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The Fate Of Historical Preservation Laws In Pennsylvania

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COMMENTS

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I. Introduction

On July 10, 1991, in *United Artists Theater Circuit, Inc. v. City of Philadelphia*,[1] the Pennsylvania Supreme Court held that Philadelphia's Historic Preservation ordinance, as applied to the Boyd Theater, was unfair, unjust, and amounted to an unconstitutional taking of private property without just compensation in violation of Article 1, Section 10 of the Pennsylvania Constitution.[2] The *United Artists* decision stands alone among historic preservation cases and casts doubt on the legitimacy of landmark and historic district ordinances in Pennsylvania. The decision has received much attention and criticism from preservationists throughout Pennsylvania and the nation.

Part Two of this Comment will explain the different tests courts use to determine if an unconstitutional taking has occurred. Part Three will trace the development of historic preservation legislation. Part Four will combine the analysis of the preceding two parts and examine takings challenges to historic preservation ordinances. Part Five will examine and critique the holding of *United Artists*. Part Six will analyze the impact of the *United Artists* decision on other

1. 595 A.2d 6 (Pa. 1991).

2. Article 1, Section 10 of the Pennsylvania Constitution provides "nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." PA. CONST. art. I, § 10.

preservation legislation in Pennsylvania and suggest reforms for Philadelphia's preservation ordinance. Finally, Part Seven will briefly explain the trend of preservation cases in other states.

II. Development of the Takings Issue

The framers of the Constitution embodied their belief in the sanctity of private property in the Fifth Amendment's prohibition against taking private property for public use without just compensation.[3] The United States Supreme Court has recognized that regulation may amount to a taking,[4] but determining when a regulation results in a taking has proven to be problematic.[5] The Court has repeatedly stated that whether a taking has occurred must be determined on a case-by-case basis and by evaluation of the specific facts of each case.[6] The Constitution protects both the possession and value of property,[7] but the degree of protection accorded possession is significantly different from the degree of protection accorded value. In this part of the Comment, I will briefly set forth the United States Supreme Court's approach in determining when an unconstitutional taking has occurred.

A. Possession

Courts are extremely protective of property owners' rights of possession and generally label even the slightest interference with possession as a taking requiring just compensation.[8] In *Loretto v. Teleprompter Manhattan CATV Corp.*,[9] the Court found a taking

3. The Fifth Amendment provides "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

4. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Justice Holmes stated the general rule that "[w]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

5. One commentator described the problem of determining when a taking has occurred as "the most haunting jurisprudential problem in the field of contemporary land-use law . . . one that may be the lawyer's equivalent of the physicist's hunt for the quark." CHARLES M. HAAR, LAND-USE PLANNING 766 (3d ed. 1977).

6. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (stating that there is no set formula for determining when a taking has occurred, rather courts engage in ad hoc factual inquiries). *See also* Agins v. City of Tiburon, 447 U.S. 255, 260-61 (1980) (noting that there is no precise rule for determining when property has been taken); United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) (observing that finding a taking depends upon the particular circumstances of the case).

7. Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 76 (1986).

8. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967) ("Courts . . . never deny compensation for a physical takeover.").

9. 458 U.S. 419 (1982). *Loretto* involved a New York statute that required landlords to

even though the regulation resulted in an encroachment on the property of only one-eighth of a cubic foot of space.[10] Stressing that physical invasion of property is the most serious form of interference with an owner's property rights,[11] the Court explained that when a physical invasion occurs the government does not just take one strand from the property rights bundle but rather takes a portion of every strand in the bundle.[12] A physical invasion destroys the owner's right to possess, to use, and to dispose of the property.[13] The *Loretto* case makes it clear that any permanent physical occupation caused by a regulation is a per se taking even though it has only a minimal economic impact on the property owner.

B. Value

In direct opposition to the Court's stance regarding interference with possession is its stance regarding interference with value. Regulations that greatly interfere with the value of property have survived takings challenges.[14] To facilitate its analysis, the Court has identified a number of factors or tests used in determining when a regulation which interferes with the value of property amounts to a taking. Which test or tests a court applies depends upon the facts and circumstances of the particular case.[15] No one test is conclusive, and courts frequently use a combination of tests.

1. Noxious Use.—When faced with the question of whether a taking had occurred, early courts would examine how the property was used. If the court determined that the property was a nuisance no taking would be found no matter how severely the regulation affected the property.[16] The Court in *Mugler v. Kansas*[17] saw a dis-

permit a cable television company to install cable facilities on the landlord's property.

10. *Id.* at 443 (Blackmun, J., dissenting).

11. *Id.* at 435.

12. *Id.* The Court has conceptually analyzed property as a bundle of rights. The bundle must be viewed as a whole and the destruction of one strand in the bundle does not necessarily amount to a taking. Andrews v. Allard, 444 U.S. 51, 65-66 (1979).

13. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982). *See also* United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945) (explaining that property consists of the right to possess, to use, and to dispose of the property).

14. *See infra* note 33 and accompanying text.

15. *See supra* note 6 and accompanying text.

16. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (sand and gravel pit); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (brick yard); Reinman v. City of Little Rock, 237 U.S. 171 (1915) (livery stable); Mugler v. Kansas, 123 U.S. 623 (1887) (beer manufacturing); Northwestern Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878) (fertilizer manufacturing plant); Pompano Horse Club, Inc. v. Bryan, 111 So. 801 (Fla. 1927) (gambling facility); Thrasher v. Smith, 114 N.E. 31 (Ill. 1916) (bawdyhouse).

17. 123 U.S. 623 (1887).

tinct difference between regulations which abate nuisances and regulations which take private property for public use.[18] Justice Harlan remarked that "[i]n the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner."[19] Justice Harlan reasoned that a regulation which prohibits a nuisance does not restrict the property owner's right to dispose of the property and does not disturb the owner's use of the property for lawful purposes.[20] The noxious use test has been criticized because a use often is labelled a nuisance solely because of its location or the nature of the surrounding area.[21] Today courts rarely use the noxious use test.[22]

2. Economic Impact.—One important factor in determining if a regulation amounts to a taking is the economic impact the regulation has on the property. Courts will examine the diminution in value of the property caused by the regulation,[23] the uses to which the property may be put after enactment of the regulation,[24] and the investment backed expectations of the owner.[25]

a. Diminution in value.—In *Pennsylvania Coal Co. v. Mahon*,[26] the Court set forth the diminution-in-value test. Justice Holmes reasoned that government could not survive if it had to pay for every diminishment in value caused by its regulations.[27] Property owners hold their property subject to an implied limitation that the government may regulate private property by use of its police powers.[28] The government's power, however, has limits.[29] When the dim-

18. *Id.* at 669. In *Mugler*, a beer manufacturer challenged Kansas' prohibition of the manufacture of intoxicating liquors. The court labeled the manufacture of beer a nuisance and found no taking. *Id.* at 668-69.

19. *Id.*

20. *Id.*

21. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), Justice Sutherland described a nuisance as a "pig in a parlor instead of the barnyard." *Id.* at 388.

22. Despite criticism, the noxious use test is occasionally resurrected. *See* Nassr v. Commonwealth, 477 N.E.2d 987 (Mass. 1985)(hazardous waste operation); Kuban v. McGimsey, 605 P.2d 623 (Nev. 1980)(brothel).

23. *See infra* notes 26-36 and accompanying text.

24. *See infra* notes 37-44 and accompanying text.

25. *See infra* notes 45-49 and accompanying text.

26. 260 U.S. 393 (1922). The Pennsylvania statute at issue prohibited the mining of anthracite coal in a manner causing the subsidence of land on which houses were built. *Id.* at 412-13.

27. *Id.* at 413.

28. *Id.* Police powers are the state's power to pass laws for the health, safety, morals, and general welfare of its citizens. Bacon v. Walker, 204 U.S. 311, 317 (1907). *See also* Robinson v. Town Council, 199 A. 308, 313 (R.I. 1938) (explaining that the government has the power to enact zoning laws in the public interest and for the general welfare).

29. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

inution in value reaches a certain magnitude, the government must exercise its power of eminent domain and compensate the owner.[30] The Court found that the regulation in *Pennsylvania Coal* made it commercially impracticable for the owner to mine coal on the regulated land and, therefore, destroyed the value of the owner's mining rights.[31] Accordingly, the court struck down the regulation as an unconstitutional taking.[32]

Although the Court announced the diminution-in-value test, it gave no indication just how much diminution in value would be tolerated before a taking is found. Since *Pennsylvania Coal*, courts have allowed substantial diminution in value without finding a taking.[33] The seminal zoning case applying the diminution-in-value test is *Village of Euclid v. Ambler Realty Co.*[34] In *Euclid* the Court rejected the takings challenge to a zoning ordinance even though it had the effect of reducing the value of the land by seventy-five percent, or $510,000.00.[35] Although the diminution-in-value test is not conclusive, it is used by many courts.[36]

b. Reasonable use.—Courts also examine how the property may be used after the regulation. A taking does not occur just because the owner is denied the highest and best use of the property.[37] Courts examine whether the property owner is left with any econom-

30. *Id.*

31. *Id.* at 414.

32. *Id.* at 416.

33. *See, e.g.*, William C. Haas & Co. v. City of San Francisco, 605 F.2d 1117 (9th Cir. 1979) (allowing diminishment in value of $1,900,000.00); HFH, Ltd. v. Superior Court, 542 P.2d 237 (Cal. 1975) (allowing diminishment in value of $325,000.00); Brown v. City of Fremont, 142 Cal. Rptr. 46 (Cal. Ct. App. 1977) (allowing diminishment in value of $2,825,000.00); Maywood Proviso State Bank v. Village of Berkeley, 204 N.E.2d 144 (Ill. App. Ct. 1965) (allowing diminishment in value of $164,000.00); Hoffmann v. Waukegan, 201 N.E.2d 177 (Ill. App. Ct. 1964) (allowing diminishment in value of $350,000.00); Pederson v. Harrison, 175 N.W.2d 817 (Mich. Ct. App. 1970) (allowing diminishment in value of $99,000.00); Wrigley Properties, Inc. v. City of Ladue, 369 S.W.2d 397 (Mo. 1963) (allowing diminishment in value of $400,000.00).

