Saving the Spirit of Our Places: A View on Our Built Environment

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INTRODUCTION

The places where we work and live have a spirit, a spirit that enlivens our present by reminding us of our past and anticipating our future. The ancients called this spirit the *genius loci*, a "cluster of associations identified with a place: pervading spirit."[1] It is the "distinctive character or atmosphere of a place with reference to the impression that it makes on the mind."[2] In our built environment, the *genius loci* is the power of the structures around us to create these associations, to make that impression.[3]

What should we expect of our built environment?[4] It should offer us order and variety, stability and progress, the old and the new, working together to create an external environment which

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1. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged, 1986).

2. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. unabridged, 1987).

3. *See* PAUL GOLDBERGER, THE CITY OBSERVED, NEW YORK: A GUIDE TO THE ARCHITECTURE OF MANHATTAN 56 (1979) [hereinafter GOLDBERGER, CITY OBSERVED].

> There is drama to these brooding facades [in SoHo], and a tension between the richness of their detail and the strength of their overall masses. The buildings want to be strong and they want to be pretty; their genius is in their ability to make you wonder why you had ever imagined there was a contradiction between these things. It is more important to wander the streets than it is to go in search of a group of individual buildings; it does not take too many minutes . . . to perceive the power of the ensemble overall, and to feel how brilliantly the tension is resolved.

Id.

4. What do we have to demand from the environment in order that man may call himself human? . . . [I]t ought to possess an "imageable structure" which offers rich possibilities of identification . . . because of its complex articulation.

CHRISTIAN NORBERG-SCHULZ, ARCHITECTURE: MEANING AND PLACE: SELECTED ESSAYS 37 (1988) [hereinafter NORBERG-SCHULZ, MEANING AND PLACE].

we can see as meaningful.[5] This is not a demand that our built environment be beautiful. Beauty, to the extent that it could even be satisfactorily defined, does not go far enough.[6] A responsibly preserved built environment engages more than our aesthetic sense. It engages all of our senses, it awakens our memories, it fuels our aspirations. This built environment is more than just depiction; it is representation. We ascribe personal and cultural meanings to the significant structures of our built environment.[7]

These significant structures enhance our identity and our understanding of our culture.[8] Their destruction or defacement cre-

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5. It is a necessity for man to come to terms with the *genius* of the locality where his life takes place. We have to be "friends" with the environment to gain an existential foothold.... Such a "friendship" implies that the environment is experienced as "meaningful." A correspondence between outer and inner world is thus established which means that man's psyche is founded on a standing under, among, meaningful things.

Id. at 196.

6. See Carl-Axel Acking, *Humanity in the Built Environment, in* ARCHITECTURE FOR PEOPLE: EXPLORATIONS IN A NEW HUMANE ENVIRONMENT 103 (Byron Mikellides ed., 1980), where the author preferred to "speak of emotional experiences and reactions than of aesthetic values, because the words 'aesthetics' and 'aesthetic values' are so easily misunderstood"; he focused on "[s]ensory perception" as "a source of great pleasure as well as an infinitely rich source of information." He applied this to the structures of our built environment, noting that:

[T]he art of building contains much which has little to do with the intellect, but rather is perceived by the senses. It is just this which contributes to our feelings of comfort or discomfort, pleasure or displeasure, in the built environment. A sensitive and thoughtful treatment of sensory characteristics is an important ingredient for the user of architecture, who not only sees the front of the building as an illustration, but literally enters into it, takes possession of it and lives behind it.

Id.

7. *See* JOHN J. COSTONIS, ICONS & ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE 61 (1989) [hereinafter COSTONIS, ICONS & ALIENS]; Acking, *supra* note 6, at 105-106. Paul Goldberger, Chief Cultural Correspondent for the New York Times, has recently described an author who

knows that places are not merely physical things but emotional presences, resonant with the meanings each of us brings to them. Yet powerfully formed places can in themselves confer meaning and shape experience. Few writers have ever captured the exquisite, delicate balance of architecture and memory as eloquently and as movingly as Suzannah Lessard.

Paul Goldberger, *The Monster Builder*, N.Y. TIMES BOOK REV., Nov. 10, 1996, at 7.

8. *See* Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 569 (1995). Also see Patty Gerstenblith, *Architect As Artist: Artists' Rights and Historic Preservation*, 12 CARDOZO ARTS & ENT. L.J. 431, 432 (1994), where the author explored

three major themes: 1) the rights of artists to preserve their work in its original form . . . ; 2) the right of the public to preserve, from alteration or destruction, important elements of cultural property and heritage, including prominent examples of architecture and landmark buildings . . . ; and 3) the rights of owners and

ates a sense of loss. Recent examples of this effect abound.[9] When the Venetian opera house, La Fenice, burned down, Italy was described as being in mourning. Luciano Pavarotti said, "[t]he entire world of opera feels like an orphan"; Venice without La Fenice is like "a body without a soul."[10] When a Japanese heiress bought and then vandalized a chateau of Louis XV's mistress, Madame du Barry, the French were outraged because the heiress had shown a "complete disrespect for [the] country's cultural and architectural heritage."[11] The French government decreed that "[c]ulture is not a product; it is the vital part of the national identity."[12]

Closer to home, Harvard University's decision to renovate the Harvard Union dining room, the Great Hall, generated "a hyperbolic debate about tradition, diversity, the relationship between

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users of the cultural property to derive the most beneficial use from their property, with the assumption that progress, economic growth, and efficiency are thereby promoted.

9. *See* Richard Moe, *Preserving History—Natural and Otherwise*, N.Y. TIMES, May 4, 1996, at 19. Moe notes that our national park system, more than half of which is "historic places outside of the great parks," is "home to some precious elements of our heritage"; however, the author notes, "they are also a testament to the erosion of our national resolve to keep that heritage alive." *Id.* He argues that we "need an earmarked fund within the Park Service budget for historic structures" because preservation protects "not just bricks and mortar, but a part of the American soul." *Id. See also* John Darnton, *House Is Given Its Due: Darwin Cogitated Here*, N.Y. TIMES, June 15, 1996, at A4 (describing efforts to restore Down House where Charles Darwin wrote ORIGIN OF SPECIES).

10. Celestine Bohlen, *A Stunned Venice Surveys the Ruins of a Beloved Hall*, N.Y. TIMES, Jan. 31, 1996, at C11. Another observer said La Fenice "was our patrimony and it is lost.... It will be restored, but how? With the eyes of modern architects, it won't be the same." *Id. See also* Paul Griffiths, *The Phoenix*, NEW YORKER, Feb. 12, 1996, at 45 (commenting that La Fenice reverberated with "the voices of those who have appeared" there, the "ghosts" of whom "will wait to regain possession").

This sense of loss appears trans-cultural. *See* Donald G. McNeil Jr., *A Palace Inferno Sears Madagascar's Very Soul*, N.Y. TIMES, June 22, 1996, at 2; Patrick E. Tyler, *Dam's Inexorable Future Spells Doom for Yangtze Valley's Rich Past*, N.Y. TIMES, Oct. 6, 1996, at A12.

For those who doubt the strength of a structure's symbolism see, for example, Alan Riding, *Venice Opera's Rebirth: As It Was or Might Be*, N.Y. TIMES, Apr. 1, 1996, at C11; Douglas Martin, *War Over Zoo: A Fantasy Land vs. Interaction*, N.Y. TIMES, Mar. 19, 1996, at B1; Douglas Martin, *Plans Approved for New Central Park Children's Zoo*, N.Y. TIMES, Apr. 18, 1996, at B3; and Douglas Martin, *At the Children's Zoo, A Last Goodbye to Jonah and Friends*, N.Y. TIMES, Aug. 11, 1996, at A33.

11. Marlise Simons, *Proud Castles Stripped, and France Is Scandalized*, N.Y. TIMES, Feb. 15, 1996, at A4.

12. *Id.* This incident prompted the French government to take further action. *See* Marlise Simons, *France to Form New Body to Further Protect Culture*, N.Y. TIMES, Feb. 25, 1996, at A12.

space and intellectual life and the future of Harvard, not to mention the very fate of American culture."[13] Some saw the Great Hall as great art, others as a great artifact.[14] On the opposite pole, some saw the Great Hall as "an outdated relic, a symbol of a Harvard that is no longer there, and to which they bid good riddance"; others saw renovation and reuse as "the price you pay for not having the building be a dead remnant."[15]

Such incidents illustrate the power of the significant structures in our built environment. Preserving these structures recognizes the power of our past—its ideas, values, and culture—to inform our present ideas, values, and culture. We do not have to agree with the statements made by the structures, but we do have an obligation to preserve what was said, both as a basis for present debate and as a record for those in the future. Our view on our built environment must be long as well as short term.

> Admittedly, a bit of mystery is at play here. Our built environment can move us deeply in ways which are more spiritual than temporal.
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> It is as if we are being manipulated by some subliminal code, not to be translated into words, which acts directly on the nervous system and the imagination at the same time, stirring intimations of mean-

13. Sara Rimer, *A Tradition is Pounded by Hammers and Nails*, N.Y. TIMES, Mar. 20, 1996, at A14.

14. One letter writer claimed that such structures "are documents of a culture" and "often eloquent records of a civilization." *Young and Old Want to Save Harvard Hall*, N.Y TIMES, Mar. 27, 1996, at A20. For this writer, a professor emeritus of fine arts at Harvard, the destruction of the Great Hall was the architectural "equivalent of the loss of a novel of Henry James or a painting by John Singer Sargent." *Id.* He argued that "[t]o the extent that buildings erected by and for people whose views we do not share are permitted to be destroyed, we are deprived of the opportunity to interpret them and the society for which they were built." *Id.* In similar words, another letter writer claimed the structure was "a gift from the past" and "[s]hortsighted administrators should not be allowed to deny future generations the opportunity to enjoy this gift." *Id.*

15. Paul Goldberger, *Slice up a Great Hall and Harvard Gets Testy*, N.Y TIMES, Apr. 9, 1996, at C13. The author said the controversy was not just about "respect for a significant work of architecture" but also about "the idea of the university itself, and the belief that universities are places for the conservation and protection of culture as much as for the creation of it." *Id.* He concluded that:

> [I]f great architecture is worth preserving in a great university, it is as something other than an artifact. It is as an object of great quality that can improve the present, and to which the present can contribute layers of meaning of its own. Had the Great Hall been preserved, surely it would have enriched the life of the school, just as the magnificently restored Memorial Hall two blocks down the street does. Harvard has already created one stunning example of the right way to connect old architecture to contemporary college life. Too late, alas, for another.

Id.

> ing with vivid spatial experience as though they were one thing—something like Wordsworth's great evocation of "unknown modes of being" provoked by our wonder at Nature, only this time provoked by structures and images that are man made.[16]

It seems undeniable, if perhaps not conclusively demonstrable, that our built environment plays "a fundamental role in establishing for each culture its form of stability," providing "the images of reconciled conflict and integration that strive to make us . . . at home in the world."[17]

The structures of our built environment are the products of architecture. Architecture seeks "to fit multifarious elements into some kind of compact, cohesive, apprehensible scheme" and is indispensible in "helping us to understand the world and to change it for the better."[18] A well built environment is a richly representative setting which infuses our lives with an identity and a sense of continuity essential to our well-being.[19]

We can reasonably ask that the places where we work and live be "made by art, shaped for human purpose," permitting us "to adjust to our environment, to discriminate and organize perceptually whatever is present to our senses."[20] The structures of our built environment do more than permit us to move about with ease and speed. They also serve "as a broad frame of reference, an organizer of activity or belief or knowledge . . . [and] a useful basis for individual growth."[21] It is orientation and identification, individually and culturally.[22] We need, individually and culturally, an environment

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16. Colin St. John Wilson, *The Natural Imagination: An Essay on the Experience of Architecture*, ARCHITECTURAL REV., Jan. 1989, at 64-65.

17. *Id.* at 66.

18. D.E. BERLYNE, AESTHETICS AND PSYCHOBIOLOGY 296 (1971).

19. COSTONIS, ICONS & ALIENS, *supra* note 7, at 37.

20. KEVIN LYNCH, THE IMAGE OF THE CITY 95 (1960) [hereinafter LYNCH, CITY IMAGE]. The author continued:

> Survival and dominance based themselves on this sensuous adaptability, yet now we may go on to a new phase of this interaction. On home grounds, we may begin to adapt the environment itself to the perceptual pattern and symbolic process of the human being.

Id.

21. *Id.* at 4.

22. We may also say that dwelling consists in orientation and identification. We have to know where we are and how we are, to experience existence as meaningful. Orientation and identification are satisfied by organized space and built form, which together constitute the concrete place. . . . When dwelling is accomplished, our wish for belonging and participating is fulfilled.

CHRISTIAN NORBERG-SCHULZ, THE CONCEPT OF DWELLING: ON THE WAY TO FIGURATIVE ARCHITECTURE 7 (1984) [hereinafter NORBERG-SCHULZ, DWELLING].

> which is not simply well organized but poetic and symbolic as well. It should speak of the individuals and their complex society, of their aspirations and their historical tradition, of the natural setting, and of the complicated functions and movement of the city world. But clarity of structure and vividness of identity are first steps to the development of strong symbols. By appearing as a remarkable and well-knit place, the city would provide a ground for the clustering and organization of these meanings and associations.[23]

Such a well-built environment merits protection.

However, this protection involves, in large part, the public regulation of privately owned structures. We ask private owners to maintain at least the exterior of structures that we as a society regard as significant. The clash is between public need and private rights. Who are we as a society to demand that privately owned structures be maintained by the private owner for our benefit?[24] If we love it, why don't we just buy it?

The reason is the United States Supreme Court's decision in *Penn Central Transportation Company v. New York.*[25] The Court validated a process for identifying and preserving the significant structures of our built environment even if that process resulted in the structure's owner being compelled to maintain at least the exterior of the structure. Although the decision has been recently attacked, this article concludes that *Penn Central* remains a vital and necessary judicial landmark. It is the foundation for a preservation system which serves us all by saving the spirit of the places where we work and live, a spirit which cares about the past and the future, a spirit which gives us in the present an individual and cultural identity.

Part I of this article describes the individual and cultural values provided by the significant structures of our built environment.

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23. LYNCH, CITY IMAGE, *supra* note 20, at 119.

24. When you get down to it, to focus on property rights, as such, is really a distraction, a device to turn our eyes from what is really at stake.... The real question is, what right does our nation have to protect itself from the shortsighted destruction of its national land? What right does a nation have to protect the land on which the quality of its citizens' lives depends? I say our nation has plenty of right. For even though private property rights are important, no nation can bind itself to pay off those who, if not paid, would harm or waste its natural resources. No nation can leave the quality of its land or its children's lives to the self-interested decisions of a relative few. No nation can give up its right to defend its national land.

John A. Humbach, *Should Taxpayers Pay People to Obey Environmental Laws?*, 6 FORDHAM ENVTL. L.J. 423, 431-32 (1995).

25. 438 U.S. 104 (1979).

Part II describes the judicial system's gradual acceptance of government's right to determine that its citizens' health and welfare encompasses their right to live in a place which has preserved its spirit. Part III focuses specifically on the *Penn Central* decision, concluding that despite recent attacks, it remains a foundation from which we, as a society, can choose to preserve, in a principled manner, the significant structures of our built environment. Part IV uses the New York law validated in *Penn Central* to illustrate how local government and the judiciary have responsibly used a preservation law to manage change in our built environment.

I.

PSYCHOLOGICAL, BIOLOGICAL, AND CULTURAL VALUES IN OUR BUILT ENVIRONMENT

The significant structures of our built environment are the visualization of its *genius loci*; they create the meaningful places where we work and live.[26] The architecture which produces these structures is a social art, "a means of understanding ourselves and nature, a means of creating and a means of communication," a means of expressing order and significance in our environment.[27] Our built environment matters, affecting us as individuals and as members of a culture.[28] Not all structures en-

26. Man dwells when he can orientate himself within and identify himself with an environment or, in short, when he experiences the environment as meaningful. Dwelling therefore implies something more than "shelter." It implies that the spaces where life occurs are *places*. . . . A place is a space which has a distinct character. Since ancient times the *genius loci*, or "spirit of the place," has been recognized as the concrete reality man has to face and come to terms with in his daily life. Architecture means to visualize the *genius loci*, and the task of the architect is to create meaningful places whereby he helps man to dwell.

