Comment:

Landmarks Preservation and Tax-Exempt Organizations: A Proposal in Response to *Lutheran Church*

> *The monuments of consular, or Imperial, greatness were no longer revered, as the immortal glory of the capital: they were only esteemed as an inexhaustible mine of minerals, cheaper, and more convenient, than the distant quarry... the fairest forms of architecture were rudely defaced, for the sake of some paltry, or pretended, repairs.... Majorian, who had often sighed over the desolation of the city, applied a severe remedy to the growing evil. He reserved to the prince and senate the sole cognizance of the extreme cases which might justify the destruction of an ancient edifice; imposed a fine of fifty pounds of gold... on every magistrate who should presume to grant such illegal and scandalous license, and threatened to chastise the criminal obedience of their subordinate officers, by a severe whipping, and the amputation of both their hands. In the last instance, the legislator might seem to forget the proportion of guilt and punishment; but his zeal arose from a generous principle, and Majorian was anxious to protect the monuments of those ages, in which he would have desired and deserved to live.*
>
> Edward Gibbon, *The History of the Decline and Fall of the Roman Empire,* Vol. III, 227.

The approaching Bicentennial of the American Revolution will be a time of reckoning for the nation's future as well as a celebration of its past. By 1976 Americans may be hard-pressed to find historic and architectural landmarks attesting to their cultural heritage. Instead, bronze plaques will be the only witnesses to history in areas of mute glass and steel structures. A single statistic indicates the extent of the destruction that has taken place: more than one-third of the 16,000 buildings listed in the Historic American Buildings Survey, which was commenced by the government only forty years ago, have since been razed.[1]

1. J. COSTONIS, SPACE ADRIFT: SAVING URBAN LANDMARKS THROUGH THE CHICAGO PLAN 4 (1974).

In response to the destruction of some of the architectural and historic treasures in New York City, and in an effort to preserve some of the remaining significant architectural witnesses to the city's past, the New York City Council amended its Charter and Administrative Code[2] in 1965, to provide for the creation of a Landmarks Preservation Commission.[3] The primary responsibility of this Commission is to control the kinds of physical changes owners may make to buildings it has designated as landmarks.[4] Very real problems, however, are present in New York City's landmarks legislation. Indeed, these problems have reached crisis proportions.[5] One central issue in the controversy is the status under the Landmarks Preservation Law of organizations exempt from paying real property taxes. A recent decision of the New York Court of Appeals, *Lutheran Church in America v. City of New York*,[6] has cast in doubt the power of the Commission to prevent the alteration or destruction of landmarks owned by such organizations. As one commentator has noted, "The future of the landmarks law in New York—if there is one—is going to involve the wisdom of Solomon, the moral convictions of Moses, the courage of Caesar, and the flexibility of Machiavelli."[7] This Comment will review the *Lutheran Church* case and its impact on the Landmarks Preservation Law of New York City, and examine the feasibility of a legislative proposal designed to reconcile the conflict of the historic preservation and tax exemption policies seen in *Lutheran Church.*

LUTHERAN CHURCH IN AMERICA v. CITY OF NEW YORK

The Landmarks Preservation Commission designated the Morgan House as a landmark on November 23, 1965.[8] Located at the corner

2. NEW YORK CITY, NEW YORK, CHARTER AND ADMINISTRATIVE CODE, ch. 8A (1965), *as amended,* Local Laws of the City of New York, No. 71 (1973). [Hereinafter cited as *Charter.*]

3. *Charter,* ch. 8A, §§ 205-1.0, 207-2.0.

4. *Charter,* ch. 8A, § 207-2.0.

5. New York City suffered another setback recently when the State Supreme Court voided the Landmarks Preservation Commission's designation of Grand Central Terminal. Penn Central Transp. Co. v. City of New York (Sup. Ct. Jan. 22, 1975) in N.Y.L.J., Jan. 23, 1975, at 16, col. 3.

6. 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974).

7. Huxtable, *Landmarks Are in Trouble With the Law,* N.Y. Times, Dec. 22, 1974, § 2, at 39, col. 1.

8. Brief for the Municipal Art Society as Amicus Curiae at 13, Lutheran Church, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974).

of Madison Avenue and 37th Street, the mansion was built in 1853 and served as the residence of the Phelps-Dodge family and J. P. Morgan, Jr.[9] On the basis of the evidence presented at a public hearing held in September, 1965, prior to designation, the Commission found that the "property has importance 'because it was the residence of J. P. Morgan, Jr. during the first half of the twentieth century, [and] that the house is significant as an early example of Anglo-Italiante [*sic*] architecture, that it is one of the few free standing Brownstones remaining in the City, that it displays an impressive amount of fine architectural detail and that it is a handsome building of great dignity.' "[10] The property was purchased in 1942 to provide headquarters for the Lutheran Church, but had since become too small for such use.[11] The Church wanted to demolish the existing building and erect a new nineteen-story office building,[12] but its plans were frustrated by the landmark designation.

The issue, as the Court of Appeals chose to frame it, was:

> whether that part of the New York City Landmarks Preservation Law which purports to give the Landmarks Preservation Commission the authority to infringe upon the free use of individual premises remaining in private ownership is a valid use of the city's police power in cases where an owner organized for charitable purposes demonstrates hardship, economic or otherwise.[13]

The court found that Morgan House was "totally inadequate for plaintiff's legitimate needs" and that it would have to be replaced for the Church to be able to use the property freely and economically.[14] As a religious organization, the Church was not subject to the ameliorative provisions of section 207-8.0 of the Landmarks Preservation Law,[15] which provides options by which the Commission can

9. *Id.* at 25.

10. Lutheran Church, 35 N.Y.2d at 125, 316 N.E.2d at 308, 359 N.Y.S.2d at 11.

11. *Id.* at 124, 316 N.E.2d at 307, 359 N.Y.S.2d at 10.

12. *Id.* at 125, 133 n.2, 316 N.E.2d at 307, 313 n.2, 359 N.Y.S.2d at 11, 18 n.2.

13. *Id.* at 123, 316 N.E.2d at 307, 359 N.Y.S.2d at 9.

14. *Id.* at 132, 316 N.E.2d at 312, 359 N.Y.S.2d at 17.

15. An owner is expected to realize at least a six percent return on commercial property. *Charter*, ch. 8A, § 207-1.0(v). If he establishes an economic hardship by the fact of a lesser return, the Commission has discretion to ease the hardship by granting a remission of real estate taxes or a partial or complete tax exemption. *Charter*, ch. 8A, § 207-8.0(c). The Commission is afforded the additional right of producing a buyer who could profitably utilize the property without the sought for

relieve a landmark owner of an economic burden caused by the designation.[16] With the Commission lacking the power to relieve the owner's hardship, the landmark designation became vulnerable to the claim of taking without just compensation.[17] Applying the test set out in *Matter of Trustees of Sailors' Snug Harbor v. Platt*,[18] the

alteration or demolition. *Charter*, ch. 8A, § 207-8.0(i). If these remedies prove unrealistic or unobtainable, the City is given the power to condemn. *Charter*, ch. 8A, § 207-8.0(g)(2). Tax-exempt property is given different treatment under the Landmarks Preservation Law. *Charter*, ch. 8A, § 207-8.0(a)(2). The provision for such designated property, however, is limited only to the special case in which the owner has entered into an agreement to sell the property or lease it for at least twenty years. *Charter*, ch. 8A, § 207-8.0(a)(2)(a). The Commission is given the right to obtain a purchaser or tenant who is willing to purchase or acquire an interest identical with that proposed to be acquired by the owner's prospective purchaser or tenant, but without the sought after alteration or demolition. *Charter*, ch. 8A, § 207-8.0(i)(1). If the Commission is unable to find a purchaser or tenant, the City is given the power to condemn. *Charter*, ch. 8A, § 207-8.0(i)(4). There is no provision for tax rebates for such properties (since no tax is paid in the first place), nor for direct subsidies.

In the *Lutheran Church* case, it was determined that the landmark was not covered by the ameliorative provisions of § 207-8.0 because the Church was tax-exempt, and there was no arrangement by the Church to sell or lease the property. The Church intended to use the land to erect a nineteen-story office building.

16. Lutheran Church, 35 N.Y.2d at 124, 316 N.E.2d at 307, 359 N.Y.S.2d at 10.

17. U.S. CONST. amend. V, XIV, § 1; N.Y. CONST. art. I, §§ 6, 7. *See* Vernon Park Realty v. City of Mount Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954).

The situation in the *Penn Central* case was in some respects very similar to *Lutheran Church*. Penn Central had entered into an agreement providing for a large office tower to be erected on top of the Grand Central Terminal. However, the Terminal is a designated landmark and the Commission refused to issue the certificate of appropriateness necessary to permit the planned exterior alterations. Of crucial importance to the outcome of the case was the fact that since 1959 Penn Central has been partially tax-exempt. Sections 489-a to 489-v and 489-aa to 489-gg of the New York Real Property Tax Law grant a tax exemption to Penn Central for that portion of the Grand Central property devoted to transportation use. This tax exemption over the years has amounted to $11,083,489, and represents the approximately sixty-five per cent of the Terminal which is used for transportation purposes. The net effect of the exemption has been to increase substantially the income flowing to Penn Central as a result of train service using the Grand Central Terminal and to offset part of the operating cost incurred in operating the Terminal. Defendants' Post-Trial Memorandum, at 27. The court found that § 207-8.0 of the Landmarks Preservation Law afforded Penn Central no relief because of its tax-exempt status. Penn Central was limited to the remedy of seeking a certificate of appropriateness which the Commission could refuse to issue at its discretion. The landmark designation and its accompanying restrictions were deemed to inflict such a burden on Penn Central as to constitute an uncompensated taking. Penn Central Transp. Co. v. City of New York (Sup. Ct. Jan. 22, 1975) in N.Y.L.J., Jan. 23, 1975, at 16, col. 3.

18. 29 App. Div. 2d 376, 288 N.Y.S.2d 314 (1st Dep't 1968). The test is set out *id.* at 378, 288 N.Y.S.2d at 316: "A comparable test for a charity would be where

court found the designation unconstitutional as exceeding the permissible bounds of the zoning power and as an uncompensated taking of property.[19] Ironically, it was the tax-exempt status of the Church which proved to be the crucial factor in the determination that the ameliorative provisions of the Landmarks Preservation Law did not apply, and the landmark designation constituted an uncompensated taking.

In order to assess the impact of *Lutheran Church* on the Landmarks Preservation Law it is important to examine two aspects of the case: the procedural irregularities, and the legal basis of the *Sailors' Snug Harbor* test.

