

## Historic Preservation Law in the United States

by David L. Callies

Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance. These nationwide legislative efforts have been precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today.<sup>1</sup>

### Introduction

Historic preservation law in the United States is rooted in the concepts of listing and the exercise of the police power. Contributing to the subject is public acquisition of historic places and tax incentives to preserve them. Neither of the latter is particularly complex in terms of law or policy, and so comparatively little of this Article is devoted to either topic. Instead, what follows concentrates primarily on the use of governmental regulatory authority to preserve historic buildings and districts and the listing of historic buildings and places in "official registers," primarily under the National Historic Preservation Act (NHPA).

### Regulation for Historic Preservation: Police Power and the Bill of Rights

The exercise of police or regulatory power at the state and local government level is responsible for most historic preservation in the United States.<sup>2</sup> There are constitutional restrictions on this exercise of regulatory authority due to the nature of the federal system of government in the United States and, in particular, the application of parts of the U.S. Constitution as amended by the Bill of Rights. It is useful as a prelude to discussing such regulation to briefly review this structure and the consequent restrictions on the regulatory authority of states and local governments.

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### *Nature and Structure of Government and Restrictions on Power to Regulate*

The government of the United States is federal in nature. The national government was created by the states in a constitutional convention near the end of the 18th century. Fundamentally, therefore, the national or federal government is a government of enumerated powers granted by the state. Put a different way, the federal government must trace all its authority, statutes, regulations, and powers to the federal Constitution. The individual 50 states hold all the rest of governmental power, both theoretically and specifically, according to the Tenth Amendment to the Constitution.<sup>3</sup>

The police power—the power to regulate for the health, safety, and welfare of the people—is predominately a state power, often delegated to local governments by statutes called enabling acts. Among the powers so delegated from state to local government is the power to regulate the use of land. It is in this delegation of power—usually to zone and control land development—that the power to preserve historically important buildings, sites, and districts or neighborhoods generally resides.<sup>4</sup> Sometimes the state shares this power with local government by enacting statutes to preserve certain historic areas of statewide importance. The Vieux Carre district in New Orleans, Louisiana, is an example of such an instance of shared power. Indeed, for some period of time, the preservation of the Vieux Carre was enshrined in the Louisiana State Constitution. Federal preservation efforts, by contrast, generally come about through purchasing historic sites—the Civil War battlefield at Gettysburg, for example—or through listing of important sites under the NHPA and by requiring federal agencies to consider the effects of their actions on such sites under NHPA §6 and under various other environmental reviews required by other federal legislation such as the National Environmental Policy Act (NEPA) or the Department of Transportation Act (DOT Act).

While states and local governments exercising delegated state power are broadly free to establish their own laws with respect to the use of land free of federal control, they are nevertheless limited by whatever power the states surrendered under the Constitution to the national or federal government. Among the most prominent of these are the Fifth Amendment's prohibition of taking property without compensation and the First Amendment's protection of religious freedom. Briefly, courts have determined that the over-regulation of private property can be the same as a physical taking, requiring compensation under certain circumstances, as if the land were taken by compulsory purchase. Moreover,

1. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 107-08, 8 ELR 20528, 20528-29 (1978) (internal footnotes omitted).  
2. JULIAN C. JUERGENSMAYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW 584 (West Group 1998).

3. DANIEL R. MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 9 (3d ed. 1996).

4. A few regulate interior space. See TIAA v. New York, 586 N.Y.S.2d 262 (1992).

the historic regulation of buildings used for worship or other religious purposes can, in some circumstances, interfere so much with the practice of religion that some courts may find such regulations violate the First Amendment's protection of religious practices. Both of these issues are treated more extensively below.

### Historic Preservation Through Regulation and Constitutional Challenges

#### *Historic Preservation Regulation: Raleigh, North Carolina, and New York, New York*

By far the most effective preservation of historic structures, districts, and landmarks takes place at the local government level under state-delegated power to control the use and development of land. The most common methodology is for a historic structure or grouping of structures to be inventoried through some sort of study and listing process, followed by zoning or other land use restrictions imposed on their repair, reconstruction, or any other activity that would affect their outward appearance. Two examples explain this process.

#### Raleigh, North Carolina

The designation of a historic district uses an increasingly popular "overlay" technique, whereby all existing zoning regulations are applicable to land and buildings in the district and the historic preservation regulations are in addition to those underlying zoning requirements. In Raleigh, North Carolina, the city amended its zoning ordinance to create a 98-acre overlay historic district in one of its neighborhoods and established the Raleigh Historic District Commission to apply to the district certain architectural guidelines and design standards in order to preserve the historic character of the neighborhood. The city also provided for civil and criminal penalties for failure to comply with the ordinance. The ordinance itself was adopted pursuant to authority delegated to the city from the state of North Carolina authorizing cities to designate historic districts and to require that after the designation of a historic district any property owner within it who desires to erect, alter, restore, or move the exterior portion of any building or structure to first obtain a "certificate of appropriateness" from a historic district commission. Such a commission may, according to the state statute, prevent "the construction, reconstruction, alteration, restoration, or moving of buildings, structures, appurtenant fixtures, or outdoor advertising signs in the historic district which would be incongruous with the historic aspects of the district."<sup>5</sup> In order to designate the historic district, the city conducted a study in 1974. The city's planning department then submitted a proposal for designation of the district to the city council (the city's governing body) in 1975, and the designation was adopted as an ordinance after notice and a public hearing. The proposed ordinance designating the district was also submitted to the State Division of Archives and History for review and recommendations for changes before the hearing and passage of the ordinance by the city council.

As finally adopted by the city council, the ordinance established the district and its boundaries. It also established

the Raleigh Historic District Commission to enforce the ordinance by authorizing it to require proposed activities seeking an application for a certificate of appropriateness to satisfy the following requirements:

From and after the designation of a historic district, no exterior portion of any building or other structure (including stone walls, fences, light fixtures, steps and pavement or other appurtenant features) nor above-ground utility structure nor any type of outdoor advertising sign shall be erected, altered, restored, or moved within such district until after an application for a certificate of appropriateness as to exterior architectural features has been submitted to and approved by the historic district commission.

