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J. Langdon Marsh

Albany Law School of Union University

Judith Green Simon

New York State Board of Equalization and Assessment

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THE PROTECTION OF HISTORIC RESOURCES IN NEW YORK STATE: AN OVERVIEW OF FEDERAL, STATE AND LOCAL LAWS

J. Langdon Marsh *
Judith Green Simon **

I. Introduction

The historic preservation movement has gained tremendous momentum in recent years. Although the term may conjure up images of national monuments and battlefields, historic preservation is one of the most significant tools available for community revitalization. Growing recognition of the economic benefits that historic preservation can bring to a community, coupled with the more traditional belief in preservation for its own sake, has focused the attention of federal, state and local government officials on the need for historic preservation statutes.¹

This Article explores the legal means available to protect historic resources in New York. Section II discusses steps taken by the federal government, primarily in the National Historic Preservation Act of 1966,² to protect historic resources from adverse impacts resulting from federal actions. Section III analyzes the New York State Historic Preservation Act of 1980,³ enacted to serve the same purpose on the state level that the 1966 Act serves on the federal level. In Section IV, the types of provisions generally found in local preservation ordinances throughout New York State are examined.

* Director, Government Law Center, Albany Law School of Union University. A.B. 1962, Harvard College; LL.B. 1966, Harvard Law School.

** Attorney, New York State Board of Equalization and Assessment, B.S.W. 1977, State University of New York at Albany. J.D. 1981, Albany Law School of Union University.

1. See Stipe, *Why Preserve?*, PRESERVATION NEWS, July 1972, at 5, reprinted in 11 N.C. CENT. L.J. 211 (1980). For recent historic preservation symposia, see 11 N.C. CENT. L.J. 195-393 (1980); 12 URB. LAW. 1-133 (1980). Other recent articles discussing historic preservation include Bauriedel, *Federal Historic Preservation Law: Uneven Standards for Our Nation's Heritage*, 20 SANTA CLARA L. REV. 189 (1980); Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473 (1981); Samuels, *After Penn Central: A Look Down the Tracks at Constitutional Taking*, 8 REAL EST. L.J. 230 (1980).

2. 16 U.S.C. §§ 470-470t (1976 & Supp. III 1979).

3. 1980 N.Y. Laws ch. 354 (codified at scattered sections of N.Y. GEN. MUN. LAW, N.Y. PARKS, REC. & HIST. PRESERV. LAW, and N.Y. PUB. BLDGS. LAW).

II. Protection of Historic Resources Under Federal Law

Congress has demonstrated an increasing awareness of the need to protect historic resources during the past two decades. In the National Historic Preservation Act of 1966,⁴ Congress recognized "that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development. . . ."⁵ With the enactment of a number of other statutes which require various departments of the federal government to give special treatment to historically significant property,⁶ Congress has begun to ensure that valuable historic resources will not be harmed by actions of the federal government.

A. The National Historic Preservation Act of 1966

1. *The National Register*

The National Historic Preservation Act of 1966 (1966 Act) authorizes the Secretary of the Interior to expand⁷ and maintain a National Register of "districts, sites, buildings, structures, and objects significant in American history, architecture, archeology and culture."⁸ Listing on the National Register does not impose any restraints upon private property interests, but is used instead as a planning tool to identify historic resources.⁹ Properties listed on or eligible for the National Register¹⁰ are afforded procedural protection from direct or

4. 16 U.S.C. §§ 470-470t (1976 & Supp. III 1979).

5. *Id.* § 470(b).

6. See notes 36-50 *infra* and accompanying text.

7. The 1966 Act was preceded by the Historic Sites, Buildings, and Antiquities Act of 1935, 16 U.S.C. §§ 461-467 (1976 & Supp. III 1979), which established a national policy to preserve the historic resources of national significance. The 1935 Act authorized the Secretary of the Interior to create the National Historic Landmarks Program and to list properties declared eligible for designation as National Historic Landmarks on a National Register of Historic Places. National Historic Landmarks are properties "which possess exceptional value as commemorating or illustrating the history of the United States," 36 C.F.R. § 65.2(b)(1) (1981), and "pertain to the development of the Nation as a whole rather than to the history of a single place or group of people," *id.* § 65.9(d). Under the 1966 Act, a property need not qualify as a National Historic Landmark to be included on the National Register of Historic Places. *Id.* § 60.2.

8. 16 U.S.C. § 470a(a)(1) (1976). Whether the property is "significant" under the 1966 Act may be determined according to national, state, or local standards. 36 C.F.R. § 60.2(a) (1981).

9. *Id.* § 60.2(c). *But see* *White v. Shull*, 520 F. Supp. 11 (S.D.N.Y. 1981), in which residents of the Village of Tuxedo Park, New York, for reasons not stated in the opinion, sought to remove the village from the National Register. The court dismissed the complaint because the plaintiffs had failed to exhaust their administrative remedies. *Id.* at 14-15.

10. See 36 C.F.R. § 60.6 (1981) for the criteria used to evaluate whether properties are eligible for the National Register.

indirect federal "undertakings"¹¹ that may have an adverse effect upon them.¹²

2. *The Advisory Council on Historic Preservation*

The 1966 Act also established the Advisory Council on Historic Preservation, an independent agency of the federal government.¹³ The statutorily mandated composition of the twenty-nine member Advisory Council ensures the representation of the possibly competing interests of various federal agencies, state and local governments, and private preservation advocates.¹⁴ The primary function of the council is outlined in section 106 of the 1966 Act.¹⁵ Section 106 requires federal agencies with direct or indirect jurisdiction over a planned project which may have an adverse impact on a historic resource to afford the Advisory Council a "reasonable opportunity" to comment before the plans are approved.¹⁶

Under the regulations promulgated to implement section 106,¹⁷ the federal agency, in consultation with the relevant State Historic Preser-

11. "Undertaking" is defined as "any Federal, federally assisted or federally licensed action, activity, or program or the approval, sanction, assistance, or support of any non-Federal action, activity, or program." *Id.* § 800.2(c). See *Save the Courthouse Comm. v. Lynn*, 408 F. Supp. 1323, 1338-39 (S.D.N.Y. 1975) (injunction issued to prevent the "undertaking" of demolishing the Westchester County Courthouse).

12. 16 U.S.C. § 470f (1976). *But see* *Cobble Hill Ass'n v. Adams*, 470 F. Supp. 1077 (E.D.N.Y. 1979), in which the court found that major repairs to a highway near districts listed on the National Register would not affect the districts enough to warrant an injunction.

13. 16 U.S.C. § 470i(a) (1976 & Supp. III 1979).

14. The twenty-nine members of the Advisory Council are: the Secretary of the Interior, the Secretary of Housing and Urban Development, the Secretary of Commerce, the Administrator of the General Services Administration, the Secretary of the Treasury, the Attorney General, the Secretary of Agriculture, the Secretary of Transportation, the Director of the International Communication Agency, the Secretary of Defense, the Secretary of Health and Human Services, the Chairman of the Council on Environmental Quality, the Chairman of the Federal Council on the Arts and Humanities, the Architect of the Capitol, the Secretary of the Smithsonian Institute, the Chairman of the National Trust for Historic Preservation, the President of the National Conference of State Historic Preservation Officers, and twelve citizens appointed by the President from outside the federal government, giving "due consideration to the selection of state and local government officials and individuals who are significantly interested and experienced in the matters to be considered by the Council." *Id.*

15. 80 Stat. 915, 917 (1966).

16. 16 U.S.C. § 470f (1976). The Advisory Council also is charged with advising the President and Congress on preservation matters and recommending measures to coordinate federal preservation activities. 16 U.S.C. § 470j(a) (1976).

17. 36 C.F.R. §§ 800.1-800.15 (1981).

vation Officer,¹⁸ identifies any property located within the proposed project's environmental impact area¹⁹ which is listed on or eligible for the National Register.²⁰ Next, the parties determine whether the proposed project will have an effect²¹ upon the property, and if so, whether that effect will be adverse.²²

If the federal agency or the Advisory Council's executive director finds that the effect will be adverse, the federal agency must request the Advisory Council to comment.²³ The federal agency, the State Historic Preservation Officer and the Advisory Council's executive director then consult "to consider feasible and prudent alternatives to the undertaking that could avoid, mitigate, or minimize adverse effects. . . ."²⁴ If more than one federal agency is involved, they may coordinate their consultation responsibilities through a single lead agency.²⁵ Until the Advisory Council comments, good faith consultation precludes the federal agency from proceeding with the planned project.²⁶

If the consulting parties agree on a plan to either avoid, satisfactorily mitigate,²⁷ or accept²⁸ the adverse effect of the proposed project on a historic resource, they execute a memorandum of agreement. If they fail to agree on a plan, the full Advisory Council may meet to consider the proposed project and issue written comments to the

18. State Historic Preservation Officers serve as liaisons with federal agencies for purposes of the 1966 Act. New York's State Historic Preservation Officer is the Commissioner of the Office of Parks, Recreation and Historic Preservation. The Deputy Commissioner for Historic Preservation of the Office of Parks, Recreation and Historic Preservation has characterized the National Register Program as a "federal-state partnership." Address by Ann Webster Smith, "Historic Preservation for Local Government" conference at the Government Law Center of Albany Law School at Union University (Mar. 7-8, 1980).

19. "Area of the undertaking's potential environmental impact" is defined as "that geographical area within which direct and indirect effects generated by the undertaking could reasonably be expected to occur and thus cause a change in the historical, architectural, archeological, or cultural qualities possessed by a National Register or eligible property." 36 C.F.R. § 800.3(o) (1981). The impact area's boundaries are determined by the federal agency in consultation with the State Historic Preservation Officer. *Id.*

20. *Id.* § 800.4(a).

