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# A LAYPERSON'S GUIDE TO HISTORIC PRESERVATION LAW

A Survey of Federal, State, and Local Laws  
Governing Historic Resource Protection

By Julia H. Miller

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# A LAYPERSON'S GUIDE TO HISTORIC PRESERVATION LAW

## A Survey of Federal, State, and Local Laws Governing Historic Resource Protection

By Julia H. Miller

Historic preservation and the law have been surprising but comfortable bedfellows for well over a century. When the words “historic preservation” are pronounced, however, visions of stately houses or monumental buildings rather than preservation ordinances or easement agreements readily come to mind. Most people are unaware of the complex array of legal tools that generally lie behind a particular site’s rehabilitation or preservation.

Important laws exist at the federal, state, and local level that require preservation in some cases and encourage preservation in others. Behind these laws rest public policy considerations that attempt to balance the need to preserve important resources with other governmental objectives such as economic development and that also address the rights of individual property owners who may be affected. Some laws limit or restrict changes to historic property while others seek to place preservation on equal footing with alternative courses or actions, such as demolition and new construction.

Historic preservation laws are important tools that can shape, modify, strengthen, or otherwise improve preservation programs. A basic understanding of the laws affecting historic preservation will help you identify the full range of options available to protect a historic building or archeological site. It will help you evaluate the strengths and weaknesses of existing laws in your community and to understand the limits of those laws when fully implemented. Familiarity with preservation law will also help you respond to individual threats as they arise and to develop strategies on how best to avoid or reduce the likelihood for such threats in the future.

This booklet explains the laws and legal principles that protect historic resources. It provides a basic overview of the laws governing historic resources at the federal, state, and local level, along with a number of



Historic resources may be listed in any of three types of registers: the National Register of Historic Places, a state register of historic places, or a local listing of historic landmarks and districts.

Photo by Adrian Scott Fine.

other laws that can either enhance or restrict historic resource protection efforts. It also lists resources on preservation law and related issues designed to help you find additional information and advice.

### DEFINING THE HISTORIC RESOURCE: PROPERTY IDENTIFICATION AND LISTING

The first step in understanding preservation laws is to determine what properties are subject to protection. Historic resources include a wide range of properties ranging from buildings and other structures to archeological or culturally significant sites. In most cases, resources are identified

through a formal process that lists buildings, structures, districts, objects, and sites in a historic register or inventory based on specific criteria.

Historic resources (sometimes called “heritage” or “cultural” resources) may be listed in any of three types of registers: The National Register of Historic Places, a state register of historic places, or a local listing of historic landmarks and districts. To be eligible for listing, properties must meet certain statutory criteria generally based on historical, architectural, archeological, or cultural significance.

## NATIONAL REGISTER CRITERIA

The National Park Service applies specific criteria to evaluate property nominated for inclusion in the National Register of Historic Places. These criteria, codified at 36 C.F.R. § 60.4, often serve as the basis for listing in state and local registers as well.

**National Register Criteria for evaluation.** The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

- (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or
- (b) that are associated with the lives of persons significant in our past; or
- (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
- (d) that have yielded, or may be likely to yield, information important in prehistory or history.

## National Register of Historic Places

Established under the Historic Sites Act of 1935, 16 U.S.C. §§ 461, *et. seq.*, and expanded by the National Historic Preservation Act of 1966, as amended, 16 U.S.C. §§ 470a, *et. seq.*, the National Register is the official list of historic resources at the national level. The National Register includes districts, sites, buildings, structures, and other objects that are significant in American history, architecture, archeology, engineering, and culture. It includes not just nationally significant resources, but also those having state or local significance.

Initially designed as a planning tool for federal agencies, the National Register's primary purpose is to identify the historical and cultural resources of our nation. While listing in the National Register is primarily honorific, the National Register plays a central role in the federal regulatory protection scheme, enables property owners to qualify for federal tax benefits, and in some cases may be used as the basis for listing at the state and local level.

The National Register of Historic Places is maintained by the Secretary of the Interior through the National Park Service. The Park Service's Keeper of the National Register is

responsible for listing and determining eligibility for listing in the National Register, although the designation process usually begins with the state historic preservation office. A property owner may prevent the inclusion of his or her property in the National Register by formally objecting to the listing. This will not prevent the application of laws affecting historic properties that are eligible for inclusion in the National Register, such as the Section 106 review process, discussed later.

The National Register includes a special category of properties, known as National Historic Landmarks (NHLs). These properties are generally of exceptional value to the nation as a whole. As with other properties listed in the National Register, NHL designation is primarily honorific. National Historic Landmarks, however, may receive a higher degree of protection from federal actions.

The criteria for designation, established by the Department of the Interior, are set forth at 36 C.F.R. Part 60. Regulations governing National Historic Landmarks are codified at 36 C.F.R. Part 65. The National Park Service publishes an annual cumulative listing of National Register properties in the *Federal Register* each year.

## State Registers

Many states maintain their own register of historic places, which may be more or less inclusive than the National Register of Historic Places. As with the National Register, listing in a state register tends to be honorific. In some cases, however, it may trigger regulatory protection or govern whether a property owner may qualify for favorable tax treatment.

## Locally Designated Landmarks and Historic Districts

Properties may also be designated as individual landmarks or as contributing structures within a historic district pursuant to a local historic preservation ordinance. Unlike listing in the National Register, designation under local ordinances often affects a property owner's ability to change his or her property in ways that would harm its historic or architecturally significant character. Sometimes properties designated under local ordinances may be eligible for significant tax benefits, such as reductions in local property taxes.

Locally designated properties may also enjoy flexible application of land-use laws through the waiver of use and bulk restrictions or benefit by transferable development rights programs.

## REGULATORY APPROACHES TO HISTORIC RESOURCE PROTECTION

Historic resources may be protected from both governmental and private actions at the federal, state, and local level. The nature of the restrictions and degree of regulation vary depending upon the players and, in some cases, the type of property being regulated. In general, historic resource laws governing governmental actions do not require preservation every time. Rather, they provide a process for balancing preservation concerns with other governmental objectives. In contrast, historic preservation laws governing private actions generally seek to protect the historic resource by regulating alterations, demolitions, or other changes that could destroy or impair significant features of the resource. These laws, typically enacted as local historic preservation ordinances, do not

prohibit change altogether, but rather establish a mechanism to ensure that the integrity of the resource is not compromised.

Finally, a few laws, generally enacted at the federal level, do not fit neatly into either category of resource protection laws. These laws are designed to address specific types of actions governing specific types of resources. Archeological protection laws, Native American cultural resource laws, and laws protecting historic shipwrecks fall into this category.

Specific information about a particular law can generally be obtained from the federal, state, or local agency directly responsible for the law’s implementation. Besides the National Park Service and the Advisory Council on Historic Preservation—the primary federal agencies charged with the implementation of federal preservation laws—it may be useful to contact your state historic preservation office—the state agency responsible for historic preservation matters—or your local preservation or planning commission. Statewide and/or

local nonprofit, historic preservation organizations are often equipped to provide detailed assistance. National Trust Regional Offices, listed on the inside back cover of this booklet, can also provide these contacts.

### The Regulation of Governmental Actions Affecting Historic Resources

Protection of historic resources from harmful governmental actions is generally accomplished through historic preservation acts and environmental protection laws. These laws do not require that federal, state, or local governments preserve historic resources where other competing governmental interests may be at stake. Rather they require governmental agencies to comply with specific procedures to ensure that the effects of their actions are fully considered before embarking on otherwise harmful activity. Governmental agencies are generally directed to identify historic resources and weigh and assess competing factors, including historic resource protection along with other environmental and socio-economic concerns, in deciding how and whether a project or activity should proceed.

While most laws falling within this category are purely *procedural* in nature, (meaning that governmental bodies must follow a specific process to fulfill their statutory obligation), there are a few laws, enacted at both the federal and state level, that afford historic resources substantive protection (meaning that governmental bodies must take affirmative steps to protect the resource). These laws require agencies to avoid harming historic resources unless there is no alternative, and then, only if the harm is minimized.

Public participation is essential to the enforcement of laws protecting historic resources from governmental actions. Many statutes give individuals and organizations the right to sue and the ability to recover attorneys’ fees.

### Federal Preservation Laws

Three major laws protect historic resources from federal government actions: the National Historic Preservation Act, 16 U.S.C. §§ 470 *et. seq.*; the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347; and Section 4(f) of the Department of Transportation Act, 49

## FEDERAL HISTORIC PRESERVATION LAWS AT A GLANCE

	NEPA	Section 4(f)	Section 106
Citations	42 USC § 4332 40 CFR Part 1500	49 USC § 303; 23 USC § 138 23 CFR § 771.135	6 USC § 470f 36 CFR Part 800 (revised July 6, 2004)
Properties Protected	all environmental resources, including cultural & historic	historic sites (nat’l, state, or local); parks; wildlife refuges; recreation areas	National Register listed or eligible
Triggering Federal Action	“major federal action”	“approval” of transportation project	“undertaking”
Threshold Effect	“significantly affecting the quality of the human environment”	“use” (subject to “de minimis” exception); or constructive use (“substantially impair”)	any “effect”
Standard for Consideration	disclose & consider impacts	avoid unless not feasible & prudent; all possible planning to minimize harm	“take into account”
Procedure v. Substance	procedural	substantive	Combination (procedure + MOA)
Mechanism for Compliance	EIS or EA; public hearings	4(f) determination or chapter of EIS or EA	“consultation” negotiation; MOA
Involvement of Other Agencies	EPA review; CEQ referral in extreme cases  Litigation is the only way to appeal agency decisions.	DOT has final authority; Interior comments  Litigation is the only way to appeal agency decisions.	SHPO (sometimes ACHP) at the table, with an opportunity to object to effect determinations & historic significance issues

U.S.C. § 303. Other statutes, more narrow in scope, include the Antiquities Act of 1906, 16 U.S.C. §§ 431-433, the Historic Sites Act of 1935, 16 U.S.C. §§ 461-467, and the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1272(e). In addition, a number of federal statutes relate only to specific resources.

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**The National Historic Preservation Act is the key federal law that establishes a federal policy for the preservation of cultural and historic resources in the United States.**

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*The National Historic Preservation Act*  
The National Historic Preservation Act of 1966, 16 U.S.C. §§ 470a to 470w-6, (NHPA), amended in 1980, and again in 1992, is the key federal law that establishes a federal policy for the preservation of cultural and historic resources in the United States. The law establishes a national preservation program and a system of procedural protections, which encourage both the identification and protection of historic resources at the federal level, and indirectly, at the state and local level.

The NHPA can be broken down into three major components.

1. It authorizes the expansion and maintenance of the National Register of Historic Places, the official federal listing of “districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture.”
2. It establishes a protective review process (known as “Section 106 review process”) to ensure that federal agencies consider the effects of federally licensed, assisted, regulated, or funded activities on historic properties listed or eligible for listing in the National Register.
3. It requires federal agencies to locate, inventory, and nominate properties to the National Register, assume responsibility for preserving historic properties, and use historic buildings to “the maximum extent possible.”

The NHPA creates a specific role for state and local governments, Native American tribes, and Native Hawaiian organizations in carrying out the Act’s specific directives. A state or tribe electing to establish a historic preservation program (for which federal grant funding is available) is responsible for identifying and nominating properties for listing in the National Register of Historic Places and working with federal agencies in implementing the Section 106 review process. (Regulations governing state, tribal, and local government programs under the NHPA are set forth at 36 C.F.R. Part 61). State historic preservation offices are also responsible for administering a federal assistance program for historic preservation projects and certifying local governments who wish to assume specific responsibilities under the NHPA. For example, a certified local government may nominate property for listing in the National Register. To be certified, local governments must meet certain criteria such as establishing a preservation commission and operating a preservation program that designates and protects historic properties.

The NHPA establishes a Historic Preservation Fund in the U.S. Treasury. Money from this fund is made available to the states through annual appropriations by Congress. At least 10 percent of a state’s allocation must be transferred to certified local governments to fund local historic preservation projects.

Section 106 is the regulatory heart of the NHPA. Codified at 16 U.S.C. § 470f, Section 106 requires that federal agencies consider the effects of their actions on historic resources before funding, licensing, or otherwise proceeding with projects that may affect historic resources listed in, or eligible for listing in the National Register of Historic Places.

The kinds of undertakings requiring Section 106 review are broad and inclusive and may affect historic resources either directly or indirectly. For example, a federal agency may be required to perform a Section 106 review before approving funds to build a new convention center in or near a historic district or before issuing a permit to fill in a wetlands area that would allow the construction of new houses that could harm the historic character of a nearby village. While

a federal agency may delegate certain Section 106 responsibilities to a state or local government, the federal agency is ultimately responsible and may be held legally accountable for Section 106 compliance.

The statutory provision establishing the Section 106 review process is relatively succinct. It states:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of such Federal agency shall afford the Advisory Council of Historic Preservation established under §§ 70i-470v of this title a reasonable opportunity to comment with regard to such undertaking.

This provision, in effect, directs federal agencies to determine whether any properties listed or eligible for listing in the National Register will be adversely affected by proposed “undertakings,” and if so, provides the Advisory Council on Historic Preservation, an independent federal agency, with an opportunity to comment.

For the most part, the Advisory Council, whose members include heads of different federal agencies, a governor, mayor, a Native American or Native Hawaiian member, and preservation experts (the National Trust for Historic Preservation and the National Conference of State Historic Preservation Officers serve as ex officio members), participates as a facilitator rather than regulator of federal agency actions. Located in Washington, D.C., the Council, through its staff, works with federal agencies and state historic preservation offices to meet their Section 106 responsibilities. The agency also assists federal agencies in satis-

fyng their stewardship requirements under the NHPA (Section 110) and encourages coordination and consistency of federal agency laws and programs with national policy on historic preservation.

The Section 106 review process may encompass the identification of protected resources, determinations as to adverse effects, and consultation with the appropriate state historic preservation officer, the tribal historic preservation officer, and in some cases, the Advisory Council about ways to avoid or reduce those effects. In the vast majority of cases, a legally binding Memorandum of Agreement is executed by the consulting parties, setting forth specific protective measures that must be taken. In situations where agreement cannot be reached, the matter is put before the full Council, who in turn issues formal comments that may be accepted or rejected by the agency involved.

While Section 106 is an effective tool in focusing attention on federal agency actions affecting historic resources, *it does not prevent federal agencies from taking actions that ultimately harm historic resources*. Section 106 only requires that federal agencies comply with certain procedural requirements before issuing a permit or funding a project affecting historic resources.

In other words, Section 106 will not prevent a federal agency from funding a housing project that entails demolishing a complex of historic buildings. It does, however, require the agency to identify historic resources and explore alternative measures, in consultation with the state historic preservation officer, that may mitigate or avoid whatever harm the project would have on the buildings. The agency, for example, may be required to address alternatives such as moving the entire housing project to a different site or shifting the location of the project on the proposed site so that an archeological resource or historic structure can be preserved.

In cases where alternatives to demolition are not options, the agency may agree to adopt certain measures that would mitigate the harm identified. For example, an agency may document the historic buildings and erect a plaque in their stead. If other historic

resources besides those being demolished will be adversely affected, the agency may agree to redesign the project so that it is more in keeping with the scale and style of the remaining resources.

Regulations implementing Section 106 have been promulgated by the Advisory Council on Historic Preservation. These regulations set forth the specific procedures that federal agencies must follow to satisfy the requirements of Section 106. The regulations, most recently revised in 2004, are published at 36 C.F.R. Part 800. They may be viewed at the ACHP's website at [www.achp.gov](http://www.achp.gov).

#### *National Environmental Policy Act*

Although the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347, (NEPA), is primarily viewed as an environmental law, it governs major federal agency actions affecting not only natural resources, but also cultural resources, including properties listed in the National Register of Historic Places. NEPA states, in relevant part:

[I]t is the continuing responsibility of the Federal Government to use all practical means, consistent with other essential considerations of national policy, to ... (2) *assure* for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings, ... [and] (4) *preserve important historic, cultural, and natural aspects of our national heritage*, and maintain, wherever possible, an environment which supports diversity and variety of individual choice.

To ensure that environmental concerns are disclosed and considered to the fullest extent possible, NEPA directs federal agencies to "include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on the environmental impact of the proposed action," including any "adverse environmental effects that cannot be avoided" and any "alternatives to the proposed action." Federal agencies must consult with other relevant agencies regarding the proposed action and make copies of their envi-

ronmental statements available to the President, the Council on Environmental Quality (CEQ), and the public.

Depending upon the magnitude of the impact, agency responsibilities under NEPA may be achieved through the preparation of an Environmental Assessment, or a more detailed Environmental Impact Statement, where adverse effects have been identified. Regulations implementing NEPA, codified at 40 C.F.R. Part 1500, set forth the process for conducting an environmental review, the specific documents that must be prepared, as well as public notice requirements and timing for public review and comment.

In many cases, the statutory protections under NEPA and the NHPA overlap. As with Section 106 of the NHPA, NEPA governs federal agency actions. Moreover, like Section 106, NEPA is essentially a compliance statute, providing only procedural protection against potentially harmful federal agency actions. Coordination of Section 106 and NEPA responsibilities is encouraged under the Advisory Council's regulations implementing the Section 106 review process.

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**The National Environmental Policy Act...** governs major federal agency actions affecting not only natural resources, but also cultural resources, including properties listed in the National Register of Historic Places.

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Nonetheless, because of slight differences in the scope of protection afforded, in certain situations only one of these laws may be invoked. While NEPA applies to all historic and cultural properties, it regulates only "major federal actions," such as the adoption of federal policies and programs or the approval of federally funded, licensed, or permitted projects. In contrast, the NHPA only governs properties listed or eligible for listing in the National Register of Historic Places. The NHPA, however, applies to a broader range of federal agency undertakings.



After a lengthy legal battle against the Department of Transportation, an overhead section of I-30 in Fort Worth, Tex., was dismantled rather than expanded. The court decision resolving this case, *I-CARE v. Dole*, established that indirect effects of highway projects such as noise, air pollution, physical access, and visual and aesthetic damage, trigger Section 4(f) protection if such effects “substantially impair” the significance, enjoyment, or value of historic sites.

Photo by Jim Lindberg.

### *Section 4(f) of the Department of Transportation Act*

Section 4(f) is considered the strongest preservation law at the federal level. Codified at 49 U.S.C. § 303, it provides substantive protection for historic properties by prohibiting federal approval or funding of transportation projects that require the “use” of any historic site, public park, recreation area, or wildlife refuge, unless (1) there is “no feasible and prudent alternative to the project,” and (2) the project includes “all possible planning to minimize harm to the project.”

The term “use” includes not only the direct physical taking of property, but also indirect effects that would “substantially impair” the value of protected sites. For example, the effect of a proposed highway on the economic vitality of a nearby historic district that would isolate the district from nearby commercial activity would probably require assessment under Section 4(f). (The provision has been called “Section 4(f)” since its initial adoption in 1966 as Section 4(f) of the Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931, 933 (1966).)

Section 4(f) applies to all transportation agencies within the U.S. Department of Transportation, including the Federal Highway Administration (FHWA), which funds highway and bridge projects; the Federal Transit Administration (FTA); the Federal Aviation Administration (FAA); and the Coast Guard, which owns or operates many historic lighthouses and often has regulatory authority affecting bridges.

Although statutory protections under the NHPA, NEPA and Section 4(f) overlap, there are important distinctions. Unlike Section 106 and NEPA, Section 4(f) applies only to the “approval” of transportation projects. While Section 106 and NEPA require agencies to “take into account” historic properties, Section 4(f) directs the Secretary of the Department of Transportation to avoid harming such resources unless no feasible or prudent alternative exists. Note, however, that in an effort to streamline the Section 4(f) review process, the Secretary may find a “de minimus impact” whenever a project has been determined, under Section 106, to have no adverse effect on a historic site or that no historic properties would be affected.

The Department of Transportation’s regulations implementing Section 4(f) for the FHWA and FTA are set forth at 23 C.F.R. § 771.135. The regulations seek to clarify when Section 4(f) applies and to coordinate Section 4(f) requirements with environmental review procedures under the NHPA and/or NEPA.

