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Historic Preservation: At What Cost?

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HISTORIC PRESERVATION: AT WHAT COST?

Steven J. Laurent

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INTRODUCTION

In early 2000, a developer proposed a new seventeen-story apartment building for the corner of Madison Avenue and 91st street located within Manhattan’s Carnegie Hill Historic District.¹ Although the building was not much taller than nearby buildings, and within the allowable height limit allowed by the zoning code,² as a new building in an existing historic district, its design required approval by the New York City Landmarks Preservation Commission. Given the property’s location on New York’s posh Upper East Side, the debate over the suitability of the building drew out some of the city’s most famous celebrities, and none less than Woody Allen.

¹ See “Landmarks Panel Blocks a Tower Opposed by Woody Allen,” NEW YORK TIMES, June 14, 2000, at B3.

² See “The Big City: Woody Allen and Some Curious Logic,” NEW YORK TIMES, April 10, 2001.

After hearing testimony from several notable citizens,³ the Commission rejected the proposed plan for the apartment tower. Explaining that the architects had “failed to consider the sense of place” in the neighborhood,⁴ the Commission declared the tower too tall and out of context with the area. Echoing concern over the size of the building and summing it up for local residents, Mr. Allen quipped, “[i]f they said they want to build a 10-story building, fine.”⁵

Undaunted by the Commission’s rejection, the developers returned the following year with a scaled-down version of the building—the 10-story design alluded to by the Commission and Mr. Allen. However, by this time Allen had changed his tune. He explained that if the Commission were to approved the reduced design, the entire neighborhood would be “ruined.”⁶ Ultimately, the commission rejected this proposal as well.⁷

Although this dispute is notably peculiar for its high-profile players, its underlying themes are typical. Across the country there are historic districts and landmark sites which are similarly “threatened” by new construction or renovation. Local historic preservation commissions regularly decide whether building designs are appropriate, acting as arbiters in battles that pit residents, historians, artists, and even politicians against developers and community investors. And as illustrated above, these commissions are granted much leeway to accept or reject designs that are technically in compliance with general building codes and otherwise deemed appropriate for the location.

³ In addition to Allen, who presented a short film about the neighborhood to the Landmarks Preservation Commission in February, other famous neighbors voicing their disapproval of the design included: author and former White House speechwriter Peggy Noonan; Sir Howard Stringer, Chairman of Sony Corporation of America; and U.S. Representative Carolyn B. Maloney. See “Landmarks Panel,” *supra* note 1.

⁴ *Id.*

⁵ See “The Big City,” *supra* note 2.

⁶ *Id.*

⁷ See “Manhattan Community Boards,” *NEW YORK OBSERVER*, November 26, 2001, at 12. Ultimately, the Commission approved a nine-story building for the site, see “Boldface Names,” *NEW YORK TIMES*, December 13, 2001, at D2, although several exterior details including balconies were removed to make the building less obtrusive. See “Manhattan Community Boards,” *supra*.

This paper will examine some of the larger effects these site-specific preservation decisions have on the urban fabric. Nearly twenty-five years ago, the United States Supreme Court validated the practice of historic designation in the landmark case *Penn Central Transportation Company v. City of New York*.⁸ In the years since this decision, planners and academics alike have widely heralded and universally accepted historic preservation zoning as an important practice for preserving and enhancing the quality of life in our cities.

Notwithstanding this unanimous acceptance, this paper illustrates that times have changed since *Penn Central*. Because the benefits of historic landmarking have gone almost entirely unquestioned,⁹ few have considered the negative effects of this practice on larger planning and social issues. Particularly in light of the problem of urban sprawl, no recent study has attempted to examine whether the continuing designation of historic buildings and districts provides only benefits. Moreover, since *Penn Central*, the legal landscape has also changed. In the nearly quarter-century since *Penn Central* declared that landmark designation did not violate the Constitution, the Supreme Court has shown a propensity to scrutinize more strictly the limits of governmental action as regards Fifth Amendment takings.

In light of changes in the urban and legal context since *Penn Central*, this paper seeks to examine the heretofore unaccounted for external costs of preservation. In particular, and using New York City as its subject, this paper examines the aggregate effects of the Landmark Preservation Commission's decisions to scale down or outright reject new construction in landmarked areas as described above. A question that has gone unasked is this: assuming a developer has done their homework and recognized a demand for a particular building or area,

⁸ 438 U.S. 104 (1978).

⁹ The significant exception is the issue of gentrification, which is not the subject of this paper except to the extent that it is mentioned in footnotes.

where does that demand go when the Commission rejects their proposal?¹⁰ While the answer to this question may not seem particularly important regarding a single building or lot, the cumulative effect of these individual decisions may be considerable.

Since the mid-1960s, New York City has designated over 21,000 buildings and sites as landmarks, thereby subjecting them to Commission review. This paper points up the potential costs of preservation particularly its potential contribution to the problem of urban sprawl as more urban building space is shut out. The principal purpose is to illustrate that these decisions, undertaken with only the building site and immediate area in mind, may have larger consequences. This paper seeks to discuss and more closely quantify those negative external effects.

Part One explains the purpose of historic preservation zoning, the *Penn Central* decision, the premises underlying the decision, and the legacy of the case as a validator of preservation zoning practice. Part Two reviews the pressing urban problem of sprawl and examines how the cumulative effect of landmarking individual parcels and neighborhoods can contribute to the problem. Using New York City as the example, the paper identifies the potential connection between landmark designation and urban sprawl by showing that placing limits on highest and best use within the preserved urban core may contribute to a significant loss of greenspace on the urban fringe. In Part Three, the paper discusses changes in takings jurisprudence since *Penn Central*, whereby the Supreme Court has demonstrated a willingness to apply greater scrutiny to Fifth Amendment takings cases. Here, it is suggested that judicial recognition of the cumulative negative impacts discussed in Part Two could make the practice of preservation zoning more

¹⁰ One possibility is that the disallowed space is simply transferred to adjacent properties under New York's Transfer of Development Rights (TDR) program. But TDRs are rarely the simple fix their proponents claim them to be. See Joseph D. Stinson, Note, *Transferring Development Rights: Purpose, Problems, and Prospects in New*

susceptible to a takings challenge in the future. As such, the paper recommends steps that might be taken to ensure that landmarking continues to serve a valid public purpose while steering clear of future constitutional challenges.

I. *PENN CENTRAL* AND ITS LEGACY

A. Historic Preservation Prior to *Penn Central*

Prior to the 1960s, very few local governments utilized zoning codes to preserve historic properties in this country. Preservation of landmark buildings and areas was essentially a private matter.¹¹ During that decade, however, the scope of preservation widened drastically, triggered by the side-effects of two well-intended but major federal programs--interstate highway construction and urban renewal.¹² These well-funded programs caused a great deal of social displacement and destruction of the built environment at the historic core of most sizeable American cities. By 1965, the U.S. Conference of Mayors, alarmed at the degree of destruction taking place in their cities, put out a call to action that marked the beginning of widespread governmental involvement with historic resources.¹³

York, 17 PACE L. REV. 319 (1996); Norman Marcus, *Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan*, 50 BROOK. L. REV. 867 (1984).

¹¹ Famous early efforts include the 19th century preservation of Mount Vernon, by the Mount Vernon Ladies Association, and preservation and restoration of Williamsburg, Virginia by John D. Rockefeller during the 1920s. Prior to World War II, only Charleston and New Orleans had some form of ordinance designed to protect their historic districts. For a history of the early movement, see James Marston Fitch, *HISTORIC PRESERVATION*, 83-108 (1990), and William J. Murtagh, *KEEPING TIME: THE HISTORY AND THEORY OF PRESERVATION IN AMERICA*, 25-49 (1988).

¹² See Murtagh, *supra* note 10, at 62.

