NORTH CAROLINA LAW REVIEW

Volume 63 | Number 2 Article 6

1-1-1985

Applying Historic Preservation Ordinances to Church Property: Protecting the Past and Preserving the Constitution

Elizabeth Cameron Richardson

Applying Historic Preservation Ordinances to Church Property: Protecting the Past and Preserving the Constitution

"It's a red-hot issue,"[1] according to New York State Senator John Flynn. In May 1983 New York City's Interfaith Commission introduced a bill in the General Assembly that would have exempted houses of worship from local preservation laws. This move was the latest round in the battle between religious organizations and preservationists in New York City. Although the New York General Assembly rejected the bill,[2] the battle still rages.

At the center of the controversy is St. Bartholomew's Episcopal Church, on Park Avenue. The church requested the Landmarks Preservation Commission's approval to build a fifty-nine story office complex over the landmark church structure.[3] Proponents of the development plan had also requested that the church be decertified as a landmark.[4] They assert that the landmark designation infringes their first amendment right to free exercise of religion because the designation places restrictions on how they can alter or dispose of church property.[5] Opponents of the landmark designation contend that the Landmarks Law "leaves the church in the position of requiring secular approval for a decision on how to use its resources."[6] They further assert that churches have a constitutional right "not to be hindered by landmark laws."[7]

Preservationists and a group of St. Bartholomew's parishioners oppose the church's plan because it would destroy "one of the most priceless and irreplaceable church edifices in New York City."[8] They contend that the first amendment argument is specious and that the issue has been raised only because the church cannot make a successful case for relief based on economic hardship.

St. Bartholomew's is not alone in contesting its landmark designation. The St. Paul and St. Andrew United Methodist Church has filed suit against the New York Landmarks Commission for $30,000,000 in damages allegedly suffered as a result of its landmark designation. The church also has alleged that the landmark designation violated its first amendment rights.[9] This case has not been decided.

The intense debate over the constitutionality of applying historic preservation laws to churches has not been settled. The debate focuses on two constitutional questions: when does the application of historic preservation laws to churches abridge the first amendment guarantee of free exercise of reli-

---

1. N.Y. Times, June 15, 1983, at B6, col. 1.
2. N.Y. Times, Aug. 28, 1983, at D18, col. 1.
3. N.Y. Times, Dec. 13, 1983, at A1, col. 3.
4. *Id.* at B24, col. 6.
5. *Id.* at A1, col. 3.
6. *Id.* at col. 4.
7. *Id.*
8. *Id.*
9. *Landmark Churches Raise Constitutional Issues*, 2 PRESERVATION L. REP. 1061 (1983).

gion[10] and what standard should be applied to determine whether a historic preservation law, as applied to church-owned property, is so burdensome that it constitutes a taking?[11] The United States Supreme Court has not addressed either issue. Very few lower courts have dealt with the taking issue and case law concerning the first amendment issue is particularly sparse.[12]

It is difficult for courts to determine standards for treatment of church property. The prohibitions of the first amendment[13] place the courts squarely between Scylla and Charybdis. On the one hand, courts cannot infringe on the free exercise of religion by enforcing preservation laws too strictly. On the other hand, the establishment clause of the first amendment dictates that courts cannot uphold laws that constitute an impermissible establishment of religion by granting churches preferential treatment.[14]

It is difficult to formulate broad rules to apply in every case involving church-owned property. Whether there is a first amendment violation or a taking[15] depends on the facts and circumstances of each case. There is, how-

---

10. *See infra* text accompanying notes 46-118.

11. *See infra* text accompanying notes 119-211.

12. The only case that deals squarely with a historic preservation regulation and the free exercise of religion is Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980). *Society for Ethical Culture* also addresses the taking issue. Other cases that deal with whether application of a historic preservation regulation of church property constitutes a taking include Lutheran Church in Am. v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974); First Presbyterian Church v. City Council, 25 Pa. Commw. 154, 360 A.2d 257 (1976).

13. The United States Supreme Court explained the difference between the free exercise clause and the establishment clause in Engel v. Vitale, 370 U.S. 421 (1962).

> Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental encroachment, and is violated by the enactment of laws which establish an official religion, whether those laws operate directly to coerce non-observing individuals or not.

Id. at 430.

14. In Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), the United States Supreme Court articulated the test to determine whether a statute is constitutional within the ambit of the establishment clause. First, the statute must have a secular purpose. Second, the statute's primary effect must neither inhibit nor advance religion. Third, the statute must not foster excessive government entanglement with religion. The establishment clause was made applicable to the states under the fourteenth amendment in 1947. Everson v. Board of Educ., 330 U.S. 1 (1947).

In the context of historic preservation, a governmental unit risks violating the establishment clause if it applies historic preservation ordinances more leniently to church property than to other types of property, or exempts church property from such ordinances altogether. This issue soon will be addressed in the case of Old Independence, Inc. v. Board of Deacons of the First Baptist Church of Independence, No. 83-1042-CV-W-9 (W.D. Mo. filed Sept. 15, 1983). Churches are now exempt from the demolition and alteration restrictions imposed within the Harry S Truman Heritage District. Old Independence asserts that the exemption contravenes the establishment and equal protection clauses of the Constitution. For a fuller discussion of the establishment clause in the context of historic preservation, see Xeller, *The Impact of the First Amendment on the Preservation of Religious Structures*, 3 PRESERVATION L. REP. 2005 (1984).

15. A "taking" occurs when the government deprives a private landowner of the use or benefit of his land without just compensation. *See infra* text accompanying notes 119-28. There is no standard to determine when a historic preservation regulation so interferes with a property owner's rights that the government must compensate the owner. The standard to determine when a regulation constitutes a taking depends on whether property is used for commercial purposes or church purposes. *See infra* text accompanying notes 129-54 (taking in a commercial context) and

ever, a clear need for courts to announce general principles for the application of historic preservation regulations to church property. Clear standards will enable local government bodies and owners of church property to work together more effectively and balance the sometimes conflicting goals of preserving historic churches and upholding the Constitution.

In 1933 the federal government began to list historically significant structures in the Historic Buildings Survey. It is estimated that by 1971 over half of these buildings had been destroyed.[16] Only in the past twenty-five years has there been a widespread effort to enact legislation to protect historic structures. Today all fifty states have preservation laws;[17] over one thousand local preservation ordinances[18] and several federal statutes protect historic properties.[19]

The daily operations of designating and regulating historic properties take place at the local level. State enabling legislation authorizes local governmental units to designate both historic districts and historic landmarks.[20] A historic district is an area of historical, cultural, or architectural significance that possesses integrity of design, setting, materials, feeling, and association.[21] A historic landmark, sometimes called a historic property, is an individual, often isolated, building of historic, cultural, or architectural value.[22]

To analyze the constitutional questions regarding application of historic preservation laws to churches, the procedure for designation and regulation of historic districts and landmarks must be understood. North Carolina's historic

---

text accompanying notes 155-211 (takings in the context of property owned by a church or other charitable organization).

16. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 108 n.2 (1978).

17. *Id.* at 107.

18. Duerksen, *Preface* to A HANDBOOK ON HISTORIC PRESERVATION LAW xxi (C. Duerksen ed. 1983).

19. *See, e.g.*, National Historic Preservation Act, 16 U.S.C. § 470 (1982); 16 U.S.C. § 470a (a)(1) (1982); 23 U.S.C. § 1381 (1982); National Environmental Policy Act, 42 U.S.C. §§ 4321-4361 (1982). *See generally* Fowler, *Federal Historic Preservation Law: National Historic Preservation Act, Executive Order 11593, and other Recent Developments in Federal Law*, 12 WAKE FOREST L. REV. 31 (1976) (reviewing development of federal scheme protecting historic properties).

20. Some states authorize the designation of historic districts or historic properties through the general zoning power. *See, e.g.*, N.Y. GEN. MUN. LAW § 96-a (McKinney 1976). Most state statutes, however, authorize the designation of historic districts and historic properties and also set forth administrative procedures for designation and regulation. A typical example is the North Carolina historic preservation legislation. N.C. GEN. STAT. § 160A-174(a) (1982) is a general delegation of the State's power to municipalities: "A city may by ordinance define, prohibit, regulate or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances." N.C. GEN. STAT. §§ 160A-395 to -399 (1982) set forth the administrative procedure for designation and regulation of historic districts. *See infra* text accompanying notes 30-33. N.C. GEN STAT. §§ 160A-399.1 to -399.13 (1982) set forth the administrative procedure for historic properties. *See infra* text accompanying notes 24-29. A few states have constitutional provisions concerning historic preservation. Most notable is the Louisiana Constitution, which authorizes the use of historic district zoning, LA. CONST. art. 6, § 17, and formerly authorized a commission to preserve historic properties in the Vieux Carre in New Orleans. LA. CONST. art. 14, § 22A (1921, deleted but not repealed 1974). For a thorough overview of state historic preservation laws, see Beckwith, *Developments in the Law of Historic Preservation and a Reflection on Liberty*, 12 WAKE FOREST L. REV. 93 (1976).

21. *See, e.g.*, N.C. GEN. STAT. § 160A-395.1 (1982).