CHRISTIAN NORBERG-SCHULZ, GENIUS LOCI: TOWARDS A PHENOMENOLOGY OF ARCHITECTURE 5 (1980) [hereinafter NORBERG-SCHULZ, GENIUS LOCI].

27. Bruce Allsop, *Educating the Client*, *in* ARCHITECTURE FOR PEOPLE: EXPLORATIONS IN A NEW HUMANE ENVIRONMENT, *supra* note 6, at 41.

28. See NORBERG-SCHULZ, MEANING AND PLACE, *supra* note 4, at 16, where the author, in introducing a set of essays, said their

common denominator is the conviction that architecture matters. Without places, human life could not take place, and architecture simply means the creation of meaningful places, in the concrete phenomenological sense of the word.

Professor Norberg-Schulz, in an earlier book, wrote that the

meaning of a work of architecture . . . consists in its gathering the world in a general typical sense, in a local particular sense, in a temporal historical sense, and, finally, *as something*, that is, as the figural manifestation of a mode of dwelling between earth and sky. A work of architecture does not exist in a vacuum, but in the world of things and human beings, and reveals this world as what it is. . . . Man

rich our individual or our cultural lives. Some are pedestrian, some are disorienting, some are just plain bad. But those that are significant define the very character of our surroundings.[29] It is not because the structure is singularly beautiful, but because it has contributed to "the actual beauty of the strong, finely detailed, self-assured place."[30] If we do not respect the spirit of our places, our built environment loses "those qualities which allow for man's sense of belonging and participation."[31] This has been called the "loss of place."[32]

Our built environment is not a work of art hung upon a museum wall or sited in a sculpture garden or available at the local cineplex. The built environment is public and unavoidable.[33] The significance of any structure in our built environment depends not only on its relationship to other structures but also on its relationship to those who come together in that environment.[34] Significant structures give meaning to the places where

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dwells poetically when he is able to "listen" to the saying of things and when he is capable of setting what he apprehends into work by means of the language of architecture.

NORBERG-SCHULZ, DWELLING, *supra* note 22, at 30.

29. See JOHN J. COSTONIS, SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKETPLACE 4 (1974) where, in discussing the "victims" of urban renewal, the author said that "[b]ecause these buildings enriched, indeed defined the very character of the urban fabric of which they were a part, theirs is a truly grievous loss." Costonis also stated that:

> Landmarks . . . represent a direct and visible expression of the values of the community. . . . The presence of vintage, well-maintained buildings in active use tells the observer that the community has chosen to retain continuity with its past and is prepared to embrace the urban design and economic implications of its choice. . . . By forestalling the untimely death of these environmental artifacts and rejecting the mindless tendency toward accelerated obsolescence, the community affirms its reverence for age and, ultimately, for humanity as well.

Id. at 143.

30. GOLDBERGER, CITY OBSERVED, *supra* note 3, at 55.

31. NORBERG-SCHULZ, MEANING AND PLACE, *supra* note 4, at 181.

> During the last decades, our environment has not only been subjected to pollution and urban sprawl, but also to a loss of those qualities which allow for man's sense of belonging and participation. . . . Man does not identify with quantities, but with values which go beyond mere utility. . . . Environmental monotony is one aspect of this situation; our places become ever more alike, and lose what in the past was known as their *genius loci.*

Id.

32. *Id.*

33. *See* COSTONIS, ICONS & ALIENS, *supra* note 7, at 45.

34. *See* JAY APPLETON, THE EXPERIENCE OF LANDSCAPE 53 (1975). For a recent example of this, see David M. Herszenhorn, *Closing the Book on a Saloon for Drinkers With Writing Problems*, N.Y. TIMES, Oct. 14, 1996, at B3.

we work and live.[35] When these structures are destroyed or defaced, we lose a vital sense of ourself in a place:

> In general, the loss of things and places makes up a loss of "world." Modern man becomes "worldless" and thus loses his own identity, as well as the sense of community and participation. Existence is experienced as "meaningless," and man becomes "homeless" because he does not any longer belong to a meaningful totality. Moreover, he becomes "careless," since he does not feel the urge to protect and cultivate a world any more.[36]

We all need an "existential space," a meaningful place to live.[37]

There is a biological as well as a psychological basis for our response to the built environment. If a structure evokes a pleasurable response "regularly and consistently within the human species it is fair to assume that it confers some biological advantage . . . though the benefits may well be indirect and the beneficiaries may be quite unaware of them."[38] We distinguish ourselves from other animals "in being able to conceptualize and order environmental phenomena into a coherent pattern of images, expectations and meanings."[39] We characterize our environment "into complicated symbol patterns in order to cope with the world and to come to terms with it."[40] A primary human need is a stable sense of order which serves us "first and foremost to orient ourselves in space and time and to find our way in relation to the thing we seek or we avoid."[41] The structures of our

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35. *See* NORBERG-SCHULZ, GENIUS LOCI, *supra* note 26, at 166.

> The "meaning" of any object consists in its relationship to other objects, that is, it consists in what the object "gathers.". . . In general, "meaning" is a *psychic* function. It depends on *identification* and implies a sense of "belonging." It therefore constitutes the basis of dwelling. . . . [M]an's most fundamental need is to experience his existence as meaningful.

Id.

36. NORBERG-SCHULZ, MEANING AND PLACE, *supra* note 4, at 12.

37. *Id.* at 37. *See also* Trip Gabriel, *A New Sweetheart of Sigma Phi*, N.Y. TIMES, Oct. 10, 1996, at C1 (example of how a meaningful place to live can cause inhabitants to care for it).

38. Nicholas K. Humphrey, *Natural Aesthetics*, *in* ARCHITECTURE FOR PEOPLE: EXPLORATIONS IN A NEW HUMANE ENVIRONMENT, *supra* note 6, at 59.

39. Timothy O'Riordan, *Attitudes, Behavior and Environmental Policy Issues*, *in* 1 HUMAN BEHAVIOR AND ENVIRONMENT: ADVANCES IN THEORY AND RESEARCH 5 (Irwin Altman & Joachim F. Wohlwill eds., 1976).

40. *Id.*

41. E.H. GOMBRICH, THE SENSE OF ORDER: A STUDY IN THE PSYCHOLOGY OF DECORATIVE ART 151 (1980).

> A psychonalyst should . . . turn his attention to this simple localization of our memories. I should like to give the name topoanalysis to this auxilary of psychoanalysis. Topoanalysis, then, would be the systematic psychological study of the sites of our intimate lives. In the theater of the past that is constituted by memory,

built environment "include ecological properties involving association, whether inherent or learned, with conditions conducive or threatening to survival and well-being."[42] Our sense of pattern and appreciation of rhythm, our recognition of balance and sensitivity to harmonic relationships, are "written by the genes and adapted to environmental circumstances."[43]

The structures of our built environment also carry cultural genetic signals. What Simon Schama said about natural landscapes applies equally to the significant structures of our built environment; they are cultural, they are "constructs of the imagination" projected onto the forms.[44] Those constructs may be individual or they may be social, but once that certain construct "establishes itself in an actual place, it has a peculiar way of muddling categories, of making metaphors more real than their referents; of becoming, in fact, part of the scenery."[45] Those constructs are a key to understanding ourselves and our position in our culture.[46]

To live a satisfactory life, we must acquire and preserve this psychological, biological, and cultural sense of place, this

> totality made up of concrete things having material substance, shape, texture, and colour. Together these things determine an "environmental character," which is the essence of place. . . . A place is therefore a qualitative, "total" phenomenon which we cannot reduce to any of its properties, such as spatial relations, without losing its concrete nature out of sight.[47]

To gain a physical foothold, we must be able to orient ourselves, to determine where we are. To gain an existential foothold, we

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> the stage setting maintains the characters in their dominant roles. At times we think we know our selves in time, when all we know is a sequence of fixations in the space of the being's stability. . . . In its countless alveoli, space contains compressed time. That is what space is for.

GASTON BACHELARD, THE POETICS OF SPACE 8 (Marla Jones trans., 1964).

42. BERLYNE, *supra* note 18, at 81.

43. Peter F. Smith, *Urban Aesthetics*, *in* ARCHITECTURE FOR PEOPLE: EXPLORATIONS IN A NEW HUMANE ENVIRONMENT, *supra* note 6, at 74. The author said our "intuitive capacity for aesthetic appreciation" has the following components "which transcend time and culture": "(1) a sense of pattern; (2) appreciation of rhythm; (3) recognition of balance; (4) sensitivity to harmonic relationships." *Id.*

44. SIMON SCHAMA, LANDSCAPE AND MEMORY 61 (1995).

45. *Id.*

46. *See* John Brinckerhoff Jackson, *The Nature of Nature*, N.Y. TIMES BOOK REV., May 7, 1995, at 16 (noting that "Mr. Schama's wonderfully learned and perceptive survey of the now-vanished Renaissance landscape should remind us that our own very different vistas deserve the same respectful treatment: not in terms of ecology, economics or even esthetics, but as a key to the greater understanding of ourselves as inhabitants.")

47. NORBERG-SCHULZ, GENIUS LOCI, *supra* note 26, at 7-8.

must be able to identify ourselves with our environment, to know how we are in a certain environment, to become friends with it.[48]

Most of us must identify with man-made structures, with a built environment.[49] These structures then become the carriers of our culture, ordering our world, giving us common symbols, integrating us as individuals into a visible and meaningful environment.[50] The structures provide a physical framework for daily use and an associational framework connecting us to the history, ideology and civic systems of our culture.[51]

This built environment must be humane for it is for the humans who inhabit it; for them to establish an individual as well

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48. When man dwells, he is simultaneously located in space and exposed to a certain environmental character. . . . To gain an existential foothold man has to be able to *orientate* himself; he has to know *where* he is. But he also has to *identify* himself with the environment, that is, he has to know *how* he is a certain place.

Id. at 19.

For Norberg-Schulz, to identify with the environment "means to become "friends" with a particular environment. . . . For modern urban man the friendship with a natural environment is reduced to fragmentary relations. Instead he has to identify with man-made things, such as streets and houses." *Id.* at 21.

49. *See id.* at 23.

In general, this means to concretize the *genius loci.* We have seen that this is done by means of buildings which gather the properties of the place and bring them close to man. . . . In this way we protect the earth and become ourselves part of a comprehensive totality. . . . To belong to a place means to have an existential foothold, in a concrete everyday sense.

Id.

50. *See* WITOLD RYBCZYNSKI, CITY LIFE: URBAN EXPECTATIONS IN A NEW WORLD 231 (1995); COSTONIS, ICONS & ALIENS, *supra* note 7, at 17; and NORBERG-SCHULZ, MEANING AND PLACE, *supra* note 4, at 20.

51. *See* Herbert Muschamp, *A Victim of a Malady It Tried to Diagnose*, N.Y. TIMES, Jan. 21, 1996, § 2, at 36. Muschamp noted that:

[A]rchitecture isn't just any trade. It is an ancient art, once known as the mother art, because it provided the public, physical framework for the development of civilization. And though many architects today feel more like orphans than like mothers . . . theirs remains a cultural sphere in which people are trained to think creatively and responsibly about the physical realization of the public realm. Architects not only shape our places, "they reckon with the tissue that connects them: the history, ideology and urban systems that bring them into coherent relationship."

Id. See also Penelope Mesic, *Particular Places: Exploring the Link Between Our Cities and Our Character*, CHI. TRIB. BOOK REV., Oct. 29, 1995, at 7. Mesic noted that:

[A] city is both its streets and its experiences, its carefully planned civic beauties and its careless ugliness. Writing well about urban life therefore demands an exquisite sense not only of the historical but also of the personal, not just a capacity for research but also the sharp, sudden sense of a place that is like a taste in the mouth.

Id.

as a cultural foothold.[52] The significant structures in a well built environment connect with the people who inhabit it. These structures meet the inhabitants' basic biological needs for light and air, for seeing and hearing, their cultural need for strong integrative symbols, and their individual psychological need for a sense of place.[53] Individuals cannot dwell happily in a place that does not permit them to establish a meaningful relationship with their environment, to develop "a sense of belonging to a certain space."[54] The built environment must permit the individual to share with others the "cultural peculiarities of thought and belief, perception, emotional reaction, and imagery."[55]

Our built environment serves as "a scaffold to which we attach meanings and a guide by which we order our movements" and provides a mental image that has more than merely practical significance.[56] A well built environment

> gives its possessor an important sense of emotional security. He can establish a harmonious relationship between himself and the outside world. This is the obverse of the fear that comes with disorientation; it means that the sweet sense of home is strongest when home is not only familiar but distinctive as well.[57]

This sweet sense helps the individual "to find a foothold in space and time," to acquire "a sense of belonging to a certain place."[58] Preserving the significant structures of this built environment serves real psychological, biological, and cultural needs.

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52. *See* NORBERG-SCHULZ, MEANING AND PLACE, *supra* note 4, at 27-29.

> When the environment is discussed, one usually refers to economy, traffic and localization. The human being only enters the debate occasionally. Should he not, however, be the main object of our concern, he and his orientation in and identification with the world to which he belongs?

Id.

> [A]rchitecture represents a means to give man an "existential foothold.". . . He needs *symbols*, that is works of art which "represent life-situations.". . . It is one of the basic needs of man to experience his life-situations as meaningful, and the purpose of the work of art is to "keep" and transmit meanings.

NORBERG-SCHULZ, GENIUS LOCI, *supra* note 26, at 5.

53. *See* ROBERT GUTMAN, PEOPLE AND BUILDINGS xiv (Robert Gutman ed. 1972).

54. NORBERG-SCHULZ, DWELLING, *supra* note 22, at 13. *See also id.* at 15.

55. BERLYNE, *supra* note 18, at 253.

56. KEVIN LYNCH, WHAT TIME IS THIS PLACE? 241 (1972) (hereinafter LYNCH, WHAT TIME?).

57. LYNCH, CITY IMAGE, *supra* note 20, at 4-5.

58. NORBERG-SCHULZ, MEANING AND PLACE, *supra* note 4, at 241.

II.

THE LAW'S VIEW ON PROTECTING OUR VIEW

We are compelled to deal with our built environment; we cannot easily avoid the structures by which it is represented.[59] Our built environment should be developed and preserved in ways that meet our biological, psychological, and cultural needs. It should uplift, not stifle; connect, not reject; remind, not repel.[60] Public intervention can prevent private despoilation of built environmental resources that otherwise would be wasted, leaving us with urban centers that have no spirit.[61] Cities are not merely aggregations of structure and infrastructure. They are also creations "of imagination, a collectivity of associations assembled over time in response to human need and aspirations."[62] Those associations "can be kept intact by preserving their physical hosts," the structures which can be viewed.[63]

Our built environment is principally a viewed environment. Most people do not inhabit the structures around them. Not everyone works in the Seagram Building or lives in a SoHo loft or passes through Grand Central Station. Yet, these structures are significant elements of New York City's culture and organization to which the city's inhabitants are constantly responding.[64] Such structures can be read; they "always tell several stories; they tell us about their own making, they tell about the historical circumstances under which they were made, and if they are real things,

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59. *See* Gregory B. Hancks, Comment, *Copyright Protection For Architectural Design: A Conceptual and Practical Criticism*, 71 WASH. L. REV. 177, 190 (1996).

> The public is free to choose whether and when to enjoy most types of creative works which are controlled by copyright. Architecture, by contrast, is largely a public art which indiscriminately imposes itself on its surroundings and the public once it has been constructed. Not surprisingly, more than one body of law has evolved to regulate this environmental aspect of architectural works.

Id. See also Acking, *supra* note 6, at 112.

60. *See* Timothy Beatley, *Comment: Planning and Sustainability: The Elements of a New (Improved?) Paradigm*, 9 J. PLANNING LITERATURE 383, 387 (1995).