34. 272 U.S. 365 (1926). The Village of Euclid adopted a zoning ordinance that rezoned an area from industrial to residential. A portion of claimant's land was within the rezoned area.

35. *Id.* at 384.

36. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 50 (1964).

37. Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962) ("Concededly, the ordinance completely prohibits a beneficial use to which the property was previously devoted. However, . . . the fact that it deprives the property of its most beneficial use does not render it unconstitutional."); *see also* Board of County Comm'rs v. Mountain Air Ranch, 563 P.2d 341, 344 (Colo. 1977) (explaining that regulations do not have to allow the highest and best use of the subject property); S.A. Healy Co. v. Town of Highland Beach, 355 So.2d 813, 814 (Fla. Dist. Ct. App. 1978) (holding that a regulation is not invalid solely because it prevents the most economically advantageous use of the property).

ically reasonable use of the property. If so, no taking is found.[38]

However, what one court considers reasonable economic use may be different from what another court considers reasonable economic use.[39] For example, both a California Court of Appeals[40] and the Pennsylvania Commonwealth Court[41] upheld restrictions on land in a floodplain. The restrictions limited the use of the land to agricultural and recreational purposes.[42] On the other hand, the Supreme Court of New Jersey found that similar restrictions on swampland constituted a taking.[43] The restrictions limited the use of the land to agricultural, recreational, and other specifically permitted uses.[44] In effect, the California, Pennsylvania, and New Jersey courts disagreed about whether restrictions that limit land to agricultural and recreational uses leave the owner with any economically reasonable use of the property.

c. Investment Backed Expectations.—Courts examine how a regulation affects the property owner's expectations concerning the use of the property.[45] A court is more likely to find a taking if the regulation prohibits the owner from using the property in a manner in which the owner reasonably expected.[46] In *Ruckelshaus v. Monsanto Co.*,[47] the owner's investment backed expectations were the determining factor in finding a taking. The Court held that the EPA

38. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (noting that regulations effect a taking if they deny an owner all economically viable use of the land).

39. The Court in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), upheld a Pennsylvania coal mining subsidence law similar to the one the Court struck down in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). The *Keystone* Court reasoned that the regulation still allowed the property owner to mine approximately fifty percent of the value of its coal; thus, the owner was left with a reasonable economic use, and there was no taking. 480 U.S. at 501.

40. Turner v. County of Del Norte, 101 Cal. Rptr. 93 (Cal. Ct. App. 1972).

41. Gaebel v. Thornbury Twp., 303 A.2d 57 (Pa. Commw. Ct. 1973).

42. *Turner*, 101 Cal. Rptr. at 95; *Gaebel*, 303 A.2d at 59.

43. Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 193 A.2d 232 (N.J. 1963).

44. *Id.* at 236.

45. Agins v. City of Tiburon, 447 U.S. 255 (1980); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

46. The idea of investment backed expectations is similar to the zoning idea of prior nonconforming uses. Most zoning ordinances allow a property owner to continue to use the property in the manner in which it was used prior to enactment of the zoning regulation. Gross v. Zoning Bd. of Adjustment, 227 A.2d 824, 826-27 (1967) (stating that the owner of property being used as a lawful pre-existing nonconforming use has a vested property right in the nonconforming use).

47. 467 U.S. 986 (1984). Pursuant to the Federal Insecticide, Fungicide and Rodenticide Act, Monsanto Co., an inventor and developer of pesticides, submitted its formulas to the EPA. Monsanto argued that the EPA's disclosure of its formulas constituted a taking. After first determining that the formulas or trade secrets were property subject to the Fifth Amendment the Court considered the takings issue. *Id.* at 1004.

took Mansanto's trade secrets during the years 1972-1978 because during those years Monsanto reasonably expected that its trade secrets would be kept confidential.[48] Before 1972 and after 1978, however, Monsanto did not have such an expectation, or if it did, it was not reasonable, and therefore there was no taking.[49] If a property owner is or should be aware of property restrictions before the owner purchases the property any expectations the owner has regarding the prohibited uses of the property can not be considered reasonable.

3. Reciprocity of Advantage.—Another important factor or test courts use to determine if a taking has occurred is reciprocity of advantage. When using this test,[50] courts examine whether the regulation applies to all property owners in the area in a similar way. Many regulations, such as zoning ordinances, have been upheld on the ground that the regulation provides an average reciprocity of advantage to all land owners affected by the regulation.[51] Although each property owner may be burdened somewhat by the regulation, each property owner is also benefitted by the restrictions which are placed on surrounding property owners. It is not necessary for the benefits received by the property owner to equal or outweigh the burdens placed on the owner.[52] Reciprocity of advantage is an important consideration when courts are determining if historic district ordinances have effected a taking of private property.

As the preceding discussion indicates, there are no clear standards or bright line tests in the takings area. The case- by-case approach and lack of clear standards make it difficult to predict if a court will find a taking. What is clear, however, is that the party seeking to establish a taking must overcome a heavy burden.

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48. *Id.* at 1011. During these years the Federal Insecticide, Fungicide and Rodenticide Act explicitly provided for protection of trade secrets from disclosure. *Id.* at 1010-11.

49. *Id.* at 1010.

50. The reciprocity of advantage test was set forth in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). The Court in *Pennsylvania Coal* found no reciprocal advantage and determined that the regulation impaired the value of the owner's property without conferring a benefit on the owner. *Id.* at 415.

51. For example, tax cases have been justified on the ground that the taxpayer receives a benefit from the government's use of the tax dollars for the public good. Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911).

52. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). Justice Stevens observed that the court is not required to calculate whether a specific property owner burdened by the regulation receives a benefit equal to the burden. *Id.* at 491 n.21. He noted that "[n]ot every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received." *Id.*

III. Historic Preservation Legislation

During the past several decades the goal of protecting historic structures and historic districts from destruction or modification has been widely recognized.

A. Federal Legislation

Congress first recognized the importance of historic preservation by enacting the Antiquities Act of 1906.[53] The Antiquities Act authorized the President to proclaim historically and scientifically significant landmarks located on federal land as national monuments.[54] In 1935, the Historic Sites Act declared preservation of historic sites, buildings, and objects a national policy.[55] The most important federal legislation on the subject of historical preservation came in 1966 with the passage of the National Historic Preservation Act.[56] Reaffirming the importance of the nation's historic and cultural foundations, the Act declared historical preservation to be in the public interest.[57] The National Historic Preservation Act expanded the National Register of Historic Places to include "districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture."[58]

In 1980, Congress amended the National Historic Preservation Act to require the owner's consent before a property or district is placed on the National Register.[59] Owners whose property is included on the National Register qualify for federal tax incentives and federal grant programs.[60] Furthermore, the Act requires the Advisory Council on Historic Preservation to comment on the effect federal projects may have on property listed on the Register.[61] Many

53. Pub. L. No. 59-209, 34 Stat. 225 (codified as amended at 16 U.S.C. §§ 431-433 (1988)).

54. *Id.*

55. Pub. L. No. 74-292, 49 Stat. 666 (codified as amended at 16 U.S.C. §§ 461-467 (1988)).

56. Pub. L. No. 89-665, 80 Stat. 915 (codified as amended at 16 U.S.C. § 470 (1988)).

57. The declaration of policy section of the National Historic Preservation Act provides that "the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans." 16 U.S.C. § 470(b)(4) (1988).

58. *Id.* § 470(a)(1)(A).

59. *Id.* § 470(a)(6).

60. Federal matching grants are made to the states for the purpose of historic preservation. These grants may be used to improve privately owned property. Brenda Barrett, *Some Considerations in the Development Process, in* HISTORIC PRESERVATION 256, 261 (Pa. Bar Inst. 1984).

61. 16 U.S.C. § 470(f) (1988).

properties are included on the National Register;[62] however, inclusion on the National Register does not protect historically significant property from private action.[63] State and local legislation is necessary to prevent a property owner from altering or demolishing a historically significant structure.

B. State and Local Legislation

The most significant preservation activity takes place at the local level. In our constitutional system, however, the police power is vested in the state and must be delegated to municipalities for implementation.[64] All fifty states have enacted some form of historic preservation legislation,[65] usually in the form of enabling legislation granting municipalities the power to designate historic districts[66] or landmarks.[67] Local involvement in historic preservation began in 1931 when the City of Charleston, South Carolina enacted an ordinance creating the Old Charleston Historic District.[68] Five years later, Louisiana passed historic district legislation protecting the Vieux Carre.[69] Over the last half century, the number of historical preservation laws has increased dramatically.[70] By 1989, all fifty states and more than 1500 communities had enacted such laws.[71]

C. Pennsylvania Legislation

Pennsylvania entered the historical preservation field in 1929

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62. More than 2500 Pennsylvania properties and districts are included on the National Register. Alan J. Heavans, *National Register: A Matter of Status*, PHILA. INQUIRER, July 14, 1991, at J01.

63. *Id.*

64. James P. Beckwith, Jr., *Significant State Historic Preservation Statutes*, 21 INFORMATION: FROM THE NAT'L TRUST FOR HISTORIC PRESERVATION 2 (1979).

65. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 107 (1978).

66. *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-462,01(A)(10) (1990); IDAHO CODE § 67-4607-19 (1989); ILL. ANN. STAT. ch. 24, para. 11-48.2-1 to .2-7 (Smith-Hurd 1990); MINN. STAT. ANN. § 138.71-.75 (West 1979).

67. *See, e.g.*, ILL. ANN. STAT. ch. 24, para. 11-48.2-2 (Smith-Hurd 1990).

68. RICHARD J. RODDEWIG, PREPARING A HISTORIC PRESERVATION ORDINANCE 1 (Am. Planning Ass'n 1983).

69. In 1936 the Louisiana Constitution was amended authorizing the preservation of the buildings in the Vieux Carre section of New Orleans. LA. CONST. art. XIV, § 22A.

70. In 1957 there were eleven local ordinances, in 1965 there were 51, and by 1983 there were 1000. RODDEWIG, *supra* note 68, at 1.