The commission shall not consider interior arrangement and shall take no action under this section except for the purpose of preventing the construction, reconstruction, alteration, restoration, or moving of buildings, structures, appurtenant fixtures, or outdoor advertising signs in the historic district which would be incongruous with the historic aspects of the district.<sup>6</sup>

To aid the Raleigh Historic District Commission in reaching its findings and conclusions with respect to a certificate of appropriateness, the ordinance divides architectural guidelines and standards into three categories. The first applies to proposed changes to existing structures, the second applies to new construction, and the third applies to landscaping. The first category—existing structures—is further subdivided into nine categories, each of which focuses on a different structural element, primarily of "Victorian" style, such as materials, colors, and window placement patterns. Specific and general prohibitions of designs, materials, and styles that are deemed to be incongruous with existing elements of particular Victorian styles are also set forth. To a lesser extent, the same is true for other architectural styles in the district. In the second category—new construction—the guidelines set additional limitations on spacing, lot coverage, and height, as well as orientation, scale, and proportions.

Such a historic overlay district designation and its regulations were upheld by North Carolina's highest court in *A-S-P Associates v. City of Raleigh*<sup>7</sup> in which a landowner sought to build a residential structure (but for commercial use) on a vacant lot in the district contrary to the regulations.

#### New York, New York

New York City's Landmarks Preservation Law also provides for the maintenance of historic districts, but it also provides for the preservation and maintenance of individual buildings and structures outside such districts. The U.S. Supreme Court upheld this latter aspect of the law in *Penn Central Transportation Co. v. City of New York*.<sup>8</sup> As a result, it has become a model for historic preservation laws that are able to withstand takings challenges.

New York City's Landmarks Preservation Law was adopted in 1965 pursuant to a New York state enabling statute that declares it to be the public policy of the state of New York to preserve structures and areas with special historical or aesthetic interest or value. The statute authorizes local

6. *Id.*, cited in *A-S-P Assocs.*, 258 S.E.2d at 452.

7. 258 S.E.2d 444, 452 (N.C. 1979).

8. 438 U.S. 104, 8 ELR 20528 (1978).

5. N.C. GEN. STAT. §160A-397 (1975), cited in *A-S-P Assocs. v. City of Raleigh*, 258 S.E.2d 444 (N.C. 1979).

governments to impose reasonable restrictions to perpetuate such structures and areas.<sup>9</sup> The public purpose of the Landmarks Preservation Law is the comprehensive safeguarding of the desirable features of the existing urban fabric of New York City in order to foster "civic pride in the beauty and noble accomplishments of the past," to protect and enhance "the city's attractions to tourists and visitors," "support and stimulate business and industry," "strengthen the economy of the city," and to promote "the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city." The concern was that "the standing of [New York City] as a world-wide tourist center and world capital of business, culture, and government" would be threatened if legislation were not enacted to protect historic landmarks and neighborhoods.<sup>10</sup>

New York City's Landmarks Preservation Law creates a Landmarks Preservation Commission to designate landmarks and to regulate their external features. The commission's 11 members must include at least 3 architects, 1 historian, 1 city planner or landscape architect, 1 realtor, and at least 1 resident of each of New York City's 5 boroughs. According to a former chairman, there is a tradition of including one or two attorneys as well.<sup>11</sup> First, the commission identifies properties and areas that have "a special character or special historical or aesthetic interest or value as part of the development, heritage, or cultural characteristics of the city, state or nation." If the commission so determines, after notice and hearing for all interested parties, it will designate the site either as a landmark, a landmark site, or a historic district. "Landmark" is defined as:

[A]ny improvement, any part of which is [30] years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage, or cultural characteristics of the city, state or nation and which has been designated as a landmark pursuant to the provisions of this chapter.<sup>12</sup>

"Landmark site" is "an improvement parcel or part thereof on which is situated a landmark and an abutting improvement parcel or part thereof used and constituting part of the premises on which the landmark is situated, and which has been designated as a landmark site pursuant to the provisions of this chapter."<sup>13</sup> "Historic district" is any area that:

(1) contains improvements which: (a) have a special character or special historical or aesthetic interest or value; and (b) represent one or more periods or styles of architecture typical of one or more eras in the history of the city; and (c) cause such area, by reason of such factors to constitute a distinct section of the city; and (2) has been designated as a historic district pursuant to the provisions of this chapter.<sup>14</sup>

New York City's Landmark Preservation Law also provides for the designation of a scenic landmark and an interior landmark.<sup>15</sup>

When a property owner plans to alter a landmark site, New York City's Landmark Preservation Law provides three alternative procedures to obtain the necessary commission approval. First, the commission may issue a "certificate of no effect" on the protected architectural features on the ground that the contemplated improvement or alteration will not change or affect any architectural features of the landmark and will be in harmony with it. Second, the commission may issue a "certificate of appropriateness" if the commission concludes that the proposed construction on the landmark site would not unduly hinder the protection, enhancement, perpetuation, and use of the landmark, considering aesthetic, historical, and architectural values. The third procedure is for a "certificate of appropriateness due to insufficient return." Under this alternative, if the owner of a parcel that is not exempt from city real estate taxes is denied a certificate of appropriateness and is not able to earn a reasonable return on the parcel in its present state, the commission and other city agencies have the burden of developing a plan for the parcel that will enable the landowner to earn a reasonable return on the landmark site. Such a plan may include partial or complete tax exemption. If the owner does not accept the plan, the commission may recommend the city proceed by compulsory purchase to acquire a "protective interest" in the landmark. If the city does not do so within a specified time period, then the commission must issue a notice allowing the property owner to proceed with the proposed alteration or improvement as originally proposed. If, on the other hand, the parcel is already exempt from the payment of real estate taxes (churches, for example) then the owner is eligible for such special treatment only if: (1) the owner previously entered into an agreement to sell the parcel that was contingent upon the issuance of the certificate of appropriateness; (2) the property, as it exists at the time of the request, is not capable of earning a reasonable return; (3) the structure is no longer suitable to its past or present purposes; and (4) the prospective buyer intends to alter the landmark structure. Then the commission must either find another buyer for the parcel or allow the sale and construction to proceed.<sup>16</sup>

### *The Taking Issue*

Because the Constitution's Fifth Amendment prohibits the taking of property without just compensation and because the Supreme Court has held on numerous occasions that a regulation that goes "too far" may be an unconstitutional taking, owners often challenge historic preservation regulations in state and federal courts as unlawful takings.<sup>17</sup> Usually, state and federal courts have upheld the power of state and local governments to enact reasonable regulations designed to protect historic sites, landmarks, and districts provided: (1) there is a reasonable process for listing or designating such landmarks; (2) there is a reasonable process for seeking permission to alter the site or district; and (3) the owner has some economic use of the premises under the rel-

9. N.Y. GEN. MUN. LAW §96-a (McKinney 1977).

10. N.Y. CITY CHARTER §534 (1976).

11. See *Penn Cent.*, 438 U.S. at 111 n.8, 8 ELR at 20529 n.8.

12. N.Y. GEN. MUN. LAW §207-1.0(n).

13. *Id.* §207-1.0(o).