61. *See* Carol M. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 ENVTL. L. 1, 6-7 (1994).

62. COSTONIS, ICONS & ALIENS, *supra* note 7, at 86.

63. *Id.*

64. See GUTMAN, *supra* note 53, at xiv, where the author, arguing that architecture "is a legitimate topic of inquiry for the social sciences," said that architecture "is an element in human culture and social organization to which all people are responding even when they are unaware of it." *See also* LYNCH, CITY IMAGE, *supra* note 20, at 4 ("A vivid and integrated physical setting, capable of producing a sharp image, plays a social role. . . . It can furnish the raw material for the symbols and collective memories of group communication.").

they also reveal truth."[65] But to be read, they must be seen. To be seen, they must be preserved. This is a question of preserving structures significant to "our individual and social needs for stability and reassurance in the face of environmental changes that we perceive as threats to these values."[66]

Those values create the spirit of the places where we dwell; preserving our view of the structures that express those values is an act of environmental ethics.[67] It is preserving the relationship between the observer and the observed.[68] This is both physical and associational. These significant structures are, on one level, simply structures external to the viewer, points of reference.[69] Yet, on another level, these significant structures contain clues that arouse in the viewer meanings and connections which in turn create a sense of place.[70]

A. *Preservation Requires Intervention, Private or Public*

However significant a view may be, its preservation has generally required some intervention such as private contract or public statute. For example, courts have generally held that "absent an easement, covenant, or statute, a landowner has no legal right to unobstructed light, air or view from the adjoining land."[71] When

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65. NORBERG-SCHULZ, GENIUS LOCI, *supra* note 26, at 185.

66. COSTONIS, ICONS & ALIENS, *supra* note 7, at xv. For a particularly poignant example of this, see Douglas Martin, *Spirits Are Willing, but Buildings Are Weak*, N.Y. TIMES, Aug. 11, 1996, at 35.

67. *See* Rose, *supra* note 61, at 12-13.

68. *See* APPLETON, *supra* note 34, at 85.

69. *See* LYNCH, CITY IMAGE, *supra* note 20, at 78.

> Landmarks, the point references considered to be external to the observer, are simple physical elements which may vary widely in scale. There seemed to be a tendency for those more familiar with a city to rely increasingly on systems of landmarks for their guides—to enjoy uniqueness and specialization in place of the continuities used earlier.

Id.

70. *See id.* at 91-92.

> Yet there are fundamental functions of which the city forms may be expressive: circulation, major land-uses, key focal points. The common hopes and pleasures, the sense of community may be made flesh. Above all, if the environment is visibly organized and sharply identified, the citizen can inform it with his own meanings and connections. Then it will become a true *place*, remarkable and unmistakable.
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> *Id.*

71. Law v. Lee, No. CIV.A.84C-OC-16, 1988 WL 67851, at *1 (Del. Super. Ct. 1988). *See also* Reeder v. Teeple, No. 12128, 1993 WL 211825 (Del. Ch. 1993); Gulf House Ass'n, Inc. v. Town of Gulf Shores, 484 So. 2d 1061 (Ala. 1985). The common law appeared more receptive to a landowner's claim of a right to be seen from abutting roadways. *See, e.g.*, People ex. rel. Dep't of Transp. v. Wilson, 31 Cal. Rptr. 2d.

easements were granted, the courts tended to strictly construe them. The Minnesota Court of Appeals, although recognizing "that sometimes it may be difficult to describe an easement of view with any great certainty," said that "such a description must contain more than a notation that an adjacent building is to be located so as not to obstruct [the] view" of an adjacent homeowner.[72] The Texas Court of Appeals adopted a similar position with regard to a restrictive covenant of view[73] as did the Louisiana Supreme Court regarding a local ordinance.[74]

Courts have likewise been unreceptive to claims that interference with view could be redressed under nuisance law. For example, in 1988, the Iowa Supreme Court addressed the question of "whether the law of nuisance is broad enough to comprehend a claim of intentional interference with a view over private property."[75] The heart of the plaintiff's claim was that the defendant constructed a building which blocked motorists' view of the plaintiff's commercial building. Previous Iowa cases had disavowed "any cause of action for interference with light, air, and view unless granted by express contract."[76] The court was

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52, 54 (Ct. App. 1994) ("An abutting owner of property on a public highway [or street] has an easement of reasonable view of his [or her] property from the highway . . . and . . . the impairment or destruction of that view is the destruction of a valuable property right."); Northio Theatres Corp. v. 226 Main St. Hotel Corp., 231 S.W.2d 65, 67 (Ky. Ct. App. 1950) ("There is some conflict in the authorities as to whether or not an abutting property owner has an easement of view to and from the highway, but we think the better rule, supported by the great weight of authority, is that he has such an easement."); Thomas Cusack Co. v. Pratt, 239 P. 22, 23 (Colo. 1925) ("As applied to the case at hand, a substantial partial obstruction of the view would be a violation of the implied covenant of this lease.").

72. Bosold v. Ban Con Inc., 392 N.W.2d 724, 726 (Minn. Ct. App. 1986) (quoting Highway 7 Embers, Inc. v. Northwestern Nat'l Bank 256 N.W.2d 271, 274 (Minn. 1977)).

73. *See* Ramsey v. Lewis, 874 S.W.2d 320, 323 (Tex. Ct. App. 1994) (noting that the homeowners' evidence did not demonstrate "a reasonable basis for concluding" that their housing agreement "included an implied restrictive covenant which in effect guaranteed [them] an unobstructed view of the downtown El Paso skyline for at least the life of the agreement.").

74. *See* Lieber v. Rust, 398 So. 2d 519, 523 (La. 1981). In that case, the court found that:

> [N]o evidence that the City of Shreveport has established a servitude of view in favor of the landowners around the lake. View is a continuous, apparent servitude which can be established only by title, destination of the owner or acquisitive prescription. There is no evidence that the landowners have acquired a servitude of view.

Id.

75. Mohr v. Midas Realty Corp., 431 N.W.2d 380, 381 (Iowa 1988).

76. *Id.*

> convinced that giving vitality to such a cause of action in nuisance would be the same thing as granting a prescriptive easement. . . . [R]ecognizing a landowner's right to enforce a nuisance claim for intentional interference with light, air, or view would be indistinguishable from granting an unrecorded interest adjunct to that landowner's rights for the same purpose.[77]

Such an expansion of the law of nuisance "would unduly restrict a landowner's right to the free use of property, interfere with established zoning ordinances, and result in a flood of litigation."[78] The court found "no compelling reason to recognize an enforceable right of view over private property."[79]

The Washington Supreme Court recently reviewed a claim to a view in *Pierce v. Northeast Lake Washington Sewer and Water District*.[80] The District constructed a 4.3 million gallon water storage tank on District-owned property adjacent to a residential area; the tank was 160 feet in diameter and 30 feet high. The adjacent homeowners sued, claiming that "the tank is constantly visible from most of the 'view' rooms of their home and particularly obstructs their view of Mount Rainier and the Cascades [mountain range]."[81] The homeowners asserted "a property interest in their right to a view" which was "disturbed" by the District's water storage tank.[82] The court said that generally "a landowner has no natural right to air, light or an unobstructed view and the law is reluctant to imply such a right."[83] Those rights "may be created by private parties through the granting of an easement or through the adoption of conditions, covenants and restrictions or by the Legislature."[84]

The *Pierce* homeowners specifically claimed that they were entitled to compensation under a state constitutional provision

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77. *Id.*

78. *Id.*

79. *Id.* at 383. *See also* 44 Plaza, Inc. v. Gray-Pac Land Co., 845 S.W.2d 576, 577 (Mo. Ct. App. 1992) ("We find that the trial court erroneously declared and applied the law in determining that an actionable nuisance occurs where one property owner blocks another property owner's view with a malicious motive."). *But see* Hullinger v. Prahl, 233 N.W.2d 584, 586 (S.D. 1975) ("Plaintiffs have alleged the act of the defendants in placement of the billboard was a malicious act and if this cause is pursued we fail to distinguish it from the similar intended act of constructing a spite fence which this court held to constitute a valid cause of action. . . .").

80. 870 P.2d 305 (Wash. 1994) (en banc).

81. *Id.* at 308.

82. *Id.* at 309.

83. *Id.* (quoting Pacifica Homeowners' Ass'n v. Wesley Palms Retirement Community, 178 Cal. App. 3d 1147, 1152 (1986)).

84. *Id.*

which prohibited the uncompensated taking of private property for public or private use.[85] The court rejected this claim, saying that the homeowners

> cannot establish a property right or interest in their right to a view; the District has not taken or damaged any property or property interest in [the homeowners'] land; and "mere infringement" upon [their] personal pleasure and enjoyment of their property is not a sufficient basis for compensation.[86]

Although the homeowners had suffered a loss in the value of their property, they had not suffered a compensable property interest loss.[87]

The situation may be different when the property owner's loss of view results from the government's directly taking the owner's property.[88] The Colorado Supreme Court found that "owners of real property who have a portion of their property condemned . . . are entitled to compensation for reduction in the value of the remainder of the property resulting from aesthetic damage and loss of view."[89] These may be "damages that are the natural, necessary and reasonable result of the taking, as measured by the reduction in the market value of the remainder of the property"; a trial court could properly admit "evidence of aesthetic damage and loss of view that resulted in a reduction in the value of the remainder of the . . . property."[90]

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85. *Id.*

86. *Pierce*, 870 P.2d at 313.

87. *See id.* at 311-12. *See also* Adams Outdoor Adver. v. North Carolina Dep't of Transp., 434 S.E.2d 666 (N.C. Ct. App. 1993); Outdoor Adver. Ass'n of Tenn., Inc. v. Shaw, 598 S.W.2d 783 (Tenn. Ct. App. 1979) (cases in which billboard owners unsuccessfully sued the states, claiming that the state's planting or permitting vegetation on or near highways which obstructed the public's view of the billboards amounted to an uncompensated taking of their property).

88. *See, e.g.*, State Highway Comm'n v. Gilich, 609 So. 2d 367, 377 (Miss. 1992) ("To the extent that the [landowners] can show diminution in value from the loss of view or access due to alteration of the use of that land, they are entitled to compensation."). *But see* Dep't of Public Works v. Horejs, 223 N.W.2d 207, 211 (Ill. App. Ct. 1966); Public Serv. Co. v. Catron, 646 P.2d 561, 563-64 (N.M. 1982) (discussing how the situation may be different if the loss or disturbance of view is the result of the government taking abutting property).

89. La Plata Elec. Ass'n, Inc. v. Cummins, 728 P.2d 696, 696 (Colo. 1986) (en banc).

90. *Id.* at 703. *Compare* Barnes v. Commonwealth, 25 N.E.2d 737, 738 (Mass. 1940) *and In re* Dillman, 248 N.W. 894, 898-99 (Mich. 1933) *with* Commonwealth Dep't of Highways v. Williams, 487 S.W.2d 290, 292 (Ky. Ct. App. 1972).

B. *Promoting A Sense of Place*

A difficulty in preserving our built environment is that a private property owner generally is the one wanting to destroy or deface that which is viewed; the damage is done to the public. In our built environment, the value in the view is more than an individual aesthetic one. There are structures which we, individually and culturally, have come to regard as significant. The destruction or defacement of these structures dislocates and dispirits us. The question then becomes who intercedes on our behalf? The answer is that we do, through our elected governments which have, under the police power, the authority to regulate the uses to which private property may be put. Our governments have been permitted to eliminate structures that interfere with our natural views;[91] to shield our view of unsightly activities;[92] to preserve our views of scenic coastal[93] and waterway[94] areas. Should our governments be permitted to protect or promote our views of the significant structures in our built environment? A line of United States Supreme Court cases suggests that they should.

An early example is *Welch v. Swasey*.[95] The plaintiff there owned property in a residential section of Boston where building height was legislatively limited to 100 feet. In other, more commercial sections of the city, the legislation permitted building

91. *See, e.g.*, BBC Fireworks, Inc. v. State Highway and Transp. Comm'n 828 S.W.2d 879 (Mo. 1992); Crown Motors v. City of Redding, 283 Cal. Rptr. 356 (Ct. App. 1991); Temple Baptist Church v. Albuquerque, 646 P.2d 565 (N.M. 1982); Suffolk Outdoor Adver. Co. v. Hulse, 373 N.E.2d 263 (N.Y. 1977); Modjeska Sign Studios, Inc. v. Berle, 373 N.E.2d 255 (N.Y. 1977).

92. *See, e.g.*, County of Hoke v. Byrd, 421 S.E.2d 800 (N.C. Ct. App. 1992); State v. Smith, 618 S.W.2d 474 (Tenn. 1981); and National Used Cars, Inc. v. City of Kalamazoo, 233 N.W.2d 64 (Mich. Ct. App. 1975). *But see* City of Independence v. Richards, 666 S.W.2d 1 (Mo. Ct. App. 1983).

93. *See, e.g.*, Save San Francisco Bay Ass'n v. San Francisco Bay Conservation and Dev. Comm'n, 13 Cal. Rptr. 2d 117 (Ct. App. 1993); Topliss v. Planning Comm'n, 842 P.2d 648 (Haw. Ct. App. 1993); Coastal Southwest Dev. Corp. v. Coastal Zone Conservation Comm'n, 127 Cal. Rptr. 775 (Ct. App. 1976). Washington has developed an interesting line of cases exploring some of the benefits and problems raised by such shoreline management. *See, e.g.*, Dept. of Ecology v. Pacesetter Constr. Co., 571 P.2d 196 (Wash. 1977); Portage Bay-Roanoke Park Community Council v. Shorelines Hearing Bd., 593 P.2d 151 (Wash. 1979); Hunt v. Anderson, 635 P.2d 156 (Wash. Ct. App. 1981).

94. *See, e.g., In re* McShinsky, 572 A.2d 916 (Vt. 1990); Miller v. Columbia River Gorge Comm'n, 848 P.2d 629 (Or. Ct. App. 1993); State Dep't of Transp., Parks and Recreation Div. v. Solomon, 643 P.2d 1312, (Or. Ct. App. 1982); State Dep't of Transp. v. Hildebrand, 582 P.2d 13 (Or. Ct. App. 1978); Scott v. State, 541 P.2d 516 (Or. Ct. App. 1975).

95. 214 U.S. 91 (1909).

height up to 125 feet. When denied a permit to construct a 124-foot building on his property, the owner sued, contending "that the purposes of the acts are not such as justify the exercise of what is termed the police power, because, in fact, their real purpose was of an aesthetic nature, designed purely to preserve architectural symmetry and regular skylines."[96]

The Court, although acknowledging the plaintiff's claim that "[t]here is here a discrimination or classification between sections of the city," adopted a standard of review very deferential to local government. The statute would be invalidated only if "the means employed, pursuant to the statute, have no real, substantial relation to a public object which government can accomplish, if the statutes are arbitrary and unreasonable, and beyond the necessities of the case."[97] Moreover, the Court expressed "the greatest reluctance in interfering with the well-considered judgments of the courts of a state whose people are to be affected by the operation of the law."[98]

The reason for this reluctance was the Court's sense that, in such cases, the decision was location specific: "[t]he particular circumstances prevailing at the place or in the state where the law is to become operative . . . are all matters which the state court is familiar with; but a like familiarity cannot be ascribed to this court."[99] Although not entitled to absolute deference, such a state court judgment "is entitled to the very greatest respect, and will only be interfered with, in cases of this kind, where the decision is, in our judgment, plainly wrong."[100]

The Massachusetts Supreme Judicial Court had validated the legislation at issue in *Welch v. Swasey*, finding it enacted "for the safety, comfort, or convenience of the people, and for the benefit of property owners generally."[101] The U.S. Supreme Court agreed, finding the height restrictions reasonable and appropri-

96. *Id.* at 104.
97. *Id.* at 105.
98. *Id.* at 106.
99. *Id.* at 105.
100. *Id.* at 106.
101. Welch v. Swasey, 214 U.S. 91, 106 (1909).

ate.[102] The legislation was undeniably a public interference with private property, but it was a reasonable interference.[103]

The legislation in *Welch v. Swasey* was a precursor of modern zoning regulations. The more modern form of zoning was challenged in *Village of Euclid v. Amber Realty Co.*[104] The plaintiff there owned a 68 acre tract which, the plaintiff alleged, had a market value of $10,000 an acre if developed for industrial purposes but only $2,500 an acre if limited (as it was by the ordinance) to residential purposes. The plaintiff, like the plaintiff in *Welch v. Swasey*, claimed that this was a deprivation of property without due process and a denial of equal protection.[105]

The Court began its analysis by noting that changes in urban life required changes in constitutional evaluation that, in turn, could require increased restrictions on the use of private property.[106] Like the Court in *Welch v. Swasey*, the *Euclid* Court acknowledged that its evaluation of land use restrictions was, to a large degree, location specific.[107] And, like *Welch v. Swasey*, the

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102. *See id.* at 107.