¹³ The Conference of Mayors warned that private efforts of preserving individual landmark buildings was no longer enough. It explained:

Since World War II a great wave of urbanization has been sweeping across the Nation. . . . Out of the turbulence of building, tearing down and rebuilding the face of America, more and more Americans have come to realize that as the future replaces the past, it destroys much of the physical evidence of the past. The current pace of preservation effort is not enough. . . . The time has come for bold, new measures and a national plan of action to insure that we, our children, and future generations may have a genuine opportunity to appreciate and to enjoy our rich heritage. . . . If the preservation movement is to be successful, it must go beyond saving bricks and mortar. It must go beyond saving occasional historic houses and opening museums. It must be more than a cult of antiquarians. It must do more than revere a few precious national shrines. It must attempt to give a sense of orientation to our society, using structures and objects of the past to establish

The situation in post-war New York City was typical. But there, a single event triggered the passage of one of the earliest and most comprehensive landmark designation ordinances in the country. In 1963, the city razed historic Pennsylvania Station to allow for construction of the new Madison Square Garden. The ensuing public outcry led directly to the passage of New York's Landmarks Preservation Ordinance,¹⁴ a code heralded by some as the "the single most influential piece of legislation affecting land use in New York since the first zoning laws."¹⁵

Under New York's landmark preservation law, the responsibility for the city's preservation program falls on the Landmarks Preservation Commission [Commission], an eleven member body that identifies properties and areas of "special character or special historical or aesthetic interest."¹⁶ If the Commission determines this criteria has been met, it designates the identified property or area respectively as an historic landmark or district.¹⁷ Designation under the ordinance has essentially two effects on property owners: first, it creates an affirmative duty to keep the building in good repair; second, it requires that any exterior alterations or additions to the building be approved in advance by the Commission.¹⁸

values of time and place. . . . [T]he new preservation must look beyond the individual building and individual landmark and concern itself with the historic and architecturally valued areas and districts which contain a special meaning for the community. . . . In sum, if we wish to have a future with greater meaning, we must concern ourselves not only with the historic highlights, but we must be concerned with the total heritage of the nation and all that is worth preserving from our past as a living part of the present.

Albert Rains and Laurence G. Henderson, eds., *WITH HERITAGE SO RICH*, 204-208 (1966). In *WITH HERITAGE SO RICH*, the Conference of Mayors indicated and illustrated that nearly half of the buildings identified by the federal Historic American Buildings Survey in 1935 had already been destroyed. *See id.* at 205. This publication contributed directly to the passage of the National Historic Preservation Act in 1966, and a proliferation of local preservation ordinances nationwide.

¹⁴ *See* John Nivala, *The Future of Our Past: Preserving Landmark Preservation*, 5 N.Y.U. ENVTL. LJ. 83, 89 (1996).

¹⁵ Paul Goldberger, *New York, Lost and Found*, N.Y. TIMES, Apr. 9, 1995, at E3 (cited in Nivala, *supra* note 14, at 83).

¹⁶ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 110 (1978) (quoting NY Landmark Preservation Law).

¹⁷ *See Penn Central*, 438 U.S. at 110. The Commission's determination was however, subject to the approval of the New York City Board of Estimate. *See id.* at 111.

B. *Penn Central v. City of New York*

In 1978, the case of *Penn Central Transportation Co. v. City of New York*¹⁹ put to the constitutional test the practice of protecting historic properties via zoning controls. By the time the case came before the Supreme Court, New York City had designated some thirty-one historic districts and over four-hundred landmarks under its ordinance.²⁰ Among the four-hundred individual landmarks was Grand Central Terminal, one of the city's most famous buildings, designated a landmark in 1967.²¹ At issue in the case was Penn Central's plan to build a fifty-five story office tower on the Grand Central site.

In an attempt to garner approval of its design, Penn Central proposed not to raze the station to construct the tower, but rather to preserve the exterior of the building and cantilever the high-rise over its facade.²² The Commission, following four days of public hearings, rejected two of the company's proposals as being inappropriate for the landmark site.²³ Penn Central, having entered into a fifty-year agreement to lease the planned skyscraper, challenged the Commission's action, claiming the application of the preservation ordinance effectuated a taking of its property without due process of law.²⁴

By the time the case reached the Supreme Court, the issue had been distilled to whether the landmark designation of the terminal amounted to an unconstitutional taking of private property for public use without just compensation.²⁵ As such, the dispute provided a test case for the viability of government sponsored historic preservation. Under the stipulation of the

¹⁸ *See id.* at 111-12.

¹⁹ 438 U.S. 104.

²⁰ *See Penn Central*, 438 U.S. at 111.

²¹ *See id.* at 115.

²² *See id.* at 116-17.

²³ *See id.* 117.

²⁴ *See id.* at 119.

parties, at issue was not whether preservation could be characterized as an appropriate means for achieving a legitimate governmental goal, but whether the specific designation at issue required compensation under the Fifth Amendment.²⁶ Justice Brennan, in opening the opinion of the Court, declared what was at stake, foreshadowing the Court's holding:

Over the past 50 years, all 50 states and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance. These nationwide legislative efforts have been precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today.²⁷

Ultimately, the Court rejected Penn Central's argument and held that the City committed no unconstitutional taking by the designation. First, the Court declared the ordinance not invalid *per se* by the fact that it failed to provide compensation to owners prohibited what was allowed them under the general zoning code.²⁸ Second, it found that as applied, the ordinance did not constitute a taking because it did not deny Penn Central the ability to receive a return on its investment. On this issue, the Court noted that the law did not interfere with the company's present use of the terminal, nor did it preclude the property from being used as it had for the prior sixty-five years.²⁹ In the course of the opinion, Justice Brennan, responding to plaintiffs argument that it was entirely burdened without any corresponding benefit, explained that to hold

²⁵ *See id.* at 122. The other issue presented was whether the transferable development rights afforded under the ordinance constituted just compensation to satisfy the Fifth Amendment. Because the Court determined no taking had occurred, it never reached this second issue. *See id.*

²⁶ *See Penn Central*, 438 U.S. at 129.

²⁷ *Id.* at 107.

²⁸ *See id.* at 135-36.

²⁹ *See id.* at 136. In finding such, the Court rejected the plaintiff's argument that the air rights above the terminal had been entirely taken. First, the Court explained that the Commission had not prohibited *any*

for the plaintiff the Court would have to reject the notion that historic preservation benefits all citizens both economically and by improving the quality of life in the city.³⁰ This, Brennan stated, the Court would not do.³¹

Although *Penn Central* is most noted for its contribution to takings jurisprudence,³² the Court's pronouncement regarding the economic and social value of preservation profoundly effected the future of the historic preservation movement.

C. The Impact of *Penn Central* on the Preservation Movement

The National Trust for Historic Preservation explains that the significance of *Penn Central* for preservationists is its role as a "movement validator."³³ In 1978, when the Court heard the case, roughly five-hundred preservation ordinances had been enacted nationwide. Today, over two-thousand ordinances are in effect around the country, a number that continues to grow.³⁴

Penn Central not only provided validation and encouragement for local governments to enact preservation ordinances, but it has also profoundly affected the courts. Although the *Penn Central* Court validated the ordinance in the face of an as applied challenge, subsequent courts have approached similar cases as though *Penn Central* established a per se rule. A well-known preservation case from Pennsylvania is illustrative of the point.

In *United Artists' Theater Circuit, Inc. v. City of Philadelphia*,³⁵ the Pennsylvania Supreme Court addressed a takings challenge brought by the owner of a theater deemed a

construction above the terminal. Second, it noted the ordinance's saving provision allowing for TDRs that could have been transferred to other nearby properties. *See id.* at 136-37.

³⁰ *See id.* at 134-35.

³¹ *See id.*

³² *See infra* Section III.A. for further discussion and explanation.

³³ Paul W. Edmondson, National Trust for Historic Preservation, "An Introduction to the Takings Issue in the Historic Preservation Context," SE31 ALI-ABA 285, 290 (Oct. 18, 1999).

