Affirmative Maintenance Provisions in Historical Preservation: A Taking of Property?

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AFFIRMATIVE MAINTENANCE PROVISIONS IN HISTORIC PRESERVATION: A TAKING OF PROPERTY?

I. INTRODUCTION

A revolution has taken place in the field of historic preservation in recent years, a revolution that has had and will continue to have a major effect on the cultural environment. Since the formation of the National Trust for Historic Preservation in 1949, the preservation movement has evolved significantly, moving from an early concern with the protection of individual buildings, sites, and objects, to a broader concern for the management of historic resources as part of our cultural environment, equal in importance to our natural areas. As the United States Supreme Court noted in Penn Central Transportation Co. v. New York City, "historic preservation is but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people."

As preservation has broadened in scope, a partnership has developed between the traditional private non-profit and profit-making interests active in historic preservation and governmental units at the federal, state and local levels. While legislation has been passed declaring historic preservation to be public policy at the federal and state levels, the major responsibility for

1. The National Trust for Historic Preservation, chartered by Congress, is the only national, private non-profit organization with the responsibility for encouraging public participation in the preservation of sites, buildings, and objects significant in American history and culture. NATIONAL TRUST FOR HISTORIC PRESERVATION, ANNUAL REPORT (1981).
3. Id. at 108.
4. The National Historic Preservation Act, 16 U.S.C. §§ 470 to 470w-6, was passed in 1966. The statute provides, in pertinent part:
   The Congress finds and declares that—
   (1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;
cultural resources conservation lies at the local level. The municipal ordinance framework for historic resources management, originating as early as 1931 in Charleston, South Carolina, and in 1937 in New Orleans, Louisiana, has now been enacted as local government policy in over 800 communities nationwide. These local ordinances and the specific provisions within them are the subject of this Note.

II. HISTORIC PRESERVATION LEGISLATION

Two key issues are traditionally raised by local preservation ordinances: (1) whether these ordinances are a legitimate use of the police power, and (2) whether in enforcing these ordinances local governments have “taken” private property for public use. The Supreme Court attempted to resolve these issues in Penn Central. The Court’s approval of New York City’s Landmark

(2) 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 of the American people;

(3) historic properties significant to the Nation’s heritage are being lost or substantially altered, often inadvertently, with increasing frequency;

(4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic and energy benefits will be maintained and enriched for future generations of Americans; . . .


6. The first historic district in the United States was established by ordinance in Charleston, South Carolina, in 1931. P. Rohan, Zoning and Land Use Controls § 7.03 (1981) [hereinafter cited as Rohan].

7. The Vieux Carre Historic District was established pursuant to a 1936 Louisiana constitutional amendment. Id.


9. The Penn Central case arose when Penn Central Transportation Co., owner of Grand Central Terminal in New York City, sought to erect a multi-story office building above the terminal, which had been designated a “landmark site” by the local Landmarks Preservation Commission. The Commission denied Penn Central’s application for a permit to construct the building, and Penn Central filed suit claiming New York’s Landmark Preservation Law had “taken” their property by depriving them of
Preservation Law\textsuperscript{10} and its finding that the law was not a "taking" of Penn Central's property gave legitimacy to local legislation for historic preservation purposes. This local legislation has typically taken form as historic district or individual landmark designation.

The most common method of historic preservation is the designation of an historic district. This is essentially an exercise of zoning for aesthetic purposes. Zoning has been recognized as a valid exercise of the police power since Village of Euclid v. Ambler Realty Co.\textsuperscript{11} In Berman v. Parker,\textsuperscript{12} the Supreme Court, in dictum, approved zoning enacted for purely aesthetic purposes. The Court in Berman stated that "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."\textsuperscript{13} Lower courts have recognized that aesthetic controls produce economic benefits by encouraging private investment and by increasing property values and tourism.\textsuperscript{14} Historic district ordinances have been consistently upheld against constitutional challenges,\textsuperscript{15} as long as the ordinances are not vague or arbitrarily enforced.

The judiciary typically approaches challenges to historic

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11. 272 U.S. 365 (1926). The question in Euclid was whether the zoning ordinance as enacted was a permissible exercise of the police power. Since Euclid, the power of local governments to enact zoning ordinances has been clearly recognized. The question has shifted to whether the enforcement of a particular ordinance effects a taking of an individual's private property.