### *Surface Mining Control and Reclamation Act*

The Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1201 *et. seq.*, governs the regulation of surface mining activities in the United States. The Office of Surface Mining and Enforcement (OSM) is charged with its implementation. OSM is responsible for issuing permits for the surface mining of coal and monitoring state regulatory programs operating pursuant to delegated authority.

Among other things, the act provides protection for historic resources that would be adversely affected by mining operations. Section 522(e) of SMCRA, 30 U.S.C. § 1272(e)(3), provides that:

[N]o surface mining operations ... shall be permitted which will adversely affect any ... places included in the National Register of Historic Sites unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the ... historic site.

The OSM is also required to comply with Section 106 of the NHPA when approving state regulatory programs or amendments to those programs. However, Section 106 does not apply directly to individual mining permits issued by the states, according to the D.C. Circuit, even though Congress amended the NHPA in 1992, to make Section 106 applicable in such cases. See *National Mining Ass’n v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003).

### **State Preservation Laws**

Governmental actions affecting historic resources are generally taken into account at the state level in two ways. First, state agencies, through their state historic preservation officers, play a formal role in the Section 106 review process by helping federal agencies identify historic resources, assess potential impacts to those resources, and develop alternatives that would avoid or mitigate

adverse effects. Second, many states have enacted laws that protect historic resources from state government action in a manner comparable to the way in which the NHPA, NEPA, and Section 4(f) protect historic resources from federal government actions. These may be called “State Historic Preservation Acts” or “Little 106 laws” and “State Environmental Policy Acts.”

#### *Administration of Federal Programs*

State involvement in historic preservation activities historically has focused on the administration of federal government programs. Pursuant to the NHPA, each state has established a state historic preservation office (SHPO) to administer federal preservation programs, such as nominating properties to the National Register of Historic Places, participating in the Section 106 review process, and reviewing projects seeking certification for federal tax benefits.

The NHPA relies heavily on the SHPO to help federal agencies meet their Section 106 responsibilities by identifying historic resources, determining the extent to which those resources will be affected, and considering alternatives to avoid or reduce those effects.

#### *Historic Resource Protection*

The regulation of state agency actions affecting historic properties varies considerably. Some states regulate governmental actions affecting historic property through state environmental protection laws. For example, the California Environmental Quality Act (CEQA), Cal. Pub. Res. Code § 21000, *et. seq.*, requires state agencies to consider the impact of their actions on the environment, including historic resources. The Alaska Coastal Management Program, (ACMP), Alaska Stat. § 46.40-210, sets forth specific requirements agencies must follow to protect environmental and cultural resources in Alaska’s coastal zone. These laws provide an important source of protection since they take into account a broad range of factors that may adversely affect historic resources, such as increased traffic or pollution.

Many states have adopted what are commonly referred to as “state 106” or “state 4(f)” laws. Patterned after their federal counterpart, these laws generally provide

procedural and/or substantive protection for historic resources by requiring consideration of the impact of state agency actions affecting such resources. The Minnesota Environmental Rights Act, Minn. Stat. § 116B, for example, provides that state agencies may not demolish a historic resource unless there is “no prudent and feasible alternative site.” The New Mexico Prehistoric and Historic Sites Preservation Act, New Mex. Stat. Annot. §§ 18-8-1—19-8-8, directs state agencies to undergo “all possible planning to preserve and protect” and to “minimize harm” to historic resources.

As with their federal counterparts, these laws provide for public participation and, in most cases, rely upon the citizenry for enforcement.

#### **Local Preservation Laws**

Local environmental protection laws governing local government actions generally do not exist. In a few states, however, state environmental or preservation laws have been extended to include local government actions. For example, New York’s State Environmental Quality Review Act, N.Y. Environmental Conservation Law § 8-0101, *et. seq.*, (SEQRA), applies to local and state government actions, thus affecting a wide range of municipal actions, including zoning changes that could potentially affect historic resources. Because of the direct effect land-use actions have on historic resources, these laws can be an important component of a local preservation program.

As with state governments, local governments may also assume certain federal agency responsibilities under Section 106 of the NHPA. While federal agencies remain legally responsible for Section 106 compliance, some federal agency responsibilities may be delegated to local officials. Section 106 responsibilities are often carried out by city agencies, receiving federal funding from HUD, for example. Local governments may also participate as a “party” in the Section 106 consultation process.

Historic resources are most often protected at the local level through historic preservation ordinances. These laws focus on the regulation of private, as opposed to governmental, actions.

While some ordinances may protect both public and privately-owned resources, the ability to regulate public property is dependent upon the delegation of authority by a state to regulate municipal or state-owned property or the willingness of a state agency to be regulated. This issue often arises in the context of historic schools and civic buildings. While federal agencies are required to take historic preservation into consideration when constructing or altering buildings, federally-owned historic properties are not subject to local preservation ordinances. (See discussion on “Public Buildings” below.)

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Under historic preservation ordinances, historic property owners are required to obtain a permit from a preservation commission, or other authority, before altering or otherwise affecting the property being regulated.

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#### **The Regulation of Private Actions Affecting Historic Resources**

Historic resources may be protected to a limited extent from private actions through federal and state laws. Many historic resources, however, are protected through local laws that govern changes to private property. Under historic preservation ordinances, historic property owners are required to obtain a permit from a preservation commission, or other authority, before altering or otherwise affecting the property being regulated. Failure to obtain a permit may result in the issuance of a stop-work order, the imposition of fines and other penalties, and in some cases, a court injunction. These laws typically provide a much stronger level of protection for historic resources than the procedural protections that apply to governmental actions.

#### **Federal Preservation Laws**

As discussed above, the preservation of historic resources is generally accomplished under federal preservation statutes through procedural laws. These laws do not require that historic resources be preserved but rather insist that a federal agency consider historic resources before proceeding with a



Historic preservation ordinances allow local jurisdictions to regulate historic districts, including incompatible infill structures, which can seriously compromise the integrity of a historic streetscape.

Photo by Adrian Scott Fine.

particular course of action. For the most part, the emphasis is generally on process rather than substance. This means that the agency must only comply with certain procedures. Preservation is not required.

A few laws, however, contain enforcement provisions, authorizing the imposition of civil and/or criminal penalties for violations of specific provisions. The best known laws falling within this category include the Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm, (ARPA), and the Native American Graves and Repatriation Act, 25 U.S.C. §§ 3001-3013, (NAGPRA). ARPA establishes a permitting process and imposes both civil and criminal penalties for violations of its terms. NAGPRA establishes a process for, among other things, the repatriation of

Native American human remains and cultural objects held by museums or federal agencies and imposes penalties for individual violations. Both statutes are discussed in more detail later.

Although rarely invoked, penalty provisions are also contained in the Antiquities Act of 1906, 16 U.S.C. §§ 431-433, and the Historic Sites Act of 1935, 16 U.S.C. §§ 461-467. While the Antiquities Act does not establish a permitting process per se, it authorizes the imposition of a \$500 fine and/or imprisonment up to 90 days against any person who “appropriate[s], excavate[s], injure[s], or destroy[s] any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Department of Government

having jurisdiction over the lands on which said antiquities are situated.” The Historic Sites Act, correspondingly, allows the imposition of a \$500 fine against any person found violating the act or implementing regulations.

### State Preservation Laws

States address private actions affecting historic resources primarily through enabling laws, which act as a grant of police power authority from the state to local government. Only in extremely limited instances have states elected to regulate private actions through a separate permitting process. The State of Kansas, for example, regulates actions that would destroy or alter historic resources or the “environs” of those resources.

Every state has enacted some form of enabling law granting specific powers and authority to local governments to pass ordinances for the protection and preservation of historic structures. Some local governments may operate under a broad grant of authority, which is commonly referred to as “home rule authority.” Most governments, however, operate under a specific grant of authority that enumerates specific powers and authorities. A local law must comply with the specific grant of authority from the state. In other words, the level of protection afforded to historic resources under a local preservation ordinance must correspond with the regulatory scope of applicable state enabling laws.

While state enabling laws vary widely in form, they generally authorize local governments to regulate private actions affecting historic properties through a permitting process. Local governments are typically granted authority to designate historic properties and districts and to prevent incompatible alterations, demolition, or new construction. Sometimes, state enabling laws may also authorize a specific process for consideration of economic hardship claims, special merit exceptions, demolition by neglect, and even appeals.

### Local Preservation Laws

Laws governing private actions affecting historic resources are primarily enacted at the local level pursuant to state enabling authority. Through historic preservation ordinances, local jurisdictions regulate

changes to historic resources that would irreparably change or destroy their character. Projects reviewed range from routine applications for window replacement or modifications to plans for a new addition, or even demolition. Today, more than 2,300 historic preservation ordinances have been enacted across the country.

Historic preservation may also be accomplished through comprehensive planning and coordination with other land-use laws. Preservation ordinances alone can be insufficient to protect historic resources when other governmental programs and policies such as zoning, transportation, and housing favor new development over rehabilitation alternatives.

Preservation ordinances vary widely from place to place depending upon several factors. Variations may arise, for example, because of specific limitations on permissible regulatory action imposed at the state level or because of differing levels of political support for preservation in a given community. No single approach works in every situation and thus historic preservation ordinances are generally tailored to meet the individual needs of the community and the resources being protected.

As noted earlier, every state has enacted in some form an enabling law that authorizes local jurisdictions to adopt historic preservation ordinances. (In a few states, this authority may be implied through zoning enabling laws.) These laws, varying widely in form and content, provide the legal basis for regulating historic property. They should be consulted, along with interpreting case law, before adopting a preservation ordinance.

Historic preservation has been upheld as a valid public purpose under the U.S. Constitution. In 1978, the U.S. Supreme Court in its landmark decision, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) recognized that preserving historic resources is “an entirely permissible governmental goal” and that New York City’s historic preservation ordinance was an “appropriate means” to securing that goal. Some states have also explicitly recognized historic preservation as a legitimate governmental function in their state constitutions.

Local preservation commissions or design review boards administer most local ordinances. Preservation commissions are administrative bodies of local governments and are typically established under the historic preservation ordinance. While the number of commission members and terms varies, depending upon the size and needs of a community, individual members are generally required to have some expertise in certain areas, such as architecture, history, real estate, and so forth, to ensure that informed decisions are made.

The scope of authority conferred on preservation commissions will vary considerably depending upon state enabling authority, the relationship between the commission and other administrative agencies, and the support for historic resource protection. Historic preservation commissions may have either binding or advisory review authority over historic designations or changes to historic properties, and in some cases, they must be consulted regarding other land-use actions affecting historic resources, such as a request for a variance or the subdivision of land. The

historic preservation commission, however, is the governmental agency that grants or denies a permit to change historic property.

While variations exist from ordinance to ordinance, most include at least five major parts. Besides establishing a preservation commission, historic preservation ordinances generally set forth procedures and criteria for the designation of historic properties, along with procedures and criteria for reviewing requests to alter, move, or demolish such properties. Preservation ordinances also allow for consideration of hardship and other issues of special concern and establish a process for appeal and enforcement of its terms.

Individual properties are most often designated as historic resources by a city council or equivalent legislative body upon nomination by a preservation commission. Sometimes, however, the preservation commission or another administrative body may be empowered to designate individual properties and/or districts.



Historic district laws protect historic buildings as well as a community’s character. New construction generally must be compatible with the surrounding buildings in terms of size and design.

Photo by Adrian Scott Fine.

## KEY COMPONENTS OF A PRESERVATION ORDINANCE

1. Statement of “Purpose” and “Powers and Authorities” in enacting preservation ordinance.
2. Definitions.
3. Establishment and authority of historic preservation commission or other administrative board.
4. Criteria and procedures for designation of historic landmarks and/or districts.
5. Statement of actions reviewable by commission and the legal effect of such review.
6. Criteria and procedure for review of such actions.
7. Standards and procedures for the review of “economic hardship claims.”
8. “Affirmative maintenance” requirements and procedures governing situations of “demolition-by neglect.”
9. Procedures for appeal from final preservation commission decision.
10. Fines and penalties for violation of ordinance provisions.

Most jurisdictions designate historic districts or both historic districts and individual landmarks. While designations may include the entire historic structure, many communities extend protection only to the exteriors of such properties, and in some cases, only to those facades visible from a public way. A few communities protect both the interior and exterior of historic properties. Interior protections, where they exist, generally are limited to interior spaces open to the public.

Properties may be identified as *contributing* or *noncontributing* in historic districts. This determination, in turn, may dictate the level of review that will be applied. Contributing properties may enjoy full protection while changes to non-contributing property (including vacant land) are generally approved if “compatible” with the character of the historic district. A few jurisdictions also recognize distinctions among individual landmarks, providing the highest level of protection for properties of “exceptional importance.”

The preservation ordinance sets forth the criteria for designation and the process for considering applications for designation. More detailed information may also be contained in implementing regulations. While variations exist from jurisdiction to jurisdiction, historic designations are generally initiated by the property owner or the commission after conducting a survey of historic properties within the community.

Historic preservation ordinances generally empower preservation commissions to review and act upon applications for *certificates of appropriateness*. Most often, owners of property subject to a preservation ordinance must submit an application to a preservation commission for permission to alter, demolish, move, or construct additions and new buildings. Requests for change are evaluated at a public hearing based upon standards for review set forth in the ordinance. The commission will generally issue a formal decision, making specific findings of fact and conclusions of law. (A commission must determine what the facts are, apply those facts to the standards in the ordinance, and then reach a conclusion.) Permission is typically granted in the form of a permit or certificate of appropriateness.

The extent of control over requests to demolish historic structures varies from community to community. Many localities allow for the demolition of historic properties only in cases where a property owner establishes economic hardship or the property poses a safety threat after a fire or other type of natural disaster. Some communities, however, permit property owners to demolish historic properties after a specific waiting period, during which time a city or town, along with private preservation groups, can explore alternative actions to save the building. Some communities also condition the issuance of a demolition permit upon a showing that a new building will actually be constructed (i.e., by showing that plans and financing are sufficiently finalized) and that the building will be compatible with other historic resources in the area.

Routine maintenance work such as repairing a broken fence or replacing individual tiles on a slate roof is generally excluded from commission review. Many ordinances, however, require that designated property be kept structurally sound and may empower a commission to make repairs and seek reimbursement in instances where a property is essentially being *demolished by neglect*.

An increasing number of communities have also established an informal process to encourage property owners to consult with commission staff and/or members before embarking on a major project. Although not required, this process generally helps a property owner and/or architect to understand the factors that a commission will consider in acting upon a specific application.

Many ordinances also provide for the consideration of *economic hardship* claims, and to a lesser extent, projects of special merit. Economic hardship provisions typically provide a variance from individual restrictions under the ordinance in situations where the owner demonstrates that he or she would otherwise be denied all reasonable or beneficial use of his or her property. Special merit provisions enable individual buildings to be demolished or substantially altered when an overriding community objective, such as the need to construct a conference center, exists. (For a detailed discussion on economic hardship see “Providing for Economic

Hardship Relief in the Regulation of Historic Properties,” 15 *Preservation Law Reporter* 1129 (1996) and “Assessing Economic Hardship Claims Under Historic Preservation Ordinances,” 18 *Preservation Law Reporter* 1069 (1999).)

Historic preservation ordinances either provide for appeal to another administrative body or specify that appeal is to be made directly to court. In establishing an appeal process, it is important to ensure that the appellate body must uphold the commission’s decision if it is supported by “substantial evidence” or a “rational basis” exists for its decision. If the appeal body engages in “de novo” review (i.e., it engages in its own fact-finding rather than limiting its review to the information contained in the record and is not required to defer to the expertise of the commission), that body must use the same criteria as the preservation commission in making its own decision.

Preservation ordinances usually empower local jurisdictions to issue stop-work orders and impose fines and other penalties for individual violations. Fines generally range from \$100 to \$5,000 per day depending upon the type of property being regulated, residential or commercial, and the likelihood for violations. Penalties for unlawful alterations or demolitions may include the denial of a building permit for a number of years or mandatory reconstruction. (Stiffer penalties are used to discourage midnight demolitions of historic structures, where a fine might be viewed as a business cost rather than deterrent.) In cases of demolition by neglect, a commission may be empowered to repair a building and then recoup its expenses by imposing a lien on the property. Ultimately, the commission may seek an injunction in court to compel compliance with the law.

#### **Other Land-Use Laws**

The strength of a preservation program can also be measured by the degree of correlation between historic preservation and other land-use programs, such as comprehensive planning, zoning, and the subdivision of land. Pressure to demolish historic buildings will obviously be much greater in commercial districts with zoning laws that permit high-

rise development and in neighborhoods where replacement houses can far exceed the size of existing houses. Similarly, the historic setting of certain resources may be irreparably altered in communities where existing lots can be subdivided without regard to historic preservation concerns.

Comprehensive or master plans are formal documents, typically adopted at the local level, that set forth a guideline or road map for community development over time. They generally identify important community goals such as economic growth and stability, environmental protection, and public safety in the context of specific planning elements such as land use, housing, and transportation. Historic preservation is often identified as an important community goal and may be included as an element of a comprehensive plan.

The legal status of the comprehensive plan varies considerably from state to state. In some states, consistency between comprehensive plans and local laws is mandatory. In other words, all zoning and other land-use laws must be consistent with the comprehensive plan. In other jurisdictions, a plan may be viewed as advisory, serving as a guideline or road map for future development.

While planning generally occurs at the local level, it is accomplished increasingly on a statewide or regional basis as well. Several states including Vermont, Maine, Rhode Island, Washington, Georgia, Florida, and Delaware have enacted growth management laws that provide additional protection for historic resources.

The comprehensive plan should identify historic preservation as a specific goal or key element. Strong policy statements in favor of preservation can help a decision maker act favorably toward preservation in instances where historic resources might otherwise be harmed, such as in conducting a site plan review or in acting upon a rezoning request. Decisions based on comprehensive plans are also more likely to be upheld, even when the plan is merely advisory, since they help prove that a government acted fairly and reasonably rather than arbitrarily or capriciously.

Ideally, comprehensive plans should also state how conflicts between historic preservation and other community goals, such as economic development or transportation, are to be resolved in a manner consistent with a community’s local preservation ordinance. For example, while a plan may strongly endorse economic growth, it may state that historic resources should be protected in all instances or allow for demolition of historic resources only when no other prudent or feasible alternative exists. A plan may also stress the importance of historic preservation as a means to promote economic development by providing neighborhood stability and tourism opportunities.

Besides the comprehensive plan, zoning, subdivision controls, and other forms of land-use protection can impact historic resources. Zoning laws govern the use and intensity of both new and existing development while subdivision laws govern the platting and conversion of undeveloped land into buildable lots.

The relationship between zoning laws and historic properties is readily understood. Zoning laws allowing fast food restaurants as a matter of right in historic districts, for example, create potentially unresolvable compatibility concerns. Pressure to demolish low-rise, historic commercial buildings will be greater in communities with zoning laws that permit the construction of 20-story structures. Zoning laws can also be used to curtail the practice of building mansion-sized houses in older residential areas by ensuring that applicable setback, lot coverage, height, and bulk requirements conform to existing housing stock.

Subdivision laws can also affect historic properties in profound, although less direct, ways. Land is subdivided to permit new development. If that development is located next to or near a historic resource, the historic setting of that resource is likely to change dramatically.

The way tracts of land are broken into lots and blocks and streets are laid out can also be important. The design of a street system, for example, could create certain traffic patterns, which, in turn, could lead to inappropriate street-widenings in a neighboring historic district.

## PRIMARY LAWS GOVERNING ARCHEOLOGICAL RESOURCES

**Archeological Resources Protection Act of 1979**, 16 U.S.C. §§ 470aa-mm. Principal federal law protecting archeological resources on all federal and Indian lands. It establishes a permit application process for the excavation and removal of archeological resources located on these lands. Provides for the imposition of civil and criminal penalties for specific violations.