³⁴ *See id.*

³⁵ 635 A.2d 612 (Penn. 1993).

landmark under the local preservation ordinance. Although it noted that the issues in dispute were strikingly similar to *Penn Central*, the *United Artists*' court distinguished the case by the fact that it was to determine whether a taking had occurred under the state's constitution.³⁶ Although it recognized that an analysis under Pennsylvania law could produce a different outcome from *Penn Central*, the *United Artists*' court largely relied on decisions from other states. Explaining that "[t]he fact that no other state has broken with the *Penn Central* decision is not dispositive of the matter," the court explained "it is persuasive"³⁷ and held that no taking had occurred.³⁸

The *United Artists*' decision is representative of post-*Penn Central* legal challenges to preservation ordinances which have consistently failed.³⁹ In light of *Penn Central*, it appears as though, for better or worse, greater deference is given to governmental defendants in preservation-related takings cases.⁴⁰ Certainly *United Artists*' demonstrates the influence of *Penn Central* over the nation's courts:

[S]ince *Penn Central*, no other state has rejected the notion that no taking occurs when a state designates a building as historic. The decade and a half in which the *Penn Central* decision has enjoyed widespread acceptance weighs against our rejecting the *Penn Central* analysis.⁴¹

As with *Penn Central*, subsequent cases consistently reiterate that preservation zoning is grounded on a valid public purpose outweighing the burdens placed on an individual landowner. According to *Penn Central*, this purpose is founded on two presumptions: first, that a large

³⁶ See *United Artists' Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612, 614-15 (Penn 1993).

³⁷ *United Artists*', 635 A.2d at 619.

³⁸ See *id.* at 620.

³⁹ See Edmondson, *supra* note 33.

⁴⁰ See Daniel T. Caravello, Comment, *From Penn Central to United Artists I & II: The Rise to Immunity of Historic Preservation Designation From Successful Takings Challenges*, 22 B.C. ENVTL. AFF. L. REV. 593, 616-17 (1995) ("The decisions by the Pennsylvania Supreme Court in *United Artists' I* and *United Artists' II* demonstrate the proposition that since the *Penn Central* decision, historic preservation designations have become immune from successful constitutional takings challenges.").

⁴¹ See *United Artists*', 635 A.2d at 619.

number of historic buildings are destroyed before their economic value is recognized; and second, that the preservation of historic structures enhances the quality of life for all. The question that must be asked nearly twenty-five years after Justice Brennan made this pronouncement is whether these two presumptions are still valid. The remainder of the paper considers the legitimacy of these presumptions in light of two issues: the condition known as urban sprawl; and the unfettered legal success of preservation zoning and corresponding proliferation of historic designations.

II. SOCIAL RAMIFICATIONS/ POTENTIAL COSTS

A. The Matter of Urban Sprawl.

Over the past decade, urban sprawl has gained national attention and importance. Although the topic is frequently addressed by the media, and most people have a vague understanding of what sprawl is, there is no consensus as to its qualities and effects. While it is not the purpose of this paper to detail the problem of sprawl, the term requires at least a base-level definition. In a 1998 speech, then Vice-President Al Gore identified the causes and effects of urban sprawl:

In the last fifty years, we've built flat, not tall: because land is cheaper the further out it lies, new office buildings, roads, and malls go up farther and farther out, lengthening commutes and adding to pollution. . . .

Drive times and congestion increase; Americans waste about half a billion hours a year stuck in traffic congestion. An hour and a half commute each day is ten full workdays a year spent just stuck in traffic. . . .

So the exhausted commuter seeks affordable housing further out—and can't help pushing local farmers out of business, since family farms can't pay the raising property taxes. Orchards and dairy farms go under; the commute gets even longer; and nobody wins⁴²

⁴² Peter N. Herman, "Smart Growth: Consensus Forming to Put the Brakes on Suburban Sprawl," *NEW YORK LAW JOURNAL*, Mar. 10, 1999, at 5 (quoting Gore speech).

The picture painted here is a bleak one, but it is occurring across the nation. Gore's observation that the nation is building flat and not tall suggests the fundamental question: why? Although the answer to this question is much larger than the scope of this paper, the remainder considers whether historic preservation zoning might have a part to play in this phenomenon.

By way of example, in the Woody Allen neighborhood dispute described in the introduction, the Landmarks Preservation Commission ultimately restricted the proposed building to almost half its allowable height after concluding it was too tall for its surroundings. Furthermore, in *Penn Central*, the Commission similarly deemed a fifty-five story skyscraper inappropriate for its location. In these examples, two Manhattan building lots were made "flatter" than allowed by zoning because of historic preservation concerns. Multiple decisions like these, in the aggregate, could very well contribute to sprawl.

Preservationists have properly noted that urban sprawl presents the same threats to their cause today as urban renewal presented to the movement in the 1960s.⁴³ Furthermore, preservation advocates view their cause as presenting an alternative, some say even an antidote, to sprawl.⁴⁴ They reason that when downtowns are revitalized, neighborhoods restored, and urban buildings rehabilitated, there is less pressure to destroy the greenspace at the fringes of cities.⁴⁵ This, they explain, is because traditional downtowns and neighborhoods are walkable, thus providing an alternative to driving.⁴⁶ Therefore, they proclaim, preservation is "a big part of the solution to the problem of sprawl."⁴⁷

⁴³ See National Trust for Historic Preservation, CHALLENGING SPRAWL: ORGANIZATIONAL RESPONSES TO A NATIONAL PROBLEM, 13 (1999).

⁴⁴ See National Trust, *supra* note 44, at 12; see also Rachel L. Schowalter, *Reuse, Restore, Recycle: Historic Preservation as an Alternative to Sprawl*, 29 ENVTL. L. REP. 10418 (1999).

⁴⁵ See National Trust, *supra* note 44, at 12.

⁴⁶ See *id.*

⁴⁷ *Id.*

The aforementioned benefits of preservation notwithstanding, preservationists may be a bit too quick to proclaim they have a solution for sprawl.⁴⁸ While preservation may have a number of virtues, it is not entirely free from negative effects. Although preservationists are often lauded as urban champions, they might also be viewed as sharing traits with those commonly known as NIMBYs. Although NIMBYs are typically associated with opposing those obviously negative facilities and programs that diminish local quality of life, preservationists typically oppose new construction for the very reason that it will reduce the quality of life in their neighborhoods or cities.⁴⁹ Several scholars have observed that most Americans are unaware of their role in causing growth-related problems.⁵⁰ In this regard, preservationists may be no different. And according to sprawl opponents, NIMBYism contributes to sprawl:

Although sometimes well-intentioned, NIMBYism has inadvertently contributed to sprawl by pushing new developments farther and farther away from the city center. The reason for this is relatively simple: because developers often want to avoid conflicts with citizen groups—conflicts that increase project time and reduce profits—they choose to build where there is little opposition to the proposed developments. In many instances, these new locations are cornfields or cow pastures (after all, corn and cows are not invited to public hearings) on the suburban fringe—locations removed from other developments and where land is relatively inexpensive.⁵¹

Sprawl opponents explain that the way to fight sprawl is by channeling new growth to be contiguous and more dense.⁵² Although preservationists claim their cause is consistent with the goal of open space preservation, the site-specific focus of preservation zoning and the NIMBY

⁴⁸ It can be argued that preservationists arguments for preserving the cities are the same as those of New Urbanists and their espousal of traditional walking neighborhoods and cities, and a mix of urban uses. Taking this approach, one could argue whether the actual physical historic structures are necessary, or if they simply serve as examples of the kind of urban form New Urbanists have already re-discovered.

⁴⁹ E.g. Woody Allen and his Upper East Side neighbors.

⁵⁰ See NRDC, ONCE THERE WERE GREENFIELDS: HOW URBAN SPRAWL IS UNDERMINING AMERICA'S ENVIRONMENT, ECONOMY, AND SOCIAL FABRIC, 11 (1999).

⁵¹ See *id.*

⁵² See *id.*

nature of its proponents may prove otherwise. An examination of preservation in New York City since *Penn Central* provides an example.

B. The Problem of Sprawl and Office Space in New York

Sprawl is typically thought of as most seriously affecting automobile-oriented sunbelt cities. However, this is simply not the case. In a recent study on urban growth patterns, the Brookings Institution challenged the conventional wisdom that sprawl is most problematic in the south and west.⁵³ The study defines sprawl as taking place in cities where land is consumed at a rate faster than population growth, arriving at a figure that measures the *entire* loss of density in cities, not focusing solely on residential, commercial, or open space trends.⁵⁴ The study found that nationwide, between 1982 and 1997, urbanized land in the U.S. increased by 47%, while population grew by just 17%.⁵⁵ Furthermore, because the “rust belt” areas of the Northeast and Midwest are eating up raw land with very little gain in population, the report identifies these areas as representing the nation’s biggest sprawl problems.⁵⁶ New York City is no exception.