21. *See id.* § 800.3(a) for listing of "Criteria of Effect."

22. *See id.* § 800.3(b) for listing of "Criteria of Adverse Effect."

23. *Id.* § 800.4(d).

24. *Id.* § 800.6(b).

25. *Id.* This section also provides for public participation in the consultation process.

26. *Id.* § 800.4(e).

27. *Id.* § 800.6(b)(5).

28. *Id.* § 800.6(b)(6). "Acceptance of Adverse Effect" occurs when the consulting parties "determine that there are no feasible and prudent alternatives . . . and agree that it is in the public interest to proceed with the proposed undertaking." *Id.*

federal agency.²⁹ The memorandum of agreement or Advisory Council comments are included in the final environmental impact statement prepared pursuant to the National Environmental Policy Act.³⁰

The federal agency, not the Advisory Council, makes the final decision on the proposed project, although the agency must take any Advisory Council comments "into account"³¹ if a memorandum of agreement has not been executed. Having complied with these procedural requirements, submission of a report to the Advisory Council of the agency's actions and their effect on historic resources constitutes evidence of section 106 compliance.³²

Although the Advisory Council does not have authority to prohibit federal projects that will have an adverse impact upon historic resources, most planned projects reviewed by the council move ahead with substantially greater sensitivity to historic values.³³ The section 106 process is most successful when initiated early in the proposed project's planning stages and a memorandum of agreement results.³⁴ Problems occur when for one reason or another a federal agency does not come into the process until it is too late in the planning stage for the section 106 consultation and the Advisory Council's comments to have much effect.³⁵

29. *Id.* § 800.6(b)(7).

30. *Id.* §§ 800.6(c)(2), 800.6(d)(5). One of the goals of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4361 (1976), is to "preserve important historic, cultural, and natural aspects of our national heritage . . ." *Id.* § 4331(b)(4). The Advisory Council's regulations direct federal agencies to ensure that historic resources are given proper consideration under NEPA by coordinating NEPA compliance with the separate responsibilities of the National Historic Preservation Act. 36 C.F.R. § 800.9 (1981). The § 106 consultation period should run concurrently with the NEPA review process. *Id.* Where both NEPA and § 106 are applicable, preparation of a draft environmental impact statement may fulfill the requirements for reports and documentation under § 106. *Id.* The threshold for compliance with § 106, however, is less than that for the preparation of an environmental impact statement. *Id.* Section 106 applies to any "Federal, federally assisted or federally licensed undertaking having an affect on a National Register or eligible property . . ." *Id.* Requirements for an environmental impact statement extend only to "major Federal actions significantly affecting the human environment." *Id.* Section 106 requirements must be complied with even when an environmental impact statement is not required. *Id.*

31. *Id.* § 800.6(d)(7).

32. *Id.*

33. Address by John M. Fowler, General Counsel, Advisory Council on Historic Preservation, "Historic Preservation for Local Government" conference at the Government Law Center of Albany Law School of Union University (Mar. 7-8, 1980). Mr. Fowler estimated that the Council reviews approximately 2,500 planned projects each year. *Id.*

34. *Id.*

35. *Id.*

B. Other Federal Statutes Promoting Historic Preservation

A number of other federal statutes serve to encourage the preservation of historic resources. The Department of Transportation, for instance, may not approve any project requiring the use of land from a national, state or local historical site unless there is no reasonable alternative to the use and every safeguard is observed to minimize harm to the site.³⁶ The Treasury Department is empowered to insure banks from losses on loans financing the preservation of certain "historic structures."³⁷ In order to better maintain some sites, Congress has authorized the conveyance to states and municipalities, without monetary consideration, of properties suitable as National Monuments.³⁸ Congress also has sought to ensure that surface mining operations³⁹ and federal construction projects⁴⁰ do not damage historically significant property.

Certain statutes protect only National Monuments and Historic Sites. The Administrator of General Services, for example, may not approve the demolition of a government building before receiving notice from the Department of the Interior that the building is not listed as "an historic building of national significance."⁴¹ Land within a National Park or Monument generally is exempt from use as a public airport,⁴² although the Secretary of the Interior may autho-

36. 49 U.S.C. § 1653(f) (1976). The policy of the statute is "that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites." *Id.* See also 23 U.S.C. § 138 (1976) (parallel statute dealing specifically with highways).

37. 12 U.S.C. § 1703(a) (1976 & Supp. IV 1980). The statute defines "historic structures" as "residential structures which are registered in the National Register of Historic Places or which are certified by the Secretary of the Interior to conform to National Register criteria" *Id.*

38. 40 U.S.C. § 484(K)(3) (1976) (permitting the conveyance of surplus property); 43 U.S.C. § 869-1 (1976) (permitting the conveyance of any suitable property).

39. 30 U.S.C. § 1272(a)(3)(B) (Supp. III 1979). Under this statute, a state agency regulating mining activities may designate an area as unsuitable for surface mining if the mining would "affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, and esthetic values" *Id.* See generally *In re Surface Mining Regulation Litigation*, 627 F.2d 1346 (D.C. Cir. 1980) (challenges to other sections of statute).

40. 16 U.S.C. § 469a-1 (1976) (providing for preservation activities whenever a federal agency discovers that a federal construction project "may cause irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data . . .").

41. 40 U.S.C. § 304a-2 (1976). The statute provides that whether the building is one "of national significance" is to be determined by the Historic Sites Act of 1935, 16 U.S.C. §§ 461-467 (1976 & Supp. III 1979), see note 7 *supra*. The statute should be amended to reflect the broader guidelines set by the National Historic Preservation Act of 1966, 16 U.S.C. §§ 470-470t (1976 & Supp. III 1979), see notes 7-35 *supra* and accompanying text.

42. 49 U.S.C. § 1723(c) (1976).

size airports in such areas if necessary.⁴³ Federally protected areas also may be subject to stricter air control standards.⁴⁴

The Internal Revenue Code contains an especially important provision relating to historic preservation.⁴⁵ Under the provision, effective January 1, 1982, investors receive a fifteen percent credit for "qualified rehabilitation expenditures"⁴⁶ on buildings at least thirty years old,⁴⁷ a twenty percent credit on buildings at least forty years old,⁴⁸ and a twenty-five percent credit on "certified historic structures."⁴⁹ Under a separate provision, owners of certified historic structures may not deduct expenses incurred or losses sustained on the demolition of such structures.⁵⁰

III. Historic Preservation Under New York State Law

A. The New York State Historic Preservation Act of 1980

1. Goals and Administration

The New York State Historic Preservation Act of 1980⁵¹ (1980 Act) is patterned after the 1966 Act.⁵² It recognizes that New York's

43. 16 U.S.C. § 7a (1976).

44. 42 U.S.C. §§ 7470(2), 7474(d) (Supp. III 1979). The purpose of the stricter air standards is "to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value" *Id.* § 7470(2).

45. I.R.C. § 46(a)(2)(F) (P-H 1981).

46. "Qualified rehabilitation expenditures" are defined as amounts properly chargeable as capital improvements for the rehabilitation of buildings at least 30 years old when at least 75% of the external walls are retained in the rehabilitation process. *Id.* § 48(g)(1)-(2). The definition does not include any of the costs of acquiring the building or any expenditure attributable to enlarging the building. *Id.* § 48(g)(2)(B)(ii)-(iii).

47. *Id.* § 46(a)(2)(F).

48. *Id.*

49. *Id.* "Certified historic structures" are defined as buildings which are listed on the National Register, or are "located in a registered historic district and [are] certified by the Secretary of the Interior to the Secretary [of the Treasury] as being of historic significance to the district." *Id.* § 48(g)(3)(A). The Code further provides that this tax credit need not be deducted from the basis of any "certified historic structure." *Id.* § 48(g)(5)(A).

50. *Id.* § 280B(a). The statute creates a rebuttable presumption, for the purposes of this section only, that any building located in a registered historic district is a certified historic structure. *Id.* § 280(B)(b).

51. 1980 N.Y. Laws ch. 354 (codified at scattered sections of N.Y. GEN. MUN. LAW, N.Y. PARKS, REC. & HIST. PRESERV. LAW, and N.Y. PUB. BLDGS. LAW). In approving the bill, Governor Carey stated:

cultural heritage is one of the state's most important "environmental assets" and that the forces of change threaten "irreplaceable properties" which should be preserved.⁵³ Accordingly, the 1980 Act makes it a public policy of the state to engage in a comprehensive program of historic preservation.⁵⁴ The purposes of this program are to promote the use, reuse, conservation, protection, enhancement and perpetuation of properties significant in the history, archeology, architecture and culture of New York, to encourage and assist municipal preservation programs, to foster civic pride, and to enhance the state's attractions to visitors.⁵⁵

Coordinating the state's preservation programs is the responsibility of the Commissioner of the Office of Parks, Recreation and Historic Preservation (Commission), who is New York's State Historic Preservation Officer for purposes of the National Historic Preservation Act of 1966.⁵⁶ The Commissioner receives advice from the state Board for Historic Preservation,⁵⁷ a body whose responsibilities and authority on

Last year I disapproved similar legislation (1979 Disapproval Memorandum No. 80) because of my concern with respect to a number of provisions contained there-in—particularly those mandating local expenditures, those enabling further erosion of the local tax base and those instituting a new review process which would largely duplicate the existing environmental quality review process [T]he instant bill responds to the concerns which I expressed last year.