The Procedural History of Lutheran Church

The bizarre procedural history of *Lutheran Church* is worth noting. The trial court held that Civil Practice Law and Rules, section 217,[20] which prescribes a four-month statute of limitations for article 78 proceedings,[21] was applicable to the Lutheran Church's action for declaratory judgment, and that the action, commenced approximately eight months after designation of the Morgan House as a landmark, was time-barred.[22] The Appellate Division reversed and remanded the case for a new trial on the basis that plaintiff Church nowhere in its complaint sought a review of the Commission's factual determination, but instead confined its attack to the constitutional aspects of the designation.[23] The trial court, in apparent disregard of the Appellate Division ruling that the action was for declaratory judgment based solely on questions of constitutional law, perpetuated the course opened up previously at trial and allowed defendant Commission to produce evidence justifying the designation. The trial court held that it was unnecessary to deal with the constitutional questions since the designation was unjustified as

maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose."

19. Lutheran Church, 35 N.Y.2d at 131-32, 316 N.E.2d at 312, 359 N.Y.S.2d at 16.

20. N.Y.C.P.L.R. § 217 (1972).

21. N.Y.C.P.L.R. §§ 7801-06.

22. Lutheran Church, 35 N.Y.2d at 126, 316 N.E.2d at 308, 359 N.Y.S.2d at 11.

23. Lutheran Church in America v. City of New York, 27 App. Div. 2d 237, 278 N.Y.S.2d 1 (1st Dep't 1967).

a factual matter.[24] On reappeal, the Appellate Division affirmed by a divided court.[25] The majority noted that:

> this action was converted by defendant Commission's own conduct of the case from a declaratory judgment action, addressed to the constitutionality of the Landmarks Preservation Law . . . to one challenging the Commission's designation of the subject building as a landmark.[26]

It was in this posture that the case reached the Court of Appeals. After reviewing the procedural history, the court ruled that there was no justification for both lower courts having converted the action for declaratory judgment into an article 78 proceeding.[27] The majority noted that the plaintiff Church started the litigation as an action for declaratory judgment and adhered to that theory despite the Commission's and the lower courts' insistence on altering the form of the action.[28] Furthermore, since the constitutional issues had been raised in the lower courts, the majority saw no obstacle to their passing on them for the first time.[29] Finding that the Church's proof of economic hardship was "substantially unchallenged," the majority concluded that only questions of law remained to be answered.[30]

This shift in proceedings provoked Judge Jasen to write in a vigorous dissent (in which Judge Breitel concurred): "In the rather bizarre procedural posture that this case comes to us, the constitutional issue is not ripe for adjudication . . . no findings of fact were made with respect to plaintiff's claim of hardship."[31] The appropriate course would seem to have been to remit the case to the Supreme Court for findings of fact.[32] The importance of remitting this particular case was underscored by Jasen:

24. Lutheran Church, 35 N.Y.2d at 127, 316 N.E.2d at 309, 359 N.Y.S.2d at 12.

25. Lutheran Church in America v. City of New York, 42 App. Div. 2d 547, 345 N.Y.S.2d 24 (1st Dep't 1973).

26. *Id.*

27. Lutheran Church, 35 N.Y.2d at 127, 316 N.E.2d at 309, 359 N.Y.S.2d at 13.

28. *Id.*

29. *Id.* 35 N.Y.2d at 128, 316 N.E.2d at 310, 359 N.Y.S.2d at 13.

30. *Id.*

31. *Id.* at 133, 316 N.E.2d at 313, 359 N.Y.S.2d at 17-18.

32. *See* Rescue Army v. Municipal Court, 331 U.S. 549 (1947); Anniston Mfg. Co. v. Davis, 301 U.S. 337 (1937); Gerbig v. Zumpano, 7 N.Y.2d 327, 165 N.E.2d 178, 197 N.Y.S.2d 161 (1960); 7 WEINSTEIN-KORN-MILLER, N.Y. CIV. PRAC. ¶

> ... we should have the benefit of a full exposition of all factual issues with express findings made in the courts below. The instant record simply does not afford us that perspective and as such cannot suffice to render a constitutional determination of such far-reaching import to the future of landmarks preservation in the City of New York, the State and the Nation as well.[33]

Why the majority considered remand unimportant is difficult to understand.

One can only speculate whether the Commission could have succeeded in refuting the Church's evidence that the Morgan House was "totally inadequate" for its needs as a religious organization. The court in *Sailors' Snug Harbor* set out three subsidiary questions to be examined in determining whether maintenance of the landmark either "physically or financially prevents or seriously interferes with carrying out the charitable purpose."[34] These questions were: (1) whether the preservation of the buildings would seriously interfere with the use of the property, (2) whether the buildings are capable of conversion to a useful purpose without excessive cost, or (3) whether the cost of maintaining them without use would entail serious expenditure.[35] The case was remanded for further consideration of these factual questions, but no answers were forthcoming because the *Sailors' Snug Harbor* case was not retried.[36] A close look at these questions suggests that they do not necessarily presume continued use of the landmark by the charitable organization itself. Nor do they presume that alteration or demolition are the only alternatives if the structure is unsuited to the purposes of the charitable owner. If this is true, it would seem reasonable to consider alternatives available to the organization in assessing the degree of interference with its charitable purpose. Among others, the following factors could be considered: (1) whether a purchaser

5613.04. *See also* Sailors' Snug Harbor, 29 App. Div. 2d 376, 288 N.Y.S.2d 314 (1st Dep't 1968), which was remanded for the taking of further testimony with respect to whether the preservation of plaintiff's buildings either physically or financially prevented or interfered with its charitable purposes.

33. Lutheran Church, 35 N.Y.2d at 135, 316 N.E.2d at 314, 359 N.Y.S.2d at 19 (dissent).

34. 29 App. Div. 2d at 378, 288 N.Y.S.2d at 316.

35. *Id.*

36. The City has since decided to acquire Sailors' Snug Harbor. *See* Rankin, *Operation and Interpretation of the New York City Landmarks Preservation Law*, 36 LAW & CONTEMP. PROB. 366, 369-70 (1971).

or tenant who could utilize the landmark structure is obtainable;[37] (2) whether other sites are available, and whether the organization has adequate resources to purchase or rent such other sites; (3) the uniqueness of the landmark site in relation to the organization's "charitable purposes";[38] (4) whether the resources necessary for making the landmark usable to the owner (subject to landmarks restrictions), or for obtaining additional facilities, could be obtained by the transfer of air rights from the landmark site;[39] (5) whether local zoning regulations or other restrictions would permit the use to which the organization proposes to put the property after demolition. Only through a careful analysis of these questions can the degree of physical and financial interference with an organization's "charitable purpose" be determined. For example, in the *Lutheran Church* case the Church's plans called for the construction of a nineteen-story office building on the site of the Morgan House. However, the property was not zoned for such a structure, and thus rendered the Church's plans academic.[40] To measure the burden imposed on the Church as the difference between a nineteen-story office building and the value of the Morgan House is unjustified. Furthermore, there was no finding of fact with respect to the Lutheran Church's option to transfer the air rights, the surplus of unused floor area, from the landmark site to the Church's adjacent five-story annex.[41] The relation of the landmark site to the Church's charitable purpose should have been another important issue in the

37. *See* note 15 *supra*. The provisions granting the Commission the right to find a purchaser or tenant where the property is commercial, or where the property is tax-exempt and the owner has made arrangements to sell or lease it, suggest this criterion. In cases such as *Lutheran Church*, where the tax-exempt owner does not plan to alienate his landmark property, it would seem appropriate in assessing the owner's hardship to consider whether a purchaser or tenant who can use the property without destroying the landmark is available.

38. The unique relation of the site of Sailors' Snug Harbor to the purpose of providing a home for retired seamen was considered to be of compelling importance by the court in the *Sailors' Snug Harbor* case. Sailors' Snug Harbor, 29 App. Div. 2d 376, 288 N.Y.S.2d at 316.

39. On the subject of air rights transfer, *see generally* Costonis, *supra* note 1; Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); Marcus, *Air Rights Transfers in New York City*, 36 LAW & CONTEMP. PROB. 372 (1971); Note, *Development Rights Transfer in New York City*, 82 YALE L.J. 338 (1972).

40. Lutheran Church, 35 N.Y.2d at 133 n.2, 316 N.E.2d at 313 n.2, 359 N.Y.S.2d at 18 n.2 (dissent).

41. *Id.*

case. While the uniqueness of the site of Sailors' Snug Harbor, overlooking the Kill Van Kull, and its relation to the purpose of providing a home for retired seamen were of compelling influence in the *Sailors' Snug Harbor* case, these factors are minimal in *Lutheran Church*. The only evidence of uniqueness of the Morgan House site offered by the Church appears to be its proximity to transportation centers, a characteristic of almost any site in Midtown Manhattan.[42]

However, the majority in *Lutheran Church* did not consider these questions. The important question to ask is why not. Was it because they believed such considerations were not "in the light of the purposes and resources of the petitioner"?[43] Or was it because there were no findings of fact on these issues in the lower courts? These questions will only be answered in future litigation. It is conceivable that if a new case were to present itself, with facts similar to those in *Lutheran Church* but free of the procedural irregularities, the Commission might prevail on the constitutional issue of taking if it succeeds in proving at trial court that some or all of the alternatives mentioned above exist.

The Legal Basis of the Sailors' Snug Harbor Test

The question of what factors should be considered in examining the degree of interference with a tax-exempt organization's purpose raises the deeper question of the legal basis of the *Sailors' Snug Harbor* test. This test of what constitutes a taking with respect to charitable institutions deserves critical comment on two accounts.

First, the court found it necessary in *Sailors' Snug Harbor* to formulate a test for charitable[44] institutions because the Landmarks Preservation Law fails to supply one.[45] The Law does provide guidelines as to what constitutes an undue burden on commercial realty and provides relief in such instances.[46] There is also a corresponding

42. Reply Brief for the Municipal Art Society as Amicus Curiae at 15, Lutheran Church, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974).

43. Sailors' Snug Harbor, 29 App. Div. 2d at 378, 288 N.Y.S.2d at 316.

44. Although Sailors' Snug Harbor is properly a "charitable" institution in the narrow sense of the word, the term is also used in its broader meaning to include non-profit or tax-exempt organizations in general.