> We are not prepared to hold that this limitation of 80 to 100 feet, while in fact a discrimination or classification, is so unreasonable that it deprives the owner of the property of its profitable use without justification, and that he is therefore entitled under the Constitution to compensation for such invasion of his rights. The discrimination thus made is, as we think, reasonable, and is justified by the police power.

Id.

103. *See id.* at 108.

> [T]he plaintiff . . . is not entitled to compensation for the reasonable interference with his property rights by the statutes. That, in addition to these sufficient facts [advanced by the city's counsel], considerations of an aesthetic nature also entered into the reasons for their passage, would not invalidate them. . . . The reasons contained in the opinion of the state court are, in our view, sufficient to justify their enactment.

Id.

104. 272 U.S. 365 (1926).

105. *Id.* at 384.

106. *See id.* at 386-87.

> Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. . . . [W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.

Id.

107. *See id.* at 387-88.

> The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate as-

Euclid Court was prepared to defer to local legislative judgment if "the validity of the legislative classification for zoning purposes be fairly debatable."[108]

The plaintiff in *Euclid* argued that the village was merely a suburb of Cleveland, naturally subject to being swallowed up by it for industrial purposes; the zoning ordinance would serve only to divert this natural development away from the village, causing a loss to property owners within the village. The Court responded by reminding the plaintiff that the village, however characterized, remained "politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions."[109] It was for the "governing authorities, presumably representing a majority of its inhabitants and voicing their will," to determine the future growth pattern for the village.[110]

The Court then turned to the plaintiff's specific complaint about the ordinance's prohibiting certain uses of the subject parcel, a complaint which "involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded."[111] After discussing some illustrative state cases and reports describing the benefits of segregating residential, business, and industrial uses, the Court established what was, until recently, the test for evaluating such land use regulations: "[I]t must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[112] Because the plaintiff had raised a facial, not an as-applied challenge, the Court said "it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features . . . is a valid exercise of authority,

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sumption of power is not capable of precise delimitation. It varies with the circumstances and conditions.... Thus the question whether the power exists... is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and locality.

Id.

108. *Id.* at 388.
109. *Id.* at 389.
110. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 389 (1926).
111. *Id.* at 390.
112. *Id.* at 395.

leaving other provisions to be dealt with as cases arise directly involving them."[113]

Although there were some fine-tuning decisions following *Euclid*,[114] the Supreme Court did not make a big splash in land use regulation until *Berman v. Parker*,[115] which confronted an issue that *Welch v. Swasey* and *Euclid* had alluded to but avoided: could a municipality regulate private land use simply to make the built environment more pleasant?

At issue in *Berman* was the District of Columbia's condemning private property to rid an area of a slum and to develop a more attractive environment. The property owners claimed this exceeded the District's police power. In rejecting the challenge, the Court noted that slums may "suffocate the spirit by reducing the people who live there to the status of cattle."[116] Such structures "may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn."[117] In language approving the use of aesthetic criteria and reaffirming *Euclid*'s hands-off position, the Court said it would

> not sit to determine whether a particular housing project is or is not desirable. The concept of public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary.[118]

The Court said the District of Columbia could "determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[119]

Twenty years later, the Supreme Court reaffirmed *Berman* in *Village of Belle Terre v. Boraas*.[120] The village enacted an ordi-

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113. *Id.* at 397.

114. See Gorieb v. Fox, 274 U.S. 603, 608 (1927), where, in upholding the setback restrictions of a zoning ordinance, the Court, echoing *Euclid* in noting "the vast changes in the extent and complexity of the problems of modern city life," deferred to legislative judgments:

> State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts, unless clearly arbitrary and unreasonable.

But see Nectow v. City of Cambridge, 277 U.S. 183 (1928) (stating that if the local government's conclusions are arbitrary and unreasonable, the Court will intercede).

115. 348 U.S. 26 (1954).

116. *Id.* at 32.

117. *Id.* at 32-33.

118. *Id.* at 33 (citation omitted).

119. *Id.* at 33.

120. 416 U.S. 1 (1974).

nance that limited land use to one-family dwellings and defined family so as to prevent more than two unrelated persons from sharing a house. After reviewing cases such as *Euclid* and *Berman*, the Court said:

> The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.[121]

The securing of "[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs."[122]

An implicit theme in these decisions is that government may exercise its police power to promote and preserve the spirit of the places where its citizens work and live. The plaintiff in *Welch v. Swasey* objected that the "real purpose" of the legislation limiting building height on his property "was of an aesthetic nature, designed purely to preserve architectural symmetry and regular sky lines."[123] The Court, hesitant to approve aesthetics as a sole basis for exercising police power, posited several safety reasons for the restrictions, adding that if, "in addition to these sufficient facts, considerations of an aesthetic nature also entered into the reasons for their passage, would not invalidate them."[124]

The *Euclid* Court, in upholding zoning regulations that banned apartment houses from single family house residential areas, noted that "in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district."[125] The village could act to prevent this, just as the District of Columbia could act to eliminate struc-

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121. *Id.* at 9.

122. *Id.*

123. 214 U.S. 91, 104 (1909).

124. *Id.* at 108.

125. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926). The Court continued:

> Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which would otherwise fall upon the smaller homes and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed.

Id.

tures which "suffocate the spirit"[126] and the Village of Belle Terre could act to preserve the qualities which made "the area a sanctuary for people."[127]

C. *Preserving Public View of the Natural Environment*

These Supreme Court cases recognize that the structures we build and the structures we preserve have an undeniable public environmental impact.[128] The built environment must be managed to insure that naked self-interest does not waste a resource that benefits everyone or creates a situation that, by its disruption, harms the greater number. For example, the private landowner in *Polygon Corp. v. City of Seattle* wanted to construct a 13-story condominium on Queen Anne Hill, one of Seattle's most scenic residential areas.[129] Although the proposal met applicable zoning laws, the Superintendant of Buildings, relying on the State Environmental Policy Act, denied the landowner a building permit. The final environmental impact statement "disclosed that the proposed project would have a number of adverse environmental impacts of varied significance including, among others, view obstruction, excessive bulk and excessive relative scale, increases in traffic and noise, and shadow effect."[130] The superintendant's final decision found that the "most significant impact was . . . visual, but additional factors . . . were the adverse effects on property values and the trend toward more intense land use on Queen Anne Hill."[131]

After concluding that the State Environmental Protection Act gave the superintendant discretion to deny the building permit, the Washington Supreme Court had to define a standard for reviewing such discretionary actions. There was cause for concern.[132] The court chose to apply "a higher degree of judicial scrutiny than is normally appropriate for administrative action,"

126. Bermun v. Parker, 348 U.S. 26, 32 (1954).

127. Village of Belle Terre v. Boraas, 416 U.S. 9 (1974).

128. *See* Ervin H. Zube, *Perception of Landscape and Land Use*, *in* HUMAN BEHAVIOR AND ENVIRONMENT: ADVANCES IN THEORY AND RESEARCH, *supra* note 39, at 90 (defining land use "as the activity that is carried on a given piece of land and that is supported by specific physical structures and management practices"; defining landscape as "the combined physical attributes of the environment"; and defining scenic value as "the perceived visual value an individual or group places on the landscape; it is a product of an interaction between man and the landscape.")

129. 578 P.2d 1309 (Wash. 1978).

130. *Id.* at 1311.

131. *Id.*

132. *See id.* at 1315.

to guard against "potential for abuse, together with a need to ensure that an appropriate balance between economic, social, and environmental values is struck."[133] Applying this more exacting scrutiny, the court upheld the superintendant's decision even though "the most significant environmental impacts of the proposed project were aesthetic in nature."[134] The court, evaluating all factors in light of the environmental act's "public policy ... of maintenance, enhancement and restoration of the environment," concluded that "[t]he visual or aesthetic element is recognized as part of the environment that is to be maintained and enhanced."[135]

This visual element received similar environmental protection in *William C. Haas & Co. v. City and County of San Francisco*.[136] The plaintiff, a private corporate landowner, wanted to develop property in the Russian Hill section of San Francisco. After receiving a site permit for a 300-foot high rise project, the company broke ground and began construction. A neighborhood improvement association sued, claiming that the project violated California's Environmental Quality Act. The association won

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> It has long been recognized that substantive and procedural safeguards are necessary to protect property owners from abusive and arbitrary land use regulations.... This is particularly true in view of the fact that environmental factors, especially those involving visual considerations, are not readily subject to standardization or quantification. That potential for abuse is even stronger where the decision must be made in a climate of intense political pressures.

Id.

133. *Id.*

134. *Id.* The court noted the following:

> The building would have blocked views from properties to the north, northeast and northwest of the site as well as from the viewpoint at Kerry Park. Such blockage would have had a potentially adverse effect on the value of the properties involved. The building would have been totally out of scale with other structures in the neighborhood.... The building would have blocked sunlight and cast a shadow over surrounding properties. Traffic and noise would have been increased. While this court has not held that aesthetic factors alone will support an exercise of the police power, such considerations taken together with other factors can support such an action.

Id.

135. Polygon Corp. v. City of Seattle, 578 P.2d 1309, 1315 (Wash. 1978). Also see West Main Assocs. v. City of Bellevue, 742 P.2d 1266, 1269 (Wash. App. 1987), where the court upheld a city council's exercise of

> its authority under the State Environmental Policy Act... [to reject] the project on the basis of significant adverse environmental impacts which could not reasonably be mitigated and which were unacceptable under [the city's] locally adopted SEPA policies. The adverse impacts identified by the council included obstruction of scenic views, excessive bulk and scale compared to the surrounding area, increases in traffic and attendant air pollution, and shadow effects.

136. 605 F.2d 1117 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980).

and the site permit was invalidated. When the company applied for a new permit, it found that the city had rezoned the property, limiting building height to 40 feet and imposing new density controls. The company now sued, claiming that the restrictions were "so grossly disproportionate to the benefits conceivably inuring to the public in promoting the general welfare" as to constitute a taking.[137] The company claimed that the value of its property went from $2,000,000 to $100,000.

As the Ninth Circuit noted, the general welfare was promoted by restrictions that decreased population density in the Russian Hill area, that preserved available light and air, and that saved an aesthetic view enjoyed by the entire city.[138] However, the company argued "that the nature, quality, and amount of benefit to the general welfare is inadequate constitutionally to offset the individual economic burden" it suffered.[139] The court disagreed. The company was not prohibited from developing the property, only from developing the property in the way it had envisioned. The court said these "disappointed expectations" were not enough to amount to an unconstitutional taking.[140] The company was not being singled out; the restrictions "were part of a comprehensive plan for the development of the City to preserve aesthetic values and other general welfare interests of the inhabitants."[141] All Russian Hill property owners were subject to the restrictions. Although the company appeared "to have suffered a disproportionate impact because no other affected landowner has as large a parcel of undeveloped land," the restrictions were imposed for the general welfare and were permissible.[142]

Another private landowner was frustrated by a view-protecting height restriction in *Landmark Land Company, Inc. v. City and County of Denver*.[143] As permitted by the applicable zoning ordinance, Landmark wanted to build a 21-story office building on its land. After Landmark announced its plans, the city acted to bring the land under the provisions of a municipal ordinance known as the Mountain View Ordinance. This ordinance, based on findings "that the mountains were part of Denver's 'unique

137. *Id.* at 1120.
138. *Id.*
139. *Id.*
140. *Id.* at 1121.
141. William C. Haas & Co. v. City and County of San Francisco, 605 F.2d 1117, 1211 (9th Cir. 1979).
142. *Id.*
143. 728 P.2d 1281 (Colo. 1986).

environmental heritage' and that protection of mountain views would promote aesthetic enjoyment, tourism, and civic pride," limited building heights in designated areas.[144] Under the ordinance, Landmark's proposed building was limited to approximately three commercial stories.

As part of its general attack on the ordinance, Landmark claimed that the height limitation was "neither rationally nor reasonably related to a legitimate public purpose."[145] However, the Colorado Supreme Court considered it "well established that protection of aesthetics is a legitimate function of a legislature."[146] For a city like Denver "whose civic identity is associated with its connection with the mountains—preservation of the view of the mountains from a city park is within the city's police power."[147]

D. *Preserving Public View of the Built Environment*

These preceding three cases could be read as validating limits on structure height to protect views of the natural environment. However, the same protection has been extended to views of the built environment. For example, New Jersey has a statute requiring the state Department of Environmental Protection to approve all waterfront development plans.[148] The regulations accompanying the legislation specifically encouraged protection of scenic resources defined to include views of the built environment.[149] Proposed high rise structures could not block these views "currently enjoyed from existing residential structures, public roads or pathways, to the maximum extent practicable."[150]

A controversy began when the Commissioner of the Department of Environmental Protection issued a permit for a development along the Hudson River. The development included two 160-foot towers that would "obscure the scenic view of the Hud-

144. *Id.* at 1283 n.2.
145. *Id.* at 1285.
146. *Id.*
147. *Id.* Landmark then argued that if preserving the view was a legitimate public purpose, the protection had to be accomplished by zoning, not by a general ordinance. The court said that given "that protection of aesthetics is a legitimate function, and it is clear that this amendment is related to that goal, the city is free to choose the method of implementing that goal, within the constitutional parameter that the enactment is not arbitrary or capricious." *Id.* at 1286.
148. N.J. ADMIN. CODE tit. 7, § 7-2.3 (1996).
149. *In re* Waterfront Dev. Permit, 582 A.2d 1018, 1020 (N.J. Super. Ct. App. Div. 1990).
150. *Id.*

son River and New York City skyline from the Lincoln Tunnel Helix and from [streets] in Weehawken."[151] The New Jersey court said the view

> which has been described as "spectacular" is now enjoyed by hundreds of thousands of bus and car passengers each day. Although portions of the view will remain intact if the project proceeds as planned, it appears that its panoramic beauty will be substantially lost—except to the commercial tenants of the two towers.[152]

The court characterized the design of those towers as the developer's "appropriation of the unobstructed majestic spectacle for the sole enjoyment of its commercial tenants."[153]

The decision to grant the development permit was made by the Commissioner, who had, "for reasons that do not appear in the record," intervened in the normal regulatory process.[154] This decision was challenged by the American Littoral Society, a nonprofit group claiming to be "active with regard to issues involving access, both physical and visual, to coastal areas."[155] The court upheld the Society's standing to pursue its appeal of the Commissioner's decision.[156] Noting that local residents favoring the construction were well organized, the court said "the people who benefit from the view are not" and quoted the following from the Department's draft opinion which the Commissioner had suppressed: "[m]ost of the people who enjoy the view . . . are only likely to learn that it is threatened and to express a sense of outrage when they actually see the backs of office buildings rising in front of the view they have enjoyed."[157] Under these circum-

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151. *Id.* at 1019.

152. *Id.*

153. *Id.* at 1021.

154. *In re* Waterfront Dev. Permit, 582 A.2d 1018, 1020 (N.J. Super. Ct. App. Div. 1990). The court eventually vacated the Commissioner's decision because he "suppressed the normal salutary functioning of [the Department's] procedural regulations." *Id.* at 1023.

155. *Id.* at 1019.