71. RICHARD J. RODDEWIG AND CHRISTOPHER J. DUERKSEN, RESPONDING TO THE TAKINGS CHALLENGE: A GUIDE FOR OFFICIALS AND PLANNERS 23 (Am. Planning Ass'n 1989). Justice Brennan observed that the increase in the number of preservation laws is a result of two factors: 1) recognition that a large number of historic structures have been destroyed in recent years; and 2) the widely shared belief that historic structures enhance the quality of life for the entire community. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 108 (1978).

when the General Assembly created the Pennsylvania Historical and Museum Commission.[72] The Commission[73] is charged with preserving public records, documents, and objects, and encouraging and supporting historic preservation efforts throughout the Commonwealth.[74] The Pennsylvania Historical and Museum Commission has the authority to designate a Historic Preservation Board.[75] The Board nominates property for inclusion on the Pennsylvania Register of Historic Places.[76] As with the Federal Register, inclusion on the Pennsylvania Register requires the consent of the property owner or a majority of the property owners in a district.[77] The Historic Preservation Act also requires Commonwealth agencies to consult the Commission before demolishing, altering or transferring any historically significant property under their control.[78] Furthermore, the Act requires the Commission to be consulted regarding the location and design of any state assisted project which may affect the preservation of property listed or eligible for inclusion on the Pennsylvania Register.[79]

It was not until 1961 that Pennsylvania passed enabling legislation allowing municipalities to create historic districts.[80] The stated purpose of the 1961 Act was to promote the general welfare, education and culture of the community by protecting historical areas, making them a source of inspiration, and awakening interest in the past.[81] The Act authorized municipalities, except first and second class cities, to create local historic districts.[82] Once a municipality creates an historic district, the governing body of the municipality, with the advice of a Board of Historical Architectural Review,[83]

72. Act of April 9, 1929, Pub. L. No. 177 (codified as amended at 37 PA. CONS. STAT. ANN. §§ 101-104 (1992 Supp.)).

73. The Pennsylvania Historical and Museum Commission consists of the Secretary of Education, or his designee, nine residents of the Commonwealth, and four members of the General Assembly. 37 PA. CONS. STAT. ANN. § 104 (1992 Supp.).

74. *Id.* § 301.

75. *Id.* § 504. The Board consists of at least nine residents of the Commonwealth including at least one individual competent in each of the following fields: architecture, archaeology, architectural history, history and historic preservation.

76. *Id.* § 505(2).

77. *Id.* § 503.

78. 37 PA. CONS. STAT. ANN. § 508 (1991 Supp.).

79. *Id.* § 510.

80. Act of June 13, 1961, P.L. 282 No. 167 (codified as amended at PA. STAT. ANN. tit. 53, §§ 8001-8006 (1986 & Supp. 1992)).

81. *Id.* § 8002.

82. Section 8002 provides that an ordinance creating a historic district is not effective until the Pennsylvania Historical and Museum Commission has certified the historical significance of the district. *Id.*

83. *Id.* Section 8003 provides that the Board of Historical Architectural Review shall consist of not less than five members, one member being a registered architect, one a licensed

must issue a certificate of appropriateness before any permit for erection, demolition, or alteration is granted for a structure within the district.[84] The Act mandates that the governing body consider the possible effect any proposed change will have on the general historic and architectural nature of the district. The governing body, however, may consider only the appropriateness of exterior architectural features which can be seen from a public street or way.[85]

IV. Takings Challenges to Historic Preservation Ordinances

A. Challenges in Federal Court

In 1975 the Fifth Circuit dealt with the takings question in the context of historic district legislation. In *Maher v. City of New Orleans*[86] the court determined that a New Orleans ordinance creating the Vieux Carre[87] historic district did not amount to an unconstitutional taking of property.[88] Maher owned a victorian cottage within the Vieux Carre, which he sought to demolish and replace with an apartment complex.[89] The historic district ordinance required a permit for any alteration, construction, or demolition of a building within the district.[90] The City Council denied the permit and Maher brought suit.[91]

The court first determined that the ordinance's purpose of historic preservation was legitimate and its means reasonable.[92] The court then found that denying the permit did not amount to a taking. Denial of the permit did not foreclose all reasonable economic use of the property.[93] Maher failed to show that sale was impracticable, that commercial rental could not provide a reasonable return on his

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real estate broker, one a building inspector, and the remaining members being individuals with knowledge and interest in historic districts.

84. *Id.* § 8004.

85. Act of June 13, 1961, P.L. 282 No. 167 (codified as amended at PA. STAT. ANN. tit. 53, § 8004 (1986 & Supp. 1992)).

86. 516 F.2d 1051 (5th Cir. 1975).

87. The Vieux Carre district is commonly known as the French Quarter of New Orleans. *Id.* at 1053.

88. *Id.* at 1067.

89. *Id.* at 1054.

90. *Id.*

91. Maher v. City of New Orleans, 516 F.2d 1051, 1054 (1975).

92. Due process requires that the state's purpose be legitimate and the means employed to achieve that purpose be reasonable. *Id.* at 1059. The legislature enacted the ordinance in order to promote the social and economic goals of preserving the historical district. The legislature determined that preservation was in the public interest. The court stated that where the legislative determination is even fairly debatable the court can not substitute its judgment for that of the legislature. Accordingly, the court held that the objective of the ordinance was within the permissible scope of the police powers. *Id.* at 1061.

93. *Id.* at 1066.

investment, or that other uses of the property were foreclosed.[94]

The court also addressed the claim that the affirmative maintenance provision of the ordinance, which required property owners to keep buildings within the district in good repair, overstepped the police power and amounted to a taking.[95] The court found that upkeep of buildings within the district was reasonably necessary to accomplish the legitimate goals of the ordinance, and the required out-of-pocket expenses did not constitute a taking.[96] The court stressed that its decision was a narrow one, and that there may be occasions where application of the affirmative maintenance provision or denial of a permit would be unduly oppressive on the property owner. In that case, application of the ordinance would amount to a taking.[97]

In *Penn Central Transportation Co. v. City of New York*,[98] the Supreme Court considered the takings issue in regard to a landmark historic preservation ordinance. The Court held that application of New York City's landmarks law to Grand Central Terminal did not constitute a taking under the Fifth Amendment.[99] Under New York's ordinance, the owner of a landmark had an affirmative duty to keep the exterior of the building in good repair,[100] and the Landmarks Preservation Commission had to approve any alterations to the landmark.[101]

On August 2, 1967, the Commission designated the Grand Central Terminal as a landmark over the objection of the owner, Penn Central.[102] In 1968, Penn Central applied for permission to build a multistory office building on top of the terminal.[103] The Commission denied the building permit, and Penn Central filed suit claiming that

94. *Id.*

95. Maher v. City of New Orleans, 516 F.2d 1051, 1066 (5th Cir. 1975).

96. The court noted that the out-of-pocket expenses were similar to out-of-pocket expenses owners are required to incur in providing sprinkler systems and emergency facilities for safety reasons and plumbing and sewage systems for health reasons. *Id.* at 1067. Because the goal of historic preservation is in the public interest the out-of-pocket expenses are not per se confiscatory. *Id.*

97. *Id.* at 1067.

98. 438 U.S. 104 (1978).

99. *Id.* at 138. The ordinance in question provided for the designation of both historic districts and individual landmarks.

100. *Id.* at 111-12.

101. *Id.* at 112.

102. *Id.* at 115.

103. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 116 (1978). Penn Central submitted two separate building plans both of which conformed to applicable zoning ordinances. Under a lease agreement Penn Central had entered into, it would have received one million dollars a year during the construction of the office building and three million a year thereafter. *Id.*

the ordinance had taken its property without just compensation.[104]

The Court pointed out that it had on numerous occasions recognized that land use regulations may legitimately be enacted in order to enhance the quality of life by preserving the character and aesthetic features of a city.[105] The Supreme Court held that Penn Central only proved that it had been denied the most profitable use of its property.[106] The Court reaffirmed the established rule that a regulation may deprive an owner of the highest and best use of the property without effecting a taking.[107] The relevant inquiry involves the regulation's economic impact, including the impact on the owner's investment backed expectations, and whether the regulation allows any economically reasonable use of the property.[108] Because the landmark designation and the denial of the building permit did not prevent Penn Central from continuing to use the property as a terminal it did not interfere with Penn Central's primary investment backed expectations.[109] Moreover, the ordinance did not deny Penn Central all economically reasonable use of the property.[110] To the contrary, Penn Central could continue to make a profit on the terminal and obtain a reasonable return on its investment.[111]

Penn Central claimed that New York's regulation of individual landmarks is different from general zoning or historic district legislation because it singles out individual property owners to bear the burden of historic preservation.[112] The Court rejected Penn Central's argument and found that the regulation was part of a comprehensive city wide preservation plan.[113] Although the ordinance places special restrictions on the owner of property designated as a landmark, the

104. *Id.* at 119.

105. *Id.* at 129. *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297 (1976); Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Berman v. Parker, 348 U.S. 26 (1954). Penn Central did not dispute that historic preservation is a legitimate state objective and that the restrictions imposed by New York's ordinance were reasonably related to achieving that objective. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 129 (1978).

106. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 120 (1978).

107. *See supra* note 37 and accompanying text.

108. *See supra* notes 37-49 and accompanying text.

109. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978).

110. *Id.*

111. *Id.*

112. *Id.* at 133.

113. The Court stated that the ordinance was not like reverse spot zoning. *Id.* at 132. Spot zoning is the arbitrary and unreasonable zoning of a small parcel of land, a singling out of a piece of property for different treatment than similar surrounding parcels. Cleaver v. Board of Adjustment, 200 A.2d 408, 415 (Pa. 1964). The Court found it significant that thirty-one districts and over four hundred landmarks had already been designated pursuant to the ordinance, including many located close to the terminal. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 132 (1978).