45. Sailors' Snug Harbor, 29 App. Div. 2d at 378, 288 N.Y.S.2d at 316; *Charter*, ch. 8A, § 207-8.0.

46. *Charter*, ch. 8A, § 207-8.0(a).

provision in regard to property exempt from tax, but its application is limited to the instance where the institution wants to alienate the property by sale or lease.[47] The case in which a tax-exempt organization does not desire to alienate the property simply is not covered by the statute. In seeking to develop a "comparable test for a charity" to that applicable to commercial property, the court stated: "The criterion for commercial property is where the continuance of the landmark prevents the owner from obtaining an adequate return."[48] In fact, however, the applicable provision of Chapter 8A requires a determination of whether the property is "*capable* of earning a reasonable return" with the landmark intact[49] (emphasis added). This provision leaves open the possibility that the owner may not be using the landmark as efficiently as possible, in which case the ameliorative provisions of section 207-8.0 will not apply. An alternative utilization may be necessary to be "capable" of earning a reasonable return. To be consistent, then, with the test for commercial property, it is erroneous to analyze the burden of the landmark designation solely in terms of the owner's present use or purpose rather than in terms of the nature of the property itself.

The second comment to be made concerns the nature of the *Sailors' Snug Harbor* test, as opposed to its source. The test is essentially a formulation of what constitutes a taking.[50] The general rule was set out by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*:[51] if a regulation, even though a constitutional exercise of the police power, casts too substantial a burden on the individual owner, it may constitute an unlawful invasion of his right of private property which would require the municipality to compensate the

47. *Charter*, ch. 8A, § 207-8.0(a)(2)(a).

48. Sailors' Snug Harbor, 29 App. Div. 2d at 378, 288 N.Y.S.2d at 316.

49. *Charter*, ch. 8A, §§ 207-1.0(c), 207-8.0(a)(1)(a).

50. This issue has been examined extensively in academic writings. *See* Beuscher, *Some Tentative Notes on the Integration of the Police Power and Eminent Domain by the Courts*, 1968 URBAN L. ANN. 1; Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63 (P. Kurland ed.); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971). For an analysis of the problem as it relates to historic preservation, *see* Note, *The Police Power, Eminent Domain and the Preservation of Historic Property*, 63 COLUM. L. REV. 708 (1963).

51. 260 U.S. 393 (1922).

owner. However, the rule in *Pennsylvania Coal Co. v. Mahon* was framed in economic terms. *Sailors' Snug Harbor* attempts to phrase the rule in terms of a charitable organization's purposes.[52] While the principle may be sound in logic, the *Sailors' Snug Harbor* test runs contrary to authority to the extent it establishes that the burden of landmark designation must be analyzed in terms of the unique "purposes and resources" of the charitable owner rather than the characteristics of the property itself. In testing the constitutionality of other restrictions on property, the Supreme Court has avoided considering the unique characteristics of a particular owner, and has upheld restrictions that almost totally prevent the particular owner from using the property for the purposes for which it had been used, when the property remained suitable for other purposes.[53] In *Goldblatt v. Hempstead* the Court held that if an ordinance was otherwise a valid exercise of the police power, "the fact that it deprives the property of its most beneficial use does not render it unconstitutional."[54] To apply a more lenient standard to charitable owners—one based on their "purposes and resources"—appears in no way justified.

In summary, then, the *Lutheran Church* case raises a serious question whether the *Sailors' Snug Harbor* test was correctly applied. The court was unwilling to explore the issues relating to the degree of burden imposed on the Church by the Morgan House designation and the extent of the interference this burden caused to the Church's attainment of its purposes. It was necessary to ask these questions to make a sophisticated assessment of whether or not there was a "taking." But even deeper questions must be aimed at the legal premise itself. Is the *Sailors' Snug Harbor* test an adequate test? Both its derivation and nature are open to criticism. Not only is the test's derivation apparently the result of a misconstruction of the test which it was said to analogize, but the focus of the test itself, at least as construed in *Lutheran Church*, seems to run contrary to other cases on the "taking" issue.

52. Sailors' Snug Harbor, 29 App. Div. 2d at 378, 288 N.Y.S.2d at 316.

53. Goldblatt v. Hempstead, 369 U.S. 590 (1962) (where the restrictions rendered it impossible for plaintiff to continue its gravel pit operations on the particular property involved); Hadachek v. Sebastian, 239 U.S. 394 (1915) (where continued use of plaintiff's business was completely prohibited).

54. 369 U.S. at 592.

THE LANDMARKS PRESERVATION LAW AND *LUTHERAN CHURCH*

Constitutional Basis

The Landmarks Preservation Law was passed under the New York State Historic Preservation Enabling Act of 1956,[55] which granted municipalities the authority to provide for the protection and preservation of buildings and places of "special historical or aesthetic interest or value" and for the control of the use and appearance of neighboring property.[56] The New York City Law begins with a statement of legislative purpose listing the reasons for historic preservation.[57] The list begins with the preservation of districts and sites of cultural, social, economic, political and architectural history. It goes on to include the protection of property values in the districts, the encouragement of civic pride in the accomplishments of the past, the promotion of tourism, and the general strengthening of the city economy. It concludes with the purpose of promoting the use of landmarks for the education, pleasure, and welfare of the people of the city. Like other statutes of its type, the Landmarks Preservation Law rests heavily on the assertion of economic reasons for its justification as a valid exercise of police power.[58] In fact, however, the primary purposes sought to be achieved are aesthetic in nature. The drafters of the legislation took great pains to couple aesthetic and historic values with as many ancillary values as possible, so as to have a wide basis for justifying the exercise of the police power.[59] Although the courts have allowed broad scope in the exercise of the police power, they have recognized limitations on its exercise in the due process and equal protection clauses of the fourteenth amendment. These limitations include the requirements that an exercise of the police power serve a public, not a private, interest;[60] that it be rationally formulated[61] and ad-

55. N.Y. Sess. Laws, ch. 216 (McKinney 1956) (repealed 1968; amended and reenacted as N.Y. Gen. Munic. Law § 96-a (McKinney Supp. 1974)).

56. N.Y. Gen. Munic. Law § 96-a (McKinney Supp. 1974).

57. *Charter*, ch. 8A, § 205-1.0(b).

58. Wolf, *The Landmark Problem in New York*, 22 N.Y.U. Intra. L. Rev. 99 (1967); Note, 63 Colum. L. Rev. 708, *supra* note 48.

59. Wolf, *supra* note 56, at 101.

60. *See, e.g.*, Thompson v. Consolidated Gas Util. Corp., 300 U.S. 55, 77-81 (1937); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

ministered;[62] and that the means chosen be reasonably related to the desired public purposes.[63] Exercise of the police power is presumed to meet the requirements of the fourteenth amendment unless proved by an aggrieved person to be "palpably unreasonable" or clearly arbitrary.[64] If found to be unreasonable, a restriction on property rights goes beyond mere regulation and becomes confiscatory.[65] During the last fifty years judicial attitudes toward the exercise of police power to achieve aesthetic purposes have varied from outright rejection, to disguised acceptance, to apparently strong approval.[66] Although it is now well-settled that the mere presence of aesthetic considerations will not invalidate zoning legislation,[67] some courts have maintained that these considerations alone do not constitute a valid basis for an exercise of the police power.[68] Early decisions invalidated aesthetic zoning ordinances on the ground that the objective was not substantially related to the health, safety, morals, or general welfare of the community.[69] When a police power enactment *is* substantially related to the health, safety, morals or general welfare of the community, even though the primary purpose is aesthetic in nature, it will generally be upheld.[70] Thus, it could be said in 1963:

61. *See, e.g.*, Panhandle E. Pipe Line Co. v. State Highway Comm'n, 294 U.S. 613 (1935); Nebbia v. New York, 291 U.S. 502 (1934).

62. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

63. Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928); Sligh v. Kirkwood, 237 U.S. 52, 61 (1915).

64. *See, e.g.*, Nebbia v. New York, 291 U.S. 502 (1934); Gorieb v. Fox, 274 U.S. 603 (1927).

65. *See, e.g.*, Nectow v. City of Cambridge, 277 U.S. 183 (1928); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

66. *See generally* Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218 (1955); Turnbull, *Aesthetic Zoning*, 7 WAKE FOREST L. REV. 230 (1971); Note, *Aesthetic Zoning: A Current Evaluation of the Law*, 18 U. FLA. L. REV. 430 (1965); Comment, *Zoning, Aesthetics, and the First Amendment*, 64 COLUM. L. REV. 81 (1964); Comment, *Zoning for Aesthetics Substantially Reducing Property Values*, 27 WASH. & LEE L. REV. 303 (1970).

67. Welch v. Swasey, 214 U.S. 91 (1909).

68. *See, e.g.*, Presnell v. Leslie, 3 N.Y.2d 384, 144 N.E.2d 381, 165 N.Y.S.2d 488 (1957); Dowsey v. Village of Kensington, 257 N.Y. 221, 177 N.E. 427 (1931); Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925).

69. *See, e.g.*, People *ex rel.* Wineburgh Advertising Co. v. Murphy, 195 N.Y. 126, 88 N.E. 17 (1909); Isenbarth v. Bartnett, 26 App. Div. 546, 201 N.Y.S. 383 (2d Dep't 1923), *aff'd mem.*, 237 N.Y. 617, 143 N.E. 765 (1924).

70. St. Louis Gunning Advertising Co. v. City of St. Louis, 235 Mo. 99, 137 S.W. 929 (1911), *appeal dismissed per stipulation*, 231 U.S. 761 (1913); People v. Sterling, 267 App. Div. 9, 45 N.Y.S.2d 39 (3d Dep't 1943).

> Thus far, the courts have been receptive to historic preservation laws, sustaining them against constitutional challenge in language of approbation. So long as preservation laws remain a means of achieving legitimate public needs—whether such needs are economic protection, the safeguarding of property values, or perhaps even education—the present attitude of the courts toward these police measures should continue.[71]

It is possible that the courts would have sustained the Landmarks Preservation Law if the statement of purpose had been based on aesthetic considerations alone. The Supreme Court in *Berman v. Parker*[72] stated in explicit dicta that the concept of public welfare includes spiritual and aesthetic values. This case is the result of more than a fifty-year evolution in the interpretation of the "welfare" clause. The attitude of the New York Court of Appeals reflects that evolution.[73] In a note to his dissent in *Lutheran Church,* Judge Jasen stated:

> Perhaps it is time that aesthetics took its place as a zoning end *independently* cognizable under the police power for 'a high civilization must . . . give full value and support to the . . . great branches of man's scholarly and cultural activity in order to achieve a better understanding of the past, a better analysis of the present, and a better view of the future.' . . . Indeed, under our cases that would be but a moderate analogical extension.[74]

The drafters of the law, however, chose the more cautious route of linking the legislation to economic and educational as well as aesthetic values.