**Archeological and Historic Preservation Act of 1974**, 16 U.S.C. §§ 469-469c-2. Provides for the preservation of historical and archeological data that might otherwise be irreparably lost through alterations to the terrain resulting from federal agency construction-related activities. Upon notification by a federal agency that significant resources may be irreparably lost, the Secretary of the Interior must conduct a survey, preserve data, and consult with others regarding ownership and appropriate repository for items recovered.

**Historic Sites Act of 1935**, 16 U.S.C. §§ 461467. Establishes a national policy for the preservation of historic American sites, buildings, objects and antiquities of national significance, delegating specific powers and responsibilities to the Secretary of the Interior in the implementation of that policy. Also authorizes the imposition of a \$500 fine plus costs for violations of any rules promulgated under the act.

**Antiquities Act of 1906**, 16 U.S.C. §§ 431-433. Imposes criminal sanctions for the destruction of historic or prehistoric sites on federally owned or controlled land without a permit.

**National Historic Preservation Act of 1966**, as amended, 16 U.S.C. § 470 *et. seq.* Prohibits federal undertakings (such as the funding, licensing or permitting of activities) affecting properties eligible for listing in the National Register, including archeological sites, without first consulting with the state historic preservation officer and, in some cases, the Advisory Council on Historic Preservation.

**National Environmental Policy Act**, 42 U.S.C. §§ 4321-4347. Requires environmental impact statement for all major federal actions significantly affecting the quality of the human environment, including archeological resources. **Department of Transportation Act of 1966**, 49 U.S.C. § 303. Prohibits federal approval or funding of transportation projects that require the “use” of any historic site, including archeological sites, unless there is “no feasible and prudent alternative to the project,” and the project includes “all possible planning to minimize harm to the project.”

**Abandoned Shipwreck Act of 1987**, 43 U.S.C. § 2101 *et. seq.* Asserts title to abandoned shipwrecks within U.S. territorial waters and then transfers ownership to the state in whose submerged lands the shipwreck is located to facilitate the protection of historic shipwrecks.

**Native American Graves Protection and Repatriation Act of 1990**, 25 U.S.C. §§ 30013013. Provides for repatriation of Native American human skeletal material and related sacred items and objects of cultural patrimony. Also allows for the imposition of criminal penalties for the illegal trafficking in human remains and burial items.

**State archeological protection laws.** Regulate private and/or public actions affecting archeological resources on state (and in some cases on private lands).

**State preservation and environmental laws.** Require state agencies to consider impact of proposed governmental actions on archeological resources.

**Historic preservation ordinances, comprehensive plans, site plan review and subdivision laws.** Some local laws protect archeological resources in addition to historic and other cultural properties.

There are several ways to ensure compatibility between preservation and other land-use laws. Property, for example, may be rezoned or new height restrictions imposed so that pressure for new development is effectively removed. Buffer zones may also be established to prevent encroachment on lower density, commercial, or residential historic areas. (For further discussion see David Listokin, “Growth Management and Historic Preservation: Best Practices for Synthesis,” 29 *The Urban Lawyer* 2 (Spring, 1997), “Protecting Historic Structures Against Incompatible Development,” 14 *Preservation Law Reporter* 1012 (1995) and “Coordination of Historic Preservation and Land Use Controls: New Directions in Historic Preservation Regulation,” 5 *Preservation Law Reporter* 2041 (1987). For discussion on teardowns in residential areas, see “Teardowns and McMansions Resource Guide” at [www.preservationnation.org/issues/teardowns/resource-guide.html](http://www.preservationnation.org/issues/teardowns/resource-guide.html).)

In some situations, special permitting processes may be invoked to allow for consideration of preservation issues as appropriate. For example, owners of historic residential property may be allowed to conduct a limited range of commercial uses on their property such as a bed and breakfast or small office. These uses can help offset rehabilitation and/or maintenance expenditures incurred in larger historic properties. Exceptions from onerous parking requirements may also be established.

In a few jurisdictions, preservation commissions may have either binding or advisory authority over requests to subdivide historic property. Commissions with binding authority may approve, deny, or modify an application to subdivide property protected by a preservation ordinance. Commissions with advisory authority may only recommend to a planning board or other administrative agency with ultimate authority that a specific application be approved, denied, or modified to address historic preservation concerns.

Preservation commissions may also be consulted in situations involving the development of land around an existing resource to ensure that any new construction is compatible. For example, a site plan review process may call

for consultation with a commission on issues regarding the siting or massing of particular buildings or the types of materials or colors used. In some cases, the actual density or size of a project may be limited where incompatible with historic preservation objectives.

### Laws Addressing Specific Resources

A few laws seek to protect specific types of resources from governmental and/or private actions. The protective mechanisms employed by these laws are generally tailored to meet the peculiar concerns of the resource at issue.

### Archeological Resource Protection

Laws protecting archeological resources have been enacted at the federal and state level, and to a much lesser extent at the local level. These laws typically regulate archeological activity on land owned by the federal government through a special permitting process supported by the ability to impose criminal and/or civil penalties for individual violations. In more recent years, archeological protection laws have been extended to private lands, largely in response to increasing threats combined with a growing awareness that damage to archeological sites is irreversible.

#### Federal Laws

**The Archeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm, (ARPA),** is the primary statute governing archeological resource protection at the federal level. This law protects archeological resources on federal and Native American lands through a permitting process accompanied by enforcement provisions. Under ARPA, it is unlawful to remove, excavate, or alter any archeological resource from federal or Indian lands without a permit issued by the Department of the Interior. Permits are approved only for research purposes and all artifacts must remain property of the United States.

In addition, ARPA prohibits the selling, purchasing, exchanging, transporting, and trafficking of archeological resources that were removed in violation of law. Significantly, this prohibition extends not only to artifacts found on public and Indian lands, but also to artifacts taken from private land in violation of state law.



Archeological resources are protected under federal, state and, in some cases, local laws. These laws require permits before excavating or altering archeological sites and impose criminal penalties for looting and other illegal activity.

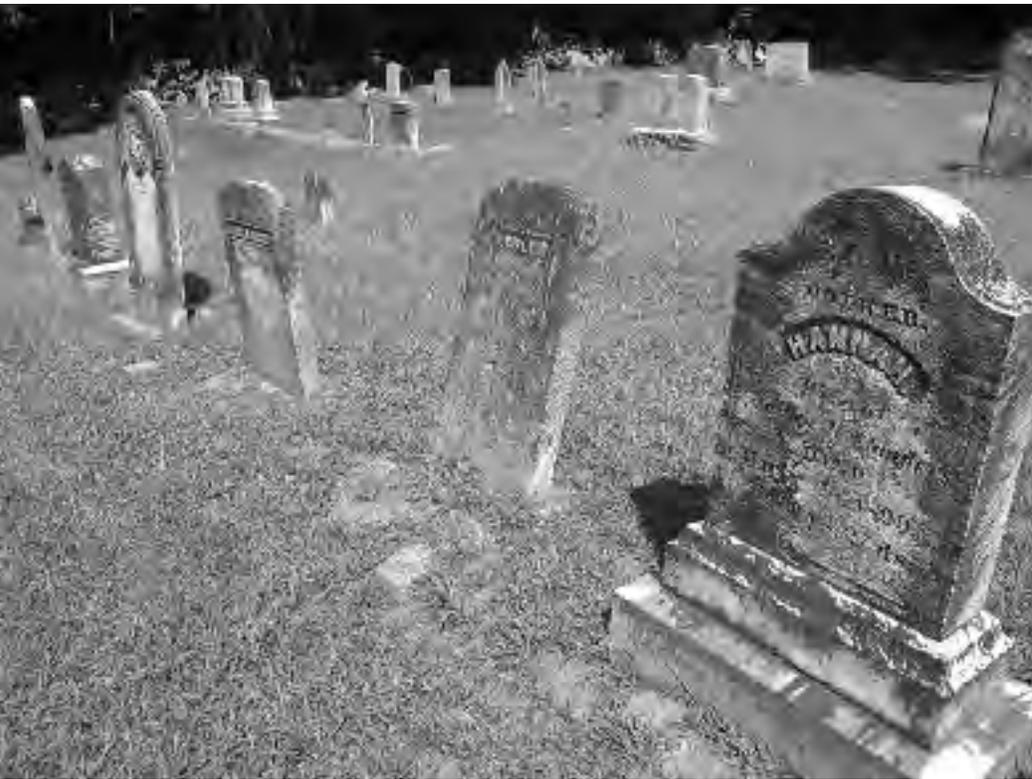
Photo courtesy of the National Trust for Historic Preservation.

ARPA's penalty provisions are critical to its effectiveness as a tool for resource protection. The statute authorizes the imposition of civil and criminal penalties, including both imprisonment and fines up to \$100,000 for repeat offenders. All archeological resources, along with any vehicles or equipment used to carry out the violation can be forfeited. The act also explicitly authorizes the federal government to pay rewards for information leading to the finding of a civil violation or criminal conviction.

Primary regulations governing the protection of archeological resources are set forth at 43 CFR Part 7. Regulations pertaining to the preservation of American antiquities are codified at 43 CFR Part 3 and regulations concerning the care of federally-owned and administered archeology collections are located at 36 CFR Part 79. These laws and

additional information are available on the National Park Service's website at [www.cr.nps.gov/linklaws.htm](http://www.cr.nps.gov/linklaws.htm).

A few federal laws protect archeological resources in particular instances. The **Reservoir Salvage Act of 1960, 16 U.S.C. §§ 469-469a,** requires federal agencies to notify the Secretary of the Interior upon the discovery of any significant archeological resources threatened with destruction due to dam construction or terrain alterations. The law authorizes the Secretary to undertake salvage operations as deemed necessary. The **Archaeological & Historical Preservation Act of 1974, 16 U.S.C. §§ 469-469c-1,** extends the scope of the 1960 Act to include all federal and federally-assisted or licensed projects that threaten historical and archeological data with destruction. The responsible federal agency may elect to undertake salvage or



Several states have enacted laws to protect historic cemeteries against vandalism and theft.

Photo by Elizabeth Byrd Wood.

other protective measures or allocate up to 1 percent of its project funds for use by the Secretary of the Interior for such efforts.

As noted above, the **Antiquities Act** establishes a permitting system for the excavation and gathering of “objects of antiquity” on federal lands designated as “National Monuments.” Limited in scope, permits may be issued only for the benefit of “reputable museums, universities, colleges, or other recognized scientific or educational institutions.” The law imposes nominal penalties (violators may be fined \$500 or jailed for up to 90 days) for the unlawful excavation, injury, or destruction of “any historic or prehistoric ruin or monument, or any object of antiquity on federal lands without the permission of the federal land manager.” **The Historic Sites Act of 1935**, 16 U.S.C. § 462 (k), also authorizes the imposition of a \$500 fine plus costs for violations of rules adopted by the Secretary of the Interior under this law. Archeological resource protection may also be accomplished under Section 106 of the National Historic Preservation Act,

16 U.S.C §§ 470-470w-6, the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347, and Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303. These laws protect archeological resources from potentially adverse federal agency actions by requiring agencies to identify archeological resources and by urging either in place preservation or removal, as appropriate.

#### *State Laws*

Laws governing archeological resource protection vary widely at the state level. Some states have enacted separate archeological resource protection laws, while others include an archeological component in more general historic preservation laws. Many states have adopted laws patterned after the federal Archeological Resources Protection Act, making it unlawful to disturb or remove archeological resources on state-owned land without a permit. A few states also restrict certain archeological activity on privately-owned land and/or extend specific protection for burial sites. Penalties are generally imposed for individual violations.

As with other types of resources, states also play a primary role in protecting archeological resources in exercising their responsibilities under both federal and state programs. The National Historic Preservation Act, state preservation laws, federal and state environmental protection laws, transportation laws, and others, require state involvement in identifying and developing plans to avoid or mitigate potentially adverse governmental actions.

#### *Local Laws*

While a number of jurisdictions extend protection for archeological or cultural sites in local historic preservation ordinances, only a handful of communities have developed detailed protection measures. Several jurisdictions, for example, include archeological resources among other items qualifying for designation, but provide little guidance about how these sites are to be protected in individual circumstances. Usually, archeological resources are treated the same as any other resource. A few communities, however, have included specific procedures governing archeological resources in their preservation ordinances. San Antonio, Tex., for example, requires owners to prepare a “determination of effect” and explore alternative ways to reduce or avoid any adverse effects.

Archeological resource protection also may be accomplished at the local level through other types of land-use laws likely to entail “land disturbing” activity. Archeological protection, for example, may be provided through conditional or incentive zoning that allows for the preservation of archeological resources in exchange for more intensive development. Resources may be protected through subdivision laws and/or site plan review by requiring that an archeological assessment be performed as a condition to approval and by requiring applicants to avoid or mitigate the destruction of such resources in delineating the size and location of buildings, and location and design of streets and individual lots. Alexandria, Va., for example, requires the preparation of a preliminary archeological assessment and, sometimes, the development of a resource management plan, as part of its site plan review process.

## Laws Protecting Native American Cultural Resources

In addition to the more general laws governing historic resource and/or archeological protection, specific laws have been enacted at the federal and state level governing the disposition of Native American artifacts and human remains. These laws seek to place control or ownership of these items in the appropriate Indian tribe or Native Hawaiian organization.

The **Native American Graves Protection and Repatriation Act (NAGPRA)**, codified at 25 U.S.C. §§ 3001-3013, establishes a process for protecting and distributing Native American cultural items found on federal or tribal lands either through “intentional excavation” or “inadvertent discovery.” Among other things, the law specifically seeks to place ownership or control of such items in the appropriate Indian tribe or Native Hawaiian organization and establishes a process to resolve competing claims. Consistent with this objective, the law also imposes specific requirements on museums and federal agencies (excluding the Smithsonian Institution) to assist Indian tribes and Native Hawaiians in the identification and eventual repatriation of burial remains and related items within their collections. NAGPRA further directs the Secretary of the Interior to establish a review committee to monitor and review the implementation of the specific documentation and repatriation requirements and provides for enforcement of its terms through the assessment of civil penalties. Regulations implementing NAGPRA are set forth at 43 C.F.R. Part 10.

A number of states (particularly in the West) have enacted specific laws to protect against the removal or destruction of human remains of Native Americans or the possession, selling or displaying of such remains as well as associated artifacts, in addition to more general laws governing cemeteries as a whole. Inadvertent disturbances must generally be reported to the state, which in turn must consult with the appropriate tribe governing the disposition of the site. Violations are generally punishable through fines and/or imprisonment proportionate to the specific offense.

Some states have also enacted laws to protect historic cemeteries. These laws frequently address issues such as theft,



Keeping federal facilities, such as post offices, downtown can be critical to the economic viability of historic commercial areas.

Photo courtesy of the National Trust for Historic Preservation.

vandalism, and trespass and may prohibit the alteration or relocation of historic cemeteries in particular instances.

### Shipwreck Laws

Specific laws apply to historic shipwrecks found in submerged lands, depending, in part, upon where the wreck is located. Shipwrecks found outside a state’s territorial waters are governed by admiralty law. Shipwrecks found within a state’s territorial waters may be governed by appropriate state law pertaining to historic shipwreck protection. State control over shipwrecks located within a state’s territorial limits is conferred by the federal Abandoned Shipwreck Act.

The disposition of shipwrecks outside a state’s territorial seas is generally governed by admiralty law. In the absence of a statutory claim, title may be conferred under the “law of finds” or the “law of salvage.” The law of finds essentially confers title to the finder of an abandoned shipwreck. Under the law of salvage, a court may order the owner of a vessel to pay a salvor an award

for his or her efforts in recovering the vessel. A number of courts have included the preservation of archeological resources as a factor in determining whether to give title to a finder or to give a salvage award.

The **Abandoned Shipwreck Act** was enacted in 1987 to end confusion over the ownership of certain abandoned shipwrecks and to provide for their protection by state authorities. The Abandoned Shipwreck Act, 43 U.S.C. §§ 2102-2106, (ASA), modifies admiralty law by vesting title to abandoned shipwrecks in the states. The law applies to abandoned shipwrecks that are embedded in the submerged lands of the states, embedded in coralline formations on the submerged lands of the states, or listed in or determined eligible for inclusion in the National Register of Historic Places. A “shipwreck” may include not only the vessel or wreck, but also its cargo and other contents. An “abandoned” shipwreck includes those shipwrecks “which have been deserted and to which the owner has relinquished ownership rights with no retention.” A shipwreck is embedded if it is

“firmly affixed in the submerged lands or in coralline formations.” The U.S. Department of the Interior has adopted advisory guidelines to assist states in implementing the ASA. These guidelines are published at 55 *Fed. Reg.* 50120 (1990). They are also posted on the National Park Service’s website at [www.nps.gov/archeology/submerged/intro.htm](http://www.nps.gov/archeology/submerged/intro.htm).

A majority of states have enacted statutes to protect archeological resources located in their territorial waters. Many of these statutes protect historic shipwrecks through a special permitting process, generally requiring private salvors to operate pursuant to a contract or license.

### Public Buildings

A number of laws, particularly at the federal level, have been enacted in recognition of the link between public policy regarding the location of governmental facilities and efforts to preserve historic properties. Public buildings such as courthouses and city halls provide an important visual landmark for urban communities and often serve as an important catalyst for further economic investment. Locating federal facilities in downtown areas can spur economic development, while relocating federal facilities outside downtown areas can significantly contribute to urban decay and suburban sprawl.

**The Public Buildings Cooperative Use Act** (PBCUA) governs the construction, acquisition, and management of space by the General Services Administration (GSA) for use by federal agencies. Codified at 40 U.S.C. § 601616, the PBCUA outlines the authority vested in the Administrator of General Services and his or her responsibilities in exercising that authority.

To encourage the use of historic buildings by federal agencies, the law directs the Administrator to “acquire and utilize space in suitable buildings of historic, architectural, or cultural significance, unless use of the space would not prove feasible and prudent compared with available alternatives.” This requirement extends to, but is not limited to, all buildings that are listed or eligible for listing in the National Register of Historic Places.

Regulations implementing the Public Buildings Cooperative Use Act are set forth at 41 C.F.R. § 19.000, *et. seq.*, and § 10551.001, *et. seq.*

The National Park Service and the GSA administer a Historic Surplus Property Program that gives state, county, and local governments the ability to obtain surplus federal properties that are listed or eligible for listing in the National Register of Historic Places, at no cost. See [www.nps.gov/history/hps/tps/hspp\\_p\\_admin.htm](http://www.nps.gov/history/hps/tps/hspp_p_admin.htm).

The disposition of surplus property is also governed by the **Federal Property and Administrative Services Act**, 40 U.S.C. § 550(h). This law authorizes the conveyance of historic properties to state and local governments for use as a historic monument.

**Section 110(a) of the National Historic Preservation Act**, 16 U.S.C. § 470h-2(a), imposes additional responsibilities on federal agencies that own or control historic properties or sites such as historic office buildings, military installations, or battlefields and cemeteries. Among other things, federal agencies are required to locate, inventory, and nominate properties to the National Register, assume responsibility for preserving historic properties, and use historic buildings to the “maximum extent possible.”

In addition, agencies responsible for the impairment or demolition of a historic building or site must document the property in accordance with professional standards. When National Historic Landmarks are involved, Section 110 also requires that federal agencies undertake, to the maximum extent possible, “such planning and actions as may be necessary to minimize harm to such landmark” and request comments from the Advisory Council on Historic Preservation.

Guidelines issued by the Secretary of the Interior regarding federal agency responsibilities under Section 110 are published at 63 *Fed. Reg.* 20496-20508 (Apr. 24, 1998). Special rules allowing for the waiver of Section 110 requirements in the event of natural disasters or emergencies are set forth at 36 C.F.R. Part 78.

### Executive Orders

A number of executive orders relevant to preservation have been enacted over the years. These orders impose additional responsibilities on federal agencies with respect to historic property.

