REFORMULATING THE NEW YORK CITY LANDMARKS PRESERVATION LAW'S FINANCIAL HARDSHIP PROVISION: PRESERVING THE BIG APPLE

I. INTRODUCTION

Federal,[1] state, and local legislatures have enacted landmarks preservation statutes to protect structures with special character, historical, or aesthetic value.[2] These structures are deemed to represent the finest products of distinct architectural genres.[3] Signifi-

[1] The National Trust for Historic Preservation (the "Trust"), chartered in 1949, is the most aggressive Congressional preservationist measure. The Trust has been critical in educating community leaders and prompting the enactment of state and local preservation statutes. The Trust also provides technical advice and financial assistance to not-for-profit preservationist organizations.

In addition, the National Historic Preservation Act of 1966 ("NHPA"), Pub. L. No. 89-665, 80 Stat. 915 (codified as amended at 16 U.S.C. §§ 470 - 470w-6), is the most prominent federal statute relating to landmark preservation. The NHPA does not address individual landmark designations but rather, it ensures that federal and state governments' preservation efforts reflect sound policies and decisionmaking.

[2] For discussions on historic preservation and cultural property laws, see Jane Papademetriou Kourtis, Comment, *The Constructive Trust: Equity's Answer to the Need for a Strong Deterrent to the Destruction of Historic Landmarks*, 16 B.C. ENVTL. AFF. L. REV. 793, 793-810 (1989); Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63 (1993); James P. Beckwith, Jr., *Developments in the Law of Historic Preservation and a Reflection on Liberty*, 12 WAKE FOREST L. REV. 93 (1976).

[3] For a general overview of landmark and historic preservation laws in the United States, see Christopher J. Duerksen & David Bonderman, *Preservation Law: Where It's Been, Where It's Going, in* A HANDBOOK ON HISTORIC PRESERVATION LAW, at 1-28 (Christopher J. Duerksen ed., 1983).

cantly, landmarks preservation is a contemporary movement that has rapidly gained tremendous influence. Yet, while these efforts have enhanced our cultural resources, they also have yielded a complex set of laws that struggles to balance normative values and descriptive realism.

Landmarks preservation laws have enabled generations of individuals to appreciate structures possessing vast artistic and cultural merit that otherwise would have been destroyed.[4] Most ordinances, however, represent legislative responses to the efforts of public groups that sought to save local architecture during periods of construction boom. Indeed, the New York City Landmarks Preservation Commission (the "Commission"), created on April 19, 1965, was established largely in response to the efforts of the Municipal Art Society[5] and the New York Community Trust.[6] Each group generated considerable public uproar following the demolition of the original Pennsylvania Station in 1962.[7]

Yet another critical consideration in enacting preservation laws is the financial benefits imparted to the City.[8] In commercial districts, the benefits may be procured from the type of activities and businesses occupying the landmarks.[9] In residential communi-

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[4] *See, e.g.*, Russo v. Beckelman, 611 N.Y.S.2d 869 (N.Y. App. Div. 1994). In affirming the Landmark Preservation Commission's designation of the Matthew Brady Gallery as a landmark, the court stated:

> Brady's occupancy corresponded with the period when this part of Broadway was the fulcrum of the nation's, and possibly the world's, daguerreotype trade . . . . This building, distinct from its specific Brady connection, was considered in its day to be an exemplar of the daguerrotypists' galleries while photography was in its genesis years. The landmarking not only preserves the building, and depicts a trade, but also provides a portrait of an era that fills a too-little appreciated niche in New York's cultural registry.

Id. at 870; *see* Cerisse Anderson, *Landmarking of Brady Photo Gallery Upheld; Court Cites Cultural, Historical Significance*, N.Y.L.J., May 18, 1994, at A1.

[5] Founded in 1892, the Municipal Art Society is a not-for-profit organization that serves to beautify and to enhance the quality of life in New York City. Bob Temliak, *Real Estate Marketplace*, N.Y.L.J., Apr. 1, 1992, at 5.

[6] The New York Community Trust was founded in 1924. It administers a variety of philanthropic funds assisting children, the environment, and the arts. Kathleen Teltsch, *Foundations Are Finding Wealth Is a Problem, Too*, N.Y. TIMES, May 2, 1994, at B1.

[7] BARBARALEE DIAMONSTEIN, THE LANDMARKS OF NEW YORK II viii (1993).

[8] *See* Christopher J. Duerksen, *Local Preservation Law, in* A HANDBOOK ON HISTORIC PRESERVATION LAW, *supra* note 3, at 63-64.

[9] New York City's Carnegie Hall exemplifies how one commercial district developed around a landmarked structure. Since 1891, Carnegie Hall has "spawned a variety of small shops, restaurants, and businesses," as well as a number of rehearsal studios and recital halls, that cater to its patrons. JOHN S. PYKE, JR., LANDMARK PRESERVATION 3 (1969). When plans for the construction of Lincoln Center for the Performing Arts were announced, questions about the commercial viability of maintaining Carnegie Hall prompted its owners to consider razing the structure and replacing it with a modern office building. However, the area's businessmen and property owners joined the "chorus of protest," having realized that their businesses depended upon the continued presence of the concert hall, and they succeeded in having the landmark purchased by a quasi-public corporation. *Id.*

ties, "landmarks often set the style and tone of community life, which in turn determines property value, assures a solid tax base, and prevents the encroachment of urban blight."[10] In historic districts, landmarked structures attract significant numbers of tourists to a city.[11] In fact, New York City's ordinance explicitly states that one of its purposes is to "protect and enhance the city's attractions to tourists and visitors and to provide support and stimulus to business and industry . . . [and] to strengthen the economy of the city."[12]

The Commission, comprised of architects, historians, city planners, and realtors, oversees the landmark designation process.[13] Either interested citizens or the Commission itself may suggest landmark designees. After a structure has been proposed, public hearings and extensive research are conducted to evaluate the structure's historical and cultural merits.[14] The Commission then issues a report to the property owner indicating whether the structure has been declared a landmark. The Commission's findings may subsequently be appealed to either the Board of Estimate[15] or to the courts.[16]

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[10] *Id.* In blighted neighborhoods, "the preservation and restoration of buildings [possessing] high quality and distinction . . . provid[es] strong incentive[s for] self-improvement and self-respect among local residents." *Id.* at 5. An example is New York City's St. Nicholas Historic District in Harlem. Today, the district contains well maintained houses on tree-lined streets within view of dilapidated homes and housing projects. *Id.* The district reflects the pride of its residents, who have formed block associations aimed at improving the community. Their activities include neighborhood cleaning and painting projects. *Id.*

Furthermore, the court in Beacway Operating Corp. v. Concert Arts Soc'y, Inc., 474 N.Y.S.2d 227, 230 (N.Y. Civ. Ct. 1984), noted that the designation of a theater as a historical landmark enhanced the theater's rental value.

[11] Former New York City Mayor Robert F. Wagner remarked in a speech at the designation of Carnegie Hall as a National Landmark: "[e]ach year now, one million New Yorkers and visitors to the City attend cultural events here. By actual count, the number of cultural events held in our City since 1960 has doubled." Mayor Robert F. Wagner, Remarks at the Designation of Carnegie Hall as a National Landmark by U.S. Department of Interior (Nov. 6, 1964) (on file with the *Cardozo Arts & Enetrtainment Law Journal*).

[12] N.Y.C. ADMIN. CODE § 25-301(b) (1986). Similarly, other local ordinances refer to the economic benefits inured to the community by landmark designation. *See, e.g.*, D.C. CODE ANN. § 5-1001(a)(4) (1994) (this Act is intended to "protect and enhance the city's attraction to visitors and the support and stimulus to the economy thereby provided"); PHILADELPHIA CODE § 14-2007(b)(.5) (1984) ("[t]he purposes of this section are to strengthen the economy of the City by enhancing the City's attractiveness to tourists and by stabilizing and improving property values").

[13] N.Y.C. CHARTER § 74-3020 (1991).

[14] N.Y.C. ADMIN. CODE § 25-303.

[15] *Id.*; *see* PYKE, *supra* note 9, at 16-17. In 1989, the New York City Board of Estimate was declared unconstitutional by the United States Supreme Court in Board of Estimate of City of New York v. Morris, 489 U.S. 688 (1989). As a result, the Board was abolished and the majority of its powers were transferred to the New York City Council, which in turn was expanded. The New York City ordinance, nonetheless, still retains references to the Board of Estimate.

[16] The Commission's decision may be reversed if a court determines that the Commis-

Once a building has been landmarked, certain conditions are imposed upon its maintenance and use. The owner is obligated to maintain the structure's features in good repair.[17] Additionally, before any construction, alteration, or structural changes may be made, the property owner must obtain the Commission's authorization via a Certificate of Appropriateness.[18] The ordinance, however, is glaringly devoid of any measure that provides direct financial support to the property owner to ensure the owner's compliance. Instead, the owner must rely upon personal resources. Moreover, violation of any statutory provision may subject the property owner to fines and/or imprisonment.[19]

Thus, landmark designation yields diametrically opposed consequences: the substantial cultural and economic benefits inured to the city and the financial burdens sustained by property owners. Justice Rhenquist's dissent in *Penn Central Transportation v. New York City*[20] addressed this concern. He stated:

> landmark designation imposes . . . a substantial cost [to the owner], with little or no offsetting benefit except for the honor of the designation. The question in this case is whether the cost associated with the city of New York's desire to preserve a limited number of "landmarks" . . . must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties.[21]

These conflicting interests may be explored by analyzing the effect of landmark designation on artistic organizations. Currently, within the borough of Manhattan, there are seventy-one landmarked structures occupied by artistic organizations; most notably, these occupants include museums, theaters, and music halls.[22] Moreover, a significant number of these occupants are not-

sion acted arbitrarily, capriciously, or in violation of the law. But, if there is a rational basis for the Commission's decision, a court may not substitute its judgment for that of the Commission. *See* Shubert Org., Inc. v. Landmarks Preservation Comm'n of the City of New York, 570 N.Y.S.2d 504, 507 (N.Y. App. Div. 1991); City of New York v. Shakespeare, 608 N.Y.S.2d 460 (N.Y. App. Div. 1994).

17 N.Y.C. ADMIN. CODE § 25-311.

18 *Id.* §§ 25-305 to 25-312.

19 *Id.* § 25-317.

20 438 U.S. 104 (1978).

21 *Id.* at 139 (Rehnquist, J., dissenting); *see* The First Presbyterian Church of York v. City Council of the City of York, 360 A.2d 257, 263 (Pa. 1976) (Kramer, J., concurring) ("I agree with and applaud the scheme to protect, restore, and maintain places of historical value, but if the public wants to use, take, or apply a private property for that public purpose, then the public should pay for that laudatory purpose through constitutional means, e.g., eminent domain.").

22 ANDREW S. DOLKART, NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, GUIDE TO NEW YORK CITY LANDMARKS (1992).

for-profit[23] artistic organizations such as the Metropolitan Museum of Art, the Imperial Theater, and the Guggenheim Museum. These organizations have limited financial resources, and since they are exempt from certain taxes, they do not qualify for any of the tax advantages that are traditionally conferred to property owners to alleviate the financial burdens of landmark designation. The demolition of the Old Metropolitan Opera House,[24] as well as the vigorous efforts of not-for-profit landmarked structures seeking decertification,[25] reflect the importance of balancing these opposing interests.

This Note will argue that the New York City ordinance imposes unyielding financial burdens upon landmarked property owners and that legislative reform is needed to reflect the current economic environment. Certainly one devastating result arising from property owners' financial inability to maintain their premises has been the demolition of dilapidated landmarked structures. Demolition, of course, permanently removes a structure from the city's cultural and artistic wealth; New York City's theatrical community already has witnessed the demolition of the Helen Hayes Theater, Morosco Theater, and Biltmore Theater. Another grave outcome is the loss of numerous artistic organizations that formerly occupied landmarked structures. In these situations, the property owners were unable to bear the financial burdens and they had to vacate their premises and dissolve their operations.[26]

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[23] A not-for-profit or tax-exempt organization is defined by the Internal Revenue Code § 501(c) (1994). Generally, this Note will address organizations which qualify for federal income tax exemption under I.R.C. § 501(c)(3), which applies to museums, theaters, and historical societies. Section 501(c)(3) states:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . [and] any candidate for public office.

Id. *See generally* MARILYN E. PHELAN, MUSEUMS AND THE LAW 8 (1982).

[24] Old Metro. Opera House Corp. v. City of New York, 224 N.E.2d 700 (N.Y. 1966).

[25] *See infra* text accompanying notes 193-99. The Playhouse Square, a group of five historic theaters in Cleveland, Ohio, further exemplifies the genuine threat of demolishing landmark structures occupied by artistic organizations. In 1972, owners of the Playhouse Square sought to demolish the theaters and to erect a parking lot in their place. Yet, the theaters were saved by the efforts of the Cleveland Junior League. Most of the theaters since have been restored and are now used for theatrical purposes. Robert Miller, *The Business of Preservation: Big Deals*, HIST. PRESERVATION, May/June 1989, at 36.

[26] One example is the Alice Pike Barney's Studio House and art collection, which were donated by her daughters to the Smithsonian Institute for use as a cultural center and museum. The Smithsonian converted parts of the studio house into office space and residences for visiting dignitaries and scholars while two floors were open to the public for tours. Stephen May, *The House that Alice Built*, HIST. PRESERVATION, Sept./Oct. 1994, at 60.