In a case-study component of its report, the Brookings Institution compared New York City and Los Angeles, the two most populous cities in the country. Viewed traditionally as dense and sprawling respectively, the study demonstrates that at a gross scale, the cities are strikingly similar, with New York’s density at 7.99 persons per urbanized acre, and Los Angeles at a surprisingly more dense 8.31 persons per acre.⁵⁷ Equally surprising is the finding that from 1982-1997 New York urbanized at a rate of 2.37 persons per acre, while Los Angeles urbanized

⁵³ See William Fulton et. al., *Who Sprawls Most? How Growth Patterns Differ Across the U.S.*, Brookings Institution (July 2001).

⁵⁴ See *id.* at 1.

⁵⁵ See *id.* at 4. Urbanized land is defined as any area with a population density over 1,000 persons per square mile. See *id.*

⁵⁶ See *id.* at 9.

⁵⁷ See *id.* at 14.

at 9.12 persons per acre.⁵⁸ On these facts, the report concludes that “[a]lthough it is still extremely dense at the center, New York is sprawling dramatically on the edges.”⁵⁹

Compounding New York’s sprawl problem is the fact that the commercial building stock in Manhattan is among the oldest in the nation.⁶⁰ It is a well known fact that in recent decades, the trend has been for urban office space to move to the suburbs. As of 1999, less than half of the nation’s offices are located in central cities.⁶¹ Although the majority of metropolitan New York’s office space remains in Manhattan, the same trend is clearly evident. In 1980 Manhattan held nearly 80% of all office space in the metropolitan area. However, by 2000, Manhattan’s share dropped by over 20%.⁶² The fact that jobs are generally moving to the suburbs is not surprising given the abundance of cheap land and second income sources of labor, but New York is additionally plagued by the reality that its core-area buildings are largely outdated. Nearly 80% of the building stock in Manhattan is of pre-1979 construction,⁶³ meaning that for Manhattan to remain competitive for office space, its present buildings must be amenable to replacement or renovation to meet current and future working space and technology needs.⁶⁴

Moreover, compounding the problem of outmoded buildings, the City is facing a crisis-level need for more office space. So much so that New York Senator Charles Schumer formed a think-tank type committee (“task force”) to address the situation. In its report issued in June 2001, the task force on New York City commercial space sounded an alarm, explaining that

⁵⁸ *See id.*

⁵⁹ *See* Fulton, *supra* note 54, at 14.

⁶⁰ *See* Robert E. Lang, *Office Sprawl: The Evolving Geography of Business*, The Brookings Institution Survey Series (Oct. 2000).

⁶¹ *See id.* at 4.

⁶² *See id.* at Appendix Table 13. The table shows the pre-1979 total as 78.8% Manhattan and 17.0% suburban, and the 2000 total as 56.7% Manhattan and 34.5% suburban.

⁶³ Using figures from Table 13. 299.2 million square feet of space pre 1979 and 390.1 million square feet after.

⁶⁴ High-tech firms and FIRE (financial, insurance, real estate) sector business are particularly likely to move to new suburban offices due to fiber-optic infrastructure and advanced telecommunications equipment which

“[t]he city’s main economic concern is not that new employment growth might wane in the short term—it is that there is not enough new office space to support future employment growth.”⁶⁵

According to the task force report, New York must add sixty million square feet of new office space before 2020 in order to capitalize on the projected 300,000 office jobs available for capture.⁶⁶ The present space shortage results from a glut in office space caused by the 1980’s building boom that resulted in little being built during the 1990s.⁶⁷ However, as the 1990s came to a close, the market absorbed some thirty-seven million square feet due to increasing demand.⁶⁸ Presently, with little new space to meet the growing demand, Manhattan rents have reached all-time highs, with vacancy rates dropping to their lowest levels in twenty years.⁶⁹ As a result, the task force explains, the city is at a crisis point where the lack of space is causing expanding companies to relocate.⁷⁰ This all without the impact of the September 11 terrorist attack, which has exacerbated the City’s predicament.⁷¹

According to the task force, two of the most significant obstacles to constructing new office space are inadequate zoning and barriers to assembling sufficient parcel space to build economically feasible high-rises.⁷² According to the report, much of the land that can support

allows for easy networking. *See* Robert Cervero, *AMERICA’S SUBURBAN CENTERS: THE LAND USE-TRANSPORTATION LINK*, 5 (1989).

⁶⁵ *PREPARING FOR THE FUTURE: A COMMERCIAL DEVELOPMENT STRATEGY FOR NEW YORK CITY*, Group of 35 Final Report, at 2 (June 2001).

⁶⁶ *See id.* at 3.

⁶⁷ *See id.* at 15.

⁶⁸ *See id.* at 14.

⁶⁹ *See id.* at 3. Manhattan vacancy rates dropped from over 16% in 1996 to 3.4% in 2001. *See id.* at 18.

⁷⁰ *See id.* By way of illustration, between 1997 and 2000, eighteen New York City based companies made commitments to move into six million square feet of new space in nearby Hudson County New Jersey, costing New York some 30,000 jobs. *See id.* at 19.

⁷¹ As a result of September 11, it is estimated that the City lost over twenty million square feet of office space. *See* Charles V. Bagli, “Seeking Safety, Downtown Firms are Scattering,” *NEW YORK TIMES*, Jan. 29, 2001, at A1. The terror attack on the World Trade Center and the related displacement of downtown businesses has caused many to consider leaving New York City altogether. *See id.*; Charles V. Bagli, “Playing the ‘Jersey Card,’ Firms in Manhattan Compare Incentives,” *NEW YORK TIMES*, Dec. 28, 2001, at D1.

⁷² *See* *PREPARING FOR THE FUTURE*, *supra* note 66, at 4.

new office development is not zoned to encourage such development.⁷³ In addition, zoning also must allow for sufficient density to make a project profitable.⁷⁴ Furthermore, due to a number of factors, the costs associated with assembling an adequately sized parcel make many potential projects untenable.⁷⁵

The task force report does not mention any connection between these obstacles and historic preservation zoning. But nonetheless, that does not mean the placement and sheer volume of designated properties is not at least a contributing factor. Although there is no hard evidence to support such a conclusion, there is evidence to suggest the possibility, especially if one considers the sheer volume of activity undertaken by the Landmarks Preservation Commission since *Penn Central*.

C. Designation of Historic Buildings: Can There Be too Much?

In *Penn Central*, the Supreme Court noted that in the roughly thirteen years since New York enacted its preservation ordinance, the city had designated over four-hundred individual landmarks and thirty-one historic districts.⁷⁶ As mentioned above, because the *Penn Central* decision served as a movement validator, the city continues to designate properties at a similar rate. Presently, the city recognizes 1,070 individual properties and seventy-seven districts as historic landmarks. Combined these comprise over 21,000 properties,⁷⁷ together occupying 2% of New York City's building lots.⁷⁸

⁷³ See *id.* at 22.

⁷⁴ See *id.*

⁷⁵ See *id.* Most new buildings require at a minimum a roughly square-shaped lot of 25,000 or more square feet. See *id.* and discussion *infra* Part II.D.

⁷⁶ See *Penn Central*, 438 U.S. at 111.

⁷⁷ See New York City Landmarks Preservation Commission website: www.nyc.gov/html/lpc/html/about (visited by author, Oct. 1, 2001).

⁷⁸ See *id.*

Two percent of the building lots may not seem all that significant,⁷⁹ but, it should be noted that the number of available building lots remains constant while designation of landmarks continues in earnest.⁸⁰ Although the Commission has designated a vast number of buildings, causing one to think most of the truly landmark quality buildings are already protected, the designation of landmarks continues without much sign of slowing. The Commission is currently designating properties at a rate of about twenty-five buildings and two districts per year.⁸¹ According to its chairwoman, the Commission is “very, very active” in identifying new properties for listing.⁸² Although it is true that the Commission has already identified most of the city’s recognizably grand and beautiful buildings, the recent trend is to designate more average buildings that tell the story of the common-person. And telling such a story typically requires more real estate than a single grand building which can stand on its own architectural and/or historical merits.

