991), the Virginia Supreme Court invalidated a state law requiring county supervisors to get unanimous owner consent before enacting certain zoning regulations. Because the statute rendered the zoning board "powerless to enact zoning . . . regulations . . . even if it [is] reasonably determine[d] that they are necessary for the public welfare," the *Fleet* Court held that statute invalid as an impermissible delegation of legislative authority. *Id.* at 673. Given the Virginia Court's ruling it is unclear whether Virginia's recently adopted owner consent will be upheld. Supporters of the provision distinguish *Fleet* by noting that *Fleet* involved a delegation of legislative authority, whereas the historic preservation owner consent provision deals with delegation of administrative authority. *Virginia Adopts Owner Consent Legislation*, 11 PRESERVATION L. REP. 1068, 1069 (1992).

The procedure to obtain a certificate of appropriateness should be no different in the ALD context than in the historic preservation context. This would include allowing the owner to request such a certificate solely on the grounds of economic hardship. The only difference is that for an ALD building, the owner must petition the ALRC and not a local commission. Otherwise, a petition for a certificate of appropriateness should have the same procedural requirements of notice, public hearing, and judicial review of the ALRC decision.

13. As an alternative to the certificate of appropriateness method of protection, ALD designation should allow the owner to grant a temporary preservation easement to the ALRC.

Through the preservation easement the owner of an ALD building would retain ownership and possession of the building while granting the ALRC the authority to protect the architectural characteristics of the building.[215]

Preservation easements are typically perpetual in duration.[216] The granting of an easement to a government agency carries significant tax benefits. Typically, the assessment value of the property is reduced to reflect the market value of the encumbered property for state property tax purposes.[217] In addition, for federal income tax purposes, the granting of a qualified conservation easement allows the donor to take a charitable deduction for the value of the easement.[218]

However, for both federal and state tax purposes, the easement must be granted in perpetuity to the governmental agency to receive the tax benefits.[219] The ALD program, though, is designed to provide temporary protection. What is needed, then, is the creation of a temporary preservation easement carrying the same tax benefits as a traditional preservation easement without the requirement of perpetuity.

Creation of and eligibility for a temporary preservation easement serves as an alternative, albeit weaker, form of protection than the requirement of a certificate of appropriateness. ALD sta-

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215 *See* VISION AND CHOICE: PROTECTING OUR HISTORIC RESOURCES 1 (Va. Dep't of Historic Resources 1990).

216 Virginia's Board of Historic Resources, for example, only accepts preservation easements granted in perpetuity. *Id.* at 3.

217 *See, e.g.*, VA. CODE ANN. §§ 58.1-3205, 10.1-2207 (Michie 1993).

218 I.R.C. § 170(h) (1995).

219 I.R.C. § 170(h)(5)(A) (for federal tax purposes); *see, e.g.*, VA. CODE ANN. § 10.1-1011 (representative for state tax purposes).

tus under this alternative, instead of automatically placing restrictions on a building, would provide the owner of the building the opportunity to voluntarily assume the same restrictions. The owner of an architecturally significant building, desiring the tax benefits a preservation easement confers, would nominate her building to the ALRC for ALD status. The ALRC would undergo the same process for deciding whether to grant ALD status, including notice, public hearing, and the availability of judicial review.

If the ALRC granted ALD status, the owner would then be able to grant a temporary preservation to the ALRC. The easement would substantively provide the same protection against alterations as the certificate of appropriateness requirement would provide. The easement, however, would be temporary rather than perpetual; as soon as ALD status was removed, the easement would cease to exist.[220] Because the combined tax savings of ALD designation and the easement should provide a strong incentive for owners to nominate their buildings, the weakness of this alternative, in that it relies upon the voluntary cooperation of the building owner, should be overcome.

B. *Legality of ALD Legislation*

For the ALD program to work, it must be able to withstand challenge in court. Likely avenues of attack will be that ALD legislation: (1) is beyond the police power of the state; (2) violates due process; and (3) constitutes a taking. Though the ALD is a novel program, it should be able to withstand these court challenges.