Court emphasized that "the major theme of the law is to ensure the owners . . . both a 'reasonable return' on their investments and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals."[114]

The Court accepted the City Council's judgment that historic preservation benefits all the citizens of New York City "both economically and by improving the quality of life as a whole."[115] Using Justice Holmes' terminology the ordinance provided an average reciprocity of advantage.[116] Furthermore, the Court stressed that the regulation's transferable development rights program mitigated whatever financial burdens the ordinance placed on the property owner.[117]

In his dissent, Justice Rehnquist concluded that New York City's landmark ordinance as applied to Grand Central Terminal constituted a taking.[118] He examined what he considered to be the two situations when the destruction of property does not constitute a taking - when the property is used for a noxious use and when the regulation provides an average reciprocity of advantage.[119] First, Justice Rehnquist easily concluded that the noxious use test did not apply because use of the terminal did not amount to a nuisance nor would the proposed office building have constituted a noxious use.[120] Second, Justice Rehnquist disagreed with the majority's conclusion that the restrictions on the terminal were part of a comprehensive scheme conferring an average reciprocity of advantage.[121] He argued that the restrictions on the property and the affirmative duty to maintain the property constituted a substantial burden on Penn Central with little or no concomitant benefit.[122]

Unlike zoning which limits the uses of property, New York's

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114. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 110 (1978).

115. *Id.* at 134.

116. *See supra* notes 50-52 and accompanying text.

117. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978). New York City's zoning regulations allowed owners who had not developed their property to the extent allowed by the regulation to transfer development rights to contiguous properties. Landmark owners were allowed to transfer development rights not only to contiguous property but also to properties across the street or intersection from the landmark. The majority found that Penn Central could readily use these transferable development rights because it owned several other properties in the area which were eligible to receive them. *Id.*

118. *Id.* at 143 (Rehnquist, J., dissenting).

119. *Id.* at 144-48.

120. *Id.* at 145.

121. *Id.* at 147. Justice Rehnquist noted that the landmark ordinance affected less than one tenth of one percent of the buildings in the city.

122. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 148 (1978)(Rehnquist, J., dissenting).

ordinance required the owner of a landmark to preserve the property as a landmark at the owner's expense in order to benefit the entire city.[123] According to Justice Rehnquist this is the type of loss which "in all fairness and justice, should be borne by the public as a whole."[124]

Although some scholars concluded that *Penn Central* conclusively established the legitimacy of individual landmark preservation statutes,[125] the majority was careful to note that, as in other takings challenges, each case must be decided by considering the specific facts and circumstances of that case. Thus, *Penn Central* left open the question whether ordinances which do not contain transferable development rights or which are not part of a comprehensive scheme are legitimate.

B. Challenges in Pennsylvania Courts

The first challenge to Pennsylvania's statute enabling municipalities to create historic districts[126] came in *First Presbyterian Church of York v. City Council of York*.[127] The City Council of York created a historic district in the central section of the city. The York House, an example of Italian-Villa architecture and described as the "finest Victorian house in the City", was located within the historic district.[128] The owner, First Presbyterian Church, decided to tear the building down and use the lot for parking.[129] The City Council refused to issue a demolition permit and the church appealed to the Court of Common Pleas.[130] The church claimed that denial of the demolition permit constituted a taking of property under Article 1, Section 10 of the Pennsylvania Constitution.[131] The

123. *Id.* at 146.

124. *Id.* at 140 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

125. Commenting on *Penn Central* one scholar said: "Henceforth, the legitimacy of preservation goals will not be questioned." Margaret V. Lang, Penn Central Transportation Co. v. New York City: *Fairness and Accommodation Show the Way Out of the Takings Corner*, 13 URB. LAW. 89, 90 (1981).

126. PA. STAT. ANN. tit. 53, §§ 8001-8006 (1986 & Supp. 1992).

127. 360 A.2d 257 (Pa. Commw. Ct. 1976).

128. *Id.* at 259. The York House was also listed on the National Register of Historic Places. *Id.*

129. *Id.* at 261.

130. *Id.* at 259.

131. First Presbyterian Church of York v. City Council of York, 63 Pa. D. & C.2d 150, 152 (York County 1973). The York County Common Pleas Court noted that there was no facial attack on the constitutional validity of the state enabling legislation, nor could there be because the right to establish such historic preservation laws had been established in numerous jurisdictions. *See, e.g.*, Opinion of the Justices to the Senate, 128 N.E.2d 557 (Mass. 1955); Trustees of Sailors' Snug Harbor v. Platt, 288 N.Y.S.2d 314 (App. Div. 1968). The York County Common Pleas Court found that the appropriate standard for determining if a taking

church conceded the facial constitutional validity of the state's enabling act and that York House had significant historical and architectural value.[132] The church had presented evidence that it would cost $29,900.00 to restore York House for church use, $17,000.00 to repair fire damage, and $12,500 annually for maintenance.[133]

In determining if the ordinance effected a taking, the Commonwealth Court adopted the approach used in *Maher v. City of New Orleans*;[134] *i.e.*, whether refusal of the demolition permit precluded use of the property for any purpose for which it was reasonably adapted. The court noted that Pennsylvania has used this same standard for applications for variances from zoning regulations.[135] The court found that the church failed to meet its burden of proof; it failed to show that the property could not be sold, that commercial rentals could not provide a reasonable return, or that denial of the permit foreclosed other potential uses of the property.[136] The Commonwealth Court held that it was possible to convert York House to a useful purpose without excessive cost. Therefore, the church failed to show that the denial of the demolition permit precluded the property from being used for any purpose for which it was reasonably adapted.[137]

Judge Kramer concurred in the decision, but he voiced his doubts about the limits of the police power to restrict the use of private property.[138] He observed that over the last fifty years zoning

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had occurred was that set forth in Trustees of Sailors' Snug Harbor v. Platt, 288 N.Y.S.2d 314 (App. Div. 1968). *Sailors' Snug* had determined that the denial of a permit for a historical building constitutes a taking if, in the case of a commercial property, it prevents an adequate return, and, in the case of charitable property, it prevents or seriously interferes with the charitable purpose. The York County Common Pleas Court concluded that the case before it would fall under the charitable property prong of the *Sailors' Snug* test, and remanded the case to the City Council for further hearings. After further hearings the City Council again denied the permit and the Common Pleas court upheld the Council's denial. First Presbyterian Church of York v. City Council of York, 360 A.2d 257, 260 (Pa. Commw. Ct. 1976).

132. First Presbyterian Church of York v. City Council of York, 360 A.2d 257, 259 (Pa. Commw. Ct. 1976).

133. *Id.* at 260.

134. 516 F.2d 1051 (5th Cir. 1975).

135. *See, e.g.*, Peirce v. Zoning Bd. of Adjustment, 189 A.2d 138 (Pa. 1963); McLean v. Zoning Bd. of Adjustment, 185 A.2d 533 (Pa. 1961); Appeal of Lally, 171 A.2d 161 (Pa. 1961); Marple Gardens, Inc. v. Bd. of Zoning Adjustment, 303 A.2d 239 (Pa. Commw. Ct. 1973). A variance will not be granted merely because the property could be used more profitably for purposes prohibited by the zoning regulation. Rather, in order to obtain a variance, the owner must establish that the property can not be sold or used for any purpose permitted by the zoning regulation. First Presbyterian Church of York v. City Council of York, 360 A.2d 257, 261 (Pa. Commw. Ct. 1976).

136. First Presbyterian Church of York v. City Council of York, 360 A.2d 257, 261 (Pa. Commw. Ct. 1976).

137. *Id.*

138. *Id.* at 262-63.

and urban redevelopment laws had eroded the basic principles of private property.[139] Applauding the goals of historic preservation, he feared, nevertheless, that legislatures and courts "have reached a constitutional precipice and that an advancement of even a fraction of an inch will result in excessive governmental encroachment upon private property rights."[140] Judge Kramer stated that the holding in the case required the church to make its property available for public view without compensation. In effect, the court had established a public museum through restrictions on the use of private property.[141]

The approach set forth in *First Presbyterian Church* has been utilized in Pennsylvania trial court decisions. In *B.P. Oil, Inc. v. City of Harrisburg*[142] the Dauphin County Court of Common Pleas affirmed the denial of a permit to B.P. Oil, which wished to demolish an existing structure and replace it with a gas station. B.P.'s property was within the historic district created by the City Council of Harrisburg.[143] The court observed that although the property may be used more profitably as a gas station, B.P. failed to show that the property could not be sold or rented.[144] Thus, B.P. failed the *First Presbyterian Church* test; *i.e.*, the denial of the permit must preclude use of the property for any purpose for which it was reasonably adapted in order to constitute a taking. Accordingly, the court refused to hold that denial of the permit amounted to a confiscatory taking of the property.[145]

In *Cleckner v. Harrisburg*,[146] the Dauphin County Court of Common Pleas again held that Harrisburg's historic district ordinance did not effect a taking of two buildings within the district. The buildings were deteriorated and the owner received an order to either tear down the buildings or bring them into conformity with safety regulations.[147] The owner applied for a permit to demolish the buildings. The City Council, on advice from the Board of Historical Architectural Review, denied the permit.[148] The evidence established

139. *Id.*
140. *Id.* at 263 (Kramer, J., concurring).
141. First Presbyterian Church of York v. City Council of York, 360 A.2d 257, 263 (Pa. Commw. Ct. 1976)(Kramer, J., concurring).
142. 99 Dauph. 182 (1977).
143. *Id.* at 183.
144. *Id.* at 185.
145. *Id.*
146. 10 Pa. D. & C.3d 393 (Dauph. County 1979).
147. *Id.* at 395.
148. *Id.* Although the owner disputed that the buildings had any historical value, the court held that the Board did not abuse its discretion in determining that the buildings were significant to the district. The court stressed that in historic districts the historical significance of the property itself is not important but what is important is the linkage among the buildings

that it would cost between $127,502.00 to $176,069.00 to restore the buildings for rental use.[149] The court agreed that repair and rental was not economically feasible, but the owner failed to show that sale of the properties was not possible.[150] The Court interpreted *Maher v. City of New Orleans*[151] and *First Presbyterian Church of York v. City Council of York*[152] to hold that the owner was required to prove the ordinance rendered his property valueless and if sale was possible there could be no taking.[153]

As the previous discussion indicates, to establish a taking in Pennsylvania a property owner has to overcome a very heavy burden of proof. Prior to the *United Artists* case, discussed below, no Pennsylvania court had held that a historic preservation ordinance effected a taking of private property.