1980 N.Y. Sess. Laws 1871 (McKinney). A letter representative of the more than 80 received by the Governor urging him to sign the bill stated:

Around the state the bill enjoys tremendous, broad-based, grass roots support The focus of the bill reflects and addresses the changes that have occurred over the past decade as historic preservation has been transformed from primarily a museum-related activity into an effective technique for the economic revitalization of cities, towns, and villages The policies and programs of the bill represent a fiscally responsible, cost effective, long range approach to preservation for state government [T]he bill does *not* call for an expensive program of direct state acquisition, development, and maintenance Instead, the bill encourages and supports preservation projects undertaken by local governments and by private individuals and organizations The bill does *not* regulate what owners may do with their properties. The bill is consistent with the Preservation League's belief that legislation controlling an owner's actions is most effectively administered at the local level by local government, not by state government.

Governor's Bill Jacket, 1980 N.Y. Laws ch. 354 (letter from Diana S. Waite, Executive Director, Preservation League of New York State (June 16, 1980)).

52. See notes 7-35 *supra* and accompanying text.

53. N.Y. PARKS, REC. & HIST. PRESERV. LAW § 14.01 (McKinney 1981).

54. *Id.*

55. *Id.* §§ 14.01(1)-14.01(5).

56. See note 18 *supra*.

57. N.Y. PARKS, REC. & HIST. PRESERV. LAW § 11.09 (McKinney 1981). The State Board for Historic Preservation is composed of the Commissioner of Education,

the state level echo those of the Advisory Council on the federal level. Each state agency⁵⁸ and municipality⁵⁹ must designate an officer to act as liaison with the Commissioner for the purpose of implementing and coordinating the statewide program,⁶⁰ as State Historic Preservation Officers do for the federal program.

2. *The State Register*

The Commissioner is directed to establish a State Register of historic places,⁶¹ which is a listing of "sites, districts, structures, buildings, areas or objects . . . significant in the history, architecture, archeology or culture of the state, its communities or the nation."⁶² The procedures and criteria established by the Commissioner for listing on the State Register must be consistent with those established for listing on the National Register,⁶³ and all places listed on or nominated by the Commissioner for inclusion on the National Register will be deemed to be listed on the State Register.⁶⁴

The State Register listings will indicate whether the historic resource is primarily of national, state or local significance.⁶⁵ Like the National Register, the State Register is to be used as a planning tool, not as a basis for regulation of private action. Any regulation of private action concerning historic resources will remain within the jurisdiction of local government.

The Commissioner also is directed to establish a statewide inventory of historic property.⁶⁶ This list includes all publicly and privately owned property which may qualify for nomination to the National Register or listing on the State Register and will be prepared with the

Commissioner of Environmental Conservation, Secretary of State, Chairman of the State Council on the Arts and eight members appointed by the Governor for four year terms. *Id.* § 11.03. The individuals appointed must meet the qualifications set forth in 36 C.F.R. §§ 61.4-.5 (1981) (a majority of the members must be recognized professionals in certain disciplines).

58. "State agency" is defined as "any state department, agency, board or commission of the state, or a public benefit corporation or public authority at least one of whose members is appointed by the governor." N.Y. PARKS, REC. & HIST. PRESERV. LAW § 14.03(11) (McKinney 1981).

59. "Municipality" is defined as "any county, city, town or village." *Id.* § 14.03(7).

60. *Id.* § 14.05(2).

61. *Id.* § 14.07(1).

62. *Id.* § 14.07(1)(a).

63. *Id.* § 14.07(1)(b). See note 10 *supra*.

64. N.Y. PARKS, REC. & HIST. PRESERV. LAW § 14.07(1)(a) (McKinney 1981).

65. *Id.* § 14.07(1)(g).

66. *Id.* § 14.07(2).

assistance of all agency and municipal preservation officers.⁶⁷ By maintaining a central inventory of all properties being considered for inclusion in the State Register, state agencies will be placed on notice that these properties probably meet the criteria for listing on the State or National Register. The effect of the inventory will be to trigger the review processes of the preservation statutes whenever state action is contemplated which may have an impact on a listed property.

3. Review Process

The notice and comment provision of the 1980 Act is patterned after section 106 of the 1966 Act. The state review process is activated whenever a state agency is planning a project⁶⁸ which may cause a change in the quality⁶⁹ of a "state historic resource," namely, a property listed on the National Register or eligible for the State Register. The review process also is triggered whenever a state agency is planning to demolish, alter or transfer any property under its jurisdiction that is listed on the statewide inventory.⁷⁰ The agency preservation officer must give notice to the Commissioner "[a]s early in the planning process as may be practicable"⁷¹ and prior to approval of the final plan.⁷² The Commissioner then reviews the plans and comments as to whether the proposed project will have an adverse impact⁷³ on any of the state's historic resources. If it is determined that

67. *Id.* § 14.07(2)(a). The Office of General Services is directed to maintain a similar listing, but has the option of using the statewide inventory prepared by the Office of Parks, Recreation and Historic Preservation to meet this requirement. N.Y. PUB. BLDGS. LAW § 62 (McKinney Supp. 1981-1982).

68. The Department of Environmental Conservation's recommendation to the Governor that he sign the bill was subject to correction of what the department considered a technical deficiency: "utilizing the word 'project' in § 14.09 . . . to describe the State's activities within the scope of the bill's review provisions . . . '[P]roject' remains undefined . . . It would be inappropriate for the regulations rather than the statute itself to set forth the jurisdictional predicate represented by the term 'project'." Governor's Bill Jacket, 1980 N.Y. Laws ch. 354 (memorandum from Richard A. Persico, Department of Environmental Conservation (June 21, 1980)).

69. N.Y. PARKS, REC. & HIST. PRESERV. LAW § 14.09(1) (McKinney 1981).

70. N.Y. PUB. BLDGS. LAW § 63(1) (McKinney Supp. 1981-1982).

71. N.Y. PARKS, REC. & HIST. PRESERV. LAW § 14.09(1) (McKinney 1981).

72. *Id.*

73. The statute sets forth guidelines to use in determining whether an adverse impact will occur:

Generally, adverse impacts [upon state historic resources] occur under conditions which include but are not limited to (a) destruction or alteration of all or part of a property; (b) isolation or alteration of its surrounding environment; (c) introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting; or (d) neglect of property resulting in its deterioration or destruction.

an adverse impact will occur, the Commissioner notifies the agency and works with it to examine alternatives.⁷⁴ The agency must “fully explore . . . alternatives and give due consideration to feasible and prudent plans which avoid or mitigate adverse impacts”⁷⁵ on state historic resources.

Mandatory exploration of alternatives is designed to prevent state agencies from unnecessarily harming historic properties when other alternatives are available. The situation described in *Montgomery v. State*,⁷⁶ illustrates the problem that the 1980 Act’s review process is intended to avoid. In *Montgomery*, New York State was temporarily enjoined from demolishing a row of late nineteenth century townhouses within an area designated as an historic district by the New York City Landmarks Preservation Commission.⁷⁷ The state sought to construct a new narcotics addiction treatment facility and argued that a state statute,⁷⁸ “designed to expedite the attempts to build facilities rapidly and to cut through all possible red tape,”⁷⁹ precluded the city through its landmarks preservation commission from interfering in any way with the plan.⁸⁰ Portions of the opinion clearly demonstrate the need for the mandated consultation process:

It has been suggested that there might be possible alternatives to the proposed demolition and construction on Mount Morris Park West. Both the community and the Landmarks Preservation Commission would be satisfied if the facades of the existing buildings were left undisturbed, while the interiors were used for narcotics rehabilitation programs. . . . The State has steadfastly refused to consider such possible alternatives, and when this court suggested on oral argument that a conference to consider alternatives might be productive, such a suggestion was flatly refused. The representa-

Id. § 14.09(1). These conditions constituting an adverse impact on state historic resources are virtually identical to the criteria of adverse effect on National Register properties, except that the federal regulations have one additional criterion: “transfer or sale of property without adequate conditions or restrictions regarding preservation, maintenance or use,” 36 C.F.R. § 800.3(b) (1981). Nevertheless, under the Public Buildings Law, proposed transfers of state-owned state historic resources trigger the state review process. Therefore, the omission of this criterion from the State Act is of minimal significance. See note 70 *supra* and accompanying text.

74. N.Y. PARKS, REC. & HIST. PRESERV. LAW § 14.09(2) (McKinney 1981).

75. *Id.* § 14.09(1).

76. 69 Misc. 2d 127, 328 N.Y.S.2d 189 (Sup. Ct. N.Y. County 1972), *aff’d*, 43 A.D.2d 552, 349 N.Y.S.2d 719 (1st Dep’t 1973), *appeal dismissed*, 33 N.Y.2d 1008, 353 N.Y.S.2d 967, 309 N.E.2d 429 (1974).

77. 69 Misc. 2d at 135, 328 N.Y.S.2d at 198.

78. The Health and Mental Hygiene Facilities Improvement Act, § 9(1)(e), 1968 N.Y. Laws ch. 359 (amended 1969).

79. 69 Misc. 2d at 131, 328 N.Y.S.2d at 194-95.