14. See, e.g., City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364 (1941); City of New Orleans v. Pergament, 198 La. 852, 5 So. 2d 129 (1941). A study published by the Advisory Council on Historic Preservation showed that property values in designated historic districts in four cities surveyed had increased by an annual average of 43% (Alexandria, Va.); 11% (Galveston, Tex.); 23% (Savannah, Ga.); and 17% (Seattle, Wash.). Advisory Council on Historic Preservation, THE CONTRIBUTION OF HISTORIC PRESERVATION TO URBAN REVITALIZATION (1979).

district designations by determining whether a valid public purpose has been served and whether the means to accomplish that purpose are valid.\textsuperscript{16} The general benefits to be derived by all property owners within an historic district are usually considered to offset any impact of restrictions on use.\textsuperscript{17} The Louisiana Supreme Court pioneered this rationale in \textit{City of New Orleans v. Pergament},\textsuperscript{18} in which the court held that the local preservation commission had the power to regulate exterior design features of all buildings within the district, regardless of whether they were of architectural or historical significance. This \textit{tout ensemble} rationale recognizes that the quality of an area derives not from individual buildings, but from the unique combination of buildings in an area and their harmony with each other.

In addition to the zoning type regulation found in historic district legislation, individual landmark designation is also an important preservation tool. Few cities have all historic buildings gathered in one location. Therefore, the ability to afford isolated landmarks the same type of protection as that found within an historic district is critical in many American cities. A rationale used to support zoning and historic district regulations is that all owners stand to benefit from a common scheme. This rationale is not as justifiable with individual landmarks. The Supreme Court upheld landmark designation in \textit{Penn Central} when it found that the New York landmarks law benefited "all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole."\textsuperscript{19} This reasoning seems equally applicable to smaller cities.

Beyond the designation of historic districts and individual landmarks, local ordinances frequently empower preservation commissions to require affirmative duties of property owners. These regulations take the form of anti-neglect or minimum maintenance provisions\textsuperscript{20} which are built into local historic pres-
ervation ordinances and designed to confront the problem of "demolition by neglect." Historic preservation ordinances frequently require the issuance of a permit before buildings within an historic district may be demolished.\textsuperscript{21} To circumvent these anti-demolition provisions, a recalcitrant owner may allow a building to deteriorate until it becomes a health or safety hazard and the health or building inspector orders it demolished. Thus, the owner is able to do indirectly what the anti-demolition ordinance sought to prohibit. Minimum maintenance provisions are the response to this problem. Typically, the provisions empower the local historic district commission to identify buildings in need of repair and notify owners of the needed repairs. If work is not commenced within a specified time, the commission may hold a hearing allowing the property owner to appear and provide reasons for noncompliance. If the owner still fails to comply after a hearing, the city council may be empowered to make the repairs at the city's expense and place a lien on the property.\textsuperscript{22} The ordinances vary in degree of specificity of what constitutes neglect requiring affirmative action. Some ordinances merely require that buildings be maintained in accordance with the local building code,\textsuperscript{23} while others are extraordinarily detailed, specifying exactly what structural defects will not be tolerated.\textsuperscript{24}

The enforcement of these minimum maintenance provisions opens historic preservation ordinances to a new challenge: whether the requirement of affirmative action on the part of a property owner effects a taking of his property in violation of the fifth amendment of the United States Constitution.\textsuperscript{25} A sur-

\textsuperscript{21} The requirement of a permit for demolition, often called an anti-demolition provision, is commonly included in historic district ordinances. Some historic district commissions are empowered to deny demolition indefinitely, while others can only delay demolition for a limited period of time. See \textsc{Rohan}, supra note \textsuperscript{6}, at § 7.03[2].

\textsuperscript{22} \textit{See}, e.g., \textsc{New Orleans}, La. Code §§ 65-36 to -40.

\textsuperscript{23} \textit{See}, e.g., \textsc{Charleston}, S.C., Code § 54-32 (1975).