14. *Id.* §207-1.0(h).

15. *Id.* §§207-1.0(w) and (m); see also *Penn Cent.*, 438 U.S. at 111 nn.9, 11, 8 ELR at 20529 nn.9, 11.

16. *Penn Cent.*, 438 U.S. at 108 n.3, 8 ELR at 20529 n.3.

17. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Penn Cent.*, 438 U.S. at 104, 8 ELR at 20528; *Agins v. City of Tiburon*, 447 U.S. 255, 10 ELR 20361 (1980); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 17 ELR 20440 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 22 ELR 21104 (1992); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

evant regulation. Generally, the courts also consider the advantages to the community at large in terms of economic benefit and the need to preserve such sites and structures for tourism. It is no accident that many of the cases reaching the courts have been from historically significant places like Boston, New Orleans, Raleigh, and Washington, D.C.

Perhaps the most famous, and certainly the most significant, of the decisions upholding the exercise of the police power is the Supreme Court's decision in *Penn Central*.<sup>18</sup> As described above, New York provides for historic preservation through the listing of historic sites and districts and through the administrative approval of exterior changes to such sites and districts. The refusal of the Landmarks Preservation Commission to grant a certificate permitting the construction of a 55-story office building on top of Grand Central Terminal led the owners, the Penn Central Transportation Company, to challenge the denial as a taking of property by regulation. The Supreme Court held that no such regulatory taking had occurred. First, the Court held that historic preservation was an appropriate use of the city's police power to protect the welfare of the people of New York. Second, the Court held that as applied to Penn Central's property, there was no regulatory taking because the company still had sufficient economic use left in the station, and it also had the right to transfer the air rights (called development rights) above the station to other nearby property that it owned, thereby further making economic use of the station property. Altogether, the Court found that the economic effect on the company's land, also considering their distinct investment-backed expectations, was not so severe that it should receive compensation for a regulatory taking.

State and lower federal courts have also upheld historic preservation ordinances and statutes when challenged by property owners as regulatory takings. In perhaps the first and most famous of these, *Maher v. City of New Orleans*,<sup>19</sup> a landowner challenged an ordinance regulating the preservation and maintenance of buildings in the French Quarter of that famous city. The landowner wished to demolish a Victorian style building and replace it with one in the Spanish style, which was arguably more in keeping with the neighborhood. The court rejected the landowner's contention that the controls imposed by the ordinance were not within the parameters of the police power, observing that the police power went beyond health and safety to "fostering ends which the community deems worthy."<sup>20</sup> Perhaps aiding the court in reaching its decision in this and other historic preservation cases from New Orleans was a since-repealed constitutional provision allowing for regulation of historic districts.<sup>21</sup> Indeed, the state of Hawaii still has such a provision in its state constitution:

The State shall have the power to conserve and develop objects and places of historic or cultural interest and provide for public sightlines and physical good order. For these purposes private property shall be subject to reasonable regulation.<sup>22</sup>

18. 438 U.S. at 104, 8 ELR at 20528.

19. 516 F.2d 1051, 5 ELR 20524 (5th Cir. 1975).

20. *Id.* at 1060, 5 ELR at 20527.

21. See *City of New Orleans v. Pergament*, 5 So. 2d (La. 1941); *City of New Orleans v. Levy*, 64 So. 2d 798 (La. 1953).

22. HAW. CONST. art. IX, § 7.

Other recent decisions have upheld landmark status for theaters, office buildings, and interior designations.<sup>23</sup>

### First Amendment Problems

When religious structures are designated and protected for landmark status, owners often challenge the regulation as a violation of the First Amendment's protection of religious freedom. Many courts require houses of worship to comply with facially neutral land use controls such as height and other bulk restrictions as well as restrictions on uses in certain zones.<sup>24</sup> Perhaps the most famous of the decisions involving historic religious properties is *Rector, Warden & Members of the Vestry of St. Bartholomew's Church v. City of New York*,<sup>25</sup> in which the church, a designated New York City landmark, was denied permission to replace its historic community house with a 59-story office tower in order to raise much-needed revenue for renovations and repair of the main sanctuary.

Such decisions were in part responsible for the U.S. Congress' passage of the Religious Freedom Restoration Act (RFRA) of 1993, which was intended to restore religious freedom from local land use and other laws that were facially neutral.<sup>26</sup> However, the Supreme Court struck down the RFRA in *City of Boerne v. Flores*<sup>27</sup> on the ground that it was an unconstitutional exercise of congressional power under the Fourteenth Amendment to the Constitution. As a result, facially neutral historic preservation laws are generally applicable to religious structures. Perhaps one exception to this rule is a regulation that seeks to preserve the interior of a church, which in at least one case was held to be "so freighted with religious meaning" as to be virtually immune from regulation for historic purposes.<sup>28</sup> Indeed, there are a few cases in which state courts have held churches generally immune from historic preservation regulations as they apply to a church's exterior on state constitutional law grounds.<sup>29</sup>

In 2000, Congress responded to the *Boerne* decision by passing the Religious Land Use and Institutional Persons

23. See *United Artists Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612 (Pa. 1993); *International College of Surgeons v. City of Chicago*, 153 F.3d 356 (7th Cir. 1998); *Teachers Ins. & Annuity Ass'n of Am. v. City of New York*, 586 N.Y.S.2d 262 (1992).

24. See *Korean Buddhist Dae Won Sa Temple of Haw. v. Sullivan*, 953 P.2d 1315 (Haw. 1998), in which the Hawaii Supreme Court upheld a height restriction against a Buddhist Temple constructed some 10 feet higher than permitted by the applicable zoning code.

25. 914 F.2d 348 (2d Cir. 1990).

26. 42 U.S.C. §2000bb.

27. 117 S. Ct. 2157 (1997).