For example, the Commission recently designated a district to represent a period of New York’s business history.⁸³ The Madison Square North Historic District, designated in 2001, encompasses ten blocks of Midtown Manhattan, consisting largely of office buildings constructed between the 1890s and early 1900s.⁸⁴ Certainly, this area was selected for the era it represents, however, it cannot be overlooked that it takes a ten block chunk of valuable Manhattan real estate to serve as that contextual representation. Furthermore, there is evidence this broad contextualism is a growing phenomenon, set to include not just New York’s

⁷⁹ Particularly to the Landmarks Preservation Commission which explains that it is “only” 2% of the lots that are listed. *See id.*

⁸⁰ Furthermore, 2% of the five boroughs may not be much, but the density of landmarks in Manhattan is surely higher.

⁸¹ *See* Jim O’Grady, “Landmarks for Common Folk,” *NEW YORK TIMES*, Nov. 5, 2000, at 14.1.

⁸² *See id.*

⁸³ *See* Andrew Friedman, “Madison Square: 10 Blocks of Commercial Hallmarks Transformed Into Landmarks,” *NEW YORK TIMES*, July 1, 2001, at 14.5; “Madison Square North,” Landmarks Commission News, Fall/Winter 2001, located at www.nyc.gov/html/lpc/pdfs/highlights/winter01.pdf.

commercial history, but its cultural and social history as well. As a recent New York Times article explained:

[A] growing number of preservationists are trying to expand the definition of what qualifies for [landmark] status. The aim is to move beyond high-style architectural structures like Grand Central Terminal or the Chrysler Building to ordinary-looking places where important figures other than generals or presidents lived, along with places where the common folk worked and played.⁸⁵

The Commission's chairwoman notes that few of the city's current landmarks are recognized for purely cultural reasons, amounting to approximately twelve of the over one-thousand individual designations.⁸⁶ However, she notes that cultural sites are "important," but adds the Commission remains preoccupied with its continuing efforts to list more traditionally recognized historic buildings and sites.⁸⁷

A recent nationally recognized historic district provides a sign of things to come. In early 2001, New York's Lower East Side was added to the National Register of Historic Places.⁸⁸

Although this level of national recognition does not restrict what owners can do to their properties as the New York City ordinance,⁸⁹ it further illustrates the growing trend to expand preservation to include the recognition of ordinary lives. In this case, the area deemed to have historic significance consists of over five-hundred buildings, primarily tenements and street-level shops.⁹⁰

⁸⁴ See Friedman *supra* note 82.

⁸⁵ See O'Grady, *supra* note 81. The author notes that "cultural landmarking" emerged primarily in New York in the early 1990s.

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ See Shaila K. Dewan, "Lower East Side is Added to U.S. Register of Historic Places," NEW YORK TIMES, April 10, 2001, at B3.

⁸⁹ Listing on the National Register of Historic Places is more of a carrot than a stick. It provides a federal tax benefit to those owners who take steps to rehabilitate their properties. See *id.*

⁹⁰ See *id.* According to the vice president of the Lower East Side Tenement Museum, the area "[is] designated for real cultural reasons. These drab little tenements, which many New Yorkers still live in, have shaped our lives." *Id.* Andrew Dolkart, author of THE GUIDE TO NEW YORK CITY LANDMARKS and the preparer of the National Register nomination admits that "[a]rchitecture is not insignificant here, but it's not architecture for the aesthetics." *Id.*

It is uncertain what impact this trend will have on the future of the city. But it would appear that there are significant issues the city will need to resolve in the not too distant future. The next section considers some of the real problems that can result from the proliferation of landmark designations.

D. Connecting the Problem of Accumulation to the Loss of Open Space

There are at least two significant consequences that can result from a program of continuing designation of historic buildings in a city like New York.⁹¹ The first relates to the fact that buildings have a limited useful life-cycle. While a building may stand for a great number of years, the purpose for which it is constructed is typically of a shorter duration. Buildings often become obsolete or unsuited to their surroundings due to changes in technology and the marketplace. Therefore, because the land upon which they sit is a finite resource, buildings must be made to adapt to changing economic and social conditions--they must periodically be either torn down, or where feasible, put to rehabilitation.⁹²

The problem of limited useful life is compounded by the accumulation that occurs as buildings are continually set aside for preservation under an ordinance. As explained above, the ongoing designation tends to make more sites unavailable for redevelopment either because the application of the ordinance makes projects economically unfeasible or developers simply find it too risky to test the uncertain approval process. One scholar has explained the problem of landmark accumulation and its negative affects:

[T]here is gradual accumulation of cultural buildings as each generation contributes its own choices to the pool. Honoring all past conservation decisions would result in continuing increases in the number of cultural buildings at the

⁹¹ There are more consequences than just the two discussed here. The major one being the displacement of the underclass through gentrification. While this is not a subject of this paper, surely the analysis herein could be applied to the housing context.

⁹² For a brief discussion these concepts, see Daphna Lewinsohn-Zamir, *The "Conservation Game:" The Possibility of Voluntary Cooperation in Preserving Buildings of Cultural Importance*, 20 HARV. J.L. & PUB. POL'Y 733, 737-38 (1997).

expense of the community's other needs. Because land suitable for development is limited, the cumulative growth of preserved buildings may restrict and even prevent additional or more intensive development of new housing, roads, schools, and so on.⁹³

One might add to this observation, that the development of new office space may also be prevented or restricted. These effects of accumulation are precisely what threatens New York as the Landmarks Preservation Commission continues its regular program of designating landmark properties. Not only does the city have to deal with its building stock becoming less utilitarian due to aging, but also that the raw number of buildings and sites available for revamped office space effectively decreases with each new landmark designation. This combination of age and accumulation contributes to the existing market forces that lead to sprawl and the loss of open space on the city's edges.

There is no better place to begin an analysis of the potential correlation between historic preservation and sprawl than the case of *Penn Central*. As explained above, in that situation the Commission rejected the company's plan to construct a tower over its landmarked building—a tower that would have attained a height of fifty-five stories.⁹⁴ The building's owner certainly recognized a demand for office space in the area because it had entered into a long-term lease for the proposed skyscraper. Once the Commission rejected the proposal the demand simply did not go away. By all indications, market forces likely drew the demand out to the suburbs.

Another important New York preservation case involved a midtown Manhattan church, St. Bartholemew's, and an adjacent commons building located just a few blocks from Grand Central.⁹⁵ The city designated the church and commons building as landmarks in 1967.⁹⁶ In December 1983, seeking to capitalize on rising real estate demand, the Episcopal Church sought

⁹³ *Id.* at 739-40.

⁹⁴ *See Penn Central*, 438 U.S. at 116, and *supra* section I.B.

⁹⁵ *See St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 351 (2d Cir. 1990).

Commission approval to replace the seven-story commons building with a fifty-nine story office tower.⁹⁷ When the Commission denied successive applications for a “certificate of appropriateness”⁹⁸ under the preservation ordinance, the church filed suit. The added Constitutional twist distinguishing the case from *Penn Central* was the matter of religious freedom. Ultimately, U.S. Court of Appeals rejected the church’s free exercise claim, finding the preservation ordinance to be a valid neutral regulation.⁹⁹ As to the takings claim, the *St. Bartholomew’s* court followed *Penn Central*, holding that no taking had occurred because the property could be used as it always had.¹⁰⁰

Penn Central and *St. Bartholomew’s* represent two occurrences where, despite a demand for new office space, skyscrapers were never built. Furthermore, they arguably represent situations where two building sites were effectively removed from the real estate market by their landmark status. Although it is possible that the demand to be satisfied by these towers relocated to other buildings in the vicinity, it is also possible that the projected occupants of these proposed buildings moved to the suburbs.