Part II of this Note analyzes federal, state, and local financial relief measures afforded to for-profit and not-for-profit artistic organizations. This section will critique the Commission's application of the New York City ordinance's standards governing reasonable rates of return[27] and financial hardship status. Part III explores the caselaw that sets forth reasonable rate of return tests for not-for-profit organizations. This section will argue that judicial decisions have yielded a complex and unwieldy body of law that is factually specific and expressed in nebulous terms. Finally, part IV examines constitutional arguments. In particular, it will evaluate First and Fifth Amendment challenges to landmarks preservation laws.

In response, part V illustrates the need for legislative reform. In conclusion, part VI suggests various legislative reforms by drawing upon foreign landmarks preservation ordinances. These proposals are: (A) to increase the reasonable rate of return from six percent to at least eight percent, and to redefine current assessed value; (B) to expand the scope of the Certificate of Appropriateness' financial planning provision as applied to not-for-profit organizations; and, (C) to implement procedural changes that will require the Commission (i) to hold preliminary hearings after applications for relief have been submitted, and (ii) to obtain a property owner's consent to landmark designation. In conjunction, these proposals address the opposing interests of preservationists and property owners, and yield a framework that ultimately benefits the public and advances the goals of landmarks preservation law.

"But last year, facing budget problems, mountaining maintenance costs, and uncertainty about how to utilize the unusual structure, the Smithsonian Board of Regents voted to explore the possibility of selling the Studio House apprised at three million dollars." *Id.* at 62-63. Fortunately, Stanford University art historians and other admirers formed the Friends of Alice Pike Barney Studio House and developed a restoration and fund-raising partnership that would ensure continued public access to the unique building.

27 "A reasonable return is a net annual return of six percent of the valuation of an improvement parcel." N.Y.C. ADMIN. CODE § 25-302(v). Net annual return is defined as:

> [t]he amount by which the earned income yielded by the improvement parcel during a [calendar] year exceeds the operating expenses of such parcel during such year, excluding mortgage interest and amortization, and excluding allowances for obsolescence and reserves, but including an allowance for depreciation of [2%] of the assessed value of the improvement, exclusive of the land, or the amount shown for depreciation of the improvement in the latest required federal income tax return, whichever is lower; provided, however, that no allowance for depreciation of the improvement shall be included where the improvement has been fully depreciated for federal income tax purposes or on the books of the owner.

Id. § 25-302(v)(3)(a).

II. Current Financial Relief Measures

The United States Congress recognized the financial hardships owners of landmarked property incurred and responded by enacting numerous economic relief measures. Various tax incentives, such as tax credits and tax exemptions, are provided for the rehabilitation of older and landmarked structures.[28] These federal tax incentives spur private individuals and corporate donors to contribute funds to financially strapped landmarked property owners.[29] Moreover, artistic organizations may seek grants provided by the National Endowment for the Arts,[30] the National Trust for Historic Preservation, the Department of Housing and Urban Development, and the Department of the Interior.[31]

The New York City Legislature similarly recognized the financial hardships property owners incur and implemented various precautionary measures into the City's ordinance. These measures provide opportunities for property owners to present their financial concerns to the Commission and to seek some form of monetary redress. For instance, public hearings[32] are held regarding proposed landmark designation. Property owners may challenge proposed landmark designations prior to their official designation by appealing to the Board of Estimate.[33] They are exempt from certain taxes upon demonstrating an inadequate rate of return on their investment in the property.[34] Property owners may utilize transfer development rights, a land use technique which severs the unused development potential of one piece of property from the remainder of the lot. The unutilized development rights are then sold to a developer who is permitted to construct a building on a

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[28] The most prominent federal tax measure is the Economic Recovery Tax Act of 1981. Pub. L. No. 97-34, 95 Stat. 172. Nonetheless, the 1986 Tax Reform Act, Pub. L. No. 99-514, 100 Stat. 2085 (1986), reduced some these incentives. For a complete discussion on federal income tax incentives for rehabilitating older structures, see Stephen L. Kass et al., Rehabilitating Older and Historic Buildings, Law Taxation Strategies (2d ed. 1993).

[29] *See* Robert Kiener, *The Business of Preservation, Companies That Care*, Hist. Preservation, May/June 1989, at 42.

[30] See *infra* notes 163-70 and accompanying text, for a review of the current status of funding for the National Endowment for the Arts and the New York State Council on the Arts.

[31] See Kass, *supra* note 28, at 93, for a discussion of federal grants and other sources of funding.

[32] N.Y.C. Admin. Code § 25-313(a). Nonetheless, other sections of the statute provide that failure of the Commission to give notice of a public hearing to a property owner "shall not invalidate or affect any proceedings pursuant to this [ordinance] . . . ." *Id.* The ordinance further provides that the Commission's determination "shall not be confined to consideration of the facts, views, testimony, or evidence submitted at such hearing." *Id.* § 25-313(b). Accordingly, the public hearing and conference provision has explicit provisions rendering the use of a public hearing substantively meaningless.

[33] *Id.* § 25-303(g).

[34] *Id.* § 25-309(e).

different site, which exceeds its zoning regulations.[35] Property owners may request a Certificate of Appropriateness authorizing demolition, alterations, or reconstruction on the basis of inadequate return.[36] Furthermore, in 1991, the Commission established a hardship appeals panel to review the Commissioner's findings. The panel's decisions are subject to judicial review.[37]

The Certificate of Appropriateness is the most significant of these measures because it permits exemptions for property owners, in certain circumstances, from the vigors of landmarks preservation laws. This provision, however, affords disparate treatment to for-profit and not-for-profit organizations. Where a for-profit organization seeks a Certificate of Appropriateness, the ordinance clearly states the property owner must show his or her inability to earn a reasonable rate of return and his or her intention to proceed in good faith to demolish, alter, or reconstruct the premises immediately.[38] Upon satisfying these conditions, the Commission and various financial planning experts proceed to devise a financial plan. The plan may include "granting partial or complete tax exemption, remission of taxes, and authorization for alterations, construction or reconstruction that is consistent with the landmarks preservation statute."[39] More importantly, the financial plan ensures that these organizations will be able to earn the requisite six percent reasonable rate of return.[40]

Despite this provision's appeal, it is difficult to satisfy the preconditions needed to qualify for special financial planning. For example, Radio City Music Hall was designated as an interior landmark on March 28, 1978; the Board of Estimate affirmed the music hall's designation on June 29, 1978.[41] Its owner, Rockefeller Center, felt landmark designation would further exacerbate the music hall's dismal financial performance. Accordingly, it sought to decertify Radio City as a landmark or, in the alternative, to obtain a Certificate of Appropriateness.[42]

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35 N.Y.C. ZONING RESOLUTION § 74-79 (1991).

36 N.Y.C. ADMIN. CODE § 25-309.

37 N.Y.C. CHARTER § 74-3021(b).

38 N.Y.C. ADMIN. CODE § 25-309(a).

39 *Id.* § 25-309 (2)(d)(2)(b-c).

40 *Id.*-§ 25-309(b)(2).

41 *In re* Radio City Music Hall, Determination of Application for Certificate of Appropriateness, LPC No. 78233 (Landmarks Preservation Commission July 11, 1978) (on file with the *Cardozo Arts & Entertainment Law Journal*).

42 The Commission was uncertain whether the request for a Certificate of Appropriateness was intended for demolition, alteration, or reconstruction. It assumed that the request was for demolition of the structure and declined to illicit further information from Radio City prior to rendering its decision.

In support of its application, Radio City submitted financial data demonstrating net losses and the estimated profit levels needed to earn a six percent rate of return. The figures, in dollars, were as follows:[43]

	Actual Net Loss	6% Return	Net Deficiency
1973	(1,136,000)	594,000	(1,730,000)
1974	(1,496,000)	497,000	(1,993,000)
1975	(1,163,000)	479,000	(1,642,000)
1976	(1,831,000)	467,000	(2,171,000)

Radio City further presented information detailing its efforts to reduce costs by changing its operational procedures and its overall revenue financing structure.[44] Despite the extensive financial data submitted, Radio City's application was denied. The Commission did not dispute the financial figures. Rather, it blanketly concluded that Radio City appeared to have demonstrated that it was not earning the requisite six percent rate of return. Yet, the Commission rejected Radio City's plea because the music hall failed to provide sufficient information regarding its plans to demolish, alter, or reconstruct the structure pursuant to section 25-309(a)(1). Thus, Radio City's application was denied, not on financial grounds, but because Radio City submitted an incomplete application.[45]

Not-for-profit organizations have an even more onerous burden of proof when seeking a Certificate of Appropriateness. These organizations typically are precluded from receiving financial planning assistance;[46] nonetheless, the ordinance does afford a limited opportunity for some not-for-profit organizations to obtain special

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[43] Rockefeller Center Inc., Responses to the Commission's Request for Information and Production of Documents dated May 31, 1978. The figures were based upon the property's assessed value pursuant to New York City's Real Property Tax Law.

[44] *Id.*

[45] *In re* Radio City Music Hall, *supra* note 41 (Dissenting Report written by Beverly Moss Spatt) (on file with the *Cardozo Arts & Entertainment Law Journal*) urged that the Commission should have refrained from issuing a holding until all pertinent information was before the Commission. She further concluded that such a premature decision prevented Radio City and the Commission from having an opportunity to work together. She stated, "I believe this hasty decision without commission review of the total information and comments is neither judicious nor in the public interest." For a complete discussion on this procedural weakness, see *infra* notes 214-23 and accompanying text.

[46] N.Y.C. Admin. Code § 25-309(a)(2) provides in pertinent part:

> the provisions [for special treatment] shall not apply . . . if the improvement parcel . . . has received, for three years next preceding the filing of such request, and at the time of filing continues to receive, under any provision of law exemption in whole or in part from real property taxation; provided, however, that the provision of this section shall nevertheless apply to such request if such exemption is and has been received pursuant to [various] sections of the real property tax law . . . .

financial treatment. To qualify, these organizations must seek to alienate their property, by sale or lease, and they must be exempt from specific sections of the real property tax code.[47] In addition, the property owners have to demonstrate: (1) they previously entered into an agreement to sell the property or to grant a lease with a term of at least twenty years, which is contingent upon the issuance of a Certificate of Approval; (2) the property is incapable of earning a reasonable return;[48] (3) the structure is no longer suited to its past or present purposes; and, (4) the prospective buyer intends to alter the landmark structure.[49]

Although the ordinance enables some not-for-profit organizations to obtain financial planning assistance, the provision assists only a limited number and its requirements are prohibitive. In short, the four preconditions have rendered the special financial treatment measure practically ineffective. For example, on March 3, 1970, the Poppenhusen Institute[50] was designated as a landmark. In 1979, its owners sought a Certificate of Appropriateness to demolish the structure. The Institute asserted that a minimum of $100,000 was needed to repair the structure's exterior, plumbing, heating, and electrical systems.[51] The Institute further contended that it lacked the funds needed to finance the repairs. It provided financial reports demonstrating that the Institute had nominal assets other than the land and building that it occupied.[52] The Institute also submitted an independent appraiser's report valuating the land itself at $175,000.[53] The owners demonstrated they were not earning a six percent rate of return by submitting financial figures showing net losses of $2,973 in 1978, and of $7,736 in 1977.[54] The Institute was also able to locate a potential buyer for

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47 *Id.*

48 The New York City landmarks preservation ordinance does not define "reasonable return" for not-for-profit organizations. Consequently, this term has been defined through judicial decisions. See *infra* part III, for a complete analysis of the caselaw defining reasonable return.

49 N.Y.C. ADMIN. CODE § 25-309.

50 The Poppenhusen Institute was built in 1868. Conrad Poppenhusen established it as a vocational school for workers in his nearby hard-rubber plant. The building is believed to have housed the first free kindergarten in the United States. In subsequent years, the Poppenhusen Institute became a community cultural center. DOLKART, *supra* note 22, at 196-97.

51 *In re* Conrad Poppenhusen Ass'n, Petition for a Certificate of Appropriateness Authorizing Demolition 2 (Landmarks Preservation Commission Sept. 14, 1979) (on file with the *Cardozo Arts & Entertainment Law Journal*).

52 *Id.*

53 *In re* Conrad Poppenhusen Ass'n, *supra* note 51, at Ex. D (Suydam Agency, Inc. Appraisal Report by Henry Skoros (Sept. 12, 1979)).

54 *In re* Conrad Poppenhusen Ass'n, *supra* note 51, at Ex. A at 6 (Poppenhusen Institute Comparative Statement of Profit & Loss).

the premises. Accordingly, the Institute had satisfied all four preconditions.

The Commission, however, did not issue a Certificate of Appropriateness. Instead, it proceeded to question the viability of the potential buyer. The Attorney General also intervened arguing that the Institute should not be permitted to alienate the building.[55] The Attorney General asserted that the use of the building itself was part of the Institute's charitable purposes. After years of litigation, the Poppenhusen Institute, the buyer, and the Attorney General entered into a stipulation which enabled the Queens Historical Society to act as a receiver for the Poppenhusen Institute.[56]

The Poppenhusen Institute illustrates another flaw in the New York City ordinance's treatment of not-for-profit organizations. The ordinance currently authorizes only those not-for-profit organizations seeking to alienate their property to obtain a Certificate of Appropriateness. More frequently, not-for-profit organizations seek financial relief or special financial treatment because they are either physically or financially incapable of maintaining their premises. By explicitly limiting special treatment to not-for-profit organizations seeking to alienate their property, the ordinance provides an incentive for owners to alienate their property. In turn, when organizations vacate their existing premises, a foreseeable consequence is that these organizations will dissolve their operations. Ideally, the organizations will continue their operations in new facilities. This, however, may be an unrealistic expectation. The Poppenhusen Institute, for instance, discontinued its operations after it vacated a landmarked building.