\textsuperscript{24} \textit{See}, e.g., \textsc{Seattle}, Wash., Or. No. 102, 902 §§ 6A-6D, which breaks down its maintenance provisions into weather protection, structural defects, and fire and safety hazards. The \textsc{Anderson}, S.C. \textsc{Commercial Maintenance Code} requires repair or replacement of decorative elements on building fronts and sides abutting streets. Specific duties and responsibilities are detailed, from maintenance of sidewalks and curb cuts to windows and signs. \textsc{Anderson}, S.C., \textsc{Commercial Maintenance Code} (Jan. 1980).

\textsuperscript{25} \textsc{U.S. Const.}, amend. V. The fifth amendment was made applicable to the states through the fourteenth amendment. Chicago B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897).
vey of the Supreme Court's analysis of the taking issue and the tests used to determine whether a taking has occurred is necessary to consider this challenge.

III. THE TAKING ISSUE WITHIN THE CONTEXT OF A CHANGING VIEW OF PROPERTY RIGHTS

An analysis of the current judicial attitude toward taking is best understood within the context of the changing attitude toward property rights in our legal history. In medieval England, property was held at the sufferance of the sovereign who had original and absolute ownership of property. By the seventeenth and eighteenth centuries, however, individual property rights were highly exalted. The views of Sir William Blackstone, who stated "[s]o great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community," influenced the drafters of our Constitution. The drafters, however, were also influenced by Locke's natural rights theory of property ownership which envisioned a need for governmental regulation of property.

The right not to be deprived of property without just compensation, although not included in the body of the Constitution, appeared in the Bill of Rights. The requirement of the taking clause that just compensation be paid when property is taken represents a compromise between an absolute view of in-
dividual property rights and the right of government to take property.

Since the taking clause became part of our jurisprudence, the rights of property owners have been subject to changing societal needs and interests. As one commentator has stated:

Restrictions and freedom are two facets of the same social factor. You must be restricted so that I have liberty. Similarly, I must be restricted so that you can have freedom. The task of any government worth its salt is to keep the restrictions sufficiently strong to assure to all equal freedoms. 'Property rights,' at any moment of time, represent the current wisdom as to how this balance is best served.31

Restrictions on private property rights are not a recent phenomenon. Property rights include the power of disposition and the power to use.32 The power of disposition has been limited by the Rule against Perpetuities—in effect since the seventeenth century,33 limits on restraints on alienation—common since the twelfth century,34 formal requirements of deeds and wills,35 and laws precluding restrictions by a donor on the future conduct of the donee.36

Restrictions on use have also been based on the greater needs of society. Easements by necessity, the law of nuisance, the regulation of water rights, building codes, health regulations, and zoning recognize the right of the state to limit or control the use of private property. As regulations and restrictions on use have increased, landowners have resorted to the argument that property rights are absolute and that the police power, when used to an excessive degree, becomes a taking of property without just compensation. Just as the right to exclude yielded to government regulation in the civil rights era, these increased restrictions can only be considered properly when property is viewed as a dynamic concept, changing as the public’s needs de-

31. Powell, supra note 26, at 139-40 (citing Bentham, Limits of Jurisprudence Defined 84 (Everett ed. 1945)).
32. Powell, supra note 26, at 140.
33. See 5 Powell, Real Property ¶ 759-90 (1980).
34. See 6 Powell, Real Property ¶ 839-48 (1979).
35. See 6A Powell, Real Property ¶ 879-85 (deeds); 7 Powell, Real Property ¶ 939-60 (wills) (1979).
mand. As Justice Sutherland stated in Euclid, "while the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation."  

IV. APPROACHES TO THE TAKING QUESTION—TESTS USED BY THE COURTS

The taking concept is derived from the fifth amendment clause which states "nor shall private property be taken for public use, without just compensation." The question of whether a taking has occurred often arises in those situations when governmental actions, although not intended to take property, are challenged as excessively regulatory. This implicit taking typically arises in the context of an exercise of the police power to regulate property owners in some way. Regulation was recognized as a taking in Pennsylvania Coal Co. v. Mahon, when Justice Holmes wrote "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." In contrast, the taking issue rarely arises in the context of the government's exercise of its eminent domain power. When government condemns private property for public use, an explicit taking has clearly occurred and compensation must be paid.