**Executive Order 11593**, enacted in 1971, requires federal agencies to operate their policies, plans, and programs so that federally owned or controlled sites, structures, and objects of historical, architectural, or archeological significance are “preserved, restored, and maintained.” (See Exec. Order No. 11,593, 36 *Fed. Reg.* 8921 (1971), reprinted at 16 U.S.C. § 470 note.) Among other things, the order directs federal agencies to locate, inventory, and nominate properties to the National Register and professionally document any listed property that may be substantially altered or affected and place such records in the Library of Congress as part of the Historic American Buildings Survey or Historic American Engineering Record. In addition, federal agencies are required to take necessary measures to provide for the maintenance and planning of federally-owned property listed in the National Register, including the preservation, rehabilitation, and restoration of such sites. Most of the requirements of this order have been enacted into law as part of the 1980 Amendments of the NHPA.

Expanding on the NHPA and PBCUA, **Executive Order No. 12072** (1978), entitled “Federal Space Management,” underscores the policies set forth under the PBCUA and directs federal agencies “to give first consideration to centralized community business area[s]” when meeting federal space needs in urban areas in order “to strengthen the Nation’s cities and to make them attractive places to live and work.” On March 7, 1996, the General Services Administration issued interim regulations, 61 *Fed. Reg.* 9110 (Mar. 7, 1996) (to be codified at 41 C.F.R. Part 101-17), reaffirming the order’s policies and goals and setting in motion a process for adopting revised regulations consistent with that order.

**Executive Order 13006**, issued in 1996, directs federal agencies not only to locate their operations in established downtowns but to give first consideration to locating in historic properties within historic districts. (See 61

*Fed. Reg.* 26,071 (1996).) The order requires the federal government to “utilize and maintain, wherever operationally appropriate and economically prudent, historic properties and districts, especially those located in central business areas.” It also directs federal agencies to give “first consideration” to historic buildings when “operationally appropriate and economically prudent” and requires that any rehabilitation or new construction be “architecturally compatible with the character of the surrounding historic district or properties.” This order was codified into law as an amendment to the NHPA on May 26, 2000. See Pub. Law 106-208 (Section 4) (amending 16 U.S.C. § 470h-2(a)(1)).

**Executive Order 13007** published at 61 *Fed. Reg.* 26,711 (1996), seeks to protect Native American religious practices. It directs federal land-managing agencies to accommodate the use of sacred sites by Native Americans for religious purposes. In addition, such agencies must avoid adversely affecting the physical integrity of sacred sites and provide reasonable notice when an agency’s action may restrict the ceremonial use of a sacred site or otherwise adversely affect its physical integrity. Because some Native American sites may qualify for listing in the National Register of Historic Places, this order may in some instances overlap with Section 106 and Section 110 of the NHPA. Recognition of the right to exercise traditional religions under the First Amendment is also set forth under the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996.

**Executive Order 13287**, known as “Preserve America,” states that the federal government “must recognize and manage the historic properties in its ownership as assets that can support department and agency missions while contributing to the vitality and economic well-being of the nation’s communities and fostering a broader appreciation for the development of the United States and its underlying values.” All agencies are required to build preservation partnerships with state and local governments, Indian tribes, and the private sector to promote local economic development through the use of historic properties. See 68 *Fed. Reg.* 10635-38 (2003).

## RESTRICTIONS ON THE REGULATION OF HISTORIC PROPERTY: PROTECTING THE INDIVIDUAL FROM THE STATE

In reviewing preservation laws, it is as important to understand the limitations on these laws as it is to understand the laws themselves. These limitations are usually imposed by courts interpreting constitutional requirements that protect the individual from overly burdensome governmental actions. The following section explains how the court system works and the types of constitutional issues that are generally raised.

### Judicial Review

Historic preservation laws, whether enacted at the federal, state, or local level, are subject to review by courts, generally called “judicial review.” The decisions resulting from this review become law until vacated or reversed by a higher court.

The importance or particular relevance of an individual court case can vary from place to place depending on a variety of factors, such as which court issued the decision and what kind of laws and issues were addressed. For example, a state supreme court decision addressing constitutional issues may have broad significance, creating either binding or persuasive authority. Whereas, a trial court decision focusing on the application of a notice provision may have little relevance outside the context of the particular controversy at issue. Therefore it is necessary to have a basic understanding of how the judicial system works and the general significance of the issue being decided in order to assess the importance of a particular decision.

Separate court systems are maintained at the federal and state level. Federal court decisions focus on disputes involving federal laws such as the National Historic Preservation Act or federal constitutional issues. State court decisions generally involve controversies over the application of state or local laws, which may involve both statutory and/or constitutional issues.

Federal court cases are generally tried in federal district courts and appealed to a U.S. Court of Appeals. There are 13 federal judi-

cial circuits within the United States. The United States Supreme Court is the ultimate arbiter of federal cases and federal constitutional cases. Supreme Court review, in most cases, is discretionary.

Most states have a trial court, appeals court, and a high court generally referred to, but not always, as the “supreme court.” The names of these courts will vary from jurisdiction to jurisdiction and thus it is important to become familiar with the judicial system within your particular state.

Lower courts are required to abide by the decisions of higher courts within their own system. For example, an appellate court decision interpreting a specific law or ordinance is binding on trial courts within the same circuit. In general, state courts are not bound by federal court decisions interpreting state law unless such decisions are issued by the U.S. Supreme Court. Federal courts, however, can determine the validity of state and local laws under the U.S. Constitution. State courts are not bound by the decisions of courts of other states, even when based on laws similar to those at issue. Such decisions, however, can have great weight, particularly in an area such as historic preservation where the body of law is relatively small, and thus are often viewed as persuasive authority. Courts often look to other jurisdictions for guidance on particular issues.

Similarly, federal courts are not bound by federal court decisions from other circuits. It is possible to have conflicting interpretations of federal statutory provisions or constitutional issues among the circuits. The U.S. Supreme Court, again, is the ultimate arbiter of conflicts among the federal circuits. While judicial consistency is strongly favored, courts may abandon prior law. In most cases, however, reversals in policy occur at the legislative rather than judicial level of government.

### Statutory Claims

Historic preservation litigation generally involves both statutory and constitutional claims. Statutory claims may address issues such as whether a local preservation commission exceeded its authority under a preservation law or whether “substantial evidence” or a “rational basis” exists to support the



In 1978 the U.S. Supreme Court upheld New York City's denial of permission to construct a 55-story office tower on Grand Central Terminal in the landmark decision, *Penn Central Transportation Co., v. City of New York*.

Photo courtesy of the National Trust for Historic Preservation.

commission's decision. Commission decisions are generally reviewed under standards set forth in state *administrative procedure* acts.

As discussed earlier, the issue of legislative authority arises most frequently in connection with local preservation laws subject to state enabling authority. If an ordinance is not enacted in accordance with state enabling law, the entire ordinance may be invalidated. Cases have been litigated, for example, on the ability of a commission to deny permission to demolish a building or to control the design of new buildings constructed within a historic district.

Even if an ordinance has been duly enacted, questions may arise concerning whether a commission has acted within the scope of authority conferred on it by the ordinance or whether it has followed appropriate procedures in taking a particular action as required under local law. For example, did the commission follow a community's open meeting laws (often referred to as "sunshine laws") or follow requisite notice and hearing requirements?

Finally, claims may arise concerning the appropriateness of a commission's decision. In other words, does the evidence in the record support the commission's findings and did the commission assign appropriate weight to the evidence presented. Most courts will defer to the expertise of the commission and uphold decisions to designate property for historic resource protection or to affirm or deny applications for certificates of appropriateness if there is a reasonable basis in the record or if the decision is supported by substantial evidence.

In reviewing preservation laws, it is important to recognize that federal, state, and local laws are generally interpreted through implementing regulations and guidelines. Guidelines are typically advisory in form and are generally used to illustrate what kinds of activities may or may not be permissible under a preservation ordinance. Design criteria, for example, are often adopted in the form of guidelines.

Regulations, in comparison, have the full force of law and must be enacted within the confines of the law being interpreted. They must be consistent with the requirements of the law and the procedural provisions of the governing law, applicable administrative procedure acts, and federal and state constitutions. Procedures governing the review of alterations, the demolition of historic resources, and applications for economic hardship are generally adopted in regulatory form.

### Constitutional Restrictions

Historic preservation laws must be within the limitations of state and federal constitutional provisions that protect the rights of individuals and organizations, and thus constitutional claims are frequently raised. Constitutional challenges to historic preservation laws may arise under the Takings, the Due Process and the Equal Protection Clauses of the Fifth and Fourteenth Amendments, or the Free Exercise and Free Speech Clauses of the First Amendment to the U.S. Constitution.

The following discussion focuses on federal constitutional requirements. Additional protection may be afforded under state constitutions as well.

### Police Power Authority

All preservation laws must be enacted in accordance with the police power. The police power is the inherent authority residing in each state to regulate, protect, and promote public health, safety, morals, or general welfare. The police power is enjoyed by the states, rather than local jurisdictions, and cities and towns can enact preservation laws only if the state has given them specific authority to do so. As noted earlier, this authority is typically bestowed on local jurisdictions either through specific enabling legislation or more general home rule power.

The basic constitutional question is whether historic preservation is a legitimate function of the government. The U.S. Supreme Court in its 1978 decision in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), laid to rest the argument that restrictions on property for the purpose of preserving structures and areas with special historic, architectural, or cultural significance were not a valid use of

governmental authority. Many state courts have explicitly found historic preservation to be a legitimate use of the police power.

### Regulatory Takings

Property owners challenging historic preservation laws sometimes argue that such laws, either generally or in their application in a specific case, amount to a taking of private property. The term “taking” comes from the Fifth Amendment to the U.S. Constitution, which states “... nor shall private property be taken for public use without just compensation.” Under the Supreme Court’s interpretation, the takings clause extends to governmental regulations as well as physical takings of property and accordingly, if a regulation is so burdensome as to amount to a “taking,” then compensation must be paid.

Takings cases fall into one of three categories—physical occupations, exactions or conditions on development, and permit denials. The level of judicial scrutiny varies among each of these categories depending upon the level of intrusiveness on the part of the government. In general, the more closely the government action resembles “confiscation” rather than simply a restriction on use, the closer the court will look at the governmental purpose behind the alleged taking and its corresponding impact on the property.

#### Physical Occupations

This first category of takings claims involves situations where the government invades or occupies private property. The occupation may be “in fact,” such as the required installation of wires or cable boxes on an apartment building, or “constructive,” such as the frequent flying of planes over private property. Because of the close link between physical occupations and actual expropriations through eminent domain, the Supreme Court has established a “per se” rule, requiring just compensation in all physical occupation cases.

#### Exactions and Conditions on Development

This category of takings claims involves challenges to conditions imposed by government in exchange for the issuance of a development permit. For example, a local government may condition the issuance of a building permit for a new residential subdivision on the construc-

tion of roads servicing that subdivision. In such cases, the Supreme Court has said that there must be an “essential nexus between the burdens placed on the property owners and a legitimate state interest affected by the proposed development.” In other words, there should be a reasonable correlation between the conditions placed on the property owner and the public interest being served. A nexus, perhaps, might not be found if a preservation commission required historic property owners to build a sidewalk in front of their house as a condition to the issuance of a certificate of appropriateness to build an addition on the back of their home. (See *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)(nexus between a lateral beach access condition and the Coastal Commission’s stated goals ruled insufficient).)

In addition, the Supreme Court has ruled that a governmentally imposed dedication of land for public use must be “roughly proportional” to the impacts on the community that will result from the proposed development. This rule precludes placing onerous requirements on property owners seeking governmental approval.

In *Dolan v. City of Tigard*, 512 U.S. 687 (1994), for example, the Supreme Court found a taking since Tigard had failed to establish that the development exaction of a greenway and bicycle path would mitigate the flooding and traffic impacts caused by a proposed store expansion in a roughly proportionate manner.

#### Permit Denials

The vast majority of preservation takings cases fall within the “permit denial” category. Under this scenario, a property owner argues that a taking has occurred as a result of the denial of an application concerning the use of his or her property. In determining whether a taking has occurred, it is important to identify the “relevant parcel.” The Supreme Court has said that reviewing courts must look at the “parcel as a whole” rather than the land directly affected by the regulatory action. Thus, for example, in analyzing a takings claim, courts should look at the entire historic estate rather than the segment of the estate on which a historic preservation commission has ruled that development may not occur.

The “parcel as a whole” analysis is especially significant in view of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), which established the rule that a “total deprivation of beneficial use” is a per se or categorical taking. In other words, if a regulation renders property completely valueless (i.e. a “total wipeout”), then a taking requiring “just compensation” results. Without the “parcel as a whole” rule, property owners could claim that a categorical taking has resulted with respect to the portion of property directly affected by the challenged regulatory action. See, e.g., *District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999), cert. denied, 531 U.S. 812 (2000), in which the owner argued, unsuccessfully, that the denial of permission to develop the lawn of a historic apartment building amounted to a categorical taking under *Lucas*.

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**Historic preservation laws must be within the limitations of state and federal constitutional provisions that protect the rights of individuals and organizations.**

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Although decided over 25 years ago, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), is the leading case governing the constitutionality of permit denials under the takings clauses of the federal and state constitutions. As Supreme Court Justice Sandra Day O’Connor wrote in her concurring opinion to *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001)(O’Connor, J. concurring). “our polestar ... remains the principles set forth in Penn Central itself and our other cases that govern partial regulatory takings. Her views were echoed by the majority in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), which held that outside the exceptional “wipe out” situation found in *Lucas*, takings claims must be analyzed under *Penn Central’s* ad hoc, multi-factored framework, and again, in *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528 (2005).

## THE PENN CENTRAL DECISION

*Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the landmark decision upholding the application of New York City’s preservation law to Grand Central Terminal, a Beaux Art railroad station in midtown Manhattan, is important to preservation for several reasons:

- The Supreme Court laid to rest concerns over the appropriateness of governmental restriction on historic property by recognizing historic preservation as a legitimate governmental objective.
- The Court strengthened preservation programs around the country by ruling that New York City’s historic preservation laws, which restricted changes to property designated as landmarks and historic districts, was an appropriate means for accomplishing historic preservation.
- The Court ruled that a property owner must be denied all reasonable and beneficial use of his or her property to establish a regulatory taking. The focus of a takings inquiry is the entire property interest (not just the property interest directly affected) and restrictions on property are valid so long as the owner is not denied a reasonable return on his or her investment. (The Court observed that nothing in New York City’s preservation law prevented the owner from using the terminal as it had for the past 65 years.)
- Property owners are not entitled to the highest and best use of their property. As stated by the Supreme Court, “the submission that [property owners] may establish a ‘taking’ simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable.”

While the Supreme Court focused its review on the constitutionality of New York City’s denial of permission to construct a 55-story office tower on top of Grand Central Station, courts throughout the country have relied upon the decision in upholding local preservation laws. The Court’s decision helped to spur considerable growth in the adoption of preservation ordinances by cities and towns throughout the United States (numbered at 500 in 1978 when the Court issued its decision and more than 2,300 today).

### *The Penn Central Test*

**Character of Governmental Action.** This prong focuses on the nature of the action in dispute. As noted above, permanent occupations are treated as per se takings and governmental actions involving exactions or conditioned approval are generally subject to a higher level of scrutiny. Historic preservation regulations are rarely challenged on this issue. Indeed, in *Penn Central*, the U.S. Supreme Court recognized that preserving historic structures is “an entirely permissible goal” and the imposition of restrictions on historic property through historic preservation ordinances is an “appropriate means of securing” that purpose.

**Economic Impact.** The vast majority of preservation cases involving takings claims focus on the question of economic impact. To succeed under this factor, the property owner must demonstrate that the challenged regulation will result in the denial of the economically viable use of the land. This inquiry focuses on the impact of the regulation on the property and not the property owner.

Takings claims involving the mere designation of properties as historic resources pursuant to historic preservation ordinances under both federal and state constitutions have uniformly been rejected. As the Pennsylvania Supreme Court observed in *United Artists’ Theater Circuit, Inc. v. City of*

*Philadelphia*, 635 A.2d 612, 619 (Pa. 1993), “in fifteen years since *Penn Central*,” no state has ruled that a “taking occurs when a state designates a building as historic.”

Takings claims involving the denial of permission to alter or demolish historic structures are also routinely dismissed. Both federal and state courts have ruled that governmental actions under historic preservation laws that prevent landowners from realizing the highest and best use of their property are not unconstitutional. A taking will not result when the owner can realize a reasonable rate of return on his or her investment or can continue to use the property in its current condition or upon rehabilitation. Several courts have also ruled that a property owner must establish that he or she cannot recoup his or her investment in the historic property through sale of the property “as is” or upon rehabilitation.

**Investment-Backed Expectations.** Under the final *Penn Central* factor, the property owner must show that the challenged regulatory action interferes with his or her “distinct investment-backed expectations.” Although the exact meaning of this factor is still being debated, the general consensus is that the individual circumstances surrounding the property in question, such as the owner’s investment motives or his or her primary expectation concerning the use of the property are relevant considerations. To prevail, the expectation must be objectively reasonable rather than a “mere unilateral expectation.”

In *Palazzolo v. Rhode Island*, the Supreme Court ruled that the acquisition of property subsequent to the adoption of a law, such as a historic preservation ordinance, does not bar a takings claim. This does not mean, however, that the existence of a preservation law or designation of a property as historic prior to acquiring title is not a relevant factor.

Conversely, the argument raised by property owners, that the application of preservation laws unconstitutionally interferes with their investment-backed expectations in situations where the property in question has been designated after the property was purchased, has also been rejected. Courts have found that an owner’s expectation to be free from regulation is not reasonable.

### Statutory Responses

In some situations, statutory provisions may protect individuals from potential regulatory takings. Many jurisdictions, for example, include provisions in their preservation ordinances that establish a separate administrative process for considering cases of undue hardship that may lead to potential takings claims. Commonly referred to as economic hardship provisions, they enable local governments to address hardship claims in individual cases and help prevent invalidation of commission decisions on constitutional grounds. Economic hardship provisions are typically invoked once an owner has been denied permission to demolish or substantially alter his or her property. An applicant may be required to submit detailed information to show that retention or sale of the property is economically infeasible.

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**Due process and equal protection require that restrictions imposed on individual rights be free from arbitrary or discriminatory treatment and that the individual receives sufficient notice and an opportunity to be heard.**

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The standard for measuring economic hardship may vary from one jurisdiction to the next. Most jurisdictions, however, use the same standard as that for a regulatory taking, finding economic hardship when an owner has been denied all economically viable use of his or her property.

A number of states have enacted so-called “takings” laws mandating a governmental assessment of the impact of a proposed action on individual property owners to avoid situations that may ultimately result in a compensable taking. A proposed regulation or governmental action may fail to be enacted based upon its projected impact on constitutionally-protected property rights. In a very limited number of states, compensation may be required upon a showing by a private owner that the value of his or her property (and, in some cases, a portion of that property) has been diminished by a certain percentage (sometimes as low as 10 percent.)

While highly controversial, the impact of takings laws on historic preservation has not been documented. Nonetheless, because historic preservation laws may affect private property, these laws are likely to have some impact on efforts to regulate historic property and should be consulted where applicable.

### Eminent Domain

Under the Fifth Amendment, a federal, state, or local government may confiscate privately owned properties for public use, provided that “just compensation” is paid. This authority has been both helpful and harmful to historic properties. On the one hand, scores of historic buildings have been demolished through the application of eminent domain proceedings under urban renewal, transportation, and other public works programs. On the other hand, dilapidated historic resources have been protected from total ruin by government seizure and subsequent transfer to preservation organizations committed to rehabilitating the structures.

The use of eminent domain or condemnation authority has become an issue of increased importance since the U.S. Supreme Court handed down its controversial decision in *Kelo v. City of New London*, 545 U.S. 469 (2005). In *Kelo*, the Court ruled that the seizure of houses for use in a major, private development project that would bring jobs and tax revenues to an economically distressed area satisfied the Fifth Amendment’s “public use” requirement.

In response to the public outcry against the decision, a number of states have amended their state constitutions and eminent domain laws. These amendments restrict seizures of privately-owned property for economic development if the property is to be transferred to another private entity. Many of these laws narrow the definition of “public use” and tighten existing laws relating to the identification of blighted areas. Some also strengthen procedures relating to the condemnation process.