Finally, the two case analyses yield peculiar results, which conflict with the purported underpinnings of the New York City ordinance. Theoretically, for-profit organizations, in comparison to not-for-profit organizations, have a less onerous burden to fulfill when seeking a Certificate of Appropriateness. Yet, the Poppenhusen Institute obtained relief while Radio City was denied relief. This curious result arises from the fact that while Radio City amply demonstrated it was not earning a reasonable rate of return,

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[55] While the Certificate was under review, the Attorney General initiated an investigation into the owner's potential mismanagement of funds. The Attorney General openly criticized the owner's competence in handling funds accusing it of intentionally mismanaging funds in an attempt to alienate the property. Affidavit of Assistant Attorney General Irwin M. Strum at 3, *In re* Conrad Poppenhusen Ass'n, Index No. 7407/80 (N.Y. Sup. Ct. 1980) (on file with the *Cardozo Arts & Entertainment Law Journal*); *see* Jack Leahy, *State Sues to Evict Poppenhusen Board*, DAILY NEWS, Mar. 7, 1983.

[56] Abrams v. Conrad Poppenhusen Ass'n, Index No. 2801-81 (N.Y Sup. Ct. 1983) (on file with the *Cardozo Arts & Entertainment Law Journal*).

its application was denied largely because it was incomplete. Furthermore, the Commission did not provide an opportunity for Radio City to amend its application. Thus, the fact that the Poppenhusen Institute did secure financial relief, is not to suggest that in practice not-for-profit organizations receive preferential treatment over for-profit organizations. Rather, this outcome is illustrative of procedural weaknesses in the Commission's review process.

III. Judicial Challenges to Landmarks Preservation Laws

The New York City landmarks preservation ordinance explicitly defines "reasonable return" as earning a "net annual return of six percent of the valuation of an improvement parcel."[57] This formula, however, is inapplicable to not-for-profit organizations. "The concept of reasonable return is irrelevant to institutions not pursuing economic gain . . . because the buildings not-for-profit institutions occupy are generally not designed to produce a commercial return."[58] The ordinance, however, fails to recognize the inapplicability of this test and it does not provide a separate formula in assessing reasonable return for not-for-profit organizations.

Instead, courts have created and applied various standards; yet, these tests are exceedingly vague and broad. Moreover, numerous cases have been decided solely upon the specific facts presented, hindering efforts to devise a uniform test applicable to not-for-profit organizations that is analogous to the reasonable rate of return formula applied to for-profit organizations. Consequently, the Commission and the courts continue to rely upon the six percent formula for guidance in their review of financial hardship claims.

In *Trustees of Sailor's Snug Harbor v. Platt*,[59] the court announced the first of a series of reasonable return tests for not-for-profit organizations. In *Snug Harbor*, the property owner housed two hundred retired seamen in four dormitory buildings. The owners asserted that the structures were no longer capable of providing suitable accommodations for the elderly men and they

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57 N.Y.C. Admin. Code § 25-302(v).

58 David M. Stewart, *Constitutional Standards for Hardship Relief Eligibility for Nonprofit Landowners Under New York City's Historic Preservation Law*, 21 Colum. J.L. & Soc. Probs. 163, 180 (1988); *see* Society for Ethical Culture in New York v. Spatt, 415 N.E.2d 922, 925 (N.Y. 1980) ("charitable organizations are not created for financial return in the same sense as private businesses").

59 288 N.Y.S.2d 314 (N.Y. App. Div. 1968).

sought to demolish and replace the buildings. The court recognized that the six percent reasonable rate of return was only applicable to commercial enterprises. It stated, "[a] comparable test for a charity would be where maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose."[60] The court proceeded to delineate various factors of consideration in devising a comparable test. The factors include:

> whether the preservation of these buildings would seriously interfere with the use of the property, whether the buildings are capable of conversion to a useful purpose without excessive cost, or whether the cost of maintaining them without use would entail serious expenditure [evaluated] in the light of the purposes and resources of the petitioner.[61]

Snug Harbor's charitable purpose test, however, affords little guidance. The test hinges upon vague terms such as "physically or financially prevents," "seriously interferes," and "serious expenditures." What constitutes serious, or conversely, what level of interference is permissible remains unclear. Furthermore, the court failed to explain how an organization's charitable purpose is to be determined. Certainly, Snug Harbor could have framed its charitable purpose in either broad or narrow terms. Snug Harbor could have asserted that its charitable purpose was to serve the community and, by exhausting funds to house elderly seamen, it was prevented from assisting other community members. Determining an organization's charitable purpose is further complicated as the court did not account for situations where an organization's original charitable purpose has expanded. A theater originally may have served as a performance space. But frequently, the role of a theater expands to providing educational programs for underprivileged school children or to fund actor support groups. The American Theater Wing, for example, has organized an in-school program that brings actors into public schools to discuss the performing arts.[62] The Wing also organizes Broadway Cares/Equity

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[60] *Id.* at 316.

[61] *Id.* A comparable charitable purpose test is incorporated into N.Y.C. ADMIN. CODE § 25-309(a)(2)(c). This provision contains various requirements that must be fulfilled in order to submit an application requesting a Certificate of Appropriateness authorizing demolition, alterations, or reconstruction on the basis of insufficient return. These requirements apply to all for-profit organizations and not-for-profit organizations seeking a transfer of ownership.

[62] Simi Horwitz, *The Wing in Flight: An Overview of ATW Programs*, BACK STAGE, Dec. 16, 1994, at 25.

Fights, an AIDS support network.[63] Thus, landmark designation arguably may not interfere with a theater's original purposes but designation can interfere with its existing charitable purposes.

Nonetheless, the Court of Appeals in *Lutheran Church In America v. City of New York*[64] affirmed *Snug Harbor's* analysis. Lutheran Church had long occupied a mansion in Manhattan. To accommodate the church's growth, an additional wing was built in 1958.[65] The premises, however, could not accommodate the church's increased space requirements. The church consequently sought to demolish the mansion and replace it with an office building.

The *Lutheran Church* court adopted *Snug Harbor's* charitable purpose test noting "that where [landmark] designation would prevent or seriously interfere with the carrying out of the charitable purpose it would be invalid."[66] Once again, the court provided little guidance and did not expand upon what is meant by "seriously interfere." The court, without referring to the evidence submitted, concluded "it appears undisputed that plaintiff's office space requirements increased to such an extent that, even with the addition of a brick wing in 1958, the building became totally inadequate."[67] Similarly, the court failed to instruct upon how one ought to determine what is an organization's charitable purpose and what constitutes serious interference with that charitable purpose. The court simply concluded "[p]laintiff has submitted ample proof not seriously contested, that the use to which the property has been put for over 20 years would have to cease because of the inability under the designation to replace the building."[68] This language merely suggests that an organization's original purposes are dispositive.

Perhaps the most striking flaw in *Lutheran Church* is the court's disjunctive physical and financial interference analysis.[69] By solely

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63 *Id.* Similarly, a church's charitable purpose may be defined as providing a place for religious worship, yet many churches have evolved into community centers. For example, the St. James United Methodist Church houses a Head Start program, an AIDS support and counseling group, and an advocacy group fighting to increase the supply of low income housing. Andrea Oppenheimer Dean, *Inspired Partners*, HIST. PRESERVATION, May/June 1994, at 28; *see* Duerksen, *supra* note 8, at 107 n.169.

64 316 N.E.2d 305 (N.Y. 1974).

65 *Id.* at 307. Lutheran Church occupied the former residence of J.P. Morgan, Jr. The Morgan Mansion is an early example of Anglo-Italiante architecture and is one of the few remaining free-standing brownstones in New York City. *Id.*

66 *Id.* at 311.

67 *Id.* at 307.

68 *Id.* at 310.

69 The court, in dictum, did question the reasonableness of the six percent rate of return. *Lutheran Church*, 316 N.E.2d at 311. It did not, however, analyze the appropriate-

analyzing how landmark designation physically interferes with the church's charitable purposes, it assumes that physical and financial hardship claims require distinct factual inquiries. On the contrary, "claims of physical hardship always have a financial element."[70] When a property owner asserts that landmark designation physically interferes with its charitable purpose, this analysis implies that the owner previously attempted to adapt the structure to its needs or knows such adaptation is necessary. The extent to which the property owner may adapt the premises is of course dependent upon the owner's financial resources. Moreover, if the owner has sufficient financial resources, the owner may relocate part of the organization's activities while retaining other functions in the inadequate landmarked building.[71] Similarly, when a building is physically inadequate and the property owner asserts that landmark designation financially interferes with the organization's charitable purposes, this result is typically attributed to the increased financial burden associated with maintaining the structure's physical premises.[72] These two elements are closely intertwined; any hardship claim should be resolved by addressing both concerns.

The United States Supreme Court in its seminal *Penn Central* decision shed light upon the New York courts' muddled charitable purpose analysis. In *Penn Central*, the Commission landmarked Grand Central Terminal. Shortly thereafter, a private developer obtained a renewable fifty year lease for the air rights above the Terminal. The developer then submitted two plans to the Commission to construct a high rise office building on top of the Terminal. The Commission rejected the plans stating:

> [T]o balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The "addition" would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity.[73]

The Terminal then filed suit[74] asserting that landmark

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ness of this figure since this test is not directly applicable to not-for-profit organizations. For a discussion on the need to increase the reasonable rate of return, see *infra* notes 173-90 and accompanying text.

70 Stewart, *supra* note 58, at 182.

71 *Id.*

72 *Id.*

73 *Penn Central*, 438 U.S. at 117-18.

74 The *Penn Central* Court noted that although the Commission refused to issue a Certificate of Appropriateness authorizing the Terminal's redevelopment plans, the developer could have taken additional measures prior to initiating this suit. *Id.* at 118. The devel-

designation prevented it from freely utilizing the air space above the terminal. Implicitly, the Terminal argued that a property owner retains some level of constitutionally protected use of its property. Beyond this point, landmark designation becomes an unjust taking requiring just compensation. Analogously, where landmark designation infringes upon a not-for-profit organization's beneficial use of its property, the designation will substantially interfere with the organization's charitable purpose. Accordingly, the factors the Court used to determine if an unjust taking has been effectuated are instructive in evaluating the level of beneficial use to which a not-for-profit property owner is entitled before landmark designation is deemed to substantially interfere with the organization's charitable purpose.

Justice Brennan's opinion in *Penn Central* identified several factors to be considered in determining whether the New York City landmarks preservation law untowardly affects the owner's use of his property. He noted "[t]he economic impact of the regulation . . . and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are . . . relevant considerations. So, too, is the character of the governmental action."[75] Accordingly, one must examine whether landmark designations interfere with an organization's ability to accomplish its original purposes.

Ironically, having announced that investment-backed expectations are dispositive, the Court declared that landmark designation did not interfere with the Terminal's use of its property. This ruling ignored the fact that the Terminal's investment-backed expectations did include use of the air space above the Terminal. Indeed, the original plans provided for the construction of a twenty story tower on top of the Terminal. Although the tower was never built, columns were erected into the Terminal's foundation intended to support the twenty story tower.[76] Yet, the Court ruled that landmark designation did not interfere with the Terminal's present use. The Court stated: "Its designation as a landmark not only permits but contemplates that appellants may continue to use

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oper could have submitted other plans to the Commission for review or it could have sought judicial review of the Commission's denial of both Certificates of Appropriateness.

Special financial treatment pursuant to N.Y.C. ADMIN. CODE § 25-309, was not an available remedy since the Terminal was a partially tax-exempt organization. "Sections 489-a to 489-v and 489-aa to 489-gg of the New York Real Property Tax Law granted a tax exemption to Penn Central for that portion of the Grand Central property devoted to transportation use." John J. Kerr, Jr., Comment, *Landmarks Preservation and Tax-Exempt Organizations: A proposal in Response to Lutheran Church*, 1 COLUM. J. ENVTL. L. 274, 277 n.17 (1975).

[75] 438 U.S. at 124 (citations omitted).

[76] *Id.* at 115.

the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions."[77] Thus, although the owner clearly contemplated the construction of a tower on top of the Terminal, the Court concluded that it was not part of the owner's investment-backed expectations.[78]

By tying investment-backed expectations to the property, rather than its owner, the Court effectively limited a landmarked property's uses to those in operation when the property was landmarked.[79] It does not account for an organization's changing activities, the steep costs of maintaining debilitated structures, or varying economic conditions. The analysis mandates an ad hoc factual inquiry providing few if any judicially manageable standards. *Penn Central's* investment-backed expectation analysis does provide some guidance as to how an organization may successfully challenge landmark designation. Nevertheless, these guidelines are premised upon broad and general terms, which do not outline clearly the method to satisfy the burden of establishing serious interference with the organization's functions. Moreover, *Penn Central* only addresses what constitutes an organization's charitable purpose; it does not identify relevant factors for determining when landmark designation substantially interferes with these purposes.

With the guidance of the Supreme Court's pronouncement in *Penn Central*, the New York appellate court in *The Society for Ethical Culture in the City of New York v. Spatt*[80] revisited the *Snug Harbor* and *Lutheran Church's* charitable purpose test. In *Ethical Culture*, the Society occupied two buildings; one was a school and the other was a

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[77] *Id.* at 136.