28. *Society of Jesus of New England v. Boston Landmarks Comm'n*, 564 N.E.2d 571 (Mass. 1990).

29. See, for example, *First Covenant Church v. City of Seattle*, 787 P.2d 1352 (Wash. 1990), holding that the "possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom." (*First Covenant Church v. City of Seattle, on remand*, 840 P.2d 174, 185 (Wash. 1992)). For commentary on historic preservation, the RFRA, and the First Amendment, see Elizabeth C. Williamson, *City of Boerne v. Flores and the Religious Freedom Restoration Act: The Delicate Balance Between Religious Freedom and Historic Preservation*, 13 J. LAND USE & ENVTL. L. 107 (1997); Richard F. Babcock & David A. Theriaque, *Landmarks Preservation Ordinances: Are Religion Clauses Violated by Their Application to Religious Properties?*, 7 J. LAND USE & ENVTL. L. 165 (1992); Alan C. Weinstein, *The Myth of Ministry Versus Mortar: A Legal and Policy Analysis of Landmark Designation of Religious Institutions*, TEMP. L.Q.D (1992).

Act.<sup>30</sup> The Act forbids state or local government from imposing or implementing a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including an institution, unless the government can demonstrate that imposing the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. The Act further defines "religious exercises" to include the use of a building, and defines "land use regulation" as a "landmarking law." The Act is clearly intended to make it difficult for the government to regulate religious buildings for historic preservation purposes. Lawyers for the National Trust for Historic Preservation suspect that it, like the RFRA, may eventually be declared unconstitutional.<sup>31</sup>

### Listing of Historic Sites

The listing of historic sites is a first and important step in state and local historic preservation efforts. The most important of the historic preservation lists, however, is the National Register of Historic Places under the NHPA.

#### *The National Register*

The NHPA is the primary legislation in a national effort to protect and preserve areas of historic and cultural significance.<sup>32</sup> The NHPA provides the authority for: (1) the National Register of Historic Places, which is a listing of historic sites and objects of national, state, or local significance; (2) a matching grant-in-aid program to encourage preservation; and (3) the federal Advisory Council on Historic Preservation (ACHP), which consults with and oversees federal project effects and, where appropriate, comments on agency actions affecting historic sites.<sup>33</sup>

The effect of the NHPA is twofold. First, it requires the federal government to consider the comments of the ACHP when a federal agency engages in an undertaking that will affect "any district, site, building, structure or object that is included in or eligible for inclusion in the National Register."<sup>34</sup> The advisory council's recommendation, however, is not binding.<sup>35</sup> Second, the Act encourages and facilitates historic preservation by offering tax incentives and grants to owners of designated properties and by serving as a catalyst for state and local efforts.<sup>36</sup> Despite such an extensive legislative scheme, the NHPA is largely confined to regulating the activities of the federal government.<sup>37</sup>

The listing of National Landmarks is a related aspect of the National Register. Properties eligible for designation as landmarks are listed on the National Register as "National Historic Landmarks of national historic significance" pursuant to different standards established and promulgated by the Secretary of the Interior.<sup>38</sup> This program is operated as a part of the National Park Service (NPS).<sup>39</sup> A national historic landmark is afforded greater protection than other property listed on the National Register.<sup>40</sup>

#### Listing on the National Register

The criteria for listing on the National Register is established and promulgated by the Secretary of the Interior.<sup>41</sup> Consistent with the purposes and policies of the Act, qualification standards are broadly defined to include sites and objects of national, state, and local historic or cultural significance.<sup>42</sup> The criteria for evaluating whether a property should be listed on the National Register are set forth in NPS regulations.<sup>43</sup> The National Register criteria for evaluation state:

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

(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) that are associated with the lives of persons significant in our past; or

(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic value, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) that have yielded, or may be likely to yield, information important in pre-history or history.<sup>44</sup>

The Act also provides that:

[C]emeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original location, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years shall not be considered eligible for the National Register.<sup>45</sup>

These properties may qualify for listing on the National Register only if they are part of a larger, eligible district or if they meet additional criteria set forth in the *Code of Federal Regulations*.<sup>46</sup> The eligibility criteria have been broadly in-

30. 42 U.S.C. §2000bb.

31. Panel Presentation on the Religious Land Use and Institutional Persons Act, APA National Planning Conference (March 2000); Interview with Elizabeth Merritt, General Counsel, National Trust for Historic Preservation, Washington, D.C. (May 2001).

32. 16 U.S.C.A. §§470 et seq.; see also JUERGENSMEYER & ROBERTS, *supra* note 2, at 578-79.

33. 16 U.S.C.A. §§470a, 470b, 470f, 470j; see also JUERGENSMEYER & ROBERTS, *supra* note 2, at 579.

34. 16 U.S.C.A. §470f; see also *Stewart v. Federal Reserve Bank of Atlanta*, No. CIV.A. 00-3183, 2000 WL 1681235 (E.D. La. Nov. 7, 2000).

35. 36 C.F.R. §60.2(a); see also 16 U.S.C.A. §470f; *Stewart*, 2000 WL 1681235, at \*2; DAVID L. CALLIES, *REGULATING PARADISE* 76 (University of Hawaii Press 1984).

36. 16 U.S.C.A. §470a(b)-(e); 36 C.F.R. §60.2(c); see also JUERGENSMEYER & ROBERTS, *supra* note 2, at 580-81.

37. JUERGENSMEYER & ROBERTS, *supra* note 2, at 581.

38. 16 U.S.C. §470a(a)(1)(B).

39. JUERGENSMEYER & ROBERTS, *supra* note 2, at 579.

40. *Id.*

41. 16 U.S.C.A. §470a(a)(2).

42. *Id.* §470a(a)(1); see also JUERGENSMEYER & ROBERTS, *supra* note 2, at 579.

43. 36 C.F.R. §60.4.