Although many of these laws may help limit the use of eminent domain authority to redevelop areas with historic buildings, local governments, even under the most restrictive statutes, still enjoy considerable authority.



*In Tahoe-Sierra Preservation Council, Inc., v. Tahoe Regional Planning Agency*, a group of property owners affected by a series of moratoria on development in the Lake Tahoe Basin argued unsuccessfully that compensation was due for the 32-month period in which the moratoria were in effect.

Photo courtesy USGS.

### Due Process and Equal Protection

Two basic constitutional concepts underlie all regulatory laws in the United States, including any effort to protect historic property—fairness and equal treatment. Known in legal terminology as “due process” and “equal protection,” they require that restrictions imposed on individual rights be free from arbitrary or discriminatory treatment and that the individual receives sufficient notice and an opportunity to be heard.

### Procedural Due Process

The Fifth and Fourteenth Amendments to the U.S. Constitution require that no person be deprived of “life, liberty, or property” without due process of law. Generally referred to as “procedural due process,” this constitutional requirement is designed to protect individuals from arbitrary governmental action by ensuring that the process of making, applying, and enforcing laws is fair. The amount of protection afforded usually depends upon the type of action being taken, the interest of the individual involved, the extent to which the governmental action affects the interest at stake, and to a lesser extent, the government’s need to work efficiently and expeditiously.



A posted sign is one way to let property owners know about a proposed historic designation for their neighborhood.

Photo by Elizabeth Byrd Wood.

The most fundamental requirement of procedural due process is the opportunity to be heard. The U.S. Supreme Court has made clear that a trial-type hearing is not required in every case. A hearing will be deemed sufficient if it provides all interested persons sufficient opportunity to present their cases fairly in a meeting open to the public.

In preservation cases, a hearing is generally held before property is designated for protection under a local preservation ordinance and in considering an application to alter or demolish property once designated. Such hearings are usually “informal,” meaning that witnesses are not sworn in and cross examination is not required. Many jurisdictions, however, follow specific statutory procedures relating to the timing and process for conducting hearings that address such issues as the presentation of the staff report, the presentation of the applicant and expert witnesses, and consideration of testimony of other interested persons or organizations.

Embraced within the hearing requirement are a number of other individual rights. In a preservation context, for example, a property owner generally has the right to fair notice of a proposed action, such as the designation of his or her property as a historic resource, and the factors under consideration. The owner should be given an opportunity to present reasons in favor of or opposed to the proposed action as well as witnesses and relevant evidence. Finally, a record of the proceedings should be made, and a formal decision based on the factors prescribed should be issued.

Notice must be both timely and sufficiently clear so that affected individuals will be able to appear and contest issues in a meaningful way. The type of notice given generally depends on the interest at stake. Notice is generally provided in one of three forms: individual mailed notice; published notice (usually through a local newspaper); and posted notice (usually a sign on the property at issue).

In preservation cases, notice is generally provided in advance of hearings regarding the designation of historic property or consideration of an application to alter or demolish such property. Property owners or occupants of property directly affected by a proposed designation of property or by decisions relating to an application for a certificate of appropriateness are generally entitled to individual notice by mail. Although not necessarily a constitutional requirement, many communities also mail individual notices to nearby property owners. Notice requirements, however, may vary depending on the law of a particular state.

The right to be heard also includes the right to an impartial proceeding. Commission members must be unbiased. They must avoid prejudging a case or exhibiting personal animosity against any particular individual. When a conflict of interest exists, the commission member should remove himself or herself from the decision-making process. Commission members must also avoid ex parte contacts, including any oral or written communications that are not part of the public record and which other interested parties have not been given reasonable notice.

While allegations have been made that historic preservation commissions, as a whole, are institutionally biased in favor of preservation, this argument has generally failed in recognition that the specialized backgrounds of many individual commission members actually help to ensure fair and informed decision making.

A number of preservation laws have been challenged under the due process clause as unconstitutionally vague, i.e., they are too vague to give fair notice of the laws being imposed. Courts, however, have uniformly rejected these challenges. Historic preservation ordinances have been upheld, both “facially” and “as applied,” so long as procedural safeguards have been enacted to control a preservation commission’s discretion and so long as the meaning of general criteria and standards is discernible from the facts and circumstances. For example, a requirement that any new construction in a historic district be consistent in scale and

design with existing historic structures should be able to withstand constitutional attack since that requirement will not be considered in a vacuum but rather in the context of nearby properties and the character of the district as a whole.

It is important to recognize that federal and state constitutions set forth only the minimum requirements that must be met in adopting and implementing historic preservation laws. State and local laws governing procedural requirements as well as any court decisions interpreting specific constitutional or statutory requirements may provide greater protection

to the individual. Laws that generally impose procedural requirements, in addition to those required under the constitution, include state enabling laws, state sunshine laws, federal or state administrative procedure acts, local land-use laws including preservation ordinances, and implementing regulations including any rules of procedures, or others.

## CONSTITUTIONAL ISSUES AT A GLANCE

The United States Constitution contains several provisions that protect the individual from the state. Included in the Bill of Rights are important restrictions on governmental actions that are relevant to historic preservation such as a prohibition on the “taking” of property without just compensation and restrictions on free speech. These constitutional protections are made applicable to the states through the Fourteenth Amendment. In addition, the Fourteenth Amendment guarantees “equal protection” under the law.

### Regulatory Taking

- Source:** Fifth and Fourteenth Amendments.
- Purpose:** Protect against overly burdensome or confiscatory governmental actions affecting private property.
- Requirement:** Governmental action must “substantially advance legitimate state interest” and not deny owner “economically viable use of his land.” Look at (1) economic impact; (2) effect on “distinct-investment-backed expectations;” and (3) “character of governmental action.” Must be “nexus” between any conditions imposed and public interest being served. Conditions on development must also be “roughly proportional.”
- Remedy:** Compensation.

### Procedural Due Process

- Source:** Fifth and Fourteenth Amendment.
- Purpose:** Protect the individual from arbitrary and capricious governmental action.
- Requirement:** Government must provide individual notice and opportunity to be heard before affecting protected property right.
- Remedy:** Invalidation.

### Equal Protection

- Source:** Fourteenth Amendment.
- Purpose:** Protect against discriminatory governmental actions.
- Requirement:** Laws must be fairly and uniformly applied.
- Remedy:** Invalidation.

Except for the Fifth Amendment, which provides for compensation if a taking of property through overly burdensome regulatory action occurs, the remedy for constitutional violations is “invalidation.” However, damages may be obtained through § 1983 of the Civil Rights Act of 1871 (42 U.S.C. § 1983), which provides relief for individuals against state actions and public officials who violate federally protected rights.

### Establishment Clause

- Source:** First Amendment.
- Purpose:** Ensure that laws are neutral toward religion.
- Requirement:** Laws must have a secular purpose and may not advance or inhibit religion or foster an “excessive entanglement” with religion.
- Remedy:** Invalidation.

### Free Exercise Clause

- Source:** First Amendment.
- Purpose:** Protect against laws or governmental actions that inhibit the free exercise of religion or coerce individuals into violating their religion.
- Requirement:** Except for “neutral laws of general applicability,” a government may not “substantially burden” the free exercise of religion unless the government can establish that the burden is the “least restrictive means” of furthering a “compelling governmental interest.”
- Remedy:** Invalidation.

### Free Speech

- Source:** First Amendment.
- Purpose:** Protect individual against governmental restrictions on speech based on content.
- Requirement:** Government may not abridge speech, including signs and other media used to convey ideas. However, it can impose “reasonable time, place, and manner” restrictions on speech, if those restrictions are “content-neutral” and “narrowly tailored” to meet legitimate governmental objectives.
- Remedy:** Invalidation.



The Second Circuit ruled that New York City's denial of an application by St. Bartholomew's Church to demolish a community house adjacent to the historic church building to construct a 47-story office tower did not unconstitutionally burden the church's burden of free exercise.

Photo: National Trust for Historic Preservation.

### Equal Protection

The Fourteenth Amendment to the U.S. Constitution, among other things, protects against any state action that would “deny to any person within its jurisdiction the equal protection of the laws.” This means that similarly situated property should be treated similarly under the law. Different treatment, however, of similar property will be upheld if reasonable grounds exist for the disparity.

Equal protection claims rarely succeed in historic preservation cases. In *Penn Central*, the Supreme Court ruled that a landmarks ordinance that singled out selected properties for landmark designation was not discriminatory

since the ordinance “embodie[d] a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city.” The Supreme Court found it significant that more than 400 other landmarks and 31 historic districts had been designated under the city’s overall plan.

Nonetheless, the uniform application of written criteria and standards is critical to the integrity of governmental actions. While courts have consistently ruled that criteria governing the designation and review of proposed actions affecting historic resources need not be precise to pass constitutional muster, it is clear that they must be fairly and uniformly applied. Note that many jurisdictions base their standards on the Secretary of the Interior’s Standards for Rehabilitation.

### The First Amendment

The First Amendment to the U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech ...” The Establishment Clause generally requires government neutrality toward religion. It prohibits laws that advance religion or express favoritism toward religion or that foster “an excessive entanglement” with religion. Thus, for example, a law that provides special funding for religious schools or exempts religious property from building code requirements may be found to violate the Establishment Clause.

The Free Exercise Clause, on the other hand, prohibits governmental entities from substantially burdening the free exercise of religion, unless the government can establish that the burden is “the least restrictive means” of furthering a “compelling governmental interest” such as public health or safety. However, “neutral laws of general applicability” need not be justified by a “compelling governmental interest,” even if “the law has the incidental effect of burdening a particular religious practice.” A law designed to promote secular objectives, for example, such as protecting historic buildings from demolition, would not burden the free exercise of religion even though a congregation may be required to spend additional money to rehabilitate rather than demolish and rebuild a historic house of worship.

While relatively few preservation-related cases have been brought under the First Amendment, claims may arise in response to the designation and regulation of historic religious property. Although infrequent, free speech claims may arise in the context of sign regulations.

### Free Exercise of Religion

While strong arguments exist in support of the regulation of historic religious property, the law in this area is still evolving. While not always consistent, the few court decisions addressing this question in the context of preservation laws provide some guiding principles.

The controlling U.S. Supreme Court decision on the free exercise issue is *Employment Division v. Smith*, 494 U.S. 872 (1990). In that decision, the Supreme Court reaffirmed prior case law which held that a government may not “substantially burden” an individual’s free exercise of religion unless the government can establish that the burden is the “least restrictive means” of furthering a “compelling governmental interest.” The Supreme Court, however, carved out a major exception to that rule. The *Smith* Court stated that “neutral laws of general applicability” need not be justified by a “compelling state interest” even if they substantially burden the exercise of religion.

Four distinct issues should be addressed in considering the constitutionality of the regulation of historic religious properties in view of *Smith*. First, what is the religious basis for asserting a free exercise violation? Second, is the law a “neutral law of general applicability?” If the law is found not to be neutral, then it must be determined whether, third, the law or action “substantially burdens” the free exercise of religion. Finally, one must consider whether the action was taken in “furtherance of a compelling state interest,” and, if so, whether the action is “the least restrictive means” of furthering that interest. Because historic preservation is generally not viewed as a compelling state interest, free exercise cases in this area are lost once a court has determined that the free exercise of religion has been substantially burdened.

**Religious Basis for Objection.** The Supreme Court has made clear that the individual or institution seeking exemption from governmental laws under the First Amendment must first show that the conduct in question is grounded in religious belief. In other words, the question of whether a religious property owner has a viable free exercise claim depends on the religious nature of the objection. Not every change that a religious property owner desires to make to its property implicates the Free Exercise Clause. Alterations to historic religious property based on practical considerations rather than theological choice warrant no more protection than changes to secular property. For example, courts have ruled that maximizing the value of real estate owned by religious organizations or covering a historic house of worship with vinyl siding does not constitute “exercise of religion.”

Although distinguishing between religious and non-religious changes to historic religious property may be difficult, determinations are generally based on whether a proposed change stems from a “sincerely held belief,” such as the need to replace a cruciform-shaped window with the Star of David. If a religious property owner establishes that the belief is “sincerely held” and the change is “religious in character,” then the government must accept those assertions as true even if it considers them to be illogical or incomprehensible.

**“Neutral Law of General Applicability.”**

Historic preservation laws are generally viewed as “neutral laws of general applicability.” The object of such laws is to promote the preservation of historic properties, rather than the suppression of religious conduct. Moreover, they seek to preserve all historic properties, whether secular or religious, and without regard to the religious orientation of the property owner. See, e.g., *Rector, Warden & Members of the Vestry of St. Bartholomew’s Church v. New York City*, 914 F.2d 348 (2d. Cir. 1990), cert. denied, 499 U.S. 905 (1991) (New York City’s landmark law is neutral law of general applicability); *First Church of Christ v. Ridgefield Historic District Comm’n*, 737 A. 2d 989 (Conn. App. 1999) (Ridgefield historic preservation ordinance is neutral

law of general applicability); and *City of Ypsilanti v. First Presbyterian Church of Ypsilanti*, No. 191397 (Mich. Ct. App. Feb. 3, 1998) (Ypsilanti preservation ordinance is “a law of general application which does not burden [the church] any more than other citizens, let alone burden [the church] because of its religious beliefs.”)

The Supreme Court in *Smith*, however, recognized two limitations on its general rule that substantial burdens on the free exercise of religion need not be justified by a compelling governmental interest: (1) where the government “has in place a system of individual exemptions;” and (2) where the substantial burden involves another constitutionally protected right. There is little guidance on the law in this area. Constitutional experts maintain that exceptions under historic preservation laws, such as “economic hardship provisions,” do not trigger the “individualized exemptions” limitation because they do not invite “religiously motivated discrimination.” See, e.g., Laura S. Nelson, “Remove Not the Ancient Landmark: Legal Protection for Historic Religious Properties in an Age of Religious Freedom Protection,” 21 *Cardozo Law Review* 740-753 (Dec. 1999). Courts are also generally in accord. See, e.g., *Cambodian Buddhist Soc. of Connecticut, Inc. v. Planning and Zoning Comm’n of Town of Newtown*, 941 A. 2d 868 (Conn. 2008) and *Grace United Methodist Church v. Cheyenne*, 451 F. 3d 643 (10th Cir. 2006). But see, *Keeler v. Mayor & City Council*, 940 F. Supp. 879 (D. Md. 1996) and *Mount St. Scholastica v. City of Atchison*, 482 F. Supp. 2d 1281 (D. Kans. 2007). While some religious property owners have argued that historic preservation laws fall into the “hybrid” constitutional rights limitation on the basis that such laws infringe on both free exercise and free speech rights, no court has applied this limitation in the context of historic properties.

**“Substantial Burden on Religion.”** Court decisions addressing this issue are both modest in number and conflicting in result. Nonetheless, the prevailing view is that enforcement of historic preservation laws against historic religious property owners does not impose a “substantial burden on religion.” In *Rectors, Wardens & Members of St. Bartholomew’s Church v. New York*

*City*, 914 F.2d 348 (1990), the leading federal court case on this issue, the Second Circuit, found that the application of the landmark law to a church-owned structure did not impose an unconstitutional burden on the free exercise of religion, even though the law “drastically restricted the church’s ability to raise revenues to carry out its various charitable and ministerial programs.” See also, *City of Ypsilanti v. First Presbyterian Church of Ypsilanti*, No. 191397 (Mich. Ct. App. Feb. 3, 1998), in which the Michigan Court of Appeals recognized that the alleged “burdens are still only incidental effects of the ordinance . . . [and do] not burden [the religious organization] any more than other citizens, let alone the religious organization because of its religious beliefs,” and *Diocese of Toledo v. Toledo City-Lucas County Plan Commissions*, Case No. 97-3710 (Ohio Ct. Common Pleas Mar. 31, 1998) (church failed to establish that denial of permit to demolish a historic house to construct a parking lot amounted to “an undue burden on the Diocese’s right to freely exercise religion” or that “the denial prevents the Diocese from continuing existing charitable and religious activities.”)

Note that some courts have dismissed free exercise claims on the basis that the claim is not yet “ripe” for review, meaning that judicial review would be premature because the jurisdiction being sued has not had the opportunity to make a final, concrete decision on what alterations or other actions it will permit a religious entity to make on the subject property. There is still some potential that a constitutional violation will not occur. See, e.g., *Metropolitan Baptist Church v. Consumer Affairs*, 718 A.2d 119 (D.C. 1998), and *Church of Saint Paul & Saint Andrew v. Barwick*, 496 N.E.2d 183 (N.Y. 1986).

**Compelling State Interest.** In the event that a preservation law is deemed “non-neutral” or not of “general applicability,” and the regulation of historic religious property would result in a “substantial burden” on the free exercise of religion, any restrictions under the law must be justified by the virtually insurmountable “compelling state interest” test, which only applies to government interests such as public safety. No court thus far has ruled that historic preservation meets that test.

**The Washington Cases.** In a trilogy of cases from the State of Washington, the Washington Supreme Court has either construed the first amendment more restrictively against the government or recognized additional protections for historic religious property owners beyond those guaranteed by the federal constitution. Among other things, the Washington court found that Seattle’s preservation law was not a neutral law of general applicability and that even the nomination of religious-owned historic property violates the free exercise clause. These decisions reflect a marked departure from controlling U.S. Supreme Court precedent on the free exercise clause.

**The Establishment of Religion.** In addition to prohibiting substantial burdens on the free exercise of religion stemming from non-neutral, generally applicable laws, the First Amendment to the U.S. Constitution also prohibits the establishment of religion. This prohibition does more than preclude the federal government or a state from setting up an “official” church. It also prohibits the adoption of laws that aid religion, or that give preference to one religion over another religion, or religion in general over non-religion. In essence, government must be neutral toward religion.

The Establishment Clause and the Free Exercise Clause work in tandem with each other, striving for the appropriate balance between church and state. On the one hand, the government may not enact laws or fund programs that are favorable to, or which give preference to, religious entities. On the other hand, government may not enact laws or fund programs that discriminate against religious entities. An issue in many Establishment Clause cases, in effect, is where to draw the line between religious preference and religious exercise. For example, under what circumstances may a governmental entity fund the restoration of a historic church?

While the answer is rarely clear cut, the U.S. Supreme Court has provided some guidance on how to evaluate Establishment Clause claims. To survive constitutional scrutiny, the challenged governmental action or program must (1) serve a secular governmental purpose and (2) have a primary effect that nei-

ther advances nor inhibits religion. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). To avoid having an impermissible “primary effect,” the governmental action must not “(1) result in governmental indoctrination; (2) define its recipients by reference to religion; or (3) create an excessive entanglement.” *Agostini v. Felton*, 521 U.S. 203 (1997).

In interpreting these requirements, the Supreme Court has said that government may “accommodate” religion, but only where accommodation is necessary to remove governmental intrusions into personal religious beliefs or practice (which, in turn, may require analysis under the Free Exercise Clause). Moreover, although a law may incidentally benefit religion, it must have a secular effect. Finally, consistent with this approach, the Court has recognized that some intermingling between church and state is inevitable in today’s world. However, excessive entanglement is impermissible. Governmental actions that require substantial intrusion into the doctrinal affairs of religious entities are not allowed.

Applying these factors, a federal district court upheld city funding of repairs and improvements for three historic churches in Detroit against an Establishment Clause claim. See *American Atheists v. City of Detroit Downtown Development Authority*, 503 F. Supp. 2d 845 (E.D. Mich. 2007).

**Statutory Protections.** Efforts have been taken at both the federal and state levels to provide statutory protection for religious property owners. The primary law at the federal level is the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc. Signed into law in 2000, this act prohibits any government from enacting or applying land-use laws, including historic preservation laws, to property owned or used by individuals or religious institutions in a manner that would “substantially burden” religious exercise without a compelling state interest, such as public health and safety. The RLUIPA also requires “equal treatment” of religious and non-religious entities and prohibits discrimination against religious institutions or assemblies. Successful claimants are entitled to attorneys’ fees and possibly damages.