[78] *Id.* It is likely that the Court viewed the plans to construct a fifty-five story office building and a fifty-three story office building to be incomparable with the investment-backed expectations that would have resulted from the originally proposed twenty story tower. Moreover, the Court had referred to the possibility of submitting additional plans for an office tower above the Terminal. It stated "nothing the Commission has said or done suggests an intention to prohibit any construction above the Terminal." *Id.* at 137. Thus, since the Terminal had submitted plans that were inconsistent with the original plan to erect a twenty story tower, the opinion is consistent with its investment-backed expectations analysis.

[79] The Court further confuses the analysis by stating so long as "the law does not interfere with what must be regarded as Penn Central's *primary expectation* concerning the use of the parcel," then landmark designation is permissible. *Id.* at 136 (emphasis added). Subsequent courts have had difficulty interpreting *Penn Central's* analysis of investment-backed or primary expectation. In Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991), the court concluded that under *Penn Central*, an unjust taking in charitable organization cases occurs when "the land-use regulation impairs the continued operation of the property in its originally expected use." *Id.* at 356.

[80] 416 N.Y.S.2d 246 (N.Y. App. Div. 1979), *aff'd*, 415 N.E.2d 922 (N.Y. 1980), *reargument denied*, 420 N.E.2d 102 (N.Y. 1981). This appeal stems from the trial court's January 15, 1976 judgment enjoining the Commission from declaring Ethical Culture's Meeting House to be a landmark.

Meeting House that was a rare example of art nouveau architecture in New York City. The Commission landmarked the Meeting House and the Society contested the designation arguing that the designation imposed serious physical and financial interferences with the organization's charitable purpose.[81] The Society pointed to the structure's dilapidated condition and asserted that using the outmoded premises would result in an underutilization of space.[82] It further argued that landmark designation would prevent it from demolishing and redeveloping the site, which in turn would enable the Society to generate funds that would be used to support its charitable purpose.[83]

The appellate court rejected the Society's arguments and reversed the trial court's finding that landmark designation impinged upon the Society's constitutional rights. It perceived the Society's proposals as a concerted effort to develop its property commercially for financial gain.[84] While this would be a legitimate interest for a for-profit organization, a desire to reap financial benefits from real estate developments is an illegitimate goal for a not-for-profit entity; financial gains are not part of a charitable organization's investment-backed expectations. The court further held that under a not-for-profit framework, the government may legitimately enact legislation that would deprive a property owner of the most beneficial use of his property so long as it does not interfere with the organization's charitable purposes.[85]

The Court of Appeals affirmed the appellate court's decision. The court emphasized that landmark designation "applies only to the building facade"[86] and so long as designation does not interfere with the Society's charitable activities within the structure, then it is permissible. The court concluded: "There is no genuine complaint that *eleemosynary activities within the landmark* are wrongfully disrupted, but rather the complaint is instead that the landmark stands as an effective bar against putting the property to

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81 *Ethical Culture*, 416 N.Y.S.2d at 249. The Society also asserted landmark designation effectuated an unjust taking violating the Fifth Amendment. The court, however, rejected the Society's constitutional challenge. See *infra* notes 114-30 for a discussion on unjust takings challenges to landmark preservation ordinances.

82 *Id.* at 251.

83 *Id.* The Society was located at Central Park West between 63rd and 64th Streets. Its premises totaled 20,000 square feet consisting of a 200 foot block front. *Id.* at 248. Due to its close proximity to Lincoln Center, the neighborhood was deemed to be "desirable and unique" prompting the Society to explore potential real estate development opportunities. *Id.* at 252.

84 *Id.* at 253.

85 *Id.* at 252.

86 *Ethical Culture*, 415 N.E.2d at 926.

its most lucrative use."[87] Thus, the *Ethical Culture* decision effectively narrowed the charitable purpose test.[88]

More importantly, the above statement endorses *Penn Central's* original charitable purpose inquiry. In its analysis, the Court of Appeals noted that for sixty years the Society used its premises for the same function for which it was constructed.[89] Thus, the Society's assertions that landmark designation interfered with its ability to develop its property and to utilize the funds in furtherance of its charitable purpose lacked merit since real property investment income was not a part of the Society's investment-backed expectations. Accordingly, the *Ethical Culture* court equated activities in furtherance of an organization's charitable purpose to those activities related to the organization's original purposes.[90]

The appellate court also considered the Society's financial hardship claim. The Society asserted that landmark designation prevented it from redeveloping the site into a commercial high-rise and applying the rental revenue towards its charitable purposes.[91] At the time, the property was valued at $4,000,000 and the Society had solicited a lucrative development plan that would have generated $2,000,000 in revenue.[92] The Society maintained that the

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87 *Id.* (emphasis added).

88 Subsequently, the court has liberally construed "eleemosynary activities within the landmark." In 1025 Fifth Ave., Inc. v. Marymount Sch. of New York, 475 N.Y.S.2d 182 (N.Y. Sup. Ct. 1983), the Marymount School, situated in a historic district, sought to construct a gymnasium on the school's roof. The court affirmed the Commission's approval of the School's plan to construct the gymnasium. It ruled that the gymnasium was essential in providing a well-rounded education to its students.

89 *Ethical Culture*, 415 N.E.2d at 926. The appellate court similarly ruled that the Society failed to provide any evidence that the property was ever purchased for investment purposes. *Ethical Culture*, 416 N.Y.S.2d at 253.

90 Some authors argue that a strict reading of *Ethical Culture* would prohibit an owner from adding new activities to existing ones even if the new activities were consistent with the organization's charitable purpose. *See* Stewart, *supra* note 58, at 185. Stewart asserts the *1025 Fifth Avenue* court's broad interpretation of "eleemosynary activities within the landmark" equated activities within the landmark as the very same activities that would be considered as the landowner's charitable purpose. *Id.* at 184. Thus, Stewart suggests that under *1025 Fifth Avenue*, future activities may be construed as being "a part of the general scheme of activities currently existing within the [structure]." *Id.* at 185.

91 *Ethical Culture*, 416 N.Y.S.2d at 251.

92 The Society solicited development proposals to exploit the property's commercial development opportunities. The most favorable plan called for demolishing the school and the Meeting House, and erecting a high-rise development in their place. The property would then be leased to a developer for ninety-nine years at an annual ground rent of $175,000. *Id.* at 252.

> According to this proposal, a high-rise, 800 unit, 240,000 square-foot luxury apartment building was to be built, in which the society would occupy 27,500 square feet on the lower floors. On the basis of the ground rent, it was estimated that the society would contemplate receipt of $2,000,000 in mortgage loan money to be applied toward "new facilities for its school on another site or toward its other charitable purpose."

Id.

premises should have been used to attain its "highest and best use" available and that landmark designation prevented it from doing so.

The appellate court, however, rejected the Society's financial hardship claim. It held that the mere fact landmark designation deprives a property owner from attaining the most beneficial use of the premises does not render the landmarks preservation law to be unconstitutional. The Court of Appeals similarly concluded that "there simply is no constitutional requirement that a landowner always be allowed his property's most beneficial use."[93]

But, are there not constitutional limits as to the extent landmark designation may infringe upon an owner's beneficial use of his property? The *Ethical Culture* court simply concluded that an owner is not constitutionally entitled to the most beneficial use of his property. Yet this holding failed to address the level of financial burden needed to establish financial hardship. In addition, the court did not consider the costs of maintaining an outdated structure and changing economic conditions. The court's only guidance was limited to suggesting that if the Society provided detailed financial reports, its contentions would have been more thoroughly considered.[94]

The appellate court revisited this second prong of the charitable purpose test in *Shubert Organization v. Landmarks Preservation Commission*.[95] The *Shubert* court held that the petitioners, twenty-two Broadway theaters, did not demonstrate that landmark designation denied the owners "essential use of their property."[96] It also declared the theaters' financial hardship claim unripe,[97] emphasizing the owners continued benefits from using the premises as theaters and the potential economic benefits from transferred development rights.[98] Yet, the *Shubert* court did not explore what level of income is a reasonable return and what level of expenditures and financial loss would be deemed a substantial interference.

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93 *Ethical Culture*, 415 N.E.2d at 926.

94 The court suggested the Society's financial hardship claim would have been fully considered if the Society had attempted to obtain a Certificate of Appropriateness requesting structural modifications or alterations. Instead, the Society sought to demolish the structure altogether. The not-for-profit organization's efforts to obtain commercial gain were met by resounding judicial disapproval. *Id.* Nonetheless, the court did not discuss the fact that a Certificate of Appropriateness is only issued if a not-for-profit organization demonstrates it is incapable of earning a reasonable rate of return.

95 *Shubert*, 570 N.Y.S.2d at 508.

96 *Id.*

97 *Id.*

98 *Id.*

This issue was unresolved until it was addressed in *St. Bartholomew's Church v. City of New York*.[99] The Church submitted a real estate report estimating the costs of necessary repairs to the building's mechanical, electrical, and plumbing systems as well as its exterior facade to be $11,000,000.[100] On appeal, the figure was reduced to $3,000,000 with an additional $1,500,000 in dispute with the City.[101] The Second Circuit ruled, "even if the potential cost of repairs totaled $4,500,000 [approximately 41% of its $14,300,000 in estimated resources], the Church has not adequately demonstrated that it is unable to meet this expense."[102] The court further noted the Church did not demonstrate that its budget could not withstand building improvement expenditures under a reasonable financing procedure, which may include borrowing against its endowments and repaying these loans over an extended period of time.[103] Thus, the *St. Bartholomew's Church* court ruled that expenses totaling forty-one percent of a not-for-profit organization's resources and assets did not constitute a substantial interference with the organization's charitable purposes. More importantly, the United States Supreme Court refused to issue a writ of certiorari, which allows the New York courts to retain their muddled substantial interference analysis.

Courts in other jurisdictions have not adhered to the Second Circuit's approach. In *First Covenant Church of Seattle v. City of Seattle*,[104] the First Covenant Church was designated a landmark. The Church sought decertification, arguing landmark designation unconstitutionally burdened and interfered with its religious activities.[105] The court ruled that the financial burden caused by a governmental regulation, such as a gross diminution in property value, may unconstitutionally burden the free exercise of religion when there is a compelling state interest within the State's power to

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99 914 F.2d 348.

100 *Id.* at 359.

101 *Id.*

102 *Id.* Compare the six percent reasonable return standard applied to for-profit organizations and not-for-profit organizations seeking transfer of ownership.

103 The *St. Bartholomew's Church* court did not refer to the statute's special financial treatment provision. Currently, the Commission devises financial planning strategies for certain organizations that satisfy specific requirements that are contained in the New York City landmark preservation ordinance. *See* N.Y.C. ADMIN. CODE § 25-309. Most likely, St. Bartholomew's Church was either ineligible or unable to fulfill the provision's rigid requirements. *St. Bartholomew's Church* demonstrates this flaw in the ordinance and further illustrates the need for legislative reform.

104 840 P.2d 174 (Wash. 1992).

105 *Id.* at 182. See *infra* part IV for a discussion on constitutional challenges to landmarks preservation ordinances.

regulate.[106] The court distinguished *St. Bartholomew's Church*[107] and declared the Seattle landmarks preservation ordinance invalid because it substantially interfered with the carrying out of the Church's religious or charitable purpose by diminishing significantly the value of its principal asset.[108] In further support of the Church's constitutional claim, the court did not find a compelling state interest. The court concluded that landmark designation did financially burden First Covenant Church because it reduced the value of the Church's property by almost half.[109]

In sum, the courts have announced a series of tests for determining what is a reasonable rate of return for not-for-profit organizations. These tests are premised upon broad and general terms where the property owner's burden of establishing serious interference with its operations is not readily ascertainable. They do not consistently account for an organization's changing activities, the steep costs of maintaining debilitated structures, or varying economic conditions. The tests provide few guidelines on how an organization may successfully challenge landmark designation. Instead, they compel ad hoc factual inquiries while providing few if any judicially manageable standards. Thus, the prohibitive nature of establishing financial hardships have rendered relief practically infeasible. Yet, until the Supreme Court reconsiders this issue, there remains a distinct split among the courts. As a result, preservationists have formed self-help organizations instructing property owners on cost-saving techniques.[110] Now, St. Bartholomew's Church actually has joined forces with the New York

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106 *Id.*

107 The court argued that St. Bartholomew's Church did not dispute its designation as a landmark whereas First Covenant Church continuously objected to its designation. Moreover, St. Bartholomew's Church sought decertification so it could use an adjacent structure for commercial purposes while First Covenant sought decertification so the Church may continue to use the premises for "exclusively religious purposes." *Id.* at 181.

108 Justice Utter's concurrence noted "although financial burdens on religious entities do not constitute a per se free exercise violation, the United States Supreme Court has indicated that an onerous financial burden can violate the First Amendment." *Id.* at 191 (Utter, J., concurring). In the instant case, the First Covenant Church provided an uncontroverted affidavit asserting that landmark designation reduced the value of the property from $700,000 to $400,000, supporting a finding of substantial decrease in value. *Id.*

109 *Id.* at 183. The court also noted First Covenant Church provided uncontroverted evidence that landmark designation reduced the value of its principal asset by nearly one half. In comparison, St. Bartholomew's Church did not argue that "designation reduced its principal asset [but], only that it impeded its ability to generate additional revenue to expand its programs." *Id.* at 181.