80. *Id.* at 132, 328 N.Y.S.2d at 195.

tive of the Attorney-General's office said, 'We have a statute, and we don't have to talk to anybody!'⁸¹

The 1980 Act places a substantive mandate upon state agencies, in that "[t]o the fullest extent practicable, it is the responsibility of every state agency . . . to avoid or mitigate adverse impacts"⁸² on state historic resources. Each agency must provide for the maintenance of state historic resources under its jurisdiction.⁸³ Additionally, agencies must, "[t]o the fullest extent practicable, secure by preservation restriction" any state historic resources sold or transferred by the state.⁸⁴ The term "preservation restriction" is not defined by the statute, but apparently refers to placing restrictive covenants in the deeds requiring the buildings to be preserved.⁸⁵ The agencies also must cooperate with the purchasers and transferees in developing "viable plans to use such property in a manner compatible with preservation objectives."⁸⁶

The statute seeks to avoid inconsistency and duplication of review functions. If a state agency files a draft environmental impact statement with the Department of Environmental Conservation⁸⁷ on a proposed project that may affect a state historic resource, a copy must be provided to the Commissioner of the Office of Parks, Recreation and Historic Preservation and the State Board, and the agency must supply any further information requested.⁸⁸ Furthermore, when a

81. *Id.* at 131, 328 N.Y.S.2d at 194.

82. N.Y. PARKS, REC. & HIST. PRESERV. LAW § 14.09(2) (McKinney 1981).

83. N.Y. PUB. BLDGS. LAW § 63(2) (McKinney Supp. 1981-1982).

84. *Id.* § 63(4).

85. This tool already has been used by the state. As was recommended by the Historic Albany Foundation, four historic mansions in Albany owned by the state were auctioned with covenants in the deeds requiring the buildings to be preserved. Address by Louise McAllister Merritt, Director of Historic Albany Foundation, "Historic Preservation for Local Government" conference at the Government Law Center of Albany Law School of Union University (Mar. 7-8, 1980).

86. N.Y. PUB. BLDGS. LAW § 63(5) (McKinney Supp. 1981-1982).

87. Under the State Environmental Quality Review Act (SEQRA), all state and local agencies must prepare an environmental impact statement "on any action they propose or approve which may have a significant effect on the environment." N.Y. ENVIR. CONSERV. LAW § 8-0109(2) (McKinney Supp. 1981-1982). Once an environmental impact statement is prepared, it becomes part of the agency's decision-making process and the agency may decline to proceed with action based on the statement. *Id.* §§ 8-0109(5)-(8).

88. N.Y. PARKS, REC. & HIST. PRESERV. LAW § 14.09(1) (McKinney 1981). The Department of Environmental Conservation recommended to the Governor that the bill be amended to "clarify the relationship between the review authority of the commissioner of OPR created by the bill and the existing review procedures for State agency actions under SEQRA," by using the same language in regard to SEQRA that is used in regard to the section 106 process. Governor's Bill Jacket, 1980 N.Y. Laws ch. 354 (memorandum from R. Persico, Department of Environmental Conservation (June 21, 1980)).

proposed project is being reviewed pursuant to section 106 of the 1966 Act,⁸⁹ the state review and comment procedures will not apply; any review or comment by the commissioner and the State Board must be within the framework of section 106.⁹⁰

4. Implementation of Review Process

The 1980 Act's review process is stronger than that of the 1966 Act it is patterned after because it imposes a substantive mandate on state agencies to avoid or mitigate adverse impacts on historic resources "to the fullest extent practicable."⁹¹ The 1966 Act does not impose any such substantive mandate upon federal agencies. The equivocal language in the 1980 Act, however, provides a loophole as well as flexibility, and the success of the act in carrying out its stated goals will depend largely on how the act is interpreted and fleshed out by regulations⁹² and in practice.

The participants in the section 106 process are the Advisory Council's executive director, the Advisory Council, the State Historic Preservation Officer, and the federal agency involved.⁹³ Their counterparts in the state scheme are the Commissioner of the Office of Parks, Recreation and Historic Preservation, the State Board, the municipal preservation officer, and the state agency involved.⁹⁴

The success of the state review process will depend on aggressive implementation of the 1980 Act by the Commissioner and the State Board. It also will depend on how sincerely municipalities intend to preserve threatened historic resources. Communities will have to balance the benefits that a proposed state project, such as a road in a specific location, will bring to the locality, against preserving an historic resource.

5. Housing State Agencies in Historic Buildings

The 1980 Act directs the Commissioner of the Office of General Services to maintain long-range projections for the building needs of state government.⁹⁵ The Commissioner of Parks, Recreation, and Historic Preservation must maintain a list of state historic resources which the owners have indicated are available for purchase or lease by

89. See notes 15-32 *supra* and accompanying text.

90. N.Y. PARKS, REC. & HIST. PRESERV. LAW § 14.09(2) (McKinney 1981).

91. *Id.*

92. Historic Preservation Regulations of the Office of Parks, Recreation and Historic Preservation (to be codified at [1982] 9 N.Y.C.R.R. §§ 426-28).

93. See notes 23-25 *supra* and accompanying text.

94. N.Y. PARKS, REC. & HIST. PRESERV. LAW § 14.09 (McKinney 1981).

95. N.Y. PUB. BLDGS. LAW § 64(1) (McKinney Supp. 1981-1982).

state agencies,⁹⁶ and both commissioners, in consultation with the State Board and municipal preservation boards and commissions, identify those buildings that "would be suitable, whether or not in need of repair, alteration or addition, for purchase or lease to meet the public building needs of state government."⁹⁷ State agency heads must give "first priority"⁹⁸ to utilizing these buildings "unless such space would not prove feasible, compatible with the intended operation of state business and prudent compared with available alternatives."⁹⁹

This creative device demonstrates the state's commitment to preservation. By using historic buildings rather than resorting to new construction for its needs, the state will save energy,¹⁰⁰ provide a use for old buildings, necessarily maintain them, and contribute to the revitalization of the areas where these structures are located.¹⁰¹ In addition, the state is setting an example for the private sector and municipal governments to follow.

6. Powers Given to Local Governments

The 1980 Act amended the General Municipal Law to encourage local government preservation programs by "clarifying and amplifying existing authority and providing necessary tools for such purpose."¹⁰² These amendments are entirely permissive—they do not mandate any local action.¹⁰³

Local governments are invited to prepare a local historic preservation report¹⁰⁴ and submit it to the Commissioner of the Office of Parks, Recreation and Historic Preservation within two years of the effective date of the statute.¹⁰⁵ The report may include, but is not

96. *Id.* § 64(2); N.Y. PARKS, REC. & HIST. PRESERV. LAW § 14.07(2)(d) (McKinney 1981).

97. N.Y. PUB. BLDGS. LAW § 64(1)(b) (McKinney Supp. 1981-1982).

98. *Id.* § 64(3).

99. *Id.*

100. "Rehabilitation requires much less expenditure of energy than new construction and provides a way of upgrading to present energy standards." Governor's Bill Jacket, 1980 N.Y. Laws ch. 354 (letter to Governor Carey from the New York Society of Architects (June 25, 1980)).

101. "Rehabilitation of these buildings can spark private development projects and investment in surrounding blocks. Because preservation projects are labor intensive, they have an important multiplier effect upon the local economy. . . ." Governor's Bill Jacket, 1980 N.Y. Laws ch. 354 (letter to Governor Carey from Diana S. Waite, Executive Director, Preservation League of New York State (June 16, 1980)).

102. N.Y. GEN. MUN. LAW § 119-aa (McKinney Supp. 1981-1982).

103. This factor was important to Governor Carey. *See* note 51 *supra*.

104. N.Y. GEN. MUN. LAW § 119-cc(1) (McKinney Supp. 1981-1982).

105. The act was signed into law June 25, 1980 and became effective sixty days later.

limited to, a statement of the municipality's preservation and land use regulations, proposals for the preservation and use of its historic cultural properties, and an analysis of problems or issues relating to the effectiveness of local development or administration of historic preservation plans.¹⁰⁶ "The purposes of such report are informational and compliance by a reporting jurisdiction shall not be used . . . as a condition for the performance of any state service, assistance or other action."¹⁰⁷

The amendments to the General Municipal Law consolidate the powers of local governments to promote historic preservation,¹⁰⁸ but the powers and tools provided already have been used by various localities. By including them as part of the 1980 Act's comprehensive preservation plan, however, the state makes it easier for local governments to legislate and regulate the preservation of historic landmarks and districts.¹⁰⁹ There was ample enabling authority in New York State for any local government to enact preservation controls and incentives prior to the enactment of this legislation. General Municipal Law section 96-a,¹¹⁰ enacted in 1968, had been considered the broadest and most important source of authority for local preservation controls.¹¹¹ Section 96-a is essentially recodified in the 1980 Act's amendments to the General Municipal Law.¹¹² This statute empowers counties, cities, towns and villages to provide for "the protection, enhancement, perpetuation and use of places, districts, sites, buildings, structures, work of art and other objects having a special character or special historical, cultural or aesthetic interest or

106. N.Y. GEN. MUN. LAW § 119-cc(1) (McKinney Supp. 1981-1982).

107. *Id.* § 119-cc(2). *Cf.* 36 C.F.R. § 61.7(c) (1981), a corresponding provision in the federal regulations that makes a state's eligibility to participate in the National Register and grants programs contingent on its submission of a satisfactory state historic preservation plan to the Secretary of the Interior.

108. The new article 5-K added to the General Municipal Law "would not affect existing local authority but would draw together and provide a consolidated restatement of existing authority for localities to develop and implement a historic preservation program." Governor's Bill Jacket, 1980 N.Y. Laws ch. 354 (New York State Assembly memorandum).

109. "Historic district" is defined as "any area which: (a) has a special character or special historic, architectural, archeological or cultural value; or (b) represents one or more periods or styles of architecture typical of one or more eras; and (c) causes such area, by reason of such factors, to constitute a distinct section." N.Y. GEN. MUN. LAW § 119-bb (3) (McKinney Supp. 1981-1982).

110. Two sections numbered 96-a were inadvertently enacted; the second one deals with preservation.

111. Address by James Coon, Principal Attorney, New York State Department of State, "Historic Preservation for Local Government" conference at the Government Law Center of Albany Law School of Union University (Mar. 7-8, 1980).