Although the RLUIPA applies to a broad range of religious activity, it does not provide immunity from historic preservation and other land-use laws. Courts have uniformly rejected attempts to make the term “substantial burden” meaningless, by finding that it applies to broad range of effects that inhibit or constrain religious exercise. Rather, they view the “substantial burden” requirement as an important limitation on the law’s scope and have dismissed claims where the burdens on religious exercise have been incidental or similar to the type of burdens experienced by any property owner. No single standard for measuring “substantial burden” has been adopted. Most federal appeals courts agree, however, that substantial burden must be interpreted in a manner consistent with First Amendment law and thus require a showing of coercion or significant restraint on religious exercise. See J. Miller, *Regulating Historic Religious Properties under the Religious Land Use and Institutionalized Persons Act* (National Trust for Historic Preservation, 2007).

Finally, governmental entities should be aware that even if a claimant establishes a substantial burden on religious exercise, accommodations made by a local entity to relieve the burden must be accepted unless they are “unreasonable” or “ineffective.” This is an important limitation in matters involving historic properties, because it should lead to negotiations that result in preservation-based solutions.

While the RLUIPA has had a noticeable chilling effect on local government activities involving historic properties, only one preservation case has been reported thus far. In *Episcopal Student Foundation v. City of Ann Arbor*, 341 F. Supp. 2d 691, 709 (E.D. Mich. 2004), a federal district court dismissed a RLUIPA claim because the preservation commission’s denial of a permit to demolish a student worship facility did not substantially burden the organization’s free exercise rights. The court reasoned that the commission’s action did not “force [the organization] to choose between pursuing its religious beliefs and incurring criminal penalties or forgoing government benefits.”

It also did not prevent the organization “from engaging in religious worship, or other religious activities.”

The vast majority of court challenges brought under the RLUIPA, to date, have primarily focused on land-use challenges involving the exclusion of religious properties from certain locations or discriminatory actions by prison officials in matters involving institutionalized persons.

By way of background, the RLUIPA was adopted in response to the U.S. Supreme Court’s ruling in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that the act’s predecessor, the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb et seq., was unconstitutional as applied to the states. Among other things, the Court found that Congress had exceeded its authority in enacting the RFRA, by mandating that the Free Exercise Clause afford more protection than that required by the Supreme Court under *Employment Division v. Smith*. (Note that RFRA is still applied to federal agency actions. See *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006).)

As with the RFRA, the RLUIPA was adopted in response to the Court’s ruling in *Smith*. Although the law’s constitutionality as applied to challenges to state or local land-use and preservation actions has not been resolved, the U.S. Supreme Court upheld the law as applied under its “institutionalized persons” prong in 2005. See *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

At least 11 states have also enacted varying forms of the RFRA, enabling religious property owners to seek redress from state and local governments that substantially burden their religious rights without a compelling governmental reason. Although preservation actions have been challenged in court under both federal and state RFRA grounds, no court has ruled in favor of a religious property owner on such grounds. See, e.g., *First Church of Christ v. Historic District Commission*, 737 A.2d 989 (Conn. App. 1999), cert. denied, 742 A.2d 358 (Conn. 1999) (upholding denial of application to install vinyl siding on historic church against state RFRA claim).



Free speech questions may arise in the context of sign regulations in historic districts.

Photo courtesy of the National Trust for Historic Preservation.

A limited number of state and local governments have responded to concerns raised by religious property owners over the land-marking of their property with the adoption of historic religious property exemptions from historic preservation laws.

Strong arguments exist that religious rights statutes violate the Establishment Clause of the First Amendment, which requires neutrality toward religion. (See discussion on the Establishment Clause above.) The California Supreme Court, however, upheld a provision in a California preservation statute that enables religious property owners to exempt themselves from local preservation laws, against such a claim. See *East Bay Asian Local Development Corp. v. State of California*, 13 P.3d 1122 (Cal. 2000), cert. denied, 532 U.S. 108 (2001).

### Free Speech

First Amendment claims have also surfaced in the context of alleged violations of free speech resulting from efforts to regulate signs or other activities in historic districts. As with free exercise of religion claims, there are only a handful of court decisions on this particular issue in a preservation context. However, a substantial body of state and federal case law exists on the question of the constitutionality of sign regulations, in particular, and free speech, overall.

In general, the First Amendment to the U.S. Constitution bars the regulation of speech, including signs, on the basis of content. Thus, a community-wide ban on all political signs or a ban that excluded political signs but allowed commercial signs would be unconstitutional. See *Ladue v. City of Gilleo*,



Easements can be used to protect both the interior and exterior of historic buildings. The National Trust holds an easement on the John H. Doughty House in Absecon, N.J.

Photo courtesy of the National Trust for Historic Preservation.

512 U.S. 43 (1994). In some cases, even the imposition of permitting requirements may also be viewed as unconstitutional. See *Lusk v. Village of Coldspring*, 475 F.3d 480 (2d Cir. 2007) (ruling that a provision under the town’s preservation ordinance, which required a permit prior to displaying a political sign, was unconstitutional as an impermissible prior restraint on free speech).

In considering the neutrality of sign regulations, it is important to recognize that “non-commercial” signs and other forms of “pure” speech involving political or religious messages will be afforded greater protection than commercial speech. However, this does not mean, in turn, that regulations favoring non-commercial speech over commercial speech will necessarily be upheld. For example, the U.S. Supreme Court in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), struck down an ordinance banning

all commercial newsracks while permitting noncommercial newsracks on the basis that the city’s action lacked a close relationship to its stated purpose of addressing aesthetic and safety concerns. While distinctions between on-premises (business identification) signs and off-premises (billboards and other types of advertising) signs is generally permissible, any exceptions within those categories must be carefully justified.

Generally speaking, a government can impose reasonable time, place, and manner restrictions on speech if those restrictions are “content-neutral.” Laws that have “an incidental effect” on some speakers or messages and not others will be upheld as content-neutral so long as they serve some purpose unrelated to the content of the regulated speech. Historic preservation and aesthetic considerations are judicially recognized police power objectives.

Restrictions on speech must also be “narrowly tailored” to meet governmental objectives. A law need not employ the least restrictive means to satisfy the governmental objective at issue. Nonetheless, restrictions on speech should not be “substantially broader than necessary.”

The vast majority of free speech questions arise in the context of sign regulations in historic districts, however, free speech questions have surfaced in other contexts as well. Free speech claims have been raised, although unsuccessfully, in preservation cases involving a total ban on newspaper vending machines in a historic district, the distribution of advertising leaflets in a historic district, restrictions on off-premise, person-to-person canvassing and the use of sidewalk tables to distribute leaflets and sell shirts, and the regulation of murals, per se, and the denial of permission to paint a mural on the wall of a commercial building in a historic district.

## VOLUNTARY APPROACHES TO HISTORIC RESOURCE PROTECTION

A variety of programs encourage the preservation of privately-owned historic resources through voluntary action ranging from preservation easements to tax incentives. These programs often play a critical role in historic preservation by encouraging protection for significant resources where regulatory protection measures do not exist or by augmenting existing regulatory programs by providing a higher degree and/or more lasting protection.

### Direct Acquisition

For many years historic resources within the United States have been protected through voluntary efforts accomplished primarily by acquisition. Often limited to places associated with important people or significant historic events, these resources are often purchased by government entities or nonprofit organizations and generally operated as house museums.

While this approach to preservation is still used today, alternative methods have been developed to preserve historic resources without converting them to museum use, which requires a significant financial investment. Historic resources may be purchased through revolving funds and then resold after restrictions have been imposed. Historic properties may also be protected by acquiring easements or partial interests in property, which give preservation organizations or public entities the right to approve changes to properties for a period of years or in perpetuity.

### House Museums

Many of our nation's most important historic properties are preserved as house museums. This form of protection generally involves restoration of the interior and exterior of the building and preservation of the surrounding landscape. Because house museums are generally open to the public, they often play a key role in attracting tourism to specific areas.

Historic museums may be owned and operated by public and/or private organizations. The level of protection often depends upon the resources available to restore the property or make necessary repairs. In some instances,

property may be donated to preservation organizations, along with special endowments to ensure its maintenance over time, through charitable giving or estate planning techniques.

In considering how best to protect a historic resource, such as a house, it is important to address the viability of the resource over time. In some instances, property may be better protected if used as a house or office rather than preserved as a house museum with limited resources.

### Revolving Funds and Land Trusts

While revolving funds may be established by either private or governmental entities, they are generally operated at the private level by historic preservation and other charitable organizations (who can accept tax-deductible donations). Revolving funds are typically established through donations, grants, or loans of money that generate income sufficient to finance the acquisition of threatened properties. Upon acquisition, the property is either rehabilitated and sold or sold with protective covenants or preservation easements. The proceeds from the resale are then used to replenish the fund.

Revolving fund money may be used to purchase historic property directly or to finance the purchase or rehabilitation by another entity or individual. Organizations with revolving funds may serve as a lender when other sources of money are unavailable or the terms for other loans are too restrictive or expensive. In addition to providing direct loans, organizations may also, through their revolving funds, provide loan guarantees or participate in the lending of money with other financial institutions.

Historic, archeological, environmental, and other resources may also be protected through land trusts. By acquiring parcels of land and/or partial interests in property, nonprofit organizations with limited funds can provide long-term stewardship of important resources. Land trusts often work directly with private landowners, soliciting donations of land, development rights, and conservation easements. When critical parcels of land cannot be obtained, donations may be sought to purchase the land.

### Easement Programs

Historic properties are frequently protected by preservation or conservation easements. Conservation easements are partial restrictions on land for conservation purposes which may include historic preservation, scenic preservation, archeology, and so forth. Conservation easements, for example, may be used to protect important archeological resources located on privately-owned property.

The term preservation easement refers to easements on historic property. This type of easement may be used to preserve the facade of the building (facade easement) and/or the entire structure and surrounding land.

Under Section 170(h) of the Internal Revenue Code, historic property owners may receive a charitable tax deduction for the donation of a conservation easement. To be deductible, however, the easement must meet a number of conditions. In particular, properties must be donated to a qualified charitable organization and the property must qualify as a "historically important land area" or a "certified historic structure." Special rules apply to contributing properties in registered historic districts.

The easement donation is usually documented in the form of an easement agreement. The agreement spells out the rights of the "holding organization" or donee, and is recorded on the deed of record. While easements may be of lesser duration, an easement must be "perpetual" to qualify for federal tax benefits. Regulations governing "qualified conservation contributions" are set forth at Section 170 (h) of the Internal Revenue Code and Section 1.170A-14 of the Treasury Regulations.

Historic preservation organizations often serve as recipients of preservation easements. As a recipient, the organization is responsible for monitoring and enforcing the restrictions spelled out in the easement agreement. If the property owner subject to the easement violates the terms of the agreement, then the organization has the legal right to require the owner to correct the violation and, if necessary, restore the property to its prior condition.



Federal tax incentives have been used to rehabilitate both commercial and residential income-producing property throughout the country. The Bedford Springs Resort in south-central Pennsylvania was recently restored to its historic grandeur after a \$120 million restoration which took advantage of the federal historic rehabilitation tax credits.

Photos by Adrian Scott Fine.

Organizations operating easement programs generally establish an application process, written criteria for accepting easements, and a standard easement agreement which can be modified based on the particular resource at issue. Fees are often imposed to cover costs associated with monitoring the easement (i.e., in the form of an endowment). For detailed information on establishing and operating easement programs, see *Establishing and Operating an Easement Program* (National Trust for Historic Preservation, 2007) and *Best Practices for Preservation Organizations Involved in Easement and Land Stewardship* (National Trust for Historic Preservation, 2008).

### Tax Incentives

Tax incentive programs generally address three important objectives: they provide monetary support for owners of property subject to preservation laws; they counter private and public land-use policies that tend to favor demolition and new construction; and they encourage the rehabilitation of historic structures. While no one incentive program accomplishes all three objectives, meaningful tax incentives have been adopted at the federal, state, and increasingly, the local level. Frequently, these incentives are combined to make a historic rehabilitation project economically viable.

### Federal Tax Incentives

The federal government encourages the preservation and rehabilitation of historic structures and other resources through tax incentives. By rehabilitating eligible buildings or investing in such projects, taxpayers can recoup dollar for dollar expenditures in the form of a credit from tax owed if certain criteria and standards are met. Taxpayers may also deduct from their taxable income, in the form of a “charitable tax deduction,” the value of donated, full, or partial interests in historic property.

Perhaps the best known incentive to preserve historic property is the **historic rehabilitation tax credit**. This incentive gives property owners either a 10 or 20 percent tax credit on rehabilitation expenses, depending upon the classification of the building at issue. “Certified historic structures” (residential investment and commercial property) are eligible for a 20 percent credit while noncerti-



fied, nonresidential property placed in service before 1936 is eligible for a 10 percent credit. See I.R.C. § 47.

Several specific conditions must be satisfied to qualify for the credit. In addition to being historic, the building must be income producing, not an owner-occupied residence, and “placed in service” before the beginning of the rehabilitation, meaning the structure must have been used as a building before being rehabilitated. Most importantly, the building must be “substantially rehabilitated” and the rehabilitation must be a “qualified rehabilitation.” In other words, rehabilitation costs must exceed the adjusted basis of the building or \$5,000, and the work performed must meet preservation standards. See I.R.C. § 47 and Treas. Reg. § 1.46, *et. seq.*

Credits from “passive activities” (those in which the taxpayer is not involved on a regular, continuous, and substantial basis) may not be used to offset income and taxes owed from “non-passive activities.” For example, partner investors in rehabilitation projects would not be able to apply the rehabilitation credit against wages and portfolio income such as stock dividends and interest on bank accounts. A credit, however, may be carried over to future tax years to offset taxes from passive activities.

A rehabilitation tax credit may not be taken until the Secretary of the Department of the Interior has certified that the building at issue is historic and the rehabilitation has met specific standards. Certifications of historic significance and certifications of rehabilitation work are obtained from the National Park Service upon review by the appropriate state historic preservation officer. Regulations governing the certification process are set forth at 36 C.F.R. Part 67.

### The New Markets Tax Credit

Congress established a new program under § 121 of the Community Renewal Tax Relief Act of 2000, which provides funding opportunities for historic business districts in low-income communities. Through a competitive process, the Community Development Financial Institutions Fund (CDFI), a division of the U.S. Treasury, awards tax credit allocations to qualified Community



Congress created the New Markets Tax Credit to stimulate long-term investment in the economic development of low-income communities. The Harmony Mills complex in Cohoes, N.Y., was converted into loft apartments using the historic and new markets tax credits.

Photo courtesy of the National Trust for Historic Preservation.

Development Entities (CDEs), which in turn, award credits to taxpayers that invest money in a CDE program. The taxpayer can receive up to 39 percent in new markets tax credits over a seven-year period.

A CDE is an investment fund, also certified by the CDIF, whose primary mission is to serve or provide investment capital for low-income areas. Through CDEs, which can include, for example, community development corporations, community development banks, small business investment corporations, and other entities, taxpayers invest in businesses serving low-income areas in the form of loans, equity investments, and financial counseling. By creating alliances with financial institutions, real estate developers, nonprofit corporations, and other taxpayers, the CDE has access to sufficient capital and business acumen to ensure economic success.

The National Trust for Historic Preservation’s for-profit subsidiary, The National Trust Community Investment Corporation

(NTCIC), is a CDE. Through the NTCIC, which has been awarded two allocations of tax credits, taxpayers can participate directly in historic rehabilitation projects or invest in conduit funds that serve, for example, historic Main Street businesses.

### Charitable Giving Rules

The federal government encourages the donation of historic property through its charitable giving rules. Generally speaking, a taxpayer is entitled to a deduction from taxable income or taxable estates and gifts, the amount of money or the fair market value of property donated to a charitable organization. With respect to charitable contribution deductions from income, the value of the deduction may depend upon the taxpayer’s adjusted gross income and the type of property donated. Deductions for estate and gift tax purposes, however, are generally unlimited.

For historic preservation purposes, charitable organizations include governmental entities, if the contribution is made exclusively for public

purposes, and a variety of educational and nonprofit organizations. See I.R.C. §§ 170(c)(1) & (2). To qualify as a charitable organization, nonprofit organizations must obtain a determination letter from the Internal Revenue Service attesting to their status as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code.

Historic resources are generally donated as part of lifetime and estate planning objectives, including the deferral and reduction of the overall tax burden of the property owner and his or her survivors as well as the continued preservation of the property into the future. The fundamentals of lifetime and estate planning are beyond the scope of this publication. Generally speaking, however, a historic property owner can ensure the preservation of a historic resource by donating the structure to a preservation or other charitable organization. A historic house, for example, may be given to a preservation organization for use as a museum or for future sale with restrictions that protect the building in perpetuity. Alternatively, historic property may be donated to a non-preservation organization with preservation restrictions already in place. In some cases a “charitable remainder” gift of historic property may be made to an organization, allowing for the retention of a “life estate” to allow the immediate family to reside in the house until the death of the donor.

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[A] historic property owner can ensure the preservation of a historic resource by donating the structure to a preservation or other charitable organization.

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Historic resources may also be preserved through the donation of partial interests in property, commonly referred to as preservation or conservation easements. As discussed above, owners of historic properties who donate easements, or partial interests in their property, to qualified preservation or conservation organizations may be eligible for a charitable contribution deduction under Section 170 of the Internal Revenue Code.

I.R.C. § 170(h); I.R.C. §§ 2055(f) and 2522; and Treas. Reg. § 1.170A, *et. seq.* Among other requirements, the donor must agree, in the form of a recordable deed, to relinquish his or her rights to demolish, alter, or develop the property, in perpetuity, to a qualified organization. Upon donation, the donor and all subsequent property owners will not be able to change the property without the express permission of the recipient organization.

The value of the easement is the difference between the property’s fair market value before donation of the easement and its fair market value afterward. In order to obtain the charitable deduction, the donor must retain a professional appraiser to value the donated easement, unless the donation is worth less than \$5,000.

#### State and Local Tax Incentives

Several jurisdictions provide special incentives to encourage the maintenance and rehabilitation of historic properties, typically in the form of property and/or income tax relief. As with federal income tax incentives, relief is generally available only to owners of qualified historic properties making qualified rehabilitations. The size of the incentive is directly proportional to the size of the rehabilitation. State and local tax incentives may be available on rehabilitations for either or both, income producing and non-income producing property.

Tax incentive programs are typically administered at the state level by the state historic preservation office. Although infrequent, local incentives may be provided in the form of property tax relief or as a credit from local taxes. Most state and local governments use the Secretary of the Interior’s Standards for Rehabilitation in certifying historic rehabilitations.

Property tax relief is generally provided in one of three ways: a property assessment freeze, a property tax abatement, or a property tax exemption. Under a property assessment freeze, the assessed value of rehabilitated property is frozen at the pre-rehabilitation assessed value for a set number of years. Under a property tax abatement, the tax owed on historic property is “abated” or reduced for a period of time. Finally, under a property tax exemption, historic property

may be completely or partially exempt from taxation, sometimes based on the difference between the property’s assessed value before and after rehabilitation.

Most states link their incentive programs to historic rehabilitations, generally requiring that a historic property be at least partially renovated. A limited number of states, however, provide relief based solely upon designation as a historic landmark.

With few exceptions, property tax incentives are generally not used statewide. Most states limit tax relief to jurisdictions that have opted to participate in the program. In at least one state, however jurisdictions are automatically included in the program unless they have opted out.

A few states provide relief in the form of a credit from state income tax for preservation projects. Similar in many respects to the federal rehabilitation tax credit, relief is provided to owners of historic property who substantially rehabilitate their property according to preservation standards. The incentive may be tied directly to the federal income tax credit or provided independently, based on state-enacted procedures.

Again, the size of the credit and the minimum amount of money that must be spent varies from state to state. Some jurisdictions also impose a “cap” or ceiling on the amount of the credit that can be taken each year.