V. The *United Artists* Case

The Boyd Theater, erected in 1928, is a rare example of an art deco movie house.[154] In 1986 the Philadelphia Historical Commission notified the owner that it was considering designating the theater as a historical landmark pursuant to The Philadelphia Historic Buildings, Structures, Sites, Objects and Districts Ordinance.[155] After the owner's unsuccessful attempt to enjoin the Commission from meeting to consider the proposed designation,[156] the Commission

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in the district. The court found that the properties were linked historically to other nineteenth century buildings in the district. *Id.* at 396-97.

149. *Id.* at 399.

150. Cleckner v. Harrisburg, 10 Pa. D. & C.3d 393, 401 (Dauph. County 1979). Although the owner attempted to sell the properties by placing a sale sign on the buildings and advertising in *Preservation News*, the court determined that the owner did not proceed prudently enough. The owner did not list the property with a real estate broker, did not advertise in a local paper, and demanded an inflated asking price.

151. 516 F.2d 1051 (5th Cir. 1975).

152. 360 A.2d 257 (Pa. Commw. Ct. 1976).

153. Cleckner v. Harrisburg, 10 D. & C.3d 393, 401 (Dauph. County 1979).

154. *See* Sameric Corp. of Chestnut St. v. City of Phila., 558 A.2d 155, 156 n.2 (Pa. Commw. Ct. 1989), *rev'd sub nom.* United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6 (Pa. 1991).

155. PHILA., PA., CODE § 14-2007 (1987). The ordinance provides that the Mayor shall appoint a Philadelphia Historical Commission which shall "[d]esignate as historic those buildings, structures, sites and objects which the Commission determines . . . are significant to the City." *Id.* § 14-2007(4)(a).

156. The owner filed suit in the Court of Common Pleas of Philadelphia seeking a temporary restraining order to prevent the Commission from holding a hearing on the designation of the Theater. The City removed the suit to federal court where it was dismissed because the complaint failed to state a claim upon which relief could be granted. The district court noted that only after the property was designated and the owner was denied a permit to alter or demolish the structure could there be "any cognizable impact upon the plaintiff's rights." Sameric Corp. of Chestnut St. v. Philadelphia Historical Comm., No. 87-553 Civ, 1987 WL 7636, at *1 (E.D.Pa. Mar. 5, 1987). Midway through the litigation the original owner of the

held a public hearing on April 2, 1987.[157] After hearing testimony on the architectural features and significance of the theater,[158] the Commission voted to designate the theater as historic. The owner filed suit seeking a declaratory judgment that the Commission did not have the authority to designate the theater as historic.[159]

A. The Commonwealth Court's Decision

Noting that this was a case of first impression in Pennsylvania, the Commonwealth Court held that the Commission's finding that the theater was historically significant was supported by substantial evidence.[160] The court then addressed the issue of whether the Commission had exceeded its authority by designating the interior of the theater as historic.[161] Philadelphia's ordinance defined a building as

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Boyd Theater, Sameric Corp., sold the theater to United Artists Theater Circuit, Inc.

157. United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6, 7 (Pa. 1991).

158. Philadelphia's ordinance sets forth criteria the Commission is to consider in deciding whether to designate a building as historic. Subsection 5 of the ordinance provides that a building may be designated for preservation if it:

> (a) Has significant character, interest or value as part of the development, heritage or cultural characteristics of the City, Commonwealth or Nation or is associated with the life of a person significant in the past; or,
>
> (b) Is associated with an event of importance to the history of the City, Commonwealth or Nation; or,
>
> (c) Reflects the environment in an era characterized by a distinctive architectural style; or,
>
> (d) Embodies distinguishing characteristics of an architectural style or engineering specimen; or,
>
> (e) Is the work of a designer, architect, landscape architect or designer, or engineer whose work has significantly influenced the historical, architectural, economic, social, or cultural development of the City, Commonwealth or Nation; or,
>
> (f) Contains elements of design, detail, materials or craftsmanship which represent a significant innovation; or,
>
> (g) Is part of or related to a square, park or other distinctive area which should be preserved according to an historic, cultural or architectural motif; or,
>
> (h) Owing to its unique location or singular physical characteristics, represents an established and familiar visual feature of the neighborhood, community or City; or,
>
> (i) Has yielded, or may be likely to yield, information important in prehistory or history; or
>
> (j) Exemplifies the cultural, political, economic, social or historical heritage of the community.

PHILA., PA., CODE § 14-2007(5).

159. Sameric Corp. of Chestnut St. v. City of Phila., 558 A.2d 155, 156 n.1 (Pa. Commw. Ct. 1989), *rev'd sub nom.* United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6 (Pa. 1991).

160. *Id.* at 157. The parties agreed that the owner's appeal of the Commission's decision was subject to the Local Agency Law. In such an appeal the court must affirm the agency's decision unless it is not supported by substantial evidence, the constitutional rights of the appellant are violated, or the procedural provisions of the local agency law are violated. United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6, 9 n.4 (Pa. 1991).

161. Sameric Corp. of Chestnut St. v. City of Phila., 558 A.2d 155, 157 (Pa. Commw.

"a structure, its site and appurtenances created to shelter any form of human activity."[162] Reasoning that in order for a building to provide shelter it must have an interior, the court concluded that the Philadelphia City Council had intended the definition of building to include both the interior and exterior of a building.[163]

Having established that the Commission did not exceed its authority by designating the interior of the theater as historic, the court went on to consider whether designating the interior, nevertheless, amounted to an unconstitutional exercise of police power.[164] The owner argued that designation of the interior exceeded the police power because the restrictions on the interior of the theater were not substantially related to the public good.[165] Citing a similar case from the District of Columbia,[166] the court held that designation of the interiors of historic buildings is substantially related to serving the public purpose of preservation of the historic and aesthetic values of the environment.[167] The Commonwealth Court noted that the questions of whether a taking had occurred and whether the Commission properly denied the demolition permit were not before the court.[168]

B. The Pennsylvania Supreme Court's Decision

The owner appealed the Commonwealth Court's decision to the Supreme Court of Pennsylvania. The Pennsylvania Supreme Court transformed the case into a takings case. The court found that by designating the theater as historic the City had taken the owner's property for public use without just compensation in violation of the Pennsylvania Constitution.[169]

Ct. 1989), *rev'd sub nom.* United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6 (Pa. 1991).

162. Phila., Pa., Code § 14-2007(2)(b) (1987).

163. Sameric Corp. of Chestnut St. v. City of Phila., 558 A.2d 155, 157 (Pa. Commw. Ct. 1989), *rev'd sub nom.* United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6 (Pa. 1991).

164. *Id.* at 158.

165. *Id.*

166. Weinberg v. Barry, 634 F.Supp. 86 (D.D.C. 1986).

167. Sameric Corp. of Chestnut St. v. City of Phila., 558 A.2d 155, 158 (Pa. Commw. Ct. 1989), *rev'd sub nom.* United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6 (Pa. 1991). The public good of preserving the historic and aesthetic environment is embodied in Article I Section 27 of the Pennsylvania Constitution. PA. CONST. art. I, § 27.

168. Sameric Corp. of Chestnut St., Inc. v. City of Phila., 558 A.2d 155, 159 n.15 (Pa. Commw. Ct. 1989), *rev'd sub nom.* United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6 (Pa. 1991).

169. United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6, 7 (Pa. 1991). Justice Larsen in his majority opinion relied heavily upon Justice Rehnquist's dissenting opinion in Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) and Judge

As do most preservation ordinances, Philadelphia's ordinance provided that the Department of Licenses and Inspection would not issue a permit to alter or demolish a historic building if the Historical Commission has an objection.[170] The ordinance also provided that a permit shall not be issued unless the Commission finds issuance necessary to the public good or that the building cannot be used for any purpose for which it is or may reasonably be adapted.[171] The ordinance incorporates nearly word for word the standard set forth in *First Presbyterian Church of York v. City Council of York*.[172] Further, the ordinance places an affirmative duty on the owner to maintain the building at the owner's expense.[173] If the owner fails to maintain the building or obtain the proper permits before altering or demolishing the property, the owner may be subject to criminal penalties[174] and be required to restore the building to its previous condition.[175]

At the April 2, 1987 hearing, the owner's counsel stated that it was his understanding that the only improvements the owner could make without obtaining a permit was painting and papering.[176] Counsel also noted that the owner could not even move a mirror from one wall to another without the Commission's permission.[177] The Commission did not dispute these observations.[178] The court observed that when the theater was designated as historic "the Commission obtained almost absolute control over the property, including the physical details and the uses to which it could be put."[179]

The court stressed that the ordinance singled out the theater owner to bear the burden associated with historic preservation.

Kramer's concurring opinion in First Presbyterian Church of York v. City Council of York, 360 A.2d 257 (Pa. Commw. Ct. 1976).

170. PHILA. PA., CODE §§ 14-2007(7)(c), 14-2007(7)(g)(2) (1987).

171. *Id.* § 14-2007(j).

172. 360 A.2d 257, 261 (Pa. Commw. Ct. 1976).

173. Section 14-2007(8)(c) provides, in part, "[t]he exterior of every historic building . . . shall be kept in good repair as shall the interior portions of such buildings . . . neglect of which may cause or tend to cause the exterior to deteriorate, decay, become damaged or otherwise fall into a state of disrepair."

174. Section 14-2007(9)(c) provides that "[a]ny person who violates a requirement of this Section or fails to obey an order issued by the Department shall be subject to a fine of three hundred (300) dollars or in default of payment of the fine, imprisonment not exceeding ninety (90) days."

175. Section 14-2007(9)(d) provides, in part, that "[a]ny person who alters or demolishes a building . . . in violation of the provisions of Section 14-2007 or in violation of any conditions or requirements specified in a permit shall be required to restore the building . . . to its appearance prior to the violation."