44. *Id.*

45. *Id.*

46. *Id.*

terpreted to include a single tree, provided it adheres to the "appropriate historic characteristics and associations[.]"<sup>47</sup>

A property may become eligible for listing by several processes. First, state historic preservation officers are responsible for "identify[ing] and nominat[ing] eligible properties" pursuant to approved state historic preservation programs.<sup>48</sup> Second, federal agencies are required to establish programs "to locate, inventory and nominate . . . properties under the agency's ownership or control that appear to qualify for inclusion" on the National Register, with the advice of the Secretary and the cooperation of the state historic preservation officer.<sup>49</sup> Such agencies are further required to preserve any listed properties under their ownership or control.<sup>50</sup> Third, the NHPA encourages cooperation between state and federal preservation officers in "locating, inventorying, evaluating, and nominating" properties.<sup>51</sup> Fourth, state and federal preservation officers are required to accept and respond to private nominations.<sup>52</sup> Finally, Congress may nominate eligible properties.<sup>53</sup> Local initiative, followed by a state review process, is the primary vehicle for identifying and nominating properties.<sup>54</sup>

Once a property is nominated, the Secretary is responsible for accepting and evaluating nominations and may place the property on the National Register provided it meets the criteria set forth in the NPS regulations.<sup>55</sup> The Secretary is also required to maintain the National Register and provide the Speaker of the House and the president with an annual list of all properties included therein.<sup>56</sup>

There is a split in the courts regarding whether there must be an official determination that the property is eligible for inclusion on the National Register before the provisions of the NHPA apply.<sup>57</sup> A reasonable reading of the NHPA indicates that the determination must be official, but the provisions of the NHPA are broad and have been liberally construed by the courts.<sup>58</sup> Once a property is listed or eligible for listing on the National Register, the property is entitled to the federal protective program and, at least for listed properties, the federal incentive program.<sup>59</sup>

## Protecting Historic Property

The protective aspect of the National Register requires that any federally conducted or authorized undertaking must take into account the effect of the activity on any listed or eligible property.<sup>60</sup> Listing on the National Register, however, has no effect on private or state activities.<sup>61</sup>

Section 470f provides that the "head of any federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking shall . . . take into account the effect of the undertaking on any [property] that is included or eligible for inclusion on the National Register."<sup>62</sup> Thus, there are three restrictive criteria in the statute. First, the federal agency must have jurisdiction. Second, there must be a "federal or federally assisted undertaking." Finally, the undertaking must "affect" the property at issue.

There is very little case law regarding the first limitation. In *Sheridan Kalorama Historical Ass'n v. Christopher*,<sup>63</sup> the court recognized "jurisdiction" and "undertaking" as distinct requirements and held that having the opportunity to disapprove of a proposed project did not give the Secretary of State jurisdiction over the project. Thus, at least in the Tenth and D.C. Circuits, it would seem that an agency must have some additional authority, such as licensing or federal funding, in order to have "jurisdiction."<sup>64</sup> Other circuits have not made a clear distinction between "jurisdiction" and "undertaking."<sup>65</sup> In those circuits, if an undertaking is found, that will likely satisfy the jurisdictional question.<sup>66</sup>

The NHPA defines an "undertaking" as:

[A] project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including: (A) those carried out by or in on behalf of the agency; (B) those carried out with Federal financial assistance; (C) those requiring a Federal permit, license, or approval; and (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.<sup>67</sup>

The case law interpreting and applying this definition is extensive. In *Vieux Carre Property Owners, Residents & Associates v. Brown*,<sup>68</sup> the court applied a very broad definition and held that a federal undertaking occurred where private park developers operated under a federal license and were subject to review by the U.S. Army Corps of En-

47. *Hatmaker v. Georgia Dep't of Transp.*, 973 F. Supp. 1058, 1066-67 (M.D. Ga. 1997).

48. 36 C.F.R. §60.6.

49. *Id.* §60.9.

50. 16 U.S.C.A. §470h; see also *Fein v. Peltier*, 949 F. Supp. 374, 378 (V.I. 1996).

51. 36 C.F.R. §60.10.

52. *Id.* §60.11.

53. JUERGENSMEYER & ROBERTS, *supra* note 2, at 519.

54. *Id.* at 579.

55. See also CALLIES, *supra* note 35, at 75.

56. 16 U.S.C.A. §470a.

57. Compare *Birmingham Realty Co. v. General Servs. Admin.*, 497 F. Supp. 1377, 11 ELR 20025 (N.D. Ala. 1980) (the provisions of the NHPA do not apply to properties that have neither been nominated for the National Register nor determined by any federal agency to be eligible), and *Wisconsin Heritages, Inc. v. Harris*, 460 F. Supp. 1120, 9 ELR 20082 (E.D. Wis. 1978) (the NHPA only applies to eligible or listed properties), with *Boyd v. Roland*, 789 F.2d 347, 16 ELR 20861 (5th Cir. 1986) (eligible property is not restricted to property that has been officially determined eligible for inclusion in the National Register).

58. See, e.g., *Hatmaker v. Georgia Dep't of Transp.*, 973 F. Supp. 1058, 1066-67 (M.D. Ga. 1997).

59. 16 U.S.C.A. §470f; see also JUERGENSMEYER & ROBERTS, *supra* note 2, at 579.

60. 16 U.S.C.A. §470f (this provision is also referred to as §106 of the NHPA).

61. 36 C.F.R. §60.2(c); see also *Foundation for San Francisco's Architectural Heritage v. City & County of San Francisco*, 165 Cal. Rptr. 401, 413 (Cal. Ct. App. 1980) (no requirements of any kind are imposed on private initiative); *Ely v. Velde*, 451 F.2d 1130, 1 ELR 20612 (4th Cir. 1971) (no duties are imposed on the states).

62. 16 U.S.C.A. §470f (emphasis added).

63. 49 F.3d 750, 755-56 (D.C. Cir. 1995); see also *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 20 ELR 21433 (10th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991) (bridge that was not under direct or indirect jurisdiction of the Federal Highway Administration did not come within the purview of the NHPA).

64. *Sheridan*, 49 F.3d at 755-56; see also *Lee v. Thornburgh*, 877 F.2d 1053, 1057 (D.C. Cir. 1989).

65. *Sheridan*, 49 F.3d at 756.

66. *Id.*

67. 16 U.S.C.A. §470w(7).