#### Combining Incentives

The economic viability of rehabilitation projects is sometimes dependant upon the combining of the federal historic rehabilitation tax credit with other federal and state programs. In addition to the New Markets Tax Credit program, discussed above, investors in the rehabilitation of low-income rental housing properties, for example, may be eligible for a low-income housing tax credit, renewal community tax incentives, empowerment zone tax incentives, or other incentives. Taxpayers often seek both federal and state rehabilitation tax credits and, in some cases, a preservation easement may also be donated. For further information, consult your tax attorney.

## OTHER RELATED LAWS AND ISSUES

A number of miscellaneous laws come into play in any resource protection program. While many of these laws address concerns unrelated to historic resource protection, they often include provisions that may either enhance or curtail preservation efforts.

### Access Laws

Increasingly, state and federal governments are enacting laws that prohibit discrimination against persons with disabilities. While historic property owners, in general, must meet each law's specific requirements, alternative measures of compliance may be applied if the historic resource would otherwise be threatened or destroyed. The most comprehensive example of this type of legislation, to date, is the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, (ADA). This law prohibits discrimination to individuals with disabilities in a wide range of circumstances including private sector employment, public services, transportation, telecommunications, and most significantly for historic resources, places of public accommodation.

The level of compliance under the ADA generally depends on the classification of the facility. The ADA requires, for example, that government buildings, "places of public accommodation" such as hotels and restaurants, and "commercial facilities," including office buildings and warehouses, be "readily accessible" to the disabled. The law establishes specific accessibility requirements for new construction and alterations to existing structures and, requires the removal of existing architectural or communication barriers when their removal is "readily achievable." Finally, all public entities must make any service, program, or activity readily accessible and usable by disabled persons.

In general, owners, lessees, or operators of historic buildings, structures, or sites must comply with the ADA. Alterations to "qualified" historic buildings and facilities, including the construction of new additions or renovation of existing spaces, for example, should be made readily accessible to the maximum extent feasible. Alternative measures of compliance may be used if the historic resource would be



The Americans with Disabilities Act requires that public entities make services, programs, or activities accessible and usable by disabled persons. Historic sites should be made accessible to the maximum extent feasible, although alternative methods of compliance may be used if the historic resources would be threatened or destroyed.

Photo by Elizabeth Byrd Wood.

threatened or destroyed. In most cases, the entity making the alteration must consult with the state historic preservation officer regarding accessibility requirements.

Architectural barriers such as steps or narrow doors and communication barriers such as high mounted telephones, must be removed from historic resources that are used as "public accommodations," if "readily achievable." If the barrier removal would destroy the historical significance of the building, however,

alternative methods of compliance may be provided. Public entities are also not required to take any action that would threaten or destroy a property's historic significance.

The ADA is primarily enforced through suits brought by individuals who believe that they have been discriminated against. In addition, the U.S. Attorney General may initiate compliance review and sue for injunctive relief and monetary damages. Note that federal buildings and federally-funded facilities cov-

ered by the Architectural Barriers Act of 1968 (ABA) must satisfy the Uniform Federal Accessibility Standards as well as Section 106 of the NHPA. State and local access codes also may differ from the ADA and may be enforced in other ways.

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**Historic preservation organizations directly involved in real estate activities as owners, developers, or holders of preservation easements may be directly liable for environmental problems associated with such property.**

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The federal Access Board adopted revised ADA Accessible Guidelines (ADAAG) in 2004. The new ADAAG includes a scoping document for ADA facilities, which govern facilities in the private sector (places of public accommodation and commercial facilities) and the public sector (state and local government facilities); a scoping document for ABA facilities, which addresses facilities in the federal sector, and a common set of technical criteria that each scoping section will reference. In contrast to the prior guidelines, specific standards applicable to historic properties are interspersed throughout the publication rather than contained in a single section.

The revised ADAAG is advisory until formally adopted by a regulatory agency, at which time they will have the force of law. Current regulations for the ADA are set forth at 28 C.F.R. §§ 5.149-151 (state and local governments) and 28 C.F.R. § 36.4-1-406 (public accommodations). The Justice Department has not yet incorporated the new standards into its ADA regulations. However, the U.S. Department of Transportation, the General Services Administration, and the U.S. Postal Service have adopted portions of the ADAAG as regulatory standards and as such, must be followed in the implementation of their own programs. Information on the ADAAG is available at the Access Board's website at

[www.access-board.gov](http://www.access-board.gov). ADA regulations can be found on the Justice Department's website at [www.usdoj.gov/crt/ada](http://www.usdoj.gov/crt/ada).

### **Environmental Hazard Laws**

Special environmental liability laws, enacted at the federal and state level, apply to individuals who own, or have a financial interest in property with environmental hazards. Historic preservation organizations directly involved in real estate activities as owners, developers, or holders of preservation easements may be directly liable for environmental problems associated with such property. Historic preservation organizations lending money secured by real property may also be liable under certain circumstances.

The most sweeping law governing liability for hazardous substances is the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or "Superfund" act), 42 U.S.C. §§ 9601-9675, which authorizes the federal government to clean up hazardous substance releases and recover damages and associated costs from those who own or "control" the property.

In addition to other environmental hazards, the following federal laws address lead-based paint hazards:

- the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§ 4851-4856 (which imposes specific abatement and disclosure requirements governing lead-based paint in residential property);
- the Lead Paint Poisoning Prevention Act of 1971, 42 U.S.C. § 4821, *et. seq.* (which sets forth specific inspection and lead-based paint abatement requirements on federally-owned and assisted housing); and
- the Toxic Substances Control Act, 15 U.S.C. § 2601, *et. seq.* (which directs federal agencies to enact regulations governing lead-based paint training programs and certification procedures for contractors involved in lead-based paint removal, and requires the development of standards for laboratory testing, technical assistance, and public education, and the performance of lead paint exposure studies.)

The Department of Housing and Urban Development (HUD) issued new regulations governing lead paint abatement and removal in 1999, which became effective in September 2000. Codified at 24 C.F.R. Part 35, the regulations set forth specific requirements for risk assessment, treatment, and ongoing maintenance of lead paint on any federally-assisted or federally-owned residential property constructed before 1978. Specific requirements vary depending on the funding source and agencies involved, but they may include risk assessment, repair or removal of deteriorated paint, and contaminated dust "clearance." For detailed information on lead paint requirements, visit HUD's website at [www.hud.gov/lead/leadpboff.cfm](http://www.hud.gov/lead/leadpboff.cfm) or contact the National Lead Information Center at 1-800-424 LEAD.

Liability for hazardous wastes may be found under the following federal and state laws:

- the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et. seq.* (which regulates the treatment, storage, and disposal of hazardous wastes);
- the Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. § 2641 (which addresses the removal and containment of asbestos); and
- the Occupational Health and Safety Act, 29 U.S.C.A. § 651678 (29 C.F.R. §§ 1910.1001 and 1929.58) (which establishes asbestos standards applicable to employers before, during, and after a rehabilitation project).

Finally, liability may be imposed under the Toxic Substances Control Act, 15 U.S.C. § 2601, *et. seq.*, mentioned above, which applies to abandoned or improperly used or disposed sources of toxic substances, such as PCBs, and the Clean Water Act, 33 U.S.C. § 1251, *et. seq.*, which governs unlawful discharges to surface or ground water. Several states have enacted some form of "superfund" legislation, imposing liability on property owners for clean up costs associated with hazardous waste, and specialized laws addressing lead paint contamination, asbestos, and so forth.

A number of states have passed “brown-field” laws to make reclamation of historic urban sites easier. These laws limit an individual’s or organization’s exposure to legal liability from contamination when they volunteer to clean up contaminated sites in certain areas. In some cases, technical or financial assistance may also be available.

### Building Code Requirements

The rehabilitation of historic buildings is often hindered by the application of building codes and standards, which specify how buildings must be constructed and used in order to protect the public’s health, safety, and general welfare. Because building codes set forth standards for new construction, particular problems arise when those standards are applied to historic resources. Code requirements, for example, may mandate the removal or alteration of historic materials and spaces to meet fire and other safety requirements.

Building codes are generally adopted at the state level and enforced at the local level. Most state code programs follow model codes, incorporating modifications as necessary to respond to individual needs and circumstances. The three most commonly used model codes include the code of the Building Officials and Code Administrators (BOCA), generally referred to as the National Building Code, the code of the International Conference of Building Officials (ICBO), known as the Uniform Building Code, and the code of the Southern Building Code Congress International (SBCCI) or Standard Building Code.

All of these codes have incorporated special provisions for rehabilitation, which require for the most part that additions and alterations meet new code requirements, but that existing parts of the buildings can avoid code requirements, provided that the building is not made less safe. Several states have adopted special rehabilitation or historic building codes that enable buildings to meet code standards with fewer alterations to historic fabric. See, e.g., the California Historical Building Code (2001), which provides alternatives to otherwise applicable code requirements, including seismic upgrades.

In recent years, a number of states have adopted special rehabilitation codes in an effort to remove code-driven barriers to investment in existing buildings in older urban areas as part of a broader, smart growth program. These codes, such as the New Jersey Rehabilitation Sub Code (adopted in 1999) and the Maryland Building Rehabilitation Code (adopted in 2000), offer flexibility in meeting life-saving code requirements such as those relating to egress requirements and the use of fire-resistant materials. For more information, see “Adopting 21st Century Codes for Historic Buildings,” M. Kaplan, National Trust for Historic Preservation (2007).

### Transportation Funding

Every six years Congress enacts a new transportation funding bill that sets forth the financial and legal framework that states must follow to qualify for federal matching funds for all transportation projects. The Transportation Equity Act for the 21st Century, dubbed TEA-21, and its predecessor, The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), authorized a wide range of highway, safety, mass transit, and other surface transportation-related programs. Both programs, for example, supported spending on bus and rail lines, bike paths, and sidewalks. They also stressed the importance of intermodalism—which focuses on the quality of connections between difference modes of transportation, and transportation planning—which requires the development of long-range plans to improve the efficiency and effectiveness of transportation in metropolitan areas.

A key component of both transportation bills, from a historic preservation perspective, proved to be a provision for “transportation enhancements” funding. Under TEA-21, for example, states were required to set aside 10 percent of their “surface transportation funds” for enhancement projects such as historic preservation, landscaping, and scenic beautification. Also included in TEA-21 was a “National Historic Covered Bridge Preservation Program,” which provided special funding to states on a competitive basis for the preservation, rehabilitation, or restoration of covered bridges.



The Alaska Department of Fish and Game used transportation enhancements funds to rehabilitate the dairy barns at Creamers Refuge—a national wildlife area near a busy four-lane road to Fairbanks.

Photo courtesy of the Yukon Historical Society.

Congress replaced TEA-21 with the “Safe, Accountable, Efficient Transportation Equity Act—a Legacy for Users” (SAFETEA-LU) in 2005. SAFETY-LU, among other things, continues the transportation enhancement program and is scheduled to expire at the end of Fiscal Year 2009. The list of qualifying enhancement activities is set forth at 23 U.S.C. § 101(a)(35).

### Road Design Standards

Standards governing road design can threaten historic resources and adversely affect local community character in unexpected ways. These standards, for example, may require that certain roads in a historic district be widened, that trees be taken down, or curbside parking in downtown areas be removed.

Roads included in the National Highway System (NHS) must comply with guidelines adopted by the U.S. Department of Transportation in consultation with the American Association of State Highway and Transportation Officials (AASHTO). Roads that are not part of the NHS are subject to state design standards.



Federal and state requirements for road design can adversely affect historic bridges and roadways. Several states have developed alternative guidelines to help protect historic bridges and roads. In Indiana, preservationists worked with the Federal Highway Administration and the state department of transportation to develop a comprehensive historic bridge rehabilitation program for the state.

Photo courtesy of the Historic Landmarks Foundation of Indiana.

While AASHTO standards and other design standards are advisory in form, they are generally treated as legal requirements and rigidly applied. This practice has been the target of considerable criticism, since the AASHTO standards recognize important concerns such as environmental protection and historic preservation. For example, the minimum width requirements for roads and bridges, based on projections for high speed driving, are often unnecessarily large and out-of-scale with many historic areas and rural communities.

Some inroads on the problem have occurred over the past few years. The Federal Highway Administration has published a new book, *Flexibility in Highway Design*, which highlights important considerations

and solutions for highway projects affecting historic or scenic areas. The State of Vermont has developed its own set of guidelines for historic roads and bridges and some states have departed from AASHTO standards in specific cases involving historic roadways such as the historic Columbia River highway in Portland, Ore. For further information, see National Trust for Historic Preservation, “Historic Preservation and Transportation,” 14 *Forum Journal* No. 4 (Summer 2000).

### State Growth Management Laws

A growing number of states have enacted comprehensive, statewide growth management laws. Most of these laws contain provisions that can help historic preservation advocates limit sprawl which, directly or indirectly, harms historic resources. For

example, these laws tend to encourage the revitalization of older urban areas and discourage new development that drains the economic vitality out of historic downtowns and neighborhoods. The growth management laws of Delaware and Rhode Island mandate the inclusion of historic preservation elements in local comprehensive plans—which state agencies, including departments of transportation, must honor. The laws of Washington, Maine, and Rhode Island list historic preservation among the state’s top planning goals. Oregon and Washington mandate “urban growth boundaries,” that prevent sprawl-type development from spreading into rural areas. Maryland’s “Smart Growth” law eliminates state subsidies for sprawl. Georgia provides protection for regionally important cultural resources.

## Laws Affecting the Organization and Operation of Historic Preservation Organizations

Historic preservation organizations generally qualify for tax exempt status under Section 501(c)(3) of the Internal Revenue Code. Under that provision, corporations “organized and operated” exclusively for charitable and educational purposes may qualify for federal income tax exemption. As a nonprofit, charitable organization, funds can be raised more easily because any contributions made to such organizations are tax deductible. Organizations enjoying tax-exempt status under federal laws are generally eligible for tax exemption under state and local laws as well.

Historic preservation organizations enjoying tax-exempt status must be careful not to jeopardize that status by engaging in activities contrary to their charitable purpose. Among other things, an organization must be operated “exclusively” or “primarily” for one or more tax-exempt purpose, and an organization’s net earnings may not inure to the benefit of any private individual such as an officer or director. Finally, an organization’s activities must be for the public benefit as a whole. Lobbying activities, while not prohibited, are subject to specific limitations under the tax code.

## ACKNOWLEDGMENTS

*A Layperson’s Guide to Historic Preservation Law* was written by Julia H. Miller. Ms. Miller, former editor of the *Preservation Law Reporter*, is now serving as Special Counsel and Education Coordinator for the National Trust for Historic Preservation. She has written extensively on historic preservation law issues and co-authored *Historic Preservation Law & Taxation*, a three-volume treatise on historic preservation law.

The inspiration for writing this book came from Paul Edmondson, vice president and general counsel for the National Trust for Historic Preservation, who saw the need for a basic summary on historic preservation law that would be useful to the preservation community and helpful in teaching preservation law.

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## PART II. RESOURCES ON HISTORIC PRESERVATION LAW

Historic preservation law is a relatively new field, first gaining recognition as a distinct body of law in 1957 with the publication of Jacob H. Morrison’s book, *Historic Preservation Law*, and his substantially revised *Historic Preservation Law* in 1965. Following the U.S. Supreme Court’s landmark decision in *Penn Central Transportation Co. v. City of New York* and the adoption of significant tax preservation tax incentives at the federal level, two major preservation publications emerged: *A Handbook on Preservation Law*, published in 1983 by the National Center for Preservation Law and the Conservation Foundation, and the *Preservation Law Reporter*, published from 1982 through 2004 by the National Trust for Historic Preservation. Indeed, two publishing houses, Matthew Bender, Inc. and

John Wiley & Sons also came out with comprehensive, preservation law publications in the 1980s: *Historic Preservation Law & Taxation* and *Rehabilitating Older and Historic Buildings*, respectively.

While historic preservation as a specialized area of law has grown rapidly, an up-to-date and comprehensive, single-source publication no longer exists. The *Preservation Law Reporter* has been discontinued and other publications were never updated. That being said, a lot of material on specific aspects of historic preservation law is available through individual publishers, nonprofit organizations, and public agencies. Set forth below is a list of the many significant publications on historic preservation law currently available.

## PRIMARY RESOURCES

***Preservation Law Reporter.*** Published by the Law Department of the National Trust for Historic Preservation from 1982 through 2004, the *Preservation Law Reporter* covered recent court decisions and legislative developments relevant to historic preservation. It includes several in-depth articles on a wide range of issues, such as lobbying by historic preservation organizations, addressing the takings challenge, recent developments in federal preservation law, cell towers, and the regulation of historic religious properties. For further information, contact the Law Department at the National Trust for Historic Preservation, 1785 Massachusetts Avenue, N.W., Washington, D.C. 20036. (202) 588-6035. FAX (202) 588-6272.

***Heritage Resources Law.*** Written by heritage resource law experts, Judge Sherry Hutt and U.S. Attorneys, Caroline M. Blanco (Department of Justice) and Ole Varmer (National Oceanic and Atmospheric Administration), on behalf of the National Trust for Historic Preservation, this book provides an overview and case law on legal issues relating to the protection of archeological, Native American, and underwater resources. Published by John Wiley & Sons in 1999, the 591-page hardbound book may be purchased from the National Trust for Historic Preservation online at [www.preservationbooks.org](http://www.preservationbooks.org) or by calling (202) 588-6296.

**Historic Preservation: An Introduction to Its History, Principles, and Practice.** Written by Norman Tyler, this basic primer on historic preservation discusses a wide range of issues, including “the legal basis for historic preservation.” Published by W.W. Norton & Company in 1999, the softbound book (154 pages) is available in bookstores and online.

**A Richer Heritage: Historic Preservation in the Twenty-first Century.** Edited by Robert E. Stipe, this publication includes a collection of essays by leading scholars and professionals, including discussion on legal developments in the field. Published by the University of North Carolina Press in 2003, the 570-page book is available from Preservation Books. See [www.preservationbooks.org](http://www.preservationbooks.org).

**The American Mosaic: Preserving a Nation's Heritage.** Edited by Robert E. Stipe and Antoinette J. Lee, this publication provides an overview of historic preservation laws in the United States, along with discussion on what types of resources are preserved and why. Originally published by US ICOMOS in 1987 and then republished by Wayne State University Press in 1997, the book (360 pages) is available online and in bookstores.

**Historic Preservation Law: An Annotated Survey of Sources and Literature.** This survey of published literature on preservation law focuses on U.S. law governing the preservation of historic buildings, sites, and districts. Written by Gail I. Winson, this 365-page hardback book was published in 1999 by William S. Hein & Co., Inc. To order a copy call (800) 828-7571 or order online [www.wshein.com](http://www.wshein.com).

## SECONDARY RESOURCES

Although preservation law is not the primary focus of publications within this category, these resources generally include preservation law-related issues among other matters addressed. Examples of resources falling within this category are a number of National Trust for Historic Preservation, National Park Service, and American Planning Association publications. A new chapter on historic preservation co-authored by Julia M. Miller and Dorothy Miner, has been published by Matthew Bender in the *Environmental Law*

*Practice Guide* (1992, rev. 2004). Information on specific issues may also be found on an ongoing basis in law reviews and legal encyclopedias such as *American Jurisprudence* (published by the Lawyers Cooperative Publishing) and *West's Federal Practice Digest* (published by West Publishing Co.).

### National Trust for Historic Preservation

The National Trust for Historic Preservation publishes a number of booklets and reports on specific issues relevant to historic preservation law.

**Preservation Books.** The National Trust for Historic Preservation offers a number of booklets on a wide range of preservation and organizational development issues such as *Procedural Due Process in Plain English*, *Takings Law in Plain English*, *Protecting Older and Historic Neighborhoods through Conservation Districts*, *Economics of Rehabilitation*, *Establishing and Operating an Easement Program to Protect Historic Resources*, *Safety*, *Building Codes and Historic Preservation*, and *Preservation Revolving Funds*. To request a Preservation Books catalog write to Preservation Books, National Trust for Historic Preservation, 1785 Massachusetts, Ave., N.W. Washington, D.C. 20036, or call (202) 588-6296. To order publications online, go to [www.preservationbooks.org](http://www.preservationbooks.org).