In fact the New York courts have upheld the constitutionality of the Landmarks Preservation Law as a whole. The court in *Manhattan Club v. Landmarks Preservation Commission*[75] upheld the law as constitutional since "the promotion of the general welfare includes the historical and cultural purpose envisaged by the City law."[76] That case also held that the statute as applied to the plaintiff Manhattan Club, the owner of a designated landmark, was constitu-

71. Note, 63 COLUM. L. REV. 708, *supra* note 48, at 732.
72. 348 U.S. 26, at 33 (1954) (dictum).
73. People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963).
74. Lutheran Church, 35 N.Y.2d at 134-35, 316 N.E.2d at 314, 359 N.Y.S.2d at 19.
75. 51 Misc. 2d 556, 273 N.Y.S.2d 848 (Sup. Ct. 1966).
76. *Id.* at 560, 273 N.Y.S.2d at 852.

tional, since the law did not preclude all uses for which the property was reasonably adapted. Plaintiff was free to do as he pleased to the interior of the building and was guaranteed a reasonable return. In *Sailors' Snug Harbor*, the court refused to declare the Landmarks Preservation Law unconstitutional. It upheld the law, stating:

> We deem certain of the basic questions raised to be no longer arguable. In this category is the right, within proper limitations, of the state to place restrictions on the use to be made by an owner of his own property for the cultural and aesthetic benefit of the community.[77]

The outcome of *Lutheran Church* was similar. Although the plaintiff Church sought to have the law declared unconstitutional on its face, the Court of Appeals chose to limit its holding to declaring the law unconstitutional as applied to the Church's property.[78] Absent from the opinion, however, is a specific statement, similar to those found in *Manhattan Club* and *Sailors' Snug Harbor*, upholding the Landmarks Preservation Law as an appropriate exercise of the police power. Also worthy of note is the statement in Judge Gabrielli's majority opinion that the court would consider on another day the question of the constitutionality of the ameliorative provisions of section 207-8.0[79] which did not apply to the Lutheran Church. Did Gabrielli intend to strike an ominous note with this comment? One can only speculate upon the outcome of a case, involving a commercial property, in which the issue is properly framed. At the present time it can only be said that the basis of the statute in the police power has been thus far upheld by the lower courts in the state of New York.[80] Whether individual provisions, particularly section 207-8.0, are "palpably unreasonable" or clearly arbitrary, is a question still to be answered.

A different issue, which has produced drastically different results,

77. Sailors' Snug Harbor, 29 App. Div. 2d at 377, 288 N.Y.S.2d at 315.

78. Lutheran Church, 35 N.Y.2d at 123, 132, 316 N.E.2d at 307, 312, 359 N.Y.S.2d at 9, 17. The State Supreme Court recently held to a similar position with respect to a commercial property in Penn Central Transp. Co. v. City of New York (Sup. Ct. Jan. 22, 1975) in N.Y.L.J., Jan. 23, 1975, at 16, col. 3.

79. *See* note 15 *supra*.

80. Sailors' Snug Harbor, 29 App. Div. 2d 376, 288 N.Y.S.2d 314 (1st Dep't 1968); Manhattan Club v. Landmarks Preservation Comm'n, 51 Misc. 2d 556, 273 N.Y.S.2d 848 (Sup. Ct. 1966).

is the application of the Landmarks Preservation Law to particular circumstances. Upon this aspect of the law attention is now focused.

As Applied To Tax-Exempt Organizations

In the long run the loss of Morgan House will be of minor significance to the people of New York City when compared with the precedent established by *Lutheran Church.* The case has shown that the Landmarks Preservation Law is vulnerable to claims of unconstitutionality when applied to landmarks which are held by organizations and institutions exempt from paying taxes,[81] and which do not fall under section 207-8.0(a)(2) of the Law. It is a clear statement that the court will not tolerate an attempt to force a landmark owner to preserve the property, without any relief or adequate compensation, when the designation imposes a burden.

If the designation "prevents or seriously interferes" with the carrying out of the owner's "charitable purposes," the City must relinquish the designation. There is reason to believe that "charitable" will not be construed in its strictest sense. While it referred to the operation of a home for retired seamen in *Sailors' Snug Harbor,* the term was used to include the functions of a religious organization in *Lutheran Church.* Extension to educational institutions, hospitals, libraries and museums can be foreseen. The distinguishing attribute is that the organization is exempt from taxation. The extent of the current dilemma facing the City, which has chosen the preservation of historic landmarks as a desirable goal, becomes even more evident with consideration of the following:

(1) The standard used by the Court with respect to tax-exempt organizations makes it clear that the battle is to be waged on the facts of each case. Although there is general agreement that compensation is required only for a governmental "taking" of property and not for losses occasioned by mere "regulation,"[82] the generality of the theory thus formulated is of little help in deciding any given case. The landmark designation, and the subsequent design and demolition controls, must be scrutinized with respect to each organization's specific purposes. It is virtually impossible to know at what point "regulation" amounts to a "taking." A survey of the recent cases dealing with the taking issue led Professor Sax to conclude:

81. *See generally* N.Y. REAL PROPERTY TAX LAW § 400 *et seq.* (McKinney 1972); *Charter,* ch. 51, § J51-3.0 (Supp. 1974).

82. *See* note 48 *supra.*

> [T]he predominant characteristic of this area of law is a welter of confusing and apparently incompatible results. The principle upon which the cases can be rationalized is yet to be discovered by the bench: what commentators have called the 'crazy-quilt pattern of Supreme Court doctrine' has effectively been acknowledged by the Court itself, which has developed the habit of introducing its uniformly unsatisfactory opinions in this area with the understatement that 'no rigid rules' or 'set formula' are available to determine where regulation ends and taking begins.[83]

In the absence of rules or formulas to be used as guidelines, the Commission is severely handicapped in assessing whether its designation and controls amount to a taking in individual instances until a court has given its pronouncement. This very framing of landmarks preservation in terms of the "taking" issue raises serious questions of whether a comprehensive, effective program is possible, and whether the test is successful in accommodating "the interests of the community to those of the landmark owner."[84]

(2) The use of the power of eminent domain is not a viable alternative as the basis for a comprehensive program of preserving historic landmarks.[85] The City's decision to acquire Sailors' Snug Harbor rather than face retrial of that case in light of the rule set down by the Appellate Division[86] temporarily avoided the painful result of *Lutheran Church*.[87] However, the City simply does not have the resources to follow such an approach with any degree of success. Only a handful of the more than 400 designated landmarks in New York City could be preserved through condemnation. Large scale condemnation, even if supportable constitutionally, would impose an enormous financial burden on the City and the necessary

83. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, at 37 (1964).

84. Pyke, *Architectural Controls and the Individual Landmark*, 36 LAW & CONTEMP. PROB. 398, 405 (1971).

85. The requirements for the exercise of the power of eminent domain are essentially twofold: the projected use must be public, *e.g.*, Matter of New York City Housing Authority v. Muller, 270 N.Y. 333, 1 N.E.2d 153 (1936); Berman v. Parker, 348 U.S. 26 (1954); and just compensation must be paid to the landowner for the taking, *e.g.*, Phelps v. United States, 274 U.S. 341 (1927); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

86. Sailors' Snug Harbor, 29 App. Div. 2d at 378, 288 N.Y.S.2d at 316.

87. Rankin, *supra* note 36, at 369-70.

increases in taxes would be politically unattainable. Furthermore, the City's burden would not end with acquisition. Widespread public ownership of historic property would require extensive restoration in addition to ordinary maintenance.[88] Moreover, public ownership may remove the landmark from economically productive use. These and similar considerations led Judge Jasen to conclude in his dissenting opinion in *Lutheran Church*: "Economic considerations alone suggest the desirability of providing standards, controls, and incentives to encourage private owners to preserve their historic properties. . . ."[89]

(3) The *Lutheran Church* case witnessed the clash of two public policies: the exemption of certain organizations from the payment of taxes, and the preservation of historic landmarks. The Church's tax-exempt status and its desire not to alienate the landmark property placed it outside of the ameliorative provisions of section 207-8.0 of the Landmarks Preservation Law, and thus in a position to challenge the constitutionality of the law as applied. Clearly, it is impossible to remit the taxes of a tax-exempt organization in order to alleviate the burden caused by designation. It is doubtful that some sort of relief from hardship imposed by designation can be provided to a tax-exempt organization that does not intend to alienate its landmark by amending the Landmarks Preservation Law. This is because the standard for a "taking" is framed in terms of "purpose" rather than a more concrete test, such as the six percent return for commercial property. In effect, the City will be hard-pressed to preserve a landmark owned by a tax-exempt organization if that organization does not want to preserve it and can show hardship. The foreboding indication from *Lutheran Church* is that when these two public policies conflict, landmarks preservation will be subordinated to tax exemption.

These observations force one to conclude that the present method of landmarks preservation is ineffective with respect to those landmarks held by tax-exempt organizations. It is imperative that if these landmarks are to be preserved, a new approach be developed. This would first of all require a closer examination of these two conflicting public policies.

88. J. Costonis, *supra* note 1, at 11-18.

89. 35 N.Y.2d at 134, 316 N.E.2d at 313, 359 N.Y.S.2d at 18.

LANDMARKS OWNED BY TAX-EXEMPT ORGANIZATIONS

Conflicting Policies

Landmarks Preservation

In 1935,[90] Congress declared "a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States."[91] It granted to the Secretary of the Interior a number of duties and functions relevant to the protection of such sites, including the powers to make a survey of historic and archaeological sites, and to acquire, restore, maintain, and manage them.[92] However, the statute did little to protect privately owned properties from destruction. The National Historic Preservation Act of 1966[93] established guidance for policy and machinery for intensified efforts toward achieving the goal of preservation in general, and protection from governmental depredation at the federal level in particular. In the preamble is the statement:

> Congress finds and declares . . . that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people.[94]

That this statement was not to be a hollow proclamation is evident in the substantive provisions of the Historic Preservation Act. It provides for the maintenance by the Secretary of the Interior of an expanded national register of "districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, and culture"[95] now known as the National Register of Historic Places. It authorized the Secretary of the Interior to provide

90. Prior to 1935 federal legislation provided only limited protection to some historic sites. *See, e.g.*, Antiquities Act of 1906, ch. 3060, 34 Stat. 225, *as amended*, 16 U.S.C. §§ 431-33 (1970), in which protection was accorded to sites on lands owned or controlled by the United States. For a general review of federal legislation with respect to historic preservation, *see* Gray, *The Response of Federal Legislation to Historic Preservation*, 36 LAW & CONTEMP. PROB. 314 (1971).