110 In 1991, Inspired Partnerships was formed to help Chicago's religious institutions cope with the burdens of maintaining older landmarked buildings. Among its participants are clergy members from the St. James United Methodist Church, who hope that they can reduce the maintenance and repair costs from their current figure of one half of the church's $98,000 annual budget. Dean, *supra* note 63, at 28; *see* Bruce Lambert, *Ex-Foe Helps St. Bart's With Its Landmark*, N.Y. TIMES, Jan. 22, 1995, § 13, at 7 (in a combined effort,

Landmarks Conservancy, which formerly opposed the church's efforts to demolish its Community House, to host a benefit lecture, tour, and reception to generate funds.[111]

IV. Constitutional Challenges to Landmarks Preservation Ordinances

As an alternative to pursuing financial relief measures, artistic organizations have sought judicial relief from landmarks preservation laws by challenging these ordinances on various constitutional grounds. Numerous challenges have been raised asserting that landmark designation constitutes an unjust taking under the Fifth and Fourteenth Amendments.[112] In addition, a significant number of landmarked structures are occupied by religious organizations who have argued that landmarks preservation ordinances violate their First Amendment free exercise of religion guarantees.[113]

A. *Takings Clause Challenges*

Landmarked property owners repeatedly have contended that landmarks preservation ordinances constitute an unjust taking under the Fifth Amendment.[114] In the seminal case of *Penn Central Transportation*,[115] the United States Supreme Court upheld the constitutionality of New York City's landmarks preservation ordinance declaring it did not constitute an unjust taking of property without just compensation. In *Penn Central*, the Terminal sought to erect an office tower above Grand Central Station. The Commission objected to its plans and the Terminal sought judicial relief. The Supreme Court affirmed the Commission's actions and rejected the Terminal's assertions that the landmark designation consti-

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the New York Landmarks Conservancy and St. Bartholomew's Episcopal Church are working to restore the church).

111 *Id.* In addition, St. Bartholomew's has decided to close its thrift shop in an effort to save funds through reducing its staff. *A Thrift Shop Is Going Out of Business*, N.Y. Times, Feb. 2, 1995, at B2.

112 *See generally* Kerr, *supra* note 74, at 289-91; David Bonderman, *Constitutional Law*, *in* A Handbook on Historic Preservation Law, *supra* note 3, at 343-72.

113 *See generally* Thomas Pak, Note, *Free Exercise, Free Expression, and Landmarks Preservation*, 91 Colum. L. Rev. 1813 (1991); Stewart, *supra* note 58; Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 Vill. L. Rev. 401 (1991); Note, *Model Free Exercise Challenges for Religious Landmarks*, 34 Case W. Res. L. Rev. 144 (1983).

114 The Fifth Amendment provides in pertinent part: "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Takings Clause is made applicable to state governments through the Fourteenth Amendment's due process clause. Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 239 (1897).

115 *Penn Central*, 438 U.S. 104. See *supra* notes 73-74 and accompanying text for the facts of this case.

tuted an unjust taking of its air rights under the Fifth Amendment.[116] The Court declared "[t]o the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied all use of even those preexisting air rights."[117] The Court further noted that the Terminal could have exercised its transferred development rights,[118] which alone may not have constituted " 'just compensation' if a 'taking' had occurred, but the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on the [Terminal]."[119] Thus, so long as there are some remaining uses, there can be no infringement of the Fifth Amendment.

The *Penn Central* Court solely contemplated the constitutionality of the New York City landmarks preservation ordinance as applied to Grand Central Station.[120] Nonetheless, subsequent unjust

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116 In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), the Court first ruled that the Takings Clause applied to actual physical deprivation of property and to governmental police powers to regulate land use. The Supreme Court, however, has had much difficulty articulating the conditions under which land use regulations constitute an unjust taking. *In Nollan v. California Coastal Comm'n*, 438 U.S. 825 (1987), the Court held that a government regulation does not amount to an unjust taking if there is an "essential nexus" between a "legitimate state interest" and the conditions exacted by the government. *Id.* at 837. Subsequently, in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), the Supreme Court ruled that so long as a land use regulation does not deprive a property owner of all "economically beneficial use" of his property, the regulation does not violate the Fifth Amendment. See generally KASS, *supra* note 28, at 209-19, for a discussion on the various judicially articulated standards.

Most recently, in Dolan v. City of Tigard, 114 S. Ct. 2309 (1994), the Court announced a "rough proportionality" test. Under this test, "no precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 2319-20; *see* Jeffrey L. Braun, *Rough Proportionality Can It Play in New York*, N.Y.L.J., July 27, 1994, at A1. The New York City landmarks preservation ordinance has yet to be challenged under the "rough proportionality" test and it is uncertain whether the ordinance can sustain an unjust taking claim.

117 *Penn Central*, 438 U.S. at 137.

118 The Supreme Court found that the Terminal could have transferred the rights to use the space above the Terminal to at least eight parcels near the Terminal, one or two of which have been deemed suitable for the construction of an office building. *Id.*

In general, transferred development rights are perceived as valuable benefits. *See* Norman Marcus, *The Grand Slam Grand Central Terminal Decision: A Euclid for Landmarks, Favorable Notice for TDR and A Resolution the Regulatory/Taking Impasse*, 7 ECOLOGY L.Q. 731 (1978). Marcus contends that *Penn Central*'s reliance on transferred development rights may trigger preservationists efforts. He warns, however, that transferred development rights must be exercised carefully. Marcus suggests that legislative bodies evaluate:

> (1) continuance of a reasonable, albeit sharply limited, beneficial residual use of the property, (2) existence of sufficient TDR-eligible receiving lots preferably, but not necessarily, in the same ownership as the lot from which the development rights spring; and, (3) a TDR technique that minimizes non-reviewable municipal discretion (contingencies) and maximizes private options involving its exercise.

Id. at 751.

119 *Penn Central*, 438 U.S. at 137.

120 The Court emphasized the limitations to its decision. It stated "[o]n *this* record, we

taking claims stemming from the New York City ordinance, for the most part, also have been rejected.[121] In addition, despite the limited approach of *Penn Central's* taking analysis, other jurisdictions have accorded their ordinances with the New York City provision and rejected unjust takings challenges.

In *United Artists Theater Circuit v. City of Philadelphia*,[122] the Pennsylvania Supreme Court reversed the trial court's finding of an unjust taking, holding that the Philadelphia historic preservation ordinance did not violate Pennsylvania's Constitution.[123] In *United Artists I*, the Philadelphia Historical Commission proposed to designate the Boyd Theater[124] as a landmark. The Boyd Theater objected to the potential designation while the Philadelphia Historical Commission proceeded to landmark the Theater. The court determined that the Philadelphia Historical Commission was forcing the owner to bear a financial burden that should have been borne by the general public. It warned of the dangers of "forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[125] In addition, the *United Artists I* court held that by designating the structure as a landmark, contrary to the owner's will and over the owner's objections,[126] the Commission's actions were "unfair, unjust and

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conclude that the application of New York City's Landmarks Law has not effected a 'taking' of appellants' property." *Id.* at 138 (emphasis added).

121 *See, e.g., Shakespeare*, 608 N.Y.S.2d 460.

122 Sameric Corp. v. City of Philadelphia, 558 A.2d 155 (Pa. Commw. Ct. 1989), *rev'd sub nom.* United Artists Theater Circuit, Inc. v. City of Philadelphia, 595 A.2d 6 (Pa. 1991) [hereinafter *United Artists I*], *rev'd*, United Artists Theater Circuit, Inc. v. City of Philadelphia, 635 A.2d 612 (Pa. 1993) [hereinafter *United Artists II*].

123 The Pennsylvania Constitution provides in pertinent part:

> The people have a right . . . to the preservation of the natural, scenic, historic and aesthetic 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 benefits of all people.

PA. CONST. art. I, § 27.

The Pennsylvania Constitution further 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.

124 The Boyd Theater was the only surviving theater designed by Hoffman and Hernon, a prominent Philadelphia theater design firm. In 1928, the Boyd was constructed as a "500-seat 'first run' movie palace and is culturally representative of the period when motion picture theaters were built to compliment the technological excitement of sound." *Sameric Corp.*, 558 A.2d at 156 n.2. Commission member, Dr. David Brownlee testified that the theater's exterior facade embodied significant art deco characteristics, including art deco handcarvings, an etched and gilded central bay window, and curled gables. *Id.* at 156 n.4.

125 *United Artists I*, 595 A.2d at 13 (quoting *Penn Central*, 438 U.S. at 152 (Rhenquist, J., dissenting)).

126 The Philadelphia landmarks preservation ordinance provides that the Landmarks

amount[ed] to an unconstitutional taking without just compensation," which violated Pennsylvania's Constitution.[127]

On reargument, the Pennsylvania Supreme Court reversed *United Artists I*. The court identified three conditions that must be fulfilled in order to support a finding of an unjust taking:

> 1) the interest of the general public, rather than a particular class of persons, must require governmental action;
> 2) the means must be necessary to effectuate that purpose;
> 3) the means must not be unduly oppressive upon the property holder, considering the economic impact of the regulation, and the extent to which the government physically intrudes upon the property.[128]

The *United Artists II* court concluded the Boyd Theater failed to fulfill any of these conditions.[129] Thus, the court declared that the landmarks designation of the Boyd Theater without the consent of the owner does not constitute an unjust taking under the Pennsylvania Constitution.[130]

Commission is responsible for organizing a landmark designation committee, recommending landmark designees, providing testimony and materials in support of potential designees, arguing on behalf or against landmark designation, and deciding whether the structure should be designated. PHILADELPHIA CODE OF GENERAL ORDINANCES, HISTORIC BUILDINGS, § 14-2008 (1984). In effect, the Commission essentially controlled the entire landmark designation process. *United Artists I*, 595 A.2d at 8. The court described the Commission's role as "hardly [acting as] a neutral and detached arbiter. To the contrary, the Commission is a determined advocate." *Id* at 8 n.1.

The Pennsylvania Supreme Court further ruled that the Philadelphia Commission's exclusive control over the designation process resulted in a blatant violation of due process. The dangers posed by the ordinance's "obvious lack of due process" were magnified by the threat of placing a property owner's rights in jeopardy. *Id.* Similarly, authors have criticized the dominant role played by the New York City Landmarks Preservation Commission. These authors suggest that the Commission may have too much influence and have caused a permanent imbalance between the city's need to develop real estate and to preserve existing structures. These commentators fear that the Commission has been going too far, and consequently, its actions may impede the course of real estate development. *See* Paul Goldberger, *What's the Proper Role of Landmarks Commission?*, N.Y. TIMES, Oct. 1, 1980, at B1.

127 *United Artists I*, 595 A.2d at 14. The majority opinion essentially disregarded *Penn Central*'s ruling and solely referenced Justice Rhenquist's dissent. The *United Artists I* concurrence acknowledged that although the majority declared the Philadelphia preservation ordinance to be an unconstitutional taking under the state constitution, as opposed to the United States Constitution, as was the case in *Penn Central*, the concurrence questioned the validity of this distinction. It asserted that "the language of our state constitution [does not] necessarily mandate a different outcome on the issue of 'taking'." *Id.* at 14 (Cappy, J., concurring).

As a result, commentators suggest that the constitutionality of state and local landmarks preservation laws are suspect and risk being declared as unconstitutional takings under state constitutions. *See* KASS, *supra* note 28, at 214-15.

128 *United Artists II*, 635 A.2d at 618.

129 *Id.* at 619.

130 *Id.* Interestingly, while *United Artists I* emphasized the substantial due process violations, *United Artists II* did not address this issue. The court did refer to a statutory provision, which provides property owners a means of relief against substantial financial

B. *Freedom of Religion Challenges*

Judicial rulings have upheld landmark designation notwithstanding the fact that the designation may hinder an organization's activities.[131] This hindrance may amount to an unconstitutional infringement where the landmarked structure is occupied by a religious institution.[132] In such situations, landmark designation implicates two countervailing interests: the religious institution's First Amendment free exercise of religion[133] and the state's interest in preserving the communities' cultural and historical heritage. Yet, in contrast to the limited relief afforded by Fifth Amendment taking challenges, religious organizations have successfully challenged landmarks preservation laws as unconstitutional infringements upon their First Amendment liberties.[134]

In re Westchester Reform Temple v. Brown,[135] the Temple asserted that landmark designation prevented it from expanding its premises to accommodate increased needs.[136] The Temple argued landmark designation interfered with its free exercise of religion. The New York Court of Appeals affirmed the Temple's contentions ruling that the potential adverse effects to the community are "outweighed by the constitutional prohibition against abridgment of the free exercise of religion and by the public benefit and welfare which is itself an attribute of religious worship in a community."[137]

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hardship, but this provision does not address the landmark designation process. *Id.* at 618 n.3.

Moreover, despite *United Artist's II* rejection of the Boyd Theater's unjust taking challenge, the court vacated the Commission's landmark designation of the Boyd Theater. The court examined the statutory language and determined that the Philadelphia Commission exceeded its statutory powers in landmarking the Boyd Theater's interior. *Id.* at 622.

131 *See St. Bartholomew's Church*, 914 F.2d 348.

132 In New York City, there are more than 200 hundred religious buildings that are designated as landmarks. Russell S. Bonds, Comment, First Covenant Church v. City of Seattle: *The Washington Supreme Court Fortifies the Free Exercise Rights of Religious Landmarks Against Historic Preservation Restrictions*, 27 GA. L. REV. 589, 589 n.2 (1993) (discussing religious organizations' challenges to historic preservation statutes under the Free Exercise Clause).

133 The First Amendment states, "Congress shall make no law respecting an Establishment of religion or prohibiting the free exercise thereof." U.S. CONST. amend. I.