68. 948 F.2d 1436, 22 ELR 20497 (5th Cir. 1991).

gineers.<sup>69</sup> Apart from *Vieux Carre* and a few other decisions, the courts seem inclined to strictly interpret "undertaking" and limit the scope of the NHPA to the statutory examples.<sup>70</sup>

Once it is determined that an action is a federal "undertaking," it must also be found that the action will "affect" the historic property at issue.<sup>71</sup> There is no statutory definition of this standard; however, insignificant or minimal effects are likely insufficient to trigger the NHPA.<sup>72</sup>

When a federal "undertaking" that "affects" any property is found, the ACHP often advises the federal agency involved.<sup>73</sup> Section 470f provides that the head of a federal agency "shall afford the [ACHP] a reasonable opportunity to comment with regard to such undertaking."<sup>74</sup> The recommendations of the ACHP, however, are advisory, and the NHPA only requires that the federal agency consider the council's comments.<sup>75</sup> As long as the agency involved affords the ACHP an opportunity to review the project and considers the ACHP's comments and recommendations, the agency will have complied with the NHPA.<sup>76</sup>

Once the agency has complied with the NHPA, the project may proceed, even if it will adversely affect a listed property.<sup>77</sup> Because the advisory council's opinion is not binding, the NHPA essentially buys time.<sup>78</sup> In some instances, however, the impact of the protective aspect of the

NHPA may be profound because the review process can take several years.<sup>79</sup> Moreover, the advisory council's comments usually result in a memorandum of agreement that includes measures to avoid, minimize, or mitigate any adverse effects of the federal action.

#### Federal Incentives for Listing

The incentive aspect of the NHPA has two prongs. First, it provides tax breaks to private owners of listed properties, as discussed above.<sup>80</sup> Through various actions, an owner may receive tax deductions, incentives, and exemptions for rehabilitating and maintaining historic structures.<sup>81</sup> Second, it serves as a catalyst for state and local preservation efforts by establishing guidelines for preservation programs.<sup>82</sup> Under the NHPA, the Secretary is required to promulgate regulations for state preservation programs.<sup>83</sup> The Secretary is also responsible for approving eligible programs and conducting periodic audits.<sup>84</sup> The NHPA has a similar provision for approving and regulating local preservation programs as an extension of a certified state program.<sup>85</sup> Qualifying state programs are eligible for federal matching grants to fund historic preservation activities.<sup>86</sup> The funds are used for administrative costs, to develop preservation plans, to conduct surveys, and to prepare nominations for the National Register.<sup>87</sup> The NHPA also makes grants directly available to the owners of listed properties for restoration efforts with the assistance of the state historic preservation officer.<sup>88</sup> The grant program has been a catalyst for state and local preservation efforts and has led to greater uniformity among the states.<sup>89</sup> Unlike the protective aspect of the NHPA, the tax incentives and grant provisions have not received extensive court review. Appeals are dealt with through administrative review within the NPS.

#### Commentary

Despite its impressive stature, the NHPA has only moderate legal effect. Although it is relatively easy to have a property listed on the National Register, the "hammer" or protective aspect of the Act applies only to federal undertakings, and where it does apply, the ACHP's opinion is only advisory. The "carrot" or incentive aspect of the NHPA has more effect. However, the tax breaks and limited grants may prove too small to be of value to owners because the cost of preserving historic structures can be high.<sup>90</sup> The NHPA likely has its most profound impact by encouraging state and local

69. See also *Fein v. Peltier*, 949 F. Supp. 374, 379 (V.I. 1996) (the court read "undertaking" liberally to include any project or activity under the direct or indirect jurisdiction of a federal agency, which requires prior approval or licensing, regardless of federal funding).

70. See *McMillan Park Comm. v. National Capital Planning Comm'n*, 968 F.2d 1283, 1288-90 (D.C. Cir. 1992) (amendment to an agreement that only codified a change in accord with an ACHP recommendation does not require additional review). See also *Sugarloaf Citizens Ass'n v. Federal Energy Regulatory Comm'n*, 959 F.2d 508, 514-15 (4th Cir. 1992) (certification of a state-owned facility pursuant to federal regulation is not an "undertaking"); *Western Mohegan Tribe & Nation of N.Y. v. New York*, 100 F. Supp. 2d 122 (N.D.N.Y. 2000) (termination of federal funding ends any duty to compile advisory report for the ACHP); *Ringsred v. City of Duluth*, 828 F.2d 1305, 1308, 18 ELR 20115, 20116 (8th Cir. 1987) (because the Secretary's role in the project was incidental, failure to consider effect of a parking ramp on historic property was not an "undertaking"); *Techworld Dev. Corp. v. D.C. Preservation League*, 648 F. Supp. 106, 119-20 (D.C. Cir. 1986) (a federal agency making a nonbinding recommendation to the mayor regarding a purely local matter was not an "undertaking"); *Yerger v. Robertson*, 981 F.2d 460, 23 ELR 20584 (9th Cir. 1992) (the NHPA does not apply when a federal agency merely assumes title or control over an eligible or listed site).

71. 16 U.S.C.A. §470f.

72. See *Morongo Band of Mission Indians v. Federal Aviation Admin.*, 161 F.3d 569, 582-83, 29 ELR 20336, 20341 (9th Cir. 1998) (flight path over historic district would not have any significant effects, and, thus, the NHPA does not apply); *Cobble Hill Ass'n v. Adams*, 470 F. Supp. 1077, 9 ELR 20710 (E.D.N.Y. 1979) (indirect harm from highway project located outside historic district did not warrant relief).

73. 16 U.S.C.A. §470f.

74. *Id.*

75. *Foundation for San Francisco's Architectural Heritage v. City & County of San Francisco*, 165 Cal. Rptr. 401, 413 (Cal. Ct. App. 1980) (the ACHP's opinion must be taken into account and integrated into the decisionmaking process, but the final decision rests with the agency implementing the undertaking); see also *Stewart v. Federal Reserve Bank of Atlanta*, No. CIV.A. 00-3183, 2000 WL 1681235 n.2 (E.D. La. Nov. 7, 2000).

76. See, e.g., *Hickory Neighborhood Defense League v. Skinner*, 893 F.2d 58, 60, 20 ELR 20540 (4th Cir. 1990) (compiling a report that analyzed alternatives that satisfied the NHPA).

77. JUERGENSMEYER & ROBERTS, *supra* note 2, at 580.

78. CALLIES, *supra* note 35, at 76.

79. JUERGENSMEYER & ROBERTS, *supra* note 2, at 580; CALLIES, *supra* note 35, at 76.

80. 36 C.F.R. §60.2(c).

81. *Id.*

82. 16 U.S.C.A. §§470a(b)-(e), 470h.

83. *Id.* §470a(b).

84. *Id.*

85. *Id.* §470a(c).