91. Act of Aug. 21, 1935, 16 U.S.C. § 461 *et seq.* (1970).

92. 16 U.S.C. § 462 (1970).

93. 16 U.S.C. § 470 *et seq.* (1970), *as amended* (Supp. III 1973).

94. 16 U.S.C. § 470(b) (1970).

95. 16 U.S.C. § 470a(a)(1) (1970).

matching grants-in-aid to states for the preservation of properties,[96] and also to the National Trust for Historic Preservation.[97] Of particular significance is that the Act provided for the establishment of the Advisory Council on Historic Preservation[98] which has the responsibility of advising the president and the Congress on matters of historic preservation; of submitting to them an annual comprehensive report; of recommending studies and encouraging training and education; and of stimulating coordination with state and local agencies and with private institutions and persons.[99] In addition, under section 106 of the Act,[100] National Register properties are afforded protection from "undertakings" involving federal participation. The head of a federal agency has two responsibilities under section 106 before approving the expenditure of federal funds or issuing a license. He or she must "take into account the effect of the undertaking" on any National Register property and "shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertakings."[101]

In addition to this general approach, Congress has also given specific direction to some federal agencies with respect to historic preservation. In the Department of Transportation Act of 1966,[102] it "declared . . . the national policy that special effort should be made to preserve . . . *historic sites*."[103] The same Act provides that the Secretary of Transportation:

> shall not approve any program or project which requires the use of . . . *any* land from an *historic site of national, State or local significance* as . . . determined . . . [by the Federal, State or local officials having jurisdiction thereof] unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such . . . historic site resulting from such use.[104]

96. 16 U.S.C. § 470a(a)(2) (1970).
97. 16 U.S.C. § 470a(a)(3). The National Trust for Historic Preservation was chartered by Congress in 1949, 16 U.S.C. § 468 *et seq.* (1970).
98. 16 U.S.C. § 470i(a) (1970).
99. 16 U.S.C. § 470j (1970).
100. 16 U.S.C. § 470f (1970).
101. *Id.*
102. Act of Oct. 15, 1966, 49 U.S.C. § 1651 *et seq., as amended* (Supp. III 1973).
103. 49 U.S.C. § 1651(b)(2) (1970) (emphasis added). Nothing suggests, however, that the policy statement is limited to activities under the Department of Transportation Act.
104. 49 U.S.C. § 1653(f) (1970) (emphasis added). For a review of the legislative history, see Gray, *Environmental Requirements of Highway and Historic Preser-*

Thus the Department of Transportation Act goes further than section 106 of the National Historic Preservation Act of 1966, which provides only for protection of properties on the National Register of Historic Places.[105] Legislation under the Department of Housing and Urban Development (HUD) program has provided funds for the purchase, restoration and preservation of properties having historic value. Under the Demonstration Cities and Metropolitan Development Act of 1966,[106] HUD has been authorized to provide grants to municipalities and counties for two-thirds of the cost of surveys to identify historic sites and provide information necessary for an effective program of historic preservation. Title VI of the same Act amended the urban renewal law to include historic and archaeological preservation within the definitions of urban renewal plans[107] and urban renewal project activities.[108] The 1966 Act also amended section 110(d)(2) of the urban renewal law[109] by authorizing local grants-in-aid credit for expenditures by localities and other public bodies for historic and archaeological preservation.

Perhaps one of the most strongly worded statements of the federal policy of historic preservation is seen in the National Environmental Policy Act of 1969 (NEPA).[110] This Act clearly establishes historical preservation as a national environmental objective and provides a methodology applicable to all federally-assisted public works projects, which could inhibit unnecessary destruction of historic places.[111] The policy declaration specifies a:

vation Legislation, 20 CATHOLIC U.L. REV. 45 (1970). This requirement, which also includes parklands, has been construed by the United States Supreme Court in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), as prohibiting the destruction of protected lands unless the Secretary of Transportation finds that the alternative routes present unique problems. Factors such as cost and community disruption are not to be given equal weight with the need for preservation in the evaluation of alternatives. 401 U.S. at 411-13.

105. For a discussion of the relation of the Department of Transportation Act §§ 2(b)(2), 4(f), 49 U.S.C. §§ 1651(b)(2), 1653(f) (1970) and the Urban Mass Transportation Act of 1970 § 14, 49 U.S.C. § 1610 (1970), *see* Gray, *supra* note 90, at 320-22.

106. Demonstration Cities and Metropolitan Development Act of 1966 § 604, 40 U.S.C. § 461(h) (1970), *amending* Housing Act of 1954, 40 U.S.C. § 461 (1964).

107. 42 U.S.C. § 1460(b) (1970), *amending* Housing Act of 1949, 42 U.S.C. § 1460(b) (1964).

108. 42 U.S.C. § 1460(c)(9)-(10) (1970), *amending* Housing Act of 1949, 42 U.S.C. § 1460(c) (1964).

109. 42 U.S.C. § 1460(d)(2) (1970), *amending* Housing Act of 1949, 42 U.S.C. § 1460(d)(2) (1964).

110. 42 U.S.C. § 4321 *et seq.* (1970).

111. Gray, *supra* note 90, at 325.

> continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy ... [to] fulfill the responsibilities of each generation as trustee of the environment for succeeding generations, [to] assure for all Americans ... esthetically and culturally pleasing surroundings ... [and to] preserve important historic, cultural, and natural aspects of our national heritage ....[112]

In section 102 of NEPA, Congress "authorizes and directs that, to the fullest extent possible ... the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter."[113] A detailed environmental impact statement is required for every proposed federal action, and it must include a discussion of the adverse effects of a proposed action and the alternatives to it.[114]

Among the purposes of preservation is included the study of history. This purpose is expressed in the National Foundation on the Arts and the Humanities Act of 1965.[115] The Act defines "humanities" to include the study of history and archaeology, and its preamble states the reasons for the study of the humanities. These may serve as the fundamental purposes of historic preservation as well:

> The Congress hereby finds and declares ... that a high civilization must not limit its efforts to science and technology alone, but must give full value and support to the other great branches of man's scholarly and cultural activity in order to achieve a better understanding of the past, a better analysis of the present, and a better view of the future. ...[116]

Historic preservation is a federal policy, which has grown in scope and in the forcefulness of its expression in the course of the past half century. However, federal assistance, for the most part, is not to initiate preservation, but to support local efforts.[117] Few landmarks are truly national in character. Rather, most landmarks derive their significance from the particular history of a locality and the

112. 42 U.S.C. § 4331(b) (1970).
113. 42 U.S.C. § 4332 (1970).
114. 42 U.S.C. § 4332(2)(c) (1970).
115. 20 U.S.C. §§ 784 *et seq.* and 951 *et seq.* (Supp. III 1973).
116. 20 U.S.C. § 951(2) (1970).
117. *See* Comment, *Legal Methods of Historic Preservation*, 19 BUFFALO L. REV. 611 (1970).

interests of the persons who live there. The standards and procedures for historic preservation are thus necessarily related to state and local objectives, and can be implemented most effectively through state and local governments. Moreover, the states and municipalities are the repositories of the powers of the government most useful in achieving preservation objectives—the police power, the power of eminent domain, and the power of taxation. Awareness of the importance of state and local initiatives is reflected in the preservation legislation enacted by Congress.[118]

It is the role of the state legislature to establish policy and standards for preservation services, and to define the powers of local governments to engage in historic preservation. Every state has now passed laws in one form or another aimed at preserving public property of unusual or historic interest.[119] Many states have also passed enabling statutes authorizing cities and towns to control private property for the purpose of historic preservation.[120] The State of New York has declared it to be a public policy to establish and maintain a statewide system of historic preservation.[121] The enabling statute authorizes

> any county, city, town or village . . . to provide by regulation, special conditions and restrictions for the protection, enhancement, perpetuation and use of places, districts, sites, buildings, structures . . . having . . . special historical or aesthetic interest or value.[122]

Under the authority of this statute, and in response to the destruction of historic buildings in the urban setting where the pressures of concentration increases the demand for new housing and commercial space, the New York City Council passed the Landmarks Preservation Law.[123] In a declaration of public policy, the statute states:

> [T]he protection, enhancement, perpetuation and use of improvements and landscape features of special character or special historical or aesthetic interest or value is a public neces-

118. Wilson & Winkler, *The Response of State Legislation to Historic Preservation*, 36 LAW & CONTEMP. PROB. 329 (1971).
119. J. MORRISON, HISTORIC PRESERVATION LAW 9 (1965).
120. *Id.* at 12.
121. N.Y. PARKS & REC. LAW § 3.01 (McKinney 1974).
122. N.Y. GEN. MUNIC. LAW § 96-a (McKinney Supp. 1974).
123. *Charter*, ch. 8A (1973).

> sity and is required in the interest of the health, prosperty, safety and welfare of the people.[124]

It has been in the furtherance of this policy that landmarks have been designated in New York City.

Property Tax Exemption of Charitable Organizations

The exemption[125] from taxation of certain institutions of religious, educational and charitable[126] character is a practice deep-rooted in the American political and social system. It has been said that the principle here "has been inseparably interwoven with the structure of all State governments and the habits and convictions of our people."[127] The public policy of the State of New York has been to favor the exemption from taxation of institutions which are operated in the interest of the public welfare and not for a profit, and which are supported wholly or in part by public subscriptions, private gifts, or endowments.[128] The basis for the exemption from taxation of such institutions is that "they render an essential public service."[129] This principle has been variously stated in terms of a shouldering of a burden which would otherwise have to be carried by the State itself,[130] or providing religious, moral, intellectual, and cultural benefits to the community,[131] which advance the common

124. *Charter*, ch. 8A, § 205-1.0(b).

125. The discussion, for the purposes of this paper, will be limited to exemptions from real property taxation.

126. "Charitable" is used here in its broad sense of "non-profit."

127. J. SAXE, CHARITABLE EXEMPTION FROM TAXATION IN NEW YORK STATE ON REAL AND PERSONAL PROPERTY 7 (1933).

128. Subcommittee on Taxation and Finance, *Problems Relating to Taxation and Finance*, 10 N.Y. STATE CONST. CONVENTION COMM. 201 (1938). [Hereinafter cited as *Subcommittee*.]

129. William D. Guthrie in a memorandum to the New York State Constitutional Convention of 1915, cited in *Subcommittee*, *supra* note 128, at 202.