134 Religious organizations have also challenged landmarks preservation laws as unjust takings. For a discussion of *Penn Central*'s taking analysis and its applicability to religious organizations, see John A. Sheehy, Note, *Religious Landmark Preservation Under the First and Fifth Amendment:* St. Bartholomew's Church v. City of New York, 65 ST. JOHN'S L. REV. 553 (1991); Ted L. Wills, Note, *Religious Landmarks, Guidelines for Analysis: Free Exercise, Takings, and Least Restrictive Means*, 53 OHIO ST. L.J. 211, 218-25 (1992) (arguing that an unjust taking of a religious landmarked is effectuated where the regulation either imposes a physical intrusion or if the regulation is applied in a discriminatory manner).

135 239 N.E.2d 891 (N.Y. 1968).

136 *Id.* at 894.

137 *Id.* at 896. The court ruled that a local zoning ordinance was not facially invalid simply because it applied to religious structures. The ordinance in itself could not be used

Similarly, other jurisdictions have declared landmark preservation laws to be an unconstitutional infringement of the freedom of religion. In *Society of Jesus of New England v. Boston Landmarks Commission*,[138] the Boston Landmarks Commission designated the interior of a church as a landmark.[139] The court declared the designation to be an unconstitutional restraint on the Society's freedom of religious worship, concluding, "the government interests in historic preservation, though worthy, is not sufficiently compelling to justify restraints on the free exercise of religion, a right of primary importance."[140] Similarly, in *First Covenant Church of Seattle v. City of Seattle*,[141] the court declared Seattle's landmark preservation ordinance to be unconstitutional because it violated the First Covenant Church's freedom of religion. It subordinated Seattle's interest in the preservation of aesthetic and historic structures, finding that the City's interest was not compelling and did not justify the infringement of First Covenant's right to freely exercise religion. It stated, "[t]he possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom."[142]

Nonetheless, various United States Supreme Court decisions have curtailed the effectiveness of the free exercise of religion challenges. Most notably, in *Department of Human Resources v. Smith*,[143] the Supreme Court announced a "facially neutral" test. It declared that if "prohibiting the exercise of religion . . . is not the object of the [provision] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[144] Thus, when a landmarks preservation ordinance is challenged under the free exercise clause, infringement upon the free exercise of religion is incidental to the general objective of the ordinance, which is to preserve structures that possess

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to hinder the Temple's activities absent a showing that the activities would have "a direct and immediate adverse effect upon the health, safety or welfare of the community." *Id.* Accordingly, under *Westchester Reform*, in the absence of some imminent threat to the community, the state's interest must yield to the Temple's religious freedom.

138 564 N.E.2d 571 (Mass. 1990).

139 BOSTON, MA., CODE § 4 St., c. 772 (1975).

140 *Society of Jesus*, 564 N.E.2d at 573.

141 840 P.2d 174.

142 *Id.* at 185.

143 494 U.S. 872 (1990).

144 *Id.* at 878. Numerous commentators have heavily criticized the *Smith* decision. *See* Stephen P. Eakman, Note, *Fire and Brownstone: Historic Preservation of Religious Properties and the First Amendment*, 33 B.C. L. REV. 93, 139 (1991) (arguing that *Smith* substantially limits the scope of the Free Exercise Clause); Tom C. Rawlings, Comment, Employment Division, Dep't of Human Resources v. Smith: *The Supreme Court Deserts the Free Exercise Clause*, 25 GA. L. REV. 567 (1991) (asserting that *Smith* removes constitutional protection for minority religious groups).

historical and cultural significance.[145]

Following the standards set forth by the Supreme Court, the Second Circuit in *Rector of St. Bartholomew's Church v. City of New York*,[146] ruled that the New York City landmarks preservation ordinance did not violate the First Amendment. In this case, St. Bartholomew's Church applied to the Commission for a Certificate of Appropriateness authorizing it to replace the church's community house with an office tower.[147] Following extensive hearings, the Commission denied the application. Subsequently, the church filed an application under the financial hardship provision alleging the premises were inadequate for the church's purposes. This application was also denied.[148] St. Bartholomew then sought judicial relief alleging the landmarks preservation law violated "both the free exercise and establishment clauses of the First Amendment by excessively burdening the practice of religion and entangling the government in religious affairs."[149]

The court ruled that the New York City landmarks preservation law did not violate the Church's First Amendment right to the free exercise of religion. The court asserted the government may "restrict certain activities associated with the practice of religion pursuant to its general regulatory power."[150] It concluded that absent a showing of discriminatory motive, coercion in religious practice, or the Church's inability to carry out its religious and charitable purposes in its current facility, there is no First Amendment violation.[151]

The Supreme Court denied St. Bartholomew's petition for cer-

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145 *Smith* adopts a markedly different analysis of the constitutionality of regulations that affect religious organizations. Traditionally, the Supreme Court uses greater scrutiny when reviewing regulations that impose substantial burdens on a central religious practice. In Sherbert v. Verner, 374 U.S. 398 (1963), the Supreme Court distinguished the freedom to act and the freedom to believe, ruling that the freedom to act is not absolute. The Court also required that the government must demonstrate the existence of a compelling interest to protect the constitutionality of a regulation that burdens Free Exercise rights. *Id.* at 403. The Court continued to apply the "compelling governmental interest" test in subsequent decisions. *See, e.g.*, Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 718-19 (1981); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 138-42 (1987); Hernandez v. Commissioner, 490 U.S. 680, 699 (1989). *See generally*, Bonds, *supra* note 132.

146 *St. Bartholomew's Church*, 914 F.2d 348; *see* Scott E. Mollen, *N.Y.C.'s Landmark Law May Bar Church From Replacing Church-Owned Building With Office Tower*, N.Y.L.J., Oct. 10, 1990, at B4 (discussing the significance of real estate as a source of revenue for religious institutions).

147 *St. Bartholomew's Church*, 914 F.2d at 351.

148 *Id.*

149 *Id.* at 352.

150 *Id.* at 354.

151 *Id.* at 355.

tiorari.[152] Its failure to review *St. Bartholomew's Church*, however, renders the holdings in *First Covenant*, *Smith*, and *St. Bartholomew's Church* irreconcilable. These decisions have created confusion and have placed civil liberties advocates in contention against historic preservationists.[153] Congress has afforded some relief and responded to the Supreme Court's inaction by enacting the Religious Freedom Restoration Act of 1993.[154] How courts will interpret this act and its resulting effect on landmarks preservation laws remains a mystery. Yet, it is certain that while judicial decisions have provided limited relief to landmarked property owners, their inadequacies are similarly evident.

V. The Need for Legislative Reform

Landmarked property owners have received some financial relief through judicial rulings. Yet, there are numerous shortcomings to curing statutory deficiencies through the adjudicative process. Judicial decisions are limited to the specific ordinances implicated and serve only as persuasive precedents in other jurisdictions. Subsequent courts may refuse to follow precedents by limiting holdings to the specific facts of a case. Judicial decisions are prospective and will not apply retroactively to landmarked structures such as the Shubert Theater. In addition, courts have refused to hear claims where the plaintiff has not complied with all applicable procedural mechanisms contained in the landmarks preservation ordinance.[155] Consequently, these organizations have been denied judicial relief because their claims were not ripe for judicial determination.[156] Accordingly, although the courts have

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[152] The petition for certiorari was denied on March 4, 1991. That same day, the Supreme Court vacated the Washington Supreme Court's decision in *First Covenant Church* and remanded the case for reconsideration in view of *Smith*. On remand, the court concluded that the Seattle landmarks preservation law infringed upon First Covenant Church's free exercise of religion. *First Covenant Church*, 840 P.2d 174.

[153] *See* Stephen L. Kass & Michael B. Gerrard, *God, Mammon and Historic Preservation*, N.Y.L.J., Apr. 23, 1991, at A7; Jane Brown Gillette, *Judgment Day*, Hist. Preservation, Sept./Oct. 1991, at 57.

[154] Pub. L. No. 104-141, 107 Stat. 1488 (1993).

[155] *See* Church of St. Paul and St. Andrew v. Barwick, 496 N.E.2d 183 (N.Y. 1986) (rejecting church's claim for declaratory judgment on its plan to renovate its premises and to construct a commercial high-rise condominium because the church did not exhaust all administrative remedies, thus its claim was not ripe for judicial review); *see also In re* Beacon Theater, 541 N.Y.S.2d 364 (N.Y. App. Div. 1989) (holding the claim was not ripe for judicial review though, the court noted that if it were to evaluate the merits of the case it would hold that the Commission did not act arbitrarily and capriciously in designating the theater to be a landmark).

[156] See Bonderman, *supra* note 112, at 360-62, for an analysis of establishing standing for constitutional challenges to landmarks preservation laws; see also Antonio Rossman, *Administrative and Judicial Litigation*, *in* A Handbook on Landmarks Preservation Law, *supra* note 3, at 375-425, for an overview on how to successfully appeal a landmark commis-

provided some relief, they do not adequately address all of the substantive and logistical problems stemming from landmark preservation laws. In contrast, legislative amendments may provide uniform relief, eliminating many of the concerns raised by judicial decisionmaking.

Another significant development compelling legislative action is the need to respond to the 1986 Tax Reform Act,[157] which created a disincentive to rehabilitate older structures. In 1976, federal tax incentives for the rehabilitation of historic buildings were first enacted to encourage the preservation of historical structures.[158] From 1976 through 1986,[159] the private sector invested nearly fourteen billion dollars towards the rehabilitation of almost twenty-one thousand historic buildings.[160] The 1986 tax revisions, however, reduced the historic rehabilitation tax credit by five percent creating lower financial returns.[161] Formerly, all of the tax credits could be applied in the year the project was completed. Under the new provision, however, taxpayers can use only $7,000 of credit each year, yielding lower long term financial returns while incurring higher transactional costs.[162] As a result, in the four years following the tax revisions, private investment has decreased by more than two-thirds. Thus, the enactment of the 1986 tax reforms drastically diminished the valuable financial relief once generated by the private sector.

In addition, the National Endowment for the Arts[163] ("NEA") traditionally has been a major source of funding for artistic organizations. Yet, in recent years, the NEA has suffered severe budget reductions.[164] Moreover, since the agency's inception, it has been

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sion decision. Rossman provides an exhaustive practitioner's guide on the administrative and litigation process.

157 Pub. L. No. 99-514, 100 Stat. 2085 (1986) [hereinafter 1986 Tax Reform Act].

158 Pub. L. No. 94-455, 90 Stat. 101 (1976).

159 In the interim, the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172, was encacted, providing significant incentives favoring the rehabilitation of older structures, representing a shift from earlier tax provisions, which had favored demolition and new construction.

160 The National Trust for Historic Preservation, *Special Report: Rehab Takes A Fall*, HIST. PRESERVATION, May/June 1989, at 51.

161 1986 Tax Reform Act, *supra* note 157; The National Trust for Historic Preservation, *supra* note 160, at 52.

162 1986 Tax Reform Act, *supra* note 157. Additional changes include: decreasing the annual depreciation deduction from $3,947 over a 19 year period to $2,540 over a 31.5 year period, which lowers after-tax financial return; decreasing the owner's marginal tax return by 22%; and imposing an additional $80 in taxes for every $1,000 of capital gains at sale. *Id.*

163 Statutory authority for these grants is found at 20 U.S.C. § 954 (1994).

164 In 1980, the NEA received a total of $188,100,000 in federal funding. By 1985, this figure decreased to $171,700,000. In 1992, NEA funding was further reduced to just $163,000,000. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF

the subject of continued controversy. "The agency's fate has been debated before in Congress; [but] now the NEA's existence seems to be facing a much bigger threat from the new Republican leadership."[165]

In contrast, funding for the New York State Council on the Arts and the New York City Department of Cultural Affairs, which support the arts, increased in 1994.[166] In 1992, the New York State Council on the Arts received $22,941,000 in funds,[167] while in 1995 it received $28,900,000 in funds.[168] These two organizations joined forces with the private sector to create the Cultural Challenge Grants. The grants will provide $10 million in awards to not-for-profit groups, which must be matched by the state.[169] Nonetheless, these grants received support from the state's former Democratic leadership. Their fate is uncertain under the new Republican administration, which already has begun to reduce the former Democratic government's allocations for arts funding.[170]

Legislative reform is long overdue. Various public interest organizations including the New York Landmarks Conservancy and the New York City Club have advocated legislative reform for some time. In 1982, these groups were tantamount in proposing an amendment to the landmarks preservation law exempting religious institutions from landmark restrictions.[171] The Commission rejected their proposal but subsequently responded to escalating

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THE UNITED STATES 520 (1994). Moreover, in fiscal 1995, the NEA received $162,400,000 in federal funding. Robert Hughes, *Pulling the Fuse On Culture*, TIME, Aug. 7, 1995, at 61, 64.

165 Amy Hersh, *1994: The Year in Review; Performing Arts*, BACK STAGE, Dec. 16, 1994, at 3. The Republican agenda for reducing funding to the NEA has been criticized extensively. Commentators argue that Congress frequently overlooks the simple fact that "culture is business." For instance, artistic and cultural organizations in New York City generate in excess of two billion dollars a year in tourist revenue. These groups also create millions of jobs and yield billions of dollars in tax revenue. Hughes, *supra* note 164, at 64.

166 Hersh, *supra* note 165, at 3. Nonetheless, funding for the New York State Council on the Arts has decreased significantly within the past decade. In 1987, total state aid was approximately $48,405,000; it peaked at $54,266,000 in 1989. THE NELSON A. ROCKEFELLER INSTITUTE OF GOVERNMENT, STATE UNIVERSITY OF NEW YORK IN COOPERATION WITH THE NEW YORK STATE DIVISION OF THE BUDGET, 1994 NEW YORK STATE STATISTICAL YEARBOOK 349 (19th ed. 1994).