176. United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6, 11 (Pa. 1991).

177. *Id.*

178. *Id.*

179. *Id.*

Before the designation, the owner could have used the theater for any lawful purpose just as neighboring property owners could and still can use their properties.[180] Prior to designation the owner could freely alter, revise, or remodel the theater just as neighboring property owners could and still can alter, revise, or remodel their properties.[181]

The court pointed out that landmark designation is different from traditional zoning. In traditional zoning all property owners in the area are restricted in the same manner "not only for the benefit of the municipality as a whole but also for the common benefit of one another."[182] Any decrease in property value caused by the zoning ordinance's restrictions is at least partially offset by an increase in value resulting from similar restrictions on surrounding properties.[183] With Philadelphia's landmark ordinance, however, there is no reciprocity of advantage.[184] Surrounding property owners are not restricted in the same way the owner of the theater is restricted. The restrictions placed on the theater as a result of landmark designation are for the benefit of the community at large, not the common benefit of a group of similarly situated property owners. The Court found that singling out the Boyd theater for historic designation is akin to "spot zoning" which the court had declared to be illegal.[185]

The court determined that the purpose of requiring the owner to maintain the theater in its present state is to benefit the city as a whole. This is a public purpose the cost of which "in all fairness and justice, should be borne by the public as a whole."[186] If the city wishes to do this it must pay just compensation in accordance with Article 1 Section 10 of the Pennsylvania Constitution.[187]

Justice Cappy, joined by two other Justices,[188] concurred with the result reached by the majority. Justice Cappy observed that the ordinance's only reference to building interiors is in the affirmative maintenance provision which provides that "[t]he exterior of every historic building . . . shall be kept in good repair as shall the interior portions of such buildings . . . neglect of which may cause or tend to

180. *Id.*
181. United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6, 11 (Pa. 1991).
182. *Id.* at 13 n.10.
183. *Id.*
184. *Id.*
185. *Id.*
186. United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6, 11 (Pa. 1991) (quoting Pa. Public Utility Comm. v. Pa. Gas and Water Co., 424 A.2d 1213, 1218 (Pa. 1980)).
187. *Id.* at 13-14.
188. Chief Justice Nix and Justice McDermott joined in the concurring opinion.

cause the exterior to deteriorate, decay, become damaged or otherwise fall into disrepair."[189] The plain meaning of this provision is that the interior of a building is to be considered only to the extent that its disrepair would adversely affect the exterior of the building.[190] Thus, the Commission's designation of the interior of the theater was improper.[191]

Relying on the long standing rule that the court should not decide a case on constitutional grounds when it can be resolved on non-constitutional grounds,[192] Justice Cappy contended that the court should not have reached the takings issue.[193] Rather, the court should have found that in designating the interior of the theater as historic the Commission exceeded its authority under the ordinance and, thus, the Commission's decision is without force and effect.[194]

C. *Critique of the United Artists Case*

The majority's opinion seems to be directly at odds with the Supreme Court's decision in *Penn Central*. Philadelphia's landmark ordinance is similar to the New York City landmark law which the Supreme Court upheld in *Penn Central*.[195] Thus, had *United Artists* been decided under the Fifth Amendment instead of the Pennsylvania Constitution a different result may have been reached.

1. New Federalism.—Although noting the applicability of the Fifth Amendment,[196] the Pennsylvania Supreme Court decided the *United Artists* case entirely under the Pennsylvania Constitution.[197] A provision of a state constitution may restrict government's power more than a similar or even identically-worded provision of the Federal Constitution.[198] In our federal system, the United States Constitution provides a minimum level of protection for individual

189. PHILA., PA., CODE § 14-2007(8)(c) (1987).

190. United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6, 14 (Pa. 1991)(Cappy, J., concurring).

191. *Id.*

192. *See* Krenzelak v. Krenzelak, 469 A.2d 987 (Pa. 1983); Ballou v. State Ethics Comm., 436 A.2d 186 (Pa. 1981); Mt. Lebanon v. County Bd. of Elections, 368 A.2d 648 (Pa. 1977).

193. United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6, 14 (Pa. 1991)(Cappy, J., concurring).

194. *Id.*

195. *See supra* notes 98-125 and accompanying text.

196. The Fifth Amendment is applicable to the states through the Fourteenth Amendment. Chicago B. & Q. R. Co. v. City of Chicago, 166 U.S. 226 (1897).

197. United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6, 11 n.8 (Pa. 1991).

198. ROBERT J. WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 117 (1985).

rights.[199] The states, however, are free to provide more protection through their state constitutions.[200] A decision based entirely on a state constitution cannot be overturned by or even reviewed by the United States Supreme Court.[201] Pennsylvania has recognized its ability to interpret its constitution more broadly than the Federal Constitution[202] and on a number of occasions has interpreted the Pennsylvania Constitution to provide more protection to its citizens.[203] Thus, the question becomes not whether the decision was correctly decided under the Fifth Amendment but whether it was correctly decided under the Pennsylvania Constitution.

In *First Presbyterian Church of York v. City Council of York*, the church alleged that denial of the demolition permit constituted a taking under Article I Section 10 of the Pennsylvania Constitution.[204] In that case the Commonwealth Court adopted the approach of *Maher v. City of New Orleans*.[205] If the refusal of the permit precluded the use of the property for any purpose for which it was reasonably adapted there was a taking.[206]

First Presbyterian Church of York v. City Council of York and

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199. Western Pa. Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co., 515 A.2d 1331, 1333 (Pa. 1986).

200. Commonwealth v. Sell, 470 A.2d 457, 467 (Pa. 1983).

201. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 (1977). If the state court clearly states that its decision rests on the state constitution the U.S. Supreme Court will accept the statement and not review the decision. Michigan v. Long, 463 U.S. 1032, 1041-42 (1983). Justice Brennan argues that the modern Supreme Court's contraction of federal rights should be viewed as an invitation for state courts to step in and interpret their constitutions in a manner so as to provide protection of civil rights and individual liberties. William J. Brennan, Jr., *The Bill of Rights and The States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986). More and more state courts have accepted the challenge and are interpreting their own constitutions to provide more protection to their citizens than the protection provided by the Federal Constitution. This is known as "New Federalism". Commonwealth v. Edmunds, 586 A.2d 887, 895 n.6 (Pa. 1991).

202. *See, e.g.*, Western Pa. Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co., 515 A.2d 1331 (Pa. 1986); Commonwealth v. Tate, 432 A.2d 1382, 1387 (Pa. 1981); Commonwealth v. Hogan, 393 A.2d 1133, 1137 (Pa. 1978); Willing v. Mazzocone, 393 A.2d. 1155 (Pa. 1978); Martin v. Haggerty, 548 A.2d. 371 (Pa. Commw. Ct. 1988); Insurance Adjustment Bureau v. Insurance Comm'r, 530 A.2d 132 (Pa. Commw. Ct 1987); Gundy v. Pennsylvania Bd. of Probation and Parole, 478 A.2d 139 (Pa. Commw. Ct. 1984); Coades v. Pennsylvania Bd. of Probation and Parole, 480 A.2d 1298 (Pa Commw. Ct. 1984).

203. *See, e.g.*, Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991)(refusing to find a good faith exception to the exclusionary rule); Commonwealth v. Sell, 470 A.2d 457 (Pa. 1983)(interpreting Article I, Section 8 of the Pennsylvania Constitution more broadly than the Fourth Amendment); Commonwealth v. DeJohn, 403 A.2d 1283 (1979)(refusing to follow the Supreme Court's decision that a citizen has no standing to object to seizure of the citizen's bank records).

204. 63 Pa. D. & C.2d 150, 152 (York County 1973).

205. 516 F.2d 1051 (5th Cir. 1975).

206. First Presbyterian Church of York v. City Council of York, 360 A.2d 257, 261 (Pa. Commw. Ct. 1976).

the cases decided under it set up a very difficult burden for an owner to meet in order to prove a taking.[207] Given the *First Presbyterian Church* analysis, the decision of the Pennsylvania Supreme Court in *United Artists* finding a taking is surprising. Even after designation the owner could have continued to use the property as a theater. Although there was no evidence regarding the diminution in value caused by the designation, the owner was able to sell the property midway through the lawsuit.[208] Thus, it seems that the theater owner was not denied all reasonable use of his property and under *First Presbyterian Church* no taking had occurred.

Without explicitly rejecting the analysis under the Fifth Amendment, the Pennsylvania Supreme Court recently has been providing more protection to the "inherent and indefeasible" right of Pennsylvania citizens to possess and protect their property.[209] For example, in a recent zoning case the Pennsylvania Supreme Court refused to join the growing number of jurisdictions which have upheld the validity of prior nonconforming use amortization provisions in zoning ordinances.[210] The court stated that if the effect of a regulation is to deprive a property owner of the lawful use of his property it amounts to a taking requiring just compensation.[211] Stressing that the amortization provision not only restricts the future use of property but also extinguishes the present use, the court found that such provisions are per se confiscatory.[212] While using the same analysis as the Supreme Court uses in takings cases, the Pennsylvania Supreme Court is more protective of private property rights than some other courts.[213]

Even if the *United Artist* court had used the analysis the Supreme Court used in *Penn Central* the Pennsylvania Supreme Court may still have found a taking. In *Penn Central* the majority was convinced that there was a comprehensive scheme and an average

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207. *See supra* notes 126-153 and accompanying text.

208. Of course, the new owner could have no reasonable investment backed expectations frustrated by the designation because it bought the property fully aware of the designation and pending appeal.

209. PA. CONST. art. I, §1.

210. Pa. Northwestern Distributors, Inc. v. Zoning Hearing Bd., 584 A.2d 1372 (Pa. 1991). On May 4, 1985, claimant obtained all necessary permits and opened an adult bookstore. Less than one month later the township adopted a zoning ordinance restricting "adult commercial enterprises". *Id.* at 1373. A provision in the ordinance required all existing nonconforming uses to comply with the ordinance within ninety days. Claimant was out of compliance with the ordinance and challenged the ordinance's validity. *Id.*

211. *Id.* at 1375.

212. *Id.* at 1376.