86. *Id.* §470(a)(c), (e).

87. JUERGENSMEYER & ROBERTS, *supra* note 2, at 579.

88. 16 U.S.C.A. §410a(e).

89. JUERGENSMEYER & ROBERTS, *supra* note 2, at 580.

90. See, e.g., *Figarsky v. Historic Dist. Comm'n*, 368 A.2d 163, 167-69, 6 ELR 20654 (Conn. 1976) (cost of repairs estimated at \$15,000 to bring a historic building up to code).

preservation efforts by establishing guidelines and grants for eligible programs, as described above.

### *State Lists: The Hawaii Register of Historic Places*

Hawaii's statutory scheme for listing of historic sites and the consequences of such listing are typical of state registers of historic places. The agency responsible for listing properties in Hawaii is the Historic Places Review Board, which also recommends sites for inclusion on the National Register. Placed within the Hawaii Department of Land and Natural Resources (DLNR) for administrative purposes, the 10-member board is appointed by the governor.<sup>91</sup> Its criteria for registration and nomination are adopted pursuant to statutory direction:

The quality of significance in Hawaiian history, architecture, archaeology, and culture is present in districts, sites, buildings, structures, and objects of state and local importance that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or (b) that are associated with the lives of persons significant in our past; or (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or represent a significant and distinguishable entity whose components may lack individual distinction; or (d) that have yielded, or may likely yield information important in prehistory or history.<sup>92</sup>

As with the federal program, there are a series of exceptions for cemeteries, birthplaces, and properties owned by religious institutions, and properties that have achieved significance only in the past 50 years. While nominations for listing are customarily made by the state historic preservation officer, anyone may nominate a site.<sup>93</sup>

Being listed on the Hawaii Register, while hardly a paragon of strength, does provide for a measure of temporary site protection. An owner of a listed site must notify and secure the concurrence of the DLNR for any proposed construction, alternation, transfer, or improvement that will affect a historic property. In the event DLNR approval is not secured, however, the owner need only wait 90 days before altering or demolishing a site. During that time the DLNR may commence condemnation proceedings or undertake investigation, recordation, preservation, and salvage of "any historical information deemed necessary to preserve Hawaiian history" (including, presumably, the moving of a historic structure from the premise). Violation of these regulations results in a modest fine of up to \$10,000 per offense.<sup>94</sup>

A cause célèbre in both local and national historic preservation circles since 1979 has been the listing or registration on the National and Hawaii Registers of the Royal Hawaiian Hotel (affectionately known as the Pink Palace) in Waikiki. Although it was subject to critical historic preservation comment during construction (several structures deemed to be historic were demolished to make way

for it), the Royal Hawaiian Hotel was finally listed in early 1980 on the Hawaii Register and nominated for the National Register.<sup>95</sup>

Not so famous outside of Hawaii, the Alexander Young Building in Honolulu also became something of a cause in the historic preservation community before its demolition. Once a luxurious downtown hotel (for which Honolulu has yet to find a replacement) and officers' quarters, the 77-year-old edifice was last used as an office building. Although listed on both the Hawaii and the National Registers, there was considerable division in the community over its historic value. It was described as both a "nostalgic grey giant" and a "renaissance monstrosity." The DLNR opted not to purchase the building, and its owner, the Northwestern Mutual Life Insurance Company, demolished it in 1980 to make way for a 29-story office building and a three-quarter acre park. Both daily newspapers in Honolulu favored its demise, given the owner's plans for developing the site, and many applauded the addition of open space in the downtown business district.<sup>96</sup>

### **Other Incentives for Preservation**

#### *Tax Law*

For at least a decade, relatively generous tax credits for the rehabilitation of historic structures resulted in substantial investment in and, hence, the enhanced preservation of, historic properties. Unfortunately for historic preservation, these credits were substantially reduced in the Tax Reform Act of 1986, leading to diminished use and consequent diminished positive effect on historic buildings.<sup>97</sup> In general, the tax laws provided substantial credits for qualified expenditures on the rehabilitation of historic buildings that were certified either by means of listing on the National Register or through designation by a state historic preservation officer in accordance with the U.S. Department of the Interior's *Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings*.<sup>98</sup> Tax deductions are

95. See the photograph in the August 8, 1979, *Honolulu Advertiser* "Letters to Editor" page taken about 1927 showing the Royal Hawaiian Hotel rising with the caption: "Vanished Waikiki Landmark—the wooden seaside building on the left was razed shortly after this picture was taken to make room for the Royal Hawaiian Hotel rising in the background"; *Royal Hawaiian Hotel Placed on State's Historic Register*, HONOLULU STAR-BULL., Jan. 15, 1980.

96. Editorial, HONOLULU STAR-BULL., Dec. 17, 1980; Editorial, HONOLULU ADVERTISER, Dec. 17, 1980; Joe Farrell, *Opening Up Space Downtown*, HONOLULU STAR-BULL., July 22, 1980; Lee Gomes, *Young Building Might Be Torn Down*, HONOLULU STAR-BULL. July 22, 1980; Clara Orenstein, *The Alexander Young's Place in History*, HONOLULU STAR-BULL., Dec. 25, 1980; Kit Smith, *High-Rise and Park to Be Built in Place of Young Building*, HONOLULU ADVERTISER, Dec. 16, 1980; George V. Whisenand, *Letter to the Editor*, HONOLULU STAR-BULL., Dec. 17, 1980; *Young Building Makes National List*, HONOLULU STAR-BULL., Aug. 6, 1980.

97. 26 U.S.C.A. §§44 et seq.

98. JUERGENSMEYER & ROBERTS, *supra* note 2; DAVID E. CALLIES ET AL., *CASES AND MATERIALS ON LAND USE* 446 (1999). See also Bradford J. White & Lee Keatings, *Historic Preservation and Architectural Control Law*, 24 URB. LAW. 865 (1992); Richard Roddewig, *Recent Developments in Land Use Planning and Zoning Law*, 22 URB. LAW. 719, 750 (1990); Carolyn Cheverine & Charlotte Hayes, *Rehabilitation Tax Credit: Does It Still Provide Incentives?*, 10 VA. TAX REV. 167 (1990).