167 1994 NEW YORK STATE STATISTICAL YEARBOOK, *supra* note 166.

168 Yet, the New York State Council on the Arts was originally allocated $30 million in funds, but Governor George M. Pataki imposed a 3.5% reduction. Governor Pataki initially considered a 7% reduction in arts funding. Ralph Blumenthal, *Budget Cut to Free Up Arts Grants*, N.Y. TIMES, Oct. 20, 1995, at C19.

169 *Id.*

170 *Id.*

171 *See* The Committee of Religious Leaders of the City of New York, FINAL REPORT OF THE INTERFAITH COMMISSION TO STUDY THE LANDMARKING OF RELIGIOUS PROPERTY (1982); *Religious Panel and Koch Meet on Landmarks*, N.Y. TIMES, Oct. 5, 1983, at B4.

pressures by enacting a hardship appeals provision.[172]

VI. Proposals for Legislative Reform

The New York City landmarks preservation ordinance inadequately addresses the concerns of property owners. Its deficiencies are magnified when compared to ordinances enacted in foreign jurisdictions.[173] This Note proposes legislative reforms: (A) to increase the reasonable rate of return from six percent to at least eight percent, and to redefine current assessed value; (B) to expand the scope of the Certificate of Appropriateness' financial planning provision as applied to not-for-profit organizations; and (C) to implement procedural changes that will require the Commission (i) to hold preliminary hearings after applications for relief have been submitted and (ii) to obtain a property owner's consent to landmark designation.

A. *Increasing the Reasonable Rate of Return and Redefining Current Assessed Value*

The New York City statutory formula defines reasonable return for a for-profit organization as earning "[a] net annual return of six [percent] of the valuation of an improvement parcel."[174] Although the six percent figure is not directly applicable to not-for-profit entities, as these organizations are not intended to earn profits, the Commission and the courts rely upon the six percent figure as an analytical tool to assess the burden of proof for financial hardship claims. By increasing the rate of reasonable return, property owners will have to tolerate a lesser degree of financial hardship before they are able to obtain relief.

The six percent rate was assigned in 1965, the year the New York City Landmark Preservation Law was enacted. Since 1965, this figure has not been adjusted, and the Commission still perceives it to be a reasonable rate of return. The *Lutheran Church* court first questioned the appropriateness of the six percent figure. Although a reasonable return analysis was inapplicable to the church, the New York Court of Appeals noted "[w]e save for another day consideration of those provisions where sought to be applied."[175] Thus, the court already had recognized the potential insufficiency of the six percent rate of return in 1974. No legisla-

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172 N.Y.C. Charter § 74-3021.

173 *See* David Listokin, New York Landmarks Conservancy, Landmarks Preservation & the Property Tax 194-215 (1982).

174 N.Y.C. Admin. Code § 25-302(v).

175 *Luteran Church*, 316 N.E.2d at 311.

tive action, however, was taken to address this concern. Nonetheless, the court has continued to acknowledge the potential inappropriateness of the six percent rate. In *St. Bartholomew's Church*, the Second Circuit observed that in this case and in *Penn Central*, "the deprivation of commercial value [was] palpable"[176] but a reasonable return analysis was inappropriate because the issue was whether landmark designation affected the continuing use of the church's charitable not commercial purposes. Aside from *Lutheran Church* and *St. Bartholomew*'s, there have been no direct challenges to the appropriateness of the six percent rate of return and no significant legislative efforts to review the appropriateness of this figure.[177]

A perfunctory evaluation of various economic indicators clearly demonstrates the inadequacies of the six percent rate. On a national level, the prime lending rates in 1965 and 1993 were 4.54% and 6.0% respectively,[178] representing an increase of 32.2%; the gross domestic product adjusted to 1990 prices in 1965 and 1993 were $2,800,400,000 and $5,815,900,000 respectively,[179] representing an increase of 107.6%.

On a local level, the net assessed value of locally taxable property dramatically increased over the years valued at $1,063,000,000 in 1975 and at $5,791,000,000 in 1989,[180] reflecting an increase of 444.77%. State and local real property tax revenue increased from $52 billion to $168 billion from 1975 to 1991,[181] representing an increase of 223.97%. In addition, New York state's finance, insurance, and real estate activity was indexed at 61/100 in 1967, 100/100 in 1977, and increased to 189/100 in 1992.[182]

These staggering increases illustrate the dynamic growth of local, state, and national economic markets over a twenty-eight year period. Moreover, these statistics illustrate a striking inconsistency. While real estate investors were reaping substantial profits and the government was receiving higher property tax revenues,

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176 *St. Bartholomew's Church*, 914 F.2d at 357.

177 Satisfying the reasonable rate of return analysis is a precondition to receiving a Certificate of Appropriateness authorizing alteration, reconstruction, or demolition of landmarked structures. *See supra* note 40 and accompanying text. Legislative inaction may result from the fear that easing the burden of showing an inadequate rate of return will lead to an increase in Certificates of Appropriateness authorizing alterations, reconstruction, or demolition of landmarked structures. Certainly, this result is inapposite to the Commission's goal of preserving landmarked structures.

178 INTERNATIONAL MONETARY FUND, INTERNATIONAL FINANCIAL STATISTICS YEARBOOK 740-41 (1994).

179 *Id.* at 742-43.

180 STATISTICAL ABSTRACT OF THE UNITED STATES, *supra* note 164, at 313.

181 *Id.*

182 1994 NEW YORK STATE STATISTICAL YEARBOOK, *supra* note 166, at 48.

landmarked property owners were prevented from earning a higher rate of return. On the contrary, landmarked property owners were not permitted to earn a greater return as the reasonable rate of return remained pegged at six percent, a figure that the legislature has deemed to be reasonable for nearly three decades.

Furthermore, the six percent figure is inconsistent with the volatile economic market, which has experienced double digit prime rates and rapidly inflating real estate values. The prime rate fluctuated from 4.54% to 7.86% to 18.87% to 6.0% during 1965 through 1993.[183] Accordingly, in periods where interest rates made loans ghastly unaffordable and the value of commercial real estate dramatically increased, a number of financially insecure landmarked property owners sought some economic benefit from the increased value of their property by selling it to real estate developers. Perhaps this bleak economic reality explains the increase of financial hardship challenges presented to the Commission by not-for-profit organizations.

A related issue of equal significance is the need to reexamine the manner in which property value is assessed. The New York City ordinance provides that the six percent rate of reasonable return shall be computed by using the current assessed value of the landmarked property.[184] But, how is the current value of a piece of property measured? Assessment problems are an inherent concern as city assessors may overlook the effect of landmark designation on property value.[185] Assessors frequently extrapolate current value from comparable buildings yet this technique may not include value adjustments that will reflect landmark status. If property is overassessed, the landowner's real property tax obligations may be unfairly high, or in the event of an underassessment, the local municipality may be deprived of tax revenues.[186] Moreover, when landmarked property is overassessed, the six percent rate of return will be measured against a higher figure and yield a greater rate of return while conversely an underassessment will yield a lower rate of return. In other words, underassessment will enable a landowner to obtain relief more readily while an overassessment

183 INTERNATIONAL FINANCIAL STATISTICS YEARBOOK, *supra* note 178.

184 N.Y.C. ADMIN. CODE § 25-302(v)(2).

185 LISTOKIN, *supra* note 173, at 18. The Center for Urban Policy Research conducted six case studies of landmarked buildings in New York City. For each building, the Center compared the assessment figures compiled by the New York City Real Property Assessment Department and those figures calculated by the New York City Landmarks Preservation Commission. Its research revealed that both organizations had computed disparate property values for each site. *Id.* at 61-75.

186 *Id.* at 20.

the performance arts. The Helen Hayes and Morosco Theater were both demolished in 1982 so a developer could erect a hotel in their place. The Second Circuit remarked, "[t]oday, Times Square is a blighted urban area,"[195] which is attributed to under-utilization of property, proliferation of pornography, increased rates of crime, decrease in tourism, and lack of significant construction in the area.[196] It failed to consider the historic and artistic significance of these theaters, opting to narrow its inquiry to mere financial considerations.

Currently, the New York City Department of Parks and Recreation along with the Central Park Conservancy are leading efforts to demolish the Elkan Naumburg Band Shell.[197] Ironically, preservationist organizations including the New York Landmarks Preservation Commission, the Municipal Art Society of New York, and the New York Art Commission support removing the band shell and replacing it with an alternative performance space. These organizations contend that the band shell's acoustic features are obsolete and that it has become a magnet for homeless individuals and illicit activities.[198] Opposing the demolition is Elkan Naumburg's great grandson, Christopher London, who has organized the Coalition to Save the Band Shell.[199] The case has not been decided and the fate of the Naumburg Band Shell is uncertain.

Thus, while the need to increase the reasonable rate of return is evident, the potential increase in demolitions must also be considered since demolition permanently removes architectural structures, which the community deemed to possess significant artistic and cultural merits, from the city's artistic wealth.

Although this Note suggests to increase the reasonable rate of return, it is significant to note that other jurisdictions, such as the District of Columbia and Philadelphia, have abandoned utilizing a concrete figure. Instead, these jurisdictions have defined unreasonable economic hardship broadly: "failure to issue a [property owner's request for a permit to demolish or alter the premises] would amount to a taking of the owner's property without just compensation or, in the case of a low-income owner(s). . . failure to issue a permit would place an onerous and excessive financial

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[195] Natural Resources Defense Council v. City of New York, 672 F.2d 292, 294 (2d Cir. 1982).

[196] *Id.*

[197] London v. Art Comm'n of the City of New York, 593 N.Y.S.2d 233 (N.Y. App. Div. 1993), *appeal denied sub nom. In re* Christopher W. London, 619 N.E.2d 659 (N.Y. 1993).

[198] *See* Allen Freeman, *Shell Game*, HIST. PRESERVATION, Sept./Oct. 1993, at 41.

[199] *Id.* at 41-42.

will thwart relief. While the ordinance authorizes the Commission to adjust the city's assessment,[187] this precautionary measure neither alters property tax obligations nor does it ensure that appropriate adjustments ultimately will be made.

Landmark status does not readily lend itself to existing assessment assumptions and procedures. Landmark designation may increase property value as it confers prestige, protects the neighborhood from urban renewal projects, and attracts businesses.[188] Conversely, it may decrease property value as it limits an owner's ability to achieve the highest value and best use of the premises, and compels the owner to absorb higher maintenance expenses and regulatory costs.[189] Whether designation will yield a net positive or negative impact on property value is unascertainable. While it is beyond the scope of this Note to propose a methodology that will provide accurate current property value assessments, this Note does seek to emphasize the interrelationship between landmark status, property value, and the reasonable rate of return.[190]

Finally, as suggested earlier,[191] the rate of return may have remained constant since the New York City ordinance requires that property owners demonstrate an insufficient rate of return as a precondition to obtaining a Certificate of Appropriateness, which authorizes alterations, modifications, and demolition of landmarked structures. Overly weakening the standards for establishing hardship relief may lead to an increase in the demolition of landmarked structures.[192]

The threat of demolition is very real. The artistic community has already witnessed the demolition of the Old Metropolitan Opera House,[193] the Helen Hayes Theater, and the Morosco Theater,[194] entities that were once regarded as prominent members of

187 N.Y.C. ADMIN. CODE §§ 25-302(v)(2)(a), (b).

188 LISTOKIN, *supra* note 173, at 33-37.

189 *Id.* at 43-44.

190 The Center for Urban Policy Research has compiled exhaustive policy and procedural recommendations for properly assessing New York City landmarks. *See id.* at 115-54.

191 *Id.*

192 Since the Commission was created in 1965, a number of landmarked structures have been demolished. DIAMONSTEIN, *supra* note 7, at 8.

193 *Old Metro. Opera House Corp.*, 224 N.E.2d at 702.

194 Following the demolition of these theaters, the Commission held public hearings for landmark designation of forty-five Broadway theaters. Between November 4, 1987 and January 5, 1988, twenty-eight theaters were designated landmarks, including the interior and exterior of nineteen theaters, the interior of seven theaters, and the exterior of two theaters. The owners of twenty-two theaters unsuccessfully filed lawsuits to overturn their designation. *Shubert Organization*, 570 N.Y.S.2d at 506. The Morosco and Helen Hayes Theaters may have been sacrificial lambs as their demolition galvanized support for saving the twenty eight designated theaters.

burden upon such owner(s)."[200] This approach affords greater flexibility and enables the Landmarks Commission to consider all pertinent factors and circumstances.

Similarly, Philadelphia has enacted an elaborate scheme for assessing financial[201] hardship claims brought by for-profit and not-for-profit organizations. The property owner must demonstrate that the property cannot be used for any purpose for which it is or may be reasonably adapted. The applicant also has an affirmative obligation to explore potential reuses of the property. In addition, certain financial information must be submitted along with the application.[202]

The Philadelphia Code recognizes that the provisions of section 14-2007 may not be wholly applicable to not-for-profit organizations, which in turn compel the Commission to adopt a flexible analytical framework. The Philadelphia Historical Commission Rules & Regulations specifically state: "No single set of measures can encompass the highly variegated types and contexts of buildings held by not-profit organizations. The economics of a building in the middle of a college campus may differ from that of a church,

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200 D.C. CODE ANN. § 5-1002(14).