22. The distinction between a historic district and an individual historic landmark sometimes is integral to a court's resolution of a constitutional issue, particularly in the taking context. *See infra* text accompanying notes 176-97.

preservation legislation[23] illustrates the procedure used in many states. Before a city or county may pass an ordinance designating a historic property, it must establish a historic properties commission.[24] The historic properties commission recommends individual properties for designation and holds a public hearing on the proposed ordinance.[25] The North Carolina Department of Cultural Resources reviews the proposal.[26] If the local governing body accepts the commission's recommendation and adopts the ordinance designating the historic property, the owner and occupants of the property are given written notification.[27] After property receives a historic designation, the owner must obtain a certificate of appropriateness[28] to alter, restore, move, or demolish the property.[29]

To establish a historic district, the local legislative body must submit a report on the area's historical significance to the North Carolina Department of Cultural Resources.[30] The city or county must establish a historic district commission.[31] After the historic district is designated, a certificate of appropriateness must be obtained from the commission before the exterior portion of any building or other structure within the district may be reerected, altered, restored, moved, or demolished.[32] In North Carolina, historic districts can be implemented either as separate-use districts with their own regulations or as

23. The North Carolina General Assembly rewrote the historic preservation legislation in 1979, granting municipalities the authority to designate historic districts and historic properties. For an account of the legal issues municipalities encounter in the area of historic preservation, see Johnston, *Legal Issues of Historic Preservation for Local Government*, 17 WAKE FOREST L. REV. 707 (1981). For a discussion of historic preservation in North Carolina, see Morgan, *Reaffirmation of Local Initiative: North Carolina's 1979 Historic Preservation Legislation*, 11 N.C. CENT. L.J. 243 (1980); Ross, *Practical Aspects of Historic Preservation in North Carolina*, 12 WAKE FOREST L. REV. 9 (1976); Comment, *The North Carolina Historic Preservation and Conservation Agreements Act: Assessment and Implications for Historic Preservation*, 11 N.C. CENT. L.J. 362 (1980).

24. N.C. GEN. STAT. § 160A-399.2 (1982).

25. *Id.* § 160A-399.3(5), -399.5(4).

26. *Id.* § 160A-399.5(3). The Department of Cultural Resources has the authority to review and comment upon the substance and effect of the proposed designation of a historic property. If the Department does not respond in writing within 30 days of the receipt of the historic properties commission's report, the commission is relieved of responsibility to consider the comments. *Id.*

27. *Id.* § 160A-399.5(5) to (6).

28. The procedure for obtaining a certificate of appropriateness for a historic property is the same as the procedure used for a historic district. *Id.* § 160A-397; *see infra* note 32. If the owner of a designated historic property or a building within a historic district alters the property but fails to obtain a certificate of appropriateness, the owner is subject to the penalties set forth in N.C. GEN. STAT. § 160A-175 (1982). A certificate of appropriateness is not required for ordinary maintenance or repair, or when the building inspector determines that an emergency exists regarding the building's safety. *Id.* §§ 160A-398, -399.7. The historic properties commission may not deny a certificate of appropriateness for demolition of a historic building; the commission, however, may require a 180-day waiting period to negotiate with the owner or to find alternative means of preserving the building. *Id.* § 160A-399.6.

29. N.C. GEN. STAT. § 160A-399.6 (1982).

30. *Id.* § 160A-395.

31. *Id.* § 160A-396. The same commission may serve for historic districts and historic properties, or a planning agency may serve as the commission. *Id.* §§ 160A-396, -399.2.

32. *Id.* § 160A-397. The commission has jurisdiction only over exterior features. *See id.* (definition of "exterior features"). The commission must adopt procedures for the issuance of certificates of appropriateness. The owner of a historic building is entitled to a hearing on the certificate of appropriateness, and the commission's decision may be appealed to the North Carolina Board of Adjustment and then to an appropriate superior court. *Id.*

overlays that impose additional regulations on existing zoning districts.[33]

The relationship between historic districts and traditional zoning is important. Traditional zoning is directed at the use of land and the density and location of buildings. Historic district zoning is concerned only with the preservation of the exterior of buildings with historical significance.[34] The underlying concepts and goals of historic district zoning and traditional zoning, however, are the same.[35]

It is logical for courts to look to the thousands of reported cases dealing with traditional zoning for guidance in resolving historic district zoning issues. Historic preservation law still is in the formative stage. By contrast, courts have resolved many of the major constitutional issues regarding traditional zoning. Thus, courts have applied by analogy the tests and guiding principles developed in traditional zoning cases to resolve constitutional issues in historic preservation cases.

In *Penn Central Transportation Co. v. New York City*[36] the United States Supreme Court addressed the constitutionality of historic preservation restrictions for the first time. The Court upheld the validity of New York's Landmarks Preservation Law, as applied to Grand Central Terminal.[37] After the Landmarks Preservation Commission rejected plans to construct a fifty-story office building above Grand Central Terminal, a designated landmark, the Terminal's owners filed suit, claiming that the application of the Landmarks Preservation Law constituted a taking of their property in violation of the fifth and fourteenth amendments of the Constitution.[38] The Court upheld the Landmarks Law and approved the concept of landmark and historic district legislation. Thus, "[j]ust as the U[nited] S[tates] Supreme Court placed its imprimatur on zoning in the 1920s, so has it now spoken in favor of zoning's sibling, preservation controls . . . ."[39]

---

33. An overlay zone, sometimes called a floating zone, differs from "Euclidean," or separate-use, zoning. Euclidean zoning divides a community into specific districts and assigns a particular land use (residential, commercial, or industrial) to the district. 2 P. ROHAN, ZONING AND LAND USE CONTROLS § 13.01[1], at 13-2 n.3, 13-3 n.4 (1984). All districts are given an immediate classification which freezes the acceptable type of land use for that district. *Id.* at 13-2. The procedure for implementing an overlay zone is different. The local government decides to establish a district for a special use, such as a historic district, but does not designate immediately the boundaries of the district. The special use thus "floats" above the district until the boundaries are defined. *Id.* at 13-5.

34. Mayor of Annapolis v. Anne Arundel County, 271 Md. 265, 291, 316 A.2d 807, 821 (1974).

35. Zoning is the most important method of preservation. 2 P. ROHAN, *supra* note 33, § 7.01[1], at 7-9. Both traditional zoning and historic district zoning seek to preserve the "harmony of the neighborhood." *Id.* § 7.01[3], at 7-17. This fact led the Missouri Court of Appeals to note that a "historic district ordinance is essentially a zoning ordinance." Lafayette Park Baptist Church v. Board of Adjustment, 599 S.W.2d 61, 66 (Mo. Ct. App. 1980). The court further stated that, "[a]s a zoning ordinance [a historic district ordinance] is subject to the same historic tests established by [courts in traditional zoning cases]." *Id.* In Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978), Justice Brennan relied on a long line of traditional zoning cases and applied them in a historic preservation context. *Id.* at 123-25.

36. 438 U.S. 104 (1978).

37. *Id.* at 138.

38. *Id.* at 119.

39. Duerksen, *Local Preservation Law*, in A HANDBOOK ON HISTORIC PRESERVATION LAW

The *Penn Central* Court, however, did more than sanction the concept of preservation legislation. The Court also resolved several major questions concerning the constitutionality of preservation controls. First, the Court rejected the argument that landmark laws are discriminatory zoning because they apply only to selected parcels.[40] The Court concluded that, unlike discriminatory zoning, New York's Landmarks Preservation Law "embodies a comprehensive plan" to preserve historic buildings.[41] Therefore, application of preservation restrictions to individual landmarks as well as to entire historic districts is constitutional. Second, the Court confirmed the notion that aesthetics alone is a proper basis for land-use restrictions.[42] Last, the *Penn Central* Court announced guidelines for determining whether the application of a historic preservation law constitutes a taking.[43]

Penn Central resolves some important constitutional questions. It is unlikely that the historic preservation concept will be challenged again.[44] Historic preservation regulations, however, have been and will continue to be challenged on the basis of factual distinctions.[45] One important distinction that has generated challenges, both on first and fifth amendment grounds, is the application of historic preservation regulations to church property.

The first amendment right to free exercise of religion ensures the freedom to hold religious beliefs.[46] The first amendment, however, does not immunize every activity undertaken by a religious organization from government regulation. Activities of a religious organization merit first amendment protection only when they are "integrally related" to underlying religious beliefs–when the activities involve a "fundamental tenet" or "cardinal principle."[47] Thus, the first amendment does not immunize a religious organization from reason-

---

29, 30 (C. Duerksen ed. 1983). Duerksen refers to Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), in which a property owner challenged a zoning ordinance on the ground that it decreased the value of the land and deprived the owner of property without due process of law. Duerksen, *supra* note 18, at 31. The Supreme Court upheld the ordinance, which excluded industrial establishments from residential districts, on the ground that the ordinance bore a rational relation to the health, safety, and general welfare of the community. *Euclid*, 272 U.S. at 394-95.

40. *Penn Central*, 438 U.S. at 132.

41. *Id.*

42. *Id.* at 129. Appellants did not contest this point, yet the Court still reiterated its approval of aesthetics as a basis for land-use regulation. This approval is important authority for preservationists in jurisdictions in which the state courts have been slow to recognize aesthetics alone as a legitimate basis for land-use regulations.

43. *See infra* text accompanying notes 131-49.

44. Seidel, *Landmarks Preservation after* Penn Central, 17 REAL PROP., PROB. & TR. J. 340, 355 (1982).

45. *Id.*

46. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

47. Sherbert v. Verner, 374 U.S. 398, 404-06 (1963) (unconstitutional to deny unemployment benefits to Seventh Day Adventist who refused to accept job that required work on Saturday, which would violate cardinal principle of her religion); Lakewood Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 306 (6th Cir.) (citing Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) (Wisconsin's school compulsory-attendance law unconstitutional as applied to Amish because law was at odds with fundamental tenet of Amish religious beliefs)), *cert. denied*, 104 S. Ct. 72 (1983).

able governmental regulation when that organization acts in secular matters.[48]

To determine whether a historic preservation regulation interferes with a church's proposed use of its property, courts apply a two-step analysis. First, if the church proposes to use its property in a purely secular manner, courts uphold the historic preservation or zoning regulation and look no further.[49] This analysis requires courts to determine what constitutes a secular use of church property. If the church's use of its property is characterized as religious rather than secular, however, courts advance to the second step, balancing the government's interest in enforcing the regulation against its interference with religion to determine whether the regulation violates the free exercise clause.