156. *See id.* at 1024. The court, relying on the draft opinion prepared by the Division of Coastal Resources, noted that there was

> a conflict in the perspectives of local municipal residents and the travelers who regularly utilize the Helix. For one thing, local residents do not make use of that roadway; they have access into the Lincoln Tunnel directly from local roads and therefore have no interest in preserving the view. The local attitude is understandably colored by the fact that the more square feet of office space that can be placed on the site, the greater will be the tax revenue gained by Weehawken.

Id.

157. *Id.*

stances, the court considered it "imperative that regional interests be spoken for in this proceeding."[158]

The previous cases all involve government preventing a private landowner from using his land in a way which government has found undesirable. The owners still had their land; they simply were frustrated in what they wanted to do with it. However, these cases all involve land without structures. Should the situation be different for land with structures—the situation presented by landmark preservation laws? In this setting, government not only restricts a use of land but affirmatively tells the owner what it must do with the structures on the land. The owner must preserve them at the owner's cost for the benefit of all.

John Costonis has analyzed this situation in his book, *Icons and Aliens: Law, Aesthetics, and Environmental Change.*[159] Costonis looks at what he calls the legal aesthetics regime: "legal aesthetics utilizes the power of the state to enforce its regimes detailing whether or not change may occur and, if so, in what form."[160] Costonis divides his inquiry into discussions of how structures should be selected for protection and how the structures selected should be protected. The standards governing selection "should address two considerations: validity of the claim that an environmental feature has actually become an icon in the community mind; and the likelihood that it is amenable to regulation by the land use tools employed in aesthetic regimes."[161] The standards governing protection "should take into account the distinctive features of the icon in question and should be drawn to prevent or minimize associational dissonance between that icon and prospective aliens."[162]

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158. *Id.*

159. COSTONIS, ICONS & ALIENS, *supra* note 7. *See also* John J. Costonis, *Law and Aesthetics: A Critique and A Reformulation of the Dilemmas*, 80 MICH. L. REV. 355 (1982).

160. COSTONIS, ICONS & ALIENS, *supra* note 7, at xvii. Costonis cautioned that:

> state-sanctioned power must be allocated in a principled basis in a system . . . that is predicated on the rule of law. The responsibility falls to legal institutions to ensure that the rule of law is not ignored in the effort to assuage the anxiety we all experience when confronted with environmental change.

Id. at xvii-xviii.

161. *Id.* at 84.

162. *Id.*

> Cherished features of our environment are preserved not because they are "beautiful" but because they reassure us by preserving, in turn, our emotional stability in a world paced by frightening change. Features serving this function are the "icons." . . . Nor is aesthetics a synonym for unbounded creativity. Quite the oppo-

This is the area of preservation. However, structures merit preservation only if they have achieved a significant status; they must be landmarks.[163] We do not know what structures will be landmarks in advance of their achieving that status; at that point, we can then identify them and their context, the context against which change can be gauged.[164] This is a process of identifying structures embodying what Costonis describes as end-state values.[165] The preferred end-state values are identified by society's representatives, the lawmakers who decide when certain end-state values have matured and deserve protection; the identified values are then protected by the administrators who apply those identified end-state values to specific situations.[166]

What the courts ensure is "that end-state values newly received into the law by legislators and administrators will respect

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site, it justifies the exercise of state power to prevent an icon's contamination or destruction. New developments posing such threats are . . . "aliens."

Id. at 1-2.

163. *See id.* at 68.

Conservation, not creativity, is legal aesthetics' province. What is being conserved, of course, is the icon, which comes to the law's attention only *after* it has achieved that status in the community's mind.

Id.

164. The law cannot identify icons in advance of their appearance in the culture . . . . Once the culture has done its work, however, the icon . . . becomes both identifiable and the "context" against which fitness or unfitness of new development is gauged. Aliens, of course, are misfits.

Id. at 58-9.

165. End-state values are prelegal. They emerge, struggle for recognition, and eventually take hold within the larger society, which only then clamors for their incorporation into its legal system. Aesthetic law thus receives its end-state values from beyond.

Id. at 35. *See also* Scott Schrader, *Icons and Aliens: Law, Aesthetics, and Environmental Change*, 89 MICH. L. REV. 1789, 1793 (1991) (book review). Schrader notes Costonis' view that:

[I]cons are not objects of "beauty," but environmental attributes for which there is significant aggregate human attachment. Icons provide communities with a sense of stability, order, and reassurance; with their loss comes great sorrow. . . . Environmental attributes can become icons through their history, their continuity with their surroundings, or their symbolic meaning, each of which may satisfy a fundamental human need for stability.

Id.

166. But which set of prelegal [end-state] values should the law prefer? That is a question the law cannot answer from within. Rather, it must look beyond to the values of the society it serves. Awaiting the maturation and presentation of end-state values are lawmakers . . . and administrators, who implement the values that lawmakers endorse. End-state values take form either as aesthetic legislation or as decisions applying this legislation to specific situations.

Costonis, Icons & Aliens, *supra* note 7, at 36.

constitutionally based process values."[167] This is how Costonis described it:

> Judges must leave it to American society to wrestle with the choice between the familiar and the novel. They possess neither the power nor the wisdom to shape that choice. True, they must ensure that tradition-favoring choices . . . respect process values. But these values concede great latitude to society in making the basic choice itself. It is enough that the choice serves some plausible social goal, even if it defeats other goals equally or more plausible. By alleviating the community's anxiety over the loss of its icons, tradition-favoring choices clearly meet this test.[168]

This describes the present status of the law preserving the significant structures of our built environment. The next section argues that this status should not be disturbed.

III.

PENN CENTRAL: PRESERVING THAT WHICH IS VIEWED

There seems little question that government can, through exercise of its eminent domain power[169] or through permit conditions,[170] compel private citizens to preserve the public's right to a view. The more difficult question is whether government can, without compensation, compel private citizens to preserve that which is viewed. In our built environment, this concerns struc-

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167. *Id.*

168. *Id.* at 115-16. See also James Charles Smith, *Law, Beauty, and Human Stability: A Rose Is a Rose Is a Rose*, 78 CAL. L. REV. 787, 793 (1990) (book review), where the author said that under Costonis' rationale,

> society protects certain features of its physical environment, not because they are beautiful, but because they represent our personal and collective sense of stability. Continuity in our environment gives us reassurance. When our cherished "icons" are disturbed or destroyed . . . we suffer emotional anguish. Psychologically, we are destabilized.

169. For example, see Kamrowski v. State, 142 N.W.2d 793, 796 (Wis. 1966), where the court upholds legislation which

> has determined that the protection of scenic resources along highways is a public purpose, has set the policy of acquiring scenic easements along particular routes in order to protect such resources, and has delegated to the state highway commission the function of deciding the exact terms of the easements to be acquired, and of exercising the power of eminent domain to acquire them.

170. *See* Dolan v. City of Tigard, 114 S.Ct. 2309, 2317 (1994). The Court noted that it agreed with the court in an earlier decision, *Nollan v. California Coastal Commission*, that the Coastal Commission's concern with protecting visual access to the ocean was a legitimate public interest, which would have supported a building permit condition requiring that the landowers "provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Id.* (quoting Nollan v. California Coastal Comm'n, 483 U.S. 825, 836 (1987)).

tures that have attained the status of what we might label as cultural property.[171] When we designate structures as cultural property, as significant structures worth preserving, we are regulating them "on the basis of their community-defined status, not on the basis of owner-selected activities occurring within them."[172] Not surprisingly, the owners complained that making them pay for this preservation was unfair.

A. *The Penn Central Decision*

That question of fairness was the crux of the Supreme Court's landmark decision on landmarking, *Penn Central Transportation Company v. City of New York*.[173] In 1967, New York City designated Grand Central Terminal as a landmark. The Court described the Terminal, which opened in 1913, as "one of New York City's most famous buildings."[174] It was recently described as "one of the city's jewels, and also one of the world's great public spaces, a monument to New York's vibrant heterogeneity."[175] It is, like most great terminals, a focal point "for the expression of civic values."[176]

After the Terminal was landmarked, the owners applied for permission to build a 50-story office structure over it. When permission was denied, the owners sued, claiming that the Terminal had been taken for a public use within the meaning of the Fifth Amendment. The Court stated the question as

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171. The concept of "cultural property" is composed of two potentially conflicting elements. The term "culture" describes the relationship between a group and the objects it holds important. The concept of "property" in its traditional sense of focusing on legal rights of individuals to possession of objects is foreign to this notion.

See Gerstenblith, *supra* note 8, at 567.

172. COSTONIS, ICONS & ALIENS, *supra* note 7, at 104.

173. 438 U.S. 104 (1978).

174. *Id.* at 115. The Court said the Terminal "is regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French beaux-arts style." *Id.*

175. *New Life for Grand Central*, N.Y. TIMES, Mar. 25, 1996, at A14. *See also* John S. Gordon, *Grand Central Project Echoes the Past*, N.Y. TIMES, Mar. 27, 1996, at A20.

176. RYBCZYNSKI, *supra* note 50, at 137:

> Civic beautification also produced the grand American railroad stations. The urban railroad terminal was a peculiarly characteristic building of the first quarter of the twentieth century. . . . Central terminals serve a vital role in the life of the cities. . . . As one historian put it, urban railroad stations were also focal points for the expression of civic values. The symbolic role of the terminal, like the ceremonial gateways of medieval towns, was to signal arrival in the city.

> whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks—in addition to those imposed by applicable zoning ordinances—without effecting a "taking" requiring the payment of "just compensation."[177]

The answer: yes. The reason: "the restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford [the owners] opportunities further to enhance not only the Terminal site proper but also other properties."[178]

In reaching that answer, the Court emphasized the benefits of preserving the significant structures of our built environment, benefits that "enhance the quality of life for all."[179] The Court recognized "that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city."[180] Enhancing the quality of life "is an entirely permissible governmental goal," and the restrictions imposed on the Terminal owners were "appropriate means of securing the purposes of the New York City law."[181]

Although the landmark designation and the accompanying restrictions had a more severe impact on the Terminal owners than on other landowners, the Court said this impact alone did not amount to a taking of the Terminal property: "Legislation designed to promote the general welfare commonly burdens some more than others."[182] Accepting the city's judgment "that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole," the Court concluded that the Terminal owners had benefited as well.[183]

Penn Central has been an influential decision. At the time it was decided, all 50 states and approximately 500 municipalities had preservation laws; the latter number has now grown to more

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

178. *Id.* at 138.

179. *Id.* at 108.

180. *Id.* at 129.

181. *Id.*

182. *Id.* at 133. Moreover, the Court characterized the owners' "repeated suggestions that they are solely burdened and unbenefited" as being "factually inaccurate." *Id.* at 134.

183. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 134-35 (1978).

than 1700.[184] Since it was decided, every state court considering the issues raised in *Penn Central* has concluded that no compensable governmental taking occurs when a structure is properly landmarked.[185] Preserving the significant structures in our built environment has become "part and parcel of an expanded concept to public welfare seeking to bring mellifluous harmony to our communities—to value and conserve the unique heritage of our past in order to enrich the quality of life for our present and future generations."[186]

Penn Central does, however, have its critics. One has said the decision lacks "a legal vision" by failing to adequately address the "concept of land" as "a biological or spiritual place" and as a consequence is "defensive and flaccid."[187] Another has characterized it "as the Alfred E. Neuman (or 'What, me worry?') case," a case in which "the Court visibly threw up its collective hands and said, 'Don't go looking for any guidance from us.'"[188] A third has labeled it "an unsound decision," a "major setback" to economic development, a decision which is both "an invitation to continued confusion and obfuscation" and "a blight on the judicial landscape."[189]

B. *Dolan v. City of Tigard: A Threat to Penn Central?*

Penn Central may be threatened by more than name calling. The Supreme Court's recent and very active interest in the Fifth Amendment's takings clause has called into question *Penn Central*'s precedential permanence.[190] One author has argued that

184. *See* Tippett v. City of Miami, 645 So. 2d 533, 535 (Fla. Dist. Ct. App. 1994) (Gersten, J., concurring).

185. *See, e.g.*, United Artists' Theater Circuit, Inc. v. City of Philadelphia, 635 A.2d 612, 619 (Pa. 1993).

186. Tippett v. City of Miami, 645 So. 2d 533, 538 (Fla. Dist. Ct. App. 1994) (Gersten, J., concurring).

187. J. Peter Byrne, *Green Property*, 7 CONST. COMMENTARY 239, 246-47 (1990).

188. Hon. Alex Kozinski, *Introduction*, 19 HARV. J.L. & PUB. POL'Y 1, 2-3 (1995).

189. William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 HOFSTRA L. REV. 1, 49-51 (1995).

190. *See, e.g.*, Marilyn Phelan, *The Current Status of Historical Preservation Law in Regulatory Takings Jurisprudence: Has the Lucas "Missile" Dismantled Preservation Programs?*, 6 FORDHAM ENVTL. L.J. 785, 785 (1995) (noting that "given the recent decisions of the Supreme Court, which reveal the diversity among members of the Court over the proper application of the Takings Clause to governmental regulation, the position of historical preservation regulation in regulatory takings jurisprudence is confusing at best.") The author later found it significant that:

> [I]f the "character of governmental action" is no longer a factor in determining when governmental regulation becomes a taking, the elimination of potential fu-

the decision has been overtaken by recent developments and, as a result, "will not hold."[191] The history of these recent developments has been oft told and need not be addressed here.[192] It is sufficient to focus on the Court's most recent opinion, *Dolan v. City of Tigard*,[193] a decision which "has provided courts greater opportunity with which to strike down a state action" as an unconstitutional taking of private property.[194]

Before *Dolan*, a local government, exercising its police power to restrict property use, received a very deferential level of judicial scrutiny. This was especially true "if the regulation promoted some public interest, had not wholly destroyed any of the classically recognized bundle of property rights, left much of the commercial value of the land intact, and the regulated property owner received some reciprocity of benefit from the regulation."[195] *Dolan* may have changed this. One analysis characterized *Dolan* as "a pro-property rights position," establishing a "new and highly subjective test" enhancing "a court's ability to

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ture profits by prohibiting private interests from updating historical properties may be a "total deprivation" that would be a compensable taking. If so, the Court's decision in Penn Central may no longer be sound doctrine.

Id. at 807. *See also* Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectation and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 151 (1995) ("Instead of concentrating upon the economic effect of the governmental action upon the individual owner, the Court needs to refocus on the nature of the power being exercised by the government.").

191. Douglas W. Kmiec, *At Last, The Supreme Court Solves the Takings Puzzle*, 19 HARV. J.L. & PUB. POL'Y 147, 157 (1995):

> The Penn Central position that landowners cannot conceptually sever their property for purposes of demonstrating regulatory loss will not hold. It should not hold because it is fundamentally at odds with the common law nature of property in which expectations often (but not always) are formed with respect to discrete aspects or segments of property. Property investment, development, sale, and descent rely upon the flexibility and utility of such property segmentation; it is artificial for the Court to maintain an anti-conceptual severance posture.

192. *See* Maureen Straub Kordesh, *"I Will Build My House With Sticks": The Splintering of Property Interests Under the Fifth Amendment May Be Hazardous to Private Property*, 20 HARV. ENVTL. L. REV. 397 (1996) (A recent, comprehensive review of the cases and literature as well as a provocative approach to the regulatory takings question).

193. 114 S. Ct. 2309 (1994).

194. James H. Freis, Jr. & Stefan V. Reyniak, *Putting Takings Back Into the Fifth Amendment: Land Use Planning After Dolan v. City of Tigard*, 21 COLUM. J. ENVTL. L. 103, 138 (1996).

195. Brenda Jones Quick, *Dolan v. City of Tigard: The Case That Nobody Won*, 1 DET. C.L. REV. 79, 82-83 (1995).

strike down governmental regulations that burden private property rights."[196]

The landowner in *Dolan* had challenged a state court decision upholding the city's decision to "condition the approval of her building permit on the dedication of a portion of her property for flood control and traffic improvements."[197] The Supreme Court took the case "to resolve a question . . . of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development."[198]

For the Court, this case exemplified the tension between the Fifth Amendment's takings clause and the concept of police power.[199] To resolve the tension, the Court first determined "whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city."[200] If, as in *Dolan*, it does exist, the Court then decides whether "the required degree of connection between the exactions and the projected impact of the proposed development" exists.[201] In *Dolan*, it did not.