130. "Thus, school and college properties may be said to receive their rights of tax exemption, not as acts of grace from the sovereign, nor as personal exemptions to the rule that all real property bear its share of the cost of government, but both upon the principle of nontaxation of public places and as a *quid pro quo* for the assumption of a portion of the function of the State." People *ex rel.* Clarkson Memorial College v. Haggett, 191 Misc. 621, 77 N.Y.S.2d 182 (Sup. Ct. St. Lawrence County 1948), *aff'd*, 274 App. Div. 732, 87 N.Y.S.2d 491 (3d Dep't), *aff'd*, 300 N.Y. 595, 89 N.E.2d 882 (1949). The Appellate Division, however, disagreed with this statement.

131. "The policy of the law has been, in this State from an early day, to encourage, foster and protect corporate institutions of religious and literary character, be-

welfare, peace, and order. In short, it is a recognition by the government that the value of the services rendered by these institutions is more important than the income that would be derived from taxing these institutions.[132]

The granting of exemptions from taxation of the property of[133] religious, educational, and charitable institutions has not been without criticism. It has been argued that the purposes which once justified the exemptions no longer exist.[134] Criticism has been directed at exemptions for religious institutions on the grounds that they do not serve a function of government in the light of the first amendment.[135] Criticism has also been based on the grounds that large parts of the population have no religious affiliation, contrary to earlier periods in our history when membership was all but universal, thus raising the question of whether a community should be forced to subsidize property which does not benefit the community as a whole.[136] This latter criticism has also been directed at private educational institutions in light of the growth of free public education, and at charities whose functions, to a large extent, have been supplanted by governmental programs.[137] A second argument leveled at tax exemptions of these institutions is based on the fiscal

cause the religious, moral and intellectual culture afforded by them were deemed, as they are in fact, beneficial to the public, necessary to the advancement of civilization, and the promotion of the welfare of society. And, therefore, those institutions have been relieved from the burden of taxation by statutory exemption." People *ex rel.* Seminary of Our Lady of Angels v. Barber, 42 Hun. 27, 30 (N.Y. App. Div., 5th Dep't 1886), *aff'd,* 106 N.Y. 669, 13 N.E. 936 (1887). *See* People *ex rel.* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Haring, 8 N.Y.2d 350, 207 N.Y.S.2d 673, 170 N.E.2d 677 (1960).

132. Diocese of Rochester v. Planning Bd. of Town of Brighton, 1 N.Y.2d 508, 136 N.E.2d 827, 154 N.Y.S.2d 849 (1956).

133. *See supra* note 22.

134. *Subcommittee, supra* note 128, at 223.

135. U.S. CONST. amend. I. Exemptions from real property taxation of property owned by religious institutions have been upheld by the Supreme Court as constitutional. Walz v. Tax Comm'n of City of New York, 397 U.S. 664 (1970). However, the question of whether the justification of this exemption can be based on the argument that the churches perform a function which the government would have to provide in their absence would seem to require a negative answer in light of the separation of church and state required by the first amendment.

136. *Subcommittee, supra* note 128, at 223.

137. *Id.* The fact that private schools offer valuable alternatives to public institutions has not been overlooked. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

burdens imposed on the municipalities hosting the institutions.[138] This problem reaches acute proportions in municipalities where large private universities are located.[139] Exemptions from taxation are bound to be likely targets of criticism in periods of generally high or rising tax rates by those who feel they bear more than their fair share of the tax burden; but the criticism that has been leveled at exemptions to religious, educational and charitable institutions cannot be dismissed so lightly. One cannot escape the suggestion that perhaps a reevaluation of these tax exemptions is in order, to determine whether they in truth serve the purposes for which they were established.[140]

It should be clear from the foregoing discussion that both historic preservation and the exemption of religious, educational and charitable institutions from real property taxes are public policies that are deep-rooted and widespread in their application. It is also clear that the principles which underlie these policies are similar in terms of the cultural benefits they provide to the community. That they should have come into conflict in a situation such as the *Lutheran Church* case could hardly have been foreseen by those who conceived these policies. The problem which confronts the City of New York at the present time is how to achieve both of these policies without conflict in the areas where they overlap. While it is not to be assumed that tax-exempt institutions intend to use their advantageous status to thwart the Landmarks Preservation Law of New York City, the effect will be the same as if they had. *Lutheran Church* indicates that the exemption policy will take precedence over the historic preservation policy. It is asserted here that this outcome is not desirable.

A Proposal

In light of the conflict of public policies in *Lutheran Church* and the unsatisfactory resolution of the problem by the court, it is im-

138. The property tax is the chief source of revenue for municipalities. *See* Bridges, *Past and Future Growth of the Property Tax*, in PROPERTY TAXATION U.S.A. 21 (R. Lindholm ed. 1970).

139. *See* Note, *Alternatives to the University Property Tax Exemption*, 83 YALE L.J. 181 (1973).

140. For the real property tax exemptions in the State of New York, which extend from the property of religious organizations to fallout shelters, see N.Y. REAL PROPERTY TAX LAW § 400-89 (McKinney 1972).

perative that if the public policies are to be reconciled with respect to the preservation of historic landmarks owned by tax-exempt organizations, legislative alternatives must be found. One possibility is the invocation of public policy limitations on exemptions in the form of explicit statutory language.

Statutory provisions whereby the real property of organizations are made exempt from taxation are not a recognition of any fundamental right, or a basic principle of law, but a matter of administrative policy.[141] Statutes granting tax exemptions may be altered or repealed at the will of the legislature.[142] Thus, an alternative open to the legislature, when exemptions impede the achievement of other policy goals, is to adjust the present exemption laws. The notion that public policy is a possible, or even necessary, consideration in the awarding of charitable exemptions has emerged from a recent case, *Green v. Connally*.[143] The *Green*[144] court held that racially segregated private schools did not qualify for the exemption or deduction under sections 170(c)(2) and 501(c)(3) of the Internal Revenue Code.[145] Construing the federal law that confers tax advantages upon educational charities, the court was guided by two interrelated principles. First, the court emphasized the general principle that the Congressional intent in providing tax deductions and exemptions is not construed to be applicable to activities that are either illegal or contrary to public policy.[146] Secondly, the court recognized the existence of a federal public policy against support for racial segregation in schools, public or private.[147] In the court's analysis, "public policy" is an entity apart from and outside the Internal Revenue Code, and an additional qualification to be met in order to qualify for the tax benefits. The federal public policy is expressed in a number of different forms,[148] but the court's ultimate

141. People *ex rel.* Clarkson Memorial College v. Haggett, 274 App. Div. 732, 87 N.Y.S.2d 491 (3d Dep't), *aff'd*, 300 N.Y. 595, 89 N.E.2d 882 (1949).

142. *See* People *ex rel.* Cooper Union v. Gass, 190 N.Y. 323, 83 N.E. 64 (1907); Grossman v. Wagner, 20 Misc. 2d 707, 192 N.Y.S.2d 557 (1959). There is no constitutional sanction save the one added in 1938, which merely confirmed certain existing laws. N.Y. CONST. art. XVI, § 1.

143. 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971).

144. *Id.* at 1153.

145. INT. REV. CODE OF 1954, § 170, 26 U.S.C. §§ 170(c)(2), 501(c)(3) (1967).

146. Green, at 1161.

147. *Id.* at 1163.

148. The specific policy against racial segregation in education was proclaimed with respect to public schools in Brown v. Board of Education, 347 U.S. 483 (1954).

source seems to have been the thirteenth amendment, and particularly the enabling clause of that amendment.

By incorporating the principle of *Green* into statutory form, the granting of tax exemptions on real property can be conditional on the property not being used to impede the public policy of historic preservation. While the policy of historic preservation does not hold the weight of a constitutionally guaranteed right, it is arguable that the principle of *Green* could apply. Furthermore, incorporating the principle into a statute would have the advantage of explicitly stating the policy and directing the court in its application to situations where the policies conflict. One way of framing such a statute is to require that all exemptions from the real property tax shall be granted only as consideration for a covenant by the owner that the land and structures thereon will not be used contrary to the purposes and policies of the Landmarks Preservation Law. This does not necessarily work a hardship on tax-exempt organizations, as will be discussed below.

There is precedent for the use of covenants as a device to achieve preservation goals. Covenants and other enforceable restrictions have been used by some states to protect agricultural and open space land on the fringes of growing urban areas.[149] The statutes generally provide for the granting of preferential tax assessment on undeveloped land in return for an agreement by the owner that the land will be restricted to certain designated uses. A Pennsylvania statute authorizes counties to enter into covenants with owners of land designated as farm, forest, water supply or open space, for the purpose of preserving the land in the designated use. In return for the owner's covenant that the land shall remain open for five or ten years, the county covenants that the real property tax assessment for that period will reflect the fair market value of the land as restricted.[150] California's system of restricted use assessment

In Bolling v. Sharp, 347 U.S. 497 (1954), the prohibition against state school segregation was applied to the federal government through the fifth amendment. The national policy against support for segregated education emerged in provisions of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c to 2000d-4 (1964).

149. *See generally* Mix, *Restricted Use Assessment in California: Can It Fulfill Its Objectives?*, 11 SANTA CLARA LAW. 259 (1971); Olpin, *Preserving Utah's Open Spaces*, 1973 UTAH L. REV. 164, 183-89; Note, *Property Taxation of Agricultural and Open Space Land*, 8 HARV. J. LEG. 158 (1970).

150. PA. STAT. ANN. tit. 16, §§ 11941-47 (Supp. 1974). *See also* HAWAII REV. LAWS § 246-12 (Supp. 1973). Under the Hawaii statute an owner who desires to use his land for ranching or other agricultural uses may petition to have the land assessed

is perhaps the most developed and serves as an instructive illustration.[151] In 1967, the California Legislature amended the state property tax statutes to implement the Breathing Space Amendment[152] to provide three methods by which enforceable restrictions may be imposed: (1) contracts, (2) scenic restrictions and (3) open space easements. The Amendment bases the tax value of land covered by the qualifying restrictions upon the land's actual uses with such restrictions, rather than the higher rate of land assessed for potential development uses. The contract method applies only to agricultural lands,[153] and it excludes all non-agricultural uses,[154] binding all successors in interest. The contract must have a minimum duration of ten years with automatic annual extensions of one year,[155] and it can be cancelled only if such action is in the public interest and not inconsistent with the purposes of the Act.[156] Neither an opportunity to make another use of the land nor the uneconomic character of an existing agricultural use is sufficient reason to grant a cancellation.[157] Furthermore, a stiff cancellation penalty is imposed of up to fifty percent of the assessed value of the land at its highest and best use.[158] The scenic restriction device is similar in its provisions to the contract and entitles the landowner to a tax break comparable to that accorded to lands covered by contracts.[159] A scenic restriction is created when the landowner grants a city an interest in the owner's land that restricts future uses and preserves open space. The third method of obtaining favorable tax treatment is by granting cities open space easements that relinquish the land-

at the use value. If the petition is approved, it constitutes a forfeiture by the owner of any right to change the use of his land for a minimum period of ten years.