**Preservation Law Publications.** The National Trust has launched a new series of publications on specific legal issues that are available in pdf format only. Examples include: *Regulating Historic Properties under the Religious Land Use and Institutionalized Persons Act* (2007); *Protecting Potential Landmarks Through Demolition Review* (2007); and *Best Practices for Preservation Organizations Involved in Easement and Land Stewardship* (2008). To order publications online, go to [www.preservationbooks.org](http://www.preservationbooks.org).

**National Main Street Publications.** The National Main Street Center of the National Trust publishes a series of reports on issues relating to historic preservation and development in downtown areas. Contact the National Main Street Center of the National

Trust at (202) 588-6219 for more information. A list of National Main Street publications can be obtained by contacting the National Main Street Center at the National Trust for Historic Preservation directly at (202) 588-6219.

### National Park Service

The National Park Service offers a variety of publications on issues relating to historic preservation law and archeology through its Cultural Resources Program. These include books on topics such as *Federal Historic Preservation Laws*, monthly periodicals, and a variety of technical summaries on issues such as *How to Establish National Register Boundaries for National Register Properties*. The Park Service publishes a *Catalog of Historic Preservation Publications*, which is available through the Superintendent of Documents of the Government Printing Office, Washington, D.C. 20401 or Heritage Preservation Services, Department of the Interior, National Park Service, P.O. Box 37127, Washington, D.C. 20013-7127.

The National Park Service makes many of its publications available to the general public through its website at [www.nps.gov](http://www.nps.gov) which may either be ordered directly from the Park Service or downloaded off the internet. Publications of particular interest include:

- **CRM.** This periodical, published by the Cultural Resources Division of the National Park Service, features articles and news items on a variety of cultural resource management and historic preservation issues.
- **Preservation Briefs Series.** Published by the Preservation Assistance Division of the National Park Service, this series addresses technical issues relating to the preservation and rehabilitation of historic structures. Examples include “Making Historic Properties Accessible” and “The Preservation and Repair of Stained and Leaded Glass.”
- **National Register Bulletins.** The Interagency Resource Division of the National Park Service publishes a series of pamphlets on issues relating to the National Register of Historic Places ranging from historic shipwreck designations to certification of state and local governments.

- **Partnership Series:** The Heritage Services Division publishes booklets on issues relating to preservation planning, zoning, subdivision controls and so forth.
- **Technical Brief Series.** The Archeology and Ethnography Program/Departmental Consulting Archeologist (formerly Archeological Assistance Program) provides technical information on cultural resource management and related issues through its “Technical Brief” series. The program also publishes a periodical, *Common Ground, Archeology and Ethnography in the Public Interest* (replacing *Federal Archeology*), which addresses archeological enforcement issues and other activities, along with a number of other publications. For specific information on this publication contact the Archeology and Ethnography Program of the National Park Service at 800 N. Capitol St., NW, Suite 210, Washington, D.C. 20002. (202) 343-4110.

### American Planning Association

The American Planning Association publishes a wide range of books and booklets on issues often related to historic preservation. A complete listing is available online at [www.planning.org](http://www.planning.org). A catalog of its publications may also be obtained through the Subscription Department, 122 S. Michigan Avenue, Suite 1600, Chicago, Ill. 60603, (312) 431-9100.

- **PAS Reports.** The American Planning Association publishes a series of reports for professional planners, which, on occasion, address preservation issues.
- **Planning & Environmental Law** (formerly the *Land Use Law & Zoning Digest*). This monthly publication reports on major issues and decisions on land-use law, including historic preservation.

### American Bar Association

The Committee on Land Use, Planning and Zoning Law of the Section of State and Local Government of the American Bar Association, publishes an annual summary of developments in historic preservation law in the fall issue of *The Urban Lawyer*. Articles addressing specific preservation issues are also published periodically. The law journal, issued quarterly, focuses on local government

law and urban legal affairs and is distributed to all members of the Section. Back issues may be obtained from Order Fulfillment, American Bar Association, 321 N. Clark St. Drive, Chicago, Ill. 60610, (312) 988-5522 (800) 285-2221 or FAX (312) 988-5568. Abstracts are available at <http://w3.abanet.org/home.cfm>.

### Libraries and Online Resources

Universities with specialized programs in historic preservation generally have a preservation law component within their library collection of historic preservation materials. The National Trust for Historic Preservation’s library is located in the Architecture Building of the University of Maryland. The collection includes books, journals, newsletters, photographs, and other items relating to historic preservation. For information, call (301) 405-6319.

The University of Virginia Law School houses the Preservation Law Collection, which includes a number of books, journals, federal and state documents, litigation files from major cases, local ordinances from more than 700 municipalities, newsletters, and other information relating to historic preservation law. Categories of materials in the collection are listed in the University of Virginia Law Library’s online catalog. For additional information contact: Law Librarian, University of Virginia Law Library, 580 Massie Road, Charlottesville, Va. 22903-1789. (804) 924-3384, FAX (804) 982-2232, e-mail address: [law@virginia.edu](mailto:law@virginia.edu).

An increasing number of resources relating to historic preservation may be found on the Internet. The National Trust for Historic Preservation provides specific information on the activities and publications of the Trust’s Legal Defense Fund, up-to-date information on pending preservation laws, and the National Trust’s library at the University of Maryland on its home page, [www.preservationnation.org](http://www.preservationnation.org). The National Park Service provides links to other databases such as the National Register of Historic Places and the Historic American Buildings Survey ([www.cr.nps.gov](http://www.cr.nps.gov)). The National Center for Preservation Technology and Training maintains a separate menu to access a range of international architectural and archeological websites. Information and

publications on federal preservation laws and programs can be obtained through the Advisory Council on Historic Preservation’s website ([www.achp.gov](http://www.achp.gov)).

### Miscellaneous Reporters

A number of specialized reporters such as *Zoning and Planning Law Report* (Clark Boardman, New York City), the *Environmental Law Reporter* (Environmental Law Institute, Washington D.C.), and the *Housing and Urban Development Reporter* (BNA, Washington, D.C.) address historic preservation-related issues on an ad hoc basis.

## RESOURCES ON SPECIFIC ISSUES

This section identifies publications that focus on specific topics of law such as environmental law, takings law, archeology, and the rehabilitation tax credit and other tax incentive programs. This list has been compiled to suggest the range of publications available and is in no way exhaustive. Also note that a number of articles on specific topics have also been published in the *Preservation Law Reporter* (see above).

### Federal Historic Preservation Laws

- *Federal Historic Preservation Case Law, 1966-2000.* A. Kanefield, Advisory Council on Historic Preservation, 1996 (rev. 2000).
- *Federal Historic Preservation Laws.* National Center for Cultural Resources, U.S. Department of the Interior, National Park Service, 2002.
- *Federal Planning and Historic Places: The Section 106 Process.* Thomas F. King (Alta Mira Pub. 2000).
- *The National Register of Historic Places Forms.* U.S. Department of the Interior, National Park Service, History and Education, (2002).
- *National Register Information System.* National Park Service, current. Online database of places listed or eligible for listing in the National Register. [www.nr.nps.gov](http://www.nr.nps.gov).
- *Tribal Consultation: Best Practices in Historic Preservation.* T. Jarvis, J. Lavellee, and R. Nichols. National Association of Tribal Historic Preservation Officers, 2005 (online). [www.nathpo.org/publications.html](http://www.nathpo.org/publications.html).

## State Preservation Laws

- *State Tax Credits for Historic Preservation.* H. Schwartz, National Trust for Historic Preservation, 2007 (online). [www.preservationnation.org/resources/public-policy/center-for-state-local-policy/additional-resources/](http://www.preservationnation.org/resources/public-policy/center-for-state-local-policy/additional-resources/)

## Local Preservation Ordinances

- *Design Guidelines Collection.* National Alliance of Preservation Commissions (online database). [www.uga.edu/sed/psol/programs/napc/guidelines.htm](http://www.uga.edu/sed/psol/programs/napc/guidelines.htm).
- *Law and the Historic Preservation Commission: What Every Member Needs to Know.* J. Reap and M. Hill, Jr., Cultural Resources Partnership Notes (National Park Service 2007).
- *Local Preservation Reference Shelf.* National Alliance of Preservation Commissions (National Park Service 1999)(bibliography).
- *Preparing a Preservation Ordinance.* R. Roddewig. American Planning Association PAS Report No. 374, 1983.
- *Preparing A Preservation Plan.* B. White and R. Roddewig. American Planning Association PAS Report No. 450, 1994.
- *Protecting Older Neighborhoods through Conservation District Programs.* National Trust for Historic Preservation, Preservation Books, 2004.
- *Working on the Past in Local Historic Districts.* National Park Service (online). [www.nps.gov/history/hps/workingonthepast/](http://www.nps.gov/history/hps/workingonthepast/)

## Land-Use Laws and Preservation

- *Aesthetics, Community Character, and the Law.* C. Duerksen and R. Goebel, American Planning Association, Planning Advisory Series (PAS) Report No. 489/490, 1999.
- *Approaches to Managing Teardowns.* A. Fine, National Trust for Historic Preservation, 2008 (online). [www.preservationnation.org/resources/public-policy/center-for-state-local-policy/additional-resources/](http://www.preservationnation.org/resources/public-policy/center-for-state-local-policy/additional-resources/)
- *Crossroads, Hamlet, Village, Town.* R. Arendt, American Planning Association, Planning Advisory Series (PAS) Report No. 487/488, 1999.

- *How Superstore Sprawl Can Harm Communities (And What Citizens Can Do About It).* Constance Beaumont, National Trust for Historic Preservation, 1994, reprinted 1996.
- *Immovative Tools for Historic Preservation.* Marya Morris, American Planning Association PAS Report No. 438, 1992.
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### OTHER SOURCES FOR INFORMATION

A number of public agencies and nonprofit organizations may be helpful in addressing specific legal problems. Listed below are a few key national organizations that may be helpful.

#### National Organizations

##### American Planning Association

1776 Massachusetts Ave., N.W.  
Washington, DC 20036  
(202) 872-0611  
www.planning.org  
122 S. Michigan Ave., Suite 1600  
Chicago, IL 60603  
(312) 431-9100 (headquarters)

##### Archeological Conservancy

5301 Central Avenue, N.E., Suite 1218  
Albuquerque, NM 87108  
(505) 266-1540  
www.americanarchaeology.com

##### National Alliance of Preservation Commissions

Public Service and Outreach Founders  
Garden House  
325 South Lumpkin Street  
University of Georgia  
Athens, GA 30602-1861  
(706) 542-4731  
www.sed.uga.edu/psa/programs/napc/contact.htm

##### National Association of Tribal Historic Preservation Officers

1625 K Street, N.W.  
Washington, DC 20006  
(202) 628-8476  
www.nathpo.org

##### National Conference of State Historic Preservation Officers

444 North Capitol Street, N.W. Suite 342  
Washington, DC 20001-1512  
(202) 624-5465  
www.ncshpo.org

##### National Trust for Historic Preservation

Department of Law and Public Policy  
Legal Defense Fund  
1785 Massachusetts Avenue, N.W.  
Washington, DC 20036  
(202) 588-6035  
www.preservationnation.org

##### Preservation Action

1054 31st Street, N.W. Suite 526  
Washington, DC 20007  
(202) 298-6180  
www.preservationaction.org

##### Society for American Archeology

900 2nd Street N.E. #12  
Washington, DC 20002-3557  
(202) 789-8200  
www.saa.org

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Through its Legal Defense Fund, the National Trust for Historic Preservation defends, enforces, and monitors federal, state, and local preservation laws to ensure their effectiveness in protecting historic resources. In over 150 cases to date, the National Trust's Legal Defense Fund has defended America's historic places. Its lawyers work closely with preservationists throughout the country, providing legal advice, advocacy, and expertise on a range of issues affecting preservation, including constitutional law, federal statutes, and state and local laws. For more information call (202) 588-6035 or check online at [www.preservationnation.org/resources/legal-resources/](http://www.preservationnation.org/resources/legal-resources/).

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## GLOSSARY OF TERMS

**Abandoned Shipwreck Act.** Federal law vesting title to abandoned shipwrecks found in state territorial waters, thereby enabling the preservation of historic shipwrecks.

**Advisory Council on Historic Preservation.** Independent federal agency responsible for implementing the Section 106 review process.

**Affirmative maintenance.** Requirement in historic preservation ordinances that a building's structural components are maintained.

**Americans with Disabilities Act.** Law prohibiting discrimination to persons with disabilities, by requiring, among other things, that places generally open to the public, such as restaurants and hotels, be made accessible. Special rules apply to historic buildings and facilities.

**Appellate review.** Review of lower court or agency decision generally based on evidence in the record.

**Archeological Resources Protection Act.** Primary federal statute governing archeological resources.

**“As applied” claim.** Term used to describe argument that a law has been unconstitutionally applied.

**Building code.** Law setting forth minimum standards for the construction and use of buildings to protect the public health and safety.

**Certificate of appropriateness.** Certificate issued by a preservation commission to indicate its approval of an application to alter, demolish, move, or add on to a protected resource.

**Certified local government.** A city or town that has met specific standards enabling participation in certain National Historic Preservation Act programs.

**Charitable contribution.** A donation to a charitable organization whose value may be deducted from gross income for purposes of determining how much tax is owed.

**Comprehensive plan.** Official plan adopted by local governments that guides decision making over proposed public and private actions affecting community development.

**Contributing structure.** Building or structure in historic district that generally has historic, architectural, cultural, or archeological significance.

**Demolition by neglect.** Process of allowing a building to deteriorate to the point where demolition is necessary to protect public health and safety.

**De novo review.** Review of matter for the first time or in the same manner as originally heard.

**Designation.** Act of identifying historic structures and districts subject to regulation in historic preservation ordinances or other preservation laws.

**Due process.** Protection of constitutionally protected rights from arbitrary governmental action. Requires notice and opportunity to be heard.

**Easement (preservation or conservation).** Partial interest in property that can be transferred to a nonprofit organization or governmental entity by gift or sale to ensure the protection of a historic resource and/or land area in perpetuity.

**Economic hardship.** Extreme economic impact on individual property owner resulting from the application of a historic preservation law.

**Eligible property.** Property that meets the criteria for inclusion in the National Register of Historic Places but is not formally listed.

**Eminent domain.** The right of government to take private property for a public purpose upon payment of “just compensation.”

**Enabling law.** Law enacted by a state setting forth the legal parameters by which local governments may operate. Source of authority for enacting local preservation ordinances.

**Environmental Assessment or Impact Statement.** Document prepared by state or federal agency to establish compliance with obligations under federal or state environmental protection laws to consider impact of proposed actions on the environment, including historic resources.

**Executive Order.** Official proclamation issued by the President that may set forth policy or direction or establish specific duties in connection with the execution of federal laws and programs.

**Facial claim.** Term used to describe argument that law is unconstitutional in all situations.

**Finding.** Factual or legal determination made by an administrative body or court upon deliberation.

**Guidelines.** Interpretative standards or criteria that are generally advisory in form.

**Historic district.** An area that generally includes within its boundaries a significant concentration of properties linked by architectural style, historical development, or a past event.

**Keeper of the National Register.** Individual in the National Park Service responsible for the listing in and determination of eligibility of properties for inclusion in the National Register of Historic Places.

**Land trust.** A nonprofit organization engaged in the voluntary protection of land for the purpose of providing long-term stewardship of important resources, whether historical, archeological, or environmental, through the acquisition of full or partial interests in property.

**Land use.** General term used to describe how land is or may be utilized or developed, whether for industrial, commercial, residential or agricultural purposes, or as open space.

**Landmark.** A site or structure designated pursuant to a local preservation ordinance or other law that is worthy of preservation because of its particular historic, architectural, archeological, or cultural significance.

**Lien.** A claim or charge on property for payment of debt, obligation, or duty.

**Memorandum of Agreement.** Document executed by consulting parties pursuant to the Section 106 review process that sets forth terms for mitigating or eliminating adverse effects on historic properties resulting from agency action.

**National Environmental Policy Act.** Primary federal law requiring consideration of potential impacts of major federal actions on the environment, including historic and cultural resources.

**National Historic Landmark.** Property included in the National Register of Historic Places that has been judged by the Secretary of the Interior to have “national significance in American history, archeology, architecture, engineering and culture.”

**National Historic Preservation Act.** The federal law that encourages the preservation of cultural and historic resources in the United States.

**National Register of Historic Places.** Official inventory of “districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering and culture.”

**Native American Graves and Protection and Repatriation Act.** Federal law providing for the repatriation of Native American human skeletal material and related sacred items and objects of cultural patrimony.

**Passive activity rules.** Prohibits the use of deductions and credits from “passive” activities (those in which the taxpayer is not involved on a regular, continuous, and substantial basis) to offset income and taxes owned from “non-passive” activities.

**Public Buildings Cooperative Use Act.** Federal law governing the construction, acquisition, and management of space by the General Services Administration for use by federal agencies.

**Police power.** The inherent authority residing in each state to regulate, protect, and promote the public health, safety, morals, and general welfare.

**Precedent.** A prior case or decision similar or identical in fact or legal principle to the matter at hand that provides authority for resolution in a similar or identical way.

**Procedural laws.** Those laws that prescribe the method in which rights and responsibilities may be exercised or enforced.

**Rational basis.** Standard of review applied by appellate courts that affords high deference to the wisdom or expertise of an administrative body.

**Regulations.** Rules promulgated by an administrative agency that interpret and implement statutory requirements.

**Rehabilitation tax credit.** Twenty percent federal income tax credit on expenses for the substantial rehabilitation of historic properties.

**Revolving fund.** Fund established by a public or nonprofit organization to purchase land or buildings or make grants or loans to facilitate the preservation of historic resources.

**Section 106.** Provision in National Historic Preservation Act that requires federal agencies to consider effects of proposed undertakings on properties listed or eligible for listing in the National Register of Historic Places.

**Section 4(f).** Provision in Department of Transportation Act that prohibits federal approval or funding of transportation projects that require “use” of any historic site unless (1) there is “no feasible and prudent alternative to the project,” and (2) the project includes “all possible planning to minimize harm.”

**Site plan.** Proposed plan for development submitted by the property owner for review by a planning board or other governmental entity that addresses issues such as the siting of structures, landscaping, pedestrian and vehicular access, lighting, signage, and other features.

**Special permit.** Device allowing individual review and approval of a proposed development.

**State historic preservation officer.** Official appointed or designated, pursuant to the National Historic Preservation Act, to administer a state’s historic preservation program.

**Subdivision.** Act of converting land into buildable lots. Ordinances generally set forth standards for layout of streets, utility systems, storm-water management, and so forth.

**Substantial evidence.** Standard of review applied by courts in reviewing governmental decisions. A decision will be upheld if supported by such evidence that a reasonable mind would accept as adequate to support a certain conclusion.

**Substantive laws.** Those laws that create, define, and regulate specific rights as opposed to those which set forth the process or means for the enforcement of such rights or obtaining redress.

**Sunshine law.** General term applied to laws that require meetings of governmental agencies and other authorities be open.

**“Taking” of property.** Act of confiscating private property for governmental use through “eminent domain” or by regulatory action.

**Tax abatement.** A reduction, decrease, or diminution of taxes owed, often for a fixed period of time.

**Tax assessment.** Formal determination of property value subject to tax.

**Tax credit.** A “dollar for dollar” reduction on taxes owed.

**Tax deduction.** A subtraction from income (rather than taxes) that lowers the amount upon which taxes must be paid.

**Tax exemption.** Immunity from an obligation to pay taxes, in whole or in part.

**Tax freeze.** A “freezing” of the assessed value of property for a period of time.

**Transferable development right.** Technique allowing landowners to transfer right to develop a specific parcel of land to another parcel.

**Undertaking.** Federal agency actions requiring review under Section 106 of the National Historic Preservation Act.

**Zoning.** Act of regulating the use of land and structures according to district. Laws generally specify allowable use for land, such as residential or commercial, and restrictions on development such as minimum lot sizes, set back requirements, maximum height and bulk, and so forth.

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