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196. Freis & Reyniak, *supra* note 194, at 107. Another author said the "essence" of Dolan "is that there must be a 'cause and effect' relationship between the social evil that the exaction or regulation seeks to remedy and the property use that is either (1) subject to an exaction requirement, or (2) restricted by a regulation." Jan G. Laitos, *Causation and the Unconstitutional Conditions Doctrine: Why the City of Tigard's Exaction Was a Taking*, 72 DENV. U.L. REV. 893, 905 (1995). If that cause and effect link is missing, "the government action may be an unconstitutional taking." *Id.*

Dolan can also be seen as a decision whose "application . . . could be constrained within a narrow, limited scope" of situations involving "specific fact patterns in which a land use regulation results in an adjudicative decision to condition a single permit approval on a physical dedication of land to the state." Freis & Reyniak, *supra* note 194, at 130.

See also Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. ILL. U.L. REV. 513, 538-39 (1995).

197. Dolan v. City of Tigard, 114 S. Ct. 2309, 2312 (1994).

198. *Id.*

199. *See id.* at 2316. The Court said the Fifth Amendment's takings clause prohibited government "from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole" while the police power permitted local government to engage in land use planning which does not effect a taking if it "substanially advances legitimate state interests' and does not 'den[y] an owner economically viable use of his land." *Id.* (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)). *See also* Ronald S. Cope, *Strange Economics of Land Use Law: From Euclid to Euclid*, 15 N. ILL. U. L. REV. 611, 615 (1995) (noting that in such situations "the polarity between the need to regulate for the common good and the 'inherent rights' of a property owner to the 'bundle of rights' acquired when title to property is obtained is clearly present.").

200. *Dolan*, 114 S. Ct. at 2317.

201. *Id.*

The Court, for the first time, shifted the burden of production from the landowner to the city; the city must now show that it made "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[202] The city in *Dolan* had conditioned the landowner's permit on her performing two acts. First, she had to dedicate the portion of her property lying within the 100-year floodplain of an abutting creek for incorporation into the city's greenway system. As the Court noted, the city "never said why a public greenway, as opposed to a private one, was required in the interest of flood control," nor did the city attempt "to make any individualized determination to support this part of its request."[203] The Court concluded "that the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the [landowner's] proposed new building."[204]

In addition to the floodplain easement, the city also required the landowner to dedicate an additional strip of land adjacent to the floodplain as a pedestrian/bicycle pathway. The Court had "no doubt that the city was correct in finding that the larger retail sales facility" would increase traffic in the area, a finding that the city did attempt to quantify.[205] However, the Court concluded that the city's attempt was a "conclusory statement" that did not meet "its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the . . . development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement."[206]

Like *Penn Central*, *Dolan* has its critics. One says *Dolan* "eroded the established constitutional presumption of legislative validity," "refuted the very state cases on which it relied by disregarding the benefits derived by the property owner in exchange,"

202. *Id.* at 2319-20. The Court justified its shifting of the burden in a footnote:

> Justice Stevens' dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. . . . Here, by contrast, the city made an adjudicative decision to condition [the landowner's] application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.

Id. at n.8.

203. Dolan v. City of Tigard, 114 S. Ct. 2309, 2320-21 (1994).

204. *Id.* at 2321.

205. *Id.* at 2321.

206. *Id.* at 2321-22.

and "so narrowed the concept in the takings context of what constitutes a separate segment of property as to render the inquiry absurd."[207] *Dolan* thus invites "potentially endless litigation in the future, much of which will be trivial."[208]

This is a dire prediction and probably is overstated. One analysis, although reading *Dolan* as affording lower courts "increased opportunities to find that local planning boards have effected uncompensated takings," concluded that the decision "marks the high point of decisions to curtail municipal land use regulation and that any ordinance designed to survive a takings challenge under *Dolan* most probably would also survive any permutations of the analysis arising in the future from an evolving Supreme Court."[209] Another analyst felt that, under *Dolan*, "[l]ocal governments can engage in reasonable and responsive land use planning, but they must clearly be sensitive to the impact on property owners."[210] For this analyst, "that might be *Dolan*'s most significant impact."[211]

However, there remains cause for concern for those who would preserve the significant structures of our built environ-

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207. Julian R. Kossow, *Dolan v. City of Tigard, Takings Law, and the Supreme Court: Throwing the Baby Out With the Floodwater*, 14 STAN. ENVTL. L.J. 215, 233 (1995).

208. *Id.* at 233. The author believes that:

> One of the saddest aspects of the Dolan decision is that takings jurisprudence did not need another doctrine. . . . The Court should return to a case-by-case analysis using . . . balancing criteria . . . and assessment of the real economic impact on the property owner. Above all, the Court should rescind the new evidentiary burden of proof in takings cases. Given the proper nexus, building permit conditions should be invalidated only in cases in which the property owner establishes that the exaction is arbitrary, discriminatory, or severely unreasonable.

Id. at 255.

209. Freis & Reyniak, *supra* note 194, at 171. *See also* Michael C. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171, 172 (1995).

210. Cordes, *supra* note 196, at 555. Cordes noted that *Dolan's* "basic message" was "quite simple":

> [G]overnment may impose exactions to offset the impact of development, but the exactions must relate to and flow from the development itself. Government cannot use the land use approval process to capture an interest unrelated to the impact of development. As a practical matter, this provides governments with substantial room with which to work, although the burden will clearly be on the government to justify exactions that are imposed.

Id. at 515. *See also* William Funk, *Reading Dolan v. City of Tigard*, 25 ENVTL. L. 127, 141 (1995).

211. Cordes, *supra* note 196, at 555.

ment.[212] As noted earlier, decisions such as *Dolan* have been seen as invitations to challenge *Penn Central*.[213] This judicial hostility, when coupled with a shrinking financial pool for preservation purposes, is indeed cause for concern.[214] However, it is not cause for taking the doomsday book down from the shelf. It is possible that the lower courts will not use *Dolan* to dismantle land-use regulations in general and preservation regulations in particular.[215] We can, as a society, choose to protect those significant structures of our past that we value as representing our individual and cultural identity.[216] We can choose to do so in a principled manner, using criteria and procedures that insure that the selection is justified and an owner's rights are respected.[217]

IV.

MANAGING CHANGE IN OUR BUILT ENVIRONMENT

The proper goal of preservation is the management of change in our built environment, management that permits growth while conserving those significant structures of our past with which we

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212. *See, e.g.*, Freis & Reyniak, *supra* note 194, at 104-5; Kmiec, *supra* note 191, at 155.

213. See Phelan, *supra* note 190, at 787-88.

> [The Court's recent decisions] raise questions whether the Court has indeed adopted a more expansive course in its application of the Takings Clause to governmental regulations—a posture, for example, that will ultimately have a profound impact on historical preservation laws. An increasingly liberal interpretation of the Takings Clause necessitates an increasingly limited endorsement of governmental regulation. . . . Some fear that the Supreme Court's liberal interpretation of the Takings Clause could cause governmental regulation to come to a screeching halt. One important regulatory zone, historical preservation law, is an area of concern.

Id.

214. *See* Patricia Leigh Brown, *Fund's Grants Focus on Man and Nature*, N.Y. TIMES, Mar. 21, 1996, at C12; Richard Moe, *Preserving History—Natural and Otherwise*, N.Y. TIMES, May 4, 1996, at A19.

215. *See, e.g.*, Parking Ass'n of Ga. v. Atlanta, 450 S.E.2d 200, 202 (Ga. 1994), *cert. denied*, 115 S. Ct. 2268 (sustaining an ordinance that had a "stated purpose . . . to improve the beauty and aesthetic appeal of the City, promote public safety, and ameliorate air quality and water run-off problems" against a *Dolan* attack.).

216. *See* James Audley McLaughlin, *Majoritarian Theft in the Regulatory State: What's a Takings Clause For?*, 19 WM. & MARY ENVTL. L. & POL'Y REV. 161, 188-90 (1995); Gerstenblith, *supra* note 8, at 566; Humbach, *supra* note 24, at 428-29.

217. *See generally* Metropolitan Dade County v. P.J. Birds, Inc., 654 So. 2d 170 (Fla. Ct. App. 1995) (a recent example of how legislatures can construct and courts can apply preservation legislation which meets both substantive and procedural due process requirements); J. Peter Byrne, *Ten Arguments for the Abolition of Regulatory Takings*, 22 ECOLOGY L.Q. 89, 128-29 (1995); Kathryn R. L. Rand, *Nothing Lasts Forever: Toward a Coherent Theory in American Preservation Law*, 27 U. MICH. J.L. REFORM 277, 293-94 (1993).

identify, individually and culturally. Cities are living organisms. They need to develop, to responsibly replace old with new, the worn with the fresh; otherwise, they become slums—dispiriting and defeating—or are shrink-wrapped as malls and theme parks—frozen and dull. Yet, development must be accomplished without sacrificing the spirit of our places.

A capsule of the problem can be seen in a recent article on the tension between development and preservation in Hanoi, Vietnam. With an upsurge in economic development, the local planners "were voicing despair that Hanoi . . . was about to go the way of Bangkok, Singapore, Jakarta and Shanghai—bustling, new and increasingly indistinguishable."[218] The planners have acted to insure that Hanoi is "the first major city in the region to modernize without losing its character and its low-rise charm"; as one planner said, "We are trying to preserve our city and develop it at the same time."[219] Hanoi authorities, motivated by both economic and spiritual concerns, have taken steps to both control development and preserve the city's distinct character; they were concerned "'about losing their culture—not just the architecture but the soul of the city.'"[220]

Closer to home, architect Robert A.M. Stern has, in similar spiritual terms, recently written "that unless the preservation of lower Manhattan and its skyline as viable real estate is soon insured, New York will lose one of its major sources of economic revenue and a defining symbol, a large chunk of urban soul."[221] This area, along with the Statue of Liberty and Central Park, "are the most precious bits of America's man-made heritage that we New Yorkers are entrusted with."[222] For Stern, "New York's greatest architectural and urbanistic challenge—the one that the world will most closely watch—is the reinvention of lower Manhattan as a desirable place to conduct business and to live in."[223]

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218. Seth Mydans, *A Vietnamese Uprising to Keep Out High-Rises*, N.Y. TIMES, Apr. 18, 1996, at A4.

219. *Id.*

220. *Id.*

221. Robert A. M. Stern, *A Skyscraper-Tall Task for New York*, N.Y. TIMES, Sept. 10, 1995, § 2, at 62. *See also* Douglas G. French, *Cities Without Souls: Standards for Architectural Controls with Growth Management Objectives*, 71 U. DET. MERCY L. REV. 267 (1994).

222. Stern, *supra* note 221, § 2, at 62.

223. *Id.*

A. *The Need For Responsibly Managed Growth*

What is common to both these articles—involving urban places as far apart culturally as they are geographically—is the conviction that the places have a spirit captured by their built environment, an environment which needs sensitive management respecting that spirit without stifling the creative energy which keeps the place alive. Both articles emphasize the need for "creating places of enduring value, and on restoring and reusing buildings and other existing elements of the built environment" which in turn "creates positive common ground between sustainability and historic preservation."[224]

Preservation and progress can be mutually sustaining.[225] The challenge is to come up with legal standards and procedures that advance the individual and cultural benefits of preservation without unduly burdening the private property owner and without stifling the city's necessary growth.[226] The structures—new and old—of our built environment affect our well being by encouraging, supporting, and enriching our "vivid sense of the present, well connected to future and past, perceptive of change, able to manage and enjoy it."[227] Those structures of our built environment make sense only in relation to each other, "in combination, . . . in context, [and] in time."[228] Our built environment cannot be a static environment because it is inhabited; it must respond to

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224. Beatley, *supra* note 60, at 385. For examples of achieving preservation and sustainability goals in our built and natural environments, see Paul Goldberger, *On Madison Avenue, Sometimes Less Is Less*, N.Y. TIMES, Oct. 27, 1996, § 2, at 46; Andrew C. Revkin, *Life's Hubbub Returns to Oft-Shunned Hudson*, N.Y. TIMES, June 10, 1996, at A1.

225. Simon Schama, in his recent work on natural landscapes, discussed an 1829 controversy surrounding the proposed development of the Hampstead Heath, an uncultivated patch of land near London, which, even then, had already set aside land for cultivated parks. Schama said that "what made the debate extraordinary was the insistence . . . that the great city *needed* a wilderness for its own civic health." SCHAMA, *supra* note 44, at 524. Schama said the urban context of the debate was important:

> Arguably *both* kinds of arcadia, the idyllic as well as the wild, are landscapes of the urban imagination, though clearly answering to different needs. It's tempting to see the two arcadias perenially defined against each other . . . civility and harmony or integrity and unruliness? . . . But as . . . irreconcilable as the two ideas of arcadia appear to be, their long history suggests that they are, in fact, mutually sustaining.

Id. at 525.

226. Rand, *supra* note 217, at 308-9.

227. LYNCH, WHAT TIME?, *supra* note 56, at 240-41.

228. GRADY CLAY, CLOSE UP; HOW TO READ THE AMERICAN CITY 19 (1972). *See also* LYNCH, WHAT TIME?, *supra* note 56, at 1 (noting that "a desirable image is one that celebrates and enlarges the present while making connections with past and

the changing and expanding needs of the inhabitants without destroying their sense of place.[229] To conclude that "[o]ur past is inextricably linked to our future" does not mean that the past is a burden on that future.[230] Preservation is not paralysis.

Our built environment is sustained and our lives our enriched by the mix of old and new.[231] We should

> regard cities and their urbanizing regions as consisting of time as well as materials and forever changing. This is real continuity. . . . Each reflects the ideas, traditions, and energies available to its citizens in past centuries as well as at this moment. Each landscape and townscape is an intricately organized expression of cause and effect, of challenges and responses, of continuity and, therefore, of coherence. . . . It has sequences, successions, climaxes. It reveals patterns and relationships, forming and reforming.[232]

Our built environment "is not as we perceive it by vision alone, but by insight, memory, movement, emotion and language."[233] It "is a fabric, to be woven and rewoven slowly over time."[234] The

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future. The image must be flexible, consonant with external reality, and, above all, in tune with our own biological nature.").

229. *See* Humphrey, *supra* note 38, at 72.

230. Rand, *supra* note 217, at 311. The author continued:

> We must balance the past and the future: if we place too much emphasis on one, the other will suffer. A successful balancing of our past and future, or preservation and progress, allows us to build on our heritage without being trapped in our past or sacrificing the foundations of our future.

Id.

231. *See* Herbert Muschamp, *Remodeling New York For the Bourgeoisie*, N.Y. TIMES, Sept. 24, 1995, § 2, at 38 (noting the work of architects who "helped create a picture of the city as an open-ended, ongoing project, a place that recognized the power of architecture to symbolize a city's willingness to respond to change with fresh ideas."). Muschamp also described a city as a vision of "the ultimate form of what Umberto Eco called 'the open work,' an art object deliberately left unfinished by the artist so others can interact with it." Herbert Muschamp, *Rem Koolhaas Sizes Up the Future*, N.Y. TIMES, Mar. 3, 1996, § 2, at 38.

232. CLAY, *supra* note 228, at 14.

233. *Id.* at 17.

> The proportions in which the symbolism of prospect, refuge and hazard are combined in a landscape establishes its equilibrium or "balance." Symbols can vary both in strength and in frequency, and the "feel" of the landscape is largely determined by the "mix" of symbols of like, opposite or complementary forms.

APPLETON, *supra* note 34, at 121.