No single analytical approach to determine whether there has been a taking emerges from a reading of the Supreme Court cases. As Justice Holmes noted in Pennsylvania Coal, the determination of a taking is "a question of degree—and therefore cannot be disposed of by general propositions." Courts have

37. Donaldson, supra note 26, at 190.
38. 272 U.S. at 387.
40. 260 U.S. 393 (1922).
41. Id. at 415.
42. Id. at 416. In his dissent to San Diego Gas & Elec. Co. v. City of San Diego, Justice Brennan recognized the difficulty of the taking question, and cited various com-
developed a number of tests to analyze the taking issue, none of which is considered dispositive of the question. The choice of the test to be applied depends on the facts of the case at hand.

An early test applied by courts was the physical invasion test. The physical invasion test came into use in the nineteenth century as the judicial response to early taking challenges. The test can be viewed as two slightly different rules. The first, and narrower approach is that a taking can only occur when the government has actually appropriated or occupied the property in question. An extension of the test would find a taking when governmental action causes a physical invasion of property, such as when a dam floods an individual’s property. Today’s courts never deny compensation when a permanent physical occupation has occurred.

A second method used to determine when a taking had occurred was the noxious use test. This test developed simultaneously with the physical invasion test, but focused on the property owner’s activities, rather than on the nature of the governmental activity. Justice Harlan explained the test as “[t]he exercise of the police power by the destruction of property which is itself a public nuisance . . . is very different from taking property. . . . In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.” Thus, when a use is deemed noxious, a regulation limiting or preventing it is not considered a taking. A common rationale to explain the test is the private fault-public benefit analysis. The idea is that compensation is required if the public “helps itself to good at private expense, but not when the public simply requires one of its members to stop making a nui-

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43. See, e.g., Transportation Co. v. Chicago, 99 U.S. 635 (1878).
44. See, e.g., Pumpelly v. Green Bay Co., 80 U.S. 166 (1871); Goodall v. City of Milwaukee, 5 Wis. 32 (1856).
45. See Loretto v. Teleprompter Manhattan CATV Corp., 102 S. Ct. 3164 (1982). In Loretto, the Court revived the physical invasion test and held that a permanent physical occupation authorized by government will always result in a taking. Id. at 3171.
47. For a discussion of this theory, see Michelman, supra note 39, at 1196-1201.
sance of himself."

The application of the noxious use test requires a determination of what uses create a nuisance. This determination lies with legislators and judges and varies with current thinking. As Justice Sutherland stated in *Euclid*, a nuisance is simply "a right thing in the wrong place—like a pig in the parlor instead of the barnyard." Early cases found a nuisance in the manufacture of beer, the operation of a livery stable, and the operation of a brickyard. The subjective judgments required to apply the noxious use test have made its application unpredictable.

The nuisance quality of a particular land use frequently arises from its incompatibility with competing uses in the area. In *Hadacheck v. Sebastian*, the city of Los Angeles had grown up around plaintiff's brickyard. The United States Supreme Court upheld an ordinance making it unlawful to operate a brickyard within the city limits, finding that the health and comfort of the community precluded any limitation on the police power. The "noxiousness" here arose not from the operation of the brickyard but rather from its location within the city. Another example of incompatibility is found in *Miller v. Schoene*, in which the complainant's cedar trees threatened to spread cedar rust to nearby apple orchards. The complainant was required to destroy his cedar trees without compensation because of the threat they posed to the apple trees.

The noxious use test has been criticized as an oversimplified distinction between good and bad:

Most human activities held to be noxious, are, at most, inappropriate to the location or in conflict with other uses in the area rather than "bad." The slaughterhouse and the brickyard are socially important and useful, but unfortunately offend our sensibilities when located in residential areas. Nevertheless, we

48. Id. at 1196.
49. 272 U.S. at 388.
53. Id.
54. Id. at 410-11.
55. 276 U.S. 272 (1928).
56. The Court in *Miller* used a balancing test and found the economic value of the apple trees to be greater than the cedars. Id. at 279.
all want them to continue somewhere, but elsewhere. A doctrine that allows such activities to be completely destroyed without compensation is without question unfair.\textsuperscript{57}

The Supreme Court discounted the noxious use test in \textit{Penn Central} and observed that the decisions in \textit{Hadacheck} and \textit{Miller} are “better understood as resting not on any supposed ‘noxious’ quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property.”\textsuperscript{58}