213. See 22 A.L.R.3d (1968) for courts that accept amortization of nonconforming use provisions.

reciprocity of advantage.[214] The majority in *United Artists*, however, believed that Philadelphia's ordinance provided no such comprehensive plan or average reciprocity of advantage.[215] The *United Artists* court concluded that individual property owners were singled out to bear the burden of historic preservation without receiving any benefits by having other property similarly restricted.[216] In *Penn Central*, the Supreme Court's conclusion that there was a scheme and reciprocity of advantage seems rather incredible given that less than one tenth of one percent of the property in the city was affected by the ordinance.[217] Some would argue that the majority in *United Artists* reached the conclusion on reciprocity of advantage which should have been reached in *Penn Central*.[218]

Because there are no bright line tests for determining if a taking has occurred it is difficult to determine if the Pennsylvania Supreme Court rejected the Supreme Court's analysis or merely reached a different conclusion using that analysis. What is clear, however, is that the *United Artists* decision goes against the clear trend of prior decisions both in Pennsylvania and the rest of the nation.

2. The Goal of Historic Preservation.—Having decided that the ordinance amounted to a taking, the *United Artists* court went on to reject the Commission's argument that the values and goals of historic preservation are embodied in the Pennsylvania Constitution. The court also rejected the Commission's argument that the ordinance is a valid exercise of the police power.

The Supreme Court in *Lawton v. Steel* set forth a three part test to determine the validity of a state's exercise of its police power: first, the objective of the legislation must be within the scope of the police power; second, the means utilized by the legislation must be reasonably necessary for the accomplishment of the purpose; and

214. Penn Central Transp. Corp. v. New York City, 438 U.S. 104, 132 (1978).

215. *See supra* notes 182-185 and accompanying text.

216. United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6, 13 n.10 (Pa. 1991).

217. Penn Central Transp. Corp. v. City of New York, 438 U.S. 104, 147 (1978)(Rehnquist, J., dissenting).

218. In fact, *Penn Central* presented a far more compelling case for finding a taking than the *United Artists* case. In *Penn Central*, the owners of Grand Central Terminal were denied a building permit, which if granted would have resulted in millions of dollars of income a year for the owner. In contrast, in *United Artists*, although the owner had been denied a demolition permit, denial of that permit was not before the court. Rather, the court determined that there was a taking based solely on the burden placed on the theater owner as a result of the designation of the building as historic and the affirmative duty to maintain the theater.

third, the means may not be unduly oppressive upon individuals.[219] The Pennsylvania Supreme Court has expressly adopted this test for determining the validity of police power enactments under the Pennsylvania Constitution.[220] The court found that the ordinance failed the third prong of the *Lawton* test — the ordinance singled out individual owners and amounted to a taking. However, in dicta, the court also discussed the first prong of the *Lawton* test.

Relying on a 1926 decision,[221] the court narrowly defined police power as the power to control the use of property "for the public good, its use otherwise being harmful."[222] However, Pennsylvania courts have repeatedly rejected this narrow definition of the police power, as have courts in other states.[223] In *Swade v. Zoning Board of Adjustment*,[224] the Pennsylvania Supreme Court reasoned that if the only legitimate goal of land use regulations, such as zoning, is the suppression of that which is offensive, zoning would be indistinguishable from the law of nuisance.[225] "A state in the exercise of its police power may, within constitutional limitations, not only suppress what is offensive, disorderly or unsanitary, but enact regulations to promote the public health, morals or safety and the general well-being of the community."[226] The legitimate objectives of the police power are broad and as comprehensive as necessary to meet the demands of society.[227] Thus, in narrowly defining the State's police power, the *United Artists* court ignored a clear line of Pennsylvania precedents which defined police power broadly.

The court in *United Artists* also stated that regulations enacted for aesthetic reasons, conservation of property value, or stabilization of economic values are not sufficient to promote the health, safety,

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219. Lawton v. Steele, 152 U.S. 133 (1894).

220. National Wood Preservers, Inc. v. Pa. Dept. of Envtl. Resources, 414 A.2d 37, 43 (Pa. 1980); *see also* Commonwealth v. Harmar Coal Co., 306 A.2d 308, 317 (Pa. 1973); Commonwealth v. Barnes & Tucker, 319 A.2d 871, 885 (Pa. 1974).

221. White's Appeal, 134 A. 409, 411 (Pa. 1926).

222. United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6, 12 (Pa. 1991)(quoting White's Appeal, 134 A. 409, 411 (Pa. 1926)).

223. *See, e.g.*, Commonwealth v. Harmar Coal Co., 306 A.2d 308 (Pa. 1973); Swade v. Zoning Board of Adjustment, 140 A.2d 597 (Pa. 1958); *see also* Berman v. Parker, 348 U.S. 26 (1954).

224. 140 A.2d. 597 (Pa. 1958). The Claimant sought a variance from a zoning ordinance that made his business illegal. He claimed he was entitled to the variance because his business was not injurious to the health, safety, morals or general welfare of the community. *Id.* at 598.

225. *Id.*

226. Commonwealth v. Harmar Coal Co., 306 A.2d 308, 316 (Pa. 1973); *see also* Bacon v. Walker, 204 U.S. 311, 318 (1907).

227. Commonwealth v. Barnes & Tucker Co., 371 A.2d 461, 467 (Pa. 1977).

morals or general welfare.[228] While there is case law in Pennsylvania to support this dicta, Pennsylvania courts have many times held that aesthetics and property values are legitimate considerations in a legislature's exercise of its power to promote the general welfare.[229] The Declaration of Public Policy section of the landmark ordinance sets forth the ordinance's goals.[230] That section indicates that the ordinance was enacted to promote the health, prosperity, and general welfare of the people of Philadelphia.[231] In any event, the court ignored Philadelphia City Council's pronouncement that historic preservation promotes the general welfare.

The legislature is the body which determines what promotes the general welfare.[232] The Pennsylvania Supreme Court has often stated that legislative enactments enjoy a strong presumption of constitutionality.[233] When a land use ordinance is attacked, the Court presumes that the legislature acted with the purpose of serving the general welfare.[234] Even where it is fairly debatable whether the goal of the ordinance is a proper objective of the police power, the court can not substitute its judgment for that of the legislature.[235] Thus, in rejecting the Commission's argument that the goal of historic preservation was a proper exercise of the police power the court failed to accord the proper deference to the City Council's determination that historic preservation is for the general welfare.

The court's dicta suggesting that historic preservation is not a proper goal of the police power is especially disturbing given that the objective of historic preservation is specifically embodied in the Pennsylvania Constitution. Article 1 Section 27 of the Pennsylvania

228. United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6, 12 (Pa. 1991)(quoting Redevelopment Authority of Oil City v. Woodring, 445 A.2d 724, 727 (Pa. 1982)).

229. *See, e.g.*, Best v. Zoning Bd. of Adjustment, 141 A.2d 606, 612 (Pa. 1958); Bilbar Construction Co. v. Board of Adjustment, 141 A.2d 851, 857 (Pa. 1958); Mont-Bux v. Twp. of Cheltenham, 388 A.2d 1106, 1107 (Pa. Commw. Ct 1978); County of Fayette v. Holman, 315 A.2d 335, 339 (Pa. Commw. Ct. 1973).

230. PHILA., PA., CODE 14-2007(1)(a) (1987).

231. The Declaration of Public Policy and Purposes provides:

> It is hereby declared as a matter of public policy that the preservation and protection of buildings, structures, sites, objects and districts of historic, architectural, cultural, archaeological, educational and aesthetic merit are public necessities and are in the interests of the health, prosperity and welfare of the people of Philadelphia.

Id.

232. Berman v. Parker, 348 U.S. 26, 32 (1954).

233. *See, e.g.*, Commonwealth v. Parker White Metal Co., 515 A.2d 1358, 1370 (Pa. 1986); Patton v. Republic Steel Corp., 492 A.2d 411, 418 (Pa. Super. Ct. 1985).

234. Bilbar Construction Co. v. Board of Adjustment, 141 A.2d 851, 856 (Pa. 1958).

235. *Id.*; *see also* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

Constitution provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.[236]

This section of the Pennsylvania Constitution, known as the Environmental Protection Amendment, was ratified by the people of Pennsylvania on May 18, 1971.[237] Interpreting the amendment, the Pennsylvania Supreme Court stated, "[n]ow, for the first time, at least insofar as the state Constitution is concerned, the Commonwealth has been given the power to act in areas of purely aesthetic or historic concern."[238] While the legitimacy of the goal of historic preservation may have been in doubt prior to 1971, after enactment of the Environmental Protection Amendment it is clear that the people of Pennsylvania consider historic preservation to be for the general welfare. Thus, historic preservation is a legitimate objective of the police power. The *United Artists* court's suggestion otherwise is in direct conflict with Article I Section 27 of the Pennsylvania Constitution.

In conclusion, the Pennsylvania Supreme Court's decision that designation of the theater as historic amounted to a taking seems to depart from prior precedents holding that to effect a taking a regulation must preclude use of the property for any purpose for which it is reasonably adapted. Furthermore, the court was not justified in substituting its opinion for that of the Philadelphia City Council in finding that the goal of historic preservation is not a proper objective of the police power.

VI. The Effect of *United Artists* on Historic Preservation in Pennsylvania and Suggested Reforms for Philadelphia's Historic Preservation Ordinance

A. Potential Impact of United Artists

The *United Artists* decision will have no impact on the Pennsyl-

236. PA. CONST. art. I, § 27. Pennsylvania is not the only state whose constitution provides that historic preservation is for the public welfare. *See, e.g.*, VA. CONST. art. XI, § 1.

237. Commonwealth v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588 (Pa. 1973).

238. *Id.* at 592.

vania Historic Preservation Act.[239] As discussed earlier the Historical Preservation Board of the Pennsylvania Historic and Museum Commission nominates properties for inclusion on the Pennsylvania Register of Historic Places. Inclusion on the Register is voluntary; the property is not included on the Register if the owner objects.[240] The court in *United Artists* specifically pointed out that this consent provision forecloses the possibility that the property is taken without just compensation.[241] Other provisions of the Act deal with state property and therefore the Pennsylvania Constitution's prohibition against taking private property is not applicable.