151. For an analysis and criticism of the California system see Mix, *supra* note 149. *See also* Alden & Shockro, *Preferential Assessment of Agricultural Lands: Preservation or Discrimination?*, 42 S. CAL. L. REV. 59 (1969); Land, *Unraveling the Urban Fringe: A Proposal for the Implementation of Proposition Three*, 19 HASTINGS L.J. 421 (1968); Note, *Assessment of Farmland under the California Land Conservation Act and the "Breathing Space" Amendment*, 55 CAL. L. REV. 273 (1967); Note, *The Dilemma of Preserving Open Space Land—How to Make Californians an Offer They Can't Refuse*, 13 SANTA CLARA LAW. 284 (1973).

152. CAL. REV. & TAX CODE §§ 421-31 (West Supp. 1974).

153. CAL. GOV'T CODE § 51242 (West Supp. 1974).

154. CAL. GOV'T CODE § 51243 (West Supp. 1974).

155. CAL. GOV'T CODE §§ 51244-45 (West Supp. 1974).

156. CAL. GOV'T CODE § 51282 (West Supp. 1974).

157. *Id.*

158. CAL. GOV'T CODE § 51283 (West Supp. 1974).

159. CAL. REV. & TAX CODE § 421(d) (West Supp. 1974).

owners' right to construct improvements on the affected land for at least twenty years.[160]

The California system[161] has been generally more successful than the preferential farmland assessment schemes of other states which do not include the use of enforceable restrictions.[162] It affords greater assurance that the public will receive the benefit of its bargain in exchanging property tax relief for preservation of open spaces. One problem with California's system, however, is that the arrangements are at the option of the landowner, who may decline them if he is speculating on the potential sale of his land. This problem should be largely absent in the proposal for landmarks preservation in New York, since the granting of a complete exemption will be a strong incentive to make the covenant. Furthermore, there will be little pressure from real estate speculators, since a new owner of a landmark property will be in turn subject to the Landmarks Preservation Law.

The principles of *Green v. Connally* and the technique of restricted use assessment statutes applied to the New York City landmarks problem, suggest the essential elements of legislation designed to reconcile the historic preservation and exemption policies. These elements are:

(1) *Declaration of Public Policy and Purpose.* There should be a clear statement, similar to that found in section 205–1.0 of the Landmarks Preservation Law, that it is a matter of public policy to preserve landmarks of historic or aesthetic interest or value, and

160. CAL. GOV'T CODE §§ 51050, 51053 (West Supp. 1974).

161. Equal protection does not seem to have been an issue raised in connection with preferential assessment, even though only certain lands qualify for the tax break, and in some cases the tax rates on two adjacent farms may differ. Nor is there reason to believe equal protection will be grounds for objection to the proposal's treatment of exemptions. The list of "fundamental interests" and "suspect classifications" identified by the Warren Court as requiring strict judicial scrutiny did not include exemptions from taxation. Recent decisions of the Burger Court indicate that there is reluctancy to expand the scope of the "new" equal protection. Lindsey v. Normet, 405 U.S. 56 (1972) (refusing to find housing a fundamental interest); Richardson v. Belcher, 404 U.S. 78, 80-81 (1971), and Jefferson v. Hackney, 406 U.S. 535, 546 (1972) (reiterating that allocations of welfare benefits are not subject to strict scrutiny). However, according to Prof. Gunther, recent developments would suggest that the Court has shifted its focus from legislative purpose to legislative means. For a stimulating discussion of recent trends in the Burger Court with respect to equal protection, *see* Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

162. Olpin, *supra* note 149, at 188-89.

that this policy has importance in terms of its value to the welfare of the community. It should be stated that the purpose of the legislation is to reconcile the policies of historic preservation and real property tax exemption in areas where there is potential for conflict.

(2) *Provision for Covenant.* In addition to such already-existing requirements imposed by state or local law, all exemptions from taxation of real property will be henceforth granted in consideration for a covenant by the owner that the exempt property will not be used contrary to the purposes, policies and provisions of the Landmarks Preservation Law.

(3) *Specific Restrictions.* There should be a statement that the restrictions on the property shall include the following: (a) the owner may not refuse to accept landmark designation of a structure on the property if the designation is made on the basis of a public hearing as provided in section 207–2.0 of the Landmarks Preservation Law; and (b) the owner may not alter the exterior or demolish any landmark-designated structure on the property without the certificate required under section 207–4.0 of the Landmarks Preservation Law.

(4)*Duration.* Although it would probably be possible to make the covenant for exemption for an unlimited time,[163] equitable considerations might call for a more limited duration. An initial duration of at least twenty years, with automatic renewal periods of ten (or twenty) years, would be reasonable.[164] The owner would be able to terminate the covenant upon proper notice not to renew. Nonrenewal would result in loss of exemption.

There are a number of practical advantages to be derived from such a proposal, in addition to the obvious one of the ordering of policies. First, a substantial deterrent to the destruction or alteration of designated landmarks is effected. The potential necessity of paying taxes on real property[165] will be a strong inducement for

163. In the absence of a specific time limit the rule generally followed is that a restrictive covenant will be limited to such time as seems reasonable from the nature of the case. Cruciano v. Ceccarone, 36 Del. Ch. 485, 133 A.2d 911 (1957); Norris v. Williams, 189 Md. 73, 54 A.2d 331 (1947).

164. *See* CAL. GOV'T CODE §§ 51050, 51053, 51244-45 (West Supp. 1974).

165. The real property tax rate in all five boroughs of New York City for 1974-75 is $73.53 per $1,000 of assessed valuation. There is no general state property tax in New York. However, certain court, stenographers' and libraries' expenses, varying from district to district and differing for the Appellate Divisions are paid initially

previously exempt organizations to make the covenant. All organizations desirous of and qualifying for exemption must make the covenant. The only restriction placed on an owner on whose property there is no landmark is to accept such designation if it should be applied in the future. Second, if an organization chooses not to make the covenant required for exemption, it will still be subject to the provisions of the Landmarks Preservation Law if its property is a designated landmark. The *Sailors' Snug Harbor* test must still be met in order to destroy the landmark or make exterior alterations. It is probable that the number of organizations that choose this option will be small, due to the resulting loss of tax-exempt status. Third, the covenant will be enforceable. It is well-settled that injunctive relief is available as a remedy against the breach of a restrictive covenant.[166] Fourth, those organizations which make the covenant will be compelled to seek their remedies through the Landmarks Preservation Law rather than in contravention of it. Denial of the certificate permitting exterior alteration or demolition would give the owner the options of either making limited modifications with the approval of the Commission, or selling or leasing the property to some person or organization that can use it. Exterior alteration or demolition without the required approval of the Commission would be a breach of the covenant.

Revision of the Landmarks Preservation Law would be a necessary complement to this proposal. If relief must be sought within the statute by tax-exempt organizations, adequate remedies must be available to accomodate an individual hardship situation. This is not only a mandate of the federal and state constitutions but also a political necessity.[167] Provisions already existing in the Landmarks Preservation Law with respect to commercial property and tax-exempt organizations under section 207-8.0(a)(2) provide useful models. Two revisions are especially urgent. First, if the designation interferes with the owner's "charitable" purposes, and the owner is willing to sell or lease the property but no purchaser or lessee is available, the Commission should have a stated period (*e.g.*, 90 or 180 days) in which to find a suitable purchaser or lessee. Failing to do this, the Commission may recommend that the City condemn the

by the State, which is then reimbursed from taxes collected locally pursuant to the Judiciary Law. 2 CCH STATE TAX REP., N.Y. ¶ 71-001 (1975).

166. Evangelical Lutheran Church v. Sahlem, 254 N.Y. 161, 172 N.E. 455 (1930).

167. Pyke, *supra* note 81, at 403.

property or any protective interest.[168] If no such condemnation is made, however, the designation must be removed and the organization be permitted to proceed with the needed alteration or demolition to achieve its purposes, without danger of breaching its covenant or violating the Landmarks Preservation Law. It is not the purpose of the proposal to strap an organization with a landmark whose preservation would contravene its purposes. Rather, the proposal encourages the owner to seek a purchaser or lessee who *can* use the landmark. Secondly, if it be determined that the designation imposes a burden on the tax-exempt landmark owner due to the lack of means for proper upkeep, it should be provided that grants-in-aid be given to the owner to the extent that the owner's "charitable" purposes are impeded.[169]

Implementation of the Proposal in New York City

There remains to be examined the question of what problems exist with respect to the implementation of the proposal in New York City. In the State of New York all real property is subject to real property taxation, special ad valorem levies and special assessments unless exempt by law.[170] Exemptions are granted to certain institutions and organizations under the general description of "non-profit organizations" in section 421 of the Real Property Tax Law.[171] Section 421(1)(b) lists a number of organizations which municipalities are authorized, but not required, to tax.[172] This list includes

168. *See Charter,* ch. 8A, § 207-8.0(g), (i).
169. *Charter,* ch. 8A, § 207-8.0(c).
170. N.Y. CONST. art. XVI, § 1; N.Y. REAL PROPERTY TAX LAW § 300 (McKinney 1972).
171. N.Y. REAL PROPERTY TAX LAW § 421 (McKinney 1972).
172. N.Y. REAL PROPERTY TAX LAW § 421(1)(b) (McKinney 1972) reads as follows:

> Real property owned by a corporation or association which is not organized or conducted exclusively for religious, charitable, hospital, educational, moral or mental improvement of men, women or children or cemetery purposes, or for two or more such purposes, but which is organized or conducted exclusively for bible, tract, benevolent, missionary, infirmary, public playground, scientific, literary, bar association, medical society, library, patriotic or historical purposes, for the enforcement of laws relating to children or animals, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association, or by another such corporation or association as hereinafter provided, shall be exempt from taxation; provided, however, that such property shall be taxable by any municipal corporation within which it is located if the governing board of such municipal

corporations or associations *not* organized or conducted exclusively for religious, charitable, educational, hospital, moral or mental improvement, or cemetery purposes, but which are organized or conducted for bible, tract, benevolent, missionary, infirmary, scientific, literary, bar association, medical society, library, patriotic or historical purposes. The taxability of these less-favored non-profit organizations is determined according to the purpose for which they are conducted. Thus if an organization is conducted as an infirmary, it is taxable; if it is conducted exclusively as a hospital, it is exempt. A church is exempt, but a bible, tract or missionary society is taxable. A society conducted for benevolent purposes is taxable; however, if it is conducted for charitable purposes, it is exempt. Exemption is not allowed, in any case, if pecuniary profit is made by any officer, member or employee other than reasonable compensation for services.[173]

The principles of section 421(1)(b) have been incorporated into the Administrative Code of the City of New York[174] by amendment in 1971. Section J51–3.0(1) states that the "corporations or associations" listed in section 421(1)(b)[175] "shall be taxable." Whether or not these less-favored non-profit organizations are, in fact, taxed is another question. At the present time it is estimated that eighty to ninety percent of those organizations which arguably fall within the categories listed in sections 421(1)(b) and J51–3.0(1) continue to hold exemptions.[176] Were the proposal to be adopted in New York City, all of the nonprofit organizations taxable by the City under section 421(1)(b) and J51-3.0(1) would be included within its scope.