112. N.Y. GEN. MUN. LAW § 119-dd(1) (McKinney Supp. 1981-1982).

value."¹¹³ A unique provision permits reasonable control of the use or appearance of neighboring private property within public view, a useful tool for municipalities without zoning.¹¹⁴

The 1980 amendments to the General Municipal Law empower counties, cities, towns and villages to establish a board or commission with such powers as are necessary to carry out the municipality's preservation program.¹¹⁵ Furthermore, municipalities are empowered to acquire the fee or any lesser interest in historic or cultural properties within their jurisdiction. The effect of an acquisition under this statute on the value of the remaining private interest in the property is to be taken into account for purposes of real estate taxation.¹¹⁶

Municipalities also are empowered to purchase, restore, lease and sell historic structures under terms and conditions appropriate to ensure the maintenance of their historic qualities. A structure cannot be sold for less than the expenses incurred by the municipality with respect to the structure.¹¹⁷ This provision may be used to avoid the gentrification and displacement problems sometimes associated with historic preservation programs. A municipality could conceivably revitalize depressed areas by purchasing old, vacant structures at a low cost, restoring them, and selling them without profit to people already living in the neighborhood, perhaps with financial assistance from government funds.

Finally, municipalities are authorized to provide for the transfer of development rights.¹¹⁸ Development rights are the rights granted under a zoning ordinance or local law respecting permissible use, area, bulk or height of improvements.¹¹⁹ The transfer of development rights is the process by which development rights are passed

113. *Id.*

114. Address by James Coon, *see* note 111 *supra*.

115. N.Y. GEN. MUN. LAW § 119-dd(2) (McKinney Supp. 1981-1982).

116. *Id.* § 119-dd(3). These powers "should be of particular significance since they eliminate the necessity to interpret the 'open space' acquisition provisions of General Municipal Law, section 247 to fit preservation of structures or facades." Governor's Bill Jacket, 1980 N.Y. Laws ch. 354 (memorandum to Governor Carey from Charles E. Williams, III, New York State Department of State (June 23, 1980)).

117. N.Y. GEN. MUN. LAW § 119-dd(4) (McKinney Supp. 1981-1982). The Towns of Huntington and Islip already had this power. 1976 N.Y. Laws ch. 855; 1979 N.Y. Laws ch. 675. "While we have had some reservations concerning the legitimacy of the public purpose in such specific authorization in the past, the broad preservation policy of this bill should provide the necessary public purpose foundation for these powers." Governor's Bill Jacket, 1980 N.Y. Laws ch. 354 (memorandum to Governor Carey from Charles E. Williams, III, New York State Department of State (June 23, 1980)).

118. N.Y. GEN. MUN. LAW § 119-dd(5) (McKinney Supp. 1981-1982).

119. *Id.* § 119-bb(1).

from one lot or parcel to another.¹²⁰ This device already has been used to foster preservation goals by allowing the owner of an historic resource to sell unused development rights to another parcel within a specified area, thereby making it economically feasible for the historic resource to be maintained by removing pressure to develop it.¹²¹

B. Other State Statutes Promoting Historic Preservation

New York State has a number of other statutes designed to encourage the preservation of historic resources. Several statutes empower local governments to regulate the use of historically significant property.¹²² A property tax exemption is allowed for land held by unincorporated historical societies for purposes of preservation,¹²³ as is a sales tax exemption for admission proceeds collected at historic sites.¹²⁴ The Commissioner of Transportation may control roadside advertising near "sites of historical significance."¹²⁵ The Commerce Commissioner, in order to increase public awareness of New York State's historical resources, is authorized to compile and distribute information concerning places of historic interest within the state.¹²⁶

IV. Local Preservation Ordinances in New York State

With its thorough, 31-page opinion in the Grand Central Terminal case, the U.S. Supreme Court has settled the doubts that existed

120. *Id.* § 119-bb(6). Professor John Costonis developed the concept of "transfer of development rights." J. COSTONIS, *SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKET PLACE* (1974); Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 *YALE L.J.* 75 (1973); Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 *HARV. L. REV.* 574 (1972).

121. *See, e.g.*, Marcus, *Villard Preserv'd: or, Zoning for Landmarks in the Central Business District*, 44 *BROOKLYN L. REV.* 1 (1977). The U.S. Supreme Court discussed the value of transfer of development rights in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1977), finding that "[w]hile these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation." *Id.* at 137.

122. In addition to N.Y. GEN. MUN. LAW §§ 119-aa to dd (McKinney Supp. 1981-1982), *see* notes 112-14 *supra* and accompanying text, *see* N.Y. TOWN LAW § 64(17-a) (McKinney Supp. 1981-1982) (town board may exercise control over historic properties within the town, but any use of the police power "shall be reasonable and appropriate to the purpose . . ." and any taking of private property "shall provide for due compensation, which may include the limitation or remission of taxes."); N.Y. VILLAGE LAW § 7-700 (McKinney 1973) (village board empowered "to regulate and restrict certain areas as national historic landmarks, special historic sites, places and buildings for the purpose of conservation, protection, enhancement and perpetuation of these places of national heritage.").

123. N.Y. NOT-FOR-PROFIT CORP. LAW § 1408 (a) (McKinney 1970).

124. N.Y. TAX LAW § 116(d)(3)(C) (McKinney 1975).

125. N.Y. HIGH. LAW § 86 (McKinney 1979).

126. N.Y. COM. LAW § 100(15) (McKinney 1950).

about laws passed to save historic buildings. The decision in *Penn Central Transportation Co. v. City of New York* has given a status to historic preservation that can only come from a review of the controversy addressed by the Supreme Court.¹²⁷

In *Penn Central*,¹²⁸ the Supreme Court tackled the issue of "whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks—in addition to those imposed by applicable zoning ordinances—without effecting a 'taking' requiring the payment of 'just compensation'."¹²⁹ The Supreme Court answered in the affirmative,¹³⁰ upholding the landmarks preservation law adopted by New York City in 1965.¹³¹

Numerous localities in New York have adopted local preservation laws,¹³² and although most are not as elaborate as New York City's, they are all built on a common theme. A body is named to administer the ordinance, a survey and inventory of historic resources is undertaken, a mechanism for designating landmarks or historic districts is created, and certain controls are placed on owners' actions concerning the appearance and maintenance of the properties. Many variations of this common theme exist due to factors such as a locality's size, political climate, and the enabling authority under which the ordinance is enacted.

A. Statement of Legislative Intent

The various goals that municipalities expect to attain by adopting preservation ordinances are expressed in their statements of legislative

127. Gilbert, *A Legal Analysis: The Grand Central Case*, PRESERVATION NEWS, Aug. 1978, at 6, reprinted in PRACTISING LAW INSTITUTE, HISTORIC PRESERVATION LAW 168 (1979).

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

129. *Id.* at 107.

130. *Id.* at 138.

131. NEW YORK, N.Y., ADMIN. CODE ch. 8-A, §§ 205-1.0 to 207-21.0 (1976 & Supp. 1981). For New York cases holding that restrictions imposed by New York City's landmarks preservation law do not result in a taking, see *Society for Ethical Culture v. Spatt*, 68 A.D.2d 112, 416 N.Y.S.2d 246 (1st Dep't 1979), *aff'd*, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980); *Sailors' Snug Harbor v. Platt*, 29 A.D. 2d 376, 288 N.Y.S.2d 314 (1st Dep't 1968); *Manhattan Club v. Landmarks Preservation Comm'n*, 51 Misc. 2d 556, 273 N.Y.S.2d 848 (Sup. Ct. N.Y. County 1966). Cf. *Lutheran Church v. City of New York*, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7, (1974) (landmark designation of former mansion used by church experiencing economic hardship amounted to a taking).

132. See Robinson, *Municipal Ordinances for Historic Preservation in New York State*, N.Y.S.B.J., Jan. 1981, at 18; Robinson, *Historical Preservation Law in New York*, N.Y.L.J., Sept. 23, 1980, at 1, col. 1. The Preservation League of New York State, located in Albany, maintains a library of preservation ordinances adopted by municipalities throughout the state.

intent. Many of these provisions, especially in city ordinances, articulate the economic benefits that a preservation program can bring to a community.¹³³ Other ordinances are aimed solely at preserving the community's heritage.¹³⁴

B. Administration of Local Ordinances

1. *The Historic Preservation Commission*

In most municipalities, a preservation commission is established to administer the ordinance, although the task may be assigned to a pre-existing body such as a planning board.¹³⁵ The advantages of establishing a separate commission are that it will have more time and energy to devote to effectuating the goals of the preservation ordinance, and depending on the criteria for appointment to the commission, it can be shaped to provide expertise in the field of historic preservation.¹³⁶

The majority of ordinances set forth certain qualifications for commission members. These qualifications are described in terms of profession, experience and community representation. Typically, specified members include architects, lawyers, historians, planners, realtors and those qualified by their knowledge or interest in preserva-

133. See, e.g., ITHACA, N.Y., MUNICIPAL CODE § 32.2 (1971), in which three of the seven stated purposes of the city's landmarks preservation ordinance are to "[s]tabilize and improve property values," "[p]rotect and enhance the City's attractions to tourists and visitors and the support and stimulus to business thereby provided," and "[s]trengthen the economy of the City." *Id.* § 32.2(3), (5), (6).