In an attempt to delineate what constitutes a secular use, one commentator has suggested that no income-producing use of church property is secular or commercial when the proceeds support the church's religious activities and missions.[50] Under this view, it is not a secular or commercial activity when a church redevelops its property and leases it to a nonreligious tenant if the income derived from such use funds religious activities. The courts, however, have not embraced this extreme view.[51]

In *Society for Ethical Culture v. Spatt*,[52] for example, the New York Court of Appeals took an opposing view. The court held that the development of property for rent to nonreligious tenants would be a "purely secular" activity.[53] Thus, the court determined that a landmark designation that prevented this development did not interfere with the free exercise of the Society's religious activities.

Three cases dealing with traditional zoning further illustrate what constitutes a secular use. Even the selection and use of a building for worship services may be a secular use. In *Lakewood Congregation of Jehovah's Witnesses,*

48. Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 456, 415 N.E.2d 922, 926, 434 N.Y.S.2d 932, 936 (1980).

49. *Id.*

50. *See* Greenawalt, *Church and State: Some Constitutional Questions in Landmarking of Church-Owned Properties*, in PRACTISING LAW INST., HISTORIC PRESERVATION LAW 1982 465, 472-73.

51. Although judicial interpretation of what constitutes a religious activity or use has been expansive, it has not been as expansive as Greenawalt's view. The use of a church or synagogue for worship services is a religious use. *See infra* text accompanying notes 63-65. Courts also have found religious uses in activities ancillary to the actual worship service and buildings ancillary to the actual sanctuary. *See generally* 2 R. ANDERSON, AMERICAN LAW OF ZONING § 12.25 to .26 (2d ed. 1982). *See also* Twin-City Bible Church v. Zoning Bd. of Appeals, 50 Ill. App. 3d 924, 365 N.E.2d 1381 (1977) (use of residential building across the street from main church building for Sunday school and fellowship classes is religious use); Unitarian Universalist Church v. Shorten, 63 Misc. 2d 978, 314 N.Y.S.2d 66 (1970) (operation of day-care center on church property is religious activity).

A particular land use can be secular, however, even when a religious organization uses the land. As a New York court noted, "[i]t is the proposed use of the land, not the religious nature of the organization, which must control." Bright-Horizon House, Inc. v. Zoning Bd. of Appeals, 121 Misc. 2d 703, 709, 469 N.Y.S.2d 851, 855 (1983). Thus, a residential care facility is not a church for zoning purposes, even though it is run by a religious organization and the patients pray and contemplate as part of the healing process. *Id.*

52. 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980).

53. *Id.* at 456, 415 N.E.2d at 926, 434 N.Y.S.2d at 936.

Inc. v. City of Lakewood,[54] the United States Court of Appeals for the Sixth Circuit upheld a municipal zoning ordinance that prohibited the construction of church buildings in most residential districts within the city limits. The Congregation claimed that the ordinance violated its free exercise of religion because the ordinance precluded the Congregation's construction of a new church on a lot in a residential district. The court of appeals emphasized that the Congregation remained free to worship in other churches or meeting halls throughout the city[55] and held that "building and owning a church is a desirable accessory of worship, [but] not a fundamental tenet of the Congregation's religious beliefs."[56]

State v. Cameron[57] also involved a zoning ordinance that excluded places of worship from zones restricted to single-family dwellings. The New Jersey Superior Court found Reverend Cameron guilty of violating the zoning ordinance by holding worship services in his home,[58] and held that the ordinance did not violate the free exercise of religion within the meaning of *Wisconsin v. Yoder*.[59] The court noted that holding services in a minister's home was a permissible element in the church's tradition but was neither central to nor required by the church's beliefs. Because holding services in a location outside a residential zone would not force the congregation to perform acts " 'at odds with fundamental tenets of their religious beliefs.' "[60] The court held that the ordinance only restrained the congregation from "performing acts that are in keeping with its secular interests."[61] Thus, the court concluded that a congregation's interest in establishing a place of worship at a location of its own choosing is a secular interest.[62]

In contrast, *Westchester Reform Temple v. Brown*[63] illustrates a purely religious use of a church building. In *Westchester* the site had been selected and the sanctuary already was being used for worship services. To meet the needs of its growing membership, the congregation needed to expand its synagogue. The proposed expansion, however, would have violated a setback requirement;[64] compliance with the setback requirement would have cost the

54. 699 F.2d 303 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983).

55. *Id.* at 307.

56. *Id.*

57. 184 N.J. Super. 66, 445 A.2d 75 (Law Div. 1982), *aff'd*, 189 N.J. Super. 404, 460 A.2d 191 (App. Div. 1983).

58. *Id.* at 84, 445 A.2d at 84. The court imposed no penalty on Reverend Cameron. *Id.*

59. *Id.* at 81, 445 A.2d at 83 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)). The court concluded that the ordinance did not violate a fundamental tenet of religion. *See supra* note 47 and accompanying text (discussion of *Yoder*).

60. *Cameron*, 184 N.J. Super. at 81, 445 A.2d at 83 (quoting Wisconsin v. Yoder, 406 U.S. 205, 218 (1972)).

61. *Id.*

62. *Id.*

63. 22 N.Y.2d 488, 239 N.E.2d 891, 293 N.Y.S.2d 297 (1968). The court did not have to rely on the secular-use/religious-use dichotomy to reach its decision. This same New York Court of Appeals, however, labeled the use in *Westchester* as religious in contrasting it with the secular use in *Society for Ethical Culture*. *Society for Ethical Culture*, 51 N.Y.2d at 456, 415 N.E.2d at 926, 434 N.Y.S.2d at 936 (*Westchester* "dealt with restrictions actually impairing religious activities").

64. *Westchester*, 22 N.Y.2d at 492, 239 N.E.2d at 894, 293 N.Y.S.2d at 300.

congregation an additional $100,000. The New York Court of Appeals stated that compliance with the restriction would impair religious activities and concluded that application of the setback requirement would violate the free exercise clause of the Constitution.[65]

From these cases emerge guiding principles to determine whether the use of church property is religious or secular. Further analysis, however, is required to determine whether there is a violation of the free exercise clause. If the congregation is using an existing building for its worship services, courts usually deem the use religious. Thus, if the restriction interferes with the ability to worship, there is an infringement on the free exercise of religion, and application of the balancing test is necessary. A congregation's interest in building a new church on a preferred site, however, probably will be considered secular. Although application of the second prong of the test is not required in this situation, the court is likely to inquire further, to ensure that there are other reasonable locations available to build a church,[66] so as not to impair the free exercise of religion. Finally, if the congregation itself does not use the property but instead wishes to develop the property and rent it to nonreligious tenants, a court will find a secular use and uphold the historic preservation regulation without further inquiry.[67]

Once a court has determined that the church's proposed use of its property is not purely secular, the court must determine whether the zoning or historic preservation regulation places such an undue burden on the church that its members' free exercise of religion is impaired. The court must examine the circumstances of each case to discern what type of burden the regulation imposes on the church,[68] and must examine the nature of the state's interest in its regulation to determine whether the state's purpose can be accomplished by a less burdensome means.[69]

Society for Ethical Culture[70] is the only case that deals squarely with a church's claims that a historic preservation regulation impairs its free exercise or religion. The court, however, did not reach the balancing test, since its finding that the Society sought to use church property for a purely secular purpose was conclusive on the free exercise issue.[71] Because *Society for Ethical Culture* offers no guidance on how to apply the balancing test, cases applying traditional zoning ordinances to churches must be examined for guidance.

To apply the balancing test between the state's regulatory interest and the alleged burden on the free exercise of religion, the crucial question is whether a court should afford special deference to church property in applying zoning

65. *Id.* at 497, 239 N.E.2d at 897, 293 N.Y.S.2d at 304.

66. *Lakewood Congregation*, 699 F.2d at 307; *Cameron*, 184 N.J. Super. at 81, 445 A.2d at 82.

67. *See supra* text accompanying notes 52-53.

68. *See infra* text accompanying notes 126-27.

69. *See infra* note 105 and text accompanying note 98.

70. 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980).

71. *Id.* at 456, 415 N.E.2d at 926, 434 N.Y.S.2d at 936; *see supra* notes 52-53 and accompanying text.

ordinances. A line of New York cases grants great deference to churches.[72] In these cases the policy favoring religious structures always outweighs public policy considerations; the court notes only one factor—that the burden falls upon church property—and then terminates its inquiry without examining any other factors.

In *Westchester Reform Temple v. Brown*[73] the New York Court of Appeals addressed whether a zoning setback requirement should be applied to a synagogue seeking to expand. The court first cited its earlier holding that religious facilities are, "by their very nature, 'clearly in furtherance of the public morals and general welfare.' "[74] The court noted that churches occupy a different status from commercial enterprises and " 'when the church enters the picture, different considerations apply.' "[75] Thus, when there is an irreconcilable conflict between the right to build a church and public welfare concerns, the latter must yield to the former.[76] This deference to churches was injected into the balancing test again in *Jewish Reconstructionist Synagogue v. Incorporated Village of Roslyn Harbor.*[77] The court stated that the "special status of religious institutions under the First Amendment freedom of religion is clearly the dominant factor."[78]

The concurring and dissenting opinions in *Jewish Reconstructionist Synagogue*, however, disagreed with the *Westchester* court's extreme deference, or "absolutist" approach.[79] The "nonabsolutist" view[80] has been embraced in recent cases. In *Holy Spirit Association for the Unification of World Christianity v. Town of New Castle*[81] the United States District Court for the Southern

---

72. *See infra* text accompanying notes 73-86.