The reason why an office would move from the city to the suburbs has been explained over and again as part of the sprawl debate. To summarize, the suburbs offer a number of advantages, including lower land and construction costs, liberal zoning ordinances, and ample room for parking and open space.¹⁰¹ However, it has also been well documented that the move to the suburbs has its consequences—sprawl. The principal problem resulting from the migration of high-rise offices to the suburbs is that suburban office buildings are almost

⁹⁶ See *St. Bartholomew’s*, 914 F. 2d at 351.

⁹⁷ See *id.*

⁹⁸ The Commission must approve this certificate as a preliminary step in the construction permitting process.

⁹⁹ See *id.* at 355-56.

¹⁰⁰ See *id.* at 357.

¹⁰¹ See Urban Land Institute, OFFICE DEVELOPMENT HANDBOOK, 13 (2d ed. 1998).

universally configured on a lateral rather than vertical plane. These “horizontal skyscrapers” form the archetypal centerpiece to the modern office park.¹⁰² Suburban business parks are designed to provide a premium, rural-like environment for their workers, offering groomed landscapes, airy office space, and plentiful parking.¹⁰³ In addition to the fact that the location of these office parks significantly contributes to traffic congestion,¹⁰⁴ their principal nuisance is the amount of land they consume.

The measure of the efficiency of the use of land by a building is called floor-to-area ratio (“FAR”).¹⁰⁵ FAR is a measurement of density, determined by dividing the building’s gross size (in square feet) by the size of the building site (in square feet).¹⁰⁶ High-rise office buildings, as can be imagined, have much greater FARs than suburban office parks. Because skyscrapers typically, and especially in midtown Manhattan, cover almost the entirety of their lots, their FARs are generally twenty and higher.¹⁰⁷ By way of example, a one-story building that entirely covers its building site has a FAR of 1—an equal amount of building and site area. A twenty-story building that entirely covers its site has a FAR of 20. Similarly, a forty-story building covering half of its building site has the same FAR—20.

Suburban office buildings, conversely, have low FARs. Most new suburban workplaces are built at FARs of .20 to .30.¹⁰⁸ By way of example, a one-story office building (or more likely collection of buildings) occupying one-quarter of its site has a FAR of .25. Similarly, a

¹⁰² See Robert Cervero, AMERICA’S SUBURBAN CENTERS: THE LAND USE TRANSPORTATION LINK, 36 (1989).

¹⁰³ See *id.* at 6.

¹⁰⁴ Cervero notes that suburban offices are built at densities considerably below that of inner cities, making mass-transit impracticable. Furthermore, due to the spread-out nature of the buildings themselves, the possibility of walking, cycling, and most forms of group travel are less convenient than the automobile, thus adding to street congestion. See Cervero, *supra* note 102, at 1-2.

¹⁰⁵ See OFFICE DEVELOPMENT HANDBOOK, *supra* note 101, at 128.

¹⁰⁶ See *id.* FAR is typically shown as a decimal, but sometimes may be expressed as a percentage. See *id.*

¹⁰⁷ See *id.* at 128.

four-story building taking up one-sixteenth of the lot area has the same FAR—.25. In addition to the space consumed by vast atriums and wide-open lawns, a major reason for the lack of density in suburban office complexes is parking. With a typical suburban office, 1,300 square feet of land is paved as parking for every 1,000 square feet of building area.¹⁰⁹

Returning to the issue of where the proposed office space in *Penn Central* and *St. Bartholomew's* may have gone, one can see the effect of historic preservation on the loss of greenspace by quantifying and comparing the amount of land required to support the same amount of office workers in the city and suburbs. Without having actual figures on the proposed floor size of the buildings rejected in the two cases, an estimate is in order. The floorplate of a typical office building (the size of a single floor) averages between 18,000 and 30,000 square feet.¹¹⁰ Of course, this is an average, and large skyscrapers have more sizeable floorplates. The Empire State Building, for example, sits on a lot of some 85,000 square feet.¹¹¹ While that building may not entirely occupy its site, a typical large Manhattan skyscraper has a floorplate of roughly half of that or just over 40,000 square feet.¹¹²

The building proposed in *Penn Central* stood at fifty-five stories, while the building proposed in *St. Bartholomew's* totaled fifty-nine. Together they amount to one-hundred fourteen floors, and at an estimated 40,000 square feet per floor, total 4.56 million square feet of space. If that amount of Manhattan office space moves to suburban New York due to market and ordinance-related reasons discussed above, the amount of greenspace consumed is alarming. At the typical suburban office FAR of .25, 19.4 million square feet of suburban land is required to

¹⁰⁸ See NRCD, ONCE THERE WERE GREENFIELDS, *supra* note 50, at 38. The Urban Land Institute, however, states that the typical suburban office development has a FAR of .25 to .50. See OFFICE DEVELOPMENT HANDBOOK, *supra* note 101, at 128.

¹⁰⁹ See Cervero, *supra* note 102, at 33.

¹¹⁰ See OFFICE DEVELOPMENT HANDBOOK, *supra* note 101, at 8.

¹¹¹ (425 ft x 200 ft). See *id.* at 12.

¹¹² (200 ft x 200 ft). Based on a three-hundred foot city block, less sidewalk space and building setbacks.

house the same number of workers as 4.56 million square feet of building space in the city. To put it in a more understandable figure, the 40,000 square foot lots in Manhattan are roughly one acre each, and the equivalent open space lost in the suburbs totals more than 445 acres.¹¹³

Therefore, in the cases of *Penn Central* and *St. Bartholomew's*, the inability to develop two acres in the city could have amounted to a loss of almost 450 acres of greenspace in the suburbs.

Furthermore, this 450 acre figure does not account for additional space lost to corresponding roads and strip-type developments that would be constructed to serve the suburban workers.

This associated loss of land is not a factor in Manhattan where the infrastructure already exists.

Certainly, this analysis is easily debatable. There are so many economic, social, and zoning-related matters to account for that a truly scientific study of this subject would consume volumes. Therefore, it must be clearly stated that the point to be made here is illustrative, not empirical. And the point is this: negative externalities accompany every public choice. Or, as applied to historic preservation zoning: with every landmark that is designated in the name of preserving a reminder of the city's past, there may be resulting land use impacts on that city's present and future.

Hopefully the point has been illustrated using the subject of New York City and its two most famous historic preservation lawsuits. Although one might want to disregard this analysis as unscientific or overly ambitious, the documented trend of accumulation and the need for office space in the city might conversely cause one to consider whether the process of landmarking should be more scrutinized. To date, the City of New York has designated 2% of its buildable lots as landmarks. In raw numbers, this is more than 22,000 lots, a number that continues to grow. The Preservation Commission's actions in *Penn Central* and *St. Bartholomew's* potentially caused a loss of suburban greenspace in the hundreds of acres.

¹¹³ One acre equals 43,560 square feet.

Surely, there are numerous similar actions of the Commission that have gone unchallenged. The cumulative effect of the Commission's decisions in overseeing 22,000 properties could be significant. By way of example, if the Commission's actions caused a mere 1% of the 22,000 landmark owners not to build ten floors, the corresponding loss of land in the suburbs under the above analysis is more than three square miles of open space.¹¹⁴ This is the equivalent of two-and-one-half Central Parks.¹¹⁵

To summarize, the practice of historic preservation zoning, since *Penn Central*, has gone virtually unchallenged. In New York City, sprawl is occurring and there will be a desperate need for commercial office space in the coming decades. Without new or rehabilitated space, jobs will be lost to other areas, and the sprawl problem will be magnified. At the same time 2% of the city's building lots fall under the city's preservation ordinance, and the great number of commercial buildings so designated are thereby made more difficult to upgrade to modern uses. As a result, central city office space is getting more obsolete and made less available to redevelopment as more areas are designated landmarks. Therefore, landmark designation may be an obstacle to feasible urban redevelopment, contributing to the office space shortage and urban sprawl without preservationists even being aware of it. As the city makes more properties subject to the ordinance, and the negative external effects of historic designation become more evident, there is a greater likelihood that new legal challenges will arise. The next section examines the likelihood of success of future takings challenges, and how preservation advocates might change the function of the ordinance to avoid losing these challenges.