The public benefit rationale has led to a third test which balances public benefit against private harm. The balancing test, suggested by language in \textit{Pennsylvania Coal}, is most commonly used to determine whether a regulation is within the police power of the government; that is, whether the regulation’s purpose is a legitimate governmental objective.\textsuperscript{59} Courts have also applied the balancing test to determine compensability\textsuperscript{60} and have found a taking when the public gains little in relation to the harm inflicted on the individual property owner.\textsuperscript{61} The difficulties in measuring both private harm and public benefit have made this test troublesome in application. The scope of public benefit is so difficult to measure that courts often slight the public need for regulatory measures.\textsuperscript{62}

A fourth test is diminution in value. This test was formulated by Justice Holmes\textsuperscript{63} and appears in \textit{Pennsylvania Coal}, in which he stated:

\begin{quote}
Government hardly could go on if to some extent values incidental to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must
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\textsuperscript{58.} 438 U.S. at 134 n.30.
\textsuperscript{59.} Michelman, \textit{supra} note 39, at 1193 n.62.
\textsuperscript{60.} \textit{Id. See}, \textit{e.g.}, Gulh v. Par-3 Golf Club, Inc., 238 Ga. 43, 44-45, 231 S.E.2d 55, 57 (1976).
\textsuperscript{61.} Michelman, \textit{supra} note 39, at 1193.
\textsuperscript{62.} \textit{See id.} at 1193-96.
\textsuperscript{63.} Sax, \textit{Police Power, supra} note 39, at 41.
have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.64

Thus, if government regulation results in too great a decrease in property values, compensation will be necessary.

Diminution in value is currently a popular approach used by lower courts to decide the taking question65 because it adapts to cases not involving a physical invasion or nuisance. The test is often applied as a component of the balancing test described above to measure the degree of private harm.

The degree of diminution tolerated before a taking has occurred is a major difficulty with the diminution in value test. Zoning cases decided under this test illustrate the range of diminished values tolerated. Ordinances have been upheld that diminished property values from $1,500,000 to $225,000,66 $450,000 to $50,000,67 and $52,500 to $10,500,68 while an ordinance has been struck down that reduced property value from $350,000 to $100,000.69 These illustrations demonstrate that the diminution in value test is no more predictable in outcome than previous tests because it requires a case by case analysis.

In Penn Central, Justice Brennan stated that diminution in value alone will not establish a taking70 and instead focused on the uses that the regulation in question permitted.71 Applying this approach to the facts in Penn Central, the Court found that New York City's Landmark Preservation law did not interfere with Penn Central's primary expectations for the property and that the law permitted a reasonable return on Penn Central's investment.72 Thus, the Court seems to have shifted its analysis from a consideration of whether property values have been di-

64. 260 U.S. at 413.
65. Sax, Police Power, supra note 39, at 50.
67. Wrigley Properties, Inc. v. City of Ladue, 369 S.W.2d 397 (Mo. 1963).
70. 438 U.S. at 131.
71. Id. at 136.
72. Id.
minished, to what the landowner's investment expectations were and the uses for the property permitted after application of the regulation.

A year later, in *Kaiser Aetna v. United States,*73 the Supreme Court found a taking in a case where reasonable investment expectations were impaired. The property owners in *Kaiser Aetna* had converted a shallow pond into a marina by dredging it and connecting it with a navigable bay. The Court found a taking74 had occurred when the federal government sought to compel public access to the private marina.75 The following year, in *Pruneyard Shopping Center v. Robins,*76 the Court emphasized the importance of real impairment of value or use to the taking issue. Finally, in *Agins v. City of Tiburon,*77 the Supreme Court focused on the uses permitted by an open-space zoning ordinance and the ability of the property owners to pursue their "reasonable investment expectations" in the property.78 As these cases illustrate, the Court's approach to the diminution in value test is from a prospective viewpoint, looking at future uses and whether they fit in with the property owner's reasonable expectations, rather than simply at the actual loss of value. This approach is far more subjective than the comparison of diminished value to original value prevalent in earlier cases.

In *Agins,* the Court also relied on another test involving the reciprocity of benefits from a regulation.79 Closely related to the


74. Justice Rehnquist, writing for the majority, characterized the taking in *Kaiser Aetna* as the physical invasion variety, although he relied on the interference with investment expectations in his decision. *Id.* at 179-80. See supra notes 43-45 and accompanying text for discussion of the physical invasion test.