201 PHILADELPHIA, PA., CODE § 14-2007(k)(.7) discerns financial hardship and unnecessary hardship claims. Unnecessary hardship exists where literal enforcement of the historic preservation ordinance will result in unnecessary hardship to low and moderate income individuals. One means of assessing unnecessary hardship is where the property owner is incapable of earning 80% of the median income for Philadelphia as provided by the United States Department of Housing and Urban Development. However, the Commission may also make an independent determination of unnecessary hardship if it feels that rigid application of this standard is unwarranted under certain circumstances. PHILADELPHIA HIST. COMM'N R. & REGS. §§ 10.1 - 10.2; *see* Weinberg v. City of Pittsburgh Historic Review Commission, 651 A.2d 1182 (Pa. Commw. Ct. 1994) (ruling under a comparable Pittsburgh ordinance that a claim for unnecessary hardship does not preclude a claim for financial hardship).

202 PHILADELPHIA, PA., CODE § 14-2007(7)(f) requires the property owner to submit the following information to the Commission in support of permits seeking alteration or demolition of the premises based on financial hardship.

> (.1) amount paid for the property, date of purchase, and party from whom purchased . . .; (.2) assessed value of the land and improvements thereon according to the most recent assessment; (.3) financial information for the previous two (2) years which shall include, as a minimum, annual gross income from the property, itemized operating and maintenance expenses, real estate taxes, annual debt service, annual cash flow, the amount of depreciation taken for federal income tax purposes, and other federal income tax deductions produced; (.4) all appraisals obtained by the owner in connection with his purchase or financing of the property, or during his ownership of the property; (.5) all listings of the property for sale or rent, price asked, and offers received, if any; (.6) any consideration by the owner as to profitable adaptive uses for the property; (.7) the Commission may further require the owner to conduct, at the owner's expense, evaluations or studies . . . to determine whether the building, structure, site or object has or may have alternate uses consistent with preservation.

a hospital, a museum or a child care center."[203]

Furthermore, both the District of Columbia and Philadelphia codes specifically address the threat of demolition and limit the circumstances where a permit to demolish may be issued. Under the District of Columbia Code,[204] the most critical conditions are that the property owner has to show demolition will promote the construction of a project of special merit[205] and that all reasonable alternatives have been considered.[206] The Philadelphia ordinance similarly contains various precautionary measures to safeguard against demolitions. It first urges all potential demolition applicants to meet with the Commission's staff in an effort to devise an amenable solution.[207] Additional conditions must be satisfied before a permit to demolish will be granted.[208] In addition, the Philadelphia Commission has enacted a special architectural committee to advise it on demolition applications.[209]

B. *Expanding Special Financial Planning Provision*

The New York City landmarks preservation law provides that if a property owner wishes to alter, repair, or demolish his landmarked building, the owner must apply to the Commission for a Certificate of Appropriateness.[210] If the owner fulfills certain preconditions, however, the Commission then engages in consulta-

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203 PHILADELPHIA HIST. COMM'N R. & REGS. § 9.1 (1990).

204 D.C. CODE ANN. § 5-1004.

205 Special merit is defined as "a plan or building having significant benefits to the District of Columbia or to the community by virtue of exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community services." *Id.* § 5-1002 (11).

206 *See* 900 G St. Assocs. v. Department of Hous. & Community Dev., 430 A.2d 1387 (D.C. 1981) (concluding that reasonable alternative uses existed and landmark designation did not constitute extreme financial hardship).

207 PHILADELPHIA HIST. COMM'N R. & REGS. § 7.1 (1990).

208 PHILADELPHIA, PA., CODE § 14-2007(7)(j) states:

> No permit shall be issued for the demolition of an historic building, structure, site or object, or of a building, structure site or object located within an historic district which contributes . . . to the character of the district, unless the Commission finds that issuance of the permit is necessary in the public interest, or unless the Commission finds that the building, structure, site or object cannot be used for any purpose for which it is or may be reasonably adapted. In order to show that building, structure, site or object cannot be used for any purpose for which it is or may be reasonably adapted, the owner must demonstrate that the sale of the property is impracticable, that commercial rental cannot provide a reasonable rate of return an that other potential uses of the property are foreclosed.

The Philadelphia Landmarks Commission has established a Committee on Financial Hardship that reviews demolition permit applications based on financial hardship. PHILADELPHIA HIST. COMM'N R. & REGS. § 7.6. Additional restrictions governing the issuance of demolition permits are contained in sections seven and nine.

209 PHILADELPHIA HIST. COMM'N R. & REGS. § 7.3(d).

210 N.Y.C. ADMIN. CODE § 25-309.

tions with the landmark owner to arrive at a workable solution to the owner's problem.[211] The Commission refers architects and financial experts to the landmark owner. Moreover, the resulting plan ensures that the owner will earn a reasonable rate of return.[212] In sum, the Commission acts as a negotiator providing professional guidance and financial planning.

Nonetheless, while this financial planning provision is only available to a limited number of not-for-profit organizations, it is available to all qualifying for-profit organizations.[213] But not-for-profit organizations have restricted access to financial resources and planning tools, which are the very type of financial and architectural consultation that is provided by the New York City Landmarks Commission. It makes little sense to compel those organizations that operate under restricted budgetary conditions to deplete their own resources in obtaining financial assistance that otherwise would be freely rendered by the Commission. If the Commission's goal is to preserve the City's cultural and artistic wealth, then it must do so in a nondiscriminatory fashion. Its existing disparate treatment fails to stand up to sound judgment and should be eradicated.

C. *Procedural Changes*

The procedural mechanisms established by the Commission to review applications for Certificates of Appropriateness, financial hardship claims, and landmark decertifications have been heavily criticized.[214] These procedures continuously have been perceived as overly burdensome, costly,[215] and biased towards the Commission. In response, the City has formed various committees to review and recommend procedural reforms. These committees have conducted exhaustive studies and have confirmed the need for procedural reform. Yet, despite their efforts and conclusive findings, very few proposals have been adopted.

In February 1985, Mayor Edward I. Koch established the Cooper Committee to review the concerns of owners, developers, and preservationists regarding the Commission's calendaring and designating procedures.[216] The Cooper Committee focused upon

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211 *Id.*
212 *Id.* § 25-309(b).
213 *See supra* notes 46-49 and accompanying text.
214 PYKE, *supra* note 9, at 20-21.
215 *Id.* at 21.
216 The Cooper Committee was created in response to the partial destruction of the Willkie Memorial Building, which resulted when the Buildings Department issued a work permit and failed to notify the Commission. At the same time, the Commission designated

the "objectives of the landmarks law, the calendaring procedures of the Landmarks Preservation Commission, and the Building Department's procedures for issuing permits"[217] in connection with potential landmarked structures. The Cooper Committee proposed various changes,[218] but the Commission only adopted one measure that imposed time limits for certain actions during the landmark designation process.

Similarly, in May 1988, Mayor Koch announced a series of initiatives to enhance the Commission's efforts to protect potential landmarks. Following public hearings, a proposal to create large geographic study areas for a one year period was submitted. Under this plan, the Commission and the property owners could compile pertinent information related to landmark designation and potential development within the study area.[219] Nonetheless, this proposal was not adopted. Why the legislature and the Commission consistently failed to adopt proposed measures is unknown and troublesome, particularly since their inaction occurred after exhaustive studies unequivocally illustrated the compelling need for procedural reform.

A recurring procedural concern is the exorbitant expenses property owners incur when submitting various applications to the Commission. The decertification process, for example, necessitates the services of attorneys, accountants, engineers, architects, real estate advisers, and developers. The current procedure compels not-for-profit organizations seeking financial redress to first absorb significant expenses to demonstrate their bleak financial status. For example, in *Morris v. Scribner*,[220] a church sought to decertify its property as a landmark. It spent approximately

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the Coty and Rizzoli buildings upon learning that a developer intended to raze the structures and erect an office and residential tower in their place. DIAMONSTEIN, *supra* note 7, at xv - xvi.

217 *Id.* at xv.

218 The Cooper Committee's proposals included establishing a protected building list of potential designations, establishing the Commission as a separate agency, and publishing rules and guidelines. *Id.*

219 *Id.* at xv - xvi.

220 505 N.Y.S.2d 121 (N.Y. App. Div. 1986), *aff'd*, 508 N.E.2d 136 (N.Y. 1987). *Morris* involved an internal dispute between the trustees of St. Bartholomew's Church and the church's rectors, wardens, and vestrymen. The rectors sought landmark decertification so that they could demolish a portion of the church's property and erect a commercial office tower in its place. 508 N.E.2d at 137. The trustees challenged the rectors' plan but its claim was centered upon the exhaustive funds being expended by the rectors in seeking landmark decertification. The Court of Appeals refused to act, ruling "the courts will not interfere with the determination of the board of directors of a business corporation honestly and fairly arrived at." *Id.* at 139-40. The appellate court did note that decertification is a protracted and complex process requiring a detailed plan and the engagement of numerous professional services. *Morris*, 505 N.Y.S.2d at 123.

$2,000,000 on attorneys, accountants, engineers, architects, and real estate advisors' fees and an additional $500,000 in contingent liabilities prior to seeking judicial relief.[221]

Excessive costs also arise from resubmitting applications to the Commission. Frequently, the Commission will deny applications because certain financial figures were lacking or because it disagreed with the owners' architectural or realtor's reports. In these instances, if the owners choose to resubmit their claims, they once again will have to absorb the costly expenses. This process is specifically codified in the Philadelphia Code, which provides: "the Commission may further require the owner to conduct, *at the owner's expense*, evaluations or studies, as are reasonably necessary in the opinion of the Commission to determine whether the building . . . has or may have alternate uses consistent with preservation."[222]

Resubmitting claims and reports, however, create additional expenses for the property owners. Moreover, this process creates a vicious cycle as the property owner, who already lacks the monetary resources to sustain the financial burden of landmark status, must continue to deplete his or her little remaining resources in order to file an application for relief.[223]

This Note proposes to implement a preliminary hearing following the submission of an application for relief. Currently, the New York City ordinance provides for public hearings prior to landmark designation.[224] The hearings, however, are conducted to evaluate the cultural merits of a proposed structure. The Commission rarely considers the resulting impact designation will have on the property owner.[225] In fact, the ordinance does not require a property owner's consent to having his property designated as a landmark. Other jurisdictions, such as the District of Columbia's landmarks preservation ordinance, have implemented a preliminary hearing provision.[226] This provision will inform owners of precisely what type of supporting documentation is needed to advance their position. This measure will allow claims to be adjudicated on the merits and will limit owners' expenses.

Another proposal is to require the property owner's consent to landmark designation. The New York City ordinance provides that public hearings shall be held before the Commission rules

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221 *Morris*, 505 N.Y.S.2d at 123.

222 PHILADELPHIA, PA., CODE § 14-2007(7)(f)(.7) (emphasis added).

223 Applications for relief include applications for a Certificate of Appropriateness, financial hardship relief, and landmark decertification.

224 N.Y.C. ADMIN. CODE § 25-303(b).

225 PYKE, *supra* note 9, at 17.

226 D.C. CODE ANN. § 5-1008.

upon Certificates of Appropriateness or landmark designations. Yet, the ordinance also states that if the Commission fails to give notice of a public hearing to the property owner, the Commission's findings will still be binding.[227] Moreover, the Commission's decisions are not confined to the materials presented at the public hearings. As a result, a property owner has limited influence over the decision to landmark his or her own property.

Compelling the Commission to obtain a property owner's consent to landmark designation will enable the owner to evaluate the consequences of designation. The owner may elect to effectuate a sale or transfer of ownership prior to designation. The Commission would be forced to evaluate the effect designation places on a property owner as opposed to its current approach, which is restricted to evaluating the artistic and cultural merits of proposed designees. Moreover, if the property owner can demonstrate that landmark designation would be overly burdensome, the Commission should proceed to devise a suitable financial strategy that will enable the property owner to continue its operations within the building while advancing the goals of landmarks preservation laws.[228]

Religious organizations have proposed an amendment to the New York City Commission requiring it to obtain their consent prior to landmark designation. The Commission rejected the proposal although other cities, such as Chicago, have adopted comparable provisions exempting religious organizations to varying degrees.[229] Other jurisdictions have adopted provisions requiring the consent of all property owners to landmark designation. The Virginia Code[230] states, "[b]efore the Board shall designate any historic district, landmark, building, structure, or site . . . the owners of such property proposed for designation shall be given the opportunity to concur in or object to such designation by the Board." If the property owner objects to the designation, the Board shall

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227 *See supra* note 32.

228 Admittedly, requiring landowners to consent may effectively eviscerate landmark protection and allow landowners to compel the municipality to use its eminent domain power. Yet, this concern may be mitigated by the fact that the existing New York City ordinance contains a formalistic "notification" provision. In practice, this provision has little substantive force and the owner's interests are not considered. The proposed measure, in contrast, is aimed solely at mandating a meaningful dialogue between the Commission and the property owner. Thus, any consent provision must be carefully drafted so that the Commission ultimately may proceed to landmark a building without the property owner's consent.

229 Carlos Sadovi, *Churches Bear Landmark Burden*, CHRISTIAN SCI. MONITOR, Aug. 15, 1989, at 8.

230 VA. CODE ANN. § 10.1-2206.2 (Michie 1994).

not proceed until the owner's objection is withdrawn.[231]

VII. Conclusion

This Note identified and examined the inadequacies of the New York City landmarks preservation law. Further, it recommended various proposals for legislative reform to balance the conflicting concerns of preservationists and property owners. The need for reform is evident by the inherent limitations of the adjudicatory process, and the decreases in private funding and government grants to artistic organizations. Legislative reform is an imperative measure in the City's efforts to preserve its vast artistic wealth. Indeed, it may be the only viable means for sustaining and furthering the goals of our landmarks preservation laws.

*Cindy Moy**

231 *Id.*

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