ALD opponents would first try to argue that ALD legislation is principally aesthetics-only based regulation and is therefore beyond the police power of the state. However, a majority of states allow for aesthetics only regulation.[221] Even those states that do require a non-aesthetics public purpose do not invalidate legislation because it contains an aesthetics element.[222] Furthermore, the ALD program does have at its core the same goals as traditional preservation legislation—the protection and preservation of America's cultural heritage—which has been upheld against con-

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220 Valuation of a temporary easement might prove quite difficult, since it is uncertain at the outset how long the easement would last. One solution might be to carry over the amount of tax savings produced by the easement in a running account. Then, when the easement ceased to exist, the relevant taxing authorities could recover some portion of the carry-over. This solution is similar to the tax assessment treatment of historic properties in North Carolina. *See* N.C. GEN. STAT. § 105-278 (1995).

221 *See supra* part II.A.

222 *Id.*

stitutional challenge.[223] ALD legislation merely recognizes that true protection must begin when the building is built, not thirty or fifty years later.

ALD legislation should also be able to withstand due process challenges. First, the standard by which the ALRC determines whether a building should be designated is not so subjective that the ALRC would be vested with "untrammeled authority to compel individual property owners . . . to comply with whatever arbitrary or subjective views"[224] members of the ALRC might have. Rather, the proposed criterion provides a "general, yet meaningful, contextual standard"[225] to limit the discretion of the ALRC.

More important, however, are the numerous procedural safeguards built into the ALD program, including notice, public hearing, and judicial review of ALRC decisions. In upholding the City of Raleigh's historic preservation ordinance, the North Carolina Supreme Court noted the presence of similar procedural safeguards and commented that they "serve as an additional check on potential abuse of the Historic District Commission's discretion."[226]

Lastly, ALD legislation should survive a general challenge on the grounds that it constitutes a taking.[227] More importantly, individual decisions by the ALRC to designate specific buildings should also survive "takings" challenges. Most significant is the fact that owners receive just compensation, through tax relief, for having their buildings designated. Secondly, as was noted by the Court in *Penn Central*,[228] ALD status does not deprive the owner of all or most of the use of his building—it only limits the owner's unfettered discretion to alter or demolish her building, and then only for a temporary period of time. Further, the owner at all times has the ability to petition for a certificate of appropriateness based solely on economic hardship.

V. CONCLUSION

With over 1,000 local, state, and federal preservation laws in force, it is no longer in doubt that the preservation of our Nation's cultural and architectural heritage is necessary in promoting the

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223 *See, e.g., Penn Central*, 438 U.S. at 129; Maher v. City of New Orleans, 516 F.2d 1051, 1061 (5th Cir. 1975); A-S-P Assoc. v. City of Raleigh, 258 S.E.2d 444, 450 (N.C. 1979).

224 *A-S-P Assoc.*, 258 S.E.2d at 453.

225 *Id.* at 454.

226 *Id.* at 455.

227 The Supreme Court in *Penn Central* put to rest the issue that landmark regulation, in general, does not constitute a taking. *See supra* part II.B.

228 438 U.S. at 135-38.

general welfare of the country. The many architecturally significant modern buildings comprise an important component of our cultural and architectural heritage. Unfortunately, most of the existing preservation laws simply do not afford much (if any) protection for these young buildings. Thus, a large part of our evolving cultural heritage is in danger of being lost forever.

This Article advocates the creation of an Architectural Landmark Designation program as a means to protect this important aspect of our built environment. An architecturally significant modern building designated under an ALD program would be safe from indiscriminate alteration at least until it fell within the scope of traditional, existing preservation legislation.

While designation as an architectural landmark would not permanently bar the demolition or alteration of architecturally significant, modern buildings, such designation would at least require the current owner to receive prior governmental approval before doing so, which might make the owner stop and rethink what she is doing. Indeed, for many buildings this may be all that is necessary. An ALD program, then, can only serve to complement rather than to supplant existing legislation designed to preserve our architectural heritage and thereby to achieve "the best of our aspirations."[229]

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[229] Telephone Interview with Michel C. Ashe, *supra* note 1.