75. The government argued that the marina was subject to the federal navigational servitude because the owners had dredged a channel connecting it to a "navigable water." 444 U.S. at 168, 170.

76. 447 U.S. 74 (1980). In *Pruneyard,* the owner of a shopping center argued that the right to exclude had been taken from him when the California Supreme Court prevented him from excluding from his property high school students soliciting support for a political cause. The Court found that prohibiting the owner from excluding these students was not an infringement of his property rights under the taking clause. *Id.* at 83.


78. *Id.* at 262. The Court also relied on the reciprocal benefits shared by the property owners under the ordinance. See infra note 79 and accompanying text.

79. The reciprocity test is derived from Justice Holmes' statement in *Pennsylvania Coal* that a regulation was justified without compensation because "it secured an average reciprocity of advantage." 260 U.S. at 415.
balancing and diminution in value approaches, the reciprocity test focuses on the degree of compensation provided by reciprocal benefits flowing from the broad application of a regulation. When the burdens are shared evenly, it is assumed the benefits will offset them.

V. THE TAKING TESTS APPLIED TO MAINTENANCE PROVISIONS

As the preceding discussion of the Supreme Court's approach to the taking clause illustrates, no clearly accepted standard exists to use in viewing minimum maintenance provisions and their constitutionality. Since any of the tests might conceivably be applied by a court, a consideration of all relevant tests is necessary.

While the Supreme Court apparently disapproved the noxious use test in Penn Central, this test could be instructive in a minimum maintenance challenge. The owner who refuses to repair and maintain a building within an historic district may create a nuisance by allowing the building to deteriorate and thus detract from the surroundings. When the level of deterioration is sufficient, the noxious use test could be applicable to uphold a minimum maintenance provision.

Reciprocity is important in an analysis of affirmative maintenance provisions, and at least one court has relied on the benefits flowing to owners in an historic district upholding a maintenance provision. In Figarsky v. Historic District Commission of Norwich, the Connecticut Supreme Court referred to the economic benefits to be derived by owners in an historic district due to the increase in property values. The increase in value of a building subject to a maintenance provision should have the effect of increasing surrounding property values. In fact, a maintenance provision, stringently applied, would have the effect of ungrading entire areas, allowing for the sharing of benefits and burdens assumed by the reciprocity theory.

The balancing and diminution in value tests are best considered together because the degree of private harm is measured

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80. See supra notes 46-58 and accompanying text.
81. 171 Conn. 198, 368 A.2d 163 (1976).
82. Id. at 208, 368 A.2d at 170. For a study documenting the increase in property values in historic districts, see supra note 14.
by diminution in value of the subject property. The economic impact of maintenance provisions makes these tests particularly relevant. The unique feature of maintenance provisions is the requirement of affirmative action on the part of property owners. While compliance with an affirmative maintenance provision may require the outlay of money, it also results in an increase in the value of the property. Therefore, the traditional diminution in value test is not particularly helpful. The current version of the test, however, is relevant in analyzing the maintenance provisions because the Court's recent focus is on economic impact measured by reasonable investment expectations and permitted future uses.

In *Maher v. City of New Orleans*, the Fifth Circuit Court

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83. The law is generally reluctant to impose affirmative duties on property owners. Affirmative covenants were disfavored in early law and still must touch and concern the land to be enforced in some states. See, e.g., Neponset Property Owner's Ass'n, Inc. v. Emigrant Indus. Savings Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938). Traditional tort law did not require the possessor of land to protect those outside the premises, but this rule has changed in recent times to require maintenance of trees along public highways. See, e.g., Brown v. Milwaukee Terminal Ry., 199 Wis. 575, 227 N.W. 385 (1929).

Nuisance law also may require an affirmative duty of a property owner, as when alterations in land cause surface water to flow onto adjoining property. The offending owner may be required to construct a retaining wall to restrict the flow. See, e.g., Tortolano v. DiFilippo, 115 R.I. 496, 349 A.2d 48 (1975). This type of affirmative duty is comparable to a situation in which a property owner has allowed a building to deteriorate to the level of a nuisance. The imposition of an affirmative duty to repair seems no more confiscated than in the surface water situation.