¹¹⁴ Based on the following calculation: 1% of 22,000 equals 220 potential sites affected. 220 multiplied by ten floors at 40,000 square feet per floor equals eighty-eight million square feet of space. Eighty-eight million square feet equals 2,020 acres which at 640 acres per square mile is 3.16 square miles. Furthermore, as discussed before, this area does not include the loss of open space to infrastructure and supporting businesses.

¹¹⁵ Central Park is 843 acres in size. See www.centralpark.org.

III. LEGAL IMPLICATIONS

A. Takings Jurisprudence Since *Penn Central*

As discussed above, the *Penn Central* decision laid down the principal that landmark designation of a property does not amount to a regulatory taking under the Constitution. *Penn Central* establishes the takings test for all regulatory situations—a three-part inquiry balancing the government interest, the owner’s investment-backed expectations, and the character of the government action.¹¹⁶ Although the *Penn Central* takings analysis has been criticized as too deferential to government actors,¹¹⁷ several Supreme Court decisions since *Penn Central* demonstrate the Court’s willingness to more closely scrutinize governmental actions in the takings context.

Since *Penn Central*, two cases in particular illustrate the Court’s scrutiny of government actions in determining whether the action advances a stated purpose. In *Nollan v. California Coastal Commission*,¹¹⁸ the Court considered whether a requirement that beachfront property owners grant a permanent easement in exchange for a building permit amounted to an unconstitutional taking. Recognizing that a legitimate governmental interest was involved, Justice Scalia, for the majority, found there was an insufficient connection between the interest to be furthered and the burden of the easement requirement.¹¹⁹ Because there was not an “essential

¹¹⁶ See *Penn Central*, 438 U.S. at 124. For a general overview of Fifth Amendment takings jurisprudence, see David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan, and What State and Federal Courts are Doing About It*, 28 STETSON L. REV. 523 (1999).

¹¹⁷ For an analysis of just how deferential the *Penn Central* balancing test can be, see Basil H. Mattingly, *Forum Over Substance: The Empty Ritual of Balancing in Regulatory Takings Jurisprudence*, 36 WILLAMETTE L. REV. 695 (2000). Mattingly, through an empirical analysis of over ninety reported regulatory takings cases, argues the *Penn Central* test is “nothing more than a strong presumption in favor of no compensation, regardless of the impact of the regulation.” *Id.* at 699.

¹¹⁸ 483 U.S. 825 (1987).

¹¹⁹ See *Nollan v. California Coastal Commission*, 483 U.S. 825, 838-39 (1987).

nexus” between the two, the *Nollan* Court found that the government’s condition resulted in an unconstitutional taking of property.¹²⁰

The Court further expanded on this “rational nexus” analysis between government purpose and government action in *Dolan v. City of Tigard*.¹²¹ There, the city required the property owner, in order to receive a building permit, to grant an easement for a public bike path and drainage.¹²² The Court, as it had in *Nollan*, examined the nexus between the purpose and requirement and found the appropriate degree of connection to be lacking. Examining the facts, the Court further expanded on the essential nexus concept, holding that there must in addition be a “rough proportionality” between the burden of the regulation and the stated government goal.¹²³ Here, the government had imposed more than required to meet the goal, and the requirement was struck down.

Although these two cases concerned more specifically government exactions, and not direct regulation as in the historic preservation context, the message sent by the Court is clear—government actions are more likely to be takings where they do not sufficiently advance the proposed goal. Applying this theme to future regulatory cases, the Court is more likely to consider and question the effects of a regulation, rather than simply defer to the stated government purpose under a balancing test.

Specifically in the historic preservation context, the Court’s inquiry under *Penn Central* is made on a case-by-case basis. One of the three-part factors is the government interest and justification for it, and the Court has made clear the relative importance of this factor to the

¹²⁰ See *Nollan*, 438 U.S. at 837, 841-42.

¹²¹ 512 U.S. 374 (1994).

¹²² See *Dolan v. City of Tigard*, 512 U.S. 374, 380 (1994).

¹²³ See *Dolan*, 512 U.S. at 391.

analysis in subsequent cases.¹²⁴ So, although in future cases the Court may not be so apt to question whether a legislative body has made a rational choice regarding what is in the public interest, it may be more willing to examine how the furtherance of that interest is realized through the regulation.

B. Preservation as a Taking Under the New Standard?

Under this new era of heightened scrutiny, historic preservation might not fare as well as it has to date. Under a takings analysis, the first question is whether the regulation serves a legitimate governmental purpose. There is little room to argue that historic preservation does not rationally serve the public--*Penn Central* establishes this fact.¹²⁵ Therefore, preservation related regulation almost surely survives a *Nollan*-type “essential nexus” analysis because the government goal is to preserve endangered resources, and the regulation does this directly. Therefore, the question becomes one of whether the relationship between the goal and the burden on the owner is roughly proportional under *Dolan*.

The potential for failing the *Dolan* test is made clear by considering the increasing numbers of buildings designated as landmarks. The underlying issue it raises is whether a qualitative difference exists between the tenth landmark building designated (e.g. the Empire State Building), and the 1,110th building designated (e.g. a Lower East Side Tenement). Or to put it more succinctly, if the goal is to preserve buildings to enhance the quality of public life—how many buildings are necessary to further this goal? Arguably, at some point, there will be more buildings designated landmarks than are necessary to achieve the goal. This is particularly relevant under the justifications traditionally given for preservation—economics, tourism, sense

¹²⁴ See *Agins v. City of Tiburon*, 477 U.S. 255, 260 (1980) (“The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests [citation omitted] or denies an owner economically viable use of his land [citing *Penn Central*].”).

¹²⁵ See *Penn Central*, 438 U.S. at 134.

of place, etc. Even assuming these goals are not achieved by the time the 1,100th or 21,000th building is landmarked, there must be a point somewhere where the benefit is so small in light of all the prior designations, that the burden on the property owner outweighs the meager benefit. In other words, a point will be reached at which the burden placed on a landmark owner is not “roughly proportional” to the benefit given the public, because that public benefit already has been largely achieved.

C. Avoiding Future Takings Challenges

As explained above, the ongoing process of landmark designation leads to an accumulation of protected resources, which over time leads to negative impacts on other government land-use interests. *Penn Central* validated historic preservation as a legitimate governmental interest,¹²⁶ whereas in a later case, *Agins v. City of Tiburon*, the Court found open space preservation to be a valid basis for regulation.¹²⁷ A problem arises when these interests become exclusive of each other. With regard to accumulation of historic properties under zoning laws, preservationists need to take steps to ensure such regulation continues to serve public interests, thereby avoiding takings challenges that may arise in the future.

One reason the *Penn Central* Court held preservation a valid government interest was its determination that New York’s program was a component of a larger plan.¹²⁸ However, while this planning connection appears real according to the program’s enumerated purpose, the connection does not exist so much in the practical sense. Under the New York City Administrative Code, the Landmarks Preservation Commission has the power to designate a property as a landmark.¹²⁹ Upon close inspection of the designation procedures, it appears far

¹²⁶ See *Penn Central*, 438 U.S. at 134-35.

¹²⁷ See *Agins v. City of Tiburon*, 477 U.S. 255, 261 (1980).

¹²⁸ See *Penn Central*, 438 U.S. at 132.

¹²⁹ See NYC Administrative Code § 25-303(a) (2001).

from conclusive that the Commission's activities are truly integrated into the city's planning processes.

Such an examination begins by looking at the composition of the Commission itself. It is an eleven member body designated by mayoral appointment.¹³⁰ Under the city code, the Commission is to consist of the following: three architects; one historian; one realtor; five citizens, one each representing the five boroughs; and one city planner *or* landscape architect.¹³¹ The composition of the Commission hardly establishes a solid connection to the city's planning department.