73. 22 N.Y.2d 488, 239 N.E.2d 891, 293 N.Y.S.2d 297 (1968).

74. *Id.* at 493, 239 N.E.2d at 894, 293 N.Y.S.2d at 301 (quoting *In re* Diocese of Rochester v. Planning Bd., 1 N.Y.2d 508, 526, 136 N.E.2d 827, 836, 154 N.Y.S.2d 849, 862 (1956)).

75. *Id.* (quoting *In re* Diocese of Rochester v. Planning Bd., 1 N.Y.2d 508, 523, 136 N.E.2d 827, 834, 154 N.Y.S.2d 849, 859 (1956)).

76. *Id.* at 497, 239 N.E.2d at 896, 293 N.Y.S.2d at 304. In *Westchester* the Planning Commission of the Village of Scarsdale argued that the public interests relating to traffic and the diminution of adjoining property values outweighed the religious interests of the synagogue. *Id.* at 494, 239 N.E.2d at 895, 293 N.Y.S.2d at 303.

77. 38 N.Y.2d 283, 342 N.E.2d 534, 379 N.Y.S.2d 747 (1975), *cert. denied*, 426 U.S. 950 (1976).

78. *Id.* at 287, 342 N.E.2d at 537, 379 N.Y.S.2d at 752.

79. In his concurring opinion Chief Judge Breitel stated:

> I agree with so much of the dissent as characterizes the majority expression of the law as too absolutist in providing a preference and even to some extent an immunity from significant zoning regulation for premises devoted to religious uses. . . . It is the all but conclusive presumption that considerations of public health, safety and welfare are always outweighed. . .by the policy favoring religious structures that I find objectionable.

Id. at 292, 342 N.E.2d at 540-41, 379 N.Y.S.2d at 756 (Breitel, C.J., concurring). Justice Jones' dissent stated that notwithstanding churches' "favored status in the law of zoning, nonetheless, they can be held to 'appropriate restrictions.' " *Id.* at 292, 342 N.E.2d at 541, 379 N.Y.S.2d at 757 (Jones, J., dissenting) (quoting *In re* Diocese of Rochester v. Planning Bd., 1 N.Y.2d 508, 526, 136 N.E.2d 827, 837, 154 N.Y.S.2d 849, 863 (1956)).

80. *See supra* note 79 (Chief Justice Breitel's statement of "nonabsolutist" view).

81. 480 F. Supp. 1212 (1979). The Unification Church sought an injunction to compel the zoning board to issue a special-use permit for the church to operate a 98-acre "religious retreat" in a residential area. The court dismissed the motion for a preliminary injunction because plaintiff failed to demonstrate that it would suffer immediate and irreparable harm if the zoning board

District of New York applied the nonabsolutist approach to a zoning ordinance affecting church property. The court held that the first amendment guarantee of freedom of religious expression "cannot be viewed as absolute" when it conflicts with the public safety, health, and welfare.[82] When a legitimate conflict arises, incidental infringement on religious expression is constitutionally permissible.[83]

The Appellate Division of the New York Supreme Court also has embraced the nonabsolutist view. In *In re Holy Spirit Association for the Unification of World Christianity v. Rosenfeld*[84] the court stated that local governments must make every effort to accommodate religious organizations' land uses.[85] The court emphasized, however, that government regulation of religious practices that are a substantial threat to public peace, safety, or order does not abridge the constitutional guarantees of the free exercise of religion.[86]

Other courts also have advocated a nonabsolutist approach.[87] In *Bethlehem Evangelical Church v. City of Lakewood*[88] the Colorado Supreme Court concluded that there is no first amendment violation if a city requires a church to make certain street improvements as a condition to receiving a permit to build a gymnasium on its property. The court stated that although churches have received preferential treatment, "church construction is subject to such reasonable regulations as may be necessary to promote the public health, safety or general welfare."[89]

In *City of Sumner v. First Baptist Church*[90] a church operated a school in

---

further investigated the church's request for a special-use permit. *Id.* at 1214. The court also held that requiring the church to apply for a special-use permit was not a prior restraint. *Id.* at 1215.

82. *Id.* at 1216.

83. *Id.* The court relied on Young v. American Mini-Theatres, Inc., 427 U.S. 50 (1976) (zoning ordinance requiring "adult" theatres to be certain distance from other "adult" theatres and from residential areas is constitutional). The court cited Chief Justice Breitel's concurring opinion in *Jewish Reconstructionist Synagogue. See supra* note 79. The court also emphasized the "extreme significance" of the state's police power in the zoning area. *New Castle*, 480 F. Supp. at 1216.

84. 91 A.D.2d 190, 458 N.Y.S.2d 920 (1983). This case involved the same proposed religious retreat that was at issue in *New Castle. See supra* note 81. The court upheld the dismissal of the church's petition seeking a judgment that the town's zoning ordinance was unconstitutional.

85. *Rosenfeld*, 91 A.D.2d at 198, 458 N.Y.S.2d at 926.

86. *Id.* In *In re* Islamic Soc'y v. Foley, 96 A.D.2d 536, 464 N.Y.S.2d 844 (1983), the court reiterated that local zoning boards should apply ordinances more flexibly to church property but noted that church property is not exempt from zoning ordinances. In dictum, the Supreme Court of Monroe County in Bright-Horizon House, Inc. v. Zoning Bd. of Appeals, 121 Misc. 2d 703, 469 N.Y.S.2d 851 (1983), noted that the general policy, as applied in New York, is that "religious institutions are virtually immune from zoning restrictions." *Id.* at 710, 469 N.Y.S.2d at 856. This statement ignores the recent curtailment of the absolutist view imposed by higher New York courts.

87. *See Lakewood Congregation*, 699 F.2d 303 (6th Cir.), *cert denied*, 104 S. Ct. 72 (1983); Bethlehem Evangelical Church v. City of Lakewood, 626 P.2d 668 (Colo. 1981); Pillar of Fire v. Denver Urban Renewal Auth., 181 Colo. 411, 509 P.2d 1250 (1973), *aff'd*, 191 Colo. 238, 552 P.2d 23 (1976); East Side Baptist Church v. Klein, 175 Colo. 168, 487 P.2d 549 (1971); State v. Cameron, 184 N.J. Super. 66, 445 A.2d 75 (Law Div. 1982), *aff'd*, 189 N.J. Super. 404, 460 A.2d 191 (App. Div. 1983); City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 639 P.2d 1358 (1982).

88. 626 P.2d 668 (Colo. 1981).

89. *Id.* at 674.

90. 97 Wash. 2d 1, 639 P.2d 1358 (1982).

the basement of the church building. The trial court held that the church must comply strictly with zoning and building ordinances or cease to operate the school.[91] The church members claimed that the uncompromising enforcement of the building codes violated their first amendment right to free exercise of religion.[92] The Washington Supreme Court found that the trial court had erred in granting the city injunctive relief without balancing the government's interest in enforcing the ordinances with the church's right to free exercise of religion.[93] The court offered helpful guidelines for applying the balancing test.[94]

> When the City, in the exercise of its police power, is confronted with rights protected by the First Amendment, it should not be uncompromising and rigid. Rather, it should approach the problem with flexibility. There should be some play in the joints of both the zoning ordinance and the building code. An effort to accommodate the religious freedom of appellants while at the same time giving effect to the legitimate concerns of the City as expressed in its building code and zoning ordinance would seem to be in order.[95]

The more recent trend is to embrace the nonabsolutist approach to the balancing test. The absolutist view is too conclusory; it precludes courts from examining all the facts of the case. *City of Sumner* demonstrates that a court applying the nonabsolutist approach still must acknowledge the special status of first amendment rights as an important factor in the balancing test. A charge of infringement of the free exercise of religion, however, should not be a talisman to end the inquiry without considering all pertinent facts.

In addressing first amendment claims against historic preservation regulations, courts can be expected to apply the balancing test in the same manner in which the test has been applied in other land-use cases.[96] In *Pillar of Fire v. Denver Urban Renewal Authority*[97] the Colorado Supreme Court applied a balancing test to determine whether the Urban Renewal Authority could condemn a church building. The court "must balance the interests in the controversy . . . and the state must show a substantial interest without a reasonable alternative means of accomplishment."[98] The court instructed the lower court on remand to weigh the plans and goals of the Renewal Authority against the right of the Pillar of Fire Church to maintain a building that the church claimed was unique and did not conform to the general development plan for the area.[99] The balancing test weighed in favor of the state because the re-

---

91. *Id.* at 4, 639 P.2d at 1361.

92. *Id.*

93. *Id.* at 9, 639 P.2d at 1363.

94. "[The] court's function is to balance the interests of the parties and if an accommodation cannot be effected, determine which interest must yield." *Id.* at 8, 639 P.2d at 1362.

95. *Id.* at 9-10, 639 P.2d at 1363-64.

96. *See* Xeller, *supra* note 14, at 2011.

97. 181 Colo. 411, 509 P.2d 1250 (1973), *aff'd on reh'g*, 191 Colo. 238, 552 P.2d 23 (1976).