Affirmative duties are also required of property owners ordered to comply with health and safety codes. These ordinances commonly require the owner to spend money to comply, but impose a limit of "reasonable" expense. See, e.g., Adamec v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937); Health Dept. of N.Y. v. Rector of Trinity Church, 145 N.Y. 32, 39 N.E. 833 (1895).


In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court found a taking in the installation of cables for television service on an apartment building. The Court indicated that it would uphold a duty imposed on the owner of the building to install the cables. The Court noted that imposing the duty on a building's owner would present a different question because the owner rather than the cable company would control the installation. 102 S. Ct. at 3176, 3179 n.19.

84. See supra notes 70-78 and accompanying text.

85. 516 F.2d 1051 (6th Cir.), cert. denied, 426 U.S. 905 (1975). The complainant in *Maher* sought to demolish a Victorian cottage adjacent to his residence in the Vieux Carre district of New Orleans in order to erect a seven-apartment complex on the site. The Vieux Carre Commission denied Maher's request for a demolition permit and insti-
of Appeals upheld the constitutionality of a minimum maintenance provision.\textsuperscript{86} The complainant argued that the application of the maintenance provision to his property was a taking on two grounds:\textsuperscript{87} first, it prevented the most profitable use of the property, and second, an affirmative maintenance provision may not be imposed without invoking the power of eminent domain. The court relied on the Supreme Court's decisions in \textit{Goldblatt v. Town of Hempstead},\textsuperscript{88} \textit{Euclid}, and \textit{Hadacheck} as indicating that an ordinance within the police power does not become an unconstitutional taking merely because property does not achieve its maximum economic potential as a result of its operation.\textsuperscript{89} Since the complainant did not demonstrate that the ordinance so diminished the value of the property as to leave him nothing, there was no taking.\textsuperscript{90} The court suggested that if the owner had shown that sale, rental, or other potential use was impractical, his taking claim would have carried more weight.\textsuperscript{91} Thus, the court implied that if the owner's investment expectations are totally thwarted and no reasonable future use is permitted, the ordinance would effect a taking.\textsuperscript{92}

Addressing the second ground of Maher's claim, the court

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tunted proceedings against him for violation of the maintenance provisions of the Vieux Carre Ordinance. \textit{Id.} at 1054.
\textsuperscript{86} \textit{New Orleans, La.}, Code §§ 65-36, -37. The ordinance provided in part:
  All buildings and structures in that section of the city known as the Vieux Carre Section . . . shall be preserved against decay and deterioration and free from certain structural defects in the following manner, by the owner thereof . . . [who] shall repair such building if it is found to have any of the following defects:

There follows a list of unsafe or deteriorated conditions, including falling portions of buildings, deteriorated or inadequate foundation, floors, walls, supports, ceilings, roofs, chimneys, and ineffectively watertight exterior or windows.

\textsuperscript{87} Maher also argued that the ordinance violated due process due to inadequate standards and arbitrary enforcement. 516 F.2d at 1058-64.

\textsuperscript{88} 369 U.S. 590 (1962).

\textsuperscript{89} 516 F.2d at 1065.

\textsuperscript{90} The court noted that, while a substantial diminution in value may be evidence of a taking, "it is by no means conclusive." \textit{Id.} at 1066, n.83 (quoting \textit{Goldblatt v. Hempstead}, 369 U.S. 590, 594 (1962)).

\textsuperscript{91} 516 F.2d at 1066.

\textsuperscript{92} In \textit{Figarsky v. Historic Dist. Comm'n}, the Connecticut Supreme Court used similar reasoning to uphold a minimum maintenance provision, stating that "[i]t is only when the regulation practically destroys or greatly decreases the value of a specific piece of property that relief may be granted. . . ." 171 Conn. 198, 211-12, 368 A.2d 163, 171 (1976) (citing Culinary Institute of America, Inc. v. Board of Zoning Appeals, 143 Conn. 257, 261, 121 A.2d 637 (1956)).
\end{quote}
reasoned that once the purpose of the affirmative maintenance ordinance has been held valid, upkeep of buildings is reasonably necessary to accomplish that purpose. Comparing the ordinance provisions with those commonly imposed for fire, safety or health purposes, the court observed that if money may be spent for these objectives, it is reasonable to require out of pocket expenditures in pursuit of other valid goals. This analogy is not wholly appropriate, however, because an owner ordered to comply with health and safety regulations has the option of withdrawing the building from the market and demolishing it. This option is not available to an owner in an historic district that enforces an anti-demolition ordinance.