234. Herbert Muschamp, *Workmanlike Efforts for Society's Nuts and Bolts*, N.Y. TIMES, Apr. 14, 1996, § 2, at 36. Also see Herbert Muschamp, *A City's Inner Workings Are Part of the Design*, N.Y. TIMES, Dec. 17, 1995, §2, at 44, in which the author saluted the Municipal Art Society

> for recognizing architecture and urban design as much more than ways to decorate surfaces. They are also powerful tools for bringing parts of a city together: streets, sewers, subways, parks. Art can deal with the systems that make a city tick, not just the individual buildings that enhance the way a city looks.

structures, new and old, give "visual expression to ideas which mean something to man because they order reality" and "[o]nly through such an order . . . do things become meaningful."[235] The perception of this order is not "a passive process," but is a "constant activity of the organism as it searches and scans the environment."[236]

Our built environment can be a rich environment, capable of inspiring wonder and surprise,[237] capable of awakening memory and recollection,[238] capable of sustaining our present and fueling our future.[239] The significant structures of that environment will be those that we admire and enjoy, those that capture the spirit of the place where we work and live.[240] These structures "repay

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235. NORBERG-SCHULZ, MEANING AND PLACE, *supra* note 4, at 22. *See also* Herbert Muschamp, *In Los Angeles, the Esthetic of Urban Grit*, N.Y. TIMES, Mar. 24, 1996, § 2, at 40 (noting that "architecture, like art, is as much a matter of seeing as of making.").

236. GOMBRICH, *supra* note 41, at 1.

237. See, for example, GOLDBERGER, CITY OBSERVED, *supra* note 3, at xvi, where, in describing New York City, Goldberger stated that:

> A great deal of this city is left—far, far more than it looked as if there would be a decade ago, when there was both greater prosperity and a weaker Landmarks Preservation Commission. This remains one of the richest urban landscapes on earth, a city whose greatest characteristic may be its ability to inspire constant wonder and unending surprise. . . . It is harsh, dirty, and dangerous, it is whimsical and fanciful, it is beautiful and soaring, it is not one or another of these things but all of them at once, and to fail to accept this paradox is to deny the reality of city existence.

238. See SCHAMA, *supra* note 44, at 574, where the author, in discussing the natural landscape stated that:

> For it seems to me that neither the frontiers between the wild and the cultivated, nor those that lie between the past and the present, are so easily fixed. Whether we scramble the slope or ramble the woods, our Western sensibilities carry a bulging backpack of myth and recollection. . . . And though it may sometimes seem that our impatient appetite for produce has ground the earth to thin and shifting dust, we need only poke below the subsoil of its surface to discover an obstinately rich loam of memory. . . . The sum of our pasts, generation laid over generation, like the slow mold of the seasons, forms the compost of our future. We live off it.

239. *See* LYNCH, WHAT TIME?, *supra* note 56, at 109-10.

> A highly adaptable environment may entail psychological as well as economic costs: uncertainty and neutrality of form can disturb behavior and the environmental image. Special measures are required to prevent this or to teach people how to be comfortable in an adaptable setting. Stable symbolic focuses . . . can help to "hold" a shifting scene. Visible continuity with the close-in and therefore relatively certain future can also convey a sense of security. And to some degree people can learn to take pleasure in possibility and surprise.

Id.

240. *See* Allsop, *supra* note 27, at 42.

> Some architects have recognized that what the public requires and expects from them is that, as architects, they should produce . . . architecture which people admire and enjoy, buildings which give beloved identity to places . . . [buildings]

not only immediate but continuing care, with layers of revelation."[241] The problem is that many of them are privately owned. Preservation asks the owner to forgo future development in the name of a greater good and without direct compensation. This calls for a regulatory regime sensitive to both private rights and public needs, capable of careful thought and credible decisions, and capable of controlling change. The system validated in *Penn Central* is sensitive to both procedural and substantive rights. It burdens the landowner no more than any other necessary aspect of living in a civilized community.

B: *Post-Penn Central Experience: A System That Works*

As the *Penn Central* Court noted, preserving the significant structures of our built environment had become a matter of local and national governmental concern—a concern for both individual and cultural values.[242] New York City, acting pursuant to state authorization, legislatively found that a preservation ordinance was a public necessity.[243] Although the ordinance placed "special restrictions on landmark properties as a necessary fea-

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which have, in some way or other, a "little bit of character" which differentiates them and those who live in them from the abyss of anonimity.

Id.

241. Charles Moore, *Human Energy*, *in* ARCHITECTURE FOR PEOPLE: EXPLORATIONS IN A NEW HUMANE ENVIRONMENT, *supra* note 6, at 115.

242. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 107-08 (citations omitted).

> 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 . . . have been precipitated by two concerns. The first is recognition that . . . 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.

Id. The Court also noted that "Congress has determined that 'the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people." *Id.* at 110 n.1.

243. *See id.* at 109. As the Supreme Court summarized it, New York City found that:

> [C]omprehensive measures to safeguard desirable features of the existing urban fabric would benefit its citizens in a variety of ways: e.g., fostering "civic pride in the beauty and noble accomplishments of the past"; protecting and enhancing "the city's attractions to tourists and visitors"; "support[ing] and stimul[ating] business and industry"; "strengthen[ing] the economy of the city"; and promoting "the use

ture to the attainment of its larger objectives," its major theme was "to ensure the owners of any such properties both a 'reasonable return' on their investments and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals."[244]

The ordinance established standards and procedures that worked together to insure the benefits of preservation without unduly burdening the owner of the structure being preserved. The ordinance created a broad-based Landmarks Preservation Commission to identify potential landmarks and investigate whether that landmark potential merited landmark designation. All interested parties have an opportunity to be heard.[245] If the Commission decides on designation, that decision is reviewed by the city's Board of Estimate. The Board may approve, modify, or reject the Commission's designation. The landmark owner may seek judicial review of any designation decision.[246]

A landmark designation results in substantial restrictions on the owner's use of the property. The owner must keep the property in good repair and may not undertake any alterations or new construction without the Commission's approval.[247] That approval process is itself procedurally well structured. The owner may apply for approval on grounds that the alteration "will not change or affect any architectural feature of the landmark and will be in harmony with it." The owner may apply for approval on grounds that the alteration "would not unduly hinder the protection, enhancement, perpetuation, and use of the landmark." Finally, the owner may apply for approval on grounds that designation has caused economic hardship. All three applications are subject to judicial review.[248] The Supreme Court was confident that courts reviewing designation or application decisions would not "have any greater difficulty identifying arbitrary or discriminatory action in the context of landmark regulation than in the context of classic zoning or indeed in any other context."[249]

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of historic districts, landmarks, interior landmarks, and scenic landmarks for the education, pleasure, and welfare of the people of the city."

Id.

244. *Id.* at 110.
245. *Id.* at 110-11.
246. *Id.* at 111.
247. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 111-12 (1978).
248. *Id.* at 112.
249. *Id.* at 133.

The Court's confidence was well placed. New York courts have been capable of reviewing and, if necessary, correcting preservation decisions. One court even did so in advance of *Penn Central.* In *Lutheran Church in America v. City of New York*, the Court of Appeals examined whether the city's Landmarks Preservation Commission's "authority to infringe upon the free use of individual premises remaining in private ownership is a valid use of the city's police power in cases where an owner organized for charitable purposes demonstrates hardship, economic or otherwise."[250]

The subject structure was a house, built in 1853, now owned by a religious corporation which, since 1942, had used it for offices. In 1965, the Commission designated it a landmark based on its historical and architectural significance. The owner, whose needs had increased to the point where the structure no longer served them, petitioned to have the designation voided. As a religious corporation, the owner could not take advantage of ordinance provisions granting relief from the hardship imposed by designation.[251]

The court, in voiding the designation, said the Commission was attempting to force the owner "to retain its property as is, without any sort of relief or adequate compensation"; this was "nothing short of a naked taking."[252] Designation here was an attempt "to add this property to the public use by purely and simply invading the owner's right to own and manage."[253] This exceeded the city's legitimate powers; the designation was "declared to be confiscatory."[254]

The Court of Appeals was faced with a similar situation in *Society For Ethical Culture v. Spratt.*[255] The Landmarks Preservation Commission again designated a structure owned by a religious organization which, in turn, sued to void the designa-

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> Where, as here, there is a rational basis for the administrative decision. a court may not substitute its judgment for that of the Commission. . . . As the action of the administrative agency was neither arbitrary nor capricious nor in violation of law, and there existed a rational basis for the determination, summary judgment was proper. . . .

City of New York v. Shakespeare, 608 N.Y.S.2d 460, 460 (App. Div. 1994) (citations omitted).

250. 316 N.E.2d 305, 306 (N.Y. 1974).
251. *Id.* at 307-08.
252. *Id.* at 312.
253. *Id.*
254. *Id.*
255. 415 N.E.2d 922 (N.Y. 1980).

tion. The court, finding it "clear that at the present time the designation has the potential of inflicting a substantial economic harm on the Society," said the question was "whether the impact . . . is so severe that the restrictions become confiscatory."[256] This time, the answer was no.

The court said that the Society had not established the "compelling circumstances" that the owner in *Lutheran Church* had demonstrated.[257] The Society only argued that its structure was "ill-adapted to its present needs"; it did not present evidence "that the only feasible solution to this problem would entail the demolition of the now protected building facade."[258] There was "no genuine complaint that eleemosynary activities within the landmark are wrongfully disrupted."[259] The complaint was only "that the landmark stands as an effective bar against putting the property to its most lucrative use."[260] That complaint did not warrant voiding the designation.[261]

A look inside the landmarking process was provided in *Shubert Organization, Inc. v. Landmarks Preservation Commission*.[262] Following the highly publicized and lamented demolition of two theaters in the Times Square area, the Commission "calendared public hearings to consider the designation of forty-five Broadway theaters."[263] The hearings were scheduled "to allow preparation of reports on the historical, cultural, and architectural significance of the individual theatres"; the concerned property owners "received individual notice and offered testimony" and were also permitted to submit "additional comments and

256. *Id.* at 925.
257. *Id.* at 926.
258. *Id.*
259. *Id.*
260. Society for Ethical Culture v. Spratt, 415 N.E.2d 922, 926 (N.Y. 1980).
261. The Court found that:

> [I]t is noteworthy that the designation . . . applies only to the building facade, and it is possible that studies would reveal that without disturbing this protected portion, feasible modifications could be employed to allow the Society to continue its charitable activities in this building, as it has for over 60 years. This, of course, would be a matter for consideration at the appropriate time by the commission.

Id. at 926. See also Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 351 (2nd Cir., 1990), where the court, applying the New York City ordinance, concluded that "the Church had failed to prove that the landmark regulation prevented the Church from carrying out its religious and charitable mission in its current buildings."
262. 570 N.Y.S.2d 504 (N.Y. App. Div. 1991), *cert. denied*, 112 S. Ct. 2289 (1992). *See also* Omabuild N.V. v. Board of Estimate, 455 N.Y.S.2d 967 (N.Y. Sup. Ct. 1982) (discussing process of historic district landmarking).
263. 570 N.Y.S.2d at 505-06.

[their own architectural] report, analyzing the listed theatres."[264] In fact, the owners had twenty nine public opportunities to speak.[265]

The court also noted that the Commission had compiled reports on and established guidelines for preserving Broadway theatres.[266] The Commission had received a large amount of material from various sources regarding the unique qualities of each subject theatre.[267] The Commission received staff reports describing each theater's cultural, historical, architectural, and aesthetic importance.[268] In turn, the Commission prepared a detailed designation report for each.[269] The Commission also addressed each proposed designation in public sessions that the theatre owners attended.[270] After the Commission made its designation decisions, the Board of Estimate, after a public meeting, ratified them.[271]

The owners then sought judicial review. The appellate division agreed with the trial court that "the administrative determination was based on substantial evidence, was not arbitrary and capricious and did not violate the law."[272] The court noted that given "the wealth of analyses and reports, as well as anecdotal testimony provided . . . prior to the subject designations," it was "beyond serious challenge that a reasonable basis existed for the designations as to each theatre, upon a consideration of the statutory criteria."[273] The owners were also afforded a fair opportunity to present their case.[274] Because the court "was not empowered to substitute its own judgment for that of the admin-

264. *Id.* at 506.
265. *See id.*
266. *See id.*
267. *See id.*
268. *See* Shubert Org., Inc. v. Landmarks Preservation Comm'n, 570 N.Y.S.2d 504, 505-06 (N.Y. App. Div. 1991), *cert. denied*, 112 S. Ct. 2289 (1992).
269. *See id.*
270. *See id.*
271. *See id.*
272. *Id.* at 507.
273. *Id.*
274. *See* Shubert Org., Inc. v. Landmarks Preservation Comm'n, 570 N.Y.S.2d 504, 507 (N.Y. App. Div. 1991), *cert. denied*, 112 S. Ct. 2289 (1992).

> There is no basis to argue that the proposals were "railroaded" through the Landmarks Preservation Commission; the preliminary analyses and reports were exhaustive, the decision making occurred over the course of several years. Three days of public hearings simply concluded the input into the decision making, and the final decisions do not appear to have been arrived at with any great dispatch. While the [owners] complain of the limited time allowed to them for comments before the Board of Estimate, there is no indication that they were deprived of a

istrative body," the question "was whether the record . . . supported the voting procedure and the determination."[275] It did.

The record does not always provide the support. The courts have intervened, both for and against preservation, when a preservation decision is arbitrary and capricious.[276] For example, in *400 East 64/65th Street Block Association v. City of New York*, the Landmarks Preservation Commission designated a 14-building housing complex as a landmark.[277] By a 6-5 vote, the Board of Estimate modified the designation to exclude four buildings from the designation, thus permitting the owner "to erect a high-rise residential tower at the expense of the integrity of the . . . Commission's designation of the complex, in its entirety, as a landmark."[278] The court reviewed the Board's modification to determine if it was rationally based or was arbitrary and capricious.[279]

The extensive record developed by the Landmarks Preservation Commission and the City Planning Commission established "that the significance of the site is that it is one of only two such light-court model developments remaining in the country which comprise an entire block."[280] The Board of Estimate's decision "that a part of the complex should be considered worthy of designation as a landmark . . . and part should not is inherently

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meaningful opportunity to submit their own reports or comments prior to the . . . hearing, particularly at the . . . Commission phase of proceedings.

275. *Id.* at 508. *See also* Russo v. Beckelman, 611 N.Y.S.2d 869, 871 (N.Y. App. Div. 1994) ("The administrative record is replete with reasoned decision-making during which commissioners grappled with the different landmarking theories in light of the historical record, and we reject petitioner's [the owner's] contention that the final determination was a foregone conclusion.").

The Commission and the courts are capable of drawing distinctions even when the structures are joined. *See* Doro's Restaurant, Inc. v. City of New York, 578 N.Y.S.2d 163 (N.Y. App. Div. 1992). The owner complained when his half of a twin structure was landmarked in 1989; in 1971, the Commission had declined to landmark the adjoining structure and had permitted it to be demolished. *Id.* at 164. The court said there was no "merit in comparing nondesignation of 317 Broadway, which rested on wholly economic considerations, with the later designation of 319 Broadway, which relied upon the appropriate historical, architectural, and aesthetic attributes of that specific property." *Id.* at 165.

276. *See, e.g.*, Rudey v. Landmarks Preservation Commission, 627 N.E.2d 508, 509 (N.Y. 1993) (finding it "arbitrary and capricious in the circumstances presented for the Landmarks Preservation Commission to differentiate between two residents in the same building in setting the timetable for replacement of nonconforming windows in both units.").

277. 583 N.Y.S.2d 452 (N.Y. App. Div. 1992).

278. *Id.* at 454.