134. See, e.g., Orangetown, N.Y., Local Law No. 4 (Dec. 28, 1965), which provides:

The Town Board of the Town of Orangetown hereby determines that a portion of the Town of Orangetown located in the Hamlet of Tappen is of such historic value by reason of places, buildings and other objects which relate to early colonial history of the Town of Orangetown and the County of Rockland, to the days of the American Revolution and to the early development of the Town of Orangetown and Rockland County in the era between the end of the American Revolution and the end of the Civil War; that such places, buildings and other objects should be protected by action of the Town Board. It is with this purpose and intent in mind that this local law is adopted.

135. See, e.g., PENFIELD, N.Y., CODE § 14-3 (1975) (Town Board authorized to create an "Historical and Historical-Architectural Review Board" to administer the ordinance); cf. Islip, N.Y., Planned Landmark Preservation Overlay District (Mar. 4, 1975) (amending local zoning ordinance to permit Planning Board, with the advice of the Historical Landmark Preservation Committee, to establish and oversee Landmark Preservation Overlay Districts).

136. Address by James Coon, see note 111 *supra*.

tion and local history.¹³⁷ Although some or all¹³⁸ of the members are required to be residents of the municipality and a place on the commission often is reserved for a resident of a designated historic district,¹³⁹ the ordinances provide for flexibility and community input into commission appointments. For example, the criteria for appointment may be relaxed if there would be a vacancy otherwise.¹⁴⁰ Some ordinances require the official or board making the appointments to the commission to solicit recommendations from particular community organizations.¹⁴¹

Most commissions have between five and nine members who serve three-year, overlapping terms.¹⁴² Appointments generally are made by the municipal legislative body in villages and towns,¹⁴³ and by the mayor with legislative approval in cities.¹⁴⁴ Vacancies which occur are filled by appointment of a new member having the same qualifications as the member being replaced and the new member serves the remainder of the unexpired term.¹⁴⁵ Members usually serve until the

137. *See, e.g.*, Troy, N.Y., An Ordinance Relating to the Establishment of an Historic District and Landmarks Review Commission § 2 (Oct. 2, 1975) (members to be appointed based on experience and profession, and "[e]ach member shall have displayed a working knowledge or interest in the field of historic preservation").

138. *See, e.g.*, Sea Cliff, N.Y., Local Law No. 1, § 2 (1965) (majority of five member Board to be residents of the Village of Sea Cliff); *cf.* Schenectady, N.Y., Ordinance No. 14221, § 6(2) (May 14, 1962) (all five members of the commission required to live in the City of Schenectady).

139. *See, e.g.*, POUGHKEEPSIE, N.Y., MUNICIPAL CODE § 19-56-b(b) (1979) (at least one member of the Historic District Commission, other than the city planning director, must be a resident of the historic district).

140. *See, e.g.*, Riverhead, N.Y., Landmarks Preservation Ordinance § 3B (May 6, 1975), which provides that its seven member Landmark Preservation Commission shall include at least three residents of the Town of Riverhead, one member of the New York State Bar, one architect, and one architectural historian, but that "[t]hese requirements may be waived where designated members are not available."

141. *See, e.g.*, Syracuse, N.Y., General Ordinance No. 11, § III(B) (Mar. 3, 1975) (six of nine members to be appointed by mayor from lists submitted by the Onondaga Historical Association, the Central New York Chapter of the American Institute of Architects, the Commission for the Conservation of the Environment, the Greater Syracuse Real Estate Board, and the Landmarks Association of Central New York).

142. *See, e.g.*, ITHACA, N.Y., MUNICIPAL CODE § 32.4(C) (1971) (commission to consist of seven members appointed for three year, overlapping terms); Schenectady, N.Y., Ordinance No. 14221, § 6(2) (May 14, 1962) (commission to consist of five members appointed for three-year, overlapping terms).

143. *See, e.g.*, PENFIELD, N.Y., CODE § 14-3(B) (1975) (members of preservation commission appointed by Town Board); Sea Cliff, N.Y., Local Law No. 1 § 2 (1965) (members appointed by village's Board of Trustees).

144. *See, e.g.*, ITHACA, N.Y., MUNICIPAL CODE § 32.4(B) (1971) (members of commission to be "appointed by the Mayor with the advice and consent of the Common Council"); Rye, N.Y., Local Law No. 6 § 7-5.3(B) (Oct. 5, 1977) (members to be "appointed by and serve at the pleasure of the Mayor and City Council").

145. *See, e.g.*, Bedford, N.Y., An Ordinance to Establish a Historic District in the Town of Bedford § 3 (Aug. 15, 1972).

appointment of a successor, but may be appointed to more than one term.¹⁴⁶ Commission members generally serve without compensation,¹⁴⁷ but may be reimbursed for actual expenses. Some ordinances provide that any member who has an interest in a pending matter may not take part in the commission's decisions.¹⁴⁸

2. Duties of the Commission¹⁴⁹

Local historic preservation commissions commonly have mandatory regulatory functions.¹⁵⁰ Many commissions also are empowered to

146. See, e.g., Kingston, N.Y., Local Law No. 114, § 1 (Mar. 24, 1972).

147. See, e.g., Poughkeepsie, N.Y., MUNICIPAL CODE § 19-56-b(c) (1979); Rye, N.Y., Local Law No. 6, § 7-5.3(B) (Oct. 5, 1977).

148. See, e.g., Southeast, N.Y., Ordinance 15 (Feb. 11, 1975), which states that "any member having any personal or financial interest in any matter pending before the Commission shall not participate in the Commission's deliberations or decisions." *Id.* § 3(b).

149. The language of the Town of Bedford's ordinance is typical of what the duties of a historic preservation commission are:

a. It shall be the duty of the Review Commission to maintain the character of the Historic District and to regulate construction of new buildings and the reconstruction, alteration and demolition of existing buildings, including outbuildings, walls, fences, steps and signs, to insure that such construction or alterations are compatible with that character. In maintaining the existing character of the Historic District, the Review Commission shall consider architectural style, materials, color and detail.

b. In addition to the aforementioned and subject to budgetary appropriation by the Town Board, the Review Commission shall have the following powers exercisable within the Historic District.

1. Retain or employ professional consultants, secretaries, clerks or other such personnel as may be necessary to assist the Review Commission in carrying out its duties.

2. Conduct surveys of buildings for the purpose of determining those of historic or architectural significance and pertinent facts about them.

3. Formulate recommendations concerning the preparation of maps, brochures, and historical markers for selected historic or architectural sites and buildings.

4. Cooperate with and advise the Town Board, the Planning Board, and other municipal agencies in matters involving historic or architectural sites and buildings.

5. Advise owners of historic buildings on problems of preservation and restoration.

c. The Commission, in exercising or performing its powers, duties or functions under this amendment with respect to any improvement in the District, may apply or impose, with respect to the construction, reconstruction, alteration, demolition or use of such improvement, a determination or conditions which are more restrictive than those prescribed or made by or pursuant to other provisions of law applicable to such activities, work or use.

Bedford, N.Y., An Ordinance to Establish a Historic District in the Town of Bedford § 4 (Aug. 15, 1972).

150. See, e.g., *id.* § 4(a).

make a variety of recommendations to both the municipality and local property owners.¹⁵¹ Cooperation between the local historic preservation commission and other municipal offices is essential because certain legal tools, such as transfer of development rights¹⁵² and adaptive reuse,¹⁵³ may be provided for elsewhere in a municipality's comprehensive plan, such as in a zoning ordinance.¹⁵⁴ Use of these tools to make it economically viable to maintain an historic structure requires a working relationship between the various municipal agencies involved. The adaptive reuse and preservation of the Villard Houses in New York City as part of a new high-rise hotel, for example, required the "intimate involvement" of both the New York City Landmarks Preservation Commission and the New York City Planning Commission.¹⁵⁵

The relationship between adaptive reuse provisions in a zoning ordinance and a preservation ordinance was discussed in *Foxluger v. Gossin*.¹⁵⁶ The case arose out of an amendment to the Town of Penfield's preservation ordinance which empowers the town board to issue a permit allowing a commercial use in a designated landmark structure located in a residential area.¹⁵⁷ When the town board issued a permit allowing an old mill located in a residential district to be used as a restaurant, the court discussed the relationship between the zoning and preservation ordinances: "In adopting the amendment to the 'Historical Preservation' ordinance, the town board in effect amended the zoning ordinance to permit the commercial use of a historical site. The zoning ordinance remained intact, but a commercial use, formerly prohibited, was now permitted in a residential district."¹⁵⁸ The court explained that whether the permit application

151. See, e.g., *id.* § 4(b).

152. See notes 118-21 *supra* and accompanying text.

153. Adaptive reuse refers to the preservation of an historic site by altering certain interior features of the site to serve a new purpose. See Marcus, *Villard Preserv'd: or, Zoning for Landmarks in the Central Business District*, 44 BROOKLYN L. REV. 1, 3 (1977).

154. See, e.g., NEW YORK, N.Y. ZONING RESOLUTION art. I, ch. 2, § 12-10 (1978), which permits property owners in New York City to use transfer of development rights on contiguous parcels on the same block. See generally Marcus, *Air Rights Transfers in New York City*, 36 LAW & CONTEMP. PROBS. 372 (1971). The need for cooperation was emphasized by Dorothy Miner, Counsel, New York City Landmarks Preservation Commission, "Historic Preservation for Local Government" conference at the Government Law Center of Albany Law School of Union University (Mar. 7-8, 1980).

155. Marcus, *supra* note 153, at 3.

156. 65 A.D.2d 922, 411 N.Y.S.2d 51 (4th Dep't 1978).