91. HAW. REV. STAT. §6E-5.5 (1980 Supp.).

92. State of Hawaii, Historic Places Review Board, *Rules and Regulations* (1978, as amended).

93. *Id.*

94. HAW. REV. STAT. §6E-11 (1992).

also available for the donation of preservation and conservation easements.<sup>99</sup>

### *Impact Statements and Reviews*

Both NEPA and §4(f) of the DOT Act require the consideration of historic landmarks before the initiation of federal actions. NEPA requires federal actions, including the federal funding of projects, to consider the project's impact on the cultural environment.<sup>100</sup> Section 4(f) of the DOT Act prohibits the approval or funding of transportation projects that require the use, direct or indirect, of historic sites unless there is no feasible or prudent alternative and the project includes all possible planning to minimize harm to the site.<sup>101</sup> In addition, the Coastal Zone Management Act (CZMA) attempts to preserve, protect, develop, restore, and enhance the resources of the nation's coastal zones.<sup>102</sup> The CZMA supports efforts to preserve and restore historic, cultural, and aesthetic coastal features and redevelop deteriorating urban waterfronts and ports by providing federal grants to states with approved coastal management programs. Under the Surface Mining Control and Reclamation Act, the Secretary of the Interior or a state, pursuant to an approved state program, may acquire land adversely affected by past coal mining if the land after restoration will serve recreation and historic purposes.<sup>103</sup> The Archeological Resources Protection Act aims to prevent the loss and destruction of archeological resources on Native American land by requiring a permit in order to excavate or remove any archeological resources on these lands.<sup>104</sup> Finally, the Public Buildings Cooperative Use Act requires the General Services Administration, upon advice from the ACHP, to look for buildings of historical, architectural, and cultural significance for acquisition for federal offices.<sup>105</sup>

The NHPA also requires a review process similar to those above. Although advisory, it has the potential for delaying projects that are federally funded. Thus, the discovery of an ancient Hawaiian rock carving delayed for more than a decade the construction of a federal-aid highway when it was discovered virtually in the path of the planned highway.<sup>106</sup>

Under certain circumstances or conditions, a historic site may be subject to review under state laws. For example, environmentally significant actions requiring an environmental impact assessment under the Hawaii Environmental Policy Act (HEPA) include proposing "any use within any historic site as designated in the National Register or Hawaii Register."<sup>107</sup> In the assessment, the "historic perspective" must be addressed as part of the project description. The environment in the vicinity of the proposed action must also be

described, including "natural or man-made resources of historical or archaeological significance."<sup>108</sup> Once such an assessment is made, however, there is nothing to prevent an adverse use from proceeding.

Also, Hawaii's CZMA deals with the preservation of historic sites.<sup>109</sup> Each county administers coastal zone special management areas (SMAs) by requiring SMA permits for all developments. One of the standards for receiving a permit requires that the proposed development be consistent with the state's statutory objectives, policies, and SMA guidelines. Among the objectives is one calling for the county to "protect, preserve, and, where desirable, restore those natural and man-made historic and prehistoric resources in the coastal zone management area that are significant in Hawaiian and American history and culture."<sup>110</sup> Further, one of Hawaii's CZMA polices is to "support state goals for protection, restoration, interpretation, and display of historic resources."<sup>111</sup> These requirements apparently give counties the right to deny a permit for any development that threatens a significant resource as defined in Hawaii's CZMA. What is "significant" is largely governed by a 1988 statutory directive requiring city and state agencies to notify the DLNR before permitting or approving any project that "may affect historic property or a burial site" including those listed on the Hawaii Register.<sup>112</sup> Rules providing a process for evaluating "significance" are presently in the draft stage.<sup>113</sup>

One more state statute affects the preservation of historic sites: Act 100, the State Plan Act.<sup>114</sup> Act 100 contains a number of broad policies, objectives, and goals that address historic preservation. For example, one of its objectives states that planning for the state's physical environment "shall be directed towards achievement of the objective of enhancement of Hawaii's . . . historic resources."<sup>115</sup> The State Plan Act's policies include: promoting the preservation and restoration of significant natural and historic resources; providing incentives to maintain and enhance historic, cultural, and scenic resources; and protecting those special areas, structures, and elements that are an integral and functional part of Hawaii's ethnic and cultural heritage.<sup>116</sup> These criteria are all binding on both state agencies and on the counties' development planning and implementation process.

### **Conclusion**

State and local governments continue to be the primary protectors of private historic buildings and sites in the United States through the exercise of their inherent and delegated police power. However, courts occasionally balk at such exercise for the tenuous "welfare" purpose associated with

99. *Id.*

100. 42 U.S.C. §4332, ELR STAT. NEPA §102.

101. 49 U.S.C. §303.

102. 16 U.S.C. §§1451-1465, ELR STAT. CZMA §§302-319.

103. 30 U.S.C. §1237, ELR STAT. SMCRA §407.

104. 40 U.S.C.A. §611(c).

105. 16 U.S.C.A. §470.

106. See *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434, 6 ELR 20424 (9th Cir. 1976); see also *Gettysburg Battlefield Preservation Ass'n v. Gettysburg College*, 799 F. Supp. 1571 (M.D. Pa. 1992); PATRICIA MILLER, A SURVEY OF FEDERAL STATE AND LOCAL LAWS GOVERNING HISTORIC RESOURCE PROTECTION (1997); JUERGENSEMEYER & ROBERTS, *supra* note 2, at 580-81.

107. HAW. REV. STAT. §343 (1974).

108. *Id.* §343-5 (1979 Supp.); State of Hawaii, Environmental Quality Commission, *Rules of Practice and Procedure*, subpt. E, §1.42 (1975).

109. HAW. REV. STAT. §205A (1979 Supp.).

110. *Id.* (2000 Supp.).

111. *Id.* §205A(C)(2)(C).

112. *Id.* §6E-42 (1993).

113. Written response of Donald Hibbard, Hawaii's State Preservation Officer (August 2001).

114. HAW. REV. STAT. §225 et seq. (2000).

115. *Id.* §226-12.

116. *Id.*

regulating for historic preservation purposes, particularly when historic property designation imposes maintenance and repair burdens on the owner in addition to restrictions on use. Given the increased protection afforded property rights in federal courts today, it is both necessary and prudent to continue to look beyond police power regulation for the pro-

tection of historic structures. It is therefore critical that the kinds of reviews and benefit programs largely associated with the federal role in historic preservation both continue and increase. Indeed, it would behoove state and local government to increase resources available to owners of historic properties as well.