279. *See id.*

280. *Id.*

inconsistent."[281] The Board's "failure . . . to advance any reason for removing four of the 14 buildings in the complex from the designated landmark site does not render the action any less arbitrary when viewed in the context of the administrative record."[282]

C. *Responsibly Serving Public and Private Interests*

New York City's preservation law is fair to both the public and the private property owners, fair on both substantive and procedural grounds. Designation is not lightly made. A record must be built which, in the light of an impartial review, supports both the legitimacy of the landmark decision and its fairness to the property owner.[283] Critics of *Penn Central* too often forget that the Supreme Court concluded that a preservation decision must pass two tests, one public and one private.[284] The decision must be "substantially related to the promotion of the general welfare" and must "permit [the owner] reasonable beneficial use of the landmark site" as well as "afford [the owner] opportunities further to enhance not only the [landmark] site proper but also other properties."[285]

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281. *Id.*

282. *Id.*

283. *See, e.g.*, Gilbert v. Board of Estimate, 575 N.Y.S.2d 840 (App. Div. 1991); Teachers Ins. and Annuity Ass'n of Am. v. New York, 623 N.E.2d 526 (N.Y. 1993).

284. See Byrne, *supra* note 217, at 136.

> The contest between property rights advocates and ecologists reveals fundamental disagreements about the place of people in the world. The former stress individualism, self-interest, liberty, and the creation of measurable wealth. The latter stress mutual dependence, cooperation, moral duties toward other forms of life, and spiritual enrichment. Not surprisingly, the Constitution . . . does not enshrine either vision. It creates imperfect representative institutions through which the polity can determine its own future. Inevitably, the clash of differing visions and interests engenders compromise and inconsistency. The law must accomodate the ecological perspective for there to be any hope of preserving an environment in which future generations can flourish.

Id. See also Carol M. Rose, *Property Rights, Regulatory Regimes, and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 589 (1990). In this article, Rose argued that:

> [W]ith an increasing scarcity of land resources, we do not need just *any* regulatory regime; we need a good one. We need a regulatory regime that helps us to internalize externalities—a regulatory regime that induces us to think carefully about the way we use land, without distorting our decision-making process or diverting us from activities that are worthwhile and valuable.

Id.

285. Penn Cent. Transp. Co., v. City of New York, 438 U.S. 104, 138 (1978). Not everyone agrees that the system works well. *See* Cindy Moy, *Reformulating The*

The New York courts have been able to protect both interests. When the owner is able to demonstrate that designation inflicts unacceptable economic hardship, the courts will grant relief. When the owner demonstrates that a Commission decision was arbitrary and capricious, the courts will grant relief. Unlike the owner in *Dolan*, who was being forced to give to the citizens something that they had not previously had, the owner of a landmarked structure is only being asked, without undue sacrifice, to preserve that which has entered the culture of which that owner is a part. The burdens of preservation are the burdens which are a necessary adjunct of being part of a civilized community.

Preservation is not paralysis, is not an attempt to lock our built environment into a specific time period.[286] Our built environment is comprised of man-made structures reflecting the ideas and values of the people who make them. Our built environments, "like customary dress and food, have always been local responses that incorporate local needs and local dreams."[287] Those needs and dreams change; it is not surprising that the responses change. Preservation seeks to save structures which capture the history of those responses. Preservation is "[t]he management of change and the active use of remains for present and future purpose," not "an inflexible reverence for a sacrosanct past."[288]

Responsible preservation requires a balance between public and private interests.[289] There is a conflict to be managed, a

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New York City Landmarks Preservation Law's Financial Hardship Provision: Preserving The Big Apple, 14 CARDOZO ARTS & ENT. L.J. 447 (1996).

286. *See* Rikard Kuller, *Architecture and Emotions*, *in* ARCHITECTURE FOR PEOPLE: EXPLORATIONS IN A NEW HUMANE ENVIRONMENT, *supra* note 6, at 98. Kuller discusses that:

> To some extent we are prepared to accept changes, to develop an affection for new things. The same old place might become boring and from time to time many of us will set out to seek the new.... However, when it is a matter of altering an existing environment, there is a limit to what we can tolerate. When the old surroundings disappear too quickly and too extensively, and when the replacement is too different from what people are used to, there is likely to be a strong reaction.

Id.

287. RYBCZYNSKI, *supra* note 50, at 50.

288. LYNCH, WHAT TIME?, *supra* note 56, at 64.

289. *See id.* at 39.

> There seems to be some optimum degree of previous development in a changing environment.... [W]hile too little restraint confuses and impoverishes, too much is costly and frustrating. An environment that cannot be changed invites its own destruction. We prefer a world that can be modified progressively, against a back-

"perpetual conflict between the freedom of man to devise his own styles, his own fashions, his own forms of expression, and the limitations ultimately placed on him both by the character of the place in which he works and by the nature of his own behavioural reactions to it."[290] This is a conflict between change and continuity, between progress toward the future and preservation of the past. It is local government, acting responsibly on behalf of public and private interests, which is best able to manage this conflict, to preserve the spirit of the places where we work and live so that our present, informed by our past, gives us hope for the future.[291]

It is wrong to see the situation as polar, as either saving the past or controlling the future. Responsible preservation speaks to both as well as to our present condition:

> We preserve present signals of the past or control the present to satisfy our images of the future. Our images of past and future are present images, continuously re-created. The heart of our sense of time is the sense of "now." The spatial environment can strengthen and humanize this present image of time, and . . . this function is one of its vital but most widely neglected roles.[292]

Our built environment is the result of piecemeal growth, a growth putting the new along side the old.[293] We value both, we need both.[294] It is not that we abhor change, but that we want to

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ground of valued remains, a world in which one can leave a personal mark alongside the marks of history.

Id. See also David W. Dunlap, *A Landmark Reveals Its Glories*, N.Y. TIMES, Aug. 25, 1996, § 2, at 4.

290. APPLETON, *supra* note 34, at 256. The author said this conflict is "between the emancipation of imagination, of invention, of art, and the inescapable tyranny of what Pope, following Virgil, calls 'the Genius of the Place.'" *Id.*

291. This is not to minimize the problems posed by the preservation/development conflict. The problems can be real and the conflict fiercely fought even when both sides are well-intentioned. *See* B. Drummond Ayres Jr., *Fight over a Cathedral for Los Angeles Turns on Faith in the Soul of the City*, N.Y. TIMES, June 17, 1996, at B7; Christopher Gray, *A Remnant of the 1930's, and Its Sky, Will Fall*, N.Y. TIMES, Aug. 18, 1996, § 9, at 7.

292. LYNCH, WHAT TIME?, *supra* note 56, at 65.

293. The process of piecemeal urban growth . . . had always provided variety and scale to the city, adding new buildings side by side with old ones. . . . The advocates of urban renewal, on the other hand, were impatient with such a process. . . . New urban redevelopment schemes encompassing entire blocks, and even multiple blocks, were being built by a single developer and designed by a single architect. The long term effect of ponderous, inward looking complexes . . . on the surrounding street life was deadening.

RYBCZYNSKI, *supra* note 50, at 162-63.

294. *See* GRANT HILDEBRAND, PATTERN AND MEANING IN FRANK LLOYD WRIGHT'S HOUSES 29 (1991).

see it as being principled, respecting the spirit of the place where we work and live.[295] We cannot develop an individually and culturally sustaining identity in a constantly recreated environment.[296] Preservation respects, not reveres, those significant structures from our past which represent the tradition which we wish to live into the future.[297]

There is now considerable empirical evidence to corroborate the long-standing belief that aesthetic experiences, including those of preferred environments, seem to exhibit some combination of "diversity, structural complexity, novelty, incongruity, or surprisingness," in conjunction with some perceived order or resolution.

Id. (footnote omitted). Hildebrand also found:

[A]n explanation of the familiar observation that experiences or artifacts consistently ranked very high in aesthetic value usually exhibit high levels of both complexity and order. The complexity engages our search for variations of stimuli; the order reassures us that these stimuli share a commonality; and we find in the juxtaposition an enduring aesthetic delight. . . . Architectural examples such as the Parthenon or Chartres are usually considered "high art." But vernacular or popular examples . . . can also be shown to possess a large measure of the same duality of characteristics.

Id. at 30.

295. *See* NORBERG-SCHULZ, DWELLING, *supra* note 22, at 56.

It is the built form which determines the . . . local character, and it is the built form which makes continuity and variety manifest. . . . [T]he built form should not only give presence to those activities which are gathered by the place, but that the visualization should happen in a certain way, to constitute a particular "here." Continuity therefore means something more than linear succession; it also means that variety ought to appear as variations on conspicuous local "themes."

Id.

296. [H]uman identity presupposes the identity of place, and *stabilitas loci* therefore is a basic human need. The development of individual and social identity is a slow process, which cannot take place in a constantly changing environment. . . .[I]t is possible to preserve the *genius loci* over considerable periods of time without interfering with the needs of successive historical situations.

NORBERG-SCHULZ, GENIUS LOCI, *supra* note 26, at 180. Later, Norberg-Schulz wrote that respecting

the *genius loci* does not mean to copy old models. It means to determine the identity of the place and to interpret it in ever new ways. Only then may we talk about a *living tradition* which makes change meaningful by relating to a set of locally founded parameters.

Id. at 182.

297. See Paul Goldberger, *An Old Jewel of 42d Street Reopens, Seeking to Dazzle Families*, N.Y. TIMES, Dec. 11, 1995, at C18, where the author, describing the refurbishing and reopening of the Victory Theater on 42d Street in New York City, said that to see the street with the theater's "exquisite facade restored . . . is to rediscover not only a single building but an entire block," an act of preservation by which "the urbane quality of this whole block becomes visible." Goldberger also stated:

[P]art of the architectural notion here is to keep illusions in check—to have no illusions about illusion, so to speak. The New Victory is dazzling, yet no one will mistake it for a trip into the past. This is not 42d Street as theme park, not a total environment designed to fool us into thinking that we are in a Times Square of the past. It is a restoration that uses the architecture of the past to create a viable 42d

CONCLUSION

> For if the entire history of landscape in the West is indeed just a mindless race toward a machine-driven universe, uncompromised by myth, metaphor, and allegory, where measurement, not memory, is the absolute arbiter of value, where our ingenuity is our tragedy, then we are indeed trapped in the engine of our self-destruction.[298]

The significant structures of our built environment are our voice: "It is not enough that man 'says' the things, he also has to keep and visualize them in concrete images which help us to see our environment as it is."[299] Our built environment serves as both a record of the past and our pronouncement to the future.[300] The structures that comprise it are not merely distinct objects; they are part of the larger pattern:

> Though a building has physical boundaries, its meaning and value depend on its relationship to the city outside them. Not just the physical space around the building, but also the economic, social, political and historical forces converging on its site. The building provides a frame for examining those forces.[301]

It also provides a frame of reference for future development.[302]

The well built environment represents the spirit of the places where we work and live, and, as in most matters spiritual, it de-

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Street for today, and that is a different enterprise altogether from the architecture of make-believe.

Id.

298. SCHAMA, *supra* note 44, at 14. Later, the author stated:

> American modernity, even in its most aggressively imperial forms . . . has been no more depleted of nature myth and memory than any other culture. Only blind obedience to the assumptions of the Enlightenment claims science and capitalism to be necessarily incompatible with natural religion. Two centuries of American culture in which both have flourished is a constant state of dynamic hostility—John Bunyan and Paul Bunyan lashed to the same steed—proves such assumptions unfounded.

Id. at 207.

299. NORBERG-SCHULZ, DWELLING, *supra* note 22, at 111-12.

300. *See* Acking, *supra* note 6, at 110.

301. Herbert Muschamp, *Eloquent Champion of the Vernacular Landscape*, N.Y. TIMES, Apr. 21, 1996, § 2, at 36.

302. *See* RYBCZYNSKI, *supra* note 50, at 12.

> I'm convinced that our undistinguished record of the last fifty years in building cities and towns stems at least in part from a willful ignorance of our urban past. . . . There is no such thing as perfect foresight, of course, so we can never plan infallibly, but we can face the urban future with modesty and an approach tempered by a knowledge of earlier successes and failures. In order to understand where we're going, its necessary to know where we've been.

Id.

mands something from us.[303] It demands that we, individually and communally, care; that we have regard for the spiritual values of the places which have been entrusted to us for the short time we are about.[304] The built environment has been passed down to us with the expectation that we will act as responsible stewards.[305] Christian Norberg-Schulz has argued that we need to rediscover our built environment "as a totality of interacting, concrete qualities" and "to develop again the sense of respect and care" for it:

> Environmental friendship implies a respect for the place. We have to "listen" to the place and try to understand its *genius*. Only in this way we may give it a new (and old) interpretation and contribute to its self-realization. . . . To respect the *genius loci* does not mean to "freeze" the place and negate history. On the contrary, it means that life is rooted, and that history becomes something more than a series of accidents.[306]

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303. See NORBERG-SCHULZ, DWELLING, *supra* note 22, at 12.

> To dwell in the qualitative sense is a basic condition of humanity. When we identify with a place, we dedicate ourselves to a way of being in the world. Therefore dwelling demands something from us, as well as from our places. *We* have to have an open mind, and the *places* have to offer rich possibilities for identification.

Id.

304. *See* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 746 (1986). Rose states:

> An entire populace may have customs . . . as Blackstone and others recognized when they called the common law the "custom of the country." The concept of a managed but completely open commons presupposes just such a populace—one that behaves according to customs of civic care, and with some regard for the resources its uses. Such a concept of the citizenry, after all, was familiar to nineteenth-century jurisprudence, given the serious discussion during the American revolutionary and constitutional periods of "republican virtue"—the individual self-restraint and civic regard for the greater good that was thought essential to any democratic regime.

Id.

305. See Rose, *supra* note 61, at 27-28, where the author noted that:

> [P]roperty held exclusively at the whim of an individual owner is only one of our forms of property, and while it is important, forms of common property are important as well. There are great bodies of law about common property, and they revolve around an ethic of moderation, proportionality, prudence, and responsibility to the others who are entitled to share in the common resource. Indeed, even individual property revolves around these normative characteristics. The individual property owner relies in great part on the recognition and acquiescence of others, and individual property law assumes a large measure of neighborliness and attentiveness to the needs of others in the use of one's own "exclusive" property.

306. NORBERG-SCHULZ, MEANING AND PLACE, *supra* note 4, at 16, 196.

Our built environment comprehends common values meriting common care.[307]

We all suffer when the significant structures of our built environment are destroyed or defaced.[308] We cannot rely on individual self-interest or individual initiatives to preserve them.[309] Preservation is a necessary and proper function of government acting responsibly under its police powers.[310] Government has, as discussed above, demonstrated the capacity to do so; when it has not, the courts have demonstrated the capacity to intercede.

What *Penn Central* has wrought is a preservation process responsive to communal and private needs. It is a process which serves us all by saving the spirit of the places where we dwell, a spirit which cares about the past and the future, a spirit that gives us a present identity, individually and culturally. As in most matters spiritual, the system requires faith, a belief and trust in values which can more often be sensed than quantified. The spiritual values represented and imparted by our built environment are real; those structures which best represent those values demand respectful treatment. That is what *Penn Central* provides and, in so doing, provides us with protection for the spirit of the places where we dwell.

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307. *See id. See also* Diana Shaman, *Using Landmark Status to Bar Unwanted Change*, N.Y. TIMES, Feb. 25, 1994, at A18 (quoting Christopher Wigren, Director of Real Estate Services for the Connecticut Trust for Historic Preservation: "My favorite argument is that landmarking serves the larger community by insuring that structures are held in trust for the future. . . . The idea is to preserve something that is a nonrenewable resource for the public benefit.").

308. *See* Peter C. Meier, *Stevens v. City of Cannon Beach: Taking Takings Into the Post-Lucas Era*, 22 ECOLOGY L.Q. 413, 448 (1995) (discussing the Supreme Court's decision in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)). Meier stated:

> At a time when states are struggling to respond to the legacy of decades of environmental degradation, *Lucas* threatens to bring government innovation to a halt. Governments need flexibility to cope with environmental threats. The Supreme Court's takings analysis will foster more unpredictable, confusing decisions . . . thereby burdening the public with the costs of uncertainty. The public as a whole suffers from environmental degradation, and nearly all recognize the basic wisdom of most environmental legislation. Any test protecting landowners from takings of all economic value must contain in its calculus a broad understanding of the government's need to respond to new and growing environmental threats.

Id.

309. *See* Humbach, *supra* note 24, at 424-25.

310. *See* Rose, *supra* note 284, at 592-93.