98. *Id.* at 418, 509 P.2d at 1253. The court held that urban renewal is a substantial state interest. *Id.*

99. *Id.* at 420, 509 P.2d at 1254.

newal project would not be possible if the nonconforming Pillar of Fire Church remained in the center of the block.[100]

In *Bethlehem Evangelical Lutheran Church v. City of Lakewood*[101] the Colorado Supreme Court again applied a balancing test and held that requiring a church to improve the streets surrounding its property did not violate the first amendment.[102] A key factor in the decision was the nature of the regulation's impact on the church's first amendment rights. The regulation interfered only minimally with the free exercise of religion; this fact tipped the scales in favor of the State.[103]

In *State v. Cameron*[104] a New Jersey court used the same balancing test applied by the Colorado Supreme Court.[105] The New Jersey court determined that an ordinance excluding places of worship from zones restricted to single-family dwellings had only slight and incidental impact on the free exercise of religion.[106] The court further noted that the ordinance did not regulate any religious belief and did not require anyone to "act in a manner contrary to his or her religious belief."[107]

On the other side of the scale, the zoning ordinance satisfied the standard necessary for an ordinance to be justified when it has a slight and incidental impact on first amendment rights. In *Cameron* the city had a substantial interest in excluding churches from single-family districts. Although places of worship could "be considered inherently beneficial," they also could "have a deleterious effect on the tranquility of the single-family zones in which their operations are located."[108] The presence of churches also could have an undesirable effect on property values.[109] After balancing these factors, the court concluded that the zoning ordinance did not infringe the free exercise of religion.

The United States Court of Appeals for the Sixth Circuit upheld the same type of ordinance in *Lakewood Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood.*[110] The ordinance excluding churches from residential dis-

100. Denver Urban Renewal Authority v. Pillar of Fire, 191 Colo. 238, 241, 552 P.2d 23, 25 (1976).

101. 626 P.2d 668 (Colo. 1981).

102. The court found that the city had "a substantial interest in developing streets which will facilitate the safe and free flow of traffic." *Id.* at 675. The city also had an interest in "the maintenance of and liability for the streets within its jurisdiction." *Id.*

103. *Id.*

104. 184 N.J. Super. 66, 445 A.2d 75 (Law Div. 1982), *aff'd*, 189 N.J. Super. 404, 460 A.2d 191 (App. Div. 1983); *see supra* notes 57-62 and accompanying text.

105. The New Jersey court articulated the test as follows: The ordinance is justified if it "substantially further[s] a legitimate and important government purpose unrelated to suppression of First Amendment activity while infringing upon such activity to no greater an extent than is essential to furthering that purpose." *Cameron*, 184 N.J. Super. at 80, 445 A.2d at 82.

106. *Id.* The court noted that church members living in zoning districts that did not permit churches could attend places of worship in nearby districts. *Id.* at 76-77, 445 A.2d at 80-81.

107. *Id.* at 79, 445 A.2d at 82.

108. Deleterious effects include litter, noise, traffic, and congestion. *Id.* at 75, 445 A.2d at 80.

109. *Id.* at 76, 445 A.2d at 80.

110. 699 F.2d 303 (6th. Cir.), *cert. denied*, 104 S. Ct. 72 (1983); *see supra* notes 54-56 and accompanying text.

tricts precluded the Jehovah's Witnesses from building a church on the lot they desired. The court found that requiring the congregation to build its church in a commercial or multi-family residential district did not infringe on religious freedom because restricting the choice of a site for their meeting hall did not pressure the congregation to abandon its beliefs and observances.[111] The only burdens imposed on the congregation were the increased cost of purchasing land in a different district and "the violation of the Congregation's aesthetic senses."[112] Relying on *Braunfeld v. Brown*,[113] the court concluded that "[i]nconvenient economic burdens on religious freedom do not rise to a constitutionally impermissible infringement of free exercise."[114] As in *Braunfeld*, the ordinance in *Lakewood Congregation* affected only what the court considered a secular activity, and the ordinance merely made " 'the practice of their religious beliefs more expensive.' "[115]

Braunfeld offers guiding principles that are useful in determining the constitutionality of traditional zoning regulations and historic preservation regulations.[116] The *Braunfeld* test is essentially the same test enunciated in other cases; *Braunfeld* balances the state interest against first amendment rights. The *Braunfeld* test is more useful, however, because it enumerates the major factors courts should consider in balancing a zoning or historic preservation ordinance against the free exercise of religion. First, the purpose of the regulation must be the advancement of a secular purpose; the burden on religious observance must be indirect. Second, the regulation should be the only feasible, effective means to accomplish the state's purpose. If a less restrictive means is available, that alternative means should be used. Last, the church property must be used for religious, not secular, purposes to invoke first amendment protection.[117]

The *Braunfeld* Court discussed why statutes that impose only an indirect burden should stand. The Court stated: "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the ex-

111. *Lakewood Congregation*, 699 F.2d at 307.

112. *Id.*

113. 366 U.S. 599 (1961) (Sunday closing laws upheld as proper exercise of state power even though incidental economic burden placed on Jewish merchants who rested from work on Saturday).

114. *Lakewood Congregation*, 699 F.2d at 306.

115. *Id.* at 307 (quoting *Braunfeld*, 366 U.S. at 605).

116. *See generally* Bonderman, *Freedom of Religion and Historic Preservation*, in PRACTISING LAW INST., HISTORIC PRESERVATION LAW 1982 457, 459 (*Braunfeld* balancing test has become "hallmark of analysis" of this issue).

117. The *Braunfeld* Court noted:

> If the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

Braunfeld, 366 U.S. at 607. Historic preservation regulations generally meet the *Braunfeld* criteria. Under the *Braunfeld* rule, it appears that historic preservation statutes can be applied to churches "except, perhaps, in those cases where the church would be entirely prevented from using its property in a way necessary to religious exercise and there are less restrictive alternatives." Bonderman, *supra* note 116, at 460.

ercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature."[118] This is particularly true in the application of historic preservation statutes to churches. The purpose of historic preservation statutes is to preserve irreplaceable buildings having cultural, architectural, or historical significance. Churches often are distinctive or even unique in their architectural design and frequently are historically significant. Therefore, churches often will be designated as historic properties and will play an integral part in any historic preservation program. The inclusion of churches within historic preservation statutes is especially important when a church is part of a historic district because the central idea is to preserve the area's integrity of design and setting. If churches were excluded from historic districts whenever the congregation invoked first amendment claims, it would be difficult to preserve the unity of a historic district. Undue deference to churches would result in an even more rapid loss of historic structures.

Courts must look at all the facts of each case and weigh those facts carefully. The balancing process requires courts to recognize the special status of first amendment rights without granting these rights undue deference. In this manner, courts can protect the free exercise of religion without contravening the establishment clause, and at the same time preserve historically significant churches.

In addition to first amendment challenges, historic preservation zoning has been challenged under the fifth amendment "just compensation" clause. The just compensation clause of the fifth amendment provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[119] This proscription has been extended by the fourteenth amendment to state and local actions.[120] Thus, a taking of private property by the federal, state, or local government for public use without just compensation is unconstitutional.

Numerous landowners have challenged land-use regulations on the ground that the regulations are so burdensome that they constitute a taking of the landowner's property in violation of the fifth or fourteenth amendments.[121] Although a few lower courts have addressed the taking issue in the context of church property, the United States Supreme Court never has addressed the issue in the context of a regulation applied to church property. On several occasions, however, the Court has addressed the taking issue in the commercial property context.[122] The standards developed for commercial property form the foundation for developing a standard for church

118. *Braunfeld*, 366 U.S. at 606.

119. U.S. CONST. amend. V.

120. Chicago, B.& Q. R.R. v. City of Chicago, 166 U.S. 226 (1897).

121. *See generally* 1 P. ROHAN, *supra* note 33, §§ 1.05[1] & [2], at 1-82 to -94 (overview of constitutional challenges to zoning laws); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) (examination of "taking" theories).

122. *See infra* text accompanying notes 129-52.

property.[123]

Two important factors shape the search for a "taking" standard to apply to church property. First, the Supreme Court has been unable to develop a "set formula" to determine what constitutes a taking.[124] The effect of the unsettled nature of the law on those who seek guidance on the taking issue was stated effectively in Chief Judge Breitel's *Penn Central* opinion, later affirmed by the United States Supreme Court. Breitel stated that "one does not pursue a path guided by ample precedent or wholly developed principles . . . . The last word has not been spoken; it has hardly been envisaged."[125] This proposition is true especially in the context of church property.

The second important factor in the establishment of a taking standard is that determining whether there has been a taking " 'depends largely upon the particular circumstances [of the] case.' "[126] Particularly in the context of church property, courts engage in "essentially ad hoc, factual inquiries."[127] Thus, the only practical method to determine whether the application of a historic preservation regulation to church property constitutes a taking is to examine the particular circumstances and contrast those circumstances with analogous commercial taking cases.[128]

In *Pennsylvania Coal Co. v. Mahon*[129] the Supreme Court stated the general rule: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[130] With this general rule providing guidance, the Supreme Court in *Penn Central*[131] set forth several factors that are particularly significant in the context of a taking claim.[132]

The first factor is the impact of the regulation, particularly "the extent to

123. An understanding of taking cases involving commercial property is essential to analyzing cases involving alleged takings of church property. First, even though the standard applied to commercial property is not the same as the standard applied to church property, the court asks the same question in both instances to determine whether there has been a taking. That question is whether the land-use regulation so interferes with the property owner's intended or actual use of the property that the owner deserves compensation because he no longer can use the property for its intended purpose. Second, churches sometimes use their property for commercial purposes. *See infra* text accompanying notes 168-173 and 206-07. Last, courts have applied concepts developed in commercial property cases to church property cases. *See infra* text accompanying notes 180-97.