157. PENFIELD, N.Y., CODE § 14-7(H) (1977).

158. 65 A.D.2d at 922-23, 411 N.Y.S.2d at 52.

was characterized as an application for a variance, zone change, or special permit was irrelevant because the conditions of the preservation ordinance authorized the permit. It held that zoning was not the issue and, therefore, "[t]raditional zoning principles simply do not apply."¹⁵⁹

3. Designation of Landmarks and Historic Districts

Most preservation ordinances are designed to protect exterior landmarks or historic districts although some provide for the designation of interior¹⁶⁰ and scenic¹⁶¹ landmarks. Very few ordinances require the consent of property owners before a designation may be made. In the Town of Pound Ridge, however, the commission has the duty to "poll the owners of the property in the proposed district or of the proposed landmark or landmark site and shall not create the landmark, landmark site or Historic District without the approving vote of seventy percent of the owners of the affected properties."¹⁶² The consent provision in the City of Rye is even more restrictive, stating that no site or structure may be designated or included within a preservation district unless the owner files a written consent.¹⁶³

Consent provisions have only a limited value. Owners who consent to designation would preserve their historic properties even if there was no preservation ordinance. Conversely, ordinances with consent provisions may not protect historic properties whose owners are not so inclined. As is the case with purely advisory preservation ordinances,¹⁶⁴ however, consent provisions can serve as a first step for a

159. *Id.* at 923, 411 N.Y.S.2d at 53.

160. *See, e.g.*, NEW YORK, N.Y., ADMIN. CODE ch. 8-A, § 207-1.0(m) (1976); Syracuse, N.Y., General Ordinance No. 11, §§ II(D), V(A)-(B) (Mar. 31, 1975) ("[d]esignation of a Protected Site, may apply to the exterior only, or to the interior only, or to both").

161. *See, e.g.*, NEW YORK, N.Y., ADMIN. CODE ch. 8-A, § 207-1.0(w) (1976), which defines a "Scenic Landmark" as:

Any landscape feature or aggregate of landscape features, any part of which is thirty years or older, which has or have a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated a scenic landmark pursuant to the provisions of this chapter.

162. Pound Ridge, N.Y., Local Law No. 4, § 2-1 (Oct. 10, 1976). The statute further provides that "the owner or owners of each separately assessed parcel shall be entitled to but one vote notwithstanding that title may be held in joint ownership or tenancy in common, or similar multiple-party ownership." *Id.*

163. Rye, N.Y., Local Law No. 6, § 7-5.5(D) (Oct. 5, 1977).

164. *See, e.g.*, Waterford, N.Y., Resolution Creating Village of Waterford Historical Commission (Oct. 1976) (commission limited to advisory and promotional roles).

community which is wary of establishing a regulatory ordinance but wishes to establish a public policy favoring protection of historic places.

Procedures for designation in most regulatory ordinances are variations on a common theme.¹⁶⁵ Typically, the proposal for designation may be made by anyone—the property owner, any other person, group or association, or by the commission on its own initiative.¹⁶⁶ Notice of the proposed designation and a required public hearing is sent by mail to the property owner and also given by publication.¹⁶⁷ A public hearing is held by the commission, the planning board, or the municipality's legislative body.¹⁶⁸ If it is determined that the criteria specified for designation are met, the property is designated. Notice of designation is published and given to the property owner and specified municipal offices, such as the building department, and designation then may be entered on the zoning map.¹⁶⁹ A schedule setting time limits for completing the various steps is set out in the ordinance.¹⁷⁰ A provision of the ordinance may enable the removal of a designation by following the same procedures.¹⁷¹

The preservation ordinance may provide for a moratorium on the issuance of building permits for properties being considered for designation.¹⁷² Such provisions prevent owners of historic properties from

165. See, e.g., ITHACA, N.Y., MUNICIPAL CODE § 32.6 (1976).

166. *Id.* § 32.6(A).

167. See, e.g., Oyster Bay, N.Y., Landmarks Preservation Ordinance § 23-7(e) (Nov. 19, 1974).

168. See, e.g., Pound Ridge, N.Y., Local Law No. 4, § 2-2 (Oct. 10, 1976) (public hearing held by commission).

169. *Id.* § 2-3.

170. *Id.* §§ 2-2 to 2-3 (notice by publication of public hearing to be made at least 15 days in advance of hearing; designation to be made on official map of Town within 10 days of approval by commission).

171. *Id.* § 2-4, which provides, "A landmark, landmark site or Historic District may be amended or rescinded in the same manner as the original designation was made."

172. See, e.g., Riverhead, N.Y., Landmarks Preservation Ordinance § 8(a) (Sept. 16, 1975), which provides:

Upon receipt of notice that the Landmarks' Preservation Commission is considering a place, site, structure or building for designation as a landmark or landmark site or as part of an historic district, the Building Department and Town Clerk shall not issue any permit for the demolition, alteration or improvement of said place, site, structure, or building for a period of 120 days unless prior to the expiration of said period there is a final determination by the Town Board that said place, site, structure or building has not qualified as a landmark or landmark site, or as part of an historic district. If within said period the Town Board designated the property in question as a landmark or landmark site, or as part of an

immediately altering or demolishing them upon receiving notice that the commission is considering designation.¹⁷³ If the commission determines that the property does not meet the criteria for designation, the usual procedures of the building department are followed regarding the issuance of building permits.¹⁷⁴ If the property in question is designated, however, building permits can be issued only as provided for in the preservation ordinance.¹⁷⁵

C. Effects of Local Ordinances

1. Regulated Conduct

Local commissions typically review and regulate any proposed "material change of use or appearance"¹⁷⁶ of designated landmarks and properties located wholly or partly within the boundaries of historic districts. Their goal is to ensure that any such action taken by the owner is compatible with the existing character of the building or neighborhood and consistent with the policies set forth in the ordinance. In addition to activities such as alteration and demolition, the definition of "material change of appearance" in some ordinances includes any treatment which results in the covering of existing features.¹⁷⁷ The use of aluminum siding, for example, which hides the

historic district, no building permit shall be issued except pursuant to Article VI [permitting approved signs identifying landmarks] of this Ordinance.

173. *Id.*

174. *Id.*

175. *Id.*

176. *See, e.g.,* ITHACA, N.Y., MUNICIPAL CODE § 32.3(5) (1971), which defines "Material change of use or appearance" to include:

- a. Any change in the type of use of land or of a structure or memorial;
- b. Change or reconstruction or alteration of the size or external appearance of a structure or memorial;
- c. Change in the intensity of the use of land, such as an increase in the number of businesses, manufacturing establishments, offices or dwelling units in a structure;
- d. Demolition of a structure or memorial;
- e. Commencement of excavation;
- f. Deposit of refuse, waste or fill on land not already used for that purpose, or which extends the height of any existing deposit above the level of the land adjoining the site;
- g. Commencement of or change in the location of advertising on the external part of any structure; and
- h. Alteration of a shore, bank, or flood plain of a river, stream, channel or of any lake, pond or artificial body of water.

177. *See, e.g.,* Rye, N.Y., Local Law No. 6, § 7-5.2(F)(1) (Mar. 3, 1975) (defining "material change of appearance" to include "any treatment to a structure which results in a change in materials, texture, colors, bulk, mass, or any treatment by the

historic structures' exterior architectural features and makes it impossible to know whether they are deteriorating, is subject to control under these ordinances. Similarly, the use of sandblasting to clean brick and stone building exteriors was recently prohibited by the City of Albany.¹⁷⁸ Several ordinances have unique provisions geared to the specific goals that the municipality hopes to attain by enacting a preservation law.¹⁷⁹

One court has held that counties are subject to the preservation ordinances of local governments located within their boundaries. In *City of Ithaca v. County of Tompkins*,¹⁸⁰ a preliminary injunction was granted prohibiting Tompkins County from demolishing a county owned office building situated within an area designated as an historic district under the City of Ithaca's preservation ordinance.¹⁸¹ The court held that the county had to obtain a demolition permit from the city's preservation commission.¹⁸² The county was enjoined even though Ithaca's preservation ordinance provides that the city need only issue a "report"¹⁸³ prior to city action authorizing material changes to city-owned property located within an historic district.¹⁸⁴ Under *Tompkins*, therefore, a county may have to comply with a city's preservation ordinance procedures to a higher degree than the city itself.

addition, substitution or deletion of materials or fixtures, including such treatment which results in the covering of existing surfaces. . . .").

178. ALBANY, N.Y., HOUSING CODE § A603(b) (1979); ALBANY, N.Y., COMMERCIAL CODE § A201-1(b) (1979). Sandblasting is harmful to brick because it removes the crusty exterior, leaving the remainder susceptible to environmental damage. The Albany ordinance recently has been challenged as unconstitutional at local hearings. Times-Union (Albany, N.Y.), Mar. 9, 1982, at 2, col. 3.

179. The Village of The Branch, for example, has an unusual provision in its zoning law to establish and regulate the appearance and use of buffer zones. BRANCH, N.Y., ZONING LAW art. VIII, § 11 (1970). Properties in the historic district which adjoin property in any residential district are required to provide a landscaped buffer zone which is at least fifty feet in depth, consisting of trees and shrubs at least six feet in height and of sufficient density to effectively screen the historic district from the residential district. A six-foot high continuous Dubois-type fence anchored by galvanized posts set in concrete and fastened with stainless steel straps must be erected on the boundary line between the two districts. The owner of the property in the historic district is required to maintain the buffer zone, replacing the trees, shrubs and fences as the superintendent of buildings determines is necessary. *Id.* §§ 11(a),(c).

180. 77 Misc. 2d 882, 355 N.Y.S.2d 275 (Sup. Ct. Tompkins County 1974).

181. *Id.* at 884, 355 N.Y.S.2d at 277.

182. *Id.* at 883-84, 355 N.Y.S.2d at 276-77.