Finally, the Court of Appeals in Maher cautioned that every application of affirmative maintenance ordinances would not be beyond constitutional assault;\(^5\) regulations could not be "unduly oppressive" to property owners.\(^6\) An ordinance is probably unduly oppressive when it requires extensive repairs to a building having no reasonable future use, thus making the repairs economically infeasible. A Missouri court opinion upholding an anti-demolition provision is informative of what courts consider economically feasible: "If the owner is unable to restore from an economic standpoint he must then establish it is impractical to sell or lease the property or that no market exists for it at a reasonable price."\(^6\) Under these circumstances, application of an affirmative maintenance provision would likely be held an unconstitutional taking of property. The balancing test as applied to minimum maintenance provisions will, therefore, depend on the extent of the economic impact as measured by the potential future uses of the property. Only when the potential return on the property is minimal will the degree of harm outweigh the public benefits to be gained from maintenance of historic buildings.

The results under these tests indicate that maintenance

\(^5\) 516 F.2d at 1067.
\(^6\) Id.

95. Lafayette Park Baptist Church v. Board of Adjustment, 599 S.W.2d 61, 66 (Mo. Ct. App. 1980). The claim in this case was based on a denial of due process rather than a taking of property.

In Cleckner v. City of Harrisburg, 101 Dauph. Co. 134 (1979), a Pennsylvania trial court ruled a showing of economic infeasibility includes a demonstration that a sale of the property is impossible or impractical.
provisions will be upheld except in cases of extreme economic hardship. No easily applied theory emerges from the various approaches taken by courts, but clearly the question is one of degree to be considered on a case-by-case basis. Since no ordinance has ever been shown to be unconstitutional on its face, only one applied to a structure with little or no potential use should be questioned.  

At least one court has expressed a concern that requiring affirmative duties may discourage private citizens from purchasing and maintaining landmark or historic properties. While this may be a legitimate concern, the benefits to be derived from maintaining historic neighborhoods and buildings seem to outweigh the burdens. The reciprocal economic benefits attained by increasing property values in an historic district and the mitigating factors increasingly available to owners of historic properties, such as tax advantages and transferable development rights, make it unlikely that citizens will be discouraged from purchasing landmark or historic properties.

VI. Conclusion

In view of the national concern with our architectural heritage and cultural environment, and the general acceptance of design controls within historic preservation ordinances, the en-

96. The specifics of particular ordinances would not really affect the outcome of a taking claim, because the application to a particular property is the critical point. The ordinances vary greatly in specificity of what constitutes "needed repairs," but these provisions may be more readily attacked on due process grounds as arbitrary standards. See Maher v. New Orleans, 516 F.2d 1051, 1061-63 (5th Cir.), cert. denied, 426 U.S. 905 (1975).


99. Transferable development rights allow owners of landmark sites to transfer development rights to other parcels. The concept is an attempt to compensate owners of historic buildings situated in high land value areas by allowing them to sell unused air rights to the developer of another site. See Marcus, Air Rights Transfers in New York City, 36 L. AND CONTEMP. PROB. 372
enforcement of minimum maintenance provisions is a reasonable use of local government's power to regulate private property for public purposes. The enforcement of affirmative maintenance provisions will not effect a taking of property except in cases of extreme economic hardship. The provisions can be upheld under the noxious use test if the degree of deterioration is sufficient to create a nuisance. The reciprocity test, while not providing justification by itself, supports the economic impact approach used by the Supreme Court in Penn Central and Agins.

Courts must look at how maintenance provisions are applied to determine the impact on the individual property owner. Local municipalities must carefully consider this impact and refrain from enforcement when no reasonable potential use for a building exists. Failure to do so may force municipalities to pay compensation. In a situation in which potential future use is unlikely and the cost of repairs high, local governments would be wise to allow demolition rather than enforce a maintenance provision. Thoughtful application of maintenance provisions by local government, combined with cooperation from owners of historic buildings, will provide great benefits for our communities by improving the quality of our environment, as well as preserving our architectural heritage.

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