Although its membership could cause the Commission to be overly parochial in its viewpoint, its actions are not entirely lacking review. Once the Commission makes a determination, that action is of full force and effect,¹³² but each action is forwarded to the city Planning Commission for review.¹³³ While this review seems to provide a degree of connectivity to citywide planning, the Planning Commission's role is limited in two significant ways. First, the Planning Commission has no direct ability to overturn a Preservation Commission decision--it can only make a recommendation to the City Council whether or not to affirm.¹³⁴ More importantly, however, the scope of Planning Commission review is limited to the impact of the designation on the "area involved."¹³⁵ Therefore, the Planning Commission does not take into account the effect of a designation on anything greater than the property's immediate vicinity. Finally, once the Planning commission has made its report, the City Council

¹³⁰ See New York City Charter § 3020(2)(a).

¹³¹ See Charter § 3020(1)(2001).

¹³² See Charter § 3020(8).

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ See *id.* § 3020(8)(a) (The Planning Commission shall submit a report to the council "with respect to the relation of any such designation, whether of a historic district or a landmark, to the zoning resolution, projected public, improvements, and any plans for the development, growth, improvement or renewal of the area involved.").

has 120 days to modify or disapprove of the designation on a majority vote. There is no code requirement for substantive review of a Preservation Commission designation.¹³⁶

If New York's landmark designation process is to be truly considered a component of city planning, the entire program should be evaluated at a citywide level—and planners are the ones to do it. The Planning Commission must have an opportunity to review each designation and its larger impact, including whether the designation is a step toward achieving the overall purpose of the preservation program. In its review, the Planning Commission should balance all the needs of the community. Because every public program has negative incidental costs, to the extent possible, such costs should be quantified and weighed with regard to each designation. The Planning Commission, not the Preservation Commission, is the body to do this.

Despite the almost unchecked deference given by courts to preservation ordinances since *Penn Central*,¹³⁷ there is some precedent for historic preservation ordinances being subrogated to other public purposes. New York's highest court recently decided one such case. In *Trustees of Union College v. Schenectady City Council*,¹³⁸ the city designated a nine-block area as a residential historic district limiting property use exclusively to single-family residences.¹³⁹ Union College, sitting adjacent to the historic district and seeking to develop property it owned within the district, challenged the city's authority to exclude under the preservation ordinance. At issue, essentially, was resolving the clash between two important government interests—public education and historic preservation.

The *Union College* court held that as a matter of law preservation does not override competing educational interests. Furthermore, it explained that to resolve the matter, the

¹³⁶ See *id.* § 3020(9).

¹³⁷ See *supra* Part I.C.

¹³⁸ 690 N.E.2d 862 (1997).

¹³⁹ See *Trustees of Union College v. Schenectady City Council*, 690 N.E.2d 862, 864 (1997).

educational uses must be weighed against the interests in historic preservation to determine how the public welfare would be best served.¹⁴⁰ Rejecting the city’s argument that the ordinance already constituted such a balancing of interests, the court found that “the ordinance merely reflects the City’s sweeping policy decision that historical preservation interests will, in all cases, outweigh educational interests.”¹⁴¹ This method of determination by the city, the court found, was not valid.¹⁴²

In *Union College*, the case involved education, an interest generally given special treatment by the courts.¹⁴³ But another recent case from Washington D.C. involved a challenge to historic preservation in light of other public interests. *Kalorama Heights Limited Partnership v. District of Columbia Department of Consumer and Regulatory Affairs* involved the proposed demolition of a historic house in the District that was to be replaced by multi-unit condominiums.¹⁴⁴ Under the zoning ordinance, the Mayor’s Agent could approve demolition of historic properties only if the demolition was necessary in the public interest.¹⁴⁵ To meet the qualification, a construction project had to be of “special merit.”¹⁴⁶ Although the demolition at issue involved an important structure within a designated historic district, the plaintiff argued that his project qualified for the special merit exception thus allowing for the demolition to proceed. Special merit under the ordinance included a number of factors, but the one argued by

¹⁴⁰ See *Union College*, 690 N.E.2d at 865.

¹⁴¹ See *id.*

¹⁴² Ultimately, the ordinance was struck down for lack of a saving provision of allowing for special uses in the historic district. The court explained that because the ordinance failed to provide a means by which the city’s interest in preservation might be balanced against its educational interests, the ordinance was not substantially related to the promotion of health, safety, or welfare, and was thus unconstitutional. See *id.* at 866.

¹⁴³ As noted by the court in that case. See *id.* at 865.

¹⁴⁴ See *Kalorama Heights Ltd. P’ship. v. Dist. of Columbia Dept. of Consumer and Regulatory Affairs*, 655 A.2d 865, 867 (1995). The house was located in an historic district, however it was not just a typical house. It served as the French Consulate and Embassy from the 1940s until 1984. By the time of the dispute, however, it had been vacant and deteriorating for a number of years. See *id.* at 867.

¹⁴⁵ See *id.* at 869. The demolition permit could also be approved in the case of economic hardship.

¹⁴⁶ See *id.*

the plaintiff was that the project involved “social and other benefits having a high priority for community services.”¹⁴⁷

The D.C. Court of Appeals found the plaintiff failed to meet his burden. But it explained that this special merit option would not automatically be precluded in cases involving historic structures. In doing so, the court cited a prior case where a shopping center was allowed to be built at the expense of all but the facades of two historic buildings and the total destruction of a third.¹⁴⁸ That court held the special merit requirement was met because the project generated two million dollars in tax revenues and provided jobs for 2,000 persons, half of whom were of low to moderate incomes.¹⁴⁹

The kind of balancing taken into account in these cases is more of what should be undertaken in all landmark related projects. In effect, all such designations and determinations of project appropriateness should be justified in light of the larger public interest. One way in which New York’s Landmarks Preservation Commission can be aided in having its determinations take into account broader considerations is to change the criteria for designation. Currently, the criteria are very non-specific, with a landmark including any building older than thirty years “which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation.”¹⁵⁰ This broad definition of landmark should be narrowed, and the Commission should, in concert with the Planning Commission, set goals for the city’s preservation program and regularly take stock of what new designations are needed to achieve those goals.

¹⁴⁷ “Special Merit” was defined under the ordinance as “a plan or building having significant benefits to the District of Columbia or the community by virtue of [1] exemplary architecture, [2] specific features of land planning, or [3] social or other benefits having a high priority for community services.” *Id.*

¹⁴⁸ *See id.* at 874 (citing *Citizens Comm. to Save Historic Rhodes Tavern*, 432 A.2d at 717).

¹⁴⁹ *See id.*

¹⁵⁰ NYC Admin. Code §25-302(n).

Whatever the mechanism, the city needs to evaluate frequently the quality and quantity of its historic resources in order to prioritize and justify future designations. In turn, the Preservation Commission must take stock of which representative resources have already been designated and which have not, and seek only to recommend for designation properties that work to fulfill a commonly recognized government goal. Before designating a new neighborhood of brownstones, for example, the Commission should be made to ask how many have already been designated and, according to planning goals, how many more are necessary to represent a particular era or type.

Historic qualities can be found in almost any building over thirty, especially by amateurs and locals--particularly under an ordinance that defines what can be considered for designation in the vaguest of terms. To address this program shortfall and avoid future legal challenges, the city needs to make the designation and review process less subjective, and more tailored to suit larger urban planning goals.

CONCLUSION

As with most government-sponsored programs, historic preservation provides a great deal of public benefit. But with many such programs, it also has negative externalities that typically remain untracked. This study has attempted to illustrate some of the negative effects of historic preservation zoning--generally regarding its impact on urban land use, and specifically its effect on sprawl. Although New York City is a distinctly unique subject, the salient points of this study have relevance to each of the more than two thousand localities that manage historic preservation programs.

The benefits of preservation have long been heralded, yet since the practice reached its maturity with the *Penn Central* decision, the urban context has changed. With these changing

times, the purposes of municipal preservation programs need reevaluation. Government-sponsored preservation was born in an era where the loss of treasured buildings led to a state of near-panicked frenzy in our cities. Now that era has passed. Nonetheless, under this old paradigm, historic preservation commissions continue to designate resources and shape redevelopment decisions without much government oversight or external judicial review. The time has come to recognize that these largely unfettered actions can have negative effects on the community. Accordingly, if municipal preservation programs are to continue to provide maximum public benefits, they must be remade to address these effects.