124. *Penn Central*, 438 U.S. at 124.

125. 42 N.Y.2d 324, 337, 366 N.E.2d 1271, 1279, 397 N.Y.S.2d 914, 922 (1977), *aff'd*, 438 U.S. 104 (1978).

126. *Penn Central*, 438 U.S. at 124 (quoting United States v. Central Eureka Mining Co. 357 U.S. 155, 168 (1958)).

127. *See id.*

128. Bonderman, *Federal Constitutional Issues*, in A HANDBOOK ON HISTORIC PRESERVATION LAW, *supra* note 18, at 353 (C. Duerksen ed. 1983).

129. 260 U.S. 393 (1922). *Pennsylvania Coal* involved a due process claim. The line of cases that originated with *Pennsylvania Coal*, however, treat a regulation that goes too far as a taking in violation of the fifth amendment. Bonderman, *supra* note 128, at 351 n.24.

130. *Pennsylvania Coal*, 260 U.S. at 415.

131. 438 U.S. at 123-28. For a description of the *Penn Central* case, see *supra* text accompanying notes 36-45.

132. Justice Brennan concluded that the fact that the Landmark Law had a more severe impact on some landowners than others did not, of itself, effect a taking. *Penn Central*, 438 U.S. at 132. For other important factors, see *infra* notes 133-49 and accompanying text.

which the regulation has interfered with distinct investment-backed expectations."[133] This rule does not mean that the government must compensate a landowner for every regulation that diminishes his property value.[134] A regulation that denies a landowner "the most beneficial use of his property"[135] does not constitute a compensable taking. Nor is a diminution in property value a compensable taking.[136] In *Penn Central* the Supreme Court cited a line of "no taking" cases with approval[137] and determined that the landmark regulation which prevented development of an office tower that would have netted one hundred fifty million dollars over a fifty-year period was not a taking.[138] The Court, however, has found a taking when the challenged regulation completely destroyed the landowner's property rights.[139]

Historic preservation regulations have an economic impact because they require landowners to maintain their property in a particular manner. *Penn Central*, however, upheld a landmark regulation that precluded a property use which would have yielded sizeable profits.[140] In other cases dealing with property in historic districts, courts have required owners to find some reasonable use for their property, even if that use is not lucrative or in fact causes the landowner economic loss.[141] The guiding principle gleaned from these cases is that "land-use regulations may severely restrict property as long as there is *some* reasonable remaining use."[142]

The second significant factor in determining whether a taking has occurred is the character of the governmental action.[143] "A taking may more readily be found when the interference with property can be characterized as a physical invasion of the property . . . than when interference arises from some

133. *Penn Central*, 438 U.S. at 124.

134. On the contrary, in cases in which the state court has reasonably concluded that the health, safety, and general welfare would be benefited by prohibiting a proposed land use, the Supreme Court has upheld land-use regulations that have diminished or even destroyed property values. *Id.* at 125.

135. *Id.* at 125 (citing Goldblatt v. Hempstead, 369 U.S. 590, 592-93 (1962), which upheld ordinance banning excavations below the water table; claimants alleged that defendant's excavations shut down their sand and gravel mining business).

136. In Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Supreme Court upheld a zoning ordinance that reduced the claimant's property value by 75%. In Hadachek v. Sebastian, 239 U.S. 394 (1915), the Supreme Court found no taking where a regulation forced an owner to close down his brick factory, reducing his property's value by more than 90%.

137. *Penn Central*, 438 U.S. at 123-35; *see also supra* notes 135-36.

138. In *Penn Central* the Court found no taking because the landowners still could earn a "reasonable return" on their investment and still were permitted the "reasonable beneficial use of the landmark site." *Penn Central*, 438 U.S. at 131-38.

139. *Pennsylvania Coal*, 260 U.S. 393, 414 (1922). A mining company had reserved subsurface mining rights from landowners. A subsequent state statute forbidding exploitation of these mining rights was held an unconstitutional taking because it made coal mining commercially impracticable and destroyed the value of the company's reserved rights.

140. *See supra* note 138 and accompanying text.

141. *See, e.g.*, Dempsey v. Boys' Club of St. Louis, Inc., 558 S.W.2d 262 (Mo. Ct. App. 1977) (no demolition allowed); Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856 (Mo. Ct. App. 1977) (no demolition allowed); First Presbyterian Church v. City Council of York, 25 Pa. Commw. 154, 360 A.2d 257 (1976) (owner could not show lack of reasonable use).

142. Bonderman, *supra* note 128, at 353.

143. *Penn Central*, 438 U.S. at 124.

public program adjusting the benefits and burdens of economic life to promote the common good."[144]

Preservation ordinances rarely involve any physical invasion. This factor, however, does embody two notions relevant to a preservation ordinance's effect on property. First, the severity of the restriction's effect can be an important factor–the more severe the restriction, the more a court will be inclined to hold that the restriction is tantamount to a physical invasion. Second, the character-of-the-action factor implicitly recognizes the court's willingness to consider whether the regulation produces benefits as well as burdens.[145] Designation as a historic site or district can bring numerous benefits. Because historic properties attract tourists and visitors, property values often increase when a historic area is restored and maintained.[146] Thus, historic preservation can strengthen the economy of the historic area and the city. A court will consider these benefits to determine the severity of the regulation's impact.

The third factor the *Penn Central* Court deemed important to determine whether a taking had occurred is whether the regulation promotes the " 'health, safety, morals or general welfare by prohibiting particular contemplated uses of land.' "[147] When the Court has found such public benefit, it has upheld land-use regulations "that destroyed or adversely affected recognized real property interests."[148] Zoning laws are the "classic example" of such land-use regulations.[149]

This factor can weigh heavily in favor of upholding historic preservation ordinances, especially after *Penn Central.* The appellants in *Penn Central* did not challenge New York City's objective of preserving historic structures.[150] Nevertheless, the *Penn Central* Court expressed its approval of historic preservation as a valid exercise of the police power. The Court noted that "in a number of settings" it had recognized the valid objective of land-use controls "to enhance the quality of life by preserving the character and desirable aesthetic features of a city."[151] In fact, the *Penn Central* Court's support for his-

144. *Id.* at 125; *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (television cable installed on claimant's building); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (government imposed navigational servitude to give public access to private pond); United States v. Causby, 328 U.S. 256 (1946) (plane flights above claimant's land destroyed present use of land as chicken farm).

145. This is the average-reciprocity-of-advantage notion recognized in *Pennsylvania Coal,* 260 U.S. at 415.

146. 2 P. ROHAN, *supra* note 33, § 7.01[3], at 7-14 to -15 & n.27.

147. *Penn Central,* 438 U.S. at 125 (quoting Nectow v. Cambridge, 277 U.S. 183, 188 (1928)).

148. *Id.* at 125; *see, e.g.,* Goldblatt v. Hempstead, 369 U.S. 590 (1962). Appellants in *Goldblatt* claimed an ordinance prohibiting excavations below the water table prevented them from continuing their sand- and gravel-mining business. The Court did not believe that the ordinance denied appellants any use of the land, finding the evidence indecisive on the reasonableness of prohibiting further excavation below the water table. The Court weighed heavily the countervailing public safety factors involved (holes in fence around lake and many schoolchildren in the area). *Id.* at 595.

149. *Penn Central,* 438 U.S. at 125. An instructive application of this third factor is found in Goldblatt v. Hempstead, 369 U.S. 590 (1962).

150. *Penn Central,* 438 U.S. at 129.

151. *Id.*

toric preservation, demonstrated by its upholding the constitutionality of the concept, has given local governments new confidence in adopting and enforcing historic preservation ordinances.[152]

With the principles developed in cases relating to commercial property[153] to guide them, courts must formulate standards to determine when the application of a historic preservation ordinance to church property constitutes a taking. The key question is what standard to apply when the property in question is used for religious or charitable purposes. The standard applied to commercial property is whether the regulation still affords the landowner the "reasonable beneficial use" of the property.[154]

Very few courts have had to decide which standard to use in determining whether a land-use regulation effects a taking of church property. The courts that have faced the issue have determined that the reasonable-return-on-investment standard is not applicable to church property.[155] "[C]haritable organizations are not created for financial return in the same sense as private businesses."[156]

As in all taking cases, determinations of which standard to apply and whether a taking has occurred turn on the particular facts of the case.[157] From the existing cases two tests have evolved to determine if application of a historic preservation ordinance applied to the property of a church or charitable organization is a taking.

The first test that has evolved is the charitable-purpose test. This test was first enunciated in *Trustees of Sailors' Snug Harbor v. Platt.*[158] Sailors' Snug Harbor is a charitable organization that provides a home for retired seafaring men. The seamen's dormitories were a group of buildings on Staten Island, described as "one of the two best examples of Greek Revival architecture in the country."[159] The charitable organization sought to vacate the buildings' designation as a landmark, contending that the landmark designation constituted a taking because it precluded the demolition of these buildings to make way for more modern structures.[160] Although the court did not determine whether there was a taking, it did set forth the standard for determining the taking issue on remand. The court noted that there is a taking of commercial property when the owner cannot earn a reasonable return.[161] The court then stated that a taking of charitable property occurs "where maintenance of the landmark either physically or financially prevents or seriously interferes with

152. Seidel, *supra* note 44, at 355.

153. *See supra* note 123.

154. *See Penn Central,* 438 U.S. at 138.

155. *See infra* notes 161-73 and accompanying text.

156. Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 454, 415 N.E.2d 922, 925, 434 N.Y.S.2d 932, 935 (1980).

157. *See supra* note 127 and accompanying text.

158. 29 A.D.2d 376, 288 N.Y.S.2d 314 (1968).

159. *Id.* at 378, 288 N.Y.S.2d at 316.

160. *Id.*

161. *Id.*

carrying out the charitable purpose."[162]

Six years later the Court of Appeals of New York applied this charitable-purpose test in *Lutheran Church in America v. City of New York*.[163] The Church's office, a freestanding brownstone townhouse surrounded by modern multistory commercial structures, was a designated landmark. Plaintiff, the Lutheran Church in America, used the building for offices for its "corporate-religious purposes."[164] Even after a wing was added to the building, it still was inadequate for the organization's needs.[165] Plaintiff claimed that the corporate-religious use of the building would have to cease because the landmark designation prevented the organization from replacing the building.[166] Thus, plaintiff sought a declaration voiding the landmark designation.

In *Lutheran Church* plaintiff prevailed because the court determined that the application of the Landmarks Law to this particular building was a taking. The court explained that the commission's "attempt[s] to force plaintiff to retain its property as is, without any sort of relief or adequate compensation, are nothing short of a naked taking."[167] Applying the charitable-purpose test, the landmark restrictions, if enforced, would prevent the religious organization from achieving its charitable purpose.

In *Society for Ethical Culture v. Spatt*[168] the Court of Appeals of New York again applied the charitable-purpose test, but concluded that no taking had occurred. The Society, a tax-exempt religious and charitable organization, owned a valuable piece of property fronting Central Park that was known as the Meeting House. The Meeting House was a designated landmark.[169] The Society argued that application of the landmark restrictions was a taking because it would "prevent the exploitation of the full economic value of the Central Park West property."[170] Although the court conceded that the reduced development potential lowered the market value of the property, it reminded plaintiff that the Constitution does not guarantee a landowner the most beneficial use of his property.[171] Further, the court noted that

---

162. *Id. Sailors' Snug Harbor* was not retried. Instead, the city decided to purchase the landmark buildings. *See* Rankin, *Operation and Interpretation of the New York City Landmarks Preservation Law*, 36 LAW & CONTEMP. PROBS. 363, 369-70 (1971).

163. 35 N.Y.2d 121, 131-32, 316 N.E.2d 305, 311-12, 359 N.Y.S.2d 7, 16-17 (1974). This case involved J.P. Morgan, Jr.'s former residence, which was an early example of "Anglo-Italianate" architecture and " 'one of the few free standing Brownstones remaining in the City.' " *Id.* at 125, 316 N.E.2d at 308, 359 N.Y.S.2d at 11 (quoting findings of Landmarks Preservation Commission).

164. *Id.* at 124, 316 N.E.2d at 307, 359 N.Y.S.2d at 10 (plaintiff was a religious corporation).

165. *Id.*

166. *Id.* at 129, 316 N.E.2d at 310, 359 N.Y.S.2d at 14.

167. *Id.* at 132, 316 N.E.2d at 312, 359 N.Y.S.2d at 16.

168. 51 N.Y.2d 449, 415 N.E.2d 922, 43 N.Y.S.2d 932 (1980); *see supra* notes 52-53 and accompanying text.

169. *Id.* at 452, 415 N.E.2d at 924, 434 N.Y.S.2d at 934. The structure was "the first building facade of the art nouveau style pioneered in this country by the noted architect Robert D. Kohn." *Id.*

170. *Id.* at 453, 415 N.E.2d at 924-25, 434 N.Y.S.2d at 934. The Society would have had to demolish the house's protected facade to develop the property. This demolition would violate the landmark commission's rules. *Id.*

171. *Id.* at 454-55, 415 N.E.2d at 925-26, 434 N.Y.S.2d at 935-36.

whether the Society could get a reasonable return on the property was not the applicable standard for determining whether the situation constituted a taking.[172] Instead, the charitable-purpose standard was applicable. The question was "whether the impact on the Society and its charitable activities is so severe that the restrictions become confiscatory."[173] The court determined that there was not a taking.

Two important factors shaped the court's decision. First, the Society did not prove that the only feasible solution was demolition. The court contrasted the *Lutheran Church* case, in which it was "[p]articularly significant" that the church had tried to modify its structure to meet its needs and had not sought demolition until it was clear that demolition was the only alternative.[174] Second, the court determined that the Society was concerned only with the landmark restriction's effect on developing the land for its most lucrative use. The Society voiced no concern that the restrictions might interfere with its religious or charitable activities.[175]

First Presbyterian Church v. City Council of York[176] provides an interesting comparison to the charitable-purpose cases. It also illustrates the importance of factual distinctions in taking cases. The crucial distinguishing factor in *York* was that the historic building was part of a historic district; it was not an isolated landmark.

In *York* the First Presbyterian Church sought a permit to demolish the York House, a building adjoining the church edifice.[177] The York House was the centerpiece of a city block of residences that provided an unspoiled view of an 1890s street. After the Board of Historical Architectural Review recommended denial of the demolition permit, the Church filed suit claiming that denial of the permit amounted to a taking without just compensation. After the lower court remanded the case to the Board for further findings,[178] the Board conducted a second hearing and again recommended denial of a demolition permit.[179]

In the interval between the order of remand and the second appeal, the case of *Maher v. New Orleans*[180] was decided. In *Maher* claimant had been denied a permit to demolish a cottage in the French Quarter of New Orleans. The court set forth a test to determine when denial of a permit to demolish a

172. *Id.* at 454, 415 N.E.2d at 925, 434 N.Y.S.2d at 935.

173. *Id.* at 454, 415 N.E.2d at 925, 434 N.Y.S.2d at 934.

174. It still was possible in *Society for Ethical Culture* for the Society to make some modifications in the structure without disturbing the protected facade. *Id.* at 455, 415 N.E.2d at 926, 434 N.Y.S.2d at 936.

175. *Id.* at 455-56, 415 N.E.2d at 926, 434 N.Y.S.2d at 936.

176. 25 Pa. Commw. 154, 360 A.2d 257 (1976).

177. *Id.* at 158, 360 A.2d at 259. York House was glowingly described as "an exceptional specimen of Victorian Italian-Villa architecture . . . representing the highest level of design, workmanship, materials and aesthetic values of the time of its construction." *Id.*

178. The court requested factual findings sufficient for the court to apply the charitable-purpose test and determine whether there was a taking. *Id.* at 158-59, 360 A.2d at 259-60.

179. *Id.* at 159-60, 360 A.2d at 260.

180. 371 F. Supp. 653 (E.D. La. 1974), *aff'd*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).

structure in a historic district constitutes a taking. *Maher* established that an ordinance is confiscatory and thus unconstitutional when it "goes so far as to preclude the use of the property for any purpose for which it is reasonably adapted."[181] This test has evolved as the primary alternative to the charitable-purpose test. To establish a taking under the *Maher* test, the claimant must establish that sale of the property is impracticable, commercial rental cannot provide a reasonable rate of return, and other potential uses of the property are foreclosed.[182]

On the second appeal in the *York* case, the church urged the court to apply the charitable-purpose test.[183] Instead, the court applied the *Maher* test because of the factual dissimilarity between the single property designation of a landmark and the area designation of a historic district.[184] Because the church had made no attempt to rent the premises over the previous five years, had refused to consider offers to buy the property, and also had refused to consider entering a cooperative arrangement to restore the building, the church did not carry its burden of proof to establish a taking under the *Maher* test.[185] The court concluded that the building was " 'capable of conversion to a useful purpose without excessive cost.' "[186] The court also noted the use that the church intended for the property.[187] The church offered evidence that it had no desire to use the property for religious purposes, but instead wished only to use the property for landscaping and parking.[188]

In *Lafayette Park Baptist Church v. Scott*[189] the Missouri Court of Appeals faced the same question presented in *Maher* and *York*. The property in question adjoined a church in the Lafayette Square Historic District of St. Louis. The church planned to demolish the historic townhouse on the adjoining property and replace it with a parking lot and recreation space. After denial of its request by both the Landmarks and Urban Design Commission and the Board of Adjustment, the church appealed to the Missouri Court of Appeals.[190] The court determined that the Board had failed to consider the economic feasibility of restoration, and thus had applied the wrong standard in reaching its decision.[191] The case was remanded to the Board with instructions to apply the *Maher* test.[192]

On remand, the Board again denied the demolition permit.[193] In appeal-

181. *Maher*, 516 F.2d at 1066.
182. *Id.*
183. *York*, 25 Pa. Commw. at 159, 360 A.2d at 259-60; *see supra* notes 158-75 and accompanying text (charitable-purpose test).
184. *York*, 25 Pa. Commw. at 161, 360 A.2d at 261.
185. *Id.* at 161-62, 360 A.2d at 261.
186. *Id.* at 161, 360 A.2d at 261 (quoting lower court).
187. *Id.*
188. *Id.*
189. 553 S.W.2d 856 (Mo. Ct. App. 1977).
190. *Id.* at 859.
191. The Board had considered only the technological feasibility of whether the dilapidated building could be restored. *Id.* at 861.
192. *Id.* at 863-64.
193. Lafayette Baptist Church v. Board of Adjustment, 599 S.W.2d 61 (Mo. Ct. App. 1980).

ing this decision to the Missouri Court of Appeals, the church did not contend that application of the ordinance to the church's property was a taking.[194] Instead, the church contended that application of the ordinance to its property was a denial of due process under the fifth and fourteenth amendments.[195] Nevertheless, the court applied the *Maher* test in the same manner that the test had been applied in taking cases. "If the owner is unable to restore [his property] from an economic standpoint he must then establish [that] it is impracticable to sell or lease the property or that no market exists for it at a reasonable price."[196] The court concluded that the church had not satisfied the *Maher* test and, therefore, that denial of the demolition permit did not violate the church's constitutional rights.[197]

Although there are few reported cases that address when application of a historic preservation statute to church property constitutes a taking, some standards are discernible to guide courts in deciding this issue. No court has applied to church property the reasonable-return-on-investment standard that applies to commercial property.[198] This is a sound approach–property used for religious activities normally is not purchased for commercial investment. In fact, many churches may prefer a noncommercial neighborhood so that the congregation will not have to deal with heavy traffic and shortages of parking space. Thus, it seems unlikely that a court ever would apply the traditional commercial standard to a taking case involving church property; a court will apply either the charitable-purpose standard or the *Maher* standard.[199]

One major factor that affects which standard the court applies is the nature of the church property—is it an individual landmark or is it property within a historic district? All the reported cases have applied the more lenient charitable-purpose standard to individual landmarks and the stricter *Maher* standard to property within a historic district. Because there are so few reported cases, this distinction could be the product of coincidence. The distinction, however, seems to be purposeful. In *York* the court originally had intended to apply the charitable-purpose test to the church property, which was in a historic district.[200] After *Maher* enunciated a new standard for historic district property, however, the *York* court instructed the Board of Historical and Architectural Review to abandon the charitable-purpose test and

194. *Id.* at 65.

195. *Id.* The fifth amendment provides that "no person shall be . . . deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V. The fourteenth amendment makes the due process requirement applicable to the states ("nor shall any State deprive any person of life, liberty, or property without due process of law") and further prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

196. Lafayette Baptist Church v. Board of Adjustment, 599 S.W.2d 61, 66 (Mo. Ct. App. 1980).

197. *Id.* at 65.

198. *See supra* notes 161-73 and accompanying text and text accompanying note 155.

199. It is more difficult to prove a taking under the *Maher* standard. A building would have to be extremely dilapidated for a court to find not only that the property was incapable of being sold or rented but also that there was absolutely no potential use for the property.

200. *York*, 25 Pa. Commw. 154, 158-59, 360 A.2d at 259-60.

apply the *Maher* test. The court noted the factual dissimilarity between the single property designation in *Sailors' Snug Harbor* and the area designation in *Maher*.[201] Because *York* involved an area designation, the *Maher* test was applied.[202]

The New York courts have continued to apply the charitable-purpose test to historic landmarks even after *Maher*. Both *Lutheran Church* and *Society for Ethical Culture* were decided after *Maher*. New York's continued application of the charitable-purpose test should be viewed as coincidence; no cases involving church property in historic districts have come before the New York courts since *Maher* was decided. New York courts therefore should apply the more stringent *Maher* standard to property in a historic district.

In a historic district, the church is surrounded by other historically significant property; it benefits from its location. Because property values in a restored area usually rise,[203] a tenant or purchaser is easier to find. Furthermore, the concept of a historic district is to preserve the unity and character of an entire area. If a lenient taking test were applied, churches could demolish their historic structures and destroy the unity of the historic district.

In contrast, an individual landmark may be isolated from other historic structures. The landmark church that becomes surrounded by commercial structures, especially in a rapidly developing urban area, faces special problems. There may be no room for the church to expand if the congregation's needs outgrow the structure. Congregation members may face parking and traffic problems, especially if they attend services during the week. The courts' application of the more lenient charitable purpose standard recognizes these special problems of the isolated individual landmark.

Once a court has chosen the standard to apply, several factors affect how the court applies the standard. The *Maher* test is a straightforward factual inquiry to determine whether the claimant landowner has met its burden of proof. The court makes simple yes-or-no determinations of whether the claimant has proved that it cannot feasibly rent, sell, or otherwise use its property.[204]

The court's decision in a historic district case also may be affected by the church's intended use of the property. The *York* court noted that the church offered evidence that it had no desire to use the property for religious purposes.[205] Thus, a court may be less inclined to find a taking when the church plans a secular use for the altered property.

The *York* court only hinted that intended use would be a factor. In the charitable purpose cases, however, the property's proposed use clearly is a factor. A court cannot find that a historic preservation ordinance interferes with

201. *Id.* at 161, 360 A.2d at 261.
202. *Id.*
203. *See supra* note 146 and accompanying text.
204. *See supra* text accompanying notes 180-88 & 196.
205. *York*, 25 Pa. Commw. at 162, 360 A.2d at 261.

a charitable purpose when the church does not use the land for a charitable purpose. The New York Court of Appeals weighed this factor heavily in *Society for Ethical Culture.* The court noted that "[t]here is no genuine complaint that eleemosynary activities within the landmark are wrongfully disrupted . . .,"[206] exhibiting little sympathy for the "charitable" organization that seeks only to put its property to its most lucrative use.[207] In contrast, the same court found a taking in *Lutheran Church,* in which the building was used for religious purposes.[208]

Another factor that affects the court's application of a taking standard is whether the church has investigated alternative dispositions of the property. A court will not be inclined to find a taking when a church seeks a demolition permit without having explored alternatives that may alter the building but preserve its historic significance. The New York Court of Appeals explicitly cited this factor in *Society for Ethical Culture,*[209] when the Society did not demonstrate that demolition was the only feasible solution.[210] The court contrasted this with the attempts at modification in the *Lutheran Church* case: "Particularly significant in the *Lutheran Church* case was the fact that the church had tried unsuccessfully to modify the structure to suit its needs, and that no further accommodation, short of demolition and rebuilding, would have alleviated the serious space problems which had arisen."[211]

The constitutionality of historic preservation restrictions applied to church property is a particularly unsettled area of the law. Historic preservation law still is in the formative stage. Courts can seek guidance, however, from cases applying historic preservation regulations to commercial property and traditional zoning ordinances to church property. To determine whether a historic preservation regulation interferes with the free exercise of religion, courts must focus on the crucial question of the nature of the church's proposed use of its property.[212] Merely raising a first amendment claim should not be conclusive; the first amendment is not a talisman before which the well-recognized public welfare benefits attendant to historic preservation inevitably must yield. Nevertheless, courts should recognize the special status of the first amendment and weigh its guarantees as a factor in balancing the church's freedom of religion against the state's interest in historic preservation.[213]

To determine whether the application of a historic preservation regulation to church property constitutes a taking, courts may apply either the charitable-purpose test or the *Maher* test. The outcomes depend primarily on the facts of each particular case. In deciding which test to apply, courts must con-

206. *Society for Ethical Culture,* 51 N.Y.2d at 455, 415 N.E.2d at 926, 434 N.Y.S.2d at 936.
207. *Id.*
208. *Lutheran Church,* 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974).
209. *Society for Ethical Culture,* 51 N.Y.2d at 455, 415 N.E.2d at 926, 434 N.Y.S.2d at 936; *see supra* note 174 and accompanying text.
210. *Society for Ethical Culture,* 51 N.Y.2d at 455, 415 N.E.2d at 926, 434 N.Y.S.2d at 935.
211. *Id.* at 455, 415 N.E.2d at 926, 434 N.Y.S.2d at 936.
212. *See supra* text accompanying notes 205-08.
213. *See supra* text accompanying notes 79-95.

sider the nature of the church property–is it an isolated landmark in a crowded urban area or is it an integral part of a historic district? The location of the church property, however, should not be the sole factor used to determine which test applies. A landmark church may be in a small town, with room to expand, and may be the only historic structure in the town. Under these circumstances, a court should not automatically apply the more lenient charitable-purpose test as it would to the urban landmark church.

The establishment clause mandates governmental neutrality toward religious institutions. Thus, it seems clear that total exemption of church property from historic preservation regulations would be unconstitutional. Certainly any special consideration given to churches would have to be given to all nonprofit organizations.[214] Governmental grants to churches to restore and maintain their property also would violate the establishment clause.[215] Thus, there is a clear need for private citizens to act when the government is forbidden to act. Private groups could raise funds to help maintain historically significant church property. Private citizens with expertise in the maintenance of historic property could contribute their knowledge and technical assistance. The economic benefits to the neighborhoods and the city provide powerful incentives for such private efforts. Although many problems remain unsolved, historically significant church property can be preserved, within the bounds of the Constitution, if church property owners, local governmental units, and private citizens work together to seek innovative solutions. Cooperation and flexibility should guide owners of church property and local historic district and historic properties commissions. Each side must be sensitive to the special interests and concerns of the other; litigation should be the last resort.

ELIZABETH CAMERON RICHARDSON

214. The importance of extending benefits to other nonprofit organizations is articulated in Walz v. Tax Comm'n, 397 U.S. 664 (1970). In *Walz* the Supreme Court upheld tax exemptions for religious organizations for properties used solely for religious worship. The exemption applied not only to churches but also to a broad class of nonprofit organizations. The broad application of the exemption was crucial to the Court's decision to uphold the exemption.

> [The state] has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.

Id. at 673. *See generally* Menapace, *Preservation Laws and Houses of Worship*, in PRACTISING LAW INST., HISTORIC PRESERVATION LAW 1982 495, 507-08 (*Walz* granted exemption not to religious organizations specifically but to charitable organizations generally); Xeller, *supra* note 14, at 2013-15 (discussing church exemption from landmark laws as violation of establishment clause).

215. Greenawalt, *supra* note 50, at 492. See also Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), in which the United States Supreme Court stated: "If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair." *Id.* at 777.