On the other hand, the broad language of the *United Artists* opinion could affect the state enabling statute.[242] The Pennsylvania Supreme Court demonstrated its willingness to find that the burdens a historical preservation ordinance places on a property owner amount to a taking. The State enabling statute and local ordinances enacted under it differ, however, in several important respects from Philadelphia's Ordinance. First, and most importantly, the state enabling statute empowers local municipalities to designate only districts. It does not authorize the designation of individual landmarks. Historic district legislation is more akin to zoning in that all the properties in a district are similarly restricted. The restrictions placed on the property are for the benefit of all property owners in the district as well as the entire community, and the burden on an individual owner is partially offset by the benefit of having other property similarly restricted. The court in *United Artists* stressed that Philadelphia's ordinance singled out individual property owners to bear the burden of historic preservation.[243] This is not so with historic district legislation. There is an average reciprocity of advantage with district legislation.

Second, unlike Philadelphia's ordinance the state enabling legislation does not contain an affirmative maintenance provision. Although other courts have upheld such provisions,[244] the Pennsylvania Supreme Court emphasized that Philadelphia's ordinance required the owner to maintain the property at his own expense.

Third, although the court did not decide the *United Artists* case

239. 37 PA. CONST. STAT. ANN. §§ 501-505 (1992 Supp.).
240. *Id.*
241. United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6, 13 n.11 (Pa. 1991).
242. PA. STAT. ANN. tit. 53, §§ 8001-8006 (1986 and Supp. 1992).
243. United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6, 11 (Pa. 1991).
244. *See, e.g.*, Figarsky v. Historic District Commission, 368 A.2d 163 (Conn. 1976); Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975).

on this ground, the Theater owner appealed the Commission's designation of the interior of the building. The state enabling legislation makes clear that only the exterior of buildings which can be seen from a public street or way are subject to the ordinances.[245]

These differences between Philadelphia's ordinance and the state enabling legislation may very well save the state enabling statute and ordinances enacted under it from a court finding that a taking has occurred. Still, the court's dicta rejecting the claim that the goal of historic preservation is a proper objective of the police power places in question the legitimacy of even historic district legislation. This dicta casts doubt on a municipality's power to designate enterprise zones and special services districts.[246] In fact, it casts doubt on all land use regulations beyond use and density zoning.[247] Pennsylvania Senator David J. Brightbill, in supporting Wetland legislation, stated that *United Artists* could be used to attack the DER's current wetlands regulations.[248] He stated that the regulations are "vulnerable to similar and perhaps more devastating court challenges."[249]

According to the director of the Pennsylvania Bureau of Historic Preservation, the decision in *United Artists* has had a chilling impact on preservation efforts in Pennsylvania.[250] The Philadelphia Historical Commission has stopped designating landmarks and has indefinitely delayed hearings on four proposed historic districts.[251] The city of Scranton has suspended its attempt to enact a preservation ordinance.[252] Pittsburgh has delayed declaring its Syrian Temple building a landmark,[253] and at least seven other municipalities have postponed implementing preservation ordinances.[254] According to the Pennsylvania Historical and Museum Commission, "[l]ocal governments may decide to forgo any protection of historic resources rather than face the expense and uncertainty of

245. PA. STAT ANN. tit. 53, § 8004 (1991 Supp.).

246. Editorial, *Good News for Wreckers It Could be Open Season on Historic Buildings: Thanks to a PA Supreme Court Ruling*, PHILA. INQUIRER, July 22, 1991, at A08.

247. Thomas Hine, *Murky Meanings of "Boyd" Decision*, PHILA. INQUIRER, July 21, 1991, at I01.

248. David J. Brightbill, *Clarifying Wetlands Legislation*, PHILA. INQUIRER, Aug. 7, 1991, at A12.

249. *Id.*

250. Thomas Hine, *Meeting on Preservation Ruling*, PHILA. INQUIRER, July 19, 1991 at D03 (quoting Brenda Barrett, director of Pennsylvania Bureau of Historic Preservation).

251. Thomas Hine, *For Preservationists, A Strategy Meeting*, PHILA INQUIRER, Aug. 14, 1991, at D04.

252. Thomas Hine, *City Wants Boyd Case Reheard, Asks New Ruling on Preservation*, PHILA. INQUIRER, July 26, 1991, at A01.

253. *Id.*

254. Hine, *supra* note 251, at D04.

litigation."[255]

Preservationists throughout the state have banded together to discuss the decision and its implications.[256] Many groups supporting preservation filed amicus curiae briefs in support of the City's petition for reargument.[257] Their efforts were successful; the court agreed to rehear argument on the takings aspect of the case.

B. Recommendations

The differences between Philadelphia's ordinance and the state legislation on historic preservation may save the state legislation from takings challenges. In addition, these differences show how Philadelphia can amend its ordinance to avoid further challenges. First, and most drastically, Philadelphia could make historic designation depend upon the owner's consent just as inclusion on the State Register requires consent. This would eliminate any takings challenge, but consent requirements severely limit the effectiveness of preservation ordinances. Richard Tyler, Philadelphia's Historic Preservation officer observed that "[t]he people who will consent to certification are the people who would be doing the right thing anyway."[258] Once a property owner consents to certification, however, subsequent owners would be bound by the certification because they purchased the property with notice of the restriction.

Less drastically, Philadelphia could limit designation to historic districts rather than individual landmarks. This solution is less than ideal for Philadelphia given that it contains many buildings of historical significance which are not located within an area considered to be historically significant. However, district legislation has the advantage of providing average reciprocity of advantage.

Next, the Philadelphia Historical Commission should cease designating interiors of buildings as historic. As Justice Cappy's concurring opinion points out, the plain meaning of the ordinance belies the argument that the City Council intended to grant the commission the authority to designate interiors.[259]

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255. Hine, *supra* note 252, at A01.

256. Hine, *supra* note 251, at D04.

257. Groups filing amicus briefs include The National League of Cities, The U.S. Conference of Mayors, The National Trust for Historic Preservation, and The American Planning Association. Mark A. Tarasiewicz, *Phila.'s Historic Preservation Law to be Reviewed by PA Supreme Ct.*, PA. LAW J. REP., Sept. 9, 1991, at 9, 11.

258. Thomas Hine, *Ruling on Preservation Means Little — or a Lot*, PHILA. INQUIRER, July 13, 1991, at A01.

259. United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6, 14 (Pa. 1991)(Cappy, J., concurring).

Finally, Philadelphia will have to modify its designation procedure in order to comply with the requirements of due process. The court in *United Artists* noted that a property owner whose property is being considered for designation is entitled to a neutral and detached arbiter.[260] The commission's own designation committee can no longer recommend properties for designation, present testimony and argument for designation, and then proceed to make the decision to designate the property.

VII. Other States' Decisions

The *United Artists* decision is contrary to the majority of decisions in the historic preservation area. No other court has held that merely designating a property as historic constitutes a taking.[261] Most other states which have considered the question have held that historic preservation is a legitimate objective of the state's police power.[262]

In *City of Santa Fe v. Gamble-Skogmo, Inc.*[263] the Supreme Court of New Mexico held that the purposes of historic preservation ordinances are within the scope of general welfare and therefore a valid objective of the police power.[264] The court noted that the role of the judiciary is very narrow once the legislature has declared the policy to be for the general welfare.[265] Furthermore, although recognizing that particular applications of Historic District or Landmark ordinances may rise to the level of an unconstitutional taking,[266] most challenges fail to meet the heavy burden of proving that the ordinance effected a taking.[267] *Mayor of Annapolis v. Anne Arundel County*[268] is representative of this difficulty. In that case the Court of Appeals of Maryland decided that the denial of a demolition permit did not amount to a taking under the Maryland Constitution,

260. *Id.* at 8 n.1.

261. Henry Goldman, *City Preservation Law Declared Unconstitutional*, PHILA. INQUIRER, July 12, 1991, at A01 (quoting Maria Petrillo, Philadelphia Deputy Solicitor).

262. *See, e.g.*, ASP Associates v. City of Raleigh, 258 S.E.2d 444 (N.C. 1979)(applying the three part test of Lawton v. Steele); *See also* Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975); City of New Orleans v. Levy, 64 So.2d 798 (La. 1953); Donnelly Advertising Corp. v. City of Baltimore, 370 A.2d 1127 (Md. 1977); State v. Wieland, 69 N.W.2d 217 (Wis. 1955).

263. 389 P.2d 13 (N.M. 1964).

264. *Id.* at 17.

265. *Id.*

266. *See, e.g.*, Citizens Comm. to Save Historic Rhodes Tavern v. District of Columbia Dept. of Housing and Community Development, 432 A.2d 710 (D.C. App. 1981).

267. *See, e.g.*, 900 G Street Associates v. Dept. of Housing and Community Development, 430 A.2d 1387 (D.C. 1981).

268. 316 A.2d 807 (Md. 1974).

because the owner failed to show that it was denied all reasonable use of the property.[269]

Given the difficult burden of proving a taking, challenges to historic preservation laws will likely be brought under state constitutional provisions on the theory that the state constitution provides more protection than the Fifth Amendment.[270] However, even where challenges have been brought under state constitutional provisions, the courts seem to have followed the same analysis as under the Fifth Amendment.[271] But a property owner challenging a preservation ordinance would be wise to remember that state courts are free to hold that the state constitution may afford more protection to property owners than the Fifth Amendment.

VIII. Conclusion

Landmark and historic district preservation legislation serves to protect historically significant property by placing restrictions on the property owner's ability to alter or demolish the property. The objective of such legislation is the promotion of the general welfare through preservation. This is a legitimate police power objective and is embodied in the Pennsylvania Constitution. The Pennsylvania Constitution, however, also embodies the prohibition against private property being taken for public use without just compensation. In *United Artists* these two concerns came into conflict. The Pennsylvania Supreme Court found that Philadelphia's landmark ordinance, as applied, took the owner's property without just compensation. In the process of reaching this conclusion, the court cast doubt on the validity of all historic preservation ordinances in Pennsylvania. *United Artists* stands alone among historic preservation decisions. It remains to be seen whether it will remain standing and, if so, whether other courts will follow its lead.

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269. *Id.* at 822.

270. Challenges to historic preservation legislation based on the free exercise clause of the First Amendment and similar state constitutional provisions have been more successful than challenges based on the Fifth Amendment. *See, e.g.*, First Covenant Church v. City of Seattle, 787 P.2d 1352 (Wash. 1990).

271. *See, e.g.*, Mayor of Annapolis v. Anne Arundel County, 316 A.2d 807 (Md. 1974).