183. ITHACA, N.Y., MUNICIPAL CODE § 32.6(I) (1971).

184. *Id.*

2. Procedure for Certificate of Approval

A procedure usually is established whereby applications to a building department for building permits affecting protected sites must indicate that the site has been designated as a landmark or is located within a historic district.¹⁸⁵ Upon receipt of the application, the building department forwards a copy of it to the preservation commission.¹⁸⁶ No building permit may be issued until the commission has granted a certificate of approval.¹⁸⁷ The certificate of approval is required in addition to, and not in lieu of, the building permit.¹⁸⁸ The commission then must decide whether to grant the certificate of approval based on certain criteria set forth in the ordinance.¹⁸⁹ While the commission is considering an application for a certificate of approval, the owner of the property in question may be consulted,¹⁹⁰ but few ordinances require that notice and an opportunity to be heard also be afforded to either neighboring property owners or the general public.

An ordinance which did not require that notice be given to neighboring property owners was upheld in *Zartman v. Reisem*.¹⁹¹ The owners of residential property located in a preservation district challenged the decision of the Rochester Preservation Board to grant a "certificate of appropriateness" for the construction of a tennis court (a permitted use under the applicable zoning ordinance) on neighboring residential property within the district.¹⁹² The court rejected the petitioners' contention that they were denied proper notice of the hearing before the Preservation Board:

Having had the opportunity to be fully heard on the merits, they are in no position to complain about the inadequacy of the notice

185. See, e.g., SARATOGA SPRINGS, N.Y., CODE ch. 135, § 135-33.2(C)(1) (1978).

186. *Id.*

187. *Id.* § 135-33.2(E). Cf. Schenectady, N.Y., Ordinance No. 14221, § 9 (May 14, 1962) (building permit may be issued after 45 days if Historic District Commission fails to approve or disapprove plans).

188. See, e.g., OSSINING, N.Y., CODE § 3.19.5.3 (1975).

189. See, e.g., SARATOGA SPRINGS, N.Y., CODE ch. 135, § 135-33.2(H) (1978), which contains numerous criteria to guide the commission "in approving or disapproving plans, except where the Commission specifically finds that application of the following standards is inappropriate or would create undue hardship for the applicant. . . ."

190. See, e.g., Schenectady, N.Y., Ordinance No. 14221, § 9 (May 14, 1962), which provides, "In reviewing the plans, the Commission may confer with the applicant or his authorized representative for the building permit."

191. 59 A.D.2d 237, 399 N.Y.S.2d 506 (4th Dep't 1977).

192. *Id.* at 238-39, 399 N.Y.S.2d at 508.

or the ordinance's failure to require a public hearing. . . . Further than that, however, the ordinance need not give adjoining owners personal notice. . . . While we may recognize the legitimate interests of adjoining owners particularly and of the public generally, in the preservation of landmarks and special preservation districts [citation omitted], this interest is not of constitutional dimension as claimed by petitioners.¹⁹³

3. Demolition

Except under limited circumstances, preservation ordinances prohibit the demolition of structures designated as landmark sites or located within historic districts.¹⁹⁴ The ordinance may allow a commission to prohibit demolition even in the face of hardship to the property owner, but usually the prohibition extends only for a short period to allow the commission and the property owner to attempt to formulate an economically feasible plan for preservation.¹⁹⁵ Some ordinances allow historic structures to be moved as an alternative to demolition.¹⁹⁶

4. Exemptions and Limitations

Most preservation ordinances limit the commission's jurisdiction to exterior architectural features visible from public ways.¹⁹⁷ It also is

193. *Id.* at 242, 399 N.Y.S.2d at 510.

194. *See, e.g.*, ITHACA, N.Y., MUNICIPAL CODE § 32.6(F) (1977), which prohibits the demolition of protected structures unless the commission finds that either:

1. In the case of commercial property, that prohibition of demolition prevents the owner of the property from earning a reasonable return;

or

2. In the case of non-commercial property, all of the following:

(i) that preservation of the structure will seriously interfere with the use of the property;

(ii) that the structure is not capable of conversion to a useful purpose without excessive costs; and

(iii) that the cost of maintaining the structure without use would entail serious expenditure all in the light of the purposes and resources of the owner.

195. *Id.* Ithaca's ordinance permits its commission to deny permission to demolish, despite hardship to the property owner, if "the structure is of unique value." *Id.* The denial of permission, however, extends only for a 90 day period while the commission attempts "to work out with the owner an economically feasible plan for the preservation of such structure, provided that, subject to approval of the Common Council the City shall reimburse the owner any difference between a fair return and the return he might reasonably have obtained using the structure in its then state." *Id.*

196. *See, e.g.*, Schenectady, N.Y., Ordinance No. 14221, § 7(c) (May 14, 1962).

197. *See, e.g.*, ITHACA, N.Y., MUNICIPAL CODE § 32.6 (E) (1971).

common to exempt ordinary maintenance and repair from the conduct regulated by the ordinance.¹⁹⁸ Most preservation ordinances have a provision dealing with hazardous conditions, providing that the ordinance should not be construed to prevent the construction, reconstruction, alteration or demolition of any exterior architectural feature which the building inspector determines is required for public safety.¹⁹⁹

Hardship provisions are fairly common. The City of Syracuse's preservation ordinance, for example, provides that the ordinance will not apply to alterations where prior to the date of public notice of a proposed designation the property owner has begun, or contracted to begin, the alterations and failure to proceed will expose the owner to "substantial financial hardship."²⁰⁰ Such hardship requires a showing, to the satisfaction of the board, that "(a) the land or improvement in question cannot yield a reasonable return or be used for a necessary purpose of the owner if the proposed construction, removal, alteration or demolition is not permitted; and (b) the hardship is not the result of any act or omission by the applicant."²⁰¹ Upon a showing of substantial hardship, the board is directed to take one or more of the following actions: (a) assist the owner in developing an economically sound plan to overcome the board's objections; (b) reconsider its decision if it finds that the alterations may be completed without substantial harm; (c) recommend a limitation or remission of taxes on the property affected; or (d) recommend that the city acquire a preservation restriction on the property.²⁰²

5. Miscellaneous Provisions

Some preservation ordinances provide that an assessor valuing designated premises should take into account factors such as limitations upon use or improvement, any unique or extraordinary expenses necessarily incurred by the owner in maintaining the structure, or the loss in market value as a result of the designation.²⁰³ Other ordinances authorize the commission to recommend that designated structures be

198. *Id.* § 32.7(I).

199. *See, e.g.*, Pittsford, N.Y., An Ordinance Relating to the Establishment of an Historic and Architectural District in the Village of Pittsford, New York § 4(b) (June 8, 1971).

200. Syracuse, N.Y., General Ordinance No. 11, §§ IV (A), (B) (Mar. 3, 1975).

201. *Id.* § VII (A).

202. *Id.* § VII (B). If the board recommends that the city take action to alleviate hardship and the city fails to take such action within 90 days, then a Certificate of Appropriateness shall be deemed to have issued to the property owner. *Id.* § VII(c).

203. *See, e.g.*, Pound Ridge, N.Y., Local Law No. 4, § 4-3 (June 10, 1976).

exempt from municipal taxation for a certain number of years, provided that the owner agrees, in a recordable instrument, that the structure will never be altered or demolished without approval of the commission.²⁰⁴

An ordinance may provide for penalties to be imposed against those who fail to comply with its provisions.²⁰⁵ Many ordinances also explain how persons adversely affected by a commission's decision may appeal the decision.²⁰⁶

Almost all preservation ordinances contain a severability clause providing that if any provision of the ordinance or its application is held invalid, the remainder of the ordinance and its application to other persons shall not be affected.²⁰⁷ In addition, an ordinance may provide that it will control over any other municipal ordinance which contains conflicting provisions.²⁰⁸

V. Conclusion

Historic preservation is too important a concern to be left unregulated. One insensitive property owner can quickly destroy what generations before have preserved. In New York, a state abundant with historically significant resources, local governments are beginning to ensure the survival of such resources with the enactment of preservation ordinances. Effective local preservation ordinances, coupled with federal and state statutes designed to encourage preservation, should guarantee that the best examples of New York State's rich cultural heritage will endure for generations to come.

204. See, e.g., ITHACA, N.Y., MUNICIPAL CODE § 32.6(G) (Common Council has discretion to determine number of years of exemption).

205. See, e.g., Southeast, N.Y. Ordinance 15 § 6 (Feb. 11, 1975) (any person violating ordinance guilty of misdemeanor and subject up to \$1000 in fines); Syracuse, N.Y., General Ordinance No. 11, § IX (A) (Mar. 3, 1975) (violators subject to penalty of \$100 per day; willful violators subject to \$150 per day fines or up to 15 days imprisonment).

206. See, e.g., Pound Ridge, N.Y., Local Law No. 4, § 5-1 (June 10, 1976), which provides:

Any person or persons, jointly or severally aggrieved by any decision, resolution or determination of the Historic District Commission, may have the determination reviewed by a special term of the Supreme Court in the manner provided by Article 78 of the Civil Practice Laws and Rules, provided the proceeding is commenced within thirty days after the filing of the determination in the office of the Board. Commencement of the proceeding shall stay proceedings upon the decision appealed from.

207. See, e.g., Rye, N.Y., Local Law No. 6, § 7-5.10 (Oct. 5, 1977); Schenectady, N.Y., Ordinance No. 14221, § 11 (May 14, 1962).

208. See, e.g., PENFIELD, N.Y., CODE § 14-11 (1975) ("In the event that any of the provisions of this ordinance shall be in conflict with the provisions of any ordinance in the Town of Penfield, the provisions of this ordinance shall control.").