With respect to real property owned by corporations or associa-

corporation, after public hearing, adopts a local law, ordinance or resolution so providing. None of the following subdivisions of this section providing that certain properties shall be exempt under circumstances or conditions set forth in such subdivisions shall exempt such property from taxation by a municipal corporation whose governing board has adopted a local law, ordinance or resolution providing that such property shall be taxable pursuant to this paragraph (b).

173. N.Y. Real Property Tax Law § 421(1)(d) (McKinney 1972).

174. *Charter*, ch. 51, § J51-3.0 (Supp. 1974).

175. § J51-3.0(1) also incorporates § 421(1)(d).

176. Telephone interview with the Department of Real Property Assessment, Office of Finance Administration of New York City, Jan. 23, 1975. Under *Charter*, ch. 51, § 1145(c) (1972), the tax department is authorized to hear and determine applications for exemptions from real property taxation.

tions organized or conducted *exclusively* for religious, educational, charitable, hospital, moral or mental improvement, or cemetery purposes, these properties are explicitly exempt by state law from taxation by municipalities.[177] In addition, the first three categories—real property used exclusively for religious, educational or charitable purposes—enjoy a constitutional safeguard from taxation under Article XVI of the New York State Constitution.[178] Exactly how many of the non-profit organizations in New York City fall within these protected categories is a difficult question to answer. The courts have done little in the way of providing a clear guideline. Judicial interpretation of the categories of use dedication in section 421(1)(b) has held that they are not mutually exclusive. For example, there is no necessary incompatibility between simultaneous dedication of property for exclusively religious purposes on the one hand, and bible and tract purposes on the other.[179] To tax real property, the taxing authority must prove not only that the owner is organized exclusively for bible and tract purposes, but also that it is not organized or conducted exclusively for religious purposes.[180] This apparent paradox has been made possible by the Court of Appeals interpretation of "exclusive" to connote "principal" or "primary".[181] Thus it has been held that a group of Jehovah's Witnesses was organized "exclusively" for religious purposes, even though they were also organized for bible and tract purposes.[182]

177. N.Y. REAL PROPERTY TAX LAW § 421(1)(a) (McKinney 1972). It reads as follows:

> Real property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, moral or mental improvement of men, women or children or cemetery purposes, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section.

178. N.Y. CONST. art. XVI, § 1 provides in part:

> Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes....

179. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Lewisohn, 35 N.Y.2d 92, 315 N.E.2d 801, 358 N.Y.S.2d 757 (1974).

180. *Id.* at 97, 315 N.E.2d at 803, 358 N.Y.S.2d at 759.

181. Ass'n of the Bar of City of New York v. Lewisohn, 34 N.Y.2d 143, 313 N.E.2d 30, 356 N.Y.S.2d 555 (1974); *see also* Rabbi Solomon Kluger School, Inc. v. Town of Liberty, 76 Misc. 2d 691, 351 N.Y.S.2d 563 (Sup. Ct. 1974); Lower East Side Action Project, Inc. v. Town of Liberty, 70 Misc. 2d 562, 334 N.Y.S.2d 333 (Sup. Ct. 1972).

182. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Lewisohn, 35 N.Y.2d 92, 315 N.E.2d 801, 358 N.Y.S.2d 757 (1974).

However, the court has held that a bar association, despite its significant educational functions, is not exempt from real property taxes because it is organized primarily for the professional interests of its members.[183] A companion case held that the Explorers Club, organized to further and spread knowledge of general exploration and to maintain a library of exploration and travel, does not qualify for tax exemption because its purposes are scientific.[184] Thus it appears that the courts of New York have embarked upon a course of subjectively weighing the purposes and conduct of organizations on an ad hoc basis to determine if they are sufficiently religious, educational, or charitable to qualify for exemption under section 421(1)(a).[185]

To further complicate the situation, there are some older cases which have never been overruled that strictly interpreted the word "exclusively" in the earlier versions of the statute from which section 421 is derived. *Society of the Free Church of St. Mary the Virgin v. Feitner*[186] held that a rectory was not exempt under the "exclusively" religious use category, even though it was occupied by the rector who could be consulted there at any time. In *Congregation Gedulath Mordecai v. New York*,[187] the court held that a three-story building, in which the first floor was used exclusively for religious services but the two upper stories were used as the residence for the rabbi and his assistants, was exempt only as to the first floor. It is difficult to understand how these cases can be ignored in light of the recent statement in *America Press, Inc. v. Lewisohn* that "there is no legislative intent evinced, explicit or implicit, to change the accustomed interpretations of the terms found in section 420 when they were transferred to section 421."[188]

In summary, recent interpretations of section 421 by the courts have done little more than create confusion in determining which organizations fall within the protective categories of section 421 (1)(a). While it is certain that implementation of the proposal in New York City will bring within its ambit those less-favored non-

183. Ass'n of the Bar of City of New York v. Lewisohn, 34 N.Y.2d 143, 313 N.E.2d 30, 356 N.Y.S.2d 555 (1974).

184. Explorers Club v. Lewisohn, 34 N.Y.2d 143, 313 N.E.2d 30, 356 N.Y.S.2d 555 (1974).

185. N.Y. Real Property Tax Law § 421 (McKinney 1972).

186. 168 N.Y. 494, 61 N.E. 762 (1901).

187. 135 Misc. 823, 238 N.Y.S. 525 (Mun. Ct. 1929).

188. 74 Misc. 2d 562, at 569, 345 N.Y.S.2d 396, at 404 (Sup. Ct. 1973).

profit organizations under sections 421(1)(b) and J51-3.0(1), it is not certain how many of New York's tax-exempt properties will fall within these taxable categories. It becomes evident that the proposal will have, however significant, a limited effect in preserving historically and aesthetically valuable landmarks, the success being relative to the percentage of the non-profit organizations potentially taxable by the City. To be truly effective, it will be necessary to amend not only section 421(1)(a) of the New York Real Property Tax Law, but also Article XVI, section 1 of the New York Constitution, to remove the ironclad exemptions of the favored non-profit organizations. Such action involves political considerations and questions beyond the scope of this article. One must question the wisdom of placing real property tax exemptions in the Constitution without qualification, thus binding the hands of the legislators.[189] Such a constitutional provision is justified only if no other legislative policy is as important.

CONCLUSION

Landmarks preservation in New York City has reached a point of crisis. One of the factors contributing to this situation is a weakness in the Landmarks Preservation Law as indicated by the *Lutheran Church* case. Organizations exempt from paying real property taxes do not fall within the ameliorative provisions which grant tax exemptions and remissions designed to reduce hardships imposed on individual owners, and thus lessen the chance of regulation being characterized as an unconstitutional taking. Furthermore, it will be extremely difficult to amend the Landmarks Preservation Law to accomplish the dual purpose of preserving landmarks owned by such organizations while providing relief to individual owners unreasonably burdened by the designation. This is a result of the *Sailors' Snug Harbor* test which frames the taking issue for "chari-

189. N.Y. CONST. art. XVI, § 1 was added in 1938 and merely confirmed certain existing laws. The *Report of the Committee on Taxation*, which reported the new article to the Constitutional Convention, contains only a very brief explanation of the purposes behind the clause relating to exemptions:

> [T]hose corporations are discharging social obligations which the State would otherwise have to assume and are reasonably entitled to constitutional protection in the exemptions granted to them . . . .

N.Y. State Constitutional Convention of 1938, Journal of the Constitutional Convention of the State of New York, Appendix No. 3, Document No. 2, at 2. It appears that there was little debate over this clause on the floor of the Convention. *See* REVISED RECORD, N.Y. STATE CONST. CONVENTION (1938).

table" organizations in terms of interference with their charitable purposes. While tax relief may provide a commercial landmark owner the necessary return on that owner's land to avoid the problem of taking, grants, even of unlimited amounts, to a "charitable" organization will not guarantee that the landmark structure will be adequate for achieving the organization's purposes.

Thus the *Lutheran Church* case has indicated an area of conflict betwen the two public policies of historic preservation and tax exemption. The question is how can these policies be reconciled? It has been suggested here that, in addition to the already existing qualifying factors, exemptions from real property taxes be in consideration for a covenant by the owner not to use the property contrary to the purposes, policies and provisions of the Landmarks Preservation Law. When combined with proper revision of the Landmarks Preservation Law, making it sensitive to individual hardship situations, this proposal will not necessarily be detrimental to "charitable" organizations. It is not the intention of the proposal to inflict a severe burden on such organizations, whose service to society has been recognized through tax exemption. Rather it is the object of this proposal to assure that this privilege granted by the government does not, either by coincidence or intent, work contrary to the public policy of historic preservation.

The necessity of such a proposal becomes more apparent in light of the number of historic and architectural landmarks that have been destroyed in the United States during the last fifty years. It is not to be expected that the process will stop of its own accord. The situation is complicated by the fact that an effective program of condemnation and public ownership of landmark properties is beyond the means of any city, New York not excluded. It has been shown that the proposal can be effective to a significant degree in New York City. However, Article XVI of the New York State Constitution and section 421 of the New York Real Property Tax Law present limits to the degree of effectiveness possible. But these need not be permanent bars, since constitutional and legislative amendments are possible. Such action is a major step which requires full consideration of the political issues involved. Nevertheless, if historic preservation is the important public policy that it has been declared to be over the course of the last fifty years, the present circumstances in New York City call for